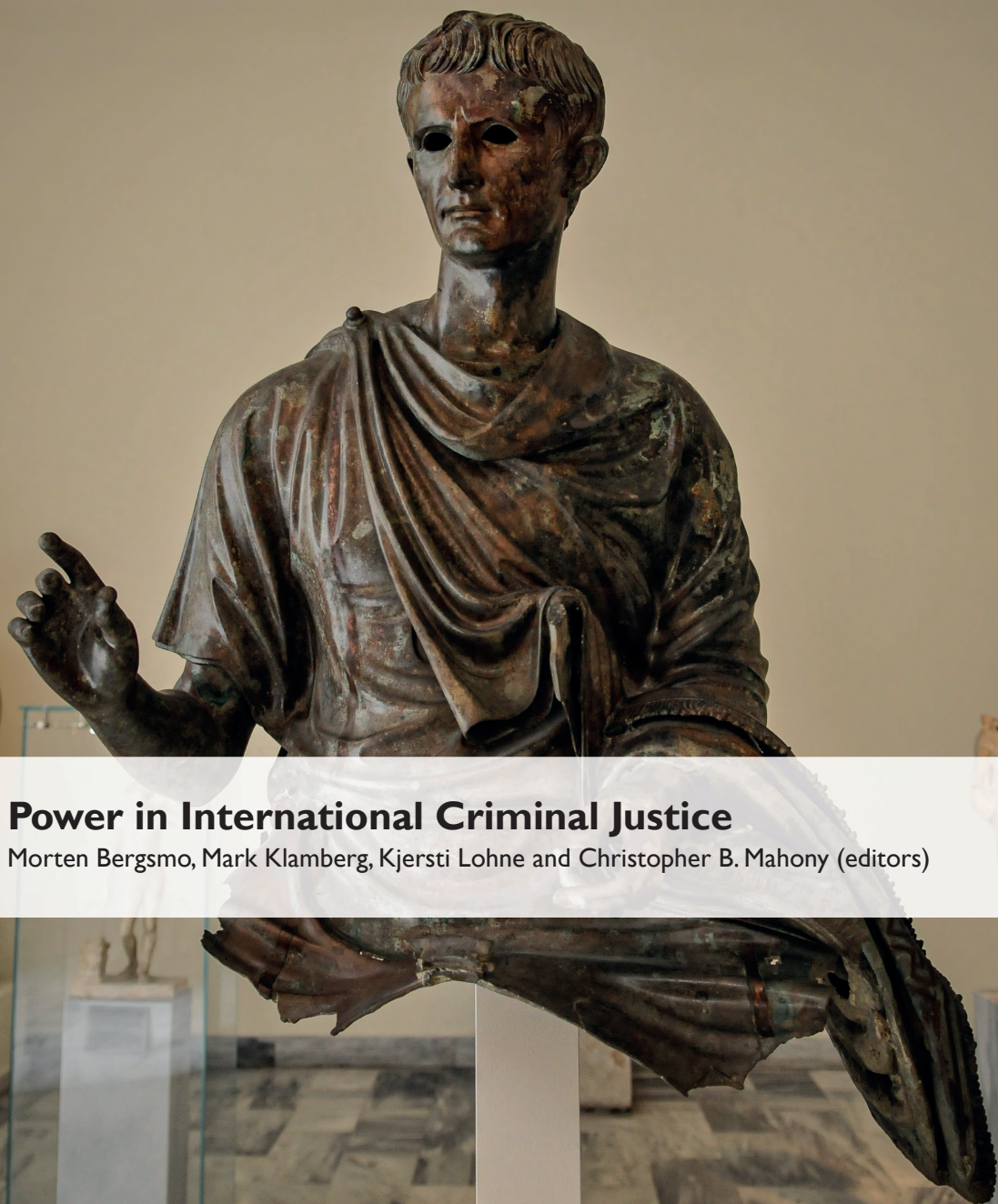


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Power in International Criminal Justice

Morten Bergsmo, Mark Klamberg, Kjersti Lohne and Christopher B. Mahony (editors)

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**Morten Bergsmo, Mark Klamberg,
Kjersti Lohne and Christopher B. Mahony
(editors)**

**2020
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Front cover: *Octavian, known as Caesar Augustus (63 BC–AD 14), the first Roman emperor, who enjoys a 2000-year old legacy as one of the most effective leaders in human history. He is a symbol of power. But this famous fragment of a bronze equestrian statue in the National Archaeological Museum of Athens is also a hollow mask. This book is about unmasking power.*

Back cover: *Excerpt from Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report, 30 September 2020. The experts showed courage and incision by challenging power in the International Criminal Court system in their report.*

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*the fundamental concept in social science is Power,
in the same sense in which Energy is the fundamental concept in physics.*

Bertrand Russell, *Power* (1938)

PREFACE BY THE CO-EDITORS

The roots of this book go back a decade. First among them is the co-operation between Christopher B. Mahony and Morten Bergsmo on the role of power in internationalised criminal justice, linked to Mahony's doctoral dissertation at Oxford, several of his subsequent publications, his work as UNDP's Global Focal Point on Transitional Justice, and as part of the team that authored the joint UN-World Bank report on conflict prevention, *Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict*. Secondly, Kjersti Lohne has undertaken award-winning doctoral research on paths towards a sociology of punishment for international criminal justice, leading to her 2019 monograph *Advocates of Humanity: Human Rights NGOs in International Criminal Justice*. Thirdly, Mark Klamberg has pursued research interests in social science and international law and published the monograph *Power and Law in International Society: International Relations as the Sociology of International Law* in 2015. The present anthology is the result of our decision to undertake a joint project to nourish the development of a sociology of international criminal justice.

The Centre for International Law Research and Policy (CILRAP) and the International Nuremberg Principles Academy co-organised the conference 'Power in International Criminal Justice: Towards a Sociology of International Justice' in Florence in October 2017, in co-operation with the Department of Criminology and Sociology of Law of the University of Oslo, the Stockholm Centre for International Law and Justice of Stockholm University, the HANDA Center for Human Rights and International Justice of Stanford University, University of Delhi Campus Law Centre, Peking University International Law Institute, and the United Nations Development Programme. The conference concept paper¹ served as the conceptual framework of the conference and several of the chapters in this book, most of which were presented at the Florence conference. Chapter 2 below by Kjersti Lohne provides an overview of all subsequent chapters

¹ For the conference concept paper, programme, AV-recordings and podcasts of presentations, and other materials relevant to the project, please go to the designated web page <https://www.cilrap.org/events/171028-29-florence/>.

and the substantive context in which a discipline of sociology of international criminal justice is emerging. Chapter 1 by Morten Bergsmo discusses the notion and purposes of unmasking power, different layers of the topography of power in international criminal justice, informal social networks and their membership, whether they wield more power than the ‘invisible college’ of international criminal lawyers, how we can draw on domestic traditions of sociology of law, and the relevancy of the final report of the Independent Expert Review of the International Criminal Court (‘ICC’) to the study of power in international criminal justice.

The book was first published in early December 2020, shortly before the election of several new high officials by the ICC States Parties, including its third Prosecutor. Election processes can offer insights into how power is wielded, by whom, over international justice institutions. In the 2020 lead-up to the Prosecutor-election, it became apparent that a few leaders of non-governmental organizations had a strong interest in the outcome of the election, working informally with a small number of diplomats and staff members of the ICC. Real power was wielded by this constellation of actors – a conglomerate without an identity or a name. If there is any main idea that can be distilled from this book it is that power in international justice should be unmasked, just as public institutions in mature rule of law states around the world have been unmasked by civil society, scholars, journalists, inquiries, artists and even comedians for many decades.

The front cover of this book shows a bronze sculpture of Caesar Augustus (63 BC–AD 14), the first Roman emperor, who initiated a long period of stability and peace referred to as Pax Romana. He enjoys a 2000-year old legacy as one of the most effective leaders of human history. He is a symbol of power. But this famous fragment of a bronze equestrian statue in the National Archaeological Museum of Athens is also a hollow mask. It invites an unmasking of the highest order of power. That is not easy to achieve. But that should be one of the functions of a sociology of international criminal justice. A few weeks before the publication of this book, on 30 September 2020, the Independent Expert Review of the ICC and the ICC system submitted its final report to the Assembly of States Parties. Among its recommendations was the introduction of a tenure system for staff members in higher professional- and director-level categories. The experts suggest that the Court should encourage existing staff in such positions “to consider taking early retirement, including through offering financial packages” (para. 252). This is a courageous recommendation.

This is to scratch the surface of power, if not its face. For this reason, an image of relevant paragraphs is reproduced on the back-cover of this book.

We would first of all like to thank the authors who have contributed chapters to this book, investing time and effort in their texts and showing patience. We thank the Nuremberg Academy and its Director Klaus Rackwitz and Deputy Director Viviane E. Dittrich for their support for the Florence Conference in October 2017. We also thank the co-operating institutions contributing to the Florence Conference. We finally place on record our gratitude to indefatigable and gifted CHAN H.S. Icarus and Antonio Angotti of the Torkel Opsahl Academic EPublisher for their contributions to the making of this book.

Morten Bergsmo
Mark Klamberg
Kjersti Lohne
Christopher B. Mahony
Co-Editors

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PART I:
POWER IN INTERNATIONAL
CRIMINAL JUSTICE INSTITUTIONS

Unmasking Power in International Criminal Justice: Invisible College v. Visible Colleagues

Morten Bergsmo*

1.1. Holding Up a Mirror

Who wields power in international criminal justice? This would seem to be an obvious question to ask in an emerging sub-discipline of sociology of international(ised) criminal jurisdictions. A sociology that does not dare to ask this question, may not provide us with knowledge and insights that can help improve the system of international criminal justice, which is my concern. If holding up a mirror to public justice institutions seeks to instil contentment and complacency in justice actors and gratitude towards the one who holds the mirror, it is not what a sociology of international criminal justice should do, although it could be a legitimate role for others to perform.

In his chapter in the 2020 anthology *Integrity in International Justice*, Judge David Re remarks that the “various permanent and temporary institutions [of international criminal justice] do not operate within the framework of a coherent functioning justice system. Each institution stands alone”.¹ It has been remarked that some “lawyers in the international legal profession at times feel that they are far from home, if you

* **Morten Bergsmo** is Director of the Centre for International Law Research and Policy (CILRAP). He was the first Legal Officer hired by the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (1994-2002); represented the Tribunal in the negotiations on the International Criminal Court (‘ICC’) (1996-2002); and subsequently led the preparatory team that established the ICC’s Office of the Prosecutor (2002-2003) and served as its first Senior Legal Adviser (2003-2005). He has been an academic at leading institutions in China, Europe and the United States (2006-2018).

¹ See David Re, “Some Reflections on Integrity in International Justice”, in Morten Bergsmo and Viviane E. Dittrich (eds.), *Integrity in International Justice*, Torkel Opsahl Academic EPublisher (‘TOAEP’), Brussels, 2020, p. 1126 (<https://www.toaep.org/nas-pdf/4-bergsmo-dittrich>).

like; that they are out of sight”, and that we are still lacking some of the external correctives which surround domestic criminal justice systems:

we do not yet have the kind of peer pressure or feedback that national associations of prosecutors may generate, or judges, or advocates (the bar societies); we do not yet have the level of questioning which the national daily press provides in many countries, or national auditors generate, or hearings before national parliamentary committees may produce.²

Absent this domestic level of corrective mechanisms, the source – the present writer – goes on to underline the importance of the self-corrective role of integrity *internally* in international criminal justice institutions. That proposition is comprehensively analyzed from different perspectives by more than 40 authors in the anthology *Integrity in International Justice*.³

The present book – which has been prepared in a simultaneous, parallel project – is about the development of an additional *external* corrective. In her Chapter 2 below, co-editor Kjersti Lohne frames the ambition of the book as “nothing short of contributing to the consolidation of a sociology of international criminal justice”,⁴ with the following reasoning:

the nobility of aims does not confer exemption from neither scrutiny nor accountability for one’s behaviour, and it is within this context that *transparency* within the institutions and practices of international criminal justice surfaces as an essential yardstick for the field. In short, we need a better grasp of how power operates within international criminal justice, so that people *in* power can be better equipped to make better choices for the future. This is because legitimacy – trust in institutions – is deeply sociological; it is a dialectic and continuous process of claims by power-holders, and the support of such claims by a diversity of constituencies. The time has therefore come to strengthen our sociolog-

² Morten Bergsmo, in “Integrity in International Justice”, CILRAP Film, Florence, 19 November 2020 (<https://www.cilrap.org/cilrap-film/integrity/>).

³ See footnote 1.

⁴ Kjersti Lohne, “Towards a Sociology of International Criminal Justice”, Chapter 2 below.

ical understanding of how power operates within and through international criminal justice [...].⁵

The book is not, however, written only for those in power in international criminal jurisdictions. A sociology of international criminal justice should not be initiated or funded by them. Socio-legal inquiry into how power is wielded within and over international criminal courts and tribunals requires a degree of experienced independence and genuine understanding of how these institutions work. This anthology is therefore primarily offered to those who associate with this group as well as those who simply seek to broaden their understanding of the issues it discusses.

The background to the present volume is inter-linked with other projects undertaken by the Centre for International Law Research and Policy ('CILRAP') in recent years, not only the Integrity Project.⁶ For example, the Historical Origins Project produced the anthology *Historical Origins of International Criminal Law: Volume 5* (published by the Torkel Opsahl Academic EPublisher ('TOAEP') on 29 April 2017),⁷ a 1,180-page collection of concept analyses and assessments on the creation and early life of the Office of the Prosecutor of the International Criminal Court ('ICC').⁸ Chapter 1 of the book included the following passage:

We need a sociology of international criminal justice. Not only is international criminal justice strong enough to withstand the kind of scrutiny that sociology of law requires, but the institutions can benefit greatly from serious research on patterns in the power relations in and around the courts in question, in the country- and social-backgrounds of those who serve the institutions, and in decisions made by judges and prosecutors. Such scholarship is the converse of tabloidised exposure of individual failures or scandals, which may not help institutions or their main stakeholders to affect real change. Durable sociology of law goes deeper and can generate insights that help us to improve the institutions. A

⁵ *Ibid.* (footnotes omitted). Lohne highlights that international criminal justice does not yet enjoy the same democratic scrutiny as domestic criminal justice, and that this makes sociological examination more important.

⁶ See <https://www.cilrap.org/integrity/>.

⁷ Morten Bergsmo, Klaus Rackwitz and SONG Tianying (eds.): *Historical Origins of International Criminal Law: Volume 5*, TOAEP, Brussels, 2017 (<http://www.toaep.org/ps-pdf/24-bergsmo-rackwitz-song>).

⁸ See Morten Bergsmo, "Institutional History, Behaviour and Development", in *ibid.*

follow-up project to this volume is concerned with exactly that.⁹

The book was presented on the day of its publication at an event in the courtroom used by the International Military Tribunal in Nuremberg.¹⁰ My remarks on that occasion reinforced the call for the development of a sociology of international criminal justice:

We have reached the point in the development of international criminal law and justice where we need a proper sociology of international criminal justice, a serious academic study of *the behaviour of the institutions and their dynamics of power and autonomy*, beyond the discourses of blogs and ‘critical legal studies’. We know from national legal systems that sociology of law can serve as a mirror of justice institutions, and by that, contribute to better understanding and quality-control.¹¹

Less than a month later, on 26 May 2017, CILRAP issued a public call for papers on ‘Power in International Criminal Justice: Towards a Sociology of International Justice’. An international conference on this topic took place in Florence on 28-29 October 2017.¹² A research Project Committee was formed with David Cohen, Mark Klamberg, Kjersti Lohne, Christopher B. Mahony, Klaus Rackwitz, Usha Tandon, YI Ping and the present writer as members. The conference was co-organized by CILRAP, Delhi University Campus Law Centre, the International Nuremberg Principles Academy, the Department of Criminology and Sociology of Law of the University of Oslo, Peking University International Law Institute, the HANDA Center for Human Rights and International Justice of Stanford University, and the Stockholm Centre for International Law and Justice of Stockholm University, with financial support from the Nuremberg Academy.

The present volume mostly contains papers presented at the conference in Florence. Three of the members of the Project Committee have joined me as co-editors of the volume: Mark Klamberg, Kjersti Lohne and

⁹ *Ibid.*, pages 26-27. The last sentence refers to the book you are now reading.

¹⁰ See <https://www.cilrap.org/events/170429-nuremberg/>.

¹¹ Morten Bergsmo, “HOICL 5”, CILRAP Film, Nuremberg, 29 April 2017 (<https://www.cilrap.org/cilrap-film/bergsmo-hoicl5/>) (the emphasis is naturally added here).

¹² For the conference concept note, programme and AV-recordings and podcasts of presentations, see <https://www.cilrap.org/events/171028-29-florence/>.

Christopher B. Mahony. They have each submitted a chapter to the anthology. Lohne's Chapter 2 conveniently provides a summary overview of the contents of each subsequent chapter in the book, in addition to her own substantive statement on the project, as one of the founders of the emerging sociology of international criminal justice.

This Chapter 1 first considers who some of the main wielders of power in international criminal justice may be. Section 2 discusses the high officials of international criminal courts, whereas Section 3 analyses states and some of their diplomats. Section 4 sketches common features of some individual power-wielders in international criminal justice and how they are associated with states, in the context of the process of unmasking power. In Section 5, I discuss how social network analysis may be used in a sociology of international criminal justice, 'membership' in such networks, the role of leaders of non-governmental organisations, and the relevancy of sources from national traditions of sociology of law and philosophy. Finally, Section 6 considers how the report of the ICC Independent Expert Review relates to the unmasking of power. I conclude by asking whether the 'invisible college' of the professional community of international lawyers actually wields as much power over the International Criminal Court after it was established as informal social networks do. Those who elect to read this chapter will benefit from watching the film of my lecture at the Florence conference on 'Power in International Criminal Justice: Towards a Sociology of International Justice'¹³ which supplements the text and contextualises the anthology as a whole.

1.2. The High Officials of International Criminal Jurisdictions

A traditional sociology of law approach would also include a focus on the *judges and chief prosecutors* and factors relevant to the power which they wield within and through the international criminal courts.¹⁴ They represent the face of their institution, sometimes even more so than the symbols of the permanent seat, the seal or logo of the court (which are among the images frequently resorted to when courts are referred to in the mass media, by teachers or others). Established seats of courts can take on an

¹³ See Morten Bergsmo, "On the Will to Power and to International Criminal Justice", CILRAP Film, Florence, 28 October 2017 (<https://www.cilrap.org/cilrap-film/171028-bergsmo/>).

¹⁴ See, for example, Vilhelm Aubert, *Retten sociale funksjon [The Social Function of Law]*, Universitetsforlaget, Oslo, 1976, pp. 167-250, in particular pp. 225-250.

iconic function of justice in the minds of people – sometimes way beyond national borders, as is the case with the seat of the United States (‘US’) Supreme Court completed in 1935. After years of preparation, its architect, Cass Gilbert, designed a neoclassical building with “an imposing central temple front, flanked by lower wings, and a main ceremonial hallway leading into the courtroom itself”, as inspired by the work of the French architect Pierre François Henri Labrouste.¹⁵ The “temple front” – with its wide staircase, portico of Corinthian columns, pediment with the sculptural group ‘Liberty Enthroned Guarded by Order and Authority’, and bronze doors depicting ‘The Evolution of Justice’ – has become the face of the Supreme Court (which he described as “the greatest tribunal in the world”),¹⁶ much more so than Chief Justice William Howard Taft who after years of persistent effort managed to persuade the US government that the Court should get a permanent seat, which it finally got in 1935 after 145 years of operation.

The visibility of the power of the high officials of courts is diluted by several factors, not just famous buildings. Chief among these veils are the judicious restraint in their public statements (rarely providing the kind of sharp relief that feeds tabloid headlines),¹⁷ and the emphasis on reasoning and justification of their decisions which may contain many premises and distinctions that are lost on the general public as they tend to complicate texts. The dilution can be aggravated if the court has a relatively high number of judges (and not just nine celebrities like the US Supreme Court) or if it produces very many written decisions, lengthy judgments that may be widely perceived as technical, or frequent dissenting or separate opinions on very fine distinctions,¹⁸ especially if decisions and opinions are

¹⁵ See Suzy Maroon and Fred J. Maroon, *The Supreme Court of the United States*, Lickle Publishing Inc., Palm Beach, 1996, p. 30.

¹⁶ *Ibid.*, p. 28. There is more about the seat than the “temple front” that has become symbols of justice, such as the Great Hall leading to the Courtroom, the two elliptical spiral staircases of marble, and the consistent use of Madre Cream marble from Alabama throughout the building, giving it a distinct sense of durability and strength.

¹⁷ The purpose of such restraint is to protect the perceptions of independence and impartiality of the official and office in question. It is also a fundamental way to manifest the integrity of the high official in question. On this latter point, see the incisive text by Richard J. Goldstone, “Prosecutorial Language, Integrity and Independence”, in Morten Bergsmo and Viviane E. Dittrich (eds.), *Integrity in International Justice*, *supra* note 1, pp. 1065-1078.

¹⁸ It could be worthwhile to apply Bourdieu’s theory of distinction to the profligate practice of separate and dissenting opinions at, for example, the International Criminal Court. See

not particularly well-penned or lack in moral authority. Systemic factors may also play a role. If an international criminal jurisdiction rises on the chronological heels of a highly successful, standard-setting court – as arguably is the case of the International Criminal Court rising in the shadow of the International Criminal Tribunals for the Former Yugoslavia and Rwanda – it may take a couple of decades before the later court gains the visibility its mandate and work deserve.

But these veils do not really diminish the power of high officials in international jurisdictions, although it may feel like that at times. In such a situation, it may be useful to remind ourselves that the *impact* of court decisions cannot be reduced to the mere metrics of citations, a logic which is already stifling innovation and the widening of perspective in industrial international law academia.¹⁹ Neither should impact be reduced to *access* to legal information, however important that is to broadening the discourse community – it is actually a precondition to universalizing international criminal law.²⁰ It is the impact of the decision's upholding of legal principles and legally protected values that should be our concern. This affirmation is not static, but occurs in a fluid context with ever-changing priorities of governments and their diplomats. Facing such a plethora of variables, high officials of international criminal courts – and those who may be drafting segments of public texts for them – need to speak to the *conscience of human beings* to ensure real impact. And should the relative anonymity of being pillars of one wing of the international legal order become pressing, one may wish to recall Dag Hammarskjöld's advice to be "grateful as your deeds become less and less associated with your name".²¹

Pierre Bourdieu, *Distinction: A Social Critique of the Judgment of Taste*, Routledge, London, 1984.

¹⁹ This challenge is not limited to 'Western' academia. Some of the leading universities in East Asia – in Beijing, Seoul, Shanghai and Singapore – are particularly susceptible to the logic of metrics as they strive to climb in international rankings, also because of the general brand consciousness. This problem can hold back the development of genuine thought among younger international lawyers in the orbit of these universities. Their contributions are sorely needed in the international criminal justice discourse as a whole for it to evolve and mature.

²⁰ See Morten Bergsmo, "Decomposition Works in Our Favour", Policy Brief Series No. 114 (2020), TOAEP, Brussels, 2020 (<http://www.toaep.org/pbs-pdf/114-bergsmo/>).

²¹ Dag Hammarskjöld, *Markings*, Ballantine Books, New York, 1983, p. 125. The Swedish original – *Vägmärken* – was first published by Albert Bonniers Förlag AB in 1963. Dag Hammarskjöld was Secretary-General of the United Nations Organisation from 1953 to

When considering the power of judges and prosecutors in international criminal justice, traditional sociologists of law like the late Wilhelm Aubert (discussed in Section 5 below) would emphasize issues such as common characteristics in terms of the socio-economic background of the high officials; identifiable distinguishing features in the processes leading to their election; patterns in their opinions and decisions; in their exercise of discretion, particularly where it concerns material or substantive prioritisation; in their recruitment of subordinated personnel; and in their relationship with their own government, which more often than not has paid their salary prior to the international appointment, and frequently continues to do so after their international service ends. The high officials wield statutory power over the participants in cases before them – no one has a higher public stake in the exercise of power by the judges and prosecutors. Staff members subordinated to their administrative authority may, however, have a more immediate stake in their exercise of power, but this remains largely hidden from public view, unless abuse reaches the Administrative Tribunal of the International Labour Organisation or otherwise becomes notorious.²²

These issues of traditional sociology of law make up the first layer of the topography of power within international criminal jurisdictions. It should, it is submitted, be afforded primary attention in an emerging sociology of international criminal justice. Cognizant of its role as a discourse catalyst and fertiliser, the co-editors of this anthology decided that it would only partially address this first layer, aspiring neither to be a textbook nor a monograph.

One chapter that does address the first layer – Chapter 3 (“On the Early Release of the ‘Rwandan Goebbels’: American Free Speech Excep-

1961. The quotation continues: “as your feet ever more lightly tread the earth”. The more lightly the high officials of international criminal jurisdictions – and the national diplomats who oversee these institutions – “tread the earth”, the deeper the footprint of the institutions themselves may be. This is one of the insights distilled from the anthology *Integrity in International Justice*, *supra* note 1, see Morten Bergsmo and Viviane E. Dittrich, “Preface by the Co-Editors”, p. x.

²² Cyril Laucci discusses some such ILOAT cases in Cyril Laucci, “The Wider Policy Framework of Ethical Behaviour: Outspoken Observations from a True Friend of the International Criminal Court”, in Morten Bergsmo and Viviane E. Dittrich (eds.), *Integrity in International Justice*, *supra* note 1, pp. 845-874. See also Brigid Inder OBE, “Conformity, Leadership and the Culture of Integrity at the International Criminal Court”, in *ibid.*, pp. 309-396.

tionism and the Ghost of the Nuremberg–Tokyo Commutations”) by Gregory S. Gordon – is important also because it says something about how inquiries into power in international criminal justice may be conducted. Gordon zooms in on the exercise of judicial discretion by one judge and warns against the concentration of power in one individual’s hands. He treats the judge – who happens to be one of the most senior judges in international criminal justice – as a *public figure* whose work can be subjected to critical analysis, a precondition for any serious sociological approach to international criminal law. As recently observed elsewhere:

International judges and prosecutors – and other high officials of international courts – are *public figures* and their work should therefore be subjected to direct critical review. That comes with the job and this is one of the reasons why such high officials are highly remunerated. In order to execute their weighty responsibilities under the statutory instruments of international courts, the States Parties need to be assisted by clearly articulated, critical assessments that are not artificially constrained by fear of sanction or a desire to be cited in decisions or submissions. It is in the institutional interest of international courts that critical analysis not be impeded by a deference which may be appropriate *within* legal fraternities and their practice, but do not apply in the same way *outside*.²³

It is not easy to undertake meaningful sociological analysis of international criminal justice and to singularly remain within its legal fraternity. Good lawyers would normally have some advantages when venturing into sociological analysis: they understand the legal work-processes, principles, sensitivities and struggles. But many will find the requisite detachment from the fraternity elusive. As Karl Popper wrote: “Sociology, or at least a very important part of it, must be autonomous”.²⁴ Gordon shows courage

²³ Morten Bergsmo and Viviane E. Dittrich, “Integrity as Safeguard Against the Vicissitudes of International Justice Institutions”, in Morten Bergsmo and Viviane E. Dittrich, *Integrity in International Justice*, *supra* note 1, pp. 1-43.

²⁴ See Karl Popper, *The Open Society and Its Enemies*, Routledge, London, 2011, p. 302 (first published in 1945). Popper included the section “The Autonomy of Sociology” in the part of *Volume II: The High Tide of Prophecy* where he critiques Karl Marx. Exceptionally, he agrees with Marx’s “opposition to psychologism, i.e. to the plausible doctrine that all laws of social life must be ultimately reducible to the psychological laws of ‘human nature’”, as the “danger of this presumption is its inclination towards historicism” (*ibid.*, pp. 301, 310).

and autonomy in his analysis, and it will surely inspire many more critical assessments of named judges and other high officials in and around international criminal justice in coming years, in the interest of strengthening the institutions of international criminal justice and the effects of their work.

1.3. States and Their Representatives

For the purposes of these reflections, the second layer in the topography of power in international criminal justice is made up of the States Parties and their representatives. The States Parties create the legal basis of these jurisdictions, directly or indirectly; they subsequently set them up and elect their high officials, who they can also remove; they fund the institutions, conduct oversight over them, and determine several instruments of their legal infrastructure. States Parties decide who should be considered trusted advisers and listened to in non-governmental organisations and academia – and who not.

Chapters 10 (“International Law-Making on Terrorism: Structural and Other Powers of Resistance”) by Judge David Baragwanath and 11 (“Negotiating the Crime of Aggression: Between Legal Autonomy and State Power”) by Marieke de Hoon consider aspects of the power of states in norm-creating processes, linked to terrorism and aggression respectively. The comprehensive Chapter 12 (“Judicial Governance Entities as Power-Holders in International Criminal Justice: A Plea for a Socio-Legal Enquiry”) by Sergey Vasiliev analyses “the exercise of power *vis-à-vis* international and special or hybrid criminal tribunals (‘ICTs’) by political-administrative bodies set up by States and international organisations, and vested with responsibility for running ICTs. In the nascent line of research into the mandates and functioning of those bodies, they have been referred to as international judicial governance institutions, or ‘*injugovins*’”.²⁵

Normally diplomats represent States Parties in such standard-setting, governance, and other functions mentioned above. They are the bearers of state power in international criminal justice. But they are also human beings with personal ambitions and career concerns. There has not been much socio-legal analysis of the power exercised by diplomats in international criminal justice, certainly not of the duality of interests characteris-

²⁵ See Sergey Vasiliev, “Judicial Governance Entities as Power-Holders in International Criminal Justice: A Plea for a Socio-Legal Enquiry”, Chapter 12 below.

ing their role. This will change when a sociology of international criminal justice starts to take form. As with the high officials of the courts, the analysis of the role of diplomats needs to zoom in on specific individuals. Ambassadors in multilateral negotiations and governance structures are public figures. They do enjoy formal immunity in the relations between states, and high respect pursuant to the protocol and culture of diplomacy. They master the art of diplomatic formulation, also when they speak about each other. It goes without saying that a sociological approach – one objective of which is to unmask power – requires autonomy. An increase in critical analysis is called for in this area.

Indeed, some diplomats stand out as suitable initial candidates for scrutiny, attracting, through their own acts, a closer, disinterested look, either because of widespread perceptions of blameworthy conduct, excessively long and profitable service in the area of international criminal justice, or because of failures linked to processes of great transitional importance. For example, the historian and diplomat Dr. Zeid Ra'ad Al-Husseini has made a remarkable career out of international criminal justice. His rhetoric as former United Nations High Commissioner for Human Rights made headlines around the world after he publicly shamed Ambassador Kyaw Moe Tun, Myanmar's Permanent Representative to the United Nations in Geneva, on 4 July 2018.²⁶ The following was written about Al-Husseini in *Colonial Wrongs and Access to International Law*:

His co-authored op. ed. "The International Criminal Court Needs Fixing", *Atlantic Council*, 24 April 2019 (available on its web site) has also been seen as controversial. Observers have asked how Mr. al-Husseini could publicly attack the ICC in this manner when he served as the President of the Bureau of the Assembly of States Parties of the Court during the most critical period of its history. Indeed, no one contributed more to the election of the first ICC Prosecutor – widely considered the source of many of the problems that have plagued the Court since – than Mr. al-Husseini, as confirmed by the first Prosecutor in a recent publication, see Luis Moreno-Ocampo, "6. The International Criminal Court", in

²⁶ See, for example, Nick Cumming-Bruce, "'Have You No Shame?' Myanmar Is Flogged for Violence Against Rohingya", *The New York Times*, 4 July 2018. He since expressed his moral indignation to states more sweepingly, see, for example, his audio-visual op. ed. "I Will Not Stay Silent. Our Leaders Are Failing Human Rights.", *The New York Times*, 6 May 2019.

David M. Crane, Leila N. Sadat and Michael P. Scharf (eds.), *The Founders*, Cambridge University Press, 2018, pp. 95–125. Mr. al-Hussein also intervened in the start-up work of the ICC Office of the Prosecutor in ill-informed ways with significant negative consequences. It seems unavoidable that diplomatic failures around the ICC will be subjected to critical analysis, especially where it has unfairly complicated the work of the incumbent Prosecutor and Judges.²⁷

How a historian with no background in (international) criminal justice could become sub-coordinator of the informal negotiations on the elements of the crimes in the ICC Statute (1999-2000), and the first President of the Bureau of the ICC Assembly of State Parties (2002–2005) remains intriguing. His biography on the web site of The Elders explains:

In September 2002, Zeid was elected the first President of the Assembly of States Parties to the Rome Statute of the International Criminal Court. Over the next three years he oversaw the election of the first 18 judges, mediated selection of the Court's first president, and led efforts to name the Court's first prosecutor.²⁸

His legacy will be assessed in part on the basis of what he highlights here, including the way he led the election of the first ICC Prosecutor, an appointment which has widely been seen as the main source of the problems for which he later criticized the second Prosecutor and for which, in 2019-2020, an entire Independent Expert Review was established. As the head of the preparatory team to establish the ICC Office of the Prosecutor from 1 August 2002, and then as its first Senior Legal Adviser, I could observe first-hand how his intervention in the process to establish the Office undermined important quality-control tools that had been put in place. Such errors of judgment may be explained by lack of relevant experience or expertise, which may well be the general lesson that we can distil here. It is noted that, by leading the “closing stages of the negotiations over the crime of aggression” in 2010 to – what civil society, including leading

²⁷ See Morten Bergsmo, “Myanmar, Colonial Aftermath, and Access to International Law”, in Morten Bergsmo, Wolfgang Kaleck and Kyaw Yin Hlaing (eds.), *Colonial Wrongs and Access to International Law*, TOAEP, Brussels, 2020, p. 231 (<https://www.toaep.org/ps-pdf/40-bergsmo-kaleck-kyaw>). It goes on to refer to Morten Bergsmo, “Institutional History, Behaviour and Development”, in Morten Bergsmo, Klaus Rackwitz and SONG Tianying (eds.), *Historical Origins of International Criminal Law: Volume 5*, *supra* note 7, pp. 1–31.

²⁸ See www.theelders.org/profile/zeid-raad-al-hussein/ (last accessed on 24 November 2020).

international lawyers have considered – a successful conclusion,²⁹ and by coming across as an outspoken United Nations High Commissioner for Human Rights (2014-2018), Al-Hussein has made it more challenging for those who may be in a position to undertake a constructive sociological analysis of how he has wielded power over international criminal justice.

It was Dr. Silvia A. Fernández de Gurmendi from Argentina who had presented Luis Moreno-Ocampo as candidate to become the first ICC Prosecutor and who led his campaign. She would not have succeeded had it not been for the way Al-Hussein “led efforts to name the Court’s first prosecutor”.³⁰ She was aided by William Pace (long-time Convenor of the Coalition of the International Criminal Court), who circulated Moreno-Ocampo’s resume to a small circle of key persons, and from behind by Ambassador Philippe Kirsch (a Canadian diplomat who had taken over the chairmanship of the ICC diplomatic negotiations when Ambassador Adriaan Bos fell ill, and went on to become the first ICC President) and Professor Elizabeth S. Wilmshurst CMG (who played a pivotal role during the ICC negotiations through the delegation of the Foreign and Commonwealth Office of the United Kingdom, where she had served as the Deputy Legal Adviser).³¹

Late 2002 and early 2003, I was in almost daily contact with diplomats of ICC States Parties from my office in the interim premises of the Court in The Hague, where I would also run into Kirsch frequently. It was there that I received Moreno-Ocampo in my office when he came to Europe to meet with some capitals as part of Fernández de Gurmendi’s campaign. I vividly recall that Ambassador Harry Verweij had wanted the candidate to meet with me at the Court first, before his introduction to the Dutch Ministry of Foreign Affairs, and the very moment he stepped out of the Court, Verweij called to hear my assessment. There were, however, three opinions that mattered more than any other: that of Wilmshurst, Kirsch and Fernández de Gurmendi herself. Looking back, one person was more true-eyed than all of them. Together with me in the long meet-

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ Wilmshurst famously resigned as Deputy Legal Adviser on 20 March 2003 (on the eve of the 2003 invasion of Iraq) shortly after Attorney General Lord Peter H. Goldsmith PC QC gave advice to the British government that reversed her legal opinion that the invasion was illegal without a further resolution by the United Nations Security Council. Her resignation has been seen and admired around the world as an act of high professional integrity.

ing with Moreno-Ocampo was Gilbert Bitti, one of the first legal advisers at the Court. He remained in my office until I came back upstairs. With wide open, sad eyes he looked at me and spoke gently: “Do you really think we can work with a man like that?”. He was in a vulnerable state of disbelief.³²

Upon Moreno-Ocampo’s election in April 2003, at the end of the process led by Al-Hussein, Fernández de Gurmendi assumed the role as his *Chef de cabinet* already in May 2003, before he had been installed as the first Prosecutor the subsequent month. Gregory S. Gordon describes what happened next:

Fernández de Gurmendi persuaded Moreno-Ocampo that political payback required the OTP to hire Britons and Canadians. When Bergsmo protested that one of the candidates in question was not the most qualified and that hiring him for the relevant position would violate institutional recruitment rules, he was sharply rebuked. At Fernández de Gurmendi’s apparent urging, and in an environment of “fear and intimidation,” the OTP’s chief investigator was then asked to “dig up dirt” on the stronger competing candidate so as to justify the political hiring of the weaker, politically favored one.

But the untoward influence did not end at the recruitment stage, according to Mahoney.³³ He notes that one of Fernández de Gurmendi’s “payback” hires, Gavin Hood, coming from the British Foreign and Commonwealth Office, “sought to shape OTP operations in the interests of the U.K. government.” Thus, to quote Mahoney, Hood had an impact on “which situations [and cases] would be selected for prosecution.”³⁴

³² The nature of Bitti’s unvarnished premonition vividly returned to me sixteen years later, in early March 2019, when I was struck by the essential beauty of two marble busts from 1465-1475 by Andrea del Verrocchio – so called because he was indeed considered *true-eyed*, one who saw things as they were. Andrea del Verrocchio (1435-1488) was the teacher of Leonardo da Vinci, Sandro Botticelli, Domenico Ghirlandaio and others. For the marvellous catalogue of the exhibition I visited in the Strozzi Palace in Florence, see Francesco Caglioti and Andrea de Marchi, *Verrocchio: Master of Leonardo*, Marsilio, Venice, 2019.

³³ Gordon’s original text is hyperlinked at this point to Christopher B. Mahony, “The Justice Pivot: U.S. International Criminal Law Influence from Outside the Rome Statute”, in *Georgetown Journal of International Law*, 2015, vol. 46, pp. 1071-1134.

³⁴ See Gregory S. Gordon, “Selecting the ICC’s Next ASP President: High Scrutiny for High Stakes”, *OpinioJuris*, 16 November 2020 (available on its web site).

What Gordon writes about Fernández de Gurmendi is sadly true, as also attested to in a publication by the directors of four independent organisations, the European Center for Constitutional and Human Rights, The Hague Institute for Innovation of Law, the Commission on International Justice and Accountability, and the Centre for International Law Research and Policy (CILRAP).³⁵ Within days and weeks of taking up her position as *Chef de cabinet*,³⁶ she had pushed through the hiring of Andras Vamos-Goldman (who represented the Canadian foreign ministry during the ICC negotiations), Gavin Hood (the desk officer for international criminal law in the Foreign and Commonwealth Office at the time, and a British representative during the ICC negotiations), the above-mentioned Elizabeth S. Wilmshurst, and Darryl Robinson (the desk officer for international criminal law in the Canadian foreign ministry). Indeed, she explained to me how she had “agreed with Philippe³⁷ that [one of the two Canadians] would be hired in your Section [the Legal Advisory Section of the Office of the Prosecutor], because it would not look good if he is hired in the Presidency or Chambers”, as he had worked so closely with President Kirch during the ICC negotiations. When I gently raised rules-based concerns about such an exceptional hiring procedure at a time when we sought to build trust in the predictability and professionalism of the Court – and the position in question in fact was in the Section of which I

³⁵ See Morten Bergsmo, Wolfgang Kaleck, Alexander S. Muller and William H. Wiley, “A Prosecutor Falls, Time for the Court to Rise”, FICHL Policy Brief Series No. 86 (2017), TOAEP, Brussels, 2017 (<http://www.toaep.org/pbs-pdf/86-four-directors/>).

³⁶ Fernández de Gurmendi was not content with the available positions in the approved budget of the ICC Office of the Prosecutor, so the Chief of Investigations position – which was at the D-1 level – was redeployed so that her *Chef de cabinet* position would have a higher pay-level. “This was perhaps the most significant deviation from the first budget of the Office of the Prosecutor, with substantial consequences for the development of the Office”, see Morten Bergsmo and Klaus Rackwitz, “The First Budget of the Office of the Prosecutor”, in Morten Bergsmo, Klaus Rackwitz and SONG Tianying (eds.), *Historical Origins of International Criminal Law: Volume 5*, supra note 7, pp. 1012-1013. This could be seen as the start of a downgrading of the importance of the investigation function at the ICC Office of the Prosecutor during the term of the first Prosecutor, which later had unfortunate consequences for the ICC and its States Parties.

³⁷ For more than one year, Fernández de Gurmendi and Philippe Kirsch conducted weekly working meetings between the two of them in the open cantine of the Court – in full view of everyone at the Court, including visitors – until it was kindly suggested to them that it is not appropriate for the President and *Chef de cabinet* of the Prosecutor to be seen to coordinate the work of the Court in this manner. This, and other lapses, may best be explained by the fact that neither of them had ever worked in criminal justice.

served as Head – she angrily³⁸ responded: “If you do not hire him, I will destroy the Legal Advisory Section!”. The Section is still there – and its importance is highlighted in the final report by the Independent Expert Review³⁹ – but Fernández de Gurmendi made the Prosecutor move two of its Legal Adviser positions into her external affairs section, and she promptly hired the Canadian without a separate competition.⁴⁰

At the time of writing, Fernández de Gurmendi was a candidate to become the next President of the Bureau of the ICC Assembly of States Parties. In that connection, Gordon wrote:

The reasons the ICC must get it right in terms of its next Prosecutor selection apply with equal force to its next pick for ASP President (who, in turn, may play a significant role in choosing the Prosecutor at the Assembly’s next Session, scheduled for December [2020]). Should a key person so intimately connected to the ICC’s “original sin” of making Moreno-Ocampo its first Prosecutor become the next ASP President? Prudence would seem to counsel against it. Certainly, Ms. Fernández de Gurmendi deserves fair and even-handed consideration that is in no way tainted with guilt by association. That said, and equally true, a very high degree of scrutiny is in order. Per the NHC [Norwegian Helsinki Committee], the next ASP President must adhere to the highest professional standards so as to “strengthen the ICC and its role as guarantor of international justice.” In fact, the NHC’s counsel may not be expressed in sufficiently dire

³⁸ Fernández de Gurmendi is indeed a warm and friendly diplomat, who can negotiate well. But it is regrettably also true that she is widely referred to as “mean” among lawyers who worked in ICC Chambers where she subsequently served as judge for nine years. These are among the lawyers who shoulder perhaps the largest burden in producing the decisions of the Court. It is obviously uncomfortable to recount this label, but it would be contrary to the spirit of the unmasking of power in international criminal justice to deliberately exclude such notoriety because it is unpleasant.

³⁹ See Independent Expert Review, “Review of the International Criminal Court and the Rome Status System, Final Report”, 30 September 2020 (‘IER report’) (<https://www.legal-tools.org/doc/cv19d5/>), *inter alia*, Recommendations 43-45. The Section is ably led by Dr. Hans Bevers.

⁴⁰ Needless to say, this was also unfair to that person, who had outstanding qualifications and probably would have been hired in one of the other Legal Adviser positions in my Section which were being filled successively, if the process had been allowed to go ahead in accordance with the UN Common System which applied to recruitment at the Court at that time. As a matter of fact, I would have been very pleased to work with this Canadian colleague.

terms. Given nearly two decades of tumult and perceived failure, rather than an aspirational hire, this could prove to be an existential choice.⁴¹

Earlier in his text, Gordon refers to a letter by the Norwegian Helsinki Committee – probably the leading Nordic human rights organisation – to President O-Gon Kwon of the Bureau of the ICC Assembly of States Parties on 26 October 2020. In his letter, the leader of the Committee states:

I am aware that Mrs. Fernández de Gurmendi is a candidate of the Latin American and Caribbean Group of states (GRU-LAC) to become the next President of the ICC Assembly of States Parties. With this letter, I want to state my serious concern that likely future revelations about her previous role in the ICC Office of the Prosecutor will undermine a successful performance as Assembly President and also the authority of the wider ICC System. Such problems are the last thing the Court needs during the critical next three years. [...]

I am convinced that ensuring that the next President of the Assembly of States Parties adheres to the highest standards of integrity and professionalism is of crucial importance to strengthening the ICC and its role as a guarantor of international justice. States Parties should avoid electing a President, who might be criticised for not having always adhered to such standards.⁴²

According to the web site of the Committee, on “14 November 2020 a copy of the letter was sent to the Permanent Missions of Canada, France, Germany, Japan, the Netherlands, New Zealand, Sweden, Switzerland, and the UK”, and it offers a hyperlinked list of these letters.⁴³

On 20 November 2020, Stéphanie Maupas – perhaps the leading journalist in international criminal justice at the time of writing this chapter – published a widely-read article in *Justiceinfo*, where she writes that after Moreno-Ocampo was appointed ICC Prosecutor on 21 April 2003, “[t]hose who elected him were soon rewarded with positions in his office.

⁴¹ See Gregory S. Gordon, “Selecting the ICC’s Next ASP President: High Scrutiny for High Stakes”, *supra* note 34 (square brackets added).

⁴² The Norwegian Helsinki Committee, Letter to the President of the Bureau of the Assembly of States Parties of the International Criminal Court, 26 October 2020 (<https://www.legal-tools.org/doc/jo7vkk/>).

⁴³ See <https://www.nhc.no/no-external-inquiry-at-the-international-court/>.

Silvia Fernandez de Gurmendi, Argentina's representative to the United Nations, became his chief of staff (which did not prevent her from presiding over the Court ten years later)" (referring to the fact that she was President of the ICC during the last three years of her term as judge). Maupas continues: "As for Silvia Fernandez de Gurmendi, she is now on track to head the Assembly of States Parties. On the agenda for the coming years: the implementation of the recommendations of the Goldstone expertise [the Independent Expert Review]"⁴⁴

The concerns about Fernández de Gurmendi have been articulated with considerable specificity as regards her perceived relationship with government officials of Canada and the United Kingdom. In the above-mentioned article by Christopher B. Mahony, he writes:

The British and Canadian role in achieving the election of Moreno-Ocampo provided a degree of indirect U.S. control via election of a prosecutor its allies favored. The British and Canadian role in advancing the U.S. interest as far as *realpolitik* would advance it at Rome had continued in the early formation of the Office of the Prosecutor.⁴⁵

There has been growing talk about this for several years, which may not be known to diplomats who only started working with international criminal justice the past three years. There is reason to believe that the practice of diplomatic rotation can undermine the appreciation by foreign ministries of some long-standing concerns among key actors who in effect serve as durable pillars of support for international criminal justice institutions, as diplomats come and go from the field. It may even be that the British and Canadian foreign ministries have not heard eye-witness accounts of how individual actors invoke a 'special relationship' with their governments. It may come as some surprise to them that such invocations can be very explicit and offered without the kind of discretion and subtlety which are taken for granted among senior members of their own diplomatic ranks. I was astounded when Fernández de Gurmendi on several occasions (at the time we were both in the ICC Office of the Prosecutor) would openly announce in the presence of others her admiration for the

⁴⁴ See Stéphanie Maupas, "Exclusive: List of Candidates for Next ICC Prosecutor", *Justiceinfo*, 20 November 2020 (available on its web site).

⁴⁵ Christopher B. Mahony, "The Justice Pivot: U.S. International Criminal Law Influence from Outside the Rome Statute", *supra* note 33, p. 1098. It is a densely footnoted article that draws on his doctoral research at Oxford.

United States, how they “are the best”, and how, in their absence as a State Party, we have to “align ourselves with the British”. And when “the British” came from the Foreign and Commonwealth Office, special arrangements were made for lunch in the finest restaurants. Sitting next to these polite diplomats from London, I had the impression they were slightly bemused and that it would never have occurred to them to ask for any special treatment in violation of the Court’s independence and impartiality – for one, they had obviously realised that it was not necessary at that table. I was equally taken aback by Fernández de Gurmendi’s open statements of disapproval of the French, Chinese and others, which, at the time, I saw as an expression of plain prejudice.

In reality, the indiscretion displayed by Fernández de Gurmendi created a common risk for the Court and the British and Canadian foreign ministries. They did not need any ‘special treatment’ offered by an individual staff member. There was no bias against them in the ICC Office of the Prosecutor. Their remarkable contributions during the ICC negotiations, their important role in the financing of the Court, their high number of experts with relevant experience from the earlier *ad hoc* tribunals, Britain’s permanent membership of the United Nations Security Council, and Canada’s multileveled proximity to US government agencies in Washington were eminently understood by the colleagues in the Office of the Prosecutor. No one needed a soap-operatic display of professed loyalty, laudations of Anglo-American superiority, and imagined needs to adduce proof of reliability through appointments. In my contact the following years with Sir Franklin D. Berman KCMG QC, an earlier Legal Adviser of the Foreign and Commonwealth Office, it became clear to me that he would have been taken aback had he witnessed the indiscretions of Fernández de Gurmendi at the expense of perceptions being created about his former Office.

I presume he would also feel uncomfortable about the way the process to elect the third ICC Prosecutor evolved in the second half of 2020. Initially, Britain had supported France and Germany when they suggested that one of the ambassadors in The Hague – a prominent international lawyer who had worked with international criminal law and ICC-related issues for almost 20 years – should chair the Election Committee that the ICC Assembly of States Parties had set up. Out of the blue, at the meeting intended to confirm this highly-qualified candidate, Canada put forward their former Ambassador in The Hague, Sabine Nölke. When this was

supported by the British representative, the agreed candidate for chair immediately withdrew.⁴⁶ By the end of 2020, Ambassador Nölke and the Canadian foreign ministry may have regretted that they insisted to fill this key position (and the way they did it), given the serious criticism that the Election Committee has faced, following its failure to identify a consensus candidate to serve as the third ICC Prosecutor. Much has been written about the process, already in 2020.⁴⁷ I presume that also its chief architects – including James A. Goldston, whose Open Society Justice Initiative advised the President of the ICC Assembly of States Parties on the nature of the process – agree that what matters the most is the result at the end of the process: that a high-quality Prosecutor of integrity is appointed, preferably on the basis of broad agreement. I was informally involved in the processes that led to the appointment of the first two prosecutors of the *ad hoc* tribunals for ex-Yugoslavia and Rwanda: Richard J. Goldstone and Louise Arbour. Frankly speaking, there was not much of a process, but the result was outstanding in both cases.⁴⁸ Having the ability to land the process on its feet – and not the toes of others – surely matters. Process alone is not enough.

Nölke came under fire for producing a Committee shortlist of four persons of uncertain electability, one from her Canada (who works in the same national justice sector as her husband has for many years), one from Ireland (where she serves as Canada’s chief diplomatic representative), one Nigerian-US citizen (at the same time as the US government had imposed sanctions against high officials of the Court),⁴⁹ and one African candidate (when the second Prosecutor Fatou Bensouda is an African and “the ‘rotation principle’ [...] means that the two African candidates are

⁴⁶ This information was conveyed to me by one of the ambassadors in The Hague who was directly involved in the process at the time.

⁴⁷ See, for example, Gregory S. Gordon, “The Third ICC Prosecutor: Is It the Process or the Outcome of the Process that Matters More?”, *OpinioJuris*, 27 July 2020 (available on its web site); Gunnar Ekeløve-Slydal, “The Process of Electing the Next ICC Prosecutor Should be Opened Up”, *OpinioJuris*, 10 August 2020 (available on its web site); and Frank Petit, “ICC Prosecutor’s Election: In December, ‘Potentially No Candidate Will Be Nominated’”, *Justiceinfo*, 17 November 2020 (an interview with Patryk Labuda) (available on its web site).

⁴⁸ I joined the Office of the Prosecutor of the ex-Yugoslavia Tribunal in May 1994, as the first lawyer among its staff members.

⁴⁹ For an overview of relevant US statements, see Morten Bergsmo and Viviane E. Dittrich, “Integrity as Safeguard Against the Vicissitudes of International Justice Institutions”, in *idem*, *Integrity in International Justice*, *supra* note 1, pp. 5-9.

not being seriously considered by states this time around”.⁵⁰ The long-list of 14 contained two Canadian prosecutors, while the Court’s Deputy Prosecutor, James Stewart, is a Canadian and Article 42(2) of the ICC Statute expressly provides that the “Prosecutor and the Deputy Prosecutors shall be of different nationalities”. So “many States feel that, among the 4, the Irish candidate was given an unfair advantage” insofar as he may be the only electable candidate. Was it fair to Fergal Gaynor that such an impression was created?⁵¹ Was it fair to Richard Roy and Robert Petit to have a compatriot chair the Election Committee that put them on the short- and long-list respectively? These are legitimate questions to ask, not only because several of these professionals are my former colleagues. I do not think that it was kind to ICC Judge Kimberley Prost that her fellow-Canadian and superior during the ICC negotiations, former ICC President Kirsch, was the Chairperson of the Advisory Committee on Nominations of Judges when she was elected.⁵² Should Fernández de Gurmendi be appointed President of the ICC Assembly of States Parties during its 19th Session, would that cast a shadow over the prospects of Judge Prost to be elected President of the Court (given that she worked as the *Chef de cabinet* of Fernández de Gurmendi when she was President of the Court and their close collaboration during the ICC negotiations)?

1.4. Unmasking Power in International Criminal Justice

This is what the preliminary analysis of a sociological inquiry into the power wielded by diplomats over international criminal justice might look like. I have selected three diplomats, with a view to explaining the approach. There are a number of other diplomats who could be selected. And there are other constellations and expressions of power over international criminal justice than that individualised in diplomats and high offi-

⁵⁰ See Patryk Labuda, in Frank Petit, “ICC Prosecutor’s Election: In December, ‘Potentially No Candidate Will Be Nominated’”, *supra* note 47.

⁵¹ *Ibid.*

⁵² Despite recusal during the interview of and deliberation on candidates of the same nationality (as duly declared in both reports), a lingering doubt is unavoidably created, especially when the state of nationality actively sought the chair. For the recusal language, see ICC, Assembly of States Parties, Report of the Advisory Committee on Nominations of Judges on the work of its sixth meeting, ICC-ASP/16/7, 10 October 2017, Annex III: Rules of Procedure of the Advisory Committee on Nominations of Judges, Rule 5; ICC, Assembly of States Parties, Report of the Committee on the Election of the Prosecutor, ICC-ASP/19/INF.2, 30 June 2020, para. 22.

cial (and prominent staff members) in the international criminal courts. Several are discussed in this anthology, including the power of non-state actors such as non-governmental organisations and their polyhedric roles,⁵³ representational power in,⁵⁴ and cultural power of,⁵⁵ international criminal justice; the power of narratives by⁵⁶ and about,⁵⁷ and concepts of,⁵⁸ international criminal justice; and the redistributive power of social media in international criminal justice.⁵⁹ There are also significant barriers or ceilings to power in international criminal justice, such as those faced by international lawyers in developing countries,⁶⁰ by women,⁶¹ or by victims.⁶²

⁵³ See Gunnar Ekeløve-Slydal, “The Process of Electing the Next ICC Prosecutor Should be Opened Up”, *supra* note 47: “As civil society actors, we have been given a role beyond mere observers. *We are players in this election process, with the ability to influence the outcome* of what may become the most important international justice election this decade” (italics added). See also Mayesha Alam, “Agency, Authority, and Autonomy: The Role and Impact of Interactions with Transnational Civil Society on the International Criminal Court’s Operations”, Chapter 17 below.

⁵⁴ See Sarah-Jane Koulen, “The Power of Affective Aesthetics in International Criminal Justice”, Chapter 8 below; Marina Aksenova, “Transformative Power of the International Criminal Tribunal for the Former Yugoslavia”, Chapter 9 below.

⁵⁵ See Joachim J. Savelsberg, “The Representational Power of International Criminal Courts”, Chapter 6 below.

⁵⁶ See Mark Klamberg, “Rebels, the Vanquished, Rogue States and Scapegoats in the Crosshairs: Hegemony in International Criminal Justice”, Chapter 14 below; Tosin Osasona, “The Role of the International Criminal Court System in Modulating Political Behaviour in Africa: The Nigerian Example”, Chapter 20 below.

⁵⁷ See Jacob Sprang, Benjamin Adesire Mugisho, Jackson Nyamuya Maogoto and Helena Anne Anolak, “The Power of Narratives: The African Union’s Bid to Develop an Alternative International Criminal Law Narrative”, Chapter 16 below.

⁵⁸ See Barrie Sander, “The Anti-Impunity Mindset”, Chapter 7 below.

⁵⁹ See Emma Irving and Jolana Makraiová, “Capture, Tweet, Repeat: Social Media and Power in International Criminal Justice”, Chapter 19 below.

⁶⁰ See the clear and concise statement by the former Legal Adviser of the Ministry of External Affairs of India and Chairman of the United Nations International Law Commission, Narinder Singh, “Foreword”, in Morten Bergsmo, Wolfgang Kaleck and Kyaw Yin Hlaing (eds.), *Colonial Wrongs and Access to International Law*, *supra* note 27, pp. xi-xvi. In Chapter 15 below (“Development and National Prosecutions: Addressing Power and Exclusion for Sustainable Peace and Development”) by Djordje Djordjević and Christopher B. Mahony, the power of criminal justice for core international crimes to contribute to strengthening the rule of law is discussed, in the emerging prevention framework determined by the 2030 development agenda of the United Nations.

⁶¹ See the discussion on the relationship between sexual harassment and redistribution of power in Dienneke T. de Vos, “Institutional Ethics, Individual Integrity, and Sexual Harass-

It may perhaps be easier to engage in unmasking of the power of *individual* actors than more abstract categories. There is a face to unmask, rather than an institution, a relationship or a concept. The unmasking is an inherent part of the kind of socio-legal or sociological inquiry promoted by this book. The exercise may feel a bit like removing a plaster cast: we do not necessarily like what we see, and we may find aspects of the removal process unpleasent. The cover of the book visualises and aestheticizes the idea. Octavian's grip on and use of power have been studied and admired for centuries, including the aesthetic measures deployed during his lifetime in furtherance of his use of power.⁶³ The famous fragment of a bronze equestrian statue – which the National Archaeological Museum of Athens has kindly provided for this book through an agreement with the publisher – does not show a warrior, an athlete or any other Herculean character. He does not wield a weapon in his raised hand. Rather, his slender frame and the posture of his right arm evoke the sense of a caring thinker who is providing reasoned counsel or injunction, whilst his left hand casually holds the reins.⁶⁴ This may explain why the sculpture has been admired over the centuries. The sculpture as it presides today also lends the authors of this book a hand: the hollowness of Octavian's eyes reminds us that power – however well-robed and -mounted – is but a mask. It also helps us to understand that unmasking does not require demonisation or dislike of the power-holder. On the contrary, we may have

ment: Recent Developments in Ethics Standard-Setting and Mechanisms at the United Nations”, in Morten Bergsmo and Vivian E. Dittrich (eds.), *Integrity in International Justice*, *supra* note 1, pp. 515-550. See also Susan R. Lamb, “Self-Interest and International Criminal Justice Networks”, CILRAP Film, Florence, 28 October 2017 (<https://www.cilrap.org/cilrap-film/171028-lamb/>).

⁶² Chris Tenove, “International Criminal Justice and the Empowerment or Disempowerment of Victims”, Chapter 18 below.

⁶³ Octavian, known as Caesar Augustus (63 BC–AD 14), was the first Roman emperor. He enjoys a 2000-year legacy as one of the most effective leaders in human history. He is a symbol of power.

⁶⁴ Michelangelo's famous sculpture *David* (of the Old Testament) was carved pursuant to a civic commission by the city of Florence to show the mental or spiritual power of David in his struggle against the larger character Goliath. The city of Florence saw David as a symbol of its intellectual and moral superiority, so the sculpture was placed to the left of the entrance of its city hall on 8 September 1504, where it still stands (the original has been preserved against the elements in nearby Galleria dell'Accademia since 1873). To make sure the idea would not be lost on less subtle visitors, the city placed a simpler sculpture of *Hercules and Cacus* by Bandinelli to the right of the entrance. See Howard Hibbard, *Michelangelo*, The Folio Society, 2007, pp. 37-45 (first published by Harper & Row in 1974).

genuine appreciation for his or her qualities. And indeed, the diplomats discussed in the previous section are quite likeable. The surgical honesty of unmasking should be as disinterested as possible, and should not be mistaken for dislike.

Are there features common to the three diplomatic actors discussed in the previous section? First of all, they have all been privileged with high public trust in an area of international relations that speaks to aspirations of people around the globe. As the above-mentioned four directors wrote in their November 2017 publication:

The formalized Independent Oversight Mechanism is not the ultimate overseer of the Court, nor is the Assembly of States Parties. *The aspirations of individuals and communities made the Court and continue to provide its foundation.* If the leaders of the Court cannot retain their trust, their aspirations will move on to other instruments for the betterment of humankind.⁶⁵

A mandate inseparable from the “aspirations of individuals and communities [who] continue to provide [the] foundation” of the ICC is so weighty that it probably goes beyond the mandate that any single State Party can offer. It is a high trust to be worthy of.

Secondly, none of the three individuals had experience from or expertise in criminal justice when they assumed their functions in the ICC system. All three have come to the field of international criminal justice – and, quite extraordinarily, reached their positions of significant power within the field – through their capacity as diplomats. In his letter informing Nölke that he was no longer interested in being considered for appointment as the third ICC Prosecutor, Dr. Serge Brammertz put it in these terms:

It would be beneficial to involve experienced senior practitioners to a far greater degree in reviewing and evaluating candidates. While diplomats and commentators surely have a role, it should not be controversial to say that any successful

⁶⁵ See Morten Bergsmo, Wolfgang Kaleck, Alexander S. Muller and William H. Wiley, “A Prosecutor Falls, Time for the Court to Rise”, *supra* note 35, p. 4 (italics added).

candidate should first be able to secure the support of his or her peers.⁶⁶

It may simply be a mistake to assume that diplomats or others without criminal justice experience or expertise can perform key functions within the ICC and in the ICC system (other than judgeships open to international lawyers). International criminal justice is, in my view, too important for there to be the slightest suspicion that it has become a playground for personal ambitions of diplomats, however significant their responsibilities in the creation and State Party-governance of the Court. If a few diplomats get in the way of the strengthening of international criminal justice, they should perhaps be gently encouraged to get out of the way when feasible.

Thirdly, each of the three individuals have risen in connection with ICC elections: Al-Hussein and Fernández de Gurmendi played the key roles to have the first ICC Prosecutor Moreno-Ocampo elected; Nölke played an important role in the election of the third ICC Prosecutor. Elections of high officials in international criminal courts represent moments of transition of power. They stir hopes for change, but also unpredictability and, for some, insecurity. Elections could well be – sociologically speaking – the ‘state of exception’ moment of international criminal justice:⁶⁷ when ‘real power’ feels unsettled, moves, becomes more visible, and thus offers an unmasking moment during which we can see more clearly who is in charge or seeks power.

Fourthly, all three of the diplomatic actors were supported by the foreign ministries of Britain and Canada. Both Al-Hussein and Fernández de Gurmendi rose in the ICC negotiations through nominations or other

⁶⁶ Serge Brammertz, Prosecutor of the United Nations International Residual Mechanism for Criminal Tribunals, Letter to the Chair of the Committee on the Election of the Prosecutor, 17 November 2020 (on file with the author).

⁶⁷ See Carl Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität*, Duncker & Humblot GmbH, Berlin, 1922, pp. 11-21. Schmitt (1888-1985) was concerned with effective governance, and he saw the power to declare a ‘state of exception’ (‘Ausnahmestand’) as a way for the executive to solve problems more effectively, unrestrained by the slower processes of parliamentary deliberation. When there is a perceived need for and actual declaration of state of emergency, the ‘real power’ is revealed. Whereas a sociology of international criminal justice should seek to unmask power with a view to exposing it so that the main wielders of power must justify themselves and, if they fail, step aside, Schmitt sought to strengthen executive power. Schmitt is a fundamentally controversial character because of his membership of the Nazi Party and legitimization of Adolf Hitler’s rule.

support by one or both of these two foreign ministries.⁶⁸ Several members of the Bureau of the ICC Assembly of States Parties and other key ICC diplomats told me in 2002, 2003 and 2004 that they were amazed by the swiftness with which Britain and Canada moved to have Al-Hussein become the President of the Bureau (through which he “led” the process to have Moreno-Ocampo installed as Prosecutor),⁶⁹ Fernández de Gurmendi become *Chef de cabinet* and architect of Prosecutor Moreno-Ocampo’s main policies between May 2003 and the end of 2006, and Dr. Medard Rwelamira become Director of the Permanent Secretariat of the Assembly.⁷⁰ Arguably, these were the most important positions in the ICC system at the time, except for the position of President of the Court itself which was held by Ambassador Kirsch from Canada, as we have already established.

Fernández de Gurmendi, Rwelamira and Al-Hussein were prominent members of three groups of states outside the Group of Western European and Other States (WEOG): the Group of Latin America and the Caribbean (GRULAC), the Southern African Development Community (SADC), and a group of Arabic-speaking countries, respectively. Given that one of the main fault lines in the ICC negotiations were between Civil and Common Law countries, and given that it was more or less clear from the start of the process in 1996 that the US would not become a State Party, Common Law diplomats feared numerical minority during the negotiations. This seems to have made it particularly important for British and

⁶⁸ Fernández de Gurmendi served as Chair of the Working Group on Criminal Procedure (1995-1998); Chair of the Working Group on Rules of Procedure and Evidence of the Preparatory Commission for the International Criminal Court (1998-2000); and as Chair of the Working Group on Aggression of the Preparatory Commission for the International Criminal Court (2001-2002). Al-Hussein served as sub-coordinator of the Working Group on Elements of Crimes (under the chairmanship of Herman von Hebel, a Dutch diplomat who later became Registrar of the ICC); and as Chair of the Working Group on the Crime of Aggression at the Review Conference of the Rome Statute in Kampala (June 2010).

⁶⁹ See *supra* note 28.

⁷⁰ Medard Rwelamira was Chief Legal Adviser to the South African delegation to the 1998 Rome Diplomatic Conference, where he co-ordinated the negotiations on Part IV of the ICC Statute, and he subsequently led the South African delegation to the Preparatory Commission on the ICC. Originally from Tanzania, he obtained a doctorate from Yale Law School and became a South African citizen. On the occasion of his premature passing in April 2006, ICC President Kirsch correctly observed: “Many of us lose in Dr. Rwelamira a dear friend; all of us lose in him a highly professional and always friendly colleague. We will all remember Dr. Rwelamira as a warm and generous human being”, see ICC, “ICC – Passing of Dr Medard Rwelamira”, Press Release, ICC-CPI-20060431-130, 30 April 2006.

Canadian diplomats to invest in understanding and support for their concerns and views in other groups of states than WEOG (of which Australia, Canada, New Zealand and the United Kingdom are all members). This is not easy to achieve in a complex multilateral negotiation process. One approach is to seek close working relations with prominent actors in groups where you want to strengthen your position. Should the actor be a jurist from a Civil Law jurisdiction, all the better. Indeed, in the battle that ensued between Civil and Common Law countries during the ICC negotiations⁷¹ – a battle which later moved into the Court where it still seems to continue at the time of writing – a small number of Civil Law lawyers worked consistently for the preferred positions of Common Law countries. Some diplomats would affectionately refer to them as the ‘Civil Law torpedoes’ in conversations with me.

In his Chapter 4 below (“Bend It Like Bentham: The Ambivalent ‘Civil Law’ vs. ‘Common Law’ Dichotomy Within International Criminal Adjudication”), Alexander Heinze discusses in some detail the reasons and consequences of the choice of procedural approaches and rules, and shows that this should go deeper than the taxonomical Civil-Common Law divide. This contribution reminds us that this divide may not always be what it appears to be. It can also be used as a smokescreen while states are genuinely concerned to find effective ways to protect their interests in complex and dynamic multilateral settings.⁷² This is a shared sensitivity, which is not particular to any group of states.

⁷¹ On the background to this tension, I wrote in 2009:

This tension had some roots in facts and others in fiction. Regrettably, by 2002, some 85% of managers in the ICTY Office of the Prosecutor came from four countries: the United States, the United Kingdom, Canada and Australia. More than 50% of the lawyers in the Office were from the same four countries, as were approximately 75% of its GTA lawyers. Add to that, transparent layers of information showing who was assigned to which cases, to which witnesses and which legal questions, and *the contours of the topography of power start to emerge with some clarity*.

See Morten Bergsmo, “The Autonomy of International Criminal Justice”, FICHL Policy Brief Series No. 3, Oslo, 2011, p. 2 (<http://www.legal-tools.org/doc/5fa508/>) (italics added). This inadequate representation between different legal traditions was an issue in several Civil Law capitals during the ICC negotiations.

⁷² In a 2017 publication I asked “how could such an abstract distinction between common and civil law become a real dividing line?” (Morten Bergsmo, “Institutional History, Behaviour and Development”, *supra* note 8), before quoting the publication of the keynote speech presented on 6 February 2009 at the Dutch Ministry of Foreign Affairs in The Hague on the occasion of the departure of the first ICC President at the end of his term, Philippe Kirsch:

As a matter of fact, Britain and Canada are among the closest allies of my country, Norway. If my Norwegian friends have read this chapter up until this point, they are likely to observe that it is fortunate if Britain and Canada have worked closely with various actors to protect the ICC – from external pressure by great powers that are less friendly disposed to the Court, and from inherently irrational elements that necessarily exist in all international organisations, they might add. I would respond that they are right that this is not about Canada and the United Kingdom, but about how international criminal justice can be strengthened. I realize now that I may have created some suspense by not hoisting this banner earlier in the chapter. My friends might then suggest that Fernández de Gurmendi, when elected President of the ICC Assembly, would find a way to ‘lean on’ the new ICC Prosecutor to ensure that no member of the US Armed Forces or other US government agencies will become an ICC suspect (but that his or her Office instead focus on a weaker non-State Party if it is bent on going down that road). Maybe they would add that the world has become accustomed to individualising blame in the Court’s Prosecutor – sometimes quite unfairly during the tenure of Fatou Bensouda, who inherited problems from her predecessor – and that they expect that Fernández de Gurmendi would be shielded from responsibility for such ‘leaning’ (for carrying out ‘the white men’s burden’ of pruning the Court to the shape some of them originally had in mind). Nevertheless, my Norwegian friends would unreservedly concur that inquiry into power in international criminal justice is necessary – that the project to unmask the wielding of power within and over the international criminal courts will strengthen international criminal justice. They would agree that it may help us to walk less in circles, and not to waste time on remedies that are based on the wrong diagnosis.

Indeed, three of the four co-editors of this book are Scandinavians⁷³ and the fourth is from New Zealand.⁷⁴ How do we explain the national

Did the details of the distinguishing features of common and civil law criminal procedure really have the capacity to mobilise governments and international justice institutions? Or was the common versus civil law divide merely a proxy tension, a smoke-screen? Interests do mobilise – conflict of interests even more. Maximising the national interest by working together with likeminded States or other actors is not unknown to multilateral diplomacy and international organization.

See Morten Bergsmo, “The Autonomy of International Criminal Justice”, *supra* note 71.

⁷³ Professor Mark Klamberg is from Sweden, and Dr. Kjersti Lohne and the present writer from Norway.

background to our common interest in contributing to the crystallization of a sociology of international criminal justice? For one, we are all used to asking critical questions about possible connections and causality without fear of facing negative consequences such as retaliation. Perhaps this tradition of welcoming critique of manifestations and constellations of power is one of the reasons why the criminal justice systems of New Zealand, Norway and Sweden are so well-reputed.

1.5. Social Network Analysis and International Criminal Justice

In her influential 2004 monograph *A New World Order*, Anne-Marie Slaughter developed a conception of a networked world order that “assumes disaggregated states in which national government officials interact intensively with one another and adopt codes of best practices and agree on coordinated solutions to common problems – agreements that have no less legal force but that can be directly implemented by the officials who negotiated them”.⁷⁵ She argued that such “transgovernmental networks”

permit a loose, flexible structure that can bring in national officials from a wide range of different countries as needed to address specific problems. They can target problems at their roots, plug loopholes in national jurisdictions, and respond to goods, people, and ideas streaming across borders. Their members can educate, bolster, and regulate one another in essentially the same ways that make private transnational networks so effective. They are indeed the “institutions of globalization,” and far better suited to global governance in an age of globalization and information.⁷⁶

Slaughter is obviously aware that there is a third dimension, namely shared personal interests among key members of “transgovernmental networks”, which may be concealed by the “governmental” mandate, in par-

⁷⁴ That is, Dr. Christopher B. Mahony.

⁷⁵ See Anne-Marie Slaughter, *A New World Order*, Princeton University Press, 2004, p. 263.

⁷⁶ *Ibid.*, p. 264. A few pages later, Slaughter elaborates a thought experiment wherein national government officials “seek to work together in a variety of ways, recognizing that they could only do their jobs properly at the national level by interacting – whether in cooperation and conflict – at the global level. Their ordinary government jobs – regulating, judging, legislating – would thus come to include both domestic and international activity. Over time, they would also come to recognize responsibilities not only to their national constituents but to broader global constituencies. If granted a measure of sovereignty to participate in collective decision making with one another, they would have to live up to obligations to those broader constituencies” (p. 270).

ticular in highly value-laden areas such as ending impunity for victimisation of civilians in armed conflicts or bringing peace. The fact that a significant engine behind some “transgovernmental networks” may be to distribute benefits (such as high-paying or -profile international positions) among the core network members – which may be particularly attractive for members who would increase their domestic compensation four-five times if they can benefit from such distribution – does not detract from the importance of Slaughter’s contribution.

Unmasking a ‘third dimension’ of shared personal interests in networks would seem to be a prime task for the sociology of international criminal justice. Most elements are already in place to explore such inquiries. Bruno Latour’s *La fabrique du droit* – published a mere two years prior to Slaughter’s book – is interesting in this respect.⁷⁷ In this ethnography of the Conseil d’État of France he shows the ways legal ties build up associations. By visualising multi-levelled relations, his sociograms stimulate creativity and incision on how social networks in international criminal justice can be mapped and unmasked. It need not concentrate on individual career paths and associated relations in a limited time-period, as Latour does in Figure 1 below.⁷⁸

⁷⁷ Bruno Latour, *The Making of Law: An Ethnography of the Conseil d’Etat*, Polity Press, Cambridge, 2010 (the French original *La fabrique du droit* was published by La Découverte, Paris, 2002).

⁷⁸ *Ibid.*, pp. 123-126. He described another of his related sociograms as showing “nothing more or less than the condensed projection of the individual trajectories of counsellors, in the same way in which a myrmecologist could trace the displacements – accumulated over a long period of time – of ants though their nests” (p. 116).

1. Unmasking Power in International Criminal Justice: Invisible College v. Visible Colleagues

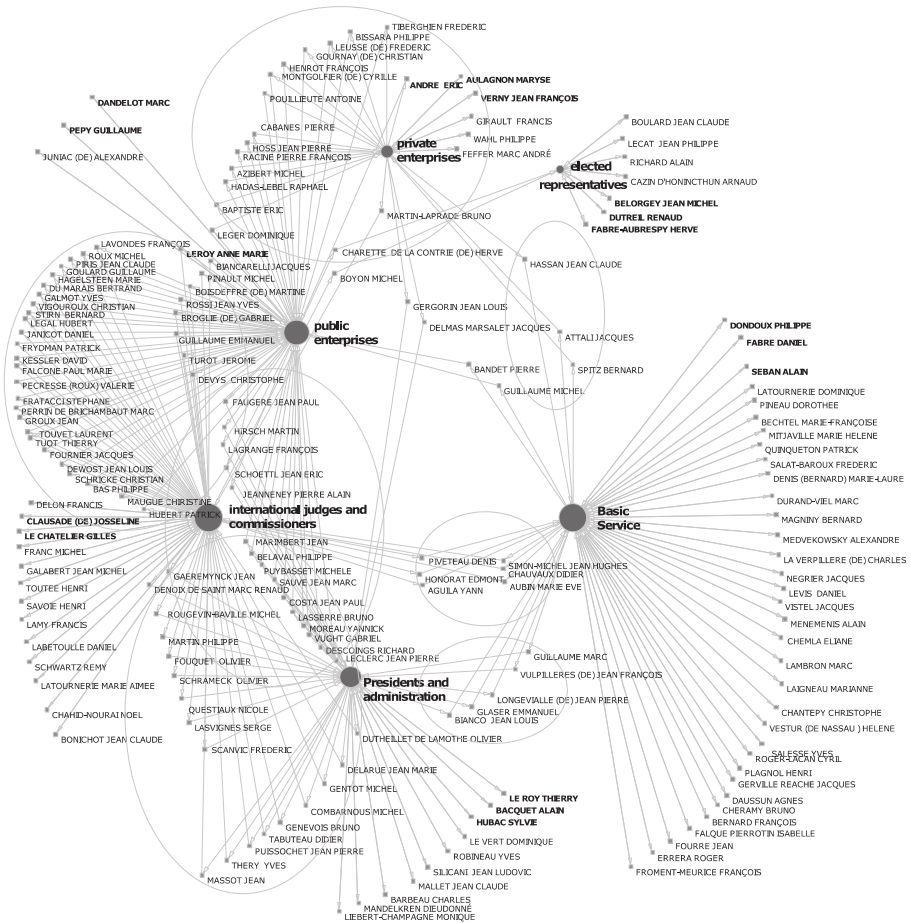


Figure 1: Latour’s illustration of career paths of Conseil members 1980-1989, classified in clusters.

The Danish lawyer and sociologist Mikael Rask Madsen offers an insightful overview of work by Pierre Bourdieu, Manuel Castells, Peter M. Haas and Kathryn Sikkink relevant to ‘networks’. His claim is that “when lawyers act transnationally – and thus theoretically outside the state – they still to an extent act in the shadow of the state as they embody both private and public interest”, and that decisive “transnational legal entrepreneurs [...] have been able to bring to the fore much more than legal capi-

tal and skills, namely social capital in terms of connections and access”.⁷⁹ He reminds us that “the very notion of networks is inherently vague”.

Shai Dothan explains that one of the main findings of social network analysis is that the “social network in which people are embedded may determine their behaviour even more than formal institutional boundaries such as, for example, firm structures”.⁸⁰ It suggests that transnational social networks may have a strong influence on its members.

A “network science” has come to develop both a terminology and tools “to measure and describe network structure”, according to Sergio Puig:

The network is the unit of analysis. A node is the component of the system or member of the population. An edge is the connection between components or members. Popular measures of structure include *degree distribution*, *hub*, *authority*, *eigenvector centrality*, *closeness*, and *betweenness*.⁸¹

Dothan elaborates:

The workhorse of social network analysis is the sociogram – a formal depiction of the connections between individuals or organizations. The agents forming the network are often referred to as ‘nodes’ and the connections between them as ‘ties’. Ties may include any form of relationship between the nodes that can lead to the transmission of material goods or information. The advantages of this framework for investigating relations between institutions and political entities are evident. The sociogram can help determine how easy it is to transmit information from one node to another, and help raise hypotheses about the way agents within the network are likely to act. The ability to control the flow of information is

⁷⁹ Mikael Rask Madsen, “Unpacking Legal Network Power: The Structural Construction of Transnational Legal Expert Networks”, in Mar Fenwick, Steven Van Uytsel and Stefan Wrabka (eds.), *Networked Governance, Transnational Business and the Law*, Springer, 2014, p. 18 (version on ResearchGate): “Legal network power, like all other exercises of power in society, is due to underlying social structures that allow for the projection of symbolic power”.

⁸⁰ Shai Dothan, “Social networks and the enforcement of international law”, in Moshe Hirsch and Andrew Lang (eds.), *Research Handbook on the Sociology of International Law*, Edward Elgar, Cheltenham, 2018, p. 335.

⁸¹ See Sergio Puig, “Network analysis and the sociology of international law”, in Moshe Hirsch and Andrew Lang (eds.), *Research Handbook on the Sociology of International Law*, *supra* note 80, p. 323.

a powerful asset and can determine the social power an individual can exert over others.⁸²

We therefore have available sociological tools that can be employed in the uncovering of a sociology of international criminal justice, as one of several approaches. Whereas Dothan predicts that the “application of social network analysis to international law has a bright future ahead of it”,⁸³ Puig correctly cautions that the application of network analysis “may be problematic if detached from careful understanding of the specific contexts in which legal institutions operate”.⁸⁴

Kjersti Lohne’s penetrating study of non-governmental organisations in international criminal justice confirms that “transnational networks have come to be seen as central infrastructures of contemporary transnational politics and global social movements, including, as is the concern here, global justice-making through international criminal law”.⁸⁵ But the domain of Latour’s *La fabrique du droit* is so much more mature than that of international criminal justice, where the very existence of social networks has yet to be visualised and generally recognised.

Network ‘membership’ is therefore not given in the same clear way as in an established, venerated institution like the Conseil d’État in Latour’s study. The previous sections of this chapter have discussed some obvious members of a social network that has succeeded to consistently wield power in international criminal justice during the period 1996–2020. To that list should be added a small number of civil society actors as well as some members of the ICC itself. Who else? We may get some clues from those who object most vehemently to the propositions that there is such a network and that there should be a wider project to unmask its power over international criminal justice.⁸⁶

⁸² *Supra* note 80, p. 334.

⁸³ *Ibid.*, p. 336.

⁸⁴ *Supra* note 81, p. 319.

⁸⁵ See Kjersti Lohne, *Advocates of Humanity: Human Rights NGOs in International Criminal Justice*, Oxford University Press, 2019, p. 68.

⁸⁶ Let me take the opportunity to underline that the present author alone is responsible for this chapter, not the other three co-editors of the book or others who have contributed to its publication. The International Nuremberg Principles Academy kindly supported the conference in Florence in October 2017, but they have not made any contributions towards this book and no one from the Academy has been consulted on this chapter (which has been written in a spirit of service to the field of international criminal justice).

Lohne argues that “the embeddedness of the core NGOs in the field of international criminal justice undermines the claim to moral authority, which is a critical basis of their legitimacy”.⁸⁷ She highlights the role of three civil-society leaders: the above-mentioned William Pace (former Convenor of the Coalition for the International Criminal Court),⁸⁸ Richard Dicker (Director of the International Justice Program of Human Rights Watch), and the late Christopher K. Hall (Senior Legal Adviser, International Justice Project, Amnesty International).⁸⁹ She refers to them as “individual moral entrepreneurs [who] have been involved since the early days of the ICC negotiations”, which “gives them individualized power – an institutional form of power – in an otherwise transient field”.⁹⁰ There is no indication that Dicker or Hall have been part of the social network sketched above. They have both repeatedly expressed reservations about the mode of operation of some of the actors discussed in Section 3 above – Hall most explicitly already in 2003.⁹¹

But the balancing of the NGO interest in access to information from high officials in international criminal justice, on the one hand, against the need to defend integrity in international justice institutions, on the other, has been challenging for NGO leaders *vis-à-vis* the ICC. For that reason, a seminar was convened in Oslo already in October 2006 on the theme ‘The

⁸⁷ *Supra* note 85, p. 70.

⁸⁸ On the Coalition, Lohne writes, *inter alia*: “the Coalition has become *the* global civil society *vis-à-vis* the ICC, which is highlighted, for example, by processes of accreditation to the [Assembly of States Parties] meetings. The power to define and constitute ‘global civil society’ is similarly apparent in the Coalition’s handling of information, where, in general, the moral knowledge provided within the field is defined by a select few, although facilitated by their web of transnational knowledge and expertise. Again, [the] tracing and unpacking of networks illustrate how it is that the metropole comes to speak for, and profit from, the periphery”, see *ibid.*, p. 96 (square brackets added).

⁸⁹ *Ibid.*, see in particular Chapters 3 (“Networks of Global Justice-Making: The Coalition for the International Criminal Court”) and 4 (“From Moral Entrepreneurs to Moral Advocates”).

⁹⁰ *Ibid.*, p. 107.

⁹¹ Hall (1946-2013) was under consideration for one of the senior positions in the Legal Advisory Section of the ICC Office of the Prosecutor in the late summer of 2003. In her efforts to hire the Canadian diplomat described in Section 3 above, Fernández de Gurmendi took active steps to undermine the recruitment process in which Hall was a candidate. She even wrote an e-mail message to Hall evidencing such disruptive intent on her part (in violation of the applicable UN Common System). Within minutes of receiving the e-mail message, Hall forwarded the information to me and expressed disbelief. He subsequently lost interest in the application.

Evolving Role of NGOs in International Criminal Justice’, during which NGO leaders were criticised for not having taken sufficiently effective measures to stop Moreno-Ocampo’s weakening of the standing of the Court when they received detailed information about the problems that started from the late summer of 2003.⁹² Dicker and Human Rights Watch were singled out for particular criticism. The concept note of the event recalled “the basic obligation of NGOs to monitor or watch the way public institutions exercise power, including internationalised criminal justice mechanisms. [...] the convergence of values protected by the human rights movement and international criminal justice should not blind the NGOs to this responsibility now that international criminal justice has come of age”.⁹³

A sociology of international criminal justice would also be able to draw on the older traditions of sociology of law and social science which have to some extent been concerned with the unmasking of power. Such research has sometimes had surprising societal impact. For example, on 22 September 1972, the Norwegian Cabinet mandated a comprehensive study to “establish the best possible knowledge about real power relations in Norway”. The final report prepared by the appointed experts in consultation with several social science institutions – known as ‘Maktutredningen’ or ‘The Study on Power’ – was presented in January 1982.⁹⁴ Its importance for Norwegian public discourse can hardly be overstated – it is still being cited and discussed. It essentially sought to unmask power in five sectors of Norwegian society: public administration, organisations of labour and business, economic power groups, international decision-making with effects on the Norwegian economy, and the mass media. This should illustrate that there is nothing strange or unusual about inquiries that seek to unmask power. It is arguably one of the main functions of the social sciences.

‘Sociology of law’ has existed as a discipline for more than half a century in several countries, even longer in some, such as the United States. We may find inspiration in domestic traditions of sociology of law

⁹² For information on the event, see <https://www.fichl.org/activities/the-evolving-role-of-ngos-in-international-criminal-justice/>. The programme speakers included Gunnar Ekeløve-Slydal, Richard Dicker, Christopher K. Hall, Carla Ferstman, Gilbert Bitti and Antoine Bernard.

⁹³ *Ibid.* (details on file with the author).

⁹⁴ Norges Offentlige Utredninger, NOU 1982: 3, “Maktutredningen: Sluttrapport”.

in the development of socio-legal approaches to international criminal law and justice. When I studied law at the University of Oslo in the late 1980s, sociology of law was an obligatory subject for all law students. I read textbooks by Vilhelm Aubert (1922-1988)⁹⁵ and Thomas Mathiesen (1933-)⁹⁶ on law in society. At the time, Aubert enjoyed academic celebrity status, and was well-known beyond the borders of Norway. He had undertaken several empirical studies since the early 1950s, including with Torstein Eckhoff (1916-1993) who – in his lucid monograph on American legal thought published in 1953⁹⁷ – identifies as main sources of inspiration the American legal scholars Oliver Wendell Holmes (1841-1935), Nathan Roscoe Pound (1870-1964),⁹⁸ William Underhill Moore (1879–1949), Thurman Wesley Arnold (1891-1969)⁹⁹ and others. Following World War II, he had turned to the United States for his post-doctoral research in 1947-1948, not to Germany. Eckhoff's monograph details how American legal thought between Holmes' early writings in the 1890s and World War II had become more pragmatic and realistic, and moved closer to social science. Like other Scandinavian jurists at the time, Eckhoff was also influenced by Karl Popper's *The Open Society and Its Enemies*¹⁰⁰ and later by Alf Ross (1899-1979).¹⁰¹ In a 1960-article in *Scandinavian Stud-*

⁹⁵ Vilhelm Aubert, *Retts sosiologi [Sociology of Law]*, Universitetsforlaget, Oslo, 1982. It draws on his more comprehensive *Rettsens sosiale funksjon [The Social Function of Law]*, Universitetsforlaget, Oslo, 1976.

⁹⁶ Thomas Mathiesen, *Retten i samfunnet: En innføring i retts sosiologi [The Law in Society: An Introduction to Sociology of Law]*, Pax Forlag A/S, Oslo, 1984.

⁹⁷ Torstein Eckhoff, *Rettsvesen og rettsvitenskap i U.S.A. [Justice and Science of Law in the U.S.A.]*, Akademisk Forlag, Oslo, 1953.

⁹⁸ See Roscoe Pound, *Social Control Through Law*, Yale University Press, New Haven, 1942 (reprinted by Archon Books in 1968): "What we require is not [...] a sociology of law that runs to methodology and seeks to justify a science of society by showing that it has its own special method by which then all the phenomena of social life are to be tried", p. 7.

⁹⁹ See in particular Thurman W. Arnold, *The Symbols of Government*, Yale University Press, New Haven, 1935; for example: "Disillusionment is a frame of mind as inimical to a scientific approach as the most fanatical idealism. 'Realism,' effective as it is as a method of political attack, or as a way of making people question ideas which they had formerly considered as established truths, ordinarily winds up by merely making the world look unpleasant. Since, for most people at least, the world is actually not an unpleasant place, the realist remains in the sun only a short time.", p. 6.

¹⁰⁰ See *supra* note 24.

¹⁰¹ In particular Alf Ross, *Om ret og retfærdighet: En indførelse i den analytiske retsfilosofi*, Nyt Nordisk Forlag, Copenhagen, 1953 (new English edition: Alf Ross, *On Law and Justice*, Oxford University Press, 2019, edited and with a helpful introduction by Jakob v. H.

ies in Law, Eckhoff acknowledges that in “the years since the second world war Scandinavian jurisprudence has to some extent shifted its orientation from the European continent to England and U.S.A. and has become familiar with the ideas advanced by the legal realists, as well as with the statistical analysis of judicial behaviour carried out in the United States”.¹⁰² He highlights a 1963 study of the recruitment to the judiciary and the societal position of the Norwegian Supreme Court, as compared to that of the US Supreme Court.¹⁰³ Eckhoff describes the evolution of the field sociology of law in the Nordic countries, suggesting the term had become a “common denominator [of] quantitative fact-finding related to legal theories” (primarily concerning problems in the “enforcement of the social consequences of certain rules of law”) as well as sociological and psychological research on legal institutions,¹⁰⁴ setting the field apart from older criminological research.¹⁰⁵ Pointing to the future, he highlighted

Holtermann); see also Alf Ross, *The United Nations: Peace and Progress*, The Bedminster Press, Totowa, 1966 (Chapter VI “Political Power and Influence Behind the Apparatus” discusses state power and independence, in particular in the context of McCarthyism and the first United Nations Secretary-General, pp. 182-184 (which legal advisers at the ICC might wish to revisit)). *On Law and Justice* has influenced several generations of Nordic jurists. Holtermann explains the potential of using Ross “to carve out and secure the conceptual space that allows the empirical study of law without forgetting about law itself has already inspired attempts to see influential contemporary socio-empirical studies of the legal field as manifestations of what has been called European New Legal Realism” (p. xlvi of the introduction to *On Law and Justice*, citing Jakob v. H. Holtermann and Mikael R. Madsen, “European New Legal Realism and International Law: How to Make International Law Intelligible, *Leiden Journal of International Law*, 2015, vol. 28, no. 2, pp. 211-230). Ross has also been criticized by Scandinavian lawyers, see Peter Hoilund, *Den forbudte retsfølelse [The Forbidden Sense of Justice]*, Munksgaard, Copenhagen, 1992; Sverre Blandhol, *Juridisk ideologi: Alf Ross’ kritikk av naturretten [Legal Ideology: The Critique of Natural Law by Alf Ross]*, Universitetsforlaget, Oslo, 1999.

¹⁰² See Torstein Eckhoff, “Sociology of Law in Scandinavia”, in *Scandinavian Studies in Law*, 1960, pp. 29-58 (reproduced in Torstein Eckhoff, *Justice and the Rule of Law*, Johan Grundt Tanum Forlag, Oslo, 1966 (updated by Vilhelm Aubert), p. 27 (page references are to this book, a collection of his writings)).

¹⁰³ *Ibid.*, p. 37, referring to Ulf Torgersen, “The Role of the Supreme Court in the Norwegian Political System”, in Glendon Schubert (ed.), *Judicial Decision-Making*, The Free Press, New York, 1963, pp. 221-244.

¹⁰⁴ See Torstein Eckhoff, “Sociology of Law in Scandinavia”, *supra* note 102, p. 9.

¹⁰⁵ Eilert Sundt (1817-1875) had pioneered research of criminological problems in some Norwegian communities, later followed by Theodor Geiger (1891-1952) in Denmark and Torgny T. Segerstedt (1908-1999) in Sweden. See the recent references to Sundt’s work in Gunnar Ekeløve-Slydal, “Past Wrongdoing Against Romani and Sámi in Norway and the Prism of Modern International Criminal Law and Human Rights”, in Morten Bergsmo,

“the growing interest in research into the behaviour of officials”,¹⁰⁶ an integral element of the emerging sociology of international criminal justice.

In Vilhelm Aubert’s original 1965 study *The Hidden Society*, he observed that “society continuously describes itself, but never fully, and rarely to the entire satisfaction of a scientific observer. Thus, it is *always a task of sociology to reveal the hidden society to its members*”.¹⁰⁷ He wrote that “the revealing aspect of social analysis becomes more predominant” when the inquiry is directed at “social perceptions and cognitions”.¹⁰⁸ As a student, I guess I detected a certain class consciousness permeating the relevant writings of Aubert, Mathiesen and other Nordic sociologists of law, but this did not dim the clarity of Aubert’s call to expose or unveil hidden power constellations not only in societies, but also in professional communities and public organisations. Its appeal was not only the sense that such unveiling could not be stopped except by oppressive means (a widely held view at a time when the Cold War was coming to an end), but also the assumption that the threat of exposure can make power constellations more visible, and public organisations, in turn, more committed to professionalisation. It also found sympathetic Aubert’s recognition of the “intimate bond between theory and practice in the field of law”,¹⁰⁹ and suggestion that for sociology “there may nevertheless be a lesson to learn from this old profession”.¹¹⁰ He pointed out that “[s]ociologists are members of society, and this may give them more access to data than many a

Wolfgang Kaleck and Kyaw Yin Hlaing (eds.), *Colonial Wrongs and Access to International Law*, *supra* note 27, pp. 525-575.

¹⁰⁶ See Torstein Eckhoff, “Sociology of Law in Scandinavia”, *supra* note 102, p. 41. Eckhoff was a prolific writer. Of his social science-related works, see, for example, his monographs *Rettferdighet ved utveksling og fordeling av verdier [Justice in connection with the exchange and distribution of goods]*, Universitetsforlaget, Oslo, 1971 (400 pp.); and *Retts-systemer: Systemteoretisk innføring i rettsfilosofien [Systems of Law: System-Theoretical Introduction to the Philosophy of Law]*, Tanum-Norli, Oslo, 1976 (302 pp.) (the latter co-authored with Nils Kristian Sundby).

¹⁰⁷ Vilhelm Aubert, *The Hidden Society*, The Bedminster Press, Totowa, 1965, p. 4 (Norwegian edition: *Det skjulte samfunn*, 2nd edition, Pax Forlag A/S, Oslo, 1972, p. 8) (italics added).

¹⁰⁸ *Ibid.*, p. 4.

¹⁰⁹ *Ibid.*, p. 21.

¹¹⁰ *Ibid.*, p. 20.

formal study can ever yield”,¹¹¹ and that if “nothing but the power to predict were involved, an intimate alliance between sociology and all existent power-elites would very likely emerge”.¹¹²

There is also useful guidance in the US political science literature, not only in sociology of law and legal realism. In his classical work *Power and Personality* from 1948, Harold D. Lasswell observed the following:

Our key hypothesis about the power seeker is that he pursues power as a means of compensation against deprivation. *Power is expected to overcome low estimates of the self, by changing either the traits of the self or the environment in which it functions.*¹¹³

Ten years earlier, the British philosopher Bertrand Russell had pronounced that “the fundamental concept in social science is Power, in the same sense in which Energy is the fundamental concept in physics. Like energy, power has many forms”.¹¹⁴ Russell used the notion of ‘naked power’, “when its subjects respect it solely because it is power, and not for any other reason”:

The theory appropriate to naked power has been stated by Plato in the first book of the Republic, through the mouth of Thrasymachus, who gets annoyed with Socrates for his amiable attempts to find an ethical definition of justice. ‘My doctrine is,’ says Thrasymachus, ‘that justice is simply the interest of the stronger’.¹¹⁵

Importantly, he observed that an “attitude of obedience, when it is exacted from subordinates, is inimical to intelligence. [...] There will be, in consequence, a lowering of the intellectual level, which must, before long, interfere with technical progress”.¹¹⁶ As “the holders of power are biased

¹¹¹ *Ibid.*, pp. 3-4. He asks whether there is a “principle of sociological complementarity”, with reference to Niels Bohr.

¹¹² *Ibid.*, p. 24.

¹¹³ See Harold D. Lasswell, *Power and Personality*, W.W. Norton & Company, New York, 1948, p. 39 (2009 edition by Transaction Publishers) (italics in the original). Lasswell was Professor at Yale Law School, and President of the American Political Science Association, the American Society of International Law, and of the World Academy of Art and Science.

¹¹⁴ See Bertrand Russell, *Power*, Routledge, London, 1938, p. 9 (first published by George Allen & Unwin).

¹¹⁵ *Ibid.*, p. 66.

¹¹⁶ *Ibid.*, p. 104.

by their power-impulses”,¹¹⁷ “there must be as little naked power as possible”, “if human life is to be [...] anything better than a dull misery punctuated with moments of sharp horror”.¹¹⁸ These insights may help to stimulate the will to unmasking.

1.6. Invisible College, Visible Colleagues and the Golden Calf

States Parties have faced challenges in stemming the slide in trust in the International Criminal Court. To do so is their responsibility. At its 2019 Session, the Court’s Assembly of States Parties stated that it was “[g]ravelly concerned by the multifaceted challenges facing the International Criminal Court and the Rome Statute system”, “[m]indful of the fact that those challenges have multiple causes and of the need for all stakeholders to undertake joint action to ensure” its effectiveness.¹¹⁹ To end impunity for the perpetrators and contribute to the prevention of core international crimes, the States Parties expressed their commitment “to further strengthening the Court and the Rome Statute system”,¹²⁰ and decided to “commission an Independent Expert Review starting 1 January 2020 [...] with a view to making concrete, achievable and actionable recommendations aimed at enhancing the performance, efficiency and effectiveness of the Court and the Rome Statute system as a whole”.¹²¹ On 30 September 2020, the Group of Independent Experts (‘IER’) submitted its final report and recommendations to the Assembly and the Court for consideration.¹²²

Already on 20 November 2020, Stéphanie Maupas warned in an article that “‘some would already like to discredit the report’ and persuade States not to adopt the proposed reforms”, and that this “battle is still in its infancy and promises to be a tough one”.¹²³ This naturally stimulates the sociologist in us, as it suggests that the IER report might have touched

¹¹⁷ *Ibid.*, p. 105.

¹¹⁸ *Ibid.*, p. 71.

¹¹⁹ ICC, Assembly of States Parties, “Review of the International Criminal Court and the Rome Statute system”, Resolution ICC-ASP/18/Res.7, 6 December 2019 (adopted by consensus), ninth and tenth preambular paragraphs (<https://www.legal-tools.org/doc/d1fyfk/>).

¹²⁰ *Ibid.*, eleventh preambular paragraph.

¹²¹ *Ibid.*, para. 6.

¹²² See Independent Expert Review, “Review of the International Criminal Court and the Rome Status System, Final Report”, *supra* note 39.

¹²³ See Stéphanie Maupas, “Exclusive: List of Candidates for Next ICC Prosecutor”, *supra* note 44.

powerful actors and interests in the ICC system. Indeed, some of the recommendations are far-reaching, for example concerning the functions of the Secretariat of the ICC Assembly of States Parties.

For the purposes of this anthology, the references to power in the IER report are interesting. It refers to perceptions of where “real power” lies within the Court;¹²⁴ to accounts of sexual harassment having “more to do with power relationships than with mutual attraction”;¹²⁵ to managers seeing “their staff as a measure of their power and authority”;¹²⁶ and to the benefits of introducing time-limited contracts insofar as “a diffusion of the power currently held at [P-5 level and above], would, in the view of the Experts, greatly outweigh [inevitable work] disruption”.¹²⁷ The report

¹²⁴ IER report, para. 140: “The Experts also heard concerns that the Prosecutor and Deputy Prosecutor have little direct contact with the integrated teams handling the situations and cases. While the PD Director convenes weekly PD senior management meetings (P-4 grade and above), there is no equivalent forum for the Prosecutor or Deputy Prosecutor to meet with the leadership of integrated teams. These concerns are accompanied by a perception that the real power of the OTP rests with the Directors.”.

¹²⁵ *Ibid.*, para. 209: “The Experts heard many accounts of bullying behaviour amounting to harassment in all Organs of the Court, though particularly in the OTP. They also heard frequent complaints that the culture of the Court’s workplace was adversarial and implicitly discriminatory against women. They heard a number of accounts of sexual harassment, notably uninvited and unwanted sexual advances from more senior male staff to their female subordinates. Female interns seemed to be particularly vulnerable to such approaches, underlining the extent to which this phenomenon, not just at the Court, but in business, government, law, academia and many other professional environments around the world, frequently has more to do with power relationships than with mutual attraction.”.

¹²⁶ *Ibid.*, para. 239: “The Experts consider that this issue needs to be addressed on multiple fronts if the Court is in the future to provide the satisfying work life for its staff that they deserve and which will contribute to a better performing Court across the board. At the simplest level, the leadership of each organ should embrace the concept of movement between units within the relevant Organ, to respond to changing work pressures. Some managers will be resistant to this as they see their staff as a measure of their power and authority and thus to transfer some officers to a busier work unit as effectively weakening them. But at a time when States Parties are reluctant to increase budgets, redeployment of staff is a simple and cost-effective way to improve productivity.”.

¹²⁷ *Ibid.*, para. 248: “The measures suggested above would help to address the challenge of staff stagnation in the Court and could mostly be implemented relatively easily with the appropriate will and commitment on the part of the Court leadership. However, in the view of the Experts, a more far-reaching and effective way to address the challenge, though admittedly with more administrative difficulty and likely strong opposition in certain quarters, would be to introduce a policy of tenure for all staff above a certain grade. It is simply not healthy for an organisation to have its senior management unchanged for the length of time that has occurred within the Court.¹⁴⁵ While there would inevitably be some work disruption from imposing a specified term limit for all officers of P-5 level and above, the bene-

predicts expressly that its proposal of tenure for “all officers of P-5 level and above” will cause “likely strong opposition in certain quarters”, but that this will introduce “fresh thinking” and “a different managerial dynamic in the work unit”.¹²⁸ Paragraph 252 addresses existing Court staff at the relevant levels:

The Experts recognise the difficulty of applying a new tenure system to staff already in the Court, so they suggest that the system be applied only to new recruitments for P-5 and Director-level positions as these come vacant. *This would not preclude the Court from encouraging senior staff who have served in the Court for a long time to consider taking early retirement, including through offering financial packages.*¹²⁹

Regardless of whether one considers the advantages or disadvantages of this recommendation more persuasive, it is fair to say that the Group of Independent Experts seeks to address “real power” in the International Criminal Court and argues for the “diffusion of the power” held by individuals within the Court. This amounts to a form of unveiling or unmasking of power within the Court, which only has a few positions at the Director and Professional-5 levels. Arguably, all holders of such positions are public figures, given their acknowledged level of power and remuneration. From the perspective of the present anthology, the Group of Experts takes an important step towards more systematic inquiries into power relations in and around international criminal jurisdictions. While I consider it unrealistic that there will be anything comparable to the above-mentioned Norwegian 1972-1982 study in international criminal justice in the foreseeable future, the IER report invites scholars with an interest in the uncovering of a sociology of international criminal justice to proceed. It is for this reason that language from the report has been reproduced on the back cover of this book.

Rhetorically, we might ask who wields more power over the International Criminal Court after its establishment: the individuals referred to

fits in terms of introducing fresh thinking, a different managerial dynamic in the work unit, and a diffusion of the power currently held at that level in the different Organs, would, in the view of the Experts, greatly outweigh that disruption.”. Footnote 145 in the original text provides: “44% of D-1 staff and 23% of P-5s have been at the Court for more than 10 years; 33% of D-1s and 41% of P-5s have been at the Court between 5–10 years – based on data provided to the Experts by the Court.”.

¹²⁸ *Ibid.* See also para. 253.

¹²⁹ *Ibid.*, para. 252 (italics added).

by the IER, against a background of an external social network, on the one hand, or the ‘invisible college of international criminal lawyers’ which Claus Kreß so eloquently reminded us of in his publication ‘Towards a Truly Universal Invisible College of International Criminal Lawyers’ of November 2014, on the other?¹³⁰ Building on Oscar Schachter’s thoughtful publication from 1977 – on the role of “the professional community of international lawyers” or “international lawyers who are acting as nonofficial experts and not as advocates of a government or special interest”¹³¹ – Kreß surveys where we are in the evolution of the ‘invisible college’ and calls for its universalisation.¹³² That this rhetorical question can even be meaningfully put may be revealing, and an indication of how important the IER report and further descriptive socio-legal analysis are.¹³³ The ‘invisible college’ should welcome such research.

There are risks for the ICC if the Court is allowed to become a Golden Calf around which a few individuals dance in search of position or promotion.¹³⁴ It may negatively affect professional morale among Court

¹³⁰ See Claus Kreß, “Towards a Truly Universal Invisible College of International Criminal Lawyers”, FICHL Occasional Paper Series No. 4 (2014), TOAEP, Brussels, 2014 (<https://www.toaep.org/ops-pdf/4-kress>).

¹³¹ See Oscar Schachter, “The Invisible College of International Lawyers”, in *Northwestern University Law Review*, 1977, vol. 72, no. 2, pp. 217-226 (quoted words at pp. 222, 221). He also refers to “the nonofficial professional community” (p. 225). Relevant to this anthology, Schachter writes that “it would be myopic to minimize the influence of national positions on the views taken by the great majority of international lawyers. There is no need to attribute this identification of personal and national outlook to crass influences of rewards of power and privilege, although we have to recognize that these influences do play a role” (p. 219).

¹³² Kreß does so also on the basis of Schachter’s appeal that “the professional community of international lawyers should aim at a wide international participation embracing persons from various parts of the world and from diverse political and cultural groupings” (*ibid.*, p. 222).

¹³³ Schachter acknowledges the importance of the descriptive work of social scientists, noting their interest in “examining behavior” (*ibid.*, p. 224).

¹³⁴ The metaphor of the Golden Calf symbolizes “the rejection of a faith once confessed”, see Britannica.com, “Golden calf”, available on its web site: The Golden Calf was a sculpture that served as an “idol worshipped by the Hebrews during the period of the Exodus from Egypt in the 13th century BC and during the age of Jeroboam I, king of Israel, in the 10th century BC”. See also Exodus 32: 4 *et seq.*, Old Testament, King James Version. In philosophy, ‘idol’ may symbolise prejudice, see, for example, Giordano Bruno and Sir Francis Bacon (who distinguished between four kinds of idol or prejudice).

staff, further to the challenges already described in the IER report,¹³⁵ and reduce the standing of the Court in the eyes of respected lawyers around the world. A range of self-deceptive justifications may be offered for swirlings around the Calf, some revolving around the ‘best interest of the Court’. As I have written elsewhere:

There are also some leaders of international criminal justice institutions who have their clear country preferences, sometimes linked to simple cultural bias. Further from the centre of the spectrum would be an international criminal justice leader who thinks that the Office of the Prosecutor or the Court cannot be without protection from one or more national governments – that the question is only which governments it should be. This view – which I have witnessed more than once – considers it naive not to recognise that the continued existence of international criminal justice institutions depends on such protection. Fully equal treatment of all governments is therefore not considered realistic. This view is sometimes combined with a clear personal preference for one or a few governments – perhaps because the international justice leader in question has not yet developed a genuine global identity or, of greater concern, because those governments have helped to make his or her international career. This combination can create perceptions of instrumentalisation or facilitate actual instrumentalisation.

This was the greatest risk I saw for the ICC Office of the Prosecutor in August 2002. That is also why – in a lecture on the occasion of the end of term of the first ICC President, Mr. Philippe Kirsch – I called for a deeper form of “fraternity of international criminal justice, whereby internation-

¹³⁵ The IER report observes thought-provokingly:

The staff at the Court are, generally speaking, engaged in a stimulating and worthy international endeavour, the envy of professional colleagues around the world. Moreover, those based in The Hague (i.e. the vast majority), live and work in close to idyllic conditions, notably in a highly organised and well-ordered city and in a soaring and inspirational purpose-built court complex that provides superb working conditions by any standards.

Yet repeated internal surveys over the years, anecdotal evidence, observations from professional counsellors at the Court and interviews conducted by the Experts indicate that many members of staff are unhappy and dissatisfied. [...]

IER report, paras. 201-202. Note that Stéphanie Maupas’ above-quoted article has a section called ‘Appointing Friends’, *supra* note 44.

al justice institutions seek an equal measure of protection from all States Parties”.^{15 136}

I believe this fundamental challenge is as valid at the time of writing this chapter in late 2020 as it was in 2002, 2009 and 2017.

It is also in the interest of ICC States Parties to be wary of indiscrete invocations of their patronage, especially by citizens of other states. Perceptions of such purported instrumentalization are carefully chronicled by the Court’s state detractors and others (some of whom, we can safely assume, are paying close attention to alleged practices that may appear useful to themselves when they have gained adequate strength). Working with friends and informal social networks is not the prerogative of only a few Western countries. It is not for this book to sit in moral judgment of such practices, or to pronounce on what should be the extent of blame if, for example, an indiscrete proxy turns out to be self-serving or quarrelsome in unhealthy ways. But the chapter shows that the use of informal social networks necessarily entails risks for states and international criminal courts.

The rise of China and India heightens this sensitivity in several respects.¹³⁷ For example, it will undoubtedly be of keen interest to the Chinese and Indian governments whether the elections of the third ICC Prosecutor and new President of the ICC Assembly of States Parties came to have an impact on the Court’s handling of the allegations against members of the US Armed Forces in Afghanistan. Any rumour that the President of the Assembly has ‘leaned’ on the Prosecutor in this question – directly or indirectly – will be noted in Beijing, Delhi and other capitals around the world.

¹³⁶ See Morten Bergsmo, “Institutional History, Behaviour and Development”, in Morten Bergsmo, Klaus Rackwitz and SONG Tianying (eds.), *Historical Origins of International Criminal Law: Volume 5*, *supra* note 7, pp. 8-9. The text of footnote 15 in the original quotation reads: “See Morten Bergsmo, ‘The Autonomy of International Criminal Justice’, FICHL Policy Brief Series No. 3, Oslo, 2011, p. 3 (<http://www.legal-tools.org/doc/5fa508/>). The lecture was given on 6 February 2009 at the Dutch Ministry of Foreign Affairs in The Hague.”.

¹³⁷ Let us not ignore the Chinese proverb “物以类聚，人以群分” which literally means “Things of a kind come together; people of a mind fall into the same group”, see *Intrigues of the Warring States*, edited by LIU Xiang in Western Han Dynasty. It is a well-known proverb which means that a person’s character can be judged by his or her company [《战国策·齐策三》，刘向编著]. It goes without saying that the Indians – the chief codifiers of future proverbs in the English language – are intimately familiar with the English saying “A man is known by the company he keeps”.

If we look back to the ICC negotiations between 1996 and 2002, it was the ability to find a path when most thought that none existed that provided some of the most rewarding moments. In the situations that come to mind, members of different national delegations – including Lionel Yee (Singapore), Rolf Einar Fife (Norway) and Sir Franklin Berman (the United Kingdom), soft-spoken, attentive persons – found solutions based on sheer ingenuity and finely calibrated balancing of interests. By their sense of responsibility for the process as a whole, their articulation of the common interest, it was as if they belonged to no country. Such leadership can unite us around solutions to the most intricate dilemmas. This requires that States Parties are willing to bring their best minds to the table. Informal social networks – with their risks, vested interests and power games – should not take their place. I am confident that there is a way out of the ICC’s predicament that avoids a head-on confrontation, based on its existing normative framework.

This book is concerned with how actors wield power over international criminal courts – by their high officials, States Parties, diplomats, informal social networks or others. It discusses different layers in the topography of power in international criminal justice. An underlying assumption is that responsible unmasking of power-wielders can improve the quality of the justification of such power or, alternatively, reveal that it has no persuasive justification. If the power is not directed towards the benefit of the Court and its main objectives, but rather aims to serve the interests of the power-wielders, then this should be addressed. The report of the Independent Expert Review confirms that there are issues linked to “real power” and its “diffusion” at the International Criminal Court. An emerging sociology of international criminal justice should pursue relevant inquiries, including by informed use of social network theory, drawing on rich domestic traditions of sociology of law and social science more broadly. The ‘invisible college’ of international criminal lawyers should support such research. States should also embrace the critical feedback that may flow from attempts to unmask power, and be wary of informal social networks that may not represent the best long-term interests of international criminal courts.

Towards a Sociology of International Criminal Justice

Kjersti Lohne*

2.1. Introduction

A week or so before the contributors of this volume came together for two intensive days of intellectual critique in Florence, Italy, stories were breaking across Europe on the (lack of) character of the International Criminal Court's ('ICC') very first Chief Prosecutor, the Argentine Luis Moreno Ocampo. Based on leaked documents, the media network European Investigative Collaborations disclosed how Ocampo had shared confidential information while in office. After leaving the ICC in 2012, he had continued to nurture and leverage staff at the Office of the Prosecutor ('OTP'), to the extent of receiving information from the OTP's advisor for international co-operation concerning investigations of the Libyan businessman Hassan Tatanaki, whom Ocampo at the time was working with and subsequently tried to shield from further investigations.¹ These alle-

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¹ Tjitske Lingsma, "How Ocampogate harms the International Criminal Court", in *Blog of the Groningen Journal of International Law*, 30 November 2017 (available on its web site).

gations are aggravated by experts and judges' criticism of Ocampo's careless approach to investigations and prosecutions,² but also, crucially, by recently published material on the inner workings of the OTP's early days. As made public in *Historical Origins of International Criminal Law: Volume 5*, an institutional culture of intimidation, fear – and one may add, nepotism – has been depicted,³ and a call has been made for a “more accurate mirror” of power in international criminal justice.⁴ That is the aim of this book.

Contrary to criminal justice institutions in established democracies, international criminal justice is not as readily subject to the checks and balances of democratic processes involving parliamentary committees, a critical media, and academic scrutiny – in short, to a democratic and public constituency.⁵ This is all the more significant as institutional power is more concentrated in international criminal justice than is the case with its domestic counterparts. Where the latter are composed of a patchwork of several State institutions – courts, correctional services, health care, police, and so on – the International Criminal Court, for example, is not only expected to adjudicate international crimes, but also to investigate and detain, provide protection and reparations to victims and witnesses, do outreach to a variety of communities, among other things⁶ – and to do all this in the context of international politics, by intervening, more often than not, in the midst of ongoing conflicts.⁷ Rather than by a State, international

² See, for example, Marta Minow, Cora True-Frost and Alex Whiting (eds.), *The First Global Prosecutor: Promise and Constraints*, University of Michigan Press, 2015; Morten Bergsmo, “Institutional History, Behaviour and Development”, in Morten Bergsmo, Klaus Rackwitz and SONG Tianying (eds.), *Historical Origins of International Criminal Law: Volume 5*, Torkel Opsahl Academic EPublisher, Brussels, 2017 (<http://www.legal-tools.org/doc/09c8b8/pdf>).

³ Bergsmo, Rackwitz and SONG (eds.), 2017, *ibid*.

⁴ Morten Bergsmo, Wolfgang Kaleck, Sam Muller and William H. Wiley, “A Prosecutor Falls, Time for the Court to Rise”, FICHL Policy Brief Series No. 86 (2017), Torkel Opsahl Academic EPublisher, Brussels, 2017 (www.toaep.org/pbs-pdf/86-four-directors/).

⁵ *Ibid*.

⁶ Carolyn Hoyle and Leila Ullrich, “New Court, New Justice? The Evolution of ‘Justice for Victims’ at Domestic Courts and at the International Criminal Court”, in *Journal of International Criminal Justice*, vol. 12, no. 4, p. 681.

⁷ Mark Kersten, *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace*, Oxford University Press, Oxford, 2016.

institutions, like the ICC, are legitimated by non-democratic claims,⁸ such as efficiency, rationality, and universal values of humanitarianism and protection of ‘the peace, security and well-being of the world’.⁹

However, the nobility of aims does not confer exemption from neither scrutiny nor accountability for one’s behaviour, and it is within this context that *transparency* within the institutions and practices of international criminal justice surfaces as an essential yardstick for the field. In short, we need a better grasp of how power operates within international criminal justice, so that people *in* power can be better equipped to make better choices for the future. This is because legitimacy – trust in institutions – is deeply sociological; it is a dialectic and continuous process of claims by power-holders, and the support of such claims by a diversity of constituencies.¹⁰ The time has therefore come to strengthen our sociological understanding of how power operates within and through international criminal justice, and the ambition of this book is nothing short of contributing to the consolidation of a sociology of international criminal justice.¹¹

To this end, this book brings together a bouquet of excellent scholars, practitioners, and judges, each bringing with him or her different sets of experiences, fields of expertise, insights and perspectives that shed light on the social dimensions of international criminal justice. Sociology of law is a rich body of research, offering a range of different sociological approaches to law and legal institutions, depending, largely, on their theoretical understanding of the social world. What we have put together is a collection of chapters that, given the diverse backgrounds of our authors, offer unique insights into some of the most important social dynamics and pressing issues facing authority and legitimacy in international criminal justice today. No single volume, of course, can do it all. Rather than a complete characterization of the social world that international criminal

⁸ Mikael Rask Madsen, “Unpacking Legal Network Power: The Structural Construction of Transnational Legal Expert Networks”, in Mark Fenwick, Steven Van Uytsel and Stefan Wrba (eds.), *Networked Governance, Transnational Business and the Law*, Springer Publishing, Heidelberg, 2014.

⁹ Rome Statute of the International Criminal Court, 17 July 1998, Preamble (‘ICC Statute’) (<http://www.legal-tools.org/doc/7b9af9/>).

¹⁰ David Beetham, “Revisiting Legitimacy, Twenty Years On”, in Justice Tankebe and Alison Liebman (eds.), *Legitimacy and Criminal Justice*, Oxford University Press, Oxford, 2013.

¹¹ See also Kjersti Lohne, *Advocates of Humanity: Human Rights NGOs in International Criminal Justice*, Oxford University Press, Oxford, 2019.

justice is constituted by and of, this book offers a long-awaited attempt to hold it still – if only for a moment – so that it may be brought under scrutiny.

This chapter proceeds to outline the potential of a sociology of international criminal justice. Following a seven-step approach, the next section identifies trends in international criminal justice that make a greater engagement with sociology critical. It then provides an inventory of the conceptual make-up of the sociology of law, before, fourthly, briefly addressing its methodologies and research strategies. Fifthly, the emergent field of sociology of international criminal justice is outlined. After that, the chapter provides an overview of the themes to which a sociology of international criminal justice might contribute, by introducing the contributions of this volume in their various approaches to power in international criminal justice. Finally, a brief conclusion is offered.

2.2. The Need for a Sociology of International Criminal Justice

International criminal justice is today faced with predicaments of legitimacy, identity, and its constitutive role in global society. Recent years have seen increasing criticism towards international criminal justice and the ICC in particular, on issues ranging from (its lack of) procedural justice to (challenges of) normative legitimacy.¹² Apart from the leaks concerning Ocampo, the most potent point of critique has been accusations of the ICC ‘targeting Africa’, with all of its pending cases against African nationals and all but one of its 11 situations under investigation taking place on the continent.¹³ While the Court’s interventions in African conflicts are often explained by the high rate of African States Parties to the Rome Statute, and the fact that most of the situations are self-referrals, images and perceptions matter. Riding on charges of colonialism and imperialism, the critique culminated in the threat of a mass exodus of African States Parties from the Court in late 2016. And yet, while several ex-

¹² George P. Fletcher and Jens David Ohlin, “Reclaiming Fundamental Principles of Criminal Law in the Darfur Case”, in *Journal of International Criminal Justice*, 2005, vol. 3, no. 3; Dov Jacobs, “A Tale of Four Illusions: The Rights of the Defence before International Criminal Tribunals”, in Colleen Rohan and Gentian Zyberi (eds.), *Defence Perspectives on International Criminal Justice*, Cambridge University Press, Cambridge, 2017; Nobuo Hayashi and Cecilia M. Baillet (eds.), *The Legitimacy of International Criminal Tribunals*, Cambridge University Press, Cambridge, 2017.

¹³ See, for example, Kamari Clarke, *Africa and the ICC*, Cambridge University Press, Cambridge, 2016.

pressed their intentions to leave the Court, Burundi is the only one to have done so far (in an attempt to escape from legal accountability, as the situation is currently under ICC investigations).¹⁴ The road ahead will be no less difficult, as indicated by the OTP's investigatory attempts into the situations of Georgia and Afghanistan, the latter of which was effectively shut down by Pre-Trial Chamber II in a novel interpretation of the "interest of justice".¹⁵ The political friction against the ICC must be seen alongside a changing geopolitical landscape, where the cosmopolitan rhetoric of a post-Westphalian liberal world order has lost traction in the face of the (re-)emergence of a multipolar one.¹⁶ However, an equal if not more critical challenge to the international criminal justice project is the frequent rejection and distain from those in whose names justice is done. For the survivors of violence coded as international crimes, international criminal justice has been accused of being 'too little, too late', of destabilizing and disrupting peace negotiations, and of crowding out alternative paths towards peace, justice and reconciliation in the aftermath of mass violence.¹⁷ Yet, the fight against impunity continues to harness significant discursive, political, and material power.¹⁸ There is thus fundamental friction in the relationship between those advocating and representing international criminal law, its institutions and ideas in international politics on

¹⁴ Following internal legal and political quagmires, South Africa and The Gambia rescinded their notices of withdrawal from the Court. As of 17 March 2019, the Philippines became the second country to leave the ICC.

¹⁵ See Mark Klamberg, "Rebels, the Vanquished, Rogue States and Scapegoats in the Crosshairs: Hegemony in International Criminal Justice", chap. 14 below.

¹⁶ Andrew Hurrell, *On Global Order: Power, Values, and the Constitution of International Society*, Oxford University Press, Oxford, 2007; see also G. John Ikenberry, "The end of liberal international order?", in *International Affairs*, 2018, vol. 94, no. 1.

¹⁷ For example, see Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa*, Cambridge University Press, Cambridge, 2009; Adam Branch, *Displacing Human Rights: War and Intervention in Northern Uganda*, Oxford University Press, Oxford, 2011; Sarah Nouwen and Wouter Werner, "Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity", in *Journal of International Criminal Justice*, 2015, vol. 13, no. 1.

¹⁸ Karen Engle, Zinaida Miller, and Denys Mathias Davis, *Anti-Impunity and the Human Rights Agenda*, Cambridge University Press, Cambridge, 2016; Anette Bringedal Houge and Kjersti Lohne, "End Impunity! Reducing Conflict-Related Sexual Violence to a Problem of Law", in *Law & Society Review*, 2017, vol. 51, no. 4; Lohne, 2019, see above note 11; see also Barrie Sander, "The Anti-Impunity Mindset", chap. 7 below.

the one hand, and the societies most affected by its practices on the other.¹⁹

The volatile state of international criminal justice is also reflected in its scholarship. International criminal justice is now frequently depicted as in a state of “identity crisis”,²⁰ with several diagnoses offered of its “acute ontological anxiety”.²¹ As a field of legal practice, anxiety is associated with the over-saturation of the field, having peaked in terms of institution-building last decade and is now slowly shrinking, as illustrated by the recent closure of the International Criminal Tribunals for Rwanda (‘ICTR’) and the former Yugoslavia (‘ICTY’).²² While this seems not to have affected the generation of scholarship – quite the contrary, one might argue – it appears that, found by a fear of losing its relevance and validity, it is moving in too many directions too fast, at the risk of becoming not only a fragmented body of scholarship but distant and disconnected to practice. Accordingly, and as called for by Sergey Vasiliev, “there needs to be a collective deliberation on the question of what (new) intellectual projects it should reinvest itself in the near future in order to preserve its validity, particularly (though not only) *vis-à-vis* practice”.²³ However, the current condition also seems to speak to broader and deeper notions about the ‘identity’ of the international criminal justice project – what it ‘is’ compared to other systems of justice – and to a strained self-image as a result of the recurrent criticism on the gaps between its promises and the realities of what it can (be expected to) deliver. Indeed, it seems a standard critique of international criminal justice these days is to find some lofty ideal of the ICC (easily found in the Rome Statute’s Preamble or in celebratory speeches by representatives of the Court, States Parties, or the NGO community) and demonstrate how the ICC is unsuccessful in

¹⁹ Immi Tallgren, “The Voice of the International: Who Is Speaking?”, in *Journal of International Criminal Justice*, 2015, vol. 13, no. 1.

²⁰ Darryl Robinson, “The Identity Crisis of International Criminal Law”, in *Leiden Journal of International Law*, 2008, vol. 21, no. 4.

²¹ Sergey Vasiliev, “On Trajectories and Destinations of International Criminal Law Scholarship”, in *Leiden Journal of International Law*, 2015, vol. 28 no. 4, p. 705. See also Frédéric Mégret, “The Anxieties of International Criminal Justice”, in *Leiden Journal of International Law*, 2016, vol. 29, no. 1.

²² Mikkel Jarle Christensen, “From Symbolic Surge to Closing Courts: The Transformation of International Criminal Justice and its Professional Practices”, in *International Journal of Law, Crime and Justice*, 2015, vol. 43, no. 4.

²³ Vasiliev, 2015, p. 708, see above note 21.

achieving it. In response, the enthusiasm of ICC advocates, academics and practitioners for an expanding international legal regime is now frequently replaced by the need to ‘manage’ expectations.²⁴

International criminal justice thus finds itself in the paradoxical situation of not living up to its expectations, but also failing those beyond the immediate application of its legal institutions. Perhaps animated by the initial enthusiasm for the project – and certainly against its limits – international criminal justice has become a dominant global framework and interpretative tool for framing global grievances. The language of crime and individual criminal responsibility are invoked to de-legitimize violence globally, reflecting an important normative development where particular criminal acts and violations of rights are codified as issues of universal concern, as a matter of common responsibility in a perceived shared sense of humanitarian consciousness. Questions thus need to be asked not only about the implications of juridifying the complex social phenomena that mass violence is, but more profoundly about what kind of global society is constituted by international criminal justice.²⁵

From this brief stocktaking follows a simple observation: any attempt to resolve the current predicaments of international criminal justice must be preceded by an understanding of the dynamics and processes through which these circumstances have arisen. What this entails, essentially, is that in order to understand power in and of international criminal justice, there is a need to understand the social conditions that make this power possible. In comparison with international legal scholarship generally, sociology of international criminal justice approaches its research objects in a broader institutional context. Whether this concerns the particular institutionalized forms of judicial practice of international criminal law, or the ICC’s role in shaping the global social order, sociology’s impulse to engage critically with questions of power and legitimacy – including social classes, identities, and ways of life structuring social prac-

²⁴ For a recent discussion on the ICC’s ‘turn to the practical’, see Mark Kersten, “Whither the Aspirational ICC, Welcome the ‘Practical’ Court?”, *EJIL: Talk!*, 22 May 2019 (available on its web site). There is an interesting parallel to domestic criminal justice discourses in late-modern Western democracies from the 1960s to the 1980s, which saw a shift from a strong faith in the transformative effects of criminal justice to ‘nothing works’, and then onwards to ‘what works’. See Francis T. Cullen and Paul Gendreau, “From Nothing Works to What Works: Changing Professional Ideology in the 21st Century”, in *The Prison Journal*, 2001, vol. 81, no. 3.

²⁵ Lohne, 2019, see above note 11.

tices – makes it a disciplinary lens particularly apt for studying the current state of international criminal justice.²⁶ For example, whereas international legal scholarship generally deals with legitimacy as legality or as abstract politico-philosophical aims, a sociological approach to legitimacy is concerned with whether power is acknowledged as ‘rightful’, ‘appropriate’, or ‘just’ by relevant agents; in short, to what extent claims to legitimacy gain social acceptance.²⁷ What matters, then, is the *processes* through which an authority justifies its power, and comes to be reflective (not necessarily representative) of society.

Moreover, following Max Weber’s basic observation that only individuals – not institutions and laws – have intentions, the *actors* inhabiting those institutions and prescribing those laws become key to understanding the developments of these very same institutions and laws.²⁸ For example, in a recent publication, I have demonstrated how the aforementioned identity crisis of international criminal justice can be understood through the prism of NGO representatives lobbying the ICC and States Parties. I have shown there how they perceived that international criminal justice is intended to provide a type of ‘victims’ justice’ connected with transitional justice justifications of establishing truth, memory and public recognition of suffering, rather than fairness in a substantive, international, criminal justice sense.²⁹

At the same time, sociological approaches are attuned to how actors and processes are embedded in, and productive of, social *structures* – relatively stable patterns of arrangements, such as class, or socioeconomic stratification, networks, institutions, and norms. In international criminal justice, it seems particularly important to situate power mainly in relation to patterns of global organization, not least because it mobilizes universalist assumptions – humanity, justice, global law – that disguise the fact of

²⁶ On the potential of sociological approaches to international ‘objects’, see Mikael Rask Madsen, “Reflexivity and the Construction of the International Object: The Case of Human Rights”, in *International Political Sociology*, 2011, vol. 5, no. 3; Mikael Rask Madsen, “Sociological Approaches to International Courts”, in Cesare P.R. Romano, Karen J. Alter, and Yuval Shany (eds.), *The Oxford Handbook of International Adjudication*, Oxford University Press, Oxford, 2014.

²⁷ Beetham, 2013, see above note 10.

²⁸ Madsen, 2014, see above note 26.

²⁹ Kjersti Lohne, “NGOs for International Justice: Criminal or Victims’ Justice?”, in Andreas Føllesdal and Geir Ulfstein, (eds.), *The Judicialization of International Law: A Mixed Blessing?*, Oxford University Press, Oxford, 2018.

situatedness. Yet, it is created and practiced in particular spaces by particular individuals that occupy particular positions in the global stratified order. Mindful that the founding fathers of sociology of law approached law and legal institutions as shapers of modernity,³⁰ a question may be asked about what kind of globality, or global society, is constituted by international criminal justice. Thus, a sociological approach that sees international criminal law from the ‘outside’ – as constitutive of and by society – enables an empirically founded critique of the power that international criminal justice embodies.

Finally, and notwithstanding examples to the contrary, the sociological distance involved in ‘objectivizing’ international criminal justice as a field of research also enables more attention to the role of emotions, logic, and *representations* in international criminal justice. As an empirical social science, this also means – generally – a stronger distinction between the ‘is’ and the ‘ought’. The normativity of sociological approaches is often – not always – much less prominent than much of the scholarship that characterizes international criminal justice. In a field as troubling, emotional, and horrifying as international criminal justice truly is, this can be a particular challenge. It can be difficult to be ‘objective’ or maintain what can be called academic distance regarding people and institutions that strive to do good, especially when one is confronted with representations of the suffering they are attempting to address and aspiring to put a stop to. However, the difficulty this may entail – in confronting and unpacking power in a field that above all is filled with good intentions – is at the same time a critical pointer to the moral outrage on which international criminal justice depends. Indeed, it remains a sociological pointer to what Didier Fassin would refer to as ‘the morally driven, politically ambiguous, and deeply paradoxical strength of the weak’.³¹ Understanding how such humanitarian reason – or governance – works through international criminal justice is a question for the sociology of international criminal justice.³²

³⁰ Émile Durkheim, *The Division of Labour in Society*, MacMillan Publishing, London, 1984; Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, University of California Press, Berkeley, 1978.

³¹ Didier Fassin, *Humanitarian Reason: A Moral History of the Present*, University of California Press, Berkeley, 2011.

³² Kjersti Lohne, “Penal Humanitarianism beyond the Nation State: An analysis of International Criminal Justice”, in *Theoretical Criminology*, Sage Journals, 2018. See also Sara

2.3. Conceptual Orientations in the Sociology of Law

The discipline of sociology has a long and significant tradition of studying law and legal institutions. Its founding fathers – Émile Durkheim and Max Weber – and contemporary giants – Jürgen Habermas, Pierre Bourdieu, Michel Foucault, Niklas Luhmann and Bruno Latour – have all engaged law, in some way or another, as a point of departure for inquiry into the social ordering of society and its development.³³ Whereas legal studies generally engage in efficiency-oriented studies of law ‘on their own terms’ in order to understand law’s internal workings, or, alternatively, undertake external and evaluation-oriented approaches that focus on law’s normative justifiability, the sociology of law places law in the context of society and social sciences, as *law-in-society* whose basic problematique is concerned with how law influences society, how society influences law, and how law and society are co-constituted.³⁴ The sociology of law is thus the body of research concerned with external and empirically oriented analyses of the characteristics of systems of law, their causes, developments, and effects, and the functions and objectives of legal institutions and practices.³⁵

To approach law – and thus also legal actors, institutions and practices – from the perspective of sociology means, perhaps to no surprise, to actuate theories of society. These theories, or sociological approaches to law, can generally be conceptualized by four conceptual couplets: viewing law from *internal* – *external* perspectives, in relation to *consensus* – *conflict* in society, as determined by *structure* – *agency*, and as analysed at the

Kendall and Sarah Nouwen, “International Criminal Justice and Humanitarianism”, *Research Paper 69*, University of Cambridge Faculty of Law, 2018.

³³ Durkheim, 1984, see above note 30; Weber, 1978, see above note 30; Jürgen Habermas, *The Theory of Communicative Action, Vol. 2*, Beacon Press, 1984; Pierre Bourdieu, “The Force of Law: Toward a Sociology of the Juridical Field”, in *Hastings Law Journal*, 1986, vol. 38; Michel Foucault, *Discipline and Punish: The Birth of the Prison*, Pantheon Book, 1977; Niklas Luhmann, *Law as a Social System*, Oxford University Press, Oxford, 2004 (1993); Bruno Latour, *The Making of Law: An Ethnography of the Conseil D’état*, Polity Press, 2010.

³⁴ Thomas Mathiesen, *Retten i samfunnet: En innføring i rettssosiologi*, Pax, Oslo, 2001.

³⁵ Kjersti Lohne and Kristin Bergtora Sandvik, “Bringing Law into the Political Sociology of Humanitarianism”, in *Oslo Law Review*, 2017, vol. 4, no. 1; see generally Mathieu Deflem, *Sociology of Law: Visions of a Scholarly Tradition*, Cambridge University Press, Cambridge, 2008. For a difference between sociology of law and socio-legal studies, see Reza Banakar and Max Travers, *Theory and Method in Socio-Legal Research*, Bloomsbury Publishing, 2005.

micro – macro levels. These categories are in themselves so-called Weberian ‘ideal types’ – simplifications used as analytical tools in sketching out the main theoretical approaches to law and society. This means that there are, of course, several nuances within the classifications; they may blur into one another, and they are not always mutually exclusive. Indeed, while these conceptual couplets have often been treated as analytical binaries, many contemporary studies in the sociology of law and sociology generally stress the importance of bridging these gaps and treating them as co-constitutive of one another as will be further explained below.

2.3.1. Internal – External

The first conceptual couplet within the sociology of law concerns the question of boundaries, and that of defining the research object; in short, of what is considered analytically relevant to a study of power in international criminal justice. How one ‘objectivizes’ international criminal justice as a research object necessarily depends on one’s research questions and methodologies. Whereas scholars coming from a legal background will tend to emphasize the *internal* legal system, social scientists may stress *external* perspectives, as law and legal actors, discourses and practices are taken as points of empirical departure for an analysis of the ‘social’. Generally, this entails that one may not necessarily accept the readily available ‘scripts’ in international criminal justice, that is, the dominating and prescriptive discourses and *savoir faire* in the field.³⁶ For actors *in* international criminal justice, the questions that sociology and sociologists are interested in may seem rather trivial, often even naïve. However, sociology’s analytical strength is precisely to make sense of that which is taken for granted – what Pierre Bourdieu calls *doxa*.³⁷

The composition of the contributions to this book has a major advantage in this respect, in that it integrates both internal and external perspectives on power in international criminal justice through its unique blend of legal practitioners and interdisciplinary scholars. Indeed, one could argue that a volume of this sort is particularly equipped to offer what Jürgen Habermas refers to as a ‘double perspective’ of law, and to give a significant contribution to the ‘full reality’ of power in international

³⁶ Madsen, 2011, see above note 26.

³⁷ Pierre Bourdieu, *Outline of a Theory of Practice*, Vol. 16, Cambridge University Press, Cambridge, 1977.

criminal justice.³⁸ In other words, our approach is both attentive to the legal norms of international criminal law, including the perceptions of its legal actors, as well as the external mechanisms and social institutions that co-constitute this volatile world of international criminal law and international justice-making.

2.3.2. Consensus – Conflict

Most sociological approaches to law can be distinguished by their normative approach to law as reflecting consensus or conflict. For example, Émile Durkheim, one of sociology's founding fathers as mentioned above, sees the materiality of law as an observable manifestation of what he calls society's "collective consciousness", that is, the totality of beliefs and sentiments common to the average members of society (which, in turn, become a determinate system with a life of its own).³⁹ In this view, crimes are violations of the collective consciousness – as attacks upon something transcendent – and punishment of crimes not an act of personal vengeance, but "rather vengeance for something sacred" desacralized.⁴⁰ In this manner, criminal punishment becomes a 'speech-act'; a conversation that the social corpus is having with itself in order to ensure moral unity – bonds and boundaries – in society through differentiation, that is, processes of membership and exclusion. International criminal justice lends itself very well, on face value at least, to a Durkheimian analysis,⁴¹ keeping in mind

³⁸ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Polity Press, Cambridge, 1996.

³⁹ Émile Durkheim, "The Division of Labour in Society", Macmillan Publishing, London, 1984 (1893). The original French term *conscience collective* has been translated into English as both 'collective consciousness' and 'collective conscience', and should not be interpreted as reflective of any psychological state. Durkheim treats the concept of collective consciousness in various ways in his writings. For example, he sees it as a mode of integration in *The Division of Labour*, but treats it more as a general condition of society in Émile Durkheim and George E. G. Catlin, *The Rules of Sociological Method*, Free Press, New York, 1966. He replaces it with 'collective representations' in his later work – first discussed in Émile Durkheim, *Suicide: A Study in Sociology*, Free Press, New York, 1951. Here, he uses it to refer to the realm of social facts in society, along with his cultural or ideational intellectual trajectory. See also Steven Lukes (ed.), *The Rules of Sociological Method by Emile Durkheim*, The Free Press, New York, 1982; Denes Nemedi, "Collective Consciousness, Morphology, and Collective Representations: Durkheim's Sociology of Knowledge, 1894–1900", in *Sociological Perspectives*, 1995, vol. 38, no. 1, 1995.

⁴⁰ Durkheim, 1984, p. 56, 57, see above note 39.

international criminal justice's emphasis on legal expressivism,⁴² as the embodiment and materialization of a global morality (founded upon the ideology of humanism).⁴³

However, rather than seeing international criminal justice as a product of a self-evident morality, the point of departure for a sociology of international criminal justice attentive to power is concerned with how its contemporary form is the result of particular historical, political, and social struggles worthy of our critical attention. At the other end of the spectrum are scholars who approach law not as reflective of social consensus but as a product of social conflict – and ultimately, of domination and power. Yet also here, there are many variations. Whereas Marxist approaches view the legal system as part of a coercive and repressive toolbox of the dominant class, Weberian analyses would be more concerned with the forms of authority invoked in law's legitimation processes. Both of these perspectives have already made a significant impact on studies of international criminal justice (and international legal scholarship generally). Whereas Marxist approaches are easily read into much of the critical approaches to international criminal justice, including post-colonial and Third World Approaches to International Law (TWAAIL), a growing body of scholarship is concerned with the forms of authority at

⁴¹ Salif Nimaga, "An International Conscience Collective? A Durkheimian Analysis of International Criminal Law", in *International Criminal Law Review*, 2007, vol. 7, no. 4; Immi Tallgren, "The Durkheimian Spell of International Criminal Law?", in *Revue interdisciplinaire d'études juridiques*, 2013, vol. 71, no. 2.

⁴² Barrie Sander, "The Expressive Limits of International Criminal Justice: Victim Trauma and Local Culture in the Iron Cage of the Law", in *iCourts*, 2016, no. 38; Marina Aksenova, "Symbolism as a Constraint on International Criminal Law", in *Leiden Journal of International Law*, 2017, vol. 30, no. 2.

⁴³ Luigi D.A. Corrias and Geoffrey M. Gordon, "Judging in the Name of Humanity: International Criminal Tribunals and the Representation of a Global Public", in *Journal of International Criminal Justice*, 2015, vol. 13, no. 1.

play in international criminal justice,⁴⁴ with strong links to authority in global governance generally.⁴⁵

2.3.3. Agency – Structure

The third set of conceptual couplet in the sociology of law is concerned with whether behaviour is determined by social structures or human agency. Would Ocampo have acted differently if internal and institutional constraints, such as the Independent Oversight Mechanism (‘IOM’), were already in place during his term?⁴⁶ Are there structural explanations to the African critique of the Court or is it merely speech-acts from rogue States trying to escape criminal accountability? While the debate on structure and agency goes to the heart of sociological theory generally, it is important to be mindful of how it impacts legal thinking. For instance, whereas international criminal accountability presume an autonomous – and thus accountable – legal subject, the development of international criminal justice is driven by a strong faith in the ability of law in general – and criminal law in particular – to transform people and societies.⁴⁷ Indeed, the ‘fight against impunity’ for international crimes infers the “ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules”,⁴⁸

⁴⁴ Bert Swart, “Damaška and the Faces of International Criminal Justice”, in *Journal of International Criminal Justice*, 2008, vol. 6, no. 1; Peter Dixon and Chris Tenove, “International Criminal Justice as a Transnational Field: Rules, Authority and Victims”, in *International Journal of Transitional Justice*, 2013, vol. 7, no. 3; see also Hayashi and Bailliet, 2017, see above note 12. See also Leslie Vinjamuri, “The International Criminal Court and the Paradox of Authority”, in *Law & Contemporary Problems*, 2016, vol. 79.

⁴⁵ Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen (eds.), *International Court Authority*, Oxford University Press, Oxford, 2018. There is also a considerable literature on authority in international relations, such as those emphasizing the authority of epistemic communities, transnational advocacy groups, or international organizations generally. See work following the works of Peter M. Haas, “Introduction: Epistemic Communities and International Policy Coordination”, in *International Organization*, 1992, vol. 46, no.1; Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, Cornell, Ithaca, 1998; Michael Barnett and Martha Finnemore, “The Power of Liberal International Organizations”, in Michael Barnett and Raymond Duvall (eds.), *Power in Global Governance*, Cambridge University Press, Cambridge, 2005.

⁴⁶ The Independent Oversight Mechanism only became fully operational in 2017, although adopted by the ASP in 2009. Mr. Ocampo opposed the creation of the IOM during his office. See Bergsmo, Rackwitz and Tianying, 2017, see above note 3.

⁴⁷ Houge and Lohne, 2017, see above note 18.

⁴⁸ Judith N Shklar, *Legalism: Law, Morals, and Political Trials*, Harvard University Press, 1964.

presuming therefore that the *presence* of criminal accountability for international crimes will accordingly achieve their avoidance. However, deterrent rationalities presume rational actors who calculate the risks of detection and/or prosecution against the benefits of the crime.⁴⁹

Yet, in chaotic situations of war, conflict, and collective offenses – no matter how institutionalized and organized the violence may seem, to what extent is it possible to speak of individual, let alone calculated, rational – and moral – agency on the ground? Criminological, micro-sociological, and social-psychological research into excessive violence and war violence emphasize situational factors such as existential fears, extensive dehumanization processes, fatigue, peer pressures, orders, widespread propaganda and/or intoxication to explain the human potential for violent profusion.⁵⁰

This tension is presently epitomized in the *Ongwen* case before the ICC, as Dominique Ongwen is charged with international crimes he himself has been a victim of, as a former abductee and commander of the Lord's Resistance Army in Uganda.⁵¹

However, as said, few sociological theories would today undermine the importance of bridging the agency–structure debate. Pierre Bourdieu remains one of the most central social theorist concerned with resolving the distinction, using the concept of practice to recognize the relation between action and structure. Practice – practical activity – is always shaped by learning (*habitus*), contexts (*fields*), and structural conditions (distribution of *capital*), in addition to choice and creativity. Social structure is in other words embodied in our experiences as well as a matter of available resources or barriers. As will be returned to below, his conceptual framework also lends itself very well to the sociology of international criminal justice.

2.3.4. Micro – Macro

The final conceptual couplet in the sociology of law concerns the analytical scale; here, whether power in international criminal justice is studied

⁴⁹ Mark A Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press, Cambridge, 2007.

⁵⁰ See Houge and Lohne, 2017, p. 779, see above note 18.

⁵¹ Erin K Baines, “Complex Political Perpetrators: Reflections on Dominic Ongwen”, in *The Journal of Modern African Studies*, 2009, vol. 47, no. 2.

at the *micro* or the *macro* level of analysis. Studies at the micro level emphasize face-to-face interactions and the social power dynamics within the institutions of international criminal justice, such as within the OTP. These types of sociological studies are concerned with how individuals and their interactions influence development and decision-making within legal institutions, the most prominent examples being the role of prosecutors' and judges' 'individual' inclinations for the outcome of cases.

Studies at the macro level are concerned, by contrast, with overarching social structures, and how international criminal justice is both a product of power, and productive of power, within these larger structures, whether it be the current geopolitical landscape or the use of law as a structuring component of global society altogether. However, many studies combine layers of different analytic scales; indeed, most prominent sociological studies on law and legal institutions combine detailed empirical analysis at the micro level with sociological explanation at a more structural and overarching level.

2.4. Methodologies and Research Methods

The methodologies of the sociology of law are intimately connected with its research objectives, which, as seen above, are animated by various theoretical approaches to law and the social. The question of whether the sociology of law requires a particular set of methods beyond that already used in social science, is subject to debate.⁵² That said, there is nonetheless a dearth of scholarship and reflection on methods and methodology in the sociology of law, which Banakar and Travers explain by reference to the disciplinary background of those inhabiting the field, with lawyers – rather than social scientists – dominating socio-legal research.⁵³

However, as concerned with law-in-society, the sociology of law is an empirical science. This has epistemological and practical implications, insofar as it means that knowledge is generated by sensational experience, as opposed to 'pure' theory or rational thought. Similar to how the sociology of law actuates theories of society in its approach to law, it is also impelled by sociology's research methods and methodology. These are often divided into quantitative and qualitative methods, depending on what type of empirical data – information gathered through the scientific method –

⁵² Banakar and Travers, 2005, see above note 35.

⁵³ *Ibid.*

that is of analytic interest. Quantitative methods yield quantitative data, often through surveys or register data, which through statistical measurements of large amounts of data enable the identification of behavioural patterns and societal arrangements, such as internal consistency in international sentencing,⁵⁴ or potential bias of international judges towards their nation States' political interests,⁵⁵ both relevant to the judicial independence and the authority of international criminal courts. Besides statistical measurements, there is an expanding use of computational techniques in (the sociology of) law, whose application of big data, algorithms, and statistical modelling shifts the scientific impetus from understanding social behaviour to predicting it. Qualitative methodologies, on the other hand, are more concerned with understanding, and may use interviews or observations of a smaller number of individuals to probe deeper into individual meaning-making, their behavioural motivations, interpretations, reasoning, and practices.⁵⁶ In larger research projects, however, sociological approaches often combine a number of methods, and may include mixed-method design,⁵⁷ including quantitative and qualitative methods to explore both significant patterns of behaviour as well as their explanation.

2.5. The Sociology of International Criminal Justice

Although arriving late to the table, sociological approaches to international criminal justice are no novelty. Sociologists have been engaged with international criminal justice and its institutions for some time, in addition to the increasing body of interdisciplinary scholarship on international (criminal) justice that, in various degrees and ways, draws on sociological insights and methodologies. As conscientiously observed by Mikkel Jarle Christensen, the main lines of sociological inquiry on international criminal justice have been predominantly characterized by two main approach-

⁵⁴ Barbora Holá, Catrien Bijleveld, and Alette Smeulers, "Consistency of International Sentencing: ICTY and ICTR Case Study", in *European Journal of Criminology*, 2012, vol. 9, no. 5.

⁵⁵ Michal Onderco, Barbora Hla, and Stijn Ruiter, "Testing Detachment of International Criminal Tribunals: Empirical Evidence from the ICTY", in *Transnational Legal Theory*, 2013, vol. 4, no. 3.

⁵⁶ This is the methodology most often used by sociological and interdisciplinary enquiries of international criminal justice and examples are provided in Section 5.

⁵⁷ See for example, Charles Teddlie and Abbas Tashakkori (eds.), *Handbook of Mixed Methods in Social & Behavioral Research*, Sage Publishing, 2003.

es, namely one concerned with the production of knowledge, and a relational one inspired by the work of Pierre Bourdieu.⁵⁸

Concerned with the social production of new legal ideas and practices in and around the institutions of international criminal justice, the first approach draws on the work of, predominantly, Habermas,⁵⁹ Foucault,⁶⁰ and Latour.⁶¹ In general, this literature demonstrates how international criminal justice is ‘brought into being’ by analysing the ‘products’ of courts, such as documents, discourses, and other legal artefacts as empirical data rather than as legal statements.⁶² In mapping out the processes and strategies inherent in the everyday operation of international criminal justice, these studies offer unique insight into the social dynamics that structure international criminal justice as a way of ‘being’ in the world.⁶³ This approach is often, but by all means not always, dominated by legal scholars venturing into non-legal disciplines. As such, it often offers an ‘insider perspective’, and one that is attuned to law as both social and legal practice.

⁵⁸ Mikkel Jarle Christensen, “The Emerging Sociology of International Criminal Courts: Between Global Restructurings and Scientific Innovations”, in *Current Sociology*, 2015, vol. 63, no. 6; Christensen, 2015, see above note 22; Mikkel Jarle Christensen, “Preaching, Practicing and Publishing International Criminal Justice: Academic Expertise and the Development of an International Field of Law”, in *International Criminal Law Review*, 2017, vol. 17, no. 2; Dixon and Tenove, 2013, see above note 44; Lohne, 2019, see above note 11.

⁵⁹ Michael Struett, *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency*, Springer, 2008.

⁶⁰ Kamari Maxine Clarke, “Global Justice, Local Controversies: The International Criminal Court and the Sovereignty of Victims”, in Marie-Bénédicte Dembour and Tobias Kelly (eds.), *Paths to International Justice: Social and Legal Perspectives*, Cambridge University Press, Cambridge, 2007.

⁶¹ Kirsten Campbell, “Reassembling International justice: The Making of ‘the Social’ in International Criminal Law and Transitional Justice”, in *International Journal of Transitional Justice*, 2013, vol. 8, no. 1.

⁶² See, for example, Anette Bringedal Houge, “Representations of defendant perpetrators in sexual war violence cases before international and military criminal courts”, in *British Journal of Criminology*, 2015, vol. 56 no. 3.

⁶³ See, for example, Sarah Nouwen and Wouter G. Werner, “Doing Justice to the Political: The International Criminal Court in Uganda and Sudan”, in *European Journal of International Law*, 2010, vol. 21, no. 4; Sara Kendall and Sarah Nouwen, “Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract victimhood”, in *Law & Contemporary Problems*, 2013, vol. 76; Houge and Lohne, 2017, see above note 18.

Sociologically trained scholars who approach international criminal justice as part of global restructurings, however, dominate the second approach. The work of John Hagan is not only perhaps the earliest contribution to the sociology of international criminal justice, but is also a more explicit institutional study, in which he, in *Justice in the Balkans*,⁶⁴ and in later work with Ron Levi,⁶⁵ demonstrates the individual agency at play in the legal and political crafting of a new legal regime. With Dixon, Chris Tenove has also demonstrated how international criminal justice is a social field crafted at the intersection of human rights advocacy, diplomacy, and criminal justice.⁶⁶ In developing a *relational* sociological approach to international criminal justice further, Christensen has in particular analysed the practices and social stratifications at work in international criminal justice, animated by Bourdieu's concept of a field as a social space that is both structured and structuring at the same time.⁶⁷ In this relational approach (that also bridges the aforementioned agency–structure dilemma), the role of elites, legal professionals and other transnational networks is studied as part of 'making' the global through their competing strategies and practices. The study of international criminal justice is thus shown to benefit from a point of departure of the adversarial nature of its social field, as shaped by the continuous competition between and among different actors and agendas. In this manner, rather than offering a 'grand theory' of the global, relational sociology offers a set of conceptual tools for empirically approaching actual position-taking and practices in international criminal justice. The work of Joachim Savelsberg deserves particular mention. As part of his extensive scholarship on violence and legal intervention,⁶⁸ his work on Darfur especially demonstrates how different

⁶⁴ John Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal*, University of Chicago Press, Chicago, 2010.

⁶⁵ Jon Hagan and Ron Levi, "Social Skill, the Milošević Indictment, and the Rebirth of International Criminal Justice", in *European Journal of Criminology*, 2004, vol. 1, no. 4; John Hagan and Ron Levi, "Crimes of War and the Force of Law", in *Social Forces*, 2005, vol. 83, no. 4.

⁶⁶ Dixon and Tenove, 2013, see above note 44.

⁶⁷ Christensen, 2015, see above note 58.

⁶⁸ For example, Joachim J Savelsberg, "Knowledge, Domination, and Criminal Punishment", in *American Journal of Sociology*, 1994, vol. 99, no. 4; Joachim J. Savelsberg and Ryan D. King, "Institutionalizing Collective Memories of Hate: Law and Law Enforcement in Germany and the United States", in *American Journal of Sociology*, 2005, vol. 111, no. 2; Joachim J. Savelsberg, *Crime and Human Rights: Criminology of Genocide and Atrocities*, Sage Publishing, Los Angeles, 2010.

professional sectors or social fields – the media, the diplomats, humanitarian and human rights NGOs – frame violence in different ways, and how judicial intervention affects these representations. He thus goes beyond a micro-level focus on courts to provide an understanding of how the world acknowledges and understands violence.⁶⁹

In addition, several different strains of sociological scholarship on international criminal justice are emerging. For example, more studies now emphasize the cultural and social aspects of international criminal justice, often from a perspective of ‘symbolic interactionism’ that emphasizes how international criminal justice is performed into being through images, representations, and face-to-face social interactions.⁷⁰ Some of this work has also revisited (and reworked) Durkheim in connecting these practices to the making of global social order – in short, to what functions international criminal justice serves with respect to implementing and integrating a global society.⁷¹

Finally, there is also significant sociological work concerned with the reception of these institutions in the communities and towards their diverse constituencies – in short, how law affects society.⁷² As concerns the ICC in particular, large-scale studies by the Human Rights Center at the University of California, Berkeley – in co-operation with the Court – have contributed empirical knowledge of victims’ and survivors’ needs in response to mass violence and in their engagement with the Court.⁷³

⁶⁹ Joachim J. Savelsberg, *Representing Mass Violence: Conflicting Responses to Human Rights Violations in Darfur*, University of California Press, 2015.

⁷⁰ Wouter G. Werner, “We Cannot Allow Ourselves to Imagine What It All Means: Documentary Practices and the International Criminal Court”, in *Law & Contemporary Problems*, 2013, vol. 76; Sofia Stolk, “‘The Record on Which History Will Judge Us Tomorrow’: Auto-History in the Opening Statements of International Criminal Trials”, in *Leiden Journal of International Law*, 2015, vol. 28, no. 4; Marieke de Hoon and Kjersti Lohne, “‘All the World’s a Stage’: Constituting International Justice at the ICC Assembly of States Parties Meeting”, in Lianne J.M. Boer and Sofia Stolk (eds.), *Backstage Practices of Transnational Law*, Routledge Taylor & Francis Group, 2019.

⁷¹ Tallgren, 2013, see above note 41; Lohne, 2019, see above note 11.

⁷² There is also a substantial literature in legal anthropology, see, for example, the work of Gerard Anders and Nigel Eltringham.

⁷³ Alexa Koenig, Stephen Smith Cody, Eric Stover and Robin Mejia, *Bearing Witness at the International Criminal Court: An Interview Survey of 109 Witnesses*, Human Rights Center, University of California, Berkeley, School of Law, Berkeley, 2014; Stephen Smith Cody, Eric Stover and Mychelle Balthazard, *The Victims’ Court?: A Study of 622 Victim Partici-*

2.6. The Contributions of This Volume by Themes

Beyond the general features of the sociology of law and of international criminal justice that have been outlined so far, the objective of this volume is to push the understanding of power in international criminal justice by attuning to the social space of which it is part. In addition to being animated by various disciplinary, methodological and theoretical approaches, the present volume reflects some of the diversity and multiplicity of this space. In the coming chapters, the authors address power in international criminal justice from various perspectives and approaches. Steven Lukes' three dimensions of power – as decision-making, agenda-setting, and ideology – can be a useful tool to conceptualize the forms of power engaged with by our contributors.⁷⁴ Some deal with the explicit display of power as the *power to decide*, others with actors that have the *power to set the agenda*, and others still with the more subtle but equally important *power of thought, ideas, and ideology* that gives shape to international criminal justice.

2.6.1. Part I: Power in International Criminal Justice Institutions

Part I goes to the heart of the title and objective of this book. It addresses power in international criminal justice institutions, approached through the exploration of typographies of power, the professionals, the networks, and the bureaucratic domination in the institutions of international criminal justice, and the relevancy of the civil-common law divide. For example, at the Florence conference the deliberations focused on how, and in spite of widespread claims to the contrary, there is no clear process of hybridization of legal traditions in the procedures and practices of international criminal justice institutions. Rather, it was asserted that tensions between civil law and common law continue to evolve and fluctuate, and that it depends, in large, upon the composition of Chambers and the legal background of the Presiding Judge. In this and other ways, Part I speaks to the power to decide, to make judicial decisions, and to punish the part

pants at the International Criminal Court, Human Rights Center, University of California, Berkeley, School of Law, Berkeley, 2015.

⁷⁴ Steven Lukes, *Power: A Radical View*, Macmillan International Higher Education, 2004. See also Mayesha Alam, "Agency, Authority, and Autonomy: The Role and Impact of Interactions with Transnational Civil Society on the International Criminal Court's Operations", chap. 17 below.

of humanity that inflicts atrocious suffering upon the other. It speaks to the power to judge on behalf of an international society.

Gregory S. Gordon opens up the book's central problematique by inviting us to consider the consolidation of both individual and national power in the institutions of international criminal justice. Through a sharp analysis of an early release decision by the International Residual Mechanism for Criminal Tribunals ('MICT'), the chapter addresses the relationship between American First Amendment sensibilities of the MICT's President, Judge Theodor Meron, and the early release of Ferdinand Nahimana. In December 2003, Nahimana was given a 30-year sentence on various genocide and crimes against humanity charges for directing the Radio Télévision Libre des Mille Collines in Rwanda. Tracing the biographic and legal trajectory of Judge Meron in relation to the Nahimana case, Gordon critically examines the fact that the same judge who made a unilateral decision on Nahimana's early release, also sat in judgement of the defendant during the merits phase, took issue with the basis of liability, and dissented on grounds that the sentence was too harsh. By addressing power on multiple levels, Gordon's chapter is a reminder of how national policy interests may seep into judicial decision-making in international justice.

Alexander Heinze is also concerned with the dichotomy – or not – between civil law and common law. Through an analysis of jurisprudence, he shows how these categories lack clarity and definition and are of limited descriptive value. He suggests that this does not render them ill-suited – on the contrary, they may in fact serve as a tool for gaining a better understanding of why certain procedural approaches are selected over others. Drawing on the models of Mirjan Damaška, and himself influenced by the work of Max Weber, Heinze's analysis seeks to identify and define the internal system of procedural rules at the ICC. Indeed, his socio-legal analysis of jurisprudence demonstrates how insight into the nature of a society's legal system is shaped by the kinds of individuals who dominate it.

This view resonates with **Mikkel Jarle Christensen's** research, who in his sociological approach moves outwards, toward an external view on power in international criminal justice institutions. His chapter investigates the main forms of institutional power animating international criminal justice, approaching the latter as a relational social field following the work of Pierre Bourdieu. By developing the sociological approach

to international criminal justice, Christensen identifies new ways to conceive of power in the institutions of international criminal justice by building on examples of how specific professional practices are used to craft and leverage influence. The focal point is on what is recognized as *poles of power*. These poles have a double nature. They mediate access to certain positions and enable agents in these positions to mobilize specific forms of resources and project them towards impacting legal developments (understood broadly). This analytic approach enables Christensen to reveal the less obvious social and professional power-battles that characterize the daily workings of the field of international criminal justice. Such inquiry matters for the agents' ability to create legal results, including the production of narratives and symbolism, as well as their connections to larger diplomatic processes such as the creation and negotiation of new courts.

2.6.2. Part II: Representational Power in International Criminal Justice

A sociology of international criminal justice is interested in more than law, more than legal system and jurisprudence; it is concerned with international criminal justice as a social 'complex', including its laws, its institutions, its practices, but also its discourses, its performances, its rituals and symbols.⁷⁵ We are interested in international criminal justice as a field embedded in social structure and cultural meaning. In this way, power is not only direct, linear, and factual in the sense of having the power to decide and to punish, but also encompasses the power to produce the context in which the power to punish arises. Part II focuses on what Lukes calls the third dimension of power, namely the normative and ideological kind – the power to control what people think is 'right'.⁷⁶ In this way, a sociology of power in international criminal justice becomes central to understanding the international, or global, as a particular site of crime, justice, and community.⁷⁷

Joachim J. Savelsberg initiates Part II through an impressive empirical study, probing into the question of whether international criminal courts have representational power – “the chance to impress on a global

⁷⁵ Lohne, 2019, see above note 11.

⁷⁶ Lukes, 2004, see above note 74.

⁷⁷ Nesam McMillan, “Imagining the international: The constitution of the international as a site of crime, justice and community”, in *Social & Legal Studies*, 2016, vol. 25, no. 2.

public, even against resistance, an understanding of mass violence as a form of criminal violence”.⁷⁸ As mentioned before, drawing on sociological theory and on data from extensive empirical research on responses to the Darfur conflict, he documents how international criminal justice institutions and their supporters are engaged in struggles of competing representations. For example, “these include diplomats who privilege representations that open up spaces for mediation and negotiation, and humanitarian organizations that advance narratives that allow for collaboration with the perpetrator State in the interest of the delivery of humanitarian aid”.⁷⁹ Moreover, there are significant constraints and impediments to the representational power of international criminal justice institutions. For example, their institutional logic emphasizes individual actors rather than structural forces, neglects historical context, and applies a simplifying binary logic of guilty or innocent, victim or perpetrator, good or evil. Against these constraints, however, Savelsberg’s theoretical argument and empirical data document substantial representational power of international criminal courts.

Barrie Sander picks up the baton and addresses what he refers to as the “anti-impunity mindset”. As the call for criminal prosecutions has become the default response in response to mass violence, Sander examines the set of assumptions underpinning this mindset beyond the frame of criminal prosecution. By examining anti-impunity *as a mindset*, he illuminates its power and limits, both within and beyond the field of international criminal justice. He begins by defining the anti-impunity mindset through an examination of the human rights field’s struggle to end impunity for mass violence. He then turns to explore the *reach* of the mindset by examining three entities beyond the field of international criminal justice, namely truth commissions, local justice mechanisms, and civil human rights litigation. Despite their formally non-retributive nature, Sander shows how these three entities have all ended up embracing the assumptions of the anti-impunity mindset in practice. Next, the chapter demonstrates the *power* of the mindset by reviewing some of the principal critiques of the anti-impunity mindset, and its limits. Based on a thorough conceptual review, Sander argues that the capacity of the anti-impunity

⁷⁸ Joachim J. Savelsberg, “The Representational Power of International Criminal Courts”, see Chapter 6, below p. 281.

⁷⁹ *Ibid.*, pp. 282.

mindset to crowd out concern for issues of structural violence has been overstated.

Sarah-Jane Koulen continues the analysis of the anti-impunity mindset by probing the social and cultural spaces animating this particular set of meanings, understandings, and knowledge. Taking an ethnographic approach, Koulen beautifully draws us into the everyday world of international justice-making by teasing out its aesthetics and affects, taste, and texture. She is interested in the spaces in which the makers of international justice work, meet, and congregate, and how such spaces are arranged, built, or adorned to convey a particular set of meanings and understandings. In their expression of normative power, these cultural spaces also serve, she argues, to buttress against external critique. Her chapter focuses on an opening of an art exhibit on international criminal justice in New York City, bringing together several members of what she identifies as the field's 'cohort'. By doing so, she forces us to reflect on the role that affect, aesthetics, and social texture do for understanding the workings of power in international criminal justice, as well as the power of understandings within it.

Marina Aksenova continues the probing of international criminal justice's representational force by skilfully combining social theory and legal analysis. Her chapter focuses on how the ICTY was instituted with the representational aim of condemning evil deemed universal. In bringing to light symbolic expression as the underlying objective of the ICTY, she draws on Michel Foucault in analysing the content of its outputs as discourse. To make sense of how this discourse is structured – and productive – she relies on the anthropologist Maurice Bloch, who explained symbolic significance of rituals by connecting individuals to institutional structures transcending their consciousness. Aksenova thus analyses how symbolic expression at the ICTY manifests itself in a number of ways: through the process of its establishment, its institutional design, rhetoric in the judgments, and, finally, through the way in which the ICTY frames its achievements. In this manner, she not only demonstrates the representational power of the ICTY, but also engages the social functions of international criminal justice more generally.

2.6.3. Part III: State Power and Autonomy in International Criminal Justice

While the ICC's jurisdiction is based on delegated authority from States, by virtue of either State ratification or a Security Council referral, the legitimacy of international criminal justice as *international* criminal justice is nonetheless contingent on autonomy and independence from individual state power. Mindful of this delicate balance in the power of international criminal justice, Part III delves further into the relationship between state power and autonomy in international criminal justice.

Judge **William David Baragwanath** begins Part III by addressing the power of States to make, *or refuse to make*, international criminal law. Specifically, he is concerned with resisting terrorism, and how international law may be put to work for the creation, and thus, the international recognition of an international crime of terrorism, concerned with what role international criminal law can play in pursuing terrorism. While the ultimate power to make international law is possessed by States, Judge Baragwanath is also explicit, however, in his emphasis on the duties of the legal profession. In his contribution, he urges the legal profession to take up the challenge, and “to recognize that the legal response to terrorism must not be neglected by any of us anywhere in a position to make a relevant contribution”.⁸⁰ As such, his contribution is a sharp reminder of the role of transnational legal power networks to the shaping and making of international law,⁸¹ and their professional decoupling from the State.

Marieke de Hoon continues the probing into the making of international criminal law, but shifts the perspective from Judge Baragwanath's normative and forward-looking faith in law to solve global violence to an empirical investigation into the making of the crime of aggression at the intersection of international legal autonomy and State power. Based on document analysis and participant observations, de Hoon traces the trajectory of the negotiation history of the crime of aggression, and teases out the various positions and roles of States, and the role of diplomats as legal entrepreneurs in its creation. As such, she demonstrates the palpable tension yet diplomatic oeuvre of balancing State power and supra-State legal autonomy in the construction of the international legal order. Her analysis

⁸⁰ William David Baragwanath, “International Law-Making on Terrorism: Structural and Other Powers of Resistance”, see Chapter 10 below, p. 443.

⁸¹ Madsen, 2014, see above note 8.

demonstrates the influence of these actors for the ‘kind’ of law that is created, and how it comes into conflict with what a criminal legal system fundamentally aims to do, such as providing “equality before the law and to impose a vertical, authoritative and coercive power relationship upon those that violate it. The crime of aggression thereby sits somewhat uneasily with criminal law’s fundamental notion of equality before the law by adhering to State consent, the fundamental principle of public international law”.⁸²

Sergey Vasiliev zooms in on the exercise of power and autonomy *vis-à-vis* international and special or hybrid criminal tribunals by political-administrative bodies vested with responsibility for running them, referred to as international judicial governance institutions (*injugovins*). The practices of governance of these Tribunals and the functioning of *injugovins* has been subject to scant attention, and his chapter advances this emerging line of inquiry by placing those *injugovins* at the front and centre of the debate on power in international criminal justice. In testing the hypothesis that *injugovins* exercise agency of their own, and as such, impact the power individual States exert *vis-à-vis* the courts as part of collective entities, his chapter first outlines the relationship between judicial governance and power, and highlights the benefit of non-legal approaches to studying that relationship. Drawing on historical, comparative, and socio-legal perspectives, the chapter then examines past and present governance schemes of international criminal tribunals, and offers a classification of the main governance models including their features and challenges. Finally, the chapter reviews some of the limitations of the ICC model and addresses how its defects could be remedied. As Vasiliev sharply observes, “[t]he understanding of the power dynamics animating this field would remain fragmentary and imbalanced without looking also at the legal and institutional frameworks and practices used by States to delegate, exercise, contest and reclaim power over” international criminal tribunals.⁸³

Jacopo Governa and **Sara Pausco** move from the national to the regional, and offer a thorough analysis of the European Union’s (‘EU’) engagement with international criminal justice. They show that while EU

⁸² Marieke de Hoon, “Negotiating the Crime of Aggression: Between Legal Autonomy and State Power”, see Chapter 11 below, pp. 476–477.

⁸³ Sergey Vasiliev, “Judicial Governance Entities as Power-Holders in International Criminal Justice: A Plea for a Socio-Legal Enquiry”, see Chapter 12 below, p. 488.

competences in criminal law are still not directly involved in international criminal law, EU action – especially their external relations – are guided by the need to implement its policy interests. By mapping and documenting the EU’s external missions and their intersections with ICC interventions, Governa and Paiusco suggest that the EU and the ICC can complement one another in a more comprehensive approach to transitional justice in unstable regions. However, rather than fighting impunity for international crimes *per se*, they argue that it is the EU’s proper interests – border control, economy, security – that drive the EU’s engagement in rule-of-law reform, capacity-building, and the like. As such, they suggest that realist power may explain the EU’s approach to international criminal justice as part of their wider approach to external relations. This entails, they conclude, that “only if proper interest in international justice becomes part of the Union can there be identification between self-interest and normative advance in this field, as far as the EU as an actor is concerned”.⁸⁴

In the last chapter of Part III, **Mark Klamberg** scrutinizes State power and autonomy in international criminal justice from various theoretical positions in international law and relations. Exploring recent developments in international criminal justice such as the decision of the Pre-Trial Chamber II in the *Afghanistan* situation, Klamberg analyses whether international criminal justice is an independent system or is subject to power politics – or even a tool of hegemonic States. He engages the debate on structure and agency, and specifically, how structural constraints and room for agency play out in international criminal justice. He addresses the hegemonic tendencies of international criminal justice, yet concludes by presenting a nuanced defence for international criminal justice grounded in a cosmopolitan liberal approach.

2.6.4. Part IV: Non-State Power and External Agents in International Criminal Justice

Albeit authorized and dependent on States and State co-operation, a plethora of other *non-State actors* also engage with international criminal justice. Indeed, as aptly put by Philippe Sands in his keynote speech at the European Society of International Law’s 2016 annual conference, “[o]ur

⁸⁴ Jacopo Governa and Sara Paiusco, “Is the European Union an Unexpected Guest at the International Criminal Court?”, see Chapter 13 below, pp. 621–622.

legal world is no longer just about States”.⁸⁵ In this final part, the chapters concern themselves with non-State power and external agents seeking to shape the practice and development of international criminal justice, including the underlying arrangements and assumptions animating the field.

Djordje Djordjević and **Christopher B. Mahony** consider the nexus between the fields of international criminal justice and development, an area of increasing relevance considering the growing attention to domestic prosecutions of international crimes under the aegis of positive complementarity. The authors point to how, since the early 2000s, development actors have garnered increasing attention for their potential contributions to develop national capacity for prosecutions of conflict-related crimes – often considered among the most sensitive tasks in transitional and post-conflict settings. In spite of these connections in practice, however, the authors note how “the nexus between complementarity and development was never systematically explored by researchers to identify risks and added value for national prosecutions”.⁸⁶ Taking this research gap as the point of departure, they address the critical questions of how development actors can adequately take on this challenge, and if so, what the advantages of this form of engagement are.

In the next chapter, **Jacob Sprang**, **Benjamin Adesire Mugisho**, **Jackson Nyamuya Maogoto** and **Helena Anne Anolak** interrogate yet another set of external actors, as they consider the relationship between the ICC, the African Union (‘AU’) and the proposed African Court of Justice and Human Rights (‘ACJHR’). They explain how the ICC indictment against the former Sudanese President Omar Al-Bashir sparked the flames of discontent amongst African States towards the ICC, which arguably escalated the process to establish a regional court of human rights in Africa. Seeking to provide the ICC a way to overcome its critiques and challenges to its authority by African States, the authors suggest that the ICC should embrace the proposed ACJHR, instead of trying to squeeze out what they view as a new, viable alternative approach. While considering challenges of complementarity and co-operation, they assert that “institutionalizing a relationship between the ACJHR and the ICC would allow

⁸⁵ Philippe Sands, “Reflections on International Judicialization”, in *European Journal of International Law*, 2017, vol. 27, pp. 885–89.

⁸⁶ Djordje Djordjević and Christopher B. Mahony, “Development and National Prosecutions: Addressing Power and Exclusion for Sustainable Peace and Development”, see Chapter 15 below, p. 651.

for African States to come to the table as partners in shaping the international legal framework, rather than obstructing a system that they are excluded from”.⁸⁷

Mayesha Alam continues the exploration of non-State actors’ significance and influence on dimensions of power in international criminal justice by considering the role of transnational civil society in their interactions with the ICC. Specifically, she is concerned with the modes, mechanisms, and motivations that drive transnational civil society interactions with the Court, and examines the agency, authority, and autonomy of transnational civil society *vis-à-vis* the ICC. Based on empirical data, this enables her to analyse the impact of transnational civil society interactions on the Court’s operations. She finds that, “while unlikely and unable to compel the ICC to act in accordance to their wishes, transnational civil society groups continue to hold authority and wield power through agenda-setting, technical expertise, and moral accountability”.⁸⁸ She notes how while the ICC’s resource constraints necessitate collaboration and cooperation with a range of non-State partners including transnational civil society, this also, however, has implications for the autonomy of the latter.

As Alam, **Chris Tenove** also offers an empirical contribution based on qualitative analysis of interview data. Based on focus group discussions and interviews with survivors of conflict and international crimes in Kenya and Uganda, he examines the ways in which international criminal justice processes may empower or disempower victims in their pursuit of justice. Critically engaging with the vast literature that holds the ICC, and international criminal justice generally, to be either empowering or disempowering for victims, Tenove argues that these oppositional narratives of survivors’ experiences is reductionist and cursory. Instead, he suggests that “tribunals are *selective* about who receives victim status, they *channel* people’s agency in particular ways, and their impact is highly *context-dependent*”.⁸⁹ As a result, victim status is not simply empowering or dis-

⁸⁷ Jacob Sprang, Benjamin Adesire Mugisho, Jackson Nyamuya Maogoto, and Helena Anne Anolak, “The Power of Narratives: The African Union’s Bid to Develop an Alternative International Criminal Law Narrative”, see Chapter 16 below, p. 710.

⁸⁸ Mayesha Alam, “Agency, Authority, and Autonomy: The Role and Impact of Interactions with Transnational Civil Society on the International Criminal Court’s Operations”, see Chapter 17 below, p. 714.

⁸⁹ Chris Tenove, “International Criminal Justice and the Empowerment or Disempowerment of Victims”, see Chapter 18 below, p. 744.

empowering – “it enhances the agency of some people in some contexts to pursue some justice aims, but it can also pose serious risks and constraints”.⁹⁰ He further considers the implications of this framework for understanding the power of international criminal justice, and for evaluating the capacity of international criminal tribunals to advance justice for victims.

Emma Irving and **Jolana Makraiová** engage with an increasingly important set of external actors and practices shaping the content of international criminal justice, namely the role of social media. Aptly labelled “Capture, Tweet, Repeat: Social Media and Power in International Criminal Justice”, their chapter examines ways in which social media may affect power dynamics among international criminal justice actors. They consider how social media have significantly altered the way people communicate, and how these shifts in communication have influenced power dynamics in conflict – and, as a consequence, conflict responses. Besides their potential evidentiary value, the authors point to how the use of social media in conflict could potentially have a systemic and fundamental impact on international criminal justice, providing, for instance, an avenue to (at least partially) side-step an un-co-operative State and collect evidence remotely. However, the authors also consider the potential negative effects of the increased relevance of social media in international criminal justice. Among issues considered are loss of credibility in the Court as a result of its impotence *vis-à-vis* graphical, visible and continuous violence (in Syria, for example), or obscuring the voice of victims that do not garner the most ‘likes’ and ‘shares’ on social media. Moreover, the authors note how, with the increased interaction of social media and international criminal justice, yet another set of non-State actors enter the field of international criminal justice, namely social media companies.

In the volume’s final contribution, **Tosin Osasona** considers the influence of the ICC upon electoral processes in Africa, and specifically in Nigeria. Against the background of ICC’s prosecutorial focus in Africa, and consideration of critiques concerning such practice, Osasona evaluates the effect of the ICC’s intervention on the conduct of political leaders in Africa. As a case study, he focuses on Nigeria during the 2015 presidential electoral process. Considering the Nigerian political context, Osasona notes that while a number of factors have been highlighted as being

⁹⁰ *Ibid.*, pp. 744–745 below.

responsible for the success of the 2015 presidential elections, the role of the ICC in the process has been especially underlined. For instance, he points out that Nigerian stakeholders considered only the ICC effective and independent enough to report to intervene. He argues that as long as mass violence is perpetrated, threatened, or envisaged in the context of elections, the ICC has a definite responsibility to act. However, at the same time, he recognizes the potential problematic nature of the ICC intervening in the domestic affairs of electoral politics, as that practice may fuel perceptions of the Court as criminalizing outcomes it considers problematic. Above all, Osasona's contribution demonstrates the reach of power in international criminal justice.

2.7. Conclusion

Through our participation at the Florence conference, and in our work on this volume, we share the goal of moving towards a deeper understanding and critical scrutiny of the various forms and expressions of power in international criminal justice – indeed, to work for a “more accurate mirror” of power in international criminal justice.⁹¹ This has been our analytic aim, not a cynical and destructive one. We have only begun to outline the ways in which a sociology of international criminal justice may contribute to such a pursuit. We believe the coming chapters demonstrate the significance of such an approach to a more reflexive engagement with power in international criminal justice across policy, practice, and scholarship.

⁹¹ Bergsmo, Kaleck, Muller and Wiley, 2017, see above note 4.

On the Early Release of the ‘Rwandan Goebbels’: American Free Speech Exceptionalism and the Ghost of the Nuremberg–Tokyo Commutations

Gregory S. Gordon *

3.1. Introduction

On 14 December 2016, the United Nations (‘UN’) announced it was granting early release to Ferdinand Nahimana, whose December 2003 conviction and 30-year sentence on various genocide and crimes against humanity charges was predicated on establishing or directing the operations of Radio Télévision Libre des Milles Collines (‘RTLML’). Otherwise known as ‘Radio Machete’, RTLML exhorted Rwandan Hutus to slaughter Tutsis and thus helped spark and fuel the 1994 genocide, during which up to 800,000 innocent civilians were massacred in just 100 days. On the surface, Nahimana’s release might appear routine. He had served two-thirds of his 30-year sentence and a practice had formed granting early release to well-behaved International Criminal Tribunal for Rwanda (‘ICTR’) convicts at the two-thirds mark.

Nevertheless, digging deeper reveals there may be more to the early release decision than meets the eye. In particular, the decision was made by one man, 87-year-old United States (‘US’) Judge Theodor Meron, President of the UN International Residual Mechanism for Criminal Tribunals (‘MICT’). There was no hearing. Nor was there input from victims,

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prosecutors, the UN, government officials or non-governmental organizations. Many have criticized Meron as a flawed jurist, given several questionable decisions, including the controversial acquittals in the *Gotovina* and *Perišić* cases.

It is important to note that Judge Meron had sat in judgement of the defendant during the merits phase, took issue with the basis of liability, and dissented on the grounds that the sentence was too harsh. Meron had disagreed with the other judges on his panel, finding that Nahimana's liability connected to hate speech was illegitimate in light of freedom of expression concerns explicitly grounded in the zealous free-speech bent of United States ('US') First Amendment jurisprudence. That appellate panel had reduced Nahimana's sentence from life to 30 years. Thus, Meron arguably played a part in Nahimana's eligibility for such an early release in the first place.

This chapter will consider whether, in light of his previous role as a merits judge with an American free-speech-exceptionalism stance, Meron was the right person to decide on the early release of the architect of the hate radio that spurred the Rwandan Genocide. Implicated in this analysis is the issue of how Meron was put in this position of absolute power in the first place. Is the Nahimana early release decision a snapshot of how American power has influenced the operations of international criminal justice?

In examining this question, the chapter will reflect on another instance of American political interests impacting the arc of justice for convicted war criminals. In the early 1950s, US High Commissioner for Germany, John J. McCloy, pardoned or commuted the sentences of numerous high-level Nazi defendants convicted at Nuremberg, including prominent industrialists Alfred Krupp and Friedrich Flick as well as *Einsatzgruppe* commander Martin Sandberger. The same year, General Douglas MacArthur began releasing high-level Japanese war criminals convicted by Nuremberg's sister court, the Tokyo Tribunal. These early release decisions were motivated by shifting American Cold War policies favouring rapprochement with the Germans and Japanese. The chapter concludes by reflecting on whether the ghost of this post-World War II commutation policy hovers over Meron's decision to release Nahimana early. Is it another example of American exceptionalism tinkering with the machinery of transnational penal law?

The chapter proceeds in five sections. Section 3.2. examines the case of Ferdinand Nahimana and his role in the development of hate radio in pre-genocide Rwanda. It chronicles the pernicious influence of his radio station, RTL, both before and during the Rwandan Genocide. And it considers Nahimana’s post-genocide experience in the international justice process, focusing on his trial and the appellate proceedings at the ICTR that led to his receiving a sentence of 30 years’ imprisonment. Section 3.3. considers the career of Judge Theodor Meron, including his career progression from New York University law professor, to US State Department representative, to *ad hoc* tribunal appeals judge, and then to President of the International Criminal Tribunal for the former Yugoslavia (‘ICTY’) and the MICT. This section also examines Meron’s involvement in the *Nahimana* case and his objections to those aspects of liability he felt were in contravention of the US First Amendment. Additionally, the section explores controversies related to other matters for which Meron has served as a judge, as well as allegations that Meron owes his position to behind-the-scenes US power manoeuvring meant to ensure US interests are looked after. Section 3.4. details Meron’s unilateral *Nahimana* release decision and its patent deficiencies. Finally, Section 3.5. looks back on the US convictions of Nazi leaders at Nuremberg and Japanese high-level officials in Tokyo and the Cold War-influenced decisions to commute the sentences of those war criminals. It concludes with reflections about the relationship between US political priorities, the doctrinal and policy framework of early release in international criminal law, and the evolution of international criminal justice.

3.2. The Case of RTL Founder Ferdinand Nahimana

3.2.1. Background: Lead-Up to the Rwandan Genocide

When the European powers carved up Africa into colonies in the 1890s, Rwanda, situated in the eastern part of central Africa, was given to Germany. The Germans inherited a Tutsi-run kingdom and, for administrative convenience, exercised colonial control through the Tutsi ethnic group. This gave the Tutsis (only about 15 per cent of the territory’s people), on-the-ground control over the more numerous Hutu ethnic group (approximately 84 per cent of the population) and Twa (a pygmy people only constituting roughly 1 per cent of the colony’s citizens). After Germany’s defeat in World War I, control of the colony – along with neighbour possession Burundi – was ceded to Belgium as a League of Nations mandate

known as Ruanda-Urundi. The Belgians continued the German practice of governing through the Tutsi overlords and, like the Germans, treated the Tutsis as ‘racially superior’, thereby fanning the flames of pre-World War I ethnic resentment.

By 1962, the majority Hutu population assumed governing functions and, its resentment having metastasized into hatred, ethnically cleansed the territory of its former governing caste. Those Tutsis who survived the pogroms streamed into neighbour States seeking refuge.¹ They formed a great regional diaspora that hoped one day to return to their homeland.² After nearly three decades in exile, a portion of those in exile near the northern border decided to return by force. In 1990, a Ugandan Tutsi faction known as the Rwandan Patriotic Front (‘RPF’) led a military incursion into Rwanda.³

Although French and Zairean troops halted the invasion, a Rwandan Civil War had begun and it inspired the birth of anti-Tutsi hate media.⁴ In reaction to the 1993 ‘Arusha Accords’, a UN-brokered plan to end the war that entailed power-sharing with the RPF, embittered Hutu hardliners devised a plan to scuttle the deal and solve all future problems: eliminate through genocide their internal ‘enemy’, the Tutsis. As part of this, taking advantage of the new media environment, they launched a virulent anti-Tutsi radio station – RTLM.

3.2.2. The Rise of Ferdinand Nahimana in Pre-Genocide Rwanda

The person tapped to establish this new outlet was Ferdinand Nahimana, a former history professor and intellectual darling among Hutu extremists. In his book *Modern Genocide: The Definitive Resource and Document*

¹ Javaid Rehman, *The Weakness in the International Protection of Minority Rights*, Kluwer Law International, The Hague, 2000, p. 66 (referring to the post-independence “massacre of approximately 20,000 Tutsi men, women and children”); Howard B. Tolley, Jr., “Rwanda”, in David P. Forsythe (ed.), *Encyclopedia of Human Rights*, vol. 4, Oxford University Press, Oxford, 2009, p. 384 (noting that Rwanda’s Hutu president was “mobilizing Hutus to drive more ‘alien race’ Tutsis into exile and [the] UNHCR estimated the number of Tutsi exiles in Burundi, Uganda, Tanzania and Zaire in 1964 at 400,000”).

² Frank K. Rusagara, “The Spread of the ‘Genocide Ideology’ within the Great Lakes Region: Challenges for Rwanda”, in Maddalena Campione and Patrick Noack (eds.), *Rwanda Fast Forward: Social, Economic, Military and Reconciliation Prospects*, Palgrave Macmillan UK, Basingstoke, 2012, p. 218 (referring to the “Tutsi diaspora” in the region).

³ John Shattuck, *Freedom on Fire: Human Rights Wars and America’s Response*, Harvard University Press, Cambridge, MA, 2003, p. 30.

⁴ *Ibid.*

Collection, genocide expert Paul Bartrop describes Nahimana as the “leading propagandist for the radical Hutu cause against the Tutsi minority prior to and during the Rwandan Genocide of 1994”.⁵ Yves Gounin describes Nahimana as the “Theoretician of Extermination” and refers to his sobriquet: the “Rwandan Goebbels”.⁶

An historian known for his work on the “history of the ‘Hutu nation’”, through which “he rehabilitated the precolonial Hutu kingdoms”⁷, a key argument in Nahimana’s scholarship was “that the Tutsi were not indigenous to Rwanda”.⁸ Driven by a hatred for the former minority-group rulers, his work meant to show that the Tutsis had no legitimate place in the land of a thousand hills. According to Dina Temple-Raston:

[His] gentle demeanor belied the turmoil that raged inside him. People said that he secretly harbored hatred of the Tutsi and he had come to the conclusion that a history needed to be written that extolled the virtue of the majority people, the Hutu. Nahimana’s “new history” was a rejection of an inherited body of understandings [...]. Nahimana felt the Tutsi [...] were a natural enemy of the Hutu majority. Anything that provided a boost to the Tutsi came at the expense of the Hutu, he said. The Tutsi had no right to rule. Their goal was to return Rwanda to its days as a monarchy.⁹

These intellectual leanings were on display during Nahimana’s days as a student at the National University of Rwanda. In 1973, he “briefly won glory as the head of a “Comité de Salut Public” (Committee of Public Safety) that had “spontaneously” formed to purge Tutsis from the University, in the administration and in private organizations, and even in

⁵ Paul R. Bartrop, “Nahimana, Ferdinand”, in Paul R. Bartrop and Steven Leonard Jacobs (eds.), *Modern Genocide: The Definitive Resource and Document Collection*, vol. 4, ABC-CLIO, Santa Barbara, CA, 2015, pp. 1773–1774.

⁶ Yves Gounin, “Un idéologue dans le génocide rwandais. Enquête sur Ferdinand Nahimana” (An Ideologue in the Rwandan Genocide: Investigation on Ferdinand Nahimana), Spring 2011 (available at the web site of Institute de Relations Internationales et Stratégiques) (translated into English by the author).

⁷ Marie-Soleil Frère, *The Media and Conflicts in Central Africa*, Lynne Rienner Publishers, Boulder, CO, 2007, p. 85.

⁸ Linda Melvern, *A People Betrayed: The Role of the West in Rwanda’s Genocide*, Zed Books, London, 2000, p. 70.

⁹ Dina Temple-Raston, *Justice on the Grass: Three Rwandan Journalists, Their Trial for War Crimes, and a Nation’s Quest for Redemption*, Free Press, New York, NY, 2005, p. 25.

secondary schools”.¹⁰ Nahimana went on to earn his Ph.D. at the University of Paris, supervised by Rwanda expert Jean-Pierre Chrétien, via a dissertation on the Hutu kingdoms of northwest Rwanda.¹¹

Nahimana’s swift ascent into the upper ranks of Rwandan academia can be briefly chronicled. He was appointed Assistant Lecturer of History at the National University of Rwanda in 1977.¹² A year later, he assumed the position of Vice-Dean of the Faculty of Letters. In 1980, he was appointed Faculty Dean, from which position he was elevated to the post of President of the Administrative Committee of the University’s Ruhengeri campus. Finally, he served as Assistant Secretary-General for the Ruhengeri campus from 1983 to 1984.¹³

Dina Temple-Raston observes that Nahimana “might have labored on in relative anonymity had it not been for [Rwandan] President [Juvénal Habyarimana]”.¹⁴ As a stalwart supporter of Habyarimana’s party, the Mouvement Révolutionnaire National pour le Développement (‘MRND’), Nahimana offered to assist the Rwandan president to unify the country’s Hutus.¹⁵ The latter was grateful and, in 1990, appointed the professor as Director of ORINFOR (Rwandan Office of Information – the State-owned and -controlled information service that ran the national radio station, Radio Rwanda).¹⁶

As described by Alison Des Forges, Nahimana “gave up teaching to take charge of government propaganda at ORINFOR”.¹⁷ In this new role, Nahimana’s pattern of discrimination against Tutsis continued. Allan Thompson, in his book *The Media and the Rwandan Genocide*, encapsulated a key part of the background evidence against Nahimana at trial: “A number of Prosecution witnesses testified to discriminatory practices en-

¹⁰ Jean-François Dupaquier, *Politiques, Militaires et Mercenaires Français au Rwanda : Chronique d'une Désinformation*, Karthala, Paris, 2014, p. 105.

¹¹ Temple-Raston, 2005, p. 26, see above note 9.

¹² International Criminal Tribunal for Rwanda (‘ICTR’), *Prosecutor v. Ferdinand Nahimana et al.*, Trial Chamber, Judgment, 3 December 2003, ICTR-99-52-T, para. 5 (‘Nahimana Case Trial Judgment’) (<https://www.legal-tools.org/doc/45b8b6/>).

¹³ *Ibid.*

¹⁴ Temple-Raston, 2005, p. 26, see above note 9.

¹⁵ *Ibid.*

¹⁶ Nahimana Case Trial Judgment, para. 5, see above note 12.

¹⁷ Alison Des Forges, “Leave None to Tell the Story: Genocide in Rwanda”, in *Human Rights Watch*, 171-1, March 1999, p. 85.

gaged in by Ferdinand Nahimana as a student against fellow Tutsi students, as a professor against his Tutsi students, in university admissions and faculty appointments, and as Director of ORINFOR against Tutsi employees”.¹⁸

Yet, at ORINFOR, Nahimana’s anti-Tutsi animus turned lethal. In what has been described as a “dress rehearsal” for the Rwandan Genocide,¹⁹ in March 1992, Nahimana had Radio Rwanda broadcast (over the objections of an editorial board concerned with the lack of verification) a fudged news bulletin informing listeners that the Tutsis had compiled a list of targets to be murdered in Bugesera (a Tutsi enclave in Eastern Province, Rwanda).²⁰ Radio Rwanda aired this bogus ‘news’ to extremist Hutu *Interahamwe* militias and members of the Presidential Guard being transported to that locale.²¹ Nahimana’s voice soon came on the same airwaves and implored listeners to “*Annihilate* these Machiavellian plans of the enemy Inyenzi-Inkotanyi”.²² He then referred to the Tutsis as “cockroaches” (*inyenzi*) and warned that they were “preparing to overthrow the country”.²³

Incensed by the announcement and then dropped off at the doorstep of an exclusive Tutsi community, these amped-up armed men, arriving in Bugesera by the truckload, butchered scores of innocent civilians.²⁴ As described by Dina Temple-Raston:

[The] Interahamwe militia and the presidential guard arrived in Bugesera. Residents recalled the first sounds that evening were the wheezing of truck engines and the clattering of

¹⁸ Allan Thompson, “The Verdict: Summary Judgment from the Media Trial”, in Allan Thompson (ed.), *The Media and the Rwanda Genocide*, Pluto Press, Ann Arbor, MI, 2007, p. 286. Thompson goes on to note, however, that “[t]he Defence led a number of witnesses to counter these allegations, which in some cases date back to the 1970s”. The Chamber did not make findings on these factual allegations given that they were too remote to the crimes charged.

¹⁹ Gregory S. Gordon, *Atrocity Speech Law: Foundation, Fragmentation, Fruition*, Oxford University Press, Oxford, 2017, pp. 51–52.

²⁰ Aimable Twagilimana, *Historical Dictionary of Rwanda*, Rowman & Littlefield, London, 2007, p. 123.

²¹ Linda Melvern, *Conspiracy to Murder: The Rwandan Genocide*, Verso, London, 2006, pp. 26–28.

²² Temple-Raston, 2005, pp. 27–28, see above note 9.

²³ *Ibid.*, p. 28.

²⁴ *Ibid.*, p. 27.

metal. There was the dead sound of boots on the dirt. Orders barked. Then the tangled, unmistakable sound of commotion: short gasps, bare feet thumping across soft earth, small shrieks, and then the dull thud of body meeting ground. When the work was done, and it didn't take long, corpses lay along the streets frozen in twisted poses, limbs missing, eyes open in startled surprise. At first glance it might have appeared indiscriminate, proof of a world gone mad. Many of the dead looked of a piece: they were tall, thin, fine-featured, the color of café au lait. They lay in delicate repose, floating in muddy circles of blood. Truck engines roared back to life. Metal blades fell with a clatter into the truck beds. The killers melted back into the eucalyptus groves and the bottle green hills without a trace.

[...]

As Bugesera began to bury its dead, a group of men in Kigali were watching the events with satisfaction. It was the first phase in a grander plan meant to end this Tutsi problem in Rwanda once and for all.²⁵

Nonetheless, most in Rwanda, and in the international community at large, were appalled by the orchestrated slaughter in Bugesera. Bowing to the attendant pressure, President Habyarimana fired Nahimana from his ORINFOR post.²⁶ The defrocked former Office of Information chief was then slated to become Rwanda's ambassador to Germany.²⁷ Still, the Germans refused to admit him "because he was a known racist".²⁸ He next tried to reclaim his position at the university, but his colleagues there also protested against his return.²⁹

Nahimana, though, remained busy. At the beginning of 1993, he published an essay titled *Rwanda: Current Problems and Solutions*, which "called for the organization of [...] armed youth to fight 'the enemy', who were defined [...] implicitly as 'the Tutsi league', a veiled reference to the Tutsi population".³⁰ In March 1994, Nahimana recirculated the piece "amidst the ongoing initiative at that time to engage armed youth organi-

²⁵ *Ibid.*, pp. 28–29.

²⁶ *Ibid.*, p. 29.

²⁷ Des Forges, 1999, p. 85, see above note 17.

²⁸ Temple-Raston, 2005, pp. 29–30, see above note 9.

²⁹ Des Forges, 1999, p. 85, see above note 17.

³⁰ Thompson, 2007, p. 285, see above note 18.

zations such as the *Interahamwe* in attacks against the Tutsi population”.³¹ This is the month before the Hutu hardliners launched the genocide and were in the midst of the most intense preparation period. Although the Trial Chamber found that one possible interpretation of the essay was a call for the government to institute civil defence measures,³² the testimony of Rwanda expert Allison Des Forges indicated Nahimana’s writing was meant “to support the effort, then being organized within certain civilian and military circles, to prepare a large-scale mobilization of the civilian population to attack Tutsi”.³³ In other words, it was verbal priming for the imminent Rwandan Genocide.

In her book on the Rwandan Genocide, Des Forges leaves no doubt regarding her view of Nahimana’s intentions:

[28 March 1994] Ferdinand Nahimana sent around to members of the elite his call for “self-defense” originally circulated in February 1993 and asked for suggestions for a “*final solution*” to the current problems. In the document, he calls for national unity, condemns “the Tutsi league” with its plan for a “Hima empire” and insists that the elite not remain “unconcerned” but rather work with local administrators to rouse the population [...].³⁴

When *Rwanda: Current Problems and Solutions* was being drafted, Nahimana also began collaborating with Hutu hardliners to set up a radio station whose content, unlike that of Radio Rwanda, would not be dictated or limited by popular sentiment or international opinion. As noted by Des Forges, Nahimana “regained the opportunity to shape public opinion, this time through the most effective propaganda medium in Rwanda”.³⁵

3.2.3. Nahimana and the Founding of RTLM

To begin, he put together a “Comité d’Initiative” or “Steering Committee” from among his confreres in the hardliner community.³⁶ The Committee

³¹ *Ibid.*

³² Nahimana Case Trial Judgment, para. 667, see above note 12.

³³ *Ibid.*, para. 653.

³⁴ Des Forges, 1999, p. 240, see above note 17 (emphasis added).

³⁵ Nahimana Case Trial Judgment, para. 667, see above note 12.

³⁶ Tonja Salomon, “Freedom of Speech vs. Hate Speech: The Jurisdiction of ‘Direct and Public Incitement to Commit Genocide’”, in Ralph Henham and Paul Behrens (eds.), *The Criminal Law of Genocide: International, Comparative and Contextual Aspects*, Routledge, London, 2007, p. 113.

was culled from among these extremists and numbered six, including Nahimana himself as well as Jean-Bosco Barayagwiza, Stanislas Simbizi, a member of the CDR Executive Committee, Ignace Temahagari, who served as Committee Secretary, and Félicien Kabuga, an extremely wealthy and influential hard-line Hutu businessman, who served as Committee Chair.³⁷ Nahimana used his widespread network of contacts within the MRND to secure the necessary financing. The funds were provided from a group of founding members – financial contributors and shareholders – who comprised a good cross-section of Rwanda’s conservative and extremist Hutu elite. They included, among their ranks, leaders and members of the MRND, CDR and leaders of the *Interahamwe* militia.³⁸ Per Rwanda expert Linda Melvern:

The radio station had some very powerful patrons. A complete list of shareholders of RTL, some twenty-five pages long, starts with the major shareholder, President Habyarimana. It goes on to list all the members of his inner circle, the *Akazu*, businessmen, bank managers, journalists, army officers and government officials. The singer Simon Bikindi was a shareholder, as was Théoneste Bagosora [Rwandan Ministry of Defence Chief of Staff and key architect of the genocide]. He had more shares in the station than anyone else in either the army or the ministry of defence.³⁹

Once the seed money was procured, the Steering Committee, which Nahimana acknowledged was a “provisional Board of Directors”,⁴⁰ named him Chair of the Technical and Programming Committee.⁴¹ Thus, in this position, he moulded the station’s journalistic content. As described by Linda Melvern:

Nahimana [served] on RTL’s [...]. Comité d’Initiative which constituted a de facto board of directors because [...]

³⁷ Nahimana Case Trial Judgment, para. 491, see above note 12.

³⁸ *Ibid.*, para. 494. As noted below, President Juvenal Habyarimana ultimately became RTL’s largest shareholder with 200 shares. Colonel Théoneste Bagosora, considered to be the genocide’s central plotter and behind-the-scenes leader also became a shareholder. *Ibid.*, para. 508.

³⁹ Melvern, 2004, p. 55, see above note 21.

⁴⁰ Nahimana Case Trial Judgment, para. 498, see above note 12. RTL never held an election for a permanent Board of Directors. As a result, the “Steering Committee” continued to function as a Board of Directors for RTL until the station closed down at the end of the genocide.

⁴¹ *Ibid.*, para. 491.

the general assembly of shareholders never met to elect a board. Nahimana assumed the role of manager of the station and all the journalists of RTLM were recruited by him either directly or under his authority. [Nahimana attended] editorial meetings [that were held] to explain policy.⁴²

Nahimana later tried to argue that he exercised little control after RTLM’s initial founding. Nonetheless, a large quantity of evidence at trial belied his assertion. For example, document after document demonstrated his continued management responsibilities with respect to RTLM banking, corporate affairs, and public relations.⁴³ Nahimana himself confessed on the stand that during the February–March 1994 period, he reprimanded RTLM journalists identifying “Inkotanyi” (Tutsi) in an identified vehicle moving in a particular direction at a specific place and time.⁴⁴ The prosecution led a slew of witnesses who recounted interacting with and perceiving Nahimana as RTLM’s “main brain” or “leader”.⁴⁵ RTLM’s editor-in-chief, Gaspard Gahigi (via a videotaped interview played in court) spoke about Nahimana as RTLM’s “top man”.⁴⁶

Francois-Xavier Nsanzuwera, who had been chief Prosecutor in the Rwandan capital, gave testimony that established Nahimana’s direct control over RTLM’s content just before the beginning of the genocide. He explained that he had summoned Kantano Habimana to his office in March 1994 to be questioned regarding an incendiary March 1994 broadcast which called on “Hutu to massacre Tutsi”.⁴⁷ Habimana told Nsanzuwera that he had simply read a telegram given to him by his supervisor, Ferdinand Nahimana.⁴⁸ Significantly, Nsanzuwera went on to add:

[Habimana told him] that RTLM journalists were “small fish” and that with regard to some editorials, Nahimana was the one to write them and the journalists only read them. Nsanzuwera reported this conversation to Nkubito [the person named in the telegram who filed a complaint with the Prosecutor], who told him that if Nahimana was behind it

⁴² Melvern, 2004, p. 54, see above note 21.

⁴³ Nahimana Case Trial Judgment, paras. 506–508, see above note 12.

⁴⁴ *Ibid.*, para. 501.

⁴⁵ *Ibid.*, paras. 509–530.

⁴⁶ *Ibid.*, para. 511.

⁴⁷ *Ibid.*, para. 516.

⁴⁸ *Ibid.*, para. 517.

that meant the *Akazu* was behind RTLM and that Nsanzuwera should just drop it, otherwise they would get themselves killed.⁴⁹

The ICTR prosecutors' case-in-chief included substantial evidence establishing the nature of RTLM broadcasts from the station's founding until the start of the genocide. This content could roughly be subdivided into four categories: (1) general efforts to create animosity toward Tutsis (for example, mocking them for stereotypical physical features or criticizing them for economically exploiting Hutus);⁵⁰ (2) equating the terms *Inyenzi* and *Inkotanyi* with Tutsis in general (this was a critical strategy as it helped groom listeners to associate all of the country's ethnic minority (minus Twa) with these derogatory words);⁵¹ (3) acknowledging RTLM's reputation as anti-Tutsi and purveyors of Tutsi hate messages;⁵² and (4) particular instances of verbal assaults on Tutsis.⁵³ This last included airing names and locations of Tutsis who were physically attacked afterwards. For example, the Trial Chamber alluded to a 3 April 1994 transmission wherein Kantano Habimana complained about a doctor in Cyangugu. That individual was burnt alive in front of his residence three days later.⁵⁴

During this period, Nahimana, as RTLM's leader, was being put on notice by the government of the station's inappropriate persecutory messages. At trial, prosecution submissions included evidence of the Ministry of Information taking the RTLM Steering Committee to task for its pre-genocide programming. Thus, on 25 October 1993, the Ministry sent RTLM management a letter warning that its programs were "encouraging violence".⁵⁵ Also, the Minister of Information met with Nahimana, Barayagwiza, and Kabuga (November 1993 and February 1994) to put

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, paras. 345–355, 363–368. It should be pointed out that this portion of the Trial Chamber's decision also provides three examples of RTLM allowing speakers to counter its point of view on air: see *ibid.*, para. 348 (Vincent Ravi Rwabukwisi, editor of *Kanguka*); para. 350 (Landouald Ndasingwa, Vice Chair of the Liberal Party); and para. 351 (RPF leader Tito Rutaremara).

⁵¹ *Ibid.*, paras. 358–362.

⁵² *Ibid.*, paras. 353 ("So, those who think that our radio station sets people at odds with others will be amazed") and 356 (admitting people believe RTLM "creates tension", and "heats up heads").

⁵³ *Ibid.*, paras. 371–389.

⁵⁴ *Ibid.*, paras. 371–389.

⁵⁵ *Ibid.*, paras. 571–572.

them on notice again that RTLTM was stirring up ethnic hatred and violence and it needed to stop or severe measures would be taken.⁵⁶

3.2.4. RTLTM During the Genocide and Nahimana’s Role

The nature of RTLTM content post-genocide was also examined by the Trial Chamber. There was significant overlap, but the post-6 April 1994 material was much more intense and genocide focused. Plus, new categories of content were also identified: (1) broadcasts calling for a blanket extermination of all Tutsis;⁵⁷ (2) broadcasts reporting that extermination had taken place and praising it;⁵⁸ (3) broadcasts attacking UNAMIR;⁵⁹ (4) broadcasts downplaying the extermination or pressing the population to hide traces of it to preserve Rwanda’s image externally;⁶⁰ and (5) broadcasts providing directions to militia manning the roadblocks.⁶¹ The Trial Chamber highlighted one announcement that demonstrated unequivocally that Tutsis were being targeted for destruction because of their ethnicity. In the 4 June 1994 recording, Kantano Habimana declaimed:

One hundred thousand young men must be recruited rapidly. They should all stand up so that we kill the Inkotanyi and exterminate them, all the easier [...]. [The] reason we will exterminate them is that they belong to one ethnic group. Look at the person’s height and his physical appearance. Just look at his small nose and then break it.⁶²

Another frightful RTLTM broadcast from the previous month was nearly as explicit and chilling:

⁵⁶ *Ibid.*, paras. 573–607.

⁵⁷ *Ibid.*, para. 402 (recounting Kantano Habimana’s broadcast of 13 April 1994: “This never happened anywhere in the world, that a few individuals [Tutsis], a clique of individuals (agatsiko k’abantu) who want power [...] who want power [...] who are lying that they are defending the interest of a few people [...] who, thirsty for power [...] should be exterminated”).

⁵⁸ *Ibid.*, para. 403 (in an RTLTM broadcast of 2 July 2 1994, Kantano Habimana exulted in the extermination of the Tutsis: “So, where did all the Inkotanyi who used to telephone me go, eh? They must have been exterminated. [...] Let us sing: ‘Come, let us rejoice: the Inkotanyi have been exterminated! Come dear friends, let us rejoice, the Good Lord is just’”).

⁵⁹ *Ibid.*, para. 432.

⁶⁰ *Ibid.*, paras. 419–424.

⁶¹ *Ibid.*, para. 433 (describing a May broadcast in which Kantano Habimana directly encouraged those guarding the trenches against the “Inyenzi” to take drugs because it appears to make them “quite courageous”).

⁶² *Ibid.*, para. 396.

Let me congratulate thousands and thousands of young men I have seen this morning on the road in Kigali doing their military training to fight the Inkotanyi. At all costs, all Inkotanyi have to be exterminated, in all areas of our country. Some may say they are refugees, others act like patients, and others like sick nurses. Watch them closely, because Inkotanyi tricks are so many.⁶³

The genocidal bent of RTLM's on-air offerings is clear. Nonetheless, what was Nahimana's relationship with RTLM once the genocide began? At trial, he claimed no involvement at all, explaining that the Steering Committee ceased to function and the radio station was "kidnapped" by the army, which concededly turned it into a "tool for killing".⁶⁴ He testified to taking refuge at the French embassy and then being evacuated by French troops to Bujumbura, Burundi.⁶⁵ Once again, however, the record told a different story.

First, by Nahimana's own admission, he visited the RTLM studios on 8 April 1994 and spoke with the journalists.⁶⁶ That may not have been much in and of itself but, when combined with other evidence, appears much more damning. What was that additional evidence? First, during a 25 April 1994 interview on Radio Rwanda (while he was in Kigali's Cyangugu neighbourhood, that is, still in Rwanda), Nahimana described himself as "one of the founders of RTLM" and recounted an exchange he had with the former Burundian Ambassador to Kigali. Nahimana said he told the Burundian that he was "very happy because I have understood that RTLM is instrumental in awakening the majority people".⁶⁷ Nahimana added that "today's wars are not fought using bullets only, it is also a war [sic] of media, words, newspapers and radio stations".⁶⁸ Referring to RTLM and Radio Rwanda, he concluded: "We were satisfied with both radio stations because they informed us on how the population from all corners of the country had stood up and worked together with our armed

⁶³ Temple-Raston, 2005, p. 231, see above note 9.

⁶⁴ Nahimana Case Trial Judgment, para. 538, see above note 12.

⁶⁵ *Ibid.*, para. 541.

⁶⁶ *Ibid.*, para. 538.

⁶⁷ *Ibid.*, para. 539.

⁶⁸ *Ibid.*

forces, the armed forces of our country with a view to halting the enemy”.⁶⁹

Journalist Philippe Dahinden was put on the stand at Nahimana’s trial and told the judges that he met with the RTLM founder during the genocide, on 9 and 15 June 1994. Dahinden had previously testified before the UN Human Rights Commission that, as “the spiritual leader and kingpin of RTLM” and “the main ideologue behind Hutu extremism”, Nahimana should be prosecuted for war crimes.⁷⁰

In respect of the 9 June 1994 meeting, Dahinden was meant to interview the President of the Interim Government, Theodore Sindikubwabo. Apparently, the President was not available but had Nahimana, who was working as his “Political Adviser”, meet with him instead.⁷¹ Nahimana admitted at trial to using the title “Adviser to the President” during the genocide (and the Trial Chamber noted that he travelled with the President to various foreign destinations on official trips).⁷² During the 9 June 1994 meeting, Dahinden asked Nahimana whether he knew about the statement Dahinden had made, mentioning him, to the UN Human Rights Commission. Nahimana said he knew about it.⁷³ He did not indicate to Dahinden that he disapproved of the RTLM broadcasts.⁷⁴

For the 15 June 1994 meeting, Dahinden had again requested a meeting with the President. This time, Nahimana and Barayagwiza met him. During this meeting, Dahinden asked whether RTLM was still operating. Nahimana and Barayagwiza told him that RTLM was about to be transferred from Kigali to Gisenyi. Dahinden stated that it was his goal to set up a radio station in the region. Barayagwiza responded, in a jovial manner, apparently with Nahimana indicating nothing to the contrary, that Dahinden’s radio station would compete with RTLM.⁷⁵

However, the most condemnatory evidence linking Nahimana to RTLM during the genocide came from prosecution expert witness Alison Des Forges. Per Des Forges, in early May 1994, Nahimana was seen en-

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, para. 541.

⁷¹ *Ibid.*, para. 565.

⁷² *Ibid.* Nahimana asserted, however, that the title was “less than real”.

⁷³ He denied, though, that he was the head of RTLM. *Ibid.*, para. 542.

⁷⁴ *Ibid.*, para. 564.

⁷⁵ *Ibid.*

tering the Ministry of Defense in the company of RTLTM Provisional Director Phocas Habimana.⁷⁶ Even more damning, Des Forges also informed the Trial Chamber that in late June a French diplomat, Ambassador Yannick Gerard, told Nahimana that the broadcasts were deplorable and must stop, particularly those threatening General Dallaire and UN-AMIR.⁷⁷ Nahimana promised to intervene with the journalists and Gerard reported that RTLTM attacks on General Dallaire and UNAMIR halted promptly thereafter.⁷⁸

In her book *Justice on the Grass: Three Rwandan Journalists, Their Trial for War Crimes and a Nation's Quest for Redemption*, journalist Dina Temple-Raston provided another perspective of just how bad Des Forges's testimony was for Nahimana:

There were reams of evidence to suggest that Nahimana was in charge of Radio Mille Collines after the genocide began, Des Forges told the court. There were stock purchase receipts and receipts for financial transactions out of Nahimana's personal account. There was a letter from the then-Rwandan minister of defense authorizing RTLTM to possess firearms. Nahimana shared his bank account with RTLTM, and RTLTM mingled its funds with his own. But by far the most damning evidence, Des Forges said, was that Nahimana never tried to stop RTLTM's venomous broadcasts. He didn't distance himself from the radio station's work until he arrived at the tribunal. "If he really did not agree with RTLTM,

⁷⁶ *Ibid.*, para. 543. Hearsay evidence was admissible at the ICTR. See ICTR, Rules of Procedure and Evidence, 29 June 1995, amended 6 July 2002, Rule 89 (<http://www.legal-tools.org/doc/0b0d43/>).

⁷⁷ Nahimana Case Trial Judgment, para. 543, see above note 12.

⁷⁸ *Ibid.*, paras. 506–508. At trial, Nahimana denied going to the Ministry of Defense with Phocas Habimana. *Ibid.*, para. 543. He also denied that French officials spoke to him about RTLTM. He acknowledged meeting with them, but said they only talked about "Opération Turquoise", the French military establishment of a "safe zone" to evacuate those fleeing the victorious RPF forces that were capturing most of Rwanda. The source cited for the information about Nahimana's conversation with Gerard was a 28 February 2000 interview with Jean-Christophe Belliard of the French Foreign Ministry, based on a French diplomatic telegram from which he was reading. Des Forges testified that Belliard was with Gerard when he met with Nahimana. *Ibid.*, para. 543. In hearings of the French National Assembly on Rwanda, extracts of which were introduced into evidence at trial, Opération Turquoise was discussed and Belliard's meeting with Nahimana was mentioned. In the report of the hearings, Nahimana was referred to three times as the "Director" of RTLTM. *Ibid.*, para. 544.

he could have disassociated himself by resigning, but he never did”, she said.⁷⁹

3.2.5. Nahimana’s ICTR Arrest and Conviction

After the genocide, Nahimana fled Rwanda and eventually found his way to Cameroon, where he was arrested on 27 March 1996. Pursuant to Articles 2 and 3 of the ICTR Statute, the Tribunal charged him with seven counts: conspiracy to commit genocide (based on the institutional linkage between RTLM and the anti-Tutsi newspaper *Kangura*); instigation to genocide (advocacy for genocide when the crime is committed and the advocacy made a substantial contribution); direct and public incitement to commit genocide (advocacy not necessarily leading to commission, that is, an inchoate crime); complicity in genocide and crimes against humanity (persecution and extermination).⁸⁰

Under Article 6 of the Statute (Individual Criminal Responsibility), these charges against Nahimana were pursuant to 6(1), that is, direct commission, but also pursuant to 6(3), superior responsibility, in respect of direct and public incitement to commit genocide and crimes against humanity (persecution), not for the other charged crimes (that is, genocide and crimes against humanity (extermination and murder)).⁸¹ Barayagwiza was arrested in the same raid and charged with the same crimes although supplemented in reference to his CDR leadership offenses (thus CAH-murder was included in his indictment).⁸² Another Hutu extremist journalist, Hassan Ngeze, editor-in-chief of the radically anti-Tutsi newspaper *Kangura*, was arrested in Kenya in 1997 and also charged with similar crimes.⁸³

Their cases were combined and prosecuted jointly before ICTR Trial Chamber I in a proceeding dubbed the “Media Trial”.⁸⁴ The bench consisted of Navanethem Pillay (South Africa), presiding, Erik Møse (Norway), and Asoka de Zoysa Gunawardana (Sri Lanka). After trial began on 23 October 2000, the judges were at last ready to deliver their verdict

⁷⁹ Temple-Raston, 2005, p. 167, see above note 9.

⁸⁰ Nahimana Case Trial Judgment, para. 8, see above note 12.

⁸¹ *Ibid.* As we shall see below, the failure to charge genocide and CAH (extermination) would result in certain portions of Nahimana’s convictions being overturned.

⁸² *Ibid.*, para. 14.

⁸³ *Ibid.*, para. 19.

⁸⁴ Temple-Raston, 2005, p. 167, see above note 9.

nearly fifty months later, on 3 December 2003. It soon became apparent, as the decision was being read by Judge Pillay, that the Trial Chamber found that RTLM (along with *Kangura* and the CDR) played an integral role in the perpetration of the Rwandan Genocide. According to Judge Pillay:

The Defence contends that the downing of the President's plane and the death of President Habyarimana precipitated the killing of innocent Tutsi civilians. The Chamber accepts that this moment in time served as a trigger for the events that followed. That is evident. But if the downing of the plane was the trigger, then RTLM, *Kangura* and CDR were the bullets in the gun. The trigger had such a deadly impact because the gun was loaded. The Chamber therefore considers the killing of Tutsi civilians can be said to have resulted, at least in part, from the message of ethnic targeting for death that was clearly and effectively disseminated through RTLM, *Kangura* and CDR; before and after 6 April 1994.⁸⁵

In the words of Dina Temple-Raston: "It was clear that the radio station, had it been on the docket, would have been found guilty".⁸⁶

Nevertheless, what about Ferdinand Nahimana? In the first instance, the Trial Chamber noted proof of his intent:

Ferdinand Nahimana, in a Radio Rwanda broadcast on 25 April 1994, said he was happy that RTLM had been instrumental in awakening the majority people, meaning the Hutu population, and that the population had stood up with a view to halting the enemy. At this point in time, mass killing in which RTLM broadcasts were playing a significant part - had been ongoing for almost three weeks. Nahimana associated the enemy with the Tutsi ethnic group. His article *Current Problem und Solutions*, published in February 1993 and recirculated in March 1994, referred repeatedly to what he termed as the "Tutsi League", a veiled reference to the Tutsi population as a whole, and associated this group with the enemy of democracy in Rwanda. As the mastermind of RTLM, Nahimana set in motion the communications weaponry that fought the "war of media, words, newspapers and radio sta-

⁸⁵ Nahimana Case Trial Judgment, para. 953, see above note 12.

⁸⁶ Temple-Raston, 2005, p. 233, see above note 9. Temple-Ralston probably meant to write "in the dock".

tions” he described in his Radio Rwanda broadcast of 25 April as a complement to bullets. Nahimana also expressed his intent through RTLM, where the words broadcast were intended to kill on the basis of ethnicity, and that is what they did.⁸⁷

The panel held that Nahimana exercised control over the radio station both before and after the genocide. Regarding the former:

The broadcasts collectively conveyed a message of ethnic hatred and a call for violence against the Tutsi population [...]. As board members responsible for RTLM, including its programming, Nahimana and Barayagwiza were responsible for this message and knew it was causing concern, even before 6 April 1994 and as early as October 1993 when they received a letter from the Rwandan Minister of Information. Their supervisory role in RTLM was acknowledged and exercised by them in their defence of the radio at meetings in 1993 and 1994 with the Minister. In the face of his concern, both Barayagwiza and Nahimana knew that RTLM programming was generating concern defended the programming in their meetings with him. To the extent that they acknowledged there was a problem and tried to address it, they demonstrated their own sense of responsibility for RTLM programming. Ultimately, the concern was not addressed and RTLM programming followed its trajectory, steadily increasing in vehemence and reaching a pitched frenzy after 6 April.⁸⁸

As for the post-genocide period, the Chamber ruled:

After 6 April 1994, although the evidence does not establish the same level of active support, it is nevertheless clear that Nahimana and Barayagwiza knew what was happening at RTLM and failed to exercise the authority vested in them as office-holding members of the governing body of RTLM, to prevent the genocidal harm that was caused by RTLM programming. That they had the *de facto* authority to prevent this harm is evidenced by the one documented and successful intervention of Nahimana to stop RTLM attacks on UN-AMIR and General Dallaire. Nahimana and Barayagwiza informed Dahinden when they met him in June 1994 that

⁸⁷ Nahimana Case Trial Judgment, para. 966, see above note 12.

⁸⁸ *Ibid.*, para. 971.

RTLM was being moved to Gisenyi. Together with Barayagwiza's jovially competitive remark about Dahinden's radio initiative, this conversation indicates the sense of continuing connection with RTLM that Nahimana and Barayagwiza maintained at that time.⁸⁹

Yet, the judges particularly focused on Nahimana's liability in this regard:

The Chamber notes Nahimana's particular role as the founder and principal ideologist of RTLM. RTLM was a creation that sprang from Nahimana's vision more than anyone else. It was his initiative and his design, which grew out of his experience as Director of ORINFOR and his understanding of the power of the media. The evidence indicates that Nahimana was satisfied with his work. In a broadcast on Radio Rwanda on 25 April 1994, he said, "I am very happy because I have understood that RTLM is instrumental in awakening the majority people". His communications with Dahinden in June 1994 do not indicate that he and Barayagwiza felt otherwise. Although Nahimana disclaimed responsibility for RTLM broadcasting after 6 April, the Chamber considers this disclaimer too facile. Nahimana's interview on Radio Rwanda took place while the genocide was underway; the massacre of the Tutsi population was ongoing. Nahimana was less actively involved in the daily affairs of RTLM after 6 April 1994, but RTLM did not deviate from the course he had set for it before 6 April 1994. As found in paragraph 486, the broadcasts intensified after 6 April and called explicitly for the extermination of the Tutsi population. The programming of RTLM after 6 April built on the foundations created for it before 6 April. RTLM did what Nahimana wanted it to do. It was "instrumental in awakening the majority population" and in mobilizing the population to stand up against the Tutsi enemy. RTLM was Nahimana's weapon of choice, which he used to instigate the killing of Tutsi civilians.⁹⁰

Based on the evidence, Trial Chamber I convicted Nahimana of genocide, direct and public incitement to commit genocide, conspiracy to commit genocide, and crimes against humanity (extermination and perse-

⁸⁹ *Ibid.*, para. 972.

⁹⁰ *Ibid.*, para. 974.

cution).⁹¹ It sentenced him to life in prison.⁹² Dina Temple-Raston explains how Nahimana and the other Media Trial defendants were perceived to be an integral part of the plan for genocide:

Other courtrooms at the tribunal by October 2002 had pieced together the broad details of how the genocide was planned. Colonel Theoneste Bagosora, a former director of the cabinet in the Rwandan Ministry of Defense, was on trial for its orchestration [...]. Major General Augustin Bizimana, the defense minister, was on trial for the actions of the Rwandan army and the presidential guard, for which he was responsible. Businessman Felicien Kabuga, one of the financiers behind RTLM, was accused of providing cash and weapons to finance the massacres. In that context, prosecutors said the media trial trio provided the final piece: the defendants were in charge of stoking the fires with ideological motivation and justification.⁹³

3.3. Judge Theodor Meron and the Media Case

3.3.1. Background: From Holocaust Survivor to International Judge

Theodor Meron’s trajectory toward the international criminal bench might seem the stuff of movies. Born in 1930 to a middle-class Jewish family in the small town of Kalisz, Poland, Meron was nine years old when the Nazi *Blitzkrieg* overwhelmed Poland.⁹⁴ In the occupation that followed, the Germans slaughtered nearly all 20,000 Jews of Kalisz. However, Meron managed to survive. His nightmare odyssey of ghettoization, forced labour camps, and the murder of most of his family, ended with his liberation in 1945 and his flight to Mandate Palestine.⁹⁵ Meron has said of his

⁹¹ *Ibid.*, para. 1092. The Trial Chamber found all three defendants guilty of conspiracy to commit genocide, genocide, direct and public incitement to commit genocide and persecution and extermination as crimes against humanity. All three were acquitted on the counts of complicity in genocide and murder as a crime against humanity. Barayagwiza was also found guilty of serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.

⁹² *Ibid.*, para. 1105. Ngeze was also sentenced to life in prison. Barayagwiza was sentenced to life imprisonment too but the decision reduced the sentence to thirty-five years in light of alleged procedural violations of his rights. *Ibid.*, paras. 1106–1107.

⁹³ Temple-Raston, 2005, pp. 201–202, see above note 9.

⁹⁴ Michael Bazyler, *Holocaust, Genocide, and the Law: A Quest for Justice in a Post-Holocaust World*, Oxford University Press, New York, NY, 2016, p. 242.

⁹⁵ *Ibid.*

childhood: “Surviving in ghettos, hiding in lofts, losing most of my family and spending several years in a forced labour camp is not something I would wish for any child”.⁹⁶

The extreme travails of his childhood meant that “education soon became an obsession”. So once in Palestine, he resumed his studies at a Jewish high school and then rendered military service to the new State of Israel.⁹⁷ Yet, his educational development was just beginning because the “impact of the war led him into international law in particular the fields which held the promise of reducing the risk of the atrocities, violence and chaos he had experienced during his childhood”.⁹⁸ Thus, his high school degree was followed by law studies at the University of Jerusalem (M.J., 1954), Harvard University (LL.M., 1955 and J.S.D., 1957), and the University of Cambridge (Diploma in Public International Law).⁹⁹

While at Cambridge, Meron was approached by Shabtai Rosenne, then the Legal Adviser of the Israeli Foreign Ministry. Rosenne offered Meron a job in the Ministry and he accepted.¹⁰⁰ He spent the next twenty years in Israeli government service, replacing Rosenne as Legal Adviser along the way (in 1967, right after the Six-Day War). During those twenty years, he also occupied other positions, including Israeli Ambassador to Canada, Permanent Representative to the Israeli Mission at the United Nations in Geneva, and member of the Permanent Mission of Israel to the United Nations in New York.¹⁰¹

Within weeks of becoming the Ministry of Foreign Affairs Legal Adviser, Meron was requested to counsel the Prime Minister regarding the legality of establishing civilian settlements in the occupied West Bank, the Golan Heights, and Gaza.¹⁰² Meron advised that the civilian settlements would violate the Fourth Geneva Convention as well as property rights of the Arab inhabitants, premised on the view that there was a state of occu-

⁹⁶ Shehzad Charania, “A Life of Legal Principle, Not of Politics – An Interview with Theodor Meron”, in *Justice in Conflict*, 27 July 2016 (available on its web site).

⁹⁷ Theodor Meron, *The Making of International Criminal Justice: A View from the Bench*, Oxford University Press, New York, NY, 2011, p. 3.

⁹⁸ Charania, 2016, see above note 96.

⁹⁹ Meron, 2011, pp. 3–4, see above note 97; New York University School of Law, “Theodor Meron – Overview” (available on its web site).

¹⁰⁰ Meron, 2011, p. 4, see above note 97.

¹⁰¹ *Ibid.*, pp. 4–6.

¹⁰² Meron, 2011, p. 5, see above note 97.

pation.¹⁰³ The Israeli government did not heed his advice and the settlements were established. Meron later noted: “To the credit of the Israeli government, I must note that there were no repercussions, of which I am aware, from my unpopular opinion”.¹⁰⁴

During his service in the Israeli government, Meron had ample opportunity to write academic articles and became a frequent contributor to the *American Journal of International Law* (for which he would serve as Editor-in-Chief in the 1990s).¹⁰⁵ As he later put it, “the call of academia was becoming irresistible”.¹⁰⁶ In the mid-1970s the Israeli Foreign Ministry granted him a year’s leave, with funding from a Rockefeller Foundation grant, to write a book in New York about the UN Secretariat.¹⁰⁷ During this time he was teaching part time at NYU Law, which offered him a full-time faculty position that he accepted in 1977.¹⁰⁸

In the years that followed, Meron’s services were also used by the United States government, which ultimately granted him citizenship in 1984. In 2000-2001, he served as Counsellor on International Law in the US Department of State. Prior to that, in 1990, he served as a Public Member of the United States Delegation to the CSCE Conference on Human Dimensions in Copenhagen. In 1998, he was a member of the United States Delegation to the Rome Conference on the Establishment of an International Criminal Court (‘ICC’) and played a part in drafting the provisions on substantive offences, including war crimes and crimes against humanity. He has also served on the Preparatory Commission for the establishment of the ICC, with particular responsibilities for the definition of the crime of aggression.¹⁰⁹ Meron has also been a member of the American Council on Foreign Relations, the American Branch of the International Law Association and the New York State Bar.¹¹⁰

¹⁰³ *Ibid.*, p. 6.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.* The eventual book was titled *The United Nations Secretariat: The Rules and the Practice*.

¹⁰⁸ *Ibid.*

¹⁰⁹ “Theodor Meron – Overview”, see above note 99.

¹¹⁰ *Ibid.* Meron’s *curriculum vitae* is extensive and also includes service to the International Committee for the Red Cross and teaching stints at other universities around the world.

In 2001, the United States nominated Meron as a judge for the ICTY.¹¹¹ He was elected a judge by the UN General Assembly on 14 March 2001 and designated as a member of the Appeals Chamber on 23 November 2003. The Appeals Chamber operated on behalf of both the ICTY and the ICTR. As an Appeals Chamber judge, Meron would be president of the ICTY on two separate occasions – from 2003 to 2005 and from 2011 to 2015.¹¹²

3.3.2. The Media Case Appeals Chamber Judgment

3.3.2.1. Filing of the Appeal

Soon after the 3 December 2003 Trial Chamber judgment against them, Nahimana, Barayagwiza and Ngeze filed respective notices of appeal. As it happened, the Appeals Chamber panel assigned to consider Nahimana's appeal (as well as that of the other two defendants) consisted of the following judges: (1) Fausto Pocar, presiding (Italy); (2) Mohamed Shahabuddeen (Guyana); (3) Mehmet Güney (Turkey); (4) Andréia Vaz (Senegal); and (5) Theodor Meron.¹¹³

Nahimana's appellate brief raised three principal points of error in the Trial Chamber's decision: (1) he challenged all of the interlocutory decisions rendered on issues relating to the validity of the proceedings; (2) he alleged errors of law and fact in connection with the rules of a fair trial; and (3) he claimed errors of law and fact related to the decision on the merits. Nahimana's arguments regarding validity and fair trial violations were dismissed by the Appeals Chamber.¹¹⁴

¹¹¹ Charania, 2016, see above note 96.

¹¹² International Criminal Tribunal for the former Yugoslavia, "Former Presidents", section about Judge Theodor Meron (USA) (available on its web site).

¹¹³ ICTR, *Prosecutor v. Ferdinand Nahimana et al.*, Appeals Judgment, 28 November 2007, ICTR-99-52-A ('Nahimana Case Appeals Judgment') (<https://www.legal-tools.org/doc/4ad5eb/>).

¹¹⁴ See, for example, *ibid.*, para. 224 (rejecting argument that late filing of broadcast translations caused prejudice); para. 226 (rejecting argument regarding admission of evidence); para. 229 (amending the prosecution list found not to be prejudicial); para. 235 (argument regarding obstruction to defence investigation found not to have merit); and para. 257 (no proof that right to have defence witnesses appear under the same condition as prosecution witnesses was violated).

3.3.2.2. The Majority Decision

3.3.2.2.1. Incitement and Persecution Convictions Upheld

Moreover, on the merits, the main grounds for conviction against Nahimana were upheld. In particular, the Appeals Chamber left undisturbed those portions of the judgment analysing the elements of direct and public incitement to genocide.¹¹⁵ In the most germane portion of the decision regarding incitement, the panel held:

The Appeals Chamber considers that the Trial Chamber did not alter the constituent elements of the crime of direct and public incitement to commit genocide in the media context (which would have constituted an error) [...]. Furthermore, the Appeals Chamber notes that several extracts from the [Trial Chamber] Judgment demonstrate that the Trial Chamber did a good job of distinguishing between hate speech and direct and public incitement to commit genocide [...]. The Appeals Chamber will now turn to the Appellants’ submissions that the Trial Chamber erred (1) in considering that a speech in ambiguous terms, open to a variety of interpretations, can constitute direct incitement to commit genocide, and (2) in relying on the presumed intent of the author of the speech, on its potential dangers, and on the author’s political and community affiliation, in order to determine whether it was of a criminal nature. The Appellants’ position is in effect that incitement to commit genocide is direct only when it is explicit and that under no circumstances can the Chamber consider contextual elements in determining whether a speech constitutes direct incitement to commit genocide. For the reasons given below, the Appeals Chamber considers this approach overly restrictive.¹¹⁶

Similarly, the Appeals Chamber affirmed the convictions based on hate speech as crimes against humanity (persecution). The Trial Chamber had found that “hate speech targeting a population on the basis of ethnicity, or other discriminatory grounds, reaches a sufficient level of gravity [as required by the case law] and constitutes persecution under Article 3(h) of its Statute”.¹¹⁷ The judges then elaborated:

¹¹⁵ *Ibid.*, para. 695.

¹¹⁶ *Ibid.*, paras. 696–697.

¹¹⁷ *Ibid.*

In [*Prosecutor v. Ruggiu*, the guilty plea of an RTLM announcer], the Tribunal so held, finding that the radio broadcasts of RTLM, in singling out and attacking the Tutsi ethnic minority, constituted a deprivation of “the fundamental rights to life, liberty and basic humanity enjoyed by members of the wider society”. Hate speech is a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human. The denigration of persons on the basis of their ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm [...]. Unlike the crime of incitement, which is defined in terms of intent, the crime of persecution is defined also in terms of impact. It is not a provocation to cause harm. It is itself the harm. Accordingly, there need not be a call to action in communications that constitute persecution.¹¹⁸

On appeal, Nahimana and his co-defendants argued that hate speech could not serve as the *actus reus* for the persecution offence because it was not criminalized under customary international law. The Appeals Chamber (by a four to one majority, Meron dissenting) rejected this argument. The majority concentrated on the issue of whether hate speech violated fundamental rights and whether the gravity threshold was met.¹¹⁹ Affirming the Trial Chamber’s approach, it held that hate speech *per se* violates the right to human dignity, and hate speech “inciting to violence” violates the right to security (the panel also pointed out that hate speech on its own could not violate rights to life or physical integrity as it would require intermediate actors to cause the harm necessary to amount to a violation of these rights).¹²⁰

With respect to the gravity requirement, the four majority judges declared that they did not need to rule on whether “mere hate speeches not inciting violence” could rise to the requisite level of gravity, because a

¹¹⁸ Nahimana Case Trial Judgment, paras. 1072–1073, see above note 12.

¹¹⁹ Nahimana Case Appeals Judgment, paras. 986–987, see above note 113.

¹²⁰ *Ibid.*, para. 986. I have been critical of this portion of the Appeals Chamber judgment as the panel squandered a golden opportunity to clarify whether hate speech on its own, as part of a widespread or systematic attack directed against a civilian population, can constitute the *actus reus* for crime-against-humanity persecution. Gordon, 2017, pp. 233–234, 335–336, see above note 19.

cumulative approach had to be taken with reference to all relevant broadcasts. Thus, in the case before it, hate speech was

accompanied by calls for genocide against the Tutsi group and [took] place in the context of a massive campaign of persecution directed at the Tutsi population of Rwanda, this campaign being also characterized by acts of violence (killings, torture and ill-treatment, rapes ...) and of destruction of property”.¹²¹

3.3.2.2.2. Portions of the Trial Chamber Judgment Reversed

One of the defendants’ key areas of success on appeal was in relation to pre-1994 hate speech. The Appeals Chamber found that, based on the evidence, certain pre-genocide rhetoric could not be considered incitement beyond a reasonable doubt.¹²² It also held that the pre-1994 conduct of the defendants, which the Trial Chamber considered part of the incitement crimes at issue (via the “continuing offence doctrine”, according to which speech that first arose in 1993 “continues” until commission of the target offense in 1994), was outside the ICTR’s temporal jurisdiction. So this meant a reduction of the defendants’ respective sentences.¹²³

The defendants prevailed on other points too. First, the Appeals Chamber invalidated the convictions for instigation to genocide, incitement to genocide, and crimes against humanity (extermination and persecution) premised on Article 6(1) liability – that is, Nahimana’s direct “commission” of the crimes (namely, the illicit broadcasts). The Chamber refused to uphold the finding of instigation (advocacy calling for crime that actually results in a crime being committed and establishing a substantial contribution between the speech and the crime’s commission) because it concluded that the contribution element could not be satisfied. Although the Chamber held that it was reasonable to conclude that certain RTLTM broadcasts substantially contributed to murders, there was not sufficient evidence of Nahimana’s playing “an active role in broadcasts instigating the killing of Tutsi, or that he had used RTLTM for such purpose”.¹²⁴

Similarly, because he played no active role in broadcasts *inciting* the killing of Tutsis (that is, speech that did not necessarily lead to vio-

¹²¹ Nahimana Case Appeals Judgment, para. 988, see above note 113.

¹²² See, for example, *ibid.* paras. 740–751.

¹²³ See, for example, *ibid.* para. 314.

¹²⁴ *Ibid.*, para. 599.

lence), he could not be liable for such incitement in respect of Article 6(1) (that is, for direct commission). (Thus, Nahimana’s incitement conviction was based on Article 6(3) liability – that is, superior responsibility for the acts of RTLM announcers – superior position, effective control, knowledge of subordinates committing criminal acts and failure to prevent or punish the criminal acts.)¹²⁵

The same was true for Nahimana’s crimes against humanity convictions (for extermination and persecution) premised on Article 6(1) liability, which were vacated.¹²⁶ Nonetheless, for the same reasons proffered by the Chamber in respect of incitement, the persecution conviction based on Article 6(3) superior responsibility was upheld.¹²⁷ Finally, Nahimana’s conspiracy conviction was thrown out (as were the ones for Barayagwiza and Ngeze) because an inference of possible motives other than a genocide cabal (that is, promoting “Hutu Power” ideology) could have been drawn regarding evidence of institutional linkage between RTLM and *Kangura*.¹²⁸ Thus, conspiracy had not been proven beyond a reasonable doubt.¹²⁹

3.3.2.2.3. The Impact on Nahimana’s Sentence

In light of all this, the Appeals Chamber then considered the appropriate sentence. It rejected Nahimana’s pleas for a reduction in sentence based on his lack of direct commission of the offences (that is, the genocidal broadcasts), his civilian status, making himself available to judicial authorities before arrest and fully participating in the trial, and the claim that opposing the RTLM broadcasts would have exposed him and his family to danger, as well as the testimony of defence witnesses that he refused to adhere to extremist ideologies.¹³⁰

Instead, the panel emphasized the Trial Chamber’s conclusion that the life sentence was based on the following: (1) the crimes of which Nahimana was convicted were of the gravest kind; (2) he was involved in the

¹²⁵ *Ibid.*, para. 857.

¹²⁶ *Ibid.*, paras. 942, 996.

¹²⁷ *Ibid.*, paras. 996.

¹²⁸ *Ibid.*, paras. 910, 912.

¹²⁹ *Ibid.*, para. 912.

¹³⁰ *Ibid.*, para. 1044.

planning of the criminal activities; and (3) he abused his authority and betrayed the trust placed in him.¹³¹

Nevertheless, given the vacated portions of the guilt finding, the Chamber reduced the life sentence to 30 years (with credit being given, under Rule 101(D) of the ICTR Rules of Procedure and Evidence, for the period already spent in detention).¹³² In doing so, it noted that the extent of the reduction was being made with Judge Meron dissenting.¹³³ The next section of this chapter will take up his partial dissent.

3.3.3. Judge Meron’s Partial Dissent and American Free Speech Exceptionalism

3.3.3.1. Background Part 1: The Other Dissents

Four partly dissenting opinions were appended to the majority opinion. Presiding Judge Fausto Pocar’s was brief but its import was clear – he thought the majority opinion took too restrictive of an approach to liability. His first concern related to the narrow timeframe adopted by the majority – Judge Pocar believed the panel should have been able to take into account acts of conspiracy and incitement that commenced prior to 1994 and continued after 1 January 1994.¹³⁴ He wrote: “Insofar as offences are repeated over time and are linked by a common intent or purpose, they must be considered as a continuing offence, that is a single crime”.¹³⁵ Additionally, he wished to criticize the majority for not providing a definitive ruling as to whether hate speech, standing on its own and not explicitly calling for violence, could serve as the *actus reus* for the persecution offence. He opined that “the hate speeches broadcast on RTLM by Appellant Nahimana’s subordinates [...] amounted to a violation of equivalent gravity as other crimes against humanity”.¹³⁶

Judge Shahabuddeen’s partial dissent was longer and more substantial. He agreed with Judge Pocar that non-advocacy hate speech, on its own, should satisfy persecution’s conduct requirement. This is so because

¹³¹ *Ibid.*, para. 1045. The Appeals Chamber also noted that no representations regarding sentencing were made on Nahimana’s behalf at trial.

¹³² *Ibid.*, para. 1052.

¹³³ *Ibid.*

¹³⁴ *Ibid.*, Partially Dissenting Opinion of Judge Fausto Pocar, para. 2.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*, para. 3.

such speech is made as part of a widespread or systematic attack directed against a civilian population.¹³⁷ Further, Judge Shahabuddeen registered his view that, in contrast to the civil law's restrictive approach, conspiracy to commit genocide need only be proved by the agreement itself, not any additional overt acts – the approach of common law jurisdictions “in respect of the most heinous of crimes”.¹³⁸

Judge Shahabuddeen also dissented based on his view that the crime of direct and public incitement to commit genocide is a “continuous crime”, and thus pre-1994 instances of incitement could be counted in assessing the defendants' liability.¹³⁹ Other grounds for Judge Shahabuddeen's partial dissent included: (1) a pre-jurisdictional attack can extend the later jurisdictional period so as to coexist with an attack on the civilian population during the latter period;¹⁴⁰ (2) in respect of Ngeze, the pre-1994 *Kangura* publications constituted enough evidence of incitement to commit genocide;¹⁴¹ (3) in any event, there was enough evidence that, in the jurisdictional year of 1994, *Kangura* published inciting material;¹⁴² (4) there was enough evidence that, in 1994, RTLM broadcast inciting material;¹⁴³ (5) the Trial Chamber had enough evidence that the appellants personally collaborated with the specific purpose of committing genocide;¹⁴⁴ (6) there was ample evidence on which the Trial Chamber could reasonably find that incitement by the appellants through both *Kangura* and RTLM was direct.¹⁴⁵

Previewing Judge Meron's partial dissent, and pushing against it, Judge Shahabuddeen concluded thus:

¹³⁷ *Ibid.*, Partially Dissenting Opinion of Judge Mohamed Shahabuddeen, para. 9. In fact, Judge Shahabuddeen's partial dissent on this point is complex and masterfully reasoned. For a complete analysis of the dissent, see Gregory S. Gordon, “Hate Speech and Persecution: A Contextual Approach”, in *Vanderbilt Journal of Transnational Law*, 2013, vol. 46, no. 2, 2013, pp. 337–339.

¹³⁸ Nahimana Case Appeals Judgment, Partially Dissenting Opinion of Judge Mohamed Shahabuddeen, paras. 2, 5, see above note 113.

¹³⁹ *Ibid.*, paras. 21, 35.

¹⁴⁰ *Ibid.*, paras. 36–39.

¹⁴¹ *Ibid.*, paras. 40–45.

¹⁴² *Ibid.*, paras. 46–51.

¹⁴³ *Ibid.*, paras. 52–56.

¹⁴⁴ *Ibid.*, paras. 57–64.

¹⁴⁵ *Ibid.*, paras. 65–72.

The case is apt to be portrayed as a titanic struggle between the right to freedom of expression and abuse of that right. That can be said, but only subject to this: No margin of delicate appreciation is involved. The case is one of simple criminality. The appellants knew what they were doing and why they were doing it. They were consciously, deliberately and determinedly using the media to perpetuate direct and public incitement to commit genocide. The concept of guilt by association is a useful analytical tool, but, with respect, it can also be a battering ram; in my opinion, there is no room for its employment here. It was the acts of the appellants which led to the deeds which were done: a causal nexus between the two was manifest. The appellants were among the originators and architects of the genocide [...].¹⁴⁶

Judge Güney’s partial dissent was even terser than Judge Pocar’s and not speech focused. His chief lament was that, in the case of Barayagwiza, the convictions for persecution and extermination were cumulative as they were based on the same underlying facts.¹⁴⁷

3.3.3.2. Background Part 2: The Open Society Institute *Amicus* Brief

3.3.3.2.1. Arguments Made in the Brief

Before considering Judge Meron’s dissent, it is also helpful to examine the *amicus curiae* brief filed in support of the defendants by the American non-governmental organization Open Society Institute (‘OSI’). The brief advocated adoption of an American approach to hate speech issues. It did so through two primary arguments: (1) pushing for a bright-line distinction between hate speech and direct and public incitement to commit genocide – advocating a very narrow scope for the latter (including a restriction on its temporal scope); and (2) urging that hate speech be rejected as satisfying the conduct element of persecution as a crime against humanity.¹⁴⁸

With respect to incitement, OSI’s argument was fairly straightforward but quite revealing of its pro-American stance. The Trial Chamber, it contended, should have first turned to the Genocide Convention and to the

¹⁴⁶ *Ibid.*, para. 73.

¹⁴⁷ *Ibid.*, Partially Dissenting Opinion of Judge Mehmet Güney, paras. 1–5.

¹⁴⁸ *Ibid.*, para. 10.

relevant *travaux préparatoires*, rather than to international treaties that allow or require States Parties to proscribe hate speech in their domestic law. (In defining incitement, the Media Case Trial Chamber had looked at the hate speech provisions of the International Covenant on Civil and Political Rights and the International Convention on the Elimination of Racial Discrimination.)¹⁴⁹ OSI emphasized that the Genocide Convention drafters “explicitly considered and repeatedly rejected the notion that hate speech that did not call for genocide should be criminalized”.¹⁵⁰

Two observations here are in order. First, interestingly, as I chronicle in my book *Atrocity Speech Law: Foundation, Fragmentation, Fruition*, in negotiations leading to the framing of the Genocide Convention, the United States acted as a lone wolf in consistently countering inclusion of speech-related provisions. This was true in respect of all three phases of negotiations – the initial Secretariat’s draft, the draft of the ECOSOC *Ad Hoc* Committee, and then the final draft adopted by the Sixth Committee.¹⁵¹ Thus, the United States wanted the incitement offense deleted entirely and pushed its weight around to achieve that goal.¹⁵² Nevertheless, the rest of the global community stood up to the US and the provision was adopted. Thus, during Sixth Committee deliberations, the US contended incitement should be punishable only if it created an “imminent” threat of genocide.¹⁵³ Otherwise, any “newspaper article criticizing a political group [...] might make it possible for certain States to claim that a Government [...] was committing an act of genocide; and yet such an article might be nothing more than the mere exercise of the right of freedom of the press”.¹⁵⁴

Yet, the United States position was roundly rebuffed. As I recount in *Atrocity Speech Law*:

In response, the Polish representative, Manfred Lachs, contended that, in light of the magnitude of the crime of genocide, early legal intervention was necessary. In other words,

¹⁴⁹ *Ibid.*, para. 689.

¹⁵⁰ *Ibid.*

¹⁵¹ Gordon, 2017, pp. 117–123, see above note 19.

¹⁵² See, for example, *ibid.*, p. 121: “The United States wanted it [the incitement provision] deleted, fearing it would impermissibly infringe on freedom of expression”.

¹⁵³ *Ibid.*, p. 122.

¹⁵⁴ UN General Assembly Official Records, third session, sixth committee, eighty-fourth meeting, 1948, p. 213, Mr. Maktos (United States).

acts that might seem innocuous in ordinary circumstances must be criminalized in the context of preparing for genocide. Yugoslavia’s representative underscored that point by noting that incitement was the first step in the commission of genocide. As for freedom of the press, Haiti’s representative stated that the seriousness of the offense of genocide mandated that “the interests of the victims of genocide should take precedence over the interests of the Press”. The Soviet representative added that “freedom of speech could never be confused with the freedom to incite people to commit genocide”. In the end, the U.S. position was rejected and incitement remained in the draft.¹⁵⁵

Regarding its hate speech as persecution argument, OSI’s *amicus* brief argued that the CAH-persecution conviction of Nuremberg defendant Julius Streicher, Editor-in-Chief of the viciously anti-Semitic broadsheet *Der Stürmer*, hinged uniquely on his “prompting ‘to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions’”.¹⁵⁶ This conclusion was bolstered, the brief contended, by the Nuremberg International Military Tribunal’s acquitting Nazi Radio Division Chief Hans Fritzsche “on grounds that his hate speeches did not seek ‘to incite the Germans to commit atrocities against the conquered people’”.¹⁵⁷ The brief also criticized the Media Case Trial Chamber for failing to follow the ICTY Trial Chamber judgment in *Prosecutor v. Kordić*, which, contrary to the ICTR position, had found that mere hate speech could not constitute persecution.¹⁵⁸

As we saw above, however, in its majority opinion, the Appeals Chamber implicitly rejected these arguments. In *Atrocity Speech Law*, I help explain why. With regard to *Streicher*, the sentence about calls for violence while “Jews in the East were being killed” should not be seen in isolation because the judgment “equally emphasized criminal responsibility for general hate speech that conditioned German citizens to persecute

¹⁵⁵ Gordon, 2017, p. 123, see above note 19, quoting the Sixth Committee proceedings.

¹⁵⁶ *Ibid.*, para. 979, quoting International Military Tribunal, *Trial of the Major War Criminals before the International Criminal Tribunal Volume 1 – Judgment*, Judgment, 1 October 1946, (‘IMT Goering Judgment’) (<http://www.legal-tools.org/doc/f21343/>).

¹⁵⁷ *Ibid.*, quoting IMT Goering Judgment, 1946, p. 163, see above note 156.

¹⁵⁸ *Ibid.*, citing International Criminal Tribunal for the former Yugoslavia (‘ICTY’), *Prosecutor v. Dario Kordić and Mario Čerkez*, Trial Chamber, Judgment, 26 February 2001, IT-95-14/2, para. 209 (<http://www.legal-tools.org/doc/d4fedd/>).

Jews”.¹⁵⁹ In particular, the book points to the judgment’s language about “twenty-five years [...] of preaching hatred of the Jews [that] infected the German mind with the virus of anti-Semitism”.¹⁶⁰

Judge Shahabuddeen, in his partial dissent, dismissed the *amicus* brief position regarding *Fritzsche*. The Nazi Radio Division head was acquitted, Shahabuddeen observed, because “he did not take part ‘in originating or formulating propaganda campaigns’”.¹⁶¹ Moreover, while the IMT happened to note that Fritzsche did not appear to intend “to incite the German people to commit atrocities on conquered people”, this does not show that the IMT thereby meant to make advocacy to genocide or extermination an essential element “to the success of a charge for persecution (by making public statements) as a crime against humanity”.¹⁶²

Finally, returning to *Atrocity Speech Law*, the failings of the *Kordić* decision, a key source of jurisprudential support for OSI (and Judge Meron’s partial dissent), are exposed therein:

Only the ICTY’s *Kordić* decision deviates from this great weight of authority [that non-advocacy hate speech, on its own, can qualify as persecution]. But we have seen that [*Kordić*] is deeply flawed – internally inconsistent [for example, calling for a contextual approach and then analyzing speech in the abstract], at odds with existing ICTY precedent [in particular, *Prosecutor v. Kupreskić*,¹⁶³ which takes a broad view of persecution’s scope] less than forthcoming about existing ICTR precedent [ignoring *Prosecutor v. Ruggiu*, which held that non-advocacy hate speech on its own could constitute persecution], and promptly repudiated by ICTY follow-on cases [for instance, in *Prosecutor v. Brđanin*¹⁶⁴]. And *Kordić*, as well as the American approach to hate speech in general, is the outlier in a world where international human rights treaties and most non-authoritarian

¹⁵⁹ Gordon, 2017, pp. 326–327, see above note 19.

¹⁶⁰ *Ibid.*, p. 327, quoting IMT Goering Judgment, p. 162.

¹⁶¹ Nahimana Case Appeals Judgment, Partially Dissenting Opinion of Judge Mohamed Shahabuddeen, para. 10, see above note 113.

¹⁶² *Ibid.*, Partially Dissenting Opinion of Judge Mohamed Shahabuddeen, paras. 10–11.

¹⁶³ ICTY, *Prosecutor v. Kupreskić et al.*, Trial Chamber, Judgment, 14 January 2000, IT-95-16 (<http://www.legal-tools.org/doc/5c6a53/>).

¹⁶⁴ ICTY, *Prosecutor v. Radoslav Brđjanin*, Trial Chamber, Judgment, 1 September 2004, IT-99-36, paras. 1029–1031 (<http://www.legal-tools.org/doc/4c3228/>).

domestic jurisdictions have no compunction outlawing virulent forms of out-group-focused hate speech.¹⁶⁵

3.3.3.2.2. The Zealous American Free Speech Position

Still, what informs this zealous American approach to liberty of expression? To put the OSI *amicus* brief into context, and before examining Judge Meron’s partial dissent, it would be useful to consider policy orientation towards free speech in the US. Of all nations on the planet, the United States offers the most robust protection for public expression of inimical ideas. The First Amendment of its Constitution stipulates that the government may “make no law [...] abridging the freedom of speech, or of the press”.¹⁶⁶ This has been interpreted strictly. With regard to inciting speech, in *Brandenburg v. Ohio* (1969), the US Supreme Court held: “[Constitutional] guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”.¹⁶⁷

The philosophy undergirding this stance was famously summed up by Justice Oliver Wendell Holmes in his seminal *Abrams v. United States* dissent.¹⁶⁸ Referred to by some as “the most powerful dissent in American history”,¹⁶⁹ Holmes used it to explain that the public communications space in the United States should be seen as a “marketplace of ideas”.¹⁷⁰ In this modern agora-cum-crucible, interlocutors espouse competing ideas that vie for audience preference. The underlying premise is that, in this clash of accounts, the truth will out. Or, put another way, exposure through speech should marginalize inimical ideas, valorise more worthy ones, and reinforce democracy in the process.

The United States has been aggressive in proselytizing its rabid free speech faith with regard to other countries and on the international plane.

¹⁶⁵ Gordon, 2017, p. 402, see above note 19.

¹⁶⁶ United States, Constitution, 21 June 1788, amendment I (<http://www.legal-tools.org/doc/bc3d56/>).

¹⁶⁷ Supreme Court of the United States, *Brandenburg v. Ohio*, 1969, 395 U.S. 444, p. 447 (*‘Brandenburg’*).

¹⁶⁸ Supreme Court of the United States, *Abrams v. United States*, 1919, 250 U.S. 616 (*‘Abrams’*).

¹⁶⁹ Andrew Cohen, “The Most Powerful Dissent in American History”, *The Atlantic*, 10 August 2013 (available on its web site).

¹⁷⁰ *Abrams*, p. 630, see above note 168.

We had a glimpse of that in connection with the *travaux préparatoires* of the Genocide Convention, but it is also found elsewhere. For example, in negotiations for the International Covenant on Civil and Political Rights, the United States “zealously countered” inclusion of Article 20(2),¹⁷¹ which states that: “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”.¹⁷² The US minority view did not prevail.¹⁷³

It should be pointed out that, in the Media Case Trial Chamber judgment, the judges were specifically asked to adopt the American position with respect to the regulation of hate speech. Yet, the judges sought a reference point representing a broader consensus. So, in formulating a test for incitement to genocide, it rejected the wholesale adoption of the zealous American approach. Instead, it looked to international law for guidance in developing the proper standard. That body of law does a better job of balancing freedom of speech with freedom from discrimination. In the words of the Trial Chamber:

Counsel for Ngeze has argued that United States law, as the most speech protective, should be used as a standard, to ensure the universal acceptance and legitimacy of the Tribunal’s jurisprudence. The Chamber considers international law, which has been well developed in the areas of freedom from discrimination and freedom of expression, to be the point of reference for its consideration of these issues, noting that domestic law varies widely while international law codifies evolving universal standards.¹⁷⁴

It is in this context of the Media Case Trial Chamber rejecting the imposition of US free speech exceptionalism (backed by the Appeals Chamber majority) that Judge Meron’s partial dissent in the Media Case Appeals Chamber judgment should now be considered.

¹⁷¹ Evelyn M. Aswad, “To Ban or Not to Ban Blasphemous Videos”, in *Georgetown Journal of International Law*, 2013, vol. 44, p. 1321.

¹⁷² International Covenant on Civil and Political Rights, 16 December 1966, Article 20(2) (<https://www.legal-tools.org/doc/2838f3/>).

¹⁷³ *Ibid.*

¹⁷⁴ Nahimana Case Trial Judgment, para. 1010, see above note 12.

3.3.3.3. Judge Meron’s Partial Dissent

Of the four judges who filed partial dissents, only one of them, Judge Meron, objected to the majority approach on the grounds that it was too permissive regarding speech as the basis for liability. Meron began his partial dissent by noting that “[t]he sheer number of errors in the Trial Judgement indicates that remanding the case, rather than undertaking piecemeal remedies, would have been the best course”.¹⁷⁵ Having shown his animosity toward the Trial Chamber judgment in general, Meron then vented his spleen on Nahimana’s persecution conviction in particular.

Per Judge Meron, under any circumstances, “mere hate speech may not be the basis of a criminal conviction”.¹⁷⁶ Only when hate speech “rises to the level of inciting violence or other imminent lawless action” can it be criminalized.¹⁷⁷ In support of his position, the American jurist pointed to a supposed lack of consensus around the world in terms of criminalizing hate speech domestically – in other words, having it as the basis for a conviction at the ICTR violated the principle of legality.¹⁷⁸ In support of this, he cited with approval the *Kordić* judgment ruling that hate speech that does not explicitly call for violence does not rise to the same level of gravity as the other enumerated CAH acts.¹⁷⁹

This conclusion, Judge Meron asserted, accurately reflects the law on hate speech since, “the Prosecution did not appeal this important determination, and the Appeals Chamber did not intervene to correct a perceived error”.¹⁸⁰ Judge Meron also wrote of the value of protecting hate speech, alluding to American values that cherish the “benefit of protecting political dissent”.¹⁸¹ Citing the US Constitution and US Supreme Court case law, he observed that:

[T]he government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable [...]. [U]nder the rubric of persecution, to criminalize unsavory speech that does not constitute actual imminent

¹⁷⁵ Nahimana Case Appeals Judgment, Partially Dissenting Opinion of Judge Theodor Meron, para.1, see above note 113.

¹⁷⁶ *Ibid.*, para. 13.

¹⁷⁷ *Ibid.*, para. 12.

¹⁷⁸ *Ibid.*, para. 5.

¹⁷⁹ *Ibid.*, para. 7.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*, paras. 7, 11.

incitement might have grave and unforeseen consequences.¹⁸²

Having explained why, in his view, non-advocacy hate speech, on its own, cannot be the basis for a criminal conviction, Judge Meron then impugned the persecution charge on an independent ground. He asserted that the prosecution failed to demonstrate a nexus between any RTLM broadcasts for which Nahimana was responsible and the widespread or systematic attack against the civilian population underlying the crimes against humanity count. Thus, he claimed, the conviction should be overturned on that independent ground too. (Judge Meron simply asserted this – in fact, no causal link must be demonstrated – merely that broadcasts were part of the attack, with the speakers aware that they were part of the attack.)¹⁸³

In light of Meron’s belief that the persecution conviction against Nahimana should be thrown out, and that only parts of the incitement conviction against him remain, he believed that Nahimana’s 30-year sentence was too severe. In the words of Judge Meron:

Because I would reverse the conviction of Appellant Nahimana for persecution, I believe that the only conviction against him that can stand is for direct and public incitement to commit genocide under Article 6(3) and based on certain post-6 April broadcasts. Despite the severity of this crime, Nahimana did not personally kill anyone and did not personally make statements that constituted incitement. In light of these facts, I believe that the sentence imposed is too harsh, both in relation to Nahimana’s own culpability and to the sentences meted out by the Appeals Chamber to Barayagwiza and Ngeze, who committed graver crimes. Therefore, I dissent from Nahimana’s sentence.¹⁸⁴

¹⁸² *Ibid.*, paras. 11–12, citing Supreme Court of the United States, *Texas v. Johnson*, 1989, 491 U.S. 397, p. 414; *Brandenburg*, p. 447, see above note 167; Supreme Court of the United States, *Watts v. United States*, 1969, 394 U.S. 705, p. 708.

¹⁸³ Gordon, 2017, p. 10, see above note 19, noting that the crime against humanity of hate speech as persecution is committed as “part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. This does not mean that there must be a “causal nexus” between the hate speech and the attack. Judge Meron merely asserted this without support.

¹⁸⁴ Nahimana Case Appeals Judgment, Partially Dissenting Opinion of Judge Theodor Meron, para.1, see above note 113.

3.4. Imprisonment, Controversy and An Early Release

3.4.1. A Prison Transfer and Two High-Profile ICTY Acquittals

On 3 December 2008, Nahimana was transferred from Arusha to Bamako Central Prison, Mali, where he was slated to serve the balance of his sentence.¹⁸⁵ Yet, as he was being moved across the African continent and out of the public eye, Judge Meron would soon start courting controversy.

3.4.1.1. The *Gotovina* Acquittals

On the date of Nahimana’s Mali transfer, the ICTY Prosecutor was in the middle of presenting his case-in-chief against Croatian Generals Ante Gotovina and Mladen Markač, whose trial before the Tribunal had begun in March. Gotovina had been the overall southern regional commander of the August–November 1995 “Operation Storm”, an effort to take certain areas of the Krajina region, whose Serb population had seceded from Croatia.¹⁸⁶ Markač had been the Commander of the Special Police. Mark Danner has described Operation Storm as “easily the largest single instance of “ethnic cleansing” of the Yugoslav war”.¹⁸⁷ Martin Mennecke reports that Operation Storm was “a scorched-earth campaign that led to the looting and burning of tens of thousands of Serbian homes”.¹⁸⁸ Hundreds of Serbs were killed and close to 90,000 forcibly displaced “with the clear intention that they never return”.¹⁸⁹ It has been reported that Operation Storm received important US assistance in terms of diplomatic cover, material support, planning and training.¹⁹⁰

¹⁸⁵ Bartrop, 2015, p. 1774, see above note 5.

¹⁸⁶ Gary D. Solis, “The Gotovina Acquittal: A Sound Appellate Course Correction”, in *Military Law Review*, 2013, vol. 215, p. 78.

¹⁸⁷ Mark Danner, “Operation Storm”, *The New York Review of Books*, 22 October 1998 (available on its web site).

¹⁸⁸ Martin Mennecke, “Genocidal Violence in the Former Yugoslavia: Bosnia Herzegovina”, in Samuel Totten and William S. Parsons (eds.), *Centuries of Genocide: Essays and Eyewitness Accounts*, Routledge, New York, NY, 2013, p. 478.

¹⁸⁹ Bruno Waterfield, “Former Croat General Guilty of War Crimes Jailed for 24 Years”, *The Telegraph*, 15 April 2011.

¹⁹⁰ Saadia Touval, *Mediation in the Yugoslav Wars: The Critical Years, 1990–95*, Palgrave MacMillan, Basingstoke, 2002, p. 146, opining as more likely that “the U.S. played a key role in planning and launching” the Croatian campaign; Danner, 1998, see above note 187, reporting the US training of Croatian officers and Operation Storm’s “striking resemblances to current American military doctrine”; “Croatia: Operation Storm 1995”, on *GlobalSecurity.org* (available on its web site), where it was stated that “[w]ith the explicit consent of the US State and Defense Departments, [US private military company MPRI]

By the turn of the new millennium, Gotovina had fled Croatia but was arrested in Spain in December 2005 and transferred to the ICTY. Markač had turned himself in to the ICTY in 2004. Both had been charged as part of a joint criminal enterprise (with another Operation Storm commander, Ivan Čermak) that committed various crimes against humanity and serious breaches of the laws and customs of war, which included counts for murder, persecution, wanton destruction of towns and villages, deportation, forcible transfer and inhuman acts (he was also charged individually with these pursuant to Article 7(1) aiding and abetting liability and 7(3) command responsibility).¹⁹¹

In April 2011, Gotovina and Markač were found guilty pursuant to the joint criminal enterprise, whose common purpose was to permanently remove the Serb civilian population from the Krajina region by ordering unlawful artillery attacks and by failing to make a serious effort to prevent or investigate crimes committed by his subordinates against Serb civilians. The joint-criminal-enterprise liability was in reference to crimes against humanity (persecution, deportation, murder, and inhumane acts) and war crimes (plunder of public and private property, wanton destruction, murder, and cruel treatment). (Ivan Čermak, was acquitted of all counts.) Given the liability of Gotovina and Markač pursuant to the joint criminal enterprise, the Trial Chamber found it was not necessary to make findings on the other modes of liability alleged in the Indictment. Gotovina was sentenced to 24 years and Markač to 18.¹⁹²

Gotovina and Markač appealed their convictions. On 16 November 2012, an ICTY Appeals Chamber, Judge Theodor Meron presiding, via a divided 3:2 panel, quashed the convictions and dismissed the proceedings with prejudice. Judge Meron was joined by Judges Mehmet Güney and Patrick Robinson, whose majority opinion drew vehement dissents from Judges Carmel Agius and Fausto Pocar.

[modernized and retrained] the command structure of the Croatian national army” and helped launch Operation Storm; Thierry Tardy, “United Nations Protection Force (UNPROFOR-Croatia)”, in Joachim A. Koops, Norrie MacQueen, Thierry Tardy, and Paul D. Williams (eds.), *The Oxford Handbook of United Nations Peacekeeping Operations*, Oxford University Press, Oxford, 2015, p. 379, noting that “the Clinton administration openly supported the Croatian regime, was fully aware of Tudjman’s intention to retake the Serb-held territories, and in the end welcomed the military offensive [Operation Storm] as ‘an opportunity to reach a negotiated settlement on a fair basis’”.

¹⁹¹ “Ante Gotovina”, Trial International, 4 May 2016 (available on its web site).

¹⁹² Waterfield, 2011, see above note 189.

It was Meron who read out the majority’s judgment in the courtroom that day. He began by asserting that the Trial Chamber’s conclusion of a joint criminal enterprise was premised on the unlawful artillery attacks targeting civilians that resulted in their mass deportation from the Krajina region. Per the majority, the Trial Chamber’s finding that the artillery attacks were unlawful was based on the Trial Chamber’s finding a 200-metre range of error for the artillery projectiles fired. Based on this range of error, the Trial Chamber found that all impact sites located more than 200 metres from a target it deemed legitimate served as evidence of an unlawful attack – regardless of site variations, such as wind speed and air temperature. Also, the majority noted that this analysis did not account for identifying potential “targets of opportunity”, such as moving police or military vehicles.

The Appeals Chamber unanimously held the Trial Chamber erred in deriving the “200 Metre Standard” – no evidence or specific reasoning supported it. Given the failure of the 200 Metre Standard analysis (including failure to account for potential “targets of opportunity” in one town that was attacked), the majority held that no reasonable trial chamber could conclude that the only reasonable interpretation of the overall evidence on the record was the existence of the alleged joint criminal enterprise. This decision was made regardless of the other evidence concerning the joint criminal enterprise, including shells landing significantly beyond the 200-metre mark in many instances, meetings planning the attacks on Krajina or failure to prevent or punish instances of murder, forcible transfer or other inhuman acts against civilians.

Despite the Appeals Chamber having authority to do so, the majority refused to enter convictions on alternate modes of liability or to remand the case for further consideration of liability *sans* the 200 Metre Standard. Instead, given the failure of the 200 Metre Standard, it adopted a *de novo* standard of review and found the totality of the evidence did not support non-joint-criminal-enterprise forms of liability – aiding and abetting (Article 6(1)) or command responsibility (Article 6(3)) – notwithstanding the Trial Chamber’s finding extreme-deviation shelling (that is, well beyond 200 metres) and permitted or non-punished person-to-person attacks by the subordinates of Gotovina or Markač on civilians).

In a short separate opinion, Judge Meron wrote that the Appeals Chamber should not enter convictions pursuant to alternate modes of liability as this would involve unfairness to the Appellants. Although

Gotovina and Markač were charged with other forms of liability, including superior responsibility, Judge Meron emphasized that bringing in the alternate modes of liability at this stage would be “different from [the crimes] they defended against”.

Judges Agius and Pocar wrote blistering dissents. The former stressed that, at “every turn”, the majority “rather than looking at the totality of the evidence and findings”, took an “overly compartmentalised and narrow view”. The 200 Metre Standard became “fatal to the whole Trial Judgement” – an approach Judge Agius found to be “artificial and defective” and “flawed in numerous respects”. Undertaking the *de novo* review was not justified as the 200 Metre Standard was not properly a legal standard and the majority never identified what legal standard should actually be used. Also, the *de novo* review was conducted within just three paragraphs – upending a 1300-page judgment that contains 200 pages of analysis on the unlawfulness of the artillery attacks. In addition, if the wayward shelling could be chalked up to inaccurate artillery pieces, how could the majority put so much stock in the accuracy of “targets of opportunity” (that is, direct hits on Serb military vehicles).

Overall, a large amount of evidence outside the 200 Metre Standard analysis provided compelling proof of unlawful attacks (and thus joint criminal enterprise). For example, it was undisputed that over 900 artillery projectiles fell on Knin in the course of one and half days in the absence of any resistance from the town itself. Moreover, even if joint criminal enterprise were not proven, the non-200 Metre Standard evidence (including failure to prevent or punish person-to-person violence against civilians and meetings to discuss the Operation Storm) established aiding and abetting liability as well as superior responsibility. Judge Pocar shared the misgivings of Judge Agius based on “the sheer volume of errors and misconstructions in the Majority’s reasoning and the fact that the Appeal Judgment misrepresents the Trial Chamber’s analysis”. Judge Pocar described the majority decision as both “contradicting any sense of justice” and “grotesque”.

The Meron-Güney-Robinson opinion was subject to withering criticism outside of the ICTY as well. Guy Elcherth and Stephen Reicher have written that the judgment was “perceived as highly controversial in-

ternationally and was criticised in unusually blunt terms”.¹⁹³ Noted American international criminal law expert Milena Sterio has excoriated the decision for “its dubious legal reasoning and its apparent lack of consideration for established legal precedent regarding appellate review”.¹⁹⁴ In his piece “The Gotovina Omnishambles”, eminent British international criminal law scholar Marko Milanovic has called the judgment “a disaster at almost every level”. In particular, he has noted:

[The] majority make a complete mess of the appellate standards for review [...]. The Trial Chamber is owed deference with regards to its findings of fact, which are not to be disturbed lightly on appeal, but only if no reasonable trier of fact could have made the relevant finding on the strength of the record [...]. While the majority endorses these standards as they are set out in the ICTY’s long-established jurisprudence, it does not actually follow them [...]. From a unanimous Trial Chamber declaring that the highest ranks of the Croatian leadership, including President Tudjman, formed a joint criminal enterprise with the purpose of ethnically cleansing Serbs from Croatia, to a divided, 3 to 2 decision by the Appeals Chamber that *no* reasonable trier of fact could have found that JCE [joint criminal enterprise] to exist on the evidence heard by the Trial Chamber. Not only is this outcome hard to rationally explain to non-specialists, it only serves to harden the conflicting nationalist narratives in Croatia and Serbia.¹⁹⁵

3.4.1.2. The *Perišić* Acquittal

Not long after *Gotovina*, Meron was generating controversy again when he authored another Appeals Chamber decision departing from settled *ad hoc* tribunal jurisprudence by narrowing liability and rejecting evidence related to the overall circumstances and environment. Once again, the end result was the shifting of guilt away from a commander – this time former Serbian General Momčilo Perišić, who served as Chief of the General Staff of the Yugoslav Army between 1993 and 1998 – its highest-ranking

¹⁹³ Guy Elchereth and Stephen Reicher, *Identity, Violence and Power: Mobilising Hatred, Demobilising Dissent*, Palgrave MacMillan, London, 2017, p. 193.

¹⁹⁴ Milena Sterio, “Balkan Injustice?”, *IntLawGrrls*, 20 November 2012 (available on its web site).

¹⁹⁵ Marko Milanovic, “The Gotovina Omnishambles”, *EJIL: Talk!*, 18 November 2012 (available on its web site).

officer. On 6 September 2011, an ICTY Trial Chamber convicted Perišić of several counts of war crimes and crimes against humanity and sentenced him to 27 years of imprisonment. Nonetheless, on 28 February 2013, Meron’s Appeals Chamber panel (by a vote of 4 to 1) reversed this decision and acquitted Perišić on all counts.

Perišić’s Trial Chamber conviction was primarily based on aiding and abetting liability connected to his providing officers, troops, ammunition and logistical support to the Army of the Republika Srpska (‘VRS’), which was responsible for committing, *inter alia*, the Srebrenica massacres as well as the murderous four-year siege of Sarajevo (he was also convicted on superior responsibility grounds linked to the Croatian Serb shelling of Zagreb). The Trial Chamber found that provision of the personnel and materiel “had a substantial effect on the crimes” committed by the Bosnian Serb forces. The defendant gave the assistance knowing that Bosnian Serb forces were committing crimes against humanity and war crimes.

The key ground for the Appeals Chamber quashing the aiding and abetting convictions was on a point of law – in particular, the *actus reus* for aiding and abetting. The 4:1 majority adopted the standard that this conduct yields liability only if it was “specifically directed to the commission of crimes” (supposedly derived from the 1999 Appeals Judgment in *Prosecutor v. Tadić* – and cases that have since cited it)¹⁹⁶ rather than representing “general assistance directed towards a war effort”.¹⁹⁷ In a Joint Separate Opinion with Judge Agius, Judge Meron specified that “specific direction” is part of the offense’s *actus reus*, not its *mens rea*. (The panel also acquitted Perišić on superior responsibility grounds because he supposedly lacked effective control over Croatian Serb forces – as with *Gotovina*, the Chamber alluded to problems with the Trial Chamber’s use of the testimony of two witnesses and used that as an excuse to review *de novo* the entirety of the evidence with regard to effective control, that is, without any deference to the Trial Chamber.)

With its new *actus reus* standard, the Appeals Chamber majority then reviewed the evidence of aiding and abetting on the record. It ob-

¹⁹⁶ ICTY, *Prosecutor v. Momčilo Perišić*, Appeals Chamber, Judgement, 28 February 2013, IT-04-81, para. 17 (‘Perišić Case Appeals Judgment’) (<http://www.legal-tools.org/doc/f006ba/>).

¹⁹⁷ *Ibid.*, para. 20.

served that Perišić’s assistance to the VRS was geographically remote from the relevant crimes of the principal perpetrators. The panel then ruled that, in light of the general nature of the aid provided and the defendant’s lack of proximity to the principal crimes themselves, it could not be proven beyond a reasonable doubt that the assistance provided by Perišić was specifically directed to the commission of crimes by the VRS in Sarajevo and Srebrenica.

In a partially dissenting opinion, Judge LIU Daqun explained why the majority’s adoption of the “specific direction” requirement was at odds with the existing jurisprudence:

While I recognize that the specific direction requirement has been mentioned in the relevant jurisprudence, I note that it has not been applied consistently. Indeed, the cases cited by the Majority as evidence of an established specific direction requirement merely make mention of “acts directed at specific crimes” as an element of the *actus reus* of aiding and abetting liability. In the majority of these cases the Appeals Chamber simply restates language from the *Tadić* Appeal Judgement without expressly applying the specific direction requirement to the facts of the case before it. Moreover, the jurisprudence of the Tribunal demonstrates that aiding and abetting liability may be established without requiring that the acts of the accused were specifically directed to a crime. In these circumstances, I am not persuaded that specific direction is an essential element of the *actus reus* of aiding and abetting liability or that it is necessary to explicitly consider specific direction in cases where the aider and abettor is remote from the relevant crimes. Given that specific direction has not been applied in past cases with any rigor, to insist on such a requirement now effectively raises the threshold for aiding and abetting liability. This shift risks undermining the very purpose of aiding and abetting liability by allowing those responsible for knowingly facilitating the most grievous crime to evade responsibility for their acts.¹⁹⁸

In his dissent, described as “strident”,¹⁹⁹ Judge LIU stressed that there was “extensive evidence” that Perišić was aware of the VRS’s pro-

¹⁹⁸ Perišić Case Appeals Judgment, Partially Dissenting Opinion of Judge Liu Daqun, paras. 2–3, see above note 196.

¹⁹⁹ Steven Freeland, “Judicial Decision-Making in International Criminal Courts: ‘Effective’ Justice?”, in *Griffith Journal of Law and Human Dignity*, 2015, vol. 3, no. 1, p. 61.

pensity to commit criminal acts”.²⁰⁰ He added that “Perišić’s acts, which facilitated the large-scale crimes of the VRS through the provision of considerable and comprehensive aid, constitute a prime example of conduct to which aiding and abetting liability should attach”.²⁰¹ In fact, he concluded that “even assuming specific direction were a required element”, he was “not convinced that an acquittal would be justified given the magnitude, critical importance, and continued nature of the assistance Perišić provided to the VRS”.²⁰²

As with *Gotovina*, the *Perišić* Appeals decision was slammed by experts. Canadian international criminal law scholar James Stewart, in his commentary “The ICTY Loses Its Way on Complicity”, declaimed that *Perišić* could “leave a black mark on [the ICTY’s] important contribution to international criminal law, and erect an unjustifiable impediment to the accountability of those who assist atrocities”.²⁰³ Marko Milanovic followed up his *Gotovina* harangue by calling *Perišić* an “unfortunate” decision that is “profoundly unsatisfactory”.²⁰⁴ In his words: “This essentially boils down to the conclusion that it will be practically impossible to convict under aiding and abetting any political or military leader external to a conflict who is assisting one of the parties even while knowing that they are engaging in mass atrocities”.²⁰⁵ Chuck Sudetic, a former ICTY analyst, went even further. He observed that on the basis of the standard set by the *Perišić* acquittal, “arguably, if Hitler were being judged for crimes arising out of the Holocaust on the basis of the aiding and abetting standard now being applied by the ICTY, he might well have gotten off [...]. This is not blind justice. This is blindness”.²⁰⁶

Not surprisingly, *Perišić* has been roundly rejected by other international courts. First, the Appeals Chamber of the Special Court for Sierra

²⁰⁰ Perišić Case Appeals Judgment, Partially Dissenting Opinion of Judge Liu Daqun, para. 8, see above note 196.

²⁰¹ *Ibid.*, para. 9.

²⁰² *Ibid.*

²⁰³ James G. Stewart, “The ICTY Loses Its Way on Complicity – Part 1”, *Opinio Juris*, 3 April 2013 (available on its web site).

²⁰⁴ Marko Milanovic, “The Limits of Aiding and Abetting Liability: The ICTY Appeals Chamber Acquits Momčilo Perišić”, *EJIL: Talk!*, 11 March 2013 (available on its web site).

²⁰⁵ *Ibid.*

²⁰⁶ “Two Puzzling Judgments in The Hague: The International Criminal Tribunal for the Former Yugoslavia Lost Credibility”, *The Economist*, 1 June 2013 (available on its web site).

Leone refused to adopt it in *Prosecutor v. Taylor*, expressing that it was “not persuaded by the *Perišić* Appeals Chamber’s analysis [...]”.²⁰⁷ Then, the ICTY itself [through an Appeals panel on which Meron did not sit] spurned the 2013 decision “in unusually strong language”.²⁰⁸ In *Prosecutor v. Šainović* (2014), the majority “unequivocally reject[ed] the approach adopted in [*Perišić*] as it is in direct and material conflict with the prevailing jurisprudence [...] and with customary international law”.²⁰⁹

3.4.2. Judge Meron and the WikiLeaks Controversy: Allegations of Being a US “Stooge”

After *Gotovina* and *Perišić*, the *Economist* proclaimed that the credibility of the ICTY was “in shreds and few understand the reasoning behind recent judgments”.²¹⁰ The *New York Times* reported that the acquittals “provoked a storm of complaints from international lawyers, human rights groups and other judges at the court, who claimed in private that the rulings had abruptly rewritten legal standards that had been applied in earlier cases”.²¹¹ William Schabas pointed out:

A decade ago, there was a very strong humanitarian message coming out of the tribunal, very concerned with the protection of civilians. It was not concerned with the prerogatives of the military and the police. This message has now been weakened, there is less protection for civilians and human rights.²¹²

If this censure of *Gotovina* and *Perišić* seemed indirectly aimed at Meron, one of his ICTY colleagues would launch a bombshell line of attack that singled out the octogenarian jurist directly and unequivocally impugned his integrity. Several months after the *Gotovina* and *Perišić* Appeals Chamber decisions, then-ICTY Danish Judge Frederik Harhoff confidentially sent a letter to certain individuals explaining that the

²⁰⁷ Special Court for Sierra Leone, *Prosecutor v. Taylor*, Appeals Chamber, Judgment, 26 September 2013, SCSL-03-01, para. 478 (<http://www.legal-tools.org/doc/3e7be5/>).

²⁰⁸ Freeland, 2015, p. 61, see above note 199.

²⁰⁹ ICTY, *Prosecutor v. Šainović*, Appeals Chamber, Judgment, 23 January 2014, IT-05-87, para. 1650 (<http://www.legal-tools.org/doc/81ac8c/>).

²¹⁰ *The Economist*, 1 June 2013, see above note 206.

²¹¹ Marlise Simons, “Judge at War Crimes Tribunal Faults Acquittals of Serb and Croat Commanders”, *The New York Times*, 14 June 2013.

²¹² *Ibid.*

Gotovina and *Perišić* acquittals (along with certain other acquittals)²¹³ were the result of political pressure on Judge Meron exercised by the US and Israel (the letter was exposed by the Danish tabloid publication *BT*).²¹⁴ In turn, per Judge Harhoff, Meron influenced his fellow judges to increase the threshold of complicity so as to make convictions more difficult.

In the words of Judge Harhoff: “[Reports] of the same American presiding judge’s tenacious pressure on his colleagues in the *Gotovina-Perišić* case makes you think he was determined to achieve an acquittal – and especially that he was lucky enough to convince the elderly Turkish judge to change his mind at the last minute”.²¹⁵ The “ageing Turkish judge”, Harhoff referred to was then-77-year-old Mehmet Güney.²¹⁶ In his missive, Judge Harhoff also complained that, during the same time period, Judge Michele Picard of France was given only four days to write her dissent against the majority decision to acquit Serbian secret police defendants Jovica Stanišić and Franko Simatović.²¹⁷ The *New York Times* reported that Judge Picard was “very taken aback by the acquittal and deeply upset about the fast way it had to be handled”.²¹⁸ The letter generated a firestorm of controversy and Judge Harhoff was ultimately removed from the ICTY bench.

Was there any validity to these allegations? In the ensuing controversy over Harhoff’s accusations against Meron, a *WikiLeaks* cable dated 27 July 2003 was unearthed. The cable relates a discussion between Judge Meron, then President of the ICTY, and an unnamed American ambassador – international criminal law expert Kevin Jon Heller intuitively it was the

²¹³ In particular, Harhoff referenced ICTY, *Prosecutor v. Stanišić and Simatović*, Trial Chamber, Judgment, 30 May 2013, IT-03-69 (‘Stanišić Trial Chamber Judgment’) (<http://www.legal-tools.org/doc/066e67/>), involving the acquittal of Serbian State Security Service officials against whom allegedly deficient joint-criminal-enterprise common purpose evidence was proffered. For a detailed statement by Harhoff, see Frederik Harhoff, “Mystery Lane: A Note on Independence and Impartiality in International Criminal Trials”, FICHL Policy Brief Series No. 47 (2016), Torkel Opsahl Academic EPublisher, Brussels, 2016 (<http://www.toaep.org/pbs-pdf/47-harhoff>).

²¹⁴ Simon Andersen, “Murderers Are Being Allowed to Go Free”, *BT*, 13 June 2013 (available on its web site).

²¹⁵ Frederik Harhoff, “Email to 56 contacts”, 6 June 2013.

²¹⁶ Andersen, 2013, see above note 214.

²¹⁷ Stanišić Trial Chamber Judgment, see above note 213.

²¹⁸ Simmons, 2013, see above note 211.

US Ambassador to the United Nations.²¹⁹ The Meron–Ambassador conversation centred on then-ICTY Prosecutor Carla del Ponte. The cable summary shows Judge Meron colluding with the US Ambassador to cause UN action that would affect Tribunal case selection and strategy – replacement of the ICTY and ICTR Prosecutor:

President Theodor Meron of the International Criminal Tribunal for the former Yugoslavia (ICTY) met with the Ambassador on July 16 to convey his serious concerns about the performance of Chief Prosecutor Carla Del Ponte and the risk the renewal of her tenure would pose to the completion strategy. Meron urged the USG to oppose renewal and expressed reservations about a one year extension of her mandate. Meron further advised that the UN secretariat had contacted his chief of staff on July 15 to “float” the idea that no action be taken by the Security Council in September and that Del Ponte term simply be allowed to lapse. Under such an approach, which Meron found promising, the Deputy Prosecutors of the ICTY and ICTR would serve as “acting” prosecutors of their respective offices until replacements were named.²²⁰

Shockingly, Meron then provided more direct evidence of seeming collusion with the US government regarding prosecutorial selection, strategy and resource allocation:

On penal policy, Meron noted that the OTP brings prosecutions that are too broad in scope which result in unnecessarily lengthy and resource consuming trials. Instead of focusing on a few significant charges that are supported by strong evidence, the OTP brings indictments with too many charges of which many are ultimately not readily provable. He added that the presiding judge of a trial chamber had complained to him this week that in a small case with a mid-level defendant, the OTP had informed the chamber that it planned to present 80 to 90 witnesses. This request prompted the defense to request a similar number of witnesses, guaranteeing a long and

²¹⁹ Kevin Jon Heller, “The Real Judge Meron Scandal at the ICTY”, on *Opinio Juris*, 17 June 2013 (available on its web site). For a more detailed discussion on the relevant *WikiLeaks* cables, see “Julija Bogoeva, “International Judges and Government Interests: The Case of President Meron”, FICHL Policy Brief Series No. 48 (2016), Torkel Opsahl Academic EPublisher, Brussels, 2016 (<http://www.toaep.org/pbs-pdf/48-bogoeva>).

²²⁰ Kevin Jon Heller, see above note 219.

complex trial. “This is no way to run a court”, Meron observed.

Meron expressed to the Ambassador his support for the splitting of the prosecutorial functions noting that the ICTR deserves a “first class prosecutor”. He also noted that concerns about divergent penal policies arising from such a split were unwarranted because the appeals chamber would continue to preside over both tribunals, thereby ensuring a consistency in approach and jurisprudence.²²¹

Kevin Heller describes Meron’s statements in the cable as “truly shocking”. He noted that “it is completely unacceptable for a judge to encourage a state to not re-appoint the Prosecutor of his tribunal because he disagrees with the way she has exercised her prosecutorial discretion or because he doesn’t believe she is a ‘first class prosecutor’”.²²²

Article 16(2) of the ICTY Statute provides that “[t]he Prosecutor shall act independently as a separate organ of the International Tribunal”.²²³ In light of this, Kevin Heller complains that, “Judge Meron’s secret meeting with the US Ambassador was inconsistent with any of the OTP’s independence. Indeed, it was a frontal assault on it”.²²⁴ The *New York Times* reported that a “mini-rebellion” was “brewing against Judge Meron” from the other ICTY judges.²²⁵ Heller concludes that “given Judge Meron’s evident willingness to undermine the Prosecutor over disagreements concerning matters committed solely to the Prosecutor’s discretion, it’s hard not to take the side of the rebels”.²²⁶

In an article titled “Did a supporter of International Criminal Law Turn into a Stooge of the US?”, journalist Martin Burcharth suggests the cables corroborate Harhoff’s allegations against Meron and support his “hypothesis”.²²⁷ Burcharth reports that colleagues at the Tribunal believe that Meron “takes instructions from the US government”. Burcharth de-

²²¹ *Ibid.*

²²² *Ibid.*

²²³ Updated Statute of the International Criminal Tribunal for the former Yugoslavia, 7 July 2009, Article 16(2) (<http://www.legal-tools.org/doc/b4f63b/>).

²²⁴ Heller, 2013, see above note 219.

²²⁵ Simmons, 2013, see above note 211.

²²⁶ Heller, 2013, see above note 219.

²²⁷ Martin Burcharth, “Did a Supporter of International Criminal Law Turn into a Stooge of the US?”, on *Information*, 18 June 2013, (available on its web site).

scribes Meron as “coordinating his views on the court’s work with the US government”.²²⁸ In another US intra-governmental cable described in Burcharth’s article, Meron is described as “the Tribunal’s preeminent supporter of United States government efforts”.²²⁹

The journalist adds: “It is apparent that the President of the Tribunal [Meron] had remarkably close ties to the US government. This despite the fact that UN employees are expected to act independently of their national government”.²³⁰ The piece concludes with a former legal adviser to the Tribunal stating: “The perception among my colleagues is that Meron takes instructions from the US government and that this reigning in of the legal standards – as we have seen with the acquittals – would have implications for the US [...] and WikiLeaks does not help him”.²³¹

3.4.3. The US Nominates Judge Meron to the MICT and He Grants Nahimana Early Release

3.4.3.1. The US Puts Meron on the MICT

On 22 December 2010, pursuant to an initiative of the United States, the Security Council created the MICT via resolution 1066.²³² Its purpose was to continue the “jurisdiction, rights and obligations and essential functions” of the ICTR and the ICTY.²³³ The ICTR branch took over that tribunal’s functions on 1 July 2012 and is based in Arusha (the ICTY branch did the same on 1 July 2013).²³⁴ The MICT has three separate organs – a judiciary, a prosecutor and a registrar.²³⁵ Each is headed by a person appointed to renewable four-year terms.²³⁶ The MICT has a roster of 25

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ *Ibid.* Prominent civil society leaders have also expressed serious concern, see, for example, Gunnar M. Ekeløve-Slydal, “ICTY Shifts Have Made Its Credibility Quake”, FICHL Policy Brief Series No. 49 (2016), Torkel Opsahl Academic EPublisher, Brussels, 2016 (<http://www.toaep.org/pbs-pdf/49-slydal>).

²³² Resolution 1966, 22 December 2010, UN Doc. S/RES/1966 (2010) (‘SC Resolution 1966’) (<http://www.legal-tools.org/doc/30782d/>). The Statute of the MICT is attached to SC Resolution 1966 (‘MICT Statute’).

²³³ *Ibid.*

²³⁴ Chandra Lekha Sriram, Olga Martin-Ortega, Johanna Herman, *War, Conflict and Human Rights: Theory and Practice*, Routledge, London, 2014, p. 178.

²³⁵ SC Resolution 1966, Articles 8–15, see above note 232.

²³⁶ *Ibid.*, Articles 10, 14, 15.

judges (used when needed) and one permanent judge who serves as its President. The judges are nominated by their countries of origin. The United States nominated Meron. In turn, the UN Secretary General, after consulting the President of the Security Council and the judges of the Mechanism, selected the then-81-year-old Meron as the MICT's first president in March 2012. In 2016, his term was renewed. Thus, as of the Nahimana early release decision, Judge Meron had been the only person to have served in the role of MICT "President" .

3.4.3.2. The Decision on Nahimana's Application for Early Release

Part of the MICT's responsibilities include supervising enforcement of sentences handed down by the ICTR and the ICTY. In particular, per Article 26 of the MICT Statute, the Mechanism's President has jurisdiction to supervise the enforcement of sentences and decide on requests for pardon or commutation of sentences.²³⁷ Per that provision, "[t]here shall only be pardon or commutation of sentence if the President of the Mechanism so decides on the basis of the interests of justice and the general principles of law".²³⁸

On 15 February 2016, ICTR prisoner Ferdinand Nahimana filed an application for early release under Article 26 of the MICT Statute.²³⁹ On 29 August 2016, pursuant to paragraphs 3, 4, and 5 of the MICT Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the ICTR, ICTY or the Mechanism ('Practice Direction'), the following information was collected and conveyed via a memorandum from the Registry to Judge Meron: (1) a 13 July 2016 letter from the Mali Ministry of Justice and Human Rights; (2) an 11 April 2016 letter from the former Warden of Koulikoro Prison where Nahimana was incarcerated (transmitting (a) an 11 April 2016 report on the status of incarceration; (b) an 11 April 2016 psycho-social report; (c) a 28 December 2015 psychiatric examination report from Polyclinique Pasteur); (3) a 3 August 2016 letter

²³⁷ MICT Statute, Article 26, see above note 232.

²³⁸ *Ibid.*

²³⁹ MICT, *Prosecutor v. Ferdinand Nahimana*, President of the Mechanism, Public Redacted Version of the 22 September 2016 Decision of the President on the Early Release of Ferdinand Nahimana, 5 December 2016, MICT-13-37-ES.1, para. 1 ('Nahimana Early Release Decision') (<https://legal-tools.org/doc/115p1y>).

from Koulikoro Prison Warden Abdoulaye Fofana; and (4) a 25 August 2015 memorandum from the MICT Office of the Prosecutor.²⁴⁰

This material was then transmitted to Nahimana on 8 September 2016 and he filed a response on 22 September 2016.²⁴¹ It was based on these materials that Judge Meron analysed the merits of the application for early release. It should be noted that his written decision is heavily redacted and so there are transparency issues in terms of the process and the analysis.

Be that as it may, Meron began his analysis with consideration of the MICT Rules of Procedure and Evidence (‘RPE’). Rule 150 of the RPE provides: “The President shall, upon such notice, determine, *in consultation with any Judges of the sentencing Chamber* who are Judges of the Mechanism, whether pardon, commutation of sentence, or early release is appropriate”.²⁴² Rule 151 declares:

In determining whether pardon, commutation of sentence, or early release is appropriate, the President shall take into account, *inter alia*, the gravity of the crime or crimes for which the prisoner was convicted, the treatment of similarly-situated prisoners, the prisoner’s demonstration of rehabilitation, as well as any substantial cooperation of the prisoner with the Prosecutor.²⁴³

²⁴⁰ *Ibid.*, para. 5.

²⁴¹ *Ibid.*, para. 6.

²⁴² MICT, Rules of Procedure and Evidence, 26 September 2016, Rule 150 (emphasis added) (‘MICT RPE’) (<http://www.legal-tools.org/doc/cef176/>).

²⁴³ *Ibid.*, Rule 151. In addition, Meron referred to the Agreement between the United Nations and the Government of the Republic of Mali on the Enforcement of Sentences Pronounced by the International Criminal Tribunal for Rwanda or the International Residual Mechanism for Criminal Tribunals, 13 May 2016, Article 3(2) (‘UN-Mali Enforcement Agreement’) (<https://legal-tools.org/doc/ulm6wv/>), which provides that the conditions of imprisonment shall be governed by the law of Mali Subject to the Supervision of the Mechanism. Nahimana Early Release Decision, para. 10, see above note 239.

Article 8 of the UN-Mali Enforcement Agreement provides, *inter alia*, that following notification of eligibility for early release under Malian law, the President shall determine whether early release is appropriate on the basis of the interests of justice and the general principles of law, and the Registrar shall transmit the decision of the President to Mali, which shall execute the terms of the decision promptly. In this case, Meron observed, according to the provisions of Mali, Law No. 01-003 of 27 February 2001 on the prison system and supervised education, 27 February 2001, Article 35, which states that “detainees who have provided sufficient proof of their improvement could be eligible for parole or semi-custodial treatment”. Nahimana Early Release Decision, para. 11, see above note 239.

The focal point of Meron's decision was Rule 151. He began by acknowledging that the crimes for which Nahimana had been convicted were of a high gravity.²⁴⁴ He quoted the Media Case Trial Chamber's words that the "power of the media to create and destroy fundamental human values comes with great responsibility" and that those "who control such media are accountable for its consequences".²⁴⁵ Meron also cited that portion of the Trial Judgment finding that RTLM promoted contempt for the Tutsi population and explicitly called for its extermination, which led to mass killings of Tutsis.²⁴⁶ He then acknowledged the Trial Chamber's conclusion that if the downing of President Habyarimana's plane on 6 April 1994 was the "trigger" for the killings that followed, that RTLM was "the bullet in the gun" and that the killings resulted in part from its effectively disseminated messages".²⁴⁷ This, in turn, provided "conclusive evidence" of genocidal intent.²⁴⁸

Meron then focused on Nahimana's role in founding, shaping and running RTLM. He pointed out that Nahimana was the "mastermind" of RTLM, who, during the Rwandan Genocide, expressed his satisfaction that RTLM had been "instrumental in awakening the Hutu population and "halting" the "Tutsi ethnic group" when mass killing had been going on for nearly a month.²⁴⁹ Nahimana's writings referred to the "Tutsi league" – a "veiled reference to the Tutsi population as a whole", which he vilified as the enemy of Rwanda.²⁵⁰ Thus, he set in motion the communications weaponry that fought the war of media, words, newspapers and

Meron noted in his decision that the Malian authorities "state that Nahimana "meets the conditions set out in Malian legislation for parole or semi-custodial treatment". *Ibid.* Meron noted, however, that that even if Nahimana were eligible for early release under Mali's domestic law, "early release of persons convicted by the ICTR falls exclusively with in the discretion of the President pursuant to Article 26 of the Statute and Rules 150 and 151 of the Rules". *Ibid.*, para. 12.

²⁴⁴ Nahimana Early Release Decision, para. 14, see above note 239.

²⁴⁵ *Ibid.*, quoting Nahimana Case Trial Judgment, para. 945, see above note 12.

²⁴⁶ Nahimana Early Release Decision, para. 14, see above note 239, quoting Nahimana Case Trial Judgment, para. 949, see above note 12.

²⁴⁷ Nahimana Early Release Decision, para. 14, see above note 239, quoting Nahimana Case Trial Judgment, para. 953, see above note 12.

²⁴⁸ Nahimana Early Release Decision, para. 14, see above note 239, quoting Nahimana Case Trial Judgment, para. 965, see above note 12.

²⁴⁹ Nahimana Early Release Decision, para. 15, see above note 239, quoting Nahimana Case Trial Judgment, para. 966, see above note 12.

²⁵⁰ *Ibid.*

radio stations, which he described during the genocide as a complement to bullets.²⁵¹

Meron also highlighted Nahimana’s awareness of his criminal conduct during the genocide. He emphasized the Trial Chamber’s finding that “Nahimana was ‘fully aware of the power of words’ and used ‘the radio – the medium of communication with the widest reach – to disseminate hatred and violence’”.²⁵² Thus, the Trial Chamber concluded, and Meron acknowledged, “without a firearm, machete or any physical weapon”, Nahimana “caused the deaths of thousands of innocent civilians”.²⁵³ For this, he bore superior responsibility as he failed to use his *de facto* power and authority to prevent the “genocidal harm” caused by the broadcasts.²⁵⁴

Meron then considered the next Rule 151 factor – the need for equal treatment of “similarly-situated” prisoners when deciding early release applications. Here, Meron’s analysis was terse and superficial: “In this respect, I recall that ICTR convicts like Nahimana, are considered ‘similarly situated’ to all other prisoners under the Mechanism’s supervision and that all convicts supervised by the Mechanism are to be considered eligible for early release upon the completion of two-thirds of their sentences, irrespective of the tribunal that convicted them”.

He backed this up with a footnote – number 30 – in which he cited two other cases (one early release decision each from the ICTY and ICTR, respectively). In both cases cited – *Prosecutor v. Borovčanin* (August 2016 decision) and *Prosecutor v. Bisengimana* (December 2012 decision) – the convicts were released after serving two-thirds of their sentences. Interestingly, Ljubomir Borovčanin’s culpability arose out of a relatively minor hierarchical or scope role linked to two incidents in Bosnia in July 1995 during which he was a deputy commander of a police brigade. He was convicted of war crimes and crimes against humanity in reference to: (1) aiding and abetting in the forcible transfer of civilians out of Potočari; and (2) failing to punish his subordinates who took part in

²⁵¹ *Ibid.*

²⁵² Nahimana Early Release Decision, para. 16, see above note 239, quoting Nahimana Case Trial Judgment, para. 1099, see above note 12.

²⁵³ Nahimana Early Release Decision, para. 16, see above note 239, quoting Nahimana Case Trial Judgment, para. 1102, see above note 12.

²⁵⁴ Nahimana Early Release Decision, para. 16, see above note 239, quoting Nahimana Case Trial Judgment, para. 972, see above note 12.

killing prisoners in front of a warehouse in Kravica.²⁵⁵ He was sentenced to 17 years and did not appeal.²⁵⁶ Significantly, Borovčanin was originally on trial with Vujadin Popović, Ljubiša Beara, and Drago Nikolić, who had overall leadership roles related to the criminal transactions at issue.²⁵⁷ The fact that the Trial Chamber sentenced Popović and Beara to life in prison, and Nikolić to 35 years,²⁵⁸ helps put Borovčanin's subordinate role in perspective.

With respect to the other case cited by Meron to demonstrate that Nahimana was similarly situated to other MICT convicts, *Prosecutor v. Bisengimana*, the defendant was the mayor of a town called Gikoro in the Kigali-Rural Prefecture of Rwanda.²⁵⁹ In December 2005, he pled guilty to aiding and abetting crimes against humanity (murder, extermination) committed against Tutsis in his town between 13 and 15 April 1994. Again, this was a relatively low-level player who co-operated with the prosecution by pleading guilty.

Notably, Meron's footnote 30 does not contain legal authority for the proposition that "all convicts supervised by the Mechanism are to be considered eligible for early release upon the completion of two-thirds of their sentences, irrespective of the tribunal that convicted them". He merely cites two cases, suggesting this has been the MICT's practice (even though the two convicts in those cases do not seem to be similarly situated, as the previous paragraphs have suggested). Meron does note that a "convicted person having served two-thirds of his or her sentence shall be merely eligible to apply for early release and not entitled to such release, which may only be granted by the President as a matter of discretion, after

²⁵⁵ ICTY, "Ljubomir Borovčanin Transferred to Denmark to Serve Sentence", 11 November 2011 (available on ICTY's web site); MICT, *Prosecutor v. Borovčanin*, President of the Mechanism, Public Redacted Version of the 14 July 2016 Decision of the President on the Early Release of Ljubomir Borovčanin, 2 August 2016, MICT-15-85-ES.6, para. 3 ('Borovčanin Early Release Decision') (<https://legal-tools.org/doc/qw7qxb>).

²⁵⁶ Borovčanin Early Release Decision, para. 3, see above note 255.

²⁵⁷ Bosnian Serb Srebrenica Convict Ljubomir Borovčanin Freed", *Balkan Transitional Justice*, 2 August 2016 (available on its web site).

²⁵⁸ *Ibid.*

²⁵⁹ MICT, *Prosecutor v. Bisengimana*, President of the Mechanism, Decision of the President on Early Release of Paul Bisengimana and on Motion to File a Public Redacted Application, 11 December 2012, MICT-12-07, para. 3 ('Bisengimana Early Release Decision') (<https://legal-tools.org/doc/urptdm>).

considering the totality of the circumstances in each case”.²⁶⁰ With this in mind, after first confirming that, by Meron’s calculations, Nahimana served two-thirds of his sentence on 27 March 2016, Meron went on to consider: (1) demonstration of rehabilitation; (2) substantial co-operation; and (3) “humanitarian concerns”.

Regarding demonstration of rehabilitation, Meron referred to the reports from the Malian officials. The “Psycho-Social Report”, for example, explained that “Nahimana is consistently ready to assist his fellow inmates complete tasks required by the prison authorities and he lives “in perfect harmony” with both the prison inmates and the prison administration”.²⁶¹ Paragraph 24 is the longest in this section and contains similar statements. Rather humorous among these is the suggestion that the bookish Nahimana would physically help to “restrain” his compatriots *vis-à-vis* prison officials – which is noted as “quite an achievement among a group of intellectuals”.²⁶²

That a former history scholar and university administrator would be polite behind bars is no great revelation. What is enlightening however, comes in the paragraph that follows, which is an omission. The topic is Nahimana’s acceptance of responsibility. The paragraph demonstrated he has absolutely no contrition for his significant role in the Rwandan Genocide. Meron could only say that Nahimana “has never ‘questioned or minimised the genocide’ or the ‘criminal nature of numerous broadcasts of the RTLM’ during that time”.²⁶³ Yet, Meron had to aver, because Nahimana put it in his own Application for Release that “he has disputed his own responsibility for these crimes”.²⁶⁴ This is in stark contrast to the other two early decision releases cited by Meron – *Borovčanin* and *Bisengimana*. In the former, the Bosnian Serb deputy police commander did not appeal his conviction or sentence and expressed that he had “no doubt whatsoever” that what he did “during the war was wrong”.²⁶⁵ In the latter, the

²⁶⁰ Nahimana Early Release Decision, para. 19, see above note 239.

²⁶¹ *Ibid.*, para. 22.

²⁶² *Ibid.*, para. 24. A nerd helping physically “restrain” other nerds from armed prison guards does not seem like much of a feat!

²⁶³ *Ibid.*, para. 25.

²⁶⁴ *Ibid.*, para. 4.

²⁶⁵ Borovčanin Early Release Decision, paras. 22–23, see above note 255.

former mayor pled guilty, which the decision noted “constitutes cooperation with the Prosecution”.²⁶⁶

Thus, Meron had to acknowledge that Nahimana “has at no time cooperated with [the Prosecution] in the course of his trial, appeal, or at any point while serving his sentence”. So, despite no evidence of remorse or co-operation, Meron can only warily intone that “Nahimana’s lack of cooperation with the Prosecution [...] is a neutral factor in determining whether or not to grant him early release”.²⁶⁷

With regard to “humanitarian concerns”, Meron noted Nahimana’s Application submission that “his age and ill health are grounds for early release”.²⁶⁸ No substantiation or details regarding the “ill health” was given (it should be pointed out, though, that the Decision is heavily redacted). It is noted that, at the time the application was submitted, Nahimana was in his mid-60s – not a very advanced age, where grave health problems might be easily assumed. Consistent with this, Meron rejected the ill health claim and was dubious of Nahimana’s claim that his age was a factor (the then-86-year-old Meron could presumably speak from personal experience in that regard).²⁶⁹

Then, in a concluding paragraph, having checked off few of the boxes he seemed to indicate were important, and acknowledging the gravity of his crimes, Meron perfunctorily granted Nahimana’s Application in one skeletal sentence: “While the crimes of which Nahimana was convicted are very grave, the fact that Nahimana already completed two-thirds of his sentence as of 27 March 2016, and the fact that he has demonstrated some signs of rehabilitation weigh in favour of his early release”.²⁷⁰

To this point, we have considered Meron’s analysis of Nahimana’s Application for Early Release pursuant to Rule 155 of the MICT RPE. However, recall that Meron was supposed to consider Rule 151 as well (obligating the President to consult with other judges). Meron did so only briefly in a footnote: “Other than myself, none of the Judges of the sentencing Chamber are judges of the Mechanism. On that basis, no consulta-

²⁶⁶ Bisengimana Early Release Decision, para. 30, see above note 259.

²⁶⁷ Nahimana Early Release Decision, para. 30, see above note 239.

²⁶⁸ *Ibid.*, paras. 32–33.

²⁶⁹ *Ibid.*, para. 34.

²⁷⁰ *Ibid.*, paras. 35–37.

tions with other Judges of the Mechanism pursuant to Rule 150 of the Rules are required in determining his Application”.²⁷¹

3.4.3.3. Reflections on the Early Release Decision

The decision on Nahimana’s Application for Early Release is a debacle on many levels. Let us begin with the most glaring. Meron was a judge on the merits for Nahimana’s appeal. In his dissent appended to the Appeals Judgment, he rejected one of two bases for Nahimana’s culpability – hate speech as crimes against humanity (persecution). Moreover, even as to the one remaining count Meron would not have invalidated – incitement to genocide – he stated in no uncertain terms that he felt Nahimana’s sentence should have been reduced.

Was it appropriate for the same judge who felt Nahimana was punished too severely to make a unilateral decision on his early release? It is painfully obvious that this must be answered in the negative! Meron had a definite conflict of interest, could not make the determination neutrally on his own, and doing so created an appearance of impropriety.

At the very least, if Meron were to be the sole decision-maker, he should have convened a hearing with parties other than Mali prison officials allowed to weigh in (in Nahimana’s case, the Prosecution apparently submitted a memorandum but Judge Meron essentially ignored it). Early release decisions are commonly made on the basis of a public hearing with submissions made by victims, witnesses and relevant law enforcement officials.²⁷² It certainly would have been within the judge’s discretion to have scheduled a hearing – the RPE or other relevant rules certainly do not prohibit it (if anything, Rule 150 suggests a hearing could be the appropriate mechanism for the President to obtain feedback).

Not only did Judge Meron not convene such a hearing, but he failed to comply with the spirit, if not the letter, of the explicit instructions provided in RPE Rules 150 and 151. In this regard, his treatment of Rule 150 stands out. That provision, it should be recalled, mandates that the President consult “with any Judges of the sentencing Chamber who are Judges of the Mechanism, whether pardon, commutation of sentence, or early

²⁷¹ *Ibid.*, para. 8, footnote 15.

²⁷² See, for example, United States Department of Justice, “Parole Hearings”, 11 September 2015 (available on its web site), where it was stated that “[hearings] rely greatly on the testimony of victims, witnesses and law enforcement”.

release is appropriate”.²⁷³ Here, Judge Meron hung his hat on a technicality – it is true that no member of the sentencing bench was on the MICT roster at the time in question (not a group of full-time paid judges but persons on call who are paid only for work performed when assigned to them). However, Judge Fausto Pocar, a member of the sentencing panel who disagreed with Meron, was still a judge at the ICTY – as was Meron himself.²⁷⁴ It would have been quite feasible to solicit Judge Pocar’s views given the close structural and personnel link between the ICTY and the MICT.

A review of the Rule 151 analysis also reveals serious issues. The evaluation begins auspiciously with consideration of the gravity of Nahimana’s crimes. The gist of this section is that the RTLM founder was a principal architect of the Rwandan Genocide and desired the impact “Radio Machete” had on fomenting and fuelling the massacres. However, what follows can only be described as cognitive dissonance. In particular, the “equal treatment of similarly-situated prisoners” exposition is a non-sequitur and internally incoherent. How could Meron assert that a Bosnian Serb police brigade deputy commander and a Kigali suburb mayor were “similarly situated” *vis-à-vis* the Rwandan Genocide’s propaganda master? The imbalance in criminal responsibility alone renders the comparison ridiculous.

That disparity is exacerbated when one considers that these lower-level players co-operated (through a guilty plea and non-appeal) and expressed contrition whereas Nahimana fought every step of the way and continued to deflect blame for his actions until the day of his release. What is worse, a bit of research by the MICT would have revealed that Nahimana’s lack of repentance only intensified after he began serving his sentence.

In a document he published on the Internet titled “Debate on the Book of Jean Baptiste Nkuliyingoma”, Nahimana was vehement in denying any form of responsibility whatsoever in relation to his hate media involvement both before and during the 1994 genocide.²⁷⁵ In the docu-

²⁷³ MICT RPE, Rule 150, see above note 242.

²⁷⁴ ICTY, “The Judges” (available on its web site), indicating that Judge Fausto Pocar and Judge Theodor Meron were on the ICTY bench at the relevant time.

²⁷⁵ Ferdinand Nahimana, “Débat Sur le Livre de Jean Baptiste Nkuliyingoma: Inkundura. Amateka y’intambara ya ruhekura yakuyeho igitugu ikimika ikindi”, 9 February 2012 (available online).

ment, he generally blamed all his problems, and those of Rwanda in general, on the Rwandan Patriotic Front (‘RPF’) and its supposed spread of propaganda in the previous twenty-plus years (referring, for example, to the “propaganda, the rumor, and the false presentation of actual facts between 1990 and 1994 meant to demonize the opponents of the RPF and hide the true nature of this movement”).²⁷⁶ Among other serious points of denial made by Nahimana in this document:

1. He alleged that the text of the communiqué read on Radio Rwanda, as reported in various histories of Rwanda, was a fabrication of Jean-Pierre Chrétien – Nahimana’s thesis supervisor – in his 1995 book *Les Médias du Génocide* and that the communiqué was selectively redacted and read out of context without his knowledge and contrary to his wishes. In any event, he insisted, the overall message of the communiqué was an appeal for nonviolence.²⁷⁷ (This assertion is contrary to trial testimony as well as the histories of experts beyond reproach, such as Alison Des Forges in her book *Leave None to Tell the Story*: “In March 1992, Radio Rwanda warned that Hutu leaders in Bugesera were going to be murdered by Tutsi, false information meant to spur the Hutu massacres of Tutsi”).²⁷⁸
2. Similarly, Nahimana claimed he was not responsible for the reading of the communiqué and was sacked from ORINFOR by backchannel manoeuvrings of the RPF – not because of indignation throughout Rwandan society and the international community, which pressured the government to remove Nahimana from the ORINFOR post.²⁷⁹ He also asserted he was offered the consular post in Germany but turned it down to return to the University.²⁸⁰ (Award-winning National Public Radio journalist and author Dina Temple-Raston, who wrote a book on the Media Trial, reported in her book that “Ferdinand Nahimana handed journalists a communiqué [warning of] a rash of assassinations [airing] the contents of the [false] communiqué without making a single attempt to corroborate it”).²⁸¹ Ac-

²⁷⁶ *Ibid.*, p. 6.

²⁷⁷ *Ibid.*, pp. 13–14.

²⁷⁸ Des Forges, 1999, p. 79, see above note 17.

²⁷⁹ Nahimana, 2012, pp. 14–18, see above note 275.

²⁸⁰ *Ibid.*, pp. 15–16.

²⁸¹ Temple-Raston, 2005, p. 27, see above note 9.

ording to Allison Des Forges: “He gave up teaching to take charge of government propaganda at ORINFOR. After being forced from this position, Nahimana was supposed to become the Rwandan ambassador in Bonn, but the German government refused to accept him. He tried to go back to the university, but his colleagues there also protested against his return”.²⁸²)

3. It is a lie that *Kangura* and its Editor-in-Chief, Hassan Ngeze, were the mouthpiece of Hutu extremism – in fact, they were a front for the RPF to disseminate anti-Tutsi rhetoric so extreme that it would discredit the Habyarimana government and Hutus in general.²⁸³ Nahimana also wrote that Ngeze was being financed by the American government, which gave him money to cover the genocide (and distribute images of the massacres to American news outlets).²⁸⁴ (These allegations are so beyond the realm of credibility, and contrary to the evidence developed at trial, that providing a credible journalistic response is not necessary.)
4. He took part in RTLTM’s pre-6 April 1994 management, but the radio station did not espouse a radical Hutu hard-line anti-Tutsi message – it was only after 6 April 1994 that the message turned genocidal. Nevertheless, he had no control at that point.²⁸⁵ (He ignored the specific examples of RTLTM’s pre-6 April 1994 incitement – explicitly brought to his attention through communications with the Ministry of Information (whose existence he has acknowledged) and made no reference to his position in the genocidal rump government, his discussions with Dahinden, or his successful instructions to RTLTM, given at the behest of the French ambassador, to refrain from attacking Dallaire over the air waves.)

Moreover, Nahimana made wild claims of exoneration – suggesting that the Appeals Chamber Judgment fully acquitted him:

When he [Nkuliyingoma] speaks about RTLTM, he clearly opines that he and its shareholders had the intention and had made the decision to use RTLTM as a tool of incitement to commit crimes of extermination and genocide. This accusa-

²⁸² Des Forges, 1999, p. 85, see above note 17.

²⁸³ Nahimana, 2012, pp. 11–12, see above note 275.

²⁸⁴ *Ibid.*, p. 12. Nahimana noted that Ngeze testified to this effect before the ICTR and has maintained this claim ever since.

²⁸⁵ *Ibid.*, pp. 21–25.

tion does not stand up to scrutiny and cannot go unchallenged. If certain debates and analyses disseminated on RTLTM’s air waves before 6 April 1994 did not correspond to the views or beliefs of certain persons or groups of persons, especially due to their tone or orientation, which was sometimes provocative, indeed denigrating, I do not deny that. But that cannot constitute grounds for accusing the RTLTM shareholders to have been motivated by the desire to commit genocide at the time RTLTM was founded. The judges of the ICTR Appeals Chamber were of this opinion. After examining the legal documents, the list of the RTLTM corporation’s shareholders, my role within this corporation and the broadcasts of this radio station, they overturned the Trial Chamber’s guilty verdicts against me as a principle for the “*crimes of genocide, direct and public incitement to commit genocide, conspiracy to commit genocide, and extermination and persecution as crimes against humanity*”.²⁸⁶

Two sentences later, he referred to his “acquittal” in blanket terms. Of course, Nahimana failed to add that he was convicted of incitement to genocide and crimes against humanity (persecution) on grounds of superior responsibility. Nor did he mention that he likely would have been convicted of the other crimes if those had been charged under a theory of superior responsibility (and not merely pursuant to Article 6(1)).

This tract is littered with denials and blame deflection. Nahimana stated that those who believe RTLTM was part of the plan of genocide of the Hutu extremists are hurling “unfounded accusations” and have “manifestly twisted the truth”.²⁸⁷ He even went so far as to attribute his criminal convictions to a frame-up by Reporters without Borders media expert Hervé Deguine, who brought RTLTM’s incendiary broadcasts to the world’s attention during the genocide. In Nahimana’s own words:

In fact, the names “Radio Hate” and “Radio Tele-Death” (RTLTM) are the invention of the association Reporters Sans Frontières (RSF) (Reporters without Borders). RSF coined these names and publicized them after July 1994 and found support for them from certain Rwandan journalists who were looking for work, money and name-recognition as well as

²⁸⁶ *Ibid.*, pp. 18–19 (emphasis in the original; author’s translation).

²⁸⁷ *Ibid.*, p. 19, referring to “accusations si infondées” and saying that anyone who believes this have “manifestement tordu la vérité” (author’s translation).

through Jean Baptiste Nkuliyingoma, the Minister of Information of the RPF's first government during this month of July 1994. Hervé Deguine of RSF coordinated this propaganda campaign. He received money from RSF to put together a collection of commissioned fabrications and publish them under the title *Rwanda: The Media of Genocide*. He personally organized the witch-hunt and verbal and written attacks against me; he caused me to be arrested; he caused me to be convicted.²⁸⁸

Nahimana's blatant rejection of his own responsibility in this polemic has been picked up elsewhere. Also readily available on the Internet, Jean-Baptiste Nkuliyingoma has written that Nahimana's piece adopts "a clearly visible strategy to exculpate himself of all the crimes for which he was found guilty by the ICTR, both at the Trial Chamber and Appeals Chamber levels".²⁸⁹ Despite being easily accessible on the Internet, Judge Meron's Early Release Decision made no reference to this egregious display of denial.

To make matters worse, Meron implicitly gave the lie to Nahimana's claims of ill health. Thus, having acknowledged his tremendous responsibility as a chief architect of the Rwandan Genocide, and noted that early release is merely an eligibility privilege, not a guarantee, Meron merely parroted the words of Malian prison officials regarding docile prison conduct. He essentially ignored a memorandum from the Prosecutor, acknowledged lack of co-operation and equated Nahimana with low-level convicts who have co-operated and acknowledged guilt. Despite Nahimana showing absolutely zero remorse and seemingly having fabricated claims of ill-health, Meron nakedly asserted that based on Nahimana's having arrived at the two-thirds mark of his sentence and having demonstrated "some signs of rehabilitation" (although what those signs are was never made clear), early release was to be granted. So much for the eligibility license and not the guarantee.

What is the legal support for eligibility for early release at the two-thirds mark in the first place? As it turns out, there is no statutory support

²⁸⁸ *Ibid.*, p. 23 (author's translation).

²⁸⁹ Jean-Baptiste Nkuliyingoma, "Livre Inkundura: Ferdinand Nahimana Peut-Il Être Juge Et Partie?" (The Book *Inkundura*: Can Ferdinand Nahimana Be Both Judge and Jury?), *La Tribune Franco-Rwandaise*, 19 February 2012 (available on its web site) (author's translation).

for it.²⁹⁰ It was simply a practice adopted by the judges at the *ad hoc* tribunals. However, the ICTR had a different practice from the ICTY. The latter’s custom was to release prisoners after they served two-thirds of their sentences; in contrast, the ICTR used a three-quarters standard.²⁹¹ The greater severity of the crimes before the ICTR, which arose within the context of a widespread and systematic genocidal campaign, accounted for the policy divergence between the two tribunals.²⁹²

Moreover, as explained by Jonathan Choi, the early release policy is counter to the intentions of the *ad hoc* tribunal framers because it confuses parole with commutation:

The ICTY seems to have implemented early release policies that are significantly more generous than its framers intended. It has adopted something like a *presumption* that prisoners need only serve two thirds of their sentences, apparently out of confusion between commutation and parole [...]. However, it is important to note at this point that the Statute only contemplates the convicted person’s eligibility for pardon or commutation of sentence, *not* for parole. This is a crucial distinction because, as we will see, domestic actors grant commutation much less often than they do parole. The plain language of the Statutes suggests that their framers intended early release to be similarly rare.²⁹³

Thus, the early release policy is problematic in the first place. Nonetheless, it is exacerbated at the ICTY, where a two-thirds standard was applied. How is it, then, that the two-thirds standard was transposed to ICTR convicts at the MICT? The answer is simple: Judge Theodor Meron. In the 2012 *Besingimana* early release decision, as President of the MICT, he simply made a unilateral decision to apply the two-thirds rule to Rwandan genocidaires.²⁹⁴ In his words: “While I acknowledge that adoption of the two-thirds eligibility threshold might constitute a benefit not previously recognised for persons convicted by the ICTR, I do not

²⁹⁰ Jonathan H. Choi, “Early Release in International Criminal Law”, in *Yale Law Journal*, 2014, vol. 123, no. 6, pp. 1792–1793.

²⁹¹ *Ibid.*, p. 1793.

²⁹² *Ibid.*

²⁹³ *Ibid.*, pp. 1793–1794 (emphasis added).

²⁹⁴ *Bisengimana Early Release Decision*, paras. 20–21, see above note 259.

consider that this can justify discriminating between the different groups of convicted persons falling under the jurisdiction of the Mechanism”.²⁹⁵

3.5. The Ghost of the Nuremberg-Tokyo Commutations

So, what we have at the MICT, in effect, is a sole American making what amounts to commutation decisions about convicted war criminals. In the *Nahimana* case, that same American was involved at the merits phase and, based on a zealous American free speech policy preference, openly expressed disdain for a portion of the liability finding. Thus, in the case of *Nahimana*, to a certain extent, American policy seemed to be triumphing over the interests of international criminal justice.

3.5.1. The Nuremberg Commutations

And this caused me to reflect on an analogous situation from the middle of the last century. At Nuremberg, after the International Military Tribunal’s trial of the major Nazi war criminals, the Americans prosecuted a vast array of Nazi leaders in their zone pursuant to Allied Control Council Law Number 10. From 1946 through 1949, 12 separate cases were tried and are now known as the “Subsequent Nuremberg Trials”. The cases were separated thematically, or by defendant, as follows:

- Doctors’ Trial (Nazi physicians of the euthanasia or medical experimentation programs);
- Milch Trial (Field Marshal Erhard Milch of the *Luftwaffe*);
- Judges’ Trial (Nazi jurists and lawyers);
- Pohl Trial (Oswald Pohl and other SS officers);
- Flick Trial (Friedrich Flick and directors of his companies);
- IG-Farben Trial (directors of IG Farben, maker of Zyklon B used in the gas chambers);
- Hostages Trial (German generals of the Balkan and Norwegian campaigns);
- RuSHA Trial (SS “racial cleansing” and “resettlement” officials);
- Einsatzgruppen Trial (officers of *Einsatzgruppen* – SS mobile death squads);

²⁹⁵ *Ibid.*, para. 21.

- Krupp Trial (Krupp Group directors) – armed Nazi aggression and used slave labour);
- Ministries Trial (officials of various Reich ministries, including Foreign and Interior); and
- High Command Trial (high-ranking generals).

As the above list makes clear, these defendants were the leaders and the elite of Nazi society in all its key sectors. Twenty-five of 183 defendants were found not guilty. That said, many of them were convicted on charges of crimes against peace, war crimes and crimes against humanity. Of those, 24 were sentenced to death and 13 of those death sentences were carried out. Twenty of the defendants were sentenced to life in prison, and 98 to long prison terms. But many of the worst did not serve out their prison sentences.

In the early years of the American occupation of its zone in Germany, many influential Germans had appealed to the US High Commissioner (or military governor) Lucius Clay to review the Nuremberg Subsequent Trial sentences.²⁹⁶ Clay, however, ignored these requests. He was replaced as High Commissioner by John J. McCloy toward the end of 1949. By then, the Cold War had begun to dominate global politics.²⁹⁷ McCloy, who, as Assistant Secretary of War, had been one of those in the United States government strongly supporting the Nuremberg trials,²⁹⁸ began to view American priorities in a different light. He appointed a panel, headed by an American appellate judge (Justice David Peck), to study all the decisions of the Subsequent Nuremberg Trials.²⁹⁹ Many claimed the review was hasty, if not cursory or biased.³⁰⁰ Corroborating the latter accusation, the panel accepted briefs from the defence, but refused them from the prosecution.³⁰¹ The advisory body then sent McCloy a report recommend-

²⁹⁶ Alan Brinkley, *Liberalism and Its Discontents*, Harvard University Press, Cambridge, MA, 1998, p. 192.

²⁹⁷ Robin Cohn and Paul Kennedy, *Global Sociology*, New York University Press, New York, NY, 2013, p. 60, where it was stated that “[t]he East-West Cold War dominated global politics from 1947 to 1989”.

²⁹⁸ Ronald Smelser and Edward J. Davies, *The Myth of the Eastern Front: The Nazi-Soviet War in American Popular Culture*, Cambridge University Press, New York, NY, 2008, p. 53.

²⁹⁹ Brinkley, 1998, p. 192, see above note 296; *ibid.*, p. 53.

³⁰⁰ Brinkley, 1998, p. 192, see above note 296.

³⁰¹ *Ibid.*

ing reduced prison sentences for dozens of the convicted former Nazis and the commutation of most death sentences.³⁰²

McCloy adopted most of their recommendations. He commuted the sentences of the majority of prisoners who had been ordered to die (allowing five of them to be executed).³⁰³ However, he reduced the sentences, or paroled completely, 79 of 89 war criminals then being held in Landsberg prison. Among those he released were *Einsatzgruppe* leaders directly involved in the slaughter of Jews and other innocent civilians. This included Martin Sandberger, who had been chief of *Einsatzkommando* 1a of *Einsatzgruppe A*, later commander of the Security Police and SD in Estonia, where he oversaw the murder of thousands of Jews.³⁰⁴ It also included Alfried Krupp, who had been serving a long sentence for exploiting Jews and other wartime concentration camp prisoners as slave laborers for his armaments factories. Alan Brinkley explains that what these prisoners endured was “appalling, even inhuman”.³⁰⁵ Nonetheless, on 31 January 1951, “Alfried Krupp walked out of the gates of Landsberg prison [...] drove to a champagne breakfast at a nearby hotel, and resumed active control of one of the world’s largest armaments companies”.³⁰⁶

The commutations, and Krupp’s release in particular, generated a firestorm of controversy back in the United States. Eleanor Roosevelt asked McCloy, “Why are we releasing so many Nazis?”.³⁰⁷ Krupp himself seemed to have an answer to that question. “Now that they have Korea on their hands”, he said, “the Americans are a lot more friendly”. Krupp was referring to the communist North Korea’s invasion of South Korea in June 1950, which sparked the Korean War and elevated Cold War hostilities to a fevered pitch. Krupp was right – America’s shifting priorities due to the Cold War played a decisive role in McCloy’s decision to release the Nazi war criminals.

As McCloy told President Truman in September 1950, because of political exigencies such as German rearmament and the Cold War, “certain things we would like to see done in Germany will not be complet-

³⁰² *Ibid.*

³⁰³ Smelser and Davies, 2008, p. 54, see above note 298.

³⁰⁴ *Ibid.*

³⁰⁵ Brinkley, 1998, p. 192, see above note 296.

³⁰⁶ *Ibid.*

³⁰⁷ *Ibid.*, p. 193.

ed”.³⁰⁸ Alan Brinkley put his finger on the American Cold War strategy as the counter to the international criminal justice imperative:

The invasion of South Korea in June 1950 had transformed [...] the American [view] of the world. As McCloy wrote a few years later: “[The] realization that the Soviet was prepared to release armed forces to extend its power aroused Europe and particularly Western Germany, whose situation presented a parallel unpleasant to contemplate”. In this new context concern about Germany’s past faded quickly, to be replaced by commitment to Germany’s anticommunist future.³⁰⁹

By the end of 1958, all remaining Nuremberg-convicted war criminals in American custody had been released.

3.5.2. The Tokyo Commutations

If the 1950 invasion of South Korea marked a shift in American policy *vis-à-vis* war criminals in Europe, it certainly had the same effect in Asia, where Japanese atrocity architects had been put on trial by the International Military Tribunal for the Far East (‘IMTFE’) from 1946 through 1948.³¹⁰ Under the jurisdiction of the Americans, the occupying authority in Japan at that time (under the leadership of General Douglas MacArthur), the IMTFE, seated in Tokyo, consisted of eleven judges, one each from the Allied nations that fought against Japan – Australia, Canada, China, France, Great Britain, India, the Netherlands, New Zealand, Philippines, the Soviet Union and the US.³¹¹ They sat in judgement of twenty-eight Japanese leaders – 19 professional military men and 9 civilians.³¹²

The defendants were charged in a consolidated indictment with crimes against peace, for planning and promoting wars of aggression con-

³⁰⁸ Smelser and Davies, 2008, p. 55, see above note 298.

³⁰⁹ Brinkley, 1998, pp. 193–194, see above note 296.

³¹⁰ Peter Lowe, “An Embarrassing Necessity: The Tokyo Trial of Japanese Leaders, 1946–48”, in Maureen Mulholland and R. A. Melikan (eds.), *The Trial in History: Domestic and International Trials, 1700-2000*, vol. 2, Manchester University Press, Manchester, 2003, p. 137.

³¹¹ Arne Kislenko, “International Military Tribunal for the Far East (1946-1948)”, in Alexander Mikaberidze (ed.), *Atrocities, Massacres, and War Crimes: An Encyclopedia*, vol. 1, ABC-CLIO, Santa Barbara, CA, 2013, p. 313.

³¹² *Ibid.*

trary to international law, and war crimes.³¹³ The latter included murdering, maiming, and ill-treating prisoners of war and civilians.³¹⁴ Specific allegations included forced labour under inhumane conditions, destroying public and private property, razing cities beyond military necessity, and facilitating mass murder, rape and torture.³¹⁵

Evidence of Japanese atrocities during the trial was graphic and revolting. In Nanking alone, during the first month of Japanese occupation, evidence revealed 20,000 rapes were committed.³¹⁶ Trial testimony revealed that, throughout the war, rapes of civilians were routinely quite cruel and appalling, with young girls and old women as victims.³¹⁷ Japanese soldiers were told to murder those they raped after commission of the assault.³¹⁸ According to Kelly Dawn Askin, the IMTFE evidence demonstrated:

The [rape] victims were ranged from young girls to old women [...]. One woman would frequently be assaulted by a number of soldiers. A woman was killed for refusing intercourse. For amusement, a father was forced to assault his daughter. In another case, a boy was forced to assault his sister. An old man was forced to assault his son's wife. Breasts were torn off, and women were stabbed in the bosoms. However, while "amusement" may have been a factor, equally inauspicious reasons, such as degradation and destruction [...] were also intended [...].³¹⁹

IMTFE testimony also established that Japanese torture of prisoners of war and civilians was routine throughout areas of Japanese occupation. It was horribly sadistic: "Prosecutors for the IMTFE [...] mapped Kempetai [military secret policy] torture [...] beating, whipping, burning, forced kneeling (often on sharp objects), the knee spread, suspension,

³¹³ *Ibid.*

³¹⁴ *Ibid.*, pp. 313–314.

³¹⁵ *Ibid.*, p. 314.

³¹⁶ Hu Hua-ling, *American Goddess at the Rape of Nanking: The Courage of Minnie Vautrin*, Southern Illinois University Press, Carbondale, IL, 2000, p. 85.

³¹⁷ Kelly Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals*, Martinus Nijhoff, The Hague, 1997, p. 68.

³¹⁸ *Ibid.*

³¹⁹ *Ibid.*

pumping stomachs with water (usually with a teapot), and magneto torture”.³²⁰ In the Final Judgment, the IMTFE held that

[Torture], murder, rape and other cruelties of the most inhumane and barbarous character were freely practiced by the Japanese Army and Navy, and [given] the scale, the geographical spread, and commonality of patterns of atrocity, only one conclusion is possible – the atrocities were either secretly ordered or wilfully permitted by the Japanese Government or individual members thereof and by the leaders of the armed forces.³²¹

By trial’s end, two defendants had died and one was found to be insane.³²² Of those to face final judgment, seven were sentenced to death, sixteen to life imprisonment and the rest were given prison sentences of various lengths.³²³ However, as with the Nuremberg process, post-conviction justice faltered. With the Cold War intensifying, the United States reckoned that Japan’s allegiance was necessary to stand as a bulwark against the spread of communism in eastern Asia.³²⁴ To curry favour with their vanquished wards, the United States began releasing those IMTFE convicts who had not been executed.³²⁵ In November 1948, General MacArthur released the first of the convicts. By 1956, all surviving prisoners were out on parole. By 1958, all the high-level Japanese war criminals had been given unconditional release.³²⁶

³²⁰ Darius Rejali, *Torture and Democracy*, Princeton University Press, Princeton, NJ, 2007, p. 152.

³²¹ “United States *et al.* v Araki Sadao *et al.*”, in R. John Pritchard (ed.), *The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East, with an Authoritative Commentary and Comprehensive Guide*, 2002, vol. 103, Majority Judgment, pp. 49, 592.

³²² Thomas J. Weiler, “Allied Military Tribunals (1945-1948)”, in Mikaberidze (ed.), 2013, p. 11, see above note 311.

³²³ *Ibid.*

³²⁴ The Pacific War Historical Society, “How the United States Protected Japanese War Criminals and Facilitated Japan’s Denial of War Guilt and War Crimes” (available on its web site).

³²⁵ Robert Cryer and Neil Boister (eds.), *Documents on the Tokyo International Military Tribunal: Charter, Indictments and Judgment*, Oxford University Press, Oxford, 2008, p. lxxxii.

³²⁶ *Ibid.*

3.5.3. The Nuremberg–Tokyo Commutations and Nahimana’s Early Release

In US High Commissioner John J. McCloy in Germany and General Douglas MacArthur in Japan, we have the case of a lone American making early release decisions in reference to convicted war criminals based on US political preferences. These individuals were invested with absolute power to guide the trajectory of justice post-conviction and they let the Cold War interests of the United States trump the interests of international justice. If Robert Jackson was correct in his IMT opening statement that, in bringing Axis war criminals to book, the “real complaining party at [the] bar is Civilization”,³²⁷ then McCloy and MacArthur were custodians for global aspirations and values, and their commutations look like breaches of their fiduciary duty to humanity.

It is in this sense, perhaps, that we can say the ghost of those commutations hovers over Meron’s early release of Ferdinand Nahimana. Once again, an American was given complete power to decide whether the interests of justice mandated further incarceration of a high-level war criminal. Before him, making this application for early release, Meron had a man responsible for arousing genocidal hatred that led to the mass murder of hundreds of thousands. Since his conviction, he had served 13 years, nearly half of it in a comfortable UN detention facility in Arusha. Meron recognized the monumental role Nahimana played in fomenting the extirpation of nearly a million innocents in less than 100 days. He recognized Nahimana’s lack of remorse, but he released him, nonetheless.

One cannot fail to remember Meron’s objection on free speech grounds to a large portion of Nahimana’s adjudicated guilt. One cannot forget that, at least in part due to those liberty of expression concerns grounded in American First Amendment philosophy, Meron had argued that Nahimana’s significantly reduced sentence was still too harsh. One cannot quantify how much Meron’s US policy sensibilities factored into the early release decision. However, one cannot ignore that those idiosyncratically American doctrinal values likely dulled any lingering concerns over letting the “Rwandan Goebbels” walk out of jail a free man after less than a decade in Mali confinement. Once again, American exceptionalism would appear to have trumped global justice.

³²⁷ Robert H. Jackson, “Opening Statement before the International Military Tribunal”, *The Robert H. Jackson Center* (available on its web site).

3.6. Conclusion

The issue of the relationship between Judge Meron’s American First Amendment sensibilities and the early release of Ferdinand Nahimana has been a fascinating portal through which to explore the often-fraught dynamic between national interests and international justice. It is easy to connect the dots and trace Meron’s explicit animosity to the hate-speech-as-persecution basis for liability, the reduction of sentence from life to 30 years, the complaint that 30 years was too much, and the ultimate decision to let Nahimana walk only eight years after his transfer to Mali.

That decision, made after acknowledging that the two-thirds mark confers only *eligibility* for release, casually ignores (1) Nahimana’s long history of Tutsi hatred and his outsize and integral role in fomenting the Rwandan Genocide (acknowledged early in the decision but oddly ignored by its conclusion); (2) the disproportion in roles between Nahimana and the other supposedly “similarly-situated” early-release prisoners cited in the decision (Borovčanin, a deputy police commander and Bisengimana, a small-town mayor) to justify the early release; (3) the defendants’ complete lack of remorse, which reared its ugly head on the Internet after the transfer to Mali (material easily accessible but completely ignored in Meron’s decision); and (4) contrary to the spirit of the rules, the failure to confer with Judge Pocar, who was in favour of the appeals-reduced sentence and was sitting with Judge Meron in the MICT’s sister court. In the face of all this, Judge Meron could only offer the anodyne comments of Mali prison authorities about the intellectual Nahimana’s docile behaviour and cordial relations with fellow Rwandan genocidaires behind bars.

Certainly, Judge Meron’s First Amendment frissons may not be the sole explanation for the early release. Yet, they remind us that national policy preferences can adulterate, if not stymie, the desired end-result of the justice process. From the *WikiLeaks* cables alone, there is certainly evidence that the United States perceived Theodor Meron as ‘its man in The Hague’. If America has long objected to the inclusion of hate speech crimes in international criminal law instruments (or their potential to thwart American free speech policy in court), then its diplomatic isolation and failures at the negotiating table on this issue should not permit it to triumph in the shadows of the back end of the process. To the extent that is what has happened here, it has been gratifying to shine a light on the darkness of that end-phase-subversion in this chapter.

However, this chapter certainly raises more issues than the mere impact of American free speech exceptionalism on Ferdinand Nahimana's early release. Why is one man alone allowed to make a unilateral decision concerning the liberty of someone convicted by the international community of setting up the communications nerve-centre for one of the worst genocides in history? Even if a one-person unilateral decision is in the best interests of justice, should that person be the same one who sat on the appellate merits panel and felt the sentence reduced by that panel was still too harsh?

Even so, there are concerns that go even beyond the *Nahimana* case. What doctrine or policy justifies the 'two-thirds-mark' release eligibility in the first place? Should ICTR defendants have continued to be held to the ICTR's three-quarters eligibility standard? Has there been too much cross-contamination at the appellate level in terms of sentence reductions between the ICTY (where most atrocities did not amount to genocide) and the ICTR (where nearly all atrocities implicated genocide, the crime of crimes)? If, based on that, the ICTY has generally issued more lenient sentences than the ICTR, perhaps at the appellate level perceived errors as to parts of ICTR convictions have led to disproportionate reductions in sentences by ICTY-acclured judges. If, in the end, regardless of excluding pre-1994 speech activity, Nahimana was still found by the Appeals Chamber to be guilty of incitement to genocide and hate speech as persecution, that is, still found to be the propaganda master of the Rwandan Genocide, what is the justification in the steep reduction from life in prison to 30 years?

Other concerns remain. Should there be more due process and transparency in early release decisions, including hearings where prosecutors, victims and other witnesses can be heard? Should a 'Prisoner Release Analysis Unit' be created within the MICT? Should there be a mechanism in place to allow for *en banc* review of early release decisions (by the 25 judges on the roster in exceptional cases)? Should early release be premised on meeting certain key conditions, such as expression of remorse, promise to refrain from speaking in public to defend past criminal conduct or justify new ethnic animosity? Or, even more simply, should the defendant also be required to agree not to contact survivors? MICT Prosecutor Serge Brammertz has called for such reforms:

[I] fully understand the concerns by the victims [...]. There are many countries where early release is more of a condi-

tional release where it is linked to a number of conditions to be imposed and a number of actors of the judicial process like victims or prosecutor are consulted before a decision is taken. That is a system I would personally prefer [...].³²⁸

Indeed, since this chapter was originally presented to international criminal law experts and members of the international criminal bench in October 2017, officials at the MICT have begun to take notice and make changes. Last year, Rwandan genocidaire Aloys Simba was the first convicted ICTR/Y defendant to be released early under certain defined conditions. For instance, he was asked to pledge not to “interfere in any way with the proceedings of MICT, or administration of justice”; to “conduct himself honorably and peacefully [...] and not to engage in secret meetings intended to plan civil unrest or any political activities”; and not to “discuss [his] case, including any aspect of the 1994 genocide against the Tutsi in Rwanda with anyone [...] nor make any statements denying the 1994 genocide”.³²⁹

In the meantime, until wider ranging and more systemic/codified changes are made, it is the victims who are betrayed by a system that British investigative journalist Linda Melvern describes as “unaccountable as it is questionable”.³³⁰ Melvern sums up the problem in relation to the early release decisions made by Judge Meron:

The decisions by Meron to grant early release to génocidaires who fail to even recognise the crimes for which they were convicted raises serious questions about the procedures in place. Meron seems to have attempted no verifications of the claims made by the génocidaires to obtain their early release; no questioning of prison officials who seem to think these convicts are somehow fit for release. There are no steps in place to see whether these prisoners, the world’s worse criminals, are in actual practice proven to be adequately rehabilitated, a claim made by their lawyers. Once released there is no monitoring to keep track of them. What they are granted is an unconditional reduction in sentence and there is

³²⁸ Nasra Bishumba, “UN Prosecutor Faults Early Release of Genocide Convicts”, *The New Times*, 16 February 2017 (available on its web site).

³²⁹ Barbara Hola, “Early Release of ICTR Convicts: The Practice Beyond the Outrage”, *JusticeInfo.Net*, 5 July 2019 (available on its web site).

³³⁰ Linda Melvern, “Who Will Bring UN Judge Theodor Meron to Account?”, *The New Times*, 23 December 2016, (available on its web site).

nothing to stop these génocidaires justifying their crimes and continuing to promote their racist ideology. It is yet one more betrayal. We owe the survivors so much more than this.³³¹

It is interesting to note that Judge Meron himself is a survivor of the Holocaust, which has shaped his entire career. Some may point to his noble stance as a member of the Israeli government in advising against civilian settlements in land captured after the 1967 Six-Day War. It demonstrates his integrity, independence, and adherence to higher humanitarian principles. Nevertheless, that was the Theodor Meron of fifty years ago, only a couple decades removed from losing his family to the Final Solution. In the half-century since, did his life as an American academic and an appellate judge change him? Undoubtedly proud of his adopted country and certainly ensconced in reading books as a scholar and reviewing dry transcripts as an appellate jurist, did his changed life circumstances over the past few decades, somewhat desensitize him to the realities of being an atrocity survivor seeking justice? One wonders how he would react if someone sitting in judgment of the incarcerated persons responsible for taking his loved ones simply rubber-stamped their return to liberty after so short a time. In such a case, it is not difficult to imagine a much different reaction from the other side of the bench.

³³¹ Linda Melvern, “Early Release of Genocide Criminals One More Betrayal”, *The New Times*, 21 April 2017 (available on its web site).

Bend It Like Bentham: The Ambivalent ‘Civil Law’ vs. ‘Common Law’ Dichotomy Within International Criminal Adjudication

Alexander Heinze *

As early as in 1869, Robert von Mohl, Professor of Political Sciences at the University of Tübingen and one of the first who coined the term ‘Rechtsstaat’, published a three-and-half pages long critique of the state of international criminal law that he ended with words that might well be uttered today:

There is no hope that this [namely, the state of international criminal law] is going to improve. Governments are occupied with mutual envy, heads of State perceive themselves as high above matters that in their eyes are pedantic scholarly ideas, scholars and academics are still confused and too divided to formulate meaningful advice [...]. After all, there would be no complete achievement without North America’s consent; this consent, however, is out of the question due to the barbaric state of international concepts and terms and the increasingly defiant attitude of both the media and domestic legislators. Thus, in this matter [that is, the matter of interna-

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tional criminal law] it is made sure that the trees of intellectual complacency do not grow up to the sky.¹

Surely, especially the critical perception of the media is due to the historical context. Yet, what von Mohl emphasized with drastic words might only be slightly exaggerated with a view to the current state of international criminal law discourse: the “barbaric state of international concepts and terms”.

A prominent example of this are the terms adversarial–inquisitorial and common–civil law – certainly the most common taxonomy of international criminal justice. These categories lack clarity and definition and have proven to be of limited descriptive value. This does not render them ill-suited; on the contrary, they may in fact serve as a tool to gain a better understanding of why certain procedural approaches are selected over others. However, they need to be defined, refined, and complemented by other more precise topographies of power within international criminal jurisdictions.

In this chapter, I will demonstrate, as a premise of my argument, that different procedural traditions create diverse attitudes and very distinct points of view about legal norms. Evidentiary rules, for instance, are so rooted in their historical and cultural context that they cannot be transplanted in a piecemeal fashion from a common law or civil law system into international criminal justice, because different legal traditions and cultures foster different responsibilities within a system. To transplant a procedural element from one system into another requires an accurate description of the default legal system, for which the common–civil law taxonomy is unsuitable.

¹ Robert von Mohl, *Staatsrecht, Völkerrecht und Politik*, Dritter Band: Politik, Zweiter Band, Verlag der H. Laupp’schen Buchhandlung, Tübingen, 1869, p. 700 (translated by the author):

Leider ist nun aber auch eine baldige Verbesserung nicht zu hoffen. Die Regierungen haben mit gegenseitigem Neide zu viel zu thun, die leitenden Staatsmänner stehen zu hoch über dem, was ihnen eine pedantische Schulgrille erscheinen mag, die Wissenschaft ist noch viel zu confus und unter sich uneinig, als dass sie mit Auctorität einen Rath formuliren könnte, als dass an einen Congress und eine allgemeine Vereinbarung zu denken wäre. Und schließlich wäre nicht einmal etwas vollständiges erreicht, wenn nicht auch Nordamerika seine Zustimmung gäbe; eine solche aber ist bei dem barbarischen Zustande der internationalen Begriffe daselbst und bei dem immer trotzigeren Auftreten roher Zeitungsschreiber und Gesetzgeber außer aller Frage. Es ist also auch in diesem Punkte schon dafür gesorgt, dass die Bäume intelligenter Selbstzufriedenheit nicht in den Himmel wachsen.

I will therefore first describe the procedural models that are commonly employed for international criminal justice (common law vs. civil law; adversarial vs. inquisitorial) and then, in a second part, identify which taxonomy serves best to categorise the procedural framework of international criminal justice. This taxonomy has to be descriptive, empirical, analytical and interpretive (explanatory), taking into account the structural, institutional, sociological and political features of procedural provisions of international criminal tribunals. To that end, of all existing categories, Damaška’s concepts of co-ordinate vs. hierarchical officialdom and a reactive vs. an activist State, with conflict-solving vs. policy-implementing types of proceedings, serve best to model procedural frameworks in international criminal justice, because they are more precise topographies of power within international criminal jurisdictions. Damaška, drawing on Weber and other social theorists, builds a bridge to political theory, is able to encapsulate the complexities of real legal processes, and creates models of relatively unusual combinations of features by using Weberian ideal-types. His models embrace the differences of legal thought between common law and civil law, which at the same time underline the aforementioned utility of such categories – not as models in themselves, but as features of Damaška’s ideal-types. The combination of sociological, empirical and political elements with the use of ideal-types allows an insight into the nature of a society’s legal system that is shaped by the kinds of individuals² who dominate it.

What appears to be a mere snapshot of procedural practice is symptom of a much larger picture. This chapter is thus an essay about definition, terminology, deconstructionism, and the arbitrary use of concepts. It

² I prefer the term ‘individual’ over ‘actor’, since the premise of this chapter is that decisions in international criminal law are based on the individual’s personal legal background. I use the term ‘actors’ to describe agents that construct a legal system. Individual actors – or individuals – have the ability to act reflexively but in doing so “they are significantly constrained by the structures in which they operate” (Nerida Chazal, *The International Criminal Court and Global Social Control*, Routledge Taylor & Francis, Abingdon, 2016, p. 4). The individual as judicial actor, for instance, can shape the legal discourse but will basically reproduce both concepts, terminology and methodology of the epistemic group the individual is connected to (*ibid.*). See, in more detail, Alexander Heinze, “Bridge over Troubled Water – A Semantic Approach to Purposes and Goals in International Criminal Justice”, in *International Criminal Law Review*, 2018, vol. 18, p. 946.

addresses both the perspective of the practitioner and the legal scholar – if there is, and ever has been, a difference.³

4.1. Introduction

It is a popular tool for legal argumentation to refer to the nature of criminal proceedings before the International Criminal Court ('ICC'). I will review two recent examples. For one, in a decision on a 'no case to answer' motion – a motion that has become a viable weapon for the Defence before the ICC⁴ – the Appeals Chamber remarked "that the Court's legal framework combines elements from the Common Law and Romano-Germanic legal traditions".⁵ This classification – using the terms "Com-

³ See the illuminating remarks by Peter Birks, "The Academic and the Practitioner", in *Legal Studies*, 1998, vol. 18, pp. 397–413, especially 405. For the opposite position, see the remark of Justice Sir Robert Megarry in *Cordell v Second Clanfield Properties Ltd*, Chancery Division, 8 July 1968, Property, Planning and Compensation Reports, vol. 1, p. 848, 855: "The process of authorship is entirely different from that of judicial decision. The author, no doubt, has the benefit of a broad and comprehensive survey of his chosen subject as a whole, together with a lengthy period of gestation, and intermittent opportunities for reconsideration. But he is exposed to the period of yielding to preconceptions, and he lacks the advantage of that impact and sharpening of focus which the detailed facts of a specific case bring to the judge. Above all, he has to form his ideas without the aid of the purifying ordeal of skilled argument on the specific facts of a contested case. Argued law is tough law. This is as true today as it was in 1409 when Hankford J. said "Home ne scaveroit de quel metal un campane fuit, si ceo ne fuit bien batu, *quasi diceret*, le ley per bon disputation serra bien conus"; and these words are nonetheless apt for a judge who sits, as I do, within earshot of the bells of St. Clements. I would therefore give credit to the words of any reputable author in book or article as expressing tenable and arguable ideas, as fertilisers of thought, and as conveniently expressing the fruits of research in print, often in apt and persuasive language. But I would do no more than that; and in particular I would expose those views to the testing and refining process of argument. Today, as of old, by good disputing shall the law be well known". For a nuanced view, see Basil S. Markesinis, *Comparative Law in the Courtroom and Classroom*, Hart, Oxford, Portland, Oregon, 2003, p. 36.

⁴ International Criminal Court ('ICC'), Situation in the Republic of Kenya, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber, Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on "No Case to Answer" Motions), 3 June 2014, ICC-01/04-01/06-772, para. 32 (<http://www.legal-tools.org/doc/128ce5/>); ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Bosco Ntaganda*, Appeals Chamber, Judgment on the appeal of Mr Bosco Ntaganda against the "Decision on Defence request for leave to file a 'no case to answer' motion", 7 September 2017, ICC-01/04-02/06-2026, paras. 43, 44, 48, 56 (<http://www.legal-tools.org/doc/7b95ed/>).

⁵ ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Bosco Ntaganda*, Appeals Chamber, Judgment on the appeal of Mr Bosco Ntaganda against the "Decision on Defence request for leave to file a 'no case to answer' motion", 5 September 2017, ICC-01/04-02/06-2026, para. 52 (<https://www.legal-tools.org/doc/7b95ed>).

mon Law” juxtaposed to “Romano-Germanic legal traditions” – helped the Chamber to argue that “a ‘no case to answer’ procedure is not inherently incompatible with the legal framework of the Court”.⁶

The nature of the procedural law at the ICC is also playing a role in the ongoing dispute amongst different Chambers concerning whether to make a preliminary admissibility decision (including on *prima facie* relevance and probative value) when just one piece of evidence is submitted,⁷ as had been the previous practice,⁸ or to defer this decision “until the end of the proceedings”, following the alternative approach allowed by the *Bemba* Appeals Chamber.⁹

⁶ *Ibid.*, para. 44.

⁷ Cf. ICC, Situation in the Central African Republic, *The Prosecutor v. Jean-Pierre Bemba Gombo* (*Bemba*), Appeals Chamber, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, 3 May 2011, ICC-01/05-01/08-1386, para. 37 (‘Appeals judgement on evidence admission decision’) (<http://www.legal-tools.org/doc/7b62af/>), arguing that the word “may” in Article 69 (4) allows a Trial Chamber to take this approach; *Bemba*, Trial Chamber, Judgment pursuant to Article 74 of the Statute, 21 March 2016, ICC-01/05-01/08-3343, para. 222 (<http://www.legal-tools.org/doc/edb0cf/>).

⁸ See, for example, ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (*Katanga and Chui*), Trial Chamber, Decision on the Prosecutor’s Bar Table Motions, 12 May 2011, ICC-01/04-01/07-2635, para. 15 (<http://www.legal-tools.org/doc/7710b6/>). For a similar approach at the International Criminal Tribunal for the former Yugoslavia (‘ICTY’), see Christine Schuon, *International Criminal Procedure: A Clash of Legal Cultures*, T.M.C. Asser Press, The Hague, pp. 137–8 (shift from admissibility to weight or reliability).

⁹ *Bemba*, Appeals judgement on evidence admission decision, para. 37, see above note 7; in the same vein, see ICC, Situation in the Central African Republic, *The Prosecutor v. Bemba et al.* (*Bemba et al.*), Trial Chamber VII, Decision on Prosecution Requests for Admission of Documentary Evidence (ICC-01/05-01/13-1013-Red, ICC-01/05-01/13-1113-Red, ICC-01/05-01/13-1170-Conf), 24 September 2015, ICC-01/05-01/13-1285, para. 9 (<http://www.legal-tools.org/doc/5a06b3/>). The Defence’s request for leave to appeal was rejected, mainly for being “premature”, by Trial Chamber VII; see *Bemba et al.*, Trial Chamber VII, Decision on Babala and Arido Defence Request for Leave to Appeal the Trial Chamber’s “Decision on Prosecution Requests for Admission of Documentary Evidence (ICC-01/05-01/13-1285)”, 12 October 2015, ICC-01/05-01/13-1361 (<http://www.legal-tools.org/doc/a19620/>); ICC, Situation in the Republic of Côte d’Ivoire, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé* (*Gbagbo and Ble Goudé*), Trial Chamber I, Decision on the submission and admission of evidence, 29 January 2016, ICC-02/11-01/15-405, paras. 12 *et seq.* (‘Decision on the submission and admission of evidence’) (<http://www.legal-tools.org/doc/7b6dce/>), with dissenting opinion of Judge Henderson: Annex to Decision on the submission and admission of evidence, 29 January 2016, ICC-02/11-01/15-405-Anx, paras. 13, 16 *et seq.* (‘Dissenting Opinion of Judge Henderson’) (<http://www.legal->

In the *Gbagbo and Blé Goudé* case, Trial Chamber I opted for the latter approach by majority.¹⁰ In his dissenting opinion, Judge Henderson (who is from common law dominated Trinidad and Tobago) rejected this approach on two premises: first, in “adversarial proceedings”, the Chamber’s approach would violate the rights of the accused;¹¹ and second:

Although the legal architecture of the Court blends aspects of both civil and common law systems, as highlighted by my learned colleague in the Appeals Chamber, the Rome Statute provides for *key aspects of the proceedings to be conducted in an adversarial nature*, insofar as Articles 66(2) and Article [sic] 67(1)(e) of the Statute confine the discharge of the burden of proof to the Prosecutor and provide for the confrontation of the evidence by the accused.¹²

For Judge Henderson, apparently, both the “discharge of the burden of proof to the Prosecutor” and “the confrontation of the evidence by the accused” are elements of the adversarial procedural model and not, *argumentum a contrario*, of the inquisitorial procedural model.

tools.org/doc/6fbd2c/). However, against this approach, albeit *obiter*, see *Bemba*, Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”, 8 June 2018, ICC-01/05-01/08-3636-Red (<http://www.legal-tools.org/doc/40d35b/>); *Bemba*, Appeals Chamber, Separate opinion Judge Van den Wyngaert and Judge Morrison, 8 June 2018, ICC-01/05-01/08-3636-Anx2, para. 18 (<http://www.legal-tools.org/doc/c13ef4/>):

Whereas this [approach] may have been unproblematic in the context of a case relating to offences against the administration of justice. We are of the opinion that it is not appropriate in cases relating to article 5 of the Statute. [...] Not only is it necessary to rule on the admissibility of all evidence submitted by the parties, the Trial Chamber must also apply the admissibility criteria of article 69 (4) of the Statute sufficiently rigorously to avoid crowding the case record with evidence of inferior quality. We are confident that, if this had been done in the present case, many of the problems that we have identified in this section would not have arisen.

In a similar vein, see *Bemba*, Appeals Chamber, Concurring Separate Opinion of Judge Eboe-Osuji, 14 June 2018, ICC-01/05-01/08-3636-Anx3, paras. 293 *et seq.* (<http://www.legal-tools.org/doc/b31f6b/>). Guariglia tags the two models as ‘submission model’ vs. ‘admission model’, see Fabricio Guariglia, “‘Admission’ v. ‘Submission’ of Evidence at the International Criminal Court: Lost in Translation”, in *Journal of International Criminal Justice*, 2018, vol. 16, p. 315. On the common law-civil law dimension of the dispute, see Kerstin Bree Carlson, *Model(ing) Justice*, Cambridge University Press, Cambridge, 2018, p. 76.

¹⁰ *Gbagbo and Blé Goudé*, Decision on the submission and admission of evidence, paras. 12 *et seq.*, see above note 9.

¹¹ *Ibid.*, Dissenting Opinion of Judge Henderson, para. 9.

¹² *Ibid.*, para. 7 (footnote omitted, emphasis added).

Judge Henderson even goes on to remark:

In accordance with this Chamber’s ‘Directions on the Conduct of Proceedings’, this trial was also to be conducted on a basis more consistent with the practice and procedure of an adversarial trial, in which the phases of trial provide for each *party* to present its case and its evidence to the Chamber.¹³

In other words, Judge Henderson concludes, from the Chamber’s Directions on the Conduct of Proceedings, a preference for what he calls “an adversarial trial” – a phrase that he seems to use interchangeably with “proceedings to be conducted in an adversarial nature” in the same paragraph of his dissenting opinion. However, the Chamber’s Directions on the Conduct of Proceedings do not once use the term ‘adversarial’. On top of this, paragraph 12 of the Directions – the one referred to by Henderson – provides for elements that might well be part of an inquisitorial model of procedure, as I will show later. When the Chamber, presided by Henderson, recalls that “it may intervene at any time during the presentation of evidence and may order the production of any evidence it considers necessary for the determination of the truth”, it refers to elements that would sound very familiar to lawyers from, say, France, Germany or Spain. Throughout his dissenting opinion, Henderson seemingly shares the chorused belief that only an adversarial procedure can protect the rights of the accused – an assumption that is refuted by many non-adversarial proceedings in the world.

These two examples suggest that the categorisation of the procedural model of an international criminal tribunal – the ICC in this case – is crucial for legal interpretation and argumentation. Judge Silvia Fernández de Gurmendi, the former President of the ICC, portrayed it thus: “Every day, questions arise which may be answered differently depending on whether the issue is analysed through the lens of an inquisitorial or adversarial system”.¹⁴ In contrast, an anonymous former Judge at the International Criminal Tribunal for the former Yugoslavia (‘ICTY’) reportedly said that “[t]he conflict between civil and common law is overstated”.¹⁵

¹³ *Ibid.* (footnote omitted, emphasis in the original).

¹⁴ Silvia Fernández de Gurmendi, “Enhancing the Court’s Efficiency: From the Drafting of the Procedural Provisions by States to their Revision by Judges”, in *Journal of International Criminal Justice*, 2018, vol. 16, p. 346.

¹⁵ Cited in Daniel Terris, Cesare P.R. Romano and Leigh Swigart, *The International Judge*, Oxford University Press (‘OUP’), Oxford, 2007, p. 111.

The purpose of this chapter is to define the internal system of procedural rules at the ICC. To this end, it is necessary to identify the best model that describes what the ICC process is. Only then can a determination be made of how certain rules *should be* interpreted. The sought model is supposed to specify what the priorities of the criminal justice system ought to be or to identify the optimal means of implementing these priorities. In other words, a normative-prescriptive model is not desired.¹⁶ Instead, what is needed is a ‘magnifying glass’ which provides a good view of the internal organisation of the ideas and structures of criminal procedure.¹⁷ Because procedural questions can only be answered by a contextual interpretation involving comparative, institutional and sociological elements, this model must describe more than the framework of procedural provisions for a particular procedural problem. The model has to incorporate legal and political traditions, because those roots are not easily changed.¹⁸ Describing the process before the ICC, many authors – and judges – have overlooked its structural, institutional, sociological and political features.¹⁹

¹⁶ Cf. the approaches of Neil Walker and Mark Telford, *Designing Criminal Justice: The Northern Ireland System in Comparative Perspective*, Her Majesty’s Stationery Office, Norwich, 2000, p. 3 and Davor Krapac, “Some Trends in Continental Criminal Procedure in Transition Countries of South-Eastern Europe”, in John Jackson, Máximo Langer and Peter Tillers (eds.), *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaška*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 121; see the definition of “normative” in Aaron Rappaport, “The Logic of Legal Theory: Reflections on the Purpose and Methodology of Jurisprudence”, in *Mississippi Law Journal*, 2003–2004, vol. 73, p. 572: “The term ‘normative’, like many words, has a varied meaning. For our purposes, normative questions refer to ‘should’ questions, questions about how individuals or institutions should act. [...] A statement that a decision is ‘justified’ or ‘good’ is a normative statement if it implies that a decisionmaker is, was or will be under an obligation to reach a certain decision. Thus, the claim that a legal right to assisted suicide is justified typically means that a court should rule in that way”. Although in most cases, the terms “prescriptive” and “normative” are used interchangeably, Rappaport defines prescriptive as a methodology that helps to identify “authoritative principles that answer the important ‘should’ questions”, see *ibid.*, p. 574.

¹⁷ Cf. Krapac, 2008, p. 121, see above note 16.

¹⁸ Cf. Robert A. Kagan, *Adversarial Legalism: The American Way of Law*, Harvard University Press, Harvard, Massachusetts, 2003, pp. 5–6.

¹⁹ Stephanos Bibas and William W. Burke-White, “International Idealism Meets Domestic-Criminal-Procedure Realism”, in *Duke Law Journal*, 2010, vol. 59, p. 641; about theories and models in more detail, see Michael S. Moore, *Placing Blame – A Theory of the Criminal Law*, OUP, Oxford, 1997/2010, pp. 4 ff.

4.2. Modelling the International Criminal Process

The debate on international criminal procedure is still heavily influenced by the apparent dichotomy between the inquisitorial ‘civil law’ and the adversarial ‘common law’ process.²⁰ Beyond that, there are countless theories that account for the structure of criminal procedure itself. The most commonly used models²¹ are ‘adversarial’ vs. ‘inquisitorial’. Since the dichotomies ‘civil law’ vs. ‘common law’ and ‘adversarial’ vs. ‘inquisitorial’ (this sharp distinction between the mentioned dichotomies or models is in itself an ideal)²² play the most prominent role in the interpretation of rules at international criminal tribunals, I will limit my analysis to those categories. Suffice to say that there have always been other attempts to model criminal procedure. The relevant approaches can generally be divided into descriptive and normative models, although not all of them fit into this distinction and many of them seem to have an overlap between a rather descriptive and a somewhat normative take.²³ The most prominent example of the former category is Packer’s crime control and due process model. This bifurcated approach focuses, on the one hand, on the efficient suppression of crime and, on the other, on fair trial rights and the concept of limited governmental power.²⁴ Thus, under ‘crime control’, speed, effi-

²⁰ Kai Ambos, *Treatise on International Criminal Law: Volume III: International Criminal Procedure*, OUP, Oxford, 2016, pp. 1–7. Critically about the use of these models, see Christoph Burchard, “Perspektiven pluralistischer Strafrechtsvergleichung”, in *Rechtswissenschaft*, 2017, vol. 8, p. 296: “Begonnen sei mit der klassischen Herausbildung von Rechtskreisen und Modellen (z.B. zur strafrechtlichen Beteiligungslehre). Obwohl sich dagegen zunehmend Widerstand formiert, insbesondere weil sie zu ‘gewaltsamen Vereinfachungen’ führen und ideologisch vorbesetzt sind (polemisch: Common Law, Civil Law und der Rest), haben sie doch eine bemerkenswerte Beständigkeit. Wollte man das rechtsvergleichende Rechtskreis- und Modelldenken nun am Maßstab der wissenschaftlichen Neutralität, Universalität und Genauigkeit messen, so müsste man es verwerfen” (footnotes omitted).

²¹ The terms ‘model’ and ‘system’ are often misleadingly used interchangeably, see also the critique by Teresa Armenta-Deu, “Beyond Accusatorial or Inquisitorial Systems: A Matter of Deliberation and Balance”, in Bruce Ackerman, Kai Ambos, and Hrvoje Sikirić (eds.), *Visions of Justice - Liber Amicorum Mirjan Damaška*, Duncker & Humblot, Berlin, 2016, p. 57.

²² See below Section 4.3.1.

²³ See, in more detail, Alexander Heinze, *International Criminal Procedure and Disclosure*, Duncker & Humblot, Berlin, 2014, pp. 133 ff.

²⁴ Herbert L. Packer, *The Limits of the Criminal Sanction*, Stanford University Press/OUP, Stanford, California/Oxford, 1969, pp. 149–53; see also the accounts of Yvonne McDermott, *Fairness in International Criminal Trials*, OUP, Oxford, 2016, pp. 9–10; Katja Šugman Stubbs, “An Increasingly Blurred Division between Criminal and Administrative

ciency, and finality are the overriding values that any rule or measure may not compromise,²⁵ while ‘due process’ aims at the protection of the ‘most disadvantaged’ and thus demands equal treatment regardless of wealth or social status.²⁶ Packer’s categorisation served as a basis for further elaborations, for example, taking into account rehabilitation and societal stability,²⁷ focusing on cases that never reach the courtroom,²⁸ emphasising more strongly the protection of the innocent,²⁹ and the interests of victims.³⁰

Last but not least, Damaška, in his seminal *The Faces of Justice*,³¹ developed a set of models based on attitudes towards State authority and on concepts of government.³² First, the ‘hierarchical’ and ‘co-ordinate’ models describe two structures of State authority that express two “ideals of officialdom”.³³ Damaška’s second pair of procedural models refer to

Law”, in Ackerman, Ambos and Sikirić (eds.), 2016, p. 353, see above note 21; Liz Campbell, Andrew Ashworth, and Mike Redmayne, *The Criminal Process*, fifth edition, Oxford University Press, Oxford, 2019, pp. 39 ff.

²⁵ Cf. Heinze, 2014, p. 134, see above note 23.

²⁶ Packer, 1969, p. 168, see above note 24.

²⁷ John Griffiths, “Ideology in Criminal Procedure or A Third ‘Model’ of the Criminal Process”, in *Yale Law Journal*, 1969–1970, vol. 79, pp. 359–417.

²⁸ Satnam Choongh, “Policing the Dross – A Social Disciplinary Model of Policing”, in *British Journal of Criminology*, 1998, vol. 38, p. 625.

²⁹ Keith A. Findley, “Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process”, in *Texas Tech Law Review*, 2008–2009, vol. 41, pp. 141 ff.

³⁰ Kent Roach, “Four Models of the Criminal Process”, in *Journal of Criminal Law & Criminology*, 1999, vol. 89, p. 672; Hadar Aviram, “Packer in Context: Formalism and Fairness in the Due Process Model”, in *Law & Social Inquiry*, 2011, vol. 36, 237–258, 241. See more recently Gerson Trüg, “Die Position des Opfers im Völkerstrafverfahren vor dem IStGH – Ein Beitrag zu einer opferbezogenen verfahrenstheoretischen Bestandsaufnahme”, in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 2013, vol. 125, p. 79, who however neglects existing procedural models which take the role of the victim into consideration. See generally Ambos, 2016, p. 7, see above note 20.

³¹ Steven G. Calabresi, “The Comparative Constitutional Law Scholarship of Professor Mirjan Damaška: A Tribute”, in Ackerman, Ambos and Sikirić (eds.), 2016, p. 107, see above note 21 (“a key work in the field of comparative procedure”).

³² Mirjan Damaška, *The Faces of Justice and State Authority*, Yale University Press, New Haven and London, 1986, pp. 8–12. For a comprehensive overview of the reviews of this book see Izhak England, “The Faces of Justice and State Authority: A Review of the Reviews”, in Ackerman, Ambos and Sikirić (eds.), pp. 199–211, see above note 21.

³³ Damaška, 1986, p. 16, see above note 32.

the notions of the State: the ‘reactive State’ and the ‘activist State’.³⁴ The task of the reactive State is limited to “providing a supporting framework within which its citizens pursue their chosen goals”.³⁵ The type of proceeding in a reactive State is ‘conflict solving’,³⁶ amounting to a contest between two formally co-equal disputants before the State official as the neutral decision maker.³⁷ In contrast, the nature of proceeding in an activist State is ‘policy implementing’: the justice system is considered an instrument to implement certain policies.³⁸

4.2.1. ‘Civil Law’ and ‘Common Law’: The Division into Legal Families

International criminal procedure has traditionally been analysed as a blending of the common law and civil law traditions.³⁹ Both concepts describe a certain legal system or legal tradition,⁴⁰ that is, “an operating set of legal institutions, procedures and rules”⁴¹ (legal system) or “a set of

³⁴ In more detail, see Heinze, 2014, pp. 145 ff., above note 23; Bruce Ackerman, “My Debt to Mirjan Damaška”, in Ackerman, Ambos and Sikirić (eds.), 2016, p. 18, see above note 21.

³⁵ Damaška, 1986, p. 73, see above note 32.

³⁶ *Ibid.*, p. 97.

³⁷ *Ibid.*, pp. 73–80 and 97–147.

³⁸ *Ibid.*, pp. 82, 84.

³⁹ Ambos, 2016, p. 1, see above note 20; Vladimir Tochilovsky, “Trial in International Criminal Jurisdictions: Battle or Scrutiny?”, in *European Journal of Crime Criminal Law & Criminal Justice*, 1998, vol. 6, pp. 55–59; Mark Findlay, “Synthesis in Trial Procedures? The Experience of International Criminal Tribunals”, in *International & Comparative Law Quarterly*, 2001, vol. 50, pp. 26–53; Theodor Meron, “Procedural Evolution in the ICTY”, in *Journal of International Criminal Justice*, 2004, vol. 2, pp. 521–525; Daryl A. Mundis, “From ‘Common Law’ Towards ‘Civil Law’: The Evolution of the ICTY Rules of Procedure and Evidence”, in *Leiden Journal of International Law*, 2001, vol. 14, pp. 367–82; Peter C. Keen, “Tempered Adversariality: The Judicial Role and Trial Theory in the International Criminal Tribunals”, in *Leiden Journal of International Law*, 2004, vol. 17, pp. 767–814; Schuon, 2010, p. 11, see above note 8; Jens David Ohlin, “A meta-theory of international criminal procedure, Vindicating the rule of law”, in *UCLA Journal of International Law & Foreign Affairs*, 2009, vol. 14, p. 81.

⁴⁰ Generally see Heinze, 2014, pp. 104 ff., above note 23; Emmanouil Billis, *Rolle des Richters im adversatorischen und im inquisitorischen Beweisverfahren*, Duncker & Humblot, Berlin, 2015, pp. 14 ff.

⁴¹ John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems in Europe and Latin America*, fourth edition, Stanford University Press, Stanford, California, 2019, p. 1; Brianne McGonigle Leyh, *Procedural Justice? Vic-*

deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught”⁴² (legal tradition). According to estimates, 34 per cent of the world’s jurisdictions are based on the civil law model, or civil law systems mixed with others (for example, indigenous or religious legal ideologies),⁴³ while approximately 28 per cent of the jurisdictions follow the common law model, including systems compounded with it.⁴⁴

4.2.1.1. Civil Law

The term ‘civil law’ is derived from the Latin ‘*ius civile*’⁴⁵ and also referred to as Romano-Germanic law or Continental European law.⁴⁶ Some even say that the civil law traditions have most widely influenced international law, international organisations, and indeed, the common law system in which “[t]he ghost [Roman law] walks and sometimes talks”.⁴⁷ Lawyers with a common law background normally use the term to capture all non-English legal traditions.⁴⁸ Generally speaking, there are three connotations associated with the concept: (1) the application of legal principles, normally derived from or based on written law; (2) the search for

tim Participation in International Criminal Proceedings, Intersentia, Cambridge *et al.*, 2011, p. 65.

⁴² Merryman and Pérez-Perdomo, 2019, p. 2, see above note 41; McGonigle Leyh, 2011, p. 65, see above note 41.

⁴³ Heinze, 2014, p. 106, see above note 23.

⁴⁴ Cf. University of Ottawa, “World Legal Systems Research Group” (available on its web site).

⁴⁵ Joseph Dainow, “The Civil Law and the Common Law: Some Points of Comparison”, in *American Journal of Comparative Law*, 1966–1967, vol. 15, p. 420.

⁴⁶ Merryman and Pérez-Perdomo, 2019, pp. 2–3, see above note 41, noting that civil law dates back to 450 B.C., which is the date most often quoted for the publication of the Twelve Tables in Rome; John Henry Merryman and David S. Clark, *Comparative Law – Western European and Latin American Legal Systems – Cases and Materials*, Bobbs-Merrill, Indianapolis, 1978, p. 4.

⁴⁷ Barbara D. Barth, “American Legal Education: Some Advice from Abroad”, in *Buffalo Law Review*, 1974, vol. 23, 681–708, 690. Critically, however, Aniceto Masferrer, “Tradition and Foreign Influences in the 19th Century Codification of Criminal Law: Dispelling the Myth of the Pervasive French Influence in Europe and Latin America”, in Aniceto Masferrer (ed.), *The Western Codification of Criminal Law*, Springer, Cham, 2018, pp. 3–50.

⁴⁸ Heinze, 2014, p. 107, see above note 23.

truth; and (3) a largely inquisitorial approach in proceedings.⁴⁹ Typical procedural elements of the civil law tradition are the following:

1. the ‘one case approach’;⁵⁰
2. an investigating magistrate, paradigmatically the *juge d’instruction*,⁵¹ tasked to investigate the truth;
3. a State prosecutor, as a public official, also tasked to investigate the truth,⁵²
4. the judge, as an active umpire, who is (also) under a legal duty to establish the true facts of a case and to submit the appropriate evidence accordingly;⁵³ and
5. the victim, as a participant with his or her own procedural rights (a *partie civile*).⁵⁴

In contrast, civil law’s emphasis on the written law⁵⁵ is less relevant given the increasing reliance on statutes and other written sources in mod-

⁴⁹ McGonigle Leyh, 2011, p. 70, see above note 41; Michael Bohlander, “Language, Culture, Legal Traditions, and International Criminal Justice”, in *Journal of International Criminal Justice*, 2014, vol. 12, pp. 494 ff.; on the importance of truth-seeking, see for example, Michèle-Laure Rassat, *Traité de procédure pénale*, Presses Universitaires de France, Paris, 2001, p. 297; Frédéric Desportes and Laurence Lazerges-Cousquer, *Traité de procédure pénale*, fourth edition, Economica, Paris, 2016, mn. 550; Hans-Heiner Kühne, *Strafprozessrecht*, ninth edition, C.F. Müller, Heidelberg, 2015, mn. 1, 628, 751; Karl Peters, *Strafprozeß*, fourth edition, C.F. Müller, Heidelberg, 1985, pp. 16, 82–3; Billis, 2015, pp. 42 ff., see above note 40.

⁵⁰ Where only one case is prepared by a State official who carries out the major part of the investigations, see Kai Ambos, “International Criminal Procedure: ‘adversarial’, ‘inquisitorial’ or mixed?”, in *International Criminal Law Review*, 2003, vol. 3, p. 4; Schuon, 2010, p. 4, see above note 8; Máximo Langer, “The Rise of Managerial Judging in International Criminal Law”, in *American Journal of Comparative Law*, 2005, vol. 53, p. 839.

⁵¹ Heinze, 2014, p. 107, see above note 23.

⁵² See, on the prosecutor, Thomas Weigend, “Prosecution: Comparative Aspects”, in Joshua Dressler (ed.), *Encyclopedia of Crime and Justice*, second edition, MacMillan, New York et al., 2002, pp. 1232–4. This is why the prosecutor, like the judge, has a duty to gather both inculpatory and exculpatory evidence, see *ibid.*, p. 1234.

⁵³ Schuon, 2010, p. 4, see above note 8; Langer, 2005, p. 840, see above note 50; Heinze, 2014, p. 108, see above note 23. About “judge-led trials” at the ICC see Megan A. Fairlie, “The Unlikely Prospect of Non-adversarial Trials at the International Criminal Court”, in *Journal of International Criminal Justice*, 2018, vol. 16, pp. 295–313.

⁵⁴ List from Ambos, 2016, p. 2, see above note 20. On the role of the victim as a *partie civile* in the criminal procedure of France and Italy, respectively, see for example, Rassat, 2001, pp. 247–93, see above note 49; Gilberto Lozzi, *Lezioni di procedura penale*, G. Giappichelli, Turin, 2001, pp. 128–33. See also Ambos, 2016, pp. 175 ff., see above note 20.

ern common law systems. At any rate, the civil law tradition, as “a body of general principles carefully arranged and closely integrated”,⁵⁶ suggests an ideological element in the history and reality of codification, including elements of legal theory and the sociology of law.⁵⁷ Further, the generality of legal rules is high – codes in civil law are said to be a collection of abstract principles rather than specific rules for particular situations or even concrete cases.⁵⁸ Finally, since legal certainty and predictability⁵⁹ are “supreme value[s]” and basically “unquestioned dogma[s]”⁶⁰ in the civil law tradition – think only about its strict take on the principle of legality (*nulum crimen sine lege*)⁶¹ – it promotes sophisticated methods of interpretation⁶² and common definitions and classifications.⁶³

4.2.1.2. Common Law

Common law is also referred to as ‘Anglo-American’ law. This might be misleading because it suggests that English and American laws are rather similar. It also ignores the plurality within US legal systems and the relationship of English law to Scottish and (Northern) Irish laws. However, this ambiguity might only exist with regard to legal systems and their (un-

⁵⁵ Merryman and Pérez-Perdomo, 2019, pp. 20–26, especially 25, see above note 41; see also Dainow, 1966–1967, p. 424, see above note 45 (“Generally, in civil law jurisdictions the main source or basis of the law is legislation, and large areas are codified in a systematic manner. These codes constitute a very distinctive feature of a Romanist legal system, or the so-called civil law”.); in more detail, Heinze, 2014, p. 108, see above note 23.

⁵⁶ Dainow, 1966–1967, p. 424, see above note 45; see also Heinze, 2014, p. 108, see above note 23, with further references.

⁵⁷ Charles H. Koch Jr., “Envisioning a Global Legal Culture”, in *Michigan Journal of International Law*, 2003–2004, vol. 25, p. 24.

⁵⁸ Joseph Sanders, “Law and Legal Systems”, in Edgar F. Borgatta and Rhonda J.V. Montgomery (eds.), *Encyclopedia of Sociology, Vol. III*, second edition, Macmillan, New York et al., 2000, pp. 1544, 1546; see also Dainow, 1966–1967, p. 424, see above note 45; Heinze, 2014, p. 109, see above note 23. For a German perspective, see Michael Bohlander, “Radbruch Redux: The Need for Revisiting the Conversation between Common and Civil Law at Root Level at the Example of International Criminal Justice”, in *Leiden Journal of International Law*, 2011, vol. 24, p. 402.

⁵⁹ Koch, 2003–2004, p. 36, see above note 57.

⁶⁰ Merryman and Pérez-Perdomo, 2019, p. 48, see above note 41.

⁶¹ Cf. Kai Ambos, *Treatise on International Criminal Law, Vol. I: Foundations and General Part*, OUP, Oxford, 2013, pp. 88 ff.

⁶² Koch, 2003–2004, p. 31, see above note 57; Heinze, 2014, p. 109, see above note 23.

⁶³ Koch, 2003–2004, p. 33, see above note 57; see also Bohlander, 2014, p. 504, see above note 49.

intentional) equation by using the word ‘Anglo-American’. If one is talking about legal traditions in the way previously mentioned, the term ‘Anglo-American’ can indeed be used.

The common law is characterised by the concept of a dialectical competition between the parties, in which the stronger – and therefore true – version of the case will prevail.⁶⁴ Typical procedural elements of this tradition are:

1. a party-driven process;⁶⁵
2. the ‘two-case approach’, that is, the parties prepare two cases during the pre-trial stage and present their respective cases subsequently at trial;⁶⁶
3. an attitude towards getting the best results for the clients instead of uncovering the truth;⁶⁷
4. the judge, as a passive umpire, whose task is to ensure that the parties abide by the procedural rules;⁶⁸
5. complex rules of evidence;⁶⁹ and
6. the jury, as a decision maker.⁷⁰

While the civil law tradition emphasises codification, the chief source⁷¹ of law in common law legal systems is case law of the courts.⁷² It

⁶⁴ McGonigle Leyh, 2011, p. 70, see above note 41; Schuon, 2010, p. 4, see above note 8. See generally Bohlander, 2014, pp. 493 ff., see above note 49; Billis, 2015, pp. 27 ff., see above note 40; Carlson, 2018, pp. 73–74, see above note 9.

⁶⁵ That is, the matter of what evidence to submit, and in which order, is mainly left to the parties, Schuon, 2010, p. 3, see above note 8.

⁶⁶ Schuon, 2010, p. 3, see above note 8.

⁶⁷ Kagan, 2003, p. 244, see above note 18.

⁶⁸ See “Democracy? Freedom? Justice? Law? What’s all this?”, in *The Economist*, 23 December 1999 (available on its web site).

⁶⁹ Heinze, 2014, p. 111, see above note 23.

⁷⁰ *Ibid.*

⁷¹ Many observers from civil law systems still ignore that the common law in common law legal system has often been replaced by statutory law, see in the same vein Massimo Donini, “An impossible exchange? Versuche zu einem Dialog zwischen civil lawyers und common lawyers über Gesetzlichkeit, Moral und Straftheorie”, in *Jahrbuch der Juristischen Zeitgeschichte*, 2017, vol. 18, no. 1, p. 342. See also Geoffrey Samuel, *A Short Introduction to Judging and to Legal Reasoning*, Edward Elgar, Cheltenham, Northampton, MA, 2016, p. 31: “The common law has of course traditionally been regarded as being based upon cases and precedents. Before the 19th century this was largely true, but today the position is dramatically different. By far the most important source of law in England is

is “both the source and the proof of the law, pronounced in connection with actual cases”.⁷³ Consequently, statutes are “usually not formulated in terms of general principles but consist rather of particular rules intended to control certain fact situations specified with considerable detail”,⁷⁴ which involves the danger of over-criminalisation.⁷⁵ While the civil law tradition follows abstract (deductive) reasoning than a casuistic (inductive) approach,⁷⁶ decisions in common law are reached through confrontation

legislation and the great majority of cases decided by the courts involve the interpretation and application of a legislative text”; Carissa Byrne Hessick, “The Myth of Common Law Crimes”, in *Virginia Law Review*, 2019, vol. 105, pp. 965-1024.

⁷² Michael Zander, “Forms and Functions of the Sources of the Law from a Common Law Perspective”, in Albin Eser and Christiane Rabenstein (eds.), *Neighbours in Law – Are Common Law and Civil Law Moving Closer Together? Papers in Honour of Barbara Huber on her 65th Birthday*, Edition Iuscrim, Freiburg, 2001, pp. 32, 43; Heinze, 2014, p. 111, see above note 23. For a more nuanced note, see Birks, 1998, p. 399, see above note 3 (“[T]he self-image of the common law as judge-made is incomplete. It is judge-and-jurist-made. The common law is to be found in its library, and the law library is nowadays not written only by its judges but also by its jurists.”).

⁷³ Dainow, 1966–1967, p. 425, see above note 45.

⁷⁴ *Ibid.*, pp. 419, 425.

⁷⁵ See Darryl K. Brown, “Criminal Law Theory and Criminal Justice Practice”, in *American Criminal Law Review*, 2012, vol. 49, pp. 78–79 with further references: “Observers on both sides of the Atlantic overwhelmingly take the view that Anglo-American codes over-criminalize, meaning that statutes label conduct as criminal that should not be so labelled because the conduct is not sufficiently harmful and wrongful, and committing it does not manifest culpability”. See also Sabine Swoboda, *Verfahrens- und Beweisstrategien vor den UN-ad hoc Tribunalen*, Nomos Verlagsgesellschaft, Baden-Baden, 2013, p. 218: “Zuletzt sei noch auf den Teufelskreis der Expansion des materiellen und prozessualen Strafrechts hingewiesen, der die Entwicklung des US-amerikanischen Strafrechts prägt. Dieser Teufelskreis nimmt seinen Anfang in der beständigen Ausweitung der materiell-rechtlichen Strafgrundlagen durch den Gesetzgeber. Den Expansionstendenzen des materiellen Rechts versuchen die Gerichte mit immer weiteren Verfeinerung des Verfahrens- und Beweisrechts zu begegnen, woraufhin der Gesetzgeber die ihm strafprozessual gesetzten Grenzen abermals mit neuen, noch expansiver ausgeformten Strafvorschriften zu unterlaufen versucht”.

⁷⁶ Bohlander, 2011, p. 402, see above note 58. This general observation lacks nuances but is dictated by space constraints. It goes without saying that the approach to judicial or legal decision making in civil law traditions is not that obvious. In fact, Arthur Kaufman – drawing on Peirce and Lüderssen – recognised three “methodological instruments” (*methodische Instrumente*): Deduktion, Induktion and Abduktion. Abduktion occurs in the initial stage of a trial: The decision maker searches for a hypothesis about what his or her judgment could be. Frankly, this presupposes a hermeneutical preconception of the judgment, what Kaufmann calls *Vorverständnis* but might be a euphemistic phrasing of prejudice (*Vorurteil*). Abduktion is thus a form of *Rechtsbegründung*, which I will describe below 4.5.3., and a way to ensure the court’s *jura novit curia*. See Arthur Kaufmann, “Be-

and reasoned debate,⁷⁷ that is, by assessing “the force of arguments” from all sides.⁷⁸ Legal certainty is “not elevated to the level of dogma”,⁷⁹ as is often the case in civil law systems. Renowned scholars such as Jeremy Bentham and Robert Kagan associated ‘common law’ or ‘adversarial legalism’ with unpredictability, legal uncertainty and costliness.⁸⁰

merkung zur positive Begründung und zur Falsifikation des Rechts”, in Cornelius Prittwitz *et al.* (eds.), *Festschrift für Klaus Lüderssen*, Nomos, Baden-Baden, 2002, p. 83, 92. It is interpretation proceeding from the (hypothetical) result, Joachim Hruschka, *Strafrecht*, second edition, Walter de Gruyter, Berlin, New York, 1988, p. XVIII (“Auslegung vom Ergebnis her”). Formulating a hypothesis by abduction is a necessary requirement to be able to formulate the major premise (*Obersatz*) that contains the written rule that is applied (*ibid.*, p. 94). This is the inductive approach. What follows is a comparison between case and law, the *Untersatz*. This comparison has famously been described as “moving back and forth between case and law” (*Hin- und Herwandern des Blickes zwischen Obersatz und Lebenssachverhalt*) by Karl Engisch in his *Logische Studien zur Gesetzesanwendung*, third edition, Carl Winter, Heidelberg, 1963, pp. 14-15. It is thus an analogical approach. What follows as a last step is the falsification: The subordination of *Untersatz* and *Obersatz* through a syllogism. This *Subsumtion* is a deductive approach (*ibid.*, p. 94). I translated *Subsumtion* as ‘subordination’ for reasons of simplification. Drawing on Frege, ‘subordination’ and *Subsumtion* are distinct: The former is the subordination of a term under another term, while the latter is the attribution (that word might come closest) of a matter to a term, see Gottlob Frege, *Schriften zur Logik und Sprachphilosophie*, edited by Gottfried Gabriel, Felix Meiner Verlag, Hamburg, 2001, pp. 25-28. See also James R. Maxeiner, “Legal Certainty: A European Alternative to American Legal Indeterminacy?”, in *Tulane Journal of International and Comparative Law*, 2007, vol. 15, pp. 542, 577 *et seq.*; Winfried Hassemer, *Tatbestand und Typus - Untersuchungen zur strafrechtlichen Hermeneutik*, Heymann, Cologne *et al.*, 1968, pp. 18 *et seq.* About judges’ preconceptions also Thomas W. Merrill, “Learned Hand on Statutory Interpretation: Theory and Practice”, in *Fordham Law Review*, 2018, vol. 87, p. 1, 8; Carl-Friedrich Stuckenberg, “Der juristische Gutachtenstil als cartesische Methode”, in *Zeitschrift für Didaktik der Rechtswissenschaft*, 2019, vol. 6, p. 323, 326. The traditional hermeneutic approach has come under scrutiny by the proponents of a structural (pragmatic) jurisprudence, see Janine Luth, *Semantische Kämpfe im Recht*, Universitätsverlag Winter, Heidelberg, 2015, p. 40 with further references.

⁷⁷ Christopher J. Peters, “Adjudication as Representation”, in *Columbia Law Review*, 1997, vol. 97, pp. 358–9.

⁷⁸ Jeffrey S. Wolfe and Lisa B. Proszek, “Interaction Dynamics in Federal Administrative Decision Making: The Role of the Inquisitorial Judge and the Adversarial Lawyer”, in *Tulsa Law Journal*, 1997, vol. 33, p. 305. See also Geoffrey Samuel, *A Short Introduction to Judging and to Legal Reasoning*, Edward Elgar, Cheltenham, Northampton, MA, 2016, p. 3.

⁷⁹ Merryman and Pérez-Perdomo, 2019, p. 48, see above note 41.

⁸⁰ Kagan, 2003, p. 4, see above note 18; Jeremy Bentham, “Truth versus Ashhurst or law as it is, contrasted with what it is said to be”, in John Bowring (ed.), *The Works of Jeremy Bentham, Volume V*, Simpkin, Marshall, Tait, Edinburgh, London, 1792/1843, pp. 231, 235; see also Ian Bonomy, “The Reality of Conducting a War Crimes Trial”, in *Journal of International Criminal Justice*, 2007, vol. 5, pp. 348 ff. Recently, this even implied the US

An important feature of the common law is a strong mistrust of government.⁸¹ As Bradley puts it: “We are not comfortable, especially in the United States, where distrust of government is mother’s milk, with a system in which government officials determine guilt with little input from the defendant’s advocate, and none from ordinary citizens on a jury”.⁸² Thus, in the US for instance, both the federal and the State constitutions subject governmental power to crosscutting institutional checks and judicially enforceable individual rights.⁸³

4.2.2. ‘Adversarial’ and ‘Inquisitorial’

The terms ‘adversarial’ and ‘inquisitorial’ are probably the most common terms used to categorise procedural systems.⁸⁴ Once an author writes about domestic or international criminal procedure in a general sense, it does not take long until both terms appear. In that case, it is often alleged that this or that procedural system is adversarial or inquisitorial in nature. Adversarial features are enumerated and called for, and it is likely that the term ‘adversarial’ is used to justify the introduction or rejection of certain procedural features.

Supreme Court in a decision about plea bargaining: “[W]e accept plea bargaining because many believe that without it our long and expensive process of criminal trial could not sustain the burden imposed on it, and our system of criminal justice would grind to halt”, see United States, Supreme Court (‘US SC’), *Lafler v. Cooper*, 21 March 2012, 132 S. Ct. 1376, p. 1397; see also Pamela R. Metzger, “Fear of Adversariness: Using Gideon To Restrict Defendants’ Invocation of Adversary Procedures”, in *Yale Law Journal*, 2013, vol. 122, p. 2555 (“The Court’s anxiety about adversariness is not limited to shoring up the viability of the plea bargaining system. Rather, this anxiety extends to adversarial constitutional criminal procedures in the trial process itself” (footnote omitted)).

⁸¹ Andrew E. Taslitz, “Temporal Adversarialism, Criminal Justice, and the Rehnquist Court: The Sluggish Life of Political Factfinding”, in *Georgetown Law Journal*, 2005–2006, vol. 94, p. 1595; Daniel H. Foote, “Reflections on Japan’s Cooperative Adversary Process”, in Malcolm M. Feeley and Miyazawa Setsuo (eds.), *The Japanese Adversary System in Context*, Macmillan, Besingstoke, 2002, pp. 29, 37.

⁸² Craig M. Bradley, “The Convergence of the Continental and the Common Law Model of Criminal Procedure”, in *Criminal Law Forum*, 1996, vol. 7, p. 472.

⁸³ Kagan, 2003, p. 15, see above note 18.

⁸⁴ See also the account of Damaška’s description of the variety of senses and the meaning of ‘adversarial’ and ‘inquisitorial’ by John D. Jackson, “Re-visiting ‘Evidentiary Barriers to Conviction and Models of Criminal Procedure’ after Forty Years”, in Ackerman, Ambos and Sikirić (eds.), 2016, p. 241, see above note 21; Masha Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings*, Intersentia, Cambridge, Antwerp, Portland, pp. 92 ff.

Now, what does this ‘adversarial’ really mean? Over the years, while comparative scholars have drawn attention to the dangers of using adversarial or inquisitorial labels to characterise legal processes in the common law and civil law traditions,⁸⁵ they have used those terms quite differently and there have been no agreements concerning their meaning.⁸⁶ In fact, there has been considerable confusion about the meaning of the terms ‘adversarial’ or ‘accusatorial’, on the one hand, and ‘non-adversarial’ or ‘inquisitorial’, on the other, because these terms are assigned a variety of loose meanings.⁸⁷ It is not difficult to find diverse definitions; a quick look into an encyclopaedia is sufficient. To be clear, the potential of a definition has been a matter of controversy, mainly due to the fact that the term ‘definition’ is in itself hard to define.⁸⁸ Definitions may be approached from several angles: a philosophical angle, accounting for the “sense of words and terms, for the nature of the corresponding general ideas and finally for the nature of ‘things’”; a linguistic and philological angle, determining “the variations in linguistic form, generally of a lexical item, produced by actual usage”; and a creative or prescriptive angle that “is motivated by the intention of limiting the notion and prohibiting any other usage”.⁸⁹

⁸⁵ See generally Swoboda, 2013, pp. 69 ff., see above note 75.

⁸⁶ John D. Jackson, “The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?”, in *Modern Law Review*, 2005, vol. 68, p. 740; Fedorova, 2012, p. 93, see above note 84.

⁸⁷ Sean Doran, John D. Jackson, and Michael D. Seigel, “Rethinking Adversariness in Nonjury Criminal Trials”, in *American Journal of Criminal Law*, 1995–1996, vol. 23, p. 13; Mirjan Damaška, “Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study”, in *University of Pennsylvania Law Review*, 1973, vol. 121, pp. 507, 513; Giulio Illuminati, “The Accusatorial Process from the Italian Point of View”, in *North Carolina Journal of International Law & Commercial Regulation*, 2009–2010, vol. 35, p. 297 (“Any debate on comparative law, especially in the field of criminal procedure, requires clearly defined concepts. Although it is broadly used, the concept of an accusatorial system is one of the most difficult to understand and scholars offer very different explanations. What is certain is that the notions of accusatorial and inquisitorial processes are abstractions. As a matter of fact, the traditional dichotomy alludes to two hypothetical models obtained by making a generalization from some real features of existing and no longer existing systems. It follows that it is not a matter of how the law is interpreted that defines the dichotomy; rather, the concept depends on the choice of an ideologically oriented scale of values”).

⁸⁸ Alain Rey, “Defining Definition”, in Juan C. Sager (ed.), *Essays on Definition*, John Benjamins Publishing, Amsterdam, Philadelphia, 2000, p. 1.

⁸⁹ Rey, 2000, p. 2, see above note 88.

Thus, when I try to illustrate that the term ‘adversarial’ is by no means used in only one sense, I am employing the second perspective mentioned above (referring to the paper of Damaška within the *Encyclopedia of Crime and Justice*, but also to other scholars, who have been sensible of the issue and thus tried to bring light to the darkness).⁹⁰ Due to the lack of space, I am mainly reflecting upon the term ‘adversarial’. Its counterpart ‘inquisitorial’ I will analyse only in a comparative fashion because the analysis applies to this term as well. The terms shall first and foremost be defined pragmatically,⁹¹ that is, how they *are* used,⁹² and not so much how they *should* be used or can be used (the latter semantic dimension does a play a role, though). The condition for speech and language from a pragmatic perspective is context.⁹³ Second, the terms will be defined and conceptualised at the same time. I thus focus on both “lexical semantemes and their meanings in common usage” (definition of words) and “concepts and their instantiation by terms” (definition of concepts).⁹⁴ With regard to concepts and terms, the common usage of the ‘adversarial’ shall be determined.⁹⁵ Due to space restrictions, the distinction between ‘word’, ‘term’ and ‘concept’ must be reserved for another time.⁹⁶

⁹⁰ Cf. Fedorova, 2012, p. 93, see above note 84; Albin Eser, “Changing Structures: From the ICTY to the ICC”, in Ackerman, Ambos and Sikirić (eds.), 2016, pp. 213–234, see above note 21.

⁹¹ About the pragmatism turn in textual interpretation Umberto Eco, *Die Grenzen der Interpretation*, Hanser, München, 1992, pp. 350 ff.; Noah Bubenhofer, *Sprachgebrauchsmuster*, De Gruyter, Berlin, New York, 2009, p. 43. About the difference between semantics and pragmatics Lawrence B. Solum, “Contractual Communication”, in *Harvard Law Review Forum*, 2019, vol. 133, p. 23, 27.

⁹² About the usage of words see already Wittgenstein, *Philosophische Untersuchungen*, posthum 2nd ed., Blackwell, Malden, 1958, reprint 1999, p. 20.

⁹³ Bubenhofer, 2009, p. 43, see above note 91; Luth, 2015, p. 23, see above note 76.

⁹⁴ Rey, 2000, p. 2, see above note 88.

⁹⁵ Cf. the famous quote of d’Alembert: “Il est un grand nombre de sciences où il suffit, pour arriver à la vérité, de savoir faire usage des notions les plus communes. Cet usage consiste à développer les idées simples que ces notions renferment, et c’est ce qu’on appelle définir”, Jean Le Rond d’Alembert, *Œuvres De D’Alembert, Tome Deuxième, Partie 2, A*. Belin, Paris, 1821, p. 410 (“In order to arrive at the truth, in a large number of sciences it suffices to be able to use the most common concepts. This use consists of developing the simple ideas contained in these concepts, and this process is called ‘definition’” (translation Rey, 2000, p. 2, see above note 88).

⁹⁶ In fact, ironically, a clear distinction between the three seems to be diluted due to the use of language. In his distinction between ‘Wort’ and ‘Begriff’, Rickert opines that the conduct of defining is when a certain name or word describes a certain term (‘Begriff’), see

The term ‘adversarial’ can be used at least in five different contexts: in addition to (i) a traditional and (v) a historical meaning, it may describe (ii) a theoretical model, (iii) a procedural type and (iv) an procedural ideal.⁹⁷

4.2.2.1. Traditional Meaning

In Anglo-American jurisdictions, the term ‘adversarial’ evokes both the aspirations and the “actual features of Anglo-American criminal justice”.⁹⁸ Very often, it is used to refer to the division of responsibilities between the decision-maker and the parties,⁹⁹ or to the assistance of counsel and the due process of law.¹⁰⁰ Since these features are present in both le-

Heinrich Rickert, *Zur Lehre von der Definition*, C.A. Wagner, Freiburg im Breisgau, 1888, p. 18 (“Die Form wird sich immer so darstellen: dieser oder jener Name bezeichnet einen Begriff, dessen Elemente die mit diesen oder jenen anderen Namen bezeichneten Vorstellungen bilden“.). Sigwart concludes that a ‘Begriff’ can never described, only a word (‘Wort’) can, see Cristoph Sigwart, *Logik, Erster Band* (Tübingen: H. Laupp’sche Buchhandlung 1873), p. 324 (“Nennt man die Angabe aller Merkmale eines Begriffs oder des Genus proximum und der Differentia specifica Definition, so ist klar, dass es sich darin nicht um eine Begriffserklärung, sondern, sofern etwas erklärt wird, nur um eine Worterklärung handeln kann“.). While some translate ‘Begriff’ as ‘concept’ (Juan C. Sager (ed.), *Essays on Definition*, John Benjamins Publishing, Amsterdam, Philadelphia, 2000, p. 208; Heikki E. S. Mattila, “Legal Vocabulary”, in Peter M. Tiersma and Lawrence M. Solan (eds.), *Language and Law*, Oxford University Press, Oxford, 2012, p. 27), Ogden and Richards translate it as ‘thought’, see C. K. Ogden and I. A. Richards, *The Meaning of Meaning*, Harcourt, Brace & World, New York, 1923, p. 99. The latter seems more convincing. In that vein, von der Pfordten points out that words and sentences are parts of speech and language, respectively. Terms, by contrast, belong to thoughts and thinking, see Dietmar von der Pfordten, “Begriffe – Sprache – Recht”, in Frank Schorkopf and Christian Starck (eds.), *Rechtsvergleichung - Sprache - Rechtsdogmatik: Siebtes Deutsch-Taiwanesisches Kolloquium vom 8. bis 9. Oktober 2018 in Göttingen*, Nomos, Baden-Baden, 2019, p. 41. For an entire different understanding of ‘term’ (in the context of contracts), see Frederick Wilmot-Smith, “Term Limits: What is a Term?”, in *Oxford Journal of Legal Studies*, 2019, vol. 39, p. 705, 706: “[T]erms are the propositions of law made true by contracting parties through their acts. The second subsection refines that definition, distinguishing two different ways lawyers use the concept of a term.”, footnote omitted. Concepts, by contrast, are external components of language. They are context-dependent, which distinguishes them from terms or thoughts, see Luth, 2015, p. 74, see above note 76.

⁹⁷ By contrast, Fedorova identifies only three different “senses” of the term adversarial: a traditional model, a theoretical model and an ideal model, see Fedorova, 2012, pp. 94–6, above note 84.

⁹⁸ Mirjan Damaška, “Adversary System”, in Dressler (ed.), 2002, p. 25, see above note 52.

⁹⁹ US SC, *McNeil v. Wisconsin*, 13 June 1991, 501 U.S. 171, 111 S. Ct. 2204; Fedorova, 2012, p. 94, see above note 84.

¹⁰⁰ Damaška, 2002, p. 25, see above note 98.

gal systems with a common law tradition and those with a civil law tradition, the term ‘adversarial’ in that context is not qualified to be used as a distinction.

With regard to “actual features of Anglo-American criminal justice”, those features should not be confused with features of the common law process. The latter are important for an understanding of ‘adversariness’ as a procedural type. “Actual features of Anglo-American criminal justice” are, for example, the confrontation style,¹⁰¹ the privilege against self-incrimination,¹⁰² the right to pre-trial release and the hostility to preventive detention,¹⁰³ as well as its basis on liberal ideology (including the presumption of innocence and the requirement of proving guilt beyond reasonable doubt).¹⁰⁴ Thus, the *traditional meaning* of ‘adversarial’ is simply the opposite of ‘inquisitorial’ in the sense of continental European criminal justice prior to its reform in the wake of the French Revolution.¹⁰⁵ Damaška summarises:

The traditional concept of the adversary system evokes both actual features of Anglo-American criminal process and its aspirations. Inevitably, therefore, it combines both descriptive and prescriptive elements and cannot be expected to achieve rigorous internal consistency and coherence. It is not so much analytically precise as it is hortatory and rhetorical, aimed at mobilizing consent and at winning points in legal argumentation.¹⁰⁶

4.2.2.2. Theoretical Model

The second context is ‘adversariness’ as a *theoretical model*. This theoretical model describes the goal of the process: conflict resolution.¹⁰⁷ Procedures facilitating the implementation of conflict resolution most effectively are named ‘adversarial’.¹⁰⁸ As Damaška points out: “In this second sense, then, the adversary system [sic] is a blueprint designed to promote

¹⁰¹ Which is – in this sense – “subverted” by plea bargaining mechanisms, see *ibid.*

¹⁰² US SC, *Malloy v. Hogan*, 15 June 1964, 378 U.S. 1, p. 7.

¹⁰³ Damaška, 2002, p. 25, see above note 98.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*, p. 26.

¹⁰⁶ *Ibid.*

¹⁰⁷ Fedorova, 2012, p. 95, see above note 84.

¹⁰⁸ Damaška, 2002, p. 26, see above note 98.

the choice of certain procedures. Elements of the blueprint and features traditionally classed as adversary do not coincide”. The goal of conflict resolution can be pursued by a variety of approaches and models.¹⁰⁹ ‘Adversariness’ in this sense is thus normative.

4.2.2.3. Procedural Type

The third meaning of ‘adversariness’ is a procedural one. According to Damaška, it is a “procedural type designed by comparative law scholars to capture characteristic features of the common law process, particularly when contrasted with continental systems”.¹¹⁰ This procedural type is *purely descriptive* and sometimes called the ‘lowest-common-denominator approach’, meaning that the adversarial and inquisitorial categories simply contain the features shared by all common and civil law criminal procedure systems, respectively.¹¹¹ For instance, the trial by jury or the hearsay rule would qualify as features of the adversarial system if all common law jurisdictions included these elements at a certain moment in time.¹¹² Thus, scholars who adopt the lowest-common-denominator approach call a common denominator ‘adversarial’ or ‘inquisitorial’ simply because they find it across a number of systems and then label the system adversarial or inquisitorial.¹¹³ Nevertheless, it remains unclear what happens when one of the common denominators is withdrawn – either that system can no longer be called ‘adversarial’ or ‘inquisitorial’ or the denominator that was withdrawn is no longer ‘common’.¹¹⁴

4.2.2.4. Ideal-Type Procedure

Fourth, ‘adversariness’ can also be an ideal-type of procedure, which does not serve as an abbreviated description of actual procedure but would have a *purely normative meaning*.¹¹⁵ This approach conceptualises the

¹⁰⁹ *Ibid.*, p. 27.

¹¹⁰ *Ibid.*, p. 28.

¹¹¹ *Ibid.*; see also Joachim Herrmann, “Various Models of Criminal Proceedings”, in *South African Journal of Criminal Law & Criminology*, 1978, vol. 2, pp. 4–6.

¹¹² Máximo Langer, “From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure”, in *Harvard International Law Journal*, 2004, vol. 45, p. 7.

¹¹³ Jackson, 2005, pp. 737, 741, see above note 86.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*, p. 742; Illuminati, 2009–2010, p. 298, see above note 87 (“The features of the accusatorial system are determined only through contrast to those of the inquisitorial system

terms adversarial and inquisitorial as Weberian ideal-types.¹¹⁶ These models do not exactly exist in any historical legal system,¹¹⁷ but while common law jurisdictions would be closer to the adversarial type, civil law jurisdictions would be closer to the inquisitorial type.¹¹⁸ The approach, instead, only labels concrete criminal procedure as closer to or farther from the ideal-type.¹¹⁹ For instance: ‘adversarial’ as an ideal of procedure would include the presumption of innocence, the privilege against self-incrimination and the use of oral testimony, which are then contrasted with counter-tendencies¹²⁰ to be found (allegedly) in Continental proceedings.¹²¹ ‘Accusatorial’¹²² as an ideal procedure has, according to Jackson, at times been used to describe the reformed Continental procedures of the nineteenth century whereby the separate functions of prosecuting and ascertaining facts were severed, with the former entrusted to the prosecutor and the latter to the investigating judge.¹²³ In the US, ‘inquisitorialism’, on the contrary, has always been used as an idealised system against which the courts defined their own system.¹²⁴ In a both insightful and sur-

and vice-versa; therefore they represent only ideal models that, in practice, can combine in different ways in relation to several variables”.); Fedorova, 2012, pp. 97 ff., see above note 84. About the meaning of “normative” see below Section 4.4.4.4.1. and Heinze, 2014, pp. 172 ff., see above note 23.

¹¹⁶ Langer, 2004, p. 8, footnote 29, see above note 112. Tatjana Hörnle even says, that the terms “adversarial” and “inquisitorial” cannot be something else than ideal-types, see Tatjana Hörnle, “Unterschiede zwischen Strafverfahrensordnungen und ihre kulturellen Hintergründe”, in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 2005, vol. 117, p. 804. About Weber’s ideal types in more detail, see Heinze, 2014, pp. 180–3 and 195–9, see above note 23.

¹¹⁷ Doran, Jackson and Seigel, 1995–1996, p. 14, see above note 87.

¹¹⁸ Langer, 2004, p. 8, see above note 112.

¹¹⁹ Hörnle, 2005, p. 804, see above note 116; Langer, 2004, p. 9, see above note 112.

¹²⁰ In reality, of course, the safeguards mentioned are nowadays provided for in most procedural systems that are labelled “inquisitorial” and enshrined in Article 6 European Convention on Human Rights, see Heinze, 2014, pp. 155–7, see above note 23.

¹²¹ Damaška, 1973, pp. 506, 569, see above note 87. See as an example US SC, *Crawford v. Washington*, 8 March 2004, 124 S. Ct. 1354, p. 8, and – as a commentary – Sarah J. Summers, “The Right to Confrontation after *Crawford v. Washington*: A ‘Continental European’ Perspective”, in *International Commentary on Evidence*, 2004, vol. 2, pp. 1–13.

¹²² About the difference between ‘accusatorial’ and ‘adversarial’, see Heinze, 2014, pp. 131–3, see above note 23.

¹²³ Jackson, 2005, pp. 737, 740, see above note 86.

¹²⁴ William E. Connolly, “The Challenge to Pluralist Theory”, in William E. Connolly (ed.), *The Bias of Pluralism*, Atherton Press, New York, 1969, pp. 3, 22–24. In more detail see Heinze, 2014, pp. 152 ff., see above note 23.

prising article – at least for Continental lawyers – Sklansky stated: “A lengthy tradition in American law looks to the Continental, inquisitorial system of criminal adjudication for negative guidance about our own ideals. Avoiding inquisitorialism is taken to be a core commitment of our legal heritage”.¹²⁵

The anti-inquisitorialism debate in the US reveals that there is a variant form of adversariness and inquisitorialism as an ideal-type procedure: an *ideal model of proof*. By contrast to an ideal procedure which applies to the entire procedure, an ideal model of proof only applies to a particular hypothesis of proof, like the question of how the truth is established,¹²⁶ or whether the decision-maker should be a judge or a jury.¹²⁷ For example, while the adversarial model of proof claims that the truth is best discovered by powerful statements on both sides of a question, for the inquisitorial model of proof this goal is best achieved by an active judge and a strong investigating (State) agency, which are committed to objectivity.¹²⁸

4.2.2.5. Historical Meaning

A fifth meaning of ‘adversariness’ was promoted by Vogler and also mentioned by other authors.¹²⁹ It is usually called ‘historical meaning’.¹³⁰ Illuminati states that “[t]he historical approach is essential not only to identify the real origins of the dichotomy, but also to fully understand the meaning of the parameters of the opposition and the way they have

¹²⁵ David Alan Sklansky, “Anti-Inquisitorialism”, in *Harvard Law Review*, 2008–2009, vol. 122, pp. 1635–6.

¹²⁶ Cf. John D. Jackson and Sean Doran, *Judge Without Jury – Diplock Trials in the Adversary System*, Clarendon Press, Oxford, 1995, p. 60; Doran, Jackson and Seigel, 1995–1996, p. 14, see above note 87.

¹²⁷ Taslitz, 2005–2006, pp. 1589, 1591, see above note 81. De-emphasising the relevance of the judge–jury question for a categorisation as “adversarial” or “inquisitorial” model of proof, see Jackson and Doran, 1995, p. 60, see above note 126. See also Heinze, 2014, pp. 153 ff., 231–2, 268–276, above note 23.

¹²⁸ Cf. Gary Goodpaster, “On the Theory of American Adversary Criminal Trial”, in *Journal of Criminal Law & Criminology*, 1987–1988, vol. 78, p. 121.

¹²⁹ See, for example, Illuminati, 2009–2010, pp. 298 ff., see above note 87.

¹³⁰ Sabine Swoboda, “A Normative Theory of Criminal Procedure”, Book Review, in *Criminal Law Forum*, 2007, vol. 18, p. 157; Swoboda, 2013, p. 69, see above note 75; cf. Paul Roberts, “Comparative Criminal Justice Goes Global”, in *Oxford Journal of Legal Studies*, 2008, vol. 28, pp. 370, 375.

changed in the course of time”.¹³¹ More concretely, under the historical perspective, it is particularly relevant which party is given prosecutorial power and whether the judge can initiate proceedings *proprio motu*.¹³² Thus, “the essential structural elements of the adversarial method” are:

1. The state must be prevented by law from using its power to apply psychological or physical pressure to distort the free testimony of the individual.
2. The state must be prevented by law from using its superior resources to create an unfair trial.
3. The individual must be an active subject of the process and not merely a passive object.¹³³

In the same vein, Illuminati has identified the private nature of prosecution, including the discretionary power to instigate a prosecution case; the burden of proof on the prosecutor; the equality of arms between the parties and their control of the evidence; the principle of publicity and orality of the trial; the judge’s passive role as the arbitrator of the dispute; and, the fact that the private accuser was left in charge of gathering the evidence as historical features of adversarialism.¹³⁴

By contrast, an inquisitorial process is often seen as something akin to the Francophone model of criminal procedure, deriving originally from Napoleon’s criminal procedure code of 1808 or even earlier.¹³⁵ This process is characterised by the following features: (1) the process “is based upon a hierarchical system of authority in which power is delegated downwards through a chain of subordinate officials of decreasing status”; (2) the procedure assumes the form of a “continuous, bureaucratic process”; (3) it employs “different forms of intolerable pressure against defendants in order to achieve co-operation, including physical and mental torture in every imaginable form”, often in complete secrecy; and (4) finally, the inquisitorial trial prefers the method of “rational deduction and

¹³¹ Illuminati, 2009–2010, p. 298, see above note 87; Luigi Ferrajoli, *Diritto e Ragione*, eighth edition, Laterza, Rome-Bari, 2004, p. 574.

¹³² Illuminati, 2009–2010, see above note 87.

¹³³ Richard Vogler, *A World View of Criminal Justice*, Ashgate, Aldershot, 2005, p. 130.

¹³⁴ Illuminati, 2009–2010, p. 300, see above note 87.

¹³⁵ Paul Roberts and Adrian Zuckerman, *Criminal Evidence*, second edition, OUP, Oxford *et al.*, 2010, p. 47 with further references.

forensic enquiry” to a fair and orderly process of communication between the parties.¹³⁶

Obviously, this understanding of ‘adversariness’ reminds us of the traditional meaning of this term in the sense of aspirations and features. Thus, Swoboda gives this approach a second name: “due process adversariality”.¹³⁷

4.2.2.6. Máximo Langer: A New Theoretical Framework

In his article “From Legal Transplants to Legal Translations”, Langer proposes “a new theoretical framework to reconceptualize the adversarial and the inquisitorial systems”.¹³⁸ With that framework, he strives to “describe the differences between the criminal procedures of the common and civil law traditions”.¹³⁹ This theoretical framework pretends to provide “a clear axis of reference in comparing the differences between the adversarial and the inquisitorial systems”.¹⁴⁰ Thereby, Langer identifies certain core levels¹⁴¹ of a criminal process. Each one of these levels can have an adversarial or inquisitorial shape.¹⁴² By identifying these core levels, Langer avoids the shortcomings of the usual adversarial–inquisitorial dichotomy. Instead, his new theoretical framework “should be understood not only as two different ways to arrange powers and responsibilities between the

¹³⁶ Vogler, 2005, pp. 19–20, see above note 133; for another description of the historical meaning of inquisitorial see Illuminati, 2009–2010, pp. 301 ff., see above note 87. For a recent detailed, instructive and nuanced account of the origin of Roman-Canon legal proof in criminal cases, see Mirjan Damaška, *Evaluation of Evidence*, Cambridge University Press, Cambridge, 2019, pp. 10 *et seq.*

¹³⁷ Swoboda, 2007, p. 157, see above note 130.

¹³⁸ Langer, 2004, p. 5, see above note 112.

¹³⁹ *Ibid.* (italics added).

¹⁴⁰ *Ibid.*

¹⁴¹ Langer himself calls it “levels”, although it might as well be called “categories”, see *ibid.*, p. 13.

¹⁴² Langer’s identification of core levels of a criminal process that appear in a different shape is reminiscent of Klamberg’s so-called “differentiated functional approach”. Borrowing from Lindblom and Edlestam, Klamberg’s approach “describes how different objectives and functions such as crime control and due process vary during criminal proceedings”, Mark Klamberg, *Evidence in International Criminal Trials*, Martinus Nijhoff, Leiden, Boston, 2013, p. 9. The argument is “that the criminal procedure has to be broken into in specific procedural activities which may determine the outcome of a legal issue and appear to resemble the casuistic approach”, *ibid.*, p. 92. For an application of the approach to procedural models such as ‘inquisitorial’, ‘adversarial’, ‘civil law’ and ‘common law’, see *ibid.*, p. 501.

main actors of the criminal process (judges, prosecutors, defense attorneys, etc.), but also as two different procedural cultures”.¹⁴³ The levels are: the technique for handling cases; the procedural culture; and ways to distribute powers and responsibilities between the main actors.

4.2.2.6.1. The Technique for Handling Cases

The first difference is the technique for handling cases, as “the adversarial and inquisitorial systems present substantial differences in the way they structure procedure”.¹⁴⁴ In Langer’s view, choosing between these two techniques “may affect how accurately an international jurisdiction distinguishes the guilty from the innocent and establishes the historical background that led to mass atrocities; how swiftly it investigates and adjudicates cases; how fair or unfair the public perceives international criminal proceedings to be; and similar issues”.¹⁴⁵ One example is case-management techniques: in the inquisitorial system, a written dossier is the backbone of the whole process and a major case-management tool, from the first stage of the proceeding in which the police intervene, to the phase of appeals against the verdict;¹⁴⁶ conversely, in the adversarial system, oral and public hearings play an important role in the management of cases, even in bargained ones.¹⁴⁷ In fact, plea bargaining had been an unknown case-management tool in inquisitorial systems until recently,¹⁴⁸ despite its widespread usage in Anglo-American jurisdictions.¹⁴⁹

¹⁴³ *Ibid.*, p. 6.

¹⁴⁴ Langer, 2005, pp. 835, 848, see above note 50.

¹⁴⁵ *Ibid.*

¹⁴⁶ For a description of the role of the written dossier in inquisitorial systems, see Rudolf B. Schlesinger, “Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience”, in *Buffalo Law Review*, 1977, vol. 26, pp. 365–67.

¹⁴⁷ Langer, 2004, p. 16, see above note 112.

¹⁴⁸ For a classic analysis, see John H. Langbein, “Land Without Plea Bargaining: How the Germans Do It”, in *Michigan Law Review*, 1979, vol. 78, pp. 204–225. It becomes obvious that Langbein was influenced by Rheinstein.

¹⁴⁹ For historical analyses of how the practice of plea bargaining developed in U.S. jurisdictions, see Albert W. Alschuler, “Plea Bargaining and Its History”, in *Law & Society Review*, 1979, vol. 13, pp. 211–245; George Fisher, “Plea Bargaining’s Triumph”, in *Yale Law Journal*, 2000, vol. 109, pp. 857–1086; Lawrence M. Friedman, “Plea Bargaining in Historical Perspective”, in *Law & Society Review*, 1979, vol. 13, pp. 247–259; John H. Langbein, “Understanding the Short History of Plea Bargaining”, in *Law & Society Review*, 1979, vol. 13, pp. 261–272.

4.2.2.6.2. The Procedural Culture

Second, adversariality and inquisitorialism must be distinguished in relation to the ‘procedural culture’. At first glance, the meaning of ‘procedural culture’ is rather vague. However, it becomes clearer considering the two elements of procedural culture: (i) the structure of interpretation and meaning, and (ii) the internal dispositions of legal actors.

First, Langer describes the structure of interpretation and meaning as “the basic ideas about prosecution and adjudication of criminal cases”.¹⁵⁰ Within these two “procedural languages”, the same terms or “signifiers” often have different meanings,¹⁵¹ such as the words “prosecutor”¹⁵² or “truth”.¹⁵³ At the same time, there are ideas and concepts that exist only

¹⁵⁰ Langer, 2005, p. 848, see above note 50.

¹⁵¹ Langer, 2004, p. 10, see above note 112.

¹⁵² *Ibid.*: “For instance, in the adversarial system, the word ‘prosecutor’ means a party in a dispute with an interest at stake in the outcome of the procedure; in the inquisitorial system, however, the word signifies an impartial magistrate of the state whose role is to investigate the truth”. On the different conceptions of the prosecutor in the Anglo-American system and the inquisitorial one, see, for example, William T. Pizzi, “Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform”, in *Ohio State Law Journal*, 1993, vol. 54, pp. 1349–51; Weigend, 2002, pp. 1233–4, see above note 52.

¹⁵³ Langer, 2004, p. 10, see above note 112:

This word has a different meaning in each procedural structure of interpretation and meaning. In the adversarial system, even if the dispute is about ‘truth’, the prosecution tries to prove that certain events occurred and that the defendant participated in them, while the defense tries to question or disprove this attempt. The adversarial conception of truth is more relative and consensual: if the parties come to an agreement as to the facts of the case, through plea agreements or stipulations, it is less important to determine how events actually occurred.

Langer explains the last sentence in more detail:

This may sound like an exaggeration because, in U.S. jurisdictions, the judge still has to verify the factual basis for a guilty plea. But in practice, U.S. judges are usually deferential to the agreements of the parties about the facts.

[footnote omitted]

He then continues:

In the inquisitorial structure of interpretation and meaning, ‘truth’ is conceived in more absolute terms: the official of the state – traditionally, the judge – is supposed to determine, through an investigation, what really happened, regardless of the agreements or disagreements that prosecution and defense may have about the event.

On the conception of truth predominant in the inquisitorial system as opposed to the accusatorial one, see Antoine Garapon, “French Legal Culture and the Shock of ‘Globalization’”, in *Social & Legal Studies*, 1995, vol. 4, pp. 496–497.

in one but not the other. For instance, the adversarial system includes both “confession”¹⁵⁴ and “guilty plea”,¹⁵⁵ while the inquisitorial procedural structure only knows “confession”.¹⁵⁶ In this system, “a defendant cannot end the phase of determination of guilt or innocence by admitting his guilt before the court. While the admission of guilt may be very useful to the judge in seeking the truth, the judge still has the final word on the determination of guilt”.¹⁵⁷

Second, just as the adversarial and inquisitorial structures of interpretation and meaning are grounded in concrete procedural practices, they are also internalised by the relevant legal actors.¹⁵⁸ Langer calls this the “dimension of individual dispositions”. Langer’s “source of inspiration”¹⁵⁹ for the development of this dimension of internal dispositions was Pierre Bourdieu’s sociological concept of *habitus*, which can be defined as “a set of *dispositions* which induce agents to act and react in certain ways. The dispositions generate practices, perceptions, and attitudes which are ‘regular’ without being consciously co-ordinated or governed by any ‘rule[...]’”.¹⁶⁰

For Langer, internal dispositions are patterns “acquired by the internalization of the procedural structures of interpretation and meaning, through a number of socialization processes”.¹⁶¹ These patterns are, for example, the judge’s role to be a passive umpire. This role

¹⁵⁴ Which Langer describes as “an admission of guilt before the police”, see Langer, 2004, p. 11, see above note 112.

¹⁵⁵ Which is “an admission of guilt before the court that, if accepted, has as its consequence the end of the phase of determination of guilt or innocence”, *ibid.*

¹⁵⁶ *Ibid.* See, for example, Myron Moskowitz, “The O.J. Inquisition: A United States Encounter with Continental Criminal Justice”, in *Vanderbilt Journal of Transnational Law*, 1995, vol. 28, p. 1153.

¹⁵⁷ Langer, 2004, p. 11, see above note 112, continuing: “In any case, if an admission of guilt happens during the pre-trial phase, the case must still go to trial before the judge can make a final determination”. See, in more detail, John H. Langbein, *Comparative Criminal Procedure: Germany*, West Publishing Co., St. Paul, Minnesota, 1977, pp. 73–74.

¹⁵⁸ Langer, 2004, p. 11, see above note 112.

¹⁵⁹ Langer speaks of “source of inspiration”, because he explicitly does not follow the theoretical framework of Pierre Bourdieu in this chapter, see *ibid.*, p. 12, footnote 41.

¹⁶⁰ John B. Thompson, “Editor’s Introduction”, in Pierre Bourdieu, John Thompson, Gino Raymond and Matthew Adamson (eds.), *Language and Symbolic Power*, Harvard University Press, Cambridge, 1999, p. 12.

¹⁶¹ Langer, 2004, p. 12, see above note 112. Those “socialisation processes” are, for example, “law schools, judiciary school, prosecutor’s office and law firm training, interaction with

is not only due to the adversarial structure of interpretation and meaning; it is also due to the phenomenon that a substantial number of legal actors have internalized this structure of meaning in a common law jurisdiction, they have come to consider this as the proper role of a judge and will usually act accordingly – i.e., censoring a judge who participates too actively in the interrogation of witnesses.¹⁶²

In other words, “to the extent that legal actors internalize these structures of meaning and then interpret and interact with reality through them, one could say that these structures of meaning constitute and shape legal actors as subjects”.¹⁶³

These individual dispositions are often underestimated and become especially relevant in the case of the transfer of legal ideas, norms, and institutions between adversarial and inquisitorial systems, as well as legal transplants in general.¹⁶⁴ As I will demonstrate later, ignoring these individual dispositions leads to many difficulties, as happened in Italy¹⁶⁵ and Germany,¹⁶⁶ and as it still occurs at the ICC.¹⁶⁷

4.2.2.6.3. Ways to Distribute Powers and Responsibilities Between the Main Legal Actors

Finally, adversarial and inquisitorial procedures differ at another level, which Langer calls the “dimension of procedural power”.¹⁶⁸ Langer ob-

the courts, etc.”. As a result of this socialisation, “a substantial number of actors in the criminal justice system are predisposed to understand criminal procedure and the various roles within it in a particular way, and these dispositions become durable over time”, *ibid.*

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ See below Section 4.3.2. See also Heinze, 2014, pp. 152, 316 ff., 529 ff., 535 ff., see above note 23; Michael Vitiello, “Bargained-for-Justice: Lessons from the Italians?”, in *University of the Pacific Law Review*, vol. 48, 2017, pp. 247–263; Ennio Amidio, “Rethinking Evidence under Damaška’s Teaching”, in Ackerman, Ambos and Sikirić (eds.), 2016, p. 54, see above note 21.

¹⁶⁶ For more details see Kai Ambos and Alexander Heinze, “Abbreviated Procedures in Comparative Criminal Procedure: A Structural Approach with a View to International Criminal Procedure”, in Morten Bergsmo (ed.), *Abbreviated Criminal Procedures for Core International Crimes*, Torkel Opsahl Academic EPublisher, Brussels, 2017, pp. 57 *et seq.*

¹⁶⁷ See Heinze, 2014, pp. 535 ff., see above note 23.

¹⁶⁸ Langer, 2004, p. 13, see above note 112. Langer remarks that “[t]his dimension of procedural power has also been relatively overlooked by comparative criminal procedure analyses, and it is central not only to describing the differences between the adversarial and the

serves that “[t]he main actors of the criminal process – judges, prosecutors, defense attorneys, defendants, police, etc. – have different quanta of procedural powers and responsibilities in each system”.¹⁶⁹ He provides examples relating to the powers and responsibilities of the decision-maker¹⁷⁰ *vis-à-vis* the prosecution and the defence.¹⁷¹ He thereby includes institutional considerations, describing the relationships of power between the “office of the prosecution, the judiciary, the bar, the public defense office, the police, etc.”,¹⁷² but also with regard to “permanent professional actors and lay people”.¹⁷³ Again, Langer alludes to the so-called “internal dispositions of legal actors” being also intertwined with the dimension of procedural power.¹⁷⁴ He remarks that, for instance, “an inquisitorial structure of interpretation and meaning gives the judge broad investigatory powers while giving more limited powers to the prosecution and defense. At the same time, though, any attempt to change this structure of interpretation and meaning will usually generate a reaction by the judges who protest against being disempowered through a new procedural structure of meaning”.¹⁷⁵ This statement does not only describe certain anomalies and contradictions in domestic settings such as Italy,¹⁷⁶ and in the context of the rather diverse procedural regime of the ICC,¹⁷⁷ but it also shows that the

inquisitorial systems, but also to identifying potential *loci* of resistance towards judicial reforms in adversarial and inquisitorial institutional settings”, see *ibid.*, with footnote 47.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*, with footnote 48: “The inquisitorial judges are also more powerful than adversarial professional judges because of their power to decide which evidence is produced at trial and the order in which it is presented, as well as through their power to lead the interrogation of witnesses and expert witnesses. However, this last statement must be qualified. The adversarial judges have inherent powers – i.e., contempt powers – that the inquisitorial ones lack. In addition, since there is less hierarchical control over the decisions of the adversarial judges than the inquisitorial judges, the former also have more power in this respect”.

¹⁷¹ *Ibid.*: “An example of this is the power that the defense has in the adversarial system to do its own pre-trial investigation – a power generally not present in inquisitorial systems”.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*, with footnote 50: “In the inquisitorial system, the power of lay people as decision-makers is minimal or entirely non-existent. In the adversarial system, it is much more substantial, at least in comparative terms”. Cf. also Kagan, 2003, see above note 18.

¹⁷⁴ Langer, 2004, p. 14, see above note 112.

¹⁷⁵ *Ibid.* with further references.

¹⁷⁶ See above note 165.

¹⁷⁷ See, for instance, the question of how much evidence should be communicated to the Chamber (see in detail Heinze, 2014, pp. 80 ff. and 508 ff., see above note 23): contrary to

above mentioned features of potential differences between adversarial and inquisitorial procedures operate jointly in reality and tend to reinforce, though also eventually subvert, one another.¹⁷⁸

To summarise, the four adversarial–inquisitorial levels according to Langer are:

- 1) Technique to handle criminal cases
- 2) Procedural culture
 - a) Structure of interpretation and meaning
 - basic ideas about prosecution and adjudication of criminal cases
 - b) Internal dispositions of legal actors
 - internalisation of these basic ideas by legal actors
 - practices, perceptions and attitudes which are ‘regular’ without being consciously co-ordinated or governed by any ‘rule’
- 3) Legal identity
 - awareness of coming from an adversarial or inquisitorial system influences the own definition of legal actors
- 4) Ways to distribute powers and responsibilities between the main legal actors
 - that is, active judge?¹⁷⁹

4.2.2.7. Conclusion

As demonstrated above, one possible (and most often used) model of criminal process is through the categories ‘adversarial’ and ‘inquisitorial’. Its suitability for a contextual interpretation of procedural rules and the

the *Lubanga* Pre-Trial Chamber, the *Bemba* Pre-Trial Chamber demanded to have access to evidence other than that on which the parties intend to rely at the confirmation hearing, since otherwise the Chamber could be deprived of its power to order further disclosure (*Bemba*, Pre-Trial Chamber, Decision on the evidence disclosure system and setting a timetable for disclosure between the parties, 31 July 2008, ICC-01/05-01/08-55, para. 44 (‘Decision on disclosure’) (<http://www.legal-tools.org/doc/15c802/>)). In other words, without knowing what evidence exists, the power to order further disclosure is not more than a paper promise.

¹⁷⁸ Langer, 2004, p. 14, see above note 112.

¹⁷⁹ Cf. figure 13 in Heinze, 2014, p. 128, see above note 23.

Statute of the ICC will be assessed later. However, it can already be concluded that the terms have various meanings and are used either as *Nominaldefinition*¹⁸⁰ or as *Realdefinition* without the ensuing reflection on the possibility of other (pragmatic) meanings.¹⁸¹

Before the US Supreme Court, for example, the different meanings and uses of ‘adversarial’ and ‘inquisitorial’ became apparent in *McNeil v. Wisconsin*, where the majority decided to limit the scope of *Miranda* protections – that is, *in casu*, the right to counsel. Even though *Miranda*-type warnings are also generally required in legal systems of the civil law tradition,¹⁸² in his dissenting opinion, Justice Stevens stated: “today’s decision is ominous because it reflects a preference for an inquisitorial system that regards the defense lawyer as an impediment rather than a servant to the cause of justice”.¹⁸³

Justice Scalia responded to this allegation:

The dissent condemns these sentiments as ‘revealing a preference for an inquisitorial system of justice.’ [...] We cannot imagine what this means. What makes a system adversarial rather than inquisitorial is not the presence of counsel, much less the presence of counsel where the defendant has not requested it; but rather, the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties. In the inquisitorial criminal process of the civil law, the defendant ordinarily has counsel; and in the adversarial criminal process of the common law, he sometimes does not. Our system of justice is, and has always been, an inquisitorial one at the investigatory stage (even the grand jury is an inquisitorial body), and no other disposition is conceivable. Even if detectives were to bring impartial magistrates around with them to all interrogations, there would be no decision for the impartial magistrate to umpire. If all the dissent means by a ‘preference for

¹⁸⁰ A *Nominaldefinition* would not explain but constitute both usage and core elements of a word *ab initio*, cf. Klaus Friedrich Röhl and Hans Christian Röhl, *Allgemeine Rechtslehre*, third edition, Verlag Franz Vahlen, Munich, 2008, p. 39.

¹⁸¹ A *Realdefinition* is an analytical or lexical definition that explains both common usage and core elements of the words, cf. Röhl and Röhl, 2008, p. 39, see above note 180.

¹⁸² Bradley, 1996, pp. 471, 475, see above note 82.

¹⁸³ *McNeil v. Wisconsin*, Dissenting Opinion of Justice Stevens, see above note 99.

an inquisitorial system’ is a preference not to require the presence of counsel during an investigatory interview where the interviewee has not requested it—that is a strange way to put it, but we are guilty.¹⁸⁴

Obviously, Justices Stevens and Scalia simply applied different meanings of ‘inquisitorial’: while Justice Stevens (probably subconsciously) was referring to a historical meaning of this term, Justice Scalia rather meant a combination of procedural type and ideal-type.¹⁸⁵ Nevertheless, it was Justice Stevens who caused this misunderstanding by not explaining which meaning he was referring to (Justice Scalia did not do this either, but he at least committed himself to more detailed explanations of the term).

Unfortunately, the reluctance to define ‘adversarial’ and ‘inquisitorial’ remains even before the ICC, although at this level the protagonists should be aware of the different understandings of legal terms. For example, the Pre-Trial Chambers in the *Katanga and Chui* and *Bemba* cases referred to “the requirements of *adversarial proceedings* and the principle of equality of arms”¹⁸⁶ and the Trial Chamber in the *Katanga and Chui* case stated in a hearing that “the *adversarial nature of the proceedings* and the fairness of the proceedings under Art. 64(2) of the Statute will be reinforced”.¹⁸⁷ In a decision of the *Bemba* Trial Chamber, the dissenting Judge Kuniko Ozaki observed that “ICC proceedings are closer to the *adversarial legal system than to the inquisitorial system*”.¹⁸⁸

¹⁸⁴ *McNeil v. Wisconsin*, see above note 99.

¹⁸⁵ See also Sklansky, 2008–2009, p. 1636, see above note 125.

¹⁸⁶ *Katanga and Chui*, Trial Chamber, Decision on the Prosecutor’s Application for Protective Measures Pursuant to Article 54(3)(f) of the Statute and Rule 81(4) of the Rules, 25 March 2009, ICC-01/04-01/07-989-tENG, para. 3 (<http://www.legal-tools.org/doc/f50c3c/>) with reference to *idem*, Decision on the Redaction Process, 12 January 2009, ICC-01/04-01/07-819-tENG, para. 7 (<http://www.legal-tools.org/doc/a7527b/>) (italics added); *Bemba*, Appeals Chamber, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled “Decision on application for interim release”, 16 December 2008, ICC-01/05-01/08-323, para. 32 (<http://www.legal-tools.org/doc/5a1931/>).

¹⁸⁷ *Katanga and Chui*, Trial Chamber, Trial Chamber Hearing, 12 February 2010, ICC-01/04-01/07-T-101-Red-ENG, Judge Cotte, p. 2, lines 21–22 (<http://www.legal-tools.org/doc/1f2b06/>).

¹⁸⁸ *Bemba*, Trial Chamber, Partly Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, ICC-01/05-01/08-1039, 24 November 2010, para. 20 (‘Dissenting Opinion of Judge Kuniko Ozaki’) (<http://www.legal-tools.org/doc/f62f75/>).

All those statements – whether correct or not – share both a lack of a proper explanation as to the meaning of ‘adversarial’ and the transparent use of *Realdefinitionen* and *Nominaldefinitionen*. Thus, one can only guess that the first statement probably refers to an ideal model while the second is a combination of a theoretical model and a procedural ideal. The third statement obscures the matter even more by referring to the ‘inquisitorial system’ instead of inquisitorial proceedings or the inquisitorial trial. However, the adversarial system is not similar to the adversarial trial,¹⁸⁹ let alone that the countless attempts to define the terms “system”¹⁹⁰ and “trial”¹⁹¹ and to grasp them as concepts. Applied to the criminal process, a

¹⁸⁹ Marvin Zalman, “The Adversary System and Wrongful Conviction”, in C. Ronald Huff and Martin Killias (eds.), *Wrongful Conviction: International Perspectives on Miscarriages of Justice*, Temple University Press, Philadelphia, 2008, p. 71.

¹⁹⁰ Especially the late Luhmann promoted the idea of sociological systems, where communication is a central feature, Niklas Luhmann, *Einführung in die Systemtheorie*, edited by Dirk Baecker, 4th ed., Carl-Auer, Heidelberg, 2008, pp. 100 ff.; Richard Nobles, and David Schiff, “Taking the Complexity of Complex Systems Seriously”, in *The Modern Law Review*, 2019, vol. 83, p. 662. Luhmann relied on theories of systems, as they had developed within biology and cybernetics. Law, within this theory, is one of society’s sub-systems, *ibid* and Dietmar Braun, “Rationalisierungskonzepte in der Systemtheorie Niklas Luhmanns und in der Handlungstheorie Hartmut Essers: Ein Theorienvergleich”, in Rainer Greshoff and Uwe Schimank (eds.), *Integrative Sozialtheorie? Esser – Luhmann – Weber*, VS Verlag, Wiesbaden, 2006, p. 363 (377 with fn. 13). Teubner has taken this further, drawing on Luhmann’s version of systems theory, autopoietic systems theory to observe a wide range of linked legal or potentially legal issues such as juridification, pluralism, transnational law, justice, the role of law in inter-social sub-system conflict, among others, see, e.g., Gunther Teubner, “Altera pars audiatur: Law in the Collision of Discourses”, in Richard Rawlings (ed.), *Law, Society and Economy*, Oxford University Press (Clarendon Press), Oxford, 1997, Chapter 7.

¹⁹¹ For Ingraham, ‘trials’ – more concretely – “are usually a review of facts collected by someone else (for example, by police, prosecutors, investigators, investigation judges or other officials, and defense lawyers) and presented to the decision maker in open court or through a written record”, Barton L. Ingraham, *The Structure of Criminal Procedure*, Greenwood Press, New York *et al.*, 1987, p. 24. It is rare that case law weighs in on the definition of “trial”. In the Australian case *Dietrich v The Queen* ((1992) 177 CLR 292), Justice Deane indicated that trial must take place before a magistrate, judge or jury. Kirchengast interprets Deane’s understanding of a criminal trial as being a “separate from the various other pre- and post-trial processes that constitute the means by which defendants are held to account for their wrongdoing”, Tyrone Kirchengast, *The Criminal Trial in Law and Discourse*, Palgrave Macmillan, New York, 2010, p. 8. Vasiliev – albeit with a view to the International Criminal Trial – describes the trial phase as “the culmination of a host of preceding activities of the Prosecutor in investigating a case and preparing it for prosecution”, Sergey Vasiliev, “Trial”, in Luc Reyndams, Jan Wouters and Cedric Ryngaert (eds.), *International Prosecutors*, Oxford University Press, Oxford, 2012, pp. 700–1.

system is “a set of coordinated decision making bodies”,¹⁹² it encompasses “the entire criminal justice system to the conclusion of adjudication and sentencing”,¹⁹³ and also focuses on the police, the prosecution, the defence and the judiciary.¹⁹⁴ Since Judge Ozaki analysed the “specific rules on the presentation of evidence through witnesses at the trial stage”,¹⁹⁵ she should have stated more clearly why she was referring to the entire “inquisitorial system”.

4.2.2.8. Appendix: Adversarial – Accusatorial

After I have tried to illustrate how many meanings the term ‘adversarial’ can have, the matter becomes increasingly diffused when a second term is introduced: ‘accusatorial’.¹⁹⁶ Historically, ‘accusatorial’ is more commonly used than ‘adversarial’.¹⁹⁷ Both terms are usually used interchangeably.¹⁹⁸ However, a closer look reveals that ‘accusatorial’ does not have the same meanings as ‘adversarial’.¹⁹⁹ As previously mentioned, ‘adversariness’ can have a traditional and historical meaning and can be used in the context of a theoretical model, a procedural type or even an ideal of procedure. Before this term is used, every author should clearly give information about its meaning and/or context. ‘Accusatorial’, on the contrary, is seen as a classic procedural model.²⁰⁰ As Goldstein puts it:

¹⁹² Andrew Ashworth and Mike Redmayne, *The Criminal Process*, fourth edition, OUP, Oxford, 2010, p. 17 (this definition has not been retained in the following fifth edition).

¹⁹³ Zalman, 2008, p. 71, see above note 189.

¹⁹⁴ *Ibid.*, p. 83.

¹⁹⁵ *Bemba*, Dissenting Opinion of Judge Kuniko Ozaki, para. 20, see above note 188.

¹⁹⁶ About the term, see also Armenta-Deu, 2016, pp. 58–60, above note 21.

¹⁹⁷ Ettore Dezza, *Geschichte des Strafprozessrechts in der Frühen Neuzeit*, Thomas Vormbaum (ed., trans.), Springer, Berlin, Heidelberg, 2017, pp. 1–6 ff.; Klaus Geppert, *Der Grundsatz der Unmittelbarkeit im deutschen Strafverfahren*, Walter de Gruyter, Berlin, New York, 1979, p. 12; Máximo Langer, “In the Beginning was Fortescue: On the Intellectual Origins of the Adversarial and Inquisitorial Systems and Common and Civil Law in Comparative Criminal Procedure”, in Ackerman, Ambos and Sikirić (eds.), 2016, p. 277, see above note 21.

¹⁹⁸ Jackson, 2005, pp. 737, 740, see above note 86.

¹⁹⁹ Cf. Abraham S. Goldstein, “Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure”, in *Stanford Law Review*, 1974, vol. 26, p. 1016.

²⁰⁰ See also Alexander Bechtel, “Die Constitutio Criminalis Carolina von 1532 – Wegbereiter einer eigenständigen deutschen Strafrechtsdogmatik – Teil 2”, in *Zeitschrift für das juristische Studium*, 2018, vol. 20, p. 25.

An accusatorial system assumes a social equilibrium which is not lightly to be disturbed, and assigns great social value to keeping the state out of disputes, especially when stigma and sanction may follow. As a result, the person who charges another with crime cannot rely on his assertion alone to shift to the accused the obligation of proving his innocence. The accuser must, in the first instance, present reasonably persuasive evidence of guilt. It is in this sense that the presumption of innocence is at the heart of an accusatorial system. Until certain procedures and proofs are satisfied, the accused is to be treated by the legal system *as if* he is innocent and need lend no aid to those who would convict him. An accusatorial system is basically reactive, reflecting its origins in a setting in which enforcement of criminal laws was largely confined to courts.²⁰¹

Examining the passage more closely, the term ‘accusatorial’ apparently comprises the traditional and historical meaning of adversariness, especially when it contrasts itself to the inquisitorial system like Vogler did.²⁰² Moreover, by promoting conflict resolution (“keeping the state out of disputes”) it reminds us of ‘adversariness’ as a theoretical model and may even be regarded as ‘adversariness’ as an ideal of procedure. Thus, if an author wishes to refer to ‘adversariness’ in (almost) all its meanings, it may be appropriate to use the term ‘accusatorial’. However, this will rarely be the case because then ‘adversariness’ receives its broadest meaning. In sum, the term ‘accusatorial’ should only be used in cases where the reference to ‘adversariness’ in its broadest meaning is intended.

²⁰¹ Goldstein, 1974, p. 1017, see above note 199.

²⁰² See above Section 4.2.2.5.

Difference between Adversarial / Accusatorial (Goldstein & Damaška)

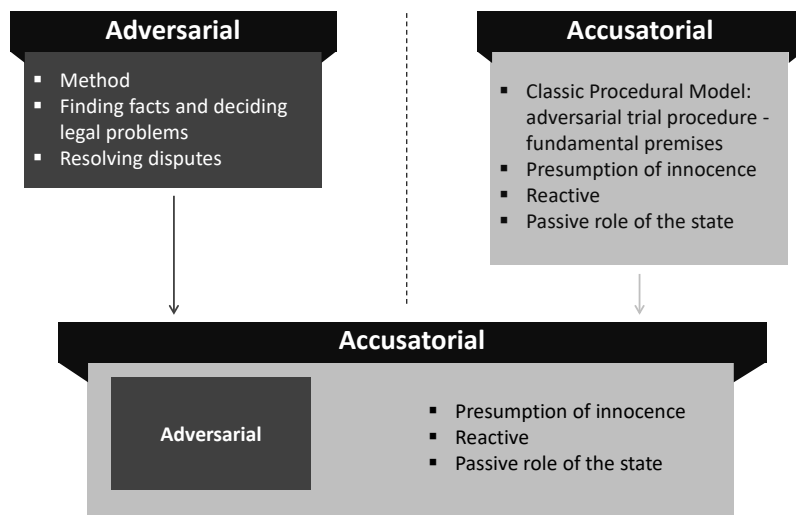


Figure 1: ‘Adversarial’ and ‘Accusatorial’.²⁰³

4.3. Misleading Taxonomies

As it has become apparent, many models of criminal procedure are not free from considerable ambiguity and their authors seldom disclose their methodology, that is, they fail to state clearly what the purpose of those models is.²⁰⁴ The disclosure and explanation of methodology is vital in scholarship. In the words of Francis: “[E]ven a string citation without an explanation of the methodology used in selecting the citations can serve merely to reinforce an ideological position rather than to provide evidence that has some claim to objectivity”.²⁰⁵ As a result, the use of such models often leads to misunderstanding rather than clarification.²⁰⁶ This misunderstanding, in turn, impacts the description of domestic and international

²⁰³ Heinze, 2014, p. 132, see above note 23.

²⁰⁴ Mirjan Damaška, “Models of Criminal Procedure”, in *Zbornik PFZ*, vol. 51, 2001, p. 477.

²⁰⁵ Leslie Francis, “Law Reviews: The Changing Roles of Law Schools and the Publications They Sponsor”, in *Marquette Law Review*, 2018, vol. 101, p. 1019, 1035.

²⁰⁶ Johannes Frederikus Nijboer, *Beweisprobleme und Strafrechtssysteme – Proof and Criminal Justice Systems*, Peter Lang, Frankfurt *et al.*, 1997, p. 173.

criminal processes. The roots of the inconsistent and partly misleading way of using procedural models as support for legal interpretation can be traced back to domestic criminal trials.

4.3.1. Domestic (Criminal) Procedure

Wrong modelling in domestic procedure is manifold and mostly involves different understandings of ‘common law’, ‘civil law’, ‘adversarial’ and ‘inquisitorial’. For instance, the legal traditions of the common law and the civil law are not clearly separated from the adversarial and inquisitorial procedural models. Carlson confuses the two.²⁰⁷ Consider also a remark by Wolfe and Proszek:

As in the common law tradition, the civil law courts apply rules of procedure to govern the means by which the ultimate decision is reached, but in much different form. The civil law and adversarial processes dramatically differ, in terms of the interrelated criteria of concentration, immediacy, and orality [...] ²⁰⁸ In a typical civil action in a common law court, this entire sequence of events – stretching over several weeks or months in a civil law court – would be telescoped into less than a minute of oral colloquy between judge and counsel. ²⁰⁹

With heightened immediacy and extensive orality, the common law court enables a rapid exchange of information; contrast this with a civil law court, which often requires that each set of questions, proposed to be asked of a witness, be submitted to the judge in advance, together with an ‘offer of proof’ supporting the proffered inquiry. ²¹⁰

This statement is terminologically unclear in several ways. In their paper on administrative and civil procedure in the US, the authors apparently strive to compare the common law and civil law legal traditions. Yet, even in the short paragraph outlined above, the terminology seems inconsistent. In the first sentence, the authors contrast the “common law tradition” with “civil law courts”. In the second sentence, they are describing

²⁰⁷ Carlson, 2018, p. 73, see above note 9 (Common law “[a]lso known as ‘adversarial law’”).

²⁰⁸ Reference to John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems in Europe and Latin America*, third edition, Stanford University Press, Stanford, California, 2007, p. 116. Latest edition: Merryman and Pérez-Perdomo, 2019, p. 118, see above note 41.

²⁰⁹ *Ibid.*

²¹⁰ Wolfe and Proszek, 1997, pp. 311–312, see above note 78, ellipsis and footnotes in the original.

the dichotomy of the inquisitorial and adversarial procedural model. However, they neither clarify which meaning both terms have nor are they consistent in the use of terminology: they do not contrast the inquisitorial model with the adversarial one but the “civil law process” with the “adversarial process”. What does the “civil law process” in this regard mean? Does it describe the process within the civil law tradition? Which process? It could be civil procedure, administrative procedure or even criminal procedure. Or does it concern the civil procedure in general? If so, why should it be compared to the “adversarial process”? Civil procedure can be both adversarial and inquisitorial. Terminologically, the third sentence of the statement does not bring any clarification. On the contrary: “Civil action in a common law court” may be identified as a civil trial before a trial court within the common law tradition. Consequently, the authors also mention “civil action” before a “civil law court”. This contributes to a confusion of civil law, civil action, civil law and common law court, civil process and adversarial process (all terms without any explanation): a person not familiar with the terminological subtleties will necessarily be confused. Does “civil action” not always take place before a “civil law court”? Even persons familiar with comparative law could only guess that the authors refer to a civil lawsuit before a court within the civil law tradition. Likewise, the question of whether this civil law tradition has an adversarial or inquisitorial procedural model for civil lawsuits remains unanswered.

The confusion of civil law as a legal tradition and civil law as contrasted to criminal law, which was partly the problem in the statement just mentioned, has also given rise to a misunderstanding in the following excerpt of an article of Freedman,²¹¹ when he is referring to a study by Kaplan:

In the criminal process there are special rules, particularly the exclusionary rules, that recognize values that take precedence over truth. The adversary system should be even more effective in determining truth in the civil process, therefore, where such values are not ordinarily applicable. A study of civil litigation in Germany conducted by Professor Benjamin Kaplan (later a Justice in the Supreme Judicial Court of Massachusetts) found the judge-dominated search for facts in

²¹¹ Monroe H. Freedman, “Our Constitutionalized Adversary System”, in *Chapman Law Review*, 1998, vol. 1, p. 78.

German civil practice to be ‘neither broad nor vigorous,’ and ‘lamentably imprecise.’²¹² Professor Kaplan concluded that the adversary system in this country does succeed in presenting a greater amount of relevant evidence before the court than does the inquisitorial system.²¹³

It is not clear what the author means: does he intend to say that in German civil procedure it is the judge who investigates the facts? This general remark would be incorrect due to the so-called *Beibringungsgrundsatz* or *Verhandlungsgrundsatz*.²¹⁴ Or is he trying to say that the criminal procedure within a civil law system like Germany provides for an active judge who investigates the facts? This is basically correct. However, the use of the term “civil litigation” for criminal procedure is at least questionable. In any case, Freedman’s statement causes confusion.

The same applies to remarks about criminal procedure as ‘inquisitorial’ or ‘adversarial’. It remains unclear whether ‘adversarial’ and ‘inquisitorial’ characteristics are being defined by the historical evolution of existent, institutionalised legal procedures, or whether existing procedural systems are to be interpreted and evaluated by reference to idealised models of an ‘adversarial’ and ‘inquisitorial’ process.²¹⁵ In US-courts, the terms ‘inquisitorial’, ‘continental’ and ‘civil law’ are not only confused, but also used inconsistently. As Sklansky²¹⁶ points out:

²¹² Benjamin Kaplan, “Civil Procedure – Reflections on the Comparison of Systems”, in *Buffalo Law Review*, 1960, vol. 9, pp. 420–421.

²¹³ *Ibid.*

²¹⁴ According to this principle, it is within the responsibility of the parties to provide the court with and prove the facts the court has to base its decision on, see Hans-Joachim Musielak and Wolfgang Voit, *Grundkurs ZPO*, fifteenth edition, C.H. Beck, Munich, 2020, mn. 208–215; Martin Schwab, *Zivilprozessrecht*, fifth edition, C.F. Müller, Heidelberg, 2016, mn. 5; Othmar Jauernig and Burkhard Hess, *Zivilprozessrecht*, thirtieth edition, C.H. Beck, Munich, 2011, § 24; Walter Zeiss and Klaus Schreiber, *Zivilprozessrecht*, twelfth edition, Mohr Siebeck, Tübingen, 2014, mn. 174 *et seq.* For reasons why this principle cannot be transferred to the criminal process, see Edda Weßlau, *Das Konsensprinzip im Strafverfahren*, Nomos, Baden-Baden, 2002, pp. 98–103.

²¹⁵ Paul Roberts, “Faces of Justice Adrift? Damaška’s Comparative Method and the Future of Common Law Evidence”, in Jackson, Langer and Tillers (eds.), 2008, pp. 295, 298, 299, see above note 16.

²¹⁶ Sklansky, 2008–2009, p. 1639, see above note 125, footnotes in the original.

Sometimes the Court implied that inquisitorial process was bad because it relied on untrustworthy evidence.²¹⁷ At other times the Court suggested the real concern was that Continental criminal procedure lent itself too easily to authoritarian abuse.²¹⁸ And sometimes it seemed as if the chief sin of Continental criminal procedure was simply that it was Continental – “wholly foreign” to our way of doing things.²¹⁹

In most of those cases, the term inquisitorial is used in its historical sense,²²⁰ without any explanation. For instance, in many US-cases that deal with the privilege against self-incrimination, the courts have pointed to a “preference for an accusatorial rather than an inquisitorial system of criminal justice” as among the “fundamental values and most noble aspirations”,²²¹ which indicates that inquisitorialism does not provide for such a right. The same is indicated by the Supreme Court in *Miranda v. Arizona*,²²² where it explained that the privilege against self-incrimination must be protected from the time of arrest, because “[i]t is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries”.²²³ Thus, using the adversarial ideal as a contrast to (strictly speaking, as an alternative to)²²⁴ the term “inquisitorial” indicates that “inquisi-

²¹⁷ See *Crawford v. Washington*, see above note 121.

²¹⁸ See *ibid.*, p. 56, footnote 7.

²¹⁹ See *ibid.*, p. 62.

²²⁰ Johannes Frederikus Nijboer, “Common Law Tradition in Evidence Scholarship Observed from a Continental Perspective”, in *American Journal of Comparative Law*, 1993, vol. 41, p. 303.

²²¹ US SC, *Murphy v. Waterfront Commission*, 15 June 1964, 378 U.S. 52, p. 55; US SC, *United States v. Balsys*, 25 June 1998, 524 U.S. 666, p. 690; US SC, *Withrow v. Williams*, 21 April 1993, 507 U.S. 680, p. 692; US SC, *Pennsylvania v. Muniz*, 18 June 1990, 496 U.S. 582, p. 595, footnote 8; US SC, *Doe v. United States*, 487 U.S. 201, pp. 212–13; US SC, *Andresen v. Maryland*, 28 June 1976, 427 U.S. 463, p. 476, footnote 8; US SC, *Michigan v. Tucker*, 10 June 1974, 417 U.S. 433, p. 455, footnote 2 (Brennan, J., concurring in the judgment); US SC, *Couch v. United States*, 9 January 1973, 409 U.S. 322, p. 328; US SC, *Piccirillo v. New York*, 25 January 1971, 400 U.S. 548, p. 566 (Brennan, J., dissenting); US SC, *Tehan v. United States ex rel. Shott*, 19 January 1966, 382 U.S. 406, p. 414, footnote 12.

²²² US SC, *Miranda v. Arizona*, 13 June 1966, 384 U.S. 436.

²²³ *Ibid.*, p. 477; cf. Sklansky, 2008–2009, pp. 1665–6, see above note 125.

²²⁴ Space restrictions do not allow for an elaboration of the topos ‘alternative’. Strictly speaking, in the case law examples provided ‘inquisitorial’ is used as a false alternative. See in more detail Jürgen Rödig, *Die Denkform der Alternative in der Jurisprudenz*, Springer, Berlin, Heidelberg, New York, 1969, pp. 22 *et seq.* and Klaus F. Röhl, “Buchbesprechung

torial” is understood historically. Justice Frankfurter’s statements in *Watts v. Indiana* very well demonstrate this:²²⁵

Ours is the accusatorial, as opposed to the inquisitorial, system. [...] Under our system, society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case not by interrogation of the accused, even under judicial safeguards, but by evidence independently secured through skillful investigation. [...] The requirement of specific charges, their proof beyond a reasonable doubt, the protection of the accused from confessions extorted through whatever form of police pressures, the right to a prompt hearing before a magistrate, the right to assistance of counsel, to be supplied by government when circumstances make it necessary, the duty to advise an accused of his constitutional rights – these are all characteristics of the accusatorial system and manifestations of its demands.²²⁶

However, the safeguards mentioned by Justice Frankfurter have in fact been provided for in the German Criminal Procedure Code of 1877.²²⁷ Moreover, many of those rights are enshrined in Article 6 of the European Convention on Human Rights.²²⁸ Some authors and judges obviously tend to equate inquisitorial systems with coercive interrogation, unbridled search, and unduly efficient crime control,²²⁹ that is, comparing a historical meaning of inquisitorialism not to a historical meaning of adversarialism but to an ideal, theoretical or procedural meaning. Freedman, for instance, refers to an ideal model of proof when he states:

The adversary system, like any human effort to cope with important and complex issues, is sometimes flawed in execution. It is both understandable and appropriate, therefore, that it be subjected to criticism and reform. The case for radically

von Rödiger, *Die Denkform der Alternative in der Jurisprudenz*”, in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1971, vol. 83, pp. 831–850.

²²⁵ US SC, *Watts v. Indiana*, 27 June 1949, 338 US 49, p. 54.

²²⁶ *Ibid.*

²²⁷ Germany, *Strafprozessordnung für das Deutsche Reich* (German Criminal Procedure Code), 1 February 1877, §§ 55, 136a (‘StPO’); Karl H. Kunert, “Some Observations on the Origin and Structure of Evidence under the Common Law System and the Civil Law System of ‘Free Proof’ in the German Code of Criminal Procedure”, in *Buffalo Law Review*, 1966–1967, vol. 16, pp. 142, 150, 151.

²²⁸ See Jackson and Doran, 1995, p. 57, see above note 126.

²²⁹ Goldstein, 1974, p. 1018, see above note 199.

restructuring it, however, has not been made. On the contrary, based upon reason, intuition, experience, and some experimental studies, there is good reason to believe that the adversary system is superior in determining truth when facts are in dispute between contesting parties. Even if it were not the best method for determining the truth, however, the adversary system is an expression of some of our most precious rights. In a negative sense, it serves as a limitation on bureaucratic control. In a positive sense, it serves as a safeguard of personal autonomy and respect for each person’s particular circumstances. The adversary system thereby gives both form and substance to the humanitarian ideal of the dignity of the individual. The central concern of a system of professional ethics, therefore, should be to strengthen the role of the lawyer in enhancing individual human dignity within the adversary system of justice.²³⁰

Although Freedman cites Damaška, he ignores Damaška’s reference to the different meaning of the adversary or adversarial system.²³¹ That differentiation has been demonstrated by Doran *et al.*²³² They do not only identify the different meanings of adversarial and inquisitorial but also clearly state which meaning they actually use, before they conclude:

Thus far we have identified adversariness as an ideal procedural process that functions best as a method of resolving disputes between parties and as an ideal proof process that maximizes the ability of individuals to participate in legal processes designed to determine historical reality. Whether a particular governmental process will turn out to be adversarial depends on many factors, including the degree to which adversariness is seen by members of the society as compatible with (or necessary to) the aims of the procedure, the degree to which individuals are considered to have an important stake in the process, and the economic costs incurred.²³³ It can be argued that enforcement of the criminal

²³⁰ Freedman, 1998, p. 90, see above note 211.

²³¹ *Ibid.*, p. 74, footnote 119; p. 76, footnotes 126 *et seq.*; and p. 77, footnotes 135 *et seq.*

²³² Doran, Jackson and Seigel, 1995–1996, p. 22, see above note 87, footnotes and information about omitted footnotes in the original.

²³³ See Denis J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion*, Clarendon Press, Oxford, New York, reprint 1987, pp. 326–337, arguing that procedural participants, at first, seek to find rational outcomes in an effective manner, but other concerns such as economic costs, the desire for proportionality between interests and accuracy, and

law involves the implementation of state policy, thereby justifying the use of inquisitorial procedures. In fact, much of Anglo-American criminal procedure has been characterized as inquisitorial [fn omitted], particularly at the stage of police investigation and interrogation.²³⁴ Nevertheless, the Anglo-American contested trial is adversarial in nature because at this stage the matter is viewed primarily as a dispute between the prosecution and the defense (the ‘state’ versus the ‘accused’) that requires impartial resolution. At this point, the focus shifts to the plight of the individual defendant. Concerns about the importance of appropriately implementing state policy yield in large part to concerns about protecting the rights of the accused, not the least of which is the right not to be falsely convicted.²³⁵

In sum, many authors – surely due to time constraints – do not resist the temptation of using false taxonomies by creating dichotomies without a clear definition of the categories or models. This is more than apparent in the case of the inquisitorial–adversarial or common-law–civil law models. Take the existence of the jury as another example. In the case *Blakely v. Washington*, Justice Scalia stressed that “the Framers’ paradigm for criminal justice” rejected “civil law traditions” in favour of “the common law ideal of limited state power accomplished by strict division of authority between judge and jury”; the US Constitution “do[es] not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury”.²³⁶ Apart from his confusion over a tradition versus an ideal, what Justice Scalia really refers to is not a procedural model (adversarial–inquisitorial) but the relationship between a judge and a jury. This relationship would have been better described with the labels ‘hierarchical’ or ‘co-ordinate’. Most importantly, it is nowadays widely recognised that the adversarial system and the jury trial, although

the ideal of participatory decision-making put restraints on the procedures and may even reduce their rational basis.

²³⁴ Abraham S. Goldstein, “The State and the Accused: Balance of Advantage in Criminal Procedure”, in *Yale Law Journal*, 1959-1960, vol. 69, pp. 1163–9.

²³⁵ See Ronald M. Dworkin, *A Matter of Principle*, OUP, Oxford, 1986, pp. 79–84, arguing that state policy in a cost-efficient society yields to the right of a person not to be falsely convicted only when that right means avoiding intentional conviction as opposed to avoiding, at all costs, accidental conviction of an innocent person.

²³⁶ US SC, *Blakely v. Washington*, 24 June 2004, 542 U.S. 296, p. 313.

usually found together, are not essential to each other.²³⁷ Otherwise, the adversarial system that Japan introduced after World War II, that was closely oriented towards the American system, could not be described as adversarial, because it did not put the defendant in the adversarial seat during the investigative phase, and it had no jury during the trial phase.²³⁸ The same could be said about the famous Diplock Courts in Northern Ireland.²³⁹

In more general terms, many authors and judges treat the inquisitorial system as a single, undifferentiated combination of a procedural model with a legal tradition and cautionary tale, stretching from the Middle Ages to the present day, and the large differences between a Napoleonic judge and a medieval inquisitor or modern European magistrate become blurred.²⁴⁰ In the same vein, many other authors overlook that there is not one ‘adversarial system’ and that there are certain important discontinuities between the ‘English common law tradition’, and modern American practice:²⁴¹ English and early American criminal procedure were considerably less adversarial than is generally believed.²⁴² Bohlander illustrates this with the following both amusing and alarming report:

Anecdotal and anonymous evidence may be permitted about this author’s encounter with different international judges in a social context, one of whom apparently thought that in civil law systems, the accused has to prove her innocence and the other stating at a symposium, with undisguised surprise during the course of a debate about adversarial versus inquisitorial principles, that this had been an epiphany for them because, until that moment, they had thought that ‘adversarial’ simply meant that the prosecution is the adversary of the defence. Another otherwise very bright young lawyer who now is a professor at a renowned law school actually asked in all

²³⁷ Gordon van Kessel, “European Trends Towards Adversary Styles in Procedure and Evidence”, in Feeley and Miyazawa (eds.), 2002, p. 241, see above note 81.

²³⁸ Shinomiya Satoru, “Adversarial Procedure without a Jury: Is Japan’s System Adversarial, Inquisitorial, or Something Else?”, in Feeley and Miyazawa (eds.), 2002, p. 115, see *ibid.*

²³⁹ See generally Jackson and Doran, 1995, above note 126.

²⁴⁰ Sklansky, 2008–2009, p. 1659, see above note 125.

²⁴¹ Ingraham, 1987, pp. 8–9, see above note 191.

²⁴² John H. Langbein, “The Criminal Trial Before the Lawyers”, in *University of Chicago Law Review*, 1977–1978, vol. 45, pp. 263–316; R. Carter Pittman, “The Colonial and Constitutional History of the Privilege against Self-Incrimination in America”, in *Virginia Law Review*, 1935, vol. 21, pp. 763–782.

seriousness whether civil law systems knew something like the Fifth Amendment.²⁴³

After all, it seems that the terms ‘adversarial’ and ‘inquisitorial’, ‘common law’ and ‘civil law’ particularly suffered from a side effect of definition as observed by Lotze already in 1874: a “willkürliche und launenhaften Beschreibung”²⁴⁴ (arbitrary and capricious course of the description).²⁴⁵

4.3.2. In International (Criminal) Procedure

In fact, two irrefutable facts counter the black and white picture of (historical) inquisitorialism and (ideal) adversarialism that is still drawn by judges and academics. First, the alleged ‘adversarial’ and ‘inquisitorial’ systems are all merging to a certain degree.²⁴⁶ Therefore, second, no country has a pure adversarial or non-adversarial system.²⁴⁷ Party authority is on the increase throughout Continental Europe, with both prosecutors and defence lawyers becoming more active and more partisan.²⁴⁸ Italy, for instance, adopted a quasi-adversarial system for certain cases, which enhanced the authority of the parties at the expense of judicial power.²⁴⁹ In general, the European Court of Human Rights influenced and changed domestic criminal procedure to a great extent, for example, emphasising the great importance of the trial stage (as opposed to the pre-trial stage)

²⁴³ Bohlander, 2011, p. 407 with footnote 52, see above note 58.

²⁴⁴ Hermann Lotze, *System der Philosophie, Erster Teil, Drei Bücher der Logik*, Verlag S. Hirzel, Leipzig, 1874, § 60, p. 198.

²⁴⁵ Translation in Juan C. Sager (ed.), *Essays on Definition*, John Benjamins Publishing, Amsterdam, Philadelphia, 2000, p. 1.

²⁴⁶ Bradley, 1996, pp. 471 ff., see above note 82; Nico Jörg, Steward Field and Chrisje Brants, “Are Inquisitorial and Adversarial Systems Converging?”, in Phil Fennell, Christopher Harding, Nico Jörg and Bert Swart (eds.), *Criminal Justice in Europe – A Comparative Study*, Clarendon Press, Oxford, 1995, p. 54.

²⁴⁷ Van Kessel, 2002, p. 225, see above note 237; see generally Christine van den Wyngaert, *Criminal Procedure Systems in the European Community*, Butterworths, London, 1993. Carlson, however, still acknowledges ideological differences, see Carlson, 2018, p. 73, see above note 9.

²⁴⁸ Bradley, 1996, pp. 471 ff., see above note 82; Johannes Andenæs, “Criminal Law, Criminology and Criminal Procedure”, in *Journal International Law & Practice*, 1993, vol. 2, p. 464.

²⁴⁹ Van Kessel, 2002, p. 228, see above note 237. In more detail see above note 165.

and the oral form of proof (as opposed to the written form of proof).²⁵⁰ The investigating magistrate – this form of active investigating judge that the US judges always contrast their system to – is either eliminated completely or has been heavily weakened. In Germany, since the Criminal Procedure Reform Act of 1974, the role of the *Ermittlungsrichter* has been amended to the extent that he or she is no longer responsible for the investigation but must authorise certain interfering actions by the prosecution.²⁵¹ Of course, there is still no ‘investigating magistrate’ in the US or in England and Wales, but the requirement of authorisation by a judge for certain action, for example, if the police want to arrest a suspect, does exist in those legal systems, too.²⁵² Even in France, the *juge d’instruction* has become controversial and its role has been constantly reduced.²⁵³ To provide another example of merging procedural systems: Germany introduced the plea bargaining model, called *Verständigung*, in 2009.²⁵⁴ The astonishing antagonism is that the German Criminal Procedure does, as a matter of principle, apart from some exceptions like §§ 265a, 391, 402, 405, 470(2) German Code of Criminal Procedure (*Strafprozessordnung*,

²⁵⁰ Van Kessel, 2002, p. 234, see above note 237; Stuart Field and Andrew West, “A Tale of Two Reforms: French Defense Rights and Police Powers in Transition”, in *Criminal Law Forum*, 1995, vol. 6, p. 473; Ksenija Turković and Krešimir Kamber, “One Face of Human Rights for Two Faces of Criminal Justice: A European Perspective”, in Ackerman, Ambos and Sikirić (eds.), 2016, pp. 413 ff., see above note 21.

²⁵¹ See for example, StPO, § 162, see above note 227. Only in a case of emergency could the investigating judge take action himself, if no prosecutor is available (*ibid.*, § 165).

²⁵² Christoph J.M. Safferling, *Towards an International Criminal Procedure*, OUP, Oxford, 2001, pp. 99–100. Of course there are exceptions to this rule, especially where an arrest or a certain police action is possible without an arrest warrant issued by the judge. See, for instance, the recent discussion about GPS tracking. About the role of the judge in those systems in more detail see Heinze, 2014, pp. 229 ff., see above note 23.

²⁵³ Stephen P. Freccero, “An Introduction to the New Italian Criminal Procedure”, in *American Journal of Criminal Law*, 1994, vol. 21, pp. 345–384; Mireille Delmas-Marty, “The Juge d’Instruction: Do the English Really Need Him?”, in Basil S. Markesinis (ed.), *The Gradual Convergence – Foreign Ideas, Foreign Influences, and English Law on the Eve of the 21st Century*, Clarendon Press, Oxford, 1994, pp. 46–58.

²⁵⁴ Jenia Iontcheva Turner, “Plea Bargaining and Disclosure in Germany and the United States: Comparative Lessons”, in *William & Mary Law Review*, 2016, vol. 57, no. 4, p. 1549, 1573. As a matter of fact, plea bargaining has been used in Germany since the 1980s, albeit informally. The words “*Absprache*” or “*Vereinbarung*” are wilfully avoided by the German legislator in order to not make the impression that a quasi-contractual agreement, and not the guilt of the accused, is the basis of the judgment. Cf. the explanations given by the German government, BT-Drs. 16/12310, p. 8.

‘StPO’), prohibit any form of negotiated justice²⁵⁵ since the German criminal process is governed by both the duty to clarify the facts (§ 244(2) StPO) and the principle of culpability (§ 46 (1) clause 1 StGB).²⁵⁶ The consensual *Verständigung* was implemented while maintaining the rather active role of the judge.²⁵⁷ The legislator thus failed to take into account the individual dispositions I have mentioned earlier.²⁵⁸

Nevertheless, it is not only the legal systems of the civil law tradition that lean towards the ‘opposite’ tradition; common law countries are tending to move away from the excesses of adversarial forms of adjudication, as well as from lay participation in fact-finding, as demonstrated through the example of increasing bench trials and decreasing jury trials,²⁵⁹ and as I have elaborated in further detail elsewhere.²⁶⁰ In the US, until 1976, only 3.4 per cent of State criminal trials were jury trials. Between 1976 and 2002, jury trials fell to 1.3 per cent.²⁶¹ In England, a crim-

²⁵⁵ Gunnar Duttge, “Möglichkeiten eines Konsensualprozesses nach deutschem Strafprozessrecht”, in *Zeitschrift für die Gesamte Strafrechtswissenschaft*, 2003, vol. 115, no. 3, pp. 542 *et seq.*; Jürgen Seier, “Der strafprozessuale Vergleich im Lichte des § 136a StPO”, in *Juristenzeitung*, 1988, vol. 43, no. 14, p. 684 shows that, in comparison to American law, German law does not allow “plea bargaining” as negotiated justice. Cf. also Heinz J. Dielmann, “‘Guilty Plea’ und ‘Plea Bargaining’ im amerikanischen Strafverfahren – Möglichkeiten für den deutschen Strafprozeß?“, in *Goldammer’s Archiv für Strafrecht*, 1981, pp. 558 ff.; Claus Krieb, “Absprachen im Rechtsvergleich”, in *Zeitschrift für die Gesamte Strafrechtswissenschaft*, 2004, vol. 116, no. 1, pp. 172–87; Andreas Ransiek, “Zur Urteilsabsprache im Strafprozess: ein amerikanischer Fall”, in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2008, vol. 3, pp. 116–22; Edda Weßlau, “Absprachen in Strafverfahren”, in *Zeitschrift für die Gesamte Strafrechtswissenschaft*, 2004, vol. 116, p. 169. For a differentiated approach see Werner Schmidt-Hieber, “Der strafprozessuale ‘Vergleich’ – eine illegale Kungelei?“, in *Strafverteidiger*, 1986, p. 357; Dominik Brodowski, “Die verfassungsrechtliche Legitimation des US-amerikanischen ‘plea bargaining’ – Lehren für Verfahrensabsprachen nach § 257 c StPO?“, in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 2012, vol. 124, p. 733, comparing the German *Verständigung* and plea bargaining in the USA with a view to constitutional restraints.

²⁵⁶ For more details see Ambos and Heinze, 2017, pp. 57 *et seq.*, see above note 166.

²⁵⁷ Walter Kargl, *Strafrecht*, Nomos, Baden-Baden, 2019, mn. 591.

²⁵⁸ See above Section 4.2.2.6.2.

²⁵⁹ See above Section 4.3.1.

²⁶⁰ See Heinze, 2014, pp. 231 ff., 269 ff., see above note 23.

²⁶¹ Marc Galanter, “The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts”, in *Journal of Empirical Legal Studies*, 2004, vol. 1, p. 512, table 7. See generally Robert P. Burns, *The Death of the American Trial*, University of Chicago Press, Chicago and London, 2009, p. 86; Mirjan Damaška, *Evidence Law Adrift*, Yale University Press, New Haven and London, 1997, p. 127; Sean Doran and John D. Jackson, “The Case for Jury Waiver”, in *Criminal Law Review*, 1997, pp. 161–164.

inal defendant’s right to a jury trial was seriously weakened in the 1970s, and this trend has continued.²⁶² To authorise freer admission of hearsay evidence and to require greater judicial control, American authors tend to use models of the civil law tradition as orientation.²⁶³ England has embraced a number of traditional inquiry-type procedures, such as open pre-trial discovery and restrictions on the right to silence.²⁶⁴

In sum, *all* systems in the world today are ‘mixed’ or hybrid systems – incorporating some features typical of the common law, adversarial, or due-process models, along with other features typical of the civil law, inquisitorial, or crime-control models.²⁶⁵ ‘Common law’ and ‘civil law’ or ‘adversarial’ and ‘inquisitorial’ do not qualify as alternatives,²⁶⁶ since they basically fulfil every criterion²⁶⁷ of a flawed legal distinction: a) its contours are rather soft, due to terminological imprecision;²⁶⁸ b) certain elements of one category belongs to the other and *vice versa* (‘overlap-

²⁶² Doran and Jackson, 1997, pp. 161–164, see above note 261.

²⁶³ Craig M. Bradley and Joseph L. Hoffmann, “Public Perception Justice and the ‘Search for Truth’ in Criminal Cases”, in *South California Law Review*, 1996, vol. 69, pp. 1267–1302; Peter L. Arenella, “Foreword: O.J. Lessons”, in *South California Law Review*, 1996, vol. 69, pp. 1233–66; Carl M. Selinger, “Dramatizing on Film the Uneasy Role of the American Criminal Defense Lawyer: True Believer”, in *Oklahoma City University Law Review*, 1997, vol. 22, pp. 223–46.

²⁶⁴ Van Kessel, 2002, p. 239, see above note 237; Jacqueline Hodgson, “The Future of Adversarial Criminal Justice in 21st Century Britain”, in *North Carolina Journal of International & Commercial Regulation*, 2010, vol. 35, p. 320: “Just as countries like France and the Netherlands do not use pure inquisitorial processes of justice, so too England and Wales use, in theory, a mixed system”; in more detail see Heinze, 2014, pp. 269 ff., see above note 23.

²⁶⁵ Richard S. Frase, “Comparative Criminal Justice Policy, in Theory and Practice”, in Association Internationale de Droit Penal (ed.), *Comparative Criminal Justice Systems: from Diversity to Rapprochement*, Editions Érès, Toulouse, 1998, pp. 112, 113; Findlay, 2001, pp. 26, 29, see above note 39; Swoboda, 2013, p. 69, see above note 75; Armenta-Deu, 2016, p. 70, see above note 21. See also the refreshing (and rare) remark by Calabresi: “My thesis is that formally the U.S. is committed to adversarial procedure but that in practice U.S. procedure has become quite inquisitorial as of 2015. The U.S. has travelled a long distance in the last thirty years and more from its common law adversarial procedural roots”, see Calabresi, 2016, p. 107, see above note 31; Jackson, 2016, p. 243, see above note 84.

²⁶⁶ See already above note 224.

²⁶⁷ The criteria are borrowed from Pierre Schlag, “Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction”, in *Stanford Law Review*, 1988, vol. 40, pp. 929, 931.

²⁶⁸ And terminological imprecision may lead to a bad argument, since it questions the validity of the premise, Pierre Schlag and David Skover, *Tactics of Legal Reasoning*, Carolina Academic Press, Durham, North Carolina, 1986, p. 13.

ping opposition’); c) certain elements belong in neither category (‘false dichotomy’); and d) the terms ‘civil law’ and ‘common law’ do not come close to grasping cultural differences (‘idiosyncratic definition’). Thus, in a way, the respective ‘alternative’ category is used for a strawman argument.

Notwithstanding this, it is indeed possible to determine the underlying tradition of a procedural system and how this system could be modelled. All existing systems today are still at least pre-dominantly of one theoretical type or its opposite.²⁶⁹ Van Kessel, for example, identifies a “superadversary system” in the US, “more moderate adversary procedures” in England and “less adversary, inquiry style systems” in “Continental Europe”.²⁷⁰ Nevertheless, nobody would seriously react to the hybridisation of, for instance, the US- or the German system by calling them ‘*sui generis*’. Unfortunately, this does occur in relation to the procedural system of the ICC.²⁷¹ Fatou Bensouda, Chief Prosecutor at the ICC, writes that the Court has assimilated national examples so completely that its practice is, in effect, *sui generis*.²⁷² Many writers do the same.²⁷³ Judge

²⁶⁹ Frase, 1998, pp. 110, 112, 113, see above note 265.

²⁷⁰ Van Kessel, 2002, p. 242, see above note 237. In a similar vein, Taruffo remarks that “the American procedural system is becoming more and more exceptional or even unique (mainly after the English reforms of the last years)”, see Michele Taruffo, “Globalizing Procedural Justice – Some General Remarks”, in Ackerman, Ambos and Sikirić (eds.), 2016, p. 378, see above note 21.

²⁷¹ In fact, the ICTY case law demonstrates a similar phenomenon, see, for instance, ICTY, *The Prosecutor v. Enver Hadzihasanovic and Amir Kubura*, Trial Chamber, Decision on defence motion seeking clarification of the Trial Chamber’s objective in its questions addressed to witnesses, 4 February 2005, IT-01-47-T, p. 6 (<http://www.legal-tools.org/doc/1c161c/>) (“[T]he procedure followed before the Tribunal is a *sui generis* procedure combining elements from the adversarial and inquisitorial systems [...]”); ICTY, *The Prosecutor v. Mucić et al.*, Decision on the Motion on Presentation of Evidence by the Accused Esad Landzo, Trial Chamber, 1 May 1997, IT-96-21-T, para. 15 (<http://www.legal-tools.org/doc/5d2c0a/>) (“A Rule may have a common law or civilian origin but the final product may be an amalgam of both common law and civilian elements, so as to render it *sui generis* [...]”).

²⁷² Fatou Bensouda, “The ICC Statute – An Insider’s Perspective on a *Sui Generis* System for Global Justice”, in *North Carolina Journal of International Law & Commercial Regulation*, 2010–2011, vol. 36, pp. 277–285; cf. Noah Weisbord and Matthew A. Smith, “The Reason Behind the Rules: From Description to Normativity in International Criminal Procedure”, in *North Carolina Journal of International Law & Commercial Regulation*, 2010–2011, vol. 36, p. 261.

²⁷³ See, for example, Frédéric Mégret, “Beyond ‘Fairness’: Understanding the Determinants of International Criminal Procedure”, in *UCLA Journal of International Law and Foreign*

Gurmendi describes the procedural framework of the ICC as “hybrid, innovative and sometimes ambiguous sui generis procedural system”.²⁷⁴ Additionally, the *Lubanga* Pre-Trial Chamber refers to the “Court’s unique criminal procedure”,²⁷⁵ disregarding the fact that labelling it as such is probably as correct as saying that the US is adversarial and Continental Europe inquisitorial. In fact, labelling the ICC procedure as ‘*sui generis*’ sounds rather like an excuse to stop analysing the process,²⁷⁶ waiving the white flag of unpredictability and going into the case-by-case analysis mentioned at the beginning of this study. If the analysis stops at this point, the characterisation of a process as a hybrid between the adversarial and inquisitorial systems would not provide any insights about the process.²⁷⁷ We are “mariners on the ocean without compass, star or land-

Affairs, 2009, vol. 14, p. 40; Ohlin, 2009, p. 77, see above note 39; Keen, 2004, pp. 767, 809, see above note 39; Håkan Friman, “Procedures of International Criminal Investigations and Prosecutions”, in Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *Introduction to International Criminal Law and Procedure*, third edition, Cambridge University Press (‘CUP’), Cambridge, 2014, p. 423; Jackson, 2005, pp. 737, 740, see above note 86; Hemi Mistry, “The Significance of Institutional Culture in Enhancing the Validity of International Criminal Tribunals”, in Joanna Nicholson, (ed.), *Strengthening the Validity of International Criminal Tribunals*, Brill, Nijhoff, Leiden, Boston, 2018, p. 201, 215; Jonathan Hafetz, *Punishing Atrocities Through a Fair Trial*, Cambridge University Press, Cambridge, 2018, p. 110; Carlson, 2018, p. 71, see above note 9.

²⁷⁴ Fernández de Gurmendi, 2018, p. 346, see above note 14.

²⁷⁵ See ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Thomas Lubanga Dyilo* (‘*Lubanga*’), Pre-Trial Chamber, Decision on the final system of disclosure and the establishment of a timetable, 15 May 2006, ICC-01/04-01/06-102, annex, para. 65 (<http://www.legal-tools.org/doc/052848/>):

Consequently, in the view of the single judge, the *consistency* of the disclosure process and the need to safeguard the *Court’s unique criminal procedure* require that disclosure be carried out inter partes with regard to (i) the evidence that subsequently must be communicated to the Pre-Trial Chamber by filing it in the record of the case, that is the evidence on which the parties intend to rely at the confirmation hearing; and (ii) the other materials that the Prosecution must disclose to the Defence before the confirmation hearing but that neither party intends to present at that hearing.

[emphasis added]

²⁷⁶ As one author noted, this “should not serve as an excuse for oversimplifying such an endeavor”, see Scott T. Johnson, “On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia”, in *International Legal Perspectives*, 1998, vol. 10, p. 181.

²⁷⁷ Langer, 2005, p. 837, see above note 50.

mark”,²⁷⁸ as Damaška suggests, losing our way when we are required to build *sui generis* procedures.²⁷⁹

4.4. Procedural Modelling as an Interpretive Tool

Due to the mixed nature of international criminal law, the identification of a common methodology to approach the gaps between rules and their application becomes a somewhat Sisyphean endeavour.²⁸⁰ The main reason is that the word ‘methodology’ itself is understood differently, depending on both context and the author’s background.²⁸¹ A legal methodology may be defined “as a systematic general approach to the duly purposive and consistent execution of a recurrent type of major task arising in the making or application of law”.²⁸² One of these ‘major tasks’, at least in many jurisdictions within developed Western systems, is the interpretation of statutes.²⁸³

As Zahar and Sluiter point out, one of the most important areas of controversy and confusion in international criminal law has been the tribunals’ choice and use of sources, to define, among other things, the elements of crimes and forms of personal criminal liability.²⁸⁴ Safferling very critically describes the interpretation at the ICC as more or less based on coincidence and considers it as rather “eclectic” to revert to unreflected argumentation in order to quickly reach the favoured result.²⁸⁵ It appears

²⁷⁸ Mirjan Damaška, “Negotiated Justice in International Criminal Courts”, in *Journal of International Criminal Justice*, 2004, vol. 2, p. 1019.

²⁷⁹ John D. Jackson, “Transnational Faces of Justice: Two Attempts to Build Common Standards Beyond National Boundaries”, in Jackson, Langer and Tillers (eds.), Oxford and Portland, Oregon, 2008, pp. 223, 224, see above note 16.

²⁸⁰ Christoph J.M. Safferling, *Internationales Strafrecht*, Springer, Berlin, Heidelberg, 2011, p. 76.

²⁸¹ *Ibid.*

²⁸² Robert S. Summers, *Form and Function in a Legal System – A General Study*, CUP, Cambridge *et al.*, 2006, p. 241.

²⁸³ *Ibid.* Other tasks are, for instance, interpreting contracts and interpreting written constitutions. Methodologies may also exist for the application of case-law precedent, and for the drafting of statutes, and of contracts.

²⁸⁴ Alexander Zahar and Göran Sluiter, *International Criminal Law*, OUP, Oxford, 2007, p. 79.

²⁸⁵ Safferling, 2011, pp. 76–77, see above note 280.

that the recourse on both the case law of the *ad hoc* Tribunals and comparative law arguments depends on the desired outcome of the case.²⁸⁶

4.4.1. Some Brief General Remarks about Interpretation at the ICC

The core requirements for the interpretation of international treaties are contained in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (‘VCLT’) of 23 May 1969.²⁸⁷ Article 31 of the VCLT reads:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

²⁸⁶ *Ibid*, p. 77; see also the dissenting opinion of Judge Kaul in ICC, Situation in the Republic of Kenya, Pre-Trial Chamber, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19, paras. 28 *et seq.* (<http://www.legal-tools.org/doc/338a6f/>).

²⁸⁷ See generally Richard K. Gardiner, *Treaty Interpretation*, OUP, Oxford, 2008. See also Shai Dothan, “The Three Traditional Approaches to Treaty Interpretation: A Current Application to the European Court of Human Rights: Dedicated to the memory of professor Roger Goebel”, in *Fordhan International Law Journal*, 2019, vol. 42, no. 3, pp. 766–794.

- (c) any relevant rules of international law applicable in the relations between the parties.
- 4. A special meaning shall be given to a term if it is established that the parties so intended.

This Article is supplemented by Article 32 of the VCLT:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

These rules are applicable as customary law,²⁸⁸ and must be applied in interpreting (justifying legal decisions respectively)²⁸⁹ not only the ICC-Statute, but also “any other norm-creating instrument”,²⁹⁰ including the Statutes of the ICTY and the International Criminal Tribunal for Rwanda.²⁹¹

²⁸⁸ On the significance of the Vienna Convention to customary law, see International Court of Justice (‘ICJ’), *Islamic Republic of Iran v. United States of America* (Case Concerning Oil Platforms), Judgment, 12 December 1996, ICJ Rep. 1996, p. 803, para. 23 (<https://www.legal-tools.org/doc/4f8d61>); ICJ, *Indonésia v. Malaysia* (Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan), Judgment, 17 December 2002, ICJ Rep. 2002, p. 23, para. 37 (<https://www.legal-tools.org/doc/2082b5>).

²⁸⁹ Armin von Bogdandy and Ingo Venzke, “On the Democratic Legitimation of International Judicial Lawmaking”, in *German Law Journal*, 2011, vol. 12, p. 1344.

²⁹⁰ ICTY, *The Prosecutor v. Duško Tadić*, Appeals Chamber, Judgement, 15 July 1999, IT-94-1-A, para. 303 (<http://www.legal-tools.org/doc/8efc3a/>); Kriangsak Kittichaisaree, *International Criminal Law*, OUP, Oxford, 2001, p. 46.

²⁹¹ See, for example, ICTY, *Prosecutor v. Zlatko Aleksovski*, Appeals Chamber, Judgement, 24 March 2000, IT-95-14/1-A, para. 98 (<http://www.legal-tools.org/doc/176f05/>) (“References to the law and practice in various countries and in international institutions are not necessarily determinative of the question as to the applicable law in this matter. Ultimately, that question must be answered by an examination of the Tribunal’s Statute and Rules, and a construction of them which gives due weight to the principles of interpretation (good faith, textuality, contextuality, and teleology) set out in the 1969 Vienna Convention on the Law of Treaties”); Antonio Cassese and Paola Gaeta (eds., rev.), *Cassese’s International Criminal Law*, third edition, OUP, Oxford, 2013, pp. 11, 17 ff.

As Articles 31 and 32 of the VCLT illustrate, the interpretive methods of domestic legal systems²⁹² apply to a certain extent to international criminal law.²⁹³ Like in other legal systems, the “starting point for interpretation”²⁹⁴ in international criminal law is the wording, that is, the “ordinary meaning”.²⁹⁵ Article 31(2) of the VCLT refers to the “context for the purpose of the interpretation” (together with paragraph 1), which portrays the systematic interpretation.²⁹⁶ The phrase “in the light of its object and purpose” in Article 31(1) makes reference to a teleological interpretation.²⁹⁷ Considering the similarities between the domestic forms of interpretation and their counterparts in international criminal law, it is not surprising that the historic interpretation is classed as a “supplementary means of interpretation” that is subsidiary to grammatical, teleological, and systematic interpretation (Article 32). It takes on independent significance only if other means of interpretation lead to an ambiguous or manifestly absurd or unreasonable result (Article 32(a)–(b)). This approach recalls the words of Lord Denning in *Nothman v. Barnet LBC*: “Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind”.²⁹⁸

²⁹² See Heinze, 2014, pp. 52 ff., see above note 23.

²⁹³ Thus, for example, ICTY, *The Prosecutor v. Duško Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-95-14/1, paras. 71 *et seq.* (<http://www.legal-tools.org/doc/866e17/>) distinguishes between the “literal”, “teleological”, and “logical and systematic interpretation”. ICTY, *The Prosecutor v. Mucić et al.*, Trial Chamber, Judgement, 16 November 1998, IT-96-21-T, para. 158 *et seq.* (<http://www.legal-tools.org/doc/6b4a33/>), uses the “literal rule”, the “golden rule”, and the “mischief rule of interpretation”. See also von Bogdandy and Venzke, 2011, p. 1344, see above note 289.

²⁹⁴ Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, fourth edition, OUP, Oxford, 2020, mn. 228.

²⁹⁵ In more detail see Ulf Linderfalk, *On the Interpretation of Treaties - The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, Springer, Dordrecht, 2007, pp. 29 ff.

²⁹⁶ Werle and Jessberger, 2020, mn. 228, see above note 294; Safferling, 2011, p. 83, see above note 280. In more detail see Linderfalk, 2007, pp. 101 ff., 133 ff., see above note 295.

²⁹⁷ Safferling, 2011, p. 83, see above note 280.

²⁹⁸ United Kingdom, England and Wales, Court of Appeal, *Nothman v. Barnet London Borough Council*, 1978, 1 W.L.R. 220, p. 228.

4.4.2. Contextual Interpretation

Even when a statutory rule is as well designed and well drafted as feasible, “this cannot prevent doubts and disputes from arising about the meaning of the statute in application to some particular circumstances”.²⁹⁹ For this purpose, the addressees of the statute³⁰⁰ need a methodology to interpret the statutes. Especially when a statute (such as the ICC Statute) contains many gaps and leaves many issues consciously ambiguous,³⁰¹ a well-designed interpretive methodology can often be highly useful: besides promoting consistency,³⁰² efficiency and predictability,³⁰³ it can also resolve issues of vagueness and ambiguity.³⁰⁴ Evidently, different judges in different jurisdictions of the same system or even different judges in the same jurisdiction in a given system may not all follow the same methodology.³⁰⁵ This is especially the case at an international tribunal. However, an interpretive methodology only has these effects, as long as all judges

²⁹⁹ Summers, 2006, p. 245, see above note 282.

³⁰⁰ About the controversial question of who the addressees of a statute are, see in detail Alexander Heinze, “Private International Criminal Investigations and Integrity”, in Morten Bergsmo and Viviane Dittrich (eds.), *Integrity in International Justice*, Torkel Opsahl Academic EPublisher, Brussels, 2020, p. 662 *et seq.*

³⁰¹ Ambos, 2013, Chapter II, pp. 74, see above note 61; Swoboda, 2013, p. 203, see above note 75.

³⁰² Rey, 2000, p. 13, see above note 88.

³⁰³ Summers, 2006, p. 245, see above note 282:

an approach in accord with a well designed interpretive methodology, not only can resolve interpretive issues, but can resolve them in a more objective, more reasoned, more faithful, more consistent, more predictable, more efficient, and more purposeful fashion. When a genuine issue arises, appropriate interpretive arguments should be constructed, and the issue resolved in light of these. A well-designed interpretive methodology, purposively and systematically arranged, is needed to construct these arguments, to resolve any conflicts between them, and, ultimately, to facilitate the formulation of a reason for determinate action or decision under the statute that is faithful to its form and content.

³⁰⁴ *Ibid.*, p. 248 (“by reference to what would qualify as a clear standard case for application of the statute in light of its linguistic and factual context, in light of its immediate purposes, and in light of how far the case at hand is similar to (or different from) the features of what would be a clear standard case for application of the vague language”). About vagueness and ambiguity in more detail Ralf Poscher, “Ambiguity and Vagueness in Legal Interpretation”, in Peter M. Tiersma and Lawrence M. Solan (eds.), *Language and Law*, Oxford University Press, Oxford, 2012, pp. 128 *et seq.* About vagueness and ambiguity in legal reasoning Schlag and Skover, 1986, p. 14, see above note 268.

³⁰⁵ *Ibid.*, p. 253; Fernández de Gurmendi, 2018, p. 345, see above note 14.

apply the same general methodology.³⁰⁶ Of course, it is not the purpose of this chapter to develop a general methodology for the interpretation of the sources at the ICC. What it does require is the identification of a contextual interpretation. In that sense, the purpose of this chapter to provide definitions (or at least an aid to use certain definitions) is thus intertwined with the purpose on a contextual interpretation: to create a system of judgments.³⁰⁷

Article 31(3)(c) of the VCLT requires that in treaty interpretation “there shall be taken into account, together with the context: [...] any relevant rules of international law applicable in relations between the parties”.³⁰⁸ This rule expresses the principle of ‘systematic integration’, as the International Law Commission concluded in its fifty-eighth session:

Article 31(3)(c) VCLT and the ‘principle of systemic integration’ for which it gives expression summarize the results of the previous sections. They call upon a dispute-settlement body – or a lawyer seeking to find out ‘what the law is’ – to situate the rules that are being invoked by those concerned in the context of other rules and principles that might have

³⁰⁶ Summers, 2006, p. 271, see above note 282 (“[A]n approach in accord with a duly-designed methodology prescribed for all judges would, if followed over time, yield far more objective, reasoned, faithful, consistent, predictable, efficient, and purpose-serving interpretations than would occur if an array of various judges were to take nonmethodological ‘approaches’ to interpretation”).

³⁰⁷ In this vein Rickert, 1888, p. 18, see above note 96 (“[U]nsere Erkenntniss würde dann vollendet sein, wenn wir unseren gesammten Vorstellungsinhalt in ein vollständiges System von nothwendigen Urtheilen gebracht hätten, deren Subjecte und Prädicate vollkommen eindeutige Begriffe sind. Daraus ergibt sich für die Definition mit Nothwendigkeit: *sie muss die Begriffe so bestimmen, dass aus ihnen ein solches System von Urtheilen geschaffen werden kann. Sie ist also ein Werkzeug zur Bearbeitung der Bausteine, aus denen eine Wissenschaft aufgeführt wird, und aus seinem Zweck heraus müssen wir das Werkzeug zu verstehen suchen*”, emphasis added). Translation by Sager 2000, p. 212, see above note 96: “[O]ur knowledge will be complete when we have fitted it into an all-embracing system of *judgments*, the subjects and predicates of which are completely determined *concepts*. It follows necessarily that definition, as the determination of concepts, *must form concepts in such a way that it is possible to create such a system of judgments*. Definition is thus a tool for shaping the components, from which the scientific system is built, and we must seek to understand this tool in respect of this its purpose.”, emphasis in the original).

³⁰⁸ See generally, Campbell McLachlan, “The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention”, in *International & Comparative Law Quarterly*, 2005, vol. 54, pp. 279–319; Duncan French, “Treaty Interpretation and the Incorporation of Extraneous Legal Rules”, in *International & Comparative Law Quarterly*, 2006, vol. 55, pp. 300 ff.

bearing upon a case. In this process the more concrete or immediately available sources are read against each other and against the general law ‘in the background’. What such reading rules ‘against each other’ might mean cannot be stated in the abstract. But what the outcome of that specific reading is may, from the perspective of article 31(3)(c) in fact be less important than that whatever the outcome, its justification refers back to the wider legal environment, indeed the ‘system’ of international law as a whole.³⁰⁹

But how would a systematic interpretation work more precisely in the practice of adjudication? On an international level, it is certainly not possible to create Dworkin’s superhuman Hercules who is able to find the one and only right answer in light of all legal practice in the system.³¹⁰ As I have shown elsewhere, different Chambers of the ICC come to different conclusions when conducting a contextual interpretation.³¹¹

4.4.3. Contextual Interpretation at the ICC

As I have demonstrated so far,³¹² the common law–civil law dichotomy is mainly used descriptively as a systematic argument to justify the interpretation of a procedural rule. Conducting a contextual interpretation will help to verify the judges’ decision and to approach the correct and definitive answer as closely as possible. However, while this might be characterised as the goal of contextual interpretation, it is still unclear how to conduct such an interpretation. For this purpose, Brugger identifies two kinds of contextual interpretation: a narrow type and a broad type. The narrow type includes “the phrases, paragraphs and articles/sections sur-

³⁰⁹ Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report on the Study Group of the International Law Commission, fifty-eighth session, 13 April 2006, UN Doc. A/CN.4/L.682, para. 479 (<https://www.legal-tools.org/doc/dda184>).

³¹⁰ Ronald M. Dworkin, *Taking Rights Seriously*, Gerald Duckworth & Co., London, 1977, p. 105 (“We might therefore do well to consider how a philosophical judge might develop, in appropriate cases, theories of what legislative purpose and legal principles require. We shall find that he would construct these theories in the same manner as a philosophical referee would construct the character of a game. I have invented, for this purpose, a lawyer of superhuman skill, learning, patience and acumen, whom I shall call Hercules”); rejecting the “right answer” in international law, see von Bogdandy and Venzke, 2011, p. 1354, above note 289.

³¹¹ Heinze, 2014, pp. 85–6, see above note 23; see also Fernández de Gurmendi, 2018, p. 346, above note 14.

³¹² See above Sections 4.1., 4.2.2.7. and 4.3.2.

rounding the provision to be construed”.³¹³ This mirrors the so-called external system that consists, for instance, of the position of the rule within the Statute, the clause within the rule or of preceding or subsequent rules.³¹⁴ An example for the latter is the argumentation of the Pre-Trial Chamber I (Single Judge Sylvia Steiner) in the *Lubanga* case:

According to its contextual interpretation, rule 121 (2) of the Rules must be interpreted in light of rule 122 (1) of the Rules, which also requires that the evidence on which the Defence intends to rely at the confirmation hearing be filed in the record of the case before the hearing commences.³¹⁵

In reaction to this interpretation by Judge Steiner, the *Bemba* Pre-Trial Chamber also referred to the external system when interpreting Rule 121(2)(c) of the Rules of Procedure and Evidence of the ICC (‘ICC-RPE’):

The Chamber notes that rule 121(2)(c) of the Rules is to be interpreted ‘in accordance with article 61 paragraph 3’ of the Statute referring also to information which the Chamber may order to be disclosed pursuant to the second sentence of article 61(3) of the Statute. This allows the Chamber to have access to evidence other than that on which the parties intend to rely at the confirmation hearing.³¹⁶

Another reference point of the external system of a rule is the official title of that rule, the section or part of the Statute in which it is situated. The Appeals Chamber in *Bemba*, for instance, used the systematic argument that the provisions on deliberations belonged to the ‘Trial’ sections in upholding the Trial Chamber’s rejection of a request for provisional release of *Bemba*.³¹⁷

³¹³ Winfried Brügger, “Concretization of Law and Statutory Interpretation”, in *Tulane European and Civil Law Forum*, 1996, vol. 11, p. 238.

³¹⁴ Franz Reimer, *Juristische Methodenlehre*, second edition, Baden-Baden, Nomos, Baden-Baden, 2020, mn. 311; Matthias Mahlmann, *Konkrete Gerechtigkeit: Eine Einführung in Recht und Rechtswissenschaft der Gegenwart*, Nomos, Baden-Baden, 2019, mn. 23; Kargl, 2019, mn. 617, see above note 257.

³¹⁵ *Lubanga*, Pre-Trial Chamber, Decision on the final system of disclosure and the establishment of a timetable, 15 May 2006, ICC-01/04-01/06-102, annex, para. 42 (‘Decision on disclosure’) (<http://www.legal-tools.org/doc/052848/>).

³¹⁶ *Bemba*, Decision on disclosure, para. 44, above note 177.

³¹⁷ *Bemba*, Appeals Chamber, Public redacted version of Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 23 December 2014 entitled ‘Decision on “Defence Urgent Motion for Provisional Release”’, 20 May 2015, ICC-01/05-01/08-3249-Red, paras. 25–6, 37–8, 41 (<https://www.legal-tools.org/doc/f4dfd6>).

Brugger's broader type of contextual interpretation includes all legal provisions that are valid within the particular legal order and in some manner concern the problem to be solved or the term or concept used in the pertinent norm.³¹⁸ This reflects the internal system, which is the law as a consistent system of values and norms.³¹⁹ This system might be perceived as a constitutional system of values.³²⁰ For instance, the question of whether disclosure at the ICC should take place merely *inter partes* or also through the Registry was answered by the *Lubanga* Pre-Trial Chamber with an internal system reference:

Consequently, in the view of the single judge, the *consistency of the disclosure process* and the need to safeguard the *Court's unique criminal procedure* require that disclosure be carried out *inter partes* with regard to (i) the evidence that subsequently must be communicated to the Pre-Trial Chamber by filing it in the record of the case, that is the evidence on which the parties intend to rely at the confirmation hearing; and (ii) the other materials that the Prosecution must disclose to the Defence before the confirmation hearing but that neither party intends to present at that hearing.³²¹

The internal system of rules is still underrepresented in interpretation before international criminal tribunals. This is hardly surprising, since the analysis of the internal system goes along with the analysis of com-

³¹⁸ Brugger, 1996, p. 238, see above note 313.

³¹⁹ Ernst A. Kramer, *Juristische Methodenlehre*, fifth edition, C.H. Beck, Munich, 2016, p. 97. The term "internal system" (*inneres System*) goes back to Philipp Heck (*Begriffsbildung und Interessenjurisprudenz*, Mohr, Tübingen, 1932, pp. 149 ff.). Put differently, the entirety of legal norms is perceived as a consistent entity, a "unified whole" (*Sinnganzes*). See generally also Bernd Rüthers, Christian Fischer and Axel Birk, *Rechtstheorie*, eleventh edition, C.H. Beck, Munich, 2020, mn. 751. See also Burchard, 2017, p. 283, see above note 20: "Wer das zu vergleichende Recht nicht mehr nur 'in the books', sondern 'in action' würdigen will, der kommt um eine Untersuchung des 'law in context' (nicht zu verwechseln mit dem 'context in law') und um die Berücksichtigung von Rechtsstatsachen bzw. der Rechtssoziologie nicht umhin". See also Kargl, 2019, mn. 619, see above note 257.

³²⁰ In that vein the German Constitutional Court, see *Decisions of the German Constitutional Court* (Entscheidungen des Bundesverfassungsgerichts, BVerfGE) vol. 32, p. 206 and vol. 73, p. 269. See also Kargl, 2019, mn. 619, see above note 257. The ICC Statute can be perceived as a constitution, as I argued elsewhere, see Alexander Heinze, "The Statute of the International Criminal Court as a Kantian Constitution", in Morten Bergsmo und Emiliano J. Buis (eds.), *Philosophical Foundations of International Criminal Law: Correlating Thinkers*, Torkel Opsahl Academic EPublisher, Brussels, 2018, S. 351-428.

³²¹ *Lubanga*, Decision on disclosure, annex, para. 65, above note 315 (emphasis supplied).

parative, institutional and sociological elements.³²² In other words: simply referring to the nature of proceedings as ‘adversarial’ or ‘common law’ has no value for a contextual interpretation. In this regard, Brugger states:

[A] ‘comparative method’, although often cited as a method of interpretation in addition to the classical canon of statutory construction,³²³ constitutes a subcategory of contextual interpretation. [...] The context also includes the *institutional and functional context – the sharing of powers in concretizing law*, notably between the legislature and the judiciary, as provided by the legal system as a whole. [...] Finally, a third part of the context of the legal provision is its *factual basis – the facts or the human action or the sphere of life regulated by the provision*. For reasons of practicality, judges should start with accurate empirical data, and should consider the conditions and consequences of their decisions. Failure to heed these maxims will lead to impractical and perhaps illegitimate solutions.³²⁴ A judge should consider such real-life implications for the case to be decided, as well as the area of life involved and the legal system as a whole. For example, a beneficial resolution of a conflict in a specific case may do harm if applied to a broad range of cases. The legal ‘equipment’ for ‘seeing’ the real world appears mainly in the law of evidence and the rules of procedure.³²⁵

In sum, a broad contextual interpretation that focuses on the internal system of rules is neither restricted to the legal terms of the particular context nor to the external position of a provision within the respective statute or code.³²⁶ Instead, a broad contextual interpretation involves the legal

³²² In a similar vein, see Kai Ambos, “Stand und Zukunft der Strafrechtsvergleichung”, in *Rechtswissenschaft*, 2017, vol. 8, pp. 248–9.

³²³ Brugger cites Hans J. Wolff, Otto Bachof and Rolf Stober, *Verwaltungsrecht*, ninth edition, C.H. Beck, Munich, 1974, pp. 161–2; for the latest edition, see Rolf Stober and Winfried Kluth, *Verwaltungsrecht, Teil I*, thirteenth edition, C.H. Beck, Munich, 2017, mn. 41, 48.

³²⁴ Brugger, 1996, pp. 224 ff., 239, see above note 313.

³²⁵ *Ibid.*, 238–9.

³²⁶ The High Court of Australia calls this the “modern approach to statutory interpretation” that “(a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses ‘context’ in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy”, see High Court of Australia, *CIC Insurance Ltd. v Bankstown Football Club Ltd.*, 4 February 1997, 187 CLR 384, p. 408, cited by Jeffrey Barnes, “Contextualism: ‘The Modern

background, which is the base that is inherent in each and every provision and interrelates to the components of the entire system.³²⁷ As I see it, the broad contextual interpretation (internal system) reconciles objective and pragmatic meaning of a text. Take, for instance, the ongoing controversy around the interpretation of disclosure rules at the ICC: a contextual interpretation of the relevant disclosure and communication provisions would involve examining the broader issues behind it, such as the nature of the confirmation hearing (which, in turn, depends on the nature of the entire process)³²⁸ and the role and function of the Pre-Trial Chamber (which, in turn, depends on the role and function of the Chambers in general).³²⁹ This broad contextual interpretation thereby contains a teleological element – every provision must, in the context of the entire system, fulfil a certain purpose.³³⁰

The fact that the ICC-RPE (and of course RPE at other Internationalised Criminal Tribunals) were created as a result of a compromise is irrelevant for the internal system. The uniformity of a body of procedural rules is necessarily not reality but an ideal reference point of interpretation.³³¹ National laws too are the product of compromise and debate and influenced by several interests. Their contradictions and inconsistencies

Approach to Statutory Interpretation”, in *UNSW Law Journal*, 2018, vol. 41, no. 4, pp. 1083–4.

³²⁷ Cf. Karl Engisch, *Einführung in das juristische Denken*, eleventh edition, Kohlhammer, Stuttgart *et al.*, 2010, p. 141 (“[Der systematische Zusammenhang] betrifft vielmehr letztlich die Fülle des im einzelnen Rechtssatz geborgenen Rechtsgedankens in seiner mannigfaltigen Bezüglichkeit auf die anderen Bestandteile des gesamten Rechtssystems”).

³²⁸ See Ambos, 2016, pp. 354–8, see above note 20; Heinze, 2014, pp. 305–8., see above note 23; Triestino Mariniello and Niccolò Pons, “The confirmation of charges at the International Criminal Court”, in Triestino Mariniello (ed.), *The International Criminal Court in Search of its Purpose and Identity*, Routledge Taylor & Francis, London and New York, 2015, pp. 217–241; Fernández de Gurmendi, 2018, pp. 345–6, see above note 14.

³²⁹ See Heinze, 2014, pp. 202, 305–8 ff., see above note 23.

³³⁰ Cf. Engisch, 2010, p. 141, see above note 327 (“Da diese Sinnbezüglichkeit jedes Rechtssatzes auf die Gesamtrechtsordnung zum guten Teil eine *teleologische* ist, indem ja die Rechtssätze größtenteils die Aufgaben haben, im Zusammenhang mit anderen Normen bestimmte Zwecke zu erfüllen, diese andere Normen final zu ergänzen, lässt sich die systematische Auslegung von der teleologischen kaum trennen”).

³³¹ Rüthers, Fischer and Birk, mn. 278, see above note 319.

are manifold.³³² It is therefore for the decision maker to compensate these contradictions by consistent decision making.³³³

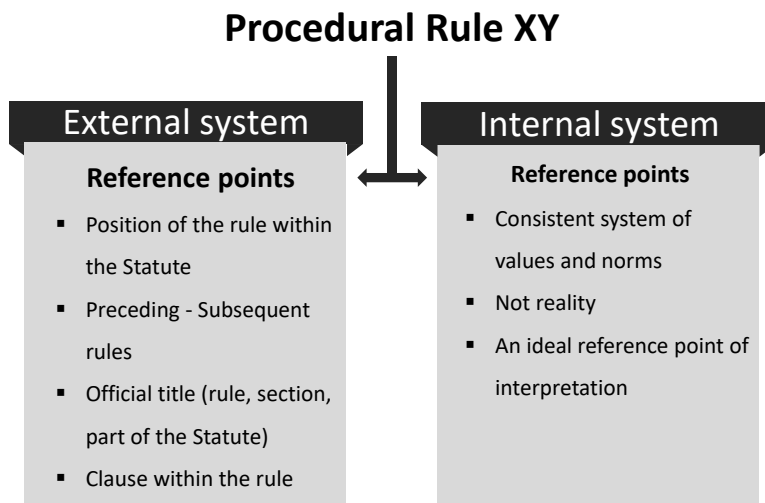


Figure 2: The External System and Internal System.

4.4.4. Modelling the Procedural Regime at the ICC

So far, I have not only demonstrated that many models exist to analyse criminal procedure, but also the misleading taxonomies that lead to a flawed analysis. This leads to the question of what the best model to analyse criminal procedure is, which shall serve as a tool for a contextual interpretation. This cannot be a prescriptive endeavour, such as preferring the adversarial model of proof over the inquisitorial model, because the latter (allegedly) allowed for coerced evidence and provided for an investigating judge, who bases his later decision upon the case file and who ignores the presumption of innocence. The system of legal process is the

³³² *Ibid.*; Dov Jacobs, “International Criminal Law”, in Jörg Kammerhofer and Jean D’Aspremont, *International Legal Positivism in a Post-Modern World*, CUP, Cambridge, 2014, pp. 472–3.

³³³ Rùthers, Fischer and Birk, mn. 278, see above note 319; about “provisions that do not seem to fit (*systemfremde Normen*)” Karl Riesenhuber, “English common law versus German Systemdenken? Internal versus external approaches”, in *Utrecht Law Review*, 2011, vol. 7, p. 122; D. Neil MacCormick and Robert S. Summers, “Interpretation and Justification”, in *idem* (eds.), *Interpreting Statutes*, Dartmouth Publishing Company, Aldershot *et al.*, 1991, p. 535.

result of many ingredients, and some of them lie, as Reimann points out, “on an emotional and subconscious level, accessible to intuitive understanding, but – in the end – not explainable by any single theory”.³³⁴

4.4.4.1. General Identification of a Purpose

Notwithstanding the impossibility of identifying only one model to analyse criminal procedure, there can indeed be a model that best serves the purpose of both identifying and categorising the procedural framework of international criminal justice. There is no single system and no model that would be useful for all purposes and acceptable to all.³³⁵ It is thus vital to decide on the purpose of a particular investigation.³³⁶ As Roberts puts it:

In order to select a suitable methodology it is necessary to define the parameters of one’s inquiry and to clarify the reasons for undertaking it. Subject-matter is determined by motivation, which in turn pre-selects method; but choice of subject-matter is also influenced by available methods (research is the art of the possible), which in turn provide motivation (ought implies can).³³⁷

The identification of the purpose simultaneously sets the direction for the following section: as indicated earlier,³³⁸ the sought model is supposed to specify what the priorities of the criminal justice system ought to be or to identify the optimal means to implement these priorities. Since procedural questions can only be answered by a contextual interpretation involving comparative, institutional and sociological elements, this model must describe more than the framework of procedural provisions for a particular procedural problem. The model has to incorporate legal and political traditions because those roots are not easily changed.³³⁹ Describ-

³³⁴ Mathias Reimann, “The Faces of Justice and State Authority”, Book Review, in *American Journal of International Law*, 1988, vol. 82, p. 208.

³³⁵ Cf. Peter de Cruz, *Comparative Law in a Changing World*, third edition, Routledge-Cavendish, London, New York, 2007, p. 226.

³³⁶ Sklansky, 2008–2009, p. 1637, see above note 125; de Cruz, 2007, p. 231, see above note 335.

³³⁷ Roberts, 2008, pp. 295, 297, see above note 215.

³³⁸ See above Section 4.1.

³³⁹ Cf. Kagan, 2003, pp. 5–6, see above note 18.

ing the process before the ICC, many authors – and judges – have overlooked its structural, institutional, sociological and political features.³⁴⁰

4.4.4.2. Concrete Parameters of a Concept

In sum, the model that helps define the internal system of procedural rules at the ICC must resemble a blueprint. To define it negatively, this blueprint should, at first, *not be normative*.³⁴¹ Normative models tell us what ought to be done, that is, how people should act, how rules should be changed, or what a law’s content should be.³⁴² It tells us what limits should be set in criminal law, and in the investigative and sentencing powers that go with it.³⁴³ Second, the blueprint *cannot be prescriptive*, that is, it does not serve the purpose of this study to identify *authoritative principles* that answer the above ‘should’-questions.³⁴⁴ Third, the model *must not be evaluative*, that is, it should refrain from evaluating a certain type of procedure – adversarial, crime control, conflict solving and so on – as ‘good’ or ‘bad’ and as preferable or undesirable.³⁴⁵ By contrast,

³⁴⁰ See above note 19.

³⁴¹ For the purpose of this chapter, I simplify the normative–descriptive divide, which is “an aspect of the methodology debate that usually rages over a number of complex issues”, see Andrew Halpin, “Methodology”, in Dennis Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, second edition, Blackwell Publishing, Chichester, 2010, pp. 615 ff.

³⁴² Brian H. Bix, *A Dictionary of Legal Theory*, OUP, Oxford, 2004, p. 148; Geoffrey A. Skoll, *Contemporary Criminology and Criminal Justice Theory*, Palgrave Macmillan, New York, 2009, p. 39; John Linarelli, “Analytical Jurisprudence and the Concept of Commercial Law”, in *Penn State Law Review*, 2009–2010, vol. 114, pp. 132–3; Rappaport, 2003–2004, p. 572, see above note 16.

³⁴³ Andrew Ashworth, “Criminal Law, Human Rights and Preventative Justice”, in Bernadette McSherry, Alan W. Norrie and Simon Nronitt (eds.), *Regulating Deviance – The Redirection of Criminalisation and the Futures of Criminal Law*, Hart Publishing, Oxford and Portland, Oregon, 2009, p. 92.

³⁴⁴ Rappaport, 2003–2004, p. 574, see above note 16 (“One answer is that such a methodology should help us identify authoritative principles that answer the important ‘should’ questions - whether citizens should obey the law, how courts should interpret the law, how government should enforce the law. This might be called a prescriptive, or ‘topdown’, approach”). See also Tom Campbell, “Prescriptive Conceptualism: Comments on Liam Murphy, ‘Concepts of Law’”, in *Australian Journal of Legal Philosophy*, 2005, vol. 30, p. 21.

³⁴⁵ Cf. Sklansky, 2008–2009, p. 1640, see above note 125 (“Evaluative means the assessment of the attractiveness of anti-inquisitorialism”); Moore, 1997/2010, p. 8, see above note 19. About a general argumentative framework for justifying evaluations and recommendations for legislative reform see Wibren Van Der Burg, “The Merits of Law. An Argumentative Framework for Evaluative Judgements and Normative Recommendations in Legal Research”, in *Archiv fuer Rechts- und Sozialphilosophie*, 2019, vol. 105, no. 1, pp. 11-43.

defined positively, the model or the conceptualisation has to be *descriptive and analytical*, that is, it has to describe and analyse how the law is.³⁴⁶ Fourth, it has to be *empirical*, outlining what *is*, with respect to both existing provisions ('law in the books')³⁴⁷ and the actual working of the system ('law in action').³⁴⁸ Empirical goals attempt to identify *facts* about the world such as how many trials are actually jury trials or the likelihood that the government will sanction a client for taking certain actions.³⁴⁹ Thus, empirical research reveals the actual working of the criminal justice system.³⁵⁰ Last but not least, the blueprint needs to serve *interpretative and explanatory* purposes. It is not sufficient that it helps to describe and analyse ICC procedure (with regard to its provisions and its actual working). A mere description and analysis of ICC provisions does not itself automatically result in having identified the system that serves as a basis for a contextual interpretation. Thus, the blueprint or concept of procedural models also needs to be explanatory or interpretive, explaining the significance of analysed provisions for a broader system.³⁵¹

In sum, the blueprint or concept of models that best serves the purpose of identifying the system of ICC procedure has to be descriptive,

³⁴⁶ Sklansky, 2008–2009, p. 1640, see above note 125. However, see Antony Duff, "Theorizing Criminal Law: a 25th Anniversary Essay", in *Oxford Journal of Legal Studies*, 2005, vol. 25, pp. 354–5, who doubts that "is" and "ought" can be sharply distinguished because analysing the law means analysing a normative institution.

³⁴⁷ François Tanguay-Renaud and James Stribopoulos, *Rethinking Criminal Law Theory*, Hart Publishing, Oxford and Portland, Oregon, 2012, p. 196; in detail Thomas Scheffer, Kati Hannken-Illjes and Alexander Kozin, *Criminal Defence and Procedure - Comparative Ethnographies in the United Kingdom, Germany, and the United States*, Palgrave Macmillan, New York and London, 2010, pp. 10 ff.

³⁴⁸ Tanguay-Renaud and Stribopoulos, 2012, pp. 193, 196, see above note 347; see in detail Scheffer, Hannken-Illjes and Kozin, 2010, pp. 10 ff., see above note 347. For the purpose of this chapter, I use the word 'empirical' in a very broad sense, that is, as 'law in action', 'law in the real world', 'socio-legal studies', 'law and society' and 'sociology of law'. In the same vein, see William Twining, *General Jurisprudence*, OUP, Oxford, 2009, p. 226.

³⁴⁹ Rappaport, 2003–2004, p. 570, see above note 16. See also Jacqueline Hodgson, "The Challenge of Universal Norms: Securing Effective Rights Across Different Jurisdictions and Legal Cultures", in *Journal of Law and Society*, 2019, vol. 46, p. 95, 97 ("Comparative work that is also qualitative and empirical is able to explore the legal and occupational cultures that drive or challenge behaviour, as well as the impact of wider policy and economic structures within which criminal practice operates, and the broader legal traditions that shape contemporary criminal justice.", footnote omitted).

³⁵⁰ Tanguay-Renaud and Stribopoulos, 2012, p. 193, see above note 347.

³⁵¹ Cf. Roberts, 2008, p. 311, see above note 215.

empirical, analytical and interpretive or explanatory with regard to structural, institutional, sociological and political features of procedural provisions of the ICC. It needs to provide a common language for a contextual interpretation, developing parameters that create a link between provisions and features of the Court, the identification of a system and the analysis of how certain rules are translated into that system.

4.4.4.3. Function of a Concept

In other words, the ICC lacks a ‘general jurisprudence’ or *Rechtsdogmatik*³⁵² in that regard, that is, on the basis of a positivistic reading of the Statute, a theory or a concept that facilitates the definition of an internal system of procedural rules at the ICC. This requires further explanation.

‘General jurisprudence’ is a term that developed throughout the eighteenth and nineteenth centuries³⁵³ in different forms, meanings and functions. I have described these meanings elsewhere in detail.³⁵⁴ Along the lines of both the German and French tradition (*Allgemeine Rechtslehre* or *théorie générale du droit*), I understand general jurisprudence – in very broad terms – as a participant theory³⁵⁵ that analyses actual legal systems

³⁵² The contours of ‘Rechtsdogmatik’ are soft and its definition is thus controversial. The objective of Rechtsdogmatik is to build a bridge between the law and its application through a complex, manageable and transparent concretisation of the law, e.g. by creating definitions and abstractions, see Kargl, 2019, p. 315, see above note 257 (“Die Rechtsdogmatik sichert das Gesetzmäßigkeitsprinzip dadurch, dass sie die Kluft zwischen Gesetz und Gesetzesanwendung durch komplexe, aber handhabbare und durchsichtige Konkretisierungen der Gesetze – z.B. durch Definitionen sowie durch Verallgemeinerungen der Fälle – überbrückt.“, footnotes omitted); from a comparative perspective Hein Kötz, “Rechtsvergleichung und Rechtsdogmatik“, in Rabels Zeitschrift für ausländisches und internationales Privatrecht, 1990, vol. 54, pp. 203, 204 *et seq.* (note that Hein Kötz is heavily influenced by the Rabel school, see also Basil S. Markesinis, *Comparative Law in the Courtroom and Classroom*, Hart, Oxford, Portland, Oregon, 2003, p. 40). Put differently, the goals of Rechtsdogmatik are systematisation, coherence and consistency, see Chien-Liang Lee, “Die Bedeutung der Rechtsdogmatik für die Rechtsvergleichung“, in Frank Schorkopf and Christian Starck (eds.), *Rechtsvergleichung - Sprache - Rechtsdogmatik: Siebtes Deutsch-Taiwanesisches Kolloquium vom 8. bis 9. Oktober 2018 in Göttingen*, Nomos, Baden-Baden, 2019, pp. 19, 21.

³⁵³ Cf. David B. Goldman, *Globalisation and the Western Legal Tradition*, CUP, Cambridge *et al.*, 2007, p. 28.

³⁵⁴ Heinze, 2014, pp. 167–72, see above note 23.

³⁵⁵ Röhl and Röhl, 2008, p. 6, see above note 180: “Participant theory” in this regard means that *Allgemeine Rechtslehre* is a form of legal theory that analyses the functioning of law, the meaning of law for the society and the history of law from an internal point of view. By contrast, “observer theories” (*Beobachtertheorien*) are formulated from an external point

at a relatively high level of generality.³⁵⁶ The appeal of a general jurisprudence lies in its methodological aspect, that is, its desire to find definite criteria for the existence of law. Although this chapter is not about criteria for the existence of law, it still strives to identify criteria for the existence (and the labelling) of a system. Thus, for the purpose of this chapter, the methodological aspect of general jurisprudence is much more useful than the question of what law actually is. To be sure, the ‘methodological aspect’ of a general jurisprudence and *Rechtsdogmatik* respectively must be distinguished from methodology (for example, legal interpretation) itself: *Rechtsdogmatik* presupposes the *lex lata*, while methodology develops the same.³⁵⁷

According to Röhl, a general jurisprudence is not confined to analytical, empirical or normative observations, but is oriented towards a practical goal.³⁵⁸ My practical goal is the definition of the internal system of procedural rules at the ICC. Since the achievement of this goal is the overriding objective, every method that advances that achievement is deemed to be appropriate.³⁵⁹ I therefore agree with Twining’s understanding of ‘general jurisprudence’: “‘General’ in this context has at least four different meanings: (a) abstract, as in ‘*théorie générale du droit*’; (b) universal, at all times in all places; (c) widespread, geographically or over time; (d) more than one, up to infinity”.³⁶⁰ Twining’s method includes not only logical, linguistic, and conceptual techniques developed by analytical philosophers, but also tools of analysis developed in neighbouring disciplines (such as ideal-types, models, metaphors, and deconstruction).³⁶¹ In the words of Giudice: “conceptual and social scientific theories complement each other at the level of general approach; both are necessary per-

of view, usually by philosophers, sociologists, political scientists or economists. They critically review the law from the outside. About the difference between “*Beobachtertheorien*” and “*Teilnehmertheorien*” in more detail, see Marietta Auer, *Materialisierung, Flexibilisierung, Richterfreiheit: Generalklauseln im Spiegel der Antinomien des Privatrechtsdenkens*, Mohr Siebeck, Tübingen, 2005, pp. 212 ff. Thus, “legal philosophy”, as contrast to “general jurisprudence”, can be qualified as an observer theory.

³⁵⁶ Twining, 2009, p. 19, see above note 348.

³⁵⁷ Kargl, 2019, pp. 315–316, see above note 257.

³⁵⁸ Twining, 2009, p. 8, see above note 348.

³⁵⁹ *Ibid.*

³⁶⁰ See *ibid.*, p. 18.

³⁶¹ *Ibid.*, p. 39. See also Röhl and Röhl, 2008, p. 2, see above note 180, for whom general jurisprudence is supposed to open the jurisprudence to interdisciplinarity.

spectives from which to understand a social phenomenon such as law. Conflict enters as a possibility at the level of particular claims made within either conceptual or social scientific theories”.³⁶² For the internal system, external observations on law,³⁶³ or talk about law,³⁶⁴ are insufficient. Instead, what needs to be taken into account is the “law in minds”,³⁶⁵ a “style of thought”,³⁶⁶ “a web of beliefs, ideals, choices, desires, interests, justifications, principles, techniques, reasons, and assumptions”,³⁶⁷ which can be apprehended only from within, that is, from the standpoint of legal actors.³⁶⁸ In a globalised world,³⁶⁹ the challenge is not to find new concepts. It is rather the opposite, that is, to face the oversupply of new theories³⁷⁰ (which are basically old theories with a new coat) by highlighting existing concepts and reaching beyond a theory’s semantic arbitrariness³⁷¹ to falsify it.³⁷² Legal scholarship requires transparency, a demand that

³⁶² Michael Giudice, “Ways of Understanding Diversity among Theories of Law”, in *Law & Philosophy*, 2005, vol. 24, pp. 509–545, 532–535.

³⁶³ See *supra* note 355.

³⁶⁴ Heinze, 2014, pp. 170 (with footnote 604), 176, see above note 23.

³⁶⁵ William Ewald, “Comparative Jurisprudence (I): What Was It Like to Try a Rat?”, in *University of Pennsylvania Law Review*, 1994–1995, vol. 143, pp. 1961–90, 2111. See also William Ewald, “The Jurisprudential Approach to Comparative Law: A Field Guide to ‘Rats’”, in *American Journal of Comparative Law*, 1998, vol. 46, p. 705.

³⁶⁶ Ewald, 1994–1995, p. 1947, see above note 365.

³⁶⁷ *Ibid.*, p. 1948.

³⁶⁸ Cf. Catherine Valcke, “Comparative Law as Comparative Jurisprudence – The Comparability of Legal Systems”, in *American Journal of Comparative Law*, 2004, vol. 52, p. 718 with further references.

³⁶⁹ For the term “global” in comparison to “universal” see Goldman, 2007, p. 15, see above note 353, with further references. See also Twining, 2009, pp. 20–21, see above note 348 (footnote omitted) and William Twining, “Have Concepts, Will Travel: Analytical Jurisprudence in a Global Context”, in *International Journal of Law in Context*, 2005, vol. 1, p. 7, who considers “general” more flexible than “global” or “universal”.

³⁷⁰ Canaris perceives the use of a “theory” as a rather classifying and semantic exercise, see Claus-Wilhelm Canaris, “Funktion, Struktur und Falsifikation juristischer Theorien”, in *Juristenzeitung*, 1993, pp. 377–391 (379: “[Theorie] ermöglicht die begriffliche und/oder dogmatische Einordnung der einschlägigen Problemlösung(en).”). Hruschka demands from a ‘Theory’ to provide perspective and order but concedes that the name ‘theory’ is used for all kinds of solutions to particular problems and sometimes even for mere opinions and arguments, see Hruschka, 1988, pp. XII–XIII, see above note 76.

³⁷¹ Cf. Röhl and Röhl, 2008, p. 2, see above note 180.

³⁷² This is what Popper famously labelled as one of the “mere puzzles arising out of the misuse of language”, Karl Popper, *Unended Quest*, Routledge, London and New York, 2005, p. 11. About Popper’s remarks Axel Birk, “Der kritische Rationalismus und die Rechtswis-

shall be revisited in the conclusion of this chapter.³⁷³ Francis recently made this point more concretely: “An author might have authority for a particular claim but miss how the claim is undermined by an entire area of thought that the author ignores”.³⁷⁴ In a rare critical review of the rhetoric in criminal law discourse, Hassemer observed that more or less all participants of this discourse have always tended to show a rhetorical vigour that a) rather emphasises the differences than similarities, b) take a certain view with resoluteness that is often tinted in moralism, and c) do not admit the need to consider other views.³⁷⁵ Kuhn explained this in his seminal work *Die Struktur wissenschaftlicher Revolutionen* with the reluctance of a scientist to admit errors, even when they have been unmistakably proven.³⁷⁶

4.4.4.4. What Concept is Preferable?

In sum, a blueprint that models ICC procedure shall serve as a ‘general jurisprudence’ of ICC procedure; put differently: as an ICC-*Processdogmatic*. Thus, it needs to be descriptive, interpretive and explanatory, instead of normative and prescriptive. Furthermore, it has to take into account comparative law elements, sociological methodology and elements of legal thought, which are closely linked to comparative

senschaft. Bernd Rüthers und Karl-Heinz Fezer – ein Ausgangspunkt, unterschiedliche Folgerungen”, in *Rechtstheorie*, 2017, vol. 48, no. 1, pp. 43, 44 *et seq.*

³⁷³ See below 4.5.3 *in fine*.

³⁷⁴ Francis, 2018, p. 1035, see above note 205.

³⁷⁵ See Winfried Hassemer, “Darf der strafende Staat Verurteilte bessern wollen?”, in Cornelius Prittwitz *et al.* (eds.), *Festschrift für Klaus Lüderssen*, Nomos, Baden-Baden, 2002, p. 222, translation by A.H. Original Quote: “(S)o neigen mehr oder weniger alle Teilnehmer am straftheoretischen Diskurs seit alters her rhetorisch zu einem Nachdruck, der weniger die Gemeinsamkeiten als die Unterschiede nach vorne stellt, vertreten sie ihren Standpunkt mit, auch moralisch getönter, Entschiedenheit und geben sie dem Bedürfnis, den Standpunkt des anderen ernsthaft zur Kenntnis zu nehmen, selten Raum. Das macht es schwer, Übereinstimmungen in der Sache festzuhalten und auf ihrer Basis zu neu definierten Streitlinien oder auch zu neuen Übereinstimmungen fortzuschreiten”. More recently, Lynch identified (albeit with a view to the political discourse) “intellectual arrogance”, Michael Patrick Lynch, *Know-It-All-Society*, Liveright, New York, London, 2019, p. 7.

³⁷⁶ Thomas S. Kuhn, *Die Struktur wissenschaftlicher Revolutionen*, twentyfifth edition, Suhrkamp, Frankfurt am Main, 2017, p. 162.

law.³⁷⁷ I will now demonstrate what that means for the applicability of the concepts and models outlined above.

4.4.4.4.1. Normative or Descriptive

A very useful descriptive tool (that is preferred over a normative one) is provided by Damaška.³⁷⁸ He puts, in the words of Nijboer,

an analytical system of lines under or behind the existing systems. Damaška’s work gives you a grip to discuss a number of aspects of different procedural systems better. When we stick to Damaška’s analytical model instead of the traditional concepts as fixed background, I think we can avoid the conceptualisation of a system in devaluating concepts of another system.³⁷⁹

Damaška’s categories serve as a valuable conceptual analysis³⁸⁰ or analytical tool³⁸¹ to describe recent criminal procedure changes³⁸² and explain³⁸³ the suitability of, or problems with, legal transplants.³⁸⁴

³⁷⁷ See Wolfgang Fikentscher, *Modes of Thought – A Study in the Anthropology of Law and Religion*, second edition, Mohr Siebeck, Tübingen, 2004, p. 44.

³⁷⁸ Nijboer, 1997, p. 178, see above note 206.

³⁷⁹ *Ibid.*; Reimann, 1988, p. 206, see above note 334 (“In this second dimension he presents them as analytical tools that should, again like the system of chemical elements, ‘assist us in tracing similarities and differences in component parts’ (p. 3). As a result of this hybrid character, the book constantly mingles descriptive with analytical elements”).

³⁸⁰ Roberts, 2008, pp. 295, 325, see above note 215. About the conceptual analysis in more detail, see Dietmar von der Pfordten, “About Concepts in Law”, in Jaap C. Hage and Dietmar von der Pfordten (eds.), *Concepts in Law*, Springer, Heidelberg *et al.*, 2009, pp. 24 ff., who distinguishes between a classical model and a reductionist-positivist model of conceptual analysis.

³⁸¹ Elisabetta Grande, “Dances of Criminal Justice: Thoughts on Systemic Differences and the Search for the Truth”, in Jackson, Langer and Tillers (eds.), 2008, p. 145, see above note 16, with reference to Mirjan Damaška, “Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study”, in *University of Pennsylvania Law Review*, 1973, vol. 121, pp. 506–589.

³⁸² Reimann, 1988, p. 206, see above note 334 (“In that sense, [Damaška’s models] are presented as a descriptive picture of the procedural universe, albeit in idealized form”).

³⁸³ See also Martin Shapiro, “The Faces of Justice and State Authority”, Book Review, in *American Journal of Comparative Law*, 1987, vol. 35, p. 837 (“Nevertheless the two political variables often do help to ‘explain’ various similarities and differences between various national procedural systems at that intermediate level of explanation that is the best comparativists can usually hope to do and far better than they actually do most of the time”); Reimann, 1988, p. 205, see above note 334.

Damaška's strength is that he builds holistic, neutral and interpretive frameworks,³⁸⁵ without lapsing into reductionism or oversimplification.³⁸⁶ He himself has emphasised that his approach would be "predominantly analytical and interpretive",³⁸⁷ and that his models were "meant to be used in seeking to understand the complex mixtures of arrangements, as means to analyze them in terms of their components, as one would study compounds in analytical chemistry".³⁸⁸ Damaška's models bring to light aspects of legal process which tend to be overlooked because they do not meet the normative expectations of orthodox procedural models.³⁸⁹ Thus,

³⁸⁴ John D. Jackson and Máximo Langer, "Introduction: Damaška and Comparative Law", in Jackson, Langer and Tillers (eds.), 2008, p. 12, see above note 16; Richard S. Frase, "Sentencing and Comparative Law Theory", in *ibid.*, p. 356:

Damaška's models were primarily designed to categorise, describe, and explain procedural systems at a given point in time, and gave little emphasis to modelling of change or evolution in these systems. Nevertheless, his models can be used to generate predictions about how systems of a given type (or tending to one pole or the other on each of his two dimensions) should evolve. For example, an essentially hierarchical system would be expected to maintain key features consistent with that model, while eliminating or softening procedures inconsistent with the model.

See also ZUO Weimin and FU Xin, "Legal Transplant in the Criminal Procedure Law of China: Experiences and Reflections", in Ackerman, Ambos and Sikirić (eds.), 2016, pp. 438 ff.; Toby S. Goldbach, "Why Legal Transplants?", in *Annual Review of Law and Social Science*, 2019, vol. 15, pp. 583–601.

³⁸⁵ Jarinde P.W. Temminck Tuinstra, *Defence Counsel in International Criminal Law*, T.C.M. Asser Press, The Hague, 2009, p. 107.

³⁸⁶ Harold Hongju Koh, "Mirjan Damaška: A Bridge Between Legal Cultures", in Jackson, Langer and Tillers (eds.), 2008, p. 31, see above note 16.

³⁸⁷ Damaška, 1997, p. 3, see above note 261.

³⁸⁸ Damaška, 1986, p. 12, see above note 32.

³⁸⁹ Roberts, 2008, p. 302, see above note 215:

First, the bridge to political theory constructed by Damaška provides an escape-route from the viciously circular logics of 'adversarial' and 'inquisitorial' conceptual models. Secondly, Damaška's intersecting axes are better able to encapsulate the complexities of real legal processes (albeit still in the relatively abstract conceptualisations of an idealised model) than one-dimensional versions of the adversarial-inquisitorial dichotomy. Thirdly, the modular structure of Damaška's basic conceptual building blocks facilitates modelling of relatively unusual combinations of features, which brings to light aspects of legal process which tend to be overlooked because they do not meet the normative expectations of orthodox procedural models. Fourthly, when set in comparative perspective, Damaška's models of legal process demonstrate the perspectival nature of all conceptualisations of legal procedure, which are shown to be relative to the standpoint of the observer. This is a novel inflection of the too-little respected methodological truism that concepts are always ideologically loaded; or, in the language I in-

for the purpose of systematisation, Damaška’s models present a suitable blueprint, because he does not provide a specific (new) thesis but develops a systematic understanding of the process.³⁹⁰ Thus, in line with the ‘general jurisprudence’ that is needed to systematise the ICC process, the *ICC-Processdogmatic*, he falls back on existing theories and distinguishes himself through the way in which he combines and applies them.³⁹¹

4.4.4.4.2. Sociological or Empirical

The inclusion of sociological elements into the blueprint of a concept of how to systematise ICC procedure shifts the focus from legal rules to human interactions.³⁹² An approach that includes sociological elements sheds light on the *de facto* course of events, in contrast to a pure legal approach, that makes normative assumptions about which law should ideally be applied.³⁹³ Recall the famous stories of YAN Ying, where in the King of Chu tried to humiliate (Master) YAN by indicating that a thief was a person from Qui. YAN replied with an analogy that became a famous Chinese proverb: The sweet oranges of the south become bitter oranges in the North.³⁹⁴ Context is key³⁹⁵ (reflecting the pragmatic understanding of

roduced earlier, subject-matter is partly defined by motivation. This section elaborates on each of these four strengths in turn.

³⁹⁰ Ronald J. Allen and Georgia N. Alexakis, “Utility and Truth in the Scholarship of Mirjan Damaška”, in Jackson, Langer and Tillers (eds.), 2008, p. 332, see above note 16:

In *Faces of Justice*, Damaška examines the procedure of common and civil law countries (in capitalist as well as socialist regimes) to develop a systematic understanding of how modern forms of justice manifest in different political contexts. This is not a truth-seeking endeavor. Damaška sets out to prove no specific thesis. He focuses his efforts on developing a ‘distinctive analytical framework’ that can be used to understand the interplay of legal systems and structures of governmental authority.

³⁹¹ Sean McConville, “Book Review, International Relations and Politics”, in *Annals of the American Academy of Political & Social Science*, 1988, vol. 497, p. 173.

³⁹² John Griffiths, “The general theory of litigation - a first step”, in *Zeitschrift für Rechtssoziologie*, 1983, vol. 4, no. 2, p. 145.

³⁹³ Max Weber, *Wirtschaft und Gesellschaft – Grundriss der verstehenden Soziologie*, Mohr Siebeck, Tübingen, 1922, pp. 181 ff.; see, in detail, Jens Petersen, *Max Webers Rechtssoziologie und die juristische Methodenlehre*, third edition, Mohr Siebeck, Berlin, 2008, pp. 16–7. See also Lee, 2019, pp. 27–28, see above note 352.

³⁹⁴ Olivia Milburn, *The Spring and Autumn Annals of Master Yan*, Brill, Leiden, 2015, The Inner Chapters: Miscellaneous Tales, Number Six, p. 349.

³⁹⁵ In the same vein and in detail David Nelken, “Whose Best Practice? The Significance of Context in and for Transnational Criminal Justice Indicators”, in *Journal of Law and Society*, 2019, vol. 46, pp. 31, 38 *et seq.* About context in (Rabel’s) comparative legal research, David J. Gerber, “Sculpting the Agenda of Comparative Law: Ernst Rabel and the

terms)³⁹⁶ but at the same time renders any categorisation somewhat arbitrary.

A sociological method that supplements the systematisation of ICC procedure is the recourse to ‘ideal-types’. Ideal-types are social scientific constructions that select ideal or material elements found in the social world, and assemble them in a pure, internally consistent form so as to accentuate aspects of reality in a (consciously) one-sided manner.³⁹⁷ They are ‘ideal’ in an analytical but not a normative sense,³⁹⁸ combining abstract generalisation and the interpretation of motives.³⁹⁹ An alternative name could be the ‘nomological machine’ Nancy Cartwright invented (albeit in relation to the laws of nature): “a fixed (enough) arrangement of components, or factors, with stable (enough) capacities that in the right sort of stable (enough) environment will, with repeated operation, give rise to the kind of regular behaviour that we represent in our scientific laws”.⁴⁰⁰

An ideal-type does not imply an aspiration to mould reality to it.⁴⁰¹ As Appiah emphasised: “[A]n idealisation is just a kind of useful fiction”.⁴⁰² Ideal-types are models that are selectively developed as aids to genetic explanation.⁴⁰³ With regard to the analysis of a legal system, the

Facade of Language”, in Annelise Riles (ed.), *Rethinking the Masters of Comparative Law*, Hart: Oxford, Portland, Oregon, 2001, p.190, 200.

³⁹⁶ See above note 91.

³⁹⁷ Max Weber, “‘Objectivity’ in Social Science and Social Policy”, in Edward A. Shils and Henry A. Finch (trans. and eds.), *The Methodology of the Social Sciences*, Free Press, Glencoe, Illinois, 1949, pp. 49, 90.

³⁹⁸ *Ibid.*

³⁹⁹ David Zaret, “From Weber to Parsons and Schutz: the Eclipse of History in Modern Social Theory”, in *American Journal of Sociology*, 1980, vol. 85, no. 5, pp. 1180–1201; Charles Ragin and David Zaret, “Theory and Method in Comparative Research: Two Strategies”, in *Social Forces*, 1982–1983, vol. 61, p. 742.

⁴⁰⁰ Nancy Cartwright, *The Dappled World*, Cambridge University Press, Cambridge, 1999, p. 50. See also Kwame Anthony Appiah, *As If – Idealization and Ideals*, Harvard University Press, Cambridge, Massachusetts, London, 2017, p. 14.

⁴⁰¹ Dhananjai Shivakumar, “The Pure Theory as Ideal Type: Defending Kelsen on the Basis of Weberian Methodology”, in *Yale Law Journal*, 1995–1996, vol. 105, p. 1401.

⁴⁰² Appiah, 2017, p. 73, see above note 400, italics omitted.

⁴⁰³ Ragin and Zaret, 1982–1983, pp. 741–742, see above note 399. Weber calls ideal-types “genetic concepts” because structural properties of ideal types are often closely related to specific genetic issues, see Max Weber, *The Methodology of the Social Sciences*, Free Press, New York, 1949, pp. 93, 106.

ideal-type “acts as a yardstick against which we might measure actual legal systems”.⁴⁰⁴ The identification of certain types and their comparison to the ideal-type, promotes rationality⁴⁰⁵ and disregards irrational events.⁴⁰⁶ In contrast to the ideal-type stands the average type (*Durchschnittstypus*), which has empirical-statistical value.⁴⁰⁷

A second distinction must be made between ideal-types and ideals. Whereas an ideal is something against which one evaluates reality, an ideal-type has “no connection at all with *value-judgments*, and it has nothing to do with any type of perfection other than a purely *logical one*”.⁴⁰⁸ An ideal-type is formed “by the one-sided *accentuation* of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent *concrete individual* phenomena, which are arranged according to those one-sidedly emphasized viewpoints into a unified *analytical* construct”.⁴⁰⁹ Additionally, MacDonald distinguishes three separate tools: strong ideal-types, weak ideal-types, and non-ideal-types.⁴¹⁰

⁴⁰⁴ Sanders, 2000, p. 1546, see above note 58:

From the sociological point of view, perhaps the most important contributor to the early development of comparative law was that preeminent lawyer-social scientist, Max Weber. Weber’s contribution was in three parts. First, he developed the device of an ideal type, a stylized construct that represents the perfect example of a phenomenon. The ideal type acts as a yardstick against which we might measure actual legal systems. Second, using ideal types, he provided a typology of legal systems classified by the formality and the rationality of their decision-making processes. Ideally, legal systems could be thought of as formal or substantive, rational or irrational. A legal system is formal to the extent that the norms it applies are intrinsic to the system itself. Substantive law, as the term was used earlier, should not be confused with the substantive dimension of Weber’s typology. A legal system is substantive in Weber’s sense to the extent that the source of the norms it applies is extrinsic to the legal system. For example, a legal system would be substantive if a court resolved disputes by reference to a religious rather than a legal code”.

⁴⁰⁵ Petersen, 2020, p. 112, see above note 393.

⁴⁰⁶ See generally Bernhard Pfister, *Die Entwicklung des Idealtypus. Eine methodologische Untersuchung über das Verhalten von Theorie und Geschichte bei Schmoller und Max Weber*, Mohr Siebeck, Tübingen, 1928.

⁴⁰⁷ Weber, 1922, p. 10, see above note 393; Petersen, 2020, p. 117, see above note 393.

⁴⁰⁸ Weber, 1949, pp. 49, 97–98, see above note 397.

⁴⁰⁹ *Ibid.*, p. 90. See generally Stuart Macdonald, “Constructing a Framework for Criminal Justice Research: Learning from Packer’s Mistakes”, in *New Criminal Law Review*, 2008, vol. 11, pp. 257–310.

⁴¹⁰ Macdonald, 2008, p. 304, see above note 409:

Again, the most convincing models in this regard are those of Damaška. By creating ideal-types – an ideal-type of co-ordinate judiciary as opposed to a hierarchical one, and an ideal-type of conflict-solving justice as opposed to a policy-implementing one⁴¹¹ – Damaška describes and explains the differences in culture, history and social traditions that account for the contrast between different legal systems or processes.⁴¹² The hierarchical ideal-type is familiar to readers of Weber’s theory on bureaucracy.⁴¹³ Some even see the combination of two independent sets of variables into four constellations as being borrowed from Weber.⁴¹⁴

For Damaška, the shape of those processes is best explained as the result of socio-political factors, especially attitudes towards official power.⁴¹⁵ Surely, Damaška’s connection between types of political States and

A strong ideal-type is a theoretical construct. It may be used in empirical work for analysis and exposition, but, since it could not sensibly be regarded as a prescription of what to exist, is not apt to be used in evaluative work. A weak ideal-type is also a conceptual construct, but, as well as being used in empirical work, it may also be employed in evaluative work as an ideal. A non-ideal-type (such as the offensive approach to criminal law policy) is not a conceptual construct; it is a description of an actual strategy or approach. Like a weak ideal-type, it may be used in both empirical and evaluative work.

[footnote omitted]

⁴¹¹ Alex Stein, “A Political Analysis of Procedural Law”, in *Modern Law Review*, 1988, vol. 51, pp. 662–3.

⁴¹² James Q. Whitman, “No Right Answer?”, in Jackson, Langer and Tillers (eds.), 2008, p. 389, see above note 16; Roberts, 2008, p. 300, see above note 215; Malcolm M. Feeley, “The Bench, The Bar, and the State: Judicial Independence in Japan and the United States”, in Feeley and Miyazawa (eds.), 2002, pp. 69–70, see above note 81 (“One of the few contemporary theorists who has systematically explored the relationship between the nature of state authority and the law and the legal system is Mirjan Damaska”).

⁴¹³ See Max Weber, *Economy and Society*, University of California Press, Berkeley, Los Angeles, London, 1978, pp. 212–301; Stein, 1988, pp. 662–3, above note 411; Vogler, 2005, p. 9, above note 133; Kagan, 2003, p. 11, above note 18. In a similar vein (with a view to the ICC), Richard Clements, “From bureaucracy to management: The International Criminal Court’s internal progress narrative”, in *Leiden Journal of International Law*, 2019, vol. 32, pp. 149, 151.

⁴¹⁴ See Max Weber, *Max Weber on Law in Economy and Society*, Max Rheinstein and Edward A. Shils (trans.), Simon and Schuster, New York, 1925/1954, pp. xlii–lii; see also Anthony Kronman, *Max Weber*, Stanford University Press, Stanford, 1983, p. 76. See generally Reimann, 1988, p. 205, above note 334.

⁴¹⁵ Reimann, 1988, p. 205, see above note 334.; Stein, 1988, p. 662, see above note 411 (“It offers a political explanation of procedural arrangements and their variability, claiming that in most cases procedural systems are affected by prevailing political attitudes towards the legitimate functions of state authorities and their organisational structure”).

types of legal processes is not a novel approach.⁴¹⁶ What is indeed new is the linking of two types of political goals of the legal process to modern political theory: his conflict-solving and policy-implementing types of States can be traced back to the opposition between liberal political conceptions versus anti-liberal conceptions of the State, an opposition that has been crucial for theoretical political debates to this day.⁴¹⁷ Damaška describes and explains the rules and practices of procedure by analysing the institutional environment and the political purposes of the administration of justice.⁴¹⁸ Moreover, he takes into account the ‘law in minds’ by including broader cultural attitudes toward governance and State authority.⁴¹⁹ As Damaška himself memorably put it, “[t]o consider forms of justice in monadic isolation from their social and economic context is – for many purposes – like playing *Hamlet* without the Prince”.⁴²⁰

The criticism of Damaška’s models is that their empirical dimension is rather stunted. Damaška is criticised in that he “presents relatively few data from a range spanning twenty centuries, half a dozen countries and a variety of procedural forms. These data are so sparse and eclectic, and so carefully selected from a huge, all-encompassing pool, that their support for Damaška’s assumptions has little significance”.⁴²¹ In fact, Damaška “never sought to fit all empirical data into his two-by-two grid”.⁴²² However, his work is still empirical “at its core”, because it “tells a sociological story linking the structure of legal procedure, and especially the trial, with the development of political authority and the goals of states”.⁴²³ For the purpose of this study Damaška’s empirical dimension is sufficient, because the inclusion of more empirical data will eventually increase the complexity of its models. Despite the different views of some authors,

⁴¹⁶ See, for example, Charles de Montesquieu, *The Spirits of the Laws*, Anne M. Cohler, Basia Carolyn Miller and Harold Samuel Stone (eds.), CUP, Cambridge, 1989.

⁴¹⁷ See, for example, John Rawls, *Political Liberalism*, second edition, Columbia University Press, New York, 2005; Stephen Holmes, *The Anatomy of Antiliberalism*, Harvard University Press, Cambridge, Massachusetts, 1993. Generally see Jackson and Langer, 2008, pp. 4, 23, 24, above note 384.

⁴¹⁸ Jackson and Langer, 2008, p. 5, see above note 384.

⁴¹⁹ Koh, 2008, pp. 29, 31, 32, see above note 386.

⁴²⁰ Damaška, 1986, p. 6, see above note 32.

⁴²¹ Reimann, 1988, p. 207, see above note 334.

⁴²² Allen and Alexakis, 2008, p. 334, see above note 390.

⁴²³ See Shapiro, 1987, p. 836, see above note 383.

who criticise Damaška for a lack of differentiation,⁴²⁴ a systematisation of the ICC process calls for a general conceptualisation rather than models that strive to include all possible exceptions and peculiarities. Damaška's ideal-types lie exactly in-between the most general adversarial-inquisitorial dichotomy and an approach of six to eight models that try to grasp procedural values.

4.4.4.4.3. Comparative

Finally, and most importantly, a suitable blueprint to systematise the ICC process needs to be based on comparative research. This, again, requires some clarification on both such research generally and Damaška's contribution thereto specifically.

By using the term 'comparative law', I am referring to the systematic study of particular legal traditions and legal rules on a comparative basis.⁴²⁵ This has to be distinguished from the term 'foreign law', which is the study of a foreign legal system without expressly comparing it to any other legal system.⁴²⁶ Furthermore, comparative law is not a legal body of rules but a variety of methods analysing the law.⁴²⁷ Thus, to avoid misunderstandings, I will use the term 'comparative law research'.

Comparative law research can have a variety of useful purposes.⁴²⁸ First, it supplements an analysis of the cultural and legal origin of certain procedural rules.⁴²⁹ In the words of Delmas-Marty:

⁴²⁴ *Ibid.* ("As indicated by these examples the model presented is not a rigid set of large pigeon holes. A particular nation's entire legal and political system need not be put neatly in three and only three boxes. A particular nation may choose to intervene actively in some segments of life and not in others and use a hierarchically organized bureaucracy as the instrument of some of its interventions and not others").

⁴²⁵ Cf. de Cruz, 2007, p. 3, see above note 335; George Winterton, "Comparative Law Teaching", in *American Journal of Comparative Law*, 1975, vol. 23, p. 71.

⁴²⁶ Winterton, 1975, p. 70, see above note 425. See also Max Rheinstein, "Teaching Comparative Law", in *University of Chicago Law Review*, 1938, vol. 5, p. 616; John R. Stevenson, "Comparative and Foreign Law in American Law Schools", in *Columbia Law Review*, 1950, vol. 50, p. 613.

⁴²⁷ Otto Kahn-Freund, "Comparative Law as an Academic Subject", in *Law Quarterly Review*, 1966, vol. 82, p. 41; de Cruz, 2007, p. 5, see above note 335.

⁴²⁸ Christian Starck, "Die Bedeutung der Rechtsdogmatik für die Rechtsvergleichung", in Frank Schorkopf and Christian Starck (eds.), *Rechtsvergleichung - Sprache - Rechtsdogmatik: Siebtes Deutsch-Taiwanesisches Kolloquium vom 8. bis 9. Oktober 2018 in Göttingen*, Nomos, Baden-Baden, 2019, p. 11. About the development, goals and methods of comparative criminal law, see the seminal study of Elbin Eser, "Strafrechtsvergleichung:

In an ideal world, the architects of international criminal tribunals would draw upon the best examples of domestic institutional design from around the globe, suitably modified for the specialist task in hand. This, of course, is where Comparative Law should make its mark, not as the fountain of all wisdom, but as an indispensable contributor to an interdisciplinary conversation.⁴³⁰

Second, comparative law research can improve the understanding of law in context by explaining⁴³¹ reasons for differences and similarities.⁴³² Third, comparative law research can provide a tool of interpretation for judges,⁴³³ since it is an important part of a broad contextual interpretation.⁴³⁴ Fourth, comparative law research can facilitate a general jurisprudence,⁴³⁵ and create a dogmatic, because it identifies the similarities of

Entwicklung – Ziele – Methoden”, in Albin Eser and Walter Perron (eds.), *Strukturvergleich strafrechtlicher Verantwortlichkeit und Sanktionierung in Europa*, Duncker & Humblot, 2015, pp. 939–1112. For an instructive and comprehensive account of “comparative criminal justice” see Ambos, 2017, pp. 247–276, see above note 322. See also Burchard, 2017, pp. 277–313, see above note 20.

⁴²⁹ Cf. Malcolm M. Feeley, “Comparative Criminal Law for Criminologists: Comparing for What Purpose?”, in David Nelken (ed.), *Comparing Legal Cultures*, Aldershot, Dartmouth, 1997, p. 93.

⁴³⁰ Mireille Delmas-Marty, “The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law”, in *Journal of International Criminal Justice*, 2003, vol. 1, pp. 13–25.

⁴³¹ For a discussion, strongly (and perhaps too exclusively) emphasising explanation as an essential objective of comparative studies, see John Henry Merryman, “Comparative Law and Scientific Explanation”, in John N. Hazard and Wenceslas J. Wagner (eds.), *Law in the United States of America in Social and Technological Revolution*, Etablissements Emile Bruylant, Brussels, 1974, p. 81.

⁴³² Esin Örucü, “Developing Comparative Law”, in David Nelken and Esin Örucü (eds.), *Comparative Law – A Handbook*, Hart Publishing, Oxford and Portland, Oregon, 2007, pp. 53–4, 66; see also Walther Hug, “The History of Comparative Law”, in *Harvard Law Review*, 1932, vol. 45, p. 1027.

⁴³³ Örucü, 2007, pp. 43, 55, see above note 432.

⁴³⁴ See above Section 4.4.3.

⁴³⁵ Cf. Röhl and Röhl, 2008, p. 9, see above note 180, with reference to Max Rheinstein, *Einführung in die Rechtsvergleichung*, second edition, C.H. Beck, Munich, 1987, p. 30 (the influence of Rheinstein on Comparative Legal Research and Law cannot be overstated, see Basil S. Markesinis, *Comparative Law in the Courtroom and Classroom*, Hart, Oxford, Portland, Oregon, 2003, p. 2 and *passim*). In a similar vein Lee, 2019, p. 27, see above note 352 (“Die Rechtsvergleichung dient einem ähnlichen Ziel, nämlich zwangsläufig der historisch-dogmatischen Rechtsmethodologie”).

different legal systems.⁴³⁶ For example, Röhl explicitly refers to the difference between common law and civil law,⁴³⁷ and the challenges that come with Europeanisation and/or globalisation. Through comparative legal research, it is possible to establish a consistent meaning of legal terms or concepts.⁴³⁸ Just as general jurisprudence does not reinvent the wheel and refers to existing theories, comparative law research encourages new courses of action that build on existing resources and potential.⁴³⁹ Fifth, comparative law research facilitates the explanation of modes of thought.⁴⁴⁰

Consequently, the purpose of comparative law has an impact on its methods, which usually vary between “functional equivalence” and the “problem-oriented” approach, “model building” and “common core” studies, the “factual” approach and “method in action”.⁴⁴¹ Because the purpose of comparative law is the understanding and explanation of differences and similarities, comparative method is an empirical and descriptive research design⁴⁴² that facilitates a general jurisprudence with regard to the systematisation of ICC procedure,⁴⁴³ and eventually creates a Processdogmatic. It hopefully became clear by now that here comparative law research is being employed as an element of contextual interpretation and not a separate mode of interpretation.⁴⁴⁴

⁴³⁶ Hans Nawiasky, *Allgemeine Rechtslehre als System der rechtlichen Grundbegriffe*, Benziger, Einsiedeln, 1948, p. 3.

⁴³⁷ Cf. Röhl and Röhl, 2008, p. 10, see above note 180.

⁴³⁸ Brugger, 1996, p. 237, see above note 313 (“If possible, legal terms or concepts should have consistent meanings in all the places where they are being used. At the very least, their meanings should not conflict! To the extent that social values are represented by these norms, legitimacy is also furthered”).

⁴³⁹ Kagan, 2003, pp. 5–6, see above note 18.

⁴⁴⁰ Fikentscher, 2004, p. 44, see above note 377.

⁴⁴¹ In detail Örüciü, 2007, p. 48, see above note 432; Ambos, 2017, pp. 260–71, see above note 322.

⁴⁴² *Ibid.*

⁴⁴³ William Twining has remarked that comparative lawyers are concerned “with description, analysis and explanation, rather than evaluation and prescription”, see William Twining, *Globalisation and Legal Theory*, Butterworths, London, Edinburgh, Dublin, 2000, p. 185. For a “comparative contextual analysis” see Findlay, 2001, pp. 26, 31, above note 39.

⁴⁴⁴ Understood as a separate mode of interpretation, see Basil S. Markesinis, *Comparative Law in the Courtroom and Classroom*, Hart, Oxford, Portland, Oregon, 2003, p. 109 with further references.

Of all models, Damaška uses comparative law to the greatest extent and provides the most significant contribution to comparative justice studies in recent years.⁴⁴⁵ His strength is that he combines the comparative law tradition of historical scholarship with a sociological analysis of contemporary justice.⁴⁴⁶ His models provide a comparative tool for different procedural systems.⁴⁴⁷ Damaška does not conduct a detailed study of different features of legal systems and therefore refrains from micro-comparison.⁴⁴⁸ Instead, he conducts comparative modelling by creating “ideal-types”,⁴⁴⁹ that is, tools that are not systems themselves,⁴⁵⁰ which I see as a certain type of macro-comparison.⁴⁵¹ Damaška found a way of highlighting the analytic and explanatory aspects of comparative law by creating models which entitle him to go beyond the usual “compare and contrast”.⁴⁵² He moves the comparative debate “on to a search for what lies at the essence of the different systems and the underlying institutional

⁴⁴⁵ Nijboer, 1997, pp. 125, 130–135, see above note 206; Feeley, 1997, pp. 93, 96, see above note 429; Eric G. Luna, “A Place for Comparative Criminal Procedure”, in *Brandeis Law Journal*, 2003–2004, vol. 42, p. 285:

The idea of comparative criminal procedure is certainly not new, nor is the summons for American academics to integrate the study of foreign penal practices into standard law school curriculum. During the 1970s, prominent legal scholars such as Mirjan Damaška, Abraham Goldstein, John Langbein, Rudolf Schlesinger, and Lloyd Weinreb were exploring the implications of a comparative approach to criminal procedure.

⁴⁴⁶ Vogler, 2005, p. 8, see above note 133.

⁴⁴⁷ Nijboer, 1997, p. 178, see above note 206.

⁴⁴⁸ About micro-comparison see de Cruz, 2007, p. 233, see above note 335.

⁴⁴⁹ Roberts, 2008, p. 300, see above note 215; see also Shapiro, 1987, p. 836, see above note 383 (Damaška “seeks to develop pure models for purposes of comparative analysis and so wishes to avoid creating two types of procedure labelled ‘inquisitorial’ and ‘accusatorial.’ He argues that those two labels have been too deeply infected with the actual practices of the Continent and the Anglo-American world to serve as tools of general comparative analysis”).

⁴⁵⁰ Nijboer, 1997, p. 178, see above note 206.

⁴⁵¹ Ragin and Zaret call this “Weberian comparison”, see Ragin and Zaret, 1982–1983, p. 744, see above note 399 (“Recall that a key feature of the Weberian strategy is the goal of explaining diversity. [...] Invariant relationships between different causes and types of revolutions would be established by applying the method of agreement to each type and the indirect method of difference between types”). About macro- and micro-comparisons Lee, 2019, p. 34, see above note 352; Catherine Valcke, *Comparing Law: Comparative Law as Reconstruction of Collective Commitments*, Cambridge University Press, Cambridge, 2018, p. 213.

⁴⁵² Feeley, 1997, p. 95, see above note 429.

and political forces that divide them”,⁴⁵³ avoiding a mere “taxonomic” classification.⁴⁵⁴

Here emerges the inseparability of sociological methods and comparative law research: the comparison between ideal-types and empirical cases reveals adequate causes and aids the understanding of – in this case – legal or procedural systems.⁴⁵⁵ By using Weberian ideal-types, Damaška followed Weber by recognising that the nature of a society’s legal system is shaped by the individuals who dominate it.⁴⁵⁶ Thus, he not only included the ‘law in the books’ and ‘law in action’, but also the ‘law in minds’, as comparative law research of criminal justice systems tend to overlook the actors involved in it and the society that forms the backdrop to these processes.⁴⁵⁷ This approach of Damaška cannot be emphasised enough, since it may well be regarded as the essence of his work – the sociological, empirical, political and cultural dimension of his models that he developed to explain and describe a system becomes epistemologically valuable by Damaška’s method of (macro)comparison. It is often overlooked that comparative analysis in the social sciences on the one hand and comparative analysis in the sociology of law on the other hand do not necessarily embrace the same analytical tools.⁴⁵⁸ By creating ideal-types, Damaška acknowledged this and provided clear blueprints as analytical tools for his – as Feeley calls it – comparative sociolegal study.⁴⁵⁹ This

⁴⁵³ Jackson, 2008, p. 222, see above note 279.

⁴⁵⁴ Shapiro, 1987, p. 837, see above note 383.

⁴⁵⁵ Cf. Ragin and Zaret, 1982–1983, pp. 732, 748, see above note 399 (“Careful use of transhistorical propositions in formulating ideal types increases their heuristic value as middle-range concepts for comparative research”); Sanders, 2000, pp. 1544, 1552–3, see above note 58.

⁴⁵⁶ Sanders, 2000, pp. 1546–7, see above note 58.

⁴⁵⁷ Francis Pakes, *Comparative Criminal Justice*, fourth edition, Routledge Taylor & Francis, Oxford, 2019, pp. 4-5 (“Often history is important in order to understand how particular arrangements have come about in the first place. Criminal justice arrangements need to be contextualised so that we can understand how they work in relation to each other and how the nuts and bolts of arrangements fit together. We also need to find ways of deciding how criminal justice arrangements fit a country, a culture or a legal tradition”).

⁴⁵⁸ Feeley, 1997, p. 93, see above note 429.

⁴⁵⁹ *Ibid.* (“Comparative lawyers bring their own understandings of the field when they embrace social science concerns, and social scientists do the same when they focus on law. But even within each field, even when there is conceptual clarity about scope, method and objective, there has been precious little scholarly, as opposed to practical, pay-off. Comparative sociolegal studies remain a problematic and ill-defined area of inquiry”).

method even compensates for the empirical flaws of the system. In other words, because those flaws are inevitable when using a rather abstract concept, the empirical support for the veracity of the explanations of procedural forms is no longer weak but “vivid evidence of the models’ functional utility: the discussion of procedural realities provides examples for the insights these tools can generate”.⁴⁶⁰ In this regard, Roberts cites Damaška’s reference to Weber that such a world cannot be understood “without constructing analytical models through which to organise and interpret the empirical data which bombard our senses”.⁴⁶¹ In conclusion, Shapiro evaluates the contribution of Damaška’s works to comparative law research: “I do not see how anyone seriously interested in comparative law could avoid reading it”.⁴⁶²

4.5. Summary

The most common labels and models that are employed to categorise the ICC’s procedural system are the adversarial–inquisitorial and common law–civil law dichotomies respectively. I have shown how inconsistently those models are applied. Apart from the examples provided above, one last example of that inconsistent application is as follows: an ICTY President characterised the ICTY-RPE as “largely adversarial”,⁴⁶³ while others

⁴⁶⁰ Reimann, 1988, p. 207, see above note 334. He continues: “In this regard, Damaska’s achievement is impressive. Here the book fulfills its ambitious promise to lead the reader beyond the conventional perspectives”.

⁴⁶¹ Roberts, 2008, p. 300, see above note 215.

⁴⁶² Shapiro, 1987, p. 837, see above note 383.

⁴⁶³ Statement by the President Made at a Briefing to Members of Diplomatic Missions, UN Doc. IT/29 (1994), quoted in Virginia Morris and Michael P. Scharf, *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, Transnational Publishers, Irvington-on-Hudson, New York, 1995, p. 650. Others agree with this characterisation, see Daniel D. Ntanda Nsereko, “Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia”, in *Criminal Law Forum*, 1994, vol. 5, p. 508, stating that the ICTY “relied heavily on proposals from the U.S. government and from non-governmental organizations such as the U.S.-based Lawyers Committee for Human Rights”; Michael P. Scharf, “Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal”, in *New York University Journal of International Law and Politics*, 1998, vol. 30, p. 171 and footnote 18, noting that a US draft provided the framework for ICTY rules. Fairlie follows from “party-driven proceedings” at the ICTY to a similar picture at the ICC through a staff-analysis:

In 2009, for example, it was observed that ‘a rather important number’ of individuals working in the ICC’s Office of the Prosecutor (OTP) had ‘learned their skills during many years of ICTY or ICTR trial proceedings’. Since the same observations can be made of ICC defence counsel and the Court’s judges, it stands to reason that this ad-

described them as continental in orientation.⁴⁶⁴ Moreover, Kerper writes in all seriousness:⁴⁶⁵ “Not all legal systems employ the adversary method of getting at the truth. In the Continental system of law, for example, the state is supposed to satisfy itself as to the guilt of the accused before it brings him to trial. Thus, when the trial begins he is presumed to be guilty, and must prove himself innocent”.⁴⁶⁶

The consequences of this erroneous modelling are inconsistency and unpredictability of judgements and decisions – consequences that should not be underestimated. The reason for this is not that the ‘adversarial-inquisitorial’ and ‘common-law–civil law’ models are inadequate. In fact, it has become rather fashionable to reject the established dichotomy between inquisitorial and adversarial approaches altogether.⁴⁶⁷ Yet, this division may in fact be useful in order to gain a better understanding of why certain procedural approaches are selected over others.⁴⁶⁸ However, those who use these models have to clarify their meaning, as Langer did in the following example:

In this sense, it is important to emphasize from the outset that I will use the expression ‘adversarial system’ as a descriptive category, not as a normative ideal. As a normative ideal, the expression is sometimes used in the United States to refer to a criminal procedure where the rights of the defendant are fully respected, see, e.g., Mirjan Damaska, *Adversary System*, 1 *Encyclopedia of Crime and Justice* 24, 25

versarial-oriented training has impacted how these individuals approach their work, as well as their views regarding how ICC trials ought to be conducted.

Megan A. Fairlie, “The Unlikely Prospect of Non-adversarial Trials at the International Criminal Court”, in *Journal of International Criminal Justice*, 2018, vol. 16, p. 305 (footnote omitted).

⁴⁶⁴ See generally Diane Marie Amann, “Harmonic Convergence? Constitutional Criminal Procedure in an International Context”, in *Indiana Law Journal*, 2000, vol. 75, pp. 843, 873.

⁴⁶⁵ Johannes Frederikus Nijboer, “The American Adversarial System in Criminal Cases: Between Ideology and Reality”, in *Cardozo Journal of International & Comparative Law*, 1997, vol. 5, pp. 81, 96, remarks that this book was seriously used in law schools in the United States.

⁴⁶⁶ Hazel B. Kerper, *Introduction to the Criminal Justice System*, West Publishing, St. Paul, Minnesota, 1972, pp. 182–183.

⁴⁶⁷ See, for example, Sarah J. Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights*, Hart Publishing, Oxford, 2007.

⁴⁶⁸ McGonigle Leyh, 2011, p. 69, see above note 41.

(Sanford H. Kadish ed., 1983), and the epitome of the adversarial system is the trial by jury. However, in this Article, I will use the expression ‘adversarial system’ as a descriptive category through which I will explain the current features of American criminal procedure in opposition to the current features of criminal procedure in continental Europe and Latin America. Similarly, the expression ‘inquisitorial system’ is sometimes used in a negative way to refer to authoritarian conceptions of criminal procedure. But in this Article, I will use the expression ‘inquisitorial system’ only as a descriptive category.⁴⁶⁹

Unfortunately, such clear definitional remarks are rare. This results in the unreasonable depreciation (or preference) towards the other system or in the labelling of a system as ‘hybrid’, ‘mixed’ or ‘*sui generis*’. Both assumptions could be acceptable, if they were based on clarifications. Yet, they are mostly misleading as a descriptive matter, and of limited analytical use.⁴⁷⁰ Thus, the use of those dichotomies should not be rejected altogether,⁴⁷¹ but is – at the same time – inadequate to model the ICC procedure.

⁴⁶⁹ Langer, 2004, p. 4 with footnote 20, see above note 112.

⁴⁷⁰ Frase, 1998, p. 115, see above note 265 identifies a further disadvantage: “[T]hey tend to obscure the many points of underlying similarity shared by all modern systems of criminal justice”.

⁴⁷¹ With regard to the undifferentiated refusal to use the adversarial-inquisitorial dichotomy (this refusal, by the way, is as unreasonable as the incorrect and undifferentiated use of those models), John D. Jackson, “The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?”, in *Modern Law Review*, 2005, vol. 68, p. 746 makes an interesting remark:

The real limitation in using ‘adversarial’ and ‘inquisitorial’ models as benchmarks for determining the extent to which systems are converging or diverging, however, is not that the models cannot encapsulate a wide variety of evidentiary processes evident across the common law and civil law divide, nor that there can be disagreements on how the terms ‘adversarial’ and ‘inquisitorial’ should be used and applied. There are difficulties endemic in any exercise which attempts to make cross-cultural comparisons between legal systems and so long as we are careful to explain what we mean by these terms, they can still be useful in analysing shifts in direction within and between systems. The limitation is that, however broadly we attempt to use the terms, they cannot claim to be comprehensive, all-inclusive categories and that by using them as though they were we may lose sight of certain processes at work which cannot be categorised as either ‘adversarial’ or ‘inquisitorial’ at all, no matter how broad or deep our perspective.

4.5.1. The Inquisitorial–Adversarial Dichotomy and Damaška’s Concept

For this and other reasons, the appeal of the adversarial–inquisitorial distinction is decreasing and theoretical constructs designed to provide a broader perspective for procedural reforms are used instead.⁴⁷² After outlining those theoretical constructs above, Damaška’s concept seems the most suitable for: a) the description of the ICC process; and b) to lay the foundation for a broad contextual interpretation. The strength of the model is that it allows for a holistic analysis or description of the criminal process, independent of its stages. Just because a procedural stage might appear in a certain setting (call it ‘inquisitorial’ or ‘adversarial’), does not change the categorisation of the process as a whole. Quite the contrary, procedural stages are usually “assigned methodological subtasks” that differ from each other: “One stage can be devoted to the gathering and organization of relevant material, another to the initial decision, still another to hierarchical review, and so on, depending on the number of levels in the pyramid of authority”.⁴⁷³ *Prima facie*, this argument appears to resemble the familiar argument that different procedural stages may have different “objectives and procedural influences”.⁴⁷⁴ However, a procedural stage does not present some sort of autonomous, closed, Luhmannesque⁴⁷⁵ system. Damaška too doubted the autonomy of procedural stages by acknowledging that a) in the hierarchical ideal, procedural stages are just part of a multi-layered hierarchy⁴⁷⁶ (and are therefore – as already mentioned – assigned to “methodological subtasks”);⁴⁷⁷ and b) the existence

⁴⁷² Damaška, 2001, p. 499, see above note 204; Nijboer, 1997, p. 178, see above note 206.

⁴⁷³ Damaška, 1986, pp. 47–48, see above note 32.

⁴⁷⁴ See, for example, Klamberg, 2013, p. 499, above note 142.

⁴⁷⁵ See Niklas Luhmann, *Soziologische Aufklärung 1: Aufsätze zur Theorie sozialer Systeme*, eighth edition, Springer, Cham, 2009, p. 226; Gunther Teubner, *Recht als autopoietisches System*, Suhrkamp, Frankfurt, 1989; Niklas Luhmann, “Introduction to Autopoietic Law”, in Niklas Luhmann (ed.), *Autopoietic Law: A New Approach to Law and Society*, De Gruyter, Berlin, 1988, pp. 1, 3; Niklas Luhmann, *Einführung in die Systemtheorie*, sixth edition, Carl-Auer, Heidelberg, 2011, p. 111.; Brian H. Bix, *Legal Theory*, OUP, Oxford, 2004, p. 18; Roger Cotterrell, “Law in Social Theory and Social Theory in the Study of Law”, in Austin Sarat (ed.), *The Blackwell Companion to Law and Society*, Blackwell, Malden, 2007, pp. 16, 22; Clemens Mattheis, “The System Theory of Niklas Luhmann and the Constitutionalization of the World Society”, in *Goettingen Journal of International Law*, 2012, vol. 4, no. 2, pp. 626 ff.

⁴⁷⁶ Damaška, 1986, pp. 47–48, see above note 32.

⁴⁷⁷ Emphasis added.

of procedural stages *per se* and the extent of their integration into the proceedings are already characteristics of a certain procedural model.⁴⁷⁸ Thus, to treat procedural stages separately with regard to their objectives and characteristics is already constitutive of a certain procedural model. To do so would beg the question and only the application of an ideal-type model facilitates the prevention of such a circular argument.⁴⁷⁹ I borrowed from legal theory or jurisprudence to choose a concept that is generally capable of creating a general jurisprudence for the ICC process, the Processdogmatic. Damaška provides such a concept.⁴⁸⁰ His models provide a more differentiated picture than the adversarial-inquisitorial dichotomy does, but refrain from the attempt to increase comprehensibility by increasing the amount of models.⁴⁸¹ By including a great variety of elements, his concept is the closest to a general jurisprudence of the ICC procedure: he builds a bridge to political theory, is able to encapsulate the complexities of real legal processes,⁴⁸² and create models of relatively unusual combinations of features by using Weberian ideal-types.⁴⁸³ His work is not a suggestion of what procedure should look like but how it could be modelled and analysed. He thus deviates from Burns, for example, whose concept is normative and highlights certain aspects of the trial that are only relevant for realising the practical intelligence of American juries in carefully qualified senses of that term.⁴⁸⁴

⁴⁷⁸ Cf. Damaška, 1986, p. 57, see above note 32.

⁴⁷⁹ See below Section 4.5.2.

⁴⁸⁰ In a similar vein, Mitchel de S.-O.-l’E. Lasser describes Damaška’s models as “unified field theory for comparative law”, see Mitchel de S.-O.-l’E. Lasser, “On the Comparative Autonomy of Forms and Ideas”, in Ackerman, Ambos and Sikirić (eds.), 2016, p. 303, see above note 21; Damaška, 1986, p. 73, see above note 32.

⁴⁸¹ Jackson and Langer, 2008, p. 5, see above note 384 (“In addition, the combination of the organisation-of-authority and political-goal axes creates a bi-dimensional framework of analysis that offers a more nuanced and flexible alternative than the adversarial inquisitorial dichotomy”).

⁴⁸² Richard O. Lempert, “Anglo-American and Continental Systems: Marsupials and Mammals of the Law”, in Jackson, Langer and Tillers (eds.), 2008, pp. 395, 413, see above note 16 (“Professor Damaška’s great book, *The Faces of Justice and State Authority*, opened its readers’ eyes to how Anglo-American and Continental legal procedures articulate with the societies in which they are found, and it alerted readers to issues that arise in considering this articulation”).

⁴⁸³ Roberts, 2008, p. 299, see above note 215.

⁴⁸⁴ David J. Smigelskis, “Book Review: Realizing the Practical Intelligence of American Juries”, in *Northwestern University Law Review*, 2000–2001, vol. 95, p. 1017; Ronald L.

Damaška's models embrace the differences of legal thought between common law and civil law. This demonstrates the aforementioned utility of those dichotomies, not as models in themselves, but as features of Damaška's ideal-types. The combination of sociological, empirical and political elements with the use of ideal-types allows an insight that the nature of a society's legal system is shaped by the kinds of individuals who dominate it.⁴⁸⁵ This is the basis for a contextual interpretation incorporating the internal system of procedural rules.⁴⁸⁶

4.5.2. Predictability and Weberian Ideal-Types

There is an important connection between Weber's ideal-types on the one hand and the predictability of procedural decisions on the other. According to Weber, the creation of ideal-types and the comparison of certain events with this ideal-type, facilitates the rational assessment of those events as a whole⁴⁸⁷ and the exclusion of irrational moments.⁴⁸⁸ Applied to the analysis of a legal system: a legal system is rational if it yields results that are predictable from the facts of cases, that is, if case outcomes are determined by the reasoned analysis of action in light of a given set of norms.⁴⁸⁹ In other words: Rationality is promoted by the Rule of Law⁴⁹⁰

Carlson, "A Theory of the Trial", Book Review, in *Justice Systems Journal*, 2001, vol. 22, p. 101.

⁴⁸⁵ Sanders, 2000, pp. 1546–7, see above note 58, giving the following example:

On the European continent, in the absence of a powerful central court, domination fell into the hands of the university law faculties who strove, through the promulgation and interpretation of authoritative texts, to create and understand the legal system as a general and autonomous set of rules. The common law in England, on the other hand, grew under the tutelage of a small elite judiciary and an accompanying centralized bar, more concerned with pronouncing rules for the settlement of disputes than with developing generalized rules of law. In time, the differences in the legal systems created by these different sets of legal actors helped to spur interest in comparative legal systems.

⁴⁸⁶ Cf. Heinze, 2014, p. 200, see above note 23.

⁴⁸⁷ Max Weber, *Wirtschaft und Gesellschaft – Grundriß der verstehenden Soziologie*, fifth edition, Mohr, Tübingen, 1985, p. 2; Alexander von Schelting, "Die logische Theorie der historischen Kulturwissenschaft von Max Weber und im besonderen sein Begriff des Idealtypus", in *Archiv für Sozialwissenschaften und Sozialpolitik*, 1922, vol. 49, pp. 623–752.

⁴⁸⁸ Pfister, 1928, see above note 406; see also Petersen, 2020, pp. 110–111, see above note 393; Carlson, 2018, p. 76, see above note 9.

⁴⁸⁹ See already Oliver Wendell Holmes, "The Path of the Law", in *Harvard Law Review*, 1897, vol. 10, pp. 857–858: "Far the most important and pretty nearly the whole meaning of every new effort of legal thought is to make these prophecies more precise, and to generalize them into a thoroughly connected system". On Holmes' insistence on this systemic ele-

and is a prerequisite for process legitimacy.⁴⁹¹ A legal system is irrational when outcomes are not predictable in this way.⁴⁹² In other words, the use of Weber’s ideal-types shall ensure that similar cases are decided similarly.⁴⁹³ Nevertheless, creating ideal-types is not only a reaction to my demand of predictability, but also reflects a contextual method of interpretation, since creating types has always been the challenge of legal methodology.⁴⁹⁴ In contrast to a ‘definition’, where every requirement or element

ment see Jeremy Waldron, “‘Transcendental Nonsense’ and System in the Law”, in *Columbia Law Review*, 2000, vol. 100, pp. 16, 26 (with footnote 41). See also Susan Haack, “The Pragmatist Tradition: Lessons for Legal Theorists”, in *Washington University Law Review*, 2018, vol. 95, pp. 1049 ff. The restoration of law’s predictability is one of the features of legal realism, see Dagan Hanoach, “Doctrinal Categories, Legal Realism, and the Rule of Law”, in *University of Pennsylvania Law Review*, 2015, vol. 163, pp. 1889, 1896 with further references. I wish to emphasize, however, that my advocacy for an application of a contextual interpretation to ensure consistency and predictability is not a portrayal of the Realists’ demand for predictability. In fact, it could not be farther away from it, since Realists “were concerned with prediction because of its practical significance for lawyers advising clients, not because they were advancing semantic claims about how we use words”, see Brian Leiter, “Legal Realism”, in Christopher Berry Gray (ed.), *The Philosophy of Law, Vol. II*, Garland, New York and London, 1999, pp. 720, 724.

⁴⁹⁰ In more detail Alexander Heinze, 2020, p. 657 *et seq.*, above note 300.

⁴⁹¹ Alexandre Skander Galand, “A Global Public Goods Perspective on the Legitimacy of the International Criminal Court”, in *Loyola of Los Angeles International and Comparative Law Review*, 2018, vol. 41, p. 125, 152.

⁴⁹² Sanders, 2000, p. 1546, see above note 58.

⁴⁹³ *Ibid.*:

A formally irrational system exists when the legal order produces results unconstrained by reason. Classic examples are judgments following consultation with an oracle or trial by ordeal. Substantive irrationality exists when lawmakers and finders do not resort to some dominant general norms but, instead, act arbitrarily or decide upon the basis of an emotional evaluation of a particular case. Weber apparently had in mind the justice dispensed by the Khadi, a Moslem judge who, at least as Weber saw him, sat in the marketplace and rendered judgment by making a free and idiosyncratic evaluation of the particular merits of each case.

⁴⁹⁴ Detlef Leenen, *Typus und Rechtsfindung – Die Bedeutung der typologischen Methode für die Rechtsfindung dargestellt am Vertragsrecht des BGB*, Duncker & Humblot, Berlin, 1971; see also Hassemer, 1968, pp. 109–148, see above note 76; Klaus-Dieter Drüen, “Typus und Typisierung im Steuerrecht”, in *Steuer und Wirtschaft*, 1997, pp. 261–274; Martin Strahl, *Die typisierende Betrachtungsweise im Steuerrecht*, Arbeitskreis für Steuerrecht, Köln, 1996; Carl Gustav Hempel and Paul Oppenheim, *Der Typusbegriff im Lichte der neuen Logik*, A.W. Sijthoff’s uitgeverij n. v., Leiden, 1936; Hans Julius Wolff, “Typen im Recht und in der Rechtswissenschaft”, in *Studium Generale*, 1952, vol. 5, pp. 195–205; Ingeborg Puppe, “Der Typusbegriff, eine Denkform?”, in Roland Hefendehl, *et al.* (eds.), *Streitbare Strafrechtswissenschaft: Festschrift für Bernd Schünemann zum 70 Geburtstag am 1 November 2014*, Duncker & Humblot, Berlin, 2014, p. 221 *et seq.*

has to be on hand,⁴⁹⁵ a type is an “elastic framework of characteristics” (*elastisches Merkmalsgefüge*), to which a certain situation merely needs to correspond as a whole,⁴⁹⁶ while it is not necessary that all elements have to be on hand.⁴⁹⁷ Thus, what matters is not only the overall picture⁴⁹⁸ but the reality aspect (*Wirklichkeitsbezug*): a type “transcends” the system.⁴⁹⁹

A final remark: it can hardly be denied that international criminal trials suffer from the shortcomings Jeremy Betham so famously – and certainly polemically – assigned to the common law: unpredictability, legal uncertainty and costliness.⁵⁰⁰ Thus, the demand for consistency and predictability of ICC decisions is the overriding objective of this chapter. I have repeatedly stressed that *because* predictability and consistency is needed (the Rule of Law), a broad contextual interpretation is necessary. And *because* this interpretation is necessary, a concept to systematise the process is needed. This is obvious: it all relates to the demand for certainty, predictability and consistency. Admittedly, however, this is a *circulus vitiosus*: certainty, consistency and predictability are important features in both civil law and common law traditions. Yet, their role and the way those features are implemented in those traditions differ: in common law, many of the features are usually discussed in more functional terms and are elevated to the level of dogma.⁵⁰¹ They are also achieved by giving the force of law to judicial decisions, something theoretically forbidden in

⁴⁹⁵ Karl-Heinz Strache, *Das Denken in Standards. Zugleich ein Beitrag zur Typologie*, Duncker & Humblot, Berlin, 1967; Lothar Kuhlen, *Typuskonzeptionen in der Rechtstheorie*, Duncker & Humblot, Berlin, 1977; *idem*, “Die Denkform des Typus in der juristischen Methodenlehre”, in Hans-Joachim Koch (ed.), *Juristische Methodenlehre und analytische Philosophie*, Athenäum Verlag, Kronberg, 1976, pp. 53–69; Reinhold Zippelius, “Die Verwendung von Typen in Normen und Prognosen”, in Paul Bockelmann (ed.), *Festschrift für Karl Engisch zum 70. Geburtstag*, Klostermann, Frankfurt, 1969, pp. 224–242; Reinhold Zippelius, “Der Typenvergleich als Instrument der Gesetzesauslegung”, in *Jahrbuch für Rechtssoziologie und Rechtstheorie*, 1972, vol. 2, pp. 482–490.

⁴⁹⁶ Karl Larenz, *Methodenlehre der Rechtswissenschaft*, sixth edition, Springer, Berlin, 1991, p. 200.

⁴⁹⁷ Leenen, 1971, pp. 28, 34 ff., see above note 494.

⁴⁹⁸ Larenz, 1991, p. 451, see above note 496; see generally Petersen, 2020, p. 122, above note 393.

⁴⁹⁹ Hassemer, 1968, pp. 109–148, see above note 76.

⁵⁰⁰ See, for instance, KWON O-Gon, “The Challenge of an International Criminal Trial as Seen from the Bench”, in *Journal of International Criminal Justice*, 2007, vol. 5, pp. 360, 364 ff.; Swoboda, 2013, p. 391, see above note 75.

⁵⁰¹ For the example of “certainty”, see Merryman and Pérez-Perdomo, 2019, pp. 48–56, see above note 41.

civil law.⁵⁰² In common law, consistency is usually achieved by precedent – a feature that in this form⁵⁰³ exists neither in civil law nor at the ICC. Thus, the demand for certainty, consistency and predictability *as a dogma* implies *a priori* that the ICC process is shaped according to civil law. Rechtsdogmatik is inbuilt in the civil law tradition, it ensures coherence⁵⁰⁴ and consistency – *nulla doctrina iurista sine prudens iurista*.⁵⁰⁵ The way the classification of the criminal process is conducted is thus already indicative of a certain tradition or design. It renders classification somewhat arbitrary. To recall the remark of a former ICTY-judge mentioned at the outset of this chapter: “The conflict between civil and common law is overstated”.⁵⁰⁶

4.5.3. Finding or Justification

Legal jurisprudence distinguishes between methods of interpretation that are directed at the ‘finding’ of the law (*Rechtsfindung*) and those that are directed at the justification of the law (*Rechtsbegründung*).⁵⁰⁷ In more concrete terms, it is said that lawyers, especially judges, justify their decisions to the outside in order to appear to comply with the rule of law, but actually find (that is, reach) those decisions in another way, namely intuitively, instinctively, based on their sense of justice or on common

⁵⁰² *Ibid.*, p. 49.

⁵⁰³ Wolfgang Alschner and Damien Charlotin, “The Growing Complexity of the International Court of Justice’s Self-Citation Network”, in *European Journal of International Law*, vol. 29, 2018, p. 106 (“Adversarial common law systems rely heavily on the argumentative use of precedent, while inquisitorial civil law systems tend to use precedent more formalistically. International courts are an amalgamation of these traditions and can be placed somewhere in between argumentative and ritualistic extremes” (footnote omitted)). Samuel clarifies: “There is a temptation to view the notion of precedent as being as old as the common law itself. This is misleading because up until the 16th century the most important decisions were taken, in the common law courts, by the jury, who did not give reasons for their verdicts”, see Geoffrey Samuel, *A Short Introduction to Judging and to Legal Reasoning*, Edward Elgar, Cheltenham, Northampton, 2016, p. 26.

⁵⁰⁴ It should be emphasised, though, that an uncritical demand for coherence leads – according to Schlag – to certain “side effects”, see Schlag, 1988, p. 959, see above note 267.

⁵⁰⁵ Lee, 2019, p. 39, see above note 352.

⁵⁰⁶ See above note 15 and text thereto.

⁵⁰⁷ However, see Scott J. Shapiro, *Legality*, The Belknap Press of Harvard University Press, Cambridge and London, 2011, p. 248: “The object of legal reasoning is the discovery of the law”.

sense.⁵⁰⁸ Accordingly, the justification of a decision has merely a secondary function, since it rationalises *a posteriori* a by itself irrational decision and, at its highest, performs a control function.⁵⁰⁹ Ideally, the judge's justification of a decision constitutes a logically flawless conclusion.⁵¹⁰ According to Popper, methods of interpretation can only be directed at the justification of a decision, but never at its finding.⁵¹¹ This differentiation between a finding and the justification of a decision has several shortcomings.⁵¹² The greatest danger that may be caused by the artificial separation of a legal finding and legal justification are so-called pseudo-justifications (*Scheinbegründungen*).⁵¹³

I would not like to delve deeper into the discussion of whether justification for and the legal finding of a decision can in fact be separated.⁵¹⁴ The answer to this question largely depends on whether the judge seeks

⁵⁰⁸ See for example, Hermann Isay, *Rechtsnorm und Entscheidung*, Verlag Franz Vahlen, Berlin, 1929, pp. 56 ff.; Kargl, 2019, mn. 661, see above note 257: “[D]ie Wirklichkeit richterlicher Tätigkeit [beruht] zu einem guten Teil auch auf pragmatischen Handlungsmustern, die nicht nur auf der Ebene der Begründung der Entscheidung, sondern bereits im Zeitpunkt der Rechtsfindung wirksam sind“; about the justification of decisions, especially of factual determinations and value judgements, see Ingeborg Puppe, “Feststellen, zuschreiben, werten: semantische Überlegungen zur Begründung von Strafurteilen und deren revisionsrechtlicher Überprüfbarkeit”, in *Neue Zeitschrift für Strafrecht*, 2012, 409–414.

⁵⁰⁹ See, for example, Isay, 1929, pp. 177 ff., see above note 508.

⁵¹⁰ Puppe, 2012, p. 410, see above note 508. Puppe believes that the requirements imposed on the judge's justification differ with respect to factual judgements on the one hand and value judgements on the other hand: while a factual decision can be wrong or correct and is justified by giving evidence of that decision, a value judgement can be plausible or implausible and is justified by convincing another person of the judgement's accuracy: *ibid.*, p. 413.

⁵¹¹ See Karl Popper, *Logik der Forschung*, eleventh edition, Mohr Siebeck, Tübingen, 2005, pp. 7–8.

⁵¹² See Engisch, 2010, pp. 92 ff., see above note 327.

⁵¹³ See generally Fritz Brecher, “Scheinbegründungen und Methodenehrlichkeit im Zivilrecht”, in Eduard Bötticher (ed.), *Festschrift für Arthur Nikisch*, Mohr, Tübingen, 1958, pp. 227–247; Wilhelm A. Scheuerle, “Finale Subsumtionen - Studien über Tricks und Schleichwege in der Rechtsanwendung”, in *Archiv für die Civilistische Praxis*, 1967, vol. 167, p. 305; Martin Kriele, *Theorie der Rechtsgewinnung – entwickelt am Problem der Verfassungsinterpretation*, second edition, Duncker & Humblot, Berlin, 1976, pp. 218 ff.; Heinze, 2014, pp. 175–176, see above note 23.

⁵¹⁴ In favour of a separation see, for example, Josef Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung*, second edition, Athenäum-Verlag, Frankfurt, 1970, pp. 132 ff., 175 ff. Against a separation see Engisch, 2010, pp. 92 ff., see above note 327. See also Karl Larenz and Claus-Wilhelm Canaris, *Methodenlehre der Rechtswissenschaft*, third edition, Springer, Berlin *et al.*, 1995, pp. 210–211.

the “right answer”” or only the “correct answer”.⁵¹⁵ In his article “A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment”,⁵¹⁶ Damaška explained that there was a reversible relationship between the nature of a legal system and patterns of legal education: “The Continental will seek the right solution; his counterpart will display a liberal agnosticism about ‘right’ answers, coupled with a procedural outlook. He will be primarily concerned about good arguments for a case”.⁵¹⁷ This is why Weber denied the common law the rationality of finding a legal decision, and stated that the English finding of justice cannot be qualified as “applying the law”, as the civil law does via logic.⁵¹⁸

In a somewhat deconstructionist reading, it might well render attempts to solve the right answer or correct answer conundrum fruitless, if an author disregards his or her own legal background. Bix was aware of that, when he remarked:

[M]y examples are all drawn from the American legal system, and I do not presume that they exemplify any (necessary or essential) aspect of all legal systems. I see no reason to believe that [...] the dynamics within the structure (the criteria of evaluation used within the system that sometimes allow one to speak of there being more than one correct – or ‘acceptable’ – answer to a legal question) are present in all other, or even most other, legal systems. [...] It is conceivable that someone could put forward an argument that systems which condone strong discretion by their decision makers, or that are structured in such a way that there are *not* always unique correct answers to legal problems, are not ‘really’ *legal systems* (or not legal systems ‘in the fullest sense of the term’).⁵¹⁹

As a result, according to Whitman, Hart and Dworkin “have limited themselves to the Anglo-American tradition they know”.⁵²⁰ However, this

⁵¹⁵ In a similar vein, see Engisch, 2010, p. 95, see above note 327.

⁵¹⁶ Mirjan Damaška, “A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment”, in *University of Pennsylvania Law Review*, 1968, vol. 116, pp. 1363–78.

⁵¹⁷ *Ibid.*, p. 1375.

⁵¹⁸ Weber, 1985, p. 510, see above note 487. See also Petersen, 2020, p. 47, see above note 393.

⁵¹⁹ Brian H. Bix, *Law, Language and Legal Determinacy*, Clarendon Press, Oxford and New York, 1993, p. 95.

⁵²⁰ Whitman, 2008, p. 371, see above note 412.

does not change the fact that the approach to that question is indeed dependent on the legal tradition. ‘Approach’ in this regard means that the question is not whether there *are* right or correct answers. The way to ensure certainty, consistency and predictability would be to create a legal system in which there are unique correct answers to all legal questions.⁵²¹ However, even authors from a civil law tradition have labelled this as rather naive.⁵²² Instead, the question is whether to *seek* right answers. As Whitman puts it:

The Continental systems tend to seek answers that are not only *correct* but also *definitive*. They tend to treat the rule of law as requiring that all legal officials will generally produce the same answer to any given question. Other legal traditions, including the American, tend to devote themselves to the search for *correct* answers in a way that largely excludes the possibility that those answers could be *definitive*.⁵²³

This difference is not a mere theoretical one, but has large practical implications: it makes assertions about the extent of judicial authority,⁵²⁴ the “grammar of law”⁵²⁵ or structural concepts, respectively;⁵²⁶ predicta-

⁵²¹ Cf. *ibid.*, p. 374.

⁵²² *Ibid.*, p. 377.

⁵²³ *Ibid.*, p. 371. See also Reinhard Zimmermann, “Civil Code or Civil Law – Towards a New European Private Law”, in *Syracuse Journal of International Law & Commerce*, 1994, vol. 20, p. 218:

This way of ‘Europeanizing’ our private law has been highly unsatisfactory so far. We are dealing with no more than fragments of uniform law, inserted rather inorganically, and in a ‘higgledy-piggledy’ fashion, into the various national legal systems. Rather than having gained in coherence, rationality, and predictability, the law has tended to become disjointed. Its application has not been streamlined, but has, instead, acquired a new dimension of complexity.

⁵²⁴ Whitman, 2008, p. 378, see above note 412:

Anglo-American philosophers give the impression of being far less concerned with the dangers of judicial authority. For Continentals, especially but not exclusively the French, the problem of right answers has always been, at base, the problem of limiting the scope of judicial decision-making authority. The Continental tradition presupposes a kind of sharp tension between rule of law and rule of men. Correspondingly, for Continentals, any maximalist understanding of judicial discretion smacks of philosophical radicalism. Anglo-American philosophers, by contrast, are generally relatively untroubled by judicial authority.

⁵²⁵ Damaška, 1968, p. 1365, see above note 516.

⁵²⁶ Whitman, 2008, pp. 371, 380, see above note 412 (“Indeed, Americans were ‘sceptical at best of the usefulness of the curious conceptual structure[s]’ of the Continent. Instead, they

bility;⁵²⁷ certainty;⁵²⁸ and the manner of decision-making.⁵²⁹ What has already been mentioned by describing the different modes of thought of common and civil lawyers,⁵³⁰ now has a reciprocal dimension: the *classification* of the criminal process before the ICC depends on the identification of certain inherent elements such as the search for the right or correct answer, the manner of decision-making, and the commitment to certainty, predictability and consistency. The identification of these elements, in turn, depend on the classification of the system. In other words, while in domestic legal systems the method of legal thinking is rather fixed (because it is influenced by a legal tradition that has evolved over centuries and shaped the minds of the individuals), at the ICC, the method of legal thinking must be determined first (because a legal tradition has not grown over centuries but must be created). England, for instance, faces great difficulties under the Human Rights Act 1998, as English criminal law must now deal with Continental concepts of “legality” and “certainty” that have no place in its jurisprudence.⁵³¹ Furthermore, recall the quote of Merryman: “Thus, the desire for certainty is an argument in favor of *stare deci-*

devoted themselves to an argumentative mode, seeking the ‘best arguments’ for a given case. And panoramic views were nowhere to be found”).

⁵²⁷ Kagan, 2003, p. 110, see above note 18:

In all legal systems most civil cases are settled before trial, as the litigants, advised by their lawyers, come to recognize what their chances would be in court. The cases that go to adjudication are likely to be those in which litigants can’t agree on the likely outcome. Hence in all countries the cases that reach adjudication involve a relatively large amount of legal uncertainty. Yet, it appears that legal unpredictability in the civil justice systems of the United States [...] is greater than in many other economically advanced democracies.

⁵²⁸ According to Whitman, 2008, pp. 371, 382, see above note 412, Europeans are “far more committed than Americans to minimising uncertainty to the extent possible”.

⁵²⁹ *Ibid.*, p. 385:

The American common law often looks a caricature of the common law tradition, and this is also true of our jurisprudence. American courts take the case-law approach utterly seriously: We are trained to decide the case before us using the most minimal possible jurisprudential means. [...] The consequence of this American minimalism is that courts scrupulously avoid exploring all the issues presented by any particular area of law. Indeed, it is common for our Supreme Court to ‘reserve’ questions – that is, to refuse expressly to decide important questions raised by the case before the Court.

⁵³⁰ See above Section 4.2.1.

⁵³¹ According to Whitman, 2008, pp. 371, 387, see above note 412.

sis in the common law tradition, whereas it is an argument against *stare decisis* in the civil law tradition”.⁵³²

4.6. Conclusion

In sum, the systematisation of ICC procedure (using Damaška’s models) not only specifies a contextual interpretation of certain procedural rules, but also determines whether it is permissible to interpret the rules differently, depending on which Chamber deals with them. Indeed, should the result be that such inconsistency is permissible, the implications a systematisation will have on a contextual interpretation lose their practical relevance. However, anything other than accepting those consequences would create the spirit of bias that inhabits the many quotes and decisions I have previously labelled as misleading taxonomies. It thus goes without saying that this chapter – and this cannot be emphasised enough – is not, or at least not only, a platform to highlight the superiority of Damaška’s procedural models in providing a *Rechtsdogmatik* for the ICC process; it is first and foremost a reminder of what international criminal scholarship is about: candor and transparency. It might be unwise to close with a general critique of the state of international criminal (procedure) scholarship – even though the chapter started with the same. This is a topic for another chapter. Yet, when terms such as ‘common law’ and ‘civil law’ or ‘inquisitorial’ and ‘adversarial’ are used, the author must show transparency as to its assigned meaning and as to its own role. Let us call it definitional transparency and role transparency. The lack of the former may lead to a bad argument, since it questions the validity of the premise.⁵³³ Without both, every attempt at classifying the ICC process by using terms such as ‘common law’ or ‘civil law’ is done as an end in itself, without any communicative value and superior goal. It is nothing more than a deconstructionist endeavour and might as well end there, given that anyone reading the words ‘common law’ and ‘civil law’ inevitably brings their “own underlying implicit assumptions to the interpretive process” and controls the meaning of those words.⁵³⁴ As popular as this indeterminist and almost

⁵³² Merryman and Pérez-Perdomo, 2019, p. 49, see above note 41.

⁵³³ See above note 268.

⁵³⁴ Peter C. Schanck, “The Only Game in Town: An Introduction to Interpretive Theory, Statutory Construction, and Legislative Histories”, in *University of Kansas Law Review* (1988-1990), vol. 38, p. 815, 825; Stanley Fish, *Doing What Comes Naturally*, Duke University Press, Durham, 1989/1995, pp. 42-44; Jonathan Culler, *Dekonstruktion*, Rowohlt, Reinbek bei Hamburg, 1988, pp. 36 *et seq.*, 81-86.

nihilist⁵³⁵ view may be in postmodernist times,⁵³⁶ when words themselves no longer signify any kind of objective reality, it defeats the purpose of international criminal discourse. Surely, especially on the international level words can hardly carry the claim of objectivity or even universality like Plato’s *universalia ante rem*.⁵³⁷ Subjectivity is a given in the pluralistic regime of international criminal justice.⁵³⁸ where decision makers from different backgrounds and legal traditions decide hard cases. Yet, the terms used should at least be made sufficiently transparent to be fully grasped by the recipient of the communication.⁵³⁹ As it has been emphasised throughout the paper, the transparency includes a) good and patient research to avoid missing how an argument is undermined “by an entire area of thought that the author ignores”,⁵⁴⁰ and to avoid emphasising the differences rather than similarities; b) an appreciation of other opinions and views; and c) a disclosure of methodology. Especially the emphasis of differences creates the temptation of using ‘Common Law’ and ‘Civil Law’ as false alternatives, as I called it, and thus using those categories for a strawman argument.

This transparency does of course not require extensive terminological elaborations – after all, time and space constraints are reign over any kind of discourse outcome. It is sufficient to consider the envisaged “interpretive community”, a concept that postmodernist literary criticism that Stanley Fish promoted⁵⁴¹ - drawing on Peirce⁵⁴² and deviating from earli-

⁵³⁵ Paul D. Carrington, “Of Law and the River”, in *Journal of Legal Education*, 1984, vol. 34, pp. 222, 227 *et seq.*; Owen M. Fiss, “The Death of the Law?”, in *Cornell Law Review*, 1986, vol. 72, p. 1, 10; Schanck, 1988-1990, p. 825, see above note 534.

⁵³⁶ About post-modernism and comparative law Basil S. Markesinis, *Comparative Law in the Courtroom and Classroom*, Hart, Oxford, Portland, Oregon, 2003, pp. 51 *et seq.*

⁵³⁷ Felix Ekardt and Cornelia Richter, “Ockham, Hobbes und die Geburt der säkularen Normativität“, in *Archiv für Rechts- und Sozialphilosophie*, 2006, pp. 552 *et seq.*

⁵³⁸ About pluralism of the international political system in general Alec Stone Sweet, “Constitutionalism, Legal Pluralism, and International Regimes”, *Indiana Journal of Global Legal Studies*, 2009, vol. 16, pp. 621, 632 *et seq.*; Jean L. Cohen, “Constitutionalism beyond the State: Myth or Necessity? (A Pluralist Approach)”, *Humanity*, 2011, pp. 127, 128-129.

⁵³⁹ Paul Horwitz, “Institutional Pluralism and the (Hoped-for) Effects of Candor and Integrity in Legal Scholarship”, in *Marquette Law Review*, 2018, vol. 101, p. 925, 937.

⁵⁴⁰ Francis, 2018, p. 1035, see above note 205.

⁵⁴¹ Fish, 1989/1995, pp. 25, 69, see above note 534; Stanley Fish, *Is there a text in this class*, Harvard University Press, Cambridge, Mass., 1980, pp. 14-15.

⁵⁴² Charles Sanders Peirce, *Peirce on Signs: Writings on Semiotic*, edited by James Hoopes, University of North Carolina Press, Chapel Hill, 1991.

er deconstructionist views. *In concreto*, both decision makers and scholars are part of a certain (ideal type)⁵⁴³ community of interpreters that curtails their subjective interpretations – as part of a cultural context⁵⁴⁴ – and even obliges them to interpret legal terms in a certain way.⁵⁴⁵ Thus, as done in this chapter, the search for the meaning of ‘common law’ and ‘civil law’ must start with a linguistic and cultural understanding of these words to discover their *Realdefinition*.⁵⁴⁶ To determine the interpretive community,⁵⁴⁷ the author must demonstrate role transparency: The requirements to definitional transparency are dependent on the author’s role (that, in turn, determines the interpretive community). Concretely speaking, the extent an author is obliged to define terms such as ‘common law’ and ‘civil law’ is derived from the author’s role as judge, attorney, academic, activist,

⁵⁴³ William S. Blatt, “Interpretive Communities: The Missing Element in Statutory Interpretation”, *Northwestern University Law Review*, 2001, vol. 95, p. 629, 641.

⁵⁴⁴ Blatt, 2001, p. 664, see above note 543.

⁵⁴⁵ Fish, 1989/1995, pp. 25 *et seq.*, see above note 534; Stanley Fish, *Is there a text in this class*, Harvard University Press, Cambridge, Mass., 1980, pp. 14-15; Vera Willems, “International Courts and Tribunals and Their Linguistic Practices: A Communities of Practice Approach”, in *International Journal for the Semiotics of Law*, 2017, vol. 30, p. 181, 183.

⁵⁴⁶ Cf. Peter C. Schanck, “Understanding Postmodern Thought and its Implications for Statutory Interpretation”, in *South California Law Review*, 1991-1992, vol. 65, p. 2505, 2590.

⁵⁴⁷ There is a small but growing body of literature on *epistemic* communities in International (Criminal) Law, also known as the “invisible college” of international lawyers, see Claus Kress, “Towards a Truly Universal Invisible College of International Criminal Lawyers”, *FICHL Occasional Paper Series No. 4* (2014); Hugh Thirlway, *The Sources of International Law*, second edition, Oxford University Press, Oxford, 2019, p. 146; Mikkel Jarle Christensen, “The Judiciary of International Criminal Law”, in *Journal of International Criminal Justice*, 2019, vol. 17, p. 537, 540; Nora Stappert, “A New Influence of Legal Scholars? The Use of Academic Writings at International Criminal Courts and Tribunals”, in *Leiden Journal of International Law*, 2018, vol. 31, p. 963, 966. A critical account is provided by Anthea Roberts, *Is International Law International?*, Oxford University Press, New York, 2017, pp. 6 *et seq.* and reviews by ZHU Lu in *Chinese Journal of International Law*, 2019, vol. 18, pp. 1009–1012 and Andrea Leiter in *Melbourne Journal of International Law*, 2018, vol. 19, pp. 413–422; Gleider Hernández, “E Pluribus Unum? A Divisible College?: Reflections on the International Legal Profession”, in *European Journal of International Law*, 2018, vol. 29, pp. 1003–1022. From a gender-based perspective: Nienke Grossman, “Shattering the Glass Ceiling in International Adjudication”, in *Virginia Journal of International Law*, 2017, vol. 56, pp. 340–406. Specifically tailored to the ICC, Nerlich introduces – borrowing from the US Supreme Court – the term ‘audience’, which seems to be a broader concept of ‘interpretive community’, see Volker Nerlich, “Audiences of the International Criminal Court”, in *International Criminal Law Review*, 2019, vol. 19, pp. 1046–1056. Yet, Nerlich’s approach lacks an engagement with existing concepts (such as epistemic and interpretive communities).

citizen etc. – and not only from the discourse’s platform. That means – and here the chapter ends with a more or less subtle critique after all – that the requirements of candour and transparency are not only determined by the expected audience and thus the format of the publication as op-ed, tweet, article, book or judgment, but also by the role of the author.⁵⁴⁸

⁵⁴⁸ See the detailed and instructive critiques by Horwitz, 2018, pp. 925 et seq., see above note 539 and Franz Josef Lindner, *Rechtswissenschaft als Metaphysik*, Mohr Siebeck, Tübingen, 2017, pp. 11 *et seq.*

The Poles of Power in the Field of International Criminal Justice

Mikkel Jarle Christensen *

5.1. Introduction

This chapter maps and investigates the main forms of power developed and active in the field of international criminal justice. Inspired by the sociology of Pierre Bourdieu, and building on previous studies of the field of international criminal justice, the chapter contributes a conceptual framework for studying the poles at which different forms of power are accumulated and exercised by agents in this field of law. Together, these poles form a larger constellation that structures access to and deployment of power in the field.

The 1990s opened a window for political and legal investments into international courts¹ and saw the emergence of the field of international criminal justice.² Linked to a wider ‘justice cascade’³ in which human rights norms coalesced around the prosecution of suspected perpetrators, this field of law and justice was to a certain extent organised around the creation of new courts that targeted what became known as the core international crimes:⁴ genocide, crimes against humanity, war crimes and (po-

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¹ Karen J. Alter, *The New Terrain of International Law: Courts, Politics, Rights*, Princeton University Press, Princeton, New Jersey, 2014, pp. 142–160.

² John Hagan and Ron Levi, “Crimes of War and the Force of Law”, in *Social Forces*, 2005, vol. 83, no. 4, pp. 1499–1534.

³ Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*, W.W. Norton & Co., New York, 2011.

⁴ Paola Gaeta, “War Crimes and Other International ‘Core’ Crimes”, in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Armed Conflict*, Oxford University Press, Oxford, 2014.

tentially) the crime of aggression. While the international crimes were at the centre of the self-perception and symbolism of this new field of law,⁵ different legal and institutional formats characterised the courts and tribunals in this space. Wider political power balances were activated in the negotiation of the courts' statutes and the practical implementation of their mandates. As a result of such dynamics, the field included tribunals set up by the UN Security Council (the International Criminal Tribunals for the former Yugoslavia); internationalised and hybrid courts⁶ in which the balance between national and international preferences varies (the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the East African Court of Justice, the Kosovo Relocated Specialist Judicial Institution and the Special Tribunal for Lebanon); as well as the permanent International Criminal Court ('ICC') set up by an international treaty.

The contention to define the legal and institutional contours of these new courts, often a push and pull between national and international interests, lays bare how political power shaped legal frameworks and the authority of law in this field.⁷ However, while the potential conflict between politics and law, reflected for instance in the peace–justice debate,⁸ has been the subject of intense academic interest, the social and professional power battles that characterise the daily workings of the field of international criminal justice remain less studied. The internal power dynamics reflected in the practices of the field itself are important because they shape the field's ability to create legal results, as well as its production of narratives and symbolic patterns, exemplified in the idea of ending impunity. While internal power battles may seem pedestrian when compared to

⁵ Immi Tallgren, "The Sensibility and Sense of International Criminal Law", in *European Journal of International Law*, 2002, vol. 13, no. 3, pp. 561–595.

⁶ Sarah Williams, *Hybrid and Internationalised Criminal Tribunals, Selected Jurisdictional Issues*, Hart Publishing, London, 2012; Astrid Kjeldgaard-Pedersen, "What Defines an International Criminal Court?: A Critical Assessment of 'the Involvement of the International Community' as a Deciding Factor", in *Leiden Journal of International Law*, 2015, vol. 28, no. 1, pp. 113–131.

⁷ Karen J. Alter, Laurence R. Helfer and Mikael R. Madsen, "How Context Shapes the Authority of International Courts", in *Law and Contemporary Problems*, 2016, vol. 79, no. 1, pp. 1–36.

⁸ Mark Kersten, *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace*, Oxford University Press, Oxford, 2016; Line Engbo Gissel, *Judicialising Peace, the International Criminal Court's Impact on Political Settlements in Kenya and Uganda*, Politica, Aarhus, 2014.

geopolitics, they are in fact deeply connected to larger diplomatic processes. Agents active in this field are called upon as part of political negotiations of new courts and often press directly for institutionalisation of the norms they champion. The perceived political value of international criminal justice as a governance tool is promoted by agents from this field. This power to impact politics is not distributed evenly. Agents who can play the political game are often those who have access to power within the field as well.

This chapter will develop a framework of analysis that aims to capture how power is organised in international criminal justice, how it affects this field of law, and what its wider impact may be. The chapter will proceed in four sections. The first will lay out the status quo with a focus on how power has been conceived (implicitly and explicitly) in the research literature. This section also outlines the contours of the theoretical framework developed in this chapter. The second section will identify new ways to conceive of power in international criminal justice, building on examples of how specific professional practices are used to craft and leverage influence in this field. The focal point is on what the chapter calls ‘poles of power’. These poles have a dual nature as they mediate access to certain professional positions *and* format the exercise of power to mobilise specific forms of resources and project them towards impacting legal and political developments (broadly understood) in this space. The third section will analyse the relations and overlaps between the different poles of power and how they shape distinct practices and the contest to define international criminal justice. This section will also situate these forms of power in a larger geopolitical space to identify the broader potential impact of the study. The fourth section concludes and points to further possible studies of power in the field of international criminal justice.

5.2. Perspectives on Power in International Criminal Justice

Implicitly or explicitly, concepts of power have played a significant role in scholarship on international criminal justice, most of which has taken the courts as their starting point and naturalised them as the centres of gravity in the field itself. Focusing on their (sometimes implicit) perception of power, the literature on international criminal justice can be divided into three different clusters. The clusters have their own internal dynamics of opposition that also shape their relation to each other. The three clusters identified here – formalist, realist and relational perspectives –

gravitate towards specific disciplines and audiences (law, political science and social science respectively) but are also related through cross-references between perspectives and disciplines.

Formalist perspectives on power have focused on the legal mandate of the international criminal courts and how it may affect their practices.⁹ While often only implicitly dealing with power, formalist scholarship builds on a functionalistic idea that legal frameworks might affect the state of play in the fight against international crimes. This functionalism, however, is not necessarily naïve, but recognises the political context of international criminal law and presumes a link between the former and the latter's slow development.¹⁰ As such, most formalist scholarship maintains a prescriptive perspective and is often normatively engaged in pushing for the progress of international criminal law. It endorses specific legal standpoints and has thus played a central role in crafting this discipline.¹¹ The productive role of scholars in systematising international criminal law and critically testing out its concepts and doctrines is mirrored in their professional positions. Many of these scholars had a close professional relationship to the courts in which some had worked or were still associated as defence counsel or in different expert capacities.¹² While rarely conceptualised explicitly, power in this perspective is linked to the potential effects of the law that follows from its functions and, ultimately, the authority vested in the courts by their political creators.

In contrast to formalist perspectives, realist scholarship has focused more explicitly on power. Mainly rooted in political science, realist per-

⁹ Antonio Cassese, *International Criminal Law*, Oxford University Press, Oxford, 2008, p. 455; M. Cherif Bassiouni, *Introduction to International Criminal Law*, Martinus Nijhoff, Leiden, 2013; William A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2011; Carsten Stahn (ed.), *Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015.

¹⁰ Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge University Press, New York, 2005, p. 360; Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction*, Oxford University Press, Oxford, 2008; Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, Oxford University Press, Oxford, 2011.

¹¹ M. Cherif Bassiouni and Ved P. Nanda, *A Treatise on International Criminal Law*, vol. 2, Thomas, Springfield, Illinois, 1973; Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, Oxford, 2013.

¹² Mikkel Jarle Christensen, "Preaching, Practicing and Publishing International Criminal Justice: Academic Expertise and the Development of an International Field of Law", in *International Criminal Law Review*, 2016, vol. 17, no. 2, pp. 239–258.

spectives are also at play in the works of more critical legal scholarship as they situate the courts in a larger political setting.¹³ Focused on *realpolitik* rather than legal form and content, this scholarship takes the power balances between States as its starting point and has criticised more functionalist (sometimes seen as utopian) thinking on this basis. In a similar vein, realist perspectives have been used to track the diplomatic power struggles behind the formation of different international criminal courts¹⁴ as well as (mixing realist and constructivist insights) to investigate how politics affect the operations of these institutions once they have been created.¹⁵ In this perspective, the space in which the law functions is defined to a large extent by the power of politics. International criminal justice becomes a reflection of geopolitics rather than an autonomous force of law.

Building on the theories and methods of both political and social sciences, the relational perspective conceives of power as divided between specific actors in the larger field in which law and politics sometimes conflict. Delving into how the battles between the two have played out, political scientists have highlighted, for instance, how non-governmental organisations ('NGOs') have affected norm- and institution-building in this field.¹⁶ As such, this perspective takes a more fine-grained perspective on power, analysing how local power battles can also affect who sits at the political table. Similar ideas have also given rise to perspectives that highlight unequal access to power in international law-making as well as in the power disparities between international justice initiatives and a plurality

¹³ Frédéric Mégret, "International Criminal Justice: A Critical Research Agenda", in Christine Schwöbel (ed.), *Critical Approaches to International Criminal Law: An Introduction*, Routledge, London, 2014, pp. 17–53.

¹⁴ Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, Princeton University Press, Princeton, New Jersey, 2000; David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics*, Oxford University Press, Oxford, 2014; Steven C. Roach, *Governance, Order, and the International Criminal Court, between Realpolitik and a Cosmopolitan Court*, Oxford University Press, Oxford, 2009.

¹⁵ Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation*, Cambridge University Press, Cambridge, 2008; Adam Branch, *Displacing Human Rights: War and Intervention in Northern Uganda*, Oxford University Press, Oxford, 2011.

¹⁶ Sikkink, 2011, see *supra* note 3; Marlies Glasius, *The International Criminal Court: A Global Civil Society Achievement*, Routledge, New York, 2006.

of locally embedded perceptions of justice.¹⁷ Sociologists have analysed how power relations structure international criminal justice, focusing on specific elite agents¹⁸ as well as how stakeholders interact with the courts.¹⁹ From a more theoretical perspective, critical legal scholars have analysed how the ideals of this field of law are sometimes in internal conflict or develop a strained relationship with some of its practices.²⁰ Whereas this literature, in different ways, contributes knowledge on how the relations between agents affect the dynamics of power in the field of international criminal justice, it has not systematically investigated the different constellations of power that structure this space.

To contribute a systematic perspective on the forms of power that play out in and structure the field of international criminal justice, the chapter builds on Max Weber's definition of power as the ability to actualise one's will despite the resistance of others.²¹ Of course, the contest to move into a position in society where one can exercise such power (both material and symbolic) must also be studied to make sense of the accumulation, distribution and balance of power in a given social space. To understand how and why some agents accumulate power over others, for instance by being able to move into specific positions, the analysis is also

¹⁷ Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenges of Legal Pluralism in Sub-Saharan Africa*, Cambridge University Press, Cambridge, 2009.

¹⁸ John Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal*, University of Chicago Press, Chicago, 2003; John Hagan, Ron Levi and Gabrielle Ferrales, "Swaying the Hand of Justice: The Internal and External Dynamics of Regime Change at the International Criminal Tribunal for the Former Yugoslavia", in *Law & Social Inquiry*, 2006, vol. 31, no. 3, pp. 585–616; Sara Dezalay, "Weakness as Routine in the Operations of the International Criminal Court", in *International Criminal Law Review*, 2016, vol. 17, no. 2, pp. 281–301; Mikkel Jarle Christensen, "From Symbolic Surge to Closing Courts: The Transformation of International Criminal Justice and Its Professional Practices", in *International Journal of Law, Crime and Justice*, 2015, vol. 34, no. 4, pp. 609–625.

¹⁹ Gerhard Anders, "Contesting Expertise: Anthropologists at the Special Court for Sierra Leone", in *Journal of the Royal Anthropological Institute*, 2014, vol. 20, no. 3, pp. 426–444; Nigel Eltringham, "'We Are Not a Truth Commission': Fragmented Narratives and the Historical Record at the International Criminal Tribunal for Rwanda", in *Journal of Genocide Research*, 2009, vol. 11, no. 1, pp. 55–79.

²⁰ Mégret, 2014, see *supra* note 13.

²¹ Max Weber, "Class, Status, Party", in Max Weber, Hans Heinrich Gerth and C. Wright Mills, *From Max Weber: Essays in Sociology*, Routledge, London, 2007, p. 180.

inspired by the sociology of Pierre Bourdieu.²² Using his conceptual tool of a ‘field’ understood as a social space defined by the power relations between its agents and positions, the chapter maps and investigates the distribution of power in international criminal justice. By analysing the agents active in this field and the competing claims for prestige, authority and impact embedded in their practices, the chapter will identify the different poles of professional power that structure this field.

The concept of poles of power is developed from Bourdieu’s analysis of French academia. Here, he refers to two types of academic power. One is located at the society pole, where academics build power through engaging with society, for instance, in governmental working groups or consulting as experts in various political processes (prevalent in the disciplines of law and medicine). The other pole is attuned to research where access to power is built through pure scientific engagement (represented mainly by the science and arts faculties that do not have as direct a relation to a particular profession).²³ Having previously been used to analyse academics in international criminal justice,²⁴ the idea of different poles of power will be further developed in the present chapter to capture the main ‘gravitational pulls’ that define how agents craft professional power in this field.

Three polar opposites of power are identified and analysed in relation to specific professional groups, but have effects beyond them. For legal practice, the poles of formalism–activism exert competing gravitational pulls and are linked to distinct types of power, the former often (but not exclusively) linked to institutional positions and the latter often to more heterodox perspectives. For NGO advocacy, the poles of local–international format investments and power relations and are linked to the ways in which advocacy builds (in particular symbolic) power in the field. And finally, with regard to scholarship, the opposite poles of society–science, adopted from Bourdieu, will be used as a conceptual tool. These poles have a dual character: they represent the types of social worth (reflected in symbolic capital) that structures access to specific positions in the field and lay bare the specific form of power accumulated at the vari-

²² Pierre Bourdieu, *Raisons Pratiques: Sur la Théorie de L’action*, Seuil, Paris, 1994, pp. 69–72.

²³ Pierre Bourdieu, *Homo Academicus*, Stanford University Press, Stanford, California, 2000, pp. 73–74.

²⁴ Christensen, 2016, see *supra* note 12.

ous poles from which agents can direct the deployment of specific resources. While the poles are identified in relation to specific professional groups, they exert influence over the field more generally including the ways in which other professionals can accumulate power. As such, the poles form an ideal-typical structure of power that will be analysed in this chapter.

The three polar pairs illustrate how the power to actualise one's will is rarely unchecked or unmitigated, but is opposed by other attempts to exercise power, and the deployment of counter-strategies aimed at reducing the effects of competing forms of dominance. As C. Wright Mills pointed out with regard to US power elites, such groups often built their position on the access to different institutions, in the case he analysed, the bureaucracies of the economy, government and military.²⁵ Through such access, elites exercise power because their decisions affect a large number of people in the bureaucracies and in the society in which these bureaucracies operate. In the field of international criminal justice, the active bureaucracies are composed of the international criminal courts, large NGOs and prestigious universities, institutions that are themselves situated in a larger space of international organisations (such as the UN) and national bureaucracies. Agents in international criminal justice exercise power from these positions to affect the field and its surroundings. However, forms of counter-power can also be built and deployed from other positions, often formulated as criticism of orthodox perspectives built in and around large bureaucracies.

The actualisation of the will of specific agents or social groups often takes the form of implementation of specific choices (for instance, on whom to investigate and prosecute, where to deploy funds, whom to work with on the ground, whom to rely on as experts, and so on) or revolves around the construction of guiding ideas and concepts. These concepts have symbolic power as they give meaning and direction to practices, here conceived as a wide spectrum that covers, for instance, actual legal decisions as well as policy-making. In studying this symbolism, the investigation of the poles of power has similarities with critical legal scholarship in a field seen to be caught between impunity and show trials,²⁶ within its

²⁵ C. Wright Mills, *The Power Elite*, Oxford University Press, New York, 1956.

²⁶ Martti Koskenniemi, "Between Impunity and Show Trials", in *Max Planck Yearbook of United Nations Law Online*, 2002, vol. 6, no. 1, pp. 1–32.

own anxieties²⁷ or inescapable dyads.²⁸ From a sociological perspective, this chapter links these controversies to the position of agents and professionals active in the field. In an analysis of both material and symbolic dominance, the poles of power are abstractions based on specific balances of influence made empirically intelligible through the focus on how specific agents accumulate capital and exercise power. Capital is used here broadly to signify not only financial but also cultural, political and professional forms of expertise.²⁹ In accumulating such capital, individual agents or social groups work within the framework provided by the relational structure of the field itself as it defines access to specific resources, material and symbolic. The access to these resources is often tied to specific positions in the field and their proximity to official or hidden structures of power captured by the polar opposites constructed for this chapter. To study the poles of power, the chapter builds on previous research and about 150 interviews in the field of international criminal justice.

5.3. Professional Poles of Power in the Field of International Criminal Justice

The division of labour in the field of international criminal justice is characterised by specific professional groups, including but not limited to legal professionals, academics and NGO advocates. While other groups are also active in this social space, for instance, forensic experts and other types of specialists working in or around the courts, the three identified groups shape the main professional dynamics and forms of contention in the field.³⁰ They will also be used as the main examples of the professional poles of power in this chapter.

While these three groups play distinct roles in the field, roles that are constantly renegotiated and under transformation, there are also significant overlaps between them. Typical career moves include staff relocating from the courts into NGOs (or *vice versa*), former court staff moving into the UN or other international organisations, as well as professional trajectories that move in and out of the academia. In addition to actual

²⁷ Frédéric Mégret, “The Anxieties of International Criminal Justice”, in *Leiden Journal of International Law*, 2016, vol. 29, no. 1, pp. 197–221.

²⁸ Darryl Robinson, “Inescapable Dyads: Why the International Criminal Court Cannot Win”, in *Leiden Journal of International Law*, 2015, vol. 28, no. 2, pp. 323–347.

²⁹ Bourdieu, 1994, pp. 108–123, see *supra* note at 23.

³⁰ Christensen, 2015, see *supra* note 19.

career moves in which experience from one part of the field is re-invested in other positions, the professional practices of agents in the field are also closely intertwined, for instance, as academics serve as experts in the courts or consult for NGOs or as courts depend on NGOs to get access to witnesses and victims on the ground.

Significantly, there are many co-operative threads running across the field and its different positions. However, convergences of interest often co-exist with competition between these groups, as practitioners, academics and NGOs take different perspectives on important discussions such as which cases the ICC ought to prosecute or how the institution can best spend its resources. In fighting out these battles, these groups mobilise different forms of power inscribed into their position either as institutional or more symbolic resources. These positions, their overlaps, collaborations and contentions, are situated in a wider space of international law and politics. As such, the battles between different stakeholders in the field are also likely to shape the perception of international criminal justice in linked spaces. While there is limited empirical knowledge of how international criminal justice is received by different audiences³¹ or on the relative professional worth of expertise from this field,³² the value of this form of law on a larger market of law and governance is likely to be linked to how other stakeholders perceive its practices. Here, the professionals in the field play a pivotal role as they are the ones who mediate innovations, results and failures to larger audiences through, for instance, NGO reports or academic publications.

5.3.1. The Formalist and Activist Poles

The first pair of power poles are linked to and visible in the practices of legal practitioners. Their work is positioned along an axis that moves from formalist perspectives on the law (often supported by bureaucratic practices) to more activist perspectives aimed at creating new legal tools and ideals.

³¹ Nigel Eltringham, “‘When We Walk out, What Was It All About?’: Views on New Beginnings from within the International Criminal Tribunal for Rwanda”, in *Development and Change*, 2014, vol. 45, no. 3, pp. 543–564; Kamari Clarke, Abel S. Knottnerus and Eefje De Volder (eds.), *Africa and the ICC: Realities and Perceptions*, Cambridge University Press, Cambridge, 2016.

³² Mikkel Jarle Christensen, “The Creation of an Ad Hoc Elite: And the Value of International Criminal Law Expertise on a Global Market”, in Kevin Jon Heller *et al.* (eds.), *The Oxford Handbook of International Criminal Law*, Oxford University Press, Oxford, 2018.

Formalistic perceptions are inscribed in particular into the bureaucracy of the courts. The professional machinery of these institutions is characterised by Chambers in which the Judges and their staff work closely together, the Office of the Prosecutor and the Registry. As famously demonstrated by Max Weber in his analysis of bureaucracy,³³ the formal application of rules and procedures characterises this form of governance. Building on a formalised application of predefined rules, bureaucracy treats all similar cases in the same way and ideally with the same outcome.

The legitimacy of bureaucracies is tied to their formalist application of rules that allows them to exercise institutional and interpretative power.³⁴ This power is not evenly divided between the practitioners of the field. Not all positions give access to ‘speaking the law’ with the same impact and not all professional profiles can access such positions. Judges are often seen as the most important professionals with regard to interpreting the law. The often highly politicised selection of judges and the focus of scholarship on the constitution of the bench³⁵ both reflect the perceived importance of this position. Attention paid to the judges is rivalled only by the focus on the prosecutor, especially in the case of the ICC.³⁶ These positions are characterised by their access to and control over institutional resources. The Prosecutor can direct the resources of her Office towards specific investigations and pursue different prosecutorial strategies, while the President directs the work of the Chambers and its different trials, aid-

³³ Max Weber, “Bureaucracy”, in H.H. Gerth and C. Wright Mills (eds.), *From Max Weber: Essays in Sociology*, Routledge, London, 2007.

³⁴ For a more general discussion of interpretation in international law and its role in the profession, see Ingo Venzke, *How Interpretation Makes International Law, on Semantic Change and Normative Twists*, Oxford University Press, Oxford, 2012; Jean d’Aspremont, André Nollkaemper and Wouter Werner, *International Law as a Profession*, Cambridge University Press, Cambridge, 2017.

³⁵ Hirad Abtahi, Odo Ogwuma, and Rebecca Young, “The Composition of Judicial Benches, Disqualification and Excusal of Judges at the International Criminal Court”, in *Journal of International Criminal Justice*, 2013, vol. 11, no. 2, pp. 379–398; *ibid.*; Ruth Mackenzie *et al.*, *Selecting International Judges: Principle, Process, and Politics*, Oxford University Press, Oxford, 2010; Daniel Terris, Cesare P.R. Romano and Leigh Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World’s Cases*, Oxford University Press, Oxford, 2007.

³⁶ Kevin Jon Heller, “The Role of the International Prosecutor”, in Cesare P.R. Romano, Karen J. Alter, and Chrisanthi Avgerou (eds.), *Oxford Handbook of International Adjudication*, Oxford University Press, Oxford, 2013; Martha Minow, C. Cora True-Frost and Alex Whitning (eds.), *The First Global Prosecutor, Promise and Constraints*, University of Michigan Press, Ann Arbor, Michigan, 2015.

ed by administrative positions such as the Chef de Cabinet and the Head of Chambers. In these positions, judges and the Prosecutor, for instance, can direct both the material resources of their offices (subject to allocation of funds by the Registry) as well as symbolic resources as they speak with a power linked to their offices.

While formalistic interpretative choices have a different force when backed by bureaucratic resources, they are also rivalled by other forms of legal reasoning, sometimes formulated against bureaucracies by agents outside them and sometimes promoted by insiders to create new legal concepts and doctrines (and as such on occasion backed by the resources of the bureaucracy). In a field of law that was characterised by a high degree of uncertainty as little jurisprudence existed before 1993, a multitude of legal questions had to be decided by importing ideas that were not fixed in formalistic and bureaucratic practices. Adopting different interpretative strategies, judges and other practitioners filled voids in terms of the procedure of the courts as well as the legal concepts they used, most importantly perhaps modes of liability.³⁷ This practice served an important function for the nascent field, but also opened up to a criticism of the judicial activism of the international criminal tribunals.³⁸ Judicial activism or creativity, a factor also in many domestic systems, is controversial because it can potentially be at odds (or perceived as such) with the principle of legality, the strict adherence to clearly defined, ascertainable and non-retroactive legal rules and principles,³⁹ a problem that has also been discussed in relation to international crimes.⁴⁰

³⁷ Shane Darcy and Joseph Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals*, Oxford University Press, Oxford, 2010; Steven Powles, “Joint Criminal Enterprise-Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity”, in *Journal of International Criminal Justice*, 2004, vol. 2, no. 2, pp. 606–619.

³⁸ William A. Schabas, “Prosecutorial Discretion v. Judicial Activism at the International Criminal Court”, in *Journal of International Criminal Justice*, 2008, vol. 6, no. 4, pp. 731–761.

³⁹ Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law*, Cambridge University Press, Cambridge, 2009.

⁴⁰ Kai Ambos, “The Crime of Genocide and the Principle of Legality under Article 7 of the European Convention on Human Rights”, in *Human Rights Law Review*, 2017, vol. 17, no. 1, pp. 175–186; Mark Klamberg, “International Criminal Law in Swedish Courts: The Principle of Legality in the Arklöv Case”, in *International Criminal Law Review*, 2009, vol. 9, no. 2, pp. 395–409; Alessandro Bufalini, “The Principle of Legality and the Role of Customary International Law in the Interpretation of the ICC Statute”, in *The Law and Practice of International Courts and Tribunals*, 2015, vol. 14, no. 2, pp. 233–254; Rehan

Nonetheless, *ad hoc* activism was a constituent element in the making of international criminal justice and, as such, the crafting of new concepts that became part of the practice of this field was a way to exercise symbolic power. The forming of new concepts as an active interpretative practice differs from the typical bureaucratic and formalistic deployment of the law because it looks for principles and rules from outside the system, whether in national jurisdictions or other international regimes, if not piecing together new legal concepts at the crossroads of different traditions. The crafting of new concepts has been used to fill holes in existing frameworks as well as to promote new directions and build prestige. For instance, while so far unsuccessful, the Special Tribunal for Lebanon built a new definition of terrorism that has been promoted by some practitioners as a crucial innovation and criticised by others.⁴¹

Outside of the international criminal courts, defence counsel have a different role as they do not have access to the same resources. Since they are not employed by the bureaucracy of these institutions, their position is freer, but also more insecure. Most supplement work in the international criminal courts with more conventional cases in domestic jurisdictions or with criminal cases that involve cross-border activity or co-operation. This flexible position does not give access to material resources, but the proximity to the accused can sometime give access to media exposure that allow these professionals to promote their work to a broader audience and to champion specific perspectives on international criminal justice.

Conceptual activism is a way to build prestige linked to the ability to impact legal developments through legal reasoning as concepts are defined and defended. At the same time, activism can be a double-edged sword if new concepts give rise to significant pushback from other practitioners and scholars. Besides crafting new concepts, modes of liability and legal tools such as sealed indictments, a less conceptually focused form of activism is tied to the association with new doctrines aimed, for instance,

Abeyratne, "Superior Responsibility and the Principle of Legality at the ECCC", in *The George Washington International Law Review*, 2012, vol. 44, no. 1, pp. 39–78.

⁴¹ Matthew Gillett and Matthias Schuster, "Fast-Track Justice: The Special Tribunal for Lebanon Defines Terrorism", in *Journal of International Criminal Justice*, 2011, vol. 9, no. 5, pp. 898–1020; Kai Ambos, "Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law", in *Leiden Journal of International Law*, 2011, vol. 24, no. 3, pp. 655–675.

at prosecuting rape as a war crime⁴² or the formation of new outreach or victim participation schemes.⁴³ In such practices, activism (here broadly defined) is often linked to other practices that transcends the legal realm (narrowly conceived). Such practices are linked to ideas that the international criminal courts ought to do more than just deliver judgments. Working for different agendas linked to the legal mission of the courts, practitioners take part in networks beyond the courts, working, for instance, with NGOs to create new channels of communication to communities affected by international crimes or to further knowledge about the work of the courts. While such activity is sometimes also driven by bureaucracies themselves, such practices can generate criticism that courts are losing sight of their main tasks and have taken a problematic path that discards the formalism through which they ought to work.

5.3.2. The International and Local Poles

The contrast between power built at the international and the local poles is perhaps the clearest in the work of NGO advocacy. Large human rights NGOs with an international profile have played a significant role in the creation of international criminal courts,⁴⁴ and local NGOs work closely with these institutions on the ground.⁴⁵ Their claim to power often lies in their ability to combine the local and the international to represent victims and groups that do not have a voice at the international level. This symbolic role, supported also by resources from the Global North, is built and reproduced, among other activities, through publications that either support or criticise governments and international criminal courts (or both at

⁴² Niamh Hayes, “Creating a Definition of Rape in International Law: The Contribution of the International Criminal Tribunals”, in Darcy and Powderly (eds.), 2010, see *supra* note 41.

⁴³ Mariana Pena and Gaelle Carayon, “Is the ICC Making the Most of Victim Participation?”, in *International Journal of Transitional Justice*, 2013, vol. 7, no. 3, pp. 518–535.

⁴⁴ Glasius, 2006, see *supra* note 17; Michael J. Struett, *The Politics of Establishing the International Criminal Court: NGOs, Agency and Discourse*, Palgrave Macmillan, Basingstoke, 2008.

⁴⁵ Marlies Glasius, “Global Justice Meets Local Civil Society: The International Criminal Court’s Investigation in the Central African Republic”, in *Alternatives: Global, Local, Political*, 2008, vol. 33, no. 4, pp. 413–433; Luc Reyndams, “NGO Justice: African Rights as Pseudo-Prosecutor of the Rwandan Genocide”, in *Human Rights Quarterly*, 2016, vol. 38, no. 3, pp. 547–588; Kjersti Lohne, *Advocates of Humanity: Human Rights NGOs and International Criminal Justice*, FICHL Policy Brief Series No. 77, TOAEP, Brussels, 2017 (<http://www.legal-tools.org/doc/2fd215/>).

the same time) as well as through working with actors on the ground, for instance, after the occurrence of atrocities. In this sense, NGO influence was built at the two opposing poles of the international and the local.

With regard to the latter end of the spectrum, the role of NGOs in the wider field of international criminal justice, and the power they are able to exercise within it, builds on their close contact to local stakeholders and victims. NGOs can often access local environments when States or international criminal courts cannot, and yield bargaining power in this respect as authorities often rely on them for access to witnesses or victims, in some cases to the testimony on which new cases hinge. Local NGOs play an important role in mediating access and collecting evidence, something that is evident, for instance, in the case of Cambodia and the Extraordinary Chambers there, where the Documentation Centre of Cambodia has played a pivotal role in collecting and systematising evidence used for the trial against the former Khmer Rouge leaders.⁴⁶ They have the knowledge of local power dynamics and ability to mobilise witnesses and victims as well as to represent the core groups whose justice international criminal justice sees itself as fighting for. However, while the local power of NGOs is crucial for their role in the field, it also opens for abuse and criticism for being too dependent on local intermediaries, something that has been discussed with regard to international criminal courts in general⁴⁷ and the ICC in particular.⁴⁸

At the other extreme of the spectrum, the transnational character of large NGOs has been used to strengthen their independence and legitimacy through their ability to represent victims all over the world and advocate particular solutions in and around international political processes. In this respect, the international pole gives larger transnational NGOs access to build material power and exercise symbolic power precisely because they function at a distance from local power dynamics and offer an external (and ideally unbiased) perspective on abuses. This is the case, for instance, for Amnesty International or Human Rights Watch, whose position

⁴⁶ Christoph Sperfeldt, "Cambodian Civil Society and the Khmer Rouge Tribunal", in *International Journal of Transitional Justice*, 2012, vol. 6, no. 1, pp. 149–160.

⁴⁷ Nancy Combs *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions*, Cambridge University Press, Cambridge, 2010.

⁴⁸ Leila Ullrich "Beyond the Local-Global Divide: Local Intermediaries, Victims, and the Justice Constellations of the International Criminal Court", in *Journal of International Criminal Justice* vol. 14, no. 3, pp. 543-568.

in the field built on representing victims all over the world and on being able to point to the most egregious abuses, working to redirect global opinion and political action towards the hotspots where it is perceived as being most needed. This ability is predicated on the creation of a large international organisation that has the analytical tools and expertise to produce reports on hotspots all over the world and to relay their criticism to relevant political and legal stakeholders. While they do not wield the same institutional power as other bureaucratic entities, their size and the professionalisation of the type of work they do enable them to direct considerable resources towards specific conflict zones and public relations campaigns.

However, while this position has allowed NGOs to build a strong organisation and networks that gives some access to international politics on the scene of The Hague and New York, it has also been the subject of criticism. Specifically, such organisations have been criticised of their proximity to power interests in the Global North, and several NGOs have pledged to move their headquarters to the Global South where most of the people they represent are situated.⁴⁹ A related criticism highlights that these NGOs have themselves become bureaucratic in parts of their functionality⁵⁰ and that their proximity to governmental bureaucracies leads to a form of isomorphism that transforms their own ways of working.

5.3.3. The Society and Science Poles

The final polar pair of power structures a crucial part of the intellectual space in the field of international criminal law. As scholars have been a constant and structuring presence in international criminal justice, the accumulation of and access to specific forms of academic power play an important role in the larger field. As highlighted elsewhere,⁵¹ the types of intellectual and institutional power accumulated and exercised by scholars are organised in two opposing poles: the society and the science poles. In the field of international criminal justice, the societal pole is closely asso-

⁴⁹ Joanna Moorhead and Joe Sandler Clarke, “Big Ngos Prepare to Move South, but Will It Make a Difference?”, in *The Guardian*, 16 November 2015.

⁵⁰ E.A. Narayana, “Bureaucratization of Non-Governmental Organizations: An Analysis of Employees’ Perceptions and Attitudes”, in *Public Administration and Development*, 1992, vol. 12, no. 2, pp. 123–137; Elżbieta Drażkiewicz-Grodzicka, “‘State Bureaucrats’ and ‘Those NGO People’: Promoting the Idea of Civil Society, Hindering the State”, in *Critique of Anthropology*, 2016, vol. 36, no. 4, pp. 341–362.

⁵¹ Christensen, 2016, see *supra* note 12.

ciated with legal practice and the pole of science to particular parts of legal scholarship linked to other social sciences and to critical theory. For scholars close to the society pole, power is accumulated by producing scholarship of practical value to other stakeholders active in the field, mainly legal practitioners.⁵² The scholarship produced by this invisible college of criminal lawyers⁵³ is mainly of a legal character and aims to contribute concepts and systematisation to the evolving practice of international criminal law. This proximity allows them to remain close to practice and to be accepted and read by its practitioners, sometimes even being quoted in the case law of the courts. At times, being able to jump in and out of the academia to work also for the courts, some of these scholars see scholarship as an activity that caters to practice and use it to position themselves also in the practical space, perhaps moving to become judges in one of its courts at a stage in their career.

On the other pole, legal scholarship is conducted as a critical endeavour used to push back against some of the doctrines and ideologies of international criminal justice. At this pole, prestige and access to power builds on the production of original and critical legal scholarship (its practitioners sometimes referred to as ‘crits’) that highlights the innate fallacies of international criminal justice. While these academics are seen as irritants or obstructions for practitioners, they build power tied to professorships and the ability to define criticism of the courts as well as to educate new generations. In doing so, they import ideas and concepts from other social sciences who usually enter the field via this pole but are often far removed from the practical pole. The opposing poles of society and academia give access to different forms of prestige and power, and some agents build careers in the centre of these extremes, a position that also contains the risk of being seen as irrelevant or even as obstacles to practitioners who work between the poles of formalism and activism and are rarely in the market for criticism.

5.4. Field Effects Across Different Power Poles

The effect of the poles of power throughout the field can be located analytically through the ways in which contention and conflict play out in

⁵² Stahn, 2015, see supra note 9.

⁵³ Claus Kreß, *Towards a Truly Universal Invisible College of International Criminal Lawyers*, FICHL Occasional Paper Series No. 4, TOAEP, 2014, pp. 1–36 (<http://www.legal-tools.org/doc/82bf10/>).

and around the international criminal courts. From these three polar oppositions, influence is exercised in the field and across different professional groups. For instance, whereas the poles of international–local exercise strong gravitational forces over NGO engagement with international criminal justice, the effects of these poles are visible also in legal practitioners and in the battle to define the courts and their relation to the context where crimes were committed. This is visible also in scholarship and debates on, for instance, the goals and potential benefits of hybridity,⁵⁴ often contrasted to more internationalist perceptions of criminal justice.⁵⁵ Generally, the local embeddedness of hybrid solutions was perceived as being able to enhance the effectiveness and legitimacy of international criminal justice,⁵⁶ while international models were posited as reflections of the will of the international society, drawing their power and autonomy from this collective.⁵⁷ The opposition between local and international prestige and power reflected in scholarship is also visible in the practices of establishing criminal courts to deal with core crimes and in making these institutions perform according to plan (or in some cases mediating between conflicting plans). This has been visible in different political negotiations, including in the process leading up the creation of the Extraordinary Chambers in the Courts of Cambodia. In the negotiations the representative for the UN, head of the Office for Legal Affairs, Hans Corell, stood firmly on the value of international standards of justice, and thus on international control with the court, while the Cambodian negotiators insisted on the value of an institution that was dominated by local actors.⁵⁸ The

⁵⁴ Frédéric Mégret, “In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice”, in *Cornell International Law Journal*, 2005, vol. 38, no. 3, pp. 725–751.

⁵⁵ Frédéric Mégret, “The Case against Complementarity”, in Carsten Stahn and Mohamed El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge University Press, Cambridge, 2018.

⁵⁶ Laura A. Dickinson, “The Promise of Hybrid Courts”, in *The American Journal of International Law*, 2003, vol. 97, no. 2, pp. 295–310; Harry Hobbs, “Towards a Principled Justification for the Mixed Composition of Hybrid International Criminal Tribunals”, in *Leiden Journal of International Law*, 2017, vol. 30, no. 1, pp. 177–197.

⁵⁷ Antonio Cassese, “The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice”, in *Leiden Journal of International Law*, 2012, vol. 25, no. 2, pp. 491–501.

⁵⁸ Mikkel Jarle Christensen and Astrid Kjeldgaard-Pedersen, “Competing Perceptions of Hybrid Justice: International v. National in the Extraordinary Chambers of the Court of Cambodia”, in *Journal of International Criminal Justice*, 2018, vol. 18, no. 1, pp. 1–27.

result was a court caught between two extremes based on a complex organisational and operational structure in which the Cambodian government has maintained control with important parts of the proceedings.

Similarly, the society–science poles exert a structuring force on professionals besides academics. NGOs frequently engage in research to support their perspectives on local and international justice. In doing so, they enter into a practice whose methodological baseline is defined to a high degree by academics. While the perspective of NGOs makes them lean towards the society pole, they adhere to standards of research created and policed by academics to craft a legitimate product that manifests their independence from the courts and presumably increases their chance of having impact on political priorities.

Finally, but without exhausting the ways in which the poles affect power in the field, the opposition between formalism and activism also structures the generation of ideas among NGOs and scholars. While these groups are often more activist in their legal perspectives on what international criminal justice ought to do (at least when it comes to academics with clear normative perspectives), to successfully frame legal and political activism, it must be framed in ways that mirror the formalism of the courts in this space. While the NGOs often assert and preserve their independence by making broad statements on what the courts should do, more formalistically adapted ideas can be seen, for instance, when academics write concrete reform proposals that aim to prescribe solutions for problems of crime by folding new articles into the Rome Statute.⁵⁹ Such strategies, clearly attuned to the society pole, are evident in the writing of draft statutes that have often preceded the actual establishment of the courts.⁶⁰ While scholars and NGOs also develop strategies of activism in the sense of devising new concepts and paths for the courts to take, another strategy for successfully planting ideas that can get institutional traction is to situate proposals in the formalistic language of the courts to make it easy to use and implement. This can be done, for instance, by submitting *amicus curiae* briefs in specific cases. However, institutional influence does not

⁵⁹ Steven Freeland, *Addressing the Intentional Destruction of the Environment During Warfare under the Rome Statute of the International Criminal Court*, Intersentia, Cambridge, 2015.

⁶⁰ M. Cherif Bassiouni, *Draft Statute, International Criminal Tribunal*, Association Internationale de Droit Pénal, Pau Cedex, 1992; *Draft Statute for an International Criminal Court* (<http://www.legal-tools.org/doc/17ad09/>).

always seem to be the main goal, NGOs at times preferring to voice more assertive forms of criticism that speak to audiences outside of immediate professionals active in the field, such as funders and stakeholders in human rights to which many of the larger organisations remain linked.

The identified poles exert influence on different sets of practitioners that gravitate towards them as they mediate access to specific forms of prestige and professional opportunities, that allow agents to strengthen their profiles or to legitimise particular ideas, at times backed by institutional resources. This constellation of poles structures the accumulation and exercise of specific forms of material and symbolic power that have effects throughout the field at large. As the poles of power affect stakeholders in the field, they also tie the latter to other social spaces such as the academia, human rights advocacy and legal practice beyond international criminal justice.

5.5. Concluding Remarks

While political power has shaped and continues to affect the field of international criminal justice, its genesis and developments, the forms of power built inside this social space impact debates, forms of contestation, decision-making and innovations. Exerting particular pulls on concrete professional groups, the poles of power mediate access to specific forms of competence and influence, sometimes distancing agents from the form of power located at other poles. This does not entail that all agents become tied at one pole of power, but that they draw their main power and ability to raise resources at specific poles. In particular, elite agents can seemingly jump between poles or craft careers at equidistance between them. At these power equators, careers can be built that grant access to different forms of prestige of influence, but risk taking less secure paths to power that can be seen as illegitimate in their vacillation between opposites.

Developing a new perspective on power in the field of international criminal justice, the chapter identified three oppositional poles that structure access to accumulating and exercising influence and power in this field. This exercise was linked to the ability to direct institutional resources, but also took other more symbolic forms. In their relation to specific professional and institutional practices, formalism–activism, the international–local, and the society–science poles can mediate access to particular symbolic and material forms of power. By directing activities to

wards contentious ideas or practices in the field, power is exercised from and between the poles as part of a competition for resources and prestige. Linked to the perceived social worth and power of these poles, the ideas and practices of this space interact also with the nexus of law and politics as they try to affect the development of both. The deepened perspective on the professionals at the poles of power in the field of international criminal justice demonstrate how power dynamics at play in this interaction are more nuanced than a simple opposition between hard political power and formal (sometimes even soft) law. The interaction between the two as it plays out in the field of international criminal justice must be analysed in relation to the poles of power, how they are situated in relation to each other and how the balances between them changes over time.

PART II:
REPRESENTATIONAL POWER IN
INTERNATIONAL CRIMINAL JUSTICE

The Representational Power of International Criminal Courts

Joachim J. Savelsberg*

With a view to contributing to discussions about the effectiveness of international criminal courts, this chapter suggests that we should pay attention to their representational power: the chance to impress on a global public, even against resistance, an understanding of mass violence as a form of criminal violence. The chapter asks if such power generates memorial normativity and if it has the potential of turning into symbolic power *à la* Bourdieu: a tacit mode of cultural domination unfolding within everyday social habits and belief systems. The contribution draws on sociological theory and on materials from extensive empirical research on responses to the Darfur conflict.

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The data show, first, that international criminal justice institutions and their supporters in civil society are engaged in struggles with forces that promote competing representations, including diplomats who privilege representations that open up spaces for mediation and negotiation, as well as humanitarian organizations advancing narratives that allow for collaboration with the perpetrator State in the interest of the delivery of humanitarian aid. Second, the analyses demonstrate a dominance of international criminal justice representations in media reporting. They prevail over frames of the violence as armed conflict or as a humanitarian emergency, especially after the onset of institutional intervention. Sources of this dominance include control over rituals (ritual power), access to channels of communication (communicative power), and authority derived from procedurally based legitimacy. Third, memories established by judicial representations unfold their own normative force – memorial normativity.

Yet, constraints and impediments to the representational power of international criminal justice also have to be accounted for. First, while authority based on procedure secures autonomy, and thereby the representational output the system produces, its representations are constrained by a specific institutional logic: focus on the role of individual actors rather than structural forces; limiting evidentiary rules; neglect of historical context; and a simplifying binary logic. Second, in international criminal justice, even more than in fully institutionalized domestic criminal justice systems, formal rationality is engaged in a constant struggle with substantive rationalities that are oriented toward practical outcomes. They include, in the case of the International Criminal Court (‘ICC’), the needs to satisfy institutions and States that exert power by controlling funding and the statutory basis of the Court, and to be on good terms with permanent members of the United Nations Security Council (‘UNSC’) on whom the Court partially depends for the referral of cases and for enforcement action. The result of such tension is a treacherous journey between Scylla of formal-rational justice and Charybdis of practical concerns in a highly politicized environment. Finally, international criminal justice depends on the diffusion of its representations through mass media that follow their own rules of the game, some of which are affine to the logic of criminal law, while others induce selectivity. Despite such constraints, theoretical arguments suggest, and empirical data document, the substantial representational power of international criminal courts.

6.1. Introduction

The legal scholar Martha Minow has argued that the particularity of the twentieth century is not the widespread occurrence of mass atrocities.¹ Other centuries are ready to compete for that distinction. Specific to the twentieth century is instead, Minow proposes, the search for interventions, for institutional mechanisms to respond to atrocities in ways that may break cycles of violence. Some recent interventions even challenge the idea of national sovereignty, the solution to an earlier period of massive warfare and bloody atrocities, inscribed in the Westphalian Peace Treaty of 1648 that ended the Thirty Years War.² Institutional responses come in many colours, such as truth commissions, vetting procedures, compensation programs, amnesties and apologies.

They include, prominently, criminal justice responses. Some scholars, most noteworthy Kathryn Sikkink, even see a “justice cascade” and document a substantial increase in individual criminal accountability for grave human rights offences in the late twentieth and early twenty-first centuries.³ Sikkink’s data indeed show a quadrupling of trial activity, at the domestic and international levels, in only two decades from the early 1980s to the beginning of the twenty-first century. While cases tried in foreign courts remain relatively rare, domestic courts are a prominent part of international justice when they apply international humanitarian and human rights laws, often in combination with domestic law. Importantly, domestic courts now operate in the shadow of the ICC. Its mere existence likely encourages domestic enforcement, as countries typically prefer to handle cases in their own justice systems.⁴ Crucial in this context is the doctrine of complementarity that governs the ICC, which can only take up cases if domestic courts are unable or unwilling to do so.

This contribution addresses the effectiveness of international criminal justice, specifically the ICC. Yet, as opposed to traditional deterrence arguments, I focus on the ICC’s representational power and the cultural

¹ Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, Beacon Press, 1998; Martha Minow and Nancy L. Rosenblum, *Breaking the Cycles of Hatred: Memory, Law, and Repair*, Princeton University Press, Princeton, 2002.

² Ann Hironaka, *Neverending Wars*, Harvard University Press, Cambridge, 2005.

³ Kathryn Sikkink, *Justice Cascade*, Knopf, New York, 2011.

⁴ Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights*, University of Pennsylvania Press, Philadelphia, 2005.

consequences of this type of intervention. A discussion of literature and theoretical debates culminates in my central thesis: that international criminal justice intervention has the potential for shaping the collective representation and memory of mass atrocity, and that such memory itself wields normative power. The theoretical discussion is followed by an introduction of empirical data used to examine this thesis and by a presentation of findings. The findings demonstrate the cultural effects of ICC interventions and, hence, the representational power of international criminal justice institutions. I follow up with some cautionary notes before I arrive at conclusions.

6.2. Effectiveness of International Criminal Justice: Towards a Theory of Representational Power

The effectiveness of criminal justice intervention in preventing grave human rights violations is hotly debated. Critics challenge, for example, the rise of universal jurisdiction, the power of domestic courts to try foreign citizens, summarized in the Princeton Principles of Universal Jurisdiction and justified by the recognition that human rights violations are offences to all humanity. Such courts, critics argue, have little sense of the harm their prosecutions may cause in the affected foreign country. Amnesties, truth commissions and other transitional justice programs, and thereby successful transitions to peace and democracy, could be at risk.

The ICC and other international courts are also targets of critique. They are said to suppress the consideration of power, necessary to assess the consequences of intervention and to balance legal accountability with political costs. Critics argue, for example, that filing charges against the Serb President, Milošević, by prosecutors of the International Tribunal for the former Yugoslavia ('ICTY') made it harder for NATO to reach a deal with Serbia, thereby extending war and suffering in the Balkans into the summer of 1999. In 2011, critics challenged the ICC for its decision to charge Omar al-Bashir, then Sudan's president, with genocide, at a time where his role in stabilizing relations with the newly independent South Sudan may have been crucial. In general, the concern is that perpetrators will not be willing to negotiate and cease power if threatened by criminal trials.⁵

⁵ Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice", in *International Security*, 2003/2004, vol. 28, no. 5, p. 44.

The challengers of these sceptics – one may call ‘optimists’ – include the political scientist, Kathryn Sikkink, who offers an impressive new data set with information on domestic truth commissions and domestic, foreign, and international trials for a 26-year period (1979–2004), covering 192 countries and territories. Sikkink finds that transitional justice does not typically lead to the strengthening of old forces; that the severity of offences and the likelihood of trials are highly correlated (decisions for trials are thus not made lightly); and, importantly, that countries with more human rights trials show greater improvements of later human rights records, especially where trials were coupled with truth commissions. Specifically for South America, not a single case shows that holding a trial contributed to violent conflict and dislodged transition.⁶

A recent study by Hyeran Jo and Beth A. Simmons examines specifically the effects of ICC prosecutions.⁷ They find that prosecution generates both “prosecutorial deterrence” (hesitancy to commit a criminal act based on concern for legal punishment) and “social deterrence” (fear of negative social responses based upon criminal behaviour). Both mechanisms contributed to reducing violence. The authors show that the time following the introduction of the Rome Statute and the ICC, as well as the onset of prosecution, witnessed a reduction in killings by State actors, especially those who have supported the ICC and who actively depend on the world community. Even rebel leaders kill less, especially those who lead secessionist movements that strive for recognition by the world community.⁸

This chapter seeks to widen the horizon: to move away from a narrow focus on deterrence as an outcome of criminal court proceedings and toward a broader perspective that takes seriously the cultural potential of international criminal court decisions and their contribution toward violence reduction. I plead for an effort to open the black box between judicial intervention and human rights outcomes, in the hope of better understanding the mechanisms involved.

Max Pensky, “Amnesty on Trial: Impunity, Accountability, and the Norms of International Law”, in *Ethics & Global Politics*, 2008, vol. 1, nos. 1-2, pp. 1–40.

⁶ Sikkink, 2011, see above note 3.

⁷ Hyeran Jo and Beth Simmons, “Can the International Criminal Court Deter Atrocity?”, in *International Organization*, 2016, vol. 70, no 3, pp. 443–475.

⁸ Hyeran Jo, *Compliant Rebels: Rebel Groups and International Law in World Politics*, Cambridge University Press, Cambridge, 2015.

Even those who focus on deterrence admit uncertainty and leave the door open for the consideration of cultural effects. Sikkink, for example, concluding a chapter on the consequences of the justice cascade, states: “[w]e can’t yet sort out clearly whether trials work mainly through deterrence and punishment or through socialization and collective memory”.⁹ Similarly, Jo and Simmons, while focusing on deterrence, argue that “the normative environment is critical to deterrence [...] The ICC has stimulated normative change within civil society through its justice outreach [...] More research to characterize the nature of said normative change would support our point”.¹⁰

Highlighting the potential of cultural consequences is in line with the hopes prominent actors in the world of practice invested in one of the earliest efforts to pursue international criminal justice. In 1944, when the US President, Roosevelt, became convinced that court trials were an appropriate response to Nazi perpetration, according to a confidant, he was “determined” that “the question of Hitler’s guilt—and the guilt of his gangsters—must not be left open to future debate. The whole nauseating matter should be spread out on a permanent record under oath by witnesses and with all the written documents”.¹¹ Similarly, Justice Robert Jackson, the US chief prosecutor at the International Military Tribunal in Nuremberg, insisted “we must establish incredible events by credible evidence”.¹² Both Roosevelt and Jackson thereby wrote a historiographic function into the agenda of a criminal tribunal. The trial’s outcome was to shape the global collective memory of the Holocaust and of other Nazi crimes.

Such hopes are supported by sociological arguments and empirical evidence to which I turn below. Together, they lead to my central thesis: that institutions of international criminal justice hold substantial *representational power*, which generates *memorial normativity* and has the potential of turning into *symbolic power*.

By the ‘representational power’ of international criminal justice, I mean the chance of an international criminal justice institution to affect

⁹ Sikkink. 2011, p. 188, see above note 3.

¹⁰ Hyeran Jo and Beth Simmons, “Quo Vadimus? A Response to Critics”, in *James G Stewart’s blog*, 7 April 2016 (available on his web site).

¹¹ Stephan Landsman, *Crimes of the Holocaust: The Law Confronts Hard Cases*, University of Pennsylvania Press, Philadelphia, 2005, pp. 6 ff.

¹² *Ibid.*

collective representations and memories, even against resistance, and thereby to impress on a global public a particular understanding of mass violence as a form of criminal violence. ‘Collective representations’ (or memories) are notions of ongoing or past events that are shared, mutually acknowledged and reinforced by a collectivity. Acknowledgment and reinforcement can be achieved through rituals, a focus of neo-Durkheimians, and through documents and historiography, which Karl Mannheim highlighted in his classic work. ‘Memorial normativity’ is the normative power entailed in memories. ‘Symbolic power’, following Bourdieu, is a tacit mode of cultural domination unfolding within everyday social habits and belief systems.¹³ I expect that it will result from the repeated use of representational power.

The historical significance of representational power of international criminal justice must not be underestimated. Throughout much of human history, those who incited and ordered mass violence were celebrated as heroes and great State-builders.¹⁴ The perspective that world opinion may instead consider such actors villains and criminal perpetrators is indeed revolutionary.

The expectations of criminal law’s representational power, and relatedly, its delegitimizing functions, are grounded in classic writings of G.H. Mead and in the perception of trials as degradation ceremonies.¹⁵ Actors, once holding all the symbols of power and prestige, find themselves in a jail cell and in the position of a defendant and possibly convict. Those expectations are further supported by a new line of neo-Durkheimian work in cultural sociology. Here, criminal punishment is interpreted as a didactic exercise, a “speech act in which society talks to itself about its moral identity”.¹⁶ The potential weight of this mechanism for our theme becomes clear if indeed the International Military Tribunal (‘IMT’) in Nuremberg and the Universal Declaration of Human Rights initiated the extension of the Holocaust and psychological identification

¹³ Pierre Bourdieu. *Distinction, A Social Critique of the Judgement of Taste*, Routledge Taylor & Francis Group, 1984.

¹⁴ Bernhard Giesen. *Triumph and Trauma, Paradigm*, 2004.

¹⁵ George H. Mead, “The Psychology of Punitive Justice”, in *American Journal of Sociology*, 1918, vol. 23, pp. 577–602.

¹⁶ Philip Smith, *Punishment and Culture*, University of Chicago Press, Chicago, 2008, p. 16.

with the victims, as Jeffrey Alexander (2004) argues.¹⁷ Judicial events like the Nuremberg trial, the *Eichmann* trial in Jerusalem, and the Frankfurt Auschwitz trial produced cultural trauma: members of a world audience were affected by an experience to which they themselves had not been exposed.

The ritual power of criminal court interventions is backed up by a particular legitimacy that is secured through adherence to procedural rules, in line with Luhmannian arguments. It is further supported by the role courts play as fora for discourse between the opposing parties, a Habermasian argument proposed by the legal scholar, Mark Osiel.¹⁸

Historical and sociological research shows that criminal trials indeed have the capacity of colouring narratives of recent events,¹⁹ and further, the collective memory of a more distant past in the minds of subsequent generations.²⁰

Once court proceedings have succeeded in impressing on the public interpretations of mass violence as (atrocious) crimes, and once such representations have settled in collective memories, a positive feedback loop becomes activated. Collective memories, after all, themselves carry, reinforce, and in fact generate normative power as we learned early from the classic work of Émile Durkheim.²¹ It is thus meaningful to speak of ‘memorial normativity’, a normativity that is entailed in, and generated by, memories and that simultaneously regulate memories.

¹⁷ Jeffery C. Alexander, “On the Social Construction of Moral Universals: The ‘Holocaust’ from War Crime to Trauma Drama”, in J.C. Alexander *et al.* (eds.), *Cultural Trauma and Collective Identity*, University of California Press, Berkeley, pp. 196–262.

¹⁸ Mark J. Osiel, *Mass Atrocities, Collective Memory, and the Law*, Transaction Publishers, 1997.

¹⁹ Devin O. Pendas, *The Frankfurt Auschwitz Trial, 1963-65: Genocide, History, and the Limits of Law*. Cambridge University Press, 2006; Michael R. Marrus, “The Nuremberg Doctors’ Trial and the Limitations of Context”, in Patricia Heberer and Jürgen Matthäus (eds.), *Atrocities on Trial*, University of Nebraska Press, Lincoln, 2008, pp. 103–122.

²⁰ Joachim J. Savelsberg and Ryan D. King, “Law and Collective Memory”, in *Annual Review of Law and Social Science*, 2007, vol. 3, pp. 189–211. Joachim J. Savelsberg and Ryan D. King, *American Memories: Atrocities and the Law*, Russell Sage Foundation, 2011.

²¹ Emile Durkheim, *The Elementary Forms of Religious Life*, Oxford University Press, 2001 (1912); Edward Shils, “Tradition”, in Jeffery K. Olick, Vered Vinitzky-Seroussi and Daniel Levy (eds.), *The Collective Memory Reader* Oxford University Press, Oxford, 2011, pp. 402–406.

Sociological literature explores and specifies this mechanism. Durkheim himself formulated the first mode of thinking, the memory–normativity link, in his classic statements in the *Elementary Forms*: “The traditions whose memory [a system of beliefs] perpetuates express the way in which society represents man and the world; it is a moral system and a cosmology as well as a history”.²² Much later, Durkheim’s ideas were rejuvenated by scholars such as Edward Shils, whose book *Tradition* tells about the dangers entailed in the loss of collective memory: “There is a demoralization arising from the loss of contact with ancestors”.²³ In both the classic Durkheim and in Shils, norms are embedded in collective memory, and they provide guidance to contemporary actors.

Further, memory and tradition do not just entail norms; they also generate them. This linkage between memory and normativity is most obvious when members of carrier groups evoke memories to generate and strengthen norms. Jeffrey Alexander speaks to this mechanism when he specifies the conditions under which cultural trauma emerges: actors engaging in claims making and representing carrier groups; speech-acts through which such actors seek to project the trauma claim to an audience; classification of the nature of pain and victims; and attribution of responsibility.²⁴ Once cultural trauma has been established, claim-makers may mobilize it to engage in analogical bridging. They make use of past situations that are culturally processed, and have thus taken specific shape, to shed light onto new situations, and then apply norms to the latter that had been generated in the past. Elsewhere, we have shown empirically that for the case of hate-motivated crime, the law and the practices of law enforcement vary with memories and their symbolic representations, in international comparison between Germany and the United States and in inter-jurisdictional comparison within the United States.²⁵

Our age of globalization, in which groups and actors engage each other at global, national, and local levels, witnesses a multiplication of

²² Durkheim, 2011, p. 136, see above note 21.

²³ Shils, 2011, p. 403, see above note 21.

²⁴ Jeffrey C. Alexander, “Toward a Theory of Cultural Trauma”, in Jeffrey C. Alexander *et al.* (eds.), *Cultural Trauma and Collective Identity*, University of California Press, Berkeley, 2004, pp. 1–30.

²⁵ Joachim J. Savelsberg and Ryan D. King, “Institutionalizing Collective Memories of Hate: Law and Law Enforcement in Germany and the United States”, in *American Journal of Sociology*, 2005, vol. 111, pp. 579–616.

groups involved in struggles over memorial normativity, also in the realm of memories and norms that concern human rights. Examining the link between human rights and collective memory in this context, Daniel Levy and Natan Sznaider provide two messages that are relevant here. First, their socio-historical analysis confirms the memory–normativity link and specifies it for human rights norms. In Levy and Sznaider’s own words: “historical memories of past failures to prevent human rights abuses have become a primary mechanism through which the institutionalization of human rights idioms and their legal inscription during the past two decades have transformed sovereignty”.²⁶ Secondly, Levy and Sznaider tackle potential tensions between global and nation-level memories and norms. They strive for synthesis by arguing that current day memories are no longer national but cosmopolitan: national and global concerns are closely interwoven. In short, Levy and Sznaider’s line of argument support my thesis that memory, itself generated by criminal proceedings, drives normativity for the realm of human rights.

6.3. An Empirical Study: ICC Interventions in the Case of Darfur

Based on funding by the US National Science Foundation, and with the help of a research team, I was able to examine empirically some of the arguments laid out above.²⁷ I selected the case of Darfur, to analyse criminal justice representation of the violence that unfolded in this Western part of Sudan in 2003 and following years. I sought to contrast ICC narratives with competing representations and to measure the relative effect of these competing narratives on media reporting about the violence across a sample of countries. In addition to the criminal justice field, supported by human rights NGOs, I considered the fields of diplomacy and humanitarian aid, and finally the journalistic field through which court proceedings and their representations are communicated to a broad public. As the representational power of an international institution such as the ICC is likely

²⁶ Daniel Levy, and Natan Sznaider, “The Institutionalization of Cosmopolitan Morality: The Holocaust and Human Rights”, in *Journal of Human Rights*, 2004, vol. 3, pp. 143–57; Daniel Levy and Natan Sznaider, *The Holocaust and Memory in the Global Age*, Temple University Press, 2005.

²⁷ Joachim J. Savelsberg, *Representing Mass Violence: Conflicting Responses to Human Rights Violations in Darfur*, University of California Press, 2015; Joachim J. Savelsberg and Hollie Nyseth Brehm, “Representing Human Rights Violations in Darfur: Global Justice, Local Distinctions”, in *American Journal of Sociology*, 2015, vol. 121, no. 2, pp. 564–603.

to vary across nation States, I collected data in eight countries in Western Europe (Austria, France, Germany, Ireland, Switzerland, and the United Kingdom) and North America (Canada and the United States). While a study of non-Western countries would be desirable in future research endeavours, the current set of countries includes an important variety, with three permanent members of the United Nations Security Council, small and large countries, and nations with both common law and civil law traditions.

6.3.1. Methods and Data

I conducted in-depth interviews with experts on Darfur and Sudan in foreign ministries, one human rights NGO (Amnesty International), and one humanitarian aid NGO (Médecins sans Frontières [*'MSF'*], or Doctors without Borders), as well as with Africa correspondents (not to be confused with *African* correspondents) who had reported on Darfur. In addition, to measure the representation of the Darfur conflict in the eight countries, my research team analysed the content of 3,387 media reports and commentaries. Some explanation of both the interview-based and the content analysis-based data collection efforts is in order before I present findings that speak to the above theoretical expectations.

Between November 2011 and November 2012, I travelled to the seats of government, media and international NGOs across North America and Europe to conduct semi-structured interviews with Africa correspondents, NGO specialists and experts on Sudan in foreign ministries. As mentioned, I had selected Amnesty International and MSF as rights- and humanitarian aid-oriented NGOs respectively. I had also selected two prominent newspapers, one left-liberal, the other conservative or centre-right, from each country. Most of the interviews lasted between 60 and 80 minutes, with a few as short as a half an hour and some as long as two hours. I followed a positional sampling strategy, as I attempted to include at least one Darfur specialist from each of the five organizations in each of the eight countries (in total 38 country-organizations). I was able to secure 42 interviews, covering 7 foreign ministries, 12 newspapers, and 13 national divisions of NGOs. Consent was secured from each interviewee in line with the approval by the Institutional Review Board at the University of Minnesota. The interviews were audio-recorded and transcribed. No interviewee will be referred to by name. Specific positions of interviewees will only be explicated where necessary for understanding.

At times, a respondent's gender ascription may be changed to further disguise his or her identity.

The structure of the interviews was closely aligned with my thematic concerns. After gathering information on the interviewees' background (education, relevant socialization experiences, career path, and work context), I inquired about: (a) perceptions of victimization; (b) actors responsible for the violence; (c) causes of the conflict; (d) (i) appropriate frames of interpretation, policy goals and strategies, (ii) potential conflicts between them, and (iii) institutions to execute them (with a special emphasis on the pursuit of justice and the ICC); (e) positions of the interviewees' organization and nation's government; (f) the role of historical experience; and (g) sources of information.

In addition to the formal interviews, numerous informal conversations with a diversity of actors provided insights into the representation of Darfur. I visited with conversation partners in their offices, coffee shops and in the context of two conferences. They included (a) European scholars specializing on Sudan; (b) Sudanese informants, specifically (i) anthropologists, (ii) journalists, and (iii) opposition politicians from Sudan; (c) two US foreign policy-makers (ambassadors); (d) other journalists; (e) lawyers from the ICC; (f) the director of a genocide memorial museum; and (g) Darfur activists. The conferences were a January 2011 symposium on "War Crimes Journalism", at the Vassar Institute in The Hague, and a summer 2012 conference entitled "Discourses on Darfur" at the Rockefeller Bellagio Center. I conducted two additional formal interviews with a member of the governing board of one of the Darfur rebel movements and with a Sudan expert of the foreign ministry of a ninth country.

In our data collection of media content, we examined each country's most prominent daily newspapers with national distribution. As mentioned above, we selected one conservative and one centre-left paper from each country for analysis based on reputation and readership numbers. Exceptions were Ireland and Switzerland, small countries each with only one paper that widely covers international news.

Examining national representations of the violence in Darfur via media accounts, we are mindful that Western news reporting is not dictated by national governments. Yet, reporting about international events is more often affected by government positions than reporting about domes-

tic events.²⁸ Further, most journalists are employed in countries in which they were socialized, and they are typically tied to particular language communities. Simultaneously, media reporting on foreign affairs strongly affects public opinion, as events beyond a country's borders are not subject to citizens' everyday lived experience.²⁹ There is thus reason to expect cross-national variation in reporting, even when messages derive from global and international institutions, which has to be taken seriously.

We conducted content analysis on articles that appeared between 1 January 2003 and 30 May 2010. That is because most of the violence occurred during this period, even though tensions in the Darfur region developed over the past several decades. In February 2003, two major rebel groups attacked Sudanese government forces. The government, in collaboration with Arab militias (Janjaweed) whom it equipped and mobilized, responded with a massive campaign of violence. The international community responded. Its interventions marked the periods for which we analysed media content:

- *18 September 2004*: UNSC Resolution 1564, establishing an International Commission of Inquiry on Darfur;
- *25 January 2005*: delivery of the Commission report to the UN Secretary-General, Kofi Annan, concluding that the Sudanese government had committed serious offences against human rights and humanitarian law but not genocide;
- *31 March 2005*: UNSC referral of the situation of Sudan to the ICC;
- *27 February 2007*: application of the Prosecutor for an arrest warrant against the Sudanese Humanitarian Affairs Minister, Ahmad Harun, and Janjaweed militia leader, Ali Kushayb, for war crimes and crimes against humanity;
- *2 May 2007*: the ICC issuing said arrest warrant for both actors;
- *14 July 2008*: application of the Prosecutor for an arrest warrant against then Sudanese President, Omar al-Bashir, for crimes against humanity, war crimes, and genocide;

²⁸ Piers Robinson, "The Policy-Media Interaction Model: Measuring Media Power during Humanitarian Crisis", in *Journal of Peace Research*, 2000, vol. 37, no. 5, pp. 613–633.

²⁹ Yehudit Auerbach and Ya'eli Bloch-Elkon, "Media Framing and Foreign Policy: The Elite Press vis-à-vis US Policy in Bosnia, 1992-95", in *Journal of Peace Research*, 2005, vol. 42, pp. 83–99.

- *4 March 2009*: the ICC issuing the arrest warrant, but only for crimes against humanity and war crimes;
- *18 May 2009*: a rebel leader who had previously been summoned to appear before the ICC under seal making his initial appearance before the ICC.³⁰

We identified all articles and opinion pieces in the 14 newspapers that appeared during our period of interest and that contained the search term ‘Darfur’. From all relevant documents, we selected every other article for most periods and every sixth article for two lengthy periods that passed without judicial intervention.

Throughout, coding at the article level, we treated each article as a collection of statements based on different sources that the journalist combined. In other words, each statement was coded, so an article could include several different, even conflicting, frames or statements. All information, including quotations and paraphrased information, was coded if it was relevant to Darfur.

We conducted the content analysis based on a detailed coding scheme. Among seven types of variables, I highlight two that are especially relevant to this chapter:

- *Acknowledgement of Victimization*: Mentions of violent incidents, including killings, rapes, and kidnappings of Darfuris were documented. References to refugees, shortages of food or water, destruction of livelihood, and disease were also coded, as well as numbers of those affected for all types of victimization and perceived causes.
- *Conflicting Frames*: Five different substantive frames on Darfur were coded: (i) an *insurgency* frame, which depicts the violence as caused by Darfuri tribal insurgents; (ii) a *civil war* frame; (iii) a *humanitarian emergency* frame; (iv) a *crime* frame, which labels the violence as criminal; and (v) an *aggression* frame, which identifies the violence as disproportionate but not criminal. All but one of these frames were identified in previous analyses of discourses on Dar-

³⁰ At beginning of this research, the 18 May 2009 appearance before the ICC was the most recent international intervention in Darfur. Newspaper articles were analysed one year after this last intervention to assess whether and how representation and acknowledgement change without international interventions. Thus, sampling stops on 31 May 2010. Additional interventions took place, of course, after the end of the quantitative analysis of media reports, especially the issuing of genocide charges against Omar al-Bashir.

fur by John Hagan and Wenona Rymond-Richmond,³¹ and supplemented after our initial reading of a sample of media reports. Their relevance was later confirmed by our interviews with Darfur experts in foreign ministries, NGOs and the media. Further, the substantive frames were not conceptualized as mutually exclusive. In other words, articles often included statements that fell in line with different frames (for example, both a civil war frame and a humanitarian emergency one in a single article). We coded all frames found in an article, as it typically proved impossible to assess a dominant frame.

6.3.2. Finding 1: International Criminal Justice, Competitors, and Diverging Representations of Mass Violence

As I examine representations of mass violence by competing social fields, I use Pierre Bourdieu's term "social field" liberally to refer to sets of actors oriented toward similar goals. They are embedded in power relations and use (and seek to expand) diverse types of capital – material, social, and cultural. Actors in such fields develop a particular habitus – a set of relatively permanent dispositions that allow them to function effectively.³²

A crucial difference between the human rights versus the humanitarian aid and diplomacy fields is the distinct power position of the perpetrating country in the latter two. The goal of humanitarian aid is to help victims survive. Diplomats seek to stabilize a region and to end military confrontation. Actors in both fields depend on interactions with the Sudanese government. In the words of one MSF interviewee:

I then was head of missions [...] in Sudan, based in Khartoum, which means more of the overall management of the humanitarian projects – and their representation, negotiation with the [Sudanese] government and other actors [...] You negotiate with representatives of the government in order to secure the delivery of services, to have permission to have international staff in Darfur, and for the particular services as well.³³

Dependency on government actors is yet more pronounced in the field of diplomacy. Here, foreign actors do not just depend on co-

³¹ John Hagan and Wenona Rymond-Richmond, *Darfur and the Crime of Genocide*, Cambridge University Press, 2009.

³² Bourdieu, 1984, see above note 13.

³³ On file with the author; same hereinafter.

operation by mid-level bureaucrats, but on active participation by high-level government officials. Such dependency is reflected in an interview with a political scientist from a foreign ministry-affiliated institute:

If you want to make peace in Darfur through negotiations, you have to deal with the Sudanese government and you have to deal with the people who hold the power in the Sudanese government, and that includes Omar al-Bashir. If you want to achieve justice through the International Criminal Court, well, then you should stigmatize someone who is indicted. You shouldn't talk to Omar al-Bashir, right?

Importantly, the use of different modes of operation across social fields is not just strategic, that is, based on actors' rational calculations. Instead, actors are immersed in their fields' respective missions, through training and practice. They have invested long periods of professional socialization and work on behalf of their organizations, often under challenging circumstances, in dangerous contexts, accepting long absences from home and family. Such actors strongly identify with their field's mission. They have internalized its goals and its scripts. Corresponding with the resulting habitus, there emerge particular knowledge repertoires – a specific mode of thinking and way of seeing the world, including situations of mass violence.

Interviews with actors from the fields of human rights, humanitarian aid, and diplomacy indeed revealed rather distinct narratives regarding the Darfur conflict. In the following, I briefly display ideal-typical accounts along a set of analytic dimensions: (i) victims, (ii) responsible actors, (iii) time, (iv) causes of conflict, (v) interpretive frames, and (vi) appropriate responses. To be sure, ideal types are theoretical constructs, and empirical types always deviate from them, especially when they intersect with actors' national and professional backgrounds, as was often the case among my interviewees. Such deviations are important for reasons of scholarly insights and practice. Nevertheless, actual knowledge repertoires at least approximate the ideal types in each of the fields under study. Table 1 provides an overview.

		<i>Fields</i>		
		Human rights/ Criminal law	Humanitarian aid	Diplomacy
Analytic Dimensions	Suffering/ Victimization	graphic accounts, high numbers for killings and rapes, especially among ‘black African’ groups	graphic accounts, high numbers for displacements, caution on death counts	caution about numbers, stress of victims on both sides of conflict
	Responsible actors	Government of Sudan, SAF, Janjaweed, specified individuals	caution about identifying actors	vague reference to indirect responsibility, more on rebel side than in other fields
	Origins/time	short-term	short-term	long-term
	Causes	ethno-political entrepreneurs	complex historical, cross-national processes	history of colonialism; centre-periphery conflicts
	Frame	crime, genocide	humanitarian emergency	insurgency, counter-insurgency
	Policy conclusions	criminal law toward justice	humanitarian aid toward survival	negotiations toward peace

Table 1: Analytic dimensions of the Darfur conflict and their use by holders of different positions in three social fields.

Offering illustrations of the contrasting narratives of the three fields, I focus on accounts of victimization and responsible actors.

6.3.2.1. The Human Rights Field and International Criminal Law

Interviewees from the human rights field speak generously and at times graphically about victimhood and the suffering of the population of Darfur, about killings, rapes (including “mass rapes” and “mass rape as an instrument of ethnic cleansing”), displacements, torture, looting, destruction

and, generally, violations of human rights. They describe suffering and victimhood primarily in terms of criminal offending, in the language of criminal law.

Interview responses are consistent with publications by human rights NGOs. In 2013, for example, on the tenth anniversary of the beginning of the mass killings in Darfur, Amnesty International issued a report to update the public. The following short excerpt illustrates its position well, highlighting the organization's concern with the violation of the local population's human rights and with the impunity of leading political actors:

As the Darfur conflict marks its 10th anniversary, the human rights situation in the region remains dire. Civilians continue to face attacks by government forces, pro-government militias, and armed opposition groups. In the last three months alone, 500 people were reportedly killed and roughly 100,000 displaced in attacks against civilians that have involved members of government forces. The government in recent years has continued to carry out indiscriminate aerial bombardment and deliberate attacks against civilians. In addition, security services carry out torture and other ill-treatment against detainees and, alongside the police, use excessive force against peaceful protesters. And impunity reigns. Government officials, including President Bashir and a leader of the '*janjaweed*' pro-government militia Ali Kushayb, indicted by the International Criminal Court on counts of war crimes, crimes against humanity and genocide remain at large and there is little or no accountability for these crimes.³⁴

The online publication cited here lists 17 previous reports on the violence of Darfur that Amnesty had issued over the preceding decade. The first alert cited was issued during the second peak of mass killings.³⁵ An early product of intense field-research appeared five months later.³⁶

³⁴ Amnesty International, "10 Years on Violations remain widespread in Darfur", March 2013.

³⁵ Amnesty International, "Sudan, Darfur: "Too many people killed for no reason"", 3 February 2004, AFR 54/008/2004 (<https://legal-tools.org/doc/9ach0e>).

³⁶ Amnesty International, "Sudan, Darfur: Rape as a weapon of war: Sexual violence and its Consequences", 18 July 2004, AFR 54/076/2004 (<https://legal-tools.org/doc/fmcxem>).

Interview statements also closely link accounts of victimization with narratives regarding responsible actors. A young lawyer, who was the head of Amnesty’s impunity group and a prosecutor who had previously interned at the ICC, used these words: “I would say the government sent out [horse and camel] riding groups, collaborated with the Janjaweed militias thus [*sic*], which it instrumentalized to help its own army to [*sic*] show their dominance, as it were. In the course of this campaign, hundreds of thousands were displaced and killed. Rapes were a very strong element of this conflict, and I’d say it is one of the most cruel [*sic*] conflicts in recent years. And it was planned and purposefully conducted”.

The narrative of human rights NGOs parallels that of the UNSC’s International Commission of Inquiry on Darfur (‘ICID’), staffed primarily with international criminal law experts. Throughout its report, the Commission strictly follows the legal logic.³⁷ It categorizes actors (“1. Government Armed Forces”; “2. Government supported and/or controlled militias—The Janjaweed”; and “3. Rebel movement groups”),³⁸ spells out the legal rules that are binding to the Government of Sudan and to the rebel groups, identifies categories of international crimes, and associates available and legally relevant evidence with those legal categories.³⁹ In summarizing its findings, the ICID first addresses the *actus reus* with regard to “Violations of international human rights law and international humanitarian law”:

The Commission took as the starting point for its work two irrefutable facts regarding the situation in Darfur. Firstly, according to United Nations estimates there are 1.65 million internally displaced persons in Darfur, and more than 200,000 refugees from Darfur in neighbouring Chad. Secondly, there has been large-scale destruction of villages throughout the three states of Darfur. The Commission conducted independent investigations to establish additional facts and gathered extensive information on multiple incidents of violations affecting villages, towns and other locations across North, South and West Darfur. The conclusions

³⁷ International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004*, 25 January 2005 (<https://www.legal-tools.org/doc/e684bb>).

³⁸ *Ibid.*, pp. 27–39.

³⁹ *Ibid.*, pp. 40–107.

of the Commission are based on the evaluation of the facts gathered or verified through its investigations.⁴⁰

Having summarized the facts on the ground, as established by multiple actors, including the UN and its organs, as well as NGOs, and supplemented by the Commission's own investigation, the report proceeds to link evidence to the legal categories of the Rome Statute and concludes:

The Commission established that the Government of the Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law. In particular, the Commission found that Government forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur. These acts were conducted on a widespread and systematic basis, and therefore may amount to crimes against humanity. The extensive destruction and displacement have resulted in a loss of livelihood and means of survival for countless women, men and children. In addition to the large scale attacks, many people have been arrested and detained, and many have been held incommunicado for prolonged periods and tortured. The vast majority of the victims of all of these violations have been from the Fur, Zaghawa, Massalit, Jebel, Aranga and other so-called 'African' tribes.⁴¹

By identifying the acts of violence as "widespread and systematic", the ICID determines that they amount to crimes against humanity, as defined in the Rome Statute, and thus fall under the jurisdiction of the ICC. The ICID thereby lays the ground for its recommendation to the UNSC that the case be referred to the Court.

6.3.2.2. The Humanitarian Aid Field

Narratives regarding victimization and, especially, responsible actors, take a very different shape in the humanitarian aid field, a field that has grown immensely in recent decades as budgets for humanitarian relief rose (from

⁴⁰ *Ibid.*, p. 3.

⁴¹ *Ibid.*

USD 2.1 billion in 1990 to USD 12.9 billion in 2012).⁴² Also in Darfur, aid-oriented NGOs such as CARE and Oxfam were well represented. In the words of one interviewee who was a staff member of a humanitarian aid international NGO, Darfur is the story of the “largest scale humanitarian intervention that the world has ever seen [...] There were like ten thousand aid workers, like a thousand international aid workers, which is unheard of – in the Sudanese context at least”.

Examining MSF, my research focused on a somewhat atypical aid organization. After all, MSF was founded to combine its aid function with the mission of bearing witness (*‘témoignage’*).⁴³ And indeed, in the Darfur context, the organization released a report early on (“Crushing Burden of Rape”) concerning the rape campaigns that were part of the violence. One interviewee stated:

This report probably would not have attracted any attention had Kofi Annan not quoted from it on World Women’s Day, March 9, 2005 [...] in a speech before the General Assembly. Through that, the report immediately found widespread attention. Our head of mission and deputy head of mission were arrested shortly thereafter and interrogated by the Sudanese authorities. They were then locked up for several days because of this report.⁴⁴

MSF’s mission to bear witness caused the organization more trouble when the ICC cited some of its evidence in charging decisions against Sudanese government actors, especially against Omar al-Bashir. One project manager, a physician, described the conflict as follows:

In March 2009, with the ICC decision, I think it had a big impact on the conflict and on many issues. You know of course that it resulted in the expulsion of many NGOs immediately from Darfur. And not only that, but it really was the beginning, or at least the visible beginning, of the attempt by the Sudanese government of domesticating the Darfur crisis – a deliberate strategic policy to reclaim ownership over

⁴² Monika Krause, *The Good Project: Humanitarian Relief NGOs and the Fragmentation of Reason*, University of Chicago Press, 2014.

⁴³ Fabrice Weissman, “Silence Heals ... From the Cold War to the War on Terror, MSF Speaks Out: A Brief History”, in Claire Magone, Michael Neuman, and Fabrice Weissman (eds.), *Humanitarian Negotiations Revealed: The MSF Experience*, Columbia University Press, New York, 2011, pp. 177–198.

⁴⁴ Author’s translation.

the Darfur, try to remove international influence in Darfur [...] I have talked with ministers, with the Sudanese ambassador to the US [...]; they said very clearly these things [...] It's not just expulsion from the country; it's also the restriction of work in Darfur [...] One of our MSF teams was kidnapped, early – I think it was two weeks after the ICC decision.

Such responses by the Sudanese State clearly dampened the witness-bearing function and moved MSF to caution its language, in line with its aid delivery mission. While interviewees speak freely about the suffering of the people of Darfur, they are guarded with regard to the classification of responsible actors in moral or legal terms. Asked whether he would negotiate with the devil if that would help get aid to the suffering population, one MSF interviewee responded:

What is the devil? Good and bad, we don't necessarily see the world in that way. As a person coming from a different background, you have your personal opinions on those sorts of things. But as an organization we don't and that is something we defend very strongly. On Iraq, I did a round of meetings with the State Department, with the Pentagon [...] and I challenged them with that. I said "Do you have a problem with us having communication and links with terrorist organizations, Al-Qaeda, insurgent groups in Iraq, and so forth?" [...] We need it, because to be present in an area you need acceptance by the groups.

In line with such interview statements, a statistical analysis, comparing MSF web sites with those of Amnesty (United States sections) and Save Darfur, shows that MSF rarely names perpetrators. It is also comparatively reluctant in referring to the Sudanese State as a perpetrator.⁴⁵ To be sure, MSF interviewees were not uncritical of the Sudanese State. Almost all stressed the centre-periphery conflict and the neglect of the periphery by the government in Khartoum as a central cause of the conflict. Yet, interviewees also highlighted that the current government of Sudan inherited this centre-periphery tension from old times, reaching back to the colonial period:

⁴⁵ Meghan Zacher, Meghan, Hollie Nyseth Brehm, and Joachim J. Savelsberg, "NGOs, IOs, and the ICC: Diagnosing and Framing Darfur", in *Sociological Forum*, 2014, vol. 29, no. 1, p. 42.

Taking over from the colonial period in the early 1950s, it is a very centralized government where power is held by a very small group of people. There was never really an established modernized, modern country [...] All the peripheries feel that they are neglected by their government in terms of resources, in terms of representation mainly.

Such assessments were associated with rather pronounced negative sentiments toward criminal law and justice interventions, even if MSF initially welcomed the creation of the ICC:

We have had a real discussion in the organization about our relationship to the ICC. In 1999, when accepting the Nobel Peace Prize, we called for the ratification [of the ICC] and we've since backed away quite considerably from it [...] Bashir is able to justify the expulsion on the ground that these agencies co-operated with the ICC investigation. They are not there to do humanitarian work. They are there to spy on us. Ocampo doesn't help by saying things like "we used data from humanitarian aid agencies to do this". [...] We really needed to distance ourselves.

Interviewees generally made clear that they do not regard the crime frame as satisfactory. They leave judgments on criminal responsibility to lawyers and the courts. This is in line with our comparative quantitative analysis of framing strategies by the US section of MSF. Here, too, the explicit crime frame is rarely used, the Sudanese State is almost never referred to as a perpetrator, and support for international prosecution is missing altogether.⁴⁶ In short, MSF – a prominent example of an international NGO placed in the humanitarian aid field, in which the Sudanese State is a crucial player – is a central contributor to the production of representations of the Darfur conflict. Its representation differs substantially from that of the human rights field, resulting occasionally in intense conflicts. In one of the countries under study, it led to a non-public meeting in which positions were exchanged and an effort was undertaken to minimize hurdles each organization would place in the way of the other's campaigns.

⁴⁶ Zacher *et al.*, 2014, p. 42, see above note 45.

6.3.2.3. The Diplomacy Field

Like humanitarian aid actors, diplomats also depend on the co-operation of representatives of the State, even if its leaders are charged with grave human rights crimes. In the case of Sudan, two major diplomatic efforts were under way when I conducted my interviews between December 2010 and July 2011. The first was the implementation of the Comprehensive Peace Agreement ('CPA') of 2005, intended to settle the devastating Second Sudanese Civil War between the country's North and South with its estimated two million dead. The second was the Doha Peace negotiations, following the ill-fated Abuja Peace Agreement of 2006, the most recent comprehensive attempt to bring peace to Darfur. The Doha negotiations were finalized in spring of 2011, after two and a half years of diplomatic labour. Both processes loomed large on the minds of the diplomats I interviewed and coloured their reading of the conflict.

One interviewee from a large European country expressed hopes and caution toward the Government of Sudan:

There was obviously a lot of work being put in, internationally, into the North-South agreement [...] After 20 years, two million people killed, there was such desire to bring that to a conclusion and get the CPA signed that people said: "Look at Darfur, it is terrible, but we can't rock the boat, we can't jeopardise the CPA negotiations".

In the minds of diplomats, the government of Sudan had to be kept in the game, treated with respect, even offered incentives, so as to capitalize on the diplomatic investments of previous years.

Despite such perceived dependency on the Sudanese government, diplomats were not blind toward its responsibility for mass violence. Some pointed specifically at the military and the Popular Defence Forces. Yet, diplomats simultaneously urged not to focus on the perpetrators and on criminal responsibility alone, but on the victims and on broadly conceived political responsibility. They rarely named specific government actors. When mentioning al-Bashir directly, interviewees added partly exculpating statements. One respondent reported conversations he had had with President al-Bashir, describing him as a man "who realizes today that he was fooled in many things [...] by his own people".⁴⁷ Another respondent supported this sentiment: "In how far Bashir was informed

⁴⁷ Author's translation.

about everything, I cannot really tell you”. The interviewee then drew parallels, as he reported visits with North Korea’s Kim Il Sung:

He was so cut off from the world, that he just did not have any direct experience any more [...] I think in the case of Bashir, that he must have understood what kinds of decisions he supported and consented to. But I do not dare to say if he really knew about the real scale, but I personally have to say truthfully: “I doubt it”. I have met him three times thus far, I cannot easily be misled in these things.⁴⁸

Fewer than half of the diplomats who responded to my inquiry about the victimization and suffering of the Darfuri population specified forms of suffering. One respondent from a small European country spoke about people “who were forced to leave their homes and villages”, which have been burned down, and “their number is estimated at two million”. An interviewee from another small country referred to “all these displacements [...], in many different directions; there have been refugee camps”.⁴⁹ One diplomat from a large European country addressed suffering while highlighting the relative successes of international interventions: “I think [UNAMID] has had an effect, the fighting and the displacement is less than it was at the height of it in 2005, but it is still ongoing. And the government is still bombing civilians. The rebels are still fighting”. Only two diplomats elaborated on the suffering. One respondent, from Irish Aid within the Irish Department of Foreign Affairs, described compassionately the displacement of (according to her) 1.5 million people, the lack of shelter, water, food and protection, the deaths of 200,000 and “systematic rape campaigns”. She simultaneously cautioned, though: “if you look at the media coverage of those years, it was quite sensationalized”. Apart from such exceptions, diplomats spoke sparingly about suffering. Several interviewees in fact explicitly challenged victimization numbers that fare prominently in human rights discourses.

Finally, while diplomats do not outright reject the State crime frame, as opposed to a humanitarian emergency or civil war frame, they always did express some kind of reservation: “The State has a clear responsibility. They didn’t act upon the crimes that have been committed [...] There is no justice being done. I think it is obvious that the State is involved in these crimes or at least has responsibility”. This and another respondent con-

⁴⁸ Author’s translation.

⁴⁹ Author’s translation.

sidered the crimes of the Sudanese State more as crimes of negligence than of aggression. Others pointed out that crimes were committed on both sides of the conflict. An interviewee from a small European country deemed the term ‘State crime’ appropriate, but he insisted that such understanding was not shared by African actors: “State crime? Yes, for us unambiguously, but for the Africans not quite so clearly”. Earlier he argued: “One regards this in Sudan as normal intervention”,⁵⁰ and he referred to growing African scepticism toward the ICC. At least one respondent appeared to develop sympathies with the position of the African Union. He expressed a clear preference for a ‘traditional’ justice response as opposed to international criminal justice intervention.

In addition to such cautious applications of the State crime frame, I also encountered staunch opposition. One actor from the diplomatic field, trained as a political scientist with a focus on international relations, posed the most explicit challenge, insisting instead on a political-structural mode of understanding the conflict:

I don’t find it [the State crime label] a helpful lens because if you look at the history of Sudan, since independence in [19]56, you have different regimes, right? You have democratically elected regimes, you have military regimes, and in the last 22 years an Islamist regime, right? They function very differently, have different constituencies that they draw on, different political strategies to secure their rule. Yet, mass atrocities happened in all of these regimes. So there is something, I think, systemic that the way in which the Sudanese State functions produces mass violence in certain ways. And by focusing on a few individuals – and since the ICC indictment a lot of people in the West have focused on the role of President Bashir – and to see the conflict in Darfur in a way as an outcome of the criminal energy of Omar al-Bashir and his acolytes is not actually accurate in terms of understanding why the conflict emerged in the first place, and why the Sudanese government has been engaging in these kinds of atrocities.

Quantitative patterns from an analysis of 210 foreign ministry press releases we conducted, written to reach a broad public, show a somewhat greater balance. Yet, while references to conflict and war (25.7%) and humanitarian emergency (28.6%) frames are privileged only somewhat

⁵⁰ Author’s translation.

over the crime frame (20.5%), the patterns for preferred solutions are rather in line with responses cited in this section. Fifty-one percent of press releases suggest diplomatic solutions. Humanitarian aid (35%) and peace-keeping operations (39%) also fare prominently, but legal solutions (10%) and especially military intervention (1.4%) lag far behind.⁵¹

6.3.2.4. Conclusions on Competing Fields and Their Narratives

Clearly, the nature of the various fields, especially the role of the Sudanese State in the balance of a field's power relations, colours their respective representations of mass violence. Detailed accounts of victimization and the identification of specific actors, including high-level government officials, dominate human rights and criminal justice narratives. The humanitarian aid field instead generates representations that, while certainly highlighting forms of suffering that humanitarian aid work can address, are much more cautious about the attribution of criminal responsibility to specific individual actors. The latter also applies to the diplomatic field. Contrasts between field-specific narratives are similarly stark with regard to the underlying causes, the period, the interpretive frame, and appropriate policy conclusions. In addition, not only do we encounter representations that compete with that of institutions of international criminal justice; yet, we see how those who provide competing representations, here in the social fields of humanitarian aid and diplomacy, at times challenge the interpretation of the violence as a form of criminal violence. The question then arises as to who prevails in the competition over the validity of competing representations. What is the ICC's *representational power* relative to that of its competitors?

6.3.3. Findings 2: Prevailing Representation and the Representational Power of International Criminal Justice

The question of the ICC's representational power can be answered when we examine the effect of interventions on the intensity of reporting about Darfur, and, yet more directly, when we examine how the competing representations are reflected in those media reports that provide a world audience with information about mass violence. Courts, especially international criminal courts, are mindful of the centrality of journalism and mass media, as they seek to convey their message to a world audience. At the

⁵¹ Percentages do not add up to 100 as not each press release allows for the identification of a frame, but each may suggest more than one solution.

IMT at Nuremberg, for example, the back wall of the courtroom was removed to allow for the seating of a more extensive press corps (Figure 1).



Figure 1: The courtroom of the IMT in Nuremberg (the position of the photographer would today be – and was before the IMT proceedings -- behind the room’s back wall).

6.3.3.1. Mediating Competing Narratives to Civil Society: The Journalistic Field

How much attention did the media then pay to the mass violence in Darfur? How did institutional interventions affect the intensity of reporting? Figure 2 depicts the number of media reports over time by years of the conflict and by country, and displays remarkable patterns. The numbers in this figure reflect the entire population of articles on Darfur that my research team identified in the 14 newspapers and from which the sample of 3,387 articles was drawn for detailed analysis. The different graph lines distinguish trends by country. It is most instructive when following these lines year by year.

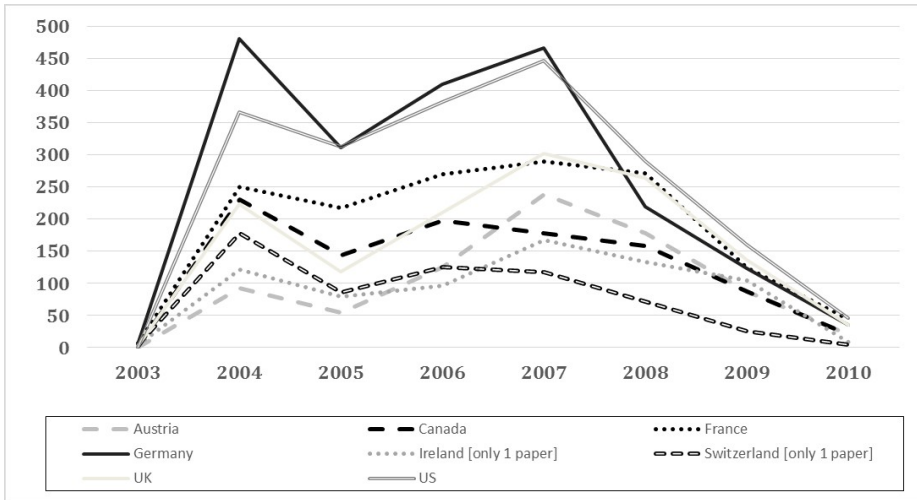


Figure 2: Number of articles on Darfur by country and year.

Note first that the intensity of reporting differs across countries, a result for which I have provided a detailed analysis elsewhere.⁵² Secondly, and importantly in this context, shifts in the intensity of reporting developed in almost perfect unison. Years with peaks in the number of articles in one country experience the same in other countries. The years 2004 and 2007, with their massive volume of reporting, stand out in all countries. The mass killings of 2003, instead, barely evoked any reporting. It took a highly visible international intervention to attract media attention to Darfur. Some journalist interviewees spoke to factors that motivated their first reporting about Darfur in early 2004. Consider the following quotation from an interview with a distinguished Africa correspondent:

When first messages about a new war in Sudan appeared in 2003, I initially did not take that so seriously. But when the commemorative events unfolded on the tenth anniversary of the Rwandan genocide [April 2004] and Kofi Annan [2004] and others said, “we will no longer tolerate this”, then I also decided to take this conflict seriously and I travelled there.⁵³

Figure 2 also shows that media attention to Darfur did not rapidly give way to reporting about other events, as is common for comparable conflicts. Instead, despite a relative lull in 2005, it remained at a high lev-

⁵² Savelsberg, 2015, see above note 27.

⁵³ Author’s translation.

el for a total of four years. It is likely that such unusually sustained attention resulted from several quasi-judicial and judicial interventions during this period, as already enumerated earlier (Section 6.3.1.).

Yet, attention began to decline substantially in 2008, despite the 14 July 2008 application for an arrest warrant against Omar al-Bashir; the 4 March 2009 issuance of the arrest warrant; and the 18 May 2009 initial appearance before the ICC of rebel leader Bahr Idriss Abu Garda, as aforementioned.

Interview materials suggest several potential explanations for the decline in reporting, including continued obstruction of journalistic work by the Government of Sudan, the eviction of aid agencies, and the reluctance of those who remained to speak to journalists. But forces associated with the journalistic market also matter. They are well captured in an interview with a German Africa correspondent who spoke about stalemates in the decision-making bodies of the international community:

This Darfur conflict, however, quite decisively disappeared from public view, because – I believe – there emerged an absolute stalemate. The Americans could scream, the Europeans could scream, and the Chinese said ‘no’ and the Russians too [in the UNSC]. Then you realize that there is simply no way forward, and the only thing that still caused attention was that they issued this international arrest warrant against Bashir. But that is totally personalized and focused on one single person. What’s going on in Darfur these days is barely being registered, neither by the public nor by journalists, because it is redundant in the end, because it has been happening for years.⁵⁴

In short, political pressures coincided with economic forces of the media market. The common cycle of news reporting, with its focus on the new and dramatic, enhanced the decline in media attention on the ongoing suffering in Darfur. It is likely that the decline would have been far more abrupt without the judicial interventions. Yet, even ICC intervention eventually could not hold attention levels at the previous height. The question arises as to how specifically juridical forces acted on the journalistic field. If they could not prevent the decline of attention, could they affect the substance of the reporting? What opportunities and constraints did they face? What cultural receptivity did they encounter?

⁵⁴ Author’s translation.

Consider the frequency of citations of the crime frame, which competed with the frames generated by other fields, especially the humanitarian emergency and civil war frames. The data demonstrate that several judicial intervention points – but not all – are intensely reflected in journalistic reporting. Figure 3 displays the percentage of articles about Darfur per period that cite the crime frame, in combination with three competing frames. The graph shows that increases in citations of the crime frame follow (i) the release of the ICID report, (ii) the application for an arrest warrant related to Darfur by the ICC prosecutor (against Harun and Kushayb), (iii) the application for an arrest warrant against Bashir (remaining at that rather high level after its issuing), and finally, (iv) a first court appearance.

The crime frame loses ground during periods that are marked by UNSC Resolution 1564 (establishing the ICID) and the UNSC's referral of the Darfur situation to the ICC. The latter instance is of particular interest as the intervention is followed immediately by a major diplomatic event (signing of Abuja Peace Treaty), the preparation and echo of which appear to have overwhelmed uses of the crime frame. Media reporting, reflecting diplomatic activities, favoured instead the use of the civil war frame during this period, as the respective lines indicate. Another drop of the crime frame occurs, but this time surprising and unexplained, after the ICC issued the first major arrest warrants (against Harun and Kushayb).

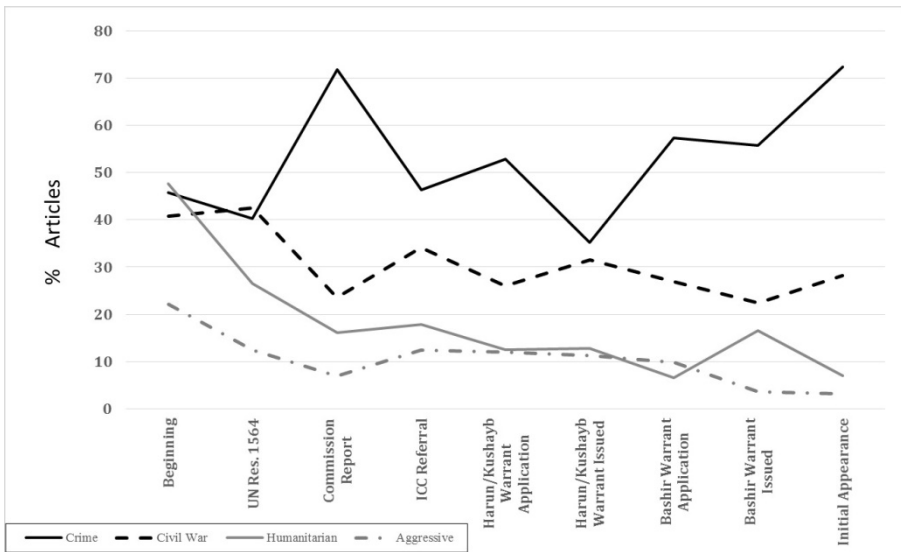


Figure 3: Competing frames over stages marked by intervention points.

The data also show that reference to particular types of violence and crimes peaks, albeit in less pronounced ways, at similar stages as the use of the crime frame. Specifically, reporting about killings and rapes reach the highest levels during exactly those periods where use of the crime frame also peaks: the release of the ICID report, the Prosecutor’s application for arrest warrants against Harun and Kushayb, and the application for and issuance of, an arrest warrant against al-Bashir. The reporting of destruction of livelihood and displacements, on the other hand, is characterized by steady declines that judicial interventions barely interrupt.

For another example, consider the rise in citations of the crime frame after the Prosecutor had applied for an arrest warrant against al-Bashir (Figure 3). The use of the crime frame stabilizes at this new and higher level after the issuing of the warrant, and it increases further in the final reporting period, after the initial appearance of a rebel before the ICC. A closer look at patterns of reporting in specific media sheds light on the meaning of this peak.

In the United States, one day after the application for an arrest warrant against al-Bashir, the *New York Times* featured a long report by staff journalists Marlise Simons (Paris), Lydia Polgreen (Dakar) and Jeffery Gettleman (Nairobi). Their 1,446-word report, reviewing the mass violence of Darfur, reminded the reader of Slobodan Milošević and Charles

Taylor, two previous sitting presidents who had been tried before international tribunals. The authors further quoted Ocampo: “Mr. Bashir had ‘masterminded and implemented’ a plan to destroy three ethnic groups [...] Using government soldiers and Arab militias, the president ‘purposefully targeted civilians’”.⁵⁵ An editorial of the same day, entitled “Charged with Genocide”, opened with this sentence: “The truth can be difficult. That doesn’t make it any less true. And so we support the decision by the prosecutor of the International Criminal Court to bring charges of genocide against Sudan’s president, Omar Hassan al-Bashir, for his role in masterminding Darfur’s horrors”.⁵⁶ Also on the same day, an opinion piece by Richard Goldstone, former chief prosecutor of the ICTY and the International Criminal Tribunal for Rwanda, strongly supported the arrest warrant against al-Bashir. Both the editorial and Goldstone’s piece challenged critics who pointed at an indictment’s problematic consequences for aid delivery and diplomatic efforts. Some 20 additional articles and editorials followed in the *New York Times* in the remainder of July 2008 alone. The editorial messages decidedly stay on course in supporting the prosecution.

Multivariate statistical analyses, presented elsewhere, confirm that international criminal justice interventions intensify the depiction of the mass violence in Darfur as a form of criminal violence.⁵⁷

6.3.3.2. Journalistic Receptivity to International Criminal Justice Narratives and Empirical Support from Human Rights Trials

Several previous studies shed light on the news media’s particular receptivity to criminal court narratives, as seen in the above-described patterns. I provide here but one remarkable example: Devin Pendas’ impressive historical study of the Auschwitz trial held in Frankfurt in the years 1963–65, its representation in the media, and its public reception. The trial “proved to be much more than simply a trial. It was a cultural watershed. It was both a focal point and a wellspring for the politics of memory of the Federal Republic”.⁵⁸ Importantly in this context, Pendas finds that

⁵⁵ Marlise Simons, Lydia Polgreen and Jeffrey Gettleman, “Arrest is Sought of Sudan Leader in a Genocide Case”, in *The New York Times*, 15 July 2008, p. 1.

⁵⁶ *The New York Times*, “Charged with Genocide”, 15 July 2008, p. 18.

⁵⁷ Savelsberg and Nyseth Brehm, 2015, see above note 27.

⁵⁸ Pendas, 2006, p. 251, see above note 19.

journalism played a major role for this outcome. Media reported prominently and in detail about the trial throughout its proceedings.

Yet, media did not only draw widespread public attention to the trial, and they did not just report the court's determination of the criminal nature of the defendants' actions. They also bought into the shortcomings of the trial. Being primarily concerned with the "concrete guilt of the individual defendants",⁵⁹ the trial downplayed the organization of a criminal State. Further, the court devalued "the experiential truth of Auschwitz recounted by the survivor witnesses" for the benefit of "the judicial truth of individual agency".⁶⁰ And finally, the types of crime brought to the eyes of the public were also coloured by the evidentiary rules of trial proceedings: "torture and other individual atrocities represented in many respects an 'easy case', compared with the ambiguous domains of responsibility and obedience that characterized bureaucratically organized genocide [...]. Consequently, atrocity tended to occupy a privileged terrain compared to genocide".⁶¹

Pendas attributes the diffusion of the Court's representation of Auschwitz, including its shortcomings, to journalism's use of 'realist' techniques, like selected strings of exchanges between trial participants to increase the sense of drama. Similarly, 'novelist' methods such as atmospheric descriptions that extended to the defendants, in the service of narrative fealty, contributed to

what might be termed the characterological style of objective newspaper reporting. [This style] entailed both a concern with personality and a tendency to reduce it to monadic types. And in this, a strong homology existed with the juridical emphasis on the subjective disposition of defendants and the assumption of a causal nexus between motivation and action.⁶²

While Pendas' analysis thus confirms the representational power of criminal courts in human rights, specifically genocide, cases, it simultaneously sheds light on the first of three constraints of criminal trials to which I now turn.

⁵⁹ *Ibid.*, p. 291.

⁶⁰ Pendas, 2006, see above note 19.

⁶¹ *Ibid.*

⁶² *Ibid.*, p. 262.

6.4. Cautionary Notes: Constraints of Law's Representational Power

Constraints faced by international criminal justice responses to grave human rights violations include narrative limits imposed by the particular institutional logic of criminal law, the political environment of international relations in which international courts operate, and such courts' dependency on the journalistic field if they hope that their message will reach a world audience. I address each in turn.

6.4.1. Internal Constraints and Institutional Logic

Law always faces limits as it seeks to write history. Wise jurists are aware of these limits as reflections of the Jerusalem court in its proceedings against Adolph Eichmann, the organizer of central aspects of the Nazi extermination machine, illustrate:

The Court does not possess the facilities required for investigating general questions [...] For example, to describe the historical background of the catastrophe, a great mass of documents and evidence has been submitted to us, collected most painstakingly and certainly out of a genuine desire to delineate as complete a picture as possible. Even so, all the material is but a tiny fraction of the existent sources on the subject [...] As for questions of principle which are outside the realm of law, no one has made us judges of them and therefore our opinion on them carries no greater weight than that of any other person who has devoted study and thought to these questions.⁶³

More specifically, court narratives are constrained by the institutional logic of criminal law. Criminal law, after all, focuses on the behaviour of individuals. Structural conditions of genocide and larger cultural patterns that contribute to atrocity crimes, at the centre of sociologically based narratives, are blended out from the Court's representation. Further, criminal courts focus on behaviours defined as criminal by statutes or precedent. The actions of bystanders (and of protagonists in the world of cultural production) may well play a central, enabling role; but they do not enter into the narrative told by criminal courts. In addition, criminal courts follow specific rules of evidence that differ from those used by historians. This is appropriate in light of due process rules, but it further con-

⁶³ Osiel, 1997, pp. 80 ff., see *supra* note 18.

tributes to the narrative constraints of criminal courts. Finally, criminal law, even though it may recognize aggravating and mitigating circumstances, justifications and excuses, in final logic is bound to a binary logic of guilty versus not guilty. Such simplification would neither be shared by social psychologists nor even by survivors of atrocity crimes, who, like Primo Levi, are mindful of shades of grey. Importantly in our context, media reports directly translate these constraints into their own depictions, given journalists' literal reading of trials as described by Devin Pendas and summarized above.

6.4.2. Political Power and Substantive Rationales

A second constraint of international criminal courts results from the grave consequences that decisions guided by formal legal procedure may generate, and from the political environment of the international relations in which they operate. The challenge of the substantive consequences of formal justice at times results in severe internal conflicts. Within the ICC, for example, scholars find conflicting reasoning between lawyers versus technocrats, a chasm that is not limited to international criminal courts.⁶⁴ On the one side of the dividing line is law's formal rationality, oriented toward a system of legal criteria alone. Codifications such as the Rome Statute have indeed laid the ground for the pursuit of legal rationales, beginning to revolutionize a world in which foreign affairs used to be subject to political reasoning alone.⁶⁵ Some legal philosophers in fact argue

⁶⁴ Jens Meierhenrich, "The Evolution of the Office of the Prosecutor at the International Criminal Court: Insights from Institutional Theory", in Martha Minow, Alex Whiting, and Cora True-Frost (eds.), *The First Global Prosecutor*, University of Michigan Press, Ann Arbor, 2014. This tension is discussed by Max Weber in his *Sociology of Law* (Max Weber, *Economy and Society*, University of California Press, Berkeley, 1976). It has been updated in recent literature on 'technocratization' (Robin Stryker, "Limits on Technocratization of Law", in *American Sociological Review*, 1989, vol. 54, pp. 341–58), 'substantivation' (Joachim J. Savelsberg, "Law That Does Not Fit Society: Sentencing Guidelines as a Neo-Classical Reaction to the Dilemmas of Substantivized Law", in *American Journal of Sociology*, 1992, vol. 97, pp. 1346–81), responsive law (Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law*, Octagon, 1978) and post-liberal law (Roberto M. Unger, *Law in Modern Society*, Free Press, 1976). For a detailed application to international criminal law, see Joachim J. Savelsberg, "Formal and Substantive Rationality in Max Weber's Sociology of Law: Tensions in International Criminal Law", in Werner Gephart and Jens Suntrup (eds.), *Law as Culture: Max Weber's Comparative Sociology of Law*, Vittorio Klostermann, Frankfurt, 2017, pp. 493–510.

⁶⁵ On the emergence and solidification of a semi-autonomous transnational legal field, see Yves Dezalay and Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitra-*

that international criminal justice and human rights law can secure legitimacy in the long run only through strict adherence to formal legal criteria and abstinence from political rationales.⁶⁶ On the other side are those actors who are more concerned with substantive outcomes of court actions than with formal procedure, outcomes that in the cases under consideration may well involve the immediate survival chances of thousands. Foreign policy makers at times back this side of the divide, as illustrated by the words of one of my interviewees from the foreign ministry of one large European country, who specialized on issues of the ICC within his ministry's Division of International Law and who represented his country in the Assembly of States Parties:

As to my interlocutors in the [Foreign Ministry] [...] there were constantly conflicting perceptions. I do remember quite a number of quarrels I had with my colleagues in the political department [...] And the reason is that we had two different approaches. Their approach was purely political. My approach was both political, but also legal and judicial. And that is extremely difficult to combine at times. Because, if you are only confined to making political assessments, then it is difficult to evaluate the work of a court, to accept a court, to accept any independent legal institution. And that is really something new in the international field where people are trained to assess complex issues by political means only. And you can find that very, very tangibly when you talk to United Nations staff, because they have for decades been trained in having an exclusively political view on issues. Now there is a new factor, a new player on the ground [ICC], which does not make a political assessment, but which simply applies the law. That is a new phenomenon, and I think for those who have an exclusively political approach that is difficult to accept.

Foreign policy-makers who fend for the autonomy of international law obviously face contending forces within their own ministries and within the United Nations. In addition, the Rome Statute opens the window for substantive, political concerns to intrude into the work of the ICC:

tion and the Construction of a Transnational Legal Order, University of Chicago Press, 1997.

⁶⁶ Aaron Fichtelberg, "Crimes Beyond Justice? Retributivism and War Crimes Trials", in *Criminal Justice Ethics*, 2005, vol. 24, no. 2, pp. 31–46.

The United Nations Security Council, its permanent and non-permanent members, countries that are no strangers to the consideration of geopolitical and economic interests, are authorized to refer cases to the ICC.⁶⁷ This intrusion of political rationales is institutionalized in Article 16 of the Rome Statute, a window built into the edifice of the Statute to keep political considerations in plain view:

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.⁶⁸

The court's vulnerability *vis-à-vis* political powers is further enhanced as many countries have not yet ratified the Rome Statute, including ones – as is well known – as powerful as the United States, the People's Republic of China, and Russia.⁶⁹ Others have threatened to withdraw from the Statute.

Apart from external pressures, substantive outcomes of legal decision making also matter to jurists directly. Max Weber, in his classic work on the Sociology of Law, recognized how lawyers resent a notion of formal rationality that threatens to reduce them to an automaton into which one drops the facts and the fees for them to spew out the decision (and the opinion).⁷⁰ Instead, lawyers seek discretion, enabling them to consider ethical maxims or practical concerns of political, economic, or geopolitical nature in their legal decisions. The long history of criminal law speaks to this tension between formal and substantive rationalities. In international criminal law, substantive considerations have particular weight, as thousands of lives may be at stake if conditions on the ground and practical consequences of legal decisions are disregarded. Applied to the case of Darfur, many foreign policy-makers, including several of my interviewees,

⁶⁷ Those failed, however, who sought to allow *only* the Security Council to refer cases to the ICC.

⁶⁸ Rome Statute of the International Criminal Court, 17 July 1998 (<http://www.legal-tools.org/doc/7b9af9/>).

⁶⁹ The Court is further weakened by the fact that rich and powerful countries seek to protect themselves against potential ICC interventions. The United States, for example, has entered numerous bilateral immunity agreements, rewarding smaller countries for guarantees that they will not extradite American citizens to the ICC.

⁷⁰ Weber, 1976, see above note 64.

expressed concern that charges against al-Bashir, especially on the grounds of genocide, might threaten the North–South agreement and the referendum on the independence of South Sudan. It is hard to imagine that these concerns did not touch decision makers at the ICC.

In short, despite its particular institutional logic, criminal law is no stranger to internal contradictions and conflicts. Conflicts between formal legal criteria versus substantive concerns, while dividing legal and political actors, also create ambivalences and internal tensions within the legal field. The ICC, and the case of Darfur, are no exceptions. I have elsewhere described in detail this struggle and the treacherous journey between the Scylla of formal-rational justice and the Charybdis of practical concerns in a highly politicized environment.⁷¹

6.4.3. Dependency on Mass Media

As discussed above, international criminal courts are mindful of the role of mass media when they hope to bring their message to a world audience. We had also seen that journalists are receptive to the narratives provided by criminal courts. Yet, communicative barriers also exist. Africa correspondents who report from the field generally note a substantial disconnect from the Court. A German interviewee, stationed in Nairobi, told me that he had never been to The Hague. Similarly, a British respondent claimed not to receive any information directly from the ICC. He only learnt about special events such as indictments, about which he was informed by other sources. An Irish journalist similarly confessed that he knew about the ICC and its actions primarily as a newspaper reader. One interviewee told me that information he received about big events at the ICC was based on wire reports. Some journalists, who did mention interactions with the Court, experienced conditions that were not compatible with their journalistic habitus. When asked “Is the ICC a source of information for you in any way?”, a journalist answered:

In no way at all. And I really find that rather regrettable. I had occasional contacts with investigators for the ICC, but that was in the context of the Congo, East Congo, and the DFLR [Forces Démocratiques de Libération du Rwanda], those Rwandan militias, and how they acquire funding. These people wanted information from me. I am a journalist. I told them, “one hand washes the other. You can get some-

⁷¹ Savelsberg, 2017, pp. 493–510, see above note 64.

thing from me, give me something of yours, and then we can talk reasonably in what way that can be published at all without endangering your work". I never heard from them again. But, it would be interesting to learn how often the term International Criminal Court is now being used in media reporting. Very often. At the same time, we know that those who report about it know nothing about this criminal court, because this court shuts itself off. That is a pity.⁷²

This quotation illustrates how it is not just geographic distance between Africa correspondents and the ICC, but also differences in habitus and contrasting rules of the game that impede communication. The journalist's tit-for-tat practice does not sit well in interactions with actors who are bound by judicial rules. Another interviewee, an Africa correspondent who works out of the capital of his European country, recounted additional communicative hurdles: "I've been there [the ICC in The Hague] once. And it was useless in fact [...] Their time is not our time. It is not the same [...] It is years". This journalist contrasted the slow progress of judicial proceedings with the fast pace of journalistic work. Additional problems included the need to explain to domestic readers the institutional particularities of an international court. In the words of a journalist interviewee: "We have the problem that the judicial system used in The Hague is not the French one. So we have to explain to people how it works".

In short, Africa correspondents have little interaction with the ICC and the interaction they do have is marred by problems. Yet, they are not the only contributors to journalistic work on mass violence. A German Africa correspondent referred me to a colleague, who worked from his paper's headquarters in his European country. While not specialized on Africa, this journalist did visit the ICC. Similarly, a US journalist spoke about her paper's specialist for institutions such as the ICC, who occasionally supplied her with relevant information. Finally, a British correspondent reported, and his foreign editor confirmed, that the paper would send someone to The Hague "for the big day". And indeed, such "big days" find many journalists gathered in the ICC's press room (Figure 4).

⁷² Author's translation.



Figure 4: The media room of the ICC.

6.5. Conclusions

This chapter aims to contribute to knowledge about the cultural impact of international criminal justice interventions, especially of the International Criminal Court. I argued, and demonstrated empirically, that we cannot fully grasp the effectiveness of prosecutions of genocides and other atrocity crimes if we focus exclusively on deterrence mechanisms. Instead, we have to consider the representational power of international court interventions, their ability to impress on a global public a definition of acts of mass violence as a form of criminal violence, even against competing narratives. It seems as though such power is a crucial mechanism through which human rights violations become de-legitimized. In addition, even rational choice theorists will have to concede that for deterrence to work, potential perpetrators need to be part of a mnemonic community that maintains the memory of past atrocities and penal responses to them.

Empirical data on interventions in the Darfur situation show indeed that crime narratives prevail in media reporting, over humanitarian emergency and armed conflict frames. This is especially the case in the aftermath of international criminal justice interventions. I provided theoretical arguments that potentially explain this empirical pattern, suggesting that the Court's representational power is based on the ritual and communicative quality of legal proceeding and supported by legitimacy that is based on procedure.

Fundamentally, international courts depend on mass media to communicate their message to a global audience. The case of Darfur shows

that the media do indeed serve this role, despite impediments. Once the media have carried representations of mass violence as a form of criminal violence to the public, such framing is likely to settle in the collective memories of various communities, and these memories – in a feedback loop – themselves wield normative power. Eventually, representational power, reinforced by memorial normativity, potentially turns into symbolic power, a tacit mode of cultural domination unfolding within everyday social habits and belief systems. In other words, understandings of those who bear responsibility for unleashing mass violence as heroes and great State-builders, common throughout much of human history, will give way to matter of course assumptions about such actors as criminal perpetrators.

Diluting the hopes in the representational power of criminal justice responses to grave human rights violations and atrocity crimes, I pointed at three constraints. First, the representations of mass violence produced by criminal courts are limited by the institutional logic of criminal law, its focus on individuals, the legal categories by which it is bound, its evidentiary rules, and a binary logic that knows only the distinction between guilty and not guilty, neglecting shades of grey. Second, international criminal justice operates in a highly politicized environment. Its functioning is contingent on the good will of States that may follow other rationales than those of the justice system. Third, the diffusion of court reasoning is dependent on mass media, and journalistic rules, while partly congenial to the logic of criminal law, also put up communicative barriers between courts and the media.

Finally, and importantly, while my empirical illustration of the representational power of international criminal justice focused on the ICC and the situation of Darfur, other case studies on international and domestic proceedings against human rights perpetrators support these findings. They include the ICTY,⁷³ the My Lai trial,⁷⁴ the Frankfurt Auschwitz trial,⁷⁵ the IMT in Nuremberg,⁷⁶ and the Nuremberg ‘Doctors’ Trial’.⁷⁷

⁷³ John Hagan, *Justice in the Balkans: Prosecuting War Crimes in The Hague Tribunal*, University of Chicago Press, 2003; Savelsberg and King, 2011, see above note 20.

⁷⁴ Savelsberg and King, 2011, see above note 20.

⁷⁵ Pendas, 2006, see above note 19.

⁷⁶ Joachim J. Savelsberg and Ryan D. King, “Institutionalizing Collective Memories of Hate: Law and Law Enforcement in Germany and the United States”, in *American Journal of Sociology*, 2005, vol. 111, pp. 579–616.

⁷⁷ Marrus, 2008, see above note 19.

In sum, theoretical arguments and empirical evidence suggest that we must take the representational power of international criminal justice institutions seriously if we hope to comprehend their effectiveness. Simultaneously, limitations and constraints of international criminal law suggest that supplemental mechanisms must accompany criminal justice responses toward the goal of a less violent and more human rights respecting future.

The Anti-Impunity Mindset

Barrie Sander*

7.1. Introduction

Towards the end of the twentieth century, the field of human rights underwent a significant shift in its agenda and priorities in its response to mass atrocity. From the mid-1970s through the late 1980s, human rights groups – particularly those in the United States (‘US’) and Europe – predominantly directed their advocacy in opposition to State criminalisation of political activity and abuses within domestic criminal justice systems. Their primary tactic was naming and shaming; their principal target was the State.¹ In this period, domestic amnesties became standard political tools – whether ‘political amnesties’ used by authoritarian regimes for political prisoners as bargaining chips that could be offered to the international community, ‘self-amnesties’ used by oppressive regimes for their political and military leaders to shield perpetrators from criminal prosecution, or ‘blanket amnesties’ used in peace negotiations to immunise entire groups of persons unconditionally from criminal prosecution.²

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¹ Karen Engle, “A Genealogy of the Criminal Turn in Human Rights”, in Karen Engle, Zinaida Miller, and D.M. Davis (eds.), *Anti-Impunity and the Human Rights Agenda*, Cambridge University Press, 2016, p. 18. On the dangers of referring to ‘human rights groups’ or ‘the human rights movement’ as a “singular, monolithic entity”, see Paul O’Connell, “Capitalism, Inequality, and Human Rights”, in *Law and Political Economy*, 4 June 2018 (available on its web site).

² Max Pensky, “Amnesty on trial: impunity, accountability, and the norms of international law”, in *Ethics & Global Politics*, 2008, vol. 1, no. 1, p. 6.

However, from at least the early 1990s, the field of human rights experienced a “criminal turn”,³ marked by human rights groups increasingly directing their resources towards the promotion of criminal prosecution as an indispensable requirement of securing justice and truth in the aftermath of mass atrocity.⁴ Under the banner of ‘ending impunity’, the primary tactic became the promotion of criminal accountability before domestic and international courts, the principal target became the individual.⁵ Nowadays, as Karen Engle has argued, “the correspondence between criminal prosecution and human rights has become so ingrained that expressing opposition to any particular international prosecution is sometimes seen as anti-human rights”.⁶

To date, the turn to anti-impunity has primarily been examined as an embrace of criminal prosecution as a necessary antidote to mass violence. Breaking with this trend, this chapter instead examines anti-impunity as a mindset, encompassing a set of assumptions that have permeated justice mechanisms beyond the frame of criminal prosecution.⁷ By examining anti-impunity as a mindset, this chapter aims to illuminate its

³ For a detailed genealogical account of this “criminal turn”, see generally, Engle, 2016, p. 15, see above note 1.

⁴ See, in this regard, the Coalition for the International Criminal Court, established in the mid-1990s by a group of 25 civil society organisations and now comprised of 2,500 civil society organisations in 150 different countries. The official website defines the Coalition as “a movement to end impunity”. For a narrative account of the history of the Coalition, see generally Coalition for the International Criminal Court, “Our Story” (available on its web site).

⁵ Pensky, 2008, p. 6, see above note 2:

With the advent of the anti-impunity norm, the overall attitude toward amnesties in the international legal community underwent a remarkable 180 degree shift. Rather than a yearned-for release of innocents from captivity, domestic amnesties for international crimes became the poster child for the most egregious forms of impunity.

⁶ Engle, 2016, p. 42, see above note 1. See also, Kieran McEvoy, “Beyond Legalism: Towards a Thicker Understanding of Transitional Justice”, in *Journal of Law and Society*, 2007, vol. 34, no. 4, p. 420 (“in some transitional societies human rights concerns become a byword for a retributive notion of justice”).

⁷ In forging this path, the chapter aims to build on and critically review some of the ideas initially put forward in the excellent edited volume of Karen Engle, Zinaida Miller and Dennis M. Davis. See, in particular, their “Introduction”, in *idem.* (eds.), 2016, p. 4, see above note 1 (noting how several chapters in the volume “examine mechanisms for human rights adjudication or transitional justice that appear to operate outside the retributive criminal framework, but nevertheless end up mimicking aspects of it”). For my review of that volume, see Barrie Sander, “The Human Rights Agenda and the Struggle Against Impunity”, in *Lawfare*, 6 February 2017 (available on its web site).

power and limits, both within and beyond the field of international criminal justice.

This chapter unfolds in five parts. It begins by defining the anti-impunity mindset through an examination of the human rights field's struggle to end impunity for mass violence (Section 7.2.). The chapter then turns to explore the *reach* of the mindset by examining three entities beyond the field of international criminal justice which, despite their formally non-retributive nature, have ended up embracing the assumptions of the anti-impunity mindset in practice: truth commissions, local justice mechanisms, and civil human rights litigation (Section 7.3.). Next, the chapter illuminates the *power* of the mindset by reviewing some of the principal critiques to which the mindset has been subjected in practice (Section 7.4.). After discussing the mindset's reach and power, the chapter then proceeds to identify its *limits*. Specifically, it is contended that the capacity of the anti-impunity mindset to crowd-out concern for issues of structural violence has sometimes been overstated (Section 7.5.). The chapter concludes with some reflections on critical scholarship concerning the anti-impunity mindset (Section 7.6.).

7.2. The Anti-Impunity Mindset

Since at least the early 1990s, a significant number of human rights groups have waged a struggle to end impunity for gross human rights violations.⁸ In this context, impunity – literally the absence of punishment – has come to be equated with an absence of *criminal* prosecution and, where persons are found guilty, *criminal* punishment.⁹ As Max Pensky

⁸ See above note 4 (referring to the work of the Coalition for the International Criminal Court). See also, Martti Koskeniemi, “Between Impunity to Show Trials”, in *Max Planck Yearbook of United Nations Law*, 2002, vol. 6, no. 1, p. 13 (“The effort to end the “culture of impunity” emerges from an interpretation of the past – the Cold War in particular – as an unacceptably political approach to international crises”); and Hani Sayed, “The Regulatory Function of the Turn to Anti-Impunity in the Practice of International Human Rights Law”, in *Stanford Journal of International Law*, 2019, vol. 55, no. 1, pp. 3–6 (discussing three different registers under which the turn to anti-impunity could be described, namely changes in the practices of the human rights movement, changes in the background international law framework, or the success of norm entrepreneurs in pushing specific reform proposals past the tipping point to produce a norm cascade).

⁹ See similarly, Anette Bringedal Houge and Kjersti Lohne, “End Impunity! Reducing Conflict-Related Sexual Violence to a Problem of Law”, in *Law & Society Review*, 2017, vol. 51, no. 4, p. 778 (“we hold the force of the fight impunity-approach to be reflective of [...] a strong faith in the ability of law in general – and criminal law in particular – to transform people and societies”); Engle *et al.*, 2016, p. 4, see above note 7 (noting how in general the

has observed, “impunity has been understood virtually entirely [...] as a retributive principle of narrowly defined criminal justice”.¹⁰ The prioritisation of criminal prosecution and punishment as the preferred policy response to episodes of mass violence is reflected not only in the policy statements of human rights groups, but also the discursive practices of both human rights bodies and international criminal courts.¹¹ In its *Policy Paper on the Interests of Justice*, for example, the ICC Office of the Prosecutor (‘OTP’) elaborates a strong presumption in favour of criminal investigation and prosecution when the other relevant statutory criteria set out in Article 53 of the Rome Statute have been satisfied.¹² Embodying the values of the struggle to end impunity, the OTP notes that other transitional justice mechanisms should be seen as “complementary” to the work of the ICC, forming part of “a comprehensive approach” to justice, rather than as alternatives.¹³

The equation of anti-impunity with criminal prosecution and punishment has been driven by a number of claims concerning the potential of law in general – and international criminal law in particular – to posi-

turn to anti-impunity has been viewed “as an embrace of the idea that criminal law is the necessary and preferred response to a particular set of human rights violations and international crimes”).

¹⁰ Pensky, 2008, pp. 19–20, see above note 2.

¹¹ On the growing tendency of human rights bodies to trigger the application of criminal law and criminal measures within domestic criminal courts, see generally, Alexandra Huneus, “International Criminal Law By Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts”, in *American Journal of International Law*, 2013, vol. 107, no. 1; and Mattia Pinto, “Awakening the Leviathan through Human Rights Law – How Human Rights Bodies Trigger the Application of Criminal Law”, in *Utrecht Journal of International and European Law*, 2018, vol. 34, no. 2. On the deployment of anti-impunity rhetoric within the practices of international criminal courts, see generally, Mark Drumbl, “Impunities”, in *Washington & Lee Public Legal Studies Research Paper Series*, 2017, Accepted Paper No. 2017-17, pp. 8–18; and Max Pensky, “Impunity: A Philosophical Analysis”, in Morten Bergsmo and Emiliano J. Buis (eds.), *Philosophical Foundations of International Criminal Law: Foundational Concepts*, Torkel Opsahl Academic EPublisher, 2019, pp. 246ff. For a discussion of anti-impunity thinking within domestic legislation and criminal courts, see generally, Mattia Pinto, “Sowing a ‘Culture of Conviction’: What Shall Domestic Criminal Justice Systems Reap from Coercive Human Rights?”, LSE Legal Studies Working Paper No. 9/2019, 2019.

¹² ICC Office of the Prosecutor, *Policy Paper on the Interests of Justice*, September 2007, p. 3 (<http://www.legal-tools.org/doc/bb02e5/>).

¹³ *Ibid.*, pp. 7–8.

tively transform individuals and societies.¹⁴ At the individual level, it is claimed that criminal prosecution responds to the needs of victims of mass atrocities, by vindicating their value in the eyes of society, offering a civilised alternative to the desire for revenge, and delivering an authoritative account of what happened during the events in question. At the societal level, it is claimed that criminal prosecution is important for deterring the commission of similar acts in the future. These claims, which pervade the discursive practices of the human rights field, are articulated in particularly clear terms in Amnesty International's *Policy Statement on Impunity* issued in 1991:¹⁵

Amnesty International believes that the phenomenon of impunity is one of the main contributing factors to these continuing patterns of [gross human rights] violations. Impunity, literally the exemption from punishment, has serious implications for the proper administration of justice [...] Victims, their relatives and the society at large all have a vital interest in knowing the truth about past abuses and in the clarification of unresolved human rights crimes. Similarly, bringing the perpetrators to justice is not only important in respect of the individual case, but also sends a clear message that violations of human rights will not be tolerated and that those who commit such acts will be held fully accountable. When investigations are not pursued and the perpetrators are not

¹⁴ For a detailed exploration of these progress claims, as well as the critiques to which they have been subjected, see generally, Barrie Sander, "International Criminal Justice as Progress: From Faith to Critique", in Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (eds.), *Historical Origins of International Criminal Law: Volume 4*, Torkel Opsahl Academic EPublisher, Brussels, 2015, p. 749 (<http://www.legal-tools.org/doc/b7ac0c/>).

¹⁵ Amnesty International, "Policy Statement on Impunity", in Neil J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes: Volume I: General Considerations*, US Institute of Peace Press, 1995, p. 219. See similarly, Annual Report 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, UN Doc. A/49/342, S/1994/1007, 29 August 1994, para. 15 (asserting that the "only civilized alternative to this desire for revenge is to render justice" and that the failure to provide a fair trial would cause "feelings of hatred and resentment seething below the surface [...] [to] erupt and lead to renewed violence"); and Carla Del Ponte, "The Dividends of International Criminal Justice", Address at Goldman Sachs, 6 October 2005 ("Of course, the value of satisfying the victims' need for justice cannot be estimated. But what is certain, is that it prevents the feelings of revenge which are strong when injustice prevails").

held to account, a self-perpetuating cycle of violence is set in motion resulting in continuing violations of human rights cloaked by impunity.

According to this perspective, impunity is not merely a failure to criminally prosecute and punish individuals for their participation in the commission of gross human rights violations, but also a major contributing factor to the commission and perpetuation of gross human rights violations.¹⁶

By emphasising the indispensability and progressive potential of criminal prosecution and punishment in response to mass violence, the struggle to end impunity has come to embody a number of implicit assumptions about how to think about mass violence. Collectively, these assumptions may be understood to form a particular *mindset* amongst their adherents.¹⁷ Specifically, the anti-impunity mindset conceptualises responsibility for mass violence in primarily individualised terms,¹⁸ directs attention towards specific violations rather than structural phenomena,¹⁹ evinces a tendency to prioritise concern for physical violence,²⁰ and delineates boundaries through binary categorisations, such as guilt and

¹⁶ See also, Houge and Lohne, 2017, pp. 768–78, see above note 9 (examining how “the diagnostic, prognostic and motivational framing of conflict-related sexual violence constructs and reinforces criminal law as its proper response”).

¹⁷ See, in this regard, Martti Koskeniemi, “Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization”, in *Theoretical Inquiries in Law*, 2007, vol. 8, no. 1, p. 9 (describing ‘constitutionalism’ as “a mindset – a tradition and a sensibility about how to act in a political world”).

¹⁸ Larry Catá Backer, “The Führer Principle of International Law: Individual Responsibility and Collective Punishment”, in *Penn State International Law Review*, 2003, vol. 21, no. 3, p. 525 (“cult of personal responsibility”). Some scholars have referred to anti-impunity’s individualism as ‘liberal legalist’. See, for example, Laurel E. Fletcher, “From Indifference to Engagement: Bystanders and International Criminal Justice”, in *Michigan Journal of International Law*, 2005, vol. 26, no. 4, p. 1031 (defining liberal legalism as “the legal principles and values that privilege individual autonomy, individuate responsibility, and are reflected in the criminal law of common law legal systems”); Mark A. Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press, 2007, p. 5 (adopting Fletcher’s definition of liberal legalism but adding that “these values also are shared by civil law legal systems”); and Houge and Lohne, 2017, p. 778, see above note 9 (holding “the force of the fight impunity-approach to be reflective of liberal legalism”).

¹⁹ See similarly, Tor Krever, “International Criminal Law: An Ideology Critique”, in *Leiden Journal of International Law*, 2013, vol. 26, no. 3, p. 722.

²⁰ See similarly, Zinaida Miller, “Anti-Impunity Politics in Post-Genocide Rwanda”, in Engle *et al.* (eds.), 2016, pp. 168–71, see above note 1.

innocence, right and wrong, blamers and blamed, and victims and perpetrators.²¹

Although the struggle to end impunity has only become entrenched within the field of human rights over the course of the last 30 years, the mindset and assumptions underpinning the struggle have a longer history. At the international level, anti-impunity thinking is rooted in a double movement: first, the criminalisation of international law, characterised by the tendency to proscribe criminal acts under international law by imposing obligations directly on individuals without the intermediary of the State; and second, the internationalisation of criminal law, characterised by the tendency to prosecute individuals in international criminal courts above the level of the State.

Referred to by Mahmood Mamdani as “the logic of Nuremberg”,²² the anti-impunity mindset finds its clearest expression in the practices of international criminal courts. It is notable, for example, that the mandates of international criminal courts have not only facilitated but also consistently been restricted to the determination of *individual* criminal responsibility.²³ As the International Military Tribunal at Nuremberg famously put it, international crimes are “committed by men, not abstract entities and

²¹ See, similarly, Doris Buss, “Performing Legal Order: Some Feminist Thoughts on International Criminal Law”, in *International Criminal Law Review*, 2011, vol. 11, no. 3, p. 411; and Stina Löytömäki, *Law and the Politics of Memory: Confronting the Past*, Routledge, 2014, p. 10.

²² Mahmood Mamdani, “Beyond Nuremberg: The Historical Significance of Post-apartheid Transition in South Africa”, in *Politics & Society*, 2015, vol. 43, no. 1, p. 80. See also, Ryan Liss, “Crimes Against the Sovereign Order: Rethinking International Criminal Justice”, in *American Journal of International Law*, 2019, vol. 113, no. 4, p. 757 (discussing the notion of “crimes against the sovereign order”, which may be traced back to the late eighteenth century in the form of piracy as an international crime).

²³ See, for example, the references to ‘natural persons’ in: Statute of The International Criminal Tribunal for the Former Yugoslavia, 25 May 1993, Article 6 (<http://www.legal-tools.org/doc/b4f63b/>); Statute of the International Tribunal for Rwanda, 8 November 1994, Article 5 (<http://www.legal-tools.org/doc/8732d6/>); and Rome Statute of the International Criminal Court, 17 July 1998, Article 25(1) (<http://www.legal-tools.org/doc/7b9af9/>). Article 9 of the Charter of the International Military Tribunal, 8 August 1945 (<http://www.legal-tools.org/doc/64ffdd/>) provided that a group or organization may be declared to be “a criminal organization”. However, this power did not entail the assignment of responsibility as such, but was a mechanism designed to facilitate the determination of the individual criminal responsibility of members of such organisations. The Statute of the Special Court for Sierra Leone, 16 January 2002 (<http://www.legal-tools.org/doc/aa0e20/>) appeared to leave open the possibility of prosecuting persons other than individuals, though this never eventuated in practice.

only by punishing individuals who commit such crimes can the provisions of international law be enforced”.²⁴ Although efforts have been made in recent years to hold collective entities such as corporations accountable,²⁵ it remains the case that ever since Nuremberg, a paradigm of individual criminal responsibility has held the field of international criminal justice firmly within its grasp.²⁶

Similarly, the legal form of international criminal law has served to focus attention on the *specific* over the general, directing international criminal courts towards particular incidents, individuals and crimes at the expense of examining the structural logics that lurk beneath them.²⁷ As Zinaida Miller has put it, “[c]riminal courts try individuals, not structures. They pursue particular violations, not a situation of structural violence”.²⁸

International prosecutors have also tended to prioritise the prosecution of *physical violence* to the relative neglect of economic, social, cultural and environmental violence. In this regard, it is notable that while international criminal law has only ever been able to offer a partial response to these forms of violence, international prosecutors have had at their disposal at least some of the necessary doctrinal tools to orient their charging practices towards a broader range of harms had they so desired.²⁹ In practice, however, international criminal courts have predomi-

²⁴ International Military Tribunal, *Göring and others*, Judgment, 1 October 1946, in *Trial of the Major War Criminals before the International Military Tribunal: Volume I*, Nuremberg, 1947, pp. 171 and 223 (emphasis added) (<http://www.legal-tools.org/doc/388b07/>).

²⁵ Barrie Sander, “Addressing the Economic Dimensions of Mass Atrocities: International Criminal Law’s Business or Blind Spot?”, in *Justice in Conflict*, 8 June 2015 (available on its web site).

²⁶ Kai Ambos, *Treatise on International Criminal Law: Volume I: Foundations and General Part*, Oxford University Press, 2013, p. 103.

²⁷ Robert Knox, “Marxism, International Law, and Political Strategy”, in *Leiden Journal of International Law*, 2009, vol. 22, no. 3, p. 430.

²⁸ Miller, 2016, p. 169, see above note 20.

²⁹ See similarly, Ioannis Kalpouzos and Itamar Mann, “Banal Crimes Against Humanity: The Case of Asylum Seekers in Greece”, in *Melbourne Journal of International Law*, 2015, vol. 16, no. 1, p. 1; Frédéric Mégret, “What Sort of Global Justice is ‘International Criminal Justice’?”, in *Journal of International Criminal Justice*, 2015, vol. 13, no. 1, pp. 95–96; and Evelyne Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law*, Cambridge University Press, 2015.

nantly enforced a very narrow set of human rights priorities, neglecting structural injustices rooted in global social-economic inequality.³⁰

Finally, the legal form of international criminal law also relies on *binary adversarial categorisations*, which require international criminal courts to “speak” through bright line distinctions.³¹ Mark Osiel, for example, has referred to the “bipolar logic of criminal law”, which insists on “dividing the world into mutually exclusive categories of people: legally, into guilty and innocent; sociologically, into blamers and blamed”.³² By relying on these binary categorisations, international criminal courts have tended to reduce the complexity of mass atrocities to simplified manageable narratives.³³

As these observations indicate, the anti-impunity mindset pervades the practices of international criminal courts. Yet, once anti-impunity is characterised as a mindset comprised of a number of assumptions, it is

³⁰ See similarly, Kalpouzos and Mann, 2015, pp. 1–4, see above note 29 (referring to less visible categories of crimes encompassing “normalised occurrences”, “banal acts”, and “structural human rights violations rooted in global social-economic inequality”); and Asad G. Kiyani, “International Crime and the Politics of Criminal Theory: Voices and Conduct of Exclusion”, in *New York University Journal of International Law and Politics*, 2015, vol. 48, no. 1, pp. 183ff. (noting how international criminal law “continues to enforce a very narrow set of human rights priorities”, encompassing “incidences of spectacular, not structural, violence”).

³¹ Bronwyn Leebaw, *Judging State-Sponsored Violence, Imagining Political Change*, Cambridge University Press, 2011, p. 38 (noting “the epistemology of Western legalism” whose “reliance on adversarial categories functions to reify and intensify conflict”).

³² Mark Osiel, *Mass Atrocity, Collective Memory, and the Law*, Transaction Publishers, 1997, p. 159. See similarly, Mark A. Drumbl, “Victims who victimise”, in *London Review of International Law*, 2016, vol. 4, no. 2, p. 240 (referring to “the binary reductionism of criminal law’s categorism of pure victim and ugly perpetrator”).

³³ Carsten Stahn, “Between ‘Faith’ and ‘Facts’: By What Standards Should We Assess International Criminal Justice?”, in *Leiden Journal of International Law*, 2012, vol. 25, no. 2, p. 273. See similarly, Stiina Löytömäki, “Legalisation of the memory of the Algerian war in France”, in *Journal of the History of International Law*, 2005, vol. 7, no. 2, p. 172 (noting that when criminal trials “reduce complex historical phenomena to such binary categories as victim-executioner, innocent-guilty, good-evil, oppressor-oppressed, trials tend to align identities with completely unrealistic and stereotypical classifications”); Buss, 2011, p. 416, see above note 21 (noting that “the criminal trial model, particularly in its Anglo-American adversarial form, reduces all complexity to simplistic binaries of innocent/guilt; good/bad; non-criminal/criminal”); and Richard Ashby Wilson, *Writing History in International Criminal Tribunals*, Cambridge University Press, 2011, p. 9 (noting that “[b]ecause courts follow law’s own exceptional principles rather than those of historical inquiry, they can reduce complex histories to a defective legal template, and thereby distort history”).

possible to identify the permeation of anti-impunity thinking within justice mechanisms beyond the field of international criminal justice.

7.3. The *Reach* of the Anti-Impunity Mindset

Although anti-impunity thinking is most readily identifiable within the field of international criminal justice, it has also seeped into the operation of other justice mechanisms. Drawing on the recent volume of Karen Engle, Zinaida Miller and D.M. Davis concerning the struggle against impunity,³⁴ this section discusses three contexts where the assumptions underpinning anti-impunity thinking have been particularly apparent: South Africa's Truth and Reconciliation Commission ('TRC'); Rwanda's *gacaca* process; and US Alien Tort Statute ('ATS') litigation.

7.3.1. South Africa's Truth and Reconciliation Commission

Although truth commissions have often been envisaged as opportunities for broader inquiries into the past than those presented by criminal prosecution, at times their mandates have been interpreted restrictively in ways that mimic attributes of anti-impunity thinking.

Consider, for example, South Africa's TRC, which was established by the Promotion of National Unity and Reconciliation Act of 1995, with a mandate to "provide for the investigation and establishment of as complete a picture as possible of the nature, causes, and extent of gross violations of human rights" committed in South Africa between 1960 and 1994.³⁵ In practice, however, the TRC interpreted its mandated narrowly in alignment with many of the assumptions of the anti-impunity mindset. In particular, the TRC interpreted the meaning of "gross violations of human rights" as requiring the Commission to focus on "human rights violations committed as *specific* acts, resulting in *severe physical and/or men-*

³⁴ This section owes an intellectual debt to the volume, several chapters of which examine the three contexts discussed here. See, generally, Engle *et al.* (eds.), 2016, above note 1. For a discussion of anti-impunity thinking within human rights bodies and their growing tendency to invoke human rights to trigger the application of criminal law measures at the domestic level, see Pinto, 2019, above note 11. For a discussion of how the turn to anti-impunity has had a regulatory impact across the governance regimes of international trade and development assistance, see Sayed, 2019, above note 8.

³⁵ South Africa, Promotion of National Unity and Reconciliation Act, 19 July 1995, Section 3(1)(a) (<http://www.legal-tools.org/doc/42cdab/>).

tal injury, in the course of past political conflict”.³⁶ To this end, the TRC claimed that while bodily integrity rights fell within its mandate, a broader range of subsistence rights fell beyond it.³⁷

The consequences of the TRC’s restrictive understanding of its mandate were fivefold.³⁸ First, the TRC narrated the story of apartheid from the narrow perspective of specific human rights violations rather than the broad perspective of colonialism and capitalism.³⁹ Second, the TRC individualised the victims, neglecting the collective nature of the oppression that made apartheid distinct.⁴⁰ Third, the TRC focused on the violation of bodily integrity rights, despite the vast majority of the South African population suffering economic violence through attacks on their means of livelihood, land and labour.⁴¹ In this regard, although the TRC held institutional hearings, which included consideration of the role of business in apartheid, these were ultimately reduced to providing context and background to its core examination of gross human rights violations.⁴² Fourth, the TRC individualised the perpetrators, neglecting that much of the violence in South Africa was a product of the apartheid authorities and the dynamics of the apartheid system.⁴³ Finally, by relying on the bright line distinction between victims and perpetrators, the TRC devoted minimal attention to the beneficiaries of the apartheid system who fell beyond the victim-perpetrator binary.⁴⁴ The result, as Mahmood Mamdani has explained, was to align the TRC with the logic of anti-impunity thinking:⁴⁵

[T]he TRC set aside the distinctive everyday violence of apartheid, the violence that targeted entire groups and that was central to realizing its political agenda. This is because

³⁶ TRC, *South Africa Truth and Reconciliation Commission Report: Volume 1*, 1998, para. 55 (emphasis added) (<http://www.legal-tools.org/doc/773339/>).

³⁷ *Ibid.*, paras. 55–59.

³⁸ See generally, Robert Meister, *After Evil: A Politics of Human Rights*, Columbia University Press, 2011, chap. 2; and Mamdani, 2015, p. 61, see above note 22.

³⁹ Zinaida Miller, “Effects of Invisibility: In Search of the ‘Economic’ in Transitional Justice”, in *International Journal of Transitional Justice*, 2008, vol. 2, no. 3, p. 281.

⁴⁰ Mamdani, 2015, p. 72, see above note 22.

⁴¹ *Ibid.*, pp. 72–73.

⁴² *Ibid.*, p. 75.

⁴³ *Ibid.*, p. 73.

⁴⁴ Leebaw, 2011, p. 139, see above note 31.

⁴⁵ Mamdani, 2015, p. 77, see above note 22 (emphasis added).

the TRC understood *violence as criminal*, not political; as *driven by individual perpetrators*, and not groups of beneficiaries; as *targeting identifiable, individual victims*, and not entire groups. It focused on *violence as excess*, not as norm.

By adopting many of the attributes of the anti-impunity mindset, the TRC ended up focusing on violence that infringed apartheid law, rather than the institutionalised forms of violence – including pass laws and forced removals – that were enabled by it.⁴⁶

7.3.2. Rwanda's *Gacaca* Process

Local justice mechanisms have often been viewed as offering greater restorative, reintegrative and reconciliatory potential than criminal prosecutions. In practice, however, sometimes local justice mechanisms have also become aligned with the assumptions that underpin the anti-impunity mindset.

Consider, for example, the Rwandan *gacaca* process which constituted one of the three transitional justice layers implemented in response to the genocide that occurred in Rwanda in 1994.⁴⁷ Faced with considerable financial and logistical challenges in conducting genocide trials before its national courts,⁴⁸ the Rwandan government passed Organic Law No. 40/2000 of 26 January 2001,⁴⁹ which established a new system for dealing with accused perpetrators, based on the local Rwandan dispute settlement practice known as *gacaca* – literally “justice on the grass” in Kinyarwanda.⁵⁰ Due to serious obstacles that confronted the implementation of this law, it was revised and replaced by Organic Law No. 16/2004 of 19 June 2004, which established the organisation, competence and functioning of the *gacaca* courts – which were then charged with prosecuting and trying

⁴⁶ *Ibid.*, pp. 77–78; Leebaw, 2011, p. 137, see above note 31; and Miller, 2008, p. 277, see above note 39.

⁴⁷ The other two layers took the form of the International Criminal Tribunal for Rwanda, established by the Security Council, and trials conducted before domestic courts in Rwanda. See generally, Nicola Palmer, *Courts in Conflict: Interpreting the Layers of Justice in Post-Genocide Rwanda*, Oxford University Press, 2015.

⁴⁸ *Ibid.*, p. 118. For a discussion of the range of motivations behind the utilization of *gacaca* courts as a response to the Rwandan genocide, see Drumbl, 2007, p. 86, see above note 18.

⁴⁹ Rwanda, Organic Law No. 40/2000 of 26 January 2001 Setting Up Gacaca Jurisdictions and Organising Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity Committed Between 1 October 1993 and 31 December 1994, 12 October 2000 (<http://www.legal-tools.org/doc/0bdf0ff>).

⁵⁰ Drumbl, 2007, p. 85, see above note 18.

the accused perpetrators of the crime of genocide and crimes against humanity committed between 1 October 1990 and 31 December 1994.

Up until the colonial period, *gacaca* had been a traditional method of dispute settlement among members of the same lineage.⁵¹ When conflicts arose over issues of land, property, marital relations, or inheritance, the parties were brought before informal sessions presided over by the elders (*Inyangamugayo*). After independence, State authorities of Rwanda began to dominate the *gacaca* institution, with local authorities taking on the role of the *Inyangamugayo* and the *gacaca* sessions focusing on minor conflicts concerning unpaid debts, illegal occupations of land, and contested ownership of property. Summarising the central tenets of the *gacaca* process, Charles Ntampaka – a leading expert on Rwandan customary law – has observed how:⁵²

the traditional system of conflict resolution did not include any written rules; remained wary of legal prescriptions that adjudicate and convict; was closely related to the family unit; favoured the role of ‘head of the family’; involved forms of collective responsibility; did not promote equality; gave priority to community interests over individual rights; often deemed confessions to be a form of provocation; and drew on the sacred and the religious.

In other words, the aim of *gacaca* sessions was less to adjudicate guilt or apply State law, than to restore social harmony through re-integrating the transgressors into the community.

As conceived for the Rwandan *génocidaires*, however, the *gacaca* process was significantly transformed in alignment with the anti-impunity mindset.⁵³ The genocide *gacaca* process functioned more like a criminal court with retributive goals, than a communal gathering with restorative aspirations. *Gacaca* sessions were public rather than limited to the affected parties, their functioning and the penalties they could pronounce were legally defined by the State, their judges were elected community members rather than elders, and their competencies were similar to those of

⁵¹ This paragraph draws on Penal Reform International, *Integrated Report on Gacaca Research and Monitoring: Pilot Phase, January 2002 – December 2004*, 2005, p. 8.

⁵² Jacques Fierens, “*Gacaca* Courts: Between Fantasy and Reality”, in *Journal of International Criminal Justice*, 2005, vol. 3, no. 4, p. 913 (summarising Charles Ntampaka).

⁵³ This paragraph draws on Penal Reform International, 2005, pp. 9–10, see above note 51; and Drumbl, 2007, pp. 92–94, see above note 18.

ordinary courts, including powers to issue subpoenas and summon witnesses. As Fierens has observed, with the genocide *gacaca* process, tradition was “cloaked in the mantle of a criminal trial, with a strict and written procedure, and leading to a supposedly legal judgment”.⁵⁴ Moreover, with a maximum sentence of 30 years’ imprisonment for murderers and those who committed attacks with the intention to kill but did not succeed, the genocide *gacaca* process was also “jarringly punitive”.⁵⁵ Although the mandate of the genocide *gacaca* also included objectives such as truth-telling and reconciliation, in practice emphasis was placed on individual accountability and retributive justice.⁵⁶

Examining how the *gacaca* process moved away from its traditional restorative and reconciliatory concern for the interests of victims and the community, and towards a retributive focus on the fate of the accused, Mark Drumbl has identified three sources of pressure that proved pivotal in practice:⁵⁷ first, international pressure in the form of criticism from Western governments and civil society groups that were concerned by the lack of due process guarantees in the *gacaca* process; second, pressure from the Rwandan government to utilise the *gacaca* process as a form of social control; and finally, local pressure from victims who were concerned that *gacaca* would be too lenient on perpetrators and minimise the gravity of their crimes. In the end, it was through a combination of these pressures that *gacaca* became aligned with the assumptions of anti-impunity thinking, rather than developing “penological rationales that truly operationalize restoration and reintegration as goals of sanction”.⁵⁸

7.3.3. US Alien Tort Statute Litigation

A final illustration of the anti-impunity mindset operating beyond the field of international criminal justice is identifiable within the civil human rights claims brought in the US pursuant to the ATS.

⁵⁴ Fierens, 2005, p. 916, see above note 52. See similarly, Penal Reform International, 2005, p. 9, see above note 51 (describing genocide *gacaca* as “a veritable criminal court, with retributive goals”); Drumbl, 2007, p. 92, see above note 18 (*gacaca* for genocide “is more like a liberal criminal court than what it traditionally is, namely a communal restorative mechanism”).

⁵⁵ *Ibid.*, p. 93. See similarly, Palmer, 2015, pp. 118–119, see above note 47 (“the objectives of the new post-genocide *gacaca* courts were oriented toward punitive sanctions”).

⁵⁶ Miller, 2016, p. 158, see above note 20.

⁵⁷ Drumbl, 2007, pp. 94–99, see above note 18.

⁵⁸ *Ibid.*, p. 94.

Enacted in 1798, the ATS provides that federal courts “shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”.⁵⁹ Largely dormant for two centuries, the 1980 judgment of the Court of Appeals for the Second Circuit in the *Filártiga* case enabled foreign victims of gross human rights violations to turn to the ATS to pursue civil damages claims in US courts.⁶⁰ Following *Filártiga*, there have been three waves of ATS claims.⁶¹ The first wave concerned claims against individuals based on their alleged direct involvement in human rights abuses. The second wave, which commenced in the 1990s, targeted corporations for aiding and abetting in the commission of human rights violations. A final wave concerns claims brought in light of the US Supreme Court’s 2013 judgment in the *Kiobel* case, which significantly curtailed the scope of future ATS claims to those that “touch and concern the territory of the United States [...] with sufficient force to displace the presumption against extraterritorial application”.⁶² While narrowing the claims that may be brought under ATS, litigation following *Kiobel* indicated that claims will continue “where the underlying conduct (including manufacture, financing, manage, or developing) occurs in the United States, where the conduct was intended to impact the United States, and where the United States may be harbouring an alleged wrongdoer”.⁶³ Most recently, however, the US Supreme Court’s 2018 judgment in the *Jesner* case has curtailed the ambit of future claims even further by concluding that “foreign corporations may not be defendants in suits brought under the ATS”.⁶⁴

⁵⁹ 28 U.S.C. Section 1350.

⁶⁰ US Court of Appeals for the Second Circuit, *Filártiga v. Peña-Irala* (‘*Filártiga* case’), Judgment, 30 June 1980, 630 F.2d 876 (<http://www.legal-tools.org/doc/da77e3/>).

⁶¹ Mark A. Drumbl, “Extracurricular International Criminal Law”, in *International Criminal Law Review*, 2016, vol. 16, no. 3, pp. 415–21.

⁶² US Supreme Court, *Kiobel v. Royal Dutch Petroleum Co.*, Judgment, 17 April 2013, 569 US 108 (2013), p. 1669.

⁶³ Drumbl, 2016, p. 421, see above note 61.

⁶⁴ US Supreme Court, *Jesner v. Arab Bank, PLC* (‘*Jesner* case’), Judgment, 24 April 2018, 584 U.S. ____ (2018), p. 27. See also, *Jesner* case, Opinion of Kennedy J. (‘*Jesner* case opinion of Kennedy J.’), p. 23 (stating that “plaintiffs still can sue the individual corporate employees responsible for a violation of international law under the ATS”). For critical discussion of the decision, see generally, Samuel Moyn, “Time to Pivot? Thoughts on *Jesner v. Arab Bank*”, in *Lawfare*, 25 April 2018 (available on its web site); and Chimène Keitner, “ATS, RIP?”, in *Lawfare*, 25 April 2018 (available on its web site).

For present purposes, our prime interest is the tendency for ATS litigation to reflect several of the assumptions that underpin the anti-impunity mindset. This tendency has recently been highlighted by Natalie Davidson in her close reading of the landmark *Filártiga* case, which involved a civil claim by two Paraguayan parents against a Paraguayan police officer who had tortured and killed their son in Paraguay.⁶⁵ Specifically, Davidson demonstrates how a combination of legal doctrines and the judicial need for legitimacy narrowed the narrative frame of the litigation to focus on the individual torturer at the expense of illuminating the institutionalised use of torture by the Republic of Paraguay.

First, the Court of Appeals for the Second Circuit dismissed the defendant's argument that the claim was barred by the act of State doctrine by disputing "whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterised as an act of state".⁶⁶ By this statement, the Court effectively characterised the torture as an individual abuse of the defendant's official position, rather than a routinised practice.⁶⁷

Secondly, the Court of Appeals argued that "for the purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind".⁶⁸ Through this imagery, the Court further accentuated the individualised nature of torture, at the expense of revealing the more structural and collective dimensions of the practice.⁶⁹ According to Davidson, the Court relied on the doctrine of *hostis humani generis* both to avoid a legal challenge – given that the Re-

⁶⁵ Natalie R. Davidson, "From Political Repression to Torturer Impunity: The Narrowing of *Filártiga v. Peña-Irala*", in Engle *et al.* (eds.), 2016, p. 255, see above note 1. See also, Natalie R. Davidson, "Shifting the Lens on Alien Tort Statute Litigation: Narrating US Hegemony in *Filártiga* and *Marcos*", in *European Journal of International Law*, 2017, vol. 28, no. 1, p. 147.

⁶⁶ *Filártiga* case, p. 890, see above note 60.

⁶⁷ Davidson, 2016, p. 269, see above note 65 ("While the Court could be seen here as making a more normative than descriptive statement (that is torture, though it is done by state officials, should not be recognized as an act of state for purposes of the legal doctrine), the statement actually relies exclusively on the fact that Paraguay officially prohibited torture and did not ratify Peña's acts. As a result, this statement made the torture appear more as an individual abuse of that official's position than an institutionalized practice").

⁶⁸ *Filártiga* case, p. 890, see above note 60.

⁶⁹ Davidson, 2016, p. 270, see above note 65.

public of Paraguay was protected from suit by sovereign immunity – and to bolster its legitimacy in response to possible criticism that its extension of jurisdiction might be deemed a form of US imperialism.⁷⁰

Through these findings, the Court of Appeals aligned itself with the central tenets of anti-impunity thinking, and “bequeathed to successive ATS cases an interpretation of torture that focused on the *individual* rather than the state, on the *exceptional* rather than the systemic, and on *physical* cruelty rather than economic injustice”.⁷¹ Moreover, as Davidson has observed, the *Filártiga* case very much set the tone for ATS claims more generally, with judges in future cases continuing to refer to the Second Circuit’s “individualizing and demonizing discourse”.⁷²

7.4. The Power of the Anti-Impunity Mindset

As noted earlier in this chapter, the anti-impunity mindset has typically been accompanied by a faith in the progressive potential of law to render justice for victims and to deter future atrocities. Increasingly, these expectations have been challenged by a critical wave of scholarship, which has probed the underlying assumptions on which the anti-impunity mindset is premised.⁷³ As Christine Schwöbel-Patel has explained, these critiques have sought to question “who benefits in the existing parameters, who loses through the given legal structures, and why”.⁷⁴

By reviewing some of the principal critiques to which anti-impunity thinking has been subjected, this section illuminates the productive power of the anti-impunity mindset,⁷⁵ understood as the capacity of the mindset

⁷⁰ *Ibid.*, p. 275.

⁷¹ *Ibid.*, p. 256. See also, Jesner case opinion of Kennedy J., 2018, p. 23, see above note 64 (“If the Court were to hold that foreign corporations have liability for international-law violations, then plaintiffs may well ignore the human perpetrators and concentrate instead on multinational corporate entities”).

⁷² Davidson, 2016, p. 276, see above note 65. See also, Davidson, 2017, pp. 166–67, see above note 65.

⁷³ See generally, Sander, 2015, p. 749, see above note 14.

⁷⁴ Christine E.J. Schwöbel, “Introduction”, in Christine E.J. Schwöbel (ed.), *Critical Approaches to International Criminal Law: An Introduction*, Routledge, 2014, p. 4.

⁷⁵ On productive power, see generally, Michel Foucault, *Discipline and Punish: The Birth of a Prison*, Penguin, 1991, p. 194 (“We must cease once and for all to describe the effects of power in negative terms: it “excludes”, it “represses”, it “censors”, it “abstracts”, it “masks”, it “conceals”. In fact, power produces: it produces reality it produces domains of objects and rituals of truth. The individual and knowledge that may be gained of him belong to this production”).

together with the institutions through which it is operationalised to offer “a key medium for the making of contestable, thoroughly political distributional choices – for creating winners and losers, prioritizing some voices at the expense of others”.⁷⁶ To this end, this section examines three critiques in particular: first, the tendency for anti-impunity institutions to underwrite the balance of power between and within States; second, the equation of anti-impunity institutions with a narrow de-contextualised conception of responsibility; and finally, the anti-impunity mindset’s occlusion of structural forms of violence.

7.4.1. Underwriting the Balance of Power Between and Within States

A common characteristic of justice modalities underpinned by the anti-impunity mindset has been a tendency to become aligned with the balance of power between and within States.

With respect to international criminal courts, for example, moments of anti-impunity against individuals belonging to particular factions within mass atrocity conflicts have generally been accompanied by moments of impunity for individuals belonging to factions aligned or protected by more powerful actors within the international community.⁷⁷ In particular, international prosecutors have either avoided or been prevented from targeting individuals protected by States on whose co-operation they are reliant and/or which are particularly powerful within the international community in general. In this vein, Allied personnel fell beyond the jurisdictional limits of the International Military Tribunal (‘IMT’) at Nuremberg and the International Military Tribunal for the Far East (‘IMTFE’) at Tokyo, NATO personnel were subjected to only a half-hearted investigation at the International Criminal Tribunal for the former Yugoslavia (‘ICTY’), members of the Rwandan Patriotic Front were not prosecuted at the International Criminal Tribunal for Rwanda (‘ICTR’), peacekeepers were not investigated at the Special Court for Sierra Leone (‘SCSL’), and the ICC

⁷⁶ Ben Golder, “Beyond Redemption? Problematising the Critique of Human Rights in Contemporary International Legal Thought”, in *London Review of International Law*, 2014, vol. 2, no. 1, p. 83.

⁷⁷ See similarly, Engle *et al.*, 2016, p. 5, above note 7 (“each historical moment of ‘anti-impunity’ may be more accurately described as one gripped simultaneously by “impunity”); and Miller, 2016, p. 165, above note 20 (“Anti-impunity all too often brings with it a high degree of impunity”).

Prosecutor has tended to de-prioritise prosecutions against members of factions aligned with the interests of the entities responsible for referring situations to her office for investigation.⁷⁸

In the latter regard, the ICC Prosecutor's group-based selectivity, which often takes the form of prioritising cases against non-State armed groups over governmental atrocities within particular situations under investigation, has enabled States to co-opt the ICC, and instrumentalise the vocabulary of international criminal justice to delegitimise and stigmatise their opponents, whilst validating their own monopoly over the legitimate use of force.⁷⁹ Adam Branch, for example, has examined the benefits that accrued to the Ugandan government as a result of the ICC Prosecutor's targeted arrested warrants against members of the Lord's Resistance Army ('LRA'). In particular, buoyed by its heightened legitimacy in the international community, the Ugandan government was able to launch military incursions into the eastern regions of the Democratic Republic of the Congo, as well as to obtain assistance from the US military to carry out Operation Lightning Thunder in 2008, in an attempt to capture the LRA commanders.⁸⁰ According to Branch, it is even conceivable that the Ugandan government invited the ICC to intervene against the LRA "not to help bring the war to an end but to entrench it and to obtain support for its military campaign".⁸¹ In this way, the ICC's intervention in Uganda serves to illustrate the potential for the ICC to provide a convenient pretext to legitimise military interventions in other States, as well as law enforcement activity against political opponents.⁸² In such instances, the ICC becomes embedded within justificatory arguments to legitimise the

⁷⁸ See generally, Courtney Hillebrecht and Scott Straus, "Who Pursues the Perpetrators? State Cooperation with the ICC", in *Human Rights Quarterly*, 2017, vol. 39, no. 1, p. 162; and Asad Kiyani, "Group-Based Differentiation and Local Repression: The Custom and Curse of Selectivity", in *Journal of International Criminal Justice*, 2016, vol. 14, no. 4, p. 939.

⁷⁹ See generally, Sarah M.H. Nouwen and Wouter G. Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan", in *European Journal of International Law*, 2010, vol. 21, no. 4, p. 941; and Frédéric Mégret, "Is the ICC Focusing Too Much on Non-State Actors?", in Margaret M. deGuzman and Diane Marie Amann (eds.), *Arms of Global Justice*, Oxford University Press, 2018, p. 173.

⁸⁰ Adam Branch, *Displacing Human Rights: War and Intervention in Northern Uganda*, Oxford University Press, 2011, p. 191.

⁸¹ *Ibid.*, p. 192.

⁸² *Ibid.*, p. 186.

use of force, and the vocabulary of international criminal law facilitates “a neutral and universalist mode of emancipatory intervention”.⁸³

Similar trends are identifiable within other justice modalities. For instance, the 2004 Organic Law regulating the *gacaca* courts in Rwanda eliminated jurisdiction over war crimes, thereby ensuring that many of the crimes allegedly committed by the Rwandan Patriotic Front were excluded. As Mark Drumbl has observed, “off the table [was] any discussion of human rights abuses by the government, or the reality that, in ousting the genocidal regime, the [RPF] massacred thousands of Hutu civilians”.⁸⁴

In addition, in the ATS case of *Filártiga*, the Court of Appeals of the Second Circuit neglected any mention of the economic, military or political support provided by the US that helped maintain a climate of repression during the authoritarian regime of Alfredo Stroessner in Paraguay.⁸⁵ Nor is the *Filártiga* case an isolated example. As Natalie Davidson has argued, the omission of US involvement in human rights abuses committed abroad has proven a consistent theme across ATS litigation.⁸⁶

What has gone unnoticed is the trade-off between legal accountability and historical narratives present in ATS litigation. To admit that transnational human rights claims have implicated the US government is to risk triggering doctrines meant to protect the separation of powers among branches of the US government and to risk alienating the judge or jury. Conversely, to accept a case is to abide by the fiction that there are no foreign policy issues involved.

As these examples indicate, combating impunity for particular factions within a mass atrocity conflict has generally been contingent upon impunity for other factions in accordance with the balance of power between and within States.

7.4.2. A Narrow Conception of Responsibility

Justice mechanisms aligned with the anti-impunity mindset have predominantly – though not exclusively – focused on individualised conceptions

⁸³ David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism*, Princeton University Press, 2004, p. 23.

⁸⁴ Drumbl, 2007, p. 96, see above note 18.

⁸⁵ For an overview of US involvement in Paraguay, see generally, Davidson, 2017, pp. 151–54, see above note 65.

⁸⁶ *Ibid.*, p. 168.

of responsibility. This paradigm of individualism has traditionally been viewed as one of the strengths of the anti-impunity mindset, a mark of progress from purportedly antiquated and primitive notions of collective responsibility that preceded them.⁸⁷ For instance, in his role as President of the ICTY, Antonio Cassese famously declared that past experience had demonstrated that “clinging to feelings of ‘collective responsibility’ easily degenerates into resentment, hatred and frustration and inevitably leads to further violence and new crimes”.⁸⁸ Indeed, the recognition of individual criminal responsibility at Nuremberg may even be viewed as a riposte to the perceived failings of collective responsibility in the Versailles settlement that followed the First World War.⁸⁹

At the same time, the equation of anti-impunity with a narrow individualised form of justice has risked masking the collective dimensions of mass atrocities behind the depoliticised veil of the individuals under examination.⁹⁰ According to Frédéric Mégret, for example, anti-impunity thinking within the field of international criminal justice “may occasionally let states and society off the hook too easily and even delay a necessary realization of collective faults”.⁹¹ In particular, the failings of international organisations, international peacekeeping forces, international financial institutions, foreign governments and bystanders have often fallen beyond the webs of relevancy within justice mechanisms whose attention has been fastened on individualised conceptions of responsibility.

Consider, for example, the role of bystanders within mass atrocities. Mass atrocities are often committed in environments where large numbers of individuals acquiesce in the violence around them, some even benefiting materially from its commission, without necessarily having blood on

⁸⁷ André Nollkaemper, “Introduction”, in André Nollkaemper and Harmen van der Wilt (eds.), *System Criminality in International Law*, Cambridge University Press, 2009, p. 9.

⁸⁸ Report 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, UN Doc. A/49/342, 29 August 1994, para. 16 (<http://www.legal-tools.org/doc/cacdb7/>).

⁸⁹ Gerry Simpson, “Men and abstract entities: individual responsibility and collective guilt in international criminal law”, in Nollkaemper and van der Wilt (eds.), 2009, see above note 87, p. 80.

⁹⁰ George P. Fletcher, “The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt”, in *Yale Law Journal*, 2002, vol. 111, no. 7, p. 1514.

⁹¹ Frédéric Mégret, “International criminal justice: A critical research agenda”, in Schwöbel (ed.), 2014, p. 29, see above note 74.

their hands.⁹² As Jelena Subotić has explained, senior leaders have often built their policies on “a societal receptivity to violent claims that were broadly accepted, normalized, and routinized in society and gave criminal policies a patina of legitimacy”.⁹³ In such contexts, doing nothing may in fact constitute doing something, the inaction of large numbers of individuals serving as a form of silent condonation of the atrocities unfolding around them.⁹⁴

Yet, despite the significance of bystander passivity in enabling the formation of a climate of societal permissibility for the commission of international crimes, it has tended to fall beyond the purview of anti-impunity frameworks, either because of its legal remoteness to standards of personal culpability applied by international criminal courts, or as a result of reliance placed on binary victim-perpetrator categorisations within other transitional justice modalities.⁹⁵ By overlooking bystanders, anti-impunity initiatives have not only failed to differentiate the range of roles that bystanders have played within mass atrocity situations, but also risked serving as “an alibi for the population at large to relieve itself from responsibility”.⁹⁶

⁹² Larry May, *Genocide: A Normative Account*, Cambridge University Press, 2010, p. 260.

⁹³ Jelena Subotić, “Expanding the scope of post-conflict justice: Individual, state and societal responsibility for mass atrocity”, in *Journal of Peace Research*, 2011, vol. 48, no. 2, p. 160.

⁹⁴ Laurel E. Fletcher, “Facing Up to the Past: Bystanders and Transitional Justice”, in *Harvard Human Rights Journal*, 2007, vol. 20, p. 47. See also, Iris Marion Young, *Responsibility for Justice*, Oxford University Press, 2011, p. 87 (noting how by engaging in a mass self-deception that the atrocities unfolding around them are acceptable, bystanders evacuate “any space of popular organization and critical accountability, leaving isolated and ineffectual the few of their fellow members who were inclined to think and criticize”).

⁹⁵ See, for example, Fletcher, 2005, see above note 18 (examining the depiction of bystanders within international criminal courts); and Mamdani, 2015, p. 77, see above note 22 (“Because South Africa’s TRC focused on perpetrators and kept out of sight the beneficiaries of mass violations of rights – such as pass laws and forced expulsions – it allowed the vast majority of white South Africans to go away thinking that they had little to do with these atrocities”).

⁹⁶ Koskeniemi, 2002, p. 14, see above note 8. See similarly, Osiel, 1997, p. 157, see above note 32 (“Since only a few will ever be prosecuted, the many who collaborated in myriad ways are discouraged from any serious self-examination”); Fletcher, 2005, p. 1080, see above note 18 (“By individualizing guilt, trials offer the opportunity for complicit bystanders to deny or evade their role in mass violence”); and Devin O. Pendas, *The Frankfurt Auschwitz Trial, 1963-1965: Genocide, History, and the Limits of the Law*, Cambridge University Press, 2006, pp. 294 and 304 (noting how the Frankfurt Auschwitz Trial “provided an alibi for those disinclined to examine their own histories” and that “[b]ecause the

7.4.3. Occluding Structural Violence

In his landmark paper on violence and peace, Johan Galtung referred to structural violence as social injustices such as entrenched poverty, unequal economic opportunities and systematic social deprivation that occur without “a clear subject-action-object relation”.⁹⁷ In such situations, violence is “built into the structure and shows up as unequal power and consequently as unequal life chances”.⁹⁸

Structural violence can take many forms.⁹⁹ Frances Stewart, for example, has identified four categories of structural violence: political participation; economic assets; incomes and employment; and social aspects.¹⁰⁰ The existence of these forms of structural violence can generate grievances within society that fuel exploitative violence. As Rami Mani has explained, while the precise causal relation between structural violence and mass atrocity situations is disputed, “often, although by no means always, underlying or proximate causes of conflicts appear to centre on contentions about distributive justice: unequal access to, distribution of, and opportunities for political power and socio-economic resources”.¹⁰¹

In practice, it is often the nature of structural violence that determines the likelihood of violent conflict, with horizontal inequalities – namely, those aligned with groups along cultural, religious, geographical

understanding of the defendants as individual agents disguised the way in which the vast majority of Germany society, that is, Germans as an organized collectivity, were implicated in that same process of genocide, they could quite plausibly insist that they did not know of their own involvement”) (emphasis in original).

⁹⁷ Johan Galtung, “Violence, Peace, and Peace Research”, in *Journal of Peace Research*, 1969, vol. 6, no. 3, p. 171.

⁹⁸ *Ibid.*, p. 171.

⁹⁹ There has been a tendency in transitional justice literature to limit discussions of structural causes of mass violence to economic factors to the exclusion of political factors. In fact, structural violence encompasses both economic *and* political harms. For further discussion, see generally, Evelyne Schmid and Aoife Nolan, “‘Do No Harm’? Exploring the Scope of Economic and Social Rights in Transitional Justice”, in *International Journal of Transitional Justice*, 2014, vol. 8, no. 3, pp. 371–74.

¹⁰⁰ Frances Stewart, “The Root Causes of Conflicts: Some Conclusions”, in *QEH Working Paper Series*, 1998, Working Paper Number 16, pp. 12–14.

¹⁰¹ Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War*, Polity Press, 2002, p. 127.

or class lines – more likely to lead to the onset of direct violence.¹⁰² When inequalities are defined along group lines, they may be instrumentalised by leaders to generate a sense of group identity, which in turn can lead to the mobilisation of group members through appeals to underlying grievances about real or perceived forms of structural violence.¹⁰³

Despite its perceived explanatory value, justice mechanisms underpinned by the anti-impunity mindset have generally devoted little attention to the context of structural violence where mass atrocities have occurred, either excluding or marginalising the influence of factors as diverse as land distribution, extreme poverty, demographics, systemic discrimination, political instability, social marginalisation, environmental degradation, and widespread economic injustice, many of which may be brought about by the normal operation of the global economy.¹⁰⁴ As Vasuki Nesiiah has put it, “moments of *anti-impunity* against perpetrators of international crimes are also moments of *impunity* for injustices committed by systemic inequality”.¹⁰⁵

¹⁰² See, for example, Paul Gready and Simon Robins, “From Transitional to Transformative Justice: A New Agenda for Practice”, in *International Journal of Transitional Justice*, 2014, vol. 8, no. 3, p. 347; and Frances Stewart, “Root causes of violent conflict in developing countries”, in *British Medical Journal*, 2002, vol. 324, no. 7333, p. 343.

¹⁰³ Mani, 2002, p. 128, see above note 101.

¹⁰⁴ See similarly, Ruti Teitel, “Bringing the Messiah Through the Law”, in Carla Hesse and Robert Post (eds.), *Human Rights in Political Transitions: Gettysburg to Bosnia*, Zone Books, 1999, p. 185; Immi Tallgren, “The Sensibility and Sense of International Criminal Law”, in *European Journal of International Law*, 2002, vol. 13, pp. 593–595; Philip Allott, *The Health of Nations: Society and Law Beyond the State*, Cambridge University Press, 2002, pp. 37 and 67; Rosemary Nagy, “Transitional Justice as Global Project: Critical Reflections”, in *Third World Quarterly*, 2008, vol. 29, no. 2, pp. 276, 279, and 284–86; Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa*, Cambridge University Press, 2009, pp. 46–48, 53–55 and 237; Branch, 2011, p. 213, see above note 80; Leebaw, 2011, p. 181, see above note 31; Mégret, 2014, p. 30, see above note 91.

¹⁰⁵ Vasuki Nesiiah, “Doing History with Impunity”, in Engle *et al.* (eds.), 2016, p. 96, see above note 1 (emphasis added). See similarly, Frédéric Mégret, “Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project”, in *Finnish Yearbook of International Law*, 2001, vol. 12, p. 204 (observing how international criminal courts have been at permanent risk of grossly underestimating “such trivialities as the world’s billion poor, 800 million hungry, 2.4 billion without sanitation, or 90 million children without basic education”); and Miller, 2016, p. 169, see above note 20 (“The cumulative effect of ratcheting up attention and funding for high-level prosecutions is to enforce a hierarchy of harms in which the spectacular violence pursued in international courtrooms is dubbed the

By focusing on individual perpetrators, together with the immediate collective contexts within which they operated, anti-impunity institutions have risked depicting such individuals in uniform terms as the *causes* of mass violence, while neglecting to recognise how they are also the *symptoms* of more widely dispersed structures.¹⁰⁶ Beyond diverting attention away from conditions of structural violence, some scholars have argued, in stronger terms, that anti-impunity institutions have also contributed to their perpetuation. Karen Engle, Zinaida Miller and D.M. Davis, for example, have argued that “anti-impunity discourse is often seen not only to displace attention from inequality but also *to produce it*, in part by operating as a pillar of neoliberal global governance”.¹⁰⁷ In a similar vein, Nesi-ah has claimed that “anti-impunity projects may have *legitimized* the dominant global order in the name of liberal political ethics and therefore *helped entrench* impunity [...] for atrocities such as exploitative terms of international trade which enable and condition socio-economic abuses”.¹⁰⁸

most serious while the horrific indignities and suffering of daily life in a poor country or conflict zone are naturalized as largely inescapable and unchangeable”).

¹⁰⁶ See similarly, Paul Kirby, “Refusing to be a Man?: Men’s Responsibility for War Rape and the Problem of Social Structures in Feminist and Gender Theory”, in *Men and Masculinities*, 2012, vol. 16, no. 1, p. 109; and Elizabeth Dauphinee, “War Crimes and the Ruin of Law”, in *Millennium: Journal of International Studies*, 2008, vol. 37, no. 1, p. 55.

¹⁰⁷ Engle *et al.*, 2016, p. 8, see above note 7.

¹⁰⁸ Nesi-ah, 2016, p. 113, see above note 105. See also, Mark A. Drumbl, “Pluralizing International Criminal Justice”, in *Michigan Law Review*, 2005, vol. 103, p. 1313 (“The ICTR’s judicial reductionism *absolves* the role of international agencies, transnational economic processes, the foreign policies of influential states, and colonial policies, each of which exacerbated ethnic conflict by creating an environment conducive to violence in Rwanda”) (emphasis added); David S. Koller, “The Faith of the International Criminal Lawyer”, in *New York University Journal of International Law and Politics*, 2008, vol. 40, p. 1067 (“international criminal law may ignore many of the structural factors which contribute to the perpetration of massive atrocities [...] [and] *hinder* the structural revolution necessary to bring the cosmopolitan community into effect”) (emphasis added); Zinaida Miller, “Effects of Invisibility: In Search of the ‘Economic’ in Transitional Justice”, in *International Journal of Transitional Justice*, 2008, vol. 2, p. 288 (“By ignoring the deeper roots of conflict, the relationship of inequality to reconciliation and the injustice of maldistribution, transitional justice mechanisms *may actively contribute* to new outbreaks of violence”); Joe Hoover, “Moral Practices: Assigning Responsibility in the International Criminal Court”, *Law and Contemporary Problems*, 2013, vol. 76, p. 280 (“by focusing on the acts of individuals the ICC [...] happens to *excuse* systemic causes and the influences of outside institutions and states”) (emphasis added); Grietje Baars, “Making ICL History: On the Need to Move Beyond Pre-Fab Critiques of ICL”, in Schwöbel (ed.), 2014, p. 209, see above note 74 (arguing that international criminal law establishes “specific explanations of conflicts that *exempt/exonerate* the economic/capitalism”) (emphasis added); Christopher

According to this perspective, seemingly neutral anti-impunity institutions may inadvertently operate ideologically to validate and build consensus in the existing international social order.¹⁰⁹

7.5. The *Limits* of the Anti-Impunity Mindset

By revealing the alignment of anti-impunity institutions with the balance of power between and within States, as well as their reliance on narrow conceptions of responsibility and their occlusion of structural violence, critical scholarship has helped illuminate the productive and representational power of the anti-impunity mindset. At times, however, the capacity of the anti-impunity mindset to divert attention from specific agendas as well as its complicity in particular injustices seems overstated.

In particular, while few would disagree that structural injustices have generally fallen beyond the purview of anti-impunity frameworks, less clear is the extent to which this silence has been complicit in a more general neglect of such issues during periods of transition.¹¹⁰ The anti-

Gevers, “International Criminal Law and Individualism: An African Perspective”, in Schwöbel (ed.), 2014, see above note 74, p. 233 (arguing that the individualism of international criminal law “misrepresents, and possibly even *sublimates*, the role of structural forces” and “*exculpates* – as a matter of both legal and historical record – these other drivers of conflict”) (emphasis added); and Davidson, 2017, see above note 65, p. 168 (“By ignoring and [...] *absolving* the USA of responsibility, these cases have not only addressed human rights abuses in a superficial manner, but they have further *legitimated* the conditions under which the abuses have been perpetrated”) (emphasis added).

¹⁰⁹ Tor Krever, “Unveiling (and Veiling) Politics in International Criminal Trials”, in Christine E.J. Schwöbel (ed.), *Critical Approaches to International Criminal Law: An Introduction*, Routledge, 2014, p. 128 (“the international criminal trial [...] may serve to *naturalize and legitimize* historically specific social relations and structural sources of crime. [...] [T]hey contribute to the way in which people come to accept the existing order of things. As such, even the seemingly neutral, legalistic trial may operate politically, in the sense of politics encompassing broadly the processes, multifaceted and varied, by which social orders and conditions of power are sustained or challenged”) (emphasis added); and Josh Bowsher, “‘Omnus et Singulatim’: Establishing the Relationship Between Transitional Justice and Neoliberalism”, in *Law and Critique*, 2018, vol. 29, no. 1, pp. 85 and 98 (“Transitional justice, I conclude, does the necessary work of bringing conflictual, traumatized societies back together following periods of deep division, conflict and mistrust, whilst doing so on terms that do not threaten but instead prefigure the individualising demands made upon subjects at the sites of neoliberal transition [...] At its very worst, this becomes more than a prefigurative gesture, and transitional justice forms explicit connections between past human rights abuses and the necessity of neoliberalisation”).

¹¹⁰ See also, the parallel debate in the field of human rights concerning the relationship between human rights and neoliberalism. See, in particular, Susan Marks, “Four Human Rights Myths”, in *LSE Law, Society and Economy Working Papers*, 2012, Working Paper

impunity mindset undoubtedly arrests attention through its seductive legalism,¹¹¹ as well as a dominant aesthetic that privileges the spectacle of physical violence over the complexity of structural injustices.¹¹² The anti-impunity mindset also captures attention by offering a simple and highly communicable frame for understanding mass atrocities.¹¹³ As Keck and Sikkink have observed, “problems whose causes can be assigned to the deliberate (intentional) actions of identifiable individuals are amenable to advocacy network strategies in ways that problems whose causes are irredeemably structural are not”.¹¹⁴ Nonetheless, to focus on the distracting qualities of the anti-impunity mindset is to neglect other factors that have arguably proven more instrumental in marginalising issues of structural injustice during periods of transition.

Pádraig McAuliffe, for example, has identified a range of international and domestic political and economic configurations that have undermined efforts to address structural violence in practice.¹¹⁵ Peace agreements, for instance, have typically been negotiated by “military and political elites who benefit from the existing order and whose existing ad-

No. 10/2012, p. 9 (arguing that Naomi Klein’s work identifies the emergence of the human rights movement to be “part of the context for the consolidation of neo-liberalism itself”); Samuel Moyn, “A Powerless Companion: Human Rights in the Age of Neoliberalism”, in *Law and Contemporary Problems*, 2014, vol. 77, no. 4, p. 169 (arguing that human rights have constituted “a powerless companion to neoliberalism”); and Tiphaine Dickson, “On the Poverty, Rise, and Demise of International Criminal Law”, in *Portland State University: Dissertations and Thesis Paper*, 2016, no. 2707, p. 119 (arguing that the human rights movement “was reckless, if not more, but it was also opportunistic in marginalizing socio-economic rights”). See also, Daniel McLouglin, “Post-Marxism and the Politics of Human Rights: Lefort, Badiou, Agamben, Rancière”, in *Law and Critique*, 2016, vol. 27, no. 3, p. 303.

¹¹¹ On seductive legalism, see generally McEvoy, 2007, pp. 416–17, see above note 6 (noting how the “seductive qualities of legalistic analysis lend themselves particularly well to transitional contexts [...] [including] values and working practices such as justice, objectivity, certainty, uniformity, universality, rationality, and so on”).

¹¹² On aesthetic bias, see generally Christine Schwöbel-Patel, “The Core Crimes of International Criminal Law”, in Kevin Jon Heller, Frédéric Mégret, Sarah Nouwen, Jens David Ohlin, and Darryl Robinson (eds.), *The Oxford Handbook of International Criminal Law*, Oxford University Press, 2020.

¹¹³ See generally, Houge and Lohne, 2017, see above note 9.

¹¹⁴ Margaret E. Keck and Kathryn Sikkink, *Activism Beyond Borders: Advocacy Networks in International Politics*, Cornell University Press, 1998, p. 27, cited in Houge and Lohne, 2017, p. 781, see above note 9.

¹¹⁵ See generally, Pádraig McAuliffe, *Transformative Transitional Justice and the Malleability of Post-Conflict States*, Edward Elgar, 2017.

vantages are increased by the opportunities created by marketisation and privatisation”.¹¹⁶ The consequent marginalisation of structural violence in peace negotiations is reflected by the fact that only 25 per cent of peace agreements negotiated in the last 40 years have expressly addressed economic issues.¹¹⁷ Resistance to addressing structural violence has also arisen in the form of informal war economies. These economies encompass new structures of political power that emerge during conflicts, and may persist in the form of clandestine coercion, bribery and nepotism in post-conflict societies in ways which circumvent and undermine structural reforms.¹¹⁸ Finally, international financial institutions, such as the World Bank and the International Monetary Fund, often wield significant influence over States emerging from mass violence, exerting considerable pressure on them to adopt neoliberal economic policies, notwithstanding the fact that “in many cases the pathologies of liberalization may have caused or exacerbated the conflict or repression before transition”.¹¹⁹

Beyond these political-economy factors, it is also worth considering the extent to which anti-impunity institutions can help direct public attention towards particular conflicts, and provide a discursive beginning for broader conversations concerning both structural causes of mass violence as well as the involvement and responsibility of collective actors such as States and private business entities. For example, reflecting on the work of the ICTY and the ICTR, Robert Cryer has argued that the conflicts in the former Yugoslavia and Rwanda “remained in the public eye, and this

¹¹⁶ Pádraig McAuliffe, “Weighing domestic and international impediments to transformative justice in transition”, in *London Review of International Law*, 2015, vol. 3, no. 1, p. 184.

¹¹⁷ *Ibid.*, p. 184.

¹¹⁸ *Ibid.*, pp. 189–92.

¹¹⁹ *Ibid.*, p. 194. See similarly, Anne Orford, “Locating the International: Military and Monetary Interventions after the Cold War”, in *Harvard International Law Journal*, 1997, vol. 38, no. 2, p. 443; Isaac A. Kamola, “Coffee and Genocide: A Political Economy of Violence in Rwanda”, in *Transition*, 2008, vol. 99, p. 67; Regine Andersen, “How Multilateral Development Assistance Triggered the Conflict in Rwanda”, in *Third World Quarterly*, 2000, vol. 21, no. 3, p. 441; Michel Chossudovsky, “Economic Genocide in Rwanda”, in *Economic and Political Weekly*, 1996, vol. 31, no. 15, p. 938; David Keen, “Liberalization and Conflict”, in *International Political Science Review*, 2005, vol. 26, no. 1, p. 73; and David Keen, “Greedy Elites, Dwindling Resources, Alienated Youths The Anatomy of Protracted Violence in Sierra Leone”, in *International Politics and Society*, 2003, vol. 6, no. 2, p. 67.

[...] led to at times agonised reflection on what states, through the UN, ought to have done to prevent those offences”.¹²⁰

These lines of thought should, at the very least, give pause to those who place particular weight on the power of the anti-impunity mindset to crowd-out issues of structural injustice. Overstating the diversionary power of the anti-impunity mindset is far from inconsequential, since it risks giving the impression that anti-impunity institutions are a significant part of the problem in the quest to respond to structural causes of mass violence, whilst at the same time occluding other factors that may have proven far more obstructionist in practice. As McAuliffe has argued:¹²¹

To those who doubt whether a truth commission examining rape, or a trial punishing a massacre, automatically contributes to a liberal peace-building project by dint of what they *don't* address, the argument that transitional justice provides intellectual scaffolding for neo-liberal economics that so often exacerbates socio-economic distributional inequalities resembles something akin to guilt by association.

Indeed, there is little to suggest that the silence of anti-impunity frameworks on structural violence poses a significant obstacle to reliance being placed on other emancipatory vocabularies and initiatives directed towards addressing structural injustices.¹²² As James Stewart has argued, not only does there seem to be “no reason why accountability need *necessarily* crowd out distributive justice projects”, but also “with care, consciousness, and a modicum of coordination, it is at least conceivable that these things might peaceably coexist, or even operate synergistically”.¹²³

¹²⁰ See similarly, Robert Cryer, “International Criminal Law vs. State Sovereignty: Another Round?”, in *European Journal of International Law*, 2006, vol. 16, no. 5, p. 997.

¹²¹ McAuliffe, 2015, pp. 175–76, see above note 116 (emphasis in original).

¹²² See similarly, Natalie Sedacca, “The ‘turn’ to Criminal Justice in Human Rights Law: An Analysis in the Context of the 2016 Colombian Peace Agreement”, in *Human Rights Law Review*, 2019, vol. 19, p. 321 (noting how critiques relating to international criminal law’s focus on particular atrocities rather than broader structural and redistributive issues “militate against a focus *only* or even primarily on individual criminal law [...] [and] do not necessarily preclude the use of criminal law as part of a broader strategy aimed at more strategic and redistributive goals”) (emphasis in original). See also, Paul O’Connell, “Human Rights: Contesting the Displacement Thesis”, in *Northern Ireland Legal Quarterly*, 2018, no. 69, no. 1, p. 27 (discussing “emancipatory or critical multilingualism”).

¹²³ James G. Stewart, “The Turn to Corporate Liability for International Crimes: Transcending the Alien Tort Statute”, in *New York University Journal of International Law and Politics*, 2014, vol. 47, no. 1, pp. 139–40 (emphasis in original). See also, James G. Stewart, “To-

7.6. Conclusion

In recent decades, the anti-impunity mindset has achieved a degree of normalisation that few thought imaginable. At the same time, anti-impunity thinking has also been subjected to ever increasing scrutiny. Critical scholars, in particular, have helped to illuminate the productive and representational power of the anti-impunity mindset. By examining the tendency of anti-impunity frameworks to become aligned with the balance of power between and within States, critical scholarship has revealed the risk of anti-impunity practices being co-opted in support of oppressive regimes, as well as the importance of developing a greater sensibility for the potentially darker sides of anti-impunity interventions in particular contexts. In addition, by scrutinizing the narrow conceptions of responsibility relied upon by anti-impunity institutions, as well as their occlusion of structural violence, critical scholarship has revealed the tendency for such institutions to construct simplified and incomplete narratives of mass atrocities. At best, these narratives provide a limited form of justice for victims and a partial deterrent against future atrocities; at worst, they may constitute an additional source of grievance and division within local communities.

The critical scrutiny directed towards the anti-impunity mindset is both important and healthy. By revealing blind spots in anti-impunity frameworks, critical scholarship can trigger changes within anti-impunity institutions – for example, the emergence of thematic prosecutions in response to traditionally under-prosecuted social, cultural, environmental, and economic forms of violence.¹²⁴ In addition, critical scholarship can prompt creative thinking beyond anti-impunity frameworks – for example, the establishment of people’s tribunals that examine structural causes of

wards Synergies in Forms of Corporate Accountability for International Crimes”, *Blog of James G. Stewart*, 23 February 2019 (discussing “synergistic accountability”). See, however, Sarah M.H. Nouwen and Wouter G. Werner, “Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity”, in *Journal of International Criminal Justice*, 2015, vol. 13, p. 174 (“The real issue is not whether both restorative justice and distributive justice, as well as equality before the law and retributive justice can be pursued – which is obviously possible – but which conception of justice prevails in times of clashes or limited resources. In a world of horrific constraint, conceptions of justice compete for their realization”).

¹²⁴ See generally, Sander, 2015, above note 25.

violence as well as the possibility of less retributive-centric justice mechanisms.¹²⁵

At the same time, this chapter has argued that it is also important to reflect on the limits of the anti-impunity mindset's power, in particular with respect to its capacity to divert attention from and become complicit in the perpetuation of structural violence. Although some displacement of other emancipatory vocabularies and institutions may have occurred as a result of the rise of anti-impunity thinking, to focus on the silences of anti-impunity institutions is to neglect the range of political economy factors that have obstructed the realisation of addressing structural violence at times of transition in practice. Moreover, while displacement critiques may serve as a useful reminder that anti-impunity thinking constitutes an inadequate response to the root causes of mass violence, they do little to diagnose why issues of structural violence tend to be marginalised in moments of transition, or to articulate different frameworks that might address areas that fall beyond the purview of anti-impunity institutions.¹²⁶

¹²⁵ See generally, Dianne Otto, "Impunity in a Different Register: People's Tribunals and Questions of Judgment, Law, and Responsibility", in Engle *et al.* (eds.), 2016, p. 291, above note 1.

¹²⁶ See similarly, McAuliffe, 2017, p. 13, see above note 115 ("while advocates of transformative justice are adept at identifying the need for structural alterations, they pay strikingly little attention to structural variables that explain the lack of prior and current transformation"); and Lauren Marie Balasco, "Locating Transformative Justice: Prism or Schism in Transitional Justice?", in *International Journal of Transitional Justice*, 2018, vol. 12, no. 2, p. 373 ("Transformative justice scholars thoroughly engage with reasons *why* transitional justice should assume transformative justice principles, but much less attention is devoted to identifying the paths by which transformative justice can achieve change") (emphasis in original). See also, with respect to the relationship between human rights and neoliberalism, Moyn, 2014, pp. 151 and 169, see above note 110 ("[T]here is not much critical or political value in opposing human rights out of understandable outrage at neoliberalism. [...] In an era in which human rights norms and movements are frequently overloaded with expectation, [...] [a]nalytically and politically, the mere act of criticizing human rights does little to provide useful alternatives to human rights frameworks, regimes, and movements that might succeed in areas where human rights have failed—in part because human rights are (so far) not designed to succeed in those areas. To bring the limited aims and often glancing successes of human rights movements into focus is simply to demand another politics to supplement goals that are inadequate in the first place and strategies that rarely work, especially in the socioeconomic domain").

The Power of Affective Aesthetics in International Criminal Justice

Sarah-Jane Koulen*

In recent decades, international criminal justice has developed into a distinct field of practice, animated and perpetuated by a small yet transnational network of activists, diplomats, lawyers and academics engaged in the development of key institutions and the articulation and dissemination of expert knowledge. Karen Engle labels the shift in the human rights movement towards an increased reliance on and faith in the promise of international criminal prosecutions the “anti-impunity movement”.¹ The Rome Statute and the establishment of the International Criminal Court (‘ICC’) are often celebrated as the central achievements of the anti-impunity movement.

In early 2018, I attended a commemorative event celebrating the twentieth anniversary of the Rome Statute and the ICC organized by the Coalition for the International Criminal Court (‘CICC’). William Pace, still the network’s convener at that time and the moderator of the day-long event, addressed the over 100 individuals gathered in the auditorium of the Peace Palace in The Hague. In his comments, he consistently invoked a discursive ‘we’ – a network of individuals of shared resolve, committed to the same ideals of global criminal justice and accountability. It became clear, as he moderated the event, that he knew the vast majority of speakers, participants and attendees personally. He did not appear to be using

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¹ See Karen Engle, “Anti-Impunity and the turn to Criminal Law in Human Rights”, in *Cornell Law Review*, 2015, vol. 100 and Karen Engle, Zinaida Miller and D.M. Davis (eds.), *Anti-Impunity and the Human Rights Agenda*, Cambridge University Press, 2016. See also Chapter 7 above by Barrie Sander.

any notes and eschewed the awkward if common practice of reading aloud from previously submitted speaker ‘bios’. Instead, he often seemed to be ad-libbing, recalling a fond memory or spontaneously sharing an anecdote in relation to the person’s career in international justice as each speaker took the stage. One of the first to speak was Silvia Fernández de Gurmendi, then President of the ICC, who, as Pace recollected, was present at “the very first organizing meeting of the CICC all those years ago”. Then Judge Fernández de Gurmendi reflected that this conference was a “remarkable reunion [...] of so many people who worked so hard to make the Court a reality”. Similarly, Carla Ferstman, who has a long tenure in the field of international criminal justice and was then the director of REDRESS, a well-known non-profit in the field, reflected in her statement on the “honour and challenge” it had been to be a part of the movement, and expressed recognition and acknowledgement of the “many faces who have been part of the movement since the beginning”.

At an earlier event in December 2017, also in The Hague, commemorating the soon-to-close International Criminal Tribunal for the former-Yugoslavia (‘ICTY’), Karim A.A. Khan QC, a well-known defence lawyer, reflected that one important legacy of the ICTY had been to create a “camaraderie, a brotherhood, a sisterhood amongst disparate groups, lawyers, whether they be judges, prosecution, and defence or court staff [...] that worked together in one direction, of trying to make what many thought was an experiment, work”.² This camaraderie is both visible and almost palpable at the various events, conferences, panel discussions and diplomatic assemblies that constitute the field of international criminal justice.

These anecdotal statements and expressions speak to international criminal justice as a particular social field, and a community of people, who self-identify and take pride in their membership as experts in an emergent field of practice, working together towards a common goal: international justice. During a recent meeting in The Hague, one former United States diplomat who remains active in this network fondly referred to himself and his colleagues – many of whom he also considers close friends – as the “ICL cohort” (for ‘international criminal law’). The anthropologist Nigel Eltringham has similarly argued that a central legacy of

² Karim A.A. Kahn, “ICTY Symposium: Final Reflections on the ICTY”, 18 December 2017.

the other *ad hoc* tribunal, the International Criminal Tribunal for Rwanda ('ICTR'), is the creation of an itinerant and highly-skilled transnational community of international criminal justice experts who are constantly relocating and moving on to other opportunities within their field, a practice that legal scholar Elena Baylis has called "tribunal-hopping".³ Legal scholar Christine Schwöbel-Patel, in a 2014 article on the "culture of international criminal justice", richly describes a typical gathering within this social field:

A cluster of people have gathered near the entrance, greeting each other amicably. We are all friends here. There's Judge Soandso, how wonderful that he could find the time to come! The language is English, the suits are grey, the faces freshly shaved. Sophisticated small-talk: the latest book by one of the attendees published with one of the big presses, the latest weekend trip to New York City, the new restaurant near the Plein. Coffee is served. After the talk, there will be wine, maybe even canapés. Backs are straight, oozing confidence. The area is decked out with banners bearing the blue logo of the ICC (two scales surrounded by two interlocking branches) and the blue logo of the UN (a world map surrounded by the same interlocking branches). There is a bullish sense of success in the air.⁴

In this chapter, I am interested in further exploring this "bullish sense of success" in the international justice community, a quality that I have similarly come to recognize during my research. In particular, I am interested in the role of a particular set of recurrent discursive and aesthetic patterns that appear to texture and structure the field. To put it plainly, I am interested in the spaces in which the 'ICL cohort' works, meets, and congregates, how such spaces are arranged, built or adorned to convey a particular set of meanings and understandings. I propose that these spaces play an important role in sustaining a celebratory coherence and internal logic in what is also an experimental and fragmented field of knowledge. I suggest that the repetitive phrases and aesthetic arrangements that circulate in the field, serve as personal and professional touchstones for those who work within it and identify as part of it, and work to buttress and in-

³ Elena Baylis, "Tribunal-Hopping with the Post-Conflict Justice Junkies", in *Oregon Review of International Law*, 2008, vol. 10, pp. 361–390.

⁴ Christine Schwöbel, "The Market and Marketing Culture of International Criminal Law", in *idem* (ed.), *Critical Approaches to International Criminal Law*, Routledge, 2014.

sulate the field from what can then be dismissed or deflected as ‘external’ critique.⁵

Taking aesthetic and discursive patterns seriously, following Anne Orford, encourages the assembly of new archives that make visible the minute paradigm-shifts, transformations and rationalizations that give rise to larger trends in global administration.⁶ Ann Stoler’s work on Dutch colonial archives has traced a ‘discursive density’ around issues of sentiment in these archives, and alerts us to the ways in which this density is not the opposite of rationality. Rather, it is the ability to curtail, manage and assess *appropriate* sentiment that becomes central to rational and bureaucratic rule.⁷

This chapter takes up international criminal justice as one domain of international administration through the rule of law, and is informed by several months of ethnographic fieldwork at the sites of international criminal justice, the headquarters of the ICC and the Mechanism for International Criminal Tribunals (‘MICT’) in The Hague, as well as the United Nations Headquarters in New York, and the branch of MICT in Arusha, in particular. The ‘archives’ I have assembled and draw on in this piece are the results of a combination of personal observations and conversations at landmarks, headquarters, office buildings and art galleries, but also of sustained engagement with and presence on online meeting spaces – Twitter feeds, Facebook groups and listservs.

During this research, I became increasingly fascinated by the social world of international criminal justice, the ways in which many of its experts know one another well, and the close friendships and relationships that work to ‘knit’ the field together, as well as create a sustained ‘cohort’. Even as many in the field speak of the past years as having been ‘crisis years’, characterized – particularly by those who work at the ICC – by ‘failed cases’ or unexpected acquittals, the threat of State withdrawals, apparent donor fatigue and a series of scandals and controversies, there is still powerful momentum in the field writ-large. Hundreds of interns continue to flock to places like The Hague and Geneva every year willing to work in open-ended, unpaid positions simply to gain entry into the field,

⁵ See also Samuel Moyn, 2016, above note 1.

⁶ Anne Orford, “In Praise of Description”, in *Leiden Journal of International Law*, 2012 vol. 25, no. 3, pp. 609–625.

⁷ Ann Laura Stoler, *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense*, Princeton University Press, Princeton, NJ, 2009, p. 59.

while professionals go from temporary contract to temporary contract. It was not unusual, after having first met someone in Arusha for example, for me to bump into the same person in a different, perhaps slightly more senior, but equally temporary role in The Hague. A recurring topic of ‘coffee break’ conversation at international justice conferences is the lack of job security, the fierce competition for positions, the dearth of professional development opportunities and the lack of upward professional mobility even for those who have managed to secure a coveted position. Though thousands of jobs in the field disappeared with the closure of the ICTR and the ICTY, MICT as well as the Independent, Impartial, Investigative Mechanism for Syria have since opened, while the ICC continues its work of investigations and prosecutions. In addition, international justice non-profits, foundations and international legal consultancies, similar to tech ‘start-ups’, continue to sprout up all over the world. At the final ICTY Legacy Conference in Sarajevo in June 2017, a senior official of the Tribunal remarked with pride, that while “critics and opponents in recent years have ‘pushed against’ and critiqued the system of international criminal justice, there was now also a strong community of international criminal justice experts who would simply ‘push back’”.

It is precisely this distinctly resilient quality of this community of experts, mobilized around ‘international justice’ and ‘the fight against impunity’, that this chapter explores by way of a focus on the aesthetic and discursive texture of the field. In short, I ask: what do the paintings on walls at receptions, donated art pieces and photographic displays *do or produce*? What is the purpose of the repetitive employment of phrases such as ‘the fight against impunity’ or ‘Justice Matters’? How are these arrangements and patterns experienced by those who both produce and are surrounded by them every day? The chapter begins with the description of an art exhibition, which, at its opening in New York City in 2016, brought together several members of the ‘ICL cohort’ and prompted this critical reflection on the role of affect and aesthetics in international criminal justice.

8.1. ‘Impunity’: A Private Showing and Reception

In March 2016, I received an e-mail invitation from the American Bar Association’s Center for Human Rights inviting recipients to a “private viewing” of an exhibit featuring “portraits of defendants as they stood trial before international tribunals and the ICC for war crimes and crimes

against humanity”. The subject line caught my attention: “Invitation to Private Showing and Reception - Art & International Justice - March 1st”. According to the message, recipients were invited to an exclusive preview of what was a larger artistic project on international criminal justice. Fascinated by the explicit linkage between art and international law as well as the allure of a *private* invitation to a *private* viewing (even though presumably, hundreds subscribe to this mailing list), I RSVP-ed. A week later I find myself walking along Madison Avenue on Manhattan’s Upper East Side, in search of the art gallery. I eventually enter a little doorway off the street and give my name to the intern who is working the doors, checking names off of a spreadsheet clipped to a clipboard. I make my way inside, up two sets of steep stairs. With every step, the smell of warm, soft French cheese and open bottles of wine becomes stronger and the familiar murmur of after-work small talk louder. Coats drape the stair railing and leather briefcases line the hall. I also leave my coat and bag in the hallway and step into the warm, bright room. It is a typical gallery space: white walls, high ceilings, polished parquet floors, and a little bar – the source of the powerful wine and cheese aroma – is set up in one corner. Groups of people mill around the white-walled room, talking, sipping wine from plastic cups and examining the large portraits on the walls.

Shifting my gaze, I realize that Thomas Lubanga Dyilo is staring at me.⁸ It is an enormous oil painting, so detailed that it almost looks like a photograph. His hands are clasped in front of his face, his gaze focused. The painting is so realistic that I can see red veins and a slight tinge of yellow in the whites of his eyes. On the walls are more oil paintings of familiar faces. At least, they are familiar to me, an anthropologist studying the development of international criminal justice, and as such, somewhat at home in the field myself. Moving further along the gallery, past the first portrait of Thomas Lubanga, I come face to face with a large portrait of Radovan Karadžić.⁹ There is Jean-Pierre Bemba Gombo.¹⁰ Here is a por-

⁸ Thomas Lubanga Dyilo was the first defendant before the ICC. He was President of the Union des Patriotes Congolais and Commander-in-Chief of the Forces Patriotiques pour la Liberation du Congo. He was found guilty on 14 March 2012 of the war crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities in the Democratic Republic of the Congo. He was sentenced to 14 years of imprisonment.

⁹ Radovan Karadžić was a founding member of the Serbian Democratic Party of Bosnia and Herzegovina and was President of the party from July 1990 to July 1996. He was president of the *Republika Srpska* until July 1996. He was sentenced to 40 years of imprisonment on

trait of ‘Comrade Duch’, the first defendant before the Extraordinary Chambers in the Courts of Cambodia.¹¹ On the far side of the room is a portrait of Bosco Ntaganda.¹² I see a portrait of William Samoei Ruto (also the current vice-president of Kenya).¹³ There is Charles Taylor.¹⁴ Joshua Sang.¹⁵ Many of the portraits have subtitles: “Warlord”; “Terminator”; “Nationalist”; “Defiance”; “The Butcher”; “Simba”; “Child Soldier to Commander”. Scattered around the gallery are folders with brief ‘biographies’, listing the criminal charges brought against the individuals depicted, their dates of indictment or arrest, the current stage of legal proceedings and a sentence or two on their occupation before their actions became the object of international criminal proceedings, likely the work

24 March 2016 for genocide, crimes against humanity and war crimes by the ICTY. At the time of writing, the case was under appeal at the MICT.

- ¹⁰ Jean-Pierre Bemba Gombo was found guilty on 21 March 2016 of two counts of crimes against humanity (murder and rape) and three counts of war crimes (murder, rape and pillaging), committed in the Central African Republic between October 2002 and March 2003. He was sentenced on 21 June 2016, to 18 years of imprisonment.
- ¹¹ Kaing Guek Eav, alias Comrade Duch, the former Chairman of the Khmer Rouge S-21 Security Center in Phnom Penh, was the first defendant in the first case (Case 001) before the Extraordinary Chambers in the Courts of Cambodia. On 26 July 2010, Duch was convicted of crimes against humanity and grave breaches of the 1949 Geneva Conventions. He was sentenced to 35 years of imprisonment, which on appeal was amended to life imprisonment.
- ¹² Bosco Ntaganda, alleged Deputy Chief of Staff and commander of operations of the Forces Patriotiques pour la Libération du Congo is on trial before the ICC for 13 counts of war crimes and 5 counts of crimes against humanity allegedly committed in 2002–2003 in the Ituri district of the DRC.
- ¹³ William Samoei Ruto is the Vice President of Kenya and was formerly an MP and the Minister of Higher Education, Science and Technology. He was charged by the Prosecutor of the ICC with three counts of crimes against humanity (murder, deportation or forcible transfer of population, and persecution) allegedly committed during the 2007–2008 post-election violence in Kenya. The case against him was terminated on 5 April 2016.
- ¹⁴ Charles Ghankay Taylor is the former President of Liberia and was indicted by the Special Court for Sierra Leone in March 2003. He was found guilty on 11 counts on the modes of liability of planning of crimes and for aiding and abetting of crimes committed by rebel forces in Sierra Leone. He was sentenced to 50 years of prison.
- ¹⁵ Joshua Arap Sang is a former Kenyan radio broadcaster. In December 2006, Sang allegedly established a network with the aim of committing crimes against supporters of the Party of National Unity during the period of post-election violence in Kenya in December 2007. He was charged by the Prosecutor of the ICC with being criminally responsible as an indirect co-perpetrator for the crimes against humanity of murder, deportation or forcible transfer of population, and persecution. On 5 April 2016, the Trial Chamber terminated the case, deciding that the charges were to be vacated and the accused discharged, explaining that the Prosecution failed to present sufficient evidence.

of a group of research assistants and interns from one of New York's law schools put to the task of copying and pasting this information from court web sites.

Eventually, we gather in one room of the gallery for the opening remarks. Looking around, I am struck by how many of the people gathered – not just those depicted – I recognize, and how many of us seem to know each other. I have encountered so many of these people before in similar gatherings in The Hague, Brussels, New York and Addis Ababa. There is a sense of recognition, of boisterous familiarity in the room. There is the international criminal justice specialist from Human Rights Watch. The tall guy with glasses works for Amnesty International. Standing next to me is a prominent United States law professor. Across the room I see familiar faces and former colleagues from the CICC, and I wave at the 'Africa' spokesperson for a large international NGO, whom I last saw in The Hague.

A well-known United States diplomat and international lawyer takes the floor. He welcomes us to the event and reminisces about how his work and experiences 'in the field' – where, he says, he often came face to face with individuals who committed the most heinous of crimes – have shaped and affirmed his commitment to international criminal justice. The other speakers similarly welcome those gathered. They congratulate the artist, stress the importance of his work and compliment his ability to "draw us in" through the detailed and remarkably realistic paintings that "capture the glint in the eyes" of these men. The suggestion by one speaker that perhaps former United States President Bush belongs "up there" leads to a murmur of agreement, some laughter, heads nodding.

In thinking about this moment now, I am struck by the realization that the 'we' who had received this invitation and who gathered that evening for a private viewing and reception, are removed from 'them', 'up there', "captured at the moment their impunity has ended", as per the artist. Those gathered, through their professional and educational backgrounds, have come to be a part of what Karen Engle calls the 'anti-impunity movement', advocating criminal prosecutions as the preferred policy response to widespread and systematic human rights violations. Many of us in this room then, NGO workers, international criminal lawyers, diplomats, interns and researchers, invited to this private viewing, play some role in deciding who should be 'up there'. We stand here, in a warm gallery on a cool spring night on the Upper East Side of Manhattan,

scrutinizing the faces and weighing the guilt of others, safe in the knowledge that we are not portrayed on these walls and likely never will be.

8.2. Justice is Blind

The CICC is one of the most vocal and visible advocacy networks in support of international criminal justice and a “fair, independent and effective International Criminal Court”.¹⁶ William Pace, its former convener, was approached by the artist in 2014, and together they founded and launched the Coalition Arts Initiative to End Impunity. The Initiative, following the various press releases and blog posts introducing it at the time, aimed to “harness the power of art to enrich understandings of international justice and invigorate the dialogue between human rights, arts communities and the general public. Its goal is to deepen awareness of the work of the ICC and the Coalition’s members around the world”.¹⁷ In a video on the project’s *Indiegogo* page – a crowd-funding platform – a senior CICC representative explains: “To get the international community to adopt the laws and institutions needed to rid the world from the scourges of war, we needed to have the arts community committed”. The programme director of the CICC reflects: “What we could not say in our reports, we might be able to say it through paintings [...] that’s how I understood how the Arts Initiative would help us”.¹⁸

For roughly a year, from April 2014 to March 2015, the artist worked ‘in residence’ at the CICC on his otherwise self-funded and self-initiated exhibit, in the hopes of creating an “ongoing space for the arts to engage with the international law community”.¹⁹ When I visit him in his bright Brooklyn studio a few weeks after the exhibit, he explains that the portraits of defendants are just one part of what will be a three-part exhibition. Once complete, the full exhibit will consist of oil-paintings of defendants, photographs of and with quotes from justice practitioners, and an audio installation of victim testimony. These three sections encapsulate perfectly the three core discursive pillars of the anti-impunity movement: individual perpetrators, those experts who work to develop and advance

¹⁶ Coalition for the International Criminal Court, “What We Do” (available on its web site).

¹⁷ *Idem*, “Coalition launches Arts Initiative to enrich dialogue on global justice”, 8 April 2014 (available on its web site).

¹⁸ *Indiegogo*, “To End Impunity”, available on its web site.

¹⁹ Personal communication, 25 January 2018 (on file with the author).

the field, and ‘the victims’, on whose behalf the system of international criminal justice claims to work.²⁰

The artist used pictures of the defendants on the stand, usually available through Reuters or the Associated Press, and then, with a team of studio assistants, produces oil-based, realistic renderings of the image on large canvases. As he explained it to me, the crafting of realistic renderings of these defendants, using the age-old technique of oil paint brushed onto canvas, aims to facilitate a subjective interpretation on the part of the viewer, a reading of these men’s – all of the completed paintings I saw were of men – faces through an engagement with the texture of the paint and the expression in their eyes. As I came to understand the artist’s efforts, the choice to display the portraits as diptychs, where one is the full-colour, realistic rendering, and beside it is a black and white, photonegative inversion of the original, intended to offer the viewer a sense of having gained access to the individual’s interiority. He explained that the team settled on this form after feeling dissatisfied with the effects of the initial realistic, full-colour oil paintings. Having spent hours scrutinizing the faces, painstakingly recreating their features and expressions in oil paint brushed onto linen, the result was “an absence of criticality [...] their subjectivity came through, a sense of humanity”.²¹ Similarly, his long-term studio assistant reflected that through his work on the paintings he began to notice that “they are just human beings. Same as me, or same as other people. Two eyes, one nose, one mouth”.²²

The team thus began to experiment with purposefully unfinished portraits that, as the artist explained to me: “in their rough imperfection looked appropriately scarred”. Through a process of trial and error, they eventually settled on the concept of photonegative inversions, paired with the full-colour, realistic oil paintings, aimed to produce a compelling effect: “Something was happening here that complicated the relationship between interiority and exteriority, where the photo-negative inversions appeared to reveal an interiority, to make visible what was previously hid-

²⁰ See, for instance, Engle, Miller and Davis (eds.), 2016, see above note 1. Sara Kendall and Sarah Nouwen, “Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood”, in *Law and Contemporary Problems*, 2013, vol. 76, nos. 2–3, pp. 235–262.

²¹ Conversation with the author, May 2016.

²² Indiegogo, see above note 18.

den”.²³ The artist described these pairings as a way to capture the facial expressions of individuals as they stand trial, while at the same time offering an attempt to approach or interpret the inner character of the accused. He explained: “I am creating large scale painted portraits of powerful men at a point when their *impunity has ended*. We are drawn into the power of their gaze, their humanity, while also being challenged to consider the structures of international justice and the experiences of victims and witnesses [...] With this work, art will provide a catalyst for civic discourse”.²⁴

The artist’s previous work similarly addressed themes of justice, civic discourse and race relations in America. After a first trip to The Hague and the ICC, where he saw the first defendant Thomas Lubanga Dyilo on trial, he produced his first portrait of Lubanga, connected with the CICC and pitched the idea of an arts initiative. His first paintings were all ICC defendants, which given the Court’s early case selection and caseload, resulted in a studio full of portraits of black men – all nationals of African states. The final exhibit, in an apparent effort towards diversity, includes portraits of defendants before the ICTY and the Extraordinary Chambers in the Courts of Cambodia. In the project’s crowd-funding video, a CICC spokesperson asserts: “In this room we have individuals from all over the world. You have people from Cambodia, you have people from Europe, you have people from Africa who have committed crimes. Justice is universal. Justice is blind”.²⁵

8.3. ‘Through the Looking Glass’

In November 2016, the artist and his team attended the annual session of the Assembly of States Parties to the ICC in The Hague, sponsored by the Wayamo Foundation.²⁶ Annually bringing together State delegations of ICC States Parties, diplomatic observers, ICC officials and civil society, the Assembly’s session is the annual highlight of the social calendar of the ‘ICL cohort’. For two weeks every year, the Assembly discusses the Court’s functioning, its budget and other issues related to the ICC’s mandate. Civil society organizations take the opportunity to organize a range

²³ Personal communication, May 2016 (on file with the author).

²⁴ Global Justice, “Coalition artist-in-residence to debut art projects”, 19 November 2014 (available on its web site) (emphasis added).

²⁵ Indiegogo, see above note 18.

²⁶ See the Wayamo Foundation web site.

of ‘side-events’ and receptions after and parallel to the plenary sessions, usually sponsored by a similarly aligned embassy or diplomatic mission and serve to celebrate or draw attention to a particular cause or mark a particular milestone or achievement. It was under the auspices of one such side-event called “Through the Looking Glass: Imagining the Future of International Criminal Justice” that the artist had been invited to display a preview of the exhibit. Accordingly, a selection of portraits was crated and shipped across the Atlantic. On an evening in late November 2016, one wall of The Hague Marriott hotel’s ballroom displayed five or six large portraits of mostly black and brown, all male, defendants. Some were ICC defendants, while others, such as Charles Taylor and former Chadian president Hissène Habré, had been prosecuted by other international and so-called hybrid courts, such as the Special Court for Sierra Leone and the Extraordinary African Chambers in the Senegalese courts.

Just weeks prior to this Assembly, in October 2016, The Gambia, South Africa and Burundi had announced that they were withdrawing from the Rome Statute and the ICC. These announcements were the result of years of increasing acrimony and tensions between the African Union and the ICC over a perceived disproportionate charging practice against Africans and unprecedented criminal charges against sitting African Heads of State. The then-Minister of Information of The Gambia, Sheriff Bojang, had just called the ICC, on national television, the “International Caucasian Court for the persecution and humiliation of people of colour, especially Africans”.²⁷ This charged political context and the need to assuage the tension loomed large during the 2016 Assembly session. Seen in this light, the choice to bring these larger-than-life portraits of the accused to the Assembly and display them during the event, to me seemed at best, odd, and at worst, spectacularly tone-deaf. When Kenyan newspaper *The Daily Nation* ran a story on the portraits, titled “William Ruto portrait on sale in New York”,²⁸ a furious Twitter user posted in three separate tweets: “Mr. William must stop using other pple’s [*sic*] images to create wealth without informed consent ... PERIOD!”, “This is wrong! If he was creating awareness, why sell it?”, and “This is wrong! using Africans to make

²⁷ Siobhán O’Grady, “Gambia: The ICC Should be Called the International Caucasian Court”, in *Foreign Policy*, 26 October 2016.

²⁸ Kevin Kelley, “William Ruto portrait on sale in New York”, *The Daily Nation*, 31 January 2015.

money in the name of International Justice????”.²⁹ Another Twitter user commented wryly: “Cashing in on the miseries of Africa”.³⁰

When the artist introduced his project that evening in The Hague, he explained that he had aimed “to express visually the core principles of international criminal justice” and “explore how we can look at humanity in all its complexity [...] broaden awareness and take this exhibit to audiences that may only get the sound bite”.³¹ From my perspective in the audience, while some participants commented on the portraits with some irritation and found them galling in light of the tensions and accusations of bias facing the ICC, for many others the artwork seemed utterly commonplace, an unremarkable rendering of the work of international criminal justice. Indeed, the lobbies and hallways of the annual Assembly’s venue, alternatively held at the United Nations headquarters in New York or the World Forum in The Hague, often contain photo exhibits, political cartoons or display cases of objects in relation to international justice, positioned as seeming reminders to the passing hordes of diplomats, NGO workers, lawyers and interns of the importance of the collective endeavour. In one particularly striking instance, at a reception at the 2017 session in a midtown Manhattan office building, I encountered a brown prosthetic strap-on limb of the kind funded by the ICC’s Trust Fund for Victims displayed on a table, amongst brochures and annual reports, alongside the glasses of wine and platters of *hors d’oeuvres*.

The panel discussion followed by drinks, usually coupled with the launch of a publication or report or the unveiling of a building,³² some artwork³³ or a tapestry,³⁴ is indeed a common and important social practice in this field. The event in November 2016 in The Hague, unfolded much like any other, with speeches similar to the ones all those months ago at the art gallery in Manhattan, employing familiar phrases: the ‘im-

²⁹ “Ruto portrait on sale in New York”, on *Twitter* handle of *Daily Nation*, 2 February 2015.

³⁰ “International Justice: William #Ruto portrait on sale in New York”, on *Twitter* handle of *Daily Nation*, 1 February 2015.

³¹ Personal communication, 26 November 2016 (on file with the author).

³² International Criminal Court, “Official Opening of the ICC Permanent Premises on 19 April 2016”, Press Release, 8 April 2016 (available on its web site).

³³ International Criminal Court, “Liechtenstein Foreign Affairs Minister unveils artwork donation to International Criminal Court”, Press Release, 16 November 2016 (available on its web site).

³⁴ Women’s Initiatives for Gender Justice, “Gender Justice Legacy Wall” (available on its web site).

portance of justice’, ‘the fight against impunity’ and ‘the need for accountability’. Afterwards, participants congregated at the bar to socialize, catch up, network and perhaps negotiate a pending resolution or budget proposal.

8.4. ‘Warlord, Victim, Justice Practitioner’

It is the replication of these social practices – the panel discussions, art exhibits and side events – and the ways in which discursive and aesthetic forms circulate within and texture these spaces, that I offer here as a distinct element in the maintenance of international criminal justice as a field of practice. Various scholars have commented on the modes of representation that circulate in the field. Sara Kendall and Sarah Nouwen, for instance, describe the discursive invocation of an abstracted, de-personified, almost deity-like ‘Victim’ as the *telos* of international criminal justice, while Karen Engle has critiqued the ways the victim appears as both “central and marginal, featured and featureless”.³⁵ Kamari Clarke, who has commented on the “spectral, stylized, fictionalized and idealized figure” of the victim in international criminal law discourse, also points to the ways in which the “spectacle of the warlord” is key to providing the moral legitimacy of the work of international criminal justice.³⁶ Others, such as Makau Mutua, have described the metaphorical and self-congratulatory figure of the ‘saviour’, who does the work of civilizing and safeguarding against tyranny, as fundamental to the grand narrative of the human rights corpus. A narrative of which international criminal prosecutions have rapidly become a central element.³⁷

The art exhibit at issue here, even as it espouses a commitment to critical debate and dialogue, simultaneously accepts and replicates the modes of representation that are central to international criminal justice discourse. The predominantly brown and black faces – a result of the ICC’s early charging practice – on the wall of the Marriott hotel in The Hague and in the art gallery in Manhattan, painted in an attempt to “unveil their psyche” and “probe their internal subjective landscapes”, displayed

³⁵ Engle, Miller and Davis (eds.), 2016, p. 11, see above note 1.

³⁶ Kamari Maxine Clarke, “The Rule of Law Through Its Economies of Appearances: The Making of the African Warlord”, in *Indiana Journal of Global Legal Studies*, 2011, vol. 18, no. 1, pp. 7–40.

³⁷ Makau Mutua, “Savages, Victims and Saviors: The Metaphor of Human Rights”, in *Harvard International Law Journal*, 2001, vol. 42, no.1, pp. 201–245.

with subtitles such as “Defiant” and “Opportunist”, echo a colonial history that saw people of colour, particularly Africans, portrayed, objectified and commodified for the consumption of public audiences in the West. A further, particularly tenacious pattern at play in the portrayal of these defendants is the persistent individualization of guilt. In this narrative, conflicts are caused by a few violent individuals – those who belong up on the wall. Capturing and holding them criminally accountable becomes *the* solution to complex, layered and often decades-long societal conflicts. The practice of portraying ‘Defiant’, ‘Opportunistic’ ‘Warlords’ also rather complicates the presumption of innocence, already a difficult dictum to maintain in international criminal law, given the severe, widespread and often highly publicized nature of the crimes.³⁸

A second part of the exhibit, featuring audio recordings of victim testimony, replicates and reinforces the disembodied and de-personified figure of ‘the Victim’.³⁹ Recall, for instance, the prosthetic strap-on limb at the event I described above. ‘The Victim’ was represented here solely through its appendages and served to reinforce the importance of the work of the Trust Fund for Victims, while diplomats, lawyers and NGO workers networked and sipped champagne.

The third, and final element of the exhibit is to feature photographs of ‘justice practitioners’, or following Mutua’s metaphor, ‘the saviours’. These individuals were approached and invited to sit for professional photographic portraits during various international conferences, receptions and annual iterations of the Assembly of States Parties. Their portraits

³⁸ Indeed, some of the those portrayed in the exhibit are no longer defendants, yet their paintings remain. The charges against Callixte Mbarushimana were not confirmed, those against Ruto and Sang were vacated, and Milošević died before the completion of his trial.

³⁹ For instance, Karen Engle argues that the role and place of the victim within the imagination of the anti-impunity movement is ambivalent. “The victim is both central and marginal, featured and featureless, a necessary representative of a horrific past and a feared brake on future transformation” (in Engle *et al.* (eds.), 2016, p. 11, see above note 1). Kamari Clarke has argued that ‘the victim’ permeates international criminal justice discourse as a ‘spectral’, stylized, fictionalized and idealized figure (Kamari M. Clarke, ‘The Rule of Law Through its Economies of Appearances: The Making of the African Warlord’ (2011) 18(1) *Indiana Journal of Global Legal Studies* 7), and for Sarah Nouwen, ‘the victims’ “cabined into one monolithic category [...] are not concrete persons of flesh, blood and water, with individual names and individual opinions, but a deity-like abstraction that is disembodied, depersonified and depoliticized.” (Sarah Nouwen, ‘Justifying Justice’, in Crawford and Koskeniemi, eds., *The Cambridge Companion to International Law*, Cambridge University Press, 2011, pp. 327-35, p. 340).

were to be displayed alongside short quotes and excerpts from personal interviews. These practitioners, largely well-educated and well-paid global elites approached as they attended professional events and conferences, will be represented in their own words and on their own terms, a courtesy notably not provided to the defendants portrayed.

The exhibit described above, of which the portraits of defendants were one part, was compelling. I was moved by the striking and beautifully rendered images and the dedication of the artist to his work. Yet I also recognized familiar tropes and dominant and pervasive modes of representation at play in the exhibit, just as they circulate in the larger field of international criminal justice. Even as the actors involved in the art initiative express a desire to stimulate critical debate, the images replicate key discursive arrangements and patterns of meaning. Rather than unsettle or problematize them, spaces such as the Assembly of States Parties, the reception at the diplomatic mission, or the art gallery on Manhattan's Upper East Side become veritable echo chambers, constantly amplifying a set of normalized, and almost ritualized, meanings. 'Justice matters.' 'The fight against impunity.' It is this tenacious repetition and affirmation of a central message that Christine Schwöbel-Patel calls the "marketing culture" of international criminal law, where, she argues, symbolism has displaced content. I am interested in the ways in which these places that are rich in symbolism work to support, reinforce and affirm the image of the self and one's own work as a member of the 'ICL cohort'.

8.5. Making Iconic

In a 1947 *New Yorker* piece, Lewis Mumford, an American historian and writer, wrote a scathing review of the proposed design of the UN Secretariat building. He argued that the building "should proclaim with a single voice that a new world order, dedicated to peace and justice, is rising on this site". For Mumford, the building housing the UN Headquarters ought to make a powerful aesthetic impression and convey meaning as a symbol, and he argued that the architects should have "set their most imaginative members to work on the problem of symbolism [...] the problem of public relations for the new world order".⁴⁰ The team charged with the re-

⁴⁰ Lewis Mumford, "The Sky Line. United Nations Headquarters: Buildings as Symbols", *The New Yorker*, 15 November 1947, pp. 102–109 (available on its archives web site). For a more extensive discussion on Mumford's views and his thoughts on symbolism in rela-

sponsibility of overseeing the design process for the new permanent premises of the ICC – which was completed in 2016, nestled in the dunes of Scheveningen – appeared to recognize the symbolic role for the building. In early 2008, the Netherlands, as the host State of the ICC, launched an architectural design competition in an effort to find a design that would “symbolize the goals of the Court”.⁴¹ The CICC, participating as an official observer to the competition, further suggested that

the new ICC premises must be an icon in a truly potent sense; it mustn't simply exist, it must engage. It should embody cultural and social meaning, placing us in the historical and cultural context of this new system of international justice and reflecting the importance of the International Criminal Court – an authority to help end impunity, powerful and inspiring in its actions, yet welcoming and sensitive to those involved in its proceedings. The winning design must be a strong and understandable concept that speaks not only to the governments and international civil servants of the ICC, but also to the public and to victims, giving a clear message of the processes taking place at the Court and conveying its meaning and purpose: to ensure that the perpetrators of the gravest crimes do not go unpunished. It is in this participation that a true iconization can take place, as the viewer is forced to confront its related history.⁴²

The design brief, created by Court officials and sent to contest participants, stipulated that the building was to convey seven essential institutional values: ‘Justice’, ‘Human Dignity’, ‘Openness’, ‘Credibility’, ‘Safety’, ‘Icon’ and ‘Global’.⁴³ The video of the winning design has a solemn voice-over, which explains: “the building should have the courage to be an ambassador for the credibility of the ICC”.⁴⁴ An ICC report on its permanent premises reads:

tion to the UN headquarters, see Stephen Hopgood, *The Endtimes of Human Rights*, Cornell University Press, Ithaca and London, 2013.

⁴¹ Rijksoverheid, “ICC design competition opened”, 5 February 2008 (available on the Dutch government’s web site).

⁴² CICC, “Architectural Design Competition for the Permanent Premises of the ICC: Statement to the Jury”, 31 October 2008 (available on its web site).

⁴³ ICC, “Permanent Premises, The Building” (available on its web site).

⁴⁴ *Idem*, “The Permanent Premises of ICC by schmidt hammer lassen architects”, (available on *YouTube*).

The Court's premises and buildings should immediately be perceived as reflecting the Court's identity. The Court's main facade should serve as a timeless image symbolising its principal mission, i.e. to bring to justice the perpetrators of the most serious crimes of concern to the international community as a whole. It should also reflect the fact that the Court is an international Court with a universal vocation and seeks a well-balanced representation of the entire international community and a place at the heart of that community.⁴⁵

Since the ICC premises opened its doors in 2016, there have been regular visits by diplomatic missions wishing to present pieces of art to the ICC. In March 2017, for instance, a delegation from Belgium unveiled a series of framed statues in copper and bronze, titled "Wall of Shame", described by the artist and the Belgian ambassador as "drawing attention to the global problem of child soldiers". The press release notes that the Court has received donations of artwork from the Governments of Japan, Korea, Liechtenstein, Senegal, Slovenia and Tunisia, "representing their cultural heritage as well as reflecting the mandate of the Court".⁴⁶ These donations will adorn the walls and hallways in the new premises of the ICC, in addition to the exhibit in the hallway, 'Justice Matters', which "uses intimate portraits and videos to explore how justice is crucial to survivors of the world's most heinous crimes, and how it matters to the world as we strive together to achieve lasting peace".⁴⁷ Similarly, in the courtyard to the newly-built edifice housing MICT's Arusha branch, a "single, prominent tree" serves to, according to yet another voice-over: "symbolize justice in many parts of Africa".⁴⁸ According to the Registrar, or chief administrator, of the Mechanism, the complex "tangibly embodies the legacy of the [ICTR] and the steadfast resolve of the international community to bring those individuals still at large to account".⁴⁹ Interestingly, the CICC's statement above speaks to a felt need to produce,

⁴⁵ *Idem*, "Report on the Future Permanent Premises of the International Criminal Court: Project Presentation", 18 October 2005, ICC-ASP-4-22 (available on the Assembly of States Parties' web site). See also Hopgood, 2013, p. 87, see above note 40.

⁴⁶ *Idem*, "Belgium delegation and the ICC President unveil artwork donation to International Criminal Court", Press Release, 2 March 2017 (available on the ICC's web site).

⁴⁷ *Idem*, "Visit Us".

⁴⁸ UN MICT, "Construction of the Arusha Facility" (the video is available on its web site).

⁴⁹ *Idem*, "Groundbreaking at Lakilaki Marks Start of Construction of the New Arusha Premises", Press Release, 27 February 2015 (available on its web site).

through the design and building of the ICC, an iconic symbol, not just for victims, but also for those international civil servants who work there. Seen in this light, then, the buildings and material structure of the field serves not just as a public relations effort, but also and perhaps more potently as a keenly felt, internal, ‘private’ relations effort, working to sustain the collective effort and energies of those who go to work at the ICC, and related institutions, every day. Anne Stoler urges us to think about such affective arrangements not just as embellishment, but as part and parcel of the very substance of governing projects.⁵⁰

8.6. The ‘Spirit of Rome’ and the Affective Turn

In a recent article, exploring what he similarly identifies and has experienced as distinct momentum in the field of international criminal practice, a well-known international criminal defence lawyer suggests that work in this field, for the “dynamic and roaming” group of international lawyers and academics he belongs to, offers “the creativity and freedom to seek solutions and practical answers on behalf of clients”, which provides “a considerable source of intellectual and kinetic energy”.⁵¹ In part, this notion of ‘kinetic energy’ can be read as referring to the kind of fulfilment and pleasure one derives from knowing and executing one’s profession well and the related social status and esteem that is accumulated by professionals.⁵² Similarly, David Kennedy identifies in the exercise of expertise an alluring “intellectual mastery over some of the most pressing social concerns of our time”,⁵³ while Samuel Moyn argues that a career in international law and international humanitarianism offers “the sort of meaningful life that comes from fulfilling clearly moral tasks consistent with mainstream respectability”.⁵⁴ The notion of kinetic energy, however, can also be understood as denoting a particular force or energy that circulates within the field of practice that is both created and experienced collectively by those who participate in it. This lawyer is not the first to have identi-

⁵⁰ Stoler, 2009, p. 60, see above note 7.

⁵¹ Wayne Jordash, “The Role of Advocates in Developing International Law”, in Margaret M. deGuzman and Diane Marie Aman (eds.), *Arcs of Global Justice: Essays in Honour of William A. Schabas*, Oxford University Press, 2018.

⁵² Max Weber, *Essays in Sociology*, Oxford University Press, New York, 1946.

⁵³ David Kennedy, *A World of Struggle: How Power, Law and Expertise Shape Global Political Economy*, Princeton University Press, Princeton, 2016.

⁵⁴ Moyn, 2016, p. 77, see above note 1.

fied or given voice to a particular energy felt while engaged in the work of international justice. In 1998, the mayor of Rome and the official host of the Rome Conference, the diplomatic conference where the Rome Statute was finalized and adopted in the early hours of 18 July 1998, complimented the delegates and expressed his gratitude and pride in the work they had done. He mused that the signing of the Statute had also been inspired by the “spirit of Rome”, “the emotion and the awareness transmitted by the stones and the universal history of this city”.⁵⁵ Two decades later, at the December 2017 Assembly of States Parties at the United Nations headquarters in Manhattan, several delegates spoke of a need to recapture the ‘spirit of Rome’, referring to the momentum leading up to the 1998 diplomatic convention in Rome and the creation of the ICC. The concern was that this spirit was waning and needed to be recaptured or reinvigorated somehow. Over coffee in the Vienna Café in the basement of the building, an NGO representative told me that there was a shared concern among the various NGOs in the field around ways to ensure youth around the world carried the mantle and continued to engage with this ‘spirit’ in the future.

I propose that this spirit works not just as an externalized public relations effort, leading to the raising of bright blue flags in The Hague bearing the imperative ‘Justice Matters’ on International Criminal Justice Day in July, or Twitter campaigns aiming to make the hashtag #justicematters ‘go viral’, but serves simultaneously as a personal touchstone and a reservoir of professional faith for those who work in the field every day, creating affective ties to the collective effort of ‘fighting impunity’.⁵⁶

‘Affect’ or ‘affect theory’ offers a productive analytic through which to approach and make sense of such expressions around a collective ‘spirit’ or ‘energy’ that circulates in these sites of international criminal justice. It is this emotional and emotive reservoir of *felt* rather than known, or empirically established meanings from which the professionalized anti-impunity movement draws to legitimize and sustain its project that I am interested in here. Consider, for instance, the repeated claim that international criminal prosecutions contribute to deterring the commission

⁵⁵ UN, “Secretary-General Says Establishment of International Criminal Court Is Major Step in March Towards Universal Human Rights, Rule of Law”, Press Release, 20 July 1998, L/2890 (available on its web site).

⁵⁶ David S. Keller, “The Faith of the International Criminal Lawyer”, in *NYU Journal of International Law and Politics*, 2008, vol. 40, pp. 1019–1069.

of international crimes. This is a central motif in international criminal justice discourse, a claim that may be felt to be true, but one that is far from uncontested, and generally not supported by empirical evidence or historical record.⁵⁷

Recent years have seen a turn to affect theory in the social sciences, with scholars in some fields, such as anthropology, history and sociology, speaking of an ‘affective turn’. Theorizations of affect generally point to felt ‘intensities’ or a certain atmosphere felt on a bodily level and that may circulate between bodies in social or collective spaces.⁵⁸ Following Jo Labanyi, affect social theorists represent an analytic through which to explore the entanglements of the human with the material.⁵⁹ The mayor of Rome’s 1998 invocation of “the emotion and awareness transmitted by the stones” then, can be read as a distinctly *affective* statement. Sociologist Mike Featherstone understands affect as “unstructured non-conscious experience transmitted between bodies, which has the capacity to create affective resonances below the threshold of articulated meaning”.⁶⁰ Sara Ahmed, in her work on affect and emotion, introduces the concept of an ‘affective economy’. In these economies, affect circulates to create a ‘sticky’ coherence with the potential to produce, bind together and sustain a collective. For Ahmed, the ways in which affect moves between bodies and objects generate collective attachments and align communities.⁶¹

Thinking through affect in relation to international criminal justice can produce insights into the ways in which the social field of international justice is structured, and how a field of practice has emerged that claims to operate on a purely rational, objective and technical level. Affective sensibilities around justice, a series of meanings that are *felt* rather than known, help to create internal logic and rationality and cultivate adherence to ‘best practices’, established techniques and normalized meanings.

⁵⁷ See, for instance, Pádraig McAullife, “Suspended Disbelief: The Curious Endurance of the Deterrence Rationale in International Criminal Law”, in *New Zealand Journal of Public and International Law*, 2012, vol. 10.

⁵⁸ Brian Massumi, “The Autonomy of Affect”, in *Cultural Critique*, 1995, no. 31, pp. 83–109; Kathleen Stewart, *Ordinary Affects*, Duke University Press, Durham, 2007.

⁵⁹ Jo Labanyi, “Doing Things: Emotion, Affect, and Materiality”, in *Journal of Spanish Cultural Studies*, 2010, vol. 11, nos. 3–4, pp. 223–233.

⁶⁰ Mike Featherstone, “Body, Image and Affect in Consumer Culture”, in *Body & Society*, 2010, vol. 16, no. 1, pp. 193–221.

⁶¹ Sara Ahmed, “Affective Economies”, in *Social Text*, 2004, vol. 79, no. 2, p. 22.

One such normalized practice is the discursive equivocation of ‘justice’ with ‘criminal justice’, or the way in which the ‘fight against impunity’ has become both a rallying cry as well as the dominant policy response to conflict and violence.⁶²

Kamari Clarke analyses the affective terms through which international criminal justice as a mode of governance is articulated, and how its legitimacy is constructed through particular affective strategies and aesthetic manifestations. She uses this theorization of the emotive and affective life of law and law-making to examine the structures of feelings that inform and shape the ‘push back’ by the African Union against ICC investigations and intervention on the continent. For Clarke, affective appeals, and the packages of encapsulated meaning that underlie them, are central both to the mobilization of campaigns towards an international rule of law and the fight against impunity, and those campaigns rejecting the legitimacy of the ICC.⁶³ In keeping with scholars such as Kamari Clarke, Kjersti Lohne and Immi Tallgren, who have begun the work of theorizing international criminal justice through the rubric of affect theory, this chapter has drawn attention to the affective intensities operating beneath the surface of the field of practice, that animate the professedly technical, objective and rational work of international justice.

For scholars of affect, such as Matthew Hull, Bill Mazzarella and Ann Stoler, discursive, aesthetic, graphic and material textures are central to an examination of affect.⁶⁴ Jacques Rancière alerts us to the political effects of aesthetic experience. Aesthetic formations, he writes, become part of the “the fabric of common experience that change the cartography of the thinkable, the perceptible and the feasible. As such, it allows for

⁶² Elizabeth Cullen Dunn, “The Chaos of Humanitarianism: Adhocracy in the Republic of Georgia”, in *Humanity*, 2012, vol. 3, no. 1, pp. 1–23. See also Anette Bringedal Houge and Kjersti Lohne, “End Impunity! Reducing Conflict-Related Sexual Violence to a Problem of Law”, in *Law and Society Review*, 2017, vol. 51, no. 4.

⁶³ Kamari Clarke, *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback*, Duke University Press, 2019.

⁶⁴ See Matthew Hull, *Government of Paper: The Materiality of Bureaucracy in Urban Pakistan*, University of California Press, 2012; Stoler, 2009, see above note 7; William Mazzarella, “Affect: What is it good for?”, in Saurabh Dube (ed.), *Enchantments of Modernity: Empire, Nation, Globalization*, Critical Asian Studies, Routledge, 2012, pp. 291–309.

new modes of political construction of common objects and new possibilities of collective enunciation”.⁶⁵

This chapter points to the aesthetic and affective replication that makes up part of the fabric of common experience for the ‘ICL cohort’, and in turn allows for the collective enunciation and mobilization around distinct objects (the victim, the perpetrator, humanity) and objectives (justice), within the social field of international justice. I propose that it is this replication that plays an important role in upholding and sustaining the consistent claims to legitimacy, rationality and objectivity of the field of international criminal justice.

8.7. ‘The Spirit of the Thing’⁶⁶

This chapter has explored both the particular effects and *affects* of the architectural designs, art and photo exhibitions that play a role in animating the social field of international criminal justice. Various interlocutors in the field have spoken of the collective spirit and energy that is felt in the field, one that, I argue, also animates and works to bolster the coherence and legitimacy of the field of international criminal justice. For Stephen Hopgood, the ‘architecture of humanism’, the human rights film festivals, receptions, and, I offer, the art exhibitions, work to nurture a shared effer-

⁶⁵ Jacques Rancière, *The Emancipated Spectator*, reprint edition, Verso, London, 2011, pp. 72–73.

⁶⁶ *Warrior Without Weapons* is a memoir written by Marcel Junod, a young Swiss doctor, of his time working for the International Committee of the Red Cross in Abyssinia (Ethiopia), Spain, Poland, Germany and Japan between 1935 and 1945. After his recruitment in October 1935, Junod spent time at the headquarters in Geneva, poring over the texts of the Geneva Conventions, hoping to acquaint himself with the history and principles of the organization he was so recently summoned to join and lend his medical expertise to. His fellow delegate to Abyssinia was quick to dissuade him from his reading: “Books are all very well, but when you’re on the spot, thousands of miles from Geneva, all on your own, you’ll have to fall back on your imagination. There are the official Red Cross texts, of course, but, above all, there’s the *spirit* of the thing” (p. 16). On the eve of their departure, Marcel reflects:

The farewells of my friends on that evening at Cornavin Station and a certain anxiety aroused by such words as ‘volleys’, ‘bombardments’ and ‘ambushes’ almost made me feel that I was going off to war myself. I did not realize then that the war would continue for me long after the conquest of Abyssinia by the Italians, and that it would take me to Spain, Germany, England, Poland, Greece and to the Far East – including Hiroshima. A strange kind of soldier whose only arms were two conventions. Two conventions and something else besides ... ‘The spirit of the thing’ as Brown had put it.

Marcel Junod, *Warrior Without Weapons*, Jonathan Cape Ltd., London, 1951, p. 17.

vescence, which Durkheim understood as essential to religious feeling.⁶⁷ Annelise Riles argues that the very repetition and careful placement of words and phrases in international treaties take on an aesthetic quality, where the familiar, repetitive arrangement of phrases create a reality and provide a form within which collectivities are harnessed.⁶⁸ These artefacts and aesthetic arrangements serve not only to promote the mission of global justice, but also to ‘harness’ the collective of global actors, the ‘ICL cohort’, working together to create and sustain an international legal system, against formidable odds. Taking seriously the aesthetic arrangements that circulate and the affects produced in the meeting rooms, offices and social spaces where members of the ‘ICL cohort’ congregate, offers an additional lens to understand the shift in meanings and knowledge practices that make possible and sustain the anti-impunity movement. As put, in strikingly simple and powerful terms, by an audience member at a panel discussion at a think tank in The Hague where speakers had been exploring the effects of documentary films: “These images don’t work on our brain, they work on our stomach”. It is the work of this visceral register that this chapter has sought to point to as a further domain both for understanding the workings of power in international criminal justice, as well as the power of understandings within international criminal justice.

⁶⁷ Hopgood, 2013, see above note 40.

⁶⁸ Annelise Riles, “Infinity Within the Brackets”, in *American Ethnologist*, vol. 25, no. 3, August 1998, pp. 378–398.

Transformative Power of the International Criminal Tribunal for the Former Yugoslavia

Marina Aksenova *

9.1. Introduction

What is the nature of force that is capable of driving people forward as a united power? This was the key concern of Ivan Shatov – one of the idealistic protagonists of Dostoevsky’s novel *Demons*. At the crescendo of the storyline, Shatov engages in a heated dialogue with Nikolai Stavrogin, the morally ambiguous main character of the novel. Shatov insists that intelligence and science always occupy a secondary place in the formation of collective identities of peoples. What drives nations is their perpetual search for evidence confirming their existence and denying death. Shatov refers to this process as a quest for a unique ‘god’ that helps to distinguish between ‘good’ and ‘evil’. The idea of ‘god’ is characteristic of all prominent societies, he continues: the Greeks worshipped nature and, as a result, left the legacy of their religion in the form of arts and philosophy; the Romans saw the divinity of people manifested as a nation State and thus gifted humanity with this institution; the French continued venerating the Roman idea of a State but in a truly secular manner.

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With the advent of globalization, the international community arguably searches for its own unique identity or its own ‘god’. What is then its form and how does it distinguish between ‘good’ and ‘evil’? This chapter purports to shed light on these questions using a prominent case study for its analysis, namely the creation and operation of the International Criminal Tribunal for the former Yugoslavia (‘ICTY’) as a mechanism of international response to atrocities unfolding in the Balkans in the early to late 1990s. The key argument of this chapter is that the power projected by the ICTY goes far beyond individual prosecutions it undertook in the name of the international community in the 1990s and 2000s. The influence of the ICTY also extends beyond merely developing a solid and impressive body of international criminal law, which is undoubtedly one of the tribunal’s biggest achievements.¹

It is argued that over the two decades of its existence, the tribunal served as a symbolic ideal of a global consensus on how to fight ‘evil’ using legal means. The ICTY holds symbolic power by being an institution of ‘transcendence’ through which global community attempted to put to rest violent conflict in the Balkans. This statement does not purport to discard the limitations of the discipline of international criminal law in general and the ICTY in particular,² but rather it stresses solid aspirations behind the creation of this court and its significance for the evolution of humanity as examined from an anthropological and sociological point of view. It is important to note that this chapter adopts a uniform view of sociology and anthropology for the purposes of the present discussion. The divide between the two subjects could be explained by the historical focus of the former discipline on more ‘complex’ societies, while the latter occupied itself with the ‘primitive’ ones.³ As Abner Cohen, an anthropologist, notes, however, the patterns of symbolic behaviour are characteristic to *all* societies: rituals are not the *type* of action but rather *aspects* of any action across different communities.⁴

¹ Darryl Robinson and Gillian MacNeil, “The Tribunals and the Renaissance of International Criminal Law: Three Themes”, in *American Journal of International Law*, 2016, vol. 110, no. 2, p. 193.

² For more on limitations of international criminal justice, see Marina Aksenova, “Symbolism as a Constraint on International Criminal Law”, in *Leiden Journal of International Law*, 2017, vol. 30, no. 2, pp. 475-499

³ Abner Cohen, *Two-Dimensional Man: An Essay on the Anthropology of Power and Symbolism in Complex Society*, Routledge, 1977, pp. 12–13.

⁴ *Ibid.*, p. 34 (emphasis added).

The anthropological (or sociological) lens ‘frames’ the work of the ICTY as a form of ritual charged with intense emotional energy. Randall Collins, a historical sociologist, has developed a theory of interaction ritual chains helpful in explaining this point.⁵ At the core of his theory is the idea that power and privilege are not just the outcome of an unequal distribution of resources; they also stem from the directed flow of collective emotional energy to certain activities but not others.⁶ Collins centres his research on situations as opposed to individuals. He argues that large-scale rituals bring people together, create shared mood and thereby generate mutual focused emotional energy.⁷ This energy, in turn, leads to the creation of symbols that continue to hold meaning not only for those who partook in the situation, but also for other individuals affected by the type of activity in question. Symbols create continuity that goes far beyond specific events or institutions. In other words, they produce transcendence. For instance, political campaigns or religious activities draw in and motivate large crowds of people by directing focused emotional energy to the symbols of worship or to an agenda of a political party.⁸ These symbols continue to carry meaning for crowds beyond the specific rally or religious service; the emotional energy arising out these events continues to strengthen the objects of focused attention over time.

The argument in this chapter is that the creation and the operation of the ICTY, seen as a form of ritual, generated intense collective energy. This ultimately transformed the ICTY into a symbol of justice in the aftermath of atrocities that continuously holds meaning for the international community.⁹ More specifically, the ICTY came to symbolize the idea of justice encompassing both retributive and expressive elements.¹⁰ The transformative nature of this novel international justice mechanism resided in the fact the tribunal did not only adjudicate individual cases brought before it, but also assisted in mediating collective emotions accompanying violence. As the UN Security Council resolution 808 of 22 February 1993 made it clear, the future tribunal was tasked with pursuing multiples aims

⁵ Randall Collins, *Interaction Ritual Chains*, Princeton University Press, 2004.

⁶ *Ibid.*, p. xiii.

⁷ *Ibid.*, p. 62.

⁸ *Ibid.*, p. 60.

⁹ *Ibid.*

¹⁰ Barry Sander, “The expressive turn of international criminal justice: A field in search of meaning”, in *Leiden Journal of International Law*, vol. 32, no. 4, 2019, pp. 851-87.

that included putting an end to mass atrocities, bringing to justice persons responsible for them and contributing to the restoration and maintenance of peace in the region.¹¹

The establishment of a criminal tribunal on behalf of the international community vested with the power to bring to justice those most responsible was certainly not a ‘given’ in the situation of emergency unfolding in the Balkans at the time. Other alternatives could have emerged in place of the tribunal.¹² This chapter argues that at the moment of the creation of the ICTY, the conditions were ripe for establishing this particular kind of forum. The tribunal was instituted on behalf of the community of nations with one overarching aim: condemnation of evil deemed universal. The language of the Security Council resolutions underlying the establishment of the court demonstrates an intensifying worldwide concern over offences committed in the course of the Balkan war. In other words, the time was right to bring those matters to the attention of the tribunal mandated to conduct prosecutions in the name of universal values. In this sense, the overarching purpose of the ICTY was symbolic – to uphold the value of human dignity through the ritual of criminal prosecutions in the light of the inability of local actors to prevent escalation of atrocities.

The following section of the chapter engages theoretical frameworks developed by two prominent anthropologists – Abner Cohen and Maurice Bloch.¹³ This is done in order to understand the symbolic nature of rituals. Bloch’s explanation of the symbolic significance of rituals in connecting individuals to institutional structures transcending their consciousness is a helpful background for the discussion in Section 9.3. of the chapter, which focuses on the creation of the ICTY, its operation and the way it projected transformative power through the rhetoric in its judgments. All these aspects of the tribunal are conceptualized as part of the symbolic ritual through which the international community defined its identity. Section 9.4. addresses possible objections to the principal argu-

¹¹ UN Security Council Resolution 808 (1993) on Establishment on an International Tribunal for the Prosecution of Persons Responsible for Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia, UN Doc. S/RES/808 (1993), 22 February 1993 (<http://www.legal-tools.org/doc/20fa99/>).

¹² Michael J. Matheson and David Scheffer, “The Creation of the Tribunals”, in *American Journal of International Law*, 2016, vol. 110, no. 2, p. 179.

¹³ Maurice Bloch, *Prey into Hunter: The Politics of Religious Experience*, Cambridge University Press, Cambridge, 1992.

ment of the chapter. Some conclusions are drawn in the final section of this chapter.

9.2. The Theory of Symbolic Ritual and the Importance of Rebounding Violence

In order to examine the ICTY and its operation as a form of ritual centred around symbols, it is first important to understand what the terms ‘ritual’ and ‘symbol’ mean and how they are interpreted in the field of anthropology. Abner Cohen defines ‘symbols’ as objects with functions to impel people to certain action or a pattern of activities.¹⁴ A ritual is then a symbolic action, which is objective in nature. While it is true that a symbol recreates certain internal psychological states in each individual, the action that it induces is collective. This action is not a spontaneous co-creation by a group of separate persons but is organized in the context of a pre-determined social significance of the symbol for the specific group.¹⁵ For instance, religious rituals draw their support from centuries of joint practice and a number of shared objects of worship. Thus, the collective emotional energy invested in an action pattern takes a life of its own and becomes a symbol to which society attaches certain meaning. This shared understanding, or meaning, stems from the conditions in which the symbol originated and the function of this symbol, or, in other words, the task it fulfils. The assigned meaning then transcends individual’s internal subjective perception of a situation. The collective emotional energy that flows into a ritual strengthens joint meaning-making. This energy takes shape of a symbol, which continues to carry its intended meaning over time. Arguably, the transformative power of a ritual stems from precisely the amount and intensity of collective emotional energy invested in it.¹⁶

The next question to examine is whether rituals are common to all societies. To argue that the international community adopted a ritual in the form of international prosecutions by the ICTY is to accept that rituals are not only reserved for some societies or some events but are omnipresent, or at the very least inherent in the variety of situations. As mentioned earlier, Abner Cohen contends that the patterns of symbolic behaviour are characteristic to *all* societies: rituals are not the *type* of action but rather

¹⁴ Cohen, 1977, preface, see above note 3.

¹⁵ *Ibid.*, p. 4.

¹⁶ Collins, 2004, p. 62, above note 5.

aspects of any action across different communities.¹⁷ What matters is the lens through which one looks at the action. There is empirical support for this statement. In his seminal work *Prey into Hunter*, Maurice Bloch observes the quasi-universality of the minimal religious structures across different societies.¹⁸ Having studied various rituals performed by different cultures, he notes the irreducible structures underlying these rituals. Bloch explains this common core by the urge, found in all societies, to overcome the dichotomy between the transience of human life and the permanence of institutions. Rituals are ways to extend human existence beyond the natural biological process of birth, growth and death.¹⁹

Abner Cohen shares somewhat similar understanding of the function of symbolic action. He notes that men resort to symbolic action to establish identity and to develop solutions to profound unresolvable questions, such as life and death, good and evil.²⁰ This position resonates with Shatov's monologue in *Demons* about the search of peoples for their common 'god' and for evidence to define their existence and identity beyond death. Accepting that an overarching purpose of international criminal law is upholding the value of human life and dignity in times of political chaos, necessarily leads to the conclusion that certain symbolic action is required to transmit this message to a wider community. International criminal trials are thus perfect examples of symbolic action tackling perennial issues of human existence. While their reach is global community, their innate structure closely resembles that of other symbolic rituals practiced by various societies across time.

Take, for example, the initiation ritual practiced by Orokaiva – an indigenous people of Papua New Guinea. In Orokaiva tradition, like in many others, initiation signifies the beginning of life as full moral person. Bloch describes this progression as a person's transition from a 'home-grown native vitality' to 'transcendental' and back to real life having incorporated features that defy impermanence of an individual life. The ritual accompanying this journey serves as a symbolic representation of such transformation.

¹⁷ Cohen, 1977, p. 34, above note 3 (emphasis added).

¹⁸ Bloch, 1992, p. 3, above note 13.

¹⁹ *Ibid.*, p. 4.

²⁰ Cohen, 1977, pp. 13-14, above note 3.

The ritual consists of several stages. First, children who are being initiated are chased by a group of threatening outsiders wearing feather masks. The strangers are actually adults from the village playing the part of spirits. Children in their native vitality represent pigs, thus the whole process resembles a hunt. Afterwards, the initiated are taken to the huts outside of the village where they are not permitted to eat normal food, wash or speak out loud, during which time they are considered to be symbolically dead. In this period the children learn various secrets about the world of spirits. After some time in seclusion, the children return to the village as transformed individuals – partially human and partially spirit. They come back as hunters and end the ritual with a symbolic slaughter of pigs, followed by victorious consumption of meat.²¹ Thus, children conquered their native vitality (of pigs) and replaced it by an external or consumed vitality. They underwent symbolic transformation from prey into hunter. This means they extended their existence beyond the constraints of a single life by joining the transcendental, yet still returning to the present as changed morally mature individuals.²²

Essential to Bloch's analysis is the idea of 'rebounding violence'. In the first part of the ritual, transcendental uses violence to drive out native vitality through an external drama (spirits hunting children). Violence then returns at the end when vitality is re-introduced from external sources (meat of killed pigs). After having experienced transcendental, it is through an act of violence that individual takes control of his human finite nature. The whole ritual process can therefore be understood as a transformation occurring through 'rebounding violence' constructed at the public and at the experiential level.²³ The end result is building association with permanent institutional structures.

9.3. The ICTY: Transformational Power of a Legal Ritual

Is it possible to apply the anthropological framework of a ritual developed by Bloch to the process of creation and operation of the ICTY? It is argued here that the idea of transcendence and rebounding violence is indeed present in two distinct processes associated with the tribunal: in the way it was created by the international community and in the way in

²¹ Bloch, 1992, pp. 8-23, above note 13.

²² *Ibid.*, p. 19.

²³ *Ibid.*, pp. 5-6.

which it operated as a criminal court tasked with adjudicating on the ‘evil’ deemed universal.

9.3.1. Rebounding Violence and the Creation of the ICTY

In October 1992, it quickly became clear to the members of the UN Security Council that the crimes in the Balkans could not be stemmed by local leaders. The sense of urgency and concern transpired from wording of the first UN Security Council resolution creating the Commission of Experts tasked with analysing information pertaining to the violations of international humanitarian law on the territory of the former Yugoslavia (‘Commission’).²⁴ Establishing this body, the UN Security Council expressed “grave alarm” at continuing reports about widespread crimes in the region, in particular mass killings and “ethnic cleansing”.²⁵

It is important to note, however, that the Commission was not a direct path to the tribunal as it was not originally set up with the specific purpose of collecting evidence for future prosecutions, while, admittedly, this prospect was envisaged by several members of the Security Council at the time.²⁶ The alarming rhetoric of the UN Security Council resolution creating the Commission denotes the first stage of the ritual whereby humanity comes into contact with its own limitations and the perennial problems of human existence. In the context of the war in the former Yugoslavia, the scope of the problem faced by the UN Security Council was immense and the recognition that something needed to be done at the behest of the global community was clear.

It is thus peculiar and highly symbolic that sufficient international consensus was generated around the ongoing situation to drive the international community to move extraordinarily quickly with the creation of the court. On 10 February 1993, the Commission filed its interim report and, only five days later, members of the Security Council reached an agreement on the need for an international court. On 22 February, the Se-

²⁴ UN Security Council Resolution 780 (1992) on Establishment of the Commission of Experts to Examine and Analyse the Information Submitted Pursuant to Security Council Resolution 771 (1992) on the Situation in the former Yugoslavia, UN Doc. S/RES/780 (1992), 6 October 1992 (<http://www.legal-tools.org/doc/adca2e/>).

²⁵ *Ibid.*

²⁶ M. Cherif Bassiouni, “The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780”, in *American Journal of International Law*, 1994, vol. 88, no. 4, pp. 790-791.

curity Council unanimously decided that such a court would be created.²⁷ Only three months later, on 3 May 1993, the Secretary General produced a report containing a draft statute of the tribunal, which was then unanimously adopted by the Security Council on 25 May 1993 without amendments to avoid any possible delays.²⁸ Contemporaries – Michael Jackson Matheson and David Scheffer – have noted that it was far from certain at the outset that using Chapter VII authority to institute a criminal tribunal and to impose penalties on individuals would be acceptable to the international community as a whole.²⁹ Indeed, the report of the Secretary General containing the draft statute of the tribunal indicated that in the ordinary course of events a treaty would underlie the creation of such a tribunal, but in the present circumstances creation by Council was legally justified and more effective.³⁰ This development was only possible due to an overwhelming international consensus reached at the point of the ICTY's creation.

The mere fact of the conception of the ICTY can be seen as a transformative act of rebounding violence. The ICTY was created as a court – an institutional form of confrontation and contestation most likely to produce the strongest outcome in terms of condemnation. The failure of the international community to take effective measures to halt atrocities in the former Yugoslavia from the outset created enormous pressure for an effective and quick response. Matheson and Scheffer observe that the proponents of international prosecution were genuinely appalled by the atrocities being committed. The hope was to hold the major perpetrators of atrocity crimes responsible, deter repetition of such offences, give victims a sense of justice and encourage reconciliation.³¹

²⁷ Matheson and Scheffer, 2016, p. 175, see above note 12.

²⁸ UN Security Council Resolution 827 (1993) on Establishment of the International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, S/RES/827 (1993), 25 May 1993 (emphasis added) (<http://www.legal-tools.org/doc/dc079b/>). See also Bassiouni, 1994, p. 792, see above 26; Matheson and Scheffer, 2016, p. 175, see above note 12.

²⁹ Matheson and Scheffer, 2016, p. 179, see above note 12.

³⁰ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, paras. 18–30 (<http://www.legal-tools.org/doc/c2640a/>), paras. 18-30.

³¹ Matheson and Scheffer, 2016, see above note 12.

The transcendence of the created institution is reflected in its continuity in time. Arguably, the legacy created by the ICTY outlives the institution's historical limitations. Temporal jurisdiction of the tribunal started in 1991 and extended indefinitely into the future, leaving it up to the Security Council to decide on the appropriate time to complete its mandate.³² Seventeen years after the creation of the ICTY, on 22 December 2010, the Security Council initiated the successor court – the Mechanism for International Criminal Tribunal ('MICT'). This is a residual body for both the ICTY and the International Criminal Tribunal for Rwanda. The step of initiating the MICT formally brought the ICTY's operation to the stage of completion.³³ Yet, despite limited temporal scope of the tribunal, one cannot help but notice continuity in its work: the Commission in the final report (released in 1994, a year after the conception of the ICTY) stressed the importance of the precedent of creating an *ad hoc* tribunal for the establishment in the future of a permanent body vested with similar functions. Such an institution – the International Criminal Court – was in fact created a few years later, in 1998, and continues its operation today. The body of law generated by the ICTY is among the legal sources utilized by the ICC via the route of the "principles and rules of international law".³⁴ At the other end of the spectrum of existence of the ICTY, the MICT inherited most of its functions, perpetuating its operation and its values into the future.³⁵

9.3.2. Rebounding Violence and the Operation of the ICTY

Another layer of argument as to the transformative power of the ICTY lies in the nature of tribunal's operation. The ICTY was in and of itself a forum for facilitating transition from perceived impunity to justice. How did

³² Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, para. 62.

³³ Security Council Resolution 1966 (2010) on Establishment of the International Residual Mechanism for Criminal Tribunals with Two Branches and the Adoption of the Statute of the Mechanism, UN Doc. S/RES/1966 (2010), 22 December 2010 (<http://www.legal-tools.org/doc/e79460/>).

³⁴ Rome Statute of the International Criminal Court, 17 July 1998, last amended 2010, Article 21(1)(b).

³⁵ Guido Acquaviva, "'Best Before Date Shown': Residual Mechanisms at the ICTY", in Bert Swart, Alexander Zahar and Göran Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford University Press, Oxford, 2011, pp. 507–36.

the ICTY fulfil its transformational mandate? It did so firstly through its own very structure as a criminal tribunal vested with enforcement powers, and secondly through powerful and performative rhetoric deployed in its judgments.

If one looks at the ICTY as an institution, it becomes clear that pursuant to its own constitutive documents,³⁶ the first element of rebounding violence reveals itself in the processes of indicting, and then apprehending individuals accused of bearing responsibility for mass atrocities. It is interesting to note that because of the novelty of the whole enterprise, this first stage posed certain challenges. For the most of its first two years of operation, the ICTY had no defendants in custody even though it had issued more than 30 public indictments. Louise Arbour, former Chief Prosecutor at the ICTY, even called for the creation of a specialized military force tasked with enforcing arrest warrants issued by the tribunal precisely due to the difficulties with executing arrests of individuals, especially at the beginning of the ICTY's functioning as a court.³⁷ The lack of convincing enforcement machinery also affected the way the Prosecution was conceptualized at the ICTY. In that vein, Judge Nieto-Navia stressed in *Tadić* that the Prosecution must be allowed to appeal acquittals because while it prosecutes “*on behalf of the international community*, it is not supported by a governmental apparatus with abundant resources”.³⁸

The criminal trial itself can be seen an intermediate transformative process whereby guilt or innocence of the accused is established. It is an ‘external drama’ of assigning individual blame for collective wrongdoing. In this sense, the trial can be compared to a religious ritual whereby emotions are mediated by virtue of finding an external point of focus.³⁹ Émile Durkheim, in one of his latest works focusing on practices binding communities together, observes that society affirms itself and becomes conscious of itself through a common action. For Durkheim, this common

³⁶ Statute of the International Criminal Tribunal for the former Yugoslavia, 25 May 1993, as amended on 17 May 2002, Article 1.

³⁷ Louise Arbour, “International Tribunals for Serious Violations of International Humanitarian Law in the Former Yugoslavia and Rwanda”, in *McGill Law Journal*, vol. 46, no. 1, 2000, pp. 195–201.

³⁸ ICTY, *Prosecutor v. Duško Tadić*, Appeals Chamber, Judgement, 15 July 1999, IT-94-1-A, Declaration of Judge Nieto-Navia, para. 10 (emphasis added) (<http://www.legal-tools.org/doc/8efc3a/>).

³⁹ Jean-Pierre Dupuy, *The Mark of the Sacred*, Stanford University Press, p. 8.

action was religion.⁴⁰ The process of affirmation of identity occurs at different societal levels, and in the case of the formation of the international community, the ICTY can be seen as a quasi-religious forum tasked with facilitating transition from the state of violence to the state of peace through assigning individual criminal responsibility to those most responsible for the atrocities. The purpose of its operation was thus to extrapolate ‘evil’ and to restore the value of human life affected by the conflict.

In addition to that, the context of a criminal trial allows stories to be told and verified by independent ‘outside’ mediators – the international judges. It is not coincidental that the ICTY lists establishing crucial facts related to crimes committed in the former Yugoslavia beyond a reasonable doubt as one of its achievements.⁴¹ The idea of reconciliation is tightly linked to the possibility of becoming aware of different narratives emerging from the conflict and coming to terms with these narratives, while objectively examining the facts about what has happened. It is clear that, empirically, the ICTY may not have fully achieved this measure of reconciliation in the former Yugoslavia, because conflicting victimization narratives are still persistent in various parts of the region despite the work of the tribunal.⁴² At the same time, it is fair to say that notwithstanding the perseverance of such diverse accounts, the ICTY contributed significantly to the mediation process by allowing space for examining these narratives in light of the facts of individual cases. In sum, the process of adjudication practiced by the ICTY contributed to establishing a blueprint for collective mediation as a form of response to atrocities at the level of the international community.

Maurice Bloch discusses how violence reappears at the last stage of the ritual to conquer ‘native vitality’ and signify transcendence. It is societal affirmation that necessary learning has occurred. In Orokaiva, the children become adults after they have conquered their limitations by virtue of having been attacked by the ‘spirits’ and having re-emerged on the other side as hunters. In Vedic cremation rituals, historically practiced in some parts of India, the same process of regaining vitality through re-bounding violence manifests itself through worship of two distinct dei-

⁴⁰ Emile Durkheim, *The Elementary Forms of Religious Life*, Free Press, republished in 1995, p. 313.

⁴¹ ICTY, “Achievements” (available on the ICTY’s web site).

⁴² Marko Milanović, “The Impact of the ICTY on the Former Yugoslavia: An Anticipatory Postmortem”, in *American Journal of International Law*, 2016, vol. 110, no. 2.

ties – Siva and Vishnu. The Siva part of the ritual consists of the dying person renouncing their life and submitting their body to cremation. Siva deity, in the Vedic tradition, represents halting vitality and asceticism. Cremation is then the act of transcendence and is associated with Vishnu – the deity of creation and vitality.⁴³ Although the individual person dies and is cremated, the symbolism of Vishnu in the second part of the ritual is meant to stress continuity of creation and regaining of vitality at the collective level. As Bloch notes, “by re-enacting sacrifice in funerary and other rituals the Hindu participants are therefore transforming themselves from the ascetic of the first part into the king of the second part, from Siva to Vishnu and from prey into hunter”.⁴⁴ In the context of the ICTY, then, the violence returns through the sentencing of those found guilty of mass atrocities. In this instance, condemnation of evil occurs on behalf of an external force – the international community – and, arguably, goes beyond the specific individual found guilty of an international crime. Connection to permanent – values endorsed by the tribunal – is thereby ascertained. The last part of this section examines in some detail the process of transformation and the ‘tools’ used by the tribunal to exercise its mandate. How exactly did the ICTY engage its mediation powers?

9.3.3. Transformative Power by Virtue of Legal Rhetoric at the ICTY

The nature of rhetoric employed by the tribunal provides an insight into how the transformative power of international criminal justice is projected by virtue of legal reasoning.⁴⁵ According to Derrida, to be just, the decision of a judge must not only follow the rule of law, but must also *assume* it.⁴⁶ Facts of the case are always unique; therefore adherence to the doctrine of precedent has its reasonable limits. Assuming responsibility for a case at an international criminal tribunal, like the ICTY, involves assuming responsibility for delivering justice and a measure of accountability to

⁴³ Bloch, 1992, pp. 48-50, above note 13.

⁴⁴ *Ibid.*, p. 50.

⁴⁵ See also Sofia Stolk’s work on the purposeful use of grand words in the opening statements in international trials. Sofia Stolk, “‘The Record on Which History Will Judge Us Tomorrow’: Auto-History in the Opening Statements of International Criminal Trials”, in *Leiden Journal of International Law*, 2015, vol. 28, no. 4, pp. 993–1012.

⁴⁶ Jacques Derrida, “Force of Law: The “Mystical Foundation of Authority””, in Drucilla Cornell, Michel Rosenfeld and David Carlson (eds.), *Deconstruction and the Possibility of Justice*, Routledge, 1992, p. 251 (emphasis added).

individual victims and to humanity as a whole. One of the main challenges in this process is for the message of condemnation to be universally understood and accepted.⁴⁷

One example of the transformative power of the rhetoric of the ICTY comes from the practice of sentencing convicted individuals. Sentencing is the stage of (international) criminal justice that carries a lot of expressive weight. As Émile Durkheim puts it: “punishment is a passionate reaction [of society to the wrongdoing] graduated in its intensity”.⁴⁸ The imposition of punishment, thus, is arguably the most emotional part of any criminal justice process. It is through punishment that the community affected by the crime expresses its condemnation. This practice is particularly aggressive and exclusionary, yet it produces solidarity.⁴⁹ In case of international criminal law, the specific community united around certain values is truly international. A simple word search for the word ‘condemnation’ in all of the judgments rendered by the ICTY throughout its history returned multiple results. Examining the occurrences of this word in the context of legal discussion reveals that the condemnatory component of punishment carries strong emotional appeal, which goes beyond each individual case at issue. The following quote from *Aleksovski* is sometimes cited in support of the expressive (or, using terminology of this chapter, ‘symbolic’) function of international criminal law:⁵⁰

Accordingly, a sentence of the International Tribunal should make plain the *condemnation* of the international community of the behaviour in question and show that the international community was not ready to tolerate serious violations of international humanitarian law and human rights.⁵¹

⁴⁷ Pierre Bourdieu, *Language and Symbolic Power*, Polity Press, 1991, p. 55

⁴⁸ Emile Durkheim, *The Division of Labour in Society*, Macmillan Publications, 1984, p. 48

⁴⁹ George Herbert Mead, “The Psychology of Punitive Justice”, in *American Journal of Sociology*, 1918, vol. 23, no. 5, pp. 577–602.

⁵⁰ Harmen van der Wilt, “Joint Criminal Enterprise: Possibilities and Limitations”, in *Journal of International Criminal Justice*, 2007, vol. 5, no. 1, fn. 39; Mirjan Damaška, “What is the Point of International Criminal Justice?”, in *Chicago-Kent Law Review*, 2008, vol. 83, vol. 1, p. 329.

⁵¹ ICTY, *Prosecutor v. Aleksovski*, Appeals Chamber, Judgement, 24 March 2000, IT-95-14/1-A, para. 185 (<http://www.legal-tools.org/doc/176f05/>). See also ICTY, *Prosecutor v. Kunarac et al.*, Trial Chamber, Judgement, 22 February 2001, IT-96-23-T & IT-96-23/1-T, para. 841 (<http://www.legal-tools.org/doc/fd881d/>).

Returning to the idea of rebounding violence discussed earlier, punishment is the second ‘leg’ of violence inherent in the ritual of an international criminal trial. Punishment is there to indicate symbolic transformation that occurred between the moment of bringing the accused into the ICTY custody (and thereby establishing control over the person) and the moment of declaring their guilt or innocence and the imposition of penalty in the former case. Drawing parallels with Orokaiva initiation, it is the act of sentencing that establishes a connection between an individual act of offending and the universal values that it hurts. It is through this form of condemnation that society extrapolates ‘evil’ and re-affirms those values. In this situation, society is understood as humanity as a whole:

One of the purposes of punishment for a crime against humanity lies precisely in stigmatising criminal conduct which has infringed a value fundamental not merely to a given society, but to *humanity as a whole*.⁵²

It is important to note that the Statute of the ICTY provided minimum guidance on sentencing, allowing for wide judicial discretion.⁵³ Article 24 of the ICTY only suggested that in imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person, as well as mitigating and aggravating circumstances. This formulation in Article 24 of the Statute on penalties was thus rather generic and has not been expanded upon much beyond this point in the case law of the ICTY,⁵⁴ with the exception of some cases defining and then restating primary punishment goals international criminal justice. It is within the discussion of the primary sentencing goals, such as retribution, that the idea of condemnation and its strong emotional connotation surfaces.

As early as 1996, the *Erdemović* Trial Chamber of the ICTY adopted “retribution, or ‘just deserts’, as legitimate grounds for pronouncing a sentence for crimes against humanity, the punishment having to be proportional to the gravity of the crime and the moral guilt of the convict-

⁵² ICTY, *Prosecutor v. Dražen Erdemović*, Trial Chamber, Sentencing Judgement, 29 November 1996, IT-96-22-T, para. 64 (‘Erdemović Trial Judgement’) (<http://www.legal-tools.org/doc/eb5c9d/>).

⁵³ Antonio Cassese, *International Criminal Law*, second edition, Oxford University Press, Oxford, 2008, p. 51.

⁵⁴ Marina Aksenova, *Complicity in International Criminal Law*, Hart Publishing, 2016, p. 210.

ed”.⁵⁵ The idea of condemnation emerges a number of times in subsequent sentencing judgments the context of retributive rationale:

As a form of retribution, the sentence serves as *condemnation* by the international community of the crimes committed and should not be misunderstood as a means of expressing revenge or vengeance.⁵⁶

In light of the purposes of the Tribunal and international humanitarian law generally, the Trial Chamber understands retribution to be the expression of *condemnation* and outrage of the international community at such grave violations of, and disregard for, fundamental human rights at a time that people may be at their most vulnerable, namely during armed conflict.⁵⁷

Recourse to the gravity of the offence, with considerations for the role of the accused in the commission of the offence and the impact of the offence on victims, should help guide a trial chamber in its determination of what sentence is necessary to reflect the indignation and *condemnation* of the international community for the crimes committed.⁵⁸

In addition to the gravity of the offence, the judges considered mitigating and aggravating circumstances. Instruments of the *ad hoc* Tribunals did not include the list of such circumstances, deliberately leaving them to the discretion of the judges.⁵⁹ In the *Jelisić* case, judges took the following aggravating factors into account; “the *repugnant*, bestial and

⁵⁵ Erdemović Trial Judgement, para. 64, see above note 52.

⁵⁶ ICTY, *Prosecutor v. Stanišić and Župljanin*, Trial Chamber, Judgement, 27 March 2013, IT-08-91-T, vol. 2, para. 890 (<http://www.legal-tools.org/doc/cbc02a/>); see also ICTY, *Prosecutor v. Momcilo Krajisnik*, Appeals Judgement, 17 March 2009, IT-00-39-A, para. 759 (<https://www.legal-tools.org/doc/770028/>); ICTY, *Prosecutor v. Šainović et al.*, Trial Chamber, Judgement, 26 February 2009, IT-05-87-T, vol. 1, para. 316 (<http://www.legal-tools.org/doc/9eb7c3/>); ICTY, *Prosecutor v. Delić*, Trial Chamber, Judgement, 15 September 2008, IT-04-83-T, para. 559 (<http://www.legal-tools.org/doc/a34f45/>).

⁵⁷ ICTY, *Prosecutor v. Blagojević and Jokić*, Trial Chamber, Judgement, 17 January 2005, IT-02-60-T, para. 818 (‘Blagojević and Jokić Trial Judgement’) (<http://www.legal-tools.org/doc/7483f2/>); ICTY, *Prosecutor v. Obrenović*, Trial Chamber, Sentencing Judgement, 10 December 2003, IT-02-60/2-S, para. 50 (‘Obrenović Trial Judgement’) (<http://www.legal-tools.org/doc/3f6409/>); ICTY, *Prosecutor v. Momir Nikolić*, Appeals Chamber, Sentencing Judgement, 2 December 2003, IT-02-60/1-S, para. 86 (‘Momir Nikolić Appeals Judgement’) (<http://www.legal-tools.org/doc/f90842/>).

⁵⁸ Blagojević and Jokić Trial Judgement, para. 819, see above note 57.

⁵⁹ Obrenović Trial Judgement, para. 91, see above note 57.

sadistic nature of Goran Jelisić's behaviour", "[h]is cool-blooded commission of murders", and his enthusiastic participation in the crimes.⁶⁰ In *Ojdanić*, the Chamber acknowledged that the convicted "took some measures to reduce *human suffering* during the conflict", but chose to place minimal weight on this as a mitigating factor.⁶¹ By contrast, in *Plavšić*, the accused pleaded guilty and invoked her awareness of the suffering she caused as evidence of remorse:

She continued by saying that in their fear, especially those for whom the Second World War was more than a memory, the leadership violated the basic duty to restrain itself and to respect the human dignity of others: "[t]he knowledge that I am responsible for such *human suffering* and for soiling the character of my people will always be with me".⁶²

Appealing his 20-year sentence for murder, rape and unlawful confinement and inhuman treatment of Bosnian Muslim civilians, Miroslav Bralo argued for lesser condemnation due to societal breakdown in the Vitez municipality in Bosnia and Herzegovina. He asserted that

participation of numerous local people in the attack, all acting under unlawful orders, revealed the extent of the breakdown of societal and moral norms in this area in April 1993 and that, while this approach does not condone the atrocities committed, "extreme circumstances" and a "climate of fear and uncertainty" warrant a lesser degree of condemnation of the individual perpetrator.⁶³

This argument was rejected by the Appeal's Chamber on the ground that large sections of the population across Bosnia and Herzegovina were subjected to the same pressure and yet did not respond in the same manner as Bralo.⁶⁴ The Appeals Chamber concluded by restating the formula adopted by the Trial Chamber that the principle of retribution "amounts to an expression of *condemnation* by the international community at the *horrif-*

⁶⁰ ICTY, *Prosecutor v. Jelisić*, Appeals Chamber, Judgement, 5 July 2001, IT-95-10-A, para. 86 (<http://www.legal-tools.org/doc/477a30/>).

⁶¹ ICTY, *Prosecutor v. Šainović et al.*, Trial Chamber, Judgement: Volume 3 of 4, 26 February 2009, IT-05-87-T, para. 1187 (<http://www.legal-tools.org/doc/d79e85/>).

⁶² ICTY, *Prosecutor v. Plavšić*, Trial Chamber, Sentencing Judgement, 27 February 2003, IT-00-39-S & IT-00-40/1-S, para. 72 (<http://www.legal-tools.org/doc/f60082/>).

⁶³ ICTY, *Prosecutor v. Bralo*, Appeals Chamber, Judgement on Sentencing Appeal, 2 April 2007, IT-95-17-A, para. 12 (<http://www.legal-tools.org/doc/14a169/>).

⁶⁴ *Ibid.*, para. 13.

ic nature of the crimes committed, and must therefore be proportionate to his specific conduct”.⁶⁵

9.4. Possible Objections

The sceptics will object to the argument advanced in the previous section on at least two grounds. Firstly, there is a clear empirical challenge to the contention that the ICTY became a symbol of justice and an instrument of transformative power that assisted in mediating transition from conflict to peace. Indeed, expectations of the international community were such that the creation of the ICTY would produce a common narrative for the region, leading to healing and reconciliation.⁶⁶ Nonetheless, relatively recent opinion polls suggest that this is not the case as most ethnic groups in the Balkans carry on believing their group was subject of most victimization, while rejecting or mitigating the responsibility for committing offences against members of other ethnic groups.⁶⁷

The discussion in this chapter, however, does not purport to address the important empirical question of successes and failures of the tribunal in its outreach activity in the region. Rather, it focuses on the overall *meaning* that the international community attaches to the ICTY and its role as a blueprint for other existing or future international courts. The lens through which this chapter looks at this institution is anthropological, while the purpose is to underline its transformative power as a form of legal ritual. This is not to discard the importance of specific findings of the tribunal and their impact (or lack thereof) on the affected region but rather to stress the overall performative aspect of the institution that set international standards for legal response to atrocities.

The second objection to the argument that the ICTY became a symbol of expressive justice, in part, by mediating emotions arising out of

⁶⁵ *Ibid.*, para. 82 (emphasis added); *Prosecutor v. Bralo*, Trial Chamber, Sentencing Judgement, 7 December 2005, IT-95-17-S, para. 22 (‘Bralo Trial Judgement’) (<http://www.legal-tools.org/doc/e10281/>).

⁶⁶ Refik Hodžić pointed to the failure of outreach in this regard as he noted that media and the ICTY outreach did not sufficiently target the Serb community to challenge prevalent denialism, see Refik Hodžić, “Living the Legacy of Mass Atrocities: Victim’s Perspectives on War Crimes Trials”, in *Journal of International Criminal Justice*, 2010, vol. 8, no. 1, p. 126.

⁶⁷ Milanović, 2016, pp. 243-246, see above note 42. See for detailed surveys, Belgrade Centre for Human Rights, “Attitudes Towards the International Criminal Tribunal for the Former Yugoslavia (ICTY)” (available on its web site).

conflict may raise eyebrows of legal positivists. Is it accurate to assume that the tribunal was a form of ritual that cultivated the idea of justice by making space, albeit reluctantly, for difficult emotions? Is it appropriate to compare symbolic religious rituals with the rituals developed in international law by highlighting the intensity of the emotional energy invested in each of these practices? Interestingly, the rhetoric in separate and dissenting opinions of the ICTY's individual judges reflects the same scepticism about the nature of judicial function.⁶⁸ In her 2007 interview of two ICTY presidents, judges Fausto Pocar and Theodor Meron, Diane Orentlicher asked them about tribunal's objectives:

Judge Fausto Pocar [...] replied: "I would take it that the ICTY was entrusted with prosecuting and holding trials for the main perpetrators ... and that's the only task." Although the Security Council may have had other goals, such as fostering "peace, stability and reconciliation," he continued, the Tribunal itself cannot act as though it has a "political mandate." [...] Judge Theodor Meron, expressed a similar sentiment. In his view, "the primary goal of an international tribunal is to do justice and punish atrocities."⁶⁹

However, if one steps outside of the deeply learned and historically shaped structures of behaviour within the juridical field – a phenomenon that Pierre Bourdieu termed *legal habitus*⁷⁰ – one can observe that the rationality of law essentially embraces the emotional component. As Markus Dubber poignantly points out – the dichotomy between emotions and rationality of law is false for a true sense of justice encompasses both.⁷¹ To that effect, Jacques Derrida in his famous essay *Force of Law* draws a distinction between law and justice.⁷² In his view, law is 'deconstructable' because it rests on historical and interpretative memory – ulti-

⁶⁸ See, for example: Separate and Partially Dissenting Opinion of Judge Meron and Partially Dissenting Opinion of Judge Pocar in ICTY, *Prosecutor v. Galić*, Appeals Chamber, Judgement, 30 November 2006, IT-98-29-A, para. 456 (<http://www.legal-tools.org/doc/c81a32/>).

⁶⁹ Diane F. Orentlicher, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia*, Open Society Institute, New York, 2008, p. 38 (footnotes omitted).

⁷⁰ Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field", in *Hastings Law Journal* vol. 87, 1987, p. 814.

⁷¹ Markus Dubber, *The Sense of Justice: Empathy in Law and Punishment*, New York University Press, 2006, p. 146.

⁷² Derrida, 1992, p. 248, see above note 46.

mately it is a set of rules framed in a language that is historically conditioned. Law is limited. Justice, on the other hand, is not subject to such deconstruction. Demand for justice is infinite and does not lend itself to the same lens of analysis. Law rests on violence and belongs to the same symbolic order as politics and morals – all forms of authority.⁷³ Justice is universal and unlimited;⁷⁴ it is best seen as a process with transcendental qualities. This conceptualization of justice leaves room for its emotional and ritualistic component, while acknowledging at the same time the positivistic focus of the body of law and the ‘violence’ component of law stressed by Derrida and discussed earlier in this chapter. Antonio Cassese, a great proponent of international justice and the past President of the ICTY, once argued (while advocating for the tribunal before the UN General Assembly): “[o]nly international justice can dissolve the poisonous fumes of resentment and suspicion, and put to rest the lust for revenge”.⁷⁵

9.5. Conclusion

This chapter examined the origins of the creation of the ICTY and the specifics of its operation, viewing this court as an institution resulting from the search of global community for a uniting force. Returning to Shatov’s monologue in *Demons*, one can argue that the international community was indeed seeking its own unique ‘god’, its own unique identity, when it set in motion the mechanism through which the ICTY came into existence. The circumstances of a rampant conflict in the Balkans and the pressing need to take action served as an external reference point for enabling such process. These circumstances were a catalyst for forging international consensus about the appropriate global response to violence that manifested itself first as the Commission of Experts and then, the ICTY. In this sense, the tribunal was an affirmation of the distinctiveness of values at the core of the international community and an institution that transcended its specific mandate by carrying out global aspirations beyond its immediate powers.

Furthermore, the chapter argued that an anthropological exploration of rituals by Maurice Bloch and his idea of ‘rebounding violence’ inherent in these rituals is an appropriate frame of reference to examine the work

⁷³ *Ibid.*, p. 265.

⁷⁴ *Ibid.*, p. 245.

⁷⁵ Cited in Thomas Brudholm and Johannes Lang, *Emotions and Mass Atrocity Philosophical and Theoretical Explorations*, Cambridge University Press, 2018, p. 18.

of modern international institutions, such as the ICTY. ‘Rebounding violence’ enables societies to affirm their connection to perennial questions of existence. International criminal trials are thus contemporary representations of rebounding violence, where law is the embodiment of such violence. Authority of law ultimately rests on violence – actual or symbolic – for, as Derrida pointed out, there is no law without force. The crucial element of law is thus its enforceability, which exists only when actual sanctions are threatened in case of non-compliance.⁷⁶ By choosing to address crimes occurring in the Balkans through a tribunal, the international community made a conscious choice to allow for the exercise of violence on its behalf to expunge the offenders of commonly shared values through quasi-ritualistic performance of a criminal trial. Constitutive documents of the ICTY taken together with the fact that the ICTY was based on Chapter VII of the UN Charter – section of the Charter historically used to justify forcible measures – held a very clear promise of transformative violence.

To conclude, one may ask whether the affirmations of the uniqueness of the international community and its centredness around the value of human life and human dignity will continue to hold true in perpetuity. The ICTY was just one example of consensus being forged at the level international community in response to an external pressure. The tribunal created a blueprint for global response to mass atrocities. Arguably, with the advent of globalization and our increasing realization of deep interconnectedness of all individuals across the world – relatedness that foregoes traditional State boundaries – the international community will have more opportunities to define its own identity by responding to various crises concerning humanity as a whole.

⁷⁶ *Derrida*, 1992, see above note 46.

PART III:
STATE POWER AND AUTONOMY IN
INTERNATIONAL CRIMINAL JUSTICE

International Law-Making on Terrorism: Structural and Other Powers of Resistance

David Baragwanath *

10.1. Introduction

This chapter concerns law-making in international criminal law, focused on terrorism. My experience is in law, not in sociology. I will explore two broad topics. One is: what role can international criminal law play in pursuing terrorism? The other is: since the majority of terrorist conflicts are fed by external actors such as funders, why not view terrorist conduct in total perspective, with such aspects as financing seen and treated not in isolation but as contributions to the major substantive international crime of terrorism?¹ This will assist other disciplines to see in context such non-legal questions as: who is driving extremist ideology and how?

This chapter embraces five major themes. The first is the new global threat of terrorism and other violence. According to the United Nations ('UN') Secretary-General, António Guterres:²

the nature of conflict has changed, with many conflicts occurring within countries, not between countries. These internal conflicts have regionalized, and even globalized, with

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¹ International Monetary Fund, "IMF and the Fight Against Money Laundering and the Financing of Terrorism", 8 March 2018 (available on its web site).

² As to violence, see United Nations Development Programme ('UNDP'), *Journey to Extremism in Africa*, 2017 (available on its web site).

those increasingly “interlinked to what it is now a new global threat of terrorism that is impacting the whole world and that cannot be neglected by anyone anywhere.”³

He was joined by Kim Jim Yong:

Violent conflict is increasingly recognized as one of the big obstacles to reaching the Sustainable Development Goals (SDG) by 2030. Its dramatic resurgence over the last few years has caused immense human suffering and has enormous global impact. Violent conflicts have also become more complex and protracted, involving more nonstate groups and regional and international actors. And they are increasingly linked to global challenges such as climate change, natural disasters, cyber security and transnational organized crime. It is projected that more than half of the people living in poverty will be found in countries affected by high levels of violence by 2030. [...] Prevention should permeate everything we do.⁴

The second is the new reality of public international law:

[A] fundamental change has occurred within public international law. The traditional view of public international law as a system of law merely regulating the conduct of states among themselves on the international plane has long been discarded. In its place has emerged a system which includes the regulation of human rights by international law, a system of which individuals are rightly considered to be subjects. A corresponding shift in international public policy has also taken place.⁵

The third is the structural deficiencies of international law:

I think one must recognise that international law is singularly lacking in developed, adult, grown-up machinery for interna-

³ UN News, “In London, Secretary-General Guterres spotlights UN reform initiatives to rescue multilateralism”, 10 May 2017. For the changing nature of conflict, see David Armitage, *Civil Wars: A History in Ideas*, Alfred A. Knopf, New York, 2017, reviewed by James A Sheehan, “Contested Conflicts: The Importance of Civil Wars in the Modern World”, in *Times Literary Supplement*, 3 October 2017, p. 36.

⁴ António Guterres and KIM Jim Yong, Foreword, in UN and World Bank, *Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict*, World Bank, Washington DC, 2017, p. xii.

⁵ United Kingdom, England and Wales, Court of Appeal (‘EWCA’), *Belhaj & Anor. v. Straw & Ors.*, Judgment, [2014] EWCA Civ 1394, [2015] 2 WLR 1105; not controverted by the Supreme Court (‘UKSC’) on appeal, see [2017] UKSC 3, [2017] AC 964.

tional political decision. You get international conferences and so on, and diplomatic conferences, you have the Secretary-General and the Security Council with its limits, you have General Assembly resolutions. But it's inadequate compared with the machinery you would find in any State for executive and administrative political decision, legislation and so on.⁶

The fourth is the ability to use the international crime of terrorism, including being party to that crime, as central to the law's response to the foregoing themes.

The fifth is that while the international crime of terrorism is essential, it is only one facet of a wider theme – the unrealized potential for maximizing and optimizing the operation of the rule of law internationally, thus contributing to the reduction of the kind of violence evidenced by terrorism.

As to the first theme – the current global threat of terrorism – the Secretary-General's plea is directed to all who have the power to contribute to devising, formulating and enforcing legal remedies for terrorism. Where does that power reside? How is it being exercised? What needs to be changed?

There is difference of opinion as to the gravity of this threat. On 17 October 2017, Andrew Parker, the head of the UK's MI5, was reported to have stated:

The threat is multidimensional, evolving rapidly, and operating at a scale and pace we have not seen before. We have seen a dramatic upshift in the threat this year. It's the highest tempo I have seen in my 34-year career. Today there is more terrorist activity, coming at us more quickly, and it can be harder to detect.

The threat is more diverse than I've ever known. Plots developed here in the UK, but plots directed from overseas as well. Plots online, complex scheming and also crude stabblings, lengthy planning, but also spontaneous attacks.

⁶ "Interview with Sir Robert Jennings", October 1994, in Antonio Cassese, *Five Masters of International Law*, Hart, 2011, p. 156.

Extremists of all ages, gender and backgrounds, united only by the toxic ideology of violent victory that drives them.⁷

The following day, that opinion was challenged by the *Guardian* columnist, Sir Simon Jenkins, as excessive:

terror is not an ideology but a methodology - a means to an end, not an end in itself. Every text on terrorism stresses that it cannot be “defeated”, as Blair promised, any more than a knife or a bomb is defeated. Terrorism is the use of criminality for an ulterior motive. [...] Terrorist killings are appalling, but they are not threats to national security.⁸

Wherever one stands on the continuum between caution and pragmatism, the significance of terrorism is to stimulate general apprehension calculated to prey on the public mind; which leads in turn to reaction and prejudice likely to extend beyond the triggering event. The only sensible course is for those with relevant power to take such practical steps as are available to meet this challenge.⁹

As to the second theme – the new reality of public international law – an obvious area of enquiry is the legal and judicial system, which has expertise, the power to declare the law, certain power to enforce it, and even some capacity to create it. It is coupled with the opinions of jurists. The law-making roles of both judges and scholars are acknowledged, albeit as subsidiary to those of States and international custom, by Article 38(1)(d) of the Statute of the International Court of Justice.

The (England and Wales) Court of Appeal’s synopsis of the function of modern international law confirms the responsibility of those of us whose business is law to respond to the Secretary-General’s pleas. Indeed, the duty of those with power over public affairs to protect the public is at least as old as *Calvin’s Case* (1608),¹⁰ where after the merger of the Crowns of Scotland and England, in extending the protection of English law to the Scottish claimant, Sir Edward Coke formulated the obligations

⁷ Kim Sengupta, “Britain is facing a terrorist threat as unrelenting as it is unprecedented, MI5 chief warns”, *The Independent*, 17 October 2017 (available on its web site).

⁸ Simon Jenkins, “The head of MI5 has lost the plot. Britain is safer than ever in its history”, *The Guardian*, 18 October 2017 (available on its web site).

⁹ See also, Steven Pinker, *Enlightenment Now: The Case for Reason, Science, Humanism and Progress*, Viking, 2018, chap. 13.

¹⁰ UK, King’s Bench, *Calvin’s case*, 1608, 7 Co Rep 1a, 77 ER 377.

of the Crown to provide such protection and, reciprocally, of the subject to be loyal to the Crown.

As to the third theme – the structural deficiencies of international law – despite certain notable advances, Sir Robert Jennings’ despondent account 24 years ago of systemic inadequacies in international law remains substantially true today. While a statement of the US Ambassador to the General Assembly’s Sixth Committee on 23 October 1997, about the initial jurisdiction of the International Criminal Court, was understandably conservative and did not extend to terrorism, he did not see its jurisdiction as frozen in time. Although considering that: “[t]his is not the place for [...] the elaboration of new and unprecedented criminal law”, he added that, “[i]f all goes well, the international community can and will build on our initial efforts and the court will grow and evolve”.¹¹

However, two decades later, confronted by the situation recounted by the Secretary-General, instead of a vigorous response of international criminal law, we are in general faced with the sterile approach to law-making that Jennings deplored. We now need the type of vision and imagination displayed by President Yusuf of the International Court of Justice:

Happily, however, there are some international lawyers that [...] recognize the ephemeral nature of legal rules. They recognize that the rules exist only because and for the benefit of the society that they serve. They recognize that rules evolve, grow, fall into desuetude because of the changing needs of society. Most importantly, they recognize that it is their job to identify, propose, and effect these changes in practice. [...] theory and practice are to a certain extent indissoluble: they are simply two manifestations of our personality.¹²

¹¹ Statement by the US ambassador, agenda item 150, the Establishment of an International Criminal Court, in the Sixth Committee, General Assembly, 23 October 1997, cited by Michael Boister, “The Exclusion of Treaty Crimes from the Jurisdiction of the Proposed International Criminal Court: Law, Pragmatism, Politics”, in *Journal of Armed Conflict Law*, 1998, vol. 3, pp. 28–9.

¹² Judge Abdulqawi Ahmed Yusuf, “The Role of International Lawyers between Theory and Practice”, in *Journal of International Criminal Justice*, 2017, vol. 15, no. 3, p. 612. He later presided over the notable decision of the International Court of Justice in *Application of the International Convention for the Suppression of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russia), Preliminary Objections*, 8 November 2019. It rejects a preliminary objection (paragraph 44) that it lacked jurisdiction under Article 14(1) of the Convention in relation to “[a]ny dispute between two or more States Parties concerning the interpretation and application of

Examples are seen in international criminal law and elsewhere: in President Antonio Cassese's *Tadić* Judgment¹³ applying international humanitarian law to modern internal armed conflict; in the sagacity of the *conseil d'état* described by Bruno Latour;¹⁴ in the common law, which the late Lord Toulson showed must be kept relevant and adequate to meet modern conditions;¹⁵ and in comparative law, which is the subject of a recent address by Lord Reed.¹⁶ Each employed what has been termed the 'periscope' approach: penetrating the predilections of a judge's personal experience, then looking beyond at all legitimate options and selecting what will best respond to public need.

In international criminal law, nothing less will do. Taking for instance the particular case of terrorism: who can and should respond to the Secretary-General's call and what should they be doing?

The fourth general theme – what role can international criminal law play in pursuing terrorism? – is the *Leitmotif* of this chapter. An aspect of it – liability of parties to the crime – requires emphasis.

As to the fifth theme, the law can and must respond to terrorism by reaching beyond specific terrorist activity to the contributions the rule of law can make in eliminating its causes.

To see terrorism in further context, I begin with the international law-making and its participants.

this Convention", because the term "any person" in Article 2, paragraph 1, denoting the scope of its application, has to be interpreted as meaning "private persons only" and does not cover State officials.

¹³ International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Duško Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1-AR72 (<https://legal-tools.org/doc/6a84d3>).

¹⁴ Bruno Latour, *The Making of Law: An Ethnography of the Conseil d'Etat*, Polity Press, Cambridge, 2009.

¹⁵ See EWCA, *R. (on the application of Guardian News and Media Ltd) v. City of Westminster Magistrates' Court*, Approved Judgment, [2012] EWCA Civ 420, [2013] QB 618, affirmed in UKSC, *Kennedy v. The Charity Commission*, Judgment, [2014] UKSC 20, [2015] 1 AC 485.

¹⁶ Lord Reed, *Comparative Law in the Supreme Court of the United Kingdom*, Centre for Private Law, University Edinburgh, 13 October 2017.

10.2. The Process of International Law-Making and the Actual and Potential Participants

To avoid and deal with disputes arising from human interaction, law is needed both domestically and internationally. Since the interaction extends to Antarctica and into space, international law has been extended in both dimensions. At CILRAP's conference in New Delhi in August 2017, we learned of war crimes created in India in 2500 BC to prohibit arrows so flared as, like dum-dums and chemical weapons, to cause excessive injury. There is need not only to create international law but, as time passes and circumstances change, to modify and develop it. It needs to respond both to the ability of terrorists to receive instructions or examples via the Internet, and the use not only of the knives, motor vehicles and home-made bombs that are currently popular but, potentially, of the more advanced weapons that can be visualized.¹⁷

International law is a human construct. No-one with experience in law-making now pretends that there exists any other source of law. While 'natural law' has been used historically in a variety of senses, nowadays its usages include providing a convenient label for two 'rules of natural justice' accepted by various legal systems – (1) *nemo iudex in causa sua* – having an independent judge; and (2) *audi alteram partem* – ensuring each party has the opportunity to respond to the other's contentions. Law-making is performed by both those with the ability to make law-creating decisions and those with the capacity to influence them. The whole of the current enormous volume of international law and the limitless potential for altering and creating it have lain and lie in the hands of individuals and institutions with immensely greater power than is currently being exercised.

The power and influence of political leaders and their advisors, and of such institutions as companies,¹⁸ the media and non-governmental or-

¹⁷ Steven Pinker emphasizes as the uppermost goal in States' responses to terrorism should be to make sure the numbers of terrorist casualties stay small by securing weapons of mass destruction, see Pinker, 2018, p. 197, see above note 9.

¹⁸ Despite the extraordinary refusal of international criminal law respond to crimes by companies, rejected in Special Tribunal for Lebanon ('STL'), *Prosecutor v. Akhbar Beirut S.A.L. and Al Amin (Ibrahim Mohamed)*, Redacted version of decision in proceedings for contempt with orders in lieu of an indictment, STL-14-06/I/CJ, 31 January 2014, upheld on appeal (<https://legal-tools.org/doc/h0b7cz>); STL, *In the Case against Akhbar Beirut S.A.L., Ibrahim Mohamed Ali Al Amin*, Appeals Panel, Decision on Interlocutory Appeal concerning Personal Jurisdiction in Contempt Proceedings, STL-14-06/PT/AP/AR126.1,

ganisations, is familiar. Less obvious is the potential power of those who are, or who can become, makers of international law and respond to the issues which it can affect.

The protection of sound international law, which is the responsibility of all who have the power to contribute to the process, is the right of every citizen of the globe. That right is visualized in the Preamble to the Charter of the United Nations and formulated in successive humanitarian and human rights conventions. Since the Peace of Westphalia, power has in theory and in substantial practice, resided with States, whose legal equality is stipulated by Article 2(1) of the Charter of the United Nations and emphasized by the International Court of Justice ('ICJ').¹⁹

But the reality includes power differentials and hierarchies, expressed in Security Council decision-making by the veto provision of Article 27(3), and seen in economic and military fact. The trebling in little more than a decade to some 79.5 million of the number of displaced persons evidences wholesale breaches of ostensible human rights. There is deficiency in the creation and the enforcement of international law by those who hold power; and also resentment at both the manner of, and exclusion from, its exercise.

10.2.1. Sources of International Law

Article 38(1) of the Statute of the International Court of Justice, attached to the Charter of the United Nations provides an invaluable guide to finding what may be regarded as *current* international law, referring to (i) conventions, (ii) custom, (iii) general principles, and (iv) judicial decisions and teachings of jurists. Each of these, which can overlap, identifies a potential exercise of power.

23 January 2015 (<https://legal-tools.org/doc/96b6b3>); STL, *Prosecutor v. New TV S.A.L., Karma Mohamed Tahsin Al Khayat*, Appeals Panel, Decision on interlocutory appeal concerning personal jurisdiction in contempt proceedings, STL-14-05/PT/AP/AR126.1, 2 October 2014 (<https://www.legal-tools.org/doc/e8fbb1>). The minority of the Supreme Court of the United States, *Jesner et al. v. Arab Bank, PLC*, 24 April 2018, endorsed such approach; the majority did not seize the opportunity to confirm such development of international law.

¹⁹ International Court of Justice ('ICJ'), *Germany v. Italy: Greece Intervening (Jurisdictional Immunities of the State)*, 2012, ICJ Report 99, para. 59.

10.2.1.1. Convention or Treaty

The exercise is by States and the officials who can advise and commit them to the development and adoption of conventions, as known as treaties.

The most effective option, if attainable, is a multilateral convention or treaty.²⁰ Formal consent by States parties and interpretation via the Vienna Convention is an indisputably authoritative means of creating international law. That is presumably why it was selected to head the Article 38(1) list.

Power to assist such a process resides with the greatly respected International Law Commission which can ensure the quality of the *travaux préparatoires* (the argument and draft on which a treaty document is based).

The 1969 Vienna Convention on the Law of Treaties contemplated the “progressive development of the law” it achieved,²¹ referring specifically to “a subsequent [peremptory] norm of general international law”²² and to “a rule set forth in a treaty [...] becoming binding upon a third State as a customary rule of international law, recognized as such”.²³ Ideally, terrorism should be the subject of a multi-partite criminal law treaty. But it is not.

Unhappily, successive references to and consideration by the International Law Commission of the topic of defining a crime of terrorism at international law were followed by an absence of State agreement upon the terms of a treaty. Subsequent consideration by various committees has contributed to an 80-year impasse in giving effect to what may be regarded, as far as it goes, as an indisputable definition adopted in the Convention for the Prevention and Punishment of Terrorism by the League of Nations in 1937:

the expression “acts of terrorism” means criminal acts directed against a State and intended or calculated to create a

²⁰ See UKSC, *Benkharbouche v. Secretary of State for the Foreign and Commonwealth Office*, Judgment, [2017] UKSC 62, [2019] AC 777, para. 32 (*‘Benkharbouche’*).

²¹ Preamble.

²² Article 53.

²³ Article 38.

state of terror in the minds of particular persons, or a group of persons or the general public.²⁴

10.2.1.2. Custom Deriving from State Practice

The law of nations, preceding and still used as a synonym for what Jeremy Bentham termed ‘international law’ in the English language, remains the paradigm sense of the latter term: what in practice, as a matter of custom, nation States actually accept as the law that governs their relationships.

To identify a rule of customary international law, it is necessary to establish that there is a widespread, representative and consistent practice of states on the point in question, which is accepted by them on the footing that it is a legal obligation (*opinio juris*) [...].²⁵

As we will see, relevant State officials can include domestic judges. Since 9/11, when the UN Security Council directed every State to enact domestic counter-terrorism legislation, there have been up to 193 different domestic State criminal statutes in response, many of them couched differently. But no common legislative custom has emerged.

As will be developed later, there is powerful evidence for the argument, accepted by the STL Appeals Chamber in its Interlocutory Decision of 16 February 2011,²⁶ that in the case of terrorism, international custom now effectively recognizes the definition adopted under the auspices of the League of Nations in 1937:

the subjective element of the crime under discussion is two-fold, (i) the intent or *dolus* of the underlying crime [such as murder – see below] and (ii) the special intent (*dolus specialis*) to spread fear or coerce an authority. The objective element is the commission of an act that is criminalised by other norms (murder, causing grievous bodily harm, hostage taking, etc.). The crime of terrorism at international law of

²⁴ Article 1.

²⁵ *Benkharbouche*, para. 31, see above note 20.

²⁶ STL, Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging with corrected front page, 16 February 2011, STL-11-01/I/AC/R176bis/F0936/COR/20130530/R144405-R144558/EN/nc, p. 27 (‘Interlocutory Decision of 16 February 2011’) (<https://www.legal-tools.org/doc/ceebc3>).

course requires as well that [...] the terrorist act be transnational.²⁷

The current position of commentators may be that there is a general recognition of such custom, but not that it constitutes international law. If so, that is a distinction difficult to justify as a difference in light of UN Security Council resolution 2341 of 13 February 2017, later discussed, where responding to potential threats against infrastructure within States it resolved:

Reaffirming that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and that *any acts of terrorism are criminal and unjustifiable regardless of their motivations* [...].²⁸

10.2.1.3. General Principles

This topic overlaps with custom. The best account of general principles is likely to be provided by either or both of the expert groups acknowledged to some extent in the final category of Article 38(1): courts and jurists.

It was from a myriad of counter-terrorism measures – treaties, statutes, resolutions – evidencing principles pointing in a similar direction, that in its Interlocutory Decision of 16 February 2011, the Appeals Chamber of the STL distilled its criteria similar to those adopted by the League of Nations in 1937. In *R. v. Gul* (2012),²⁹ in construing the UK Terrorism Act 2006, the Court of Appeal for England and Wales adopted the principles of that decision as to the existence under customary international of a crime of terrorism. But, on further appeal, a Full Court of the UK Supreme Court disagreed, holding that in international law there is no accepted norm as to what constitutes terrorism.³⁰ No attempt was made by the Supreme Court in *Gul* to go beyond an earlier decision of its own to analyse what has been a continuing development of international law. That is, respectfully suggested, a misfortune, insofar as it had the previous

²⁷ *Ibid.*, para. 111.

²⁸ Second occurrence of italics added.

²⁹ EWCA, *R. v. Gul*, Judgment, [2012] EWCA Crim 280, [2012] 1 WLR 3432.

³⁰ UKSC, *R. v. Gul*, Appeal Judgment, [2013] UKSC 64, [2013] 3 WLR 1207, [2014] 1 Cr App R 315 following its earlier decision in UKSC, *Al-Sirri (FC) v. Secretary of State for the Home Department*, [2012] UKSC 54, [2013] 1 AC 745.

year expressed itself cautiously: “there is *as yet* no internationally agreed definition of terrorism”.³¹

The former Deputy President of that important Court has since emphasized the function of domestic courts in the creation of international law, in *Al-Waheed v. Ministry of Defence* discussed below.

10.2.1.4. Judicial Decisions and Teachings of Jurists

We here reach a vital phase. Article 38(1)(d) obviously deals with a very important topic: *finding* existing international law. But, like Article 38(1)(a), (b) and (c), it may be taken as alluding to an even more important and difficult topic: the power *to make, and to refuse to make*, international criminal law. I will return to the power of judges and jurists to do so.

10.2.2. Law-Making Power of States, United Nations Institutions and Others

Ultimate power to make international law, seen in the creation of the Charter of the United Nations, is possessed by States, especially when exercising their authority to make multilateral treaties. For instance, the admirable Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1997) provides:

Each State Party to this Convention undertakes never under any circumstances:

- (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;
- (b) To use chemical weapons;
- (c) To engage in any military preparations to use chemical weapons;
- (d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.³²

³¹ *Al-Sirri (FC)*, para. 37, see above note 30 (emphasis added).

³² Article 1(1). For the International Convention for the Suppression of Terrorism and its interpretation by the International Court of Justice, see above note 16.

10.2.2.1. The UN Security Council

Next in authority to States exercising power by multilateral treaty, and given added authority under Chapter VII of the United Nations Charter beyond that of any State,³³ is the Security Council of the United Nations. With delegated authority from all 193 Member States and the duty to respond on their behalf to threats to international peace and security, it is empowered to employ whatever means consistent with the Purposes and Principles of the UN Charter – up to and including military force – to achieve that end.³⁴ I will return to the role of the Security Council.

10.2.2.2. The UN General Assembly

The broad powers of the UN General Assembly include considering the general principles of co-operation in the maintenance of international peace and security and making recommendations with regard to such principles to Members or to the Security Council.³⁵ Their exercise is seen in the Report of the Secretary-General of 6 October 2017, “UN Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law”.³⁶ The legal power to inform and educate is insufficiently appreciated.³⁷ State power is a function of what is seen by individuals – its leaders and, at least in a democracy, its citizens –

³³ A State lacks power to use force save in defence against armed attack of itself or another State pending Security Council intervention, see Charter of the United Nations and Statute of the International Court of Justice, 24 October 1945, Article 51, Chapter VII (‘UN Charter’) (<https://www.legal-tools.org/doc/6b3cd5>). See also Alberto Alvarez-Jiminez, “From Al-Qaida in 2001 to ISIS in 2015: The Security Council’s Decisions on Terrorism and Their Impact on the Right to Self-Defense Against Autonomous Non-State Actors” in *Minnesota Journal of International Law*, 2017, vol. 26, p. 345.

³⁴ UN Charter, Article 24, see above note 33.

³⁵ *Ibid.*, Article 11.

³⁶ United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law, Report of the Secretary-General, UN Doc. A/72/517, 6 October 2017 (<https://legal-tools.org/doc/8p4e1a>).

³⁷ The inclusion in the outreach programme of the Special Tribunal for Lebanon of a course of lectures to Lebanese students across all Confessions has been described by a participating professor as the greatest exercise in reconciliation since the end in 1990 of the 15-year civil war. Olga Kavran, “International Judicial Institutions: (Re)Defining ‘Public’ Proceedings?”, in Chrisje Brants and Susanne Karstedt (eds.), *Transitional Justice and the Public Sphere: Engagement, Legitimacy and Contestation*, Hart, 2017, pp. 125–145. I would also like to highlight the unique online e-learning platform in international criminal law, *Lexsitius*, which contains 236 lectures, a fully developed commentary, digests and more (freely available at <https://cilrap-lexsitius.org/>).

to really matter. This is an admirable example of exercise of the General Assembly's legal powers.

10.2.2.3. The Judiciaries³⁸

Both the UN Security Council and the General Assembly have power to seek from their fellow institution, the International Court of Justice, an advisory opinion on any legal issue (Article 96). While the opinion is advisory in law, the duties of the Security Council, stated in the Charter, are not. Dame Rosalyn Higgins, former President of the International Court of Justice, advises:

The Court has [...] emphasiz[ed] [...] that a UN organ need-
ed legal advice in order to know how to conduct its business
[...]³⁹

the greatest role for Advisory Opinions is where there
are uncertainties about the institutional arrangements within
the UN [...] ⁴⁰

If organs are reluctant to seek advice on the develop-
ment of their own competencies, except when forced to do
so by the behaviour of occasional recalcitrant states, the
Court's role as the supreme 'in-house counsel' to the UN will
remain limited.⁴¹

That power has recently been exercised by the General Assembly in relation to the case *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (International Court of Justice Advisory Opinion 25 February 2019).

The judiciaries' primary legal power is to declare the law. But it has been noted that they may also contribute to its development and even,

³⁸ The power of arbitrators, not least in bilateral investment treaty awards following States' conferment of relevant authority to contribute to international law-making is beyond the scope of this chapter.

³⁹ Rosalyn Higgins, "A comment on the current health of Advisory Opinions", in Vaughan Lowe and Malgosia Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essay in Honour of Sir Robert Jennings*, Cambridge University Press, 1996, p. 571 (footnote omitted).

⁴⁰ *Ibid.*, p. 575.

⁴¹ *Ibid.*, pp. 576–77.

within limits, its making.⁴² I will return to the potential role of the ICJ in the present context.

Also important are the roles of regional and domestic judiciaries. Each raises problems of coherence in international law, which bring Alice to mind.

Alice laughed. “There’s no use trying,” she said: “one *can’t* believe impossible things.”

“I daresay you haven’t had much practice,” said the Queen. “When I was your age, I always did it for half-an-hour a day. Why, sometimes I’ve believed as many as six impossible things before breakfast. [...]”⁴³

There are several apparent impossibilities for judiciaries to manage. As to regional judiciaries, Article 103 of the UN Charter was designed to ensure coherence by overriding competing claims to authority:

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.

Yet, final European Courts have denied or limited its operation. In the STL’s *Jurisdiction and Legality* appeal⁴⁴ there was discussion of three important cases where possible limits on the extent of UN Security Council authority were considered. They were *Al-Jedda* in the United Kingdom House of Lords (2007),⁴⁵ *Kadi* in the Grand Chamber European Court of Justice (2008),⁴⁶ and *Nada* in the European Court of Human Rights

⁴² David Baragwanath, “The interpretative challenges of international adjudication across the common law/civil law divide”, in *Cambridge Journal of International and Comparative Law*, 2014, vol. 3, p. 450.

⁴³ Lewis Carroll, *Through the Looking-Glass, and What Alice Found There*, Macmillan, 1871, chap. V.

⁴⁴ STL, *The Prosecutor v. Ayyash et al.*, Appeals Chamber, Decision on the Defence Appeals Against the Trial Chamber’s “Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal”, STL-11-01/PT/AC/AR90.1, 24 October 2012, paras. 54–60 (<https://legal-tools.org/doc/a4d58e>).

⁴⁵ United Kingdom House of Lords (‘UKHL’), *R. (on the application of Al-Jedda) (FC) v. Secretary of State for Defence*, [2007] UKHL 58.

⁴⁶ European Court of Justice, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Judgment, 3 September 2008, C-402/05 P and C C-415/05 P (‘Kadi case’) (<https://www.legal-tools.org/doc/9c3dd5>).

(2012).⁴⁷ In *Al-Jedda*, the House of Lords had been of the opinion that Article 103 of the UN Charter made Security Council resolutions trump all inconsistent treaties.

But in *Kadi*, the European Court of Justice held that Council Regulation 881/2002 (27 May 2002) of the Council of Europe, made to implement UN Security Council resolution 1390 (2002), requiring the freezing of funds of persons listed as associates of Osama Bin Laden, including Kadi, was invalid – at least in terms of the European law which the ECJ must apply. It was held to infringe the rights guaranteed by “the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union”.⁴⁸ In the absence of the procedural safeguards of due notice and fair hearing, Council Regulation 881/2002 was annulled in so far as it concerned *Kadi*, except that its effect was maintained for a period of three months to give the Council an opportunity to comply with the fundamental rights. The European Court gave primacy to European law and Article 103 of the Charter was effectively denied application.

In *Nada*, the European Court of Human Rights found it unnecessary to determine the hierarchy of authority as between Article 103 and the provisions of the European Convention on Human Rights. It held that Switzerland’s application of Security Council resolutions, by promulgating Ordinances requiring seizure of Nada’s assets and marooning him within a small area of Switzerland, infringed Articles 8 (respect for private life) and 13 (access to effective remedy) of the European Convention on Human Rights.

In the recent STL appeal,⁴⁹ there was cited the *Al Jedda* decision of the European Court of Human Rights on appeal from and reversing the House of Lords decision, holding that a UN Security Council resolution is presumed not to authorize infringements of fundamental rights unless it expresses a clear contrary intention.⁵⁰ In that case, the Grand Chamber of

⁴⁷ European Court of Human Rights, *Nada v. Switzerland*, Grand Chamber, Judgment, 12 September 2012, Application no. 10593/08 (<https://www.legal-tools.org/doc/577de2>).

⁴⁸ *Ibid.*, para. 303.

⁴⁹ *The Prosecutor v. Ayyash et al.*, see above note 44.

⁵⁰ The citation was to European Court of Human Rights, *Al Jedda v. United Kingdom*, Judgment, Application no. 27021/08, 7 July 2011, para. 102 (<https://www.legal-tools.org/doc/8a6292>):

the European Court of Human Rights held that a Security Council resolution employing general language, which the House of Lords had held justified detention without trial, did not authorize conduct that infringed fundamental rights. The immediate effect of the decision is that:

Such rights are to be upheld if at all possible; any authority to override them, if indeed it can lawfully be conferred, must be given in explicit and clear terms.⁵¹

A deeper consequence is identified in the partly dissenting judgment of Judge Poalelungi in *Al Jedda*:

Article 103 of the United Nations Charter provides that the Member States' obligations under the Charter must prevail over any other obligations they may have under international law. This provision reflects, and is essential for, the United Nations' primary role within the world order of maintaining international peace and security.

[...]

The point at which the majority part ways with the domestic courts is in finding that the language used in Resolution 1546 did not indicate sufficiently clearly that the Security Council authorised Member States to use internment. I regret that I find the judgment of the House of Lords more persuasive on this issue. I consider that it is unrealistic to expect the Security Council to spell out in advance, in detail, every measure which a military force might be required to use to contribute to peace and security under its mandate. Internment is a frequently used measure in conflict situations, well established under international humanitarian law, and was, moreover, expressly referred to in the letter of Colin Powell annexed to Resolution 1546. I consider that it is clear from the text of the Resolution, and from the context where the Multi-National Force was already present and using intern-

[T]here must be a presumption that the Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights. [...] In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.

⁵¹ STL, *The Prosecutor v. Ayyash et al.*, Appeals Chamber, Reasons for Decision on Applications Filed by Counsel for Witness Prh012 and Order on Confidentiality, STL-11-01/T/AC, 28 July 2015, para. 15 (<https://legal-tools.org/doc/ddb0dd>).

ment in Iraq, that Member States were authorised to continue interning individuals where necessary.

In short, Article 103 has been diminished.

More recently, in *Pham v. Secretary of State for the Home Department* (2015),⁵² a majority of the UK Supreme Court cited and rejected Advocate General Cruz Villalón's recent Opinion in a European Court of Justice case suggesting that "European law does not leave it open to any national court to adopt a criterion or benchmark for assessing the vires of a European act (which, presumably, would include a Court of Justice decision) different from that of the Court of Justice (para 53)".⁵³ The Supreme Court held:

For a domestic court, the starting point is, in any event, to identify the ultimate legislative authority in its jurisdiction according to the relevant rule of recognition. The search is simple in a country like the United Kingdom with an explicitly dualist approach to obligations undertaken at a supranational level. European law is certainly special and represents a remarkable development in the world's legal history. But, unless and until the rule of recognition by which we shape our decisions is altered, we must view the United Kingdom as independent, Parliament as sovereign and European law as part of domestic law because Parliament has so willed.⁵⁴

So, in *Pham*, the UK Supreme Court has denied to European law *vis-à-vis* UK legislation the very ultimate authority which in *Kadi* was claimed for it by the European Court of Justice *vis-à-vis* the UN Security Council resolution. But the European Court of Human Rights decision in *Al Jedda* requires a level of specificity in Security Council resolutions which may be impracticable.

There are several points:

- a. There are potential problems of conflict among jurisdictions. What may, in the eye of the Security Council, be a resolution needed to maintain or restore international peace and security, may be seen by

⁵² UKSC, *Pham v. Secretary of State for the Home Department*, Judgment, [2015] UKSC 19, [2015] 1 WLR 1591.

⁵³ *Ibid.*, para. 78 (summarising the Court of Justice of the European Union, *Gauweiler v. Deutscher Bundestag*, Grand Chamber, Judgment of the Court).

⁵⁴ *Ibid.*, para. 80.

the European Court of Justice as an infringement of basic rights guaranteed by its fundamental document.

- b. While the Council is equipped with lawyers of outstanding ability, some issues may be of such difficulty as to be beyond precise solution by the Security Council within the time constraints imposed by an emergency and can only be dealt with by general language.

Whereas a court is a retailer of law, construing and applying it to particular facts in accordance with the law's general criteria, the Security Council is required to act as manufacturer and wholesaler of laws. Their application can occur within unforeseeable conditions and, despite Article 103, result in such asperities as to bring it into conflict with other jurisdictions.

- c. There may even be conflict between Council resolutions and settled rules of international law.

The Council has sought to respond to such difficulties, for example, by creating an Ombudsperson to investigate claims that its decisions may act oppressively, as well as, in response, systems for modification of their application. But while specific provision for such *ex post* response may meet the requirement of the rule of law that legislation be as clear and predictable as practicable *from the outset*,⁵⁵ *Kadi*, *Nada* and *Al-Jedda* show that, absent adequate subsequent procedures, it may yet infringe acceptable legal standards.

The role of judiciaries is in general to apply rather than to create either policy or law, even if sometimes either or both are unavoidable.⁵⁶ More usually, they are able to bridge the gap between legal principle and its application in a particular case.

It is notable that, compared with State domestic constitutions, the Security Council as policy-maker for the United Nations not only has no legislature to assist it, but receives little input from any judiciary. Yet the latter is a vital element of States' systems. Jeremy Bentham is celebrated for his advocacy that legislation be codified. But he observed: "the legislator, who cannot pass judgment in particular cases, will give directions to the tribunals in the form of general rules, and leave them with a certain

⁵⁵ John Finnis, *Natural Law and Natural Rights*, Oxford University Press, Oxford, 1980, p. 270.

⁵⁶ Baragwanath, 2014, see above note 42.

amount of latitude in order that they may adjust their decision to the special circumstances”.⁵⁷

Bentham’s insight raises the question of whether, in addition to (1) the legislative course imposed by the Security Council upon States by Resolution 1540 (28 April 2004) to deal with terrorism – requiring them to devise and enforce “appropriate effective laws” – a process entailing delays; and (2) as in *Kadi*, giving the legislature opportunity after the event to find some retrospective solution; the Security Council might, as a further option, (3) itself choose to legislate in the more general terms employed in *Al-Jedda*, but explicitly leave courts (either international, if one exists, or domestic) to exercise their conventional authority to “adjust their decision to the special circumstances”.

There could well be different judicial opinions in different jurisdictions, as occurs where an international convention is considered by judges in more than one State. But that is tolerable so long as each of the competing opinions is rational and achieved via due process. Against such objection is to be weighed the advantage of bringing the discriminating role of the judiciary to bear in support of a process that is both effective and fair.

Take the current discussion of terrorism. Here, Higgins stated in 2003: “‘Terrorism’ is a term without legal significance. [...] The term is at once a shorthand to allude to a variety of problems with some common elements, and a method of indicating community condemnation for the conduct concerned”.⁵⁸ And in 2006, Ben Saul, the author of the leading text on defining terrorism in international law, considered: “Close analysis of customary international law [...] confirms that there is no generic international crime, or distinct legal concept, of terrorism”.⁵⁹

It would be surprising if the opinion of such respected thinkers in a specialist discipline had not been influential in the decisions made by the UK Supreme Court in *Gul* and its predecessor. And for good reason, decision-makers are always well-advised to inform themselves of the opinion of those who have a reputation for experience, knowledge and wisdom in

⁵⁷ *Bentham’s Theory of Legislation*, Charles Milner Atkinson (trans., ed.), Humphrey Milford, 1914, p. 62.

⁵⁸ Rosalyn Higgins, “The general international law of terrorism”, in Rosalyn Higgins and Maurice Florey (eds.), *Terrorism and International Law*, Routledge, 2003, p. 28.

⁵⁹ Ben Saul, *Defining Terrorism in International Law*, Oxford University Press, Oxford, 2006, p. 8.

the relevant discipline.⁶⁰ But while Saul has maintained that opinion, he has also subsequently acknowledged:

it is no longer unreasonable to speak of a discernible body of ‘international counter-terrorism law’, even if such regime may not be as unified, centralised or coherent as some others. The chapters in this book reveal a solid and irrepressible accretion of international norms and practices on terrorism, parented or serviced by competent institutions, and *recognised as a regime* by relevant actors in the system (including UN bodies, national institutions, NGOs, practitioners, and scholars). [...] [It] is distinctively normative (not a purely political project), systemic, and institutionalised. It is [...] here to stay [...] and builds on much older experiences of terrorism in international law.⁶¹

Moreover, there is now relevant expert opinion pointing in a different direction from the opinions of Higgins and of Saul’s original text. A fundamental problem underlying the opinions of those who consider that terrorism is not a crime at international law may be (1) the assumption that there is some identifiable thing called ‘terrorism’ and yet (2) it is impossible *as a matter of fact* (rather than *as a matter of law*) simply to identify what that thing is and call it a crime. I wholly agree with the second proposition. But for the following reasons the first is, in my view, mistaken. On the contrary:

it is impossible to *define* a legal concept, and [...] the task of legal writers should be rather to *describe* the use of a word like ‘[terrorism]’ in the particular legal rules in which it occurs. ‘[Terrorism]’ in the legal sense has no meaning at all apart from the rules of law in which it is used as a tool of legal thought.⁶²

I have modified this passage from a celebrated essay by Donald Harris, which concerned the concept of possession, not terrorism. His insight, however, building on writings of Jeremy Bentham and H.L.A.

⁶⁰ See, for instance, Lord Hodge, “Expert Evidence: Use, Abuse and Boundaries”, Middle Temple Guest Lecture, 9 October 2017 (<https://legal-tools.org/doc/hu6hm1>).

⁶¹ Ben Saul (ed.), *Research Handbook on International Law and Terrorism*, Edward Elgar, 2014, pp. x-xi.

⁶² Donald Harris, “The Concept of Possession in English Law”, in Anthony Gordon Guest (ed.), *Oxford Essays in Jurisprudence*, Oxford University Press, 1961, p. 70.

Hart,⁶³ identifies the problem of using the word ‘terrorism’ as if it were a legal term of art. What is needed, rather, is to turn the process around: instead of peering minutely at what *factual* implications the word ‘terrorism’ can have, to identify and adopt what are, or should be, the essential *legal* elements of a definition that meets the need for a crime which, starting with murder, kidnapping and the like, adds the intent to spread fear that extends the crime, together with a transnational perspective.

The need is indisputable in principle and in practice. Whereas we can cope with and adapt to actual realities, uncertainty plays on the power of human imagination to magnify what usually turns out to be a less daunting concern.

So instead of allowing ourselves to be frightened by the shadowy factual abstractions ‘terrorism’ and ‘terrorist’, we need to focus on specifics: what conduct, by what people, for what reason, should *the law* proscribe as ‘terrorism’? That allows us to specify defined targets to which we can make specific responses. The problem becomes manageable.

Faced with opposing high authority, it is necessary to stand back and consider both the principles and their application.

In my chapter on *reconciliation* in the anthology *Philosophical Foundations of International Criminal Law: Legally Protected Interests* (also published by the Torkel Opsahl Academic EPublisher), I cite the judicial oath, administered to many common law judges and capturing the essence of the role of all judges: (i) to do right to all manner of people, (ii) after the laws and usages of the realm, and (iii) without fear or favour, affection or ill will.⁶⁴

The second paragraph promises the stability that is the law’s function to provide to its community; the third guarantees fearless independence.

Judges must apply the third and balance the requirement of the first against the second to identify both those whose interests are at stake in the proceeding and how justice is to be done between and among competing interests.

The challenge of the task is illustrated by the former President of the Supreme Court of the Netherlands, Geert Corstens, selecting two

⁶³ H.L.A Hart, *Definition and Theory in Jurisprudence*, Oxford University Press, 1954.

⁶⁴ UK, Promissory Oaths Act, 1868.

French words to summarize the judges' role; in doing so he echoed the first and third paragraphs: "la prudence et l'audace" [caution and boldness].⁶⁵

The Premier Président of the Cour de Cassation, Guy Canivet, had opened the French legal year with a modest aphorism as to the former quality: "Il est vrai que nous ne rendons justice que les mains tremblantes".⁶⁶ What is to happen in the event of conflict between or among these values?

In domestic law, constitutional law may dictate the answer, which may require an existing law to be struck down as *ultra vires* the constitution; a constitutional principle may, as in England, dictate that no court may challenge the authority of primary legislation; a principle of *stare decisis* may require an inferior court to apply the decision of a superior. But the reality is that the decision-maker must identify and evaluate the competing values and make a decision.

In international law, the lack bewailed by Sir Robert Jennings of the "developed, adult, grown-up machinery for international political decision" makes the position more complex and presents the challenge we face today. There being no general international legislature of the domestic kind considered by Montesquieu in his *L'Esprit des Lois*, one must look elsewhere for the creation and updating of international law.

10.2.3. Practicality of Greater Recourse to the ICJ?

In an address entitled *Climate Change and the Rule of Law*⁶⁷ at the UK Supreme Court, Philippe Sands urged that the prospect of environmental disaster should be the subject of an advisory opinion of the International Court of Justice. In his oral comment, Judge Crawford of that Court took care to avoid any opinion as to whether such a course could be justified in law or fact. But he expressed the desire that, if it is, the Court should deal with it.

⁶⁵ Geert Corstens, "The role of law in society", Keynote speech to presidents of other supreme courts in Latin America, Caribbean and Europe, p. 4 (on file with the author).

⁶⁶ "Audience solennelle du 6 janvier 2006: Discours de Guy Canivet, Premier président de la Cour de cassation", 6 January 2006, p. 3 (available on the web site of the Cour de cassation).

⁶⁷ Philippe Sands QC, "Climate Change & the Rule of Law", Lecture at the UKSC, 21 September 2015 (available on the YouTube web site).

There is a vital question whether, in seeking solutions to differences over conflict as in the case of terrorism, more use could be made of Article 96 of the Charter, permitting not only the UN General Assembly but the Security Council itself to request the International Court of Justice to give an advisory opinion on any legal question. Certainly, there is need for expert involvement in such an exercise, which requires a profound understanding of UN systems and the policies of Security Council Member States. But it is logically relevant to the present topic and warrants careful consideration by the institutions with jurisdiction to seek advisory opinions which include the General Assembly and, importantly, the Security Council itself.

Is there an international crime of terrorism? If so, what are its elements? And what are the specific duties of the UN Security Council in respect of terrorism within its overall obligation as delegate of all UN Members States under Article 24 of the Charter to respond to threats to international peace and security?

As the principal judicial organ of the United Nations, the ICJ has the authority to advise the UN Security Council concerning its legal duties in this regard, as they relate to terrorism. There is, as was seen in the *Kosovo* case (2010),⁶⁸ the threshold issue of whether the ICJ would exercise its discretion to accept an Article 92 request on that topic. The ICJ would approach it with the greatest care. The reasons include the dissenting opinion of Judge Weeramantry in the *Lockerbie* case that would deny the ICJ power of judicial review over the Security Council.⁶⁹ It was cited in *Legality and Jurisdiction* (2012),⁷⁰ en route to the majority decision, that the STL judges lacked jurisdiction to consider a challenge to the Security Council's power to create the STL.⁷¹

But terrorism presents in acute form the responsibility of the UN Security Council to heed and exemplify respect for the law. Like experi-

⁶⁸ ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, 22 July 2010, *ICJ Reports 2010*, p. 403 (<https://www.legal-tools.org/doc/5ac90f>).

⁶⁹ ICJ, *Questions of Interpretation and Application of the 1971 Montreal Conventions arising from the Ariel Incident at Lockerbie (Libyan Jamahiriya v. United Kingdom)*, Dissenting Opinion of Judge Weeramantry, 14 April 1992, *ICJ Reports 3*, p. 66 (<https://www.legal-tools.org/doc/a5c2ed>).

⁷⁰ *The Prosecutor v. Ayyash et al.*, para. 39, see above note 44.

⁷¹ Cf. *ibid.*, Separate and Partly dissenting Opinion of Baragwanath J., p. 307.

enced judges of first instance when errors are corrected on appeal, the mature statesmen and women would not resent, but appreciate, the judicial contribution to better decision-making on that topic. The Security Council might emulate the decision of one of its Permanent Members, reported on the day of its Fête National 2018, as “Un nouveau plan d’action contre le terrorisme” known as PACT, formulated around 32 elements to direct the conduct of the Government of France in relation to the detection, subduing and prevention of terrorism.⁷²

As identified by the Appeals Chamber of the ICTY in *Tadić*:

the Security Council has a very wide margin of discretion under Article 39 to choose the appropriate course of action and to evaluate the suitability of the measures chosen, as well as their potential contribution to the restoration or maintenance of peace. But here again, this discretion is not unfettered.⁷³

In addition to conferring powers, the law may impose implied duties, to be inferred from the nature of the function.⁷⁴ But in the case of the Council, to date there has been no definitive global overview and statement of what those duties are in relation to terrorism.

The Commission on Global Security, Justice and Governance chaired by Madeleine Albright and Ibrahim Gambari proposes improving the working methods in relation to the Security Council.⁷⁵ It recommends undertaking “a shared, rolling analysis of the terrorist, criminal, and other extremist elements located in a Security Council-mandated peace operation environment to identify and address key, premeditated sources of instability and violent conflict”.⁷⁶

As a legal component of a global response, might the UN Security Council seek an advisory opinion from the ICJ via Article 96 to help check whether all obligations in respect of terrorism are being fulfilled? To do so, an essential point would be the formulation of suitable questions

⁷² *Le Monde*, 14 July 2018, p. 16.

⁷³ *Tadić*, para. 32, see above note 13.

⁷⁴ UKHL, *Padfield & Ors. v. Minister of Agriculture, Fisheries and Food & Ors.*, [1968] UKHL 1, [1968] AC 997.

⁷⁵ Commission on Global Security, Justice and Governance, *Confronting the Crisis of Global Governance*, June 2015, sect. 7.3.2.2, p. 85.

⁷⁶ *Ibid.*

to pose. That topic warrants consideration by experts with specialist familiarity with the issues.

Beginning at the beginning, perhaps the Council might consider inviting the ICJ to assess its systems in terms of law. There is, for instance, the existing jurisprudence which, even if domestic, may be considered by the ICJ under Article 38(1)(d) of its Statute already cited.

Study of systems deficiencies and human error as their cause has now extended beyond the sphere of employment⁷⁷ – the private law principle that an employer must ensure a safe system of work.⁷⁸ A French Nobel laureate and his co-authors have commented on the Chernobyl disaster: “it is stupefying to learn that certain of the factors that caused the Chernobyl disaster are rampantly present in other countries”.⁷⁹ Recent developments in systems safety have been towards recognizing the need, in the context of making and applying law, for sustained application of what another French scholar calls “a new vision for security”.⁸⁰ Why not extend them to terrorism?

An application by the Council under Article 96 might ask the ICJ to take a fresh look at its systems. Basic aspects are its exacting obligations and the twin realities that the international system has been described as in

⁷⁷ James Reason, *Human Error*, Cambridge University Press, Cambridge, 1990, p. 1:

Just over 60 years ago Spearman (1928) grumbled that “crammed as psychological writings are, and must needs be, with allusions to errors in an incidental manner, they hardly ever arrive at considering these profoundly, or even systematically.” Even at the time, Spearman’s lament was not altogether justified [...]; but if he were around today, he would find still less cause for complaint. The past decade has seen a rapid increase in what might loosely be called ‘studies of errors for their own sake’.

The most obvious impetus for this renewed interest has been a growing public concern over the terrible cost of human error [referring to the Tenerife, Three Mile Island, Bhopal, *Challenger*, Chernobyl, *Herald of Free Enterprise*, King’s Cross and Piper Alpha disasters] [...].

Aside from these world events, from the mid-1970s onwards theoretical and methodological developments within cognitive psychology have also acted to make errors a proper study in their own right.”

⁷⁸ UKHL, *Wilson and Clyde Coal Company v. English*, [1937] UKHL 2, [1938] AC 57, per Lord Wright (“the provision of a competent staff [...], adequate material, and a proper system and effective supervision”).

⁷⁹ See Georges Charpak, Richard L. Garwin and Venance Journé, *De Tchernobyl en tchernobyls*, Odile Jacob, 2005, p. 8 (“il est stupéfiant de découvrir que certains des facteurs qui causèrent la catastrophe de Tchernobyl existent de façon rampante dans les autres pays”).

⁸⁰ René Amalberti, *La conduite de systèmes à risques*, PUF, 1996, p. 192 (“une nouvelle vision pour la sécurité”).

constant flux⁸¹ and that there can be a tendency to treat foreign policy as a series of human challenges rather than as a permanent enterprise.⁸² With the help of the Secretary-General,⁸³ the Council is able to take on a continuous basis⁸⁴ such steps as it regards as practicable to avoid and mitigate disaster.⁸⁵

Use of Article 96 could perhaps inject into the Council's processes the clinical element of judicial analysis and, by including the detached advice of the ICJ judges as to the law, enrich the result and add to the Council's perceived legitimacy.

What the Security Council should do in particular cases of terrorism would rarely permit a reference to the ICJ; the decision would not only be likely to require urgency but is in the end a matter for the relevant States and, in the gravest cases, the Security Council itself. Yet while the Security Council will ordinarily regulate its own processes, where real difficulties are encountered, it should surely consider seeking the help of the ICJ on matters of procedure, retaining for itself the substantive issues for which it, rather than the ICJ, is *forum conveniens*. Ascertaining one's legal obligations is the first duty of any decision-maker, and surely so in the case of the body charged under Article 24 by every State with the duty of securing and maintaining international peace and security in relation to terrorism. But if there were dissent by any veto holder, access to the ICJ's guidance to the Council under Article 96 would be available via the General Assembly.

Since the UN Security Council is already able to take legal advice as to its duties, could additional questions as to procedure be of help? Clearly the addition of the opinion of the ICJ would serve the vital pur-

⁸¹ Henry Kissinger, *World Order*, Penguin, 2014, p. 248.

⁸² *Ibid.*, p. 237.

⁸³ Empowered by Article 99 to bring matters to the attention of the Council.

⁸⁴ UN Charter, Article 28(1), see above note 33.

⁸⁵ UN Charter, Article 101(2), see above note 33, permits the assignment of "appropriate staffs" to "organs of the United Nations". Compare UNGA, An Agenda for Peace: preventive diplomacy and related matters, 18 December 1992, UN Doc. A/RES/47/120, para. II(2) ("*Invites* the Secretary-General to strengthen the capacity of the Secretariat for the collection of information and analysis to serve better the early-warning needs of the Organization"). That resolution was supplemented by: Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the occasion of the fiftieth anniversary of the United Nations, UN Doc. A/50/60, S/1995/1, 25 January 1995.

poses of transparency and authority which are of such value in securing competence and public confidence in the conduct of public affairs.

Advice would be needed from those closely familiar with the current needs and activities of the Security Council as to what precise questions could sensibly be suggested as to justiciable issues of law that might improve the systems. In *Wilsons and Clyde Coal Company v. English*,⁸⁶ the court determined that the duty of an employer to provide for employees is not delegable, so the employer was in breach of its legal duty if an employee – however competent – acted carelessly so that another employee suffered injury. The principle was confirmed by the UK Supreme Court on 18 October 2017.⁸⁷ A starting point could be a formulation raising the type of issues determined in that case, such as:

Is it the duty of the Security Council in respect of terrorism to

- monitor systematically threats to international peace and security;
- devise, lay down, promulgate, and implement systems consistent with Article 27 of the Charter⁸⁸ to promote the effective, timely and continuous maintenance of international peace and security in relation to international terrorism and its definition;
- seek assignment by the Secretary-General of appropriate staff to perform such functions continuously?⁸⁹

Has it the legal power to:

- create an International Terrorism Court with authority to investigate, prosecute, defend and try proceedings for such crime;
- create a crime of terrorism at international law justiciable before the International Terrorism Court;
- liaise with Members States of the United Nations concerning such investigations and proceedings;
- empower and require Members States of the United Nations to investigate, prosecute, defend and try proceedings for such crimes when requested to do so by the International Terrorism Court and to

⁸⁶ *Wilsons and Clyde Coal Company v. English*, see above note 78.

⁸⁷ UKSC, *Armes v. Nottinghamshire County Council*, Judgment, 18 October 2017, [2017] UKSC 60, para. 32.

⁸⁸ Which permits veto by each permanent member.

⁸⁹ UN Charter, Articles 28(1), 101(2), see above note 33.

facilitate the conduct of such investigations and proceedings by the International Terrorism Court or by another Member State.

10.2.3.1. Domestic Courts

As to the role of domestic courts in relation to an international crime of terrorism, the two senior courts of the home of the common law are the UK Supreme Court and the Judicial Committee of the Privy Council, almost always comprising the same judges – the UK Law Lords. Yet despite outstanding efforts at coherence, especially by Lord Mance who was until recently the Deputy President of the UK Supreme Court and led that court’s work in international law, they have formulated rules for the recognition of international law, that on their face are at odds. In *Boyce v. R.*, Lord Hoffmann stated the principle, familiar to international lawyers,⁹⁰ that “the courts will so far as possible construe domestic law so as to avoid a breach of the State’s international obligations”.⁹¹

Yet in *R. (Wang Yam) v. Central Criminal Court* (2015) a seven-member UK Supreme Court held that in England “a domestic decision-maker exercising a general discretion (i) *is neither bound to have regard to this country’s purely international obligations nor bound to give effect to them*, but (ii) may have regard to the United Kingdom’s international obligations, if he or she decides this to be appropriate”.⁹² The opinion of the great Sir Owen Dixon in *Chow Hung Ching v. R.* (1948),⁹³ cited in the

⁹⁰ Robert Jennings and Arthur Watts (eds.), *Oppenheim’s International Law*, ninth edition, Oxford University Press, Oxford, 2008, para. 19(1), adopting William Blackstone’s assertion that the law of nations is part of the law of England.

⁹¹ UK, Judicial Committee of the Privy Council, *Boyce & Anor. v. R. (Barbados)*, Judgement, 7 July 2004, [2005] AC 400, [2004] UKPC 32, para. 25.

⁹² UKSC, *R. (on the application of Wang Yam) v. Central Criminal Court*, Judgment, 16 December 2015, [2016] AC 771, [2015] UKSC 76, para. 35 (emphasis added).

⁹³ High Court of Australia, *Chow Hung Ching v. R.*, 1948, 77 CLR 449, p. 477 (italics in the original):

It is a mistake to treat the question of the extent of the immunity as one depending upon the recognition by Great Britain of a rule of international law. In the first place the theory of *Blackstone (Commentaries, (1809), vol. 4, p. 67)* that “the law of nations (whenever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land” is now regarded as without foundation. The true view, it is held, is “that international law is not a part, but is one of the sources, of English law” (Article by Prof. *J. L. Brierly* on International Law in England, (1935), 51 *Law Quarterly Review*, p. 31.). “In each case in which the question arises the court must consider whether the particular rule of international law has been received into, and so become a source of, English

Australian text *The Practitioner's Guide to International Law*,⁹⁴ which states that “International law as such does not form part of Australian law”,⁹⁵ offers support for such conservative approach.

The force of the English law of precedent is seen in the irony that Lord Mance was the author of *Wang Yam*. In the passage emphasized,⁹⁶ he found himself bound to flatly reject his own previous dissenting judgment⁹⁷ in *R. (Hurst) v. Commissioner of Police of the Metropolis* (2007): “I find unattractive the proposition that it is entirely a matter for a discretionary decision-maker whether or not the values engaged by this country’s international obligations, however fundamental they may be, have any relevance or operate as any sort of guide”.⁹⁸

The difficulty experienced in England in determining the role and function of international law has been experienced in other jurisdictions. Fortunately, we have further guidance from Lord Mance. In another particularly sensitive judgment of 2015, *Keyu v. Secretary of State*,⁹⁹ Lord Mance has noted that, although:

144. The basis and extent to which customary international law (“CIL”) is received into common law was not examined in great detail in the parties’ submissions before us [...]

nevertheless:

146. Common law judges on any view retain the power and duty to consider how far customary international law on any point fits with domestic constitutional principles and understandings. [...]

150. Speaking generally, in my opinion, the presumption when considering any such policy issue is that CIL, once established, can and should shape the common law, whenever it can do so consistently with domestic constitutional princi-

law” (Sir William Holdsworth, *Relation of English Law to International Law: Essays in Law and History*, p. 267.).

⁹⁴ *The Practitioner's Guide to International Law*, Second Edition, LexisNexis, 2014, p. viii.

⁹⁵ *Ibid.*, p. 6.

⁹⁶ Presumably reverting to UKHL, *R. v. Secretary of State for the Home Department, ex p. Brind*, [1991] 1 AC 696, [1991] UKHL 4.

⁹⁷ In delivering the *Wang* decision, he loyally applied the majority decision in *Hurst*.

⁹⁸ UKHL, *R. (on the application of Hurst) v. Commissioner of Police of the Metropolis*, [2007] 2 AC 189, [2007] UKHL 13.

⁹⁹ UKSC, *Keyu & Ors. v. Secretary of State for Foreign and Commonwealth Affairs & Anor.*, Judgment, 25 November 2015, [2016] AC 1355, [2015] UKSC 69.

ples, statutory law and common law rules which the courts can themselves sensibly adapt without it being, for example, necessary to invite Parliamentary intervention of consideration.

It may be hoped that *Wang Yam* can be rationalized as applying a peculiar common law rule in a particular settled English context, rather than as a statement of broad principle for general application. But the contrast between the two lines of authority highlights both the importance and the difficulty of evolving an international law that will receive recognition within domestic courts.

Lord Mance has recently provided yet further valuable guidance on this topic. In *Al-Waheed v. Ministry of Defence*, he wrote:

The role of domestic courts in developing (or [...] even establishing) a rule of customary international law should not be undervalued. This subject was not the object of detailed examination before us, and would merit this in any future case where the point was significant. But the intermeshing of domestic and international law issues and law has been increasingly evident in recent years. Just as States answer for domestic courts in international law, so it is possible to regard at least some domestic court decisions as elements of the practice of States, or as ways through which States may express their *opinio juris* regarding the rules of international law. The underlying thinking is that domestic courts have a certain competence and role in identifying, developing and expressing principles of customary international law.¹⁰⁰

The emphasis that domestic courts have the role, also – like jurists – recognized by Article 38(1)(d) – of contributing to the creation of international law, makes an important contribution to resolving the problem of incoherence. It requires judges to focus on the incoherence issue.

Had the UK Supreme Court in *Gul*¹⁰¹ elected to determine the existence of the minimal international crime of terrorism defined in 1937, and if the majority of the US Supreme Court in *Jesner v. Arab Bank*

¹⁰⁰ [2017] UKSC 2, para. 148. Drawing on Lauterpacht's earlier article, Hersch Lauterpacht, "Decisions of Municipal Courts as a Source of International Law", in *The British Yearbook on International Law*, 1929, vol 10, pp. 65–95 and later writings, especially by Sir Michael Wood.

¹⁰¹ *R v. Gul*, see above note 30.

*PLC*¹⁰² had endorsed the minority's opinion that a company is liable for terrorist conduct facilitated by its staff, two major, yet objectively uncontroversial gaps in the protection of international human rights would have been filled. Together they present an urgent and continuing challenge to international lawmakers.

10.2.3.2. Conclusion as to Judiciaries

The current system of international justice needs improvement. The absence of systems to deal with cross-border terrorism is among its flaws. But it is playing an essential role, both setting standards and reminding villains that, whatever their status, they are now at risk of response by the international community. It now includes tribunals and systems which, while not yet comprehensive, already respond to wide tracts of illegality. They are assisted by a legal capacity progressively increasing in numbers, competence, and thus ideas. These include the need for lawyers and judges, when considering the capacity of the law, to understand the need to learn from the non-lawyers who appreciate its context.

10.2.3.3. Scholars

Article 38(1)(d) of the Statute of the ICJ authorizes the constant reference by modern international law decision-makers to such scholars as Vattel and Grotius and their contemporary counterparts. They have been and remain signal contributors to the making and developing of international law internationally.

10.2.3.4. The Legal Profession

Former Lord Chief Justice Matthew Hale said of the common law: “men are not born Common Lawyers, neither can the bare exercise of the faculty of reason give a man sufficient knowledge of it, but it must be gained by the habituating and accustoming and exercising that faculty by reading, study and observation”.¹⁰³

The advantage of legal practice in international law, as advisor, counsel, expert in, and initiator of ideas in international law, has been ap-

¹⁰² Reed, 2017, see above note 16.

¹⁰³ Cited by Tim Murphy, *The Oldest Social Science?*, Oxford University Press, Oxford, 1997, p. 88, who in turn cites Gerald J. Postema, *Bentham and the Common Law Tradition*, Clarendon, 1989, p. 63, who in turn cites Matthew Hale, *Reflections by the Lrd. Cheife Justice Hale on Mr. Hobbes his Dialogue of the law*, 1681 [posthumously published], p. 505.

parent since Grotius' advice to the East India Company at the age of 21, now celebrated as *The Freedom of the Seas*.

10.2.3.5. Other Decision-Makers and Contributors to Making and Developing International Law

Exactly the same responsibility rests on others with power to make, pronounce, and apply international law. They include, importantly, the experts who advise or represent States and other institutions in the large number of institutions and the enormous range of their decisions that turn on questions of international law. But important contributions are not confined to those who have achieved public prominence. The junior staff, students and young legal officers whose research and ideas contribute to or provoke reaction in the analysis of the politicians, diplomats, senior public servants, professors, and judges with whom they work, are among the many who help develop international law.

I turn from international law generally to international criminal law and then to the particular case of terrorism.

10.3. Current Problems in International Criminal Law and the Particular Case of Terrorism

The seven decades since Nuremberg have seen vital and admirable initiatives towards adding to the repertoire and discipline both of international law and, from a virtual zero base, of a significant international criminal law. Of major importance, following the end of the Cold War, have been first the establishment of the *ad hoc* international criminal tribunals, spearheaded by the ICTY and the ICTR to which Hanne Sophie Greve and Morten Bergsmo were major contributors,¹⁰⁴ and more recently, the mighty achievement of the International Criminal Court. The jurisprudence of those and other tribunals, developed by practitioners, judges and scholars, has created a formidable discipline of international criminal law, with major rule of law achievements to its credit.

Against these excellent advances are however to be set some fundamental deficiencies that it is the purpose of this volume to identify and address. They are highlighted by the sorry failure of those responsible for adding to the repertoire of international criminal law the means of dealing

¹⁰⁴ John Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal*, University of Chicago Press, 2003, p. 47.

with the all too familiar topic of cross-border terrorism. The function of international criminal law is to provide against and respond to serious predictable abuse both of humanity and, nowadays, of the planet. The need to see each human life as equally precious and entitled to the protection of an effective international criminal law requires urgent effective action to be taken. There is an imperative need for international recognition of, and effective systems to respond to, the international crime of terrorism.

That there is such a crime is asserted with force and clarity by the Security Council in successive resolutions. I have mentioned Resolution 2341 of 13 February 2017, responding to potential threats against infrastructure within States:

Reaffirming its primary responsibility for the maintenance of international peace and security, in accordance with the Charter of the United Nations,

[...]

Reaffirming that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and that *any acts of terrorism are criminal and unjustifiable regardless of their motivations*, whenever, wherever and by whomsoever committed, and *remaining determined* to contribute further to enhancing the effectiveness of the overall effort to fight this scourge on a global level,

Reaffirming that terrorism poses a threat to international peace and security and that countering this threat requires collective efforts on national, regional and international levels on the basis of respect for international law, including international human rights law and international humanitarian law, and the Charter of the United Nations,

[...]

Underlining that effective critical infrastructure protection requires sectoral and cross-sectoral approaches to risk management [...]¹⁰⁵

¹⁰⁵ The words “any acts of terrorism are criminal and unjustifiable regardless of their motivations” are italicised here. See above note 28.

I have emphasized the eight-decade delay in giving effect to the concise and admirable 1937 Convention for the Prevention and Punishment of Terrorism, adopted under the auspices of the League of Nations.

As pointed out in a recent International Bar Association Task Force's Report, *Terrorism and International Law* (2011),¹⁰⁶ that Convention did not attempt to grapple with every kind of conduct that could be described as terrorism. At the latest count there were some 250 of those.¹⁰⁷ In particular, the 1937 Convention left to others the task of dealing with three 'sticking points' – categories which raise legitimate issues of policy on which States have to-date been unable to agree:

- whether such convention should adopt a military (armed conflict) or police (law enforcement) approach to counter-terrorism;
- whether a definition of 'terrorism' should include State terrorism and conduct by State armed forces;
- whether armed resistance to an occupying regime or to colonial or alien domination should be included or excluded.¹⁰⁸

This is not the place to elaborate on why the authors of this conservative and astute document were right to leave to the future the resolution of the problems raised by each of the 'sticking points'; some of the reasons are discussed by Antony Anghie in his perceptive *Imperialism, Sovereignty and the Making of International Criminal Law* (2004).¹⁰⁹ They raise large issues on which international opinion is divided.

Instead, the authors adopted the severely practical approach of identifying three essential elements against which no credible argument could be advanced:

1. a major crime, such as murder;
2. its commission for the purpose of threatening a community;

¹⁰⁶ Elizabeth Stubbins Bates, International Bar Association Taskforce on Terrorism, *Terrorism and International Law: Accountabilities, Remedies and Reform*, International Bar Association and Oxford University Press, 2011.

¹⁰⁷ Identified by Alex P. Schmid (ed.), *The Routledge Handbook of Terrorism Research*, Routledge 2013. See Anthony Richards, "Conceptualising Terrorism", in *Studies in Conflict and Terrorism*, 2014, vol. 37, no. 3, p. 226.

¹⁰⁸ See above note 106, p. 2.

¹⁰⁹ "On Making War on the Terrorist: Imperialism as Self-Defence", in Anthony Anghie, *Imperialism, Sovereignty and the Making of International Criminal Law*, Cambridge University Press, Cambridge, 2004, chap. 6.

3. the cross-border dimension required to justify creation of an international offence.

That is, in practical terms, the conduct which the Interlocutory Decision¹¹⁰ of the Appeals Chamber of the Special Tribunal for Lebanon held to meet the criteria of a crime under customary international law.

But while, as will be seen, international practice conforms with the 1937 opinion that conduct infringing its three criteria in fact constitutes terrorism in the eye of the international community, it has proved reluctant to acknowledge that it does so as a matter of international criminal law.

My purpose is not to touch more than lightly on the continuing debate concerning the Appeals Chamber's decision. As a party to it I must leave to others, discussion of whether we were right or wrong and whether – as would be agreeable – our decision can be improved upon. It is rather to look at the way international law is – or is not – made and what may be done about it.

Terrorism is not a novelty with which we have not had time to grapple. The current outrages of ISIS were anticipated by earlier practitioners of psychological warfare. In 647 BC, having “bragged of how he skinned alive, impaled, burned, mutilated, blinded and decapitated the leaders and many of the citizens of the rebellious city of Susa”, the Assyrian Emperor Assurasirpal II wrote: “All the other survivors I left to die of thirst in the desert”.¹¹¹

Amin Maalouf's *Les Croisades vues par les Arabes*¹¹² and Alistair Horne's *A Savage War of Peace: Algeria 1954-1962*,¹¹³ recount comparable conduct at later points of history.

Part of the problem of achieving an effective international criminal law has been myopia coupled with insouciance: a general reluctance to acknowledge that every human life, and each part of the planet, is as precious as all others. The magnificent vision that led to the creation of the United Nations, its specialized agencies including the International Court of Justice, and the universal human rights institutions – that of respect for

¹¹⁰ STL, Interlocutory Decision of 16 February 2011, see above note 26.

¹¹¹ Randall A. Law, *Terrorism: A History*, Second Edition, Polity Press, Cambridge, 2016, pp. x, 15.

¹¹² Amin Maalouf, *The Crusades Through Arab Eyes*, Saqi Books, 1983.

¹¹³ Alistair Horne, *A Savage War of Peace: Algeria 1954-1962*, New York Review Books, New York, 2006.

every person¹¹⁴ – is unhappily very far from realization. And only now are we slowly coming to recognize the need to criminalize environmental misconduct that puts the planet at risk.

Philip Bobbitt has emphasized, in his book *Terror and Consent*, that “by creating a global communications network, we have enabled the creation of a global terrorist network”.¹¹⁵ Writing in 2012,¹¹⁶ Steven Pinker described a “discrepancy between the panic generated by terrorism and the deaths generated by terrorism”.¹¹⁷ He saw the “ups and downs of terrorism” as “a critical part of the history of violence, not because of its toll in deaths but because of the impact on a society through the psychology of fear”.¹¹⁸ He added: “In the future, of course, terrorism really could have a catastrophic death toll if the hypothetical possibility of an attack with nuclear weapons ever becomes a reality”.¹¹⁹

Current debate about possible missed opportunities to limit nuclear proliferation among States¹²⁰ gives sharp focus to the risk of its extending to other groups that organize to commit terrorism. Even short of that ultimate horror, impeded to an unknown extent by technical difficulties, there is pressing need for those with power to contribute to making and applying international criminal law to do all that can reasonably be done to deter and respond to international terrorism.

Yet whereas those who have created and operate ISIS have displayed in perverted form a global vision, recruiting from over 125 States and inspiring, initiating, and conducting terrorism in much of the world, including Europe, those with the capacity to create effective international criminal law in response have failed to do so. It would be imprudent in the extreme to see the ISIS’ retreat from Raqqa as more than a partial and temporary improvement in the struggle against terrorism.¹²¹ While much

¹¹⁴ Office of the United Nations High Commissioner for Human Rights, “Universal Human Rights Instruments” (available on its web site).

¹¹⁵ Philip Bobbitt, *Terror and Consent*, Allen Lane, 2008, p. 401.

¹¹⁶ Steven Pinker, *The Better Angels of Our Nature*, Penguin, 2012, pp. 414–418.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Le Monde Diplomatique*, October 2017, p. 12.

¹²¹ See Jason Burke, “Rise and fall of ISIS: its dream of a caliphate is over, so what now?”, *The Guardian*, 21 October 2017; Tim Lister, “Bigger battles are arising from the ashes of the war on ISIS”, *CNN*, 22 October 2017.

is done in other spheres to counter terrorism, for eighty years attempts to discharge a crucial responsibility of international criminal law – to establish a definition of terrorism in an international crime – have reached an impasse. What is to be done; by whom; and how?

10.4. Reaching the Law Beyond Terrorism

To deal effectively with terrorism it is not enough to create and enforce an international law against terrorism. But while the social, economic, and political causes of terrorism include factors beyond the law, the law must play a full part in preventing and responding to those causes. A recent United Nations Development Programme report “Preventing Violent Extremism”¹²² emphasizes the contributions to terrorist and other violence of lack of performance of and confidence in the rule of law, touching on such topics as inequality, unemployment, intolerance, extremism and lack of access to the levers of power.

Each of these can and should be met by the development of both domestic and international law to give legal effect to basic human rights. It is essential for law-makers to stand back and approach their task via the formula applied by Charles Malik and his colleagues when they created the Universal Declaration of Human Rights: that the law must give everyone fair access to the basic human requirements, including clean air, water and food, freedom from violence, and access to education, to have the opportunity to find and apply their talents. Higgins’ *Problems and Process: International Law and How We Use It* (1995)¹²³ provides a useful compass.

10.5. Conclusion

Sir Michael Howard has recently observed: “The great lesson of my lifetime is that all difficult problems and challenges are best addressed with partners and allies”.¹²⁴

¹²² UNDP, *Preventing Violent Extremism Through Promoting Inclusive Development, Tolerance and Respect for Diversity: A Development Response to Addressing Radicalization and Violent Extremism*, 2016 (on file with the author).

¹²³ Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, Clarendon Press, 1995.

¹²⁴ Max Hastings, “Splendid Isolation” (review of Christopher Nolan’s *Dunkirk* and Michael Korda’s *Alone: Britain, Churchill, and Dunkirk: Defeat into Victory*), in *The New York Review of Books*, 12 October 2017, p. 14.

My conclusion, in summary, is of an urgent need for all power – including our own – to be exercised to devise, create, and enforce systems giving sustained effect to certain essentials. The first is to recognize that the legal response to terrorism must not be neglected by any of us anywhere in a position to make a relevant contribution: that will include everyone who reads this book.

Next is to bring such principle to the attention of relevant decision-makers, their institutions, and also the public. Their task is to play an energetic and determined part in getting such persons and institutions to engage with making and enforcing effective international criminal law: that requires the help of social and other media.

They must identify what those with relevant power can contribute and what power should be allocated elsewhere. They must perform detailed research into the impediments to making and enforcing effective international criminal law, unmask persons and institutions responsible for such impediments and overcome them, extend such treatment to the rule of law generally, and do so enthusiastically, and together.

Practical effect can be given to such a definition by employing existing progress in the UN Security Council, as by Resolution 2341 of 13 February 2017, to promote early agreement on a simple *fundamental core definition* of a crime of terrorism at international law – the 1937 text will serve perfectly well; and thereby restore confidence in the process of future dealing with the non-core elements. Such lead would show that the core definition will permit (i) States by multi-partite treaty, (ii) the Security Council by resolution, and (iii) judiciaries in adjudicating, each to contribute to a combined international response to global terrorism.

Such new international crime will permit both individual and joint enforcement by an appropriate International Terrorism Tribunal, and, with its consent, Member States of the United Nations, and action against the parties to such crime (like money launderers) who if proved to have aided, abetted, counselled, procured, or formed a common purpose to facilitate the crime, will be properly convicted of it.

Such extension of international criminal law to enforce basic human rights would provide a practical alternative to the disastrous effect, if we flinch, on more than half the world's population. At this time of global

warming and Corona-virus,¹²⁵ the International Court of Justice, in its 8 November 2019 interpretation of the International Convention for the Suppression of Terrorism,¹²⁶ gives a lead to other legal decision-makers charged with responding to the biggest issues.

¹²⁵ See Gordon Brown, “In the coronavirus crisis, our leaders are failing us”, *The Guardian*, 13 March 2020.

¹²⁶ See above note 12.

Negotiating the Crime of Aggression: Between Legal Autonomy and State Power

Marieke de Hoon*

11.1. Introduction

On 17 July 2018, the jurisdiction of the International Criminal Court ('ICC') over the crime of aggression was activated.¹ With the crime of aggression, the ICC can prosecute State leaders for resorting to armed force against another State. Coming to agreement on whether the ICC would have jurisdiction over the crime of aggression, how the crime of aggression would be defined, and how long the arm of the ICC would be in relation to States that opposed this expansion of the ICC's reach, proved, however, to be a long and arduous road.

This chapter analyses why this is the case. While the chapter offers insights into the legal question of what the definition and criminalization of aggression provides, its main aim is to address the socio-legal questions of how the notion and crime of aggression was constructed, what reasons were invoked to argue for different positions in the negotiation process, and what can be learned from this process for the construction of international criminal justice norms at large.

To that end, the chapter discusses the negotiation history of the crime of aggression. It thereby focuses on the role of States and of diplomats or representatives that function as legal entrepreneurs or norm con-

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¹ ICC, Activation of the Jurisdiction of the Court over the Crime of Aggression, Resolution ICC-ASP/16/Res.5, 14 December 2017 (<http://www.legal-tools.org/doc/6206b2/>).

structors when they negotiate international criminal justice's norms. The analysis is based on discourse analysis of the reports and documents relating to the negotiation history of the establishment of the United Nations ('UN') in 1945, the 1945 London Conference, the 1945 Nuremberg Tribunal, the 1974 Definition of Aggression adopted by the UN General Assembly, the 1998 Rome Statute of the ICC, the 2010 Kampala amendment to the Rome Statute, and the 2017 activation decision of the ICC's crime of aggression in New York. Moreover, participant observations at the diplomatic meetings in Kampala in 2010, in several other sessions of the Assembly of States Parties ('ASP') to the ICC, and at the 2017 New York decision contribute to the analysis.

This chapter has two aims: first, to provide insight into how the crime of aggression was negotiated and what considerations lay behind some of the key elements to the provision; and second, to provide a case study into how norm negotiators navigate between State power and (supra-State) legal autonomy in the construction of the international legal order.

The argument that is developed in this chapter shows that the construction of the crime of aggression, and international criminal justice as such, generates a clash between (State) power and (supranational) legal autonomy. The crime of aggression's negotiation history illustrates well the tensions at the crossing point of the horizontality of the international legal order of independent, autonomous and equal sovereign States on the one hand, and the verticality of the international legal order as a shared aspiration to jointly address serious human rights violations and conflict on the other. It comprises an intersection of both the desire to retain autonomy (leaving for themselves the possibility and legal space to use force) and the desire to allow the international legal order to prevent others from using aggressive force against oneself or allies or in other manners inconsistent with national or international interests.

11.2. Creating a United Nations Against Aggression

During the creation of the UN in 1945, the question of how to define 'aggression' already caused much contention. Having just experienced two major world wars and a failing League of Nations that was created after the first, the UN's primary purpose would be "to maintain international peace and security; and to that end to take effective collective measures

for the prevention and removal of threats to the peace and the suppression of acts of aggression or other breaches of the peace”.²

Collectively addressing aggression was thereby placed at the centre of the UN’s tasks. While the UN comprised of separate, sovereign and equal States, the idea behind the UN was that the world would act as a united front against those that threatened international peace and security, which was considered the gravest violation of international relations. Yet, States could not agree on how to define aggression. Behind that disagreement lay fundamental dilemmas: What distinguishes aggression from lawful or legitimate war? Who should decide this in a concrete situation: States themselves or a supra-State authority, and if the latter, a judicial or political body?

Not only how to define aggression, but even the question whether a definition should be included in the UN Charter at all, consequently caused considerable contention.³ Those opposing the inclusion of a definition of aggression were in the majority, led by the United States (‘US’) and the United Kingdom (‘UK’). After protracted discussion, any definition of aggression was omitted from the UN Charter and it was decided to “leave to the [Security] Council the entire decision as to what constitutes a threat to the peace, a breach of the peace, or an act of aggression”.⁴ With this conclusion, the UN Charter was born, as well as the discussion that prolongs to date on where the distinguishing line lies between *illegal* (but not aggressive) use of force on the one hand and *aggressive* use of force on the other, and who decides if not each State for itself.

The next sections show how this discussion evolved over the period from the Second World War until the recent activation of the ICC’s crime of aggression. Over and over again, the reluctance to provide legal autonomy to a supranational legal body to decide over aggression returned at the negotiation table. Repeatedly, different ways to mask this reluctance and disagreement in legal texts were found and presented as resolution. By 17 July 2018, the ICC may exercise jurisdiction over the crime of ag-

² Proposals for a General International Organization, Washington Conversations on International Peace and Security Organization, 7 October 1944, chap. I, Article 1.

³ Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace: A Documentary History and Analysis*, vol. 1, Oceana Publications, New York, 1975, p. 39.

⁴ Report of M. Paul-Boncour, Rapporteur, on Chapter VIII, Section B, in *Documents of the United Nations Conference on International Organization*, United Nations Information Organizations, San Francisco, 1945, vol. 12, p. 448.

gression, following exhaustive negotiations in the ASP where ‘clocks had to be stopped’ both in 2010 in Kampala and in 2017 in New York. In the end, however, consensus agreements followed, which were celebrated as historic achievements for the purpose of suppressing aggression. Nevertheless, this chapter argues that while it certainly is a breakthrough that the ICC may exercise jurisdiction over aggression, the message of progress, resolution and consensus is not as complete as it may appear: fundamental issues remain unresolved today as they did in the preceding decades.

11.3. Prosecuting World War II Aggressors in Nuremberg and Tokyo

Should the ICC indeed prosecute individuals for the crime of aggression, they would not be the first. In parallel to the negotiations of the UN Charter, discussions took place on whether and how to punish Nazi and Japanese leaders for their role in the atrocities and aggressive warfare during the Second World War. The victorious States – the US, the UK, France and the Soviet Union (‘USSR’) – came together between June and August 1945 in what is now known as the London Conference, and agreed on setting up the Nuremberg Tribunal. They drafted the Charter⁵ and decided that this Tribunal would charge Nazi leaders with aggression – then called ‘crimes against peace’ – as a criminal act.⁶ They would subsequently also create the Tokyo Tribunal, prosecuting Japanese leaders for the same crimes.

In addition to the four allied powers, the Charter of the Nuremberg Tribunal was adhered to by 19 nations⁷ and subsequently received the approval of the UN General Assembly. This Charter formed the basis of the criminal indictments of the leaders of the Nazi regime who were charged

⁵ Charter of the International Military Tribunal (‘IMT’), 7 August 1945 (<https://www.legal-tools.org/doc/64ffdd>).

⁶ “American Draft of Definitive Proposal, Presented to Foreign Ministers at San Francisco, April 1945”, in Robert H. Jackson, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials: London, 1945*, US Department of State, Pub. 3080, Washington, D.C., 1949, pp. 24, 27.

⁷ Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, the Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela, and Yugoslavia, see letter of Robert H. Jackson, 29 December 1947 (on file with the author). However, Paraguay and Uruguay are not mentioned by Jackson in the records of the trial proceedings, see IMT, *Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945-1 October 1946*, vol. II, Nuremberg, 1947, p. 143 (<https://www.legal-tools.org/doc/3c08b1>).

with personal responsibility for aggressive war. However, nowhere in the eventual Charter was aggression further defined.

The French and the Russians were against defining aggression in the Charter, whereas the representatives of the UK and the US found it essential, despite earlier effort to leave it out of the UN Charter. Sir David Maxwell Fyfe of the UK and Justice Robert Jackson of the US argued that for the purpose of criminal trials, not having a definition of aggression and precise specification of the elements of the crime would allow for successful defence strategies such as anticipated self-defence and other arguments why the acts undertaken would not constitute aggression.⁸

An underlying contention in this debate was the disagreement whether aggression was a crime under international law at all. The US and the UK argued that it was, based on international instruments such as the 1924 Geneva Protocol, the 1927 League of Nations Resolution on Aggression, and the 1928 Kellogg–Briand Pact. These agreements showed that international law had the goal “to make war less attractive to those who have governments and the destinies of people in their power”.⁹ Accordingly, from these treaties it could be derived, the US and the UK argued, that aggressive war was both a violation of international law (at least for the States Parties thereto) and a crime.

France, represented by Professor André Gros, believed that this was too expansive a view of international law and did not see how these agreements could be considered legal foundations for a criminal provision, nor were the French interested in creating such international law that would create precedence for future supranational judicial authority.¹⁰ Their proposal was to keep the provision vague and without the term ‘criminal’ or ‘crime’. They suggested that the Tribunal would have jurisdiction over those who directed the preparation and conduct of “the policy of aggression [...] in breach of treaties and in violation of international law”,¹¹ and refrain from defining the notion of aggression further.

⁸ “Minutes of Conference Session of July 19, 1945” (“Minutes of 19 July 1945”), in Jackson, 1949, p. 300, see above note 6; see also Ferencz, 1975, vol. 1, pp. 378-379, 387, 392, see above note 3.

⁹ “Report to the President by Mr. Justice Jackson, June 6, 1945”, in Jackson, 1949, p. 53, see above note 6.

¹⁰ Minutes of 19 July 1945, p. 297, see above note 8.

¹¹ “Draft Article on Definition of “Crimes”, Submitted by French Delegation, July 19, 1945”, in *ibid.*, p. 293.

Likewise, General Nikitchenko of the Soviet Supreme Court also did not want the Tribunal to come up with a definition of aggression. The primary concern of the USSR was to punish the Nazi criminals and not to create international law for the future, which may turn out to be opposed to the USSR's national interest. Moreover, Nikitchenko argued that if the delegates that discussed the issue of aggression at the creation of the UN had been unable to define aggression, those drafting the Nuremberg Charter should not do it either. If the drafters of the Nuremberg Charter would formulate a definition, he argued, it would set the door open for arguments of inconsistent interpretations on what was or was not a crime under international law.¹² The Soviet delegation therefore supported the French proposal that did not include a definition.

Eventually, the parties to the London Conference could not agree on whether or not to include a definition of aggression. They compromised in the end that the crime of aggression was included (then called crimes against peace) but not a definition of what it was. Instead, the judges would be referred to the relevant treaties that did exist, following the argument made by the US and the UK.¹³

The resulting Article 6(a) of the Nuremberg Charter provides:

The Tribunal [...] shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes:

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.¹⁴

In his opening statement when the Nuremberg Trial commenced, Justice Robert Jackson, who had by then become the prosecutor for the United States, denounced aggressive war as “the greatest menace of our

¹² Minutes of 19 July 1945, p. 297, see above note 8.

¹³ Ferencz, 1975, vol. 1, pp. 394-396, see above note 3.

¹⁴ Charter of the IMT, Article 6, see above note 5.

times”.¹⁵ And the Tribunal concluded in the beginning of the judgment that:

[t]he charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.¹⁶

On that basis, the Nuremberg Tribunal and later the Tokyo Tribunal prosecuted Nazi and Japanese leaders for committing aggression.

The defence attorneys of these leaders argued that at the time when the alleged criminal acts were committed, aggressive war was not generally considered a crime, that no statute had defined aggressive war, that no penalty had ever been fixed for its commission, and that no prior court had ever been established to try the offence. Therefore, they argued, prosecuting the defendants was in violation of criminal law’s fundamental principle of legality.

However, the judges of the Nuremberg Tribunal – and subsequently also those of the Tokyo Tribunal (although with vehement dissenting opinions by Judges Pal and Röling, see below for a discussion) – did not accept the defence’s arguments. Instead, the Nuremberg Tribunal (followed by the Tokyo Tribunal) declared that it found that the Charter was an expression of international law existing at the time of the commission of the indicted acts, and not, as the defendants had argued, an arbitrary exercise of power on the part of the victorious nations.¹⁷ The core of this decision lay in the argument that the nations who signed the Kellogg–Briand Pact, including Germany, unconditionally condemned recourse to war for the future as an instrument of policy, and expressly renounced it.¹⁸ Accordingly, this “renunciation of war as an instrument of national policy

¹⁵ Robert H. Jackson, “Opening Address for the United States”, in Ferencz, 1975, vol. 1, p. 437, see above note 3.

¹⁶ IMT, *Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945-1 October 1946*, vol. I, Nuremberg, 1947, p. 186 (<https://www.legal-tools.org/doc/f21343>).

¹⁷ *Ibid.*, p. 218.

¹⁸ *Ibid.*, p. 220.

necessarily involves the proposition that such a war is illegal in international law”,¹⁹ the judges concluded.

The Nuremberg Tribunal lasted from November 1945 to October 1946 and ruled that the invasion of Austria, on 12 March 1938, was a premeditated aggressive step in furthering the carefully prepared plan to wage aggressive wars against Czechoslovakia, Poland, Norway, Denmark, Belgium, the Netherlands, Luxemburg, Yugoslavia, Greece, and the USSR.²⁰ In this major trial against the Nazi leadership, eight defendants were found guilty for committing crimes against peace.²¹ In the subsequent trials under Control Council Law No. 10,²² another 52 defendants were charged with crimes against peace, of which five were convicted. In the *Ministries* case, aggression was considered at length and the Nuremberg Military Tribunal went a step further than the original Nuremberg Tribunal.²³ Whereas the original Nuremberg Tribunal had found that the *Anschluss* of Austria in 1938, whereby Austria was incorporated by Germany, was not as such an act of aggression,²⁴ the Tribunal in the *Ministries* case argued against that ruling and decided that it was an act of aggression, since it would not be reasonable to assume that the nature of the invasion depended on whether it was met with military resistance or not.²⁵ In addition, the *Ministries* judgment considered that the defence of “military necessity was never available to an aggressor as a defense for invading the rights of a neutral”.²⁶

In these judgments, some contours emerged of what the crime of aggression for which Nazi leaders were sentenced to death actually en-

¹⁹ *Ibid.*

²⁰ *Ibid.*, pp. 194-215.

²¹ Göring, Hess, Keitel, Jodl, Von Neurath, Von Ribbentrop, Rosenberg, and Raeder.

²² Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945 (<http://www.legal-tools.org/doc/ffda62/>).

²³ Ferencz, 1975, vol. 1, p. 44, see above note 3.

²⁴ In the opinion of the original Tribunal, the *Anschluss* had been an ‘aggressive step’ in furthering the plan to wage aggressive war.

²⁵ Nuremberg Military Tribunals (‘NMT’), *The Ministries Case*, Judgment, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10: Nuremberg, October 1946–April 1949*, vol. XIII, US Government Printing Office, Washington, DC, 1952, p. 331 (www.legal-tools.org/doc/eb20ff6/).

²⁶ *Ibid.*, p. 334.

tailed. Nowhere, however, did the Nuremberg Tribunal or the subsequent trials define concretely what ‘aggressive war’ was.²⁷

Neither did the Tokyo Tribunal. On 26 July 1945, the Republic of China (‘ROC’), the US and the UK signed the Potsdam Agreement in which they demanded Japan’s unconditional surrender, warning that if Japan would not surrender, it would face “prompt and utter destruction”, and announcing that “stern justice shall be meted out to all war criminals”.²⁸ On 14 August 1945, six days after the US dropped the second atomic bomb on Nagasaki, Japan surrendered. At the subsequent Moscow Conference in December 1945, the USSR, the UK and the US (with concurrence of the ROC) granted General MacArthur, as Supreme Commander of the Allied Powers, the authority to “issue all orders for the implementation of the Terms of Surrender, the occupation and control of Japan, and all directives supplementary thereto”.²⁹ Acting pursuant to this authority, General MacArthur issued a special proclamation in January 1946 that established the International Military Tribunal for the Far East (the Tokyo Tribunal), and its Charter. Like the Nuremberg Tribunal, the Tokyo Tribunal had jurisdiction to try individuals for crimes against peace, war crimes, and crimes against humanity. The Tokyo Tribunal had jurisdiction over a longer period than the Nuremberg Tribunal, namely from Japan’s invasion of Manchuria in 1931 to its surrender in 1945.

The Tokyo Trials took place from May 1946 to November 1948. In general, the Tokyo Tribunal has been reviewed critically by most commentators and is particularly famous for its strongly worded dissenting opinions.³⁰ Most particularly, the dissenting opinions of Judges Pal and Röling submitted that the crime of aggression did not exist under the international law of the time.³¹ Judge Röling argued that the Japanese were

²⁷ Ferencz, 1975, vol. 1, p. 42, see above note 3.

²⁸ Proclamation Defining Terms for Japanese Surrender, 26 July 1945 (<http://www.legal-tools.org/doc/f8cae3>).

²⁹ US Department of State, Office of the Historian, “Milestones 1945-1952”, available on its web site.

³⁰ See, for instance, Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford University Press (‘OUP’), Oxford, 2008; Kirsten Sellars, “Imperfect Justice at Nuremberg and Tokyo”, in *European Journal of International Law*, 2010, vol. 21, no. 4, pp. 1085-1102 and Kirsten Sellars, “William Patrick and ‘Crimes against Peace’ at the Tokyo Tribunal, 1946-48”, in *Edinburgh Law Review*, 2011, vol. 15, no. 2, pp. 166-196.

³¹ Sellars, 2010, p. 1097, see above note 30.

being tried for ‘political crimes’. Moreover, Judge Pal stated that the distinction between aggressive and defensive wars was of purely “propagandist relevance”,³² that it was defeat rather than aggression that was criminalized, and that aggression was a political act falling outside of the realm of legality.³³ He asserted that the criminalization of aggression was simply a way of freezing the status quo, and thus revealing international law as a project for stabilizing and securing existing power distributions within international society.³⁴ Nevertheless, the majority decision followed the example of the Nuremberg Tribunal and convicted the Japanese leaders for aggression, without defining clearly what the elements of the crime of aggression were and how to distinguish aggression from non-aggressive use of force. For that, the world looked at the UN to clarify and to decide if and how future prosecutions for aggression would be conducted.

11.4. Defining Aggression in a Polarized World: Negotiating the 1974 Definition of Aggression

To get a more specific definition of aggression than could have been agreed on so far, the UN General Assembly directed the Committee on the Codification of International Law to formulate a codification of “offences against the peace and security of mankind”³⁵ shortly after the UN was created. Decades of protracted and fundamental disagreement followed. Nevertheless, in 1974, the General Assembly adopted a consensus resolution called the “Definition of Aggression”.³⁶

This section provides analysis of those negotiations. This is not only insightful for understanding how in various ways the same tension between legal autonomy and State power re-emerged, but also for understanding the ICC’s crime of aggression provision, which is to large extent based on the 1974 agreement.

³² Radha Binod Pal, *Crimes in International Relations*, University of Calcutta Press, Kolkata, 1955, p. 264; Gerry Simpson, *Law, War and Crime*, Polity Press, Cambridge, 2007, p. 15.

³³ International Military Tribunal for the Far East, *United States of America et al. v. Araki Sadao et al.*, Judgment of The Honorable Mr. Justice Pal, Member from India, 31 October 1948 (<http://www.legal-tools.org/doc/712ef9/>).

³⁴ Simpson, 2007, p. 147, see above note 32.

³⁵ Affirmation of the Principles of International Law Recognised by the Charter of the Nurnberg Tribunal, 11 December 1946, UN Doc. A/RES/95(I) (<http://www.legal-tools.org/doc/bb7761/>).

³⁶ Definition of Aggression, 14 December 1974, UN Doc. A/RES/3314(XXIX) (‘Definition of Aggression’) (<https://www.legal-tools.org/doc/95a6b0/>).

11.4.1. Special Committee after Special Committee

Having been tasked with defining aggression shortly after the creation of the UN in 1945, by 1947, the Committee on the Codification of International Law had concluded that it had failed to come to agreement and recommended the establishment of the International Law Commission ('ILC') to deal with this problem.³⁷ After this, very little progress had been made due to rising tensions between the USSR and its former war time allies. Despite having opposed the inclusion of a definition of aggression during the London Conference for establishing the Nuremberg Tribunal, the USSR now proposed to come to a definition of aggression in order to eliminate justifications for aggressive wars that it feared and was facing.³⁸ However, the US also turned position yet again and with France and Canada now led the protest against any form of a fixed definition.³⁹ They argued that the determination of aggression should be up to the discretion of the Security Council.⁴⁰

Several reports followed. In 1952, the 15-member First Special Committee on the Question of Defining Aggression was established.⁴¹ Its report summarized many of the problems but was unable to reconcile many of the differences.⁴² Argentina and Denmark, for instance, were doubtful that a definition would be progress at all. Others expressed general support for a definition (France had moved to this camp now), some in favour of a detailed one (the USSR).⁴³ Amid the deadlock, a new Second Special Committee on the Question of Defining Aggression was established, consisting of 19 members.⁴⁴ At the same time, there had also been a committee that considered 'international criminal jurisdiction', in

³⁷ UN Sixth Committee, Report of the Committee on the progressive development of International Law and its codification, 20 November 1947, UN Doc. A/504.

³⁸ Duties of States in the event of the outbreak of hostilities: draft resolution on the definition of aggression, Union of Soviet Socialist Republics, UN Doc. A/C1/608, 4 November 1950.

³⁹ Ferencz, 1975, vol. 2, p. 2, see above note 3.

⁴⁰ *Ibid.*

⁴¹ Question of Defining Aggression, 20 December 1952, UN Doc. A/RES/688(VII) (<https://www.legal-tools.org/doc/766be2/>).

⁴² Report of the Special Committee on the Question of Defining Aggression, 24 August – 21 September 1953, UN Doc. A/2638.

⁴³ Comments received from Governments regarding the report of the Special Committee on the Question of Defining Aggression, 6 August 1954, UN Doc. A/2689.

⁴⁴ Question of Defining Aggression, 4 December 1954, UN Doc. A/RES/895(IX) (<https://www.legal-tools.org/doc/47b440>).

which the establishment of an international criminal court was discussed. The General Assembly decided to defer any consideration of such an international criminal court as well as discussion on the Draft Code of Offences against the Peace and Security of Mankind that the ILC was working on, until the new Special Committee would produce its report. They were eventually deferred for many years.⁴⁵

This Second Special Committee produced a report that examined the desirability, the functions, the kinds of activity covered, and the various types of definitions.⁴⁶ In the meantime, the USSR, supported by the armed forces of its satellite States, had invaded Hungary to suppress a revolt, on which the UN had been unable to act. War also erupted in the Middle East between Egypt and Israel and around the Suez Canal, as well as in Vietnam where the US tried to fight communist forces. By 1957, very little progress had been made.⁴⁷ The same differences of opinions existed between those in favour of and those opposed to a definition. To some members, the growing international tension required a clear definition of aggression. Others – such as the US, the UK, Japan, the ROC, and Canada – argued that a definition might make peace more difficult, since they thought a definition would restrict the discretion that the Security Council and the General Assembly possessed under the UN Charter.⁴⁸ Most members wanted to postpone the matter, and the US now proposed that it would be postponed indefinitely.⁴⁹

For several years, the issue was adjourned because there was no change of attitude. Still another new committee, the Third Special Committee, was formed with 21 members in 1959.⁵⁰ Nevertheless, it took until 1967 before the Committee actually met with a view to defining aggression. Meanwhile, even more tensions had arisen throughout the world, and many accusations of aggression were expressed. The conclusion reached by the Third Special Committee was to establish yet another committee, the Fourth Special Committee, consisting of 35 members,

⁴⁵ International Criminal Jurisdiction, 14 December 1954, UN Doc. A/RES/898(IX) .

⁴⁶ Question of Defining Aggression: Report of the 1956 Special Committee: Report of the 6th Committee, 27 November 1957, UN Doc. A/3756 ('Report of the Sixth Committee').

⁴⁷ Ferencz, 1975, vol. 2, p. 6, see above note 3.

⁴⁸ Report of the Sixth Committee, see above note 46.

⁴⁹ UNGA Doc. A/C.6/L.402.

⁵⁰ Question of Defining Aggression, UN Doc. A/RES/1181(XII), 29 November 1957 (<https://www.legal-tools.org/doc/852ceb>).

“taking into consideration the principle of equitable geographical representation and the necessity that the principal legal systems of the world should be represented”.⁵¹

The Fourth Special Committee started its work in 1968 and would eventually agree on a consensus definition in 1974, subsequently adopted by the General Assembly.⁵²

11.4.2. Producing Consensus on Whether to Define Aggression

Even though there were many disagreements on different issues – including whether there should be a definition at all – the Fourth Special Committee met several times and its members continued their discussion. On 6 July 1968, they voted (with no votes against and eight abstaining) for a resolution that the Committee would continue its work “so that it can complete its work by submitting a report containing a generally accepted draft definition of aggression”.⁵³ Many interpreted this as a consensus that it was *possible* to draft some form of definition of aggression. However, for some years after, several States continued to express their reservations on the possibility and desirability of defining aggression.

The reasons why the represented States eventually agreed to come to a definition varied. Some representatives argued that a legal definition of aggression would provide necessary guidance for States and for the UN and particularly its Security Council. For others, a definition of aggression was necessary to quell or manage existing international tensions that grew out of the aggressive policies of imperialist and colonialist States. The absence of a definition of aggression, they argued, had made it easier to commit “crimes against the peoples of dependent countries in all parts of

⁵¹ Needs to Expedite the Drafting of a Definition of Aggression in the Light of the Present International Situation, 18 December 1967, UN Doc. A/RES/ 2330(XXII) (‘Resolution 2330(XXII)’) (<https://www.legal-tools.org/doc/e9b6d2>).

⁵² The Committee was set up by Resolution 2330(XXII) that provided that the task of the Committee was to submit specific proposals for the definition of aggression, Report of Special Committee, Question of Defining Aggression, 1968, UN Doc. A/7185/Rev. 1, p. 12. The members of this Committee were Algeria, Australia, Bulgaria, Canada, Colombia, Congo (Democratic Republic of), Cyprus, Czechoslovakia, Ecuador, Finland, France, Ghana, Guyana, Haiti, Indonesia, Iran, Iraq, Italy, Japan, Madagascar, Mexico, Norway, Romania, Sierra Leone, Spain, Sudan, Syria, Turkey, Uganda, Union of Soviet Socialist Republics, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, and Yugoslavia.

⁵³ Report of Special Committee, Question of Defining Aggression, 1968, pp. 34-35, see above note 52.

the world, to carry out acts of military aggression against national liberation movements, and to intervene forcibly in the domestic affairs of other States”.⁵⁴ Most representatives, however, used a normative argument, in that a definition of aggression could constitute a legal and political indictment of aggression in any form. The definition would be of fundamental importance for the development of international law, for the maintenance of international peace and security, and as a moral authority.⁵⁵ Many also emphasized the expressive effect: a definition would reinforce the idea that aggression is an international crime and it would help create the system of collective security.⁵⁶

Several representatives argued that what was needed was not a definition but, instead, the *application* of the existing collective security system. The reason that aggression occurred, they asserted, was the lack of willingness of Member States to respect their UN Charter obligations. A definition would, in their view, create “an illusion of accomplishment when none in fact had been made”.⁵⁷ Another argument against was that a legal definition would function as a signpost to commit those acts that were not included but may be just as aggressive or even worse, and that it would provide the argument that these would not constitute aggression since these acts were not expressly provided for in the definition and that thus the intention of the drafters would have meant to exclude them from the definition, when instead, the States involved could simply not agree on them and thus decided to keep it open.⁵⁸

In the 1969 sessions, three proposals for defining aggression were submitted for discussion. The first proposal was from the USSR,⁵⁹ which other States critiqued particularly for extending the concept of aggression

⁵⁴ *Ibid.*, p. 13.

⁵⁵ *Ibid.*, p. 18.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, p. 19. See also Julius Stone, *Conflict through Consensus: United Nations Approaches to Aggression*, Johns Hopkins University Press, Baltimore, 1977; and Martti Koskenniemi, “A Trap to the Innocent...”, in Claus Kreß and Stefan Barriga (eds.), *The Crime of Aggression – A Commentary*, Cambridge University Press (‘CUP’), Cambridge, 2016. See also Julius Stone, “Hopes and Loopholes in the 1974 Definition of Aggression”, in *American Journal of International Law*, 1977, vol. 71, no. 2, pp. 224-246.

⁵⁹ Report of the Special Committee on the Question of Defining Aggression, 24 February – 3 April 1969, UN Doc. A/7620, para. 9 (‘Report of the Special Committee, 1969’).

to indirect and non-armed aggression.⁶⁰ The second proposal was submitted by 13 countries: Colombia, Cyprus, Ecuador, Ghana, Guyana, Haiti, Iran, Madagascar, Mexico, Spain, Uganda, Uruguay, and Yugoslavia. This draft specifically excluded acts of indirect aggression, “subversive and/or terrorist acts by irregular, volunteer or armed bands organized or supported by another State”, as acts against which recourse to self-defence under Article 51 of the UN Charter was allowed. This was to keep the exceptions to the prohibition to use force limited, in fear of creative argumentation to broaden the argumentative scope for self-defence.⁶¹ Moreover, unlike the Soviet proposal, the ‘Thirteen-Power proposal’ did not specify whether the legal consequences for acts of aggression would include criminal responsibility for individuals. The third proposal was submitted by six countries: Australia, Canada, Italy, Japan, the UK, and the US. Like the Thirteen-Power proposal, it was silent on the kind of legal consequences for either States or individuals that had perpetrated aggression. The ‘Six-Power proposal’ was particularly critiqued for requiring aggressive intent, which would, according to many States, provide for the possibility to justify prohibited use of force by arguing that it was not done with bad intent, such as with what is now called ‘humanitarian intervention’.

The three proposals were skilfully used to create consensus and thereby became a game-changer. The six States that had formulated the Six-Power proposal had previously been opposed to defining aggression at all. By now focusing instead on what was in the proposal, and on the differences between the three proposals for defining aggression, the issue of whether or not to have a definition was cleverly bypassed, and from then on disappeared from the agenda. Moreover, since all three proposals had included non-exhaustive lists of examples of acts of aggression, it was fairly easily decided that a definition of aggression would also include a non-exhaustive list of acts, although the exact wording would take until 1974 to be settled.

Smaller sub-committees, working groups, contact groups and eventually drafting groups were created with specific and confined mandates to talk about details of the provision, within the framework of a definition.

⁶⁰ *Ibid.*, para. 26.

⁶¹ *Ibid.*, para. 10.

The issues they dealt with became increasingly smaller, taking the larger contentions off the table, and postponing at strategic moments.

As a result, at the end of the 1971 meeting, there was general agreement that there should be a definition of aggression. The detailed discussions in sub-groups led to a consensus text, which was subsequently adopted by the UN General Assembly as the definition of aggression. Since Article 8*bis*(2) of the amended Rome Statute⁶² reflects Articles 1 and 3 of this 1974 Definition of Aggression, the 1974 definition largely functions as the basis for the ICC's crime-of-aggression amendment that was activated in 2018. The next sub-section zooms in on how some of the most disagreed upon issues were negotiated and brought towards specific provisions that States could agree on.

11.4.3. Agreeing to Disagree and the Role of the Security Council

The issues that the negotiators disagreed on most were – in addition to whether there should be a definition at all – (i) the premise that the first one to use armed force is the aggressor (the principle of priority); (ii) whether 'aggressive intent' should have a place in the definition; (iii) whether the definition should focus on State acts or also those of non-State actors, even if not attributable to States; (iv) whether and what kind of legal responsibility should arise for the acting State and/or individual; and, in general, (v) how to define aggression.

The agreed upon text in the 1974 definition includes as its Article 1 that:

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.⁶³

Article 3 then provides a list of acts that qualify as acts of aggression, such as an invasion, bombardment and blockade of a port. These two provisions are also included in the ICC's crime-of-aggression amendment.

The key to coming to an agreed upon text in 1974, however, lay not so much in Articles 1 and 3 but in Articles 2 and 4. As mentioned, there had been a lot of disagreement on many topics, such as the principle of

⁶² Rome Statute of the International Criminal Court, 17 July 1998, Article 8*bis* ('Rome Statute') (<http://www.legal-tools.org/doc/7b9af9>).

⁶³ Definition of Aggression, Article 1, see above note 36.

priority and the need for aggressive intent. Those that opposed the inclusion of aggressive intent argued that it would allow justifications for illegal force by claiming there was not the required intent and that it would invite war,⁶⁴ because aggressors would always claim that their goal was legitimate.⁶⁵

In the end, they agreed on the following formulation of Article 2:

The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.⁶⁶

Article 4 follows the list of examples of acts of aggression in Article 3 and provides that “[t]he acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter”.⁶⁷

Articles 1 and 3 therefore give direction to how the notion of aggression is to be understood; in Article 2, States agreed that the first to use force is (only) *prima facie* assumed the aggressor; and aggressive intent was not included in the definition of aggression. However, the key to Articles 2 and 4 is the role of the Security Council. These provisions provide that in the end, the Security Council may decide that a presumed aggressor is absolved (Article 2) or that acts not listed in Article 3 may still amount to aggression (Article 4). In short, what is determined as aggression is up to the UN Security Council. Moreover, this provides the ability for the Security Council’s permanent members to ‘veto away’ an allegation towards themselves or their allies. It thereby provided sufficient State power over any possible supranational power for those States to agree to the 1974 text.

Statements that representatives made on Article 2 showed that States interpreted the text fundamentally differently, even when they ap-

⁶⁴ Report of the Special Committee on the Question of Defining Aggression, 13 July – 14 August 1970, UN Doc. A/8019, para. 37.

⁶⁵ Report of the Special Committee, 1969, para. 70, see above note 59.

⁶⁶ Definition of Aggression, Article 2, see above note 36.

⁶⁷ *Ibid.*, Article 4.

parently reached their consensus agreement. For example, Romania and Yugoslavia declared that they understood this provision in the sense that the State who uses armed force first was committing an act of aggression, and that this State would be exculpated only if the Security Council was able to reach a decision that ‘other relevant circumstances’ led to a different conclusion. The US and the UK, however, claimed that Article 2 meant that the first use of force only gives *prima facie* evidence to a determination, meaning that the Security Council had to make a determination on whether or not an act of aggression was committed. They argued that if the Security Council would not be able to come to a decision that there had actually been an act of aggression, the Security Council must be presumed not to have found the *prima facie* evidence to be persuasive. The UK added that the first use of force should by no means be the sole or determinative piece of evidence.⁶⁸ Therefore, while States could agree on the textual provision of Article 2 (in light of the resolution as a whole), at the moment of coming to that ‘agreement’, there was in fact no real agreement on the role of the Security Council and on who the aggressor could be in a particular situation.

Another example of prolonged disagreement, as mentioned, was whether non-State actors such as terrorists could commit aggression (and consequently, whether States have the right to use force in self-defence against them and addressing terrorists would be part of the Security Council prerogative). The agreement that was reached was too restricted to some and too stretched for others. Article 3(g) provides that as acts of aggression also qualified:

[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.⁶⁹

It thereby provides that the definition of aggression applies to acts of non-State actors (only) if there is a significant link with the State – in particular, if the non-State groups are *sent* by or on behalf of a State and the acts are of sufficient gravity. For the 13 powers who had focused on excluding the right to self-defence against subversive and other non-State

⁶⁸ Report of the Special Committee on the Question of Defining Aggression, 11 March – 12 April 1974, UN Doc. A/9619, 1974, p. 31.

⁶⁹ Definition of Aggression, Article 3(g), see above note 36.

actors (and thus to exclude acts of non-State actors from the definition of aggression), this was sufficiently restricted to compromise on. For the USSR who had wanted to include non-State actors, Articles 2 and 4 provided sufficient space to use its powers in the Security Council to accept the compromise as it did for the other permanent members of the Security Council. Thereby, Articles 2 and 4 allowed for a resolution between the various views, because it provides that the Security Council can both decide that a determination of aggression would not be justified (Article 2) and thus restrict the application of aggression to non-State actors, as well as stretch the scope because in accordance with Article 4, the acts listed in Article 3 are not exhaustive and the Security Council has the power to determine other acts to be aggressive.⁷⁰

11.4.4. The Legal Consequences of Committing Aggression

Another tough hurdle in the negotiation towards a definition of aggression concerned the legal consequences for aggressors. In particular, States disagreed on whether committing aggression constituted a crime. Those that were in favour argued that contemporary customary international law accepted that principle.

They referred to the Nuremberg and Tokyo Tribunals, and that their principles that had been widely accepted by States.⁷¹ This was considered a rather weak argument by others, since in San Francisco the founding members of the United Nations had been unable to reach agreement on whether or not legal consequences should be attached to aggressive use of force. Those representatives that were against inserting any provision on the legal consequences of aggression expressed grave doubts regarding the necessity of such an article. They argued that whether and to what extent responsibility arises belonged to the law of State responsibility, but not the search for a definition of aggression.⁷²

Eventually, consensus was reached, and Article 5(2) reads as follows: “A war of aggression is a crime against international peace. Aggression gives rise to international responsibility”.⁷³ The crux lay in the inser-

⁷⁰ Report of the Special Committee on the Question of Defining Aggression, 25 April – 30 May 1973, UN Doc. A/9619, Article 4 (‘Report of the Special Committee, 1973a’).

⁷¹ Report of the Special Committee on the Question of Defining Aggression, 10 December 1973, UN Doc. A/9411, para. 29.

⁷² *Ibid.*, para. 30.

⁷³ Definition of Aggression, see above note 36.

tion of the word ‘war’ rather than ‘act’ of aggression. Many representatives thought it was a mistake to introduce the new expression ‘war of aggression’ here instead of ‘act of aggression’ that was used in the rest of the text. The Spanish delegate, for instance, stated that the reference to a *war* of aggression could not be interpreted to mean that that concept had been adequately defined by the definition of aggression and found it a vulnerable point in the draft.⁷⁴ Yugoslavia (along with the USSR) likewise expressed its disappointment on the use of the phrase and stated that it would have liked to see an act of aggression as a crime against international peace, which would more accurately have followed the Nuremberg and Tokyo precedents. According to Yugoslavia, this wording would create a way to argue that an act of aggression is not a crime. Bulgaria shared its concern for omitting to provide that ‘aggression’ rather than a ‘war of aggression’ was a crime against international peace. Likely, this was exactly why those opposed to connecting the term ‘crime’ to ‘act of aggression’ could agree to Article 5(2). By changing ‘acts of aggression’ into a ‘war of aggression’, enough leeway would exist within the definition to argue that certain prohibited uses of armed force do not qualify as wars of aggression, and are therefore not the worst imaginable offence, and thus not a crime of aggression.

The final statements on Article 5(2) after reaching the consensus indeed showed that, rather than agreeing on what legal consequences followed for those committing aggression, the ‘consensus agreement’ entailed an agreement on a text that was interpreted in accordance with various views on the matter. For example, while various States concluded that the definition had reiterated that aggression was a crime, the Japanese representative concluded that, at least for the time being, Article 5(2) only referred to State responsibility and that the question of individual responsibility for an act of aggression should be left for future study.⁷⁵ France agreed on this point and added that the text was acceptable to the extent that it “merely noted the present status of international law without prejudging its development”.⁷⁶ Australia pointed out that it had been anxious that any reference to criminal responsibility should not be construed as implying any individual responsibility, which the present text in Austral-

⁷⁴ Report of the Special Committee, 1973a, p. 19, see above note 70.

⁷⁵ *Ibid.*, p. 16.

⁷⁶ *Ibid.*, p. 21.

ia's view did not. Notably, the US and the UK read in this provision a continued validity of the principles which formed the basis of the Nuremberg and Tokyo Tribunals, as well as State responsibility.⁷⁷

11.4.5. Consensus Reached

The 1974 Definition of Aggression thus maintained different interpretations of what exactly constituted an act of aggression and its legal consequences. It moreover pointed to the Security Council to decide on these matters in concrete situations. Those partaking in this deliberative practice agreed on what they could, inserted some textual provisions to mask what was still disagreed on, and delegated the decision on these disagreements in concrete situations elsewhere, in the political playing field where this discursive practice continued, with the Security Council as its institutionalized space.

The purpose of this 1974 definition was fourfold: i) to serve as a guideline to the Security Council, ii) to deter the aggressor from taking the proscribed acts, iii) to help mobilize public opinion in case of aggression, and iv) to help facilitate immediate assistance to States that are victim of aggression by other States.⁷⁸

The history of the following decades showed that the definition did not meet any of its four purposes. Instead, it was widely regarded as vague and toothless, or, in more euphemistic diplomatic terms, 'constructively ambiguous'. This celebrated vagueness was well captured by the statement of the UK during the discussion of the final draft, when it observed that the definition did not have the binding force of domestic law and constituted a "valuable guidance to the Security Council – no less and no more – in performing its functions under Article 39 of the Charter".⁷⁹

With that, three decades of negotiation finished, a consensus was reached, and disagreement of what aggression is and amounts to was left unsettled, or, more precisely, left to be settled in the political arena, away from the sphere of an autonomous legal realm that could seriously intrude on State power. Not surprisingly, the same disagreements raised their head again in the context of the ICC's discussion on the crime of aggression.

⁷⁷ *Ibid.*, pp. 24, 32.

⁷⁸ Louis B. Sohn, "Introduction", in Ferencz, 1975, vol. 1, p. 1, see above note 3.

⁷⁹ Report of the Special Committee, 1973a, p. 31, see above note 70.

11.5. Constructing the Crime of Aggression Within the Rome Statute

11.5.1. From 1974 to 2018: Producing “An Emerging Consensus”

After 1974, the debate on aggression continued, but the notion of aggression increasingly disappeared into the background. The Security Council only rarely condemned States for committing aggression,⁸⁰ and never mentioned the 1974 definition in doing so. The 1974 resolution was moreover rarely invoked elsewhere and was not included in the statutes of the *ad hoc* tribunals that were created in the 1990s, despite the Nuremberg judgment’s qualification of aggression as the “supreme international crime”.

Meanwhile, the ILC had also been considering the notion of aggression, in particular with regard to three of its projects: i) the ILC Draft Code of Crimes Against the Peace and Security of Mankind, ii) the ILC Draft Statute for an International Criminal Court, and iii) the ILC Draft Articles on State Responsibility. In each of these projects, the crime of aggression had played a relatively prominent role in the discussions,⁸¹ but was scarcely present or relevant in them in the end, with the ILC rejecting the 1974 definition because it was too vague to serve as a basis for the

⁸⁰ The five situations in which the Security Council has used the term ‘aggression’ to qualify a violation of the prohibition to the use of force are:

- (i) acts committed by Southern Rhodesia against other countries, including Angola, Botswana, Mozambique, and Zambia (Provocation by Southern Rhodesia, 2 February 1973, UN Doc. S/RES/326 (1973) (<https://www.legal-tools.org/doc/f949b3>) and subsequent resolutions, 1973–79);
- (ii) acts committed by South Africa against other countries in southern Africa (Angola-South Africa, 31 March 1976, UN Doc. S/RES/387 (1976) (<https://www.legal-tools.org/doc/e8e2be>) and subsequent resolutions, 1976–87);
- (iii) acts committed by mercenaries against Benin (Benin, 14 April 1977, UN Doc. S/RES/405 (1977) (<http://www.legal-tools.org/doc/9fc598/>);
- (iv) acts committed by Israel against Tunisia (Israel-Tunisia, 4 October 1985, UN Doc. S/RES/573 (1985) (<http://www.legal-tools.org/doc/9fc598/>) and Israel-Tunisia, 25 April 1988, UN Doc. S/RES/611 (1988) (<https://www.legal-tools.org/doc/6809f4/>); and
- (v) acts committed by Iraq against diplomats in Kuwait (Iraq-Kuwait, 16 September 1990, UN Doc. S/RES/ 667 (1990) (<https://www.legal-tools.org/doc/44dbe9/>), *Historical Review of Developments relating to Aggression*, United Nations Publications, New York, 2003, pp. 225-237 (<https://www.legal-tools.org/doc/5535bc/>).

⁸¹ Simpson, 2007, p. 151, see above note 32.

prosecution of a crime of aggression.⁸² In 1996, the ILC adopted the first project, the Draft Code, which provided for individual *criminal* responsibility with respect to a leader or organizer for the crime of aggression, based on the individual's participation in acts of aggression committed by a State.⁸³ However, the Draft Code did not provide a detailed definition of *what* the crime of aggression entails, and it was quietly dropped from the international agenda.⁸⁴

In 1998, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted the Rome Statute of the International Criminal Court. While for many the inclusion of the crime of aggression was essential and they considered that without it, international criminal law would be incomplete, the problem that resurfaced during the negotiations in Rome was how to limit the possibilities of others to commit aggressive war, whilst maintaining (one's own) possibilities to resort to force when convinced of its necessity and/or justness but that others might look upon differently (however unjust that may be).

Disagreements thus persisted: on how to include aggression into the ICC Statute, how to define the crime of aggression, what its scope would be, and what the role of the Security Council would be. Eventually, the agreement made in Rome provided that the crime of aggression was included in the Statute, but the ICC would not exercise jurisdiction over it (yet). The States Parties decided that the ICC would only exercise jurisdiction over aggression once an amendment was adopted that defined the crime and conditions for the ICC to be allowed to exercise jurisdiction.⁸⁵ In 2010, such an amendment was adopted by the ASP, in Kampala, Uganda.⁸⁶ There, however, another delay clause was included: they agreed that

⁸² Michael J. Glennon, "The Blank-Prose Crime of Aggression", in *Yale Journal of International Law*, 2010, vol. 35, no. 1, p. 79; see Report of the International Law Commission on the Work of Its Forty-Eight Session, 6 May – 26 July 1996, UN Doc. A/51/10 (<https://www.legal-tools.org/doc/f6ff65>); see also William Schabas, *An Introduction to the International Criminal Court*, CUP, Cambridge, 2007, p. 135.

⁸³ Yearbook of the International Law Commission 1996, vol. II, part 2, UN Doc. A/CN(SER.A/1996/Add.1 (Part 2), chap. II.D, para. 50.

⁸⁴ Simpson, 2007, p. 151, see above note 32.

⁸⁵ Rome Statute, Article 5(2) (prior to amendment), see above note 62.

⁸⁶ See for a thorough description of the Princeton Process and the negotiations, Stefan Barriga, "Negotiating the Amendments on the Crime of Aggression", in Stefan Barriga, Claus

in order for the ICC to exercise jurisdiction over aggression, the ASP needed to take an activation decision in or after 2017. On 14 December 2017 in New York, this decision was taken, although with yet another delay clause, providing that the activation of the 2010 Kampala compromise took place on 17 July 2018 – the International Criminal Justice Day, commemorating the adoption of the Rome Statute by 120 States 20 years ago.

The negotiation process from Rome through Kampala to New York was again characterized by many sessions, on many levels, between many States, and in many working groups. Again, reaching consensus was considered the only way to move forward instead of a majority vote, which was thought of as counter-productive: it would already be hard enough for the ICC to prosecute cases of aggression even without disagreements on core provisions.

Comparable to the 1974 process, but arguably even further perfected and executed, was how the Chairmen of the Special Working Group (first Christian Wenaweser and later Prince Zeid of Jordan when Wenaweser became President of the ASP) created consensus. In co-ordination with a small number of ‘insiders’, they managed to dominate the agenda-setting and create a pragmatic atmosphere where disagreements were circumvented through the multi-layered subdivision of topics and sub-groups in which they were discussed. The discussions in the Special Working Group were focused on the papers that were drafted under the sole authority of the Chairman. These papers were presented and understood as reflecting, at least “to a reasonable extent, the variety of views in the room”.⁸⁷ As Stefan Barriga, one of the trusted advisers to the Chairman throughout the process, describes:

Over the course of time, this technique allowed delegations to identify “an emerging consensus” on various issues, and made it more difficult for delegations to bring up proposals that deviated from the thrust of the Chairman’s papers.⁸⁸

On the one hand, this allowed for a breakthrough that many had not predicted and consensus agreements on an amendment to the Rome Stat-

Kreß (eds.), *The Travaux Préparatoires of the Crime of Aggression*, CUP, Cambridge, 2012, p. 5.

⁸⁷ *Ibid.*, p. 18.

⁸⁸ *Ibid.*

ute as well as its activation. On the other hand, however, it was also a repeated rehearsal of masking persistent fundamental disagreement behind euphemisms like ‘consensus’. Or, in the words of Julius Stone, “a triumph of verbal skills [...] to conceal conflicts” and to avoid “adding still another failure to the half-century of vain efforts to define aggression which had gone before”.⁸⁹

Taking the discussions concerning the Nuremberg and Tokyo Tribunals, those in the context of the United Nations between 1945 and 1974, and then again those revolving around the ICC’s jurisdiction over aggression together, the image appears of a continuous strife between, on the one hand, wanting to condemn others that commit aggression (and have an international body to wield such power), and, on the other (particularly States with an active military power) seeking to retain space to resort to military means when so needed or wanted without running the risk that an external legal or political authority would decide otherwise. The compromise reached and activated on 17 July 2018 reflected this tension. It surfaced in particular in the negotiations regarding a threshold clause and the ICC’s reach over its States Parties and non-States Parties. These aspects are covered in more detail in the next sub-sections.

11.5.2. The ‘Manifest Violation’ Criterion: Constructive Ambiguity 2.0.

Throughout the negotiation processes during the twentieth century, what was clear was that many States opposed equating the definition of aggression to the prohibition to use force – so that a violation of that prohibition would qualify as an act of aggression. Rather, ‘aggression’ was to be a narrower category. Every aggression is an illegal use of force, but not every illegal use of force is aggression.

This discussion returned in the negotiation on the crime of aggression in and ahead of Kampala, particularly how to exclude from its scope uses of force that may be illegal but not criminal, let alone part of the “supreme international crime”. Many had humanitarian interventions in mind, but also actions to fight terrorism and situations in which force was used in (arguably) self-defence albeit not permitted by international law. The negotiations on this point resulted in the ‘manifest violation’-criterion.

⁸⁹ Stone, 1977, p. 21, see above note 58.

The crime-of-aggression amendment provides that a crime of aggression entails

the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, *by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.*⁹⁰

Thus, an illegal use of force is not as such a crime of aggression unless it is also a *manifest* violation of the UN Charter, by its character, gravity and scale.

Some delegations rejected the idea of a threshold clause because it would distinguish between acts of aggression that were worth prosecuting and others that were not, thus undermining the definition of aggression agreed on in 1974. This was countered by other delegations who argued it was necessary to ensure that the ICC would only take up “the most serious crimes of concern to the international community”⁹¹ and not decide on borderline cases and acts with debatable illegality.⁹² The report of the June 2008 Special Working Group meeting that prepared the Rome Statute Review Conference that was to be held in 2010 in Kampala declares:

Delegations supporting this threshold clause noted that it would appropriately limit the Court’s jurisdiction to the most serious acts of aggression under customary international law, thus excluding cases of insufficient gravity and falling within a grey area.⁹³

‘Gravity’ and ‘scale’ were intended to exclude border skirmishes and the like, while ‘character’ needs to exclude genuinely legally controversial cases.⁹⁴

Yet, inserting this threshold clause did not eradicate the disagreement on what a grey area is when the greyness itself is contested.⁹⁵ Rather,

⁹⁰ Rome Statute, Article 8*bis*(1), see above note 62 (emphasis added).

⁹¹ Referring to the Preamble of the Rome Statute, see above note 62.

⁹² Stefan Barriga, 2012, p. 29, see above note 86.

⁹³ Stefan Barriga, Wolfgang Danspeckgruber and Christian Wenaweser (eds.), *The Princeton Process on the Crime of Aggression: Materials of the Special Working Group on the Crime of Aggression, 2003–2009*, Lynne Rienner, Boulder, 2009, p. 87, para. 68.

⁹⁴ Claus Kreß, “Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus”, in *European Journal of International Law*, 2009, vol. 20, no. 4, p. 1138.

again, once discussions became less abstract than ‘aggression is a crime’ and applied concretely to one or another actual conflict, the age-old problem reemerged on what *exactly* aggression is. Fundamental disagreement regarding whether and whose invocation of the right of self-defence is actually lawful self-defence, whose interpretation of what a Security Council authorization includes or not is correct, and whose humanitarian intervention is properly humanitarian (and therefore perhaps excusable or justified and, as some may argue, not manifest or criminal).

This agreement in the abstract (aggression is criminal) and disagreement in the particular (this situation does or does not constitute the crime of aggression) has been translated in the crime-of-aggression norm through its threshold clause of ‘manifest violation’. While there was little agreement among State delegations on how this ‘manifest violation’-threshold would actually in practice eradicate the grey areas that surround the notion of aggression, the overriding shared (or at least as yet uncontested) assumption among the diplomatic community was that the ICC’s judges could and should decide on this in a concrete case. In so doing, ICC judges are asked to distinguish between on the one hand crimes of aggression, and on the other “illegal but legitimate” uses of force:⁹⁶ uses of force that, though (possibly) illegal, are not (criminally) aggressive because even though in violation of the UN Charter, they do not constitute a manifest violation of it. The distinction thus becomes not only one of legal or illegal but also one of whether – even if illegal – it is also legitimate, such as for humanitarian purposes for some or for protecting sovereignty for others, to name a few possible justifications.

According to Article 46(2) of the Vienna Convention on the Law of Treaties, a violation of domestic law can be invoked as manifest “if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith”.⁹⁷ The *Oxford English*

⁹⁵ For a more extensive analysis on the ‘manifest’ criterion and its consequences for future prosecutions at the ICC, see Marieke de Hoon, “The Crime of Aggression’s Show Trial Catch-22”, in *European Journal of International Law*, 2018, vol. 29, no. 3. The remainder of this subsection draws from this article.

⁹⁶ The Independent International Commission on Kosovo characterised the North Atlantic Treaty Organization’s (‘NATO’) bombing campaign on Serbia “illegal but legitimate”. See Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned*, OUP, Oxford, 2000, p. 4.

⁹⁷ Vienna Convention on the Law of Treaties, 23 May 1969, Article 46(2) (<https://www.legal-tools.org/doc/6bfd4/>).

Dictionary defines manifest as “clearly revealed to the eye, mind, or judgement; open to view or comprehension; obvious”.⁹⁸ As Andreas Paulus has observed, on the one hand, this amounts to an extremely restrictive standard, but, on the other hand, it is also an unclear standard, as what “is obvious for one is completely obscure to the other, in particular in international law”.⁹⁹ With the ‘manifest violation’-criterion, the ICC is therefore pushed beyond merely the realm of the *legality* of use of force (which is already a legal framework filled with contested norms and interpretations), into the realm of its *legitimacy*, just as political contestation on the legitimacy of use of force is transported into a criminal court of law.¹⁰⁰

This raises the question of how ‘substantial’ the judges should understand their task of deciding whether a violation of the UN Charter is manifest, *or* whether they should dismiss as not manifest any situation that could be argued to be legitimate (that is, as *therefore* not a manifest violation of the UN Charter). The latter was argued by Harold Koh, who, on behalf of the US delegation, submitted in Kampala that ‘manifest’ simply excludes all situations that can be argued to be lawful or legitimate:

If Article 8*bis* were to be adopted as a definition, understandings would need to make clear that those who undertake efforts to prevent war crimes, crimes against humanity or genocide—the very crimes that the Rome Statute is designed to

⁹⁸ “Manifest, adj. and adv.”, August 2014 (available on the Oxford English Dictionary Online).

⁹⁹ Andreas Paulus, “Second Thoughts on the Crime of Aggression”, in *European Journal of International Law*, 2010, vol. 20, no. 4, p. 1121. Paulus submits that the definition is therefore indeterminate. Dapo Akande agrees with Paulus, asserting how this “obviously illegal” requirement effectively provides for a “mistake-of-law” defence that is unavailable to the other crimes, see Dapo Akande, “Prosecuting Aggression: The Consent Problem and the Role of the Security Council”, Oxford Legal Studies Research Paper No. 10 (2011). Sean Murphy, moreover, notes that it is a remarkable development to include a provision that says that some acts of aggression are thus not criminal and that even though the UN places aggression on the high end of coercive measures, an act of aggression may not be a ‘manifest’ violation of the UN Charter (Sean Murphy, “Aggression, Legitimacy and the International Criminal Court”, in *European Journal of International Law*, 2009, vol. 20, no. 4, pp. 1150–1151). And Kai Ambos holds that the lack of precision of the threshold clause is embedded in the primary norm regulating the use of force and that because it is not possible to clearly delimitate lawful from unlawful use of force, no secondary norm could be drawn any clearer (Kai Ambos, “The Crime of Aggression after Kampala”, in *German Yearbook of International Law*, 2011, vol 54, pp. 482–483 (<https://www.legal-tools.org/doc/b83a69>)).

¹⁰⁰ For a more elaborate analysis on this, see de Hoon, 2018, above note 95.

deter—do not commit “manifest” violations of the U.N. Charter within the meaning of Article 8*bis*. Regardless of how states may view the legality of such efforts, those who plan them are not committing the “crime of aggression” and should not run the risk of prosecution. At the same time, in order for an investigation or prosecution to proceed it must be shown that it was manifest that the action was not undertaken in self-defense, without the consent of the state in question, and without any authorization provided by the Security Council.¹⁰¹

Moreover, Claus Kreß, member of the German delegation, asserted shortly before the Review Conference in Kampala that the ‘manifest’ criterion “will make proceedings for a crime of aggression an exceptional event” because the definition would exclude “seriously controversial cases” “in order not to decide major controversies about the content of primary international rules of conduct through the back door of international criminal justice”.¹⁰²

Since most use-of-force situations raise major and serious controversy (notwithstanding whether the situation actually *is* legally controversial or not),¹⁰³ if the ICC follows the reasoning of Koh and Kreß, the crime of aggression will remain of very limited scope and meaning. Situations like the annexation or secession of Crimea, the US–UK invasion of Iraq, and the NATO bombings related to Kosovo may well fall beyond the crime of aggression’s scope. Some have questioned: if the substantive scope of the crime of aggression would not include such situations, what

¹⁰¹ Harold Hongju Koh, “Statement at the Review Conference of the International Criminal Court”, 4 June 2010 (available on the US Department of State’s web site).

¹⁰² Kreß, 2009, p. 1142, see above note 94.

¹⁰³ Although there are some widely agreed upon instances of aggression such as the Nazi invasions throughout Europe and Saddam Hussein’s occupation of Kuwait, more often than not situations of (potential) resort to force spark discussions that law in and of itself does not seem to resolve. The argumentative practices in recent events such as, for example, the 1999 NATO bombing campaign in Belgrade, the 2003 US–UK invasion of Iraq, the discussions in and out of the Security Council on whether to intervene in Darfur, on whether and at what point a right to self-defence exists against States that increase their nuclear capability, on the scope of the right to self-defence against non-State actors including terrorists, on the interpretation of the Security Council authorization to use force against Libya, on whether or not to intervene in Syria, and if so to what extent, and on Russia’s assistance in effectuating secession of Abkhazia, South-Ossetia, the Crimea and Eastern Ukraine, demonstrate that disagreements on where to draw the line between aggressive use of force and non-aggressive use of force continues.

is the crime of aggression for? Alternatively, judges would have to decide not only on the (il)legality of force, with all its difficulties in and of itself,¹⁰⁴ but also on the question of the (il)legitimacy of illegal force, where there is *fundamental* disagreement on what is just and necessary. Frequently heard responses to concerns that this places judges in a situation where their judgments are perceived as political rather than legal, neutral and objective, tend to invoke the need to have faith in judges and the reasonableness of lawyers. For example, Kreß submitted “that international legal method is advanced enough to enable reasonable lawyers to distinguish between a spurious attempt to justify an illegal use of force and an arguable case”.¹⁰⁵

The future will tell whether Kreß is correct. In any event, the ‘manifest violation’-criterion allowed a consensus agreement on the definition of the crime of aggression: rather than narrowly defining what use of force would and would not constitute a crime of aggression, there was a textual provision that all could agree to and the real decision on determining aggression in concrete situations was delegated elsewhere again, this time not to the Security Council as occurred in 1974, but to the ICC’s judges.

11.5.3. Opting In and Out of Criminal Law’s Reach

The role of the Security Council had been another fiercely debated topic. Consensus agreement required agreement not only on the definition of the substantive norm, but also on the reach of the ICC’s territorial and personal jurisdiction when it concerned the crime of aggression. Here, in particular, lay the reasons why a consensus agreement was possible. States that were reluctant or flat out against the ICC’s ability to prosecute their nationals for alleged aggression fought hard to insert the ability to stay out of the ICC’s reach.

Throughout the discussions in and towards Rome and Kampala, the permanent members of the Security Council and a number of other countries were uncompromising in maintaining their position that the ICC would be able to prosecute a case of aggression only if the Security Council had previously determined the occurrence of an act of aggression.

¹⁰⁴ For example, the legality of self-defence against non-State actors, the limits of anticipatory self-defence, and the interpretation of UN Security Council authorizations.

¹⁰⁵ Kreß, 2009, p. 1142, see above note 94.

France, for instance, in its opening statement at the Kampala Review Conference, drew such a ‘line in the sand’ – the so-called ‘exclusive Security Council filter’.

This position was rejected by many other countries as flagrantly at odds with the independence of the ICC as a judicial institution and in violation of criminal law principles such as the presumption of innocence (if it were the Security Council’s prerogative to decide who the aggressor was). Moreover, a number of States¹⁰⁶ demanded the consent of the aggressor State to trigger the ICC’s jurisdiction, whereas mainly African, Latin American and Caribbean States disagreed with this requirement. At a certain point in the negotiations, it was agreed that if the crime of aggression would be adjudicated at the ICC, “the rights of the defendant as foreseen in the Statute must be safeguarded under all circumstances including in connection with prior determination by a body other than the Court”.¹⁰⁷ This led to a strong majority of delegations that asserted that this implied that a determination by the Security Council or another organ could not legally bind the Court, though it would make a strong argument for its existence.¹⁰⁸ Because the discussions were thus placed into the frame of criminal law, the crime of aggression needed to be discussed on the terms of the criminal law paradigm accordingly, including respecting due process and rights of the defendant. This enabled the discussion on the role of the Security Council to move to the remaining question of whether or not the Security Council should be the exclusive jurisdictional filter at the stage of the proceedings where the Prosecutor has concluded the preliminary examination and intends to open a formal investigation.¹⁰⁹

By that time, however, developments on other aspects of the crime of aggression had evolved so much into the direction of those demanding an exclusive Security Council filter, that compromising on this aspect would in fact no longer be a real compromise.

The eventual compromise reached was that when a situation is referred to the ICC by the Security Council, the ICC may exercise jurisdiction over States Parties and non-States Parties alike, just like it does for genocide, crimes against humanity and war crimes. However, when the

¹⁰⁶ Particularly the European States, with the exception of Switzerland and Greece.

¹⁰⁷ Barriga, 2012, p. 30, see above note 86.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*, p. 33.

jurisdiction of the ICC is instead triggered by State referral or the Prosecutor's *proprio motu* investigation, the crime of aggression has different provisions than the other crimes.

First of all, a six-month delay provision was inserted there to ascertain whether the Security Council makes a determination of aggression. Article 15*bis*(7) provides that “[w]here the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression”.¹¹⁰ What remains interpreted differently among States, however, and may play out in future cases, is what ‘inactivity’ means: while many States believe that this means that if the Security Council is unable to come to a resolution that a situation is determined as ‘aggression’ the ICC may proceed, other States maintain that the ICC may only proceed if the Security Council issues a resolution in which it determines the existence of an act of aggression.

Furthermore, with the crime of aggression, not only nationals (both perpetrators and victims) of non-States Parties are excluded from jurisdiction, a (potentially aggressive) State Party can opt out in advance from the Court’s jurisdiction under Article 15*bis*(4),¹¹¹ unless the Security Council refers the situation to the ICC. For those States that hold a permanent seat in the Security Council, or their allies, there is thus a *de facto* inviolability from a supposedly universal court.

This is an interesting characteristic of the crime of aggression. It provides for a criminal law provision according to which a subject to the Court’s jurisdiction can declare itself not bound by it. It is an odd mixture of a vertically organized criminal law – between the law enforcer and the (alleged) criminal – and a decentralist and horizontally based public international law, based on sovereign equality of States; blending legal regimes that are in essence of a different nature. It contradicts rather fundamentally what a criminal legal system (as we know it on a non-international level) aims to do: to provide equality before the law and to impose a vertical, authoritative and coercive power relationship upon those that violate it.

¹¹⁰ This means that the Prosecutor is allowed to start the investigations after six months of inactivity by the Security Council, provided that the ICC’s Pre-Trial Division has authorized the investigation *and* that the Security Council has not decided otherwise in accordance with their powers under Article 16 to defer the investigation for a year (which is renewable).

¹¹¹ The State that opts out of the crime of aggression amendment remains part of the ICC, but merely excludes the ICC from investigating its potential aggressive use of force.

The crime of aggression thereby sits somewhat uneasily with criminal law's fundamental notion of equality before the law by adhering to State consent, the fundamental principle of public international law.

Nevertheless, it facilitated a compromise in Kampala: due to the opt-out possibility and the 'manifest'-threshold clause, States demanding an exclusive Security Council filter saw that their concerns were no longer challenged, and thus opened up to compromise. On the other side of the aisle, for the sake of consensual outcome and thus having a provision of the crime of aggression rather than none, the African States Parties were willing to accept a consent-based regime. However, they were of the view that it was too easy for States Parties to opt out of the Court's jurisdiction under draft Article 15*bis* and requested that such declarations would lapse after a certain time.¹¹² In the end, however, they gave up on such a sunset clause upon the opposition of States hoping to water down the jurisdictional provisions as much as possible.

Even though Wenaweser pushed for this compromise in his President's Papers during the last days in Kampala, the State consent approach was not yet generally agreed upon at the time of its presentation on the penultimate day of the Kampala Review Conference in 2010.¹¹³ The delegation of Japan in particular criticized the use of an opt-out regime as conflicting with the entry-into-force procedure under Article 121(5),¹¹⁴ since this was already based on an opt-in approach and thus would have contradicted the use of an additional opt-out procedure in Article 15*bis*. A large majority of States believed that upon activation the Kampala amendment would enter into force for all States Parties who could then decide to opt out, while others maintained that it would only enter into force for those that ratified the crime-of-aggression amendment. The issue remained disagreed upon in Kampala but was ignored for the time being.

Not surprisingly, the same issue flared up vehemently again towards the 2017 activation decision in New York. Many States, led by Liechtenstein, asserted that the decision in Kampala had meant that nationals of States Parties that have not accepted the crime-of-aggression amendment and had (thus) also not opted out would fall under the ICC's jurisdiction.

¹¹² *Ibid.*, p. 53.

¹¹³ *Ibid.*

¹¹⁴ Article 121(5) provides that the crime-of-aggression amendment only enters into force for the nationals and territories of States Parties that accepted the amendment.

However, the UK, France, Japan, Canada, Norway and Colombia argued that the ICC would not have jurisdiction over aggression committed by nationals of non-ratifying States or on their territory in case of a State referral or the Prosecutor's *proprio motu* powers. Ultimately, in the late hours of the final day in New York on 14 December 2017, the ASP adopted a decision that favoured the latter, more restrictive view. The activation decision included in its Article 2:

Confirms that, in accordance with the Rome Statute, the amendments to the Statute regarding the crime of aggression adopted at the Kampala Review Conference enter into force for those States Parties which have accepted the amendments one year after the deposit of their instruments of ratification or acceptance and that in the case of a State referral or *proprio motu* investigation the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted these amendments¹¹⁵

11.6. Conclusion: Power versus Legal Autonomy in the Aggression Negotiations

With that conclusion of many decades of negotiation, the road was paved towards the activation of the ICC's jurisdiction over the crime of aggression on 17 July 2018.¹¹⁶

¹¹⁵ ICC, Activation of the Jurisdiction of the Court over the Crime of Aggression, 2017, see above note 1.

¹¹⁶ In summary, the compromise that was reached contains an opt-out clause for any State that does not want to fall under the ICC's jurisdiction for the crime of aggression and excludes non-States Parties from the jurisdiction over aggression even if the alleged aggression would be committed by those States on the territory of a State Party (Article 15*bis*(5)), unless the situation is referred to the ICC by the Security Council. (Unlike the State referral or *proprio motu* jurisdictional triggers, if the Security Council refers a case to the ICC, the ICC also has jurisdiction over aggression committed by non-States Parties.) With regard to triggering the ICC's jurisdiction, the Kampala compromise provides that the different triggers of the ICC system are split between an Article 15*bis* (for when States refer a situation to the ICC or when the Prosecutor takes the initiative to investigate) and 15*ter* (for a UN Security Council referral). While in case of a Security Council referral the ICC's jurisdiction is immediately triggered, there is a six-month delay provision for the State referral and the Prosecutor's *proprio motu* power. This means that the Prosecutor is allowed to start the investigations after six months of inactivity by the Security Council, provided that the ICC's Pre-Trial Division has authorized the investigation *and* that the Security Council has not decided otherwise in accordance with their powers under Article 16 to defer the inves-

From great ideals to criminalize aggression for all by providing legal autonomy to the ICC to address the worst situations of aggressive use of force, the actual provision that States could agree on ensured that the ICC's ability to do so would be very limited.¹¹⁷

When analysing these decades of negotiating the aggression norm through the lens of State power versus (supranational) legal autonomy, what emerges is a repeating pattern in which i) States, particularly those which tend to use military means more frequently, remain reluctant to accept legal autonomy over the question of the aggressiveness of (their) use of force; ii) the vast majority of States, in particular those that are weary of becoming victims of others' aggression, look for ways to strengthen the international normative framework and supranational authority; and that iii) in their search for agreement, they repeatedly encounter the same disagreements that go to the heart of the world order: to what extent can supranational authorities limit States in their use of armed force.

In the creation of the Nuremberg Tribunal, the compromise that was reached was to give the Tribunal the power to judge over aggression but not define it; in the context of the United Nations, the definition remained vague and interpreted in contradicting ways, while pointing to the Security Council to decide on a case-by-case basis on what it deemed fit; and for the purpose of the ICC, an open definition was adopted, with as many limitations as possible to the ICC's ability to exercise jurisdiction over aggression. While in the background Russia annexes Crimea, the US and Iran bomb Syria, the African continent sees extensive acquisitions by in particular Chinese corporations, and the US fights its war on terror throughout the world with little regard for other States' sovereignty, the result of many years of attempting to protect States against other States' aggression remains modest.

Pragmatic outcomes were sought that escaped the aspects where disagreements persisted, such as on the actors involved, on humanitarian

tigation for a year (which is renewable). Finally, a threshold criterion that only *manifest* violations of the UN Charter qualify as crimes of aggression was inserted in Article 8*bis*.

¹¹⁷ Unless the Security Council refers a situation of aggression to the ICC, non-States Parties do not fall under the ICC's reach and States Parties can opt out, and, even before then, have to opt in by ratifying the crime-of-aggression amendment, retaining their own discretion to decide whether or not legal consequences would follow a decision to use aggressive force against another State. In addition, the Security Council can still considerably influence the ICC's autonomy.

intervention, and on preventive use of force in the war on terror. As Barriga explains on the negotiations in Kampala:

What can safely be said, however, is that there was the widespread concern that it would be inappropriate to deal with key issues of current international security law in the haste of the final hours of diplomatic negotiations.¹¹⁸

This is striking to say the least. The crime of aggression lies at the core of international security law and distinguishes between what is deemed criminal about it and what is not, which, on the contrary, might even be perceived as heroic (such as humanitarian intervention). Indeed, the reason why a genuine definition of aggression and serious legal consequences for committing aggression has not been achieved is that there is fundamental disagreement exactly about those key issues of international security law – in the present as it was in the past and will likely remain in the future.

Moreover, in light of the current international security challenges, one can wonder about the extent to which the crime of aggression, as thus constructed, is capable of capturing modern forms of aggression, such as when carried out by non-State actors in asymmetric conflicts.¹¹⁹ Drumbl posits that the narrow framing of the crime of aggression keeps threats – such as internal armed conflict, attacks by States against their own populations, systematic attacks by narco-terrorist syndicates or other types of terrorist attacks, massive cyber-attacks or widespread, long-term, severe and deliberately inflicted environmental harms – off the discussion table even though each could well cause *effects* normally associated with inter-State war.¹²⁰ He argues that if the purpose of the criminalization of aggression is to protect security, stability, sovereignty and human rights interests, narrowing the conversation by focusing only on the core prohibitions that emerged six decades ago leaves a significant array of serious threats outside the framework of international criminal law.¹²¹ Criminalizing only inter-State attacks that flagrantly violate the *ius ad bellum* does

¹¹⁸ Stefan Barriga, Leena Grover, Leonie von Holtendorff and Claus Kreß, “Negotiating the Understandings on the Crime of Aggression”, in Stefan Barriga and Claus Kreß, 2012, p. 95, see above note 86.

¹¹⁹ Ambos, 2011, p. 488, see above note 99.

¹²⁰ Mark A. Drumbl, “The Push to Criminalize Aggression: Something Lost Amid the Gains?”, in *Case Western Reserve Journal of International Law*, 2009, vol. 41, no. 2, pp. 291-319.

¹²¹ *Ibid.*, p. 310.

not capture the key stability, security, human rights and sovereignty challenges that the international community faces. It excludes terrorist attacks. It excludes force used on foreign territory against such terrorist attacks, which meanwhile destroy the livelihood of innocent civilians who had nothing to do with, nor any power to prevent, the activities of those non-State actors. It excludes industrialists and businessmen that influence or even pull the strings in foreign policy agendas.

Since resolving such fundamental issues was beyond the realm of possibilities as this lengthy regulation and criminalization process demonstrated, agreement was instead sought in alternative terminology, circumventing disagreement, and agreeing on restrictive provisions, abstractions and vague language, delegating the eventual resolution between opposing claims elsewhere, to the discursive space where law is (re)constructed and (re)constituted, and ultimately, on the table of judges, if it ever gets to that.

And so, the crime of aggression was created. Like in the previous attempts to attach political and legal consequences to committing aggression, the provision was kept vague and restricted rather than made to explore the circumstances where armed force, in fact, threatens international peace and security. Nevertheless, despite heavy opposition and contestation, an actual provision was agreed upon. That is a further step in the development and crystallization of the aggression norm, and may enable the ICC to prosecute an aggressive leader one day. But it is quite clear which leaders it can never touch. That will be a reality challenging the perception of any aggression case that the ICC will undertake; in the pursuit of universal justice, for everyone, everywhere.

Judicial Governance Entities as Power-Holders in International Criminal Justice: A Plea for a Socio-Legal Enquiry

Sergey Vasiliev*

This chapter zeroes in on the exercise of power *vis-à-vis* international and special or hybrid criminal tribunals ('ICTs') by political-administrative bodies set up by States and international organisations, and vested with responsibility for running ICTs. In the nascent line of research into the mandates and functioning of those bodies, they have been referred to as international judicial governance institutions, or '*injugovins*'. There is at present little sociological-legal knowledge about the '*injugovins*' organisation, working methods, and practices. Whilst exercising authority that is invariably traceable back to States, by legal form *injugovins* may be organs of international organisations (such as the United Nations), other treaty-based entities (for example, the Assembly of States Parties ('ASP') of the International Criminal Court ('ICC')), or specially designated bodies composed of major donor States (for example, management committees of UN-assisted hybrid or special tribunals). *Injugovins* wield enormous power over the tribunals on account of regulatory, human-resources, management oversight, co-operation enforcement, as well as budgetary and financial audit functions which they perform. The tribunals' success and viability as adjudicatory bodies to a large extent depend on how well

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those essential functions are carried out. The judicial governance practice is subject to mixed assessments, with the *injugovins*' effectiveness, competence, and accountability having given rise to challenging questions. A clear regulatory framework, pre-existing institutional structures, and compelling means to enforce the respective duties and keep *injugovins* accountable are missing. If and when *injugovins* show a degree of indifference towards their judicial protégés and fail to set right priorities and take action at crucial moments, this typically leads to debilitating power shortages and governance gaps. On occasions, *injugovins* may attempt to micro-manage courts and transgress boundaries set to safeguard judicial independence, triggering power conflicts and resistance on the part of the courts. Such disequilibria often arise from the pursuit of self-interest by States within the judicial governance forums and sometimes in other settings, for example regional organisations. This chapter presents a first attempt to respond to the urgent need for a socio-legal scrutiny of the behaviour and motives of States and their collective entities in governing international criminal justice, as well as the power dynamics unfolding between them in the judicial governance context and as part of their relationships with the tribunals. The chapter provides an overview of judicial governance schemes in international criminal justice. Based on this survey of legal and institutional arrangements, the chapter offers a tentative typology of the main models of judicial governance ('direct', 'envelope', 'diplomatic' and 'managerial' models). It then takes a critical look at select aspects of the ICC's governance scheme and brings to light some of the defining and salient limitations of the 'diplomatic' model. Without offering a definitive treatment, the chapter makes a plea for further socio-legal research in this domain. This perspective is indispensable for getting to the bottom of operational, enforcement, and legitimacy challenges facing international criminal justice whose resolution will be determinative for the future of the project.

12.1. Introduction

International criminal justice and power are interconnected on multiple levels and have countless points of encounter. The two are so interweaved that no singular formula could possibly capture that relationship. Taken in its manifold dimensions (political, economic, legal, symbolic, and so on), power can well serve as an all-rounded perspective on international criminal justice. Seen through this prism, the latter can be conceived of as a

juridico-political enterprise which channels the exercise of power *by* ICTs as well as *over* and *through* those tribunals by States and international organisations.

There are at least two noteworthy dimensions to this power framing. The first dimension (intrinsic, or institutional-procedural) relates to the patterns and practices of delegation, deployment, and contestation of power by participants in the context of criminal process and administrative functioning of ICTs. This angle naturally comes to the fore because criminal law is traditionally associated with sanctioned coercion, although intermittent enforcement in the international realm makes this immanent coerciveness not as readily available as in domestic settings. The contiguous issue is that of the *jus puniendi*, or the authority to punish the perpetrators of international crimes. Traditionally anchored to a sovereign nation-State, the punitive power in international criminal law is associated with the (collective) authority of States and, as argued at times, flows from the will of the ‘international community’ or other elusive constituencies such as ‘victims’ or ‘affected societies’.¹

The second (extrinsic, or politico-structural) dimension of the power-based approach highlights the fact that ICTs are embedded in, and form an integral part of, the global power structures. Constituted by States, international organisations and other non-State actors, those structures are moulded by the dynamics of contestation and persisting imbalances between them. Subject to vagaries of power relations unfolding in specific political and socio-economic contexts, ICTs are the conduits of authority delegated to them by States directly or via their creatures, international organisations. Theoretically, ICTs can also act as challengers of state power and contribute to reforming the existing power structures in the

¹ See, for example, Kai Ambos, “The Punishment without a Sovereign? The *Ius Puniendi* Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law”, in *Oxford Journal of Legal Studies*, 2013, vol. 33 no. 2, p. 293; Shlomit Wallerstein, “Delegation of Powers and Authority in International Criminal Law”, in *Criminal Law and Philosophy*, 2015, vol. 9, no. 1, p. 123; Frédéric Mégret, “In Whose Name? The ICC and the Search for Constituency”, in Christian de Vos, Sara Kendall and Carsten Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Cambridge University Press, Cambridge, 2015.

international order, even though their effective ability to do so remains an acute question.²

Much of the traditional international criminal law scholarship operates within the boundaries of the ‘intrinsic’ view of ICTs as agents endowed with certain competences *vis-à-vis* defendants, victims, witnesses and, for limited purposes, States. In turn, critical literature typically proceeds on the ‘extrinsic’ perspective which emphasizes ICTs’ character as mere tools of the powers-that-be. When not deployed by the more potent States as instruments of ‘lawfare’ for keeping their weaker counterparts in submission, ICTs can be manipulated by the regimes of postcolonial States to repress their populations and harass political opponents.³ In between those perspectives, the ICTs’ existential condition of being the *objects* of power of States is an aspect of power relations in international criminal justice which has received limited attention to date. Like any other international courts, ICTs are governed by States, whether directly or through international organisations or bodies devoid of legal personality. These international judicial governance institutions have been referred to as *injugovins*.⁴ In this context, governance can be defined as a range of political, legal, administrative and financial measures taken by external entities for the purpose of setting up, operating, and closing down international courts, which include providing them with legislative, budgetary, management, oversight and other forms of support as may be required to enable them to perform their mandates.⁵

² See further Sergey Vasiliev, “The Crises and Critiques of International Criminal Justice”, in Kevin Jon Heller *et al.* (eds.), *The Oxford Handbook on International Criminal Law*, Oxford University Press, Oxford, 2020.

³ See, for example, Tor Krever, “Dispensing Global Justice”, in *New Left Review*, 2014, vol. 85, p. 67; Sarah M.H. Nouwen and Wouter G. Werner, “Doing Justice to the Political: The International Criminal Court in Uganda and Sudan”, in *European Journal of International Law*, 2010, vol. 21, no. 4, p. 941; Asad Kiyani, “Group-Based Differentiation and Local Repression: The Custom and Curse of Selectivity”, in *Journal of International Criminal Justice*, 2016, vol. 14, no. 4, p. 939.

⁴ For the coinage of this shorthand, see Niels Blokker, “The Governance of International Courts and Tribunals: Organizing and Guaranteeing Independence and Accountability”, in Andreas Føllesdal and Geir Ulfstein (eds.), *The Judicialization of International Law: A Mixed Blessing?*, Oxford University Press, Oxford, 2018, p. 27.

⁵ Huw Llewellyn, “An Institutional Perspective on the United Nations Criminal Tribunals: Governance, Independence and Impartiality”, Ph.D. dissertation, Leiden University, 18 September 2019 (on file with author), p. 8 (defining ‘governance’ as “the formal and informal structures and decision-making processes through which the tribunals’ parent and oversight bodies seek to manage them”).

The functioning and practice of *injugovins* have only received sporadic coverage. Their position as links in the ‘power chain’ running from States and international organisations down to individuals over whom ICTs exercise jurisdiction, has for a long time remained a blind spot in the discipline of international criminal law and international law more generally.⁶ The tide has started turning recently. The few existing studies have focused on specific governance functions (e.g. financing and the election of judges)⁷ or the governance arrangements adopted for individual courts.⁸ Such functions and arrangements tend to be problematised from a judicial independence angle.⁹ The ICC’s governing entity, the ASP, has attracted much attention recently due to what is perceived by observers to constitute a crisis engulfing the Rome Statute system.¹⁰ The studies taking

⁶ The lack of titles on the subject of judicial governance, including in otherwise comprehensive collections, is telling of the gap. See, for example, Cesare P.R. Romano, Karen J. Alter and Yuval Shany (eds.), *The Oxford Handbook of International Adjudication*, Oxford University Press, Oxford, 2013.

⁷ Thordis Ingadóttir, “The Financing of Internationalized Criminal Courts and Tribunals”, in Cesare P.R. Romano, André Nollkaemper and Jann K. Kleffner (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford University Press, Oxford, 2004; Giorgia Tortora, “The Financing of the Special Tribunals for Sierra Leone, Cambodia and Lebanon”, in *International Criminal Law Review*, 2013, vol. 13, no. 1, p. 93; Mistale Taylor, “Financing Lady Justice: How the Funding Systems of Ad Hoc Tribunals Could Lend Themselves to the Possibility of Judicial Bias”, in Nobuo Hayashi and Cecilia Bailliet (eds.), *The Legitimacy of International Criminal Tribunals*, Cambridge University Press, Cambridge, 2017; Stuart Ford, “How Much Money Does the ICC Need?”, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, pp. 84–104. See also Michael Bohlander, “The International Criminal Judiciary: Problems of Selection, Independence and Ethics”, in Michael Bohlander (ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures*, Cameron May, London, 2007, pp. 325–390.

⁸ Renan Villacis, “Working Methods of the Assembly of States Parties to the Rome Statute”, in *International Criminal Law Review*, 2018, vol. 18, no. 3, p. 563–575; Max du Plessis and Christopher Gevers, “The Role of the Assembly of States Parties for the ICC”, in Richard H. Steinberg (ed.), *Contemporary Issues Facing the International Criminal Court*, Brill Nijhoff, Leiden, 2016, pp. 159–172.

⁹ Jonathan O’Donohue, “The ICC and the ASP”, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, pp. 105–140; Hannah Woolaver and Emma Palmer, “Challenges to the Independence of the International Criminal Court from the Assembly of States Parties”, in *Journal of International Criminal Justice*, 2017, vol. 15, no. 4, p. 641.

¹⁰ Douglas Guilfoyle, “Reforming the International Criminal Court: Is It Time for the Assembly of State Parties to Be the Adults in the Room”, in *EJIL: Talk!*, 8 May 2019 (available on its web site); Zeid Ra’ad al Hussein, Bruno Stagno Ugarte, Christian Wenaweser,

a more holistic and cross-cutting approach to the governance of ICTs have barely started to emerge.¹¹

The present chapter aims to advance this nascent line of inquiry by placing ICTs' *injugovins* front and centre of the debate on power in international criminal justice. The understanding of the power dynamics animating this field would remain fragmentary and imbalanced without looking also at the legal and institutional frameworks and practices used by States to delegate, exercise, contest and reclaim power over ICTs. By shining a spotlight on the *injugovins*, the chapter purports to contribute to a more textured view of the political, institutional, and material constraints under which ICTs labour and, in turn, enable a more accurate appraisal of their performance and attribution of putative failures. This objective has particular meaning in the present climate distinguished by the nationalist and populist pushback against multilateral co-operation and the withdrawal by some States from international rule-of-law institutions.¹²

The hypothesis underlying this study is that, as an intermediate link and buffer between States and ICTs, *injugovins* exercise the agency of their own. As such, they colour and transform the power individual States exert *vis-à-vis* courts as part of collective entities, with the possible effects of dispersing or concentrating, amplifying or softening that power. In testing this hypothesis, this exploration proceeds as follows. Firstly, the chapter outlines the relationship between judicial governance and power and highlights the added value of non-legal approaches to studying that relationship, thereby setting the methodological tone for the subsequent analysis (Section 12.2.). Secondly, with the benefit of historical, comparative, and socio-legal angles, the chapter examines governance schemes adopted for the tribunals both past and present, including the Nuremberg International Military Tribunal ('IMT'), the United Nations ('UN') *ad hoc* tribunals, the ICC, and the UN-assisted hybrid and special courts. Based on

and Tiina Intelmann, "The International Criminal Court Needs Fixing", in *Atlantic Council*, 24 April 2019 (available on its web site); see also Vasiliev, 2020, see above note 2.

¹¹ Most notably, Llewellyn, 2019, see above note 5.

¹² Erik Voeten, "Populism and Backlashes against International Courts", in *Perspectives on Politics*, 2019, p. 1; Mikael Rask Madsen, Pola Cebulak and Micha Wiebusch, "Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts", in *International Journal of Law in Context*, 2018, vol. 14, p. 197; Karen J. Alter, James T. Gathii and Laurence R. Helfer, "Backlash against International Courts in West, East and Southern Africa: Causes and Consequences", in *European Journal of International Law*, 2016, vol. 27, no. 2, p. 293.

this survey, the chapter offers a typology of main governance models ('direct', 'envelope', 'diplomatic', and 'managerial') – more the Weberian 'ideal types' (*die Gedankenbilder*) than descriptors purporting to capture every key aspect of the actual governance schemes. The chapter also provides a tentative account of the salient features and limitations of those models (Section 12.3.). Thereafter, it zeroes in on the workings and constraints of the diplomatic model as embodied in the governance arrangements adopted for the ICC and ponders whether its known defects could be partially remedied by means of importing elements of contiguous models (Section 12.4.).

12.2. International Judicial Governance as Power

12.2.1. Bringing *Injugovins* in the Picture

It may appear paradoxical that the role of States in shaping and enabling (as well as obstructing) international criminal justice has received greater attention in the political sciences and international relations literature than in international criminal law scholarship.¹³ Legal scholars have readily acknowledged ICTs' structural dependence on State co-operation for securing arrests, obtaining evidence, and ensuring enforcement of their decisions,¹⁴ which evokes Cassese's metaphor of "a giant without arms and

¹³ Gary J. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, Princeton University Press, Princeton, 2000; Pierre Hazan, *Justice in a Time of War: The True Story Behind the International Criminal Tribunal for the Former Yugoslavia*, Texas A & M University Press, College Station, Texas, 2004; Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation*, Cambridge University Press, Cambridge, 2008; Steven Roach, *Governance, Order, and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court*, Oxford University Press, Oxford, 2009; David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics*, Oxford University Press, Oxford, 2014. See also notable titles in the memoir genre: Carla del Ponte (with Chuck Sudetić), *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity*, Other Press, New York, 2009; David Scheffer, *All Missing Souls: A Personal History of the War Crimes Tribunals*, Princeton University Press, Princeton, 2013.

¹⁴ See, for example, Göran Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligations of States*, Intersentia, Antwerp, 2002; Jackson N. Maogoto, "A Giant Without Limbs: The International Criminal Court's State-Centric Cooperation Regime", in *The University of Queensland Law Journal*, 2004, vol. 23, p. 102; Nadia Banteka, "Mind the Gap: A Systematic Approach to the International Criminal Court's Arrest Warrants Enforcement Problem", in *Cornell International Law Journal*, 2017, vol. 49, no. 3, p. 521.

legs [...] need[ing] artificial limbs to walk and work”.¹⁵ But other than that, States are mostly consigned to obscurity and reduced to a mostly passive “unacknowledged presence”.¹⁶ All the while, the tribunals are routinely portrayed as self-directing engines for prosecuting and punishing international crimes, advancing the law and jurisprudence, and promoting the goals of international justice.

The side-lining of States as power-holders and the over-emphasising of courts’ own agency are the two sides of the same coin and may evince the discipline’s ingrained epistemic bias. The focus on legal standards and processes, combined with relative neglect of their broader context and impact, obscures the external constraints on ICTs’ autonomy and the fact that their own power remains significantly qualified by, and contingent upon, the political and institutional framework within which they pursue their mandates. Ultimately, these are States that collectively hold the reins over international criminal justice. Their power over ICTs is exerted not primarily by virtue of their ability to provide or withhold cooperation in specific cases, but even more significantly in a structural and subtle fashion through the performance of governance role in respect of those courts. Despite the deficit of legal and sociological knowledge about the institutional arrangements and processes States employ to those ends, governance is a crucial and permanent element in the power equation. *Injugovins* are the centrepieces of the power structure in international criminal justice and amount to a distinct form of state engagement with international justice institutions. Namely, they are the forums in which States, acting multilaterally in their governance roles, provide courts, as creatures of (international) institutional law, with various forms of direction and support. This is different from States’ individual (bilateral) relationships with ICTs whereby States find themselves on the receiving end of cooperation obligations owed to the courts as the arms of judicial power whilst the courts, in turn, depend on their compliance with such obligations for the adjudication of individual cases.

As institutional creatures, *injugovins* of ICTs may take a variety of legal-organisational forms. The governance arrangements in international

¹⁵ Antonio Cassese, “On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law”, in *European Journal of International Law*, 1998, vol. 9, p. 13.

¹⁶ Mirjan Damaška, “Unacknowledged Presences in International Criminal Justice”, in *Journal of International Criminal Justice*, 2012, vol. 10, no. 5, p. 1239.

criminal justice are contingent upon the manner of establishment of a respective court or tribunal by its parent States and/or international organisations. In particular, it may be indicative (yet, not over-determinative) of the legal-organisational form of the governing body whether a court or tribunal is set up as: (i) a self-standing international organisation; (ii) a subsidiary organ thereof; (iii) a part of an international (transitional) administration; or (iv) a national tribunal, or chambers within a domestic judicial system, possibly with an international component grafted into their structures. There is a nexus between the method chosen by parent States and/or international organisations for the establishment of the respective tribunal, on the one hand, and the adopted governance scheme, on the other. However, as already noted and will be explained below, there is no over-determination because similar arrangements may be adopted for courts holding different legal statuses and set up through different avenues. Moreover, the legal status – if any – of the *injugovin* does not directly inform or predefine that of the respective court or tribunal.

The *first* modality highlighted above is exemplified by the Special Court for Sierra Leone ('SCSL') and the Residual Court ('RSCSL'), the Special Tribunal for Lebanon ('STL'), and the ICC. Those courts were established, respectively, by: (a) the bilateral treaties between the relevant State and the United Nations (for the SCSL and the RSCSL),¹⁷ (b) a UN Security Council ('UNSC') resolution that brought into force the provisions of an agreement negotiated between the State and the UN (for the STL),¹⁸ and (c) a multilateral treaty between States (for the ICC).¹⁹ All of these courts were or are autonomous international organisations, even without having been labelled as such in the constituent agreements and

¹⁷ See Agreement between the United Nations and the Government of Sierra Leone, 16 January 2002, 2178 UNTS 13 ('SCSL Agreement') (<http://www.legal-tools.org/doc/797850/>); Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Residual Special Court for Sierra Leone, 11 August 2010, 2871 UNTS 333 (<http://www.legal-tools.org/doc/4768bc/>).

¹⁸ Resolution 1757 (2007), UN Doc. S/RES/1757 (2007), 30 May 2007, para. 1 (<http://www.legal-tools.org/doc/e1635d/>). Acting under Chapter VII of the UN Charter, the United Nations Security Council ('UNSC') decided to bring in force the provisions of the annexed Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, 29 January 2007 (Beirut) and 6 February 2007 (New York), 2461 UNTS 257 ('STL Agreement') (<https://www.legal-tools.org/doc/c8fb1a/>).

¹⁹ Rome Statute of the International Criminal Court, 17 July 1998 ('ICC Statute') (<http://www.legal-tools.org/doc/7b9af9/>).

statutes or the accompanying resolutions and reports.²⁰ The UN was involved in their establishment in some way: whether directly as a party to an agreement (the SCSL) or by bringing the provisions of an agreement into effect (the STL) or – what in legal terms is a minimal form of involvement – by triggering and facilitating treaty negotiation and adoption (as was the case with the ICC Statute).²¹ Nevertheless, each of the courts in question is (or was) institutionally and legally separate from the UN and endowed with its own legal personality, including the capacity to enter into agreements with other subjects of international law.²² Despite the courts' comparable legal-institutional forms, their respective governance schemes and the legal nature of their *injugovins* vary substantially. For instance, the ICC is governed by the ASP – a treaty body devoid of international legal personality, composed of States Parties to the Statute, and dedicated exclusively to the governance of the ICC. But the (R)SCSL and

²⁰ Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, para. 9 (<https://www.legal-tools.org/doc/4af5d2>) (referring to the SCSL as “a treaty-based sui generis court of mixed jurisdiction and composition”); Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon, UN Doc. S/2006/893, 15 November 2006, paras. 6–7 (<https://www.legal-tools.org/doc/0bf8d5>), (“a treaty-based organ, [...] neither a subsidiary organ of the United Nations, nor [...] a part of the Lebanese court system. [...] [A] tribunal of an international character”).

²¹ The UN General Assembly mandated bodies charged with laying the groundwork for the drafting, negotiation, and adoption of the Rome Statute: the *Ad Hoc* Committee in 1994 and the Preparatory Committee on the Establishment of an International Criminal Court (1996, 1997–1998). It also decided to hold the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court: see, for example, Establishment of an International Criminal Court, UN Doc. A/RES/51/207, 17 December 1996 (<https://www.legal-tools.org/doc/9b1999>) and Establishment of an International Criminal Court, UN Doc. A/RES/52/160, 15 December 1997 (<https://www.legal-tools.org/doc/e7481e/>). See further “Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court”, in *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June -1 7 July 1998. Official Records, Volume I: Final Documents*, United Nations, New York, 2002, pp. 67–69; Mahmoud Cherif Bassiouni, “The Making of the International Criminal Court”, in Mahmoud Cherif Bassiouni (ed.), *International Criminal Law, Volume III: International Enforcement, Third edition*, Martinus Nijhoff, Leiden, 2008, pp. 122–132.

²² ICC Statute, Articles 2, 4, see above note 19. See Headquarters Agreement between the International Criminal Court and the Host State, 1 March 2008, ICC-BD/04-01-08 (<http://www.legal-tools.org/doc/45e340/>); Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 4 October 2004 (<http://www.legal-tools.org/doc/9432c6/>).

the STL are administered by informal ‘management committees’ composed of major donor states.

By contrast, the UN *ad hoc* Tribunals for the former Yugoslavia and Rwanda (‘ICTY’ and ‘ICTR’) were established by the UNSC resolutions as subsidiary organs of the UNSC, thus representing the second modality mentioned above.²³ The Tribunals were embedded in their ‘parent’ organisation and possessed no legal personality of their own. The same holds for the Residual Mechanism for International Criminal Tribunals (‘MICT’) which continues the Tribunals’ functions.²⁴ Any agreements with the UN Member States made with an eye to enabling their operation, such as the headquarters agreements or the enforcement of sentence agreements, were concluded by and in the name of the legal person, the UN, acting through the respective Tribunal.²⁵ As a consequence of their legal-institutional character, the ICTY and the ICTR were (and the MICT is) placed under the administrative and financial responsibility of the UN, being governed jointly by the UN principal organs in accordance with the UN Charter-based division of functions between them.

²³ Resolution 827 (1993), UN Doc. S/RES/827 (1993), 25 May 1993 (<http://www.legal-tools.org/doc/dc079b/>); Resolution 955 (1994), UN Doc. S/RES/955 (1994), 8 November 1994 (<http://www.legal-tools.org/doc/f5ef47/>). See Charter of the United Nations and the International Court of Justice, 24 October 1945, Articles 29, 41 (‘UN Charter’) (<https://www.legal-tools.org/doc/6b3cd5/>); Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, para. 28 (‘UNSG Report on the ICTY Statute’) (<http://www.legal-tools.org/doc/c2640a/>) (“a subsidiary organ within the terms of Article 29 of the Charter, but one of a judicial nature”); Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1995), UN Doc. S/1995/134, 13 February 1995, para. 8 (‘UNSG Report on the ICTR Statute’) (<https://www.legal-tools.org/doc/b38d4d/>).

²⁴ Resolution 1966 (2010), UN Doc. S/RES/1966 (2010), 22 December 2010 (‘MICT Statute’) (<http://www.legal-tools.org/doc/e79460/>).

²⁵ See, for example, Agreement between the United Nations and the Kingdom of the Netherlands concerning the Headquarters of the International Residual Mechanism for Criminal Tribunals, 23 February 2015 (<https://legal-tools.org/doc/3v8fdr/>); Agreement between the United Nations and the Republic of Albania on the Enforcement of Sentences of the International Criminal Tribunal for the Former Yugoslavia, 19 September 2008 (<http://www.legal-tools.org/doc/469628/>); Agreement between the United Nations and the Government of the Republic of Benin on the Enforcement of Sentences Pronounced by the International Criminal Tribunals for Rwanda or the International Residual Mechanism for Criminal Tribunals, 12 May 2017 (<https://www.legal-tools.org/doc/0dda12/>).

In turn, the Extraordinary Chambers in the Courts of Cambodia ('ECCC')²⁶ and the Kosovo Specialist Chambers and Specialist Prosecutor's Office ('KSC' and 'SPO'),²⁷ constituted under the Cambodian and the Kosovan laws respectively, are two specimens of the third category highlighted above. Their legal character as national courts (that is, courts established under domestic as opposed to international law), endowed – unlike their parent States – with no international legal personality, is not changed by the fact that international organisations – respectively the UN and the European Union ('EU') – and individual member States have played an important role in establishing them and enabling their functioning by providing material and organisational support. In case of the ECCC, international support is provided through a technical assistance mission – the UN Assistance to the Khmer Rouge Trials ('UNAKRT') – which is embedded in the Court's structure and operates on the basis of the ECCC Agreement.²⁸ The responsibility for governing the ECCC is shared among the Cambodian authorities, the UN, and a management committee composed of major donor states and similar to the management committees of the SCSL and the STL. Somewhat differently, the EU Member States and Third (non-EU) Contributing States carry out critical governance functions *vis-à-vis* the KSC and the SPO, among others by providing competent personnel and funding through the EU Rule of Law Mission in Kosovo ('EULEX').²⁹ Thus, the EU and Contributing States share governance duties *vis-à-vis* the Kosovo specialist institutions.

²⁶ Cambodia, Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004, 27 October 2010 ('ECCC Law') (<http://www.legal-tools.org/doc/9b12f0/>); Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, 6 June 2003 ('ECCC Agreement') (<http://www.legal-tools.org/doc/3a33d3/>).

²⁷ Kosovo, Amendment of the Constitution of the Republic of Kosovo, Amendment no. 24, Law No. 05-D-139, 3 August 2015 (<https://legal-tools.org/doc/68hrzz>); Kosovo, Law No. 05/L-053 On Specialist Chambers and Specialist Prosecutor's Office, 3 March 2015 (<http://www.legal-tools.org/doc/8b71c3/>).

²⁸ See, for example, ECCC Agreement, Articles 1, 16–17, 28, see above note 26.

²⁹ Exchange of Letters, see, Law No. 04/L-274 On Ratification of the International Agreement between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo, 23 April 2014, annex, 14 April 2014 (<https://legal-tools.org/doc/9gl4si>). Other contributing states are Canada, Norway, Switzerland, Turkey, and the USA.

Finally, the Special Panels for Serious Crimes in East Timor ('SPSC') and the 'Regulation 64 Panels' in Kosovo exemplify the fourth approach mentioned above. The SPSC, which operated from 1999 to 2005 and dealt with the crimes committed in the course of withdrawal from East Timor by the former occupying power, Indonesia, were established by and as a part of the UN Transitional Administration ('UNTAET').³⁰ The latter was mandated by the UNSC acting under Chapter VII of the UN Charter, to "exercise all legislative and executive authority, including the administration of justice" on the country's path towards independence.³¹ Likewise, the 'Regulation 64 panels' operated under the authority of, and were embedded in, the UN Interim Administration in Kosovo ('UNMIK'), whose mandate had been instituted by the UNSC under Chapter VII.³² All aspects of governance of those courts were performed by the respective UN transitional administrations.

This overview gives a sufficient impression of the legal-institutional pluralism in the sphere of ICT governance. In serving States as vehicles for external judicial administration, *injugovins* wield authority over international criminal justice institutions. The effects that authority exerts upon the courts are difficult to over-estimate. *Injugovins* cannot but be major power-holders in international justice considering the gamut of prerogatives they exercise *vis-à-vis* 'their' courts. Their functions include, among others, the election and/or appointment of the courts' judges, chief prosecutors, and registrars; adoption and amendment of internal legislation and reforms of the courts' institutional structures; approving annual budgets and carrying out financial audit; performing management oversight; and ensuring the enforcement of court decisions and political backing of judicial and prosecutorial activities. The *injugovins*' commitment to the man-

³⁰ Regulation No. 2000/15 On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UN Doc. UNTAET/REG/2000/15, 6 June 2000 (<http://www.legal-tools.org/doc/c082f8/>).

³¹ UNTAET Regulation No. 1999/1 On the Authority of the Transitional Administration in East Timor, UN Doc. UNTAET/REG/2000/15, 27 November 1999 (<https://www.legal-tools.org/doc/934caa/pdf/>); Resolution 1272(1999), UN Doc. S/RES/1272 (1999), 25 October 1999 (<http://www.legal-tools.org/doc/b8ed17/>).

³² UNMIK Regulation No. 2000/64 On Assignment of International Judges/Prosecutors and/or Change of Venue, UN Doc. UNMIK/REG/2000/64, 15 December 2000 (<http://www.legal-tools.org/doc/2f3c56/>); UNMIK Regulation No. 1999/1 On the Authority of the Interim Administration in Kosovo, UN Doc. UNMIK/REG/1999/1, 25 July 1999 (<http://www.legal-tools.org/doc/a2567e/>); Resolution 1244 (1999), S/RES/1244 (1999), 10 June 1999 (<http://www.legal-tools.org/doc/12bfc3-1/>).

dates of courts under their patronage is an important precondition of the courts' success. Without this support system being available, the judicial work is easily derailed and the courts' missions become impossible. *Injugovins* may be underperforming whenever they derelict their duties and fail to intervene competently and in a timely manner, or even at all, in the resolution of matters within their responsibility – for example, by omitting to provide 'their' court with adequate legislation, funding, competent elected officials or other forms of support essential to their operations. On the other side of the spectrum are deliberate abuses of power by *injugovins* and micro-management of courts inconsistent with judicial and prosecutorial independence. Whether *injugovins* fall short of good-faith and competent governance due to negligence or backlash, such episodes will likely be detrimental to the judicial mandates. Many of the handicaps plaguing the ICTs are rooted in such under-performance. They are more appropriately framed as governance problems rather than court failures and should be put on the doorstep of *injugovins* rather than (solely) that of the courts.

Considering the *injugovins*' critical role and the escalating critiques of ICTs on account of – at times seemingly misattributed – failures, it is both imperative and urgent that *injugovins* start receiving their deserved share of critical scrutiny. What kind of epistemology ought such an examination to adopt in order to produce a richer and more fine-grained view of the power dynamics in the judicial governance context? Before taking a look at how power is channelled through the governance schemes of specific ICTs (Section 12.3.), it is useful to share the methodological intuitions which colour this inquiry. The next sub-section highlights some of the advantages of the socio-legal over the unadulterated legalist approach to studying power in the international judicial governance context. Even if developing it in full is not this chapter's task, the socio-legal approach has a lot to offer to the study of *injugovins* and therefore constitutes a seminal direction for future research.

12.2.2. Value of the Socio-Legal Approach

How the entwinement of power and international criminal justice is conceptualised and appraised is the function of a disciplinary outlook informing one's methodological standpoints and commitments. These are anything but equivalent for (positivist) lawyers and for other social sciences scholars. The members of the legal profession, academics included, tend

to look at power and justice predominantly through the legal-institutional lenses. The legalism-coloured worldview enforces a focus on formal rules and institutional shells which the power inhabits.³³ In making sense of the power dynamics, the natural lawyerly reflex is to reach for statutes, rules of procedure and evidence, and regulations, which by conferring rights and limiting prerogatives pretend to operate as determinants and predictors of actors' behaviour. Black-letter provisions and neat organograms are relied upon to gain an understanding of the setup in which power is claimed, utilised, and held to account. Whether this is about the division of labour between international and national jurisdictions, synergies and tensions between courts and other actors, or procedural operation, an undiluted legal enquiry is confined to the legal grounds for, and boundaries of, the power's exercise, with answers falling along the binary of legal/illegal.

However, prescription and description are different exercises. In predicting how actors may wield and respond to power, formalists tend to conflate 'is' with 'ought' and thus get it wrong more often than they may be willing to admit. The 'law on the books' is meant to order reality, but by no means does it paint an accurate account of it. The realities of power are an entanglement of multiple interrelated causes, transactions, contingencies, and context: a multivariate mess. Rather than helping capture this complexity, the legalist heuristics used to chart power relations and prognosticate outcomes of discretionary decision-making entrap one in an epistemic bubble. Legal rules, practice protocols, and institutional frameworks do not fully explain why those who hold power and are subject to it, choose to act and react in a certain way. This is not to say that the grass is greener on the other side of the disciplinary fence, as non-legal perspectives are not without their blind spots. Political scientists, international relations scholars, and sociologists neither have all the answers nor are immune to their own cognitive biases. An outright rejection of formalism might lead them to under-estimate the prescriptive value of the law and downplay the regulatory effects of legal standards and processes on the actors' behaviour and social reality.

The truth lurks somewhere in between: it is as misconceived to consider power relations to be fully scripted by the normative and institution-

³³ Providing a classic account, see Judith N. Shklar, *Legalism: Law, Morals, and Political Trials*, Harvard University Press, Cambridge, 1964.

al frameworks in which they are played out, as it is wrong to deny the determinative quality of rules and structures altogether. This underwrites the importance, yet again, of bridging the disciplinary divides and overcoming the compartmentalisation of knowledge and ‘ways of knowing’ in adjacent fields. Like in international law writ large, interdisciplinarity in international criminal law is not free from risks.³⁴ However, when used accountably, it helps enhance and refine the heuristics of power and increase their predictive capacity. The sociology of law can grapple with gaps and dissonances left in the portrayal of power relations by legal formalism as a result of its focus on the law’s content as opposed to context, and its normativity as opposed to its embeddedness in a community. The appeal of the socio-legal view lies in the more precise and empirically-grounded metrics it relies upon to gauge effectiveness, compliance, and impact. The availability of such metrics to probe those claims which the law’s teleological discourse takes for granted, may arguably advance an understanding of power relations more than any traditional-doctrinal take.³⁵

The sociological approach to international criminal law has recently gained in prominence, as the present volume may attest. Indeed, international criminal lawyers would be well-advised to abandon the solitary comfort of their native discipline and take advantage of non-legal expertise and methods in revisiting its foundational assumptions and truisms.³⁶ The influential sociological categories of ‘juridical field’ and ‘social practice’ have been applied by scholars as a way to make sense of the consolidation and evolution of international criminal law as a professional field

³⁴ Mark Klamberg, *Power and Law in International Society: International Relations as the Sociology of International Law*, Routledge Taylor & Francis Group, Abingdon, 2015; Michelle Burgis-Kasthala, “Introduction: How Should We Study International Criminal Law? Reflections on the Potentialities and Pitfalls of Interdisciplinary Scholarship”, in *International Criminal Law Review*, 2017, vol. 17, p. 227.

³⁵ Michael R. Madsen, “Sociological Approaches to International Courts”, in Cesare P.R. Romano, Karen J. Alter and Yuval Shany (eds.), *The Oxford Handbook of International Adjudication*, Oxford University Press, Oxford, 2013, pp. 388–411.

³⁶ Elies van Sliedregt, “International Criminal Law: Over-studied and Underachieving?”, in *Leiden Journal of International Law*, 2016, vol. 29, no. 1, p. 1; Sergey Vasiliev, “On Trajectories and Destinations of International Criminal Law Scholarship”, in *Leiden Journal of International Law*, 2015, vol. 28, no. 4, p. 701. This is not a one-way street: the focus on international criminal justice has also produced new forms of sociology and methodological innovation: Mikkel Jarle Christensen, “The Emerging Sociology of International Criminal Courts: Between Global Restructurings and Scientific Innovations”, in *Current Sociology Review*, 2015, vol. 63, no. 6, p. 825.

of practice.³⁷ Compared to the purely legal, political science or international relations scholarship, sociology offers a more granular view of the role elite groups and their members play in demarcating, expanding and holding the field together as well as in shaping its institutions and practices.³⁸ Its method allows tracing the individual career trajectories, motivations in promoting certain agendas, and influence exerted within and outside of the institutions. The socio-legal approach provides data for the more incisive, empirically-grounded critiques of norms, institutions, and practices.³⁹ It is also transformative in the sense that it entails recalibration of the terms of relevance and reframing of the research questions, hence pushing inquiry in new directions.⁴⁰

³⁷ See John Hagan and Ron Levi, “Crimes of War and the Force of Law”, in *Social Forces*, 2005, vol. 83, no. 4, p. 1499; Peter Dixon and Chris Tenove, “International Criminal Justice as a Transnational Field: Rules, Authority and Victims”, in *International Journal of Transitional Justice*, 2013, vol. 7, no. 3, p. 393; Ron Levi, John Hagan, and Sara Dezalay, “International Courts in Atypical Political Environments: The Interplay of Prosecutorial Strategy, Evidence, and Court Authority In International Criminal Law”, in *Law and Contemporary Problems*, 2016, vol. 79, p. 289; Kirsten Campbell, “The Making of International Criminal Justice: Towards a Sociology of the ‘Legal Field’”, in Mikkel Jarle Christensen and Ron Levi (eds.), *International Practices of Criminal Justice: Social and Legal Perspectives*, Routledge Taylor & Francis Group, Abingdon, 2017; Mikkel Jarle Christensen, “Preaching, Practicing and Publishing International Criminal Justice: Academic Expertise and the Development of an International Field of Law”, in *International Criminal Law Review*, 2017, vol. 17, p. 239; Frédéric Mégret, “International Criminal Justice as a Juridical Field”, in *Champ penal/Penal Field*, 2016, vol. XIII, p. 1.

³⁸ John Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal*, University of Chicago Press, 2003; Kirsten Campbell, “Reassembling International Justice: The Making of ‘the Social’ in International Criminal Law and Transitional Justice”, in *International Journal of Transitional Justice*, 2014, vol. 8, p. 53; Mikkel Jarle Christensen, “Crafting and Promoting International Crimes: A Controversy among Professionals of Core-Crimes and Anti-Corruption”, in *Leiden Journal of International Law*, 2017, vol. 30, no. 2, p. 501.

³⁹ For example, John Jackson and Yassin M’Boge, “The Effect of Legal Culture on the Development of International Evidentiary Practice: From the ‘Robing Room’ to the ‘Melting Pot’”, in *Leiden Journal of International Law*, 2013, vol. 26, no. 4, p. 947; Rosemary Byrne, “Drawing the Missing Map: What Socio-legal Research Can Offer to International Criminal Trial Practice”, in *Leiden Journal of International Law*, 2013, vol. 26, no. 4, p. 991.

⁴⁰ On this by-product of socio-legal research, see Sarah M.H. Nouwen, “‘As You Set out for Ithaka’: Practical, Epistemological, Ethical, and Existential Questions about Socio-Legal Empirical Research in Conflict”, in *Leiden Journal of International Law*, 2014, vol. 27, no. 1, p. 260.

The study of judicial governance arrangements in international criminal justice is no exception in this regard. Indeed, the topic could be a prime point for the application of interdisciplinary socio-legal methodology.⁴¹ Its promise is significant given the interplay between the multiple variables which inform power relations in judicial governance contexts. This approach can expose how political power in its macro-dimension translates into quotidian practices and techniques of power at the micro-level – to use a Foucauldian term, the ‘microphysics of power’.⁴² Take, for example, the complex institutional and social structures which comprise formal bureaucratised mechanisms as well as the more informal processes and interactions that are part of governance of the courts by external political and/or executive bodies. The relationships between the tribunals and their parent and oversight institutions cannot effectively be studied on the basis of legal frameworks alone. These only provide a limited, thin picture given the lack of detailed regulation and the fact that the authority of actors may be not formalised fully.⁴³ The socio-legal methodology is needed to analyse the confluence and mixed effects of the (limited) formal standards, customary practices, and precedents, as well as political checks and balances constraining governance relationships. The same goes for the role that States’ alliances and diplomatic networks, the calibre and expertise of individual participants, and trivial factors can play in part of the macro-design and strategic choices down to micro-level decisions. In highlighting the complexities of power in the judicial governance context, the following sections attempt to paint a thicker picture of the power structures through which international and hybrid criminal jurisdictions are governed. However, being but a tentative effort to enlist the advantages of the socio-legal approach, the chapter only taps into its epistemic potential without exploiting it the full.

⁴¹ For an ethnographic take on the ICC ASP meetings, see Marieke de Hoon and Kjersti Lohne, “‘All the World’s a Stage’: Constituting International Justice at the ICC’s Assembly of States Parties Meeting”, in Lianne J.M. Boer and Sofia Stolk (eds.), *Backstage Practices of Transnational Law*, Routledge Taylor & Francis Group, Abingdon, 2019, pp. 60-76.

⁴² Michel Foucault, *Discipline and Punish: The Birth of the Prison* (trans. by Alan Sheridan), Penguin, London, 1991, p. 26.

⁴³ Llewellyn, 2019, p. 24, see above note 5 (“Not all of the relationships are based in legal instruments, in particular, the authority of the management committees over the budgetary and other administrative aspects of the voluntarily funded tribunals is informal in nature, not based in legal rights and obligations”).

12.3. Governance Arrangements in International Criminal Justice: An Overview

The governance schemes in international criminal justice vary by court and, in spite of some recurrent elements and overlaps, are rather unique to each *injugovin*-tribunal pair. *Injugovins* come in different forms and sizes and there have been almost as many governance models as there have been types of ICTs. This variegation reflects not only the different configurations of power and interests at stake, but also the impact of situational factors which accompany the establishment and operations of courts. The following overview discusses the governance schemes adopted for the Nuremberg IMT, the UN *ad hoc* Tribunals, the ICC, and the UN-sponsored hybrid courts – following the chronology in which the governance schemes were devised by parent States and/or organisations. The purpose of this overview is, firstly, to give a sense of how exactly those governance arrangements are interposed between individual States and/or organisations and the courts; and, secondly, to identify and outline the principal governance models in the international criminal justice field. The account and denomination of models is tentative. It is not meant to exhaust past schemes, let alone anticipate choices which parent States and organisations might make in the future.

12.3.1. Nuremberg International Military Tribunal

The unique circumstances in which the IMT came into existence and the lack of precedent conditioned its idiosyncratic governance arrangements, which have not been replicated in any of the modern courts ever since. Yet one would be remiss to skip the IMT in this overview and discard it as mere historical curiosity. Over and above its significance as the first successful experiment of constructing a truly international criminal justice institution, the IMT occupies its own place on the spectrum of possible legal-institutional forms of international judicial governance. It is therefore instructive in terms of how power relations between the establishing States translate into the methods of external judicial administration that combine a thin and multitasking bureaucratic structure with direct governance by those States.

To start with, the Nuremberg Tribunal's governance scheme was not fully institutionalised; it was a partly informal and *ad hoc* affair among the parent States. Some of the essential functions – in particular the appointment of judges, their alternates, and chief prosecutors – were carried

out *directly* by each of the four Allied Powers. Each signatory of the London Agreement of 8 August 1945 establishing the IMT, appointed one member of the Tribunal and one alternate.⁴⁴ The Allied Powers could also replace their respective judges or alternates for reasons of health or for other good reasons, subject to the limitation that “no replacement may take place during a Trial, other than by alternate”.⁴⁵ Similarly, the signatories appointed one Chief Prosecutor each, who together formed the Committee for the Investigation and Prosecution of Major War Criminals. That Committee was accorded with operational autonomy and institutional functions beyond investigation and prosecution.⁴⁶

In all other matters, it was the Allied Control Council (‘ACC’) that served as the Nuremberg Tribunal’s *injugovin*. The ACC was established by the Allied Powers who conferred upon it the “supreme authority in matters affecting Germany as a whole”.⁴⁷ Since the ACC exercised a wide array of competences, it is explicable why its judicial governance role has received little attention. The IMT’s legal framework did not address the respective competences of the Control Council in a systematic fashion, although it does contain important cues. The IMT Agreement states that the IMT was to be established by the Allied Powers “after consultation with Control Council for Germany”,⁴⁸ self-evidently implying the practical side of this process rather than the principled decision to set up the IMT.

The IMT Charter sheds further light on the ACC’s judicial governance role. It stipulated that the Control Council for Germany was to designate a place at Berlin where the members of the Tribunal and the Chief

⁴⁴ Charter of the International Military Tribunal (Annexed to the London Agreement), 8 August 1945, Article 2 (‘IMT Charter’) (<https://www.legal-tools.org/doc/64ffdd>). Notably, International Military Tribunal (‘IMT’) Judges were considered literally as ‘Representatives’ of the Signatories: for example, IMT Charter, Article 4(b).

⁴⁵ *Ibid.*, Article 3.

⁴⁶ *Ibid.*, Article 14. For example, Article 14(e) authorized the Committee “to draw up and recommend to the Tribunal for its approval draft rules of procedure”. The rules of procedure were promulgated by the judges: see *ibid.*, Article 13 and IMT Rules of Procedure, 29 October 1945 (<https://legal-tools.org/doc/73787c>).

⁴⁷ “Control Council Proclamation No. 1 ‘Establishing Control Council’”, 30 August 1945, in *Enactments and Approved Papers of the Control Council and Coordinating Committee, Allied Control Authority, Germany, 1945, vol. I*, Legal Division, Office of Military Government for Germany, US, p. 44, Article II.

⁴⁸ London Agreement of August 8th 1945, 8 August 1945, Article 1 (<https://legal-tools.org/doc/844f64>).

Prosecutors were to convene for their first meeting.⁴⁹ The ACC was also granted a Charter-based authority in the matters of execution of sentences. The Charter stipulated that any stolen property which the Tribunal could alienate from convicted persons over and above the imposed punishment, was to be delivered to the ACC.⁵⁰ Sentences were to be carried out in accordance with its orders and it was authorised “at any time [to] reduce or otherwise alter the sentences” but “not increase severity thereof”.⁵¹ Upon the discovery of fresh evidence that could potentially serve as the basis of a new charge against a convicted and sentenced defendant, the Control Council was to report to the Committee of Chief Prosecutors, for appropriate action.⁵² The last provision in the Charter to mention the Council was Article 30 which made it clear that the budgetary side of the IMT’s operation was to be administered through the Council. It specified that the expenses of the IMT and the trial were to be “charged by the Signatories against the funds allotted for maintenance of the Control Council for Germany”.

The extant written records of the Control Council give some impression of how it went about the business of governing the IMT. Among others, the Council enacted directives and orders in respect of the following issues: (i) payment of defence counsel’s fees and costs in connection with the Nuremberg trial;⁵³ (ii) representation of political parties at the Tribunal;⁵⁴ (iii) sending of representatives of educational institutions to

⁴⁹ IMT Charter, Article 22, see above note 44.

⁵⁰ *Ibid.*, Article 28.

⁵¹ *Ibid.*, Article 29.

⁵² *Ibid.*, Article 30.

⁵³ “Payment of Defending Counsel’s fees and Costs in Connection with War Criminals’ Trial”, 18 March 1946, CORC/P(46)99 (DFIN/P(46)39 Revise), in *Enactments and Approved Papers of the Control Council and Coordinating Committee, Allied Control Authority, Germany, 1945, vol. III*, Legal Division, Office of Military Government for Germany, US, p. 21.

⁵⁴ “Representation of German Political Parties at Nuremberg”, Memorandum from the Political Directorate to the Coordinating Committee, Allied Control Authority”, 21 December 1945, CORC/P(45)205, in *Enactments and Approved Papers, vol. I*, in *Enactments and Approved Papers of the Control Council and Coordinating Committee, Allied Control Authority, Germany, 1945, vol. I*, Legal Division, Office of Military Government for Germany, US, p. 316 (responding positively to a communication from the leaders of the four political parties in Berlin that had requested representation at the Nuremberg trial and recommending that such representation be allowed and “be extended to the representatives of Democratic political parties which have been authorized in all four zones of occupation in Ger-

Nuremberg trials;⁵⁵ and (iv) holding of the official record of the IMT proceedings; admissibility and procedure in relation to petitions for clemency by persons condemned to death; and matters concerning the execution of sentences.⁵⁶ The latter aspect of the Council's work emerges as one of the central governance activities from its records. It issued detailed directions regarding the execution of death sentences, the service of sentences of imprisonment, and detention pending the execution of sentences, assigning the respective tasks to the quadripartite commission of military com-

many”, “[w]ith a view to associating the German Democratic political parties with the trial and to assist in bringing home to the German people the guilt of its former Nazi leaders”).

⁵⁵ “Dispatch of the Representatives of the Educational Committee of the City of Berlin to the Trials in Nuremberg”, 12 March 1946, CORC/P(46)81 (BK/ACC(46)15), in *Enactments and Approved Papers of the Control Council and Coordinating Committee, Allied Control Authority, Germany, 1945, vol. III*, Legal Division, Office of Military Government for Germany, US, p. 14 (inquiring whether the Allied Control Authority would agree in principle to the sending of educators to Nuremberg “to witness a part of the Nuremberg trials with a view to Anti-Nazi education”, as proposed by the Education Committee of the Allied Kommandatura of Berlin); “Sending of Representatives of Educational Institutions to the Nuremberg Trials (Note by Allied Secretariat)”, 8 April 1946, CORC/T(46)125, in *Enactments and Approved Papers of the Control Council and Coordinating Committee, Allied Control Authority, Germany, 1945, vol. III*, Legal Division, Office of Military Government for Germany, US, p. 78 (reporting the Internal Affairs and Communications Directorate’s decision “to request the Coordinating Committee to approve the sending of two representative of educational institutions per week from each zone of occupation to the Nuremberg trials”).

⁵⁶ “Control Council Directive No. 35, Sentences of the International Military Tribunal”, 7 September, 1946, CORC/P(46)284-Final, in *Enactments and Approved Papers of the Control Council and Coordinating Committee, Allied Control Authority, Germany, 1945, vol. IV*, Legal Division, Office of Military Government for Germany, US, pp. 89–90, paras. 2–5 (among others, holding that, to be receivable, petitions for clemency filed by persons condemned to death were to be addressed to the Control Council and lodged with the IMT Secretariat within four days from the date of the sentence). See also, “Report by the Coordinating Committee on Matters of Procedure in Connection with the Consideration of the Sentences of the International Military Tribunal by the Control Council and the Execution of the Condemned Men, Note by the Allied Secretariat”, CONL/P(46)65, *Enactments and Approved Papers of the Control Council and Coordinating Committee, Allied Control Authority, Germany, 1945, vol. IV*, Legal Division, Office of Military Government for Germany, US, pp. 107–108; “Report of the Quadripartite Commission for the Execution of the Major War Criminals, Coordinating Committee Minutes (Meeting of 29 October 1946)”, 31 October 1946, CORC/M(46)57, in *Enactments and Approved Papers of the Control Council and Coordinating Committee, Allied Control Authority, Germany, 1945, vol. V*, Legal Division, Office of Military Government for Germany, US, p. 97.

manders appointed by each Zone commander and the Allied *Kommandatura* of Berlin.⁵⁷

Within the Control Council, there was not one single body solely responsible for the IMT governance. While the decision-making on issues of principle was concentrated in its Coordinating Committee, technical matters were distributed for consideration and handling among the Council's competent directorates in charge of specific areas (the Legal Directorate, the Finance Directorate, and the Internal Affairs and Communications Directorate). The Legal Directorate was charged with "developing measures and procedures, and recommending them for Control Council action" with regard to the Council's functions pursuant to the London Agreement of 8 August 1945 and with "[a]cting for the Control Council as directed by it in the execution of such measures and procedures approved by the Control Council".⁵⁸ More specifically, the Allied Control Authority instructed the Legal Directorate that it shall hold at its disposal the record of all proceedings upon the delivery of the sentences, and that it could be delegated a study of the petitions for clemency, along with the Indictments, Judgment, and the relevant parts of the trial record and evidence.⁵⁹

The Directorate of Finance was tasked with the financial administration of the IMT, including the payment of defence counsel fees. In November 1945, the issue arose as to the manner in which such fees and costs were to be met. The Charter did not provide express guidance in this respect. No budget to cover the costs of the Tribunal and defence counsel had been allocated and the Council had not previously agreed that compensation for counsel fees or costs were to be paid.⁶⁰ The somewhat improvised arrangement that was ultimately adopted by the Coordinating

⁵⁷ Control Council Directive No. 35, Sentences of the International Military Tribunal, paras. 3–5, see above note 56.

⁵⁸ "Control Council Directive No. 9, Developing Measures and Procedures Regarding Major War Criminals of European Axis", 30 August 1945, in *Enactments and Approved Papers of the Control Council and Coordinating Committee, Allied Control Authority, Germany, 1945, vol. I*, Legal Division, Office of Military Government for Germany, US, p. 45.

⁵⁹ Control Council Directive No. 35, Sentences of the International Military Tribunal, paras. 1–2, see above note 56.

⁶⁰ Payment of Defending Counsel's Fees and Costs in Connection with War Criminals' Trial, paras. 1–2, see above note 53.

Committee tracked the proposal by the US member of the Directorate.⁶¹ The Americans were authorised by the French, British, and the Soviets to initiate advances by the *Reichsbank* at Nuremberg to a designated IMT representative who controlled or authorised the disbursement of the funds for the purpose of paying the respective costs. The advances would then be separately accounted for and repaid, total costs shared by the Zones “in any manner approved by the Council”, and advances repaid “in any manner deemed appropriate by each Zone”.⁶² Furthermore, the Finance Directorate carried out those parts of the sentences which provided for the payment of fines by the defendants, confiscation of their property, and for the disposal of such fines or confiscated property as well as for the delivery to the Council of any stolen property in the possession or control of any of the defendants of which by order the IMT he was deprived.⁶³

All in all, the Control Council’s institutional veil was remarkably thin, so much so that it is debatable whether it really was more than a sum of the four powers constituting it. It transpires from the records that the Allied Powers’ presence in the wings of the judicial operation was keenly felt at all times. The States’ participation in IMT governance affairs was mediated by the ACC to a degree, but it did not remove the need for direct intervention altogether. By modern standards, the Council operated a rather unsophisticated, if not primitive, bureaucratic structure whose organs played by the ear and devised *ad hoc* solutions to problems as those arose. Unequivocally its members represented and were appointed by the Allied Powers, as opposed to being elected or at least appointed jointly by them. The Council liaised with the IMT Secretariat and counsel for the prosecution and defence, as appropriate, through its Directorates and the Allied Secretariat, but it is difficult to appreciate to what extent such communications were regular and transparent. Finally, the ACC-IMT pair operated

⁶¹ *Ibid.*, paras. 3–4 (adding a minor revision making the scheme proposed for the defence counsel’s fees and costs applicable to “costs of Tribunal and of the present trial” as a whole. Cf. ‘Proposal for the payment of defending counsel’s fees and costs in connection with war criminals’ trials’, Coordinating Committee, Financial Directorate, 22 November 1945, CORC/P(45)158, paras. 3–4, in *Enactments and Approved Papers of the Control Council and Coordinating Committee, Allied Control Authority, Germany, 1945, vol. I*, Legal Division, Office of Military Government for Germany, US, p. 203.

⁶² ‘Payment of Defending Counsel’s fees and Costs in Connection with War Criminals’ Trial’, paras. 3–4, see above note 53.

⁶³ Control Council Directive No. 35, Sentences of the International Military Tribunal, para. 6, see above note 56.

on the notion of institutional (judicial) independence which with hindsight can be regarded as embryonic. The formal division of competences, judicial and administrative, between the IMT organs and the Council was not very distinct. Interference by the Council in the matters that would normally be considered as purely judicial, was not ruled out completely, although only further archival research could establish whether such risk materialised.⁶⁴

12.3.2. UN *Ad Hoc* Tribunals

Fast forward to the early 1990s, the ICTY and the ICTR were established by the UNSC as enforcement measures under Chapter VII of the UN Charter.⁶⁵ Being the Council's 'subsidiary organs of *judicial* nature', the tribunals were to be allowed to perform their judicial functions independently of political considerations. Although not being subject to the authority or control of their parent organ (or any individual States or a group of States, for that matter) with regard to the performance of such functions, their lifespan still remained defined by their nature as Chapter VII creations and hence subordinate to the Council's mandate and decisions relating to the restoration and maintenance of peace in the respective regions.⁶⁶

As a part of the UN system, the tribunals were fully embedded, or enveloped, in their parent international organisation. Accordingly, like the IMT, they did not have an *injugovin* exclusively dedicated to servicing them. Rather, for all governance matters, they fully depended on the UN principal organs, which took care of the non-judicial sides of their operations such as human resources (including judicial elections and appointment of the prosecutor), administrative oversight, budgeting, and financial

⁶⁴ See, for example, Control Council Directive No. 35, Sentences of the International Military Tribunal, para. 7, see above note 56 ("In case the sentence of the Tribunal is in disagreement with any provisions of this Directive, the sentence shall prevail, *unless otherwise directed by the Control Council*").

⁶⁵ The International Residual Mechanism for Criminal Tribunals ('MICT') fully replaced the International Criminal Tribunal for Rwanda ('ICTR') and International Criminal Tribunal for the Former Yugoslavia ('ICTY') following their closure on 31 December 2015 and 31 December 2018 respectively. The status of MICT and implications of its embedment in the UN system for the governance scheme are the same as for the *ad hoc* tribunals. Hence 'Tribunals' in this section refers to all three courts.

⁶⁶ UNSG Report on the ICTY Statute, para. 28, see above note 23; UNSG Report on the ICTR Statute, para. 8, see above note 23.

audit.⁶⁷ The governance responsibilities were distributed among the Council, the General Assembly, and the Secretariat in line with their Charter-based competences. They were performed in accordance with the Tribunals' legal frameworks and established practices in the UN system. This does not mean, however, that upon their establishment, the Tribunals found themselves embedded in pre-existing and smoothly running governance processes. Instead, the scope and practice of oversight were developed gradually by means of adjustment to perceived needs and challenges of the courts.⁶⁸

The General Assembly was tasked with the election of permanent and *ad litem* judges from the lists submitted by the UNSC.⁶⁹ In that process, the Secretary-General ('UNSG') played a facilitative role: inviting nominations from UN Member States and non-Member States maintaining permanent observer missions at the UN headquarters and by forwarding the lists of candidates to the Security Council. Besides, the UNSG was authorised to appoint the candidates meeting the relevant qualifications to the judicial posts: in case of a vacancy amongst the permanent judges in the Chambers, the Secretary-General could appoint a judge upon consultation with the UNSC and UNGA Presidents while the appointment of an *ad litem* judge could be carried out upon a request from the President of a Tribunal.⁷⁰ Over and above those administrative functions, the Secretary-General nominated the Prosecutor for appointment by the Security Council and appointed the staff of the Office of the Prosecutor ('OTP') upon

⁶⁷ UNSG Report on the ICTR Statute, para. 8, see above note 23 (ICTR "is dependent in administrative and financial matters on various United Nations organs; as a judicial body, however, it is independent of any one particular State or group of States, including its parent body, the Security Council").

⁶⁸ See also Llewellyn, 2019, pp. 10–11, see above note 5 ("the UN criminal tribunals were not born into settled constitutional arrangements. [...] The legal, political and financial processes through which [...] oversight relations are conducted were not pre-existing. The basic apparatus of oversight was put in place at the time of the tribunals' establishment, but the detail of the processes and the content of oversight developed through subsequent practice").

⁶⁹ Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, 7 July 2009, Articles 13*bis*(1) and 13*ter*(1) ('ICTY Statute') (<https://www.legal-tools.org/doc/b4f63b/>); Statute of the International Criminal Tribunal for Rwanda, 16 December 2009, Articles 12*bis*(1), 12*ter*(1) ('ICTR Statute') (<https://www.legal-tools.org/doc/8732d6/>); MICT Statute, Article 10(1), see above note 24.

⁷⁰ ICTY Statute, Articles 13*bis*(2) and 13*ter*(2), see above note 69; ICTR Statute, Articles 12*bis*(2) and 12*ter*(2), see above note 69; MICT Statute, Article 10(2), see above note 24.

the Prosecutor's recommendation.⁷¹ At the MICT, the Secretary-General also appoints a full-time President from among the judges, in consultation with the UNSC President and the judges.⁷²

The Security Council exercised the role of a primary legislator, except for the Rules of Procedure and Evidence ('RPE') and subordinate sources (for example, practice directives), the task of adopting and amending which was reserved for the judges as a way to safeguard their independence from the political body.⁷³ Other than that, the UNSC adopted and continuously amended the Tribunals' Statutes and regularly enacted resolutions which introduced institutional reforms for the optimisation of the Tribunals' functioning and responded to case-specific needs – for example, establishing additional chambers and increasing a number of judges,⁷⁴ or extending their term of service to complete pending cases.⁷⁵ A plethora of issues related to the Tribunals' functioning were considered first within the UNSC's Informal Working Group of the International Tribunals (established in 2000), which was composed of legal officers of the 15 UNSC members.⁷⁶ Overall, the Council took the necessary legislative and institutional measures without fail. Its track record as an enforcer was arguably less impressive considering that the Tribunals' requests to tackle

⁷¹ ICTY Statute, Articles 16(4) and (5), see above note 69; ICTR Statute, Articles 15(4) and (5), see above note 69; MICT Statute, Articles 14(4) and (5), see above note 24.

⁷² MICT Statute, Article 11(1), see above note 24. At the *ad hoc* tribunals, the Presidents were elected by the permanent judges from amongst their number: cf. ICTY Statute, Article 14(1), see above note 69 and ICTR Statute, Article 13(1), see above note 69.

⁷³ ICTY Statute, Article 15, see above note 69; ICTR Statute, Article 14, see above note 69; MICT Statute, Article 13(1), see above note 24. At the MICT, the Rule of Procedure and Evidence and any amendments thereto take effect upon adoption by the judges *unless the UNSC decides otherwise*: cf. MICT Statute, Article 13(4), see above note 24.

⁷⁴ For example, Resolution 1166 (1998), UN Doc. S/RES/1166 (1998), 13 May 1998 (<https://www.legal-tools.org/doc/96205a>); Resolution 1329 (2000), UN Doc. S/RES/1329 (2000), 30 November 2000 (<https://www.legal-tools.org/doc/b1b6cc>).

⁷⁵ For example, UNSC Resolution 1837 (2008), UN Doc. S/RES/1837 (2008), 29 September 2008 (<https://www.legal-tools.org/doc/84c4b4>); Resolution 1877 (2009), UN Doc. S/RES/1877 (2009), 7 July 2009 (<https://www.legal-tools.org/doc/4b06b3>); Resolution 1931 (2010), UN Doc. S/RES/1931 (2010), 29 June 2010 (<https://www.legal-tools.org/doc/e13348/>); Resolution 1993 (2011), UN Doc. S/RES/1993 (2011), 29 June 2011 (<https://www.legal-tools.org/doc/8b3377/>); Resolution 2329 (2016), UN Doc. S/RES/2329 (2016), 19 December 2016 (<http://www.legal-tools.org/doc/b1bc1c/>).

⁷⁶ Llewellyn, 2019, pp. 74, 149, see above note 5 (the Informal Working Group was not established as a subsidiary UNSC organ but rather an informal meeting of legal counsel who could meet as frequently as necessary to discuss current issues).

non-co-operation by regional states were often met with silence. Another major governance gap in this scheme was that the Tribunals and their principals were essentially left to their own devices in finding States prepared to receive persons who had been acquitted by the Tribunals or who had served their sentence but could not go back to their home countries.⁷⁷

Already in early 2000, the need for the Tribunals to complete their mandates within a foreseeable timeframe emerged as the most pressing concern. This concern was propelled by the increasing donor fatigue on the part of the UN Member States who were worried by the steady growth of the courts' annual budgets at the rate exceeding the progress made completing their case docket.⁷⁸ The Completion Strategy, which was initiated by the ICTY judges in consultation with all of its organs and introduced to the Council by ICTY President Claude Jorda in 2000,⁷⁹ became a recurrent item in the UNSC's tribunal agenda. In the following years, the Council took a number of proactive measures to enable and prod the Tribunals to implement the Strategy as effectively as possible. For that purpose, it introduced the institute of *ad litem* judges at the ICTY (2000) and the ICTR (2002).⁸⁰ In 2003, it became apparent that the initial projected time of completing all first-instance trials in 2007 was unrealistic. Then the UNSC prescribed 'deadlines' (or target years) by which the Tribunals were to wrap up all the investigations (by the end of 2004), trials (by the

⁷⁷ On the plight of persons acquitted by the ICTR or those who had served their sentence but could not return back to Rwanda out of fear for their safety, see Barbora Holá and Joris van Wijk, "Acquittals in International Criminal Justice – Pyrrhic Victories?," in *Leiden Journal of International Law*, 2017, vol. 30, no. 1, pp. 241–262.

⁷⁸ Tortora, 2013, p. 94, see above note 7.

⁷⁹ Current State of the International Tribunal for the former Yugoslavia – Future Prospects and Reform Proposals: Report on the Operation of the International Tribunal for the former Yugoslavia, Submitted by Judge Claude Jorda, President, on Behalf of the Judges of the Tribunal, in Identical Letters Dated 7 September 2000 from the Secretary-General Addressed to the President of the General Assembly and the President of the Security Council, Annex I, UN Doc. A/55/382-S/2000/865, 12 May 2000 (<https://legal-tools.org/doc/f2nvb3>).

⁸⁰ Resolution 1329 (2000), 2000, see above note 74; UNSC Resolution 1431 (2002), UN Doc. S/RES/1431 (2002), 14 August 2002 (<https://www.legal-tools.org/doc/a5a8cd>). See also Resolution 1481 (2003), UN Doc. S/RES/1481 (2003), 19 May 2003 (<https://www.legal-tools.org/doc/8a17e4>) (enhancing the *ad litem* judges' powers) and Resolution 1597 (2005), UN Doc. S/RES/1597 (2005), 20 April 2005 (<https://www.legal-tools.org/doc/2ad5a0>) (making them eligible for re-election).

end of 2008), and all work (2010).⁸¹ Over and above the regular obligation on the Tribunals' Presidents to submit an annual report (on unspecified matters) to the Council and the Assembly,⁸² since 2003 the Presidents and Prosecutors have been placed under an additional duty to provide the Council with updates and assessments of the progress made in the implementation of the Strategy every six months and appear in person before the Council to that end.⁸³

The Completion Strategy proved to be quite controversial, as some aspects of its implementation were deemed to encroach upon judicial and prosecutorial independence. The question is whether this was indeed so and whether, by concerning itself with the progress of the Tribunals' work, the Council may have overstepped the boundaries of an appropriate intervention by an *injugovin* in judicial matters proper. Keeping in mind that the Tribunals were never meant to be permanent and their lifespan was intrinsically linked to the UNSC's mandate under Chapter VII, the Council was arguably within its power, as their parent organ, to set general temporal limits on prosecutorial and judicial activities and take measures to avoid further prolongation of the Tribunals' mandates.⁸⁴ It can be noted, albeit with the benefit of hindsight, that the 'deadline' for the completion of all work was not a hard one, and the tribunals did receive extensions accommodating new developments such as the arrest of fugitives.⁸⁵ Moreover, the UNSC did not interfere directly in the conduct of proceedings and disposition of individual cases. Rather than the Council's measures as such, it was the implementation of the Strategy internally and its translation by the judges into rule amendments and practice adjust-

⁸¹ Resolution 1503 (2003), UN Doc. S/RES/1503 (2003), 28 August 2003 (<https://www.legal-tools.org/doc/05a7de/>); Resolution 1534 (2004), UN Doc. S/RES/1534 (2004), 26 March 2004 (<https://www.legal-tools.org/doc/4e06ee>).

⁸² ICTY Statute, Article 34, see above note 69; ICTR Statute, Article 32, see above note 69. See also MICT Statute, Article 32(1), see above note 24.

⁸³ See also MICT Statute, Article 32(2), see above note 24.

⁸⁴ For instance, the UNSC requested the tribunals to ensure that new indictments only focus on the most senior leaders suspected of being most responsible for the crimes): Resolution 1503 (2003), 2003, see above note 81; Resolution 1534 (2004), 2004, see above note 81.

⁸⁵ Resolution 1966 (2010), 2010, para. 3, see above note 24 (extending the tribunals to complete their mandates by the end of 2014); Resolution 2329 (2016), 2016, see above note 75. In a similar vein, see Llewellyn, 2019, p. 247 ("the strongest overall confirmation that the completion strategies have not entered directly into judicial consideration or significantly impacted the judicial timeline is the fact that none of the UN criminal tribunals has yet come close to completing all work by the originally determined completion date.").

ments aimed at expedition, that were met with most strident criticism.⁸⁶ Some of the judges and prosecutors resisted this new drive for expedition. They felt that the principles of fair trial, the demands of justice, and prosecutorial independence, were compromised in the interest of meeting the Strategy objectives.⁸⁷ The faulted measures, in particular the increased admission of written evidence and novel judicial powers to invite or direct the Prosecutor to cull charges to only include counts relating to crime sites or incidents deemed ‘most representative’,⁸⁸ were not directly ordered by the Council. But they did stem from the pressures exerted on the Tribunals to finalise their work and progress as swiftly as possible to closure. The question of whether the *injugovin* unduly interfered in judicial matters can only be answered positively if one regards said measures to have indeed compromised a fair trial or the principle of judicial or prosecutorial independence.

On the financial side of things, the Tribunals’ expenses were borne by all UN members as part of the UN assessed contributions, that is, mandatory financial contributions in accordance with Article 17 of the UN Charter.⁸⁹ While as per their Statutes the Tribunals were meant to be funded from the *regular* budget of the UN, in fact their operations had to be financed from a separate account outside of the regular budget as the establishing resolutions had been seen to impinge upon the budgetary pre-

⁸⁶ For discussion, see Llewellyn, 2019, pp. 238–239, see above note 5 (stating that there is “no direct evidence in the decisions of the *ad hoc* tribunals that the judges have taken account of the completion strategies in their deliberations. What is indisputable, however, is that the completion strategies had a major impact on all aspects of the management of the *ad hoc* tribunals, and their dialogue with the parent and oversight bodies.”).

⁸⁷ Letter dated 15 November 2006 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, UN Doc. S/2006/898, 16 November 2006, Annex II (Assessment of Carla del Ponte, Prosecutor), para. 17 (<https://www.legal-tools.org/doc/f6cde2/>) and Statement by Tribunal’s Prosecutor Carla Del Ponte to the Security Council, 7 June 2006 (<https://legal-tools.org/doc/knup1t>); ICTY, *Prosecutor v. Milošević*, Appeals Chamber, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statement (Majority Decision given 30 September 2003), 23 October 2003, IT-02-54-AR73.4, paras. 20–22 (<https://www.legal-tools.org/doc/41554b/>).

⁸⁸ Rules of Procedure and Evidence, 8 July 2015, Rules 73bis(D)–(E) (<https://www.legal-tools.org/doc/30df50>).

⁸⁹ ICTY Statute, Article 32 see above note 69; ICTR Statute, Article 31, see above note 69; MICT Statute, Article 13(1), see above note 24.

rogative of the UNGA.⁹⁰ Being subject to the UN budgetary process meant the Tribunals' financial accountability towards the General Assembly,⁹¹ acting through its Fifth Committee (Administrative and Budgetary Committee), as well as the Advisory Committee on the Administrative and Budgetary Questions ('ACABQ').⁹² The Fifth Committee prepared the Tribunals' annual budgets, to be approved by the Assembly. Besides, the Tribunals received voluntary contributions from States and organisations, including cash donations, in-kind contributions, and personnel seconded by States. The ICTY's annual budget grew from USD 10 million in 1994 to USD 180 million in 2014–15 and the ICTR's budget grew from USD 35 million in 1996 to USD 94.8 million in 2014–15.⁹³ The method of funding courts through the UN assessed contributions secured them a financially stable and comfortable existence. Their principals were spared from budgetary preoccupations and the need to continuously raise funds to ensure the institutions' sustainability.⁹⁴ On the downside though, the UN Member States' concern about the high (and ever-increasing) cost of justice and their impatience with what they perceived as the Tribunals' glacial progress and accountability deficits, led the UN to turn to other – more precarious – funding schemes in subsequent hybrid tribunals.⁹⁵

In terms of the budgetary oversight and audit, the Tribunals were subject to the authority of the Office of Internal Oversight Services and its Internal Audit Division under the UN Secretary-General. Early into their lifetime, the Office identified serious inefficiencies in the Tribunals' man-

⁹⁰ See Henry G. Schermers and Niels Blokker, *International Institutional Law*, 6th rev. ed., Brill/Nijhoff, Leiden, 2018, p. 735.

⁹¹ The Fifth Committee is one of the six Main Committees of the United Nations General Assembly ('UNGA'): Rules of Procedure of the General Assembly, Rule 98(e) (<https://legal-tools.org/doc/nb3c1y>). On the ACABQ, see *ibid.*, Rules 155–157.

⁹² Tortora, 2013, p. 94, see above note 7.

⁹³ *Ibid.*; Osvaldo Zavala, "The Budgetary Efficiency of the International Criminal Court", *International Criminal Law Review*, 2018, vol. 18, no. 3, fn. 6, pp. 463–464.

⁹⁴ Tortora, 2013, p. 94, see above note 7. However, on the dire consequences of the freeze on new recruitment in 2004, see Letter dated 23 November 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, UN Doc. S/2004/897, 23 November 2004, Annex II, para. 15 (<https://www.legal-tools.org/doc/04442c/>).

⁹⁵ See Section 12.3.4. below.

agement, organisation, and use of resources,⁹⁶ and an apparent lack of coherent planning later on when the Completion Strategy was in full swing.⁹⁷ In addition, the General Assembly occasionally used special arrangements for the review of the administrative performance and procedural efficiency of the Tribunals. In 1999, upon receiving the report of the ACABQ and based on the Fifth Committee's recommendation, the Assembly requested the Secretary-General to appoint an independent expert group to review the effectiveness of the operation and functioning of the Tribunals.⁹⁸ This led to a study on the topic produced by a group of experts in November 1999.⁹⁹ The report contained a list of 46 recommendations which were taken on board by the Tribunals.¹⁰⁰

Two immediate observations can be made at this juncture. First, even though the Tribunals were from the outset nested in the pre-existing UN institutional framework, their novel features and unique needs as subsidiary organs of *judicial* nature required the Organisation to continuously devise and implement tailored solutions complementing the regular UN processes or bringing the UN criminal justice matters under the same. Such adjustment was reactive rather proactive and took time; institutional lessons had to be learnt and good practices developed. Secondly, the arrangement whereby governance functions are distributed among the prin-

⁹⁶ Financing of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for Genocide and other such violations committed in the Territory of Neighbouring States between 1 January and 31 December 1994, Report of the Secretary-General on the Activities of the Office of Internal Oversight Services, Note by the Secretary-General, UN Doc. A/51/789, 6 February 1997, p. 2 (<https://legal-tools.org/doc/59dqh2>).

⁹⁷ Report of the Office of Internal Oversight Services, Note by the Secretary-General, UN Doc. A/59/359, 27 October 2004, para. 93 (<https://legal-tools.org/doc/eelo9r>).

⁹⁸ Revised budget estimates for 1998 and proposed requirements for 1999 of the International Tribunal for the Former Yugoslavia, Report of the Advisory Committee on Administrative and Budgetary Questions, UN Doc. A/53/651, 9 November 1998 (<https://legal-tools.org/doc/girpn7>).

⁹⁹ Report of an Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, UN Doc. A/54/634, 22 November 1999 (<https://legal-tools.org/doc/dahly4>).

¹⁰⁰ Comprehensive report on the results of the implementation of the recommendations of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, UN Doc. A/56/853, 4 March 2002 (<https://legal-tools.org/doc/n7cpor>).

cial UN organs entails a fragmented approach to governance, which may incur inefficiency risks. That said, the division of labour and governance responsibilities, such as those of legislative and budgetary character, also precludes the concentration of total power in a single body and may diminish risks of encroachment upon judicial independence.

12.3.3. International Criminal Court

12.3.3.1. Status and Competences

The ICC's *injugovin*, the ASP, is the representative body composed of all States Parties to the Rome Statute and dedicated exclusively to exercising governance functions (management oversight, legislative, budgetary, and so on) *vis-à-vis* the ICC.¹⁰¹ Established under the Statute alongside the Court, the ASP is institutionally separate from it. The ASP and the Court are neither the organs of a single international organisation nor in a relation of hierarchy *inter se*.¹⁰² Instead, both are the institutions of 'the Rome Statute system' established by the Statute outside of the UN system. Whilst the Statute endows the Court with legal personality and "such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes",¹⁰³ it only defines the ASP's role in functional terms, leaving the question of its legal status unaddressed.¹⁰⁴ Unlike the Court itself, the ASP is no international organisation but a 'treaty body' devoid of legal personality or capacity to enter into agreements with other subjects of international law.¹⁰⁵ This is the reason why, for instance, the immunities and privileges of the members of the ASP's Bureau and subsidiary bodies had to be provided for in the Headquarters Agreement between the host State and the ICC (rather than the ASP itself).¹⁰⁶

The ASP's constitutional duties in the Rome Statute system include the election of the ICC judges, the Prosecutor, and the Deputy Prosecu-

¹⁰¹ ICC Statute, Articles 112(1) and (6), see above note 19.

¹⁰² Blokker, 2018, p. 29, see above note 4.

¹⁰³ ICC Statute, Article 4(1), see above note 19.

¹⁰⁴ O'Donohue, 2015, p. 105, see above note 9.

¹⁰⁵ Cf. O'Donohue, 2015, pp. 105, 106, see above note 9 ('inter-governmental organisation'). While the ASP is inter-governmental by composition, it is not an intergovernmental/international organisation proper.

¹⁰⁶ Blokker, 2018, p. 29, footnote 12, see above note 4. See Headquarters Agreement between the International Criminal Court and the Host State, Article 23, see above note 22.

tor;¹⁰⁷ recommending the plenary session candidates for the Registrar's post from the list established by the President;¹⁰⁸ deciding whether to alter the number of judges;¹⁰⁹ the amendments to the Statute;¹¹⁰ and the adoption and amendment of the RPE and other legal instruments.¹¹¹ With regard to the legislative function, the States intended to retain control over procedural law-making and, therefore, envisaged that the ASP and not the judiciary, would act as the primary procedural legislator. Unlike their counterparts in the *ad hoc* Tribunals, the ICC judges may only adopt provisional Rules in urgent cases to be applied until the ASP acts on them.¹¹² ICC judges may also pass Regulations for the routine functioning of the Court to which States retain the prerogative to object, leading to their invalidation.¹¹³ The ASP's other essential governance functions are to provide "management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court";¹¹⁴ consider the reports and activities of the Bureau;¹¹⁵ consider and decide the budget;¹¹⁶ consider any question relating to non-co-operation;¹¹⁷ and any other func-

¹⁰⁷ ICC Statute, Articles 36(2)(c)(i), (6)(a), Article 42(4), see above note 19.

¹⁰⁸ ICC, Rules of Procedure and Evidence, 10 February 2016, Rules 12(1)–(2) (<https://www.legal-tools.org/doc/e1b3f5/>).

¹⁰⁹ ICC Statute, Article 36(2)(b) and Article 112(2)(e), see above note 19.

¹¹⁰ *Ibid.*, Article 112.

¹¹¹ *Ibid.*, Articles 51(2)–(3); ICC RPE, Rule 8(2), see above note 108 (for example, the Code of Professional Conduct for Counsel).

¹¹² ICC Statute, Article 51(3), see above note 19 ("in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties").

¹¹³ *Ibid.*, Article 52. See *ibid.*, Article 52(3): "The Regulations and any amendments thereto shall take effect upon adoption unless otherwise decided by the judges. Immediately upon adoption, they shall be circulated to States Parties for comments. If within six months there are no objections from a majority of States Parties, they shall remain in force".

¹¹⁴ *Ibid.*, Article 112(2)(b).

¹¹⁵ *Ibid.*, Article 112(2)(c). See also *ibid.*, Article 122(3).

¹¹⁶ *Ibid.*, Article 112(2)(d).

¹¹⁷ *Ibid.*, Article 112(2)(f). For situations referred by the Security Council, the Council acts as a co-governing body for the purpose of enforcement. See *ibid.*, Articles 87(5) and (7).

tions consistent with the Statute and the RPE.¹¹⁸ The Assembly operates subject to its Rules of Procedure.¹¹⁹

12.3.3.2. Organisation of Work and Structure

The work of the ASP is organised around yearly meetings held at the seat of the Court in The Hague and, every third year, at the UN Headquarters in New York.¹²⁰ These annual ASP sessions may be attended by States Parties, observer and non-observer States, international organisations, and NGOs.¹²¹ Special sessions may also be convened by the Bureau as appropriate on its own initiative or at the request of one-third of the States Parties.¹²² The Bureau is one of the three organs of the Assembly specifically envisaged by the Statute.¹²³ Its role is to assist the ASP in discharging its responsibilities.¹²⁴ The Bureau is a representative body consisting of 21 members (including a President and two Vice Presidents) elected by the ASP for a three-year term from among States Parties, taking into account “principles of equitable geographic distribution and adequate representation of the principal legal systems of the world”.¹²⁵ Furthermore, the Assembly may establish subsidiary organs, including the “independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy”.¹²⁶

The ASP has made an extensive use of the power to establish subsidiary organs and its institutional framework has gradually been taking shape. It has encompassed, among others, the Permanent Secretariat,¹²⁷

¹¹⁸ *Ibid.*, Article 112(2)(g).

¹¹⁹ *Ibid.*, Article 112(9), see above note 19; ICC, Rules of Procedure of the Assembly of States Parties, 3–10 September 2002 (‘ASP RoP’) (<https://www.legal-tools.org/doc/15918d>).

¹²⁰ Villacis, 2018, p. 565, see above note 8.

¹²¹ ASP RoP, Rules 93–95, see above note 119.

¹²² ICC Statute, Article 112(6), see above note 19.

¹²³ The other two are the independent oversight mechanism (*ibid.*, Article 112(4)) and the Advisory Committee on nominations of judges (*ibid.*, Article 36(4)(c)).

¹²⁴ *Ibid.*, Article 112(3). On the Bureau’s working modalities: Villacis, 2018, p. 566–570, see above note 8.

¹²⁵ *Ibid.*, Article 112(3)(b). The seats are distributed among five regional groups: African, Asia-Pacific, Eastern European, Group of Latin American and Caribbean States and the Western European and Other States; see Villacis, 2018, p. 566, see above note 8.

¹²⁶ ICC Statute, Article 112(4), see above note 19.

¹²⁷ Establishment of the Permanent Secretariat of the Assembly of States Parties to the International Criminal Court, 12 September 2003, ICC-ASP/2/Res.3, Annex, paras. 4–5 (<https://www.legal-tools.org/doc/6b1345>). The Secretariat’s functions are to provide the

the Committee on Budget and Finance,¹²⁸ the Advisory Committee on Nominations of Judges,¹²⁹ and the Independent Oversight Mechanism ('IOM').¹³⁰ The substantive preparatory work and consultations in between the ASP sessions are undertaken by the Bureau and States Parties in the framework of the two Working Groups, one based in The Hague and another in New York.¹³¹ Another subsidiary organ of the ASP is the Working Group on Amendments, established in 2009 for the purpose of considering amendments to the Rome Statute and to the RPE.¹³²

The IOM was established in 2009, but its investigative capacity gave rise to heated debates and several ASP resolutions sought to redefine

ASP, its Bureau, and subsidiary organs with independent substantive servicing as well as administrative and technical assistance in the discharge of their responsibilities.

¹²⁸ Establishment of the Committee on Budget and Finance, 3 September 2002, ICC-ASP/1/Res.4, para. 3 (<https://www.legal-tools.org/doc/9d1f8e/>) (the Committee "responsible for the technical examination of any document submitted to the Assembly that contains financial or budgetary implications or any other matter of a financial, budgetary or administrative nature [...]. In particular, it shall review the proposed programme budget of the Court [...] and shall make the relevant recommendations to the Assembly concerning the proposed programme budget").

¹²⁹ ICC ASP, Report of the Bureau on the establishment of an Advisory Committee on the appointment of judges of the International Criminal Court, 30 November 2011, ICC-ASP/10/36, para. 10 (<https://legal-tools.org/doc/3ye7a6/>) (recommending the establishment of an Advisory Committee as "an independent organism [...] in order to facilitate the process of election of the judges"); ICC ASP, Strengthening the International Criminal Court and the Assembly of States Parties, 21 December 2011, ICC-ASP/10/Res.5, para. 19 ('ICC-ASP/10/Res.5') (<https://www.legal-tools.org/doc/ec50d0/>).

¹³⁰ ICC ASP, Establishment of an independent oversight mechanism, 26 November 2009, ICC-ASP/8/Res.1, Annex, para. 7 ('ICC-ASP/8/Res.1') (<https://www.legal-tools.org/doc/bf0e8c/>) (Independent Oversight Mechanism ('IOM') "as a professional investigative unit will operate in support of the existing disciplinary structures of the Court to conduct investigations on allegations of misconduct and to ensuring effective and meaningful oversight thereof" excluding "staff management issues, such as staff underperformance of duties, as distinct from staff misconduct").

¹³¹ O'Donohue, 2015, p. 107, see above note 9; Sang-Hyun Song, "International Criminal Court-Centred International Criminal Justice and Its Challenges", in *Melbourne Journal of International Law*, 2016, vol. 17, no. 1, p. 13.

¹³² ICC ASP, Review Conference, 26 November 2009, ICC-ASP/8/Res.6, para. 4 (<https://legal-tools.org/doc/bf0e8c/>) ("a Working Group of the Assembly of States Parties for the purpose of considering, as from its ninth session, amendments to the Rome Statute proposed in accordance with article 121, paragraph 1, of the Statute at its eighth session, as well as any other possible amendments to the Rome Statute and to the Rules of Procedure and Evidence, with a view to identifying amendments to be adopted in accordance with the Rome Statute and the Rules of Procedure of the Assembly of States Parties").

and optimise the scope of its mandate.¹³³ The main controversy related to the IOM's independent investigative powers over the staff of the OTP.¹³⁴ Initially, the staff under the exclusive disciplinary authority of the OTP and the Registry pursuant to the Staff Regulations of the Court,¹³⁵ were exempted from the IOM investigative mandate.¹³⁶ Referring to the statutory guarantees of independence of his Office, the Prosecutor objected to the proposal to enable the IOM to investigate the OTP staff without the need for prior approval by the Prosecutor.¹³⁷ The 2013 ASP resolution substantially amended the IOM's operative mandate and procedures while assuring those would neither impede the authority or independence granted to the Presidency, judges, Registrar and the Prosecutor of the Court, nor interfere with its effective functioning.¹³⁸ The IOM was allowed to investigate reports of (serious) misconduct by all elected officials, *all* staff members subject to the Staff and Financial Regulations and Rules of the Court (including the OTP staff), and all contractors or consultants retained by the Court.¹³⁹ But in order to proceed with an investigation, the IOM would need to notify the Presidency, the Registrar or the Prosecutor of the receipt of a report of misconduct; consult with the respective organ's principal; and use appropriate diligence to address his or her concerns on ac-

¹³³ For example, ICC ASP, Independent Oversight Mechanism, 10 December 2010, ICC-ASP/9/Res.5 (<https://www.legal-tools.org/doc/a399fa/>); ICC-ASP/10/Res.5, paras. 64–68, see above note 129; ICC ASP, Independent Oversight Mechanism, 21 November 2012, ICC-ASP/11/Res.4 (<https://www.legal-tools.org/doc/d09f58/>); ICC ASP, Independent Oversight Mechanism, 27 November 2013, ICC-ASP/12/Res.6 (<https://www.legal-tools.org/doc/64ebcb/>).

¹³⁴ For discussion, see contributions in Richard H. Steinberg (ed.), *Contemporary Issues Facing the International Criminal Court*, Brill, Leiden, 2016, pp. 144–182.

¹³⁵ ICC, Staff Regulations, Resolution ICC-ASP/2/Res.2, Regulation 10.2(a) and (b) (<https://www.legal-tools.org/doc/bc0ddb/>) (authorizing the Registrar or the Prosecutor, as appropriate, (a) to impose disciplinary measures of staff members whose conduct is unsatisfactory and (b) to summarily dismiss a member of staff for “serious misconduct, including breach of confidentiality”).

¹³⁶ ICC-ASP/8/Res.1, Annex, para. 8, see above note 130. IOM investigations were limited to elected officials, staff members otherwise falling under the Staff Regulations, and contractors in respect of (a) internal misconduct warranting disciplinary measures; and (b) investigating external penal misconduct.

¹³⁷ ICC Statute, Articles 42(1)–(2). See ICC ASP, Report of the Bureau on the Independent Oversight Mechanism, ICC-ASP/9/31, 19 November 2010, paras. 44–47 (<https://legal-tools.org/doc/w8ns4i>).

¹³⁸ Resolution ICC-ASP/12/Res.6, para. 27, see above note 133.

¹³⁹ *Ibid.*, para. 28.

count of a possible impact of the inquiry on any ongoing prosecutorial or judicial activities, with a possibility for the respective principal to seek a – final and binding – determination from the Presidency.¹⁴⁰ This solution arguably struck a workable balance between the independence and accountability of the ICC organs concerned.¹⁴¹

The sheer number of the ASP's functions, combined with its complex and volatile structure, means that no comprehensive account of its activities and working methods can be afforded here. A detailed discussion of one essential function – the ASP's legislative competence in the sphere of criminal procedure¹⁴² – may be sufficiently revealing of how the underlying governance arrangements channel the power of States Parties over the ICC.¹⁴³

12.3.3.3. Legislative Function: Rules of Procedure and Evidence

It is only seven years into the ICC's judicial operation that enhancing the efficiency of its proceedings was taken up by the ASP in any systematic fashion. In 2010, a Study Group on Governance ('SGG') was set up as part of the Hague Working Group to serve as a forum for a "structured dialogue between States Parties and the Court with a view to strengthening the institutional framework of the Rome Statute system and enhancing the efficiency and effectiveness of the Court while fully preserving its ju-

¹⁴⁰ *Ibid.*, paras. 32–35.

¹⁴¹ O'Donohue, 2015, p. 114, see above note 9 (the compromise does not fully satisfy a "literalist interpretation of the independence of the prosecutor" but it does meet most of the OTP's concerns).

¹⁴² For a useful overview, see Hiram Abtahi and Shehzad Charania, "Expediting the ICC Criminal Process: Striking the Right Balance between the ICC and States Parties", in *International Criminal Law Review*, 2018, vol. 18, no. 3, pp. 383–425.

¹⁴³ The ASP's other functions and processes, in particular those relating to the ICC budget, judicial elections, and the enforcement of co-operation, are no less paradigmatic – or less contentious, for that matter. On the drive for cost-efficiency in budgeting: Zavala, 2018, p. 484–486, see above note 93; Jonathan O'Donohue, "Financing the International Criminal Court", in Dawn L. Rothe *et al.* (eds.), *The Realities of International Criminal Justice*, Martinus Nijhoff, Leiden, 2013; on enforcement, see Göran Sluiter, "Enforcing Cooperation: Did the Drafters Approach It the Wrong Way?", in *Journal of International Criminal Justice*, 2018, vol. 16, no. 2, p. 383; Göran Sluiter and Stanislas Talontsi, "Credible and Authoritative Enforcement of State Cooperation with the International Criminal Court", in Olympia Bekou and Daley J. Birkett (eds.), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice*, Martinus Nijhoff, Leiden, 2016, pp. 80–109.

dicial independence”.¹⁴⁴ The SGG has since become a constant element of the ASP’s institutional landscape. Its initial one-year mandate has been extended annually and the Bureau has reported regularly on the progress of its work and issues requiring further action.¹⁴⁵ The outcome of the first year (2011) of the SGG’s work was the first ever ICC RPE amendment: the modification of Rule 4 and the addition of Rule 4*bis*, whereby the competence to assign judges to judicial divisions was transferred from the plenary to the Presidency.¹⁴⁶

Concomitantly, in the course of 2012, the ICC Presidency conducted a pilot ‘Lessons Learnt’ exercise upon the completion of the judicial cycle (pre-trial and trial phases) in the first case, *Lubanga Dyilo*, and reported on the results of the exercise to the Bureau.¹⁴⁷ The objective was to take stock of the judicial experience accumulated thus far and examining,

¹⁴⁴ ICC ASP, Establishment of a study group on governance, ICC-ASP/9/Res.2, 10 December 2010, paras. 1–2 (<https://www.legal-tools.org/doc/a399fa>).

¹⁴⁵ ICC ASP, Strengthening the International Criminal Court and the Assembly of States Parties, 12 December 2018, ICC-ASP/17/Res.5, para. 90 (<https://legal-tools.org/doc/iv4khz>). See further earlier ‘omnibus’ resolutions (titled ‘Strengthening the International Criminal Court and the Assembly of States Parties’): Resolution ICC-ASP/10/Res.5, para. 37, see above note 129; ICC ASP, Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/11/Res.8, 21 November 2012, para. 39 (‘ICC-ASP/11/Res.8’) (<https://www.legal-tools.org/doc/d09f58>); ICC-ASP/12/Res.8, 27 November 2013, para. 37 (<https://www.legal-tools.org/doc/4d33bd>); ICC ASP, Strengthening the International Criminal Court and the Assembly of States Parties, 17 December 2014, ICC-ASP/13/Res.5, para. 53 (<https://www.legal-tools.org/doc/3e8cf6>); ICC ASP, Strengthening the International Criminal Court and the Assembly of States Parties, 26 November 2015, ICC-ASP/14/Res.4, para. 55 (<https://www.legal-tools.org/doc/6c935f>); ICC ASP, Strengthening the International Criminal Court and the Assembly of States Parties, 24 November 2016, ICC-ASP/15/Res.5, para. 67 (‘ICC-ASP/15/Res.5’) (<https://www.legal-tools.org/doc/991a13>); ICC ASP, Strengthening the International Criminal Court and the Assembly of States Parties, 14 December 2017, ICC-ASP/16/Res.6, para. 80 (<https://www.legal-tools.org/doc/36d60d>).

¹⁴⁶ ICC ASP, Amendments to rule 4 of the Rules of Procedure and Evidence, 20 December 2011, ICC-ASP/10/Res.1 (<https://www.legal-tools.org/doc/db9a5f>); Report of the Bureau on the Study Group on Governance, 22 November 2011, ICC-ASP/10/30, para. 21 (<https://legal-tools.org/doc/70fw0a>) (recommending the Assembly to adopt the draft amendments, which received unanimous support from States but were opposed to by the majority of judges).

¹⁴⁷ ICC ASP, Report of the Bureau on the Study Group on Governance, 23 October 2012, ICC-ASP/11/31, para. 13 (‘ICC-ASP/11/31’) (<https://legal-tools.org/doc/mi722b>). See Philip Ambach, “A Look towards the Future: The ICC and ‘Lessons Learnt’”, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, p. 1286.

in a methodical fashion, the avenues for increasing the efficiency and expeditiousness of the ICC process, including possible amendments to the ICC legislation, in particular the RPE.¹⁴⁸ As a part of the Lessons Learnt exercise, the Presidency collected proposals by the judges and input thereon from other Court organs and submitted a (non-exhaustive) list of nine clusters and 24 sub-clusters of issues that warranted attention with a view to expediting proceedings and enhancing their quality.¹⁴⁹ In October 2012, the Working Group on Lessons Learnt ('WGLL') was set up within the Court. It became the key forum for the initial consideration of proposals to amend the RPE in the areas identified previously,¹⁵⁰ next to the Court's Advisory Committee on Legal Texts ('ACLT').¹⁵¹

Absent a platform for structured dialogue on possible RPE amendments, the SGG and the Court jointly developed an algorithm for the consideration of the proposals.¹⁵² The Roadmap on Reviewing the Procedures of the International Criminal Court, endorsed by the ASP at its eleventh

¹⁴⁸ ICC ASP, Study Group on Governance: Lessons Learnt: First report of the Court to the Assembly of States Parties, 23 October 2012, ICC-ASP/11/31/Add.1, paras. 1–7 ('Lessons Learnt First Report') (<https://legal-tools.org/doc/v1idey>); ICC-ASP/11/31, paras. 10–11, see above note 147 (noting that "amendments to the Statute would take considerable more time to enter into force" and therefore "did not constitute a feasible means, at this stage, to provide timely redress to any problems relating to the criminal procedures"; "States, as the custodians of the Rome Statute, had a privileged role, both directly and indirectly under article 51, in ensuring that any proposals were in accordance with the overarching strategic and policy considerations of the Rome Statute").

¹⁴⁹ Lessons Learnt First Report, paras. 8–11, see above note 148, Annex, 'Identification of Issues' (A. Pre-trial; B. Pre-trial and trial relationship and common issues; C. Trial; D. Victims participation and reparations; E. Appeals; F. Interim release; G. Seat of the Court; H. Language issues; I. Organisational matters).

¹⁵⁰ *Ibid.*, para. 13 (Working Group on Lessons Learnt ('WGLL') is "open to all interested judges in order to commence work on the issues identified in the current report and to determine whether amendments to the Rules of Procedure and Evidence are required").

¹⁵¹ ICC, Regulations of the Court, 6 December 2016, ICC-BD/01-05-16 (<http://www.legal-tools.org/doc/8a1f87/>). The Advisory Committee on Legal Texts ('ACLT') is comprised of (a) three judges, one from each Division, elected from amongst the members of the Division for the period of 3 years; (b) one representative from the OTP; (c) one representative from the Registry; and (d) one representative of counsel included in the list of counsel.

¹⁵² ICC-ASP/11/31, para. 14, see above note 147 (observing that because "the current statutory and regulatory framework did not provide a sufficient interface to facilitate a structured dialogue between the key stakeholders within the Rome Statute system, in particular those who had the standing to put forward recommendations to amend the RPE [...] it was considered appropriate to draft a Roadmap which would facilitate a structured dialogue aimed at consolidating ideas on amending the RPE").

session in November 2012,¹⁵³ envisaged that the recommendations supported by at least five judges were to be transmitted to the SGG. Upon receiving its views, any proposed amendments having the support of at least five judges were to be transmitted to the ACLT.¹⁵⁴ Thereafter, any revised proposals would be submitted alongside with the WGLL's second report and, if endorsed by the SGG, sent to the Working Group on Amendments of the ASP for consideration.¹⁵⁵ The adoption of Rule 132 *bis* ("Designation of a judge for the preparation of the trial") at the eleventh session of the ASP can be regarded as the early outcome of the Lessons Learnt exercise,¹⁵⁶ although in fact it was more of a parallel effort. The preparatory work and debates on this Rule within the Court commenced in July 2011, thus prior to consultations on the list of issues within the Lessons Learnt.¹⁵⁷ This rule amendment was brought before the Assembly by the judges of the Court acting by absolute majority under Article 51(2)(b), of the Statute, even though the judges' plenary could have just as well adopted a provisional rule in accordance with Article 51(3), as had been proposed by the judges who initiated the amendment.¹⁵⁸ But the Court emphasised that, by following the former amendment route, it wished to engage in a transparent dialogue with States Parties and that within the Court all stakeholders, including the judges, the OTP, the Registry and representatives of counsel, had participated in drafting.¹⁵⁹ Given the different views expressed by State delegations, the SGG formulated alternative recommendations on the action to be taken with respect to the Court's proposal.¹⁶⁰ While the proposed Rule received broad support in the Working Group on Amendments, it was unable to reach immediate

¹⁵³ ICC-ASP/11/Res.8, para. 41, see above note 145.

¹⁵⁴ ICC-ASP/11/31, Annex I paras. 5–7, see above note 147.

¹⁵⁵ *Ibid.*, paras. 8–11.

¹⁵⁶ ICC ASP, Amendment of the Rules of Procedure and Evidence, 21 November 2012, ICC-ASP/11/Res.2 ('ICC-ASP/11/Res.2') (<https://www.legal-tools.org/doc/d09f58/>).

¹⁵⁷ ICC ASP, Report of the Study Group on Governance on rule 132 *bis* of the Rules of Procedure and Evidence, 1 November 2012, ICC-ASP/11/41, para. 3 (<https://legal-tools.org/doc/dxu3iq>); ICC ASP, Report of the Study Group on Governance on rule 132 *bis* of the Rules of Procedure and Evidence, 1 November 2012, ICC-ASP/11/41, Annex I, paras. 3–7.

¹⁵⁸ See above note 112.

¹⁵⁹ Report of the Study Group on Governance on rule 132 *bis*, para. 3, see above note 157.

¹⁶⁰ *Ibid.*, para. 2. The alternatives were: (a) to adopt the proposed rule as drafted by the Court (supported by the majority of delegates); (b) to support the proposal but subject it to further changes; and (c) not to support the proposal due to concerns regarding its legal basis.

consensus to recommend the adoption. It therefore continued deliberations during the eleventh ASP session,¹⁶¹ adopting the Rule without further changes.¹⁶²

Given the judicial experience accumulated by 2013, in that year the WGLL mainly focused on three of the identified clusters of issues.¹⁶³ The regular Roadmap procedure of deliberating and consulting on the relevant amendments was followed, resulting in the amendment of Rule 100 (“Place of the Proceedings”) and Rule 68 (“Prior Recorded Testimony”), both substantial and justified modifications to the legal framework made pursuant to Article 51(2)(b), of the Statute (by the absolute majority of judges).¹⁶⁴ The former rule amendment clarified and streamlined the procedure for a decision to change venue of the proceedings.¹⁶⁵ The Rule 68 amendment added three new instances in which the prior recorded testimony of an absent witness may be introduced into evidence, subject to relevant due process guarantees.¹⁶⁶

Strikingly, however, the other RPE amendments enacted in 2013 – the addition of Rules 134*bis* (“Presence through the use of video technology”), 134*ter* (“Excusal from presence at trial”), and 134*quater* (“Excusal from presence at trial due to extraordinary public duties”) – did *not* originate from the list of clusters drawn up by the judges and the SGG. These amendments were a direct response to the concerns expressed by

¹⁶¹ ICC ASP, Report of the Working Group on Amendments, 13 November 2012, ICC-ASP/11/36, paras. 6–11 (<https://legal-tools.org/doc/vwpj0m>).

¹⁶² ICC-ASP/11/Res.2, see above note 156.

¹⁶³ ICC ASP, Study Group on Governance Working Group on Lessons Learnt: Second report of the Court to the Assembly of States Parties, 31 October 2013, ICC-ASP/12/37/Add.1, para. 3 (‘Lessons Learnt Second Report’) (<http://www.legal-tools.org/doc/26fa09/>) (‘Pre-Trial’, ‘Pre-trial and trial relationship and common issues’ and ‘Seat of the Court’).

¹⁶⁴ ICC ASP, ICC-ASP/12/Res.7, Amendments to the Rules of Procedure and Evidence, 27 November 2013, paras. 1 and 2 (‘ICC-ASP/12/Res.7’) (<https://www.legal-tools.org/doc/c50839>).

¹⁶⁵ Lessons Learnt Second Report, Annex I.A, see above note 163.

¹⁶⁶ *Ibid.*, Annex II.A. The amended Rule 68 ICC RPE authorizes the Trial Chamber to admit evidence of an absent witness not examined by the parties during the recording, where such evidence (a) goes to the proof of a matter other than the acts and conduct of the accused; (b) comes from a person who has subsequently died, must be presumed dead or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally; or (c) comes from a person who has been subject to interference. The admission is subject to the requirement that it would not be prejudicial to or inconsistent with the rights of the accused and that the instance-specific safeguards are met.

the African Union ('AU') in connection with the ongoing cases against the Kenyan President, Uhuru Kenyatta, and the Deputy President, William Ruto, at the ICC.¹⁶⁷ As a matter of fact, those amendments were brought before the ASP by States Parties *obviating* the Roadmap procedure, that is, without a proper consultation with the Court and the SGG.¹⁶⁸ They were adopted following the discussions at the two formal meetings the Working Group on Amendments held during the twelfth session.¹⁶⁹ This is not to say that the legislative action was *ultra vires*. Article 51(2)(a) authorises any State Party to propose amendments and provides a respectable statutory authority for such action. It is rather that the consultative and inclusive procedure that had been agreed upon earlier, was not followed.

The ASP Bureau acknowledged from the outset that the Roadmap was “without prejudice to the statutory and regulatory framework of the Rome Statute” and that the actors mentioned in Article 51(2), could put forward proposals outside the auspices of the Roadmap if they so desired. But it also referred to the consensus that “all participants would be encouraged to engage in the Roadmap *so as to avoid a disparate and unstructured approach to any proposals on amending the criminal procedures*”.¹⁷⁰ The same rationale was upheld in the 2013 Report of the SGG –

¹⁶⁷ African Union, Decision on Africa's Relationship with the International Criminal Court, 12 October 2013, Ext/Assembly/AU/Dec.1, para. 10(i), (ii) (<https://www.legal-tools.org/doc/c36610>) (holding, among others, that to “safeguard the constitutional order, stability and integrity of Member States, no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office” and that “the trials of President Uhuru Kenyatta and Deputy President William Samoei Ruto, who are the current serving leaders of the Republic of Kenya, should be suspended until they complete their terms of office”).

¹⁶⁸ For example, ICC ASP, Report of the Bureau on Study Group on Governance, 15 October 2013, ICC-ASP/12/37 ('ICC-ASP/12/37') (<https://legal-tools.org/doc/lqhtip>) and ICC ASP, Report of the Working Group on Amendments, 24 October 2013, ICC-ASP/12/44 (<https://www.legal-tools.org/doc/a6b458>) contain no discussion of the proposed Rules 134*bis* through 134*quater* but only of Rules 68 and 100. See also Ambach, 2015, p. 1291, see above note 147 (noting that the RPE amendments adding Rules 134*bis* through 134*quater* were brought before the ASP “without any meaningful involvement of the Study Group, let alone the Court”).

¹⁶⁹ ICC ASP, Official Records, Volume I, Assembly of States Parties to the Rome Statute of the International Criminal Court Twelfth Session, 20–28 November 2013, ICC-ASP/12/20, para. 43 ('Official Records, Volume I') (<http://www.legal-tools.org/doc/7a9071/>).

¹⁷⁰ ICC-ASP/11/31, para. 15, see above note 147. See also *ibid.*, para. 16 (“Whilst [...] the Court would provide the initial impetus with proposals to amend the RPE, [...] States could also put forward proposals of their own to amend the RPE which were separate and

the same year when the process envisaged by the revised Roadmap, endorsed by the SGG and the ASP,¹⁷¹ was bypassed. The Chair of the Working Group on Amendments reported that the proposals to insert Rules 134*bis* through 134*quater* were discussed “in a spirit of understanding, cooperation and flexibility, *in close consultation with the organs of the Court*”.¹⁷² But it is doubtful whether there was sufficient room and time for genuine consultation with main stakeholders, most notably the Court, in the context of the twelfth ASP session. The separate-track and uncoordinated process by which Rules 134*bis* through 134*quater* were introduced falls nothing short of the very “disparate and unstructured approach” the Roadmap was devised to avoid. It defied the painstaking effort by the SGG and the Court to standardise and streamline the review of proposals for RPE amendments, jettisoning the Roadmap altogether.¹⁷³ Motivated by an overt and immediate political concern rather than being of a purely technical-procedural nature, this legislative initiative *a fortiori* warranted inclusive consultations, which did not materialise.

In the following two years, 2014 and 2015, the work of the SGG and the Court did not lead to any criminal procedure reforms, even though several potential amendments had been under detailed consideration and specific proposals and alternatives had been developed to that end. In 2014, the WGLL submitted two reports to the SGG, the first relating to the ‘Language Issues’ cluster and recommending to amend Rule 76(3), Rule 101(3), and Rule 144(2)(b), as well as the second relating to the ‘Organisational Matters’ cluster and recommending the adoption of a new Rule 140 *bis*.¹⁷⁴ The proposed amendments had been discussed by the Court and the SGG, the Court reports were revised, and the summary of discus-

distinct from that of the Court. The Roadmap would *provide the basis for both sets of proposals to benefit from mutual consideration and analysis*, with the aim of putting forward a series of consolidated and effective recommendations”, emphasis added).

¹⁷¹ ICC-ASP/12/37, paras. 10, 25, see above note 168; *ibid.*, Annex I; ICC-ASP/12/Res.8, para. 39, see above note 145.

¹⁷² Official Records, Volume I, Annex II p. 71, see above note 169.

¹⁷³ Ambach, 2015, p. 1291, see above note 147 (expressing the hope that “developments at the 12th ASP in November 2013 have not created a precedent devaluing the Roadmap in its revised form as it was adopted by States Parties during that very same Assembly meeting”).

¹⁷⁴ ICC ASP, Report of the Bureau on Study Group on Governance, 28 November 2014, ICC-ASP/13/28, para. 8 (<https://legal-tools.org/doc/025y1s>). For background information on the proposed amendments, see *ibid.*, Annex I paras. 7–21.

sions forwarded to the ASP's Working Group on Amendments.¹⁷⁵ But since some State delegations expressed doubts about the necessity and merits of the proposed changes, the Working Group on Amendments did not recommend them for adoption and decided to continue discussion at the thirteenth session.¹⁷⁶ However, action thereon was taken neither at the thirteenth session (2014) nor the fourteenth session (2015), despite countless meetings and extensive consultations held by the SGG and the Court.

In the course of 2015, the WGLL did not initiate any rule amendments and carried on with its work on other matters.¹⁷⁷ The judges focused on “practice-based approaches to enhancing efficiency” while the composition and working methods of the Group were reformed.¹⁷⁸ With reference to “past experience” – the rejection at the thirteenth ASP session of its recommendations on the proposals to amend Rules 76(3), 101(3), and 144(2)(b) and to introduce Rule 140*bis* – the WGLL observed that “amending the [RPE] is highly complex and cumbersome” and “a time-consuming approach to enhancing efficiency and one which carries no guarantees of success”.¹⁷⁹ It added that, even when adopted, “scattered amendments to certain rules have a limited capacity to have a real impact on proceedings”.¹⁸⁰ Accordingly, the WGLL announced the adoption of a “holistic approach to enhancing and expediting proceedings”, which entailed addressing entire clusters of issues together and considering whether “enhanced efficiency can be achieved mainly through the internal adoption of best practices and amendments to the Regulations of the Court”, without ruling out the need for RPE amendments in some cases. The judges’ pursuit of this ‘holistic approach’ resulted in the adoption of the

¹⁷⁵ *Ibid.*, para. 10.

¹⁷⁶ ICC ASP, Report of the Working Group on Amendments, ICC-ASP/13/31, 7 December 2014, paras. 14–26, 28–29 (<https://legal-tools.org/doc/m84k8f>) (agreeing to reconvene during the 13th ASP session to continue and potentially conclude the discussion on the proposals to amend Rules 76, 101 and 144 and inviting the Court to bring to its attention any information regarding the temporary absence of a judge (and the proposed rule 140*bis*) that could further inform the discussion of the working group on this issue in the future).

¹⁷⁷ These issues related to clusters D.1 (Applications for victim participation), A (Pre-trial), B (Pre-trial and trial relationship and common issues), C (Trial) and E (Appeals). See ICC ASP, Report of the Bureau on the Study Group on Governance, 16 November 2015, ICC-ASP/14/30, Annex I (‘ICC-ASP/14/30’) (<https://legal-tools.org/doc/bcx0wc>) and *ibid.*, Annex II (‘2015 WGLL Report’).

¹⁷⁸ 2015 WGLL Report, p. 30, para. 6, see above note 177.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

Pre-Trial Practice Manual in September 2015, which in February 2016 was expanded to become the *Chambers' Practice Manual* (further updated in May 2017).¹⁸¹

Furthermore, on 10 February 2016 the plenary of judges for the first time exercised the power to adopt *provisional* amendments to the RPE pursuant to Article 51(3). Rule 165 governing the investigation, prosecution and trial of Article 70 offences was provisionally amended to enable a Chamber consisting of one judge, rather than of three judges, to exercise the respective functions of the Pre-Trial and Trial Chambers in this category of cases, as a way to increase the efficiency of the Article 70 proceedings.¹⁸² This was a marked departure from the judges' earlier preferred approach to channel any rule amendment proposals via States Parties in the spirit of transparent dialogue.¹⁸³ As the limitations of that avenue, necessitating continuous and time-consuming efforts to achieve consensus in the political arena of the ASP, became painfully evident, the judges adopted a more assertive and proactive approach to promoting procedural reforms.

It is only at the fourteenth ASP session in 2016 that the amendments to Rules 101 and 104(2)(b) – but still not of Rule 76(3) – were enacted, having been re-initiated by the judges pursuant to Article 51(2)(b).¹⁸⁴ The structured dialogue between the States Parties and the Court with a view to enhancing procedural efficiency got back on track after the disruptions of the previous years. The subsequent amendment of Rule 26 relating to the receipt of complaints and investigations by the IOM, was passed by the seventeenth session of the ASP in December 2018.¹⁸⁵ It purported to enact “a more permanent solution by aligning the [RPE] with the mandate of the IOM with regard to the receipt and investigation of claims of misconduct against elected officials such as judges, the Prosecutor, a Deputy

¹⁸¹ ICC, Pre-Trial Practice Manual, September 2015 (<https://www.legal-tools.org/doc/dd93f1>); ICC, Trial Practice Manual, May 2017 (<https://www.legal-tools.org/doc/f0ee26/>).

¹⁸² ICC ASP, Report of the Study Group on Governance Cluster I in relation to the provisional amendments to rule 165 of the Rules of Procedure and Evidence, 21 September 2016, ICC-ASP/15/7, Annex II para. 3 (<https://www.legal-tools.org/doc/04222b/>).

¹⁸³ See text accompanying above note 160.

¹⁸⁴ ICC ASP, Resolution on amendments to rule 101 and rule 144, paragraph 2(b), of the Rules of Procedure and Evidence, 24 November 2016, ICC-ASP/15/Res.4 (<https://www.legal-tools.org/doc/501853/>).

¹⁸⁵ ICC ASP, Resolution on amendments to rule 26 of the Rules of Procedure and Evidence, ICC-ASP/17/Res.2, 11 December 2018 (<https://legal-tools.org/doc/mhkkg7>).

Prosecutor, the Registrar and a Deputy Registrar”.¹⁸⁶ Suggested by the then Head of the IOM, the amendment was developed by the SGG through a series of informal consultations in the course of which States Parties expressed their views and a senior Court official was heard. Upon consideration, the Working Group on Amendments recommended the amendment to the ASP for adoption.¹⁸⁷

Although this latest rule amendment was the outcome of an inclusive consultative process, this does not preclude past ruptures in the ASP legislative process from recurring in the future. The issue of the quality of the dialogue between States Parties and the Court, and the challenges the development of rule amendments has posed from the governance perspective will be further taken up in Section 12.4.

12.3.4. UN-assisted Hybrid and Special Tribunals

For all the differences in their legal nature and modes of establishment, the UN-assisted special or hybrid courts which belong to the ‘post-*ad hoc* generation’ – the (R)SCSL, the ECCC, and the STL – present notable commonalities in terms of governance and can be considered jointly. The SCSL and the STL are international courts drawing their authority from a UN-State treaty and a UNSC resolution respectively. By contrast, the ECCC is a domestic tribunal established under national law within the Cambodian judicial system while being assisted by the UN pursuant to its agreement with the government of Cambodia.¹⁸⁸ In respect of the governance arrangements adopted for them, the three courts present one ‘variation on a theme’ and raise similar issues in terms of ensuring effective and accountable administration.¹⁸⁹

Firstly, even though these tribunals were co-constituted by the UN and/or assisted by it in various ways, they are not embedded in the Organisation. Accordingly, they were not placed under an obligation to report to the UNSC. Instead, the SCSL and the STL must report to their parent enti-

¹⁸⁶ ICC ASP, Report of the Working Group on Amendments, 29 November 2018, ICC-ASP/17/35, para. 18 (<https://legal-tools.org/doc/ceidsz>).

¹⁸⁷ ICC ASP, Report of the Bureau on the Study Group on Governance, 27 November 2018, ICC-ASP/17/30, paras. 14–17 (<https://legal-tools.org/doc/faoyip>).

¹⁸⁸ See above Section 12.2.1.

¹⁸⁹ That said, the ECCC has presented unique challenges given the allegations of widespread mismanagement, corruption, and kickback schemes: Tortora, 2013, pp. 113–114, see above note 7; Llewellyn, 2019, p. 160, see above note 5.

ties which negotiated the agreements, that is, the UN Secretary-General and the governments of Sierra Leone and Lebanon, respectively.¹⁹⁰ This also had implications for the status of their staff members, who are not UN staff members.¹⁹¹ By contrast, the UNAKRT, which is not only integrated into the ECCC but also a component of the UN Secretariat, is subject to the UN's financial, administrative and staff regulations.¹⁹²

Importantly, these hybrid and special courts were/are not funded through the UN assessed contributions like the *ad hoc* Tribunals, but entirely or largely through the voluntary contributions by States.¹⁹³ States upon which the courts are financially dependent, are not party to the constituent treaties and hence under no legal obligation to provide contributions.¹⁹⁴ As noted, this financing model owes its emergence to the discontent on the part of the UN membership with the high costs and perceived budgetary inefficiencies of the ICTY and the ICTR.¹⁹⁵ States in the UNSC were resolved not to replicate the *ad hoc* Tribunals' budgeting scheme in the special/hybrid courts and instead decided to try an alternative – cheaper – funding arrangement. In respect of the SCSL, the Council did so over the objection of the UN Secretary-General who had been of the view that this way of funding the Court was not optimal or sustainable and created inadmissible risks both for the Court and for the UN, and that financing through assessed contributions was “the only realistic solution”.¹⁹⁶ Argua-

¹⁹⁰ SCSL Statute, annexed to SCSL Agreement, Article 25, see above note 17; STL Agreement, Article 10(2), see above note 18.

¹⁹¹ Llewellyn, 2019, pp. 81, 87, 94–95, see above note 5 (noting also that the tribunals were admitted to the UN Joint Staff Pension Fund on the basis of being international organisations).

¹⁹² *Ibid.*, p. 88.

¹⁹³ SCSL Agreement, Article 6, see above note 17 (“The expenses of the Special Court shall be borne by voluntary contributions from the international community”); STL Agreement, Article 5, see above note 18 (providing that the STL's expenses shall be borne for 51% by voluntary contributions from States and for 49% by the government of Lebanon).

¹⁹⁴ Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, paras. 68–72, see above note 20.

¹⁹⁵ Tortora, 2013, pp. 94, 98, see above note 7; Llewellyn, 2019, p. 14, see above note 5.

¹⁹⁶ Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, paras. 70, 71, see above note 20: “A financial mechanism based entirely on voluntary contributions will not provide the assured and continuous source of funding which would be required to appoint the judges, the Prosecutor and the Registrar, to contract the services of all administrative and support staff and to purchase the necessary equipment. The risks associated with the establishment of an operation of this kind with insufficient funds, or without long-term assurances of continuous availability of funds, are very high, in terms of

bly, the Secretary-General's reservations have proven to be fully justified. The voluntary contributions scheme effectively placed the responsibility for fundraising on the shoulders of the tribunals' principals. On a number of occasions, this funding arrangement proved problematic in terms of ensuring the courts' financial sustainability.¹⁹⁷

Secondly, the institutional framework for the governance of these tribunals departs from those considered so far. Some of the governance duties exercised in respect of those courts, most notably the financing and appointment of judges, prosecutors and other officials, were reserved for, or shared by, their 'parent' States (Sierra Leone, Cambodia, and Lebanon respectively) and entities (UN organs).¹⁹⁸ However, in the absence of plenary organs such as the UNGA or the ASP to govern them, the bulk of daily management oversight work was entrusted to the so-called 'management committees' composed of major donor States, including the parent State.¹⁹⁹ The first court to be governed through this arrangement was the SCSL. This innovation, which was not uncontroversial and took time to negotiate, was a compromise proposed by the UNSC President that was meant to address the UNSG's concerns about the voluntary funding scheme.²⁰⁰ The courts' constituent documents do not offer much insight into the character and functions of the management committees. Thus, the SCSL Agreement contains a more detailed provision, specifying:

interested States will establish a management committee to assist the Secretary-General in obtaining adequate funding, and provide advice and policy direction on all non-judicial aspects of the operation of the Court, including questions of

both moral responsibility and loss of credibility of the Organization, and its exposure to legal liability. [...] A special court based on voluntary contributions would be neither viable nor sustainable".

¹⁹⁷ Cf. Tortora, 2013, p. 102–104, see above note 7 (remarking, however, that “despite the recent reliance on assessed contributions, the SCSL has been able to work on the basis of voluntary contributions for two thirds of its life – even if amidst great financial uncertainty”). See also *ibid.*, pp. 113, 122 (reporting financial difficulties at the ECCC and STL).

¹⁹⁸ See, for example, ECCC Agreement, Article 3(1), Article 8(3), Articles 14–17, see above note 26.

¹⁹⁹ See further Tortora, 2013, p. 104–105, see above note 7.

²⁰⁰ Phakiso Mochochoko and Giorgia Tortora, “The Management Committee for the Special Court for Sierra Leone”, in Cesare P.R. Romano, André Nollkaemper and Jann K. Kleffner (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford University Press, Oxford, 2004, pp. 141–156; Llewellyn, 2019, p. 151, see above note 5.

efficiency, and to perform other functions as agreed by interested States. The management committee shall consist of important contributors to the Special Court. The Government of Sierra Leone and the Secretary-General will also participate in the management committee.²⁰¹

By contrast, the STL Agreement merely provides that “[t]he parties shall consult concerning the establishment of a Management Committee”.²⁰² The ECCC’s legal framework is silent on the issue and its Steering Committee as well as an additional oversight body, the Principal Donors Group (of which Cambodia is not a part), are not subject to any statutory regulation.²⁰³

These management committees, composed of interested States and dedicated to managing specific tribunals, present a novel element in international judicial governance. They are notable, among others, in terms of the relations of power exercised over, and ownership of, judicial institutions by major contributor States.²⁰⁴ Due to their informal and secluded character, little information about their terms of reference, procedures and work practices is in the public domain. Thus, the – unpublicised and difficult to locate – Terms of Reference of the SCSL Management Committee, which played not merely advisory role but that of primary “budgetary and administrative decision maker”, envisaged the following functions:

- (a) assisting in the identification of nominees for the positions of judges, prosecutor and registrar;
- (b) considering the SCSL’s reports and providing advice and policy direction on all non-judicial aspects of its operations, including its efficiency;
- (c) overseeing the SCSL’s annual budget and other such financial reports, and advising the Secretary-General thereon;

²⁰¹ SCSL Agreement, Article 7, see above note 17.

²⁰² STL Agreement, Article 6, see above note 18.

²⁰³ Llewellyn, 2019, p. 147, see above note 5 (it took three years from the start of the ECCC operations to set up the Steering Committee and a further two years for the Principal Donors’ Group to emerge).

²⁰⁴ There is an overlap in the membership of the committees of all three courts: Australia, Canada, France, Germany, Italy, Japan, the Netherlands, Sweden, the UK and the US. The EU also takes part in the ECCC and STL management committees. See Llewellyn, 2019, p. 16, see above note 5.

- (d) assisting the Secretary-General in ensuring the availability of adequate funds for the operation of the SCSL;
- (e) encouraging co-operation of all States with the SCSL; and
- (f) reporting regularly to the group of interested States.²⁰⁵

According to Llewellyn, such committees met “as frequently as necessary and at a short notice” and maintained close and regular working contact with the senior members of the tribunals.²⁰⁶ This created a sense of ownership of tribunals on the part of the participating States and enabled “an almost continuous dialogue with, and scrutiny of, the voluntarily funded tribunals by the management committees”.²⁰⁷ It was also beneficial that the UN Secretary-General, represented by the Office of Legal Affairs (‘OLA’), participated in the work of the committees, playing an advisory and monitoring role therein.²⁰⁸ On the other hand, the proximity between the oversight bodies and the courts cannot but raise contentious issues of judicial independence as well as the deficit of accountability towards a broader community of States and the public at large. At least on the level of perceptions, these issues are further exacerbated by the scant and inadequate legal basis and non-transparent operation of the management committees.²⁰⁹

12.3.5. Taking Stock: Main Governance Models

The above overview of the governance arrangements of select international and hybrid or special criminal tribunals gives an insight into the role of States and their collective entities in enabling and running those judicial institutions. It also provides some – admittedly limited at this point – empirical material on how the institutional framing and modalities

²⁰⁵ Annex: Report on the Planning Mission on the Establishment of the Special Court for Sierra Leone, in Letter Dated 6 March 2002 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2002/246, 8 March 2002, quoted in Llewellyn, 2019, p. 153, 155, see above note 5. Llewellyn also notes (p. 156) that the Terms of Reference did not accurately reflect the actual scope of powers of the SCSL’s Management Committee, so much so that they were “positively misleading regarding the above arrangements for control and responsibility”.

²⁰⁶ Llewellyn, 2019, p. 15, see above note 5.

²⁰⁷ *Ibid.*, pp. 15–16.

²⁰⁸ *Ibid.*, p. 17 (describing the UNSG’s role as “a form of intermediary in these relationships, monitoring the interface between governance of the tribunals on the one hand, and their independent and impartial functioning, on the other”).

²⁰⁹ *Ibid.*, pp. 157 (SCSL), 162 (ECCC) and 164 (STL).

of States' involvement in international judicial governance have reflected, mediated and translated their *power* over such institutions. Considering the common features of, and differences between, the institutional, legal, and informal arrangements and decision-making processes constituting what this chapter defines as international judicial governance, it is possible to identify the principal *models of governance* of international criminal justice.

Such governance models can potentially have a useful descriptive and heuristic value. In particular, they can serve as tools for the analysis of the power dynamics within the *injugovin*-court pairs and between individual States partaking in *injugovins*. As analytical devices, the governance models may assist scholars in delineating, classifying, and comparing sets of governance arrangements used in the field of international criminal justice and beyond. Secondly, the models could facilitate a critical appraisal of the governance schemes and *injugovins'* performance in terms of compliance with principled constraints, such as judicial independence, and other relevant parameters, including effectiveness, efficiency, and accountability. Thirdly, in a more practical sense, models could provide the architects of international and hybrid justice institutions and legal policy-makers both in *injugovins* and in courts with instruments and building blocks for the reform of the existing governance arrangements. The governance models as accumulations of good practices gained through experience, as well as signposts that certain paths should not be taken, may assist them in fine-tuning the institutional and legal frameworks of *injugovins* as well as developing novel solutions.

Proceeding in the order in which the governance arrangements for various tribunals have been set out above, it is proposed to distinguish the following four models based on the character of State involvement in judicial governance: (i) 'direct', (ii) 'envelope', or 'bureaucratic', (iii) 'diplomatic', and (iv) 'managerial'. It bears emphasising that these models are meant as abstract categories for expository purposes, Weberian ideal types (*die Gedankenbilder*), rather than accurate descriptions of governance realities.²¹⁰ They correspond only to some degree to actual governance schemes which invariably combine and hybridise different elements.

²¹⁰ Max Weber, "'Objectivity' of Social Science and Social Policy", in Max Weber, *The Methodology of the Social Sciences*, Free Press, Glencoe, 1949, p. 90 ("An ideal type is formed by the one-sided accentuation of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent concrete individual

In this vein, and subject to all caveats, the governance scheme adopted for the IMT at Nuremberg can be regarded as representing the *direct governance model*. While it is true that the Allied Control Council operated as the IMT's principal *injugovin*, the degree of institutionalisation of the governance arrangements was fairly low and the ACC's structures and processes rather under-developed in this sense. The thin bureaucratic layer superposed on the IMT, in no way rendered the direct involvement by parent States unnecessary, which allows speaking of a direct (or quasi-direct) form of governance. The relationship between the Tribunal and the Allied Powers remained close and, for the critics, even too intimate. One manifestation of immediate governance by the four Allied Powers, was that they appointed *their* judges, alternates, and prosecutors. They also remained closely engaged in the IMT administration on a structural level by taking key decisions for enabling its operations and being on standby to resolve any practical difficulties. This arrangement is characterised by an open channel of communication and a strong sense of ownership of the justice process on the part of States, but it also raises concerns with regard to judicial independence. Since oversight functions were outsourced to, and duly performed by, the ACC, the *direct governance* label can only be applied conditionally in describing the IMT's scheme, which, as any other, was hybrid by nature. Nevertheless, the *direct governance* model presents an interest in this context, whether as a precursor to the modern schemes or as one significant point on the spectrum of possibilities.

The second model, exemplified by the UN *ad hoc* Tribunals (along with the MICT), can be referred to as the 'envelope', 'embedded', and perhaps less benevolently and less precisely, 'bureaucratic', model. Admittedly, the last label is the least helpful considering that no judicial governance scheme is conceivable without elements of bureaucracy, so that all judicial governance is by definition 'bureaucratic'.²¹¹ Nevertheless, this nomenclature may still be warranted in the sense that the *ad hoc* Tribunals were established as part of a larger international bureaucracy. The UN principal and subsidiary organs performed the full range of governance functions in accordance with their own mandates, specialisations,

phenomena, which are arranged according to those one-sidedly emphasized viewpoints into a unified thought construct. In its conceptual purity, this mental construct cannot be found empirically anywhere in reality. It is a utopia").

²¹¹ I am grateful to Niels Blokker for this point.

and established practices. The courts were embedded or ‘enveloped’ within the existing bureaucratic structures and serviced through (more or less) regular budgetary, management oversight, audit and other review procedures of the UN. Rather than creating a dedicated entity to facilitate and oversee their functioning, the UN extended and adjusted the existing reporting, review and decision-making schemes as appropriate to cover the activities of newly established courts. Such an extension was gradual and need-driven rather than anticipatory. This means that the Tribunals were not inserted into prefabricated, tailor-made processes from the outset; rather, the existing UN decision-making processes were applied and adapted to match the Tribunals’ institutional needs and the expectations of the principal organs in part of their administrative and budgetary functioning. Thus, the *ad hoc* Tribunals were subject to the UNGA’s budgetary process, and reported periodically on their performance to the Assembly and the UNSC. The frequency of reporting increased from annual to six-monthly and emphasis shifted to meeting the demands of the Completion Strategy. Unlike the *direct governance* model, the *envelope* model suggests – in sociological terms – the existence of a formidable institutional layer between individual States and the Tribunals: a superposed organisational bureaucracy with a degree of autonomy and an agency of its own that is separate from the will of individual States it represents. On the one hand, this has the effect of transforming and mediating the power of States over the courts. This provides a greater distance between them that is conducive to guaranteeing the judicial independence and makes governance processes more accountable towards the entire membership of the parent organisation. On the other hand, the multilateral character of this relationship and the placement of individual States at a certain distance from the courts (although they do have a say as part of the UN principal organs), may have the effect of decreasing their sense of ownership and degree of investment. Moreover, the known bureaucratic ‘pathologies’ of large international organisations such as the UN, unavoidably imbue the judicial governance sphere with related inefficiencies and gaps.²¹²

The third, *diplomatic*, model finds its clearest – but certainly not exclusive – embodiment in the ICC’s Assembly of States Parties, a multilateral forum dedicated exclusively to the task of governing the ICC, in departure from the schemes of the IMT and the *ad hoc* Tribunals. The

²¹² Michael N. Barnett and Martha Finnemore, “The Politics, Power, and Pathologies of International Organizations”, in *International Organization*, 1999, vol. 53, no. 4, pp. 699–732.

ASP operates through a labyrinthine framework distinguished by the parallel existence of multiple subsidiary organs, separate consultation tracks, roadmaps, and decision-making protocols.²¹³ Somewhat at odds with the *diplomatic* label – and attesting again to the hybrid nature of the actual schemes – this description raises the spectre of ‘bureaucracy creep’ that is more easily associated with the model considered previously. The proliferation of entities with partially overlapping mandates and exponential growth in written material certainly points to inefficiencies typically associated with bureaucracy.²¹⁴ That said, the ASP annual sessions still remain the principal *loci* of (formal) decision-making by State representatives with the diplomatic consensus-oriented negotiations being its prevailing modality. At the ASP, no voting is taken and decisions are made by consensus, with the exception of the elections. The key legislative amendments and legal policy shifts are manufactured by States through consultations taking place in between, and on the margins of, the yearly sessions within the Bureau and its organs.²¹⁵ The bulk of substantive and more technical work is done by the ASP Bureau, the Permanent Secretariat, and specialist committees as well as working groups set up pursuant to the standing or temporary mandates the ASP confers upon the Bureau. On the budgetary, organisational and other non-judicial sides of operations, the Court regularly reports and is accountable to the ASP, which represents the entire membership of the Rome Statute system, as opposed to individual States Parties. Accordingly, the power States retain over the ICC is spread among its membership and exercised collectively by States Parties through the Assembly. It is neither concentrated in the hands of a particular State or a group of States, nor entirely and definitively ‘outsourced’ to the ASP sub-structures. In this diplomatic model, the formal communication between the Court, on the one hand, and its *injugovin* and individual States, on the other hand, takes the form of periodic reporting and a structured dialogue. The two entities engage in regular and continuous exchanges on a wide range of governance matters, although the ASP remains in its power to extract issues from such consultations and push them through a multilateral inter-State decision-making track.

²¹³ Villacis, 2018, pp. 565–566, see above note 8. See also above notes 127–130.

²¹⁴ Villacis, 2018, p. 569–571, see above note 8 (describing in detail the ASP Bureau’s challenges, such as “the number of facilitators/focal points, their location, the number of meetings held on different topics and the length of reports”).

²¹⁵ *Ibid.*, p. 567.

The fourth variation identified above can be referred to as the *managerial* or *executive* model. Its characteristics are found in the governance scheme of the voluntarily-funded UN-assisted criminal tribunals such as the (R)SCSL, the STL and the ECCC. This label does not deny the hybrid nature of their oversight arrangements, which also feature diplomatic, bureaucratic, and possibly even direct governance elements. As noted, these tribunals' parent (establishing) States, acting through their judicial administration structures, as well as the organs of their parent organisation, the UN, were tasked with carrying out specific governance functions. But each of those tribunals has a dedicated management or steering committee composed of a limited number of major donor States (mostly from the Global North, except for their parent States). The committees meet on a regular basis whenever needed and play a crucial role in enabling the tribunals' functioning, thereby exerting an enormous power over them. They concentrate all of the major governance functions, includes providing courts with necessary funding and strategic and organisational support. Unlike with the bureaucratic and diplomatic schemes, the tribunals' accountability towards these committees takes the form of continuous reporting and ongoing dialogue. This informal relationship may well resemble direct governance in its intensity and proximity between the States and the courts, save for the fact that it remains multilateral and is mediated and overseen by a neutral actor, the UNSG as represented by the OLA. This model entails an enhanced ownership of the justice initiatives by States participating in the committees and a professionalised, more hands-on approach to judicial governance. At the same time, the almost complete lack of distance between the court and the interested powers-that-be, combined with the lack of sustainable funding that has become the trademark of this model, presents certain risks in terms of judicial independence. Furthermore, the secluded character of the committees whose terms of reference and activities have been poorly publicised, raises concerns of transparency and accountability towards the wider community of States and the public at large.²¹⁶

Given their deployment in several international or special criminal jurisdictions, the four governance models are notable and influential enough to justify the attention paid to them as part of the present discussion. However, they far from exhaust the spectrum of possibilities. The

²¹⁶ Llewellyn, 2019, p. 16, see above note 5.

study of international judicial governance schemes would be greatly enriched by considering arrangements used for all other courts that have populated the international criminal law landscape.²¹⁷ Moreover, as models are fictions and correspondence to them of actual schemes is only a matter of degree, their real-life incorporations are by no means sealed off from one another. On the contrary, they have significant overlaps and commonalities. As shown above, it is not that the tribunals governed by means of a *diplomatic* model are by definition bureaucracy-free or more averse to the *managerial* touch than the others. In a similar vein, the elements of *diplomatic* or *direct governance* are not at all extraneous to courts which were placed under the *executive* model. An essentially *diplomatic* model-based *injugovin* (for example, the ICC ASP) can grow over-bureaucratized in some respects, just as the *direct governance* approach will often be perfectly reconcilable with a bureaucratic interlayer (for instance, the IMT ACC) and might at times infiltrate the *executive* schemes (for example, the managerial committees of the voluntarily-funded hybrid or special courts). Taken in the abstract, these models speak to the immediacy and degree of power individual participating States may exert *vis-à-vis* the respective tribunals and courts. Such power is typically less contained and buffered under the direct governance and executive schemes and more so under the envelope and diplomatic schemes, which entail a higher degree of institutionalisation of *injugovins*.

Finally, it bears noting that the international judicial governance arrangements are the products of their time and shaped by the prevailing political circumstances, power dynamics among States, and legal-institutional frameworks (if any) into which the tribunals are born.²¹⁸ The existing frameworks structure the power relations, which may, however, also transcend and work against the legal-institutional arrangements in place, further complicating the picture. In judicial governance, like in other spheres, one size does not fit all and none of the models can be regarded as superior or ideal for all circumstances and courts. Arguably, the les-

²¹⁷ A detailed examination of the governance of courts not discussed here, such as the Tokyo Tribunal, the UNMIK Regulation 64 panels in Kosovo, UNTAET Special Panels for Serious Crimes in East Timor, the Kosovo Specialist Chambers, the Extraordinary African Chambers, and the Special Criminal Court in the Central African Republic, is yet to be undertaken.

²¹⁸ The legal-historical and sociological research effort yet remains to be accomplished. For the first remarkable and rich study from an international institutional law perspective, see Llewellyn, 2019, see above note 5.

sons learnt and best practices from the experience of one tribunal (or a group of tribunals) will not be directly transposable to other contexts; it is likely that careless and uncritical transplantations would do more harm than good. That said, the modalities associated with contiguous governance models can still serve the *injugovins*, States, and justice architects as a source of inspiration for reforms and a repository of optimisation measures and out-of-box solutions to challenges posed by practice.

12.4. Power and Governance at the ICC: Questioning the ‘Diplomatic’ Model

12.4.1. Independence v. Governance: A (Pseudo-)Dilemma

An effective governance of criminal courts, international or national, is a delicate balancing act. On the one hand, there is an imperative need to ensure judicial and prosecutorial independence. It is the obligation of the governing bodies to respect and guarantee it. On the other hand, courts must remain accountable. Risks of mismanagement, inefficiency and abuse ought to be minimised and allegations duly investigated and acted upon, which makes competent, *bona fide* governance crucial. The tension between judicial (and prosecutorial) independence and effective judicial governance is a false dilemma because one is inconceivable without the other.

The governance of *national* courts is usually subject to the constitutional principle of the separation of powers, which supposedly constrains the executive in administering the judicial system. The judicial branch mostly enjoys autonomy *vis-à-vis* other branches of power and remains self-governed in part of judicial functions and organisation. Striking the balance between independence and effective governance in respect of *international* courts presents special challenges. The centralisation of a wide range of legislative and executive competences in one governing entity (for example, the ASP or a management committee) is not unusual in this context. This inevitably raises the issue of separation of powers, even though partially mitigated by the possibility that governance functions may be split among separate organs (for example, the principal organs of the UN). Moreover, ICTs operate in highly politicised environments and depend on the good will of other actors for the performance of their core functions. This increases risks for judicial and prosecutorial independence and calls for particular vigilance and extra-secure system of checks and balances. It is far from a mere theoretical possibility that States may be

tempted to abuse their positions within *injugovins* to exert influence on cases in which they have stakes and otherwise deploy their power over ICTs, mediated by collective governance organs as it were, for political purposes. An important counterpoint, on the other hand, is that the judicial character of ICTs does not render them any more immune to mismanagement, corruption, and incompetence than any other – inherently fallible – human institution. While an effective, hands-on governance is a *sine qua non* for their effective functioning and durable legitimacy, it may also be a natural proclivity of the tribunals to resist externally-imposed oversight measures as overly intrusive. Not every complaint referring to judicial independence, however, should be taken on its face value. The legitimate governance concerns warrant putting additional safeguards and accountability measures in place for the sake of meaningful oversight and quality control. This does not change the fact that the executive must take care not to interfere in the exercise of judicial mandates or attempt to micro-manage courts. This is the bottom line, but drawing it in practice is easier said than done.

In several respects, the ASP represents an advanced model of international judicial governance. Developed uniquely for the needs of a permanent court situated outside of the UN system, it is marked by a rare level of institutionalisation, multiplication and concentration of governance functions, and a matching degree of sophistication of governance processes. It may thus be tempting to think the ICC's governance scheme to be superior to all others. However, as will be shown in this section, the ASP's track record provides some grounds to dispel this claim. As will be shown below, the ASP has let the ICC down at times, skewing the balancing act both ways and undermining its effective and accountable operation. This is not to say that the ICC can be let off the hook for any malfunctioning and mismanagement of its own, but rather that the States Parties should also bear their share of responsibility for any management and oversight faults attributable to them. The following offers some examples of governance gaps and overreach by the ASP. More than once, it manifested itself as an amorphous, apathetic and lingering *injugovin* which failed to intervene proactively and swiftly enough to bridge the gaps of governance. In other instances, however, its interventions came impermissibly close to endangering judicial independence.

12.4.2. Gaps: Acting Too Little, Too Late

12.4.2.1. Internal Oversight

In October 2017, the European Investigative Collaborations network revealed that some of the correspondence in a batch of 40,000 leaked documents indicated that the former ICC Prosecutor Moreno Ocampo operated several offshore companies while in office.²¹⁹ Upon completing his term in 2012, he accepted a job as a legal advisor or a lobbyist with the Libyan oil billionaire Hassan Tatanaki, the ICC's potential suspect. In that capacity, the former Prosecutor allegedly received sensitive information from a serving OTP member, alerting that Tatanaki might become a prosecutorial target if he did not distance himself from the Libyan general Khalifa Haftar whose forces had allegedly committed crimes within the Court's jurisdiction. The former prosecutor had also allegedly requested Côte d'Ivoire to detain Laurent Gbagbo, who had no procedural status at the time, without legal basis, prior to the issuance of an arrest warrant. The former prosecutor also arranged for a payment to be made to the current Prosecutor Bensouda's spokesperson for organising a press conference with her, although both the former prosecutor and said OTP member were aware of the conflict of interests.²²⁰ Bensouda later denied that she had consulted the former Prosecutor on ICC matters after he left office, although her leaked communications showed otherwise. If the alleged facts are confirmed, this set of episodes would amount to a series of procedural violations and otherwise questionable behaviour by the former Prosecutor as well as breaches of the Code of Conduct by then-serving OTP staff.²²¹ It must be noted that the first Prosecutor declined to adopt

²¹⁹ The facts as described here were alleged in a series of articles published by the journalists' network European Investigative Collaborations, 'Court Secrets' (available on European Investigative Collaborations' web site).

²²⁰ ICC Statute, Article 42(1), see above note 19 ("A member of the Office shall not seek or act on instructions from any external source").

²²¹ ICC OTP, Code of Conduct for the Office of the Prosecutor, 5 September 2013 (<https://www.legal-tools.org/doc/3e11eb/>), Section 7 (Confidentiality), Section 10 (Non acceptance of gifts, remunerations and favours from external sources). See also *ibid.*, Section 9 (conflict of interests): "42. Members of the Office shall abstain from any conduct which may, directly or indirectly, be in conflict with the discharge of their official duties during terms of service or may compromise the independence and trust reposed in the Office following separation of service. These conflicts may arise, *inter alia*, from: [...] (b) circumstances in which Members of the Office appear to benefit, directly or indirectly, from financial or other involvement with the activities of any enterprise that engages in any business or transaction with the Court".

the Code during his tenure;²²² the Code as such does not apply to former Prosecutors. In October 2017, Prosecutor Bensouda announced that the matter was being investigated by the Independent Oversight Mechanism.²²³ The two staff members concerned had been suspended and were subsequently fired (or made to leave).

We can leave to one side the fact that States Parties may have made a miscalculation in 2003 when they elected a Prosecutor whose professional qualities possibly fell short of the Article 42(3), requirements.²²⁴ The situation as sketched out above can be seen as an example of a yawning governance gap. One problem, acknowledged by the Court,²²⁵ is that when Ocampo was in office, there was no financial disclosure system in place requiring senior management to submit an annual disclosure of asset form comparable to the UN Financial Disclosure Programme and the Secretary-General's Voluntary Public Disclosure Initiative. The Court was not aware of the first Prosecutor's "private financial arrangements". This financial disclosure system was first introduced in 2015, that is, 13 years after the Court's establishment. The evident question is: why so late? The same goes for the IOM – an operationally independent office reporting to the ASP President and competent, among others, to investigate at its own discretion reports of misconduct ("suspected misconduct, serious misconduct, or unsatisfactory behaviour") by elected officials and Court person-

²²² Morten Bergsmo, Wolfgang Kaleck, Sam Muller and William H. Wiley, "A Prosecutor Falls, Time for the Court to Rise", FICHL Policy Brief Series No. 86 (2017), Torkel Opsahl Academic EPublisher, Brussels, 2017, p. 3 (<https://www.legal-tools.org/doc/41b41a/>).

²²³ ICC OTP, "ICC Prosecutor, Fatou Bensouda, on recent media allegations of impropriety by former Prosecutor and certain staff", 5 October 2017.

²²⁴ For some disconcerting facts, see Bergsmo, Kaleck, Muller and Wiley, 2017, p. 2–3, see above note 222; Morten Bergsmo, "Institutional History, Behaviour and Development", in Morten Bergsmo, Klaus Rackwitz and SONG Tianying (eds.), *Historical Origins of International Criminal Law: Volume 5*, Torkel Opsahl Academic EPublisher, Brussels, 2017, pp. 22–24, footnote 34 (noting, at p. 25, that "the first Prosecutor of the Court was elected in an almost careless manner") (<http://www.toaep.org/ps-pdf/24-bergsmo-rackwitz-song>). See also "ICC OTP Kenya Cases: Review and Recommendations Executive Summary of the Report of the External Independent Experts", Annex 1, Full Statement of the Prosecutor, Fatou Bensouda, on external expert review and lessons drawn from the Kenya situation, 26 November 2019, p. 2 ("Prosecutor 1's leadership could best be categorized as autocratic, not open to contrary assessments or viewpoints, too often marginalizing those who disagreed with him or reacting angrily and threateningly. This leadership style discouraged candid, contrary assessments and viewpoints to the detriment of the cases") (available on the ICC's web site).

²²⁵ ICC OTP, 5 October 2017, see above note 223.

nel.²²⁶ The IOM became operational in late October 2015 and fully functional only in 2017 when its inspection and evaluative functions were put in operation.²²⁷ Around the same time (end of 2017), the IOM suffered a setback following the abrupt departure of its Head, even leading to discontinuance of some cases.²²⁸ In any event, the IOM could be seized with the aspects of the ‘Ocampo Gate’ and investigate the then-serving OTP members, but not the former Prosecutor, who was subject neither to disciplinary sanctions nor removal.

The failure to establish the IOM prior to 2009, agree on the parameters of its investigative mandate until 2013, and operationalise it fully until 2017 exposed the Court to the risk – ultimately materialised – of the conflict of interests in internal inquiries and an accountability gap in the early years of the OTP. As already noted, the only reason it took so long to operationalise the IOM’s investigative function, was that the OTP, in the person of its former principal, was strongly opposed to extending the IOM’s powers to the OTP staff, arguing that such a power would encroach upon the Prosecutor’s independence.²²⁹ It was only after Ocampo left the Court that a compromise was reached in 2013. This in itself is telling and means, at the least, that it could have been reached earlier if not for the persons involved. It is arguable, admittedly with the benefit of hindsight, that this is where the ASP should have been more proactive and firmer in insisting on the sooner activation of the IOM and on extending its investigative mandate to the OTP staff. Management oversight and accountability, if one is serious about minimising unreasonable risks, should not be an afterthought but a key priority in the setting-up stage.

²²⁶ See above Section 12.3.3.2.

²²⁷ ICC-ASP/15/Res.5, para. 109, see above note 145.

²²⁸ ICC ASP, Annual report of the Head of the Independent Oversight Mechanism, 8 November 2018, ICC-ASP/17/8, para. 3 (<https://legal-tools.org/doc/bauh3t>) (“This Head resigned in December 2017, creating a void which, with the addition of an increase in investigation work, significantly challenged the limited IOM resources, leading to cases being unfortunately not pursued by the IOM”).

²²⁹ Bergsmo, Kaleck, Muller and Wiley, 2017, p. 2, see above note 224 (“the first Prosecutor and his Office had systematically sought to weaken the IOM in the name of prosecutorial independence”), referring to Mediapart, “CPI: comment le procureur Ocampo a organisé son impunité”, 13 October 2017 (<https://www.legal-tools.org/doc/41b41a/>).

12.4.2.2. Enforcing Co-operation

Another example of a governance gap that merits mention, is the ASP's well-documented inability to address the issue of States Parties' non-compliance with the Court's requests for co-operation.²³⁰ A dramatic governance failure threatening the integrity of the system as a whole, it is most apparent in the impotency of the Assembly to deal in any manner with the individual States Parties' non-execution of the outstanding 2009 and 2010 arrest warrants against the then-President of Sudan, Omar Al-Bashir, when he was in their territories. The ICC's referrals, pursuant to Article 87(7), of those instances of non-cooperation to the ASP along with the UNSC, which had referred the Situation in Darfur to the ICC Prosecutor through Resolution 1593 back in 2005, did not meet with meaningful action on the part of the Assembly.²³¹

In July 2017, the Pre-Trial Chamber found that, by not arresting Al-Bashir while he was attending the AU Summit in Johannesburg in June 2015, South Africa neglected its co-operation duty, preventing the Court from exercising its functions.²³² When deciding whether to refer this matter to the ASP and the Security Council, the Chamber controversially (albeit perhaps understandably) regarded this to be unnecessary. Engaging 'external actors' would, in its view, not be an effective way to obtain co-operation. As such, this is a revealing, if disconcerting, finding. The Chamber observed that States Parties had been referred to the ASP and the

²³⁰ See sources in above note 143.

²³¹ See among others ICC, Situation in Darfur, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber II, Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute, 11 July 2016, ICC-02/05-01/09-266 (<http://www.legal-tools.org/doc/a09363/>); ICC, Situation in Darfur, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber II, Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute, 11 July 2016, ICC-02/05-01/09-267 (<http://www.legal-tools.org/doc/51c322-1/>); ICC, Situation in Darfur, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber II, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, 9 April 2014, ICC-02/05-01/09-195 (<http://www.legal-tools.org/doc/89d30d/>).

²³² ICC, Situation in Darfur, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber II, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, 6 July 2017, ICC-02/05-01/09-302 (<http://www.legal-tools.org/doc/68ffc1/>), para. 123.

Security Council six times for their failure to arrest and surrender Al-Bashir. Moreover, the past 24 meetings of the Council following the adoption of the Situation in Darfur referral resolution, including those where the Prosecutor reported on the Situation, had led nowhere. Proposals from States to develop a non-co-operation referral follow-up mechanism had not been taken up. This “further strengthen[ed the Chamber’s] belief that a referral of South Africa [was] not warranted as a way to obtain cooperation”.²³³

This is the judges’ way of saying that the ASP and the Security Council have proven to be of no assistance in enforcing co-operation. While there may have also been other considerations feeding into the Chamber’s decision, the fact that the PTC saw little point in such a referral, and said so, is a rebuke to the governance bodies and an indictment of their inaction.

12.4.3. Excesses: Independence Threatened

12.4.3.1. Tailor-made Law

At the other extreme are the instances when the ASP did not tread carefully and acted in ways which could be seen as intruding in judicial matters pending before the Court. The exercise of the legislative function in the domain of criminal procedure, proved rather problematic as it may have compromised judicial independence and muddied waters in ongoing cases. One concerning episode was the 2013 adoption of new rules regarding the accused’s presence at trial and excusal (Rules 134*bis*–134*quater*). As outlined previously,²³⁴ both prior to 2013 and afterwards, the RPE amendments were developed in consultation between the ICC and the SGG. This was based on a common understanding that rule amendments ought to be reviewed by means of a ‘structured dialogue’ between the Court and the ASP as set out in a special protocol (Roadmap on the Review of Rule Amendments), in order to prevent a “disparate and unstructured” process. However, said rules were produced by the ASP unilaterally, that is, circumventing the Roadmap and without an inclusive and meaningful consultation with the Court. The Court was simply confronted with the fact.

The 2013 Resolution of the AU’s extraordinary session held that the ICC cases against the Kenyan President, Uhuru Kenyatta, and Vice-

²³³ *Ibid*, para. 138.

²³⁴ See above Section 12.3.3.3.

President, William Ruto, would prevent them from exercising their constitutional duties. In reaction to those concerns, a group of States Parties (Botswana, Liechtenstein, and Jordan),²³⁵ wishing to defuse tensions with the AU, initiated amendments that espoused a more liberal interpretation of the statutory requirement of presence at trial.²³⁶ At that point, the matter had already been taken up by the Trial and Appeals Chambers in several decisions. Only a few weeks ahead of the twelfth ASP session, the Appeals Chamber ruled that while Article 63 did “not operate as an absolute bar in all circumstances to the continuation of trial proceedings in the absence of the accused”, the Trial Chamber’s discretion to excuse the accused from continuous presence at trial was limited and must be exercised with caution.²³⁷ The Appeals Chamber had also set out six preconditions for the excusal.²³⁸

The initial purported rationale of the amendments was to codify the existing appellate jurisprudence (Rule 134*ter*) and provide for the possibility of participating at trial through video link (Rule 134*bis*). But this was insufficient for Kenya, which was determined to see to it that the presence requirement was interpreted with an even greater latitude in the Kenyan cases. Hence Kenya propelled the adoption of Rule 134*quater*.

²³⁵ O’Donohue, 2015, p. 120, see above note 9.

²³⁶ ICC Statute, Article 63(1), see above note 19 (“The accused shall be present during the trial”).

²³⁷ ICC, Situation in the Republic of Kenya, *The Prosecutor v. Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Trial Chamber V(B), Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, 18 October 2013, ICC-01/09-02/11-830 (<http://www.legal-tools.org/doc/1919a4/>); ICC, Situation in the Republic of Kenya, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’, 25 October 2013, ICC-01/09-01/11-1066, paras. 1–2 (‘Ruto Judgment on Appeal’) (<http://www.legal-tools.org/doc/575657/>).

²³⁸ Ruto Judgment on Appeal, para. 2, see above note 237 (“(i) the absence of the accused can only take place in exceptional circumstances and must not become the rule; (ii) the possibility of alternative measures must have been considered, including, but not limited to, changes to the trial schedule or a short adjournment of the trial; (iii) any absence must be limited to that which is strictly necessary; (iv) the accused must have explicitly waived his or her right to be present at trial; (v) the rights of the accused must be fully ensured in his or her absence, in particular through representation by counsel; and (vi) the decision as to whether the accused may be excused from attending part of his or her trial must be taken on a case-by-case basis, with due regard to the subject matter of the specific hearings that the accused would not attend during the period for which excusal has been requested”).

The rule as adopted allows for excusal of an “accused subject to a summons to appear” (as was the case with the Kenyan leaders) “who is mandated to fulfill [sic] extraordinary public duties at the highest national level” (which the country’s President and Vice President undoubtedly are), subject to representation by counsel and with an explicit waiver of the right to be present at trial. The request of excusal could be granted, if “alternative measures are inadequate”, should the Trial Chamber determine that “it is in the interests of justice and provided that the rights of the accused are fully ensured”.

Rule 134*quater* clearly went beyond the terms for excusal set by the Appeals Chamber in an ongoing case. In particular, it brought to naught the requirements that absence be allowed only in “exceptional circumstances”, “be limited to what is strictly necessary”, and subject to a “case-by-case determination”. It follows from the text of the Rule that preconditions related to exceptionality are deemed satisfied by default where the accused holds “extraordinary public duties at the highest national level”. Already a few weeks after the adoption of the Rule, in January 2014, Trial Chamber V(A) conditionally excused William Ruto from presence at trial, except for specific hearings, over strong objections by the Prosecutor.²³⁹ The Prosecutor had argued, among others, that the far-reaching request under Rule 134*quater* seeking a ‘blanket excusal’ was inconsistent with the plain wording of the Rule. Even if the Rule could be interpreted as authorising a blanket excusal, such a construction would arguably be incompatible with Articles 63(1) (as interpreted by the Appeals Chamber), 27(1) (irrelevance of official capacity), and 21(3) (equal treatment). Those provisions should prevail over Rule 134*quater* in the event of the conflict, in accordance with Articles 51(4)–(5).²⁴⁰ However, the Trial Chamber

²³⁹ ICC, Situation in the Republic of Kenya, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber V(A), ICC-01/09-01/11-T-72-ENG ET WT 15-01-2014 1-68 NB T, 15 January 2014, ICC-01/09-01/11-T-72-ENG, pp. 67–68; ICC, Situation in the Republic of Kenya, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber V(A), Reasons for the Decision on Excusal from Presence at Trial under Rule 134*quater*, 18 February 2014, ICC-01/09-01/11-1186, para. 10 (“Ruto Decision on Rule 134*quater*”) (<http://www.legal-tools.org/doc/8b7d3e/>).

²⁴⁰ ICC Statute, Articles 51(4)–(5), see above note 19. ICC, Situation in the Republic of Kenya, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Prosecution response to Defence request pursuant to Article 63(1) and Rule 134*quater* for excusal from attendance at trial for William Samoei Ruto, 8 January 2014, ICC-01/09-01/11-1135, para. 4 (<https://www.legal-tools.org/doc/82390b/>) (“the Chamber should seek to give effect to the legisla-

permitted Ruto to be absent from the most of his trial and remained unimpressed by the OTP arguments.²⁴¹ In due course, it also denied leave to appeal.²⁴²

Notably, the OTP did not assert Rule 134*quater* to be *ultra vires* the Statute as such: in its view, it was possible to construe it in line with the Statute, in particular, Article 63(1), as authoritatively interpreted by the Appeals Chamber in its judgment of 23 October 2013. The fact that States Parties amended the RPE and not the Statute, meant that that Chamber's six-criterion list still reflected the standing law, being the appellate bench's reading of the statutory provisions hierarchically superior to Rule 134*quater*. Therefore, the Rule must have only been read as consistent with the Statute and the relevant appellate jurisprudence, lest the conclusion would have to be drawn that the States Parties had tried to modify the Statute through the back door of RPE amendments.²⁴³ To the Trial Cham-

tive intent of Rule 134*quater* to the extent that the provision can be reconciled with the Statute").

²⁴¹ Ruto Decision on Rule 134*quater*, paras. 52, see above note 239 (opining that an attempt to read the Appeals Chamber's criteria into Rule 134*quater* "runs counter to the apparent intention of the drafters of the new rules"), *ibid.*, 55–56 ("the adoption of Rule 134*quater* [...], without all requirements listed in Rule 134*ter* [...], was intended to be consistent with Article 63(1) [...] and to provide further clarity to that provision" as it applies "to a specific type of situations", thus being a subsequent agreement within the meaning of Article 31(3)(a) VCLT).

²⁴² ICC, Situation in the Republic of Kenya, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Prosecution's application for leave to appeal the decision on excusal from presence at trial under Rule 134*quater*, 24 February 2014, ICC-01/09-01/11-1189 (<https://www.legal-tools.org/doc/c9c7b3>); ICC, Situation in the Republic of Kenya, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber V(A), Decision on 'Prosecution's application for leave to appeal the decision on excusal from presence at trial under Rule 134 *quater*', 2 April 2014, ICC-01/09-01/11-1246 (<https://www.legal-tools.org/doc/e373b0>).

²⁴³ ICC, Situation in the Republic of Kenya, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, OTP, Prosecution response to Defence request pursuant to Article 63(1) and Rule 134*quater* for excusal from attendance at trial for William Samoei Ruto, 8 January 2014, ICC-01/09-01/11-1135, paras. 30 ("the States Parties chose to amend the Rules, not the Statute, and Article 51(4) requires amendments to the Rules to be "consistent with th[e] Statute". [...] [T]he recent amendments cannot 'overrule' the Appeals Chamber's interpretation of Article 63(1)."), *ibid.*, para. 37 ("the law requires that Rule 134*quater* be read to be consistent with the Statute, which is the governing law. The Appeals Chamber's reading of Article 63(1) must be regarded as authoritative. If the States Parties wished to change its effect, or weaken the prohibition on preferential treatment of accused who hold high public office, they could have amended the Statute. They did not do so. Contrary to

ber, however, Rule 134*quater* was a distinct provision that, unlike Rule 134*ter*, was emancipated from the Appeals Chambers' preconditions for excusal and must have been read on its own terms, being a 'subsequent agreement' on the applicability of the presence requirement under Article 63(1), to persons with the status such as that of Deputy President Ruto. The problem with the Trial Chamber's position is that the RPE amendments can hardly be regarded as 'subsequent agreements' to those encompassed within the Statute. The latter rest on the highest tier of the system of applicable law, that is, above the RPE. Any 'subsequent agreements' meant to 'clarify' the Statute by modifying the scope of the existing provisions or by introducing new ones (as Rule 134*quater* did in essence) must be incorporated in the Statute. States Parties should not amend the Statute by tinkering with the Rules in avoidance of collisions. Indeed, it is reasonable to assume that if States Parties had intended to qualify the statutory presence requirement for officials with extraordinary public duties at the highest national level, they would have rather amended the Statute. Like with the amendment of the RPE, a two-thirds majority would be needed.²⁴⁴ Since States Parties did not amend the Statute, the argument that Rule 134*quater* was *not* meant to be subordinate to the Appeals Chamber's interpretation of Article 63(1), fails.

The negative implications of the ASP's adoption of Rule 134*quater* for the coherence of the ICC's procedural regime and, more broadly, the constitutional integrity of the Rome Statute system can be appreciated in light of the Appeals Chamber's judgment. The effects of the rule amendment are problematic for several reasons. The first is the creation of two concurrent, potentially conflicting interpretations of Article 63(1), within the same legal regime: one given by the Appeals Chamber and the other implicit in the ASP's legislative intent underlying Rule 134*quater* (as divined by the Trial Chamber). To preclude a proliferation of legal meanings, States Parties should have either amended the Statute (had they indeed intended to allow for a broader scope for excusals) or codified the appellate jurisprudence more faithfully than they ostensibly did in Rule 134*quater*. The ASP's legislative measure taken in parallel to the appellate jurisprudence introduced a legal uncertainty detrimental for the coherence and integrity of the ICC's regime. If the States Parties wished to reframe

the position advanced in the Request, the same cannot be achieved by the back door, by amending the Rules") (<https://legal-tools.org/doc/82390b>).

²⁴⁴ ICC Statute, Article 51(2), Article 121(3), see above note 19.

the statutory presence requirement through the enactment of Rule 134*quater* – for example, because they saw it even more undesirable to reopen the Pandora’s box of the Statute’s compromises – they only muddied the legal waters to then throw the hot potato of the presence issue to the judges for resolution. Arguably, this falls short of a model behaviour for an *injugovin*.

Second, the promulgation of a rule drafted with specific accused persons in mind and with the language so overtly tailor-made to the circumstances of an accused person in a pending case is also problematic from a rule-of-law perspective. What was the regulatory purport of Rule 134*quater* and did the States Parties at all contemplate its application in an undefined range of situations outside the *Ruto* case?²⁴⁵ Arguably, the Rule was adopted as a concession to the AU and Kenya in a heavily charged context, under unprecedented pressure and in a hurried manner falling short of a genuine deliberation and a full appreciation of the consequences.²⁴⁶ Even if, *arguendo*, it is not *ultra vires* in a formal sense, the quality of the Rule is tainted by the circumstances of its adoption.

Third, Rule 134*quater* was adopted exactly at the time when the presence at trial was a salient issue in ongoing cases; it had been extensively litigated and subject to judicial decisions. Unavoidably, a rushed legislative intervention in such circumstances signals to the Court which direction the ASP expects it to take. Regardless of whether any indirect prodding by the Assembly *actually* influenced judicial decision-making (which is not suggested), it is bad enough that it could *potentially* do so and, in any event, that it gave rise to such a perception. The problem is that moulding the RPE to fit the circumstances of one high-profile and deeply contentious case unacceptably shrank the already cramped political space for independent judicial decision-making. It is not beyond imagination that, when placed in such a situation, judges might find it especially difficult to disregard the socio-political consequences of their decisions

²⁴⁵ Ambach, 2015, p. 1291, see above note 147 (“Noting “a general rule for law-makers not to devise an abstract-general legal provision in order to fit the circumstances of a specific case. Such a procedure generally entails many risks, including fragmentation of the relevant legal text, possibly even its incoherence, as well as a loss of the abstract-general character constitutive of a law that is meant to apply to *any* situation regardless of specifics which have consciously been considered irrelevant for its application”).

²⁴⁶ *Ibid.*, p. 1294 and note 122 (Rule 134*quater* was not adopted as a result of a process unfolding “at a pace that provides for due reflection and assures that no hasty fixes are inserted into the Rules for a concrete situation at hand”).

and eschew a cost-benefit analysis. This might make them disinclined to reach a decision they knew would trigger a political backlash on the part of a number of States (African States Parties) and engulf the system in a deeper crisis.²⁴⁷ The very fact of the court being confronted with such an unenviable scenario can be a serious test for judicial independence.

12.4.3.2. Moulding Adjudication

Another troubled episode between the ASP and the ICC took place at the fourteenth ASP session in November 2015 and also involved Kenya. The contention related to the temporal scope of application of Rule 68 amendments which, it should be recalled, had been adopted in 2013 in order to liberalise the regime for the admission of prior recorded testimony of unavailable witnesses or those subject to interference.²⁴⁸ Leading up to the session, the Bureau included in the provisional agenda a supplementary item regarding Rule 68 upon Kenya's request.²⁴⁹ The appeal against the *Ruto and Sang* Trial Chamber's decision granting the OTP's request to admit, in accordance with the amended Rule 68,²⁵⁰ the prior recorded testimony of four prosecution witnesses who subsequently recanted and of one witness who disappeared, was pending before the Appeals Chamber at the time. By introducing the issue for the States Parties' debate, Kenya sought to make the Court suppress that prior recorded evidence.

The ICC principals sent an unprecedented and alarmed letter to the ASP President expressing concern that issues proposed for discussion by States related to "matters falling clearly within the judicial and prosecuto-

²⁴⁷ O'Donohue, 2015, p. 122, see above note 9 ("had the ICC decided that the Rule is inconsistent with [the Statute] [...] and refused to grant the request, it may have generated an even stronger political backlash from some African states, more efforts to undermine the ICC, and additional pressure for the Assembly to take further measures that undermine the integrity of the Statute and the effectiveness of the Court").

²⁴⁸ Text accompanying above note 166.

²⁴⁹ Review of the Application and implementation of amendments to the Rules of Procedure and evidence introduced at the 12th Assembly, in Annotated list of items included in the provisional agenda, 13 November 2015, ICC-ASP/14/1/Add.1, p. 2, para. 3 (<https://legal-tools.org/doc/y1nz4e>).

²⁵⁰ ICC, Situation in the Republic of Kenya, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber V(A), Decision on Prosecution Request for Admission of Prior Recorded Testimony, 19 August 2015, ICC-01/09-01/11-1938-Corr-Red2 ('Ruto Decision on Admission of Prior Recorded Testimony') (<http://www.legal-tools.org/doc/d18042/>).

rial competence of the Court” that were “under active consideration before the Chambers [...] and hence *sub judice*”.²⁵¹ They referred to the judicial and prosecutorial independence as “a fundamental tenet of the Rome Statute framework”. While recognising the ASP’s role in providing management oversight regarding the administration of the Court and its legislative functions, the principals underscored that “issues relating to the application, implementation and interpretation of the Court’s legal instruments within the context of an active case/proceedings fall strictly within the judicial functions of the ICC to be determined by the independent and impartial Judges of the Court, in accordance with the legal framework governing the Court’s judicial proceedings”. In their view, the ASP’s role within the constitutional framework and separation of powers of the Rome Statute system dictated that the ASP “refrain from any action that interferes with the judicial independence in this respect, or gives the perception thereof”, including discussion of judicial matters pending before the Court. The ASP President was reminded of the role of States Parties, as custodians of the Rome Statute, to “robustly continue to safeguard the independence of the ICC’s judicial process”, which was “vital to the integrity of the Rome Statute system and to the ultimate goals of the Court”. He was also urged to ensure that the upcoming ASP would not undermine, or were not perceived to undermine, the judicial and prosecutorial independence.

Against this backdrop, the ‘Kenya issue’ came to dominate the ASP – again. Attending the fourteenth session with an oversized delegation, including ministers, members of the Parliament, and other officials, Kenya was bent on having the ASP formally pronounce that the amended Rule 68 could not be applied in ‘its’ remaining case retroactively.²⁵² Article 51(3), provides that RPE amendments and provisional Rules “shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted”. The 2013 ASP Resolution by which Rule 68 was amended, reiterated this provision, adding that the rule as amended was without prejudice to Articles 67 and 68(3).²⁵³

²⁵¹ Letter to H.E. Mr Sidiki Kaba, President of the Assembly of States Parties, signed by Silvia Fernández de Gurmendi, Fatou Bensouda, and Herman von Hebel, 13 November 2015 (<https://legal-tools.org/doc/ragycx>).

²⁵² Stéphanie Maupas, “Kenya Sets ‘Dangerous Precedent’ at ICC Assembly”, in *JusticeInfo.net*, 30 November 2015 (available on its web site).

²⁵³ ICC-ASP/12/Res.7, para. 2, see above note 164.

Whether the application of Rule 68 in the trial that had commenced prior to the amendment (September 2013) amounted to a retroactive application detrimental to the accused, was a judicial issue the Trial Chamber had dealt with previously, answering that question in the negative.²⁵⁴ But during the ASP session, delegations spent an inordinate amount of time and effort trying to meet Kenya's demands, while the Kenyan representatives aggressively lobbied other participants to include, in the omnibus resolution, language on the non-applicability of the amended Rule 68 to situations which had commenced prior to 27 November 2013, purportedly to affirm the consensus reached at the adoption.²⁵⁵ To that end, Kenya's delegates reportedly resorted to an unseemly tactics of blackmailing the Assembly with a prospective withdrawal from the Rome Statute if their concerns were not met. Other delegations were upset but continued to work behind the closed doors. Breaching diplomatic conventions and the decorum of a multilateral conference, the delegates of Kenya reportedly went as far as to threaten the members of Kenyan civil society in attendance with retaliation. During the last plenary session, the Head of Delegation delivered a vitriolic statement berating other delegations for a range of sins, from an anti-African bias and imperialism to the lack of intellectual honesty.²⁵⁶

Ultimately, in the assessment of Kenya's Head of Delegation, the ASP "has provided unambiguous clarity to the temporal scope of the application of rule 68, and [...] it does not apply retroactively to the cases that had commenced before November 2013, including all those in the Kenyan Situation who were under investigation or prosecution at that time".²⁵⁷ In fact, the Kenyan delegation's objective to push through the relevant text into the omnibus resolution failed: it contains no mention of the amended Rule 68.²⁵⁸ States Parties refused to settle the issue through

²⁵⁴ Ruto Decision on Admission of Prior Recorded Testimony, paras. 23–27, see above note 250.

²⁵⁵ Statement by Amb. (Dr.) Amina C. Mohamed, CBS, CAV, Cabinet Secretary, Ministry of Foreign Affairs & International Trade of the Republic of Kenya during the General Debate of the 14th Session of the Assembly of State Parties to the Rome Statute of the International Criminal Court, 18 November 2015, p. 3.

²⁵⁶ *Official Records, Volume I, Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourteenth Session, The Hague, 18-26 November 2015*, ICC-ASP/14/20, Annex VI, pp. 84–85 (paras. 6–12) (<https://www.legal-tools.org/doc/8b9a53/>).

²⁵⁷ *Ibid.*, para. 7.

²⁵⁸ ICC-ASP/14/Res.4, see above note 145.

the Resolution. The consensus that States managed to reach towards the end of the ASP session, after hours of negotiations behind closed doors, was the following text included in the section ‘Proceedings’ of the *Official Records*:

Following the debate on the supplementary item [...], the Assembly recalled its resolution ICC-ASP/12/Res.7, dated 27 November 2013, which amended rule 68 of the Rules of Procedure and Evidence, which entered into force on the above date, and consistent with the Rome Statute reaffirmed its understanding that the amended rule 68 shall not be applied retroactively.²⁵⁹

Evidently, the ‘compromise language’ could only be deemed such in a figurative sense and exclusively for consumption back home where it was presented as a diplomatic victory.²⁶⁰ Not only is this language *not* binding on the Court by virtue of not having been included in the resolutions of the fourteenth session, but it is also rather innocuous on substance. It merely recalled the 2013 resolution and reaffirmed the ASP’s earlier understanding without providing further details and leaving it for the Court to interpret the amendment. Hence Kenya did not gain major concessions from the delegations who had defended the ICC’s judicial independence. The reasons for the Bureau to allow for the Rule 68 debate during the fourteenth session are also understandable: this was too charged and consequential a matter to be simply swept under the carpet; an open debate was hoped to help de-escalate tensions and, to an extent, it did. On the other hand, the question arises as to whether or not the Assembly came dangerously close to undermining the integrity of the Rome Statute system in November 2015. By accepting to include Rule 68 related supplementary item in the ASP agenda over the admonition by the ICC principals and by bending over backwards to accommodate Kenya’s wishes on the issue that was *sub judice*, it can be argued that the States Parties responded too meekly to political pressure. Some of the members of the civil society were indeed of the view that the ICC’s independence was en-

²⁵⁹ *Official Records Volume I, Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourteenth Session, The Hague, 18-26 November 2015*, ICC-ASP/14/20, para. 61 (item “Review of the application and implementation of amendments to the Rules of Procedure and Evidence introduced at the 12th Assembly”).

²⁶⁰ For example, Simon Ndonga, “Kenya wins as ASP adopts text on ICC recanted evidence”, in *Capital News*, 27 November 2015 (available on its web site).

dangered.²⁶¹ While this episode illustrates risks for judicial independence which may be posed by an *injugovin*, it also highlights the resilience of the ‘diplomatic’ model. The diplomatic forum of the ASP not only served to buffer the impact of one State’s pursuit of its agenda on the Court, but it was also used by other States Parties as a ‘pressure relief valve’ to ease tensions, soothe domestic criticism, and avoid further escalation.

In February 2016, the Appeals Chamber reversed the Trial Chamber’s decision in *Ruto and Sang* to admit prior recorded evidence, on the ground that this would have been a retroactive application of an amended rule to the detriment of the accused.²⁶² However, the Appeals Chamber found no indications in the text of amended Rule 68, the 2013 Resolution, or the Rule’s drafting history that “it could not apply to a specific case or, more generally, that it could not apply to pending cases”.²⁶³ It also held the above-quoted text from the 2015 *Official Records* to fall short of a Resolution and thus irrelevant for the determination of the appeal, insofar as that text amended neither Rule 68 nor the initial 2013 resolution.²⁶⁴ Nevertheless, the concern still remains that the fourteenth ASP session may have set a dangerous precedent insofar as the ASP was dragged into the unholy business of moulding the Court’s application of the amended Rule 68 for ongoing cases. In other words, an *injugovin* overstepped the line by considering matters *sub judice*. As with the decision to excuse Ruto from continuous presence at trial, the Appeals Chamber judgment “risks being seen as tainted by political pressure – and acquiescence”: by letting matters go that far, the ASP “blurred an essential line between its legislative and administrative oversight responsibilities” and “the court’s judicial work”.²⁶⁵ Even if it was not the reason why the relevant evidence was ultimately suppressed and why the *Ruto and Sang* case collapsed, the proverbial average reasonable observer would connect the dots, that is the

²⁶¹ Maupas, 2015, see above note 252 (quoting CICC Convenor William Pace); Elizabeth Evenson, “A Threat to Justice – Ruto Decision a Cautionary Tale on ICC Independence”, on *Human Rights Watch*, 17 February 2016 (<https://legal-tools.org/doc/h9ee0a>).

²⁶² ICC, Situation in the Republic of Kenya, *Prosecutor v. Ruto and Sang*, Appeals Chamber, Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled “Decision on Prosecution Request for Admission of Prior Recorded Testimony”, 12 February 2016, ICC-01/09-01/11-2024, paras. 76–96 (<http://www.legal-tools.org/doc/5e0d03/>).

²⁶³ *Ibid.*, paras. 38–43.

²⁶⁴ *Ibid.*, para. 19.

²⁶⁵ Elizabeth Evenson, 17 February 2016, see above note 261.

ASP's attempt at substantively influencing adjudication and the case outcome.

12.4.4. Optimising ICC Scheme

The above episodes from the ICC ASP's practice construct the image of an *injugovin* which occasionally brings together the worst of both worlds. On the one hand, it can be insufficiently proactive and assertive on matters of consequence (for example, effective oversight and accountability within the Court) and, on the other hand, it can occasionally cross the line to imperil judicial independence. With the power and authority *injugovins* hold over the courts comes the duty of care, the first and foremost among which is the obligation to guarantee judicial and prosecutorial independence. The Rome Statute system is novel and without immediate precedents; previous experiences and experiments in judicial governance provide limited guidance. The ICC's constitutional practice has had to be developed from scratch and, even more than one and a half decades into the Court's existence, the process is still underway. While some might hope that the relationship between *injugovins* and their affiliate courts would remain harmonious at all times, this will not always be the case. It would take more cut-and-try and concerted work to improve the ICC's governance framework and minimise the potential for conflict in its relationship with the ASP. The terms on which the ASP may exercise its legislative and management oversight powers are not fully defined, creating scope for contestation and manipulation by (groups of) States. Kenya's political and diplomatic efforts (going beyond conventional practice) to exert pressure on other States Parties and on the Court to make it drop cases against its citizens are problematic from the perspectives of judicial independence, effective judicial governance, and the rule of law. That several consecutive sessions of the ASP were effectively hijacked to serve as a platform for exerting such pressure, may be evidence of the relative immaturity of the ICC governance system.

Given its character and working methods, the ASP is facing challenges that are consequential for the body it governs, and for the Rome Statute system as a whole. Only a few of those can be mentioned here. First, although the ICC governance regime can generally be associated with the *diplomatic* model, the effectiveness of the ASP as a governance body has seemingly been undercut by its labyrinthine and fragmented structures. One could speak of an unhappy marriage of the 'bureaucratic'

way of re-delegating and burying issues in sub-committees and the ‘diplomatic’ way of consensus-seeking, which combine to stagnate decision-making on contentious matters. The existence of specialised forums for debate, operating in parallel and at multiple levels, may also account for the duplication of work. States Parties have previously expressed concern about the interplay between the Study Group of Governance and the Working Group on Amendments.²⁶⁶ The ASP structures, which have grown incrementally, and the division of labour between different working groups, have required recalibration.²⁶⁷ The development of protocols for the engagement between different forums (for example, the Roadmap) was meant to streamline decision-making processes and give them a more technocratic expert-driven touch. But such protocols are not mandatory and, when stakes are high for influential States, can be circumvented with relative ease. The ASP is a club of States whose processes remain essentially political, despite efforts aimed at standardisation and substantial investments made to that end. Different forums can be played to push certain decisions through in a non-transparent and non-equitable way, without consultation with stakeholders including the Court, or they can be used to stall decision-making for years. The fate of the RPE amendment proposals in the 2014–16 period is a case in point. At the same time, elaborate bureaucracy creates inefficiencies for the Court in that it is placed under burdensome reporting obligations over and above its core work. The Court officials are expected to continuously engage with States Parties in different formats and often requested by State representatives to attend meetings on matters of interest. As noted by the former ICC President, this is proof of the interest States take in the ICC’s work, but the Court’s reporting and liaison activities strain its already limited resources.²⁶⁸

Second, the political character of the ASP processes, an aspect of the *diplomatic* model, fetters the efficiency and speed of decision-making. The rule according to which States Parties should make every effort to

²⁶⁶ ICC-ASP/14/30, paras. 15–16, see above note 177 (the division of labour between the two groups should be reconsidered to avoid duplication of efforts, whereby the SGG would consider amendment proposals to the RPE, while the WGA would focus on amendment proposals to the Statute).

²⁶⁷ ICC ASP, Report of the Bureau: Evaluation and rationalization of the working methods of the subsidiary bodies of the Bureau, 20 November 2013, ICC-ASP/12/59 (‘ICC-ASP/12/59’) (<https://legal-tools.org/doc/elz0ca>).

²⁶⁸ Song, 2016, p. 13, see above note 131.

reach decisions by consensus before bringing matters to vote,²⁶⁹ at times presents an obstacle to timely legislative and institutional action, causing ‘non-solutions’. It took the ASP more than a decade to make the IOM (partially) operational and, in the meantime, serious allegations of abuse by the ICC personnel in the field had to be investigated internally as well as by an *ad hoc* external independent review panel.²⁷⁰ The ASP’s legislative inertia in the domain of criminal process places a question mark over the drafters’ decision to entrust or retain the role of primary legislators on those matters to the ASP and not the judiciary. As compared to the procedural regimes of its predecessors, shaped and continuously perfected by the judges, the ICC procedure is more stagnant and less amenable to macro-amendments. It may be difficult for States Parties to keep abreast of the developments and know-hows in international criminal procedure and ensure that the ICC process is not lagging behind. If this were the goal, the process of generating and reviewing amendments would have to be reconfigured towards a more judge- and expert-driven approach. Stagnation can be precluded if judges take the lead in innovating procedure by having greater recourse to the Article 51(3), route. It may also be more difficult for ASP to abrogate provisional RPE amendments that have successfully passed the test of practice. However, this scheme would only work if embraced by States; it is ill-suited as a vehicle for large-scale reforms going beyond occasional and mundane patching of rules.

Third, the sheer number of governance functions vested in the ASP means that the amount of undivided attention it can spend per issue is limited, even though it is the institution that is exclusively dedicated to ICC governance. Its character as a forum for consultations and debate among diplomatic representatives (rather than a workplace of professional court administrators, members of the judiciary, and criminal law and procedure experts) comes at a price. Matters of equivalent importance may be given

²⁶⁹ ASP RoP, Rule 61, see above note 119 (“Every effort shall be made to reach decisions in the Assembly and in the Bureau by consensus. If consensus cannot be reached, decisions shall be taken by vote”).

²⁷⁰ Resolution ICC-ASP/12/Res.6, see above note 133. See O’Donohue, 2015, p. 113–14, see above note 104; ICC, ‘ICC Internally Inquires on Allegations of Sexual Abuse by Former ICC Staff Member’, 12 April 2013, ICC-CPI-20130412-PR895 (concerning allegations of sexual abuse of four protected witnesses in a safe house in Kinshasa); Independent Review Team Public Report, ‘Post Incident Review of Allegations of Sexual Assault of Four Victims Under the Protection of the ICC in the DRC by a Staff Member of the Court’, 20 December 2013.

unequal amounts of attention or no deserving airtime at all when needed, creating gaps in the areas where strategic guidance by the ASP would have been warranted. This may to an extent be the result of the Assembly and its Bureau staff being overwhelmed by the workload.²⁷¹ Worse still, in 2013 the Bureau acknowledged “a general lack of strategic overview over the priority, number, extent and added value of existing mandates”.²⁷² As highlighted earlier, it took States Parties seven years since the commencement of the ICC’s functioning to start debating the need and ways to enhance the efficiency of its proceedings. While this time gap (2003–10) can certainly be explained by other priorities, the experience of the UN *ad hoc* tribunals should have alerted States sooner to the need to start monitoring and reviewing practice with a view to identifying weak links in the ICC’s procedural system as early as possible.

Some of the upcoming challenges could and should have been anticipated. The risk-assessment and development of meaningful strategies should have started early on in order to provide the Court with the guidance if and when needed. For instance, it was only in 2009 that the ASP first turned its attention to the topic of the impact of the Statute on victims and affected communities, with the debate remaining highly unfocused and uncritical at least up until 2011. As years went by without a more forward-looking reflection on the challenges of organising an effective and sustainable victim participation, the Assembly was seemingly taken by surprise when the Court sounded the alarm.²⁷³ States Parties were not in a position to strategise on procedural policy, waiting instead for the Court itself to come up with workable and sustainable solutions.²⁷⁴ The

²⁷¹ O’Donohue, 2015, p. 108, see above note 104 (noting that a 8–10 days’ annual meeting is “insufficient to ensure that all issues receive the attention they deserve” and that the Bureau’s inter-sessional “workload is now considered to be overwhelming”). See also ICC-ASP/12/59, paras. 17 (“the intersessional workload has taken such proportions that only few, if any, delegations are capable of digesting the amount of reports and results that are produced, and not all processes are handled with maximum efficiency. The increased workload has often caused difficulties for States Parties in conducting thorough analysis of each subject and holding close and effective consultations with capitals before meetings on each subject”) and 19 (“the agenda of the Assembly of States Parties is often so crowded such that little time tends to be left for the discussion of political issues central to the functioning of the Court”), see above note 267.

²⁷² ICC-ASP/12/59, para. 16, see above note 267.

²⁷³ ICC-ASP/10/Res.5, para. 49, see above note 129.

²⁷⁴ On the ASP’s spasmodic moves on the issue of victim applications for participation and the individual *v.* collective approaches, see Sergey Vasiliev, “Victim Participation Revisit-

Court was entitled to a less passive or, using the Bureau's word, more 'imaginative' *injugovin*.²⁷⁵ The question is whether the ASP cares about the right issues at the right time. Despite assurances to the contrary,²⁷⁶ a great many of States Parties take a predominantly instrumental, budget-driven approach to governance issues where a more principled, mandate-driven approach is called for. Some members of the ASP's various working groups may also be lacking the necessary expertise and experience in the issues of court management and the conduct of proceedings but refrain from seeking expert assistance from outside, possibly due to time and resource constraints.²⁷⁷

The goal of devising solutions meant to strengthen the ICC governance system requires more complete empirical information about the organisation of the ASP's inter-sessional work than what is currently available to outsiders, that is, those other than State representatives and members of civil society. Such enquiry should extend well beyond legal norms and institutional mandates and cover also governance practices and working methods. The socio-legal approach can help understand how actors of influence within the courts and *injugovins* exercise their authority and discretion. In order to make the relationship between the Court and its *injugovin* work, the different professional clans – judicial personnel and lawyers, justice administrators and civil servants, legal and policy advisors at international organisations, government lawyers and diplomats – ought to learn to communicate and co-operate with one another effectively. This, in spite of differences in values, mentalities, ways of working, and expectations towards the process and outcomes of such interactions. Operating productively as part of governance schemes, requires a keen awareness of

ed—What the ICC is Learning about Itself”, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, pp. 1187–90.

²⁷⁵ ICC-ASP/12/59, para. 19, see above note 267.

²⁷⁶ For example, ICC-ASP/11/31, para. 15, see above note 147 (“the Study Group agreed that any process of review should not be driven by budgetary considerations; instead the driving factor would be to ensure that proceedings were being conducted fairly and expeditiously”).

²⁷⁷ ICC-ASP/12/59, para. 19, see above note 267 (“given the technical nature of many mandates, the deliberations of the respective working groups tend to occasionally lack the required expertise to inform the decisions of the Assembly in the best possible manner. In some cases, the Assembly has been able to benefit from interactions with Court officials to address the problem, but it has been less imaginative to request outside counsel from other experts or institutions”).

those differences and the interlocutors' constraints, openness to compromises except on matters of principle, and a capacity to transcend one's own professional habits.

Governance actors must remain sensitive to power dynamics and invested in preserving the equilibrium. The Court principals and external relations advisors should be diplomatically savvy and cognizant of the context in which they operate. In turn, State representatives and justice administrators ought to be well-versed in the (international institutional) law and have an adequate understanding of, and respect for, the principle of judicial independence. Creative solutions may be required, on the one hand, to fill the existing governance gaps and, on the other, counteract threats and deficiencies posed by manipulations and misuse of governance processes. For example, if the ASP lingers in legislating on procedure, thereby stalling rule amendments, judges would be justified to depart from the consensual scheme and pass provisional amendments under Article 51(3). In any event, judges should also continue detailing and consolidating the procedural regime by means of the Chambers' Practice Manual, which may at least to some degree remedy the lack of legislative intervention. In turn, the ASP may consider diversifying its practices by drawing elements from contiguous governance models. This is not to say that the replication of best practices from other contexts generally works, but rather that tweaking aspects of the *diplomatic* model by integrating managerial, technocratic, and expert-driven approaches might go some way to tackling current inadequacies.

One point for States Parties to consider is that certain resolutions and measures may be rather urgent for the Court's operation and that yet another one-year delay because of the inability to reach full consensus at an ASP session, may be problematic. The ASP decision-making can be made swifter if issues are submitted for vote in accordance with ASP Rule 61 whenever further consultations are not likely to bring about consensus. It is unavoidable that States in minority will be displeased with resolutions adopted through this avenue, but being overruled sometimes should be seen as part and parcel of collective decision-making process in a body comprised of 122 States. States should also take their duties of care towards the Court more seriously. Over and above safeguarding judicial independence without taking an overseeing hand away from the ICC's pulse, this includes countering attempts by individual States Parties to hijack ASP sessions to dwell on issues *sub judice* while essential matters are left

unattended. It is up to States Parties, acting individually and collectively, to do what it takes in the legal, political and diplomatic domains, to shield the ICC from political assaults and preserve its independence *vis-à-vis* external actors. So far, the efforts to defend the ICC from external threats, in particular those coming from the US government under the Trump administration, have been rather scattered and underwhelming.²⁷⁸

Secondly, further standardisation of ASP working practices and protocols in line with the *bureaucratic* model, could serve as an additional guarantee of the integrity of governance against the opportunism of individual States. Insistence on following the agreed protocols and roadmaps for consultation would make recourse to *ad hoc* solutions and shortcuts in accommodating questionable agendas more cumbersome. This neither removes the politics from the equation nor precludes the need for an open and constructive dialogue between States on relevant matters. Should that prove necessary, States Parties may consider resorting to a formal dispute settlement mechanism under the Statute.²⁷⁹ While this is an *extrema ratio* option and neither the usual nor necessarily the most effective way of settling differences, it is there for a reason. Finally, effective governance requires adequate resource investments. The ASP records give rise to an impression that the resources at the disposal of the key organs of the ASP, including the Presidency, Bureau, and the Permanent Secretariat, are limited while they appear to be overwhelmed by the sheer amount of tasks and responsibilities relating to the co-ordination of yearly meetings and inter-sessional work. Some States Parties may be lacking in-house expertise available on demand that would enable them to remain closely involved in consultations within the Hague Working Group. On the more technical issues such as criminal procedure and court administration, they

²⁷⁸ See, for example, the ASP and State Party reactions to John Bolton's 10 September 2018 speech attacking the ICC: ICC, "Statement by the President of the Assembly, O-Gon Kwon, reaffirming support for the ICC", 11 September 2018, ICC-ASP-20180911-PR1405; Alex Moorehead and Alex Whiting, "Countries' Reactions to Bolton's Attack on the ICC", on *Just Security*, 18 September 2018 (available on its web site). Cf. ICC, "The ICC will continue its independent and impartial work, undeterred", 12 September 2018, ICC-CPI-20180912-PR1406.

²⁷⁹ ICC Statute, Article 119(2), see above note 19 ("Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court").

may be less equipped than others to contribute to the review of the Court's performance and group-think on ways to strengthen it. One solution for States and ASP organs would be teaming up with external specialists and outsource some of the more technical issues to them, possibly accepting that the segments of substantive inter-sessional work would then become more expert-driven. While this measure will not fix the ICC's problems overnight, it can hopefully provide a solid basis for developing viable solutions.

12.5. Conclusion

International criminal justice has long reached the point at which more attention needed to be paid to its constitutional framework, in particular the power relations between international and special criminal tribunals and their overseeing entities. The lines of authority between them, and related accountability issues, continue to be overshadowed by matters falling within core judicial mandates. But, as ever more critical questions are being raised about the viability of international criminal justice, with its institutions increasingly facing pushback from States, it is high time for the questions of governance to be addressed in a more concerted manner. *Injugovins* are the guarantors of courts' effectiveness and guardians of judicial independence. It is equally within their power to debilitate the courts and bring them to their knees. There are numerous ways for them to achieve that. They could keep courts on a short budgetary leash, deprive them of the political support at critical stages, do little or nothing to secure co-operation, make ill-conceived organisational and staffing choices, tinker with legal framework to enable a desirable outcome in a specific case, and so on.

This chapter has offered a tentative overview of institutional arrangements used to govern international and hybrid or special criminal courts, both past and present. It distinguished, subject to caveats, four governance models (direct, bureaucratic, diplomatic, and managerial). The choice of specific arrangement depends on the legal and institutional nature of the relevant court and its parent entities, as well as the circumstances of establishment. The international criminal justice governance schemes have evolved from the relative unsophistication of the Nuremberg Tribunal's setup, whereby the Allied Control Council thinly shrouded the close involvement by the Allied Powers in the IMT's operations, to the scheme whereby the ICTY and the ICTR (and the MICT) occupied a

niche carved out for them in the UN framework, to the more ornamented ‘institutional veil’ of the ICC ASP, to the more pragmatic and informal executive schemes of the voluntarily-funded UN-assisted tribunals.

The general trend from the past to contemporary jurisdictions, is the progression from the more direct and immediate execution of governance functions by parent States, to a greater mediation and ‘buffering’ of their power by *injugovins*. The latter are autonomous agents and more than aggregates of the individual wills of States. Each tribunal–*injugovin* bilateral is a *sui generis* relationship informed by unique institutional factors and legal-cultural environments. While States have gone a long way to improve governance mechanisms, a progress narrative ‘from Nuremberg to The Hague and beyond’ would be over-simplistic. Sweeping conclusions about the strengths or weaknesses of individual models would be misleading. The tribunal–*injugovin* pairs considered in this chapter do not lend themselves to ready-made templates and practices to be repackaged and transplanted in other contexts. There are several emerging common themes, however, which can be taken up in future debates on judicial governance.

One is the (pseudo-)dilemma of preserving judicial independence from unwarranted interference by governing bodies and individual States without compromising the courts’ own accountability. The former objective is challenging because *injugovins* – and individual States comprising them – retain control over the courts’ standing and operational capacities and hold the purse strings. Threats to judicial independence lurk in a court’s association with an *injugovin*. The pursuit of judicial mandates and resistance to pressure may cause a backlash from States, whether in the form of denial of political backing, financial (logistical, operational) support or, for treaty-based courts, a withdrawal altogether. Across governance models, and as part of collective entities, individual States continue to exercise power and play a role, if a less direct one. Indeed, albeit possessing a degree of agency of their own, *injugovins* are but institutional façades, more or less elaborate, for States’ individual and collective power over the judiciaries. Behind those façades, States remain the key actors that are pulling the strings. *Injugovins* transform the power dynamics to a degree but do not cancel States’ agency entirely. It continues being exercised within the *injugovin* – or outside of it, as demonstrated by Kenya’s tactics of bringing its grievances against the ICC and amplifying them through the African Union.

The second part of the equation, accountability, also proves problematic. The cornerstone principle as it were, judicial independence is also the first go-to argument to keep *injugovins* at bay and resist forms of constitutional control, legislative guidance, or managerial oversight. However, enhanced checks and balances may be perfectly justified and necessary to prevent or address abuses of power or administrative and financial irregularities. As any other institutions, courts are not infallible and effective accountability mechanisms must be put in place, such as regular reporting obligations, performance reviews, management oversight, inquiries, financial audit, and so on. Striking the balance between independence and accountability in practice is a daunting task; eventually both might have to be compromised but where to draw the line? A related question is that of the accountability of *injugovins* themselves. Who is there to rein in a manipulative and incompetent *injugovin* – or an anaemic and indifferent one, for that matter? *Quis custodiet ipsos custodes?* The *injugovin*'s rules of procedure and its members' mutual containment can fetter the power individual States claim and wield over the courts. In theory at least, States Parties will abide by formal procedures and comity rules, failing which they are to be called to order or face negative political consequences, although this is not always the case.

The governance role of States as part of *injugovins* occasionally comes in tension with their political interests as sovereign powers, particularly when 'their' cases come before the Court. The ICC's experience shows that individual States can hijack the forum and the agenda of ASP sessions in order to carry out sustained attacks against the Court with an overt purpose of influencing its adjudication. Kenya's démarches meant to pressure the ICC into terminating its cases against President Kenyatta and Deputy President Ruto are vivid examples of such a strategy. It is not likely that the State in question was oblivious to the fact that the Court was entitled to judicial independence, even though the language it used in the Assembly indicates otherwise.²⁸⁰ Rather, it prioritised judicial independence lower than the vested interest it had in the outcomes of those cas-

²⁸⁰ Statement by Amb.(Dr.) Amina C. Mohamed, 2015, see above note 255 ("We [...] urge all delegations to insist on the supremacy of the Assembly over its institutional organs, to demand institutional subjugation and accountability of these organs to the Assembly and not to shy away from taking part in debates of a complex issues", emphasis added).

es.²⁸¹ The way Kenya engaged with other delegations and its political manoeuvring during the 2015 ASP, give food for thought. They teach a lesson about the States Parties' responsibility to contain their own impulses and police any obstinate fellow *injugovin* member whenever self-discipline fails them, lest the integrity of the governance system would be undermined. In complex and dynamic governance settings, such as the Rome Statute system, States continue to test the limits of what is admissible and what is not in their power relations with international courts. Despite the long history of international criminal justice institutions, it is only very recently that the field has embarked on the project of articulating 'good governance' standards in respect of those institutions – the project that is overdue and will require a concerted expert-driven effort in the years to come.

²⁸¹ Song, p. 13, see above note 131 (“states sometimes fail to fully appreciate that the ICC is unlike any other multilateral organisation. ICC operations cannot be initiated, controlled or suspended by them as states may sometimes wish in light of political pressure or competing priorities”).

Is the European Union an Unexpected Guest at the International Criminal Court?

Jacopo Governa and Sara Pausco *

13.1. Introduction

International criminal justice is an autonomous branch of law that interacts with the European Union ('EU') in many different ways, from judicial co-operation to foreign policy. The International Criminal Court ('ICC') is the first permanent supranational criminal court. Watching over international crimes from The Hague, the Court is situated only few kilometres from Brussels, the capital of the EU. Considering the attempt of the latter to promote democracy, human rights and its fundamental values and objectives that also enumerated in the preamble of the Rome Statute,¹ a certain relationship between them is inevitable. The EU, being an observer in the Assembly of States Parties of the ICC, has always supported the activity of the Court with different internal instruments such as the Council Common Position of 2001, the Council Conclusions of 2002, the use of so-called 'ICC clauses'² in treaties and agreements concluded with non-States Parties, up to the Agreement on Cooperation and Assistance concluded with the Court in 2006.³ But the EU's involvement in international criminal justice is not limited to its approach towards the ICC.

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¹ Rome Statute of the International Criminal Court, 17 July 1998 ('Rome Statute' or 'the Statute') (<http://www.legal-tools.org/doc/7b9af9/>).

² See Section 13.6.

³ Agreement between the International Criminal Court and the European Union on Cooperation and Assistance, 10 April 2006 ('EU-ICC Agreement of 2006') (<https://www.legal-tools.org/en/doc/4e8e0a/>).

This chapter aims to (1) identify the key interests of the EU with regard to international criminal justice,⁴ (2) determine if – and possibly to what extent – such interests concern impunity for core international crimes and (3) assess whether it is possible to distinguish between realist self-interest and normative advance in international criminal law. For example, as analysed in depth in Section 13.3., the strong economic interests of the Union could influence its policy and therefore interfere with the interests of international criminal justice, including the fight against impunity. Moreover, as the EU is inclined towards internal security while international criminal law strives towards the prosecution of international crimes, migration and asylum strategies could have consequences on judicial co-operation, which is the main instrument for international criminal law to achieve its goals. Particular attention will be given to the ICC for its broad and permanent scope, and to the Specialist Chambers for Kosovo, the first international tribunal born under the direct supervision of the EU.

Sections 13.2. to 13.5. will offer an in-depth analysis of the different instruments used by the Union to address international criminal justice concerns in order to explore the way in which the EU advances its own interests. Firstly, as far as internal EU action is concerned, Eurojust, the EU judicial co-operation body related to the Area of Freedom, Security and Justice (‘AFSJ’), has been the leading instrument to co-ordinate Member States’ responses to the challenges of international criminal justice, emphasising the peculiar relation with immigration policies.

Secondly, it is significant that the co-operation policy with the ICC (and previously with the *ad hoc* tribunals) is managed through Council Decisions and relative Action Plans in the field of the Common Foreign and Security Policy (‘CFSP’), still functioning with an inter-governmental method.

The aforementioned EU–ICC agreement,⁵ and the use of ‘ICC clauses’ in the Union’s international relations, is the third relevant aspect (Sections 13.6. to 13.8.).

⁴ For the purpose of this chapter, we will limit the concept of international criminal justice to the investigation and prosecution of international crimes. Other connected themes such as forms of transitional justice and amnesties will be considered only as appropriate. ‘International criminal law’ will be considered as an instrument to achieve the goals of international criminal justice.

⁵ EU–ICC Agreement of 2006, see above note 3.

With regards to external relations (Section 13.9.), the Union's External Action missions in third States (that is, non-Member States) will be compared with ICC situations in order to investigate its on-the-ground commitment in situations relevant to international criminal justice and to find possible conflicts of interests. The spotlight will be on the European Union Rule of Law Mission in Kosovo mission ('EULEX') (Section 13.10.), with its unique international criminal justice mandate, and on the subsequent creation of the Specialist Prosecutor's Office and the Kosovo Specialist Chambers and on the inputs of the Council of Europe.

Finally, the authors will attempt to elaborate the results of the research and understand the balance between EU policies, goals and real commitment in fighting impunity for core international crimes. Ultimately, it will be clear that a more intensive commitment of the EU towards human rights protection in connection to international criminal justice would be desirable, particularly so if said commitment does not depend on other interests.

13.2. The European Union and Criminal Law

The exercise of power in international criminal justice is an important issue as sovereign States, non-governmental and international organisations are some of the main stakeholders in international criminal law. In the last decades, the EU increased its power and influence not only on economic and financial issues, but also in the field of human rights and, as we will see, international criminal justice. International criminal justice is clearly not the main objective of the EU, as the latter was created as an organisation to foster free trade. Nevertheless, European history and events in bordering States made the EU aware of the link between its goals and the increasing importance of international criminal justice.

For the purpose of this chapter, it is necessary to point out that the relationship between European and international criminal law and justice is not a relation of specification. The broad concept of European criminal law refers to *transnational* crimes. On the contrary, except aggression, the list of core international crimes is limited to genocide, crimes against humanity and war crimes that can be committed within a single State.⁶ Their *international* dimension is linked to the global values of the protected in-

⁶ The crime of aggression, whose definition has been adopted in 2010, is the only international crime that requires the involvement of at least two States pursuant to the Rome Statute, Article 8bis, see above note 1.

terests affected by the crimes and the potential negative consequences for the international community as a whole when such crimes are committed.⁷

The Treaty of Lisbon now recognises that the EU has an indirect competence to harmonise criminal law in specific matters, set out in Article 83 of the Treaty on the Functioning of the European Union ('TFEU'),⁸ consolidating a trend started with the famous Court of Justice of the European Union ('CJEU') judgment in the case of *Commission v. Greece*.⁹ The acceleration of the integration process since the Treaty of Maastricht in 1992¹⁰ and the EU's growing role as legislator forced the development of European instruments to protect EU interests.¹¹ At first, the CJEU imposed a duty upon Member States to protect EU interests the way they protect national ones; then, it stated that national provisions had to be interpreted not only consistently with regulations and directives, but also with frame decisions.¹² The awareness of the impossibility to protect spe-

⁷ Both European and international criminal law challenge the dogma of the States' prerogative over criminal law, and they are put together because of what they are *not*: they are both perceived as belonging to national criminal law and often opposed by scholars that support the monopoly of States in criminal law. Their relationship becomes closer as we approach international judicial co-operation. See Pedro Caeiro, "The Relationship between European and International Criminal Law (and the Absent (?) Third)", in Valsamis Mitsilegas, Maria Bergström and Theodore Konstadinides (eds.), *Research Handbook on EU Criminal Law*, Elgar, Cheltenham, Northampton, 2016, p. 580.

⁸ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community ('Treaty of Lisbon'), 1 November 2009 (<https://www.legal-tools.org/en/doc/15b8be/>); Treaty on the Functioning of the European Union ('TFEU'), 13 December 2007 (<http://www.legal-tools.org/doc/15b8be/>).

⁹ CJEU, *Commission v. Hellenic Republic*, Judgment, 21 September 1989, C-68/88 (the so called 'Greek maize' case). It is the leading case with regards to the enforcement of obligations in general and the requirements EU law towards criminal law in particular. The 'assimilation principle' is one of the main points of the judgement: as a consequence, States must protect EU interests under analogous conditions to those applicable to infringements of national law of similar nature and importance; penalties must be effective, proportionate and dissuasive. See André Klip, *European Criminal Law. An Integrative Approach*, Intersentia, Antwerp, 2016, pp. 72 ff.

¹⁰ Treaty of Maastricht on European Union, 29 July 1992 ('TEU') (<http://www.legal-tools.org/doc/806147/>).

¹¹ In this context, 'EU interests' are intended as the interests of the European Union itself. As it is evident in European criminal law, there are specific values that the EU protects for its own sake. See below in this paragraph.

¹² CJEU, *Maria Pupino*, Grand Chamber, Judgment, 16 June 2005, C-105/03. The CJEU revolutionised the former obstacle to criminal law harmonisation represented by the pillar structure, affirming the obligation of consistent interpretation of national law (the case

cific values only through national instruments slowly led to the adoption of directives promoting harmonisation in criminal matters,¹³ and step by step the Treaties of Amsterdam and Nice laid the foundations for the abovementioned competence with the abolition of the division in pillars.¹⁴

Article 83(1) of the TFEU empowers the European Parliament and the Council to adopt directives establishing minimum rules concerning the definition of criminal offences and sanctions in the “areas of [...] terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime”, due to their seriousness and “cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis”.¹⁵

International crimes are not part of the list, even if at least “trafficking in human beings and sexual exploitation of women and children”¹⁶

concerned criminal procedure norms) with the principles enshrining from framework decisions of the former third pillar and not only from first pillar. See Carlo Sotis, “Le Competenze Penali dell’Unione Previste nel Trattato di Lisbona: una Lettura d’Insieme”, in Carlo Enrico Paliero and Francesco Viganò (eds.), *Europa e Diritto Penale*, Giuffrè, Milan, 2013, pp. 43-44.

¹³ Although European Community (‘EC’) law could not prescribe enforcement to Member States under criminal law, after two judgements (CJEU, *Commission of the European Communities v. Council of the European Union*, Grand Chamber, Judgment, 13 September 2005, C-176/03, and CJEU, *Commission of the European Communities v. Council of the European Union*, Grand Chamber, Judgment, 23 October 2007, C-440/05), the CJEU opened the door for an obligation under EC law to use criminal law as a mean to enforce, whose first outcome was the Directive on the Protection of the Environment through Criminal Law, 19 November 2008, 2008/99/EC (<http://www.legal-tools.org/doc/ab77d5/>). See also Klip, 2016, p. 19, above note 9.

¹⁴ Steve Peers, *EU Justice and Home Affairs Law. Volume II: EU Criminal law, Policing and Civil Law*, Oxford University Press, Oxford, 2016, p. 166.

¹⁵ EU competence is established *ratione materiae* and it is not subordinated anymore to judicial co-operation. It is possible to add new categories with the unanimity of States. Although the new Article 83(1) represents a significant innovation, criminal competence of the Union is still limited to areas of particularly serious crimes, probably in fields already covered by national criminal law. See Sotis, 2013, p. 46, see above note 12.

¹⁶ The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, adopted by the United Nations General Assembly with its Resolution United Nations Convention against Transnational Organized Crime, UN Doc. A/RES/55/25, 8 January 2001 (<http://www.legal-tools.org/doc/d1e3cd/>) provides a broad definition of ‘trafficking in persons’ as the:

could constitute crimes against humanity when the chapeau element is met. As to terrorism, though it falls under the jurisdiction of the Special Tribunal for Lebanon, the Tribunal applies the provisions of the Lebanese Criminal Code related to terrorism.¹⁷ Thus, it is arguably not yet a core international crime. Nevertheless, the unclear outcome of this offence and the lack of a universally accepted definition of terrorism make it possible, under specific circumstances, to characterise it as a crime against humanity.¹⁸

Article 83(2) of the TFEU allows the adoption of directives on other offences “if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation

recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

This definition clearly influenced the one provided by EU, Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, and Replacing Council Framework Decision 2002/629/JHA, 5 April 2011, 2011/36/EU, which is the first directive adopted in criminal matters after the entry into force of the Treaty of Lisbon, see above note 8. Article 2 states that:

[t]he recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation, where [e]xploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.

Some of the conducts mentioned in this definition can be easily attributed to acts such as “enslavement, imprisonment or severe deprivation of physical liberty, torture, sexual slavery, enforced prostitution and other inhuman acts” pursuant to the Rome Statute, Article 7, see above note 6.

¹⁷ See Special Tribunal for Lebanon, Statute, 30 May 2007, Articles 1 and 2 (<http://www.legal-tools.org/doc/da0bbb/>).

¹⁸ Kai Ambos, “The New Enemy of Mankind: the Jurisdiction of the ICC over Members of “Islamic State””, *EJIL: Talk!*, 26 November 2015 (available on its web site).

measures”.¹⁹ EU competence is therefore connected to an approximation of legislative and regulatory norms, conditioned to the harmonisation of a certain area of law. The real base is, however, the crucial role of approximation to ensure the implementation of a Union policy.²⁰

Although EU competences in criminal law are not yet directly involved in international criminal law, this short analysis suggests that EU action and its development are always guided by the need to implement its policies, and in the end its interests.

13.3. The European Union and International Criminal Justice

Even if international crimes do not fall under EU competences, it does not mean that the EU plays no role in international criminal justice. The peculiar characteristics and the complexity of the European system make it necessary to consider its action outside the limited scope of Article 83 of the TFEU.

Historically speaking, the Union’s interest in international criminal law corresponds to the birth of and the international fame gained by the *ad hoc* tribunals, as well as the negotiations and the entry into force of the Rome Statute. According to some scholars, the active role of the Union in the founding of the ICC was due to the need for co-ordination of the European response to the United States’ (‘US’) fierce opposition to the permanent body.²¹

In order to discover which interests are at stake in the Union’s commitment towards international criminal justice, it is useful to examine

¹⁹ TFEU, Article 83(2), see above note 8.

²⁰ It is clear that Article 83(2) grants the EU competence in criminal law for the main aim of ensuring not the legally protected interest, but the effective implementation of EU policy. See Carlo Sotis, 2013, p. 47, above note 12; Klip, 2016, p. 180, above note 9.

²¹ According to Martin Groenleer (“The United States, the European Union, and the International Criminal Court: Similar Values, Different Interests?”, 2014, available on SSRN), Member States understood that acting as a collective actor could effectively help them to face US requests to conclude bilateral agreement to grant immunities to US nationals. At first, there were Member States that, although committed to the ICC cause, were undoubtedly also oriented in satisfying US requests, such as the United Kingdom and Italy. US opposition to the ICC stemmed largely from the fear that a politically oriented Court could prosecute members of the US armed forces for crimes committed in their duties. On the contrary, the US was in favour of international criminal justice mechanisms (such as the *ad hoc* tribunals and the Special Court for Sierra Leone) when under United Nations (‘UN’) framework, and especially because said mechanisms are under UN Security Council control.

which EU policies are involved.²² EU action in this particular field has two sides: the CFSP and the AFSJ.

The CFSP is part of the wider external action of the Union, which represents the pursuit of EU interests in its external relations.²³ In this framework, the EU facilitated the adoption of the Rome Statute and never failed to express its support to the ICC²⁴ and international criminal tribunals in general.²⁵ The Union expressed its engagement in promoting and encouraging

the widest possible international support through ratification or accession to the Rome statute and its commitment to support the ICC as a valuable instrument of the world communi-

²² The Preamble of the Treaty on European Union (see above note 10) expresses the objectives and foundations of European integration:

DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law [...] CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law.

²³ As stated in the Preamble (*ibid.*), Member States see the following objectives as the aims of the Union:

RESOLVED to implement a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence in accordance with the provisions of Article 42, thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world.

²⁴ Among the most recent EU High Representative relevant statements: European Union External Action ('EEAS'), "Statement of the High Representative Federica Mogherini on the Accession of El Salvador to the Rome Statute of the International Criminal Court", 4 March 2016; EEAS, "Statement by the Spokesperson on the Transfer of Dominic Ongwen to the International Criminal Court", 21 January 2015; EEAS, "Statement by the spokesperson of EU High Representative Catherine Ashton on the visit of Sudanese President Al-Bashir to Chad", 21 February 2013. Among the European Parliament relevant documents: EU, European Parliament, EU support for the International Criminal Court European Parliament: Facing Challenges and Overcoming Difficulties, 2011/2109 (INI), 17 November 2011; EU, European Parliament, Resolution on the Crime of Aggression, 2014/2724 (RSP), 17 July 2014.

²⁵ For instance, see EU, Further Measures in Support of the Effective Implementation of the Mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY), Council Common Position 2004/694/CFSP, 11 October 2004 ('Council Common Position 2004/694') and following legal texts, such as EU, Implementing Common Position 2004/694/CFSP on Further Measures in Support of the Effective Implementation of the Mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY), Council Decision 2006/484/CFSP, 11 July 2006; EU, Repealing Common Position 98/409/CFSP Concerning Sierra Leone, Council Decision 2010/677/CFSP, 8 November 2010.

ty to combat impunity for the most serious international crimes.²⁶

When the Court started its activity, the EU's support was not limited to the promotion of the ICC around the world, but also included co-operation with the Court itself. The 2003/444/CFSP Common Position was followed by the Action Plan in 2004.²⁷ It has been replaced by Council Decision 2011/168/CFSP²⁸ followed by a new Action Plan.²⁹

Within the AFSJ (former Justice and Home Affairs), and in particular within Eurojust, the EU started an internal action that led to the 2002/494/JHA decision to set up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes (as known as the 'Genocide Network').³⁰ The network was established to facilitate co-operation and it was followed by the

²⁶ The quote is drawn from EU, International Criminal Court (ICC) – Council Conclusions, European Commission General Affairs and External Relations, 30 September 2002, C/02/279 (available on the European Commission's web site). See also EU, The International Criminal Court, Council Common Position 2001/443/PESC, 11 June 2001.

²⁷ EU, The International Criminal Court, Council Common Position 2003/444/CFSP, 16 June 2003 ('Council Common Position 2003/444/CFSP'); Council of the European Union, "Action Plan to follow-up on the Common Position on the International Criminal Court", 5742/04, 28 January 2004 ('Action Plan 2004').

²⁸ EU, The International Criminal Court and Repealing Common Position 2003/444/CFSP, Council Decision 2011/168/CFSP, 21 March 2011 ('Council Decision 2011/168/CFSP') (<http://www.legal-tools.org/doc/88ff3f/>).

²⁹ Council of the European Union, "Draft Action Plan to Follow-Up on the Decision on the International Criminal Court", 12077/1/11 Rev. 1, 12 July 2011, para. 5 ('Draft Action Plan 2011') (<http://www.legal-tools.org/doc/f84c46/>). Council Common Positions, since the very beginning of the endorsement of the EU towards the ICC, were drafted by the Council Working Group on Public International Law ('COJUR'), which soon created a sub-commission specifically dealing with international criminal law issues, named COJUR-ICC. COJUR-ICC then facilitated the adoption of the amendments at the Kampala Conference and leads the dialogue with the ICC and its organs. See Frank Hoffmeister, "Comité Juridique (COJUR)", in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2012.

³⁰ EU, Setting up a European Network of Contact Points in Respect of Persons Responsible for Genocide, Crimes against Humanity and War Crimes, Council Decision 2002/494/JHA, 13 June 2002 ('Council Decision 2002/494/JHA') (<http://www.legal-tools.org/doc/28aa25/>).

2003/335/JHA decision³¹ on the investigation and prosecution of genocide, crimes against humanity and war crimes.³²

13.4. The Role of Eurojust

Eurojust is one of the main instruments of the Union's integration in the judicial field. It is composed of senior prosecutors, judges and police officers, one from each Member State. Considering its tasks, in what way do they co-operate, interfere or relate with international criminal law? Eurojust is probably the institution with the most connections to international criminal justice, as it was founded to co-ordinate national prosecuting authorities and to support criminal investigations in organised crime and serious cross-border crimes through co-ordination and co-operation in investigation and prosecution, case management system, joint investigation teams and mutual recognition instruments such as the European Arrest Warrant.³³ Such instruments could serve international criminal law purposes in relation to international tribunals' (and the ICC's in particular) need for State co-operation, especially during the investigation and sanction-enforcement phases.³⁴

These means are tuned to EU internal security and justice purposes. As previously clarified, while there has been no particular interest of the EU towards the prosecution of international crimes for decades, since the entry into force of the Rome Statute, the EU has shown concern for the impunity of perpetrators of international core crimes mainly as an issue of

³¹ EU, Investigation and Prosecution of Genocide, Crimes against Humanity and War Crimes, Council Decision 2003/335/JHA, 8 May 2003 ('Council Decision 2003/335/JHA') (<http://www.legal-tools.org/doc/e41495/>).

³² Eurojust is now regulated by Article 85 of the TFEU under "Title V Area of Freedom Security and Justice, Chapter 4 Judicial Cooperation in Criminal Matters", see above note 8. Peers, 2016, pp. 253 ff., see above note 14; Antonis Antoniadis and Olympia Bekou, "The European Union and the International Criminal Court: an Awkward Symbiosis in Interesting Times", in *International Criminal Law Review*, 2007, vol. 7, no. 4, p. 626.

³³ Michèle Coninx, "Eurojust", in Valsamis Mitsilegas, Maria Bergström and Theodore Konstadinides (eds.), *Research Handbook on EU Criminal Law*, Elgar, Cheltenham, Northampton, 2016, pp. 441 ff.

³⁴ In particular, this can be relevant in respect of international criminal justice. The Framework Decision on the European Arrest Warrant and Surrender Procedures between Member States provides that the discipline of multiple requests shall be "without prejudice to Member States' obligations under the Statute of the International Criminal Court": Council Framework Decision 2002/584/JHA, 13 June 2002, Article 16(4) (<https://www.legal-tools.org/en/doc/34dae8/>). Furthermore, crimes under the jurisdiction of the ICC do not need to fulfil the requirement of double criminality in the sense of Article 2, *ibid*.

internal security. Therefore, the abovementioned Genocide Network was established by the Council of the European Union (Council Decisions 2002/494/JHA and 2003/335/JHA)³⁵ to ensure close co-operation between national authorities in investigating and prosecuting core international crimes, as defined in Articles 6, 7 and 8 of the Rome Statute of the ICC. It is essential to investigate the Genocide Network's mandate, in order to understand how EU interests could be advanced through it.³⁶

The Genocide Network promotes the effective investigation and prosecution of core international crimes at the national level by exchanging information on criminal investigation and prosecution of suspects of core international crimes. The Network's tasks include facilitating co-operation and assistance between law enforcement agencies and judicial authorities of Member States; exchanging best practices, experience and methods relating to the investigation and prosecution of relevant crimes; raising awareness of these crimes and the commitment of the European Union to ending the impunity of perpetrators of core international crimes.³⁷ The Network ensures close co-operation between national authorities by acting as a focal point for practitioners to share information, experience and ongoing case information. It also answers practical and legal questions regarding the investigation and prosecution of core international crimes. As clearly stated in the recitals of both Council Decisions, complementarity is the ground for establishing the Network. This approach falls within the framework of the International Criminal Tribunal for the former Yugoslavia ('ICTY'), the International Criminal Tribunal for Rwanda ('ICTR') and the ICC, and aims to facilitate Member States' co-operation in that regard. The Network is not a co-operation tool with the ICC or other international tribunals, but a means to facilitate the investigation and prosecution of core international crimes at the national level.³⁸

Not to be underestimated is the fact that the Council considers the EU involved not as a potential territory of perpetration, but as an immi-

³⁵ Council Decision 2002/494/JHA, see above note 30; Council Decision 2003/335/JHA, see above note 31. See also Coninx, 2016, p. 443, above note 33.

³⁶ For further details, see Eurojust, "Genocide Network" (available on its web site).

³⁷ Eurojust, "Strategy of the EU Genocide Network to Combat Impunity for the Crime of Genocide, Crime against Humanity and War Crimes within the European Union and its Member States", November 2014 (<http://www.legal-tools.org/doc/3ba86b/>).

³⁸ Klip, 2016, p. 455, see above note 9.

gration destination for perpetrators: “Member States are confronted on a regular basis with persons who were involved in such crimes and who are trying to enter and reside in the European Union”.³⁹ Since 2003, the Council’s interest, as far as international criminal law is concerned, has focused on EU border control and security concerning immigration.⁴⁰

This link has become increasingly important in light of the migration crisis the EU is facing at the time of writing. Firstly, a list of persons excluded from asylum because of their perpetration of core international crimes has been drafted. Secondly, in the recent conclusions of the Genocide Network meeting⁴¹ there is a clear reference to the European Border and Coast Guard Agency (‘FRONTEX’) in the Network’s activity. The main points on the agenda were current trends in migration flow, FRONTEX’s support to national authorities investigating and prosecuting core international crimes and migrant smuggling, the link with the fight against impunity and the role of Eurojust in international judicial co-operation.⁴²

It is self-evident that the main EU interest is more connected to migration, border control and security than to prosecuting international crimes. In case of identification of a person subjected to an arrest warrant by an international criminal justice body, the EU will surely co-operate,

³⁹ EU, Council Decision 2003/335/JHA, see above note 35.

⁴⁰ Immigration-border control has already been one of the means of the fight against terrorism after the 11 September 2001 terrorist attacks. As a matter of fact, the Schengen-Information System and the EU Visa Information System in North African Countries include information on people that could be involved in terrorism. There are several critics on possible backlashes against migrants of Arab descent. See Emek M. Uçarer, “The Area of Freedom, Security, and Justice”, in Michelle Cini and Nieves Pérez-Solórzano Borragán (eds.), *European Union Politics*, Oxford University Press, Oxford, 2016, p. 290.

⁴¹ Eurojust, “Activities of the Genocide Network” (available on its web site):

The Genocide Network organises meetings twice each year that allow practitioners to exchange operational information, knowledge, problem-solving techniques and practical examples. The meetings are divided into two sessions: an open session for all Network Members and representatives from liaison organisations to exchange best practice, knowledge and experience on different topics relating to the investigation and prosecution of core international crimes; a closed session held solely for National Contact Points and their counterparts from Observer States to allow the exchange of confidential operational information on current investigations and requests for extradition relating to core international crimes.

⁴² Eurojust, “Conclusions of the 22nd Meeting of the Network for Investigation and Prosecution of Genocide, Crimes against Humanity and War Crimes”, 29-30 March 2017 (available on its web site).

but the objective seems to be expulsion rather than prosecution.⁴³ Moreover, there is no EU body for co-ordination of investigation of international core crimes, and this is not even included in Europol's mandate. Better said, Europol can operate every time a common interest covered by a Union policy is affected: in this case, States agreed to co-operate as far as immigration policy is concerned. This can be explained as a consequence of the States' traditional tendency to keep the criminal competence strictly national, although, especially after the entry into force of the Treaty of Lisbon, European harmonisation in the field has been steadily growing.

The Eurojust framework focuses only on one of the levels of involvement of the Union in international criminal justice, that is to say the involvement of third-State nationals who allegedly committed international crimes and are asylum seekers or migrants, as well as the question of their immunities. Currently, there is no consideration for international criminal justice issues in Europe as a territory where the crime could be committed (for example, during the Second World War or during the Balkans crisis)⁴⁴ or, more likely, if Member State nationals could be involved as victims, perpetrators, or witnesses.⁴⁵

⁴³ FRONTEX provides the EU and Member States with personal data and subsequent analysis of migrants trying to enter the EU territory. Should a person involved in core international crimes be apprehended, the objective of framing such kind of co-operation in EU immigration policy could mean a tendency to expel the person, except in case there are already international arrest warrants in place.

⁴⁴ For the specific purpose of EULEX, see below Section 13.10.

⁴⁵ Considering recent developments in terrorist groups and the Islamic State operational techniques, the phenomenon of foreign fighters could involve Member State nationals in the commission of core international crimes in territories where such conflicts take place (for instance, Syria or Iraq). In theory, EU citizens could perpetrate international crimes and must be prosecuted. The EU has shown sensitivity for the phenomenon of foreign fighters and has developed a strategy to fight it. The most relevant action is the one of the Council (see European Council of the European Union, "Response to the Terrorist Threat and Recent Terrorist Attacks in Europe" (available on the European Council's web site), and recent directives on the criminalisation of terrorist offences, especially the new conducts of undertaking training or travelling for terrorist purposes or organising or facilitating such travel have shown the real commitment of the Union in updating its harmonised legal instruments in order to fight terrorism (EU, Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA, Directive 2017/541, 15 March 2017). However, the interest of the Union for foreign fighters is not focused on the possible commission of international crimes, but just on internal security concerns and them taking part in groups that could commit terrorist attacks in the Member States' territories.

13.5. The European Union Common Foreign and Security Policy

The CFSP is the main framework for the Union's legal instruments in the field of international criminal justice adopted until now. Nowadays, in most cases EU legal bodies are destined to co-operate with the ICC, as the latter is the main international actor in international criminal justice.

For the purpose of our analysis, Council Decision 2011/168/CFSP⁴⁶ is the most relevant legal act of the Union at the moment, as an expression of the wider EU external relations policy. It is significant to note that co-operation with the Court is regulated under EU foreign policy and not in co-operation in criminal matters. This is normal, because it concerns the relationship between the Union and a third subject (the Court), but the lack of an internal competence on the same issues highlights that States prefer maintaining a strong monopoly over criminal matters. This is demonstrated by the fact that Member States prefer leaving such decisions, which are *de facto* concerning criminal co-operation with an international tribunal, to the Council,⁴⁷ rather than to the ordinary legislative procedure provided in the Treaty of Lisbon. Repealing former Common Position 2003/444/CFSP, the EU conducts its foreign policy by adopting decisions defining positions taken by the Union (Article 25 of the TEU). The legal background is relevant to define how to interpret this peculiar expression of EU interests towards international criminal justice and the International Criminal Court in particular.⁴⁸

Pursuant to Article 29 of the TEU:

The Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical

⁴⁶ Council Decision 2011/168/CFSP, see above note 28.

⁴⁷ When dealing with the CFSP, the Council is reunited in its Foreign Affairs composition (the Ministers of Foreign Affairs of each Member State) and chaired by the High Representative of the Union for Foreign Affairs and Security Policy. See Article 15 of the TEU, above note 10.

⁴⁸ The CFSP is still subject to specific rules and procedures pursuant to Article 24 of the TEU, see above note 10. The article is collocated in TEU and not in TFEU (on the contrary, the rest of the external action is in the TFEU); procedures and institutional architecture are still purely intergovernmental (with the dominant role of the Council, unanimity as the only applicable rule, the marginal role of the European Parliament and the lack of control by part of the Commission and the CJEU). Roberto Adam and Antonio Tizzano, *Lineamenti di Diritto dell'Unione Europea*, Giappichelli, Turin, 2014, p. 462.

or thematic nature. Member States shall ensure that their national policies conform to the Union positions.⁴⁹

Therefore, the Decision is an expression of the approach of the Union in international criminal justice matters (related to the ICC). As a Decision, it is a legal act of the Union binding in its entirety, which in this case has general validity towards all Member States. Using CFSP and its legal instruments to address the ICC seems to indicate a general unwillingness of the States to define a more active commitment in the field of criminal justice. On the contrary, States prefer to regulate the matter with the binding position of the Union in foreign policy, which of course means explicit EU support to the work of the ICC and an obligation for the States to co-operate with the Court, but nothing more formal is said. Recognising the Union and the ICC's common values and the values of the Union in its external action, agreeing to contribute to the ICC interest of ending impunity for international crimes perpetrators, the Council commits itself to the universal accession to the ICC and the integrity of the Statute, and refers to the importance of co-operation in the surrender of persons.⁵⁰ Universality and integrity of the Rome Statute are, in name, also objectives of the Union, with due regard to the preservation of the independence of the ICC. The interest of the Union seems to be the same as that of the ICC, but the way in which it is developed is somewhat feeble.

The Decision is a binding legal text, but in fact has no actual means to achieve its objectives. As expressed in Article 1(2),⁵¹ the provisions represent a foundation of the Union's attitude towards the ICC, which includes (i) the widening of the participation to the Statute (raising the issue in negotiations; initiatives and co-operation; sharing experiences; technical and financial assistance), (ii) the preservation of the independence of the Court (encouragement to States to promptly transfer contributions; agreement on immunities; development of training), (iii) following up on co-operation; (iv) reviewing the Agreement (still not concluded); (v) *ad*

⁴⁹ TEU, Article 29, see above note 10.

⁵⁰ Council Decision 2011/168 CFSP, see above note 28.

⁵¹ *Ibid.*, Article 1(2):

The objective of this Decision is to advance universal support for the Rome Statute of the International Criminal Court [...] by promoting the widest possible participation in it, to preserve the integrity of the Rome Statute, to support the independence of the ICC and its effective and efficient functioning, to support cooperation with the ICC, and to support the implementation of the principle of complementarity.

hoc arrangements; (vi) attention to agreements for surrender of persons, (vii) ensuring the implementation of complementarity and relevant co-ordination, and (viii) the smooth functioning of the Assembly of States Parties. The only new disposition in respect to the former Common Position is Article 8, which affirms the need to ensure “consistency and coherence of instruments and policies in internal and external action of the Union in relation to most serious international crimes as referred to in the Rome Statute”.⁵² If the first articles represent the framework of EU commitment, but do not say much about if and how it will be implemented, the new Article 8 is problematic as it is difficult to interpret. It seems a point for co-ordination of the Union’s policy towards the ICC, but it has not been implemented yet. After six years, we can say that there is still no clear co-ordination between EU policies towards international criminal justice, apart from general expressions of support.

As mentioned, the Decision has been implemented with the 2011 Action Plan,⁵³ examining co-operation instruments not only at the CFSP level, but also at the AFSJ. These instruments are again nothing more than the expression of the Union’s commitment towards the ICC, as “an amalgam of aspirational rhetoric and down-to-earth practical measures”,⁵⁴ but the implementation falls within the competence of Member States.

13.6. The ‘International Criminal Court Clauses’

The EU’s efforts to ensure the universality of the Rome Statute and to promote ratifications have increased since the strong United States opposition under the Bush administration. In the past, members of the European Commission (‘Commission’) were proactive in inviting the widest ratification of the Statute, especially with countries aspiring to EU membership.⁵⁵ The Commission revised the Cotonou Agreement, which applies to seventy-nine African Caribbean and Pacific countries and the EU, introducing the first ICC clause. This *imprimatur* should have been the stand-

⁵² *Ibid.*, Article 8.

⁵³ Draft Action Plan 2011, see above note 29.

⁵⁴ Antoniadis and Bekou, 2007, p. 630, see above note 32.

⁵⁵ Some scholars considered this as an attempt to ‘*communautarise*’ the ICC as a human rights issue to be included in first pillar, see Martin Groenleer and David Rijks, “The European Union and the International Criminal Court: The Politics of International Criminal Justice”, in Knud Erik Jørgensen (ed.), *The European Union and International Organizations*, Routledge, London and New York, 2009, p. 179.

ard clause to be inserted when negotiating with third States.⁵⁶ Furthermore, clauses promoting the universality of the Rome Statute have been included in the EU's Central Asia Strategy.⁵⁷

The European Union has promoted the values of international criminal justice and has developed a limited range of instruments to co-operate with the ICC. The universality and the integrity of the Rome Statute have always been considered key points in the Union's declarations. The idea of having a powerful economic partner as the EU could be an important factor at stake for the Court, but the substantial ineffectiveness of ICC clauses could affect the ICC significantly more.⁵⁸ The Union's public statements aim to show a European commitment towards human rights issues (in a broad sense), but the interests of international justice have always been balanced with the main economic and State interests. That is to say, the purposes of human rights and international criminal law can be fulfilled only if they are not inconsistent with other goals. A clear example could be the comparison between the attitude of the Council of Europe and that of the Union at the times of US fierce opposition to the Rome Statute. The Council of Europe, through a resolution of its Parliamentary Assembly, expressly condemned the US, asking States Parties not to sign bilateral agreements excluding US citizens from the jurisdiction of the Court for international crimes committed in States Parties to the Rome

⁵⁶ Cotonou Agreement, 22 June 2010. The preamble of the agreement commits to the fight against impunity and to a national and global effort to effectively pursue accountability and international criminal justice. In Article 11(7) the States commit themselves to promote international criminal justice, to ratify and implement the Rome Statute. See European Parliament, Directorate General for External Policies, "Mainstreaming Support for the ICC in the EU's Policies", 2014, p. 34 (available on the European Parliament's web site).

⁵⁷ Council of the European Union, "The European Union and Central Asia: The New Partnership in Action", June 2009 (available on the EEAS' web site).

⁵⁸ The same problem arises for all the 'human rights clauses' attached to the agreements signed by the EU, although they seem to have a more widespread use and are provided with implementation instruments. It is remarkable that drafting ICC clauses is partially different from drafting human rights clauses. For example, in the Cotonou Agreement, see above note 56, the ICC clause is included in the Peace Building Policy section (Article 11), while human rights clauses are those of Article 9(4), dedicated to the essential elements regarding human rights, democratic principles and the rule of law. Moreover, Article 96 sets out a consultation procedure in case of non-compliance with Article 9, while no analogous provision in relation to Article 11 is provided. In general, human rights clauses are spread overall EU external agreements and in particular free trade agreements. They usually grant the right to suspend the agreement if the partner country does not fulfil its human rights obligations. Nevertheless, both instruments have proved to be quite ineffective.

Statute.⁵⁹ On the contrary, the EU had a very ambiguous position at the time due to the need to keep a close relationship with a strong economic and military partner like the US. Even if from one side the decision to negotiate with the US can be considered a strategy to reach a common position on the topic and grant broader effectiveness to the Statute, on the other side it provides testimony to the EU's willingness and tendency to balance the interests of international criminal justice with other primary interests.

13.7. The EU–ICC Agreement

In the field of the CFSP, the EU has also concluded an international agreement with the ICC in 2006, which should have been reviewed after the Kampala Conference, but still remains unchanged. It is meant to define the terms of co-operation and assistance between the two institutions. The legal framework of the agreement as an international law one is interesting.⁶⁰ In fact, international law, international agreements and connected decisions are part of EU applicable law. In particular, international agreements must be consistent with the Treaties (possible compatibility questions with the Treaties can be raised to the CJEU), but they are higher-ranked than secondary EU law.⁶¹ This means that the co-operation provided by the EU–ICC Agreement of 2006 has a particular importance, due to its rank in EU sources of law. From the ICC's point of view, the agreement has been concluded under Article 87(6) of the Rome Statute, which allows the Court to ask intergovernmental organisations to provide information or documents, but also other forms of assistance.⁶²

The analysis of this legal instrument shows that, as far as the Union is concerned, complete co-operation with the ICC is granted. This could be particularly meaningful if the documents to be surrendered are confidential, for instance related to EU External Action in third States under ICC investigation, or EU classified Europol or Eurojust information,

⁵⁹ Council of Europe, Risks for the Integrity of the Statute of the International Criminal Court, Resolution 1300 (2002) of the Parliamentary Assembly, paras. 8, 9 and 11.

⁶⁰ International agreements can be entered into by the Union under the procedure disciplined by Article 218 TFEU, see above note 8.

⁶¹ In any case, international law cannot be invoked during trial by individuals unless the CJEU recognises its direct effect.

⁶² The EU–ICC Agreement of 2006 (above note 3) was the first ever legally binding agreement of this kind between the European Union and an international organisation. See Groenleer and Rijks, 2009, p. 171, see above note 55.

which must be granted to the ICC, balancing the need for confidentiality with a special procedure to be followed.

For the purpose of the agreement, the term ‘EU’ refers to the Council, the High Representative, the Commission, excluding Member States.⁶³ It obliges the Union to provide information, with special procedures granted for classified information and Member States involved in it;⁶⁴ it provides for the possibility of witness statements from EU personnel and a closer relationship with the ICC Office of the Prosecutor (‘OTP’) as far as information and co-operation is concerned;⁶⁵ immunities are also part of the agreement.⁶⁶ The OTP appears to be the organ that could profit more from the agreement,⁶⁷ although according to some scholars⁶⁸ the tenor of the agreement is deferential towards the EU. The opportunity of specific provisions on the Office of the Prosecutor is debatable: it is self-evident that the information and documents are vital for the effectiveness of the prosecution, as the Prosecutor must rely on States’ and international organisations’ co-operation to fulfil her duties. As she is part of what must be an impartial due process of law in front of the international judges, providing investigation material to the ICC could involve a strong influence on international criminal justice dynamics. The neutrality of the EU towards ICC proceedings would emerge not only from the duty to co-operate with the Prosecutor, irrespective of the consistency of the trial’s consequences for its interests, but also from the availability to co-operate with the defence. The agreement has not yet raised conflict, and it is unlikely that it will in the future, as it regulates very neutral issues.

A potentially more problematic field could be the asset freezing and confiscation. This issue is not regulated in the Agreement, although previ-

⁶³ EU–ICC Agreement of 2006, Article 2, see above note 3.

⁶⁴ *Ibid.*, Articles 7–9.

⁶⁵ *Ibid.*, Article 10.

⁶⁶ The waiver of immunities is permitted only if it is not contrary to the interests of the Union, see Protocol no. 7 to the TFEU on the Privileges and Immunities of the European Union, Article 18 (<http://www.legal-tools.org/doc/15b8be/>).

⁶⁷ Article 11 of the EU–ICC Agreement of 2006, see above note 3, entails additional co-operation between the OTP and the EU and consists in providing additional information held by the EU, co-operation pursuant to Article 54(3)(c) of the Rome Statute, facilitating agreements under Article 54(3)(d) of the Rome Statute and requests for information.

⁶⁸ Bekou and Antoniadis, 2007, p. 635, see above note 32.

ously in relation to the ICTY, the need for freezing of assets was fulfilled through CFSP legal instruments.⁶⁹

13.8. The European Union Policy Framework to Transitional Justice (Council Conclusions)

Another instrument to advance EU interests in international criminal justice is the recent Union's commitment towards transitional justice. In the context of the CFSP, the European External Action Service ('EEAS') has launched a new policy framework in the more general field of human rights and democracy.⁷⁰ This working paper was adopted by the Council and proposed by the High Representative and the Commission, in order to affirm the Union's intention to have an active role in supporting transitional justice processes in co-operation with other states and international regional organisations. It is conceived as part of the wider support of the Union to the ICC, in the context of State and peace building, with a particular attention to gender sensitive transitional justice.⁷¹ In the annex, the EU's policy framework enumerates five main objectives: ending impunity, providing recognition and redress for victims, fostering trust, strengthening the rule of law, contributing to reconciliation. The legal basis is Article 21 of the TEU which enumerates human rights, rule of law and democracy among the principles guiding EU external policy. As a policy paper, realist motivations and interests moving the Council are not explicitly explained. It is interesting to note that, apart from the growing attention of the Union to human rights issues, priority is given to gender issues in

⁶⁹ See Council Common Position 2004/694/CFSP, above note 25. On the contrary, terrorist asset freezing has been operated through former second and third pillar decisions. See also Bekou and Antoniadis, 2007, p. 636, see above note 32. Currently, the Union is proactive in asset freeze and confiscation in the field of terrorism, through EU external policy sanctions. One more time, it is interesting to note that asset freezing and confiscation related to terrorism has nothing to do with international criminal justice or prosecution, but it is linked with national and international security. In fact, restrictive measures for people and organisations suspected of being involved in terrorism (such as Al Qaeda, Islamic State and their financial supporters) have been adopted on the basis of UN Security Council Resolutions (1267/1999, 1333/2000, 1390/2002), and now on the legal grounds of Article 215 TFEU with Council Regulations. See EEAS, "Consolidated List of Sanctions", 18 August 2015 (available on the EEAS' web site).

⁷⁰ "The EU's Policy Framework on Support to Transitional Justice" (available on the EEAS' web site).

⁷¹ Council of the European Union, EU's Support to Transitional Justice, Council Conclusions, 13576/15, 16 November 2015.

transitional justice.⁷² As in transitional context this is not the only important issue at stake, this could testify the particular commitment of the Union towards gender sensitive themes,⁷³ preferred in this case to religion and ethnic issues, which are affecting Member States as a consequence of terrorism and are often the grounds for ethnic cleansing and massacres.

The particular attention to sexual and gender-based crimes and crimes involving children could derive also from OTP policy: since 2006, the Office of the Prosecutor has tried to adopt a transparent approach towards the public, not only with regular reports on the situations under preliminary examinations, but also through strategic plans and policy papers. In particular, the policy papers provide some guidelines followed by the Prosecutor in her discretionary power, but their terminology is often broad and does not bind her future activity. The first papers concerned quite broad topics, such as the interests of justice, victims' participation, preliminary examinations, while the last three respectively deal with case selection and prioritisation,⁷⁴ sexual and gender-based crimes⁷⁵ and children.⁷⁶ With these documents, the OTP creates a 'hierarchy' not only among the crimes to fight against to avoid impunity, but also among the most relevant crimes for the Office within each situation. The situations are usually quite large in scope and cover a potential high number of crimes falling

⁷² *Ibid.*, Annex 1, no. 8:

The EU also prioritises gender sensitive transitional justice which addresses the full range of violations and abuses suffered by women, girls, men and boys and responds to their differentiated vulnerabilities and needs. In this respect, gender must be mainstreamed throughout transitional justice mechanisms and processes, from their design through to implementation of recommendations. Acknowledging that children may be simultaneously victims, survivors, witnesses and perpetrators of violations and abuses, the EU supports measures that enable children's access to justice and their involvement in the work of transitional justice mechanisms in a way that contributes effectively to children's recovery and reintegration.

⁷³ See EU, Establishing Minimum Standards on the rights, support and protection of victims of crimes, and replacing Council Framework Decision 2001/220/JHA, Directive 2012/29/EU, 25 October 2012 (<http://www.legal-tools.org/doc/5a6c31/>), EU, Recommendations to the Commission on Combating Violence Against Women, European Parliament Resolution P7_TA(2014)0126, 25 February 2014.

⁷⁴ ICC OTP, Policy Paper on Case Selection and Prioritisation, 15 September 2016 (<https://www.legal-tools.org/en/browse/record/182205/>).

⁷⁵ ICC OTP, Policy Paper on Sexual and Gender-Based Crimes, June 2014 (<https://www.legal-tools.org/en/browse/record/7ede6c/>).

⁷⁶ ICC OTP, Policy on Children, November 2016 (<https://www.legal-tools.org/en/browse/record/c2652b/>).

under the Court's jurisdiction. In a system ruled by the principle of complementarity and with limited resources like the ICC's, it would be naïve to ask the OTP to investigate and prosecute all the crimes committed in a given situation. Therefore, the Prosecutor attempts to focus her attention only on what she believes to be the most significant crimes or episodes.⁷⁷

The policy paper states that the gravity assessment in case selection includes both quantitative and qualitative considerations,⁷⁸ in which the nature of the crimes plays a role. For this reason, killings, rapes and other sexual or gender-based crimes, crimes committed against or affecting children, persecution, or the imposition of conditions of life on a group calculated to bring about its destruction benefit from particular attention by the OTP.⁷⁹

There are many reasons to justify the particular attention for these crimes: women and children in conflict are often targeted as such, they are vulnerable categories that particularly suffer for the consequences of the conflicts, there is no war without sexual crimes and the practice of employing child soldiers is widespread. Eradicating these crimes, punishing the perpetrators and providing assistance to the victims are fundamental tools to recreate the fabric of society and avoid new conflict. Such reasons remain implicit in the texts of the abovementioned documents, and it is not clear why these crimes should be graver than ethnically or religiously motivated crimes. In fact, while sexual and gender-based crimes and crimes involving children are horrible *means* used to perpetrate conflict, ethnicity and religion have always been the main *grounds* for conflicts or

⁷⁷ Since the ICC OTP, Strategic Plan 2012-2015 (<http://www.legal-tools.org/doc/be550b/>) the OTP "elevated [sexual and gender-based crimes] to one of its strategic goals". These crimes remain part of second strategic goal in the ICC, OTP, Strategic Plan 2016-2018 (<http://www.legal-tools.org/doc/7ae957/>) after the independence and impartiality of preliminary examinations, investigations and prosecutions.

⁷⁸ ICC OTP, Policy Paper on Case Selection and Prioritisation, para. 37, see above note 74.

⁷⁹ It does not mean that the OTP does not take into considerations other conducts within its mandate. The investigation and prosecution of Mr. Al-Mahdi is clear evidence of this, where the need to effectively respond to the collective damage caused by the individual convicted with the destruction of religious buildings in Timbuktu prevailed on the protection of other legal goods. Immediately after the judgement, some groups repeatedly asked to prosecute Mr. Al-Mahdi also for killings, rapes and other crimes allegedly committed during the conflict. It is not possible to exclude such an eventuality, but it seems highly improbable. Despite the fact it was surely 'easier' to build a strong case on this particular crime, the Prosecutor probably believed it was the best way for her Office (and the Court) to participate in the realisation of peace and justice in that very situation.

have often been used to justify them (for example, in the conflicts in Yugoslavia and Rwanda). Sometimes the reasons are in turn hidden behind political motivations (it is not a coincidence that many situations rousing the Prosecutor's attention are connected with pre- or post-electoral violence)⁸⁰ but remain instruments used to build a perception of certain people as 'others' and thus 'enemies'.⁸¹

13.9. The European Union Missions

Since the Action Plan in 2011, the EEAS⁸² is said to have a responsibility in mainstreaming support to international criminal justice, especially in crisis management structures and missions under the common security and defence policy.⁸³ Typical international criminal justice actions are the

⁸⁰ See the situations in Kenya, Ivory Coast, Central African Republic, Burundi and Gabon. It is paradigmatic to quote Carl Schmitt, legal scholar connected to the National Socialist Party in Germany during the regime:

The political enemy need not be morally evil or aesthetically ugly; he need to appear as an economic competitor, and it may even be advantageous to engage with him in business transactions. But he is, nevertheless, the other, the stranger; and it is sufficient for his nature that he is, in a specially intense way, existentially something different and alien, so that in the extreme case conflicts with him are possible [...] The enemy is not merely any competitor or just any partner of a conflict in general. He is also not the private adversary whom one hates. An enemy exists only when, at least potentially, one fighting collectivity of people confronts a similar collectivity.

Carl Schmitt, *The Concept of the Political*, The University of Chicago Press, Chicago and London, 1996, pp. 27–28.

⁸¹ This is a concerning reality not only in Africa, Middle East and South-Eastern Asia, but also in Europe and the other Western States.

⁸² For some scholars, the power of the US and NATO was a factor in ensuring the external security of the European Union and letting the Member States integrate their economies. By extension, the explanation for the rise of the EU foreign policy integration after the end of the cold war is the need to find a stabilizing factor for intra-European relations. It could be seen also as a reaction to the uncertainty of US intervention, in order to act as a major actor in transatlantic relationships. Andrew Glencross, *The Politics of European Integration*, Wiley Blackwell, Chichester, 2014, p. 202.

⁸³ The European Security Strategy identifies five main threats to the security of the Union and presents the EU as a comprehensive security actor that combines a wide range of means to achieve its aims of a fairer, safer world. For scholars the changing multi-polarity of the world should allow the EU the opportunity to take advantage of its comprehensive security approach. Robert Dover and Anna Maria Friis Kristensen, "The European Union's Foreign, Security, and Defence Policies", in Michelle Cini and Nieves Pérez-Solórzano Borragán (eds.), *European Union Politics*, Oxford University Press, Oxford, 2016, p. 246; Jolyon Howorth, *Security and Defence Policy in the European Union*, Palgrave Macmillan, Basingstoke, 2014.

inclusion of international criminal justice and human rights in country-specific strategies, or making expertise in international criminal justice available to EU delegations. Furthermore, in third States, EU delegations should monitor developments on the ground in relation to countries under investigation by the ICC or under preliminary examination, as well as in relation to countries under a specific obligation to co-operate with the ICC.⁸⁴

At any rate, it is not possible to exclude *a priori* conflict between EU and international criminal justice interests. Despite the fact that such interests can coincide, it is likely that impunity for international crimes could be in line with EU economic and other interests in third States. Moreover, the immigration policies of the Union could be a source of international agreements with third States that shield mass atrocities perpetrators from responsibility.

There is a relevant coincidence between EU or EEAS missions⁸⁵ and ICC ongoing situations, which could result in a potential conflict of interests. EEAS missions are civilian and are useful means to fulfil EU policies in neighbour countries.

Before analysing the EU missions linked to ICC situations under preliminary examination, investigation or prosecution, it is appropriate to provide some general information on the others, as it is nevertheless useful to understand when the EU deems necessary to involve means and resources outside its territory for purposes broadly connected to international criminal justice. There are three ‘non-linked’ missions in Somalia, one in Niger and one in Bosnia Herzegovina.

13.9.1. Somalia

Somalia is not subject to investigation for international crimes by the ICC, and is not even a party to the Rome Statute. The EU has adopted a comprehensive approach in the region that has scarce influence on the prosecution of core international crimes. The first EU mission to be conducted in Somalia is European Union Naval Force Somalia (‘EUNAVFOR Somalia’)⁸⁶ (also based on UN Security Council resolutions),⁸⁷ which started

⁸⁴ Draft Action Plan, 2011, p. 6, see above note 29.

⁸⁵ Most of CFDP missions have not been military, with a particular focus on security sector reform and police and rule of law. Approximately one third of the CFDP missions have been military. See Dover and Kristensen, 2016, p. 250, see above note 83.

⁸⁶ See the EUNAVFOR’s web site.

in December 2008 to combat Somali-based piracy and armed robbery at sea off the Horn of Africa as scope.⁸⁸ Although the EU Naval Force has the power to arrest, detain and transfer individuals suspected of having committed piracy or armed robbery at sea, the issue is more evidently linked to EU commercial interests at sea and transnational crimes, rather than international ones.

The European Union Training Mission Somalia ('EUTM Somalia')⁸⁹ was initiated in April 2010 and offers military training to strengthen the Transitional Federal Government and the institutions of Somalia, alongside advisory and mentoring activities, in order to reform and enhance the Somali security institutions.⁹⁰

The European Union Capacity Building Mission in Somalia ('EUCAP Somalia')⁹¹ was created in July 2012 and it is a civilian mission which contributes to the establishment and capacity building of civilian law enforcement capability, in co-ordination with the other EU missions. The goal is the development of the coast guard and maritime policing functions, and ultimately to fight piracy at sea.⁹²

13.9.2. Niger

Likewise, the European Union Capacity Building Mission in Sahel Niger ('EUCAP Sahel Niger'), whose mandate was given in August 2012,⁹³ is not directly connected to an ICC situation, and is aimed to help establish an integrated, coherent, sustainable and human rights-based approach among the various Nigerien security actors in the fight against terrorism

⁸⁷ See, for example, Resolution 1816 (2008), UN Doc. S/RES/1816 (2008), 2 June 2008; Resolution 1838 (2008), UN Doc. S/RES/1838 (2008), 7 October 2008.

⁸⁸ The main objectives of the mission are to protect vessels of the World Food Programme ('WFP'), African Union Mission in Somalia ('AMISOM') and other vulnerable shipping; deter and disrupt piracy and armed robbery at sea; monitor fishing activities off the coast of Somalia; support other EU missions and international organisations working to strengthen maritime security and capacity in the region. See EUNAVFOR, "Mission" (available on the EUNAVFOR's web site).

⁸⁹ See the EUTM Somalia's web site.

⁹⁰ See Factsheet on EUTM Somalia (available on its web site).

⁹¹ See the EUCAP Somalia's web site.

⁹² EEAS, "EU Capacity Building Mission in Somalia (EUCAP Somalia)" (available on EUCAP Somalia's web site).

⁹³ EEAS, "EUCAP Sahel Niger" (available on the EEAS' web site).

and organised crime.⁹⁴ The mission is part of the wider EU program in Sahel involving Burkina Faso, Chad, Mali and Mauritania, where security, immigration, terrorism, the humanitarian situation and long term development are the main issues. The Ministers of Foreign Affairs adopted in 2015 the Sahel Regional Action Plan that lists four key priorities: preventing and countering radicalisation, creating appropriate conditions for youth, migration and mobility, border management, fighting against illicit trafficking and transnational organised crime.⁹⁵

The problems of the region have not gone unnoticed by the Prosecutor of the ICC, who in November 2010 publicly opened a preliminary investigation in Nigeria for crimes against humanity allegedly committed in the Niger delta in the context of the conflict between Boko Haram and the Nigerian Security Forces.⁹⁶

13.9.3. Bosnia and Herzegovina

In Bosnia and Herzegovina there has been a European Union mission since 2004. The Union is acting under UNSC's mandate to help the post-war transition. It is well documented that the core international crimes committed during the 1992–1995 conflict are under the jurisdiction of the ICTY. The EU mandate in Bosnia and Herzegovina is both executive (de-

⁹⁴ See EEAS, “About EUCAP Sahel Niger” (available on the EEAS’ web site). The mission’s objectives are supporting the interoperability of Nigerien security forces and helping develop their operational strategies; strengthening the technical competences of Niger’s security actors, required for fighting terrorism and organised crime; strengthening Nigerien security forces’ training policies and the management of human resources and logistics to reinforce the sustainability of the first two objectives; supporting the development of regional and international co-ordination in the fight against terrorism and organised crime.

⁹⁵ Council of the European Union, “Council Conclusions on the Sahel Regional Action Plan 2015-2020”, 20 April 2015 (available on the Council of the European Union’s web site). The document clearly states that the plan “responds to a shared concern of the EU and its Member States about the increased security threats in the Sahel”. Law enforcement is the main issue while ‘justice’ is a tool useful to face these problems. See EEAS, “Strategy for security and development in the Sahel”, 21 June 2016 (available on the EEAS’ web site):

commission services and the EEAS will continue to promote independent, more efficient, fair, and more accessible justice systems at national and regional levels and will strengthen the criminal justice response to terrorism. This includes promotion of access to a credible justice that safeguards human rights, reduces impunity and reinforces the fight against corruption. Commission services and the EEAS step up support to develop effective criminal justice responses to terrorism and organised crime.

⁹⁶ See ICC OTP, “Report on Preliminary Examinations Activities 2016”, 14 November 2016, pp. 64-69 (<http://www.legal-tools.org/doc/f30a53/>).

rived from a UNSC resolution)⁹⁷ and non-executive. Its main objectives are to support the ICTY, to keep the accused for war crimes in custody and combating organised crime.⁹⁸

The ambiguity of Bosnia as a post-conflict zone and a stabile country reflects on the EU approach, both aimed at peacekeeping and European integration (the common ‘stick and carrot’ strategy). The EU has played a role in war crimes trials, although the integration goals have not been properly conceptualised and integrated with peacekeeping objectives. Nevertheless, transitional justice has been ignored by the Union, as war crimes are seen as a conflict-generating issue by Brussels. As far as international jurisdiction is concerned, the realist perspective of European integration has been the most effective instrument so far to compel the States of former Yugoslavia to co-operate with the ICTY.

The table below provides an overview over the most relevant event in situations both connected to EU missions (underlined) and under the ICC’s attention in chronological order. Comparing the date of the most relevant steps of the ICC situations with the start date of EU External Action missions, some interesting points emerge.

⁹⁷ UN Security Council authorisation was given after the proposal of the EU. The authorization was given to Member States to act in co-operation with (and through) the EU. See Resolution 1575 (2004), UN Doc. S/RES/1575 (2004), 22 November 2004 (<http://www.legal-tools.org/doc/95263f/>).

⁹⁸ Iavor Rangelov and Marika Theros, “Transitional Justice in Bosnia and Herzegovina: Coherence and Complementarity of EU Institutions and Civil Society”, in Kai Ambos, Judith Large and Marieke Wierda (eds.), *Building a Future on Peace and Justice*, Springer, Berlin-Heidelberg, 2009, p. 371.

Gabon	Mali	Libya	Georgia	Palestine*	Ukraine	CAR*
<ul style="list-style-type: none"> • <u>2016-05 (onwards)</u> Alleged crimes • <u>2016-08-27 EOM Gabon</u> • <u>2016-09-21</u> State referral 	<ul style="list-style-type: none"> • <u>2012-01 (onwards)</u> Alleged crimes • <u>2012-07-13</u> State referral • <u>2013-02</u> EUTM Mali (first mandate) • <u>2014-04-15</u> EUCAP Sahel Mali • <u>2016-03-23</u> EUTM Mali (third mandate) 	<ul style="list-style-type: none"> • <u>2011-02-15</u> Alleged crimes • <u>2011-02-26</u> UNSC Referral (Resolution 1970/2011) • <u>2013-05-22</u> EUBAM Libya • <u>2015-10-07</u> EUNAVFOR MED** 	<ul style="list-style-type: none"> • <u>2008-07-10</u> Alleged crimes in Georgia • <u>2008-08</u> Preliminary Examination • <u>2008-09</u> EUMM Georgia • <u>2016-01-27</u> Authorisation of <i>pro motu</i> investigations 	<ul style="list-style-type: none"> • <u>2005-11-24</u> EUBAM Rafah • <u>2006-01-01</u> EUPOL COPS • <u>2014-06-13</u> (onwards) ICC jurisdiction pursuant to Art. 12 • <u>2015-09-08</u> 2015-09-08 	<ul style="list-style-type: none"> • <u>2005</u> EUBAM Moldova and Ukraine • <u>2013-11-21</u> (onwards) Alleged crimes • <u>2014-12-01</u> EUBAM Ukraine • <u>2014-04-17</u> Ukrainian declaration I (Art. 12) • <u>2014-04-25</u> Preliminary Examination • <u>2015-09-08</u> Ukrainian declaration II (Art. 12) 	<ul style="list-style-type: none"> • <u>2002-2003</u> Alleged crimes related to the CAR I situation • <u>2004-12-22</u> State referral CAR I • <u>2007-05-22</u> Opening of the investigation CAR I • <u>2012-08-01 (onwards)</u> Alleged crimes related to the CAR II situation • <u>2014-05-30</u> State referral CAR II • <u>2014-09</u> Opening of the investigation CAR II • <u>2016-07-16</u> EUTM CAR

Table: EU missions and ICC situations.

* The EU missions in these countries are not directly connected to the limited jurisdiction of the ICC situations.

** EUNAVFOR MED is only indirectly linked with the Libyan situation.

13.9.4. Central African Republic

As far as the Central African Republic ('CAR') is concerned, two situations involve this country at the ICC, one for alleged crimes in 2002-2003, and the other for crimes allegedly committed since 2012.⁹⁹ In both cases CAR itself referred the situation to the Prosecutor.¹⁰⁰ The investigation in the first situation in CAR ('CAR I') was opened on 22 May 2007 for war crimes and crimes against humanity and it resulted in the process against Jean-Pierre Bemba Gombo, who was found guilty by Trial Chamber III of two counts of crimes against humanity and three counts of war crimes and sentenced to 18 years of imprisonment.¹⁰¹ The second situation ('CAR II') concerns war crimes and crimes against humanity committed in the renewed context of violence started in 2012, which are under investigation since September 2014.¹⁰²

It is self-evident that the European Union Training Mission in the Central African Republic,¹⁰³ which began in 2016, is not directly connected to the crimes committed neither in the first nor in the second CAR situation. Nevertheless, the objective of the mission is military training in the transitional state of CAR, in order to support the build-up of a modernised, effective, ethnically balanced and democratically accountable *Forces Armées Centrafricaines*. Therefore, the aim of the mission directly concerns the instable situation of CAR after the conflict of 2012. In fact, the European Union Training Mission mandate was given after the CAR President's invitation and in co-operation with the Multidimensional Integrated Stabilisation Mission in Central African Republic, a mission which

⁹⁹ CAR has been plagued by political instability and armed conflict since 2001. In the CAR I situation the matter was the *coup d'état* and the conflict between the factions loyal to President Patassé and the ones loyal to Bozizé (former Army Chief of Staff), who became President after Patassé's deposition. CAR II concerns the *coup d'état* carried out by the armed organized rebel group of Séléka against President Bozizé and the related inter-ethnic conflict. See ICC OTP, *Situation in Central African Republic II*, Article 53 (1) Report, 24 September 2014 ('ICC OTP, CAR II Report') (<http://www.legal-tools.org/doc/1ff87e/>).

¹⁰⁰ CAR I was referred in 2004, see ICC, "Prosecutor Receives Referral Concerning Central African Republic", 7 January 2005 (<http://www.legal-tools.org/doc/cfa72d/>). For CAR II, see ICC OTP, CAR II Report, see above note 99.

¹⁰¹ ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, Judgement, 21 March 2016, ICC-01/05-01/08 (<https://www.legal-tools.org/doc/edb0cf/pdf/>).

¹⁰² See ICC OTP, CAR II Report, see above note 99.

¹⁰³ EU, A European Union CSDP Military Training Mission in the Central African Republic (EUTM RCA), Council Decision 2016/610/CFSP, 19 April 2016.

involves the co-operation of the EU and the UN under invitation of the *Chef d'État de la Transition*.¹⁰⁴ The motivation behind EU interest in the region is linked to the need to provide effective support to local UN peacekeeping goals, and is clearly connected to rule of law and human rights objectives. Nevertheless, some commentators have hinted that French interests in its former African colonies are resulting in a more dubious relationship.¹⁰⁵

13.9.5. Ukraine

The EEAS has been active in Ukraine since 2005 with the European Union Border Assistance Mission to Moldova and Ukraine ('EUBAM Moldova and Ukraine'). The mission's mandate aims to bolster border and custom control, assist Moldova and Ukraine to fulfil the obligations of the Deep and Comprehensive Free Trade Area that they have signed as part of their Association Agreements with the EU, and to contribute to the peaceful settlement of the Transnistrian conflict.¹⁰⁶

The facts relevant to international criminal justice occurred from November 2013 onwards, and in particular after 20 February 2014. As a result of the Ukrainian Government's decision not to sign an Association Agreement with the EU, pro-Europe Ukrainians began demonstrating against the Government and occupied a square in the capital city. In the face of steadily growing protests, the Government imposed restrictions on freedom of expression that resulted in further protests. This led to an escalation of violence resulting in several deaths and hundreds of injuries. The EU mediated with the Government and finally the President was removed and left the country. However, conflicts continued in Crimea, which was occupied by Russia and in East Ukraine, and which proclaimed itself independent and part of the Russian Federation. Following the 'Maidan' revolution and the invitation issued by the Ukrainian Government, the European Union Advisory Mission Ukraine ('EUAM Ukraine') was launched in December 2014.

¹⁰⁴ EEAS, "About Military Training mission in the Central African Republic (EUTM RCA)", 20 June 2016 (available on the EEAS' web site).

¹⁰⁵ Klaus Schlichte, "La Françafrique: Postkolonialer Habitus und Klientelismus in der französischen Afrikapolitik", in *Zeitschrift für Internationale Beziehungen*, vol. 5, no. 2, 1998, pp. 309-342. Similar allegations have been risen for the Malian and Ivorian situations.

¹⁰⁶ EUBAM Moldova and Ukraine, "Who We Are?" (available on EUBAM Moldova and Ukraine's web site).

On 17 April 2014, the Ukrainian Government lodged a declaration under Article 12(3) of the Rome Statute accepting the ICC's jurisdiction for crimes committed from November 2013 to February 2014; a second declaration was lodged on 8 September 2015 for the crimes allegedly committed from 20 February 2014 onwards, with no end date. At the time of writing, the situation in Ukraine is under preliminary examination.¹⁰⁷

The OTP seems to qualify the situation in Crimea as an international conflict and the situation in Eastern Ukraine as a non-international armed conflict. Moreover, the crimes currently under preliminary examination are crimes against humanity allegedly committed in Crimea (harassment of the Crimean Tatar population, ill-treatment, killing and abduction, detention and fair trial, compelled military service), and in Eastern Ukraine (killing, destruction of civilian objects, detention, disappearances, torture or ill-treatment, sexual and gender-based crimes).¹⁰⁸

As in Georgia, the EU and the ICC have acted simultaneously. In both cases the European and international intervention were requested by the Ukrainian Government itself. In the case of the EU, the protests actually began as a reaction to the denial of the former Government of the signature of the first step towards the accession of the Ukraine to the EU. The mission's mandate is again non-executive and focused on civilian security, support of police and rule of law based on international and European principles of good governance and human rights, as well as political crisis management.¹⁰⁹ Priorities are, significantly, human resources management, criminal investigation, public order, community policy and delineation of competencies.

The reason for EU interest in Ukraine is self-evidently European enlargement in the region, in addition to the stabilisation of the State after the conflict which had its peak in 2014. The Union is obviously playing a role in the post-conflict and transitional situation in Ukraine. Moreover,

¹⁰⁷ ICC OTP, "Report on Preliminary Examinations Activities 2016", pp. 33-43, see above note 96.

¹⁰⁸ *Ibid.*

¹⁰⁹ Strategic advice on civilian security sector reform, in particular in relation to the need to develop civilian security strategies; support for the implementation of reforms through the delivery of hands-on advice, training and other projects; co-operation and co-ordination, to ensure that reform efforts are co-ordinated with Ukrainian and international actors. See European EUAM Ukraine, "Our Mission" (available on EUAM Ukraine's web site). See EU, The European Union Advisory Mission for Civilian Security Sector Reform Ukraine (EUAM Ukraine), Council Decision 2014/486/CFSP, 22 July 2014.

its interests could be directly involved in supporting international justice mechanisms in The Hague.

13.9.6. Palestine

With regards to the situation in Palestine, EEAS missions precede the opening of the situation at the ICC and the date of the commission of the alleged crimes. The European Union Border Assistance Mission Rafah ('EUBAM Rafah') was launched in 2005, after the Israeli withdrawal from Gaza, to monitor the operation of the border crossing point between the Gaza Strip and Egypt in order to monitor the implementation of the Israel and Palestinian Authority Agreement on Movement and Access of 2005. On the other side, the second EEAS mission, created in 2006, is European Union Co-ordinating Office for Palestinian Police Support ('EUPOL COPPS'), aimed to help building a Palestinian institutional capacity, contributing to the establishment of sustainable and effective policy arrangements, advising Palestinian counterparts on criminal justice and rule of law related aspects and supporting the establishment of an efficient Palestinian criminal and judiciary system. The mandate of the second mission is obviously related to criminal law, not to the international prosecution of core crimes, but rather to the internal rule of law and the effective fight against common criminality.¹¹⁰

The controversial status of Palestine in the international community complicated the process of accession to the Rome Statute. In 2009 The Palestinian Authority sought to accept the ICC's jurisdiction,¹¹¹ but the Palestinian status of UN observer entity instead of State determined its impossibility to join the Statute. The situation changed in 2012 when Palestine's status was upgraded by the UN General Assembly to 'non-member observer State' through the adoption of resolution 67/19.¹¹² On 31 December 2014 the Palestinian Authority lodged a declaration under Article 12(3) of the Rome Statute accepting the jurisdiction of the Court

¹¹⁰ EUPOL COPPS, "Strengthen and Support the Criminal Justice System" (available on the EUPOL COPPS' web site).

¹¹¹ Palestinian National Authority, Declaration Recognizing the Jurisdiction of the International Criminal Court, 21 January 2009 (<http://www.legal-tools.org/doc/d9b1c6/>).

¹¹² Status of Palestine in the United Nations, UN Doc. A/RES/67/19 (<http://www.legal-tools.org/doc/3a1916/>). See also ICC, "Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda: 'The Public Deserves to Know the Truth about the ICC's Jurisdiction over Palestine'", 2 September 2014 (<http://www.legal-tools.org/doc/e3fe6c/>).

since 13 June 2014¹¹³ and on 2 January 2015 became the 124th State Party to the Statute.¹¹⁴

The EU mission is not indicative of an EU influence on international criminal justice issues, as it stems from the historical instability of the region. The crimes allegedly committed in the occupied Palestinian territories since 13 June 2014 are a consequence of the ongoing conflict.¹¹⁵ Palestine has been a troubled area since 1945 and the attention of not only EU States but the whole international community has been constant since then. Moreover, no European pressure on the ICC is recorded.

13.9.7. Georgia

The European Union Monitoring Mission in Georgia was launched in September 2008 during the crisis between Georgia and the Russian Federation while the ICC jurisdiction covers the alleged crimes committed in the region between July and October 2008. The Georgian situation is peculiar because, differently from the Ukrainian one, the Prosecutor decided to initiate the investigation *proprio motu*.¹¹⁶ This is not an absolute exception, as the Prosecutor took the same decision in 2009 in Kenya¹¹⁷ but it is the first situation reaching the phase of preliminary examination outside Africa. For these reasons its development deserves particular attention.

¹¹³ Palestinian National Authority, Declaration Accepting the Jurisdiction of the International Criminal Court, 31 December 2014 (<http://www.legal-tools.org/doc/60aff8/>).

¹¹⁴ See ICC, “The State of Palestine Accedes to the Rome Statute”, 7 January 2015, ICC-ASP-20150107-PR1082 (<http://www.legal-tools.org/doc/59dd45/>).

¹¹⁵ The Report of the OTP enumerates conducts allegedly committed in the Gaza Strip by the Palestinian armed forces (attacks against civilians, use of protected persons as shields, ill-treatment of persons accused of being collaborators) and by Israel’s Defense Forces (attacks against residential buildings and civilians, attacks against medical facilities and personnel, attacks against United Nations Relief and Works Agency schools, attacks against other civilian objects and infrastructures); the crimes allegedly committed in the West Bank-East Jerusalem by Israel Defense Forces are settlement activities, ill-treatment, escalation of violence. See ICC OTP, “Report on Preliminary Examinations Activities 2016”, pp. 25 ff., see above note 96.

¹¹⁶ ICC, Situation in Georgia, Request for an Authorisation of an Investigation pursuant to Article 15, Pre-Trial Chamber I, 15 October 2015, ICC-01/15-4 (<http://www.legal-tools.org/doc/460e78/>).

¹¹⁷ ICC, Situation in the Republic of Kenya, Request for Authorisation of an Investigation pursuant to Article 15, Pre-Trial Chamber II, 26 November 2009, ICC-01/09-3 (<http://www.legal-tools.org/doc/c63dcc/>).

The goals of European Union Monitoring Mission in Georgia are provided in the Council Joint Action 2008/736/CFSP¹¹⁸ and involve monitoring the situation on the ground and reporting to EU and its Member States, stabilisation and normalisation. The reasons for EU interest in the region are not difficult to imagine even without trivialising the situation to a Cold War-type scenario. Like Ukraine, Georgia is close to the EU borders, is member of the Council of Europe and is in a strategic geographical position. The prevention of conflict or mediation¹¹⁹ is a *per se* sufficient justification for EU involvement and the mission contributes to EU engagement in the region.

13.9.8. Libya

The situation in Libya was opened after UN Security Council referral, on which the Union had no influence, coming from a more powerful and influential organ.¹²⁰ The alleged crimes are crimes against humanity committed in Libya since 15 February 2011, and the situation has, at the time of writing, led to the opening of three cases.¹²¹ The Libyan crisis, stemming from the fall of Gaddafi's regime and the Arab Spring, gained the world's attention and caused an intervention of different international

¹¹⁸ EU, The European Union Monitoring Mission in Georgia, EUMM Georgia, Council Joint Action 2008/736/CFSP, 15 September 2008.

¹¹⁹ On the Six Points Agreement, see Council of the European Union, "Press Release – Extraordinary Meeting – General Affairs and External Relations", 13 August 2008, 12453/08 (Presse 236) (available on the EEAS' web site).

¹²⁰ UN Security Council referral is included in Resolution 1970 (2011), UN Doc. S/RES/1970 (2011), 26 February 2011 (<http://www.legal-tools.org/doc/00a45e/>). The UNSC referred the situation to the ICC,

condemning the violence and use of force against civilians, deploring the gross and systematic violation of human rights, including the repression of peaceful demonstrators, expressing deep concern at the deaths of civilians, and rejecting unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan Government.

¹²¹ The main one is the 'Saif Al-Islam Gaddafi case' (the case against Abdullah Al-Senussi was declared inadmissible and Muammar Gaddafi died in 2011). See ICC, *Prosecutor v. Saif Al-Islam Gaddafi*, Warrant of Arrest for Saif Al-Islam Gaddafi, Pre-Trial Chamber I, 27 June 2011, ICC-01/11-01/11-3 (<http://www.legal-tools.org/doc/1bcca2/>). The OTP has unsealed the warrant of arrest against Al-Tuhamy Khaled, see ICC, Situation in Libya, Warrant of Arrest for Al-Tuhamy Mohamed Khaled with under seal and ex parte Annex, Pre-Trial Chamber I, 18 April 2017, ICC-01/11-01-01/13-1 (<http://www.legal-tools.org/doc/8782b5/>) and issued a new warrant of arrest against Mahmoud Al-Werfalli, see ICC, *Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*, Warrant of Arrest, 15 August 2017, ICC-01/11-01/17 (<http://www.legal-tools.org/doc/881fb6/>).

forces, as a result of international alarm about mass atrocities and human rights violations.

The EEAS mission is subsequent to the opening of the OTP investigation. In fact, the European Union Border Assistance Mission's mandate was given in May 2013.¹²² The mission was established as a European Union Integrated Border Management Assistance Mission by the Council, "recognising the serious security challenges in Libya",¹²³ which was proposed by the Union itself and welcomed by the Minister of Foreign Affairs and International Cooperation of Libya. The mandate covers the support to Libyan authorities in developing the capacity to enhance the security of Libya's borders in the short term and to develop a broader strategic management in the longer term.¹²⁴ It is a civilian mission, which backs up Libyan authorities in developing border management and security at the country's land, sea and air borders through advising, training and mentoring in strengthening border services in accordance with international standards and best practices. Since 2016 civilian capacity building and assistance in crisis management were added as goals. It is clear that security is the main aim of the mission, demonstrating that European interests are related to border control and migration.¹²⁵

The second European mission, European Union Naval Force Mediterranean ('EUNAVFOR MED'), was initiated in October 2015 and its mandate covers systematic efforts to identify, capture and dispose of vessels and enabling assets used or suspected of being used by migrant smugglers or traffickers. The goal pursued by the Union in this case is the fight against human trafficking, which in fact is one of the harmonised criminal fields and which is derived (again) from the need of control of external borders and migration. Criminal offences committed in human

¹²² The mission is now temporary transferred to Tunis as a result of the increased risk for European agents in the unstable Libyan territory.

¹²³ EU, The European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya), Council Decision 2013/233/CFSP, 22 May 2013, para. 1. The Council Decision was amended by Council Decisions 2016/207/CFSP of 15 February 2016, which extended the Union's mandate in the light of recent developments in Libyan situation, and 2016/1339 of 4 August 2016.

¹²⁴ Council Decision 2013/233/CFSP, para. 1, see *ibid.*

¹²⁵ For the problem of the external dimension of JHA after the 1999 Tampere Council exporting functions of migrations control to buffer regions outside the EU, see Christina Boswell, "Justice and Home Affairs", in Michelle Egan, Neill Nugent and William E. Paterson (eds.), *Research Agendas in EU Studies*, Palgrave, Basingstoke, 2010, p. 283.

trafficking could also be qualified as crimes against humanity; therefore, this could represent a possible space where European criminal law and international criminal law communicate.

In May 2017, reporting at the UN Security Council on the Libyan situation, the Prosecutor, Fatou Bensouda, announced for the first time that her Office was also investigating the “crimes committed against migrants attempting to transit through Libya”.¹²⁶

To sum up, European External Action missions in Libya are not directly related to international criminal justice matters, and especially to ICC situations, although trafficking in human beings could develop into a relevant problem. Furthermore, the actual absence of EU agents in Libya, while not foreseen in the mandate, has a significant role in impeding even co-operation in the investigations of the OTP. The situation in Libya represents an issue of general concern for the international community, but again the EU pursues its interests every time it intervenes in a foreign State. In this case as well, the EU intervention is motivated by self-interest related to migration and to the fact that Libya is, in practice, at the borders of the Mediterranean States of the Union and main departing point for human trafficking and migration by sea. Any eventual future commitment in international criminal justice will probably be motivated by the same grounds.¹²⁷

13.9.9. Mali

As far as Mali is concerned, the EU launched two missions, the European Union Training Mission Mali (‘EUTM Mali’) in February 2013 and the European Union Capacity Building Mission in Sahel Mali (‘EUCAP Sahel Mali’) on 15 April 2014. Both missions began after the State referral

¹²⁶ ICC, “Statement of ICC Prosecutor to the UNSC on the situation in Libya”, 9 May 2017 (available on the ICC’s web site).

¹²⁷ To demonstrate the too frequent risk of compromise between human rights and the pursuit of internal security and immigration control, see Council of Europe, CommHR/INM/sf 0345-2017, the recent letter of the Commissioner for Human Rights of the Council of Europe to the Italian Minister of the Interior to clarify Italy’s maritime operations in Libyan territorial waters, warning that “handing individuals over to the Libyan authorities or other groups in Libya would expose them to a real risk of torture or inhuman or degrading treatment or punishment”, recalling the relevant European Court of Human Rights (‘ECtHR’) jurisprudence with regards to Article 3 of the European Convention on Human Rights, 4 November 1950 (‘ECHR’) (<http://www.legal-tools.org/doc/8267cb/>).

of the Government of Mali to the ICC¹²⁸ for the crimes committed since January 2012 mainly in the northern region¹²⁹ and the opening of the investigation in January 2013.¹³⁰ A significant correspondence between the opening of the investigation and EUTM Mali started only one month later. It must be noted that while the Prosecutor focused her attention directly on the regions of Gao, Kidal and Timbuktu, with incidents in Bamako and Sévaré (in the South), the mission was originally limited to Bamako. Only its third mandate on 23 March 2016 extended the area of Gao and Timbuktu. In fact, it is in the very city of Timbuktu that the crimes committed by the (at the time of writing) only accused person in the Malian situation prosecuted at the ICC took place. However, it must be noted that the war crime of intentionally directing attacks against buildings dedicated to religion, education art and science or historic monuments¹³¹ is very specific and meets the need to address the growing iconoclastic fury of many armed groups, but it does not exhaust the list of the alleged crimes committed within the Malian situation.¹³²

Furthermore, the presence of the EU in Mali is justified, as the investigation of the OTP, by the express request of the Malian Government to provide assistance in training the Malian Armed Forces.¹³³ The mandate of European Union Training Mission Mali suggests to be based on UN Security Council resolutions, in particular resolution 2085/2012, while the Council only

takes note of the commitment of Member States and international organizations to the rebuilding of the capacities of the Malian Defence and Security forces, including the planned deployment by the European Union of a military mission to

¹²⁸ Mali, Renvoi de la Situation au Mali (Referral of the Situation in Mali), 13 July 2012 (<http://www.legal-tools.org/doc/06f0bf/>).

¹²⁹ Here it is possible to say ‘committed’ and not ‘allegedly committed’ because on 27 September 2016 Trial Chamber VIII found Mr. Al-Mahdi responsible for war crimes under article 8(2)(e)(iv) of the Statute for the destruction of protected objects. ICC, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Judgment and Sentence, Trial Chamber VIII, 27 September 2016, ICC-01/12-01/15-171 (<http://www.legal-tools.org/doc/042397/>).

¹³⁰ ICC-OTP, ICC Prosecutor Opens Investigation into War Crimes in Mali: “The Legal Requirement Have Been Met. We Will Investigate”, 16 January 2013, ICC-OTP-20130116-PR869 (ICC-OTP, Mali Statement) (available on the ICC’s web site).

¹³¹ Rome Statute, Article 8(2)(e)(iv).

¹³² Many NGOs and groups representing victims of the Malian conflict publicly wish Al-Mahdi himself could be prosecuted for other crimes such as rape and pillaging.

¹³³ EUTM Mali, “Mali EU Training Mission” (available on the EUTM Mali’s web site).

Mali to provide military training and advice to the Malian Defence and Security Forces.¹³⁴

While the endorsement of the United Nations to the EU mission is out of question, Brussels' enterprise seems to be at its origin.

As a non-executive military mission, EUTM Mali acts in the framework of the EU Common Security and Defence Policy (within the CFSP) and its mandate is not directly linked to international criminal justice. It can be considered a complementary measure¹³⁵ discouraging the insurgency of armed groups helping the Malian Government to maintain stability in the region.

On the contrary, the European Union Capacity Building Mission in Sahel Mali is a civilian mission to provide strategic advice and training to the Malian police, the Gendarmerie, the National Guard and the relevant ministries in order to support reform in the security sector.¹³⁶ The EU interest is broadly stated in the mandate and falls within the EU strategy for security and development of the Sahel. It also aims to reinforce the role of judicial and administrative authorities with regards to the management and supervision of their missions. Thus, not even European Union Capacity Building Mission in Sahel Mali is directly linked to international criminal justice. Nevertheless, the national judicial system would benefit from the improvement of the Malian civil forces and the abovementioned reinforcement of the judicial authorities. In light of the principle of complementarity that rules the international criminal law system, their proper functioning is surely an asset.

In conclusion, the European Union Capacity Building Mission in Sahel Mali considers justice in second place and only as a tool to achieve other primary goals, such as stability in whole Sahel region: "it is an important element of the regional approach in the European Union strategy

¹³⁴ Resolution 2085 (2012), UN Doc. S/RES/2085 (2012), 20 December 2012 (<http://www.legal-tools.org/doc/386f9f/>).

¹³⁵ The Prosecutor herself, regarding her decision to open an investigation in Mali, affirmed that:

Justice can play its part in supporting the joint efforts of the ECOWAS, the AU and the entire international community to stop the violence and restore peace to the region. Key regional and international organizations have acknowledged the need for justice as part of the resolution of the crisis in Mali.

ICC-OTP, Mali Statement, see above note 130.

¹³⁶ See EEAS, "The EUCAP Sahel Mali Civilian Mission" (available on the EEAS' web site).

for security and development of Sahel”.¹³⁷ While the concept of ‘security’ refers to the themes of border control, terrorism and immigration, ‘development’ implies the role of the Sahel countries as strategic economic partners. The primary interest in these fields emerges also from the coordination with other missions, such as the European Union Capacity Building Mission in Sahel Niger and the European Union Border Assistance Mission to Libya.

13.9.10. Gabon

A preliminary examination in Gabon was opened on 21 September 2016 after the Government’s referral in respect to the crimes allegedly committed since May 2016 in the context of the Presidential elections of 27 August 2016.¹³⁸

The European Union had sent a European Union Election Observation Mission under the EEAS framework for the elections of 2016.¹³⁹ The EU continued monitoring the situation in Gabon thanks to its delegation, which issued a press release in October 2017 in the context of the *Dialogue Politique Intensifié Gabon – Union Européenne*, recalling the respect of human rights as one of the pillars of the Cotonou agreement and asking for an independent investigation on the post-electoral violence of 2016, on which light must be made.¹⁴⁰

This significant commitment of the Union to international justice has resulted in a clear refusal of dialogue by Gabon, whose Government

¹³⁷ *Ibid.*

¹³⁸ ICC, “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Concerning Referral from the Gabonese Republic”, 29 September 2016 (available on the ICC’s web site). See ICC, Situation in the Gabonese Republic, Decision Assigning the Situation in the Gabonese Republic to Pre-Trial Chamber II, Presidency, 4 October 2016, ICC-01/16-1 (<http://www.legal-tools.org/doc/e5c5f8/>).

¹³⁹ See EEAS, “European Union Election Observation Mission Gabon 2016” (available on the EEAS’ web site). The High Representative at the conclusion of the elections underlined some inconsistencies in the election process, putting into question the consolidation process of the results of the elections, see EEAS, “Déclaration à la suite de la proclamation des résultats définitifs de l’élection présidentielle au Gabon” (Déclaration Following the Proclamation of the Final Results of the Presidential Election in Gabon), 24 September 2016 (available on the EEAS’ web site).

¹⁴⁰ EU, “Dialogue Politique Intensifié Gabon-Union Européenne: Session sur la Situation des Droits de l’Homme, 17 Octobre 2017” (Intensified Political Dialogue Gabon-European Union: Session on the Situation of Human Rights, 17 October 2017), 18 October 2017 (available on the EEAS’ web site).

stated that Gabon “will not go after any demand of international investigation, apart from the one of the International Criminal Court”, identifying the European Union, denouncing European interference.¹⁴¹

Among all the above-mentioned missions, it is possible to distinguish between civilian and military (non-executive) missions, aimed in larger part at border assistance, military training, capacity building and peacekeeping. As highlighted by the table above, a major part of the most relevant missions overlaps with ICC situations both in time and space. That is to say that their mandate was issued directly after or before the opening of the situation before the ICC (seven out of eleven). Nevertheless, leaving aside the cases of absolute non-correspondence between EU missions and ICC situations, most of the times the link is still only indirect. A direct link would be rather difficult to find, as the mandate of EEAS missions does not usually cover international criminal justice. As a matter of fact, international criminal justice could benefit from the aid of EU through co-operation, but it could also be hindered in case of interference between EU and the interests of international criminal justice.

From the analysis of each mission, the following conclusions emerge. The situation in Palestine is not connected to the mandate of the two European missions in the region. The mission in the Central African Republic does not involve international criminal justice, as it is much more related to peacekeeping and post-conflict management. Nevertheless, a positive influence of the EU in the transition from conflict to peace could involve international criminal justice as a broader phenomenon. The main EU interests such as border control, security, immigration and terrorism are involved in the Libyan and Malian missions. In particular, in Mali the European mission could be considered as complementary to the ICC situation, as they were both requested by the Malian Government at the times of the crisis. The Libyan missions could interact in the future with international criminal justice, especially as far as crimes against migrants are concerned. This could affect international criminal justice in a positive way, for example, but not exclusively, through co-operation, facilitating the activities of the Prosecutor on the ground and developing a secure environment for the investigations. Despite everything, it is not possible to exclude that the importance for the EU of themes such as migratory flows

¹⁴¹ See the reporting of the news in the international press, including the web site of TV5. The reaction is attributed to the spokesperson of the Government, Mr. Alain Claude Bilie By Nze.

and the key role of Libya in the recent years in this matter will have an impact on the way the EU will decide to provide its assistance to the Court. From a different perspective, the idea of a European identity grounded on the respect of human rights and the rule of law combined with the problems arising from the European enlargement process are at the core of EU interventions in Ukraine and Georgia. Their mandate is not directly connected to international criminal justice, but it is self-evident that a European human rights-oriented involvement in the field could strengthen the general perception of human rights protection in that areas. Finally, it seems that through its involvement in Gabon the EU tried to assume the role of guarantor, asking for independent investigations on the possible international crimes committed in 2016. Despite the fact that these requests seem to be of a political nature, such attitude could be seen as an intrusion *vis-à-vis* the principle of sovereignty that characterises the approach of the States to criminal law.

13.10. The European Union Rule of Law Mission in Kosovo, the Specialist Chambers and the Special Office of the Prosecutor for Kosovo

EULEX¹⁴² was established with the joint action 2008/124/CFSP.¹⁴³ The document was issued before the entry into force of the Lisbon Treaty, for this reason it is based on Article 14¹⁴⁴ (Article 28 of the consolidated version) and Article 25¹⁴⁵ (whose content is now divided between Article 38 and 39) of the TEU.¹⁴⁶

¹⁴² See Joël Hubrecht, *Kosovo. 1981–1989, 1999–2001. Etablir les faits*, Editions Esprit, Paris, 2001.

¹⁴³ EU, The European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, Council Joint Action 2008/124/CFSP, 4 February 2008 ('Joint Action 2008/124/CFSP').

¹⁴⁴ TUE, Article J.4, see above note 10, modified and re-numbered in Article 14 in the Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 10 November 1997 ('Treaty of Amsterdam') (<http://www.legal-tools.org/doc/cd7e2b/>).

¹⁴⁵ TUE, Article J.15, see *ibid.*, re-numbered Article 25 by the Treaty of Amsterdam which modified the whole Title V, and modified in 2001 by the Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 10 March 2001 ('Treaty of Nice'):

Without prejudice to Article 207 of the Treaty establishing the European Community, a Political and Security Committee shall monitor the international situation in the areas covered by the common foreign and security policy and contribute to the definition of policies by delivering opinions to the Council at the request of the Council or on its

Article 14 TEU recognised the possibility for the Council to adopt joint actions addressing specific situations where operational action by the Union was deemed to be required in the field of the CFSP. The objectives of this policy were provided by Article 11(J.1) of the TEU¹⁴⁷ and the Kosovo joint action could be related to most of them: the safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter; the strengthening of the security of the Union in all ways; the preservation of peace and strengthening of the international security, in accordance with the principles of the United Nations Charter, as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter, including those on external borders; the promotion of international co-operation; the development and consolidation of democracy and the rule of law, and respect for human rights and fundamental freedoms.

The legitimacy of the EU intervention was supported by the UNSC resolution 1244 that

welcome[ed] the work in hand in the European Union [...] to develop a comprehensive approach to the economic development and stabilisation to the region affected by the Kosovo crisis, including the implementation of a Stability Pact for South Eastern Europe with broad international participation in order to further the promotion of democracy, economic prosperity, stability and regional cooperation.¹⁴⁸

own initiative. It shall also monitor the implementation of agreed policies, without prejudice to the responsibility of the Presidency and the Commission. Within the scope of this Title, this Committee shall exercise, under the responsibility of the Council, political control and strategic direction of crisis management operations. The Council may authorise the Committee, for the purpose and for the duration of a crisis management operation, as determined by the Council, to take the relevant decisions concerning the political control and strategic direction of the operation, without prejudice to Article 47.

¹⁴⁶ Considering the differences between the old and the new version of the articles, it seems appropriate to refer to the old version.

¹⁴⁷ As modified by the Treaty of Amsterdam, see above note 144.

¹⁴⁸ Resolution 1244 (1999), UN Doc. S/RES/1244 (1999), 10 June 1999 (<http://www.legal-tools.org/doc/12bfc3-1/>). See, for instance, EU, The Establishment of an EU Planning Team (EUPT Kosovo) Regarding a Possible EU Crisis Management Operation in the Field of Rule of Law and Possible Other Areas in Kosovo, Council Joint Action 2006/304/CFSP: EULEX was the main instrument to realise the principles of the EU Planning. See Enrico Milano, *Formazione dello Stato e processi di State-building nel diritto internazionale. Kosovo 1999-2013*, Editoriale Scientifica, Napoli, 2013, pp. 172 ff.

The joint action was in line with the objectives pursued by the EU treaties and aimed in strengthening stability in the region in line “with its European perspective”.¹⁴⁹ EULEX was launched¹⁵⁰ despite the fact that within the EU Member States there was no common position on the status of Kosovo.¹⁵¹ Therefore, each State was given the possibility to decide whether to recognise Kosovar independence from Serbia or not.¹⁵² In light of the tensions that characterised the Balkans since the beginning of the 1990s, the gradually growing importance of the EU as an international actor and the troubled historical development that followed from the UN intervention to EULEX, a negative approach to the EU intervention in Kosovo would be a cause for debate.¹⁵³

During the conflict and the rounds of peace negotiations the EU followed the position of the UNSC¹⁵⁴ proposing itself as *neutral*. In order to maintain neutrality, the implementation of the Ahtisaari plan (whose rounds failed) was not expressly introduced among the purposes of EULEX. Despite the fact that Peter Faith was appointed as International Ci-

¹⁴⁹ Joint Action 2008/124/CFSP, para. 1, see above note 143.

¹⁵⁰ In light of the topic of this chapter, it is useful to remember that EULEX was approved the day after *Tadić* won the elections in Serbia and proposed a “European future for Serbia”. Cf. Milano, 2013, p. 172 ff.

¹⁵¹ Some States were afraid of a declaration of independence that could have affected the stability of EU borders and that could have legitimated the secessionist aspirations of other groups within their territory.

¹⁵² Kosovo, Declaration of Independence, 17 February 2008.

¹⁵³ EU expansion has been seen as a peace building instrument in the Balkans, but a number of contradictions have undermined the initial optimism. Ana E. Juncos, Nieves Pérez-Solórzano Borragán, “Enlargement”, in Michelle Cini, Nieves Pérez-Solórzano Borragán (eds.), *European Union Politics*, Oxford University Press, Oxford, 2016, p. 233. Nevertheless, it would be inexact to accuse the EU of trying to gain influence in the region to the detriment of Russia (who endorsed Serbia) because the negotiations were entered with the consent of Serbia and the Security Council, where Russia has a veto power (Statement by the President of the Security Council, UN Doc. S/PRST/2008/44, 26 November 2008).

¹⁵⁴ As with the EU, within the UN Security Council there were different positions as far as Kosovo’s independence was concerned. Some scholars noted the inconsistency between the declaration of neutrality of the United Nations and the statement of the Secretary General of 12 June 2008 where neutrality was meant for the final status of Kosovo, but recognised the autonomy of the region within the borders recognised by RFI in order to achieve peace and stabilisation. He also considered a foregone conclusion the entering into force of the Kosovar Constitution and the economic aid granted by the EU Commission to the Kosovar Government. Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2008/354, 12 June 2008. See Milano, 2013, pp. 187 ff., see above note 148.

vilian Representative for Kosovo by the International Steering Group for Kosovo¹⁵⁵ and was also appointed by the Council on 16 February 2008 as co-ordinator of the European activities in Kosovo (including EULEX), most scholars believe that EULEX pursued its goals in an independent way. Nevertheless, there is one exception: in July 2001 EULEX endorsed the use of Kosovar police forces in the northern part of Kosovo at the border with Serbia, in order to fulfil the Kosovar embargo to Serbian products.¹⁵⁶

Leaving aside this historical re-enactment, there are a couple of aspects connected to international criminal justice that would be better to focus on. Article 2 of Joint Action 2008/124/CFSP states that “EULEX Kosovo shall assist the Kosovo institutions, judicial authorities and law enforcement agencies in their progress [...] in further developing and strengthening an independent multi-ethnic justice system”.¹⁵⁷ The reference to internationally recognised standards and European best practices would be considered as a positive model to achieve. One of the tasks provided in Article 3 recognises that the mission has power to reverse or annul operational decisions taken by the competent Kosovar authorities. The premise to exercise this power is the necessity to ensure the maintenance and promotion of the rule of law, public order and security, and can involve international civilian authorities in consultation. The document does not provide any definition of ‘operational decision’, but it seems possible to exclude judicial decisions and other acts related to the limited definition of ‘international criminal justice’ adopted for the purpose of this chapter, despite the “certain [EU] executive responsibilities”.¹⁵⁸ International criminal justice does not seem to be touched by this provision even if a broader definition including transitional justice processes or amnesties is considered.

Within other tasks, Article (3)(d) of the Joint Action includes ensuring that cases of war crimes, terrorism, organised crime, corruption, inter-ethnic crimes, financial/economic crimes and other serious crimes are properly investigated, prosecuted, adjudicated and enforced, according to the applicable law. These tasks should be pursued, where appropriate, by

¹⁵⁵ A group of States that supported the Ahtisaari plan and Kosovo independence.

¹⁵⁶ Milano, 2013, p. 192, see above note 148.

¹⁵⁷ Joint Action 2008/124/CFSP, Article 2, see above note 143.

¹⁵⁸ *Ibid.*

international investigations, prosecutors and judges jointly with Kosovar investigators, prosecutors and judges or independently, and by measures including, as appropriate, the creation of co-operation and co-ordination structures between police and prosecution authorities. Putting aside the lack of logic in the list of the relevant crimes, it must be noted that at that time Article 31 of the TEU¹⁵⁹ provided for co-operation in combating terrorism, organised crime, corruption and financial/economic crimes, and the same crimes are now included in the European criminal jurisdiction pursuant to article 83 of the Lisbon Treaty that had already been signed even if it entered into force only in 2009. The reference to war and inter-ethnic crimes (which appears to be an attempt not to use the words genocide or crimes against humanity) is clearly linked to the particular regional situation and leads to the heart of international criminal justice.

Despite the consistency between the goals of the CFSP and the adoption of measures related to this kind of crimes, it is remarkable that they still do not fall into the EU criminal jurisdiction. The interests affected by international crimes are often described in general terms (for example, peace and security, to avoid impunity) and even the preamble of the Rome Statute, which is probably the best source of law on this issue, does not provide additional details. The broad declarations of principles leading the EU (Article 2 and 3(1) of the TEU)¹⁶⁰ make it possible the adoption of measures endorsing the investigation and repression of these hateful crimes, even if under Article 83, the EU has no internal competence.¹⁶¹

But a significant involvement of the EU in international criminal justice in Kosovo was the decision to constitute the Special Investigation Task Force ('SITF'), the Specialist Prosecutor's Office and the Kosovo Specialist Chambers. This decision followed the former ICTY Chief Prosecutor Carla del Ponte's denunciation of possible crimes committed by the Kosovo Liberation Army ('KLA') since June 1999 against Serbs and Kosovar Albanians who were suspected of co-operating with the Serbs (the main allegations included trafficking in human organs). In her statements, she highlighted the high risk of impunity for the perpetrators. After her declarations, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe issued a report entitled

¹⁵⁹ As modified by the Treaty of Nice in 2001, see above note 145.

¹⁶⁰ TEU, see above note 10.

¹⁶¹ See above Section 13.2.

“Inhuman treatment of people and illicit trafficking in human organs in Kosovo” denouncing the situation.¹⁶² Rapporteur Dick Marty remembered that the alleged crimes fall outside the temporal jurisdiction of the ICTY and for this reason the Tribunal ceased investigating,¹⁶³ while the international community “favoured a pragmatic political approach”¹⁶⁴ avoiding the adoption of measures against KLA leaders allegedly responsible for these crimes that were integrated into the new Kosovar institutions. The report recalled that the atrocious crimes committed by Serbs against Kosovo and Albanians were well known, but that a fair administration of justice cannot exonerate the responsibility of who has traditionally be considered the victim of the conflict. The indispensable asset provided by KLA on the ground during the conflict and the prestigious political role of former KLA commanders in the new Kosovo institutions did not justify the reluctance in investigating and prosecuting their alleged crimes.¹⁶⁵

Despite Dick Marty’s recognition of EULEX’ efforts in investigating on these facts and despite his highlighting the extremely difficult situation on the ground,¹⁶⁶ in light of the historical development of the international intervention in Kosovo, it seems quite evident that the international authorities (included the European ones) involved in the securitisation and development of the rule of law did not execute their missions at best.

The Rapporteur denounced the lack of co-operation of Albania with EULEX and the incomprehensible (or comprehensible) and unconscionable delays of Council of Europe members and observers in responding to EULEX requests for legal assistance.¹⁶⁷ He mentioned specific people repeatedly subjected to investigations by prosecutors under the United Nations Interim Administration Mission in Kosovo (‘UNMIK’), the ICTY and EULEX and that had anyway “evaded effective justice”.¹⁶⁸ The “re-

¹⁶² Parliamentary Assembly of the Council of Europe, *Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo*, Doc. 12462 –7 January 2011.

¹⁶³ *Ibid.*, Part A, para. 8.

¹⁶⁴ *Ibid.*, Part A, para. 10.

¹⁶⁵ *Ibid.*, Part B, paras. 41-51.

¹⁶⁶ *Ibid.*, Part B, para. 8.

¹⁶⁷ *Ibid.*, Part B, paras. 19-20.

¹⁶⁸ *Ibid.*, Part B, para. 68.

markable dedication of many EULEX staff”¹⁶⁹ does not shield the mission from criticism, as it would have been widely expected “to go after the “untouchables”, whose more than murky past was common knowledge”.¹⁷⁰ The Rapporteur went on using expressions such as “expectations were in vain”, “announcements and promises” and “tangible results remained to be seen”.¹⁷¹ He provided a pragmatic example of the inconsistency between EULEX actions and the goals and principles solemnly declared in the Joint Action, recalling that it took as much as four days before arresting and putting under protection Nazim Bllaca, who publicly admitted to having carried out murders upon the orders of high-ranking Kosovo politicians.¹⁷² The Assembly was also concerned because

all of the international community in Kosovo – from governments of the United States and other allied western powers, to the European Union-backed justice authorities – undoubtedly possess[ed] the same, overwhelming documentation of the full extent of the Drenica Group’s crimes, but none seem[ed] prepared to react in the face of such a situation and to hold the perpetrators account.[...] [A]t a minimum, there [was] a solid documentary evidence to demonstrate the involvement of this group, and its financial sponsors, in money laundering, smuggling of drugs and cigarettes, human trafficking, prostitution, and the violent monopolisation of Kosovo’s largest economic sectors including vehicle fuel and construction¹⁷³

involving crimes certainly falling in the mandate of EULEX. There is no doubt that despite the spread appreciations for the EULEX mission, EU was to blame for its inertia.

The different nature of the Council of Europe and the EU and the difference between their main interests and goals clearly emerge from the contrasting approach adopted on the same situation.¹⁷⁴ Therefore, after the Council of Europe report, the EU decided to adopt some measures and

¹⁶⁹ A snide observation leads to the question why “many EULEX Staff” instead of “the EULEX Staff”.

¹⁷⁰ Parliamentary Assembly of the Council of Europe, Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo, see above note 162.

¹⁷¹ *Ibid.*, Part B, para. 8

¹⁷² *Ibid.*

¹⁷³ *Ibid.*, Part B, fn. 32.

¹⁷⁴ *Ibid.*, Part B, para. 6.

gave birth to the Special Investigative Task Force to conduct a criminal investigation into the war crimes and organised crime.¹⁷⁵ contained in the report. It was the first step for the constitution of the Specialist Chambers that are now fully operational. It also demonstrates that the European Union can play an active role in international criminal justice, but that its involvement is subordinated to other interests. At the beginning, the EU was asked by the UNMIK to help Kosovo to develop its economy, with aid and funds. The endemic corruption motivated the EU to modify its mandate in order to achieve economic goals, extending it to the rule of law and the fight against corruption. It is the same path followed at the internal level: the protection of the EU economic interest is the premise to the attribution of criminal jurisdiction to the EU institutions.

Article 24 of the Law on Specialist Chambers and Specialist Prosecutor's Office¹⁷⁶ safeguards the independence of the Prosecutor's Office which takes over the mandate and personnel of the Special Investigative Task Force. The same need for independence is provided by Article 31 as far as the judges are concerned. The ICC experience demonstrates that the OTP is more likely subject to criticism for partiality because of its decisional power in the initiation, continuation or termination of the proceedings, investigation and prosecution.¹⁷⁷ Article 35 states that "in order to ensure continuity of the investigation, the SITF shall be transferred from its current position within the Specialist Prosecutor's Office of the Republic of Kosovo (SPRK) into the Specialist Prosecutor's Office".¹⁷⁸ Moreover, while the ICC system is based only on co-operation, the Specialist Prosecutor benefits from police units with the authority and responsibility to exercise powers given to the Kosovar Police under Kosovar law. This is possible because of the particular nature of the Chambers and their strong relationship with Kosovo's judicial system, but it is also due to the active role of the EU at its core. These possible criticisms are not enough to infer an original sin in the work of the Specialist Prosecutor's Office and of the Chambers in its entirety.

¹⁷⁵ See SITF, Statement by the Chief Prosecutor of the Special Investigative Task Force (SITF) on Investigative Findings, 29 July 2014.

¹⁷⁶ Kosovo, Law on the Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 (<http://www.legal-tools.org/doc/8b71c3/>).

¹⁷⁷ *Ibid.*, Articles 35 *et seq.*

¹⁷⁸ *Ibid.*, Article 35.

It is remarkable that the EU, especially after the adoption of the Charter of Nice in 2000 and in the perspective of the ratification of the European Convention on Human Rights, adopted acts related to crimes violating fundamental human values and international crimes. But while these measures were adopted within the EEAS, promoting for example the fight against torture outside its territory, this was not the case for the same issues within its territory.¹⁷⁹ The situation is the same if international crimes are concerned: the Special Investigative Task Force and the Specialist Chambers prove that political will is an essential premise to achieve the goals of international criminal justice. The creation of a European team of Prosecutors and the Chambers¹⁸⁰ has been prompt and rapid after Dick Marty's report. The first 'European Prosecutor' was created to investigate and prosecute crimes committed outside the EU borders, while Member States still do not give up their sovereignty in criminal matters, as the process of harmonisation within the EU would require.

13.11. Conclusions

EU interests towards international criminal justice can be divided in two categories: proper interests and general factors influencing the Union's approach in its actions.¹⁸¹ On the one hand, the Union's proper interests

¹⁷⁹ As far as the fight against torture is concerned the EU never adopted any measure in respect of countries not criminalising torture, such as Italy. The EU was silent while the Council of Europe reiterated recommendations directed to Italy in order to make the Italian parliament sensitive to the need of creating a proper torture criminal offence. The European Court of Human Rights declared the violation of Article 3 of the ECHR for the lack of effective prosecution and punishment of torture, which, in the absence of a proper criminal offence, was punished with very low detention sanctions and relative statutory limitations corresponding to minor criminal offences in the Italian Criminal Code (See ECtHR, *Cestaro v. Italy*, Fourth Section, Judgment, 7 April 2015, 6884/11: the case concerned the torture of demonstrators by police officers on the occasion of the 2001 G8 meeting in Genova). As a result of the ECtHR judgement and international pressure, Italy finally adopted a statute in 2017, which finally introduces torture as criminal offence in the Italian Criminal Code, see Italy, Codice Penale (Penal Code), 19 October 1930, Article 613 *bis* (<http://www.legal-tools.org/doc/46945d/>). This remarkable result was due to the Council of Europe's commitment towards the fight against torture and inhuman and degrading treatment, but saw no contributions by the Union. William Schabas, *The European Convention on Human Rights. A Commentary*, Oxford University Press, Oxford, 2015, p. 191.

¹⁸⁰ Created with a Kosovar law, but under SITF and EULEX and financed by the European Union

¹⁸¹ According to scholars, interests, power and identity play a role in the development of EU foreign policy. See Andrew Glencross, *The Politics of European Integration*, Wiley Blackwell, Chichester, 2014, p. 205.

include the economic one as well as security, both internal and international. On the other hand, the general factors influencing the Union's approach are the affirmation of European identity and power.

As far as proper European interests are concerned, the first interest of the Union is the economic one. As already said, the European Communities were founded in order to develop free trade and economic growth of the whole continent. Most of the times, the EU is acting for the sake of its internal economy and the economic integration of the Member States, as well as for the Union's proper financial interests. For these reasons, when international criminal justice involves in some way the economic interests of the Union (both in internal and in external projection), the latter will intervene. This has happened in the EU enlargement process in neighbour countries.

In the second place, security is another objective of the Union, both internal and international ("peace security and progress in Europe and in the world"¹⁸² is in the recitals of the TEU). Security, in conjunction with freedom and justice, is one of the main pillars on which the Union is built. Therefore, the combating of crime, control of external borders and immigration are necessary mid-term objectives for the achievement of security as precondition of economic stability and growth. The fight against terrorism is part of these objectives.

The Union shall offer its citizens an area of freedom security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.¹⁸³

As far as the factors influencing the Union's approach are concerned, the safeguarding and building of the European identity has since long been indicated as one of the reasons shaping how the Union acts internally, but most of all internationally. The reinforcement of the European identity as based on human rights and the rule of law could be achieved through a strong external co-ordinated commitment in international criminal justice as well. As a consequence, the aim of the pursuit of human rights and the rule of law towards the exterior can be seen not as an objec-

¹⁸² TEU, see above note 10.

¹⁸³ *Ibid.*, Article 2.3.

tive itself, but as a means to build up the European identity necessary to distinguish it in opposition to other international actors, in order to gain more internal cohesion as a precondition for economic integration.

Moreover, power can be a possible explanation of the Union's approach to international criminal justice, as part of the wider approach to external relations. A united European action in international justice could help showing a new European international role both in trans-Atlantic relations and in the new multi-polar world leadership.

Among the possible ways to consider EU action towards international criminal justice, we chose the first one: the analysis of the Union's proper interests in international criminal justice.

In this perspective, the abovementioned interests interact with the objectives of international criminal justice: the fight against impunity, the prosecution of core international crimes, and the pursuit of justice. Having regard to our research, it is reasonable to state that the EU has no direct interest in impunity itself. Multiple efforts in the field of judicial cooperation, the creation of EULEX and the international support to the ICC are clear signs of a certain European commitment in international criminal justice. Nevertheless, there are arguments in favour of stating that the EU has no interest in the achievements of international criminal justice as well. Better said, analysing the results of the research it emerges that international criminal justice is not an objective of the Union, but it is often a means to achieve other relevant goals. The attitude of the Union towards international criminal justice reflects the Union's attitude towards criminal law. As in EU criminal law the objective is not harmonisation of criminal law nor the creation of European criminal offences itself, but the protection of EU financial interests and potential economic damages to free trade, so EU interest in international criminal justice is mediated by the aims of European integration.

The EU is a political body, born on the ashes of the Second World War, but grounded on economical treaties (ECSC, EURATOM, EEC). It expanded its competence to other subjects only recently in its sixty-year life, and in the text of the TUE the fight against crime follows the control of the external border, asylum and immigration.¹⁸⁴ Even more, the contribution

¹⁸⁴ *Ibid.*, Article 3.

to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter¹⁸⁵

follows objectives such as the internal market, economic, social and territorial cohesion, the economic and monetary union. Borrowing a EU familiar terminology, international criminal justice would be considered a different ‘pillar’, that nowadays does not fall into the EU competence, unless the Council decides to adopt some measures under the EEAS. The common constitutional traditions and the shared values in human rights and democracy that are usually quoted in the recitals of the EU acts do not change the Union’s nature, but provide a general framework which Member States and the UE itself have to take into consideration in performing their tasks.

In a realist perspective, self-interest is considered the main factor guiding European influence on international criminal justice, but from the chapter it emerges that there is lack of co-ordination between the different goals pursued by the Union.

Firstly, the Union’s interest in security and fight against terrorism, together with migration control can be considered a unique group of connected interests. These objectives are pursued with instruments that could affect international criminal justice both in a positive and negative way. EU policy could reveal itself in line with the goals of international criminal justice, for example in the case of the co-operation between Member States in FRONTEX and in exchanging information about migrants’ identification data as far as international core crimes are concerned. In this field, international criminal justice institutions could profit from the identification and arrest of alleged perpetrators of core international crimes. On the contrary, European policy in security and terrorism could interfere with the interests of international justice and even be concurrent to them. For instance, in the field of terrorism, the involvement of potential terrorists in international crimes could produce collision between jurisdictions and issues of complementarity. It could also cause problems related to asset freezing and confiscation, due to the Union’s ambiguous commitment

¹⁸⁵ *Ibid.*, Article 3.5.

towards human rights protection in the face of national security challenges. What if the Union was obliged to hand over classified intelligence information about terrorism to the ICC in force of the EU–ICC Agreement of 2006 in a case where EU sanctions are concerned?

Secondly, stabilisation and rule of law as objectives of EU external action have to be pursued at all costs. International criminal justice is one of the issues that could be sacrificed for stabilisation and peacekeeping. For instance, in the case of EULEX, without the intervention of the Council of Europe, the atrocious crimes committed by KLA would have gone unpunished to pursue stability.

Thirdly, judicial co-operation with the ICC and the international promotion of universality and complementarity have shown an EU interest in formal commitments towards human rights related issues, but their outcome has been nothing more than formal undertakings that have not resulted in major actions or practical results, and which have played no role in international criminal justice. For instance, ICC clauses with third states have made no improvement of the situation; the EU–ICC Agreement of 2006 has not been amended yet.

All in all, incoherence, despite the new Article 8 of Council Decision 2011/168/CFSP,¹⁸⁶ seems to be the rule governing EU attitude towards international criminal justice. The result of the pursuit of different goals sometimes also through the punishment of core international crimes, more so if the pursuit is advanced under different frameworks, means to disrupt European efforts, both financial and moral. Furthermore, trying to approach international justice with different legal instruments, adopted with different internal power-balancing rules, means that they are destined to be subject to different power relationships, according to the means used. That is to say that adopting a decision under the intergovernmental method means to be subject to the Council power rules, while a military mission under EEAS depends entirely on single Member States' power and decisions.

Ultimately, international criminal justice is perceived as something different and external from the Union itself and the fight against impunity for core international crimes has not been integrated into the Union's objectives. Only if proper interest in international justice becomes part of the

¹⁸⁶ Council Decision 2011/168/CFSP, see above note 28.

Union can there be identification between self-interest and normative advance in this field, as far as the EU as an actor is concerned.

Recently, there have been signs of a possible change in EU interests: the recent Transitional Justice Framework, the creation of the Specialist Chambers and the Specialist Prosecutor could be the sign of a new effort to confront impunity, as well as the pressure on Gabon to investigate on the situation of post electoral violence of 2016.¹⁸⁷ However, considering the real context and the premises of these actions, the transitional justice framework risks to remain a formal declaration, similar to the other examples, while the Chambers and the Prosecutor are a result of international pressure. As far as the pressures on Gabon are concerned, the situation is still open and has resulted in a refusal by the Gabonese Government. The change, if we can say that one has taken place, has been driven by international pressure on the EU to ‘remain faithful’ to its international human rights and rule of law commitment.¹⁸⁸

¹⁸⁷ The EU has abandoned threat as a diplomatic means, but it is debated whether the EU really is putting ideology ahead of its interests and to what degree these normative objectives can be achieved peacefully through diplomacy alone. See Andrew Glencross, *The Politics of European Integration*, Wiley Blackwell, Chichester, 2014, p. 186.

¹⁸⁸ The EU is described as a normative power, promoting ideas such as human rights and justice above interests. See Ian Manners, “Normative Power Europe: A Contradiction in Terms?”, in *Journal of Common Market Studies*, 2002, vol. 40, no. 2, pp. 235-258.

Rebels, the Vanquished, Rogue States and Scapegoats in the Crosshairs: Hegemony in International Criminal Justice

Mark Klamberg*

14.1. Introduction

At the foundation of the mainstream, the international criminal justice programme is of the view that there should be no ‘outside-of-law’: everyone, regardless of nationality or position, should be held accountable for his or her atrocities committed.¹ The establishment of the International Criminal Court (‘ICC’) is often portrayed as a march toward the rule of law, away from politics and expediency.² This perspective holds that international criminal justice – and international law in general – embodies a common good which in turn presumes a harmony of interests between States. Conflicts between States emanate under this assumption from problems of knowledge and, with techniques of social engineering, these conflicts can be solved. This may be true in certain cases.

However, the clash of interests or values is not always about knowledge, they may also involve radically incompatible preferences on

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¹ Martti Koskeniemi, “Between Impunity and Show Trials”, in *Max Planck Yearbook of United Nations Law*, 2002, vol. 6, p. 2.

² David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics*, Oxford University Press, Oxford, 2015, p. 3.

distribution of goods and methods on how to resolve conflicts.³ The idealistic description of international criminal justice may be challenged when considering the actual situations and cases investigated and prosecuted: only rebels, the vanquished and defeated, rogue States and scapegoats appear to be in the crosshairs of international criminal justice.

Uganda and the Democratic Republic of the Congo triggered the jurisdiction of the ICC in relation to their own territory, taking aim at rebels. At the end of conflicts or changes in power, the defeated have been brought to justice, as illustrated by the International Military Tribunals in Nuremberg, Tokyo and subsequent trials concerning Libya, Côte d'Ivoire, Rwanda and Georgia. The victors' – sometimes lesser but still – crimes tend to be ignored or forgotten.⁴ The pursuit of international criminal justice sometimes clashes with convenience: at the end of the 1940s, the Allies' concern of prosecuting Nazis was reduced. Fear of communism and the interest to establish normal relations with the Federal Republic of Germany made the Western powers less interested in further purges.⁵ The perceived impunity of several Balkan war criminals and failure to prosecute NATO bombings of Serbia add to the perception that international criminal justice is one-sided.⁶ Exceptions for the powerful are carved out, as illustrated by the use of Article 16 of the Rome Statute in Security Council resolutions 1422 (2002), 1487 (2003), 1597 (2005) and 1970 (2011). Allies of powerful States are protected.⁷ Rogue States such as Sudan are targeted. When defendants from powerful States face justice, they may be perceived as scapegoats taking heat from superiors, as illustrated by the trials following the Abu Ghraib prison scandal. Is this the result of conscious decision by international criminal justice bodies – in the mod-

³ Martti Koskenniemi, "Hegemonic Regime", in Margaret A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation*, Cambridge University Press, 2012, pp. 306–308.

⁴ Koskenniemi, 2002, see above note 1, p. 8; David P. Forsythe, "'Political Trials?': The UN Security Council and the Development of International Criminal Law", in William A. Schabas, Yvonne McDermott and Niamh Hayes (eds.), *The Ashgate Research Companion to International Criminal Law*, Ashgate, Farnham/Burlington, 2013, p. 487

⁵ Koskenniemi, 2002, see above note 1, p. 8.

⁶ *Ibid.*, p. 8; Wolfgang Kaleck, "Double Standards: International Criminal Law and the West", FICHL Publication Series No. 26, Torkel Opsahl Academic EPublisher, Brussels, 2015, pp. 47–50. (<http://www.legal-tools.org/doc/971c3c/>).

⁷ Forsythe, 2013, see above note 4, p. 488.

ern form, the Rome Statute – or the greater context of the international system?

Although the Prosecutor and the judges of the ICC are formally independent, the Court is still entirely dependent on State resources to succeed. It does not have any enforcement tools of its own.⁸ A select number of States constitute major powers which are represented in the distribution of resources, membership of alliances and global institutions such as the UN and its Security Council. The International Criminal Tribunal for the former Yugoslavia ('ICTY') was successful in the sense that all indicted persons were brought before the Tribunal. A key explanation was, arguably, the result of pressure by the US, the EU and the desire of the concerned States to become members or at least have good relations with the EU and, to a lesser extent, for isolated idealistic reasons.⁹ This is a potential problem for the ICC since the same tools of incentivizing States to cooperate are lacking. Bosco has examined the ICC as an instrument of global governance and the extent to which it accommodates the world's major powers. He argues that the ICC has a weak connection to the major powers whose support it needs; those major powers who are States Parties – the United Kingdom, France, Germany, Japan and Brazil – are accorded no special powers or privileged place in the institution.¹⁰ Scholars have generally assumed that international organizations are the product of major-power interests.¹¹ Morgenthau has stated the following:

International law owes its existence to identical or complementary interests of states, backed by power as a last resort, or, where such identical interests do not exist, to a mere balance of power which prevents a state from breaking these rules of international law. Where there is neither community

⁸ Bosco, 2015, see above note 2, p. 4.

⁹ Jacob Katz Cogan, "International Criminal Courts and Fair Trials: Difficulties and Prospects", in *Yale Journal of International Law*, 2002, vol. 27, pp. 123–124; Mark Klamburg, *Power and Law in International Society: International relations as The Sociology of International Law*, Routledge, 2015, p. 113.

¹⁰ Bosco, 2015, see above note 2, pp. 4–5. Sarah Nouwen, "International Criminal Law: Theory All Over The Place", in Anne Orford, Florian Hoffmann and Martin Clark (eds.), *The Oxford Handbook of the Theory of International Law*, Oxford University Press, Oxford, 2016, p. 755.

¹¹ Kenneth W. Abbott and Duncan Snidal, "Why States Act through Formal International Organizations", in *Journal of Conflict Resolution*, 1998, vol. 42, no. 1, p. 24; Bosco, 2015, see above note 2, p. 5.

of interests nor balance of power, there is no international law.¹²

This quote may be found in Morgenthau's early writings when he still tried to develop a functional theory of international law.¹³ The reference to balance of power is an embryo to his later writings which in turn provide part of the foundation of realist theory, according to which international law and organizations lack any intrinsic significance. International law, morality, ethics and ideology are mere components in the power equation, devoid of non-instrumental significance or prescriptive worth, subject to compulsory service as tools of power when deemed necessary for the vital interests of States.¹⁴ This may be contrasted with competing approaches such as liberal institutionalism,¹⁵ constructivism,¹⁶ and the English school¹⁷ which have greater faith in the relevance of international institutions and rules.¹⁸ Independence from State influence is important for all international organizations, arguably even more central to interna-

¹² Hans J. Morgenthau, "Positivism, Functionalism, and International Law", in *American Journal of International Law*, 1940, vol. 34, no. 2, pp. 274, 275; repeated in Hans J. Morgenthau, *Politics Among Nations*, Second Edition, Alfred A. Knopf, New York, 1954, p. 252 (First Edition published 1948).

¹³ Morgenthau, 1940, see above note 12, p. 280.

¹⁴ Francis Anthony Boyle, *World Politics and International Law*, Duke University Press, Durham, 1985, p. 7; Anthony C. Arend, *Legal Rules and International Society*, Oxford University Press, Oxford, 1999, p. 116; Tom Ginsburg and Gregory Shaffer, "How Does International Law Work: What Empirical Research Shows", in Peter Cane and Herbert Kritzer (eds.), *Oxford Handbook of Empirical Legal Studies*, Oxford University Press, Oxford, 2010, p. 754; Klamberg, 2015, see above note 9, p. 38.

¹⁵ Robert O. Keohane, "The demand for international regimes", in Stephen D. Krasner (ed.), *International Regimes*, Cornell University Press, Ithaca and London, 1983; Robert O. Keohane and Lisa L. Martin, "The Promise of Institutional Theory", in *International Security*, 1995, vol. 20, no. 1, pp. 39–51; Harold Hongju Koh, "Why Do Nations Obey International Law?", in *The Yale Law Journal*, 1997, vol. 106, no. 8, pp. 2599–2659;

¹⁶ Alexander Wendt, "Anarchy is what States Make of it: The Social Construction of Power Politics", in *International Organization*, 1992, vol. 46, no. 2, pp. 391–425; Alexander Wendt, "Constructing International Politics", in *International Security*, 1995, vol. 20, no. 1, pp. 71–81; John Gerard Ruggie, *Constructing the World Policy: Essays on International Institutionalism*, Routledge, London and New York, 1998.

¹⁷ Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, Macmillan, London, 1977; Barry Buzan, "From International System to International Society: Structural Realism and Regime Theory Meet the English School", in *International Organization*, 1993, vol. 47, no. 3, pp. 327–352.

¹⁸ Klamberg, 2015, see above note 9, pp. 39–45.

tional courts.¹⁹ Koskenniemi emphasizes how the normative framework interacts with the concrete power underlying it.²⁰ He challenges political realism as well as multilateralism which are both based on “a state-centric universe for which international law is exclusively an instrument of public diplomacy”. He adopts what appears to be a Marxist view, that the international system is less about State-to-State relations and more about the expansion of capitalist relationships over the globe.²¹

At the beginning of this millennium, some scholars described international society in a period of transition from a system of sovereign equality under universal legal rules to the imperial dominance of the United States.²² Habermas has described the United States as a self-appointed hegemon.²³ However, imperialism should not be conflated with colonialism. Whilst ‘colonization’ refers to the practice of ‘settling territories’ and ‘annexation’, ‘imperialism’ describes the process of the metropole ‘maintaining an empire’ over other States. Imperialism does not necessarily involve economic or territorial dominance, it could also be understood of a means for the metropole to establish a hierarchy of power which constricts the sovereign decision-making capacity of other States.²⁴ Imperialism can be analysed on the macro-level as done hitherto; it can also occur at the micro-level. Indeterminacy in legal provisions can contribute to the perpetuation of hierarchical power relationships,²⁵ there will always be a structural bias in favour of a certain interest within the regime, even though it is implicit.²⁶

¹⁹ Bosco, 2015, see above note 2, p. 6.

²⁰ Martti Koskenniemi, “The Empire(s) of International Law: System Change and Legal Transformation”, in *Austrian Review of International and European Law*, 2003, vol. 8, no. 1, p. 63.

²¹ *Ibid.*, pp. 63, 65.

²² Karl Zemanek, “Is the Nature of the International Legal System Changing? ”, in *Austrian Review of International and European Law*, 2005, vol. 8, no. 1, p. 3.

²³ Jürgen Habermas, “Interpreting the Fall of a Monument”, in *German Law Journal*, 2003, vol. 4, p. 706.

²⁴ Michael W. Doyle, *Empires*, Cornell University Press, Ithaca and London, 1986, pp. 31–37; Frederick Cowell, “Inherent Imperialism: Understanding the Legal Roots of Anti-imperialist Criticism of the International Criminal Court”, in *Journal of International Criminal Justice*, 2017, vol. 15, no. 4, pp. 670–671.

²⁵ Martti Koskenniemi, “The Politics of International Law – 20 Years Later”, in *European Journal of International Law*, 2009, vol. 20, no. 1, p. 13.

²⁶ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, Reissue, Cambridge University Press, New York, 2005, pp. 607–610; Mark Klam-

The question whether international criminal justice performs as an independent system or is subject to power politics – or even a tool for hegemonic States – will be discussed in this study through different lenses. The next section will analyse the matter in terms of structural constraints and the room of agency. Subsequently, international criminal justice will be portrayed as a regime where hegemonic tendencies will be highlighted and evaluated. Finally, the study will set out alternative narratives or scenarios on the state of international criminal justice.

14.2. Structure versus Agency in the International Criminal Justice System

In the introduction of this volume, Lohne makes the call for the need for a sociology of international criminal justice. A key part is to understand the social conditions that underpin the power in and of international criminal justice.²⁷ International criminal justice is, like other fields of law, a response to social needs, which reinforces the case for a sociological study of international criminal justice.²⁸ A key question across social sciences is to what extent explanation should be couched in terms of autonomous actions of individuals who have agency or seen as a product of context or structure in which the individuals operate, and over which they have no control.²⁹ This structure – agency debate may be nuanced. Hay argues that “structure and agency logically entail one another – a social or political structure only exists by virtue of the constraints on, or opportunities for, agency that it effects. Thus it makes no sense to conceive of structure without at least hypothetically positing some notion of agency which

berg, “What are the Objectives of International Criminal Procedure? – Reflections on the Fragmentation of a Legal Regime”, in *Nordic Journal of International Law*, 2010, vol. 79, no. 2, p. 295; compare with Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, p. 15 where the term “structural tendency” is used.

²⁷ Kjersti Lohne, “Towards a Sociology of International Criminal Justice”, in Morten Bergsmo, and others (eds.), *Power in International Criminal Justice: Towards a Sociology of International Justice*, TOAEP, 2020.

²⁸ Klamberg, 2013, see above note 26, pp. 5, 48–65; Klamberg, 2015, see above note 9, pp. 46–48, 57–59, 107–109.

²⁹ Gerry Stoker, “Introduction”, in David Marsh and Gerry Stoker (eds.), *Theory and Method in Political Science*, Macmillan Press, 1995, p. 16; Michael Barnett and Raymond Duvall, “Power in International Politics”, in *International Organization*, 2005, vol. 59, no. 1, pp. 41, 44, 49: “thinking about power in terms of both agency and structure”. See also Lohne, 2020, see above note 27.

might be effected (constrained or enabled)".³⁰ Lohne notes that "whereas international criminal accountability presumes an autonomous – and thus accountable – legal subject, the development of international criminal justice is driven by a strong faith in the ability of law in general – and criminal law in particular – to transform people and societies".³¹ Kratochwil and Ruggie state that "actors not only reproduce normative structures, they also change them by their very practice, as underlying conditions change, as new constraints or possibilities emerge, or as new claimants make their presence felt".³² Similarly, Barnett and Duvall note that human agency is "essential in producing, reproducing and possibly transforming" structures.³³ Lawyers sometimes call this 'judicial law-making' while sociologists call it 'structuration'.³⁴

Ideas of structure and agency are arguably central to any notion of power. Structure may impose constraints both overtly through compulsory and institutional power or covertly to the extent it entails social powers, values and interpretations. World-systems theorists draw on this conception of power when they distinguish between different kinds of States, identified as core, semi-periphery, and periphery.³⁵

Studies of structure and agency are primarily empirical in nature, viewing the internal processes of law in conjunction with the external structures of the legal field.³⁶ Power ultimately concerns the victory of the

³⁰ Colin Hay, "Structure and Agency", in David Marsh and Gerry Stoker (eds.), *Theory and Method in Political Science*, Macmillan Press, 1995, p. 189.

³¹ Lohne, 2020, see above note 27.

³² Friedrich Kratochwil and John Gerard Ruggie, "International Organization: A State of the Art on an Art of the State", in *International Organization*, 1986, vol. 40, no. 4, p. 770.

³³ Barnett and Duvall, 2005, see above note 29, p. 49.

³⁴ On judicial law-making: Hersch Lauterpacht, *The Function of Law in the International Community*, Clarendon Press, 1933. The Lawbook Exchange, New Jersey, 2000, pp. 79–82; Klamberg, 2013, see above note 26, p. 67; Anthony Giddens, *A Contemporary Critique of Historical Materialism*, University of California Press, Berkeley, 1981, p. 19: "According to the theory of structuration, all social action consists of social practices, situated in time-space, and organized in a skilled and knowledgeable". As quoted by Kratochwil and Ruggie, 1986, see above note 32, p. 770.

³⁵ Immanuel Wallerstein, "The Interstate Structure of the Modern World-System", in Steve Smith, Ken Booth, and Marysia Zalewski (eds.), *International Theory: Positivism and Beyond*, pp. 171–85; Barnett and Duvall, 2005, see above note 29, p. 54.

³⁶ Jakob V.H. Holtermann and Mikael Rask Madsen, "What is Empirical in Empirical Studies of Law? A European New Legal Realist Conception", in *Retfærd*, 2016, vol. 39, no. 4, p. 19.

agent or *subject* over its other – *structure* or *object*.³⁷ This relationship between *agency* and *structure* raises at least two issues. We have to contextualize agency and when we choose to describe structures, we choose to describe them either as resources (enabling action) or constraints (limiting opportunities for action).³⁸

The structure – agency dichotomy may be applied in different ways when analysing the international criminal justice system. For the purpose of this study, the structure is understood as the international system and laws within which the actors of international criminal tribunals – judges, prosecutors, defence counsel and other actors – operate. International law – and international criminal justice – is not necessarily ‘good’ in the sense that it may reinforce asymmetries of power. As Kennedy puts it: “law consolidates winnings, translating victory into right”.³⁹ The States will in this model have a dual role. As a community, the States act as lawmakers and provide resources which create the structure. Structures and discourses are not possessed or controlled by any single State.⁴⁰ Individual States may also be perceived as actors, as illustrated by situations where they are asked or ordered to co-operate with an international criminal tribunal by providing documents or surrendering persons. More layers can be added to what has been portrayed above as a duality; when States as a community create law and provide resources, they are also subject to greater structural restraints, both material and in ideas. States, the global legal order, ideas and knowledge as power are entangled with one another.⁴¹ Below the surface of law and States, there may be deeper structures of the system,⁴² also reproduced and developed by experts, including legal scholars.⁴³ Kennedy argues that “[l]egal norms, institutions, and profes-

³⁷ Hay, 1995, see above note 30, p. 191.

³⁸ *Ibid.*, p. 205.

³⁹ David Kennedy, *A World of Struggle*, Princeton University Press, 2016, pp. 10–11, 257. See also David Kennedy, “Disciplines of international law and policy”, in *Leiden Journal of International Law*, 1999, vol. 12, pp. 39–40, 42.

⁴⁰ Barnett and Duvall, 2005, see above note 29, p. 44.

⁴¹ Kennedy, 2016, see above note 39, pp. 6–8.

⁴² Touri distinguishes between i) the surface level of law, ii) the legal culture, and iii) the deep structure of law which interact with each other, Kaarlo Tuori, “Towards a Multi-Layered View of Modern Law”, in Aulis Aarnio, Robert Alexy and Gunnar Bergholtz (eds.), *Justice, Morality and Society A Tribute to Aleksander Peczenik on the Occasion of his Birthday 16 November 1997*, Juristförlaget, Lund, 1997, pp. 432–434.

⁴³ Kennedy, 2016, see above note 39, pp. 4–6.

sional practices are the building blocks for acting and being powerful, as well as for interpreting, communicating, celebrating, and criticizing power”.⁴⁴ Thus, when categorizing a certain observation, it will not always be obvious whether it belongs to structure or agency.

The starting point is that “social structures and processes generate differential social capacities for actors to define and pursue their interests and ideals”.⁴⁵ McCormack describes the dual selectivity of criminal law: the choice of what crimes are to be prosecuted, and the choice of which actors to prosecute.⁴⁶ Kiyani appears to use a similar, but not identical, dichotomy which distinguishes between design selectivity (compare with structure) and operational selectivity (compare with agency).⁴⁷ Kiyani’s typology is made dependent on whether the exercise of discretion is made before or after a court has been established.

Design selectivity is grounded in choices made in the establishment of various [international criminal tribunals] [...]

Design selectivity can be contrasted against *operational selectivity*: exercises of discretion that occur after a court is already running, when the law is to be enforced by a tribunal and its agents.⁴⁸

This typology does not prevent, but has slightly more difficulty in, describing the ongoing interaction between structure and agency. For example, Kiyani makes capacity selectivity, that is, the resources made available to investigate, prosecute and try potential offenders, a part of operational selectivity. If instead the structure – agency dichotomy is used, capacity selectivity is arguably more a question of structure than agency. One could certainly claim that capacity is not only a question of resources made available to an international criminal tribunal; the internal management and efficiency within an international criminal tribunal could have an impact on the capacity. It should be noted that Kiyani admits that “the distinction between design and operational selectivity is more fluid than

⁴⁴ *Ibid.*, p. 10.

⁴⁵ Barnett and Duvall, 2005, see above note 29, p. 42.

⁴⁶ Tim L.H. McCormack, “Selective Reaction to Atrocity”, in *Albany Law Review*, 1996–1997, vol. 60, p. 683; Asad G. Kiyani, “Group-Based Differentiation and Local Repression: The Custom and Curse of Selectivity”, in *Journal of International Criminal Justice*, 2016, vol. 14, no. 4, p. 942.

⁴⁷ *Ibid.*, pp. 942–951.

⁴⁸ *Ibid.*, pp. 942, 945.

binary”.⁴⁹ Regardless, for the purpose of this study, the capacity of an international criminal tribunal in terms of resources made available by the States is rather perceived as question of structure than agency.

14.2.1. Structural Constraints

Jackson has noted that “the inherent flexibility of international law and the authority of other institutions affect the application of international criminal law”.⁵⁰ Structural constraints may relate to limits in different dimensions: 1) material jurisdiction, 2) territorial jurisdiction, 3) personal jurisdiction, 4) temporal jurisdiction and 5) capacity in terms of economic resources.

Selectivity in the material jurisdiction of the ICC may be illustrated by that certain means and methods of warfare are outlawed, while others are not. Poisonous weapons, asphyxiating, poisonous or other gases and ‘dum-dum’ bullets are outlawed, there is a debate whether chemical and biological weapons are criminalized under the Statute,⁵¹ while nuclear weapons are not outlawed.⁵² This clearly favours richer States, which shows how power is reflected in the material jurisdiction of the ICC.

Asymmetries in power are also reflected in the territorial and personal jurisdictions of the Court. During the negotiations of the Rome Statute, some States – Germany, Sweden, Czech Republic, Latvia, Costa Rica, Albania, Ghana, Namibia, Italy, Hungary, Azerbaijan, Belgium, Ireland, Netherlands, Luxembourg, Bosnia and Herzegovina and Ecuador – advocated that the Court should have universal jurisdiction. At the other extreme was the United States that held that the State of nationality had to give its consent in all cases, except for Security Council referrals. India, Indonesia, Gabon, Russia, Jamaica, Nigeria, Vietnam, Algeria, Egypt, Israel, Sri Lanka, Pakistan, Afghanistan, Iran and China advanced similar positions in preference of a narrower jurisdiction. The adopted text of Ar-

⁴⁹ *Ibid.*, pp. 945.

⁵⁰ Miles Jackson, “Antonio Cassese Prize for International Criminal Law Studies 2015–2016: Political Discretion and International Criminal Justice”, in *Journal of International Criminal Justice*, 2017, vol. 15, no. 3, p. 616.

⁵¹ Mark Klamberg, “Article 8(2)(b)(xvii)”, in Mark Klamberg (ed.), *The Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, Brussels, 2017, p. 95.

⁵² Antony Anghie and B.S. Chimni, “Third World Approaches to International Law and Individual Responsibility in Internal Conflicts”, in *Chinese Journal of International Law*, 2003, vol. 2, no. 1, p. 95.

Article 12 demonstrates respect for the sovereignty of States, a narrower jurisdiction.⁵³ The UN Security Council power under Article 13(b) of the Rome Statute to refer situations relating to non-States Parties to the Court is also a reflection of power asymmetries.

Even though the temporal jurisdiction is already limited preventing retroactive application pursuant to Article 11 of the Rome Statute, further limitations were made following demands by France, allowing temporary concessions in relation to war crimes.⁵⁴

When the international criminal justice can only deal with a handful of cases over which the Court has jurisdiction and are admissible, questions about selection will arise. Thus, there must be a policy and in that sense prosecution is politicized. With *ad hoc* tribunals, a political body, the Security Council, gave a clear political tack to the tribunals. In that sense, there was a relative high transparency of the policy that underpins them.⁵⁵ At a glance, it would appear that the ICC has the discretion to use the funds as it finds appropriate. A closer scrutiny reveals several caveats. The Court has two major sources of funding, from the States Parties and the United Nations.⁵⁶ The States Parties could as a last resort withhold funds if they find that the Court is acting against their interests. Further, the United Nations was supposed to cover expenses incurred due to referrals by the Security Council.⁵⁷ Both of the Security Council referrals – in relation to Darfur (Sudan) and Libya – have explicitly ruled out

⁵³ Elizabeth Wilmshurst, “Jurisdiction of the Court”, in Roy S. Lee (ed.), *The International Criminal Court: the Making of the Rome Statute: Issues, Negotiations and Results*, Kluwer Law International, The Hague, 1999, pp. 132–139; William A. Schabas and Giulia Pecorella, “Article 12 - Preconditions to the exercise of jurisdiction”, in Otto Triffterer and Kai Ambos (eds.), *Commentary on the Rome Statute of the International Criminal Court*, Third Edition, C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 675–680; Dominik Zimmerman and Mark Klamberg, “Article 12”, in Mark Klamberg (ed.), *The Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, Brussels, 2017, pp. 169–170.

⁵⁴ Rome Statute of the International Criminal Court. 17 July 1998, Article 124 (‘ICC Statute’) (<https://www.legal-tools.org/doc/9c9fd2>); Forsythe, 2013, see above note 4, p. 485.

⁵⁵ William A. Schabas, “The Short Arm of International Criminal Law”, in William A. Schabas, Yvonne McDermott and Niamh Hayes (eds.), *The Ashgate Research Companion to International Criminal Law*, Ashgate, Farnham/Burlington, 2013, pp. 404–405.

⁵⁶ ICC Statute, Article 115, see above note 54.

⁵⁷ ICC Statute, Article 115(b), see above note 54.

provision of funds by the United Nations.⁵⁸ This shows how rich States and major powers through economic means can control the efficiency and work of the Court.

14.2.2. Room for Agency

Within the structural constraints, there is room for agency. This will be illustrated by the selection of situations and cases that are investigated and prosecuted. Article 53 of the Rome Statute relies on complementarity, “gravity” and the “interests of justice” as factors for determining a “reasonable basis to proceed” with an investigation. Further, the purpose of the authorization procedure with a review of the Pre-Trial Chamber is to avoid, reduce or minimize politicization.⁵⁹ However, as the *Afghanistan* decision discussed below shows, the authorization procedure may also – counter to the traditional understanding of the process – be a stage for the judges to incorporate political considerations. The reference to complementarity creates agency for States concerned to investigate and prosecute cases and thus making cases inadmissible at the ICC.

The flexible approach to gravity allows the ICC to engage with a broader range of situations. It also grants the Prosecution discretion to focus on certain types of criminality. Stahn argues that the flexibility in the gravity assessment “allows investigation and prosecution of a wider spectrum of criminality and diversity of situations”.⁶⁰

The broader expression “the interests of justice” is not defined anywhere in the Statute.⁶¹ From the drafting history of Article 53, it appears that the provision was intended to allow for prosecutorial discretion.⁶² The

⁵⁸ Resolution 1593 (2005), UN Doc. S/RES/1593, 31 March 2005, para. 7 (<https://www.legal-tools.org/doc/4b208f>); Resolution 1970 (2011), UN Doc. S/RES/1970, para. 8, 26 February 2011 (<https://www.legal-tools.org/doc/00a45e>).

⁵⁹ Schabas, 2013, see above note 55, p. 396.

⁶⁰ Carsten Stahn, “Damned If You Do, Damned If You Don’t: Challenges and Critiques of ICC Preliminary Examinations”, in *Journal of International Criminal Justice*, 2017, vol. 15, no. 3, p. 427.

⁶¹ International Criminal Court (‘ICC’) Office of the Prosecutor, Policy Paper on the Interests of Justice, September 2007, ICC-OTP-2007, pp. 2–3 (<https://www.legal-tools.org/doc/bb02e5>).

⁶² William A. Schabas, *The International Criminal Court - A Commentary on the Rome Statute*, Second Edition, Oxford University Press, Oxford, 2016, pp. 836; Lovisa Bådagård and Mark Klamberg, “The Gatekeeper of the ICC - Prosecutorial Strategies for Selecting Situations and Cases at the International Criminal Court”, in *Georgetown Journal of International Law*, 2017, vol. 48, no. 3, p. 670; Maria Varaki, “Revisiting the ‘Interests of Justice’

“interests of justice” criterion was originally understood in doctrine and case law not to be a countervailing factor to be used by the Prosecutor to give reason not to proceed.⁶³ Bådagård and Klamberg note the following:

Scholars have proposed a variety of factors which could be considered under the “interests of justice” criterion. Some argue that the criterion could serve as a legal basis for considerations of a political or pragmatic nature, such as the practical feasibility of investigations or the prospects of state cooperation. Moreover, regarding the much debated issue of “justice vs. peace,” some argue that the OTP could use the “interests of justice” criterion in order to avoid disrupting peace processes or to defer to alternative mechanisms of transitional justice.⁶⁴

The OTP has held that the interests of justice criterion should only be applied under exceptional circumstances. There is a presumption in favour of investigating or prosecuting if other legal requirements are fulfilled.⁶⁵

The traditional understanding of “interests of justice” has come into question with the decision of the Pre-Trial Chamber II in the *Afghanistan* situation, opening the concept to take into consideration the feasibility of investigations and the prospects of State co-operation. The Pre-Trial Chamber stated the following:

An investigation can hardly be said to be in the interests of justice if the relevant circumstances are such as to make such investigation not feasible and inevitably doomed to failure. [...] subsequent changes within the relevant political landscape both in Afghanistan and in key States (both parties and non-parties to the Statute), coupled with the complexity and volatility of the political climate still surrounding the Afghan scenario, make it extremely difficult to gauge the prospects of securing meaningful cooperation from relevant authorities for the future, whether in respect of investigations or of surrender of suspects; suffice it to say that nothing in the present

Policy Paper”, 2017, p. 465: “unless the Prosecutor explicitly affirms that she has made a determination based solely on the interests of justice clause, the *proprio motu* judicial control cannot be activated”.

⁶³ Policy Paper on the Interests of Justice, p. 2, see above note 61.

⁶⁴ Bådagård and Klamberg, 2017, see above note 62, p. 67.

⁶⁵ Policy Paper on the Interests of Justice, p. 1–3, see above note 61.

conjuncture gives any reason to believe such cooperation can be taken for granted.⁶⁶

The *Afghanistan* decision not only changed the understanding and broadened the scope of the “interests of justice” criterion, it also changed the balance between the Prosecutor and the judges. Previously, the understanding had been that the criterion was a potential tool for prosecutorial discretion, now it has become an item of judicial review.⁶⁷ Heller has argued in favour of the Pre-Trial Chamber having such power.⁶⁸ The situations and cases selected for investigation and prosecution have frequently been criticized for “exhibiting political bias and seemingly replicate inter-State power imbalances through the different attention paid to Western States versus the Third World”.⁶⁹ One line of counterargument is that a number of the situations investigated are self-referrals. In addition, the Prosecutor has initiated investigations that implicate or thread against the interests of major powers such as Russia and the US. Pre-Trial Chamber I authorized the Prosecutor to open a *proprio motu* investigation in the situ-

⁶⁶ ICC, *Situation in the Islamic Republic of Afghanistan*, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, 12 April 2019, ICC-02/17-33, paras. 90, 94 (<https://www.legal-tools.org/doc/2fb1f4>).

⁶⁷ Compare with Morten Bergsmo, “The Theme of Selection and Prioritization Criteria and Why it Is Relevant”, in Morten Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Torkel Opsahl Academic EPublisher, 2010), pp. 13-14: “Even when there is agreement in a given jurisdiction that it should have and use case selection and prioritisation criteria, there may be different opinions as to whether (a) these criteria should be binding and (b) the judges should have a role in making the criteria effective. Some prosecutors prefer that the criteria function merely as internal guidelines in the exercise of prosecutorial discretion, with no judicial supervision. The answer to both questions may depend on what type of jurisdiction it is. ... giving the judiciary a role in making criteria effective, may be more attractive in international, hybrid and territorial state jurisdictions than in foreign state jurisdictions”.

⁶⁸ Kevin Jon Heller, “Can the PTC Review the Interests of Justice?”, in *Opinio Juris*, 12 April 2019 (available on its web site). See also Dapo Akanda and Talita de Souza Dias, “The ICC Pre-Trial Chamber Decision on the Situation in Afghanistan: A Few Thoughts on the Interests of Justice”, in *EJIL: Talk*, 18 April 2019 (available on its web site). Compare with Dov Jacobs, “ICC Pre-Trial Chamber rejects OTP request to open an investigation in Afghanistan: some preliminary thoughts on an ultra vires decision”, in *Spreading the Jam*, 12 April 2019 (available on its web site).

⁶⁹ Kiyani, 2017, see above note 46, p. 948.

ation in Georgia.⁷⁰ The recent request by the Prosecutor for judicial authorization to commence an investigation into the Situation in the Islamic Republic of Afghanistan may represent an addition step ‘out of Africa’ and opens up for investigation and prosecution against US personnel.⁷¹ However, the *Afghanistan* decision by Pre-Trial Chamber II would seem to confirm some of the claims that the ICC is merely a replication of inter-State power imbalances, a tool against weak States and armed non-State actors.

14.3. International Criminal Justice as a Regime

International criminal justice may be described as an international regime – a delineated area of rule-governed activity – in the international system.⁷² Krasner has defined regimes as “sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations”.⁷³

Regimes such as international human rights law, international humanitarian law and international criminal justice may in certain situations be in harmony, but may be in conflict with each other in different situations. They are neither fully integrated nor completely separated. The isolation of a regime may reflect a wish of States to protect their dominance.⁷⁴

⁷⁰ ICC, *Situation in Georgia*, Pre-Trial Chamber I, Decision on the Prosecutor’s request for authorization of an investigation, 27 January 2016, ICC-01/15-12 (<http://www.legal-tools.org/doc/a3d07e/>).

⁷¹ ICC, *Situation in the Islamic Republic of Afghanistan*, Pre-Trial Chamber III, Public redacted version of “Request for authorisation of an investigation pursuant to article 15”, 20 November 2017, ICC-02/17-7-Conf-Exp, 20 November 2017, ICC-02/17-7-Red (<http://www.legal-tools.org/doc/db23eb/>).

⁷² Klamberg, 2015, see above note 9, p. 2.

⁷³ Stephen D. Krasner, “Structural causes and regime consequences: regimes as intervening variables”, in Stephen D. Krasner (ed.), *International Regimes*, Cornell University Press, Ithaca and London, 1983, p. 2; see similar definition of international institutions in Judith L. Goldstein, Miles Kahler and Robert O. Keohane, “Introduction: Legalization and World Politics”, in Judith L. Goldstein and others (eds.), *Legalization and World Politics*, MIT Press, Cambridge and London, 2001, p. 3.

⁷⁴ Margaret A. Young, “Introduction: the Productive Friction between Regimes”, in Margaret A. Young (ed.), *Regime Interaction in International Law Facing Fragmentation*, Cambridge University Press, Cambridge, 2012, pp. 10–11; Margaret A. Young, “Regime Interaction in Creating, Implementing and Enforcing International Law”, in Margaret A. Young (ed.), *Regime Interaction in International Law Facing Fragmentation*, Cambridge Univer-

14.3.1. Competing Views on International Regimes and Institutions

Realist scholars such as Mearsheimer hold that international institutions are “arenas for acting out power relationships”.⁷⁵ International law exists and is complied with only when it is in the interests of a hegemon or a few powerful States, which coerce less powerful States into accepting the regime and complying with it.⁷⁶ States create rules for self-interested reasons and will feel no reluctance about violating rules when they cease to be in the States’ interest.⁷⁷ Legal scholars in the realist tradition argue that international courts not controlled by powerful States will usually be ineffective. States of major power will approach a court in two ways: marginalization and control.⁷⁸ Marginalization represents major-power scepticism and may include discouraging other States from joining, using political processes over judicial ones and avoiding deployment of political, economic and diplomatic resources. Control represents a will of major powers to direct and manage the court, including UNSC referrals and deferrals and deployment of resources when the State supports the court activity in question.⁷⁹ The ICC may react to such measures, primarily through its Prosecutor, with apolitical, pragmatic, strategic or captured behaviour.⁸⁰

Liberal institutionalists indicate that one of the main routes for regime formation is with a hegemonic power. The theory of hegemonic stability holds that concentration of power in one dominant State facilitates the development of strong regimes, and that fragmentation of power is associated with regime collapse. However, regimes may still persist when a hegemon declines. When States move away from a competitive sub-

sity Press, Cambridge, 2012, p. 85. As commented upon in Klamberg, 2015, see above note 9, p. 49–50.

⁷⁵ John J. Mearsheimer, “The False Promise of International Institutions”, in *International Security*, 1994, vol. 19, no. 3, p. 13.

⁷⁶ Oona A. Hathaway, “Do Human Rights Treaties Make a Difference?”, in *Yale Law Journal*, 2002, vol. 111, no. 8, p. 1945.

⁷⁷ Fiona B. Adamson and Chandra Lekha Sriram, “Perspectives in International Law in International Relations”, in Çali Başak (ed.), *International Law for International Relations*, Oxford University Press, Oxford, 2010, p. 29; as commented upon in Klamberg, 2015, see above note 9, p. 38.

⁷⁸ Eric A. Posner and John C. Yoo, “Judicial Independence in International Tribunals”, in *California Law Review*, 2005, vol. 93, no. 1.

⁷⁹ Bosco, 2015, see above note 2, pp. 11–14, 16.

⁸⁰ *Ibid.*, pp. 18–20.

optimal outcome, there is no incentive to defect from mutually collaborative strategies.⁸¹

Marginalization and control were mentioned above as two ways for major powers to approach international courts. A third alternative is that major States accept that they cannot control the court as a result of a ‘norm cascade’; States and the public to which they respond are influenced by the norms international courts embody. This assumes that the interest of States is somewhat variable and subject to reinterpretation.⁸² This constructivist view on international relations means that the interest of States cannot be taken for granted, but can change. However, the fact that structures are socially constructed is no guarantee that they can be changed.⁸³

The word hegemony has a negative connotation in the sense that is usually understood as a problem that needs to be countered. However, it can also represent an everyday phenomenon where an actor seeks to make its project, interest or pursuit appear as representative of the universal, a common good.⁸⁴

14.3.2. Hegemony in International Law

Hegemony is a way of describing the relationship between structure and agency, in the context of international relations it describes how one power – usually perceived as the United States – which has agency on its own also has major influence on the structure of the international system.

One could describe international law as distinct from power, meaning that international law is opposed to hegemony. This dichotomy may

⁸¹ Keohane, 1983, see above note 15, p. 142; Richard Little, “International regimes”, in John Baylis, Steve Smith and Patricia Oqvens (eds.), *The Globalization of World Politics*, Fifth Edition, Oxford University Press, Oxford, 2011, p. 303; as commented upon in Klamberg, 2015, see *supra* note 9, p. 41.

⁸² Thomas Risse and Kathryn Sikkink, “The Socialization of International Human Rights Norms into Domestic Practices: Introduction”, in Thomas Risse, Stephen C. Ropp and Kathryn Sikkink (eds.), *The Power of Human Rights International Norms and Domestic Change*, Cambridge University Press, Cambridge, 1999, pp. 21, 22; Bosco, 2015, see above note 2, p. 15; Klamberg, 2015, see above note 9, p. 100.

⁸³ Wendt, 1995, see above note 16, p. 80; Risse and Sikkink, 1999, see above note 82, pp. 8–9; Emilie M. Hafner-Burton, David G. Victor and Yonatan Lupu, “Political Science Research on International Law: The State of the Field”, in *American Journal of International Law*, 2012, vol. 106, no. 1, p. 54; Klamberg, 2015, see above note 9, pp. 42–43.

⁸⁴ Koskeniemi, 2012, see above note 3, p. 311.

be questioned. International law can also be used as a tool by States and thus be a technique of hegemony.⁸⁵ Hegemonic contestation is the process whereby States make their partial view of the meaning of a legal word appear as the total view, and their preference seem like the universal preference.⁸⁶ There is a basic ambivalence between unity and diversity.⁸⁷

The balancing point of interaction between international regimes is not necessarily permanent. Koskenniemi notes that much of the practice of international relations and international law is constituted by their efforts to develop rules, techniques and strategies to fortify the middle zone against collapse, and to make life there as good as possible. The concept of ‘hegemony’ involves an acceptance that there is no permanent ‘ultimate’ or ‘rational’ ground in which conflicts between regimes are to be resolved. ‘Hegemony’ should be understood as a universalization strategy or effort to appear as a representative of the universal. Koskenniemi argues that such strategies are commonplace in the international system (as well as in political life more generally).⁸⁸ Consensus is the terminus of a hegemonic process in which an actor succeeds in making its position seem the universal or ‘neutral position’. By the same reasoning, the purpose of law is to move subjective interests from the realm of the special to that of the general and objective “in which they lose their particular, political colouring and come to seem natural, necessary or even pragmatic”.⁸⁹ Even though a regime may appear as based on pragmatism and objectivity, there is still a structural bias in favour of a certain interest within the regime. The system prefers “some outcomes or distributive choices to other outcomes or choices”.⁹⁰

Regimes are developed through the informal expansion of their vocabulary in academia and in bureaucracies, creating dominant frameworks and templates for the identification of problems and broad principles for their resolution.⁹¹

⁸⁵ Martti Koskenniemi, “International Law and Hegemony: A Reconfiguration”, in *Cambridge Review of International Affairs*, 2004, vol. 17, no. 2, p. 198.

⁸⁶ *Ibid.*, p. 199.

⁸⁷ *Ibid.*, p. 200.

⁸⁸ Koskenniemi, 2012, see above note 3, pp. 309–310.

⁸⁹ Koskenniemi, 2005, see above note 26, p. 597.

⁹⁰ *Ibid.*, pp. 607–610; Klamberg, 2010, see above note 26, p. 295.

⁹¹ Koskenniemi, 2012, see above note 3, pp. 317–319.

In the face of a hegemonic regime, States have the initial choice of either choosing integration or separation. International law needs either to be celebrated or discarded. Separation may in some cases be a better strategic choice for the functioning of the regime. On the other hand, that choice may lead to exclusion, marginalization, loss of influence, prestige and knowledge.⁹²

Regimes on international trade, environmental protection and the use of force are all engaged in universalization strategies, trying to make their body of law, special knowledge and interest appear as representative of the general knowledge and common interest.⁹³ An alternative to full integration or complete separation is the creation of regime hybrids, such as ‘sustainable development’, ‘human security’ or ‘corporate social responsibility’. The hegemonic nature of the struggle between regimes in this may be hidden in a vocabulary of technical co-operation in order to avoid an open politicization that would threaten the control of the process by the experts.⁹⁴

14.3.3. Hegemony in International Criminal Law

Is there a dominant State or hegemon that had or has particular influence over the emergence and design of international criminal justice? Despite its idealistic rhetoric, the US clearly chose separation during the initial years of the ICC and tried to shield its own officials from the Court’s reach.⁹⁵

Scholars that adopt Third World Approaches to International Law (‘TWAIL’) often focus on power relations among States with interest on how an international rule or institution actually affects the distribution of power between States and peoples.⁹⁶ Part of the TWAIL perspective on international criminal law is a concern about ‘selectivity’.⁹⁷ The portrayed ‘civilizing mission’ of non-European peoples has justified and legitimated

⁹² *Ibid.*, pp. 322–324; Koskenniemi, 2004, see above note 84, p. 198.

⁹³ Koskenniemi, 2012, see above note 3, p. 315.

⁹⁴ *Ibid.*, pp. 319–320

⁹⁵ Koskenniemi, 2004, see above note 85, p. 197; Claus Kreß, “Towards a Truly Universal Invisible College of International Criminal Lawyers”, FICHL Occasional Paper Series No. 4 (2014), Torkel Opsahl Academic Epublisher, Brussels, 2014, p. 21 (<https://www.legal-tools.org/doc/82bf10>).

⁹⁶ Anghie and Chimni, 2003, see above note 52, p. 78.

⁹⁷ Kiyani, 2017, see above note 46, p. 940.

the suppression of Third World peoples.⁹⁸ TWAIL critique may target material jurisdiction, procedural framework and case selection. For example, the nexus requirement for crimes against humanity with international armed conflict should be perceived as a way of excluding criminal responsibility for atrocities committed by Western powers against minorities and peoples under colonial domination.⁹⁹ Even though the ICTY “was presented with compelling evidence to the effect that NATO had violated international humanitarian law, it chose not to proceed with any further inquiries, stating dismissively that no inquiry was useful and that nothing would emerge”.¹⁰⁰ Finally, TWAIL scholars take aim at the creation of new law by the ICTY and the ICTR, and appear more in favour of the process undertaken through the ICC which to a larger extent is controlled by States.¹⁰¹

Kiyani has highlighted group-based selectivity, which focuses on differential prosecutions of similarly situated offenders within States and situations. This is not a variation on the theme of “international law is colonialism”, but a claim that critiques the post-colonial State and not just foreign powers or international institutions. Although decolonization and self-determination are essential elements in TWAIL, this approach does not necessarily perceive formal statehood as an unfettered good.¹⁰² Kiyani writes:

The concern is with group-based selectivity, a specific subset of selectivity that may result from either the design of the tribunal, or more likely the exercise of discretionary decision-making in the tribunal. Group-based selectivity turns not on the nature of the conduct of the individual, or the strength of evidence against them, but on the group identity of that person.¹⁰³

Cowell argues that the narrative that the ICC is an imperialist institution is due to a large extent to the provisions of the Rome Statute itself, rather than contingent choices made by court organs. The criticism of the Court as an imperialist organization began with the issuance of the arrest

⁹⁸ Anghie and Chimni, 2003, see above note 52, pp. 74–75.

⁹⁹ *Ibid.*, p. 88.

¹⁰⁰ *Ibid.*, p. 91.

¹⁰¹ *Ibid.*, p. 93.

¹⁰² Kiyani, 2017, see above note 46, pp. 939–941.

¹⁰³ *Ibid.*, p. 948.

warrant against Al-Bashir, then a sitting Head of State. Some leaders who signed up their countries as States Parties to the Rome Statute, for example the former President of the Ivory Coast, Laurent Gbagbo, were initially supportive but turned antagonistic when they became the subject of the investigations. Even though Cowell admits that some of ICC's critics may have cynical political motives, it might be possible that the ICC's legal structure is itself imperialist.¹⁰⁴ Kiyani makes a similar argument and describes this phenomenon as “design selectivity”, that is, the choices made in the establishment of various international criminal tribunals. This may involve material selectivity (the crimes within the material jurisdiction of the international criminal tribunal), procedural selectivity (the rules the procedure), geographical selectivity (restrictions in relation to territorial jurisdiction) and temporal selectivity.¹⁰⁵ One could add personal selectivity as illustrated by the IMT Charter which restricted the Tribunal's jurisdiction to the “major war criminals of the European Axis”¹⁰⁶ or the Rome Statute's partial restriction when jurisdiction is based on the nationality of the accused.¹⁰⁷

But the argument of structure and “design selectivity” arguably also applies to international law in general. Cowell focuses on three provisions and functions of the Rome Statute that are inherently imperialist: the complementarity regime under Article 17, the role of the Security Council under Article 13 and the prosecutorial powers under Article 15.¹⁰⁸ One could add the deferral power under Article 16.

Article 17 is inherently imperialist in the sense that it is premised on the existence and perpetuation of State failure and weakness. It ignores that historical culpability of the Global North for the role of State failure. Article 17 also underscores the weakness of States, they become victims. Cowell perceives the possibility of self-referrals as mitigating Article 17 inherent imperialism because it allows them to act tactically.¹⁰⁹ This is not entirely persuasive. A self-referral requires that a State, at least implicitly, admits that it is weak. However, this does not undermine Cowell's main

¹⁰⁴ Cowell, 2017, see above note 24, p. 668.

¹⁰⁵ Kiyani, 2017, see above note 46, pp. 942–945.

¹⁰⁶ Charter of the International Military Tribunal annexed to the London Agreement, 8 August 1945, Article 1 (<https://www.legal-tools.org/doc/64ffdd>).

¹⁰⁷ ICC Statute, Article 12(2)(b), see above note 54.

¹⁰⁸ Cowell, 2017, see above note 24, p. 670.

¹⁰⁹ *Ibid.*, pp. 675–677.

point that Article 17 establishes a dichotomy between ‘functioning States’ and ‘failed States’.

The power under Article 13(b) to refer situations to the Court institutionalizes the power of the UN Security Council. As it grants the Security Council direct juridical privileges, it also grants exclusive powers to a narrow group of States and as such it is an indicator of inherent imperialism. Article 13(b) also gives the Security Council the power to universalize the jurisdiction of the Court in relation to non-States Parties. As such, it is part of the cosmopolitan project to establish a global order of norms and laws. The effect of Article 13(b) is that it contributes to the ‘double standards’ attack. It allows powerful States to target less powerful States.¹¹⁰

Cowell admits that the inherent colonialism is not as clear in Article 15 as it is in Articles 13(b) and 17.¹¹¹ Practical restraints only permit the investigation and prosecution of a selection of all potential cases. This leads to difficult choices. Some commentators describe this as pragmatic process,¹¹² while Cowell argues that “pragmatism in this context reflects a world of unequal sovereigns and power imbalances” since it puts “a state’s domestic legal system on trial”.¹¹³

14.4. A Nuanced Defence for International Criminal Justice

Robinson offers a liberal defence for international criminal justice against the critique that it is body of law based on Western imperialism. He argues that, at the same time as we embrace the critique that national principles cannot be projected onto criminal law, we must still respect the assumption that law should be based on the moral agency of individuals. This is the basis for the principle of personal culpability.¹¹⁴ Even TWAIL scholars appear to share the basic assumption of Robinson on the moral agency of individuals and their accountability.¹¹⁵ Robinson argues that one needs to

¹¹⁰ *Ibid.*, pp. 679–681.

¹¹¹ *Ibid.*, p. 683.

¹¹² Bådagård and Klamberg, 2017, see above note 62, p. 730.

¹¹³ Cowell, 2017, see above note 24, p. 683

¹¹⁴ Darryl Robinson, “A Cosmopolitan Liberal Account of International Criminal Law”, in *Leiden Journal of International Law*, 2013, vol. 26, no. 1, pp. 129, 132–133; see similar argument made by Klamberg, 2013, see above note 26, p. 500: “To focus on individual responsibility, to separate the culpable from the non-culpable, and thus lessen the collective guilt is arguably an essential part of the rationale of international criminal trials”.

¹¹⁵ Anghie and Chimni, 2003, see above note 52, p. 89.

nuance the liberal approach to international criminal justice. Instead of adopting a parochial liberal approach “that simply replicates familiar principles from one’s legal system, or even from several legal systems”, he argues that a cosmopolitan liberal approach “searches for commonalities between cultures but it also recognizes and respects differences, thus embracing pluralism and the building of a *modus vivendi*”.¹¹⁶

Robinson argues that certain doctrines within international criminal law are particularly vulnerable to critiques based on communitarianism: in particular some forms of political liberalism and classical contractarian theories.¹¹⁷ The same argument can be made against the foundation of international law which is premised on the sovereign equality of States, that consent can bind States and that all States through their membership in the UN have accepted the existing world order. Robinson does not deny the affiliation between ‘liberalism’ and Western thought with the international criminal justice project; he questions whether basic principles such as fair warning or personal culpability are truly only values of the West. Empirical, anthropological studies may test and challenge the critique that certain basic assumptions underlying international criminal justice, such as the idea of individual responsibility, are ‘Western’ constructs.¹¹⁸

One line of critique is that Western principles are at fault when they impose individual criminal responsibility in relation to collective activities. Whereas ordinary crimes constitute deviance from social expectations, international criminal law is faced with ‘inverted morality’ where there is a strong social pressure to participate in the crimes, and instead it is abstention from crime that is deviant.¹¹⁹

The cosmopolitan ambition of the ICC, the pursuit of justice and the promotion of universal aims may be triggers for anti-imperialist critique. This line of critique tends to ignore that the ICC by itself is powerless without any enforcement powers of its own. Another potential explanation would be the relative exclusion of States from the Global South in the establishment of the Court. However, not all States from the Global South that are marginalized engage in anti-imperialist attacks against the ICC.¹²⁰

¹¹⁶ Robinson, 2013, see above note 114, p. 137.

¹¹⁷ *Ibid.*, p. 141.

¹¹⁸ *Ibid.*, pp. 143-144; Kreß, 2014, see above note 95, p. 24.

¹¹⁹ Robinson, 2013, see above note 114, pp. 128–129, 134.

¹²⁰ Cowell, 2017, see above note 24, p. 669.

The enforcement handicap of international criminal courts is overcome once the accused is in the dock.¹²¹

Nouwen argues that where an allegation of the ICC's selectivity is barely disguised apologetic rhetoric by those under judicial threat and their friends in power, the scholarship of international criminal law should deconstruct such rhetoric rather than repeat it. Even though there is legitimate critique against the ICC Prosecutor's selection of situations and cases, maybe the critique of 'judicial neo-colonialism' is a way of some African leaders to escape responsibility for their actions.¹²² Yet, the recent decision not to authorize an investigation in the *Afghanistan* situation could prove the critics right that the ICC replicates existing power asymmetries among States.

The alternative to combatting atrocities with international institutions is not necessarily anarchy and impunity. Domestic investigations and prosecutions have and will arguably continue to play a major role in repressing international crimes.

¹²¹ Sarah Nouwen, "Justifying Justice", in James Crawford and Martti Koskeniemi (eds.), *The Cambridge companion to international law*, Cambridge University Press, Cambridge, 2015, p. 329.

¹²² Kreß, 2014, see above note 95, p. 22.

PART IV:
NON-STATE POWER AND EXTERNAL AGENTS IN
INTERNATIONAL CRIMINAL JUSTICE

Development and National Prosecutions: Addressing Power and Exclusion for Sustainable Peace and Development

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Holding perpetrators to account for core international crimes at home is often considered to be among the most sensitive tasks in transitional and post-conflict settings. Individuals and networks of former combatants im-

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plicated in crimes remain proximate to their constituency and power-base, and are often protected by entrenched political elites. Domestic trials, by definition, also take place in the context of unhealed conflict legacies. This environment exudes tendencies to judge individual wartime conduct through a communal (and potentially biased) lens. These circumstances can risk re-inflammation of group antagonisms.

Efforts to support human development, including national and local institutional capacity-building, in societies recovering from systematic rights violations, have traditionally avoided issues that might be seen as politically divisive. Development actors were accordingly not considered candidates for capacity-development for national prosecutions of conflict-related crimes, understood to be more in line with human rights and political mandates.

Since the early 2000s, however, this particular outlook has shifted on several accounts. At the national level, United Nations ('UN') agencies have been asked to provide more robust assistance to Member States in development of rule-of-law institutions.¹ At the international level, the thinking on international criminal justice has also evolved from the *ad hoc* tribunals to the International Criminal Court's ('ICC') introduction of 'positive' complementarity and increased encouragement of national initiatives.² However, a decisive moment for the engagement of the development community came when a range of host governments requested development agencies, already supporting reform of their national justice systems, to extend assistance to domestic trials involving international crimes.³ The demand for technical assistance with core international crime prosecutions took the development community by surprise and re-

¹ Following the World Summit in 2005, UN system-wide Rule of Law Coordination and Resource Group (RoLCRG) was created in 2006, followed by establishment of the Office of Rule of Law and Security Institutions (OROLSI) in the Department of Peacekeeping Operations in 2007 and launch of the Global Rule of Law Programme in Conflict and Post-conflict Situations in UNDP in 2008, which significantly strengthened capacity for the in-country rule of law assistance of the respective UN entities. See, *Independent Progress Review on the UN Global Focal Point for Police, Justice and Corrections*, June 2014, pp. 14–17.

² See, for example, Carsten Stahn. "Complementarity: a tale of two notions", in *Criminal Law Forum*, 2008, vol. 19, no. 1, pp. 87–113.

³ The first requests for UNDP assistance, for example, came through programming initiatives in 2004 in Guatemala and Serbia, in 2006 in Colombia, in 2008 in Bosnia and Herzegovina, and in 2010 in the Democratic Republic of the Congo.

quired substantive programming re-adjustments. Nevertheless, by the time of the stocktaking discussion on complementarity at the 2010 ICC Review Conference, potential for development actors to advance national capacity was already duly recognized.

Despite these connections in practice, the nexus between complementarity and development was never systematically explored by researchers to identify risks and added value for national prosecutions. Can development adequately take on this challenge, and if so, what are the advantages of this engagement? In this chapter, we examine the context from which development partnerships typically evolve and identify preliminary characteristics of a development approach to support for national prosecutions. In assessing the potential of the nexus between complementarity and development, we rely mostly on United Nations Development Programme ('UNDP') policy documents, interviews with practitioners and case studies of existing in-country programmes. We will offer an illustration of how rule-of-law assistance in development programmes has supported prosecutions of core international crimes based on three examples, from the countries of the former Yugoslavia, Guatemala and the Democratic Republic of the Congo ('DRC').

This chapter thus considers support for national prosecutions from a development perspective, including the scope for development actors to build such capacity, based on their pre-existing programming and partnership commitments with governments and civil society. In particular, it situates capacity development for national prosecutions in the context of development assistance in respect of strengthening the rule of law and *vis-à-vis* the objective of sustaining peace. We illustrate how strategic approaches to developing the capacity of national justice and security systems, and complementarity initiatives at the national level, can be mutually reinforcing. The country cases will highlight the modalities of this interaction and examine how complementarity efforts can assist with restoring respect for national rule-of-law institutions. They indicate advantages of long-term and comprehensive engagement with national prosecutions, including for the institutional capacity of the justice-chain and broader transitional justice measures. The country cases also show that some environments defy single-handed pursuits of justice to be successful and serve its primary beneficiaries. They require parallel efforts to establish other services, such as provision of security, and support stabilization or longer-term investment in prevention of recurrence of hostilities.

We, therefore, also indicate methods for developing inclusive approaches that can pre-empt and neutralize more divisive power dynamics and contestations, and support efforts to build and sustain peace. Normatively speaking, the 2030 Agenda has made social inclusion, in various respects, a front-and-centre task of development. To this end, this chapter attempts to identify a method for managing and mitigating domestic and trans-national clashes of interests or values relating to who is prosecuted and for what. Mark Klamberg cites these clashes between states in the previous chapter, noting that “radically incompatible preferences on distribution of goods and methods on how to resolve conflicts” also inform interests and values alongside knowledge.⁴ This chapter seeks to consider how development, via a long-term approach, can empower both government and civil society to design and implement criminal justice processes that are resilient to interference by competing values and interests. We explore how such processes can be deemed to be inclusive by treating all groups equally and indicating how exclusionary practices against social groups can be prevented. The literature commonly cites perceived discrimination or politicization in international criminal justice processes, but rarely identifies the mechanisms through which criminal justice processes are affected.

15.1. Complementarity and Entry Points for Development

Strengthening capacities of national and local institutions, and civil society, including those related to governance and rule of law, is an integral part of development’s mandate.⁵ It has been pointed out in the *World Development Report 2011*,⁶ and more recently reaffirmed in the UN–World Bank *Pathways for Peace* report,⁷ that building institutions and their supporting civic culture demands a generational effort. Capacity development

⁴ Mark Klamberg, ‘Rebels, the Vanquished, Rogue States and Scapegoats in the Crosshairs: Hegemony in International Criminal Justice’, in Morten Bergsmo, Mark Klamberg, Kersti Lohne, and Chris Mahony, (eds.) *Power in International Criminal Justice*, Torkel Opsahl Academic EPublisher, Brussels, 2020, pp. 623.

⁵ On the link between capacity development and Sustainable Development Goals, see, for example, United Nations Department of Economic and Social Affairs, “Capacity Development key to realizing the global goals”, 29 November 2017 (available on its website).

⁶ World Bank, *World Development Report 2011, Conflict, Security, and Development*, World Bank, Washington D.C., 2011, p. 11, table 2.1.

⁷ United Nations and World Bank, *Pathways for Peace, Inclusive Approaches to Preventing Violent Conflict*, World Bank, Washington D.C., 2018, pp. 77–108.

work is thus premised on long-term perspectives for development, continuing engagement, and building lasting partnerships with national actors. The role of development actors in the political economy of international criminal prosecutions is by equal measure informed by efforts to build reliable partnerships, and make accountability mechanisms sustainable and integrated into a broader peacebuilding strategy. Relations with the government and with civil society actors, in particular, are critical to ensuring genuine support for international crimes prosecutions.

In 2010, 12 years after the ICC's creation and eight years since the Rome Statute entered into force, the ICC's first Review Conference was held in Kampala, Uganda. The conference confirmed the international community's position that the ICC is a court of last resort. The review conference included a 'stocktaking' exercise that focused on complementarity, co-operation, victims and affected communities, as well as peace and justice.⁸ A critical theme to emerge from the stocktaking was an emphasis on strengthening national capacity to investigate and prosecute cases of core international crimes. The stocktaking acknowledged the constrained capacity of the ICC to assist national processes. It adjusted, therefore, the interpretation of 'positive complementarity' to shift the burden of constructing national capacity from the ICC to States, international organizations, and civil society.⁹ While the importance of ICC guidance was acknowledged, the imperative of systematic and holistic approaches to developing national capacity was identified as essential.¹⁰

Complementarity in this context concerns development only insofar as it is focused on developing capacity for national initiatives, irrespective of the relationship between national and international jurisdictions. It was recognized that the work on strengthening professional and institutional judicial capacity to conduct domestic trials is best undertaken by assistance providers who are already on the ground working in the rule-of-law areas, sometimes for a protracted period of time. Rule-of-law and devel-

⁸ International Criminal Court ('ICC') Assembly of States Parties ('ASP'), Strengthening the International Criminal Court and the Assembly of States Parties, 26 November 2009, ICC-ASP/8/Res.3, Annex IV (<https://www.legal-tools.org/doc/bf0e8c>).

⁹ Morten Bergsmo, Olympia Bekou and Annika Jones, "Complementarity after Kampala: Capacity Building and the ICC's Legal Tools", in *Goettingen Journal of International Law*, vol. 2, 2010, p. 793; ICC Office of the Prosecutor, "Report on Prosecutorial Strategy", 14 September 2006.

¹⁰ Bergsmo, Bekou and Jones, 2010, p. 796, see above note 9.

opment actors often enjoy preceding experience partnering with relevant line ministries, other justice institutions and civil society organizations ('CSOs'), and are ready to meaningfully and representatively engage with victim groups. Their long-term presence in the country also endows knowledge of the local context, the political economy and capacity of rule-of-law institutions, including their elements relevant for prosecution of core international crimes. In comparison, other, more specialized, international actors frequently struggle to promote complementarity while securing government partnership to build capacity. Moreover, these efforts often happen on an *ad hoc* basis, and with a limited institutional entry points.

The ICC Assembly of States Parties ('ASP') compiled a report in 2010, which preceded the Kampala review conference: *Taking stock of the principle of complementarity: bridging the impunity gap*, that defined complementarity as:

[...] all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, without involving the Court in capacity building, financial support and technical assistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis.¹¹

The review conference also drew on the experience of the International Criminal Tribunals for the former Yugoslavia and Rwanda ('ICTY' and 'ICTR' respectively), which sought to diminish the significant burden of their caseload by returning non-prioritized cases to domestic courts in Bosnia and Herzegovina (10), Croatia (2), Serbia (1), and Rwanda (10) respectively. The ICTY and the ICTR had received direction from the UN Security Council to prioritize and refer cases as part of an effort to assist the tribunals in concluding their functions and reducing their cost.¹² The

¹¹ ICC ASP, Review Conference, 25 March 2010, ICC-ASP/8/Res.9, Appendix para. 16 (<https://www.legal-tools.org/doc/6077ca>).

¹² Jens Dieckmann, and Christina Kerll, "UN Ad Hoc Tribunals Under Time Pressure—Completion Strategy and Referral Practice of the ICTY and ICTR from the Perspective of the Defence", in *International Criminal Law Review*, 2008, vol. 8, no. 1, pp. 87–108; David Schwendiman, "Capacity Building: The Institutional War Crimes Legacy of the ICTY and the International Donor Community in Bosnia and Herzegovina" in *Assessing the Legacy of the ICTY*, Brill, 2011, pp. 185–230; Alejandro Chehtman, "Developing Bosnia and Herzegovina's Capacity to Process War Crimes Cases: Critical Notes on a 'Success Story'", in *Journal of International Criminal Justice*, vol. 9, no. 3, 2011.

ICTY and the ICTR did not conditionally cede primacy to domestic jurisdictions, as under complementarity. Instead, they prioritized cases for prosecution and referred those cases determined to be of lesser gravity to domestic jurisdictions.¹³

At the time of the Kampala Review conference, for example, the UNDP had already supported host governments' initiatives for domestic prosecution in Bosnia and Herzegovina, Croatia, Colombia, the DRC, Guatemala, Kosovo and Serbia. As a part of support for the complementarity agenda, the UNDP Administrator provided a keynote speech at the ICC Annual Meeting in 2012.¹⁴ Together with the Governments of Denmark and South Africa, and with the International Centre for Transitional Justice, the UNDP hosted three annual complementarity meetings between 2010 and 2012 at Greentree, New York. The 'Greentree process' of consultations broadened our understanding of the nexus of complementarity and development, and facilitated discussion between international assistance providers and host countries, as well as South-South co-operation between developing countries, State actors and civil society organizations.¹⁵

Given their wide presence in development contexts, development agencies commonly enjoy pre-existing work with host governments on justice system reform and access to justice when national prosecutions of core international crimes are considered. For example, enlargement of UNDP rule-of-law engagement on prosecutions of international crimes took place in Bosnia and Herzegovina, the Central African Republic, Côte d'Ivoire, the DRC, Kosovo, Serbia and Tunisia, among other countries. In these and other contexts, UNDP assistance was initiated based on demand on the ground and an explicit request by the host governments, as a logical progression of existing partnerships. Development approaches employ a 'whole of the system' method that recognizes the interdependence of the criminal justice chain, including investigative, protective, prosecutorial,

¹³ *Ibid.*

¹⁴ Helen Clark, "Speech at the 111th Session of the Assembly of State Parties to the International Criminal Court on "Human Development and International Justice", UNDP News Centre, 19 November 2012 (available on its website).

¹⁵ International Centre for Transitional Justice ('ICTJ') and UNDP, "Synthesis Report on Supporting Complementarity at the National Level: An Integrated Approach to the Rule of Law", 7–9 December 2011 (<https://legal-tools.org/doc/z45dov>); ICTJ and UNDP, "Synthesis Report on "Supporting Complementarity at the National Level: From Theory to Practice" (Greentree III)", 25–26 October 2012 (<https://legal-tools.org/doc/0jfo0n>).

defence, judicial, administrative (including communications) and correctional capacity.

International assistance of national prosecutions has limited impact if taken in isolation of wider rule of law efforts and, for instance, focuses primarily or solely on capacity of the attorney-general's office.¹⁶ The added value of development lies in its ability to link up support for institutions and actors to deliver justice for the past with the broader effort to institute reform throughout justice systems. If approached from this perspective, developing capacity for prosecutions of core international crimes can at the same time benefit the whole justice system.¹⁷ It can strengthen the local judiciary's grasp of international law, and international norms and standards more broadly, as well as promote their use in domestic practice. It can also help develop relevant national legislation and implement witness protection programmes; develop communication strategies and outreach programmes that will facilitate processing of publicly visible and sensitive cases, such as those involving sexual or gender-based violence, corruption or organized crime. Conversely, raising capacity across the justice systems – such as that for drafting and enacting legislation, adjudicating, efficient management of the caseload, increasing outreach and legal awareness, and providing free legal aid – can reciprocally increase effectiveness of specialized prosecutions. These two objectives and respective forms of advancing justice system efficacy are thus considered to be mutually reinforcing.

Prosecutions of core international crimes require special additional conditions beyond a properly functioning justice chain, from law enforcement, investigative and prosecutorial capacity, to judicial, witness protection and other administrative capacities, to defence attorney and correctional capacity. Typically, the prosecutions of conflict- or atrocity-related cases tend to be perceived by the public as more than passing a judgment on individual liability. They involve a narrative of collective antagonisms that have historical significance for the political community as a whole. For these reasons, such prosecutions draw broad attention and

¹⁶ Mark Ellis, "International Justice and the Rule of Law: Strengthening the ICC through Domestic Prosecutions", in *Hague Journal on the Rule of Law*, 2009, vol. 1, no. 1, pp. 79–86.

¹⁷ Jane Stromseth, "Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?", in *Hague Journal on the Rule of Law*, 2009, vol. 1, pp. 87–97.

contestation in the public arena. This is prompting a need for additional non-legal technical capacities, providing security measures and psychosocial support to the victims, introducing communication capacity to the prosecutor's office and the court, engagement through the media as well as support for outreach campaigns led by civil society. Beyond objectives to ensure accountability and due process, spelt out in legalistic terms, more prominent proceedings are also likely to have political and historical ramifications for overall peacebuilding trends and creation of narratives regarding a community's traumatic past.

From the development perspective, therefore, the success of domestic prosecutions will not rely solely on the ability to implement the Rome Statute in the national context and deliver justice to direct victims. It will also be measured against the ability to promote the rule of law more broadly and support reform of national justice systems, as well as play a positive role in building sustainable peace and setting guarantees of non-recurrence.¹⁸ This wider significance of developing capacity for national prosecutions is not only derived from practice and engagement in the field, but is also evident in development's normative framework, namely the 2030 Agenda.

In 2015, the Sustainable Development Goals ('SDGs') explicitly recognized interdependence between conflict and development, pointing out the adverse effect that violent conflict has on development gains, and indicating development's role in building and sustaining peace.¹⁹ The SDGs speak to the relationship between power and equity in society, and call for measures that can address social conflicts stemming from power relations non-violently. More specifically, SDG16 singles out the triangulation between peace, justice and inclusion as driving principles of social development, which have implications for both developmental methods of delivering justice, including for core international crimes, and for addressing conflict drivers. As recently reaffirmed by the UN Secretary-General, implementation of the 2030 Agenda carried out by development commu-

¹⁸ On goals of complementarity and in-country rule of law programming see UNDP, 19 November 2012, see above note 14.

¹⁹ "Progress of Goal 16 in 2019", on *Sustainable Development Goals Knowledge Platform* (available on its website).

nity also plays a critical role in, and thus cannot be divorced from, efforts to prevent violent conflict and build sustainable peace.²⁰

Significant part of development's contribution to prevention has been directed towards addressing the conflict drivers.²¹ Examining this normative framework from an empirical basis, the joint UN–World Bank report *Pathways for Peace*, as have many other leading observers of violent conflict, found significant correlations between outbreak of violent conflict and so-called 'horizontal inequalities', that is, real and perceived group-on-group political, economic and social exclusions.²² This puts an additional onus of responsibility for sustaining peace on formal and informal justice systems, as mechanisms specifically intended to alleviate and eradicate modes of exclusion, discrimination and marginalization informed by inequities of power between social groups.

As a consequence, instituting justice in the sustaining peace context requires methodology that is attentive to more effective inclusion of key constituencies and all parties to the conflict. This requires particular sensitivity to exclusionary practices. Perceptions of injustice and how justice processes treat social groups are largely shaped though public discourse

²⁰ United Nations Security General Antonio Guterres stated: "Above all, sustainable, inclusive development, deeply rooted in respect for all human rights – economic, social, cultural, civil and political – is the world's best preventive tool against violent conflict and instability. The 2030 Agenda for Sustainable Development is our common blueprint for more peaceful, stable, resilient group of societies. Sustainable development is an end in itself. But it also makes a critical contribution to preventing conflict.", see "Remarks to the General Assembly high-level meeting on peacebuilding and sustaining peace", UN News, 24 April 2018 (available on its website).

²¹ *Ibid.*

²² United Nations and World Bank, 2018, pp. 109–140, see above note 7; Frances Stewart, "Development and Security, in *Conflict, Security and Development*, 2004, vol. 4, no. 3, pp. 261–288; Frances Stewart, *Horizontal Inequalities and Conflict: Understanding Group Violence in Multiethnic Societies*, Palgrave Macmillan, London, 2008; Frances Stewart, Horizontal Inequalities as a Cause of Conflict, A review of CRISE findings, *Background Paper for World Development Report 2011*, World Bank, Washington, D.C., 2010; Gudrun Ostby, *Horizontal Inequalities, Political Environment and Civil Conflict: Evidence from 55 Developing Countries, 1986–2003, Post Conflict transitions Working Paper No. 7*, World Bank, Washington D.C., 2007; Gudrun Ostby, "Inequalities, the Political Environment and Civil Conflict: Evidence from 55 Developing Countries", in Frances Stewart (ed.), *Horizontal Inequalities and Conflict: Understanding Group Violence in Multiethnic Societies*, Palgrave Macmillan, London, 2008, pp. 252–281; Ted Robert Gurr, *Peoples Versus States: Minorities at Risk in the New Century*, United States Institute of Peace Press, Washington D.C., 2000; James D. Fearon and David D. Laitin, "Explaining Interethnic Cooperation", in *American Political Science Review*, 1996, vol. 90, no.4, pp. 715–735.

and open contestations in the media. In supporting justice processes, development approaches must grapple with their complexity while communicating proper information to the population. This is how development actors can constructively manage the power relations via justice processes for international crimes prosecutions. Considerations of national prosecutions should thus pay more attention to their relationship to the drivers of conflict, particularly perceptions of exclusion. In terms of prevention and ‘do no harm’ principles,²³ frameworks to identify how accountability processes treat groups differently can help to identify ways in which to pre-empt opponents of justice measures and mitigate risks of conflict.

In the following section, we will identify a set of preliminary criteria, based on the integrity of a process from political interference, which should inform the inclusivity of criminal justice processes and their ability to support implementation of SDG16 and the sustaining peace agenda. This will depend on effectiveness in addressing power relationships between groups based on judicial mechanisms designed for this purpose, including prosecutions of international crimes.

15.2. Complementarity, Inclusion and Sustaining Peace

15.2.1. The Complementary Nature of Justice and Development

While transitional justice and development have often appeared distinct in discipline and aspiration, their common expansion has been driven by efforts to better harmonize peacebuilding functions. In many countries, transitional justice and development efforts directly and practically inform each other.²⁴ Prosecution of international crimes is therefore one part of a full range of processes and mechanisms associated with a society’s attempt to come to terms with “a legacy of large-scale past abuses in order to ensure accountability, secure justice, and achieve reconciliation”.²⁵ For development, therefore, transitional justice processes and mechanisms are “a critical component of the United Nations framework for strengthening

²³ Principles proposed in Mary B. Anderson, *Do No Harm: How Aid Can Support Peace--or War*, Reinner, London, 1999, still constitute some the bases for defining “conflict sensitivity” of development aid.

²⁴ Helen Clark, “A Role for Development in Transitional Justice: The Arab Spring and Beyond”, UNDP News Centre, 14 November 2011 (available on its website).

²⁵ Guidance Note of the Secretary General, United Nations Approach to Transitional Justice, March 2010, p. 2.

the rule of law”.²⁶ Rule-of-law assistance led by development actors constitutes the primary source of support for building national capacity to prosecute international crimes cases.

Considering the relationship between justice and development actors requires that we first consider the specific justifications for prosecuting core international crimes. Prosecutions can serve retributive, deterrent, restorative, and expressivist goals.²⁷ These goals must be informed by a society’s motivation to proportionately punish (retribution),²⁸ to deter conduct’s repetition (deterrence),²⁹ to rehabilitate offenders and achieve reconciliation for victims and affected communities (restoration),³⁰ and to publicly repudiate specific conduct (expression or expressivism). Philosophically, expression (or expressivism) requires that crimes be prosecuted in order to publicly express and lend weight to the undervalued norm that the prosecuted conduct is prohibited. It is a norm-affirmation measure. Greater proximity to the victims, the location where crimes were committed, and representative involvement in judicial process of all affected communities, will also lend greater legitimacy, and expressive power, to international criminal law enforcement.³¹

²⁶ *Ibid.*

²⁷ Morten Bergsmo, Introductory note, *Thematic investigation and prosecution of international sex crimes*, A seminar organized by the Forum for International Criminal and Humanitarian Law, Yale University and the University of Cape Town, with support by the Royal Norwegian Ministry of Foreign Affairs, 7-8 March 2011, Cape Town, Republic of South Africa, pp. 1–2.

²⁸ Andrew Von Hirsch and Nils Jareborg, “Gauging Criminal Harm: A Living Standard Analysis”, in *Oxford Journal for Legal Studies*, 1991, vol. 11, no. 1; Paul Robinson, “Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical”, in *Cambridge Law Journal*, 2008, vol. 67, no. 1.

²⁹ David Wippman, “Atrocities, deterrence, and the limits of international justice”, in *Fordham International Law Journal*, 1999, vol. 23, no. 2 p. 473; Julian Ku, and Jide Nzelibe, “Do international criminal tribunals deter or exacerbate humanitarian atrocities”, in *Washington University Law Review*, 2006, vol. 84, no. 4, p. 777; Richard Posner, “An Economic Theory of the Criminal Law”, in *Columbia Law Review*, 1985, vol. 85, no. 6.

³⁰ Andreas von Hirsch, Julian V Roberts, Anthony E Bottoms, Kent Roach and Mara Schiff, *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms*, Bloomsbury Publishing, 2003; Nancy Combs, *Guilty pleas in International Criminal Law: Constructing a Restorative Justice Approach*, Stanford University Press, 2007.

³¹ Mark Drumbl, “Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, The Geneva Conventions, and International Criminal Law”, in *George Washington Law Review*, 2006, vol. 75, p. 1165; Mark Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press, New York, 2007; David Luban, “Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law”, in Samantha Besson

Scholars focused primarily on international criminal prosecutions have expressed scepticism about retribution and deterrence as goals advanced by prosecuting international crimes.³² The causal chain linking national prosecution of international crimes, the promotion and re-affirmation of the rule of law, and the sustainability of peace is qualitative in nature. Some evidence suggests that trials (in combination with degrees of amnesty) advance the likelihood of democratic consolidation.³³ Other evidence suggests that the relationship between prosecutions and conflict recurrence is different depending on whether high-level actors are prosecuted or only middle- and low-level actors. Payne *et al.* find that where prosecutions of high-level actors take place, conflict is 65% more likely to recur, but where prosecutions of middle- and lower-level actors take place conflict is 70% more likely not to recur.³⁴ This seems to suggest that reconciling peacebuilding and justice measures in the aftermath of conflict is particularly challenging where advocates of accountability see it as most needed, that is, at the highest levels including top political and military leaders.

The findings relating to group-specific grievances of the joint UN-World Bank *Pathways for Peace* report³⁵ suggest that the reason may be

and John Tasioulas (eds.), *The Philosophy of International Law*, Oxford University Press, New York, 2010, p. 569; Mirjan Damaška, "What is the point of international criminal justice", in *Chicago Kent Law Review*, 2008, vol. 83, p. 329; Robert Sloane, "The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law", in *Stanford Journal of International Law*, 2006, vol. 43, p. 39.

³² Tricia Olsen, Leigh Payne and Andrew Reiter, *Transitional Justice in balance, Comparing Processes, Weighing Efficacy*, United States Institute of Peace, Washington D.C., 2010; Darryl Robinson, "Serving the interests of justice: Amnesties, Truth commissions and the International Criminal Court", in *European Journal of International Law*, 2004, vol. 14, no. 3, pp. 481–505; Payam Akhavan, "Beyond Impunity: Can International Criminal Justice prevent Future Atrocities?", in *The American Journal of International Law*, 2001, vol. 95, no. 1, pp. 7–31; Mirjan Damaška, "What is the point of International Criminal Justice", in *Chicago Kent Law Review*, 2008, vol. 83, p. 329; David Wippman, "Atrocities, Deterrence, and the Limits of International Justice", in *Fordham International Law Journal*, 1999, vol. 23, no. 2, p. 473.

³³ Olsen, Payne, and Reiter, 2010, see above note 32.

³⁴ Leigh Payne, Andrew G. Reiter, Chris Mahony, Tricia D. Olsen, and Laura Bernal-Bermudez. "Conflict Prevention and Guarantees of Non-Recurrence." *United Nations. World Bank. Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict. Background Papers* (2017).

³⁵ United Nations and World Bank, 2018, see above note 7.

that high-level prosecutions are more commonly perceived to persecute particular social groups. More research is needed to show linkages between group-specific grievances related to transitional justice processes and the onset or recurrence of violent conflict. More importantly, the findings demand that broader rule-of-law programming be assessed to determine whether there is a risk, at a certain moment or in the future, of a process functioning so as to marginalize particular social groups. Knowledge of the local context and its political economy may be the most informative measure, therefore, for assessing the extent to which formal or informal justice processes are being employed to persecute particular social groups in a situation.³⁶

15.3. Criminal Justice, Political Ramifications and Public Reckoning with the Past

15.3.1. Impartiality and Proportionate Prosecution Inclusive of All Conflict Parties

Historical tensions that drive international crimes may also position actors with an interest in obstructing criminal processes or seeking to exclusively direct them towards perceived adversaries.³⁷ It is important that all actors are cognizant of the risk of supporting selective and politically informed prosecutions of international crimes deepening societal grievances rather than enabling social cohesion.³⁸ One-sided, partial or politically motivated prosecutorial strategies that focus exclusively on one party can enforce the false stereotype of ‘victor’s justice’ in the aftermath of conflict. Such criminal prosecutions can further invigorate collective grievances among the members of the targeted group and thus potentially serve in the future as a driver rather than a preventive measure for recurrence of mass crimes. Assessing independence and impartiality of local courts is therefore a prerequisite of engagement with and assistance to those institutions.

³⁶ However, some comparative studies are now emerging. See, Payne *et al.*, 2017 see above note 34; Cyanne E. Loyle, and Benjamin J. Appel, “Conflict Recurrence and Postconflict Justice: Addressing Motivations and Opportunities for Sustainable Peace”, in *International Studies Quarterly*, 2017, vol. 61, no. 3, pp. 690–703.

³⁷ Local processes

³⁸ Chris Mahony, “A Case Selection Independence Framework for Tracing Historical Interests’ Manifestation in International Criminal Justice”, in Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (eds.) *Historical Origins of International Criminal Law: Volume 4*, Torkel Opsahl Academic EPublisher, Brussels, 2015, pp. 865–903 (<http://www.legal-tools.org/doc/54851b/>).

Many domestic courts have been criticized for limiting their prosecutions to a single party or members of ethnic or political groups who were conflict opponents of the ruling majorities or groups in power, including Bangladesh, Côte d'Ivoire, Rwanda, and so on.

The joint UN–World Bank report states that:

Weighing the equality of accountability processes against the imperative to bring perpetrators to book is critical to the challenge of advancing stabilization and justice in conflict-affected environments under SDG 16. Accountability processes may exacerbate grievances related to specific social groups if they are perceived to discriminate between groups. How and why the real or perceived unequal treatment of social groups actually occurs varies from one process to another. Frameworks to identify how accountability processes treat groups differently can help to identify ways in which to preempt spoilers and mitigate risks of conflict.³⁹

Observers of international criminal justice and international law have theorised about methods to identify the power of law in confrontation to the power of state self-interest. Klamberg takes forward the concepts of obligation, precision and delegation promoted Abbott *et al.*, in their seminal work in International Organization.⁴⁰ They cite 'obligation' as the extent to which a state is bound by a rule or commitment, 'precision' as the extent to which the required, authorized or proscribed conduct is defined, and 'delegation' as the extent to which third parties enjoy authority to implement, interpret, and apply rules; to resolve disputes; and (possibly) to make further rules.⁴¹ Klamberg adds 'state acceptance' as indicating a more binary disposition of states themselves toward an international law regime (a rule or commitment) than the obligation imposed by the regime itself.⁴² Klamberg cites the extent to which states consent to the jurisdiction of a regime and particularly the extent to which powerful states ac-

³⁹ United Nations and World Bank, 2018, p. 167–168, see above note 7.

⁴⁰ Abbott, Kenneth, Robert O. Keohane, Andrew Moravcsik, Anne Marie Slaughter and Duncan Snidal, 'The concept of legalization'. *International organization* 54.3 (2000): 401-419.

⁴¹ *Ibid.*

⁴² Mark Klamberg, *Power and law in international society: International relations as the sociology of international law*, Routledge, 2015.

cept a regime as an important element missing from Abbott *et al.*'s approach for evaluating a legal regime's strength.⁴³

Our approach takes the consideration of the strength of international criminal law enforcement in international relations to the level of implementation. A gap exists between abstract interpretation of previous episodes of international criminal law and its obligation, precision, delegation and state acceptance, and a framework through which practitioners can observe and evaluate the strength or weakness of a process' component parts. To make such a determination we consider whether processes treat all credibly alleged offending parties (and victim groups) equally – the extent to which a process is 'inclusive'.

To identify prosecutions that fail the inclusivity test, or a process's vulnerability to exclusions, it is important to understand historical factors, key stakeholders, the nature of crimes alleged, and the alleged perpetrators (and perpetrator group).⁴⁴ This data can be used to inform civic and victim engagement on, and criteria for supporting, the design of a domestic process's mandate (jurisdiction) and functional independence. Ensuring that all credibly alleged conduct falls within the jurisdiction and capability of a prosecution is critical. It is important to ensure that a process treats equitably all victims and credible defendants according to victims' rights and their experienced harm, rather than instrumentalize victimhood or settle conflict-related scores. Frameworks focused on the independence of who may and may not be pursued highlight process design risks and the means that spoilers might employ.⁴⁵ Understanding these dynamics helps inform approaches not only to engagement in support of a criminal justice process, but also on the building of technical and operational capacity amongst civil society and victims' groups.

Careful consideration should be given by national prosecutors to which alleged perpetrators might be excluded from prosecution by the jurisdiction of a process, and the scope of potential actors who could undermine a process via non-co-operation. The jurisdictional and functional

⁴³ *Ibid.*

⁴⁴ Chris Mahony, "International Criminal Justice Case Selection Independence: An ICJ Barometer". FICHL Policy Brief Series No. 58 (2016), Torkel Opsahl Academic EPublisher, Brussels, 2016 (<http://www.toaep.org/pbs-pdf/58-mahony>).

⁴⁵ *Ibid.*

elements that may constrain a prosecution and undermine inclusivity required by the SDG 16 are identified in the tables below:⁴⁶

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

Figure 1: Jurisdictional Variables.

⁴⁶ *Ibid.*, These elements are drawn from a study of how the independence of case selection in international crimes prosecutions may be constrained by external actors and how this advances political self-interest; Mahony, 2015, see above note 38.

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

Figure 2: Functional Variables.

The above elements inform the extent to which a process may be skewed towards or away from a particular perpetrator or victim group. To test the extent to which a process is skewed or not, a credibly alleged preliminary evidence base of the most serious crimes should be identified to determine if the cases pursued proportionately reflect the evidence. Obtaining that evidence base requires a robust and transparent approach. A multiple systems estimation approach that draws from multiple data sources produces levels of crimes perpetrated against victim groups (ethnic, regional or other social groups) for different crimes, for example, for killings (see Figure 3).

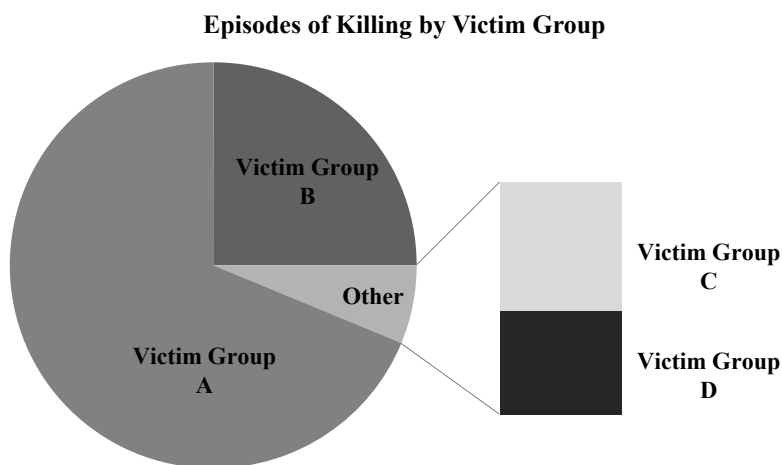


Figure 3: Example of data for killings.

Absence of protection from arbitrary adjudication of societal contests can trigger discontent amongst marginalized groups that drive armed conflict. Similarly, a selective approach that discriminates against particular groups or on the basis of political clout undermines the scope for reconciliation (at the individual, political and societal levels). Selective prosecution of international crimes cases undermines the perceived authenticity of the intent of the prosecuting group(s) to recognize wrongs and treat all groups equitably in the future – a critical tenant of the rule of law. Retributive goals are undermined where we can identify a bias in treating different groups of victims based on political, social and cultural affiliations rather than rights equally applied to all victims of conflict abuses.

Similarly, deterrent goals may be undermined because the selection of prosecuted persons may drive a sense that their selection is less about their conduct than the political utility of removing the accused from the political or security context. The established deterrence may relate more to losing a conflict or failing to ensure sufficient post-conflict clout amongst actors designing a court or other transitional justice processes.⁴⁷

Despite selective prosecution, expressivist goals can still be advanced where a culture is convinced of the stigma of specific conduct –

⁴⁷ Chris Mahony, “A political tool? The politics of case selection at the special court for Sierra Leone”, *Evaluating Transitional Justice*. Palgrave Macmillan, London, 2015, pp. 77-100.

international crimes – despite the selectivity of prosecution. The danger, then, is the extent to which selective prosecution may undermine behavioural change accompanying public expression, while also lending credit to manipulating actors for a disingenuous expression of support for human rights.⁴⁸

The potential undermining of these important goals, which assist in establishing the foundations for inclusivity, demands the engagement of civil society and victims' groups prior to the selection and design of a criminal justice process. Ensuring representative and informed participation by victims' groups as well as civil society helps identify and pre-empt any attempt to undermine equality before the law, and advance SDG 16.

Citizens sceptical of rule-of-law institutions for what they perceive as selective prosecutions may nonetheless acknowledge the criminality of prosecuted conduct and lend a degree of legitimacy to its prosecution. This scepticism may be exacerbated where courts prosecuting international crimes are created and designed largely through external actors' initiative. In such circumstances, expressivist effects of prosecutions may be impeded by perceptions of external interference, lack of national ownership and an absence of legitimacy.

Institutions retain most legitimacy where they hold State actors accountable, including political and military leaders and personnel, and where perpetrators are prosecuted by members of their own community. Three examples of prosecutions of international crimes that pursue State actors' accountability, demonstrating relative levels of independence, and support affirmation of the rule of law, are the regional initiatives in the former Yugoslavia, Guatemala and the DRC.

15.4. Complementarity and Strengthening the Rule of Law

In the previous section, we outlined an approach to enhancing inclusiveness of social groups and parties to the conflict, and thus legitimacy of domestic prosecutions of international crimes. Here we will indicate how this approach further assists in the promotion of the rule of law and in regaining confidence in institutions in transitional settings. Whether deployed in a transition from an authoritarian regime to a more inclusive form of governance or from conflict to peace, accountability for core in-

⁴⁸ Oona Hathaway, "Do Human Rights Treaties Make a Difference?", in *Yale Law Journal*, 2002, vol. 111.

ternational crimes and efforts to promote the rule of law work in mutually enforcing ways. On the one hand, a complex task of holding individuals accountable for core international crimes benefits from the development of the justice system as a whole and the capacity of its numerous independent institutions and services. On the other hand, ending impunity for some of the more serious criminal cases related to collective violence, and especially asserting accountability of those in positions of political power, can be a critical part of reaffirmation of the rule of law. In this context, strengthening both public respect for, and capacity of, rule-of-law institutions is one of the intermediary goals of both transitional justice processes, and social and political development in general.⁴⁹

National prosecutions of atrocity crimes are seen as an integral part of transitional justice processes and often a cornerstone of delivering justice to the victims. As it has been pointed out, criminal justice, and the other three standard sets of transitional justice measures, which include truth-telling, reparations, and institutional reform, all work towards a common goal. They all aim at strengthening recognition and fulfilment of victims' rights, and ultimately promoting civic trust in institutions through norm-affirmation.⁵⁰ Without exception, they seek re-establishment of the rule of law after a period when norms have been systematically violated, often on a massive scale. In order to become *justice* measures, in transitional situations, these measures have to be implemented through a comprehensive strategy to turn the page by (re)building civic trust amongst citizens and (re)gaining confidence in their institutions. Taken as a whole, the goal of transitional justice measures is to set an example for the society that a social order which instigated mass abuses of human physical integrity and dignity, and tolerated impunity for it, is over. It signals a tran-

⁴⁹ On the interdependence of rule of law and development objectives see, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, U.N. Doc. A/RES/67/1, 24 September 2012, para. 7 reads: "We are convinced that the rule of law and development are strongly interrelated and mutually reinforcing, that the advancement of the rule of law at the national and international levels is essential for sustained and inclusive economic growth, sustainable development, the eradication of poverty and hunger and the full realization of all human rights and fundamental freedoms, including the right to development, all of which in turn reinforce the rule of law, and for this reason we are convinced that this interrelationship should be considered in the post-2015 international development agenda" (<https://legal-tools.org/doc/d0qwyx>).

⁵⁰ Pablo De Greiff, "A Normative Conception of Transitional Justice", in *Politorbis*, 2010, vol. 50, no. 3, pp. 17–29.

sition from the use of power and its unrestrained resort to violence, to an order that is ruled by laws and underpinned by promotion of civic trust.

Pablo de Greiff cites a number of contributions to the rule of law in development context to transitional prosecutions. They include recovery of perpetrators' illegitimately acquired resources for reparations and reconstruction, identification and confrontation of other forms of economic and non-economic criminality and societal distortions and grievances, identification of associated societal grievances and provision of a degree of transparency.⁵¹ Development arguments for prosecutions often cite increased developmental benefit where economic crimes and economic support of, or knowing benefit from, human rights violations are also prosecuted.⁵² De Greiff, in his consideration of connections between transitional justice and development, states that "criminal trials must offer sound procedural guarantees and [...] not exempt from the reach of justice those who wield power", if they are to strengthen the rule of law.⁵³

Efforts to re-establish confidence of key domestic constituencies in the rule of law will thus depend on the ability both to end impunity for systematic abuses of the past and to improve equitable access to justice for all citizens. In the following sections, we will examine three cases where UNDP assistance for national prosecutions of core international crimes has gone hand-in-hand with strengthening access to justice and capacity of the justice system as a whole.

15.4.1. Bosnia and Herzegovina, Croatia, Kosovo and Serbia

The ICTY was established on 25 May 1993 in The Hague by UNSC resolution 827 to prosecute serious crimes committed during the conflicts on its territory between 1991 and 1999. The act of creating an *ad hoc* interna-

⁵¹ Pablo De Greiff, "Articulating the Links between Transitional Justice and Development: Justice and Social Integration," in Pablo De Greiff and Roger Duthie, (eds.), *Transitional Justice and Development: Making Connections*, Social Sciences Research Council, New York, 2009, p. 34.

⁵² *Ibid.*; Emily E. Harwell and Philippe Le Billon, "Natural Connections: Linking Transitional Justice and Development Through a Focus on Natural Resources", in *ibid.*; Chris Huggins, "Linking Broad Constellations of Ideas: Transitional Justice, Land Tenure Reform, and Development", in *ibid.*

⁵³ From a development perspective, De Greiff accepts a level of compromise, not necessarily on pursuing prosecutions, but rather on their post-conflict timing after considering their effect on social integration – the extent to which they may exempt persons of a particular group, De Greiff, 2009, p. 59, see above note 51.

tional tribunal by the international community constituted the first such precedent since the Nuremberg and Tokyo trials, and marked a shift in policy towards grave breaches of the Geneva Conventions. Until its closing on 31 December 2017, the ICTY indicted a total 161 persons between 1997 and 2004, conducted 111 trials, and prosecuted some of the key high profile political and military leaders.

UNSC resolutions 1503 (2003) and 1535 (2004) called for completion of all cases by 2010, putting additional emphasis on the Tribunal's rule 11*bis* adopted in 1997, which regulates transfer of cases to national jurisdictions.⁵⁴ Prior to 2004, Bosnia and Herzegovina ('BiH'), Croatia, Kosovo and Serbia all initiated international crimes proceedings through their domestic or hybrid justice systems. In Croatia and Serbia, with no international support and limited dedication and resources, trials did not display any significant effort to even-handedly deal with perpetrators from its own community. With the possibility of receiving cases from the ICTY, incentives quickly shifted and prompted more dedicated capacity development efforts. In total, only 13 cases of medium- and low-level suspects were transferred, 10 to BiH, two to Croatia and one to Serbia. However, from that point onwards, national capacities, the degree of independence and the pace of domestic trials improved.⁵⁵ UNDP Country Offices supported this upsurge and development effort at the national and the regional level.

Initially, the UNDP had limited engagement on capacity development of the War Crimes Chamber in the State Court of BiH. However, in 2008, a decision was made to limit the national jurisdiction of the State Court of BiH. A significant number of non-priority war crime cases were transferred to primary courts in Republika Srpska and cantonal courts in the Federation for geographical proximity to victims and relevant communities.⁵⁶ To meet this need, the UNDP used its existing engagement on institutional development of local courts, and support for the network of free legal aid providers in both entities. This was the first form of assis-

⁵⁴ ICTY, Rules of Procedure and Evidence, 8 July 2015, Rule 11*bis* (<https://www.legal-tools.org/doc/30df50>).

⁵⁵ See, Bogdan Ivanišević, *Against the Current—War Crimes Prosecutions in Serbia*, International Center for Transitional Justice, 2007 (<https://legal-tools.org/doc/957a50>).

⁵⁶ See, *Delivering Justice in Bosnia and Herzegovina: An Overview of War Crimes Processing from 2005 to 2010*, Organization for Security and Cooperation in Europe, Mission to Bosnia and Herzegovina, Sarajevo, 2011.

tance for local courts set to strengthen professional and operational capacity to process legally complex and politically sensitive cases. In addition, the UNDP worked at the local level with courts, law enforcement, NGOs and community leaders to establish a support network for victims' access to proceedings, legal, and psycho-social support.

In Croatia, the UNDP worked with government and civil society networks to develop a comprehensive set of protective, psycho-social and accompaniment provisions for victims and witnesses entering war crime proceedings. This capacity was then further specialized in Croatia for use in other high profile and sensitive cases, such as the fight against corruption and organized crime. Setting victim support and witness protection provisions for these cases was also one of the requirements of the European Union's accession process for Croatia. In Kosovo, the UNDP assisted in a broader judicial training exercise of national judges and prosecutors, who were part of the UN Mission in Kosovo-administered hybrid court system.

In 2003, following the assassination of the prime minister Zoran Đinđić, Serbia established the Special Court for War Crimes and Organized Crime. In the context of support for the Judicial Training Centre, newly established by the host government and the UNDP, development of the institutional capacity of the Special Court and the professional capacity of its judges and prosecutors received priority. In order to enhance the channels of communication with the ICTY, the UNDP also organized regular official visits to the Tribunal for judges and prosecutors from the Special Court and the Supreme Court. This brought about a standing exchange of information between the special prosecutor's office in Belgrade and the ICTY Office of the Prosecutor ('OTP'), including the transfer of OTP-investigated cases that did not reach formal indictments at the ICTY.⁵⁷

Although all national prosecutions of international crimes in the region have developed strategies and, at least, some basic criteria for selection and prioritization of cases, the significance of their guidance and extent of their implementation has often been put in question. The 2008 National War Crimes Strategy in BiH has been, for example, criticized for underestimating the backlog of cases and overestimating the capacity to

⁵⁷ Louis Aucoin and Eileen Babbitt, *Transitional Justice: Assessment Survey of Conditions in the Former Yugoslavia*, UNDP, Belgrade, 2006.

timely process them; for making prioritization criteria too open-ended to provide effective guidance; and for neglecting sexual and gender-based violence and the need for outreach.⁵⁸ Coming up with a strategy at the national level was a part of a protracted political process involving a role of international chief prosecutor and contestation of federal justice institutions at the entity level. This may also be a part of the reason preventing an update of the strategy, including lessons learned, a decade later. In Serbia, on the other hand, the Office of the War Crimes Prosecutor has developed three consecutive strategies, but has been criticized for falling short of the set standards by focusing on less demanding cases and lower-ranking perpetrators only, and in recent years for slowing down the pace of prosecutions altogether.⁵⁹

The particular nature of the conflicts in the former Yugoslavia during 1991–1999 has made principles of adequate proportionality and inclusion of all parties to the conflict, as well as collaboration with neighbouring jurisdictions, the core issues for national prosecutions. The challenge was that conflicts involved armed formations predominantly mobilized based on association with one of the six or seven different ethnic groups. The subsequent disintegration of the country into independent States created respective national (and subnational) jurisdictions and each inherited a mandate for processing highly sensitive war crimes cases informed by wartime ethnic contestations. At the same time, each ethnic or national group involved has developed its own distinctive and mutually incompatible narrative of the conflict events, further reinforced and legitimized by the State or sub-State entity authorities and their resources. Despite long-term cross-border civil society initiatives, no regional multi-ethnic truth commission was ever established to determine the facts about the core conflict events involved in contested national narratives. Unlike the experience in Guatemala, for example, described in the next country case, transitional justice in the Western Balkans did not have as a first step a systematic evidence base to map the actors and orient the processes.

⁵⁸ See, Jared O. Bell, “The Bosnian War Crimes Justice Strategy a Decade Later”, FICHL Policy Brief Series No. 92 (2018), Torkel Opsahl Academic EPublisher, Brussels, 2018 (<http://www.toaep.org/pbs-pdf/92-bell/>).

⁵⁹ Humanitarian Law Center, *Ten Years of War Crimes Prosecutions in Serbia: Contours of Justice*, Analysis of the Prosecution of War Crimes in Serbia 2004–2013, Humanitarian Law Centre, Belgrade 2014.

With a lack of an integrated, impartial and inclusive truth-seeking process, the most compelling remaining resource for future historical research is the ‘judicial truth’ generated from the ICTY trials. Nevertheless, this ICTY legacy for the region is challenged by both the limitations embedded in its mandate and its legitimacy.

Firstly, criminal justice, whether national or international, is intended first and foremost to determine individual accountability. Related fact-finding is limited to that task, and to a significant extent divorced from the broader context by default.⁶⁰ Truth-telling exercise, in contrast, typically seeks also to reveal conflict drivers, relevant inter-communal history, cultural context and understanding of overall military engagements and conflict dynamics.

Secondly, the OTP and the Chambers of the Hague Tribunal have limited the number of employees from the region (apart from defence attorneys and interpreters), due to concerns regarding the integrity of the information collected. Partly as a result of insufficient judicial and prosecutorial actors’ background knowledge, the Tribunal was often criticized in the region and internationally as lacking in understanding of the historical, geographical and cultural context in which crimes were perpetrated.⁶¹ With the inability of the regional actors involved with accountability to work across the newly established State borders, the paradox remains that, in spite of its limitations, the ICTY still provides the most significant and complete evidence resource for revisiting the past. Nevertheless, both non-State and State actors working on accountability for crimes of the 1991–1999 conflicts understood well and early on that their success at the national level would depend in large part on collaboration with colleagues and peers from the neighbouring countries involved.

Recognizing the challenge to integrate accountability initiatives in the region, the UNDP developed regional forms of engagement that consisted of three tiers: facilitating co-operation of national governments on

⁶⁰ For some of the classic statements on limitations of “judicial truth,” see Hannah Arendt, *Eichmann in Jerusalem: a report on the banality of evil*, Viking Press, New York, 1965; Clifford Geertz, “Fact and Law in Comparative Perspective”, in *Local Knowledge: Further essays in interpretative anthropology*, Basic Books, New York, 1983.

⁶¹ See, for example, Robert J. Donia, “Encountering the Past: History at the Yugoslav War Crimes Tribunal”, in *Journal of International Institute*, 2004, vol. 11. no. 2–3; Richard Ashby Wilson, Ahmad Wais Wardak and Andrew Corin, “Surveying History at the International Criminal Tribunal for the Former Yugoslavia”, *Research Papers*, nos. 6, University of Connecticut, 2010 (on file with the authors).

prosecutions and missing persons; instigating the formation of regional initiatives through multi-UNDP Country Office programme on transitional justice; and supporting existing regional civil society initiatives on victim support, accountability, archiving and truth-telling.

The first regional gathering of actors working on processing war crime cases in the region was organized by the UNDP in 2004 in Dubrovnik, Croatia. This was considered as a first step to facilitate regional cooperation between prosecutors' offices in BiH, Croatia and Serbia. Given that the constitutional frameworks of these countries prevented extraditions, transfer of evidence from State prosecutors' offices from one country to another, where alleged perpetrators resided, was an optimal option for mutually supporting domestic trials. The aim of the process was also to access mutually relevant documentation, witnesses and crime sites, and support creation of a sustainable process. In addition, transnational collaboration between judges and prosecutors was also intended at harmonizing norms, standards and procedures used in processing international crimes in the region. Accordingly, between 2005 and 2013, BiH, Croatia and Serbia all signed bilateral agreements to formally enable this process with facilitation and technical support provided by the OSCE. However, a permanent mechanism for implementation of these agreements and for spearheading judicial exchange operationally was still lacking. In 2015, the UNDP was invited by the three countries' lead prosecutors on war crimes cases to host and facilitate a regional mechanism for transferring cases and evidence, which was then located in the UN Resident Coordinator's office in Sarajevo. The national agencies for missing persons from the three countries also joined this regional mechanism in order to enhance their mutual information exchange.

Between 2006 and 2009, five UNDP Country Offices also had a regional platform for supporting cross-border transitional justice collaborations, including engagements in support of CSO initiatives to promote accountability and respect for the rule of law. At different stages, it included supporting the establishment of an NGO regional network to consolidate documentation of war crimes from three main CSO archives in the region, an important source for ICTY investigations; outreach campaigns in support of war crimes prosecutions by national offices of the ICTY and network of local NGOs; and the Regional Commission (RECOM) initiative to establish regional truth commission for the countries of the former Yugoslavia.

One of the lessons learned from these initiatives is that support for accountability must include technical capacity development that empowers informed CSO engagement. In the national prosecutions in the Western Balkans, technical capacity obtained early in the process positioned many CSOs to scrutinize practices of prosecution case selection and especially their adherence to equitable criteria, seen as the key litmus test. This also enabled CSOs to communicate issues of fairness that are commonly informed by case selection based upon understanding of prosecution procedure and its practice.

When case selection-related public discourse departs from evidence and draws instead on emotive rhetoric, still present in all quarters of the former Yugoslavia, it can enable societal divisions to widen. Development and all actors involved need to recognize the significance of inclusive approaches to prosecutions of conflict-related international crimes, including in places with less pronounced forms of ethnic contestation. This is best accomplished through managing and mitigating this risk through the identification of criteria, its relationship to proportionately representative case selection, and the training of CSOs in this area.

15.4.2. Guatemala

In Guatemala, institutional capacity to prosecute politically sensitive crimes, including international crimes, as well as civil society support for these trials, has been developed over a sustained period. At the Guatemala's Commission for Historical Clarification ('CEH'), agreed through a 1994 peace process and formally established in 1997, the conflict's primary perpetrators, the State and State security forces, opposed naming names or prosecution. They committed 93% of documented abuses (including 200,000 killings) during the 1960–1996 civil war. Negotiations surrounding the mandate to name perpetrators delayed the Commission's creation by three years. The rebel Unidad Revolucionaria Nacional Guatemalteca ('URNG') committed only 3% of abuses.⁶² The State did not provide relevant documentation or establish a witness protection programme, despite targeted killings carried out by police and criminal groups linked to State

⁶² See Priscilla Hayner, *Unspeakable Truths: Transitional justice and the challenge of truth commissions*, Routledge Taylor & Francis Group, New York, 2011, pp. 32, 34; Joanna R. Quinn and Mark Freeman, "Lessons Learned: Practical Lessons Gleaned from inside the Truth Commissions of Guatemala and South Africa", in *Human Rights Quarterly*, 2003, vol. 25, no. 4, pp. 1117–1149, 1123, p. 1122.

security forces.⁶³ The CEH held no public hearings, had no amnesty-granting power, power to name individual perpetrators, or significant powers of investigation, witness protection or power to subpoena witnesses.⁶⁴ It received little media coverage until its report was released.⁶⁵ However, the release of the report provided an evidence base upon which to assess the proportionate representation of the prosecution's case selection.

Long-term investment in institutional capacity and civil society, and a culture of accountability in Guatemala, enabled the pursuit of cases of international crimes. A part of this institutional and cultural shift towards accountability, more generally, was supported by the Commission Against Impunity in Guatemala (Comision Internacional contra Impunidad en Guatemala, 'CICIG'). The CICIG was agreed in 2006 and established in 2007 with the support of the Guatemalan Government, the United Nations, and the international community. The CICIG was established in response to Guatemala's 1996 peace accords, to investigate, map, report on, refer for prosecution, and recommend public policy on clandestine criminal networks. With the support of key anti-corruption champions, The CICIG has assisted in dismantling criminal networks. This process resulted in the 2015 indictment and resignation of Guatemala's then-President and Vice-President. It is reportedly investigating over 70 political and business elites for alleged money-laundering and bribery.⁶⁶

In the national courts, convictions for the crime of forced disappearance were first rendered in 2009. 2011 saw the first arrest of high-ranking officials for massacres committed in the 1980s. On 25 July 2011, trials finally began in Guatemala City against four former soldiers of the Kaibils special forces accused of participating in the massacre; all of them were convicted and sentenced to over 6,000 years each in prison. The most significant case, in political and legal terms, is that of Efraín Ríos Montt, who presided over Guatemala from 1982 to 1983, and of his Chief of Intelligence Mauricio Rodríguez Sánchez. Both are accused of genocide of the country's indigenous population in the Ixil Region, including

⁶³ Hayner, 2011, p. 35, see above note 62; Research Directorate, Immigration and Refugee Board of Canada, *Guatemala: Protection available to witnesses of murder and for victims of violent crime (1998–1999)*, Canada: Immigration and Refugee Board, 2001.

⁶⁴ Quinn and Freeman, 2003, p. 1123–4, see above note 62.

⁶⁵ *Ibid.*, p. 1124

⁶⁶ Editorial Board, "A corruption crusade in Guatemala", in *New York Times*, 11 June 2016 (available on its website).

their related mass forced displacement, and crimes against humanity carried out by Guatemalan troops and paramilitary forces. Their trial started in 2013 involving evidence provided by over 100 witnesses, forensic and other expert material, as well as military archives. On 10 May 2013, Ríos Montt was convicted of genocide and crimes against humanity and sentenced to 80 years in prison (50 years for genocide and 30 years for crimes against humanity). Ríos Montt is the first former Head of State to have been convicted of genocide by a court in his own country. On 20 May 2013, the Constitutional Court of Guatemala overturned the conviction, voiding all proceedings back to 19 April due to procedural issues (recusal of judges). Ríos Montt's trial resumed in January 2015 with a stipulation that, due to his poor mental conditions, he will not be given a jail sentence.⁶⁷

For victims in Guatemala, the road to first convictions and indictment at the highest level was long and uncertain. An accompaniment meant sustained support for civil society strengthening advocacy and networking, gradual development of capacity of justice institutions, and facilitating State–civil society co-operation. For almost a decade, the UNDP has provided direct technical assistance to the Special Cases of the Internal Armed Conflict Unit, located within the Human Rights Division of the Attorney General's Office. In particular, experts make available their technical assistance on specific paradigmatic cases, and help develop institutional investigation and prosecution tools such as General Instructions, Manuals, and Protocols. In addition, training programmes on the investigation and prosecution of gross human rights violations and international crimes are being provided to prosecutors. The programme also offers support to legal teams within civil society organizations acting as civil parties in the paradigmatic cases under investigation by the Human Rights Division. Support to prosecutors should include technical capacity-building relating to processes that ensure proportionately representative case selection, including training on jurisdictional and functional elements of case selection independence.

Progress on prosecutions in Guatemala was largely made through co-ordination between civil society and the prosecutor's office. Co-ordination spaces between the Prosecutor's Office and CSOs acting as

⁶⁷ Adopted from UNDP, *Addressing the Past to Build a Better Future: UNDP's Experiences on Transitional Justice for Human Development in Latin America and the Caribbean, Guatemala Case Study*, 2013.

private complainants (*querrellantes adhesives*) in the investigation of paradigmatic cases have been created. It is with respect to the right to justice that the Transitional Justice Accompaniment Program (Programa de Acompañamiento a la Justicia de Transición, 'PAJUST') has been able to achieve significant results in development and implementation of public policies and programmes. The growth and strengthening of the Human Rights Division in the Attorney General's office has been particularly notable. This approach complements institutional strengthening with support to CSOs, that is, the supply and demand sides of justice. It promotes close State–civil society co-ordination and communication which enables more constructive and evidence-based dialogue and enhanced State accountability. A number of State actors who championed and spearheaded national prosecutions have also come from previous civil society engagements.

At the start of 2019, CICIG's mandate as well as national prosecutions of conflict-related crimes in Guatemala have come into jeopardy in a quick secession. President Morales has attempted to unilaterally break the agreement with the United Nations and effectively end CICIG's mandate. However, the Constitutional Court has ruled to reverse this decision, leading to a constitutional crisis.⁶⁸ At the same time, legislation was introduced in the Congress that would terminate all ongoing proceedings on crimes of genocide, torture, and crimes against humanity charges. It would also free all military officials and guerrilla leaders already convicted of grave crimes, and extinguish all future investigations into such crimes.⁶⁹

The critical element in the process of instituting accountability for the 1960–1996 conflict crimes is a sustained and persistent effort by victims, civil society, and rule-of-law advocates holding government posts, combined with CICIG and development support from the international community. Their tireless work and personal investment in advocacy, through ups and downs, and across electoral cycles, has confronted the veil of impunity. Development support for victims, transitional justice processes and rule-of-law institutions, including the internationally mandated anti-corruption mechanism, CICIG, have been instrumental in bringing about necessary conditions and adequate capacity for national prose-

⁶⁸ See, Michael J. Camilleri and Tamar Ziff, "All eyes on Guatemala as crisis brews ahead of Elections", in *Americas Quarterly*, 4 February 2019 (available on its website).

⁶⁹ See, "Who benefits if the Guatemalan Congress Passes a Blanket Amnesty?", on *International Justice Monitor*, 25 January 2019 (available on its website).

cutions. The political will of the Attorney General, combined with PAJUST's institutional strengthening, as well as victims' firm and ongoing commitment to seek justice, has driven progress in overcoming impunity in ground-breaking cases of international crimes. However, the consolidation of this progress may be at risk in a political environment in which genocide is denied, the very commission of enforced disappearances during the conflict is questioned, and the application of amnesties is promoted by high-level members of the executive branch.⁷⁰ Sustained evidence-based engagement with both the government and civil society is critical to the constructive impact of development actors to support an environment that enables proportionately representative prosecution of international crimes cases.

15.4.3. The Democratic Republic of the Congo

A more direct form of engagement in prosecution of cases of international crimes is that undertaken by the Prosecution Support Cells ('PSCs'). The PSCs were established in the Eastern Democratic Republic of the Congo in 2010 in the wake of the Walikale mass rape incident.⁷¹ With support from the UNDP and MONUSCO (the UN Organization Stabilization Mission in the Democratic Republic of the Congo), international experts in military and civilian investigation and prosecution were provided to seven PSCs in four Eastern DRC provinces (Nord-Kivu, South-Kivu, Province Orientale, Maniema and Katanga). The experts came from Ghana, Burkina Faso, Mali, Niger and Chad.

At the time when efforts were initiated to develop capacity for prosecutions of international crimes in remote areas of Eastern DRC, the UNDP had an ongoing programme covering the relevant area of the PSCs' jurisdiction. The programme was initially intended to strengthen local justice institutions and provide greater access to justice for conflict-affected population, including through mobile courts and legal aid services. National and international expertise mobilized in the access to justice programme was made readily available to support establishment of the PSCs.

⁷⁰ Adopted from UNDP, 2013, see above note 67.

⁷¹ Amnesty International, "Democratic Republic of Congo: Mass Rapes In Walikale: Still A Need For Protection And Justice In Eastern Congo", 20 December 2010, AFR 62/011/2010 (<https://legal-tools.org/doc/wv9h7v>).

The PSCs enhance the capacity of the Congolese armed forces to prosecute their own personnel as well as those of their adversaries.⁷² The UNDP, MONUSCO and the Attorney General's Office jointly conceptualized and organized capacity-building sessions. The training included courses and practical exercises on: 1) analysis of the human rights situation and available reports on Walikale; 2) victims', witnesses' and suspects' applicable rights, interview techniques and best practices, including protection issues and minors; 3) criminal responsibility, both individual and command; 4) chain of command of military groups present in the Walikale area; 5) crimes against humanity; 6) investigation strategy and deployment on the ground. Increasing demonstration of enhanced prosecution capacity, including logistical capacity, drove increased Government co-operation and support. The UNDP also worked with victims of sexual and gender-based violence through the provision of free legal aid services. A large-scale programme on access to justice (2006–2013), for example, provided psycho-social support to 40,000 victims, resulting in the social and economic reintegration of 13,843 women and girls. Fourteen clinics have monitored over 1,300 cases of sexual violence; over 800 have gone to court, with 522 decisions rendered and 385 convictions.⁷³

As of June 2015, the PSCs had received 97 requests to support investigations and 40 requests to organize audiences' *foraines* (hearings). 63 of the 97 requests concerned sex-related offences.⁷⁴ Multiple senior actors were prosecuted on the basis of command responsibility, often in environments where local communities had never observed a senior actor held accountable for their subordinates.⁷⁵ This now includes a provincial member of Parliament of South Kivu, Frederic Batumike. An increased number of hearings have been achieved. However, the quality of the investigations and their security-sensitivity remain difficult to determine. Some threats against lawyers engaged in the Kavumu case have been reported.⁷⁶ Further, the protections of the rights of the accused (including

⁷² In the Kavumu case, the joint civilian and military status of the Courts surmounted claims that military courts did not hold jurisdiction over non-military actors. Trial International, "Kavumu Trial Starts Today", 9 November 2017.

⁷³ See UNDP, "DR Congo: Legal clinics help victims of sexual violence" (available on its website).

⁷⁴ Trial International, 9 November 2017, see above note 72.

⁷⁵ *Ibid.*

⁷⁶ Trial International, "Kavumu Case: Key role of local actors", 23 January 2010 (available on its website).

the right of appeal) have received criticism, alongside the absence of international expert experience in international crimes prosecutions.

The case of the DRC illustrates some of the more pronounced challenges facing national prosecutions of international crimes. The prosecution of perpetrators of serious crimes, we often emphasize, should take place as close as possible to the victims and affected communities, in the Kivus rather than in Kinshasa or The Hague. And yet, at this periphery in Eastern DRC, continually affected by conflict and contestation imported from elsewhere, odds appear to be stacked against ending impunity. We find almost no institutional capacity, little in the way of services, and no sense of security among the population. In this context, we need to use all resources available on the ground with an aim to gradually build sustainable capacities that will provide, in parallel, access to justice for victims and access to basic services, including security, to all citizens.

15.5. Conclusions

For development, support for complementarity at the national level and strengthening national rule-of-law institutions are intrinsically connected. Much of development assistance for national prosecutions of core international crimes is strategically and programmatically developed from existing partnerships with host governments on justice system reform. From the very inception, therefore, these efforts are integrated in the longer-term strategies to enhance capacity and effectiveness of national justice systems. Prosecutions at the national level benefit from existing investment in rule of law, in terms of institutional capacity throughout the justice chain, enhanced technical expertise of national actors and ability to build on existing partnership modalities. Conversely, ending impunity for serious crimes, especially for those in positions of authority and power, is one of the best vehicles to strengthen the respect for the rule of law. In other words, the re-establishment of the public trust in the rule of law, after a protracted period of impunity, can be one of the key symbols of sustainable development gains in the transitional period.

In addition, in conflict-affected environments, national prosecutions have to be put in the context of SDG implementation and sustaining peace agenda. The assessment and management of risks of conflict recurrence at the country level, which is widely introduced as a prevention tool,⁷⁷ needs

⁷⁷ On risk-informed approach to prevention see United Nations and World Bank, 2018, pp.275–293, see above note 7.

to recognize related risks and incorporate methods to mitigate them. As it is well recognized, national prosecutions can re-invigorate social divisions and forms of wartime polarization, and generate additional collective grievances with an immediate or a long-term effect. Inequality, and exclusions and discrimination of groups in particular, has been singled out by the SDGs and the UN sustaining peace resolutions, as one of the key drivers of conflict. One of the SDG targets for Goal 16 is accordingly to “promote and enforce non-discriminatory laws and policies for sustainable development”.⁷⁸

Justice measures in the wake of conflict thus necessitate inclusive approaches attentive to collective contestations, and particularly discrimination and perceptions of exclusion. In the case of prosecutions, this requires proportionate consideration of the alleged perpetrators’ and victims’ population of all parties to the conflict. Historically, there are very few cases where collective violence is perpetrated exclusively by members of one party against the members of another. From the standpoint of sustaining peace, prosecutorial case selection and related judicial outcomes have to include crimes perpetrated by all parties to the conflict, proportionate to the crimes committed overall. Even in cases such as Bangladesh, Rwanda or to a lesser extent Côte d’Ivoire, where crimes are said to be committed overwhelmingly by members of one party to the conflict, it can be argued that the single-group focus of national prosecutions could be a contributor to instability at a later date. In a similar vein, incorporating support for the pursuit of justice, inclusion and peace within a single integrated approach under SDG16, will in principle forewarn against any single-party-to-the-conflict type of jurisdictions for international crimes.

The *Pathways for Peace* report, for example, formulates the emerging concern from the prevention angle in the following way:

Perpetrators must be equally held to account for past abuses in order to send a strong signal of change [...] Weighing the equality of accountability processes against the imperative to bring perpetrators to book is critical to the challenge of advancing stabilization and justice in conflict-affected envi-

⁷⁸ Target 16.B also has an associated indicator for measuring progress towards implementation of the target: “Proportion of population reporting having personally felt discriminated against or harassed in the previous 12 months on the basis of a ground of discrimination prohibited under international human rights law”.

ronments under SDG 16 [...] Accountability processes may exacerbate grievances related to specific social groups if they are perceived to discriminate between groups.⁷⁹

For development and other assistance providers, beyond ensuring a due process, criminal justice thus poses the risk of supporting disproportionate or selective prosecutions. How and why the real or perceived unequal treatment of social groups actually occurs varies from one process to another. Nevertheless, here we offer some preliminary considerations that can generally apply to assist development of context-specific inclusion policies.

Frameworks for assessing prosecutorial case selection, like the one proposed in this chapter, can help us to identify how, and to what degree, accountability processes treat groups differently. For a judicial process to be inclusive in this sense, it should also be able to credibly identify a representative pool of alleged perpetrators and victims of their violations, segregated by national, ethnic, religious, linguistic, gender, age, disability or other relevant group identities.

National prosecutions of international crimes also seem to constitute one of the primary cases when “justice should not only be done, but should manifestly and undoubtedly be seen to be done”.⁸⁰ Traumatic events from the past, such as mass atrocities, by definition have historical significance for the whole of the affected community. As indicated, trials settling accountability regarding often well-known episodes of conflict tend to draw wide public interest and to be a subject of much contestation in the media between champions and opponents of national prosecutions. In this context, it is not only important, for example, for the office of the prosecutor to have a sound and inclusive prosecutorial strategy and case selection based on it. The prosecutor also needs adequate capacity to be able to communicate well to the public the reasons for choosing these criteria and making particular selections. At the same time, the process should accommodate a role for public assessment and oversight regarding inclusivity and proportionality of case selection and judicial decisions. Support should also be provided, for example, to CSOs to identify and scrutinize the provision of justice for *all* victim groups equitably using a

⁷⁹ United Nations and World Bank, 2018, pp. 167–8, see above note 7.

⁸⁰ For the origin of this well-known phrase by Chief Justice Hewart, see England and Wales High Court, *The King v Sussex Justices, Ex parte McCarthy*, Divisional Court, 1923.

framework (jurisdictional and functional) that identifies inclusive or discriminatory elements.

The intention of this chapter was, in part, to establish that national prosecutions can effectively contribute to strengthening the rule of law, and to the emerging prevention framework determined by the 2030 Agenda and sustaining peace. This seems particularly significant in a climate where several global conflict trends are again on the rise after a long decline,⁸¹ and respect for human rights has been undermined in many quarters.⁸² In order to be adequately integrated in the broad spectrum of preventive strategies and measures at the national level, prosecutions of core international crimes need to work towards developing additional criteria for inclusivity and proportionality. Some preliminary solutions were offered in this chapter, which could assist with further development of a more comprehensive framework.

⁸¹ After peaking at 50 in 1991, the number of internal violent conflicts had a long and steady decline for more than a decade, when it started to rise again. In 2015, UCDP recorded 51 violent state-based conflicts, see Marie Allansson, Erik Melander and Lotta Themnér, “Organized Violence, 1989–2016,” in *Journal of Peace Research*, 2017, vol. 54, no. 4, pp. 574–87; Cf. United Nations and World Bank, 2018, p.13, see above note 7.

⁸² See, for example the statement of the former UN High Commissioner for Human Rights (‘OHCHR’), Zeid Ra’ad Al Hussein, “The place of Human Rights in a reformed United Nations, Statement by UN High Commissioner for Human Rights Zeid Ra’ad Al Hussein”, on, 30 May 2018 (available on the OHCHR’s website), who recently declared at the Glion Human Rights Dialogue: “Nationally, as well as in international fora, there is a very forceful backlash against the progress which has been made on human rights in many essential areas”.

The Power of Narratives: The African Union’s Bid to Develop an Alternative International Criminal Law Narrative

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16.1. Introduction

The idea of an international criminal court was first discussed in 1919.¹ It was not, however, until 1 July 2002 that the permanent International Criminal Court (‘ICC’) was established following the entry into force of the Rome Statute. Support for the ICC on the African continent, from both States and civil society, led to the swift and widespread ratification of the Rome Statute by 34 out of 54 African countries. There are two ways to look at the original perception of the ICC by African States. The ICC’s espoused appeal to African States was built on the understanding that it would not be a ‘court *à la carte*’ in dispensing justice, but “rather a global justice mechanism that did not seem to be characterized by the traditional dialectic of victors’ justice”.² Unlike other international institutions, the

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¹ Christopher B. Mahony, “The Justice Pivot: US International Criminal Law Influence from Outside the Rome Statute”, in *Georgetown Journal of International Law*, 2015, vol. 46, no. 4, p. 1076 (<https://www.legal-tools.org/doc/4b7144/>).

² Christopher B. Mahony, “If You’re Not at the Table, You’re on the Menu: Complementarity and Self-Interest in Domestic Processes for Core International Crimes”, in Morten

ICC was established with specific goals: to participate “in a global fight to end impunity”; to “hold those responsible accountable for their crimes”; and to “help prevent” core international crimes “from happening again”.³ However, it is also likely that the ICC’s principle of complementarity appealed to African States as the Court appeared to defer to the jurisdiction of States. This deferral would theoretically allow African States to manipulate the Court, shielding the State’s allies from persecution and weaponizing the Court against the State’s enemies. Yet, both the assurances and supposed deference given to African States upon the founding of the ICC would soon ring hollow.

By 1 July 2014, 12 years after the Rome Statute entered into force, a total of 21 cases in eight situations had been brought before the ICC.⁴ Each case focused on Africa. Of these eight situations, only four arose from State Party referrals: Uganda, the Democratic Republic of the Congo (‘DRC’), the Central African Republic and Mali. Two others, Sudan and Libya, were the result of the United Nations Security Council (‘UNSC’) referrals involving States not party to the Rome Statute. The remaining two situations, Kenya and Côte d’Ivoire,⁵ were the result of *proprio motu* investigations commenced by the Office of the Prosecutor (‘OTP’). By

Bergsmo and SONG, Tianying (eds), *Military Self-Interest in Accountability for Core International Crimes*, Torkel Opsahl Academic EPublisher, Brussels, 2015, pp. 229–260 (<https://www.legal-tools.org/doc/0b06df/>).

³ See ICC, “About the ICC”, available on its web site.

⁴ Obiora Chinedu Okafor and Uchechukwu Ngwaba, “The International Criminal Court as a ‘Transitional Justice’ Mechanism in Africa: Some Critical Reflections”, in *International Journal of Transitional Justice*, 2015, vol. 9, no. 1, p. 98.

⁵ It is worth noting that the case of Côte d’Ivoire is unique. The active enablement of *proprio motu* investigation was triggered by the Côte d’Ivoire government itself. Basically, it was a referral in all but name. Côte d’Ivoire signed the Rome Statute in 1998, but formally ratified it in 2013. However, in 2003 Côte d’Ivoire accepted the ICC’s jurisdiction as a non-ICC member pursuant to Article 12(3) of the Rome Statute. The Côte d’Ivoire government reaffirmed its acceptance of the ICC’s jurisdiction in 2010 and before it fully ratified and implemented the Rome Statute in 2013, following the presidential election on 28 November 2010 that led the country into civil war. See generally Nicoletta Fagiolo, “The Gbagbo case: When international justice becomes arbitrary”, on Reset Dialogues on Civilizations, 24 February 2016 (available on its web site). See also Dov Jacobs and Jennifer Naouri, “Making Sense of the Invisible: The Role of the ‘Accused’ during Preliminary Examinations”, in Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Preliminary Examination: Volume 2*, Torkel Opsahl Academic EPublisher, Brussels, 2018, p. 469 (<https://www.legal-tools.org/doc/7af73d/>).

2018, four years later, the story remained the same and the romance between the ICC and African countries began to sour rapidly.

As the ICC began acting on its mandate, its seemingly 'geo-stationary orbit' over Africa served to mask "the vast extent of the incidence of international crimes in other parts of the globe".⁶ Abdalmahmoud Abdalhaleem, the former Sudanese Ambassador to the United Nations ('UN'), famously levied the charge that Luis Moreno-Ocampo, the ICC's first prosecutor, was nothing more than "a screwdriver in the workshop of double standards".⁷ This indictment resonated with many observers on the African continent, and not just within the ranks of cynical leaders. The historical aversion to imperialism runs deep throughout the continent, and Abdalhaleem's statements stirred up these sentiments.

The ICC appeared and continues to appear driven not by the fight to end impunity but rather by the perpetuation of global power asymmetries and old patterns of subjugation. This status undermines "the legitimacy of international criminal law and transitional justice in the eyes of many African and other constituencies".⁸ Mahmood Mamdani captures this sentiment, opining that "the emphasis on big powers as the protectors of rights internationally is increasingly being twinned with an emphasis on big powers as enforcers of justice internationally [...] Its name notwithstanding, the ICC is rapidly turning into a Western court to try Africans".⁹ Building upon the critiques levied by Mamdani, Chinedu Okafor and Uchechukwu Ngwaba note that:

The ICC [...] has functioned to squeeze out viable alternative approaches; it has led to the denudation of the ICC's popular legitimacy within some countries, paradoxically augmenting the power of impugned local leaders; it has led to the augmentation of domestic repression or conflict in certain countries; it has not prioritized the needs of ordinary Africans as much as it should [...].¹⁰

⁶ Okafor and Ngwaba, 2015, p. 101, see above note 4.

⁷ Simon Tisdall, "Technicians in the workshop of double standards", *The Guardian*, 29 July 2008.

⁸ Okafor and Ngwaba, 2015, p. 104, see above note 4.

⁹ Mahmood Mamdani, "The New Humanitarian Order", *The Nation*, 10 September 2008.

¹⁰ Okafor and Ngwaba, 2015, pp. 107-108, see above note 4.

In this chapter, the authors seek to provide the ICC with a way to overcome these critiques. Rather than squeeze out a new, viable alternative approach – the proposed African Court of Justice and Human Rights (‘ACJHR’) – the ICC should embrace it. To do so, this chapter first explores the history between the ICC and African States and how that relationship soured. Then, it discusses the prospects for either complementarity or co-ordination between the ICC and the proposed ACJHR. Finally, the chapter explores the possible role that the ACJHR may play in reducing impunity for international crimes committed on the African continent.

16.2. The Dawn of a New Error?

16.2.1. The Indictment of African Heads of State

Every major event in world affairs stems from a seemingly innocuous event. One need only recall the Battle of Solferino in the mid-nineteenth century that set the tempo for the Hague Conventions and subsequent Geneva Conventions which form the bedrock of contemporary international humanitarian law. The invention of the machine gun in the late nineteenth century could be seen as setting the stage for a feverish scramble for Africa. The assassination of the Austrian Archduke, Franz Ferdinand, lit the powder keg that spawned the First World War. We may speak one day of how the indictment of the former Sudanese President Omar Al-Bashir ignited the flames of discontent amongst African States towards the ICC.

African leaders further resented the fact that the ICC issued summons against the incumbent President of Kenya, Uhuru Muigai Kenyatta and his Deputy, William Samoei Ruto. The charges were dropped on 5 December 2014. In March 2015, the ICC terminated the Kenyatta case. About a year later, on 5 April 2016, ICC Trial Chamber V(A) vacated the charges against Ruto and Joshua Arap Sang.¹¹ The indictment or arrest warrants for crimes under international law issued in Europe against senior African State officials prompted the African Union (‘AU’) to seriously examine the extension of the ACJHR to include criminal jurisdiction.¹²

¹¹ ICC, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber, Decision on Defence Applications for Judgments of Acquittal, 4 April 2016, ICC-01/09–01/11 (<http://www.legal-tools.org/doc/41dc5f/>).

¹² Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 26 June 2014, Article 3 (‘AU Protocol on Amendments’) (<https://www.legal-tools.org/doc/05252d>).

In July 2008, the Prosecutor of the ICC alleged that Al-Bashir bore individual criminal responsibility for genocide, war crimes and crimes against humanity. An arrest warrant for Al-Bashir was issued in March 2009. Reacting to the indictments, the AU averred that the search for justice should be pursued in a way that did not impede or jeopardize the promotion of peace in Sudan.¹³ The AU had previously asked the UNSC to defer the investigation, stating that it felt that the process initiated by the ICC:

could seriously undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur and the promotion of long-lasting peace and reconciliation in the Sudan as a whole and, as a result, may lead to further suffering for the people of the Sudan and greater destabilization with far-reaching consequences for the country and the region.¹⁴

The UNSC declined.¹⁵ African countries were infuriated. Consequently, the AU Assembly:

decide[d] that in view of the fact that the request by the African Union has never been acted upon, the AU member states shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Bashir.¹⁶

The first indication that the romance between the ICC and African countries was in trouble could be seen at the AU summit in 2011 hosted by Equatorial Guinea. At this summit, the AU declared that its members would not co-operate with the ICC in the execution of the warrants of arrest especially as the ICC's targeting of senior officials was in certain situations a catalyst to derailing negotiated political solutions focused on maintaining and consolidating national peace and reconciliation.¹⁷

Subsequently, the ICC and the wider international community were annoyed seeing Al-Bashir often travelling to African States Parties (including Kenya, Djibouti, Malawi, and Chad), which failed to arrest and

¹³ Decision on the meeting of African States Parties to the Rome Statute of the International Criminal Court, 3 July 2009, Assembly/AU/Dec.245(XIII) Rev. 1 ('AU Decision on ICC').

¹⁴ Communique, 21 July 2008, PSC/MIN/Comm(CXLII).

¹⁵ UNSC Resolution 1593 (2005), 30 March 2005 (<https://www.legal-tools.org/doc/4b208f>).

¹⁶ AU Decision on ICC, see above note 13.

¹⁷ African Union, "Decision on the Implementation of the Assembly Decisions on the International Criminal Court", 1 July 2011, Assembly/Dec. 366 (XVII), para. 6.

transfer him to the ICC as required under the Statute. The ICC duly reported this to the UNSC and was openly condemned by the AU for doing so.¹⁸

It is noted that the AU's pronouncement was not simplistic. It does have a strong basis in customary international law. While admittedly the ICC provisions negate Head-of-State immunity when the person is indicted for core international crimes,¹⁹ there is a precedent in customary international law for staying proceedings until after an individual has left office. This is based on the understanding that legal proceedings against sitting State representatives would infringe on State sovereignty by impeding the functioning of the State. The International Court of Justice ('ICJ') has been consistent on this matter. There are two distinct cases where the ICJ confirmed that State representatives enjoy immunity from prosecution.

The first is the case against the President of the Republic of the Congo, Denis Sassou Nguesso, brought by the French government in 2001. On 5 December 2001, a Prosecutor of the Paris *Tribunal de grande instance* indicted Nguesso, his senior ministers and military generals, alleging crimes against humanity and torture. Following the indictment and summons, the Republic of the Congo instituted proceedings against France before the ICJ alleging the violation of international law principles governing State sovereignty, the dignity of the State, and the immunity of the Congolese State officials. The ICJ decided in favour of the Republic of the Congo, relying on the notion of State sovereignty and immunity of its State officials.²⁰

The second is the indictment of Abdulaye Yerodia Ndombasi, the former Minister of Foreign Affairs of the DRC, by Belgium in 2002. This case attracted special attention by African States as, at the time of his indictment and issuance of an arrest warrant by Belgium, Ndombasi was a serving Minister of Foreign Affairs. The ICJ held that Ndombasi enjoyed immunity from prosecution under customary international law on the ground that he was a serving minister. It instructed Belgium to terminate

¹⁸ Rome Statute of the International Criminal Court, adopted 17 July 1998, entry into force 1 July 2002, Articles 86–93 ("ICC Statute") (<https://www.legal-tools.org/doc/7b9af9>).

¹⁹ *Ibid.*, Article 27.

²⁰ Permanent Court of International Justice, *Case Concerning Certain Criminal Proceedings in France (Republic of Congo v France)*, Order, 17 June 2003, ICJ Rep, 2003, p. 102 (<https://legal-tools.org/doc/fa5c05>).

criminal proceedings, cancel the arrest warrant issued against Ndombasi, and inform the authorities to whom it had been circulated.²¹

Article 27(2) of the Rome Statute clearly breaks from this tradition, stating that “Immunities or special procedural rules which may attach to the official capacity of a person, whether national or international law, shall not bar the Court from exercising its jurisdiction over such a person”.²² However, the ICC’s Pre-Trial Chambers have issued conflicting decisions regarding immunities of State officials.²³ In light of this, and given the indictment of Al-Bashir, on 18 July 2018, the AU requested an advisory opinion of the ICJ “on the consequences of legal obligations of States under different sources of international law with respect to immunities” of State officials.²⁴ The need for an advisory opinion by the ICJ on

²¹ Permanent Court of International Justice, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, 14 February 2002, ICJ Rep, 2002, p. 3 (<https://legal-tools.org/doc/c6bb20>).

²² *Ibid.*, Article 27(2).

²³ See ICC, *Prosecutor v. Omar Hassam Ahmad Al Bashir*, Pre-Trial Chamber, Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, 15 December 2011, ICC-02/05-01/09-139-Corr, para. 36 (<https://legal-tools.org/doc/8c9d80>), where the Chamber observed that “the principle in international law is that immunity of either former or sitting Heads of State cannot be invoked to oppose a prosecution by an international court. This is equally applicable to former or sitting Heads of States not parties to the Statute whenever the Court may exercise jurisdiction”. Compare *idem*, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, 9 April 2014, ICC-02/05-01/09-195, para. 27 (<https://legal-tools.org/doc/89d30d>), where the Chamber adopted a different interpretative approach, holding that “when the exercise of jurisdiction by the Court entails the prosecution of a Head of State of a non-State Party, the question of personal immunities might validly arise. The solution provided for in the Statute to resolve such a conflict is found in article 98(1) of the Statute”. See also *idem*, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, 6 July 2017, ICC-02/05-01/09-302 (<https://www.legal-tools.org/doc/68ffc1/>) (‘ICC Al Bashir South Africa Decision’), where the Chamber held “since immunity from arrest would bar the Court from the exercise of its jurisdiction, the general exclusionary clause of article 27(2) of the Statute, in its plain meaning, also encompasses that immunity” (para. 74), and that States’ reliance on immunities to not co-operate would create “insurmountable obstacle” to the ICC’s jurisdiction (para. 75).

²⁴ See Request for an advisory opinion of the International Court of Justice on the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials, Letter dated 9 July 2018 from the Permanent Representative of Kenya to the United Nations addressed to the Secretary-General, UN Doc. A/73/144 (<https://legal-tools.org/doc/i5h87s>).

the legal issues pertaining to State officials' immunity, which the ICC Judge Marc Perrin de Brichambaut considers "particularly complex",²⁵ is warranted and would clarify the approach that ought to be taken when core international crimes are committed by incumbent State officials.

The AU's decision not to co-operate with the ICC following the indictment of Al-Bashir led to the call to quicken the pace of establishing a Criminal Chamber within the ACJHR to prosecute African individuals who commit international crimes. Our understanding is that the AU's stance was that empowering the ACJHR with such jurisdiction would be an effective way to address impunity in Africa through an African mechanism whereby African State officials who bear responsibility of international crimes in Africa are judged by their fellow Africans in Africa, not a remote court divorced from the very locale where the crimes occurred.

In hindsight, the writing was on the wall, yet it was not apparent that there would be a cascading effect that would filter through to the ICC. In the early 1980s, when the African Charter on Human and Peoples' Rights was being drafted, Guinea proposed an establishment of a human rights court to try those who violated human rights or perpetrated international crimes:

A l'évidence, le mécanisme de sauvegarde approuvé en 1981 par les dirigeants africains se distingue résolument de celui imaginé vingt ans plus tôt par les congressistes de Lagos : un tribunal et la possibilité de recours individuels ouverts générales de ses membres. Pareil culte de la souveraineté aux individus. Bien que plusieurs fois ranimée, cette idée n'eut jamais l'écho escompté, l'ambition du projet étant probablement à l'origine de la désaffection à son égard.²⁶

However, the proposal was deemed 'premature' at the time, but the idea was "a good and useful one which could be introduced in future by means of an additional protocol to the Charter".²⁷ Several years later, in

²⁵ ICC Al Bashir South Africa Decision, para. 97, see above note 23.

²⁶ Fatsah Ouguergouz, *La Charte Africaine des Droits de l'Homme et des Peuples*, Presses Universitaires de France, Paris, 1993, pp. 64 and 72. The Comité of Ministers of the African Union gathered first in Freetown (Sierra Leone) from 18 to 28 June 1980, and then in Banjul (Gambia) from 7 to 19 January 1981. The amendment, proposed by Guinea and supported by Madagascar, stated "création d'un tribunal qui aurait à juger les crimes contre l'Humanité et à assurer la protection des Droits de l'Homme".

²⁷ Draft African Charter on Human and Peoples' Rights, CAB/LEG/67/1, 8 December 1979, introduction, para. 4.

July 2004, discussions touched on establishing an African criminal court when the AU Assembly considered the election of judges to the African Court on Human and Peoples' Rights.²⁸ In 2005, former Chadian dictator Hissène Habré (who had fled to Senegal after being deposed) was indicted in Belgium for crimes against humanity, war crimes and other serious violations of human rights. Senegal declined to honour its extradition obligation with Belgium to transfer Habré to Belgium in order to face trial. Instead, Senegal approached the AU on this matter.

Consequently, in January 2006, the AU commissioned a committee of African jurists to prepare a report that considers "all aspects and implications of the Hissène Habré case as well as the options available for his trial".²⁹ The report did not only consider the modalities of prosecuting Habré, but also discussed how the AU should deal with crimes under international law in the future.³⁰

The Extraordinary African Chambers convicted Habré of crimes against humanity on 30 May 2016. This case demonstrates the AU's resolve to address core international crimes and a "possible way forward for international criminal justice in Africa".³¹ Ademola Abass notes that there are at three fundamental bases to support the prosecution of international crimes by the African regional court. These are: (1) a historical necessity for such a court to prosecute crimes which are committed in Africa but which are of no prosecutorial interest to the rest of the world; (2) a treaty obligation to prosecute international crimes in Africa; and (3) the existence of

²⁸ Amnesty International, "Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court", 2016, p. 8 (available on its web site) which cites Report on the Decision of the Assembly of the Union to merge the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, Executive Council, Sixth Ordinary Session, 24–28 January 2005, Abuja, Nigeria, EX.CL/162(VI), p. 2, which in turn cites President Olesegun Obasanjo, Chairperson of the Assembly.

²⁹ AU, Decision on the Hissene Habre Case and the African Union, 24 January 2006, Assembly/AU/Dec.103(VI) (<https://legal-tools.org/doc/0yov4n>).

³⁰ Committee of Eminent African Jurists, "Report of the Committee of Eminent African Jurists on the Case of Hissene Habre", paras. 35 and 39 (<https://legal-tools.org/doc/1er889>).

³¹ Bartram S. Brown, "The International Criminal Court in Africa: Impartiality, Politics, Complementarity and Brexit", in *Temple International and Comparative Law Journal*, 2017, vol. 31, no. 1, p. 145.

crimes peculiar to Africa but over which global international criminal tribunals, such as the ICC, have no jurisdiction.³²

Addressing Abass' three fundamental bases of support requires an understanding of the existing sources of power in international law. Most crucially, in order to address Abass' third point, regarding the existence of crimes peculiar to Africa over which the ICC has no jurisdiction, the centrality of the UNSC to international law – both through the UN Charter and the Rome Statute – must also be addressed. In particular, the expansion of the scope of the UNSC's Chapter VII powers in the 1990s and early 2000s resulted in the Security Council establishing authority superseding State sovereignty and immunities through the creation of the International Criminal Tribunal for the former Yugoslavia and, more specifically, the case against *Slobodan Milošević*.³³ Similarly, Article 13(b) of the Rome Statute establishes the UNSC's controls over ICC jurisdiction through the power of referral. Despite debates and concerns at the time that the UNSC could be acting *ultra vires*, the ambiguity of the Charter, inter-State politics and the spirit of the time has cemented the UNSC's power in international law and its authority to supersede State sovereignty and immunity.

However, at the time of writing, there was a feeling that the liberal optimism of the 1990s is gone, and that consensus in the UNSC has gone with it. While the United States ('US') has sought to undermine the ICC and push its national interests, the ability of the ICC to establish its jurisdiction has been further diminished by the divisions within the UNSC. As US dominance in the UNSC has diminished, China and Russia have grown more confident in their ability to prevent an instrumentalization of international criminal justice. At the same time, the shifting global economic order has undermined the economic leverage that the US, the United Kingdom and France have to ensure that African governments cooperate with international courts, as those governments can look increasingly to China for trade and economic assistance. This phenomenon, un-

³² Ademola Abass, "Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges", in *European Journal of Internal Law*, 2013, vol. 24, no. 3, p. 933.

³³ Nasu Hitoshi, "Chapter VII Powers and the Rule of Law: The Jurisdictional Limits", in *Australian Year Book of International Law*, 2007, vol. 26, p. 93.

dermining the international criminal justice mechanisms, is what Christopher B. Mahony refers to as the “Justice Pivot”.³⁴

A greater reliance on domestic referrals and the office of the prosecutor has played into the hands of the US’ realist approach of using the ICC to pursue its national interests. Other global powers, similarly, have a number of tools they can use to restrict the *proprio motu* assertions of the prosecutor and to exert their influence by supporting weaker States in manipulating the ICC process for political purposes. For example, the United Kingdom and Germany exerted their budgetary controls by cutting the ICC’s budget in 2012, increasing financial pressure on the ICC.³⁵ Cutting funding reduces the ICC Prosecutor’s ability to open new investigations, making the ICC even more dependent on State referrals and State co-operation.³⁶

In becoming more reliant on State co-operation, the ICC is more susceptible to manipulation. Key examples of State manipulation can be found in the two cases: Colombia and Uganda.

16.2.1.1. Colombia

The Colombian government, with assistance from the US government, used the complementarity principle and the ICC’s deference to domestic processes to pre-empt possible ICC investigations into crimes committed by the Colombian government. Colombia worked in co-ordination with the ICC’s OTP to create the Colombian Justice and Peace Unit, which addressed crimes that could fall within the ICC’s jurisdiction in a manner that protected politically powerful actors from scrutiny. The Colombian government commuted sentences for government-aligned forces, but did not pardon individuals, allowing them to meet the OTP’s low threshold for genuine willingness to prosecute crimes.³⁷

As the ICC is jurisdictionally dependent on State referrals and financially constrained from launching OTP investigations in all settings, cases like Colombia, where domestic processes are biased but meet minimum thresholds of willingness, provide States with a strategy to manipu-

³⁴ Christopher B. Mahony, “The Justice Pivot: US International Criminal Law Influence from Outside the Rome Statute”, in *Georgetown Journal of International Law*, 2015, vol. 46, no. 4, p. 1093.

³⁵ Mahony, 2015, p. 248, see above note 2.

³⁶ *Ibid.*

³⁷ Mahony, 2015, p. 1093, see above note 34.

late the ICC and protect the government's political supporters from prosecution.

16.2.1.2. Uganda

In Uganda, President Museveni was able to successfully use the ICC to target his political adversaries through the State referral mechanism. By domestically investigating allegations against the Ugandan People's Defence Forces, Uganda was able to meet the OTP's threshold of willingness, similarly to Colombia.³⁸ However, Uganda simultaneously asked for the ICC to investigate crimes committed by the Lord's Resistance Army, turning over its commander, Dominic Ongwen, to the ICC.³⁹ This is another model that States can use to manipulate complementarity and set the ICC's case selection in a way that targets political opponents and allows State-aligned perpetrators to escape scrutiny.⁴⁰

The next section outlines the current effort of the AU to establish a regional court to deal with core international crime committed in Africa.

16.3. Grapes of Legal Wrath: The North-South Divorce; Contestation; Whose Complementarity, Whose Narrative

On 12 June 2013, the AU Assembly proposed that "African States Parties to the Rome Statute introduce amendments to the Rome Statute to recognize an African regional Judicial Mechanism to deal with international crimes in accordance with the principles of complementarity".⁴¹ This language on complementary was removed in the final resolution, which read that "African States Parties propose relevant amendments to the Rome Statute, in accordance with the Article 121 of the Statute".⁴² In June 2014, the AU Assembly, meeting in Malabo, Equatorial Guinea, adopted the Protocol on Amendments to the Protocol on the Statute of the ACJHR and called on AU member States to sign and ratify it. The Malabo Protocol extends the jurisdiction of the yet to be established (at the time of writing)

³⁸ Mahony, 2015, p. 244, see above note 2.

³⁹ *Ibid.*, p. 246.

⁴⁰ This was a tactic used by Joseph Kabila in the DRC to target Jean-Pierre Bemba, strengthening his regime and removing a strong political opponent.

⁴¹ AU, Draft Decision on Africa's Relationship with the International Criminal Court (ICC), 12 October 2013, para. 9(viii) (on file with the authors).

⁴² AU, Decision on Africa's Relationship with the International Criminal Court (ICC), 12 October 2013, Ext/Assembly/AU/Dec.1(Oct.2013), para. 10(vi).

ACJHR to international and transnational crimes. When the Malabo Protocol comes into force, the ACJHR will have jurisdiction to try 14 crimes:⁴³ genocide; crimes against humanity; war crimes; the crime of unconstitutional change of government; piracy; terrorism; mercenarism; corruption; money laundering; trafficking in persons; trafficking in drugs; trafficking in hazardous wastes; illicit exploitation of natural resources; and the crime of aggression.⁴⁴

Where Article 17 of the Rome Statute defers the primary responsibility to investigate and prosecute cases to States Parties, there is no explicit discussion of the role of regional courts and how the ICC's complementarity principle would apply.⁴⁵ The complementarity principle is the mechanism by which the Rome Statute orders a jurisdictional relationship between the Court and its States Parties so that the latter will always have the first go at a case unless where, according to Article 17 and preambular paragraph 10 of the Statute, they are 'unwilling' or 'genuinely unable' to investigate or prosecute a case. If the AU's regional court were to take on the same conduct and personnel as the Al-Bashir case, there would undoubtedly be long debates and discussions around the complementarity principle of the ICC and the regional courts.

Some legal scholars argue that the complementarity principle of the Rome Statute 'does not allow' regional courts and binds the ICC and its States Parties in an exclusive relationship.⁴⁶ However, this is not explicitly laid out in the Rome Statute. The complementarity principle is simply the mechanism by which the Rome Statute orders a jurisdictional relationship between the Court and its States Parties so that the State has primacy in investigating and prosecuting a case. The ambiguity in the complementarity principle may allow for this primacy to extend to regional courts.

There are two sides to the complementarity principle – the primacy of the States' jurisdiction and the role of the ICC as a court of last resort.⁴⁷ Regarding the first aspect of complementarity, Akande argues that "it would be extraordinary and incoherent if the rule permitting prosecution

⁴³ AU Protocol on Amendments, 2014, see above note 12.

⁴⁴ Abass, 2013, pp. 940 – 944, see above note 32.

⁴⁵ ICC Statute, see above note 18.

⁴⁶ Abass, 2013, p. 944, see above note 32.

⁴⁷ Dapo Akande, "The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits", in *Journal of International Criminal Justice*, 2003, vol. 1, no. 3, pp. 619–650.

of crimes against the collective interest by individual states – acting as agents of the community – simultaneously prevented those states from acting collectively in the prosecution of these crimes”.⁴⁸ Under this interpretation, regional courts can be seen as a method through which individual States work to ensure that they are genuinely able to investigate and prosecute cases that would otherwise fall within the jurisdiction of the ICC. In cases like the *Saif Gaddafi* case in Libya, where the Libyan government was unable to exercise control over detention facilities or protect witnesses,⁴⁹ regional courts with greater capacity than those of an individual State could strengthen the complementarity principle. This would reinforce the second aspect of the principle and allow the ICC to truly be a court of last resort.

16.4. If Not Complementarity, Then Co-ordination?

If complementarity between the ICC and the ACJHR is impossible, there is nothing preventing the two courts from co-ordinating.⁵⁰ As Abass has stated, the African Court provides an opportunity to try cases that are not of political importance outside of Africa.⁵¹ Given the constraints – both financial and political – on case selection for the ICC, the new African Court could work alongside the ICC to prevent impunity. The risk of overlapping jurisdiction should not be seen as an obstacle, especially considering these constraints.

There is precedent for the ICC to co-operate with regional courts. In 2012, the Inter-American Commission on Human Rights signed a co-operation agreement with the ICC.⁵² Under this agreement, the two courts agree to share information on decisions, judgments, reports and documents that could be useful in processing other cases. The concerns over complementarity between the ICC and regional courts are strangely absent from discourse around the IACHR and European Court of Human Rights. If these courts are able to constructively operate alongside the ICC, there is no reason that the African Court cannot adopt a similar co-operative arrangement with the ICC.

⁴⁸ *Ibid.*, p. 626.

⁴⁹ Mahony, 2015, p. 240, see above note 2.

⁵⁰ Organization of American States (“OAS”), “IACHR Signs Cooperation Agreement with International Criminal Court”, 26 April 2012, available on its web site.

⁵¹ Abass, 2013, p. 933, see above note 32.

⁵² OAS, 26 April 2012, see above note 50.

16.5. Another Arena for Political Manipulation?

As discussed previously, the State referral mechanism of the ICC has been used at times as a weapon for States to target their political opponents. In the case of Uganda, Museveni turned Dominic Ongwen over to the ICC while using the complementarity principle to effectively shield Ugandan People's Defence Forces soldiers from punishment.⁵³ Similarly, in DRC, Joseph Kabila has regularly used the ICC to target political opponents, most notably Jean-Pierre Bemba, who was recently acquitted by the Court.⁵⁴ Bemba's conviction for witness tampering by the Court was then used to justify the DRC electoral commission's decision to invalidate his candidacy in the 2018 presidential elections.⁵⁵ Notwithstanding a dysfunctional government in place, following the killing of President Muammar Gaddafi, the ICC's OTP, empowered by Resolution 1970 of the UNSC to investigate the Libyan situation in March 2011, declared inadmissible the case against Abdullah Al-Senussi (the head of the Libyan's military intelligence service) because Libya was both willing and able to genuinely prosecute him.⁵⁶ Interestingly, however, the ICC's OTP continued to request Libyan governments⁵⁷ to handover Saif Gaddafi (Muammar Gaddafi's son) to The Hague.⁵⁸ While there are significant differences between the two cases, such as the abduction of Al-Senussi's counsel or inability to control detention facilities in the case of Gaddafi, the primary difference in the two cases is the fact that Al-Senussi was in the hands of the government.⁵⁹

⁵³ Mahony, 2015, p. 244, see above note 2.

⁵⁴ ICC, "Bemba Case", available on its web site.

⁵⁵ Deutsche Welle, "DR Congo court bans Jean-Pierre Bemba from elections", 3 September 2018.

⁵⁶ ICC, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Pre-Trial Chamber, Decision on the admissibility of the case against Abdullah Al-Senussi, 11 October 2013, ICC-01/11-01/11-466-Red, p. 34 (<https://legal-tools.org/doc/af6104>). For a detailed analysis of the Libyan situation, see Mark Klamberg (ed.), *Commentary of the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, Brussels, 2017, p. 209 (<https://www.legal-tools.org/doc/aa0e2b>).

⁵⁷ Libya has currently two rival governments, see Rob Crilly, "Gaddafi's son Saif 'to run for Libyan president' in 2018 elections", *The Telegraph*, 20 March 2018.

⁵⁸ UN News, "International court rejects Saif Gaddafi call to drop arrest warrant", 2 November 2018.

⁵⁹ Mahony, 2015, p. 240, see above note 2.

In the Côte d'Ivoire situation, the French government and the ICC's OTP discussed the arrest and detention of Gbagbo even before the investigations had started, for the alleged crimes committed in 2010 and 2011 following the disputed presidential elections.⁶⁰ This is because the Sarkozy government preferred the incumbent President Alassane Ouattara over Gbagbo. In October 2017, Fanny Pigeaud, a French investigative journalist, comprehensively documented how a French diplomat "who had led Prosecutor Moreno-Ocampo's diplomatic Division between 2006 and 2010 – worked with the Office of the Prosecutor after she returned to the foreign ministry to ensure that Gbagbo would be detained when Ouattara assumed office, until the Court would have a case ready".⁶¹ The French, argues Morten Bergsmo, should ponder on how it became "the midwife for the collapsed Gbagbo case", which effectively crumbled on 15 January 2019.⁶²

It is quite possible that the ACJHR could similarly be corrupted and used to solidify State power and target political opponents. However, the authors believe that the African Court would have the opposite effect. The AU has already begun to establish norms holding its governments accountable. One example is the successful prosecution of the former President of Chad, Hissène Habré, by the Extraordinary African Chambers in Senegal. Another example, is the recent position of the AU to call on the DRC's electoral commission to suspend its pronouncement of its controversial results for the 2018 presidential election.⁶³ As the AU continues to develop and implement norms holding African rulers accountable, the ACJHR could play a central role in this creation and enforcement. Even if the African Court functions as a tool for targeting political rivals, there is nothing to lose as this is the current status quo with the ICC, as shown by the cases mentioned previously. Given the shifting global balance of power, a reinforced AU can work to empower African governments to engage more constructively in international justice systems. The current relationships of power within the field of international criminal justice preclude

⁶⁰ Morten Bergsmo, "The Gbagbo case and the role of France", *Le Monde*, 18 January 2019 (<https://www.legal-tools.org/doc/693bee>).

⁶¹ *Ibid.*, p. 1.

⁶² *Ibid.*

⁶³ Anna Kapambwe Mwaba, "The African Union called on Congo to suspend its election's results. That's unprecedented", *The Washington Post*, 21 January 2019.

the independent, impartial and fair dispensation of justice.⁶⁴ Providing greater autonomy for African States through a regional court is a critical step in undermining these power structures. Moreover, and if the ACJHR becomes functional, the African jurisprudence will be properly rooted and expanded on in the spirit that was proposed at a six-day conference held in April 1964 at the University of Ibadan in Nigeria.⁶⁵

It is also important to note the ways that African States have already shaped international law. A key example of the influence of African States is in the criminalization of aggression. The crime of aggression has longstanding roots, going back to the execution of Konrad von Hohenstaufen for initiating an unjust war in 1268, later being encoded in international law through the Treaty of Versailles in 1919.⁶⁶ However, after the establishment of the United Nations Security Council, the crime of aggression fell out of favour until the 1970s, when it returned to the international stage through resolutions condemning acts of aggression in Southern Rhodesia, South Africa, Benin, Israel and Iraq.⁶⁷

During the 1970s and 1980s, African legal scholars began to push for further development around the crime of aggression. Notably, Doudou Thiam, the Senegalese special rapporteur of the International Law Commission, played a central role in the drafting of the Code of Offences against the Peace and Security of Mankind, which was a major step in the development of the crime of aggression.⁶⁸ Later, at the 1998 diplomatic conference, African States led the call for the inclusion of the crime of aggression in the statute.⁶⁹ African States would again lead the charge in

⁶⁴ Centre for International Law Research and Policy ('CILRAP') and the International Nuremberg Principles Academy, "Power in International Criminal Justice: Towards a Sociology of International Justice", 2017, p. 2, available at CILRAP's web site.

⁶⁵ Daryll Forde "Tropical African Studies. A Report on the Conference Organized by the International African Institute in Conjunction with the University of Ibadan 5–11 April 1964", in *Journal of the International African Institute*, 1965, vol. 35, no. 1, pp. 30–97.

⁶⁶ Allison Turner, Thesis for Master of Laws Degree, Université de Montréal, 2005, pp. 29 – 30 (on file with the authors).

⁶⁷ *Ibid.*, p. 55.

⁶⁸ Izunna Isdore Ozu, "Criminalization of Aggression in International Law: The Role and Position of African States", in *African Journal of Criminal Law and Jurisprudence*, 2018, vol. 3, p. 18.

⁶⁹ *Ibid.*, p. 19.

the Kampala amendment, establishing the ICC's jurisdiction over the crime of aggression as of 1 January 2017.⁷⁰

It is very likely that African States will continue to push for further accountability around the crime of aggression. Christopher B. Mahony contends that, when considering the crime of aggression, the international legal system must also consider the “implications of targeting all actors aiding, abetting and accessorizing” actors committing these crimes.⁷¹ To date, the ICC has failed to hold those aiding and abetting conflicts accountable. Similarly, African States have missed an opportunity by not pushing the ICC to address aiding and abetting. However, a strongly supported ACJHR has the potential to finally address a root cause of conflict – aiders and abettors seeking to profit from conflict – as Article 28N of the Malabo Protocol establishes the Court's ability to try those inciting, aiding, abetting, accessorizing or attempting to commit offenses.⁷²

As the launch of the ACJHR grows near, new technologies are also emerging that will allow international courts to illuminate the crimes outlined in Article 28N of the Malabo Protocol. For example, artificial intelligence programmes have been able to predict increases and decreases in political violence from 2012 to 2017 in Kenya based on the language used by leaders.⁷³ As similar tools emerge, it is essential that African States are given the opportunity to contribute to international law and that they seize the opportunity to target the roots of violence, through Article 28N of the Malabo Protocol. While cases of aiding and abetting could likely be used as a tool for political manipulation, the possibility of holding accountable external actors – like the United States, which was responsible for 19% of global small arms exports from 2013 to 2015⁷⁴ – is crucial to not only ending and preventing impunity, but also in uprooting the causes of conflict.

⁷⁰ *Ibid.*, p. 24.

⁷¹ Christopher B. Mahony, “Make the ICC Relevant: Aiding, Abetting and Accessorizing as Aggravating Factors in Preliminary Examination”, in Bergsmo and Stahn (eds.), 2018, p. 182, see above note 5.

⁷² AU Protocol on Amendments, 2014, Article 25, see above note 12.

⁷³ Christopher B. Mahony, Eduardo Albrecht and Murat Sensoy, “The Relationship Between Influential Actors' Language and Violence: A Kenyan Case Study Using Artificial Intelligence”, in *International Growth Centre*, 2019, p. 43 (available on its web site).

⁷⁴ Paul Holtom and Irene Pavesi, “Trade Update 2018”, in *Small Arms Survey*, 2018, p. 20 (available on its web site).

16.6. Complementarity or No Complementarity, the Court is Coming

A distinct legal basis for prosecuting international crimes in Africa derives from the obligation under AU's Constitutive Act ('AU Act') and other treaties to prosecute crimes prescribed in those treaties. Article 4(h) of the AU Act provides for "the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity as well as a *serious threat to legitimate order to restore peace and stability to the Member State* of the Union upon the recommendation of the Peace and Security Council".⁷⁵

Under international law the legality of a subsequent treaty may be determined by reference to a pre-existing treaty. This principle is enshrined in Article 34 of the Vienna Convention on the Law of Treaties, which states that a "treaty does not create either obligations or rights for a third State without its consent". Where the States Parties to a treaty decide to conclude another treaty, which establishes obligations similar to those in the previous treaty, the only legal requirement they must satisfy is that their obligations under the later treaty do not *conflict* with obligations assumed under the previous treaty.

The AU is an international organization with legal personality separate from its member States.⁴⁶ The obligations assumed by any AU member State under the Rome Statute, specifically with respect to complementarity or other rules, cannot apply to the Union. It is true that the African Criminal Chamber (when formally established) will potentially compete with the ICC in terms of jurisdiction over persons and crimes, thereby undermining the ICC's competence over international crimes.

The ACJHR would not find its legal basis under the Rome Statute. Rather, the legal basis for the establishment of such a court can be found in the tenor of Article 4(m)(o) of the Constitutive Act of the AU, which states: "The Union shall function in accordance with the following principles [...] respect for democratic principles, human rights, the rule of law and good governance". As the AU is a distinct legal entity, the existence of the ICC cannot prevent the creation of an African Court provided that the obligations of the Court do not conflict with the obligations assumed under the Rome Statute. This is clearly established in the aforementioned

⁷⁵ See African Union, Constitutive Act, 11 July 2000 (<https://legal-tools.org/doc/496299>) (emphasis added).

Article 34. Simply put, because the AU is an entity separate from member States, there are no legal barriers that could prevent the AU from creating the ACJHR, regardless of whether the ICC would recognize it within its complementarity framework.

16.6.1. An Opportunity to Reconcile?

Additionally, at the time of the writing, there is a case that may assist the ICC to restore its romance with the AU. Heinous crimes committed with impunity in the DRC over the past decades,⁷⁶ have led to the DRC being named the “rape capital of the world”⁷⁷ with an estimate of 48 woman and girls being raped every hour.⁷⁸ Core international crimes allegedly committed in DRC have been reported by the United Nations⁷⁹ and other organizations.⁸⁰ Some prosecutions have been completed and others are ongoing at the ICC.⁸¹ Fewer cases of less importance have also been prose-

⁷⁶ For an analysis of crimes in Ituri, see Anneke Van Woudenberg, “Ituri – ‘Covered in Blood’: Ethnically Targeted Violence in North-eastern DR Congo”, Human Rights Watch (‘HRW’), 2003, vol. 15, no. 11, available on HRW’s web site; See also Daniel Bergner, “The Most Unconventional Weapon”, *The New York Times Magazine*, 26 October 2003. See also Param-Preet Singh, Elizabeth Evenson and Elise Keppler, *Courting History: The Landmark International Criminal Court’s First Years*, HRW, New York, 2008, pp. 60–61. For an analysis of the crimes in North and South Kivu provinces, see Juliane Kippenberg, “Soldiers who Rape, Commanders who Condone: Sexual Violence and Military Reform in the Democratic Republic of Congo”, HRW, 16 July 2009, available on HRW’s web site. See also generally Elizabeth Evenson, *Unfinished Business: Closing Gaps in the Selection of ICC Cases*, HRW, New York, 2011, p. 9 (available on HRW’s web site).

⁷⁷ UN News, “Tackling sexual violence must include prevention, ending impunity – UN official”, 27 April 2010 (available on its web site).

⁷⁸ Benson Chinedu Olugbuo, “Thematic Prosecution of International Sex Crimes and Stigmatisation of Victims and Survivors: Two Sides of the Same Coin?”, in Morten Bergsmo (ed.), *Thematic Prosecution of International Sex Crimes*, Torkel Opsahl Academic EPublisher, Beijing, 2012, p. 128 (<https://www.legal-tools.org/doc/397b61>).

⁷⁹ Office of the High Commissioner for Human Rights, “Report of the Mapping Exercise documenting the most serious violations of human rights and international law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003”, August 2010 (available on its web site).

⁸⁰ Congo Research Group, “Setting Fire to Your Own House Crisis in Kasai: The Manipulation of Customary Power and the Instrumentalization of Disorder”, July 2018 (available on its web site).

⁸¹ Thomas Lubanga Dyilo was arrested in March 2006 and convicted in March 2012 for recruitment and enlistment of child soldiers in his Union des Patriotes Congolais movement. Germain Katanga and Mathieu Ngudjolo Chui were arrested in 2007/2008 and, in 2012, Chui was acquitted on war crimes and crimes against humanity charges for evidence insufficiency; and in March 2014, Katanga was convicted of aiding and abetting crimes against

cuted at the national level in some sham trials.⁸² There is still a significant need for justice to be done in the DRC for core international crimes.⁸³ As previously stated in this chapter, the country has recently organized presidential elections, culminating in an end to the rule of former President Joseph Kabila. However, various countries and the AU have been reluctant to acknowledge the results of those elections.⁸⁴ Rumours suggest that Joseph Kabila and Félix Tshisekedi, the incumbent president, had an *entente*, the nature of which is unknown.⁸⁵ We contend that part of this arrangement may include the protection of Kabila from being prosecuted in both national and international courts. Kabila's government referred the DRC's situation to the ICC in April 2004. This provided the ICC with jurisdictions over alleged core international crimes committed in DRC from 1 July 2002 onwards. The DRC's referral was predominantly a diversion of political rivals than to end impunity.⁸⁶ At the time, it was common knowledge that Kabila was not as directly involved in the Ituri conflict as were his political rivals, hence he drafted this referral with the hope that he would not be investigated.

There is a question one ought to ask: is this the right time for the ICC to investigate former President Kabila and his top officials for core international crimes allegedly committed during Kabila's government? The short answer to this question is 'yes', for three reasons:⁸⁷ First, to test

humanity and war crimes. There is ongoing investigation in the DRC, focusing on the FDLR rebels from Rwanda who are active in North and South Kivu.

⁸² Charles Briefel, Ignacio Tredici and Neldjingaye Kameldy, "Report of the Criminal Law and Judicial Advisory Service Combatting Impunity in the Democratic Republic of the Congo – Lessons Learned from the United Nations Prosecution Support Cell Programme", June 2015 (available at United Nations Peacekeeping's web site).

⁸³ See, for example, a 2008 survey conducted in eastern DRC finding that 92 per cent of the population demanded accountability for core international crimes. See Patrick Vinck, Phuong Pham, Suliman Baldo, Rachel Shigekane, "Living in Fear. A Population-Based Survey on Attitudes About Peace, Justice, and Social Reconstruction in Eastern Democratic Republic of Congo", International Center for Transitional Justice, August 2008, pp. 40–41 (available on its web site).

⁸⁴ *BBC News*, "African Union urges DR Congo to delay final election results", 18 January 2019.

⁸⁵ Jason Burke, "Why Kabila may be real victor of DRC's contested election", *The Guardian*, 11 January 2019.

⁸⁶ William W. Burke-White, "Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo", in *Leiden Journal of International Law*, 2005, vol. 18, p. 565.

⁸⁷ The authors may seek to expand on this thesis on a later occasion.

the current attitude of the AU's reservation in handing over former Heads of State to stand trial for alleged core international crimes (as, arguably, Kabila can no longer claim any Head-of-State immunity),⁸⁸ second, there is no political motivation in prosecuting Kabila or his top officials (Kabila's prosecution will not lead to regime change – thus, a classic example for a proper *proprio motu* powers pursuant to Article 15 of the Rome Statute⁸⁹ that is relatively apolitical compared to the cases of Kenya⁹⁰ and Cote d'Ivoire); and third, for the Prosecutor to test her independence (a vital stance for any prosecution, and indeed for the equilibrium of justice⁹¹). In any event, prosecuting 'big fish'⁹² in the DRC would complement national accountability efforts if the current government in the Congo is unable (and not necessarily unwilling) to prosecute Kabila and his cronies who are meandering around the country. Given the AU's hesitance to accept the recent elections, perhaps this case could provide an oppor-

⁸⁸ It is noted however that pursuant to Article 104 of the DRC's Constitution, "former elected Presidents of the Republic are by law Senators for life". This could prove problematic if the current Congolese government declines to handover Kabila by virtue of immunity under this provision.

⁸⁹ For a detail analysis on the criteria for selecting core international crimes to investigate, see Morten Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Torkel Opsahl Academic EPublisher, Oslo, 2010 (<http://www.toaep.org/ps-pdf/4-bergsmo-second>).

⁹⁰ It has been argued that the Kenyan situation was not a true *proprio motu* investigation but rather a 'concealed self-referral' – see, for example, Ahmed Samir Hassanein, "Self-referral of Situations to the International Criminal Court: Complementarity in Practice – Complementarity in Crisis", in *International Criminal Law Review*, 2017, vol. 17, no. 1, pp. 107–134.

⁹¹ Jan M. Broekman, "Justice as Equilibrium", in *Law and Philosophy*, 1986, vol. 5, no. 3, pp. 369–391.

⁹² See ICC, Situation in the Democratic Republic of Congo, *Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber, Decision Concerning the Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of documents into the Record of the Case Against Mr. Thomas Lubanga Dyilo, 24 February 2006, ICC-01/04-01/06, para. 50 (<https://legal-tools.org/doc/c60aaa>), where the ICC's Pre-Trial Chamber I held that only the "most senior leaders suspected of being the most responsible" for core international crimes should be prosecuted before the ICC. See also William A. Schabas, "Interacting with Academic Institutions", in Morten Bergsmo, Klaus Rackwitz and SONG, Tianying (eds.), *Historical Origins of International Criminal Law: Volume 5*, Torkel Opsahl Academic EPublisher, Brussels, 2017, p. 378 (<https://www.legal-tools.org/doc/09c8b8/>), where Schabas suggests that the focus of the Rome Statute's Preamble, Article 1, and Articles 6 to 8 is on the prosecution of "big fish"; and the ICC's power under Article 17(1)(d) to dismiss insignificant cases.

tunity for the ICC and the AU to reconcile and restore some form of cooperative relations.

16.7. Conclusion

As a cautionary note, it is hardly surprising that many years ago, when Africa resigned to external pressure and created an African human rights mechanism, they were more concerned with sovereignty and the maintenance of the status quo than with the protection of individuals and groups within their States. Given the ICC's deviation from international custom, through its arrest warrant against former President Omar Al-Bashir, it is unsurprising that these same African States have responded with such vigour. In the future, we may come to look back on that arrest warrant as an inflection point, and a main driver in the creation of a regional court of human rights in Africa.

Yes, the African Criminal Chamber will inevitably compete with the ICC in terms of jurisdiction over persons and crimes. There is, in other words, a risk that the African Chamber could end up working against, and undermining, the ICC in the exercise of its competence over core international crimes. This can also be analysed under the theme of power in international criminal justice, which this anthology concerns. The ICC's position of power within the overall system of international criminal justice⁹³ may well be affected by the operation of the African Chamber. A regional block of African States may in this way weaken the relative power-standing of the common ICC. This illustrates that regional groups of States and regional organisations such as the AU and the European Union⁹⁴ must be included among the central actors to study in a sociology of international criminal justice.

But would the rise of an African Criminal Chamber also undermine the legitimacy of the ICC, not only its power? Many African observers would probably respond by saying that the legitimacy of the ICC is al-

⁹³ In Chapter 20 below – “The Role of the International Criminal Court System in Modulating Political Behaviour in Africa: The Nigerian Example” – Tosin Osasona considers the power of the ICC as the central actor of the system of international criminal justice in preventing and responding to electoral violence in African States.

⁹⁴ In Chapter 13 above – “Is the European Union an Unexpected Guest at the International Criminal Court?” – Jacopo Governa and Sara Pausco discuss the different ways the European Union exercises power in support of the ICC, and how the ICC relates to the Union.

ready in question. As asserted by Obiora Chinedu Okafor and Uchechukwu Ngwaba:

TWAIL [Third World Approaches to International Law] scholars have long noted the ways in which the seeming subordination of third world states to the same international institutions that appear weak in the face of powerful states undermines the legitimacy of those institutions, and of the international system as a whole.⁹⁵

This is not the place to elaborate on this challenge. We are left with the question what the ICC should do in response to the African Criminal Chamber. Rather than fighting its creation, the ICC should embrace it. Recognizing such a court within the existing complementarity principle would elevate the ICC, by levelling the legal playing field between Africa and the Global North. This re-balancing would allow the international system of courts and justice mechanisms to adjust to the coming justice pivot, which is all but inevitable in the face of a divided UNSC and shifting global economic order. Furthermore, institutionalizing a relationship between the ACJHR and the ICC would allow for African States to come to the table as partners in shaping the international legal framework, rather than obstructing a system that they may feel excluded from.

It is also likely that bringing the AU to the table could result in a much-needed addition to the current international legal framework, with a shift from legalistic approaches to fuller approaches focused on the realization of rights. In the aftermath of the civil wars in Sierra Leone and Liberia, peace education programmes and truth and reconciliation commissions were crucial aspects of the peace process.⁹⁶ Similarly, in South Africa, the focus on the role of the education system in educating future generations on the transition process and the role of the Truth and Reconciliation Commission has been crucial in helping young people explore critical issues and helping the country grow and move past conflict.⁹⁷ By providing space for African conceptions of justice and human rights, the international legal framework should be strengthened, incorporating new ap-

⁹⁵ Okafor and Ngwaba, 2015, p. 102, see above note 4.

⁹⁶ Susan Shepler and James Williams, "Understanding Sierra Leonean and Liberian teachers' views on discussing past wars in their classrooms", in *Comparative Education*, 2017, vol. 53, no. 3.

⁹⁷ Clara Ramirez-Barat and Roger Duthie, "Education and Transitional Justice", International Center for Transitional Justice, November 2015 (available on its web site).

proaches, and broadening its understandings of rights. In this way, the international community can move past the concept of ending impunity and focus on the restoration of rights.

Agency, Authority, and Autonomy: The Role and Impact of Interactions with Transnational Civil Society on the International Criminal Court's Operations

Mayesha Alam*

17.1. Introduction

Since the end of the Second World War, international courts and court-like institutions have emerged across the globe to address and remedy challenges that cover a range of issues from trade agreements to control of the sea.¹ In the field of international criminal justice, the International Criminal Court ('ICC')² was established via the adoption of the Rome Statute in 1998. The Statute was designed as a punitive framework for international criminal justice that – ideally – would hold accountable wrongdoers, discourage future perpetrators, and end impunity for odious human rights violations, namely genocide, war crimes, and crimes against humanity. Conceived in the service of humanity, the Court is a permanent body comprised of four organs: the Presidency, the Chambers (judges), the Office of the Prosecutor, and the Registry. In addition, the Assembly of States Parties ('ASP') – comprised of countries that ratified the Rome Statute – serves key regulatory functions over the Court including the

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¹ Karen J. Alter, *The New Terrain of International Law: Courts, Politics, Rights*, Princeton University Press, 2014; Beth A. Simmons and Allison Danner, "Credible Commitments and the International Criminal Court", in *International Organization*, 2010, vol. 64, no. 2, pp. 225–256.

² Hereafter also referred to as the Court.

election of prosecutors and judges, approval of annual budget, oversight of administration, and adoption of rules and reforms.

The ICC is remarkable in not only its focus on human rights but also in its mission to hold individuals – rather than States – accountable.³ As such, the ICC brings into focus the role of individuals in orchestrating, abetting, and perpetrating grave violations of human rights. Despite the many complications, frustrations, and shortcomings that characterize the process of crafting the Rome Statute, the fact that the treaty was adopted and then ratified by more than 120 States remains a triumph of international co-operation. Non-governmental civil society organizations, both nationally and transnationally, not only pushed for the creation of the Court but also played crucial roles in framing the Statute and setting its scope. As Marlies Glasius observes, “the input of global civil society in the process which led to the adoption of the Statute has been almost unprecedented in international treaty negotiations”.⁴

The role of civil society in global governance has been a topic of considerable scholarly interest in the post-Cold War era but much closer attention is needed with respect to the arena of international criminal justice generally and specifically since ICC came into being. In what ways and to what end do transnational civil society actors generate and exercise power in engaging with the Court? What are the modes, mechanisms, and motivations that drive transnational civil society interactions with the Court? In seeking to answer these questions, this chapter (1) offers a relevant conceptualization of power, (2) examines the agency, authority, and autonomy of transnational civil society *vis-à-vis* the ICC, and (3) analyses the impact of transnational civil society interactions on the operations of the Court.

I argue that the transnational civil society groups exercise normative and discursive agency through a variety of strategies to produce power and influence the ICC’s functions. I find that, while unlikely and unable to compel the ICC to act in accordance to their wishes, transnational civil society groups continue to hold authority and wield power through agenda-setting, technical expertise, and moral accountability. I also show that

³ William A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, 2011.

⁴ Marlies Glasius, “Expertise in the Cause of Justice: Global Civil Society Influence on the Statute for an International Criminal Court”, in Marlies Glasius, Mary Kaldor and Helmut K. Anheier (eds.), *Global Civil Society*, 2002, Oxford University Press, Oxford, p. 137.

transnational civil society organizations, at once critical and at the same time supportive of efforts to uphold the Rome Statute, strive to maintain their autonomy and resist becoming mere instruments of the ICC and its States Parties. The Court relies on transnational civil society to amplify awareness about its mission, vision, and impact. Relatedly, the ICC faces very real constraints on its capacity – due to bureaucratic inefficiencies, political hurdles, and resources shortages – that necessitate collaboration and co-operation with a range of non-State partners including transnational civil society. Transnational civil society derives and deploys power in its relations with the Court cognizant of the ultimate shared goal of ending impunity.

17.1.1. Why is This Important?

Interest in the transnational arena has exploded thanks to the spread of globalization and the proliferation of international institutions. Ann Florini and Beth Simmons assert that transnational civil society plays a progressively salient role in global governance.⁵ With respect to the ICC, many scholars have documented and analysed the role of civil society actors (including but not limited to transnational groups) in crafting and adopting the Rome Statute as well as establishing the ICC.⁶ Relatedly, a sizable literature exists on the role of transnational civil society in changing norms and beliefs about international criminal justice more generally.⁷ Much less, however, has been written about how transnational civil society has affected and continues to affect the ICC's work since it began operating, and, specifically, how they exercise power in their relationships with the Court. As Margaret Keck and Kathryn Sikkink observe, scholars

⁵ Ann M. Florini, *The Third Force: The Rise of Transnational Civil Society*, Brookings Institution Press, 2012.

⁶ Glasius, 2002, see above note 4 enumerates the variety of ways in and ends to which NGOs participated in the Rome Conference including authoring memos, analyses, and recommendations; facilitating workshops and meetings; amplifying the impetus for the ICC internationally and locally through their networks; lobbying states to adopt the Rome Statute; offering technical expertise and acting as support staff to under-resourced delegations; leading awareness-raising campaigns, and raising and pooling financial resources to enable geographically diverse attendance at the conference.

⁷ Marlies Glasius, *The International Criminal Court: A Global Civil Society Achievement*, Routledge, 2006; Alastair Iain Johnston, "Treating International Institutions as Social Environments", in *International Studies Quarterly*, 2001, vol. 45, no. 4, p. 487–515; Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics (The Norton Series in World Politics)*, WW Norton & Company, 2011.

are “late to the party” in understanding and assessing the approaches, networks, and outcomes that transnational civil society has committed itself to for decades.⁸ Just as it is important to augment scholarship on the sociology of international criminal justice, so too is it salient to draw connections between it and the growing body of analysis on the transnationalisation of civil society. This chapter transects these literatures by adding a liberal strand of transnational advocacy research that represents powerful theoretical and empirical counters to both non-liberal theories (which prioritize other agents or structures) and other strands of liberal international theory (which emphasize the State or domestic politics).

This study is a timely endeavour for several reasons. First, the field of international criminal justice today is adequately developed such that scholars are increasingly interested in investigating and evaluating the conduct of relevant institutions and actors. Accordingly, a growing sub-field on the sociology of international criminal justice has emerged. A sociological approach emphasizes the dynamic processes and interactions that define relationships between relevant actors within the existing architecture of international criminal justice. Peter Dixon and Chris Tenove contend that the field of international criminal justice emerged at the nexus of three interrelated disciplines, namely human rights, international diplomacy, and criminal justice.⁹ Transnational civil society is a category of actors that – as I discuss below – sometimes work in unison and other times divergently for the cause of international criminal justice, but the role and impact of transnational civil society groups *vis-à-vis* the ICC remains understudied.

Second, as I show, transnational civil society wields considerable power and influence over the Court through their varied agendas and forms of engagement. Understanding the nature of this power, including its contours and limits, is essential to advancing scholarship on how justice is conceptualized and administered, laws are institutionalized, and the international legal system related to human rights protection is fortified.

Third, transnational civil society networks play important roles in facilitating co-ordination and co-operation between the ICC, States, and

⁸ Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, Cornell University Press, 2004.

⁹ Peter Dixon and Chris Tenove, “International Criminal Justice as a Transnational Field: Rules, Authority and Victims”, in *International Journal of Transitional Justice*, 2013, vol. 7, no. 3, pp. 393–412.

other international organizations such as the UN not only in the furtherance of investigations and prosecutions but also during times when the Court is subject to heavy criticism and scepticism. This has been particularly important in the lead-up to the twentieth anniversary of the Rome Statute because, in the last couple of years, multiple countries (for example, South Africa, Burundi, The Gambia, and the Philippines) have announced their intentions to withdraw from the Rome Statute.¹⁰

The continued sophistication of international human rights law and the emergence of international institutions dedicated to human rights – including the ICC – developed in conjunction with the spread of transnational civil society.¹¹ So, in trying to understand power in international criminal justice, it is salient to take stock of its manifestation in relations between the Court and transnational civil society. Transnational civil society's relationships to donors, including but not limited to States that are major players in international criminal justice, shape strategies and capacity to engage with the ICC. These are complex, multi-layered interactions that warrant review and scrutiny in order to explain the agency, authority, and autonomy of transnational civil society.

17.1.2. Methodology

The findings of this study are based on a critical review of existing academic and grey literature, and process tracing of fresh data collected through interviews with representatives from transnational civil society groups and networks, ICC officials, and subject-matter experts.¹² Interviewees represent a variety of professional backgrounds ranging from staff of the Court to representatives of transnational civil society organizations as well as subject-matter experts in academic institutions. Participants were identified through a combination of convenience, purposeful, and snowball sampling. Interviews were conducted in person in The Hague, New York, and Washington, D.C. as well as via Skype with individuals based elsewhere. To protect the identity of interviewees and en-

¹⁰ It is beyond the scope of this chapter to explain these developments, but it is important to note that those countries which have expressed their desire to withdraw have done so after the ICC directed its attention to aiding, abetting, or perpetrating of crimes by leaders of said countries.

¹¹ Thomas Risse, Stephen C. Ropp and Kathryn Sikkink, *The Persistent Power of Human Rights: From Commitment to Compliance*, Cambridge University Press, 2013.

¹² Research involving human subjects for this study was reviewed and approved by the Yale University Institutional Review Board (Protocol no. 2000021150).

sure their privacy, names and other personally identifiable information are withheld. Interviews have been assigned a four-digit numeric code. Excerpts from interviews are accompanied by brief descriptions of the interviewee to provide some background on their relevance and professional connection to the issues discussed in this chapter. The next section sets the scope for the chapter by elaborating on what is meant by power and transnational civil society in the analysis that follows.

17.2. Power and Transnational Civil Society: Clarifying Concepts to Set the Scope

Power is important in both the study and practice of international criminal justice. The operationalisation of the Rome Statute endows the ICC with the power to punish human rights abusers and, in doing so, shifts the responsibility and capacity for prosecution away from the exclusive purview of States. Before delving into the nature and limits of power in transnational civil society's interactions with the ICC, it is important to first offer some conceptual clarity.

Power is a contested concept in international politics, and there are many interpretations and arguments about what constitutes power – far too many to cite here.¹³ Steven Lukes' 'three faces of power' serves as an apt departure point for the analysis that follows.¹⁴ The underlying principle of Lukes' theory is that power and its effectiveness is a function of three key dimensions: issue, agenda, and manipulation. Issue refers to the traditional notion of power as the relation between people and the interaction through which some actor(s) directly modifies the behaviour of other(s). The second dimension, in contrast, refers to agenda-setting and -shaping, which are also important sources of power. Lukes' third dimension refers to manipulation-based power through ideology, deception, trickery, and other methods that enable the more powerful to change the values, positions, and behaviour of the less powerful. As I show hereafter, Lukes' first two conceptions of non-coercive power (related to issue and

¹³ See, for example, Hannah Arendt, "Communicative Power", in Steven Lukes (ed.), *Power*, New York University Press, 1986; Michael Barnett and Raymond Duvall, "Power in International Politics", in *International organization*, 2005, vol. 59, no. 1, pp. 39–75; Robert A. Dahl, "The Concept of Power", in *Systems Research and Behavioral Science*, 1957, vol. 2, no. 3, pp. 201–215; Bertrand Russell, *Power: A New Social Analysis*, Psychology Press, 2004; Max Weber, "Structures of Power", in H.H. Gerth and C. Wright Mills (eds.), *From Max Weber: Essays in Sociology*, 1946, p. 159-179.

¹⁴ Steven Lukes, *Power: A Radical View*, Macmillan, 1974.

agenda-setting) are most relevant to the interactions between transnational civil society and the ICC. Relatedly, the definition of power of Michael Barnett and Robert Duvall as the “production, in and through social relations, of effects that shape the capacities of actors to determine their circumstances and fate”, is applicable here.¹⁵ Barnett and Duvall caution against narrow conceptualization of power that can lead to ‘tunnel vision’ and, instead, offer a taxonomy of power in international politics that identifies four types of social relations through which power works: compulsory, institutional, structural, and productive.¹⁶ This expanded conceptualization is well suited to understanding the role and impact of transnational civil society in international criminal justice generally, and with respect to the ICC specifically, because power can be expressed both through interactions between actors and constitutively. For the purpose of this chapter, it is critical to distinguish between ‘power in’, ‘power over’, and ‘power to’. All three are relational and each kind is related to the others but, as I show throughout the chapter, they are not the same.

Furthermore, it is critical to examine the role of power in the relationship between transnational civil society and ICC in both rationalist and constructivist terms. Whereas the former concerns strategies, constraints, incentives, institutions, and rules, the latter emphasizes social relations, norms, and inter-subjective understandings of actors and their interactions. Neither theoretical tradition is adequate on its own to gaining a nuanced understanding of power in international criminal justice, both broadly, and specifically with respect to questions that motivate this study. It is important to pay attention to the nature of power between the ICC and transnational civil society because international institutions, States, and non-governmental actors are the primary agents in the arena of international criminal justice. Julie Mertus reminds us that, “transnational civil society is a highly political space for all participants, and human rights NGOs are no exception”.¹⁷ Relatedly, it is important to understand power from the perspective of individuals who occupy and act on behalf of these structures because they give life to how power is perceived, dispensed, received, and produced in international criminal justice. According to

¹⁵ Barnett and Duvall, 2005, p. 39, see above note 11.

¹⁶ *Ibid.*

¹⁷ Julie Mertus, “From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society”, in *American University International Law Review*, 1998, vol. 14, p. 1335.

Risse, “transnational civil society has established the power of norms against the norms of power”.¹⁸ This chapter elaborates upon the modes, motivations, and mechanisms through which transnational civil society exerts power and influence on the operations of the ICC.

A note, then, on disaggregating power and influence. Some theorists use power and influence interchangeably, some subsume influence under a broader umbrella of power, while others distinguish the two in form and function. One way to think about influence is that it manifests when advice is followed as a result of recognizing the influencer’s competence.¹⁹ This is particularly relevant for understanding the relationship between transnational civil society and the ICC.

Non-violent, non-State actors that exercise power in international relations have been described via a range of terms including non-governmental organizations, civil society organizations, transnational advocacy networks, and so on. The scope of this chapter is limited to transnational civil society, meaning that I am not directly concerned with the role of local civil society organizations,²⁰ individuals in ICC situation countries, or individuals who may serve as ‘intermediaries’ for the Court.²¹ The extant literature offers some useful conceptual grounding. Richard Price defines transnational civil society as “a set of interactions among an imagined community to shape collective life that are not confined to the territorial and institutional spaces of States”.²² Relatedly,

¹⁸ Thomas Risse, “The Power of Norms versus the Norms of Power: Transnational Civic Society and Human Rights”, in Ann M. Florini (ed.), *The Third Force: The Rise of Transnational Civil Society*, Brookings Institution Press, 2012, p. 205.

¹⁹ David Willer, Michael J. Lovaglia and Barry Markovsky, “Power and Influence: A Theoretical Bridge”, in *Social Forces*, 1997, vol. 76, no. 2, p. 573, define power as “structurally determined potential for obtaining favoured payoffs in relations where interests are opposed”; and influence as, “socially induced modification of a belief, attitude, or expectation effected without recourse to sanctions”.

²⁰ On local civil society organizations, see Leila Ullrich, “Beyond the ‘Global–Local Divide’: Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court”, in *Journal of International Criminal Justice*, 2016, vol. 14, no. 3, pp. 543–568.

²¹ For more information on the ICC’s designation of intermediaries, see International Criminal Court, *Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel Working with Intermediaries*, March 2014 (<https://www.legal-tools.org/doc/e0f990>).

²² Richard Price, “Reversing the Gun Sights: Transnational Civil Society Targets Land Mines”, in *International Organization*, 1998, vol. 52, no. 3, pp. 613, 615.

Florini²³ conceptualizes organizations that operate transnationally as “self-organized advocacy groups that undertake voluntary collective action across state borders in pursuit of what they deem the wider public interest”.²⁴ Transnational civil society encompasses the variety of groups referenced in the analysis that follows. It is important to note from the outset, however, that transnational civil society is not a homogenous category of actors; far from it, groups that fall under this umbrella take on many forms, sizes, orientations, and preferences. While some focus on the ICC as one programmatic area, others' very mission revolves around the Court. But those covered in this study share two key features. First, they are transnational in structure. Second, they believe in the mission of the ICC and support its existence.

Transnational civil society organizations studied here are generally liberal in their political orientation. They include, for example, the International Federation for Human Rights, Amnesty International, Human Rights Watch, REDRESS, Women's Initiatives for Gender Justice, Parliamentarians for Global Action, and the International Bar Association.²⁵ In addition, the scope of the chapter covers transnational civil society networks and coalitions, most notably the Coalition for the International Criminal Court ('CICC'). The Coalition was established in 1995 by leading international human rights champions to consolidate information, talent, energy, and expertise towards the creation of a permanent international institution that would once and for all dedicate itself to holding perpetrators of gross human rights violations accountable. Comprised originally of 25 organizations, the CICC today counts some 2,500 local and international organizations as members from throughout the globe that, collectively, promote not only an effective and respected Court, but also universal ratification of the Rome Statute. With a central office in The Hague, the CICC is able to further its mission by strategically leveraging its proximity to the Court. At the same time, the CICC draws on information and

²³ For a detailed explanation of the definition of transnational civil society, see Ann M. Florini and P.J. Simmons, “What the World Needs Now”, in Ann M. Florini (ed.), *The Third Force: The Rise of Transnational Civil Society*, Brookings Institution Press, 2012, pp. 7–8.

²⁴ Richard Price, “Transnational Civil Society and Advocacy in World Politics”, in *World Politics*, 2003, vol. 55, no. 4, p. 581.

²⁵ This is not an exhaustive list but rather a few examples. In addition to researching publicly available information about these transnational civil society organizations, representatives from some, but not all, of groups were interviewed for the purposes of this chapter.

outreach through its regional and national networks including in ICC situation countries.

The growth of the CICC is indicative of the salience of transnational activism and functional support in international criminal justice. Indeed, the CICC's continued relevance demonstrates that transnational advocacy organizations and networks have critical roles to play in not only the emergence and adoption of human rights norms but also their internationalization and institutionalization.²⁶ Heidi Nichols Haddad describes the evolution of the CICC from "a purely advocacy-oriented or demand-side NGO coalition" in the lead-up to the creation of the Court, to "an increasingly supply-side coalition that provides services such as administrative support, judicial monitoring, and outreach".²⁷

Networks and coalitions, in line with their purpose, are communicative structures.²⁸ They not only serve as tools and instruments but also constitute dynamic processes. The coalition structure²⁹ of the CICC allows it to at once draw on the individual expertise of its members and act as a forceful transnational advocacy network that monitors the Court, relays information to and from members, and rallies global support for international criminal justice broadly.³⁰ Acting as a formal network enables the solidifying of social ties between member organizations.³¹ It also facilitates co-operation in order to overcome collective action dilemmas for

²⁶ Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change", in *International Organization*, 1998, vol. 52, no. 4, pp. 887–917.

²⁷ For a more detailed explanation of how the CICC's mission, scope, and membership has changed in the last 20 years, see Heidi Nichols Haddad, "After the Norm Cascade: NGO Mission Expansion and the Coalition for the International Criminal Court", in *Global Governance: A Review of Multilateralism and International Organizations*, 2013, vol. 19, no. 2, pp. 187–206.

²⁸ Margaret E. Keck and Kathryn Sikkink, "Transnational Advocacy Networks in International and Regional Politics", in *International Social Science Journal*, 1999, vol. 51, no. 159, pp. 89–101.

²⁹ The CICC constitutes a secretariat that serves as the administrative home and oversees the transnational network's functions, a select group of members that lead a steering committee, and the broader base of official members. For more information, see Kjersti Lohne, "Global Civil Society, the ICC, and Legitimacy in International Criminal Justice", in Nobuo Hayashi and Cecilia M. Bailliet (eds.), *The Legitimacy of International Criminal Tribunals*, Cambridge University Press, 2017, pp. 455–469.

³⁰ At the Rome Conference, the CICC facilitated the accreditation of some 500 individuals representing 236 NGOs, making it the largest 'delegation' there, see *ibid.*, p. 452.

³¹ Doug McAdam and Ronnelle Paulsen, "Specifying the Relationship Between Social Ties and Activism", in *American Journal of Sociology*, 1993, vol. 99, no. 3, pp. 640–667.

civil society groups that may arise in trying to shape the Court's behaviour.³² In this respect, the membership structure of the CICC has the key advantage of broad-based participation and inclusion of thousands of smaller organizations alongside the large, well-funded, international recognized groups. This does not mean, however, that access to the Court, level of engagement, and capacity to influence the Court's work are evenly distributed across the Coalition's members. Far from it, the geographic centre of power in the landscape of transnational civil society groups engaged in international criminal justice is firmly situated in The Hague, first and foremost, and Western Europe and North America more generally. Moreover, my research reveals that people from countries where the Court operates are grossly underrepresented even within some of the most prominent and well-resourced Western-based transnational civil society organizations. While representatives of transnational civil society call for more diverse representation, they also acknowledge that a lack of diversity persists among those with the greatest resources and power within this relatively small community of professional experts and activists.³³ Underrepresentation matters with respect to the agency, authority, and autonomy of transnational civil society in international criminal justice.

17.3. Agency of Transnational Civil Society in Its Interactions with the ICC

The ability of transnational civil society to exercise agency in international criminal justice is salient to explaining how transnational civil society produces, conserves, signals, and wields power in its interactions with the ICC. By agency, I refer to the capacity to act in furtherance of a goal or objective. I am interested in both the agency of individual transnational civil society groups as well as of transnational civil society as a category of actors, including particularly the CICC. In this sense, agency is inseparable from collective action. As the role of the Court has grown and evolved during its lifespan, so too have the roles of transnational civil society groups that work directly and indirectly on international criminal justice and who have a vested interest in the Court's success. Different groups play specialized roles like providing services, advocating for tar-

³² Mario Diani and Doug McAdam, *Social Movements and Networks: Relational Approaches to Collective Action*, Oxford University Press, Oxford, 2003.

³³ A lack of diversity persists amongst the ICC staff, too, but that issue is beyond the scope of this chapter.

geted causes, or representing set constituencies.³⁴ It is difficult to conceptually map everything that transnational civil society does and seeks to do but overarching key functions include agenda-setting, diffusing norms, developing and implementing solutions, and building coalitions and broadening networks.³⁵

Since the Court opened its doors, transnational civil society groups – in both the Global North and South – have actively continued to interact with the Court by raising public awareness about the Court, providing technical assistance and information to the Court, acting as a bridge between the Court and victims and witnesses, lobbying the Court to carry out investigations, monitoring the Court’s operations and outreach, and other related functions. In pursuing a range of interactive professional activities that straddle both public and private spheres, transnational civil society organizations seek to get issues on the ICC’s agenda as well as change institutional policies, procedures and behaviour. Transnational civil society also seeks to change the broader international political environment within which the ICC operates and, in doing so, shape structures of meaning and power. Transnational civil society engages in a combination of information, symbolic, leverage, and accountability politics.³⁶

Transnational civil society networks globally amplify information about and produced by the Court while also bringing information to it. This is consistent with Jens Steffek and Patrizia Nanz’s finding that “organized civil society” can function as a “transmission belt” between citizens and local stakeholders from around the globe and institutions of global governance.³⁷ Relatedly, transnational civil society organizations serve as intermediaries between the Court and victims or victims’ organizations in their countries of origin as well as between the Court and States Parties. Transnational civil society groups facilitate public outreach and, oftentimes, even structured dialogue with a variety of constituents that the

³⁴ Clifford Bob, *The Marketing of Rebellion: Insurgents, Media, and International Activism*, Cambridge University Press, 2005.

³⁵ Keck and Sikkink, 2004, see above note 8.

³⁶ Keck and Sikkink, 1999, p. 95, see above note 28.

³⁷ Jens Steffek and Patrizia Nanz, “Emergent Patterns of Civil Society Participation in Global and European Governance”, in Jens Steffek, Claudia Kissling and Patrizia Nanz (eds.), *Civil Society Participation in European and Global Governance*, Palgrave Macmillan, London, 2008, pp. 1–29.

ICC is interested in reaching including but not limited to victims, witnesses, and domestic legal authorities. Moreover, transnational civil society plays a powerful role by framing key issues in dialogue with the Court. Framing, here, can be understood as “conscious strategic efforts by groups of people to fashion understandings of the world and of themselves that legitimate and motivate collective action”.³⁸

Through direct and indirect access to the Court's leadership, structures, and processes, transnational civil society exercises normative and discursive agency. My interviews with representatives from transnational civil society groups as well as ICC staff demonstrate that personal networks are crucial to maintaining contact and applying pressure on Court officials. The head of a transnational civil society organization that serves as a coalition of hundreds of national and sub-national human rights organizations from around the world explained, “[w]e have enormous access, from the working level to co-ordinate a mission or focus on a specific issue, all the way to President and the Registrar. The constant, fluid interaction is sometimes formal and sometimes very informal”. Groups that are members of networks – most importantly the CICC – strategize on how, when, and why they can together influence the Court in order to advance common goals. Describing a philosophy of ‘stronger together’, the designated representative of a transnational civil society organization dedicated to the protection and promotion of human rights explained:

Even if there is competition over resources or attention, for the most part we do work closely together on joint advocacy. Also, it's a small community of organizations that are based in The Hague or have representatives stationed here meaning we have to rely on each other. We try to support one another professionally and we also have a close social network.³⁹

Analysis of interview data, statements, and reports reveals that transnational civil society organizations employ a dual strategy that balances a pragmatic internal strategy with a principled external strategy.⁴⁰

³⁸ Doug McAdam, “Opportunities, Mobilization Structures and Framing Processes: Towards a Synthetic, Comparative Perspective on Social Movements”, in Doug McAdam, John D. McCarthy and Mayer N. Zald, *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings*, Cambridge University Press, 1996, p. 6.

³⁹ Interview 1703 (on file with the author; same hereinafter).

⁴⁰ Cenap Cakmak, “Transnational Activism in World Politics and Effectiveness of a Loosely Organised Principled Global Network: The Case of the NGO Coalition for an International

Put another way, transnational civil society organizations play a dual ‘good-cop, bad-cop’ role. Transnational civil society also plays an important role in helping to counter negative perceptions of, or political attacks against, the Court, especially amongst hostile States, both those that have ratified the Rome Statute as well as those that have not, including, not least, the United States. Individual groups and coalitions have the capacity to mobilize public opinion at international and national levels in favour of and against the ICC. Representatives of groups interviewed described a constant calculus between hard-line insistence and middle-ground compromise that characterizes their activism. Indeed, transnational civil society groups must negotiate issues, ideas, strategies, and solutions both within their networks as well as with officials of the Court. But transnational civil society groups also help States Parties negotiate between themselves, in addition to with the Court. Agency, therefore, takes multiple forms, on multiple levels, towards multiple ends. In order to understand why transnational civil society is able to exercise agency and how it can be effective, we must examine the relationship between agency and authority. In the following section, I discuss how different forms of authority are mobilized to produce agency and, in turn, shape power in relation to the Court.

17.4. Authority of Transnational Civil Society in Its Interactions with the ICC

Transnational civil society holds influence in its interactions with the Court and has the power to shape the agenda, approach, and outcomes of international criminal justice thanks to its perceived authority. To understand how and why this is the case, we must disaggregate authority into several interrelated but distinct forms. These include moral, credible, expert, and delegated authority.⁴¹ These forms of authority, as I explain in

Criminal Court”, in *International Journal of Human Rights*, 2008, vol. 12, no. 3, pp. 373–393.

⁴¹ Susan Burgeon, *Moral Victories: How Activists Provoke Multilateral Action*, Cornell University Press, 2001; Ann Marie Clark, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms*, Princeton University Press, 2010; Andreas Bieler, Richard Higgott, and Geoffrey Underhill, *Non-State Actors and Authority in the Global System*, Routledge Taylor and Francis Group, 2004; Keck and Sikkink, 1999, see above note 28; Sanjeev Khagram, James V. Riker, and Kathryn Sikkink, *Restructuring World Politics: Transnational Social Movements, Networks, and Norms*, University of Minnesota Press, 2002.

this section, are products of their social relations with constituents, beneficiaries, and partners.

17.4.1. Moral Authority

The first and, arguably most important, form of authority that propels transnational civil society's influence in international criminal justice is moral authority. My research suggests that there are a couple of notable sources for this type of authority. First, transnational civil society groups stake a claim on moral authority in international criminal justice by positioning themselves as committed to public, not private, interests that enhance 'the common good'.⁴² Second, irrespective of how they function or what they actually do, most organizations claim to indirectly or directly represent the interests of victims of gross human rights abuses. For example, many transnational civil society groups claim to speak on behalf of victims and some serve as gatekeepers to victims, especially in places where the ICC has a limited on-the-ground presence. Victims of international crimes – especially non-elites who lack necessary resources – seldom manage to channel their own authority towards the Court, leaving them typically dependent on transnational civil society.⁴³ Transnational civil society groups thus facilitate access for the ICC to victims directly as well as through local partners in communities that have been affected by international crimes.

Victims, especially when unable to speak for themselves or appear in front of the Court, must rely on transnational civil society to make representations on their behalf. In such instances, the victim's story – his or her suffering, fear, aspirations, and will – are shaped by the intentions and agenda of the transnational civil society group making the representation. In making the representation, the transnational civil society group at once draws on the moral authority of victims to constitute power while inevitably changing the victims' representation to influence the Court. Even when transnational civil society transmits information from victims to the Court and vice versa, the process is not always smooth and satisfying for all parties involved. Expectations may go unmet even where best intentions act as a guiding light. This remains a point of frustration for organizations as well as victims in places where the Court has opened investiga-

⁴² Risse, 2012, p. 186, see above note 18.

⁴³ Dixon and Tenove, 2013, p. 411, see above note 9.

tions as well as in contexts the Court has yet to intervene but where international crimes have been perpetrated. Moreover, if and when transnational civil society inadequately, inaccurately, or inconsistently represents victims' interests to the Court, there is little path to recourse for victims. As Chris Tenove discusses in his chapter of this volume, this asymmetry of power remains one of the biggest challenges in the international criminal justice architecture.

17.4.2. Credible Authority

The second form of authority relevant to understanding the nature and production of power is transnational civil society's credible authority. Transnational civil society holds sway over the Court because the Court perceives their advocacy as legitimate. A sociological approach to understanding legitimacy, according to David Beetham, concerns "whether power is acknowledged as 'rightful', 'appropriate', or 'just' by relevant agents, such as 'power-holders and their staff, those subject to power the power or third parties whose support or recognition may help confirm it.'" ⁴⁴ In order to have impacts that bring about change (whether procedural, structural, or cultural) in ICC operations, transnational civil society organizations have to be perceived as credible and legitimate by the Court as well as other relevant stakeholders such as States Parties. For transnational civil society organizations engaged in international criminal justice, being credible denotes qualities such as trustworthiness and authenticity whereas being legitimate means they are accepted as stakeholders whose views, activities, and expectations matter. ⁴⁵

17.4.3. Expert Authority

The third type of authority that serves as a source of power for transnational civil society in its relationship to the ICC is expertise. Transnational civil society groups possess specialized knowledge and skills that the Court seeks to enhance its judicial, outreach, and administrative functions. Numerous factors allow representatives of transnational civil society to 'claim expert authority' in its interactions with the ICC: a 'revolving door' whereby professionals move between the Court, academia, lawyering, and advocacy; demonstrated long-term commitment to spreading international

⁴⁴ David Beetham, *The Legitimation of Power*, Palgrave Macmillan, 2013, p. 19.

⁴⁵ Lloyd D. Brown, *Creating Credibility: Legitimacy and Accountability for Transnational Civil Society*, Kumarian Press, 2008, p. 2.

criminal justice generally but focusing on the ICC specifically; and gathering, processing and sharing information through different networks and channels of communication.⁴⁶ Moreover, academic centres and scholars at universities – typically in Western Europe and North America – regularly provide support to transnational civil society. In doing so, researchers lend expert authority to transnational civil society activism, making calls and proposals harder for the Court to ignore.

17.4.4. Delegated Authority

The fourth type of authority that is relevant to understanding the production and dynamics of power between transnational civil society and the ICC is delegated. Delegated authority is a well-established concept in the literature. Michael Barnett and Martha Finnemore analyse how and why States delegate vital duties in international relations to international organizations.⁴⁷ Kjersti Lohne extends this idea to international criminal justice by examining the delegation of critical tasks by the ICC to civil society groups and networks to fulfil core functions, which, she argues, have become essential in light of resource shortages facing the Court.⁴⁸ While the Rome Statute specifies that the ICC may “in exceptional circumstances, employ the expertise of gratis personnel offered by State Parties, inter-governmental organizations or non-governmental organizations to assist with the work of any of the organs of the Court”,⁴⁹ in the last 20 years the delegation of critical tasks to civil society has become the norm rather than the exception. As one official from the ICC's Office of the Prosecutor explained, “[t]he Coalition and its members are valuable partners. They help us do our jobs better”.⁵⁰ The leader of a civil society organization with global reach put it more bluntly:

The Court does not have the budget, staff, connections, or general wherewithal to do everything that is required of it. So, over time civil society has had to take on a lot of the non-judicial activities of the Court like outreach to victims,

⁴⁶ *Ibid.*

⁴⁷ Michael Barnett and Martha Finnemore, “The Power of Liberal International Organizations”, in *Power in Global Governance*, 2005, vol. 161, pp. 163–171.

⁴⁸ Lohne, 2016, see above note 29.

⁴⁹ Rome Statute of the International Criminal Court, 17 July 1998, Article 44(4) (<http://www.legal-tools.org/doc/7b9af9/>).

⁵⁰ Interview 1705.

public awareness, or liaising with local organizations. There is a lot that we're able to do individually and as part of the Coalition to support the Court to fulfil its mandate.⁵¹

When transnational civil society organizations seek to advance a common goal, they pool and marshal their collective moral, expert, and delegated forms of authority: at once directing it towards the Court's leadership through public and private appeals while at the same time activating personal connections with the Court's working-level staff. One key example that multiple interviewees cited was the development of new institutional policies and guidelines to improve the Court's internal functions and external profile. From 2012 to 2016, the ICC Prosecutor appointed the leader of a transnational civil society organization based in The Hague to serve as Special Adviser on Gender, who helped to co-write the 2014 Policy Paper on Sexual and Gender-Based Crimes, in a *pro bono* capacity.⁵² Several interviewees cited this policy paper as one of the most important achievements of collaboration between the Court and civil society. The policy paper stands out as a clear example of key issue area that representatives of transnational civil society not only lobbied for, but also were able to exercise agency through an interactive process to shape its content. In doing so, civil society organizations that directly or indirectly participated in the development of the policy drew on their individual expertise, their consultative capacity, their ability to represent victims' demands and aspirations, and their perceived legitimacy to influence the Court's decision-making.

The Court saw transnational civil society as a powerful ally and credible partner whose inputs would enhance the Court's future institutional practices and record with respect to gender analysis.⁵³ This was important because the ICC, according to one interviewee who works within the Office of the Prosecutor, has been historically slow to implement gender-related commitments outlined in the Rome Statute and for too long treated the mention of sexual violence in the Statute as symbolic rather than a charge to inform and guide its actual work.⁵⁴ But, staff are still acclimating to what the policy entails in day-to-day operations. So, even

⁵¹ Interview 1702.

⁵² International Criminal Court Office of the Prosecutor, "Policy Paper on Sexual and Gender Based Violence", June 2014 (<https://www.legal-tools.org/doc/7ede6c>).

⁵³ Interviews 1701, 1702, 1708.

⁵⁴ Interview 1708.

with respect to implementation, transnational civil society has an important role to play and in doing so can generate and wield power through monitoring, recommendations, and applying pressure on the Court. One interviewee expressed cautious optimism about the ICC's commitment to integrating gender analysis into its future preliminary examinations, investigations, and prosecutions by recalling a workshop organized by civil society that then led to "immediate action"; the ICC hired a professional consultant to focus on raising awareness, training, and technical expertise in the Office of the Prosecutor to help implement the policy on sexual and gender-based violence.⁵⁵ Building off and parallel to the work on the gender policy, transnational civil society experts have been working with staff in the Office of the Prosecutor on a policy related to the protection of children's rights.⁵⁶

At the same time, there are some issue areas – such as the policy on case selection and decision-making on initiating preliminary examinations – where transnational civil society have not made similar inroads and the ICC has been less receptive to feedback.⁵⁷ Indeed, during the tenure of both the former and current Prosecutors, ICC staff have been more open to suggestions on policies related to victims protection but less responsive to recommendations related to when and where to undertake investigations and the Court's community-level outreach in countries of interest.⁵⁸ Across the board, transnational civil society representatives expressed an unwavering commitment to protect their sources, even if faced with pressure from the Court to come clean about what and whom they know. When officials of the Investigation Division ask for detailed information about incidents and individuals of interest that transnational civil society may be more closely connected to ongoing examinations and cases, those organizations have to make their own ethical and risk assessments. While all transnational civil society organizations surveyed stressed the importance of protecting their contacts on the ground, some maintain a more flexible policy about how much and when to share valuable information with the Office of the Prosecutor and others are bound by a much more restrictive stance. In other words, different groups may choose to act in concert or divergently based on their individual missions

⁵⁵ Interview 1703.

⁵⁶ Interviews 1702, 1707.

⁵⁷ Interviews 1701, 1704, 1711, 1712, 1713.

⁵⁸ Interviews 1701, 1702, 1703, 1710.

and policies. Moreover, as the following section details, transnational civil society groups are constantly trying to achieve a balance in their relations with the ICC that allows them to assert their autonomy and be perceived as independent entities.

17.5. Autonomy of Transnational Civil Society in Its Interactions with the ICC

Autonomy, referring here to independence and the ability to self-govern, represents the third key piece of the puzzle that concerns this chapter. Autonomy is relevant to understanding power in two separate but connected ways. First, it is important to recognize that autonomy matters for transnational civil society groups individually. As previously mentioned, a diversity of motivations, goals, and strategies exists amongst organizations that support, lobby, pressure, critique and otherwise engage with the ICC on a regular basis but, in general, most believe in the Court and agree that it has an important role to play in international criminal justice. As such, there is a willingness amongst formal and informal transnational civil society networks to work together, pool resources, share lessons learned, complement each other's contributions, and focus on common – rather than divergent – interests.

Transnational civil society organizations recognize and acknowledge that though they may have differences in their preferences and outlooks with respect to the ICC's operations, strength in numbers is crucial to their advocacy efforts. By coming together as a bloc, transnational civil society is able to produce and wield power more effectively in engaging with the ICC and therefore influence the perceptions, behaviour, and decision-making of individuals within the Court. And, so, autonomy matters also between transnational civil society – as a category of actors – and the ICC. The remainder of this section focuses specifically on the importance, character, and limits to autonomy in the interactions between transnational civil society and the Court.

17.5.1. Monitoring the Court

Transnational civil society organizations play a crucial role in international criminal justice by monitoring the actions, approaches, and outcomes of institutions including the ICC. Indeed, over the course of the last 15 years, monitoring has become increasingly important as an accountability mechanism that transnational civil society groups leverage in interactions with

the Court. Monitoring is also an area in which autonomy is essential to effectiveness but also difficult to maintain, especially as the Court increasingly requires transnational civil society to support its non-judicial functions.

The annual ASP provides an opportunity for transnational civil society organizations to present findings based on its monitoring of the ICC. As accredited participants at the ASP, representatives from civil society are unable to exercise voting power but they can follow negotiations, distribute documents, and address States Parties through side-events or meetings. In addition, the CICC publishes a set of recommendations deemed priorities for ensuring the future of the Court. While the CICC and many of its constitutive organizations have capitalized on the annual ASP session to address progress and challenges relating to the ICC for years, reforming the Court and reaffirming a shared commitment to upholding the Rome Statute has taken on extra meaning in anticipation of Rome Conference's twentieth anniversary. In 2017, for example, priorities included:⁵⁹

- encouraging unity amongst States Parties in the common cause of international criminal justice;
- sustaining high-level political support to the Court;
- safeguarding the Rome Statute and ensuring its universal and full implementation;
- preserving the ICC independence and non-interference by States Parties;
- ensuring integrity and transparency in elections of judges, the Registrar, and the Committee on Budget and Finance, the next Prosecutor;
- increasing financial resources for the Court's 2018 budget;
- activating the Court's jurisdiction over the crime of aggression;
- expanding Court's outreach and communications functions;
- strengthening responses to announcements of States Parties intentions to withdraw from the Rome Statute;
- enhancing co-operation within the Rome Statute system;
- strengthening responses to non-co-operation;

⁵⁹ Coalition for the International Criminal Court, "Key Recommendations: Assembly of States Parties 16, New York, 4-14 December 2017", 2017.

- addressing outstanding arrest warrants;
- ensuring contributions to the Trust Fund for Victims;
- ensuring contributions to the Trust Fund for Family Visits;
- strengthening complementarity in practice;
- enhancing victims' participation and access to reparations;
- supporting gender justice;
- reforming the institutional structures of the ASP;
- strengthening the expertise available to the ASP; and
- strengthening linkages between the ASP, the ICC and relevant UN bodies.

Transparency and openness are critical to enabling transnational civil society's monitoring and holding the Court accountable. In the early years of the Court, during the tenure of the first Prosecutor Luis Moreno Ocampo, this was often a point of contention and disagreement. Interviews suggest that the legacy of Moreno Ocampo's tenure continues to sow mistrust and frustration in the relationship between the Court and transnational civil society groups.⁶⁰ For example, after an investigation revealed concerns and allegations about the former ICC Prosecutor's leadership, ethical judgment, and management of the Court's prosecutorial organ, the Women's Initiatives for Gender Justice released a statement calling for the Court to take necessary actions and precautions to restore its reputation and credibility in accordance with its mandate.⁶¹ Other expert observers have also called for strengthening of the ICC's Independent Oversight Mechanism to ensure greater transparency, efficiency, and due process in the future so that problems can be dealt with as they arise rather than after they have inflicted regrettable damage.⁶² Ocampo's successor, Fatou Bensouda, has voiced commitments to greater transparency but whether systemic change will happen is yet to be seen.

⁶⁰ Interviews 1701, 1702, 1703, 1704, 1713, 1710, 1715.

⁶¹ Women's Initiatives for Gender Justice, "A critical time for the ICC's credibility", 12 October 2017 (<https://www.legal-tools.org/doc/e2fbc7>).

⁶² Morten Bergsmo, Wolfgang Kaleck, Sam Muller and William H. Wiley, "A Prosecutor Falls, Time for the Court to Rise", FICHL Policy Brief Series, No. 86 (2017), Torkel Opsahl Academic EPublisher, 2017 (<http://www.toaep.org/pbs-pdf/86-four-directors/>).

17.5.2. Criticizing the Court

Transnational civil society groups are third parties but they are not neutral actors; every organization has an ideological bend and a key function they perform, related to monitoring, is calling out the Court when it falls short in delivering on its promises. Criticism *vis-à-vis* the Court is primarily persuasive, not coercive, meaning that while they leverage an assortment of approaches to effectuate desired changes, they typically do not undertake name-and-shame tactics against ICC staff or boycott its units. This is not to say, of course, that transnational civil society groups do not publicly and privately fault the Court's leadership, approach, impact, and reach. To the contrary, organizations do so unilaterally and multilaterally. In addition to the drafting and design phase of policies, where transnational civil society are typically invited to offer guidance and feedback, groups will often evaluate and scrutinize policies or decisions after they have been made. Criticizing the Court is a powerful strategy and productive for transnational civil society in multiple ways.

For one, criticizing the Court serves as a way for transnational civil society organizations to assert their autonomy *vis-à-vis* the Court. This is because transnational civil society groups are wary of a 'principal-agent' relationship solidifying as the Court increasingly relies on transnational civil society groups to support its non-judicial activities. Moreover, criticizing the Court allows transnational civil society to highlight areas of improvement that groups believe would enhance the Court's reputation and its perceived effectiveness. Public outreach was an area that many interviewees mentioned as an example of where the Court consistently falls short, despite officials' rhetorical pledges to doing more to raise the Court's profile throughout the world and connecting it tangibly to communities affected by its operations. Representatives of transnational civil society were critical of the ICC's inadequate public outreach efforts, complaining about the ICC's lack of follow-up even with victims and their families.⁶³ One interviewee observed that despite reforms introduced by the current Prosecutor to do more co-ordination on outreach, the Court fails to prioritize this area of its mandate and, yet, it is critical to maintaining its relevance, especially in countries where there are ongoing and forthcoming examinations and investigations.⁶⁴ Moreover, tensions in the

⁶³ Interviews 1702, 1703, 1710.

⁶⁴ Interview 1703.

past between the Office of the Prosecutor and the Registry have also hampered public outreach efforts. Over and over again, transnational civil society representatives stressed the importance of co-ordinated leadership within the Court as well as between the Court and its non-governmental partners.

Criticism, however, is not always taken well by Court officials and this can hamper the co-operation between the ICC and transnational civil society. One interviewee lamented:

When we offer criticism, it is really important that the leadership and staff in the Office of the Prosecutor do not take it personally but that was quite often the case during the Court's first decade of existence. This oftentimes made it difficult for us to have a productive and constructive relationship to seek justice for victims.⁶⁵

In publicly criticizing the Court, transnational civil society organizations reflect a combination of strategic and moral considerations. A staff member who focuses exclusively on the ICC at one of the world's largest transnational civil society organizations clarified, "both our defense and criticism of the Court is grounded in legal and moral principles that centre on human rights".⁶⁶ Amongst those interviewed for this study, individuals who had previous professional experience working within the ICC or at other international criminal tribunals seemed to be more sympathetic to the challenges the ICC faces in delivering on its mandates. One international human rights lawyer currently heading a transnational civil society organization that focuses on monitoring, outreach, and technical support in its relationship with the Court but who previously worked with the International Criminal Tribunal for the former Yugoslavia claimed, "[t]he ICC seems to be more forthcoming and also open to listening to civil society organizations than previous *ad hoc* tribunals of the 1990s". Why is this the case? "They need us, they depend on us, so they also listen to what we have to say", the interviewee explained. What does this mean? One human rights lawyer, who works within a transnational civil society organization that has offices in The Hague as well as dozens of countries around the world, explained:

Even when we are extremely disappointed or frustrated, we are careful about how we say what we say publicly because

⁶⁵ Interview 1702.

⁶⁶ Interview 1702.

we don't want the ICC to fail, we don't want it to be finished. The Court's detractors would pounce.⁶⁷

17.5.3. Funding

Another issue related to autonomy that proves to be particularly contentious relates to the ICC's funding. The ICC relies upon funding from member States to sustain its operations which, Sara Kendall argues, has created a "shareholder economy" such that States insist on austerity but in turn diminish the value of justice as a public good.⁶⁸ This setup deeply impacts the relationship between the Court and States Parties to the Rome Statute as well as between the ICC and transnational civil society.

Soon after it began operating, the Court realized that it needed support from transnational civil society to acquire resources from States. Lobbying for funding takes place through public, on the record communiqués, formal meetings held under Chatham House Rules, and informal chats in corridors or cafes.⁶⁹ Since several key donors to the Court began to push for a zero-nominal-growth budget, transnational civil society groups have found themselves especially susceptible to pressure from the Court to support fundraising efforts. In anticipation of the annual meeting of the ASP, officials from the Court meet with transnational civil society representatives in The Hague to discuss their needs, challenges, priorities, and expectations. The expectation then is that transnational civil society will help transmit these needs to States. For example, the CICC has publicly warned that donors' push for drastic budget cuts would not guarantee greater efficiency but rather undermine the Court's ability to deliver justice to victims of international crimes.⁷⁰ Still, for organizations individually, helping the ICC fundraise can prove to be quite the balancing act, especially as they seek to maintain their independence from the Court.

While some groups are categorically opposed to supporting the ICC fundraise, others are more forthcoming with help but still hold reservations about how their actions may be perceived by States. One interviewee

⁶⁷ Interview 1702.

⁶⁸ Sara Kendall, "Commodifying Global Justice: Economies of Accountability at the International Criminal Court", in *Journal of International Criminal Justice*, 2015, vol. 13, no. 1, pp. 113–134.

⁶⁹ Interviews 1701, 1702, 1703, 1704, 1710.

⁷⁰ Coalition for the International Criminal Court, "Victims to lose out with states' double-standard on ICC budget", 21 November 2016 (available on its web site).

described the complicated nature of the tasking by explaining how States felt that transnational civil society organizations “do the Court’s bidding” while another explained that States see transnational civil society groups as being hardly more than “cheerleaders for the Court”.⁷¹ Another interviewee echoed this sentiment: “We do not like to act as cheerleaders of the Court, that is not how we see our role”.⁷² Some interviews also expressed frustration by what the Court expects of transnational civil society groups in terms of fundraising. One interviewee recalled: “The Court is trying to instrumentalize NGOs, especially when it comes to the budget, and this can make us feel uncomfortable [...] because we need to remain independent and autonomous”.⁷³ This, the interviewee explained, is critical to ensuring the ability of transnational civil society to effectively monitor the actions and policies of both the Court and States.

At the same time, representatives of transnational civil society who have tried to help the Court secure funding over the years acknowledge that in its first 14 years operating, the institution had a budget upwards of \$175 million per annum and yet managed only to secure four convictions.⁷⁴ While international criminal justice is undoubtedly an expensive enterprise, it is easy to see why States that are sceptical of the Court question its efficacy. This leaves transnational civil society organizations that want to support the ICC’s fundraising efforts in a tricky position of having to defend the Court’s record, which only makes maintaining autonomy all the more difficult.

On the other hand, some interviewees complained that the Court was all too often willing to settle for a “bare-bones budget” that would severely constrict capacity to actually live up to the promise and potential of the Rome Statute.⁷⁵ One interviewee argued that the budget process is “strangling” the Court, which leaves its staff with an attitude of “resignation” about what is achievable.⁷⁶ Donor States are reluctant to fund bureaucracy and therefore refuse to provide the Court with adequate resources. This trend, in turn, has ripple effects on transnational civil society

⁷¹ Interview 1701.

⁷² Interview 1702.

⁷³ Interview 1702.

⁷⁴ Bergsmo, Kaleck, Muller and Wiley, 2017, p. 3, see above note 62.

⁷⁵ Interview 1703.

⁷⁶ *Ibid.*

that provide technical expertise, partner on outreach, advocate on behalf of the ICC, and work directly with victims.⁷⁷ Transnational civil society organizations focused on the ICC are able to continue to support the Court's non-judicial functions – such as monitoring, consultation, and outreach – because they can fundraise for these activities as part of their organizational priorities.

Relatedly, in thinking about the autonomy of transnational civil society, it is important to remember that many groups rely on funding from States that also fund the ICC. This necessarily raises questions about conflicts of interest, even if transnational civil society groups draw on diverse funding streams that extend beyond donor countries. Put another way, it is important to ask, who is holding transnational civil society accountable? Is it the social constituents they represent? Or is it the donors who fuel the engines of their work?

Without a doubt, governments that provide funding to the CICC and to individual transnational civil society groups hold sway over how such groups and networks behave in international criminal justice. At the same time, very few organizations have any real accountability mechanisms for individual constituents or beneficiaries of their work – whether that be communities of victims or abstract categories like ‘humanity’ or ‘the public’ – to concretely scrutinize and evaluate them.⁷⁸ Baker is sceptical of the “cosmopolitan citizens” that transnational civil society purportedly represents because they are “themselves in no way formally accountable to any citizen body”.⁷⁹ Chandler echoes this sentiment warning that civil society is neither necessarily democratic nor universally representative.⁸⁰ Future research should further look into these issues to shed light on the relationship between the Court and transnational civil society groups, in particular, and about non-State actors in international criminal justice broadly.

⁷⁷ Interview 1703.

⁷⁸ Jonas Tallberg and Anders Uhlin, “Civil Society and Global Democracy: An Assessment”, in Daniele Archibugi, Mathias Koenig-Archibugi and Raffaele Marchetti (eds.), *Global Democracy: Normative and Empirical Perspectives*, Cambridge University Press, 2011, pp. 210–232.

⁷⁹ Gideon Baker, “Problems in the Theorisation of Global Civil Society”, in *Political Studies*, 2002, vol. 50, no. 5, p. 934.

⁸⁰ David Chandler, “Building Global Civil Society From Below?”, in *Millennium*, 2004, vol. 33, no. 2, pp. 313–339.

17.6. Conclusion

While a growing body of scholarship across multiple disciplines focuses on the role of transnational civil society organizations and their advocacy networks, much more research and analysis are needed on their roles and impact in international criminal justice. Explaining the nature and limits of transnational civil society's power in international criminal justice is a complex, complicated, and enormous task. In this chapter, I have sought to fill a lacuna in the literature by focusing specifically on the modes, mechanisms, and motivations that drive transnational civil society interactions with the International Criminal Court and how this fits into the broader sociology of international criminal justice.

Beyond enumerating the activities that comprise the roles played by transnational civil society in international criminal justice, I have delved into the dynamic processes and interactions through which power is constituted, deployed, and shared. I have claimed that over the course of the ICC's lifespan, transnational civil society organizations have served as more than merely norm-entrepreneurs. They have become allies, critics, and partners of the Court through repeated and sustained, formal and informal interactions. Transnational civil society organizations have constructed and exerted power to shape the internal and external actions of the ICC. Their advocacy efforts are inherently political and they operate in a highly politicized international environment. I have shown that transnational civil society organizations operate at numerous political planes including in inter-state diplomacy and bilaterally with States, directly with the Court, at regional forums, sub-nationally with local civil society actors, and at the grassroots level with local communities. Transnational civil society harnesses power as much through their ideas as their interactions.

In exploring the role and impact of transnational civil society on the ICC's work, I have drawn on original data – namely from semi-structured interviews with relevant stakeholders and primary documents – to centre my analysis on three key issues: the exercise of agency, the source and scope of authority, and the challenge of maintaining autonomy. I find that transnational civil society organizations that seek to influence the ICC operations appeal at once to the Court's moral duty and self-interest. Transnational civil society holds steadfast to long-term strategic plans but also acts opportunistically, exploiting openings that grow out of crises and progress alike, to apply pressure on the ICC to follow through on its founding mission. I conclude that, on the one hand, the proliferation of

opportunities for transnational civil society groups to participate in the pursuit of international criminal justice has helped to improve the Court's reach and the perception that justice is being done while, on the other hand, transnational civil society's agency, authority, and autonomy remains constrained across time and space due to a range of endogenous and exogenous factors. More research and analysis are necessary to better clarify the evolution of the relationship between transnational civil society and the Court. Scholars should also further evaluate the effectiveness and efficiency of transnational civil society organizations in achieving their stated objectives as well as interrogate the structures of power within transnational civil society and shortcomings in accountability mechanisms within and among groups. Continuing to investigate these questions is as much about the pursuit of knowledge as it is about securing the future of international criminal justice.

International Criminal Justice and the Empowerment or Disempowerment of Victims

Chris Tenove*

In David Scheffer's memoir of his time as the United States' Ambassador-at-Large for War Crimes Issues, he reflects on his efforts to push colleagues in government to take stronger action on international criminal justice:

Often, while listening to senior officials sitting comfortably in the White House Situation Room explain why other national priorities trumped atrocities and the pursuit of war criminals, I wanted [...] [the] mutilated bodies and missing souls of girls, boys, women and men of Bosnia, Rwanda, eastern Congo, and Sierra Leone to file silently through that wood-paneled room and remind policy-makers of the fate of ordinary human beings.¹

Like many advocates of international criminal justice, Scheffer promotes its rules and institutions by referring to the suffering of victims and their need for redress. Indeed, commentators have observed that the legitimacy of international criminal justice is increasingly evaluated according to whether it provides 'justice for victims'.²

The passage by Scheffer is telling in another way. The role for victims in his imaginary scene is to wait silently for decision-makers to speak on their behalf. Critical scholars often make just this accusation –

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¹ David Scheffer, *All the Missing Souls: Personal History of the War Crimes Tribunals*, Princeton University Press, Princeton, 2013, p. 2.

² Laurel E. Fletcher, "Refracted Justice: The Imagined Victim and the International Criminal Court", in Christian De Vos *et al.* (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Cambridge University Press, Cambridge, 2016; Kjersti Lohne, "NGOs for International Justice: Criminal or Victims' Justice?", in Andreas Føllesdal and Geir Ulfstein (eds.), *The Judicialization of International Law: A Mixed Blessing?*, Oxford University Press, Oxford, 2018.

that victims are effectively voiceless and powerless in international criminal justice processes. Some go further and argue that international criminal tribunals de-politicize, render passive, or otherwise disempower victims as agents of justice.³ Concerns about the powerlessness or disempowerment of victims in international criminal justice processes are central to debates about whether international criminal justice does in fact advance ‘justice for victims’.

This chapter examines ways in which international criminal justice processes may empower or disempower victims in their pursuit of justice.⁴ Based on focus-group discussions and interviews with survivors of conflict and international crimes in Kenya and Uganda, I argue that neither the laudatory nor critical positions in this debate capture the very complex and variegated effects of international criminal justice processes on victims.

I develop this argument in four sections. Section 18.1. explains how issues of victim empowerment and disempowerment have been addressed in literature in the field of international criminal justice.⁵ Section 18.2. describes my approach to research conducted with survivors of violence in Kenya and Uganda. Section 18.3. summarizes this research and identifies key aspirations, concerns, and judgements regarding (dis)empowerment by the International Criminal Court (‘ICC’). Section 18.4. analyses these findings and argues that international criminal justice processes do not simply empower or disempower victims. Instead, tribunals are *selective* about who receives victim status, they *channel* people’s agency in particular ways, and their impact is highly *context-dependent*. As a result, victim status is not simply empowering or disempowering – it enhances

³ As of 2018, when this chapter was written, key authors to take this position include, among others: Adam Branch, “Uganda’s Civil War and the Politics of ICC Intervention”, in *Ethics & International Affairs*, 2007, vol. 21, no. 2; Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenges of Legal Pluralism in Sub-Saharan Africa*, Cambridge University Press, Cambridge, 2009; Julie Mertus, “Shouting from the Bottom of the Well: The Impact of International Trials for Wartime Rape on Women’s Agency”, in *International Feminist Journal of Politics*, 2004, vol. 6, no. 1.

⁴ This chapter uses the term ‘victims’ to refer to people who are recognized as victims by international criminal tribunals. In the empirical research that follows, I refer to those who experienced rights violations as survivors, since not all were seeking victim status.

⁵ On international criminal justice as a ‘field’, see Peter Dixon and Chris Tenove, “International Criminal Justice as a Transnational Field: Rules, Authority and Victims”, in *International Journal of Transitional Justice*, 2013, vol. 7, no. 3.

the agency of some people in some contexts to pursue some aims of justice, but it can also pose serious risks and constraints. The concluding section sketches some implications of this framework for understanding the power of international criminal justice, and for evaluating the capacity of international criminal tribunals to advance ‘justice for victims’.

Before developing this argument, I acknowledge that victim empowerment is not a universally accepted aim for international criminal justice. For many people, and particularly those with a background in Anglo-American legal systems, criminal justice processes should focus on the innocence, guilt, and just desert of perpetrators. Doing so enables the State (or in this case, the international community) to ‘displace’ victims and their supporters from seeking justice or avenging themselves.⁶ Furthermore, commentators and practitioners have raised valid concerns that focusing on victims’ interests or views may undermine the truth-seeking quality of trials, may lead to violations of the rights of the accused, and may fritter limited resources.⁷

It is beyond the scope of this chapter to provide a full normative justification for highlighting the empowerment or disempowerment of victims in international criminal justice. However, I will make several points. First, while victim empowerment may be controversial, concern about disempowerment is not: few people would support actions by international criminal tribunals that increase survivors’ vulnerability to harm or that undermine their capacities to address injustice. Second, as I have argued elsewhere, greater attention to survivors’ perspectives can enable those people deeply affected by injustice, and who often have significant insight into its causes and consequences, to productively contribute to deliberations regarding the findings, operations, and ambitions of interna-

⁶ On the ‘displacement function’ of criminal justice, see John Gardner, “Crime: In Proportion and in Perspective”, in *Offences and Defences: Selected Essays in the Philosophy of Criminal Law*, Oxford University Press, Oxford, 2007.

⁷ See, among others, Sofia Stolk, “The Victim, the International Criminal Court and the Search for Truth: On the Interdependence and Incompatibility of Truths About Mass Atrocity”, in *Journal of International Criminal Justice*, 2015, vol. 13, no. 5; Christine van den Wyngaert, “Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge”, in *Case Western Reserve University Journal of International Law*, 2012, vol. 44; Sergey Vasiliev, “Victim Participation Revisited: What the ICC Is Learning About Itself”, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015; Natalie von Wistinghausen, “Victims as Witnesses: Views from the Defence”, *Victims of International Crimes: An Interdisciplinary Discourse*, Springer, 2013.

tional criminal justice.⁸ Third, survivors and their allies can benefit from clearer understandings of the risks and opportunities that people may face in international criminal justice, leading to more realistic expectations for tribunals. I do not argue that victim empowerment should trump other international criminal justice objectives, such as promoting human rights, enforcing the rule of law, and deterring future violence. The empowerment of victims to help address injustice should be seen as just one aim, albeit an important one.

18.1. Victim Powerlessness and Disempowerment: Three Critiques

Claims about victims are increasingly central to debates about the legitimacy and purpose of international criminal justice in general and the ICC in particular. This attention to victims has come about for several reasons.⁹ In recent decades, victims' rights movements within States have promoted the participation of victims and the protection of their interests in domestic criminal justice systems. These campaigns have contributed to and borrowed from developments in international human rights law, as well as the decisions of international and regional human rights courts. Furthermore, international criminal justice processes are often considered a form of transitional justice, alongside processes such as truth commissions and memorialization efforts, and the field of transitional justice emphasizes victims' agency and recognition.

As a result of these and other developments, victims have become a 'figure' or a 'constituency' that is central to the legitimacy of international criminal justice.¹⁰ State diplomats, civil society advocates, the staff of in-

⁸ Chris Tenove, "Justice and Inclusion in Global Politics: Representing and Advocating for Victims of International Crimes", Doctoral Dissertation, University of British Columbia, Vancouver, 2015 (available on the University of British Columbia's web site).

⁹ See Stephen Smith Cody and Eric Stover, "The Role of Victims: Emerging Rights to Participation and Reparation in International Criminal Courts", in Philipp Kastner (ed.), *International Criminal Law in Context*, Routledge, London, 2017; Laurel E. Fletcher and Harvey M. Weinstein, "Transitional Justice and the 'Plight' of Victimhood", in Cheryl Lawther et al. (eds.), *Research Handbook on Transitional Justice*, Edward Elgar Publishing, Cheltenham, UK, 2017; Luke Moffett, *Justice for Victims before the International Criminal Court*, Routledge, New York, 2014.

¹⁰ Fletcher, 2016, see above note 2; Sara Kendall and Sarah M.H. Nouwen, "Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood", in *Law & Contemporary Problems*, 2013, vol. 76, no. 3; Lohne, 2018, see above note 2; Frédéric Mégret, "In Whose Name? The ICC and the Search for Constituen-

ternational criminal tribunals, and other actors in the field frequently invoke victims and victimhood to gain authority, assistance and attention. In sum, one might say that victims – or at least the ‘imagined victims’ of international criminal justice discourse¹¹ – help to empower the field and actors within it.¹² However, some commentators argue that survivors of violence or repression are frequently *disempowered* by international criminal tribunals. Their concerns fit in three general categories: that victims’ status may expose people to harm; that victims are powerless in international criminal justice processes and instrumentalized by other actors; and that the very social category of ‘victim’ in international criminal justice poses an obstacle to people’s pursuit of the justice they desire. I will briefly examine those positions.

18.1.1. Victims’ Vulnerability and Risks of Harm

People may face risks to their well-being and their social relationships if they seek victim status from international criminal tribunals, and such harms may be disempowering. This concern has primarily been directed toward victim-witnesses, who may face intimidation, retribution, or social sanction from supporters of the people they testify against. Victim-witnesses may also experience re-traumatization or psychological strain when providing evidence to investigators or testifying in court. For instance, in interviews with victim-witnesses at the International Criminal Tribunal for the former Yugoslavia (‘ICTY’), Mertus finds that they “almost universally experience the trials as dehumanizing and re-traumatizing experiences”.¹³

However, research on victim-witnesses paints a more complex picture. Based on interviews with larger samples of victim-witnesses at the ICTY than Mertus, Stover¹⁴ and King and Meernik¹⁵ find that while a significant number faced threats, social sanction, and insecurity after testify-

cy”, in Christian De Vos *et al.* (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Cambridge University Press, Cambridge, 2016.

¹¹ Fletcher, 2016, see above note 2.

¹² For a further development of this argument see Dixon and Tenove, 2013, see above note 5.

¹³ Mertus, 2004, p. 112, see above note 3.

¹⁴ Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in the Hague*, University of Pennsylvania Press, Philadelphia, 2005.

¹⁵ Kimi Lynn King and James David Meernik, *The Witness Experience: Testimony at the ICTY and Its Impact*, Cambridge University Press, Cambridge, 2017.

ing, the majority did not. Furthermore, while some ICTY victim-witnesses attributed psychological harm to testifying, most did not.¹⁶ Indeed, research on victim-witnesses at the ICTY and at the Special Court for Sierra Leone suggests that engagement in trial processes can increase resilience and emotional well-being.¹⁷

Regarding the ICC, there are concerns that victim-witnesses are vulnerable to harm in some situations. As a glaring example, four female witnesses under the ‘protection’ of the ICC in the Democratic Republic of the Congo (‘DRC’) were subjected to sexual exploitation by an ICC staff member.¹⁸ Worries about victim-witness safety and witness tampering exist for many ICC cases.¹⁹ However, the most wide-ranging research on victim-witnesses at the ICC to date found most to be satisfied with the safety and security procedures.²⁰

18.1.2. Victims’ Powerlessness in International Criminal Justice Processes and Risks of Instrumentalization

Commentators and participants have argued that victims’ roles in international criminal justice processes are overly circumscribed and sometimes exploitive. From this perspective, victims’ participation in judicial processes does not empower them to pursue justice but instrumentalizes them to support the aims of other actors.

The criticism that victims are ‘passive objects’ rather than the active subjects of judicial processes has been directed most pointedly at earlier generations of tribunals.²¹ At the *ad hoc* tribunals created in the 1990s,

¹⁶ Stover, 2005, see above note 14; King and Meernik, 2017, see above note 15.

¹⁷ Kimi Lynn King and James David Meernik, “The Burden of Bearing Witness: The Impact of Testifying at War Crimes Tribunals”, in *Journal of Conflict Resolution*, 2017, vol. 63, no. 2; Shanee Stepakoff *et al.*, “The Experience of Testifying in a War-Crimes Tribunal in Sierra Leone”, in *Peace and Conflict: Journal of Peace Psychology*, 2015, vol. 21, no. 3.

¹⁸ ICC, “Post Incident Review of Allegations of Sexual Assault of Four Victims under the Protection of the International Criminal Court in the Democratic Republic of Congo by a Staff Member of the Court”, Independent Review Team Public Report (available on the ICC’s web site).

¹⁹ Open Society Justice Initiative, “Witness Interference in Cases before the International Criminal Court”, November 2016 (available on Open Society’s web site).

²⁰ Stephen Smith Cody *et al.*, “Bearing Witness at the International Criminal Court: An Interview Survey of 109 Witnesses”, Human Rights Center, University of California, Berkeley, 2014.

²¹ Marie-Benedicte Dembour and Emily Haslam, “Silencing Hearings? Victim-Witnesses at War Crimes Trials”, in *European Journal of International Law*, 2004, vol. 15, no. 1; Claire

prosecution and defence lawyers decided what opportunities victims would have to speak, often focusing on forensic details and submitting them to hostile cross-examination. Some of the most acute criticisms have focused on the role of female victims in trials.²²

The ICC and other international tribunals created since the mid-1990s provide greater opportunities for victims to contribute to judicial processes, primarily as legal participants or parties. Victim legal participation has been heralded by some as a triumph of victim inclusion and dismissed by others as a costly exercise that provides little benefit to victims and infringes on the due process of trials.²³ Focusing on the victim participation at the ICC, some observers claim that victims do not substantively contribute to judicial processes, either directly or by giving instructions to a lawyer, and so victim ‘participation’ is more symbolic than real.²⁴

18.1.3. The Displacement of Survivor’s Agency and the Cage of Victimhood

The most fundamental critique is that international criminal tribunals promote different forms of justice than those desired by survivors of mass violations, and that international criminal justice interferes in the actions that survivors themselves could take to pursue the justice they seek. As scholars observe, people with victim status are generally powerless to influence the *aims* and *priorities* of international criminal tribunals. Fletcher

Garbett, “From Passive Objects to Active Agents: A Comparative Study of Conceptions of Victim Identities at the ICTY and ICC”, in *Journal of Human Rights*, 2016, vol. 15, no. 1.

²² Susanne Buckley-Zistel, “Redressing Sexual Violence in Transitional Justice and the Labelling of Women as ‘Victims’”, in Thorsten Bonacker and Christoph Safferling (eds.), *Victims of International Crimes: An Interdisciplinary Discourse*, T.M.C. Asser Press, 2013; Mertus, 2004, see above note 3; Gilbert Bitti, “Les Victimes Devant la Cour Pénale Internationale: Les Promesses Faites à Rome Ont-Elles Été Tenues?”, in *Revue de science criminelle et de droit pénal comparé*, 2011, vol. 2, no. 2.

²³ Emily Haslam and Rod Edmunds, “Victim Participation, Politics and the Construction of Victims at the International Criminal Court: Reflections on Proceedings in Banda and Jerbo”, in *Melbourne Journal of International Law*, 2013, vol. 14, no. 2; Rachel Killean and Luke Moffett, “Victim Legal Representation before the ICC and ECCC”, in *Journal of International Criminal Justice*, 2017, vol. 15, no. 4; Mariana Pena and Gaelle Carayon, “Is the ICC Making the Most of Victim Participation?”, in *International Journal of Transitional Justice*, 2013, vol. 7, no. 3; van den Wyngaert, 2012, see above note 7; Vasiliev, 2015, see above note 7.

²⁴ Emily Haslam and Rod Edmunds, “Common Legal Representation at the International Criminal Court: More Symbolic Than Real?”, in *International Criminal Law Review*, 2012, vol. 12, no. 5; Kendall and Nouwen, 2013, see above note 10.

states that there is often tension between what ‘real’ victims desire and the assumed desires of the ‘imagined victims’ of international criminal justice discourse.²⁵

The possible disjuncture between victims’ aims for justice and the practice of international criminal tribunals is magnified by international criminal justice’s European or Western pedigree,²⁶ and by the disproportionate influence that powerful States have over the creation and conduct of tribunals.²⁷ Nouwen and Werner suggest five alternative conceptualizations to international criminal justice that may be displaced by the ICC’s work.²⁸ These include justice as resource redistribution and justice as the restoration of relationships. Furthermore, the very construction and mobilization of the social category of ‘victims’ can arguably be disempowering for survivors of violence and injustice. For instance, Branch contends that international criminal justice misinterprets political violence and forces actors into the ill-fitting roles of the “criminal”, the “transcendent judge” and the “innocent, passive victims”.²⁹ In the victim role, Branch argues, individuals are shunted into institutional processes and discursive framings that limit their abilities to pursue a more just political order.

Based on this and other concerns and critiques, the empirical study that follows uses the terms ‘disempowerment’ and ‘empowerment’ to mean that people’s agency to pursue their aims (and in particular to address past or ongoing violence and injustice) is durably reduced or increased, respectively.³⁰ This approach to (dis)empowerment has two ma-

²⁵ Fletcher, 2016, see above note 2.

²⁶ Clarke, 2009, see above note 3; James G. Stewart and Asad Kiyani, “The Ahistoricism of Legal Pluralism in International Criminal Law”, in *American Journal of Comparative Law*, 2017, vol. 65, no. 2.

²⁷ John Hagan, Ron Levi and Gabrielle Ferrales, “Swaying the Hand of Justice: The Internal and External Dynamics of Regime Change at the International Criminal Tribunal for the Former Yugoslavia”, in *Law & Social Inquiry*, 2006, vol. 31, no. 3; Mahmood Mamdani, “Responsibility to Protect or Right to Punish?”, in *Journal of Intervention and Statebuilding*, 2010, vol. 4, no. 1.

²⁸ Sarah M.H. Nouwen and Wouter G. Werner, “Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity”, in *Journal of International Criminal Justice*, 2015, vol. 13, no. 1.

²⁹ Branch, 2007, p. 190, see above note 3.

³⁰ For similar understandings of empowerment and agency, see Jay Drydyk, “Empowerment, Agency, and Power”, in *Journal of Global Ethics*, 2013, vol. 9, no. 3; Erin K. Baines, “‘Today, I Want to Speak out the Truth’: Victim Agency, Responsibility, and Transitional Justice”, in *International Political Sociology*, 2015, vol. 9, no. 4.

major implications for empirical research. First, if empowerment refers to people's capacities to pursue their aims, its assessment requires attention to those aims. Second, this approach highlights the interactions and ongoing relationships between relevant actors, such as survivors of mass rights abuses and staff of international criminal tribunals, and the structuring conditions or forces that shape those interactions.

18.2. Context and Research Methods

To interrogate these claims about victims' (dis)empowerment, I will turn to research with survivors of violence in Kenya and Uganda. In particular, I draw on 14 focus-group discussions with 84 survivors of violence in seven different communities.³¹ Focus-group participants were prompted to discuss why individuals might pursue recognition as victims by the ICC, the forms of justice that victims desire, and the role of the ICC in advancing or undermining justice for victims. The following analysis emphasizes the most commonly expressed views by the discussants, but also includes alternative or dissenting views. The aim of this qualitative research was to explore people's experiences, perceptions, and understandings, in some depth. The proportion of individuals expressing different views cannot be assumed to be representative of survivors in the two countries. However, the perspectives advanced are consistent with published surveys of violence-affected communities in Kenya and Uganda.³²

³¹ Focus-groups were held in 2012, in four Kenyan communities that had experienced high rates of violence in 2007-2008 post-election violence, and three Ugandan communities that experienced extreme violence during the Ugandan civil war. Participants were purposively selected to gain the perspectives of individuals of different sexes (45 women and 39 men), ages, ethnicities and experiences of violence. All participants claimed to have been affected by crimes that are within the ICC's jurisdiction. Some had applied for or received victim participant status from the ICC. Semi-structured discussions were conducted in Lango, Luo or Swahili, and recordings were translated into English and analysed. Discussions were facilitated to elicit people's observations, insights and normative judgements, rather than to simply register initial opinions. For more details, including steps taken to avoid harm to participants and to fulfil requirements of the Behavioral Research and Ethics Board of the University of British Columbia, see Tenove, 2015, see above note 8.

³² These include Stephen Smith Cody *et al.*, *The Victims' Court?: A Study of 622 Victim Participants at the International Criminal Court*, Human Rights Center, University of California, Berkeley, Berkeley, 2015; ICJ and Kenya Human Rights Commission, "Elusive Justice: A Status Report on Victims of 2007-2008 Post-Election Violence in Kenya", International Commission of Jurists (Kenya) and the Kenya Human Rights Commission, Nairobi, 2012; Phuong Pham and Patrick Vinck, *Transitioning to Peace: A Population-Based Sur-*

The focus-group results are supplemented and contextualized by research conducted between 2010 and 2015 in Kenya, Uganda, New York and The Hague. In addition to participant observation, this research includes interviews with additional survivors of violence (four in Kenya, eight in Uganda), with members of 30 different civil society organizations that focus on victims' issues (12 in Kenya, 14 in Uganda and 4 in The Hague), and with over 50 individuals who worked as ICC staff, diplomats, and subject-area experts.

18.2.1. Country Cases

Kenya and Uganda were chosen to explore the perspectives of survivors who experienced different types of mass violence and different ICC interventions.

In Kenya, the first ICC Prosecutor, Moreno Ocampo, launched a formal investigation in 2009 regarding violence that occurred during and following the 2007 national election. During that period, there were ethnically-targeted killing, maiming, sexual violence, looting and property destruction, as well as widespread extrajudicial violence by police, which resulted in over 1,000 deaths and an estimated 600,000 forcibly displaced persons.³³

In 2010, the Prosecutor named six accused persons, including Kenya's then Deputy Prime Minister, Uhuru Kenyatta, and former cabinet minister William Ruto. The ICC's work has been highly contested by the Kenyan government, particularly after Kenyatta and Ruto joined forces and won the 2013 national elections. There have been accusations that possible witnesses for the prosecution were intimidated or killed.³⁴ Several key witnesses for the Prosecution recanted their testimony or refused to testify. The Office of the Prosecutor failed to confirm charges against Ali and Kosgey in pre-trial hearings in 2012. Since the focus-groups were conducted in 2012, the Prosecutor dropped charges against Muthaura in

vey on Attitudes About Social Reconstruction and Justice in Northern Uganda, Human Rights Center, University of California, Berkeley, 2010.

³³ Kenya National Commission on Human Rights, "On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence", Nairobi, Kenya, 2008 (<https://www.legal-tools.org/doc/aedd06/>).

³⁴ Gabrielle Lynch, "Non-Judicial Battles: Kenyan Politics and the International Criminal Court", Egmont, Royal Institute for International Relations Africa Policy Brief no. 8 (2014), Brussels, 2014.

2013 and Kenyatta in 2014, citing insufficient evidence.³⁵ Trial judges terminated the case against Ruto and Sang in 2016 before the trial was completed, due to the weakness of the prosecution's evidence.³⁶

In Uganda, the ICC became involved in 2003 when the Ugandan government referred to the Court the situation concerning the Lord's Resistance Army ('LRA'). The LRA had been fighting the Ugandan military since 1987 and had perpetrated mass killing, looting, abduction, and other forms of violence against civilians. Moreno Ocampo began investigations in early 2004 and, in 2005, the ICC issued arrest warrants for LRA leader Joseph Kony and four of his commanders, including Dominic Ongwen. Two of the accused commanders have since died.

The ICC's role in Uganda received immediate support from international human rights non-governmental organizations ('NGOs') and many States. However, ICC staff met a different reaction from activists and organizations on the ground in northern Uganda.³⁷ Speaking on behalf of affected communities, they put forward three challenges to the assumption that victims would want or benefit from the ICC. First, many argued that the ICC's actions would undermine peace efforts, including amnesties and peace negotiations. Kony repeatedly claimed that the ICC arrest warrants were a key obstacle to a peace deal.³⁸ Second, many argued that the ICC's criminal justice approach differs from the local justice practices of many northern Ugandans, which often emphasize forgiveness and community

³⁵ ICC, Situation in the Republic of Kenya, *Prosecutor V. Uhuru Kenyatta*, Trial Chamber V(b), Notice of Withdrawal of the Charges against Uhuru Muigai Kenyatta, 5 December 2014, ICC-01/09-02/11-983 (<https://www.legal-tools.org/doc/b57a97>).

³⁶ ICC, Situation in the Republic of Kenya, *Prosecutor v. William Ruto and Joshua Sang*, Trial Chamber V(a), Public Redacted Version of the Decision on Defence Applications for Judgments of Acquittal, 5 April 2016, ICC-01/09-01/11-2027-Red-Corr. (<https://www.legal-tools.org/doc/6baecd>).

³⁷ For accounts of local mobilization against the ICC's involvement, see Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, Zed, London, 2006; Branch, 2007, see above note 3.

³⁸ There is an on-going debate among scholars about whether the ICC's intervention helped or hindered the peace process. See, among others, Michael Otim and Marieke Wierda, "Justice at Juba: International Obligations and Local Demands in Northern Uganda", in Phil Clark and Nicholas Waddell (eds.), *Courting Conflict: Justice, Peace and the ICC in Africa*, Royal African Society, 2008; Patrick Wegner, "Ambiguous Impacts: The Effects of the International Criminal Court Investigations in Northern Uganda", Refugee Law Project, Kampala, Uganda, 2012; Ronald R. Atkinson, "'The Realists in Juba'? An Analysis of the Juba Peace Talks", in Tim Allen and Koen Vlassenroot (eds.), *The Lord's Resistance Army: Myth and Reality*, Zed, London, 2010.

reconciliation. Particular attention has been given to *mato oput* ceremonies and other practices of the Acholi people, the ethnic group that makes up the majority of the LRA's members and victims.³⁹ Third, the Prosecutor's decision not to charge any member of the Ugandan government or military provoked a debate about the ICC's impartiality and allegations that it pursues selective justice.⁴⁰ Critics argue that the Ugandan government has used the ICC as a tool to further stigmatize its opponents and to legitimize itself in the eyes of the international community.⁴¹

In 2015, the former LRA commander, Dominic Ongwen, was captured and transferred to ICC custody. He has been charged with 70 counts of war crimes and crimes against humanity, including sexual and gender-based crimes, committed between 2002 and 2005. His trial began in December 2016, and would continue through 2018. As of October 2018, when this chapter was written, 4107 victims had been granted the right to participate in proceedings.⁴²

The following section summarizes key findings from focus-group discussions in Ugandan and Kenyan communities.

³⁹ On this debate see, among others, Tim Allen, "Bitter Roots: The 'Invention' of Acholi Traditional Justice", in Tim Allen and Koen Vlassenroot (eds.), *The Lord's Resistance Army: Myth and Reality*, Zed, London, 2010; Refugee Law Project, "Tradition in Transition: Drawing on the Old to Develop a New Jurisprudence for Dealing with Uganda's Legacy of Violence", Refugee Law Project, Makerere University, 2009.

⁴⁰ Academics and civil society groups have documented extensive violence by the Ugandan military during military actions and in the confinement of hundreds of thousands of northern Ugandans to displaced persons camps. See Lucy Hovil and Joanna Quinn, "Peace First, Justice Later: Traditional Justice in Northern Uganda", Refugee Law Project, Kampala, Uganda, 2005; Human Rights Watch, "Unfinished Business: Closing Gaps in the Selection of ICC Cases", Human Rights Watch, New York, 2011.

⁴¹ Sarah M.H. Nouwen and Wouter G. Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan", in *European Journal of International Law*, 2010, vol. 21, no. 4; Branch, 2007, see above note 3; Valerie Freeland, "Rebranding the State: Uganda's Strategic Use of the International Criminal Court", in *Development and Change*, 2015, vol. 46, no. 2.

⁴² ICC, "Case Information Sheet: Situation in Uganda, the Prosecutor v. Dominic Ongwen", ICC-PIDS-CIS-UGA-02-013/18_Eng (available on the ICC's web site).

18.3. Survivors' Views of the International Criminal Court and Justice for Victims

18.3.1. The Significance of Victim Status

When the ICC intervenes in a country, those who have suffered violence or rights abuses may pursue or resist victim status for a variety of reasons. Focus-groups discussions and interviews in Kenya and Uganda revealed diverse and sometimes competing views about whom the ICC should recognize as victims and what such status should entail. Most saw the ICC as a critical arbiter of these decisions.

All Ugandan discussants and almost all Kenyan discussants agreed that the term 'victim' was appropriate for them, based on their experiences of violence and injustice. Many argued that to be recognized as a victim meant they had been harmed in the past *and* that there was a social obligation for others to help address the ongoing impacts of past harms.

When discussing these ongoing impacts, discussants frequently spoke of their disempowerment. Reduced agency often resulted from injuries and continuing health problems, psychological wounds, or material deprivation, which prevented people from pursuing social roles such as parent, worker, or active community member. Participants also identified the obstacles that victims face due to diminished social status. A Ugandan man who had been abducted by the LRA as a child explained that experience: "In homes and in schools there is a lot of stigmatization of those who were abducted. This situation leaves the returnees no choice but to isolate themselves from the community. We live in mimicry of our stay in captivity".⁴³

Many focus-group participants saw victim status as a means to regain agency and active membership in their communities. For instance, a Kenyan man explained:

Because of the violence I suffered my life came to a standstill and my children continue to suffer, while I see others in my community who still have good lives [...] I don't have any problem with being called a victim. In fact, I feel freed when called a victim, because I will not be abandoned but I will be helped to forge a new life.⁴⁴

⁴³ Male focus-group participant, Palabek Kal, Lamwo District, Uganda (transcripts on file with the author; same hereinafter).

⁴⁴ Male focus-group participant, Vihiga County, Kenya.

The vast majority of Kenyan and Ugandan discussants hoped that the victim status would prompt the Court to act on their behalves or help them pursue justice. Some discussants claimed that recognition as a victim by the ICC would lead to broader forms of recognition, assistance and understanding, from their governments, communities, or even their own families.

Given these and other expectations about the ICC's conferral of victim status, many focus-group participants expressed concern that the ICC would inappropriately grant or withhold that status. For instance, both Kenyan and Ugandan participants argued that the temporal restrictions of the ICC investigations were problematic – as they excluded potential crimes committed before 2002 in Uganda (due to the temporal jurisdiction of the ICC), and before 2007 in Kenya. Focus-group participants also criticized the particular cases that the Prosecutor pursued. For instance, many Ugandan discussants stated that people harmed by the Ugandan government and military warranted attention from the ICC as victims, and some claimed that the millions of Ugandans forced by the government into internal displacement camps should be recognized as victims.

Because victim status entails normative recognition and possible material assistance, focus-group participants in both countries worried that some people who were not 'real victims' would nevertheless be treated as deserving victims by the ICC. People often expressed concern that limited resources would be misdirected. This issue of 'real victims' was more politically fraught in Kenya, since those accused in ICC cases positioned themselves as victims of the Court itself. A member of a Kenyan human rights organization explained, "[m]ost of the suspects have begun to play the role of the victim. As civil society, what we have been trying to do is remind people who the real victims are – they are the people who suffered these different atrocities".⁴⁵

18.3.2. Interactions with the International Criminal Court

The ICC does not simply act *on* or *for* victims, it creates contexts for people *to* act – including opportunities to seek victim status, provide information, articulate aims, and learn about the Court's actions and limitations.

One of the major innovations of the ICC Statute in international law is the opportunity for victims to be participants in judicial processes, pri-

⁴⁵ Male interviewee, Nairobi, Kenya, August 2012.

marily achieved via legal representation. The modalities of victim participation have differed across cases and situations, and are an ongoing matter of legal dispute.⁴⁶ Victim representatives have informed judicial processes and outcomes in various ways. For instance, they have submitted motions, questioned witnesses, made opening and closing statements, and called victim participants to appear in court, and in doing so they have enriched trial records, have challenged the Prosecutor's selection of charges, and prompted judges to act on threats made against victims by supporters of accused persons.⁴⁷ They have informed judges decisions to authorize the Prosecutor's to pursue investigations in Kenya and Côte d'Ivoire.⁴⁸ Victims have also been consulted extensively regarding decisions to award and implement reparations.⁴⁹ Despite the extensive commentary on victim participation, there has been relatively little analysis of its impact on trials or on victims themselves – in part because the ICC has only recently completed cases to the conclusion of all possible appeals.⁵⁰

In interviews and focus-group discussions, I asked Kenyan and Ugandan survivors to describe their understanding of potential contributions to ICC processes, and their hopes for how these interactions ought to take place. Three observations can be drawn from their responses: the Court can be an ambiguous and perplexing institution to engage; ongoing communication with the ICC was seen as critical for people to exercise

⁴⁶ Pena and Carayon, 2013, see above note 23; Vasiliev, 2015, see above note 7.

⁴⁷ For the latter, see: ICC, Situation in the Republic of Kenya, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Pre-Trial Chamber II, Transcript of Confirmation of Charges Hearing, 8 September 2011, ICC-01/09-01/11-T-12-ENG, pp. 26-30 (<https://www.legal-tools.org/doc/c19943>).

⁴⁸ ICC, Situation in the Republic of Kenya, Pre-Trial Chamber III, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19 (<https://www.legal-tools.org/doc/338a6f>); ICC, Situation in the Republic of Côte d'Ivoire, Pre-Trial Chamber III, Corrigendum to Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 15 November 2011, ICC-02/11-14-Corr (<https://www.legal-tools.org/doc/e0c0eb>).

⁴⁹ See, in particular, ICC, Situation in the Democratic Republic of the Congo, Registry, Registry Report on Applications for Reparations in Accordance with Trial Chamber II's Order of 27 August 2014, 15 December 2014, ICC-01/04-01/07-3512, Annex 1 (<https://www.legal-tools.org/doc/544149>).

⁵⁰ But see Claire Garbett, "The Truth and the Trial: Victim Participation, Restorative Justice, and the International Criminal Court", in *Contemporary Justice Review*, 2013, vol. 16, no. 2 on the Lubanga trial, as well as Haslam and Edmunds, 2013, see above note 23, on the Jerbo and Banda trial.

agency; and survivors had quite different aspirations for their own interactions with the Court.

First, people's engagement with the ICC comes through interactions with a diverse and sometimes bewildering range of officials and go-betweens. These include staff from different units of the Court itself, national and international NGOs, and local intermediaries. Many of these individuals asked for information from survivors, and it was often unclear to individuals how their views were being used or whether they were informing the actions of the ICC itself. Interactions with these diverse representatives, officials and intermediaries generate a complex array of power dynamics and opportunities for agency for individuals who have or seek victim status.⁵¹ For some, the ongoing interactions with Court staff, NGO representatives, and researchers can generate fatigue and frustration, particularly when these interactions yield few tangible benefits and provide little new information about ICC developments.

Second, ongoing communication with ICC staff capable of providing substantive information was highly valued by discussants.⁵² Most discussants wanted to learn if and how the ICC was making progress on advancing aims of justice. Many discussants suggested that they needed ongoing updates from the Court to identify how they could contribute to and derive benefits from the ICC's actions, often in the midst of evolving political and security contexts. They also wanted updates in order to evaluate changing risks to themselves for participating – or being perceived to participate – in ICC activities. Ongoing communication is thus important for the ICC's impact on the agency of victims, both positive and negative. Recognizing this, one ICC staff member who worked with victims stated:

We want to be supported by victims, and in a perfect world they would be happy with what we do. But it's better to have well-informed victims who are pissed off at the Court than content victims who don't understand what is happening.⁵³

Third, survivors of violence did not all seek to engage with the Court in the same way. Among discussants in Kenya and Uganda, a sig-

⁵¹ For a nuanced analysis of the role and power of intermediaries, see Leila Ullrich, "Beyond the 'Global-Local Divide': Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court", in *Journal of International Criminal Justice*, 2016, vol. 14, no. 3.

⁵² For a similar finding, see Cody *et al.*, 2015, see above note 32.

⁵³ Interview with ICC staff member, The Hague, September 2014.

nificant minority claimed that their direct appearance at the Court was important, enabling them to advance justice for themselves and for fellow victims. As one Ugandan man argued: “I would like to tell the ICC everything I have seen [...] I [want] the ICC to pledge that it will use my testimony, because I know the next generation would reap the benefits when I am gone”.⁵⁴

A smaller category of focus-group participants and interviewees wanted to make more extensive contributions, and argued that victims should contribute to the Court’s policy-making as well as its judicial processes. They claimed that doing so would improve the outcomes for victims and would enhance their social recognition. Along these lines, a member of an association of Ugandan women affected by civil war stated:

We want to show the world that survivors or victims are the ones who know their problems best and who can advocate for justice better than a sympathizer or someone who knows about them. At the end of it all, justice is a process of our empowerment rather than the outcome of justice done.⁵⁵

However, the largest category of focus-group discussants and interviewees wished to make more modest contributions by sharing their views and experiences in private and secure interactions with Court staff.⁵⁶ Furthermore, many discussants claimed that the quality of their representation was at least as important as direct participation. In addition to security risks associated with direct participation, some claimed that victims’ interests should be advanced by individuals with appropriate expertise, including but not limited to lawyers. Taken together, these responses suggest that direct participation and victims’ ‘visibility’ in the courtroom should not be seen as the ideal of victim engagement, but rather as one of a range of forms of desirable engagement.

18.3.3. Multiple Forms of Justice for Victims

For the ICC to empower survivors of mass violence and rights abuses, it must create durable improvements in people’s opportunities to advance the justice that they desire. To assess those possibilities, discussions in Kenya and Uganda addressed the forms of justice and the opportunities

⁵⁴ Male focus-group discussant, Lukodi village, Gulu District, Uganda.

⁵⁵ Interviewee, Gulu District, Uganda, June 2012.

⁵⁶ For a similar finding, see Cody *et al.*, 2015, pp. 32-33, see above note 32.

for justice that survivors hoped the ICC would advance. They also identified possibilities for disempowerment.

18.3.3.1. Justice as Accountability

The ICC was created to hold individuals to account for war crimes, crimes against humanity, genocide and aggression. In the focus-groups and interviews, almost all survivors of violence agreed that the ICC should investigate those who were most responsible for ordering or orchestrating mass violence.⁵⁷ However, there was some variation in the discussants' views on the contribution that accountability might bring to victims' pursuit of justice, and the possibilities for disempowerment that might result from the ICC's pursuit of accountability.

The discussants and interviewees put forward different normative justifications and different aims for pursuing accountability. The trial and punishment of individual perpetrators was seen to serve instrumental and intrinsic justice aims. For instance, as a Ugandan woman said:

I was very impressed when I heard that the ICC will investigate, try and punish those commanders, so that we do not need to fear these deliberate killings again. I am very happy that those who killed my people are finally going to be punished and my dead ones will get their justice.⁵⁸

Many discussants argued that accountability enforced by the ICC could help reconstruct a social order that was torn during conflict and that remains frayed. As a Ugandan man stated, "the undisciplined man who thinks he is above the law should be disciplined and corrected, he should be pruned by the ICC. Then he will understand the law and respect oth-

⁵⁷ This finding differs from some previous accounts, which suggest less local support for ICC prosecutions in Uganda (see, for instance, Hovil and Quinn, 2005, see above note 40; Pham and Vinck, 2010, see above note 32). Several factors may explain my different findings. First, the security situation in northern Uganda was much better than during the time of these earlier reports, so participants were less concerned that the ICC's actions would prompt LRA attacks or undermine a peace process. Second, some discussants who initially disagreed with ICC prosecutions changed their position during the course of discussions, once they understood that prosecutions would be limited to a few top leaders. Third, my focus-groups are a small sample and may not be representative of affected communities more broadly.

⁵⁸ Female focus-group discussant, Lukodi village, Gulu District, Uganda.

ers”.⁵⁹ As this man and other discussants argued, the reconstruction of social order would help affirm the value of people who were harmed.

Most focus-group participants in Kenya and Uganda claimed that the ICC – and not domestic courts – should pursue accountability against powerful individuals. Many expressed scepticism about the fairness and effectiveness of their domestic judicial systems. As a Kenyan man stated,

I am happy that this court was created to try the ‘big fish’ that can’t be tried in their own countries because of their influence and power [...] But the ICC is very strict on the law. If you are found guilty there is no short cut, you have to pay for it.⁶⁰

However, discussants raised concerns about how the ICC’s capacity to pursue meaningful and just accountability.

One concern was that the ICC’s focus on criminal accountability would preclude local or traditional justice processes – in other words, that it would disempower people’s ability to pursue more appropriate forms of justice. However, this concern was raised by a small minority of Ugandan discussants and by no Kenyan discussants. Many Ugandan discussants were broadly supportive of local justice processes such as *mato oput* for low-ranked LRA militants, particularly those abducted as children, but they saw ICC accountability measures as more appropriate for LRA commanders and for senior Ugandan military or government officials.

More controversial than the tension between local justice and international criminal justice was the question about *who* would be held to account and for *what actions*. The ICC only focuses on a subset of crimes by a limited number of individuals in any situation. To a significant extent the Prosecutor makes these decisions. Like many experts,⁶¹ discussants raised concerns about gaps in the charges put forth by the Prosecutor. Many discussants criticized the ICC’s failure to bring charges against top

⁵⁹ Male focus-group discussant, Lukodi village, Gulu District, Uganda.

⁶⁰ Focus-group discussant, Vihiga County, Kenya.

⁶¹ For analysis of prosecutorial discretion see, among others, Nouwen and Werner, 2010, see above note 41; William Schabas, “Victor’s Justice: Selecting Situations at the International Criminal Court”, in *The John Marshall Law Review*, 2009, vol. 43, no. 3; Alana Tiemessen, “The International Criminal Court and the Politics of Prosecutions”, in *International Journal of Human Rights*, 2014, vol. 18, nos. 4-5.

leaders in the Ugandan government and military.⁶² When discussing this issue, there was considerable blurring between *legal accountability* for crimes and *political accountability* for leaders' decisions and their consequences. For instance, those who wanted ICC trials of Ugandan President Museveni or former Kenyan President Mwai Kibaki often claimed that as leaders they were responsible for the context in which crimes occurred, sometimes likening them to the heads of households who should bear responsibility for all the actions of their 'children' or sub-ordinates.

Discussants not only raised concerns about the fairness of ICC selectivity, they also explained ways in which this selectivity might undermine the pursuit of justice by people harmed by mass violence. Several discussants suggested that the ICC's failure to charge powerful individuals – and especially those in the Ugandan government or military – would help to 'hide' those crimes and 'protect' their perpetrators from national processes of legal or political accountability. Many argued that if the ICC failed to hold accountable leaders on 'all sides' of a conflict, the Court would in effect be denying the violence and injustice that many people experienced.

18.3.3.2. Justice as Truth and Recognition

Experts and practitioners disagree about the extent to which the ICC might operate as a mechanism of public truth-telling, since criminal trials pursue narrow and perpetrator-oriented inquiries.⁶³ Focus-group discussants and interviewees frequently saw the ICC as playing two important roles for public truth-telling: *seeking truth* and promoting the *recognition of truth*.

The first truth-telling role derives from the ICC's capacity to investigate and provide information that victims desire. For instance, victims may seek a court's assistance to identify what happened to a loved one who is missing or deceased, or to better understand the actions and motivations of perpetrators. Several respondents stated that they hoped the ICC would help them find out how and why crimes occurred.

⁶² This criticism of the ICC by many northern Ugandans has been widely documented. See, for example, Cody *et al.*, 2015, see above note 32; Hovil and Quinn, 2005, see above note 40; Human Rights Watch, 2011, see above note 40.

⁶³ Garbett, 2013, see above note 50; Barrie Sander, "Unveiling the Historical Function of International Criminal Courts: Between Adjudicative and Sociopolitical Justice", in *International Journal of Transitional Justice*, 2018, vol. 12, no. 2.

However, this was not the ‘truth-telling’ that most discussants looked for. Instead, they wanted their own views, and accounts of past and ongoing injustice, to be heard and acknowledged. For this role, the Court would not simply pursue truth *on behalf of* victims but would help amplify and validate the truths *of* victims.

For instance, a Kenyan woman argued that the ICC could make community members understand what she suffered, and could also force the Kenyan government to acknowledge the existence of victims. She stated: “The ICC had to come because Kenya was not willing to tell the truth about the post-election violence”.⁶⁴ Like many discussants, she wanted the ICC’s truth-telling to remind other responsible actors of their social obligations to redress victims’ ongoing suffering.

The desire by victims to have their truths known and acknowledged can be seen as the justice aim of *recognition*. For this to occur, people must believe that their voices, experiences or identity are represented in a symbolically significant process, and acknowledged by the appropriate audience.⁶⁵ Different respondents identified different intended audiences for this truth-telling, from fellow community members to fellow nationals to a world community. For example, several Kenyan discussants claimed that they needed the ICC to make their national government recognize victims and act on their plight. In contrast, a Ugandan man explained why he would like to speak at the ICC about the LRA attack on his village and its impact: “To me I think that our story should be told to the whole world [...] That way, when other voices cry out again in the future, they may get attention”.⁶⁶

Discussants also identified ways that the ICC might obstruct opportunities to contribute to public truth-telling. One risk was that the Court would not grant victim status to the appropriate people, perhaps because the harms they experienced were not pursued in cases or those cases collapsed. Another risk was that their communication with the ICC could prompt the supporters of accused persons to seek to silence them with violence. These concerns were more frequently raised in Kenya, where many discussants believed that lending their voices to the Court would be

⁶⁴ Focus-group discussant, Ugunja, Siaya County, Kenya.

⁶⁵ Peter Dixon, “Reparations and the Politics of Recognition”, in Carsten Stahn *et al.* (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Cambridge University Press, Cambridge, 2016.

⁶⁶ Focus-group discussant, Lukodi village, Gulu District, Uganda.

seen as a provocation by the government or by powerful supporters of accused persons. As one man put it, “there is risk because whenever you speak the truth, some people will definitely be offended and this may put your life in danger”.⁶⁷

Compared to previous international criminal tribunals, the ICC offers greater opportunities for victims to contribute their perspectives to trials. As will be discussed in greater detail below, they can do so through legal representation, by appearing as prosecution or defence witnesses, and – more rarely – as witnesses called by victims’ lawyers. However, a small number of discussants felt that the ICC used them as an information resource rather than amplifying their voices. They stated that they felt powerless in their relationships with the staff of the ICC and affiliated NGOs, who came to question and collect statements from survivors, but provided little in return and offered little control over how this information would be used or the impact it might have.

18.3.3.3. Justice as Reparation

Survivors of conflict frequently place greater emphasis on victim reparation than perpetrator accountability.⁶⁸ Unlike earlier international criminal tribunals, the ICC provides victims with actionable rights to reparation, as well as possible measures of rehabilitation and assistance from an affiliated body, the Trust Fund for Victims (‘TFV’). Discussants in Kenya and Uganda frequently argued that prosecutions alone would not provide justice, because victims would continue to suffer the physical, psychological, economic and social consequences of past injustices. Many focus-group participants and interviewees stated that they pursued victim status out of a desire for some form of reparations or assistance.⁶⁹

Most discussants claimed that their own governments held primary responsibility for reparative measures, but suggested that the ICC ought to intervene in the breach of those responsibilities. These calls for reparative justice fell into two general categories: communal and individual.

⁶⁷ Focus-group discussant, Vihiga County, Kenya.

⁶⁸ See, for example, Pham and Vinck, 2010, see above note 32; Harvey M. Weinstein *et al.*, “Stay the Hand of Justice: Whose Priorities Take Priority?”, in Roland Shaw *et al.* (eds.), *Localising Transitional Justice: Interventions and Priorities after Mass Violence*, Stanford University Press, Stanford, 2010; Fletcher, 2016, see above note 2.

⁶⁹ For a similar finding, see Cody *et al.*, 2015, see above note 32.

Many Ugandan participants called for compensation and other reparative measures to assist their communities or the entire northern region of Uganda. This position was justified by pointing to the lasting effects of conflict. As one man explained, these lasting effects include high rates of hunger, illness and economic deprivation, and he declared: “Honestly, the war has not ended; we have only rested from the sound of gunshots”.⁷⁰ This respondent and others called for collective reparations to the legacy of the civil war and the systemic inequalities among regions in Uganda due to State policies.

The second category of reparative justice is individual-level rehabilitation, compensation, and assistance. The majority of Kenyan and Ugandan respondents claimed that these were needed to address ongoing injustices, which were the undeserved poverty, disability or social marginalization that resulted from past harms. In the words of one Kenyan interviewee, “it is not justice for me that the perpetrator is punished, while I continue to be punished by the poverty that came from the attack on our household”.⁷¹

Some discussants claimed that the ongoing effects of past harms were undermining their capacity to themselves pursue justice. For instance, a Ugandan woman, speaking of former LRA abductees like herself, said that because of stigmatization, “we are unable to speak and act for ourselves”.⁷² A Kenyan man who had unhealed bullet wounds said: “I cannot work or even lobby officials of the government because of my injuries, and I cannot get treatment without money or help from the government. To get out of this trap would be justice for me”.⁷³

Reparative measures did prompt some concerns. Discussants raised the possibility of acrimonious competition for victim status when people believe that a direct material benefit would result, as well as the possibility that individuals who receive reparations might become the objects of envy and stigma in their communities.⁷⁴ However, the most common concern was that reparative measures would be severely delayed or would not come at all. Indeed, by 2018, no reparation orders have been issued by the

⁷⁰ Male focus-group discussant, Lukodi village, Gulu District, Uganda.

⁷¹ Female interviewee, Eldoret, Uasin Gishu County, Kenya.

⁷² Focus-group discussant, Palabek Kal, Lamwo District, Uganda.

⁷³ Focus-group discussant, Vihiga County, Kenya.

⁷⁴ See also Dixon, 2016, see above note 65.

Court in the Kenya or Uganda situations, since there have been no completed cases or convictions. The TFV can provide assistance before a conviction is achieved. However, it did not operate in Kenya, to the frustration of some victims and their allies. The TFV has funded projects in Uganda since 2008. An independent study of TFV programs in Uganda and the DRC found that recipients credited the medical, psychological and material support they received with helping them “to live a normal life again, to make plans for the future, to resume school and work, [and to gain] the confidence to participate in community gatherings again”.⁷⁵

More empirical research is required in order to further explore the impact of TFV, and in particular to assess the impact of ICC reparations (and their denial) on people who pursued victim status.

18.3.3.4. Improving Political Opportunities for Justice

In addition to the more familiar goals in international criminal justice, including accountability, truth and reparations, discussants in Kenya and Uganda also argued that the ICC could create opportunities for victims and their allies to more effectively pursue justice via other institutions or political processes. To use a sociological term, they suggested that the ICC could improve – or undermine – the *political opportunity structure* for them to act.⁷⁶

One aspect of political opportunity structure that discussants highlighted was *agenda-setting*. The ICC, they claimed, could provoke greater public attention to past crimes or injustices, and amplify victims’ demands for redress and political reform. For instance, a Ugandan man said, “I think the ICC has opened the eyes of government, which tried to stay blind to the atrocities that had happened here in Barlonyo”, and he argued that the resulting pressure from local and international activists caused State officials to pay attention and provide some compensation.⁷⁷ In Kenya, a member of a human rights organization argued:

⁷⁵ Jennifer McCleary-Sills and Stella Mukasa, “External Evaluation of the Trust Fund for Victims Programmes in Northern Uganda and the Democratic Republic of Congo: Towards a Perspective for Upcoming Interventions”, International Center for Research on Women, The Hague, 2013, p. 8.

⁷⁶ On the concept of ‘political opportunity structures’, see, for instance, Charles Tilly and Sidney G. Tarrow, *Contentious Politics*, Oxford University Press, Oxford, 2015.

⁷⁷ Focus-group discussant, Barlonyo village, Lira District, Uganda.

If we didn't have the ICC there wouldn't be as much discourse in the public arena about the post-election violence [...] [and issues such as] forced disappearances, police brutality, and overall the lack of accountability of our political leaders.⁷⁸

Second, survivors and affiliated civil society groups saw the ICC as helping them gain *access to new allies and resources*. Several discussants described how meetings that were facilitated by ICC staff led to new relationships with fellow survivors, local community leaders, or national civil society organizations. For instance, a Kenyan man said that he feared to speak of his victimization in his community, but in ICC-brokered meetings with fellow victims he felt free to talk: "It brings me relief to speak to other victims about the problems I face".⁷⁹

In addition, members of local civil society groups described new opportunities to work with international organizations and NGOs to push for accountability and victim recognition.⁸⁰ These opportunities included public advocacy campaigns and human rights litigation in domestic courts, in addition to work focused on ICC processes.⁸¹ However, respondents also spoke of risks that these relationships might distract them from doing work that would best benefit survivors of mass violence. For example, civil society members in Kenya spoke of an international donor 'market' for victims of the 2007–08 post-election violence, and claimed that it had become harder to get funding for projects that assisted people harmed by mass violence that was not being investigated by the ICC. Furthermore, some civil society groups in Kenya foresaw and later experienced a backlash from the government for their support of the ICC.

Finally, discussants suggested that the ICC's intervention had somewhat *lessened their fears of violence and repression*, and the fears of their allies. According to many Kenyan focus-group participants, the principal impact of the ICC had been the reduction in risks of politically motivated violence among competing ethnic factions. As one Kenyan woman said, "the ICC has done a good thing by summoning the suspects of the post-election violence before the court. If they didn't do that, we could

⁷⁸ Interview in Nairobi, Kenya, August 2012.

⁷⁹ Interviewee, Ugunja, Siaya County, Kenya, 2012.

⁸⁰ Interviews with members of civil society organizations in Gulu and Lira districts, Uganda (2011 and 2012) and in Eldoret, Kisumu and Nairobi in Kenya (2012).

⁸¹ Tenove, 2015, see above note 8.

still be at war”.⁸² Many Ugandan discussants credited the ICC with scaring off the LRA and improving the behaviour of their government. Some civil society actors suggested that Kenyan and Ugandan politicians were more respectful of peace and human rights due to the ICC’s ongoing monitoring of events in the countries, though others disagreed.⁸³

Evidence to support these claims is mixed. In Kenya, the elections in 2013 and 2017 were much less violent than in 2007, but it is unclear whether the ICC’s involvement played a significant role. Certainly, the ICC offers no certitude of declining violence, as is clear from ongoing conflict in the CAR, DRC and Libya. Regarding Uganda, the ICC’s impact on the civil war with the LRA is mixed,⁸⁴ and so too is its impact on violence and repression by the Ugandan State.⁸⁵

18.4. Selective, Channelled and Contextual Effects on Agency

Survivors of violence in Kenya and Uganda described how they may seek, compete over, utilize and become frustrated by the victim status granted by the ICC. They articulated different and sometimes contrasting aspirations for the role the Court might play in helping them attain justice, and they often had desires that exceed the Court’s current capacities. Drawing on this research and secondary literature, I argue that international criminal tribunals may enhance the agency of some victims to pursue some aims in some contexts, while undermining that agency in other situations. More specifically, I propose that this variability exists because tribunals are highly *selective* about whom to confer victim status on, they *channel* people’s agency in specific ways, and their effects are highly *context-dependent* rather than being consistent over time and across situations.

18.4.1. Selective

When people are recognized as victims by international criminal tribunals, they may gain opportunities to contribute to judicial processes or to receive reparations from them. Victim status may also generate benefits

⁸² Female focus-group discussant, Ugunja, Siaya County, Kenya.

⁸³ Interviews with members of civil society organizations in Kampala and Gulu District (2012), and in Kisumu and Nairobi in Kenya (2012).

⁸⁴ Atkinson, 2010, see above note 38; Otim and Wierda, 2008, see above note 38; Wegner, 2012, see above note 38.

⁸⁵ Valérie Arnould, “Transitional Justice and Democracy in Uganda: Between Impetus and Instrumentalisation”, in *Journal of Eastern African Studies*, 2015, vol. 9, no. 3.

such as social recognition of the past and ongoing injustices that people face. For this reason, the fact that international criminal tribunals grant formal victim status to a very limited number of people can be a cause for anger and frustration.⁸⁶ Survivors who seek victim status but do not receive it often interpret the decision as a denial of the injustice they experienced and the removal of an opportunity to advance justice.

This selectivity regarding victim status is a particularly acute problem for international criminal tribunals, compared to other transitional justice mechanisms (such as truth commissions) or to conventional criminal processes. Not all acts of violence are international crimes, and not all international crimes will be pursued by international criminal tribunals. Jurisdictional limitations significantly narrow the situations and crimes that tribunals can investigate. The mandates and limited resources of tribunals further limit the number and scope of cases they pursue, primarily by shaping prosecutors' decisions.⁸⁷ Aptel therefore likens international criminal prosecutors to film directors, since they shine the "spotlight" of international criminal justice on some acts "and leave everything else in the dark".⁸⁸ The spotlight often becomes smaller still during judicial proceedings as charges are dropped or accused persons acquitted. In many countries where the ICC has intervened, the tribunals' spotlight has progressively narrowed from the initial intervention through to the end – or collapse – of judicial proceedings, thus generating an arc of increasing disappointment among survivors of violence.

This pattern is clear in the Kenyan situation. The prosecutor's failure to pursue charges against some crimes and some leaders, including Kenyan opposition leader Raila Odinga, provoked distress and criticism by some survivors of violence. The ICC's spotlight narrowed further as the Prosecutor failed to advance cases in pre-trial confirmation of charges hearings and then in trials. By 2016, all cases had collapsed and the spotlight went dark.

⁸⁶ For similar findings with respect to the ICC, see Cody *et al.*, 2015, see above note 32; Dixon, 2016, see above note 65. For similar findings at the ECCC, see Rachel Killean, "Constructing Victimhood at the Khmer Rouge Tribunal: Visibility, Selectivity and Participation", in *International Review of Victimology*, 2018, vol. 24, no. 3.

⁸⁷ For analysis of prosecutorial discretion see, among others, Nouwen and Werner, 2010, see above note 41; Schabas, 2009, see above note 61; Tiemessen, 2014, see above note 61.

⁸⁸ Cécile Aptel, "Prosecutorial Discretion at the ICC and Victims' Right to Remedy: Narrowing the Impunity Gap", in *Journal of International Criminal Justice*, 2012, vol. 10, no. 5, p. 1372.

The lawyer for victims' in the case against Kenyatta solicited the views of those he represented after the case collapsed, and described their feelings of anger, betrayal and disbelief to the judges. He concluded:

Nearly seven years after the crimes and after three years of proceedings, the victims in this case have received no truth, accountability or reparation from the Court. Nor have they received any 'general assistance', which falls within the mandate of the Trust Fund for Victims. In short, they have received almost nothing from the entire ICC process.⁸⁹

In Uganda, the Prosecutor's decision not to advance charges against President Museveni and other senior government or military officials has provoked frustration and has limited opportunities for some survivors to pursue justice. So, too, has the Court's inability for more than a decade to secure accused persons after arrest warrants were issued. However, once Ongwen was turned over to the ICC in 2015, the Prosecutor somewhat widened the spotlight of attention. Based on additional investigations, the Prosecutor substantially expanded upon the charges against Ongwen that existed in the original arrest warrant, to address attacks on additional communities and additional thematic offences such as sexual and gender-based crimes. Victims' lawyers praised these developments, though they continued to argue that important acts of victimization had been left out.⁹⁰

The selective conferral of victim status by international criminal tribunals can be an obstacle for some people to pursue the aims of justice. It can create conflicts and cleavages within communities, thereby undermining collective action to pursue justice.⁹¹ Social cleavages can arise from

⁸⁹ International Criminal Court, Situation in the Republic of Kenya, *Prosecutor v. Uhuru Kenyatta*, Trial Chamber V(b), Victims' Response to the "Prosecution's Notice of Withdrawal of the Charges against Uhuru Muigai Kenyatta", 9 December 2014, ICC-01/09-02/11-984, p. 18 (<https://www.legal-tools.org/doc/d87801>).

⁹⁰ ICC, Situation in the Republic of Uganda, *Prosecutor v. Dominic Ongwen*, Pre-Trial Chamber II, Transcript of Confirmation of Charges Hearing, 25 January 2016, ICC-02/04-01/15-T-22-ENG, pp. 5-9, 37-38 (<https://www.legal-tools.org/doc/cba25d/>).

⁹¹ This argument was repeatedly made by Kenyan focus-group discussants in my research. Survivors declared that the failure of the ICC to pursue crimes against 'all sides' of the past electoral violence – including the two leading candidates for president in 2007 – meant that the Court exacerbated rather than overcame political conflict, and distracted from a national pursuit of justice for victims. For similar arguments in other country cases, see Tami Amanda Jacoby, "A Theory of Victimhood: Politics, Conflict and the Construction of Victim-Based Identity", in *Millennium - Journal of International Studies*, 2015, vol. 43, no. 2.

the selection of cases to prosecute, but also from the distribution of reparations. The selection of some individuals to receive reparations can expose them to resentment and community backlash, particularly if they belong to stigmatized categories such as former child soldiers and victims of sexual violence.⁹²

Finally, the selectivity of international criminal tribunals may sometimes help to justify crimes and protect the reputations of those actors who are not prosecuted.⁹³ In such situations, some survivors may face challenges including a poorer political opportunity structure for their pursuit of justice.

18.4.2. Channelled

International criminal tribunals, like all institutions, bring people into sets of structured relationships with others. These structured relationships expose people to tribunals' power over them, as well as opportunities to exercise agency in alignment with tribunals. In doing so, tribunals shape victims' opportunities for action and the aims they may pursue. I call this the *channelling* of agency.

Because agency is channelled, individuals designated as victims may be empowered for some justice projects and undermined for others. Like travellers in a boat in a water channel, survivors find that their movement becomes easier if they are going the direction of the canal and more difficult if they wish to go elsewhere. This channelling is revealed in the gaps between the forms of justice that the ICC may promote and the justice aims of some survivors. These gaps may be large – such as when survivors wish that tribunals will help rebuild communities – or smaller, such as when survivors pursue broader truth-telling from tribunals than criminal processes allow.

The channelling of agency can also be seen in the forms of action that international criminal tribunals offer to people with victim status. Those who wish to be victim participants experience this channelling from the moment that they meet ICC staff or civil society affiliates, and are asked to contribute information about some forms of injustice they

⁹² Dixon, 2016, see above note 65.

⁹³ For this argument in the case of Uganda, see Branch, 2007, see above note 3; Freeland, 2015, see above note 41. More ICC cases beyond Uganda see Nouwen and Werner, 2010, see above note 41; Tiemessen, 2014, see above note 61.

suffered and not others. Those individuals who can provide evidence for proving crimes may be put in contact with the Prosecutor and potentially become witnesses (giving them ‘dual status’ in proceedings as victim-witnesses), while others might provide compelling illustrations of the harms victims endured and their impacts: either in the courtroom or – more often – via their legal representative. By contrast, those who wish to pursue other activities, such as testifying to forms of structural violence, or directing investigators to seek missing relatives, will find the ICC unhelpful. Survivors also have no opportunities to pursue justice on their own timelines.

Victim representation in ICC cases in Kenya and Uganda reveals a range of contributions that survivors may make. In Kenya, there were ultimately almost 1,800 victim participants in the two cases that went to trial. Before the cases were terminated, their representatives had made statements, legal submissions, and questioned witnesses in both pre-trial and trial proceedings. Lawyers for the victims also consulted their clients to inform policy decisions. For instance, when the Trial Chamber contemplated holding trials in Nairobi or Arusha rather than The Hague, the lawyers communicated the victims’ views: over 97% wanted trials to remain in The Hague, out of concerns that accused persons could more effectively influence trials held in Kenya or East Africa.⁹⁴ Importantly, victims’ lawyers were able to communicate with some regularity with the people they represented, either in person, through local staff, or by phone.

In Uganda, at the time of writing, over 4,000 individuals have registered to participate as victims in the trial against Ongwen. They are represented by two legal teams.⁹⁵ In addition to legal submissions, statements and questions of witnesses, the victims’ lawyers have been able to call their own witnesses to speak to the ongoing impact of the alleged crimes. These witnesses included three expert witnesses and two community leaders from two of the communities that were attacked. While victims’ lawyers have not been able to further expand the charges laid, they have

⁹⁴ ICC, Situation in the Republic of Kenya, *Prosecutor v. Francis Muthaura and Uhuru Kenyatta*, Common Legal Representative for Victims’ Observations in Relation to the ‘Joint Defence Application for Change of Place Where the Court Shall Sit for Trial’, 22 February 2013, ICC-01/09-01/11-620 (<https://www.legal-tools.org/doc/8e7b1d/pdf/>).

⁹⁵ For analysis of the tensions that led to the creation of the two teams, see Michael Adams, “Who Will Stand for Us?: Victims’ Legal Representation at the ICC in the Ongwen Case and Beyond”, Human Rights Watch, New York, 2017.

been able to raise concerns about other victims and accusations of the Ugandan governments' responsibility for injustice.⁹⁶

The relationship between victims and their legal representative is a key structuring element of the agency of victims, and one over which the tribunal has significant control.⁹⁷ So, too, are relationships with local intermediaries and with ICC staff. In all these relationships, most victims have fewer material, social, and dispositional resources than their interlocutors, and thus have very limited opportunities to set the rules and aims of interactions.⁹⁸

18.4.3. Context-Dependent

International criminal tribunals operate in very diverse contexts. They may or may not be located in the country where the crimes under consideration occurred; they may or may not have the backing of the United Nations Security Council or powerful States; and – perhaps most importantly – they may face a supportive or a hostile national government in the country where crimes occurred. Different contexts influence tribunals' behaviours and outcomes, such as prosecutorial strategy and arrests secured,⁹⁹ local legitimacy,¹⁰⁰ and the deterrence of further conflict or rights abuses in the country under consideration.¹⁰¹ Less attention has been giv-

⁹⁶ See, for instance, ICC, Situation in Uganda, *Prosecutor v. Dominic Ongwen*, Pre-Trial Chamber II, Victims' Pre-Confirmation Brief, 18 January 2016, ICC-02/04-01/15, p. 19 (<https://www.legal-tools.org/doc/975ef2/>).

⁹⁷ For arguments over the responsiveness of victim legal representatives to the tribunal or to their 'clients', see Haslam and Edmunds, 2013, see above note 23; Emily Haslam and Rod Edmunds, "Whose Number Is It Anyway? Common Legal Representation, Consultations and the 'Statistical Victim'", in *Journal of International Criminal Justice*, 2017, vol. 15, no. 5; Pena and Carayon, 2013, see above note 23.

⁹⁸ For a development of this argument, see Dixon and Tenove, 2013, pp. 408-411, see above note 5.

⁹⁹ Hagan, Levi and Ferrales, 2006, see above note 27; Eric Stover, Victor Peskin and Alexa Koenig, *Hiding in Plain Sight: The Pursuit of War Criminals from Nuremberg to the War on Terror*, University of California Press, Oakland, 2016; Tiemessen, 2014, see above note 61.

¹⁰⁰ Laurel E. Fletcher, Harvey M. Weinstein and Jamie Rowen, "Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective", in *Human Rights Quarterly*, 2009, vol. 31, no. 1; Jelena Subotic, "Truth, Justice, and Reconciliation on the Ground: Normative Divergence in the Western Balkans", in *Journal of International Relations and Development*, 2015, vol. 18, no. 3.

en to the impact that context has on empowering or disempowering survivors' pursuits of justice. Nevertheless, several patterns are clear.

First, cultural understandings of victimhood and the forms of justice that victims desire vary across and within societies.¹⁰² For instance, notions of collective victimhood – and collective responsibility for victimhood – are prominent among the Acholi people in northern Uganda, and lead to different expectations of justice for victims than the ones common in countries such as Kenya, Bosnia-Herzegovina, or the United States. The ICC's criminal-legal approach to justice will thus resonate more powerfully with survivors in some contexts compared to others.

Second, international criminal tribunals usually intervene in situations where national governments are unable or unwilling to pursue justice. Indeed, research by me and others suggests that survivors of violence frequently support the ICC *because* they distrust domestic institutions. However, the ICC and other tribunals struggle to investigate, make arrests and achieve convictions when domestic governments are hostile to their activities. While convictions do not necessarily advance all survivors' justice aims, they are necessary for at least some individuals to see meaningful accountability or truth-telling, or to receive court-ordered reparations.

Third, the security situation in which tribunals operate can shape survivors' aims and the risks faced by people granted victim status. For instance, Ugandans were exposed to both LRA attacks and harmful Ugandan government responses during the early years of the ICC's intervention. During this period, survivors were frequently concerned that they might face retributions from the LRA for engaging with Court staff.¹⁰³ As the security situation improved and people moved from displacement camps in northern Uganda to their communities, individuals focused more on the ICC's potential to provide reparations and assistance, and felt that association with the Court was less risky.

¹⁰¹ Hyeran Jo and Beth A. Simmons, "Can the International Criminal Court Deter Atrocity?", in *International Organization*, 2016, vol. 70, no. 3; Geoff Dancy and Eric Wiebelhaus-Brahm, "The Impact of Criminal Prosecutions During Intrastate Conflict", in *Journal of Peace Research*, 2018, vol. 55, no. 1.

¹⁰² Jan Van Dijk, "Free the Victim: A Critique of the Western Conception of Victimhood", in *International Review of Victimology*, 2009, vol. 16, no. 1.

¹⁰³ This and the next claim are based on focus discussions and on my interviews with eight civil society members in Gulu, Uganda, in 2011 and 2012.

In Kenya, survivors believed that their interactions with Court staff could expose them to retaliation by supporters of accused persons. Interviews with Court staff who worked in Kenya and with Kenyan civil society actors who assisted the ICC confirmed these fears. They also claimed that they were under regular surveillance by State-affiliated actors in Kenya, and believed that the ICC lacked sufficient capacity in Kenya to address all the security concerns faced by witnesses and participating victims.¹⁰⁴

Finally, international criminal tribunals have very complex interactions with the political opportunity structures in the countries where crimes occurred, as well as at the regional and international levels. For instance, the ICC's intervention in Uganda was encouraged by international attention to the civil war in Uganda, and to some extent helped reduce international criticism of the Ugandan government's role in that war.¹⁰⁵ This international attention also contributed to the Ugandan government's policies toward transitional justice, which were significant on paper but limited in implementation, and tended to minimize government or military complicity in crimes.¹⁰⁶ The ICC's intervention has had ambiguous effects on opportunities for survivors of violence to engage in local, reparative justice measures. Paradoxically, international and local support for these processes may have been increased because of criticisms by Ugandan civil society of interference by a foreign, retributive Court.¹⁰⁷

The ICC's intervention in Kenya provides a particularly powerful demonstration of how a shifting context can shape the Court's empowerment or disempowerment of victims. Between 2008 and 2010, many Kenyan politicians supported the ICC's intervention in Kenya, including William Ruto. During this period, Kenya adopted a new constitution and improved the independence of its judiciary. Human rights organizations and other civil society actors were enthusiastic of these developments, and some believed that victims of the post-election violence would soon enjoy

¹⁰⁴ Interviews with three Court staff in Nairobi and The Hague (2012 and 2014), and interviews with members of four civil society actors in Eldoret, Kisumu and Nairobi (2012).

¹⁰⁵ Nouwen and Werner, 2010, see above note 41.

¹⁰⁶ Arnould, 2015, see above note 85; Freeland, 2015, see above note 41.

¹⁰⁷ Interviews with four civil society members, Gulu, Uganda, 2011 and 2012. See also Sarah M.H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan*, Cambridge University Press, Cambridge, 2013.

multiple avenues to pursue justice – including the ICC, domestic criminal courts, and Kenya’s Truth, Justice and Reconciliation Commission.¹⁰⁸

However, when the Prosecutor put forward charges against six individuals in 2010, politicians including Ruto and Uhuru Kenyatta began to mobilize their supporters against the Court. Kenyatta and Ruto, who had long been political opponents, united to form a new party that some referred to as the “alliance of the accused”.¹⁰⁹ After winning the 2013 national elections, the Kenyatta and Ruto government actively resisted the ICC, both within Kenya and in regional and international politics.¹¹⁰ The ICC Prosecutor has argued that its investigations were systematically undermined, and witnesses and victim participants expressed fears of increasing threats to them.¹¹¹ Several key witnesses for the Prosecution recanted their testimony or refused to testify, and all cases eventually collapsed before any trials reached completion. In addition, since 2013, the Kenyan government has increasingly cracked down on Kenyan human rights organizations, which had been supportive of the ICC and of accountability, truth and reparations for victims.¹¹² This backlash has undermined the political opportunity structure for survivors and allies to pursue their justice aims. Amidst these developments, victims have seen little accountability or reparations for crimes against them.

18.5. Conclusion

This chapter argues that international criminal tribunals’ impact on the agency of people labelled victims is complex and multi-dimensional. I propose that international criminal tribunals do not simply empower or disempower all ‘victims’, but that they can provide resources or opportunities for certain people to pursue certain aims in certain contexts. More specifically, tribunals are *selective* about who receives victim status, they *channel* people’s agency in particular ways, their impact is highly *context-*

¹⁰⁸ Interviews with four staff of human rights NGOs, Nairobi, Kenya. May – August, 2012.

¹⁰⁹ Gabrielle Lynch, “Electing the ‘Alliance of the Accused’: The Success of the Jubilee Alliance in Kenya’s Rift Valley”, in *Journal of Eastern African Studies*, 2014, vol. 8, no. 1.

¹¹⁰ Laurence R. Helfer and Anne E. Showalter, “Opposing International Justice: Kenya’s Integrated Backlash Strategy against the ICC”, in *International Criminal Law Review*, 2017, vol. 17, no. 1.

¹¹¹ Lynch, 2014, see above note 109.

¹¹² Thomas Obel Hansen and Chandra Lekha Sriram, “Fighting for Justice (and Survival): Kenyan Civil Society Accountability Strategies and Their Enemies”, in *International Journal of Transitional Justice*, 2015, vol. 9, no. 3.

dependent rather than being consistent across different social and institutional circumstances.

Research with survivors of violence shows that they seek, compete over, utilize, and are frustrated by victim status conferred by the ICC. In Kenya and Uganda, the Court and its in-country officers were seen as possible sources of assistance to advance diverse justice aims, ranging from directly providing material assistance and prosecuting perpetrators to more indirect improvements of community recognition or political opportunity structures. However, people's lack of influence over selectivity and channelling, combined with the Court's struggle to achieve its own mandate in difficult contexts, led to frustration and – in some cases – the disempowerment of some survivors' pursuit of justice.

By paying attention to selectivity, channelling, and context dependence, we can better understand different forms of (dis)empowerment. For instance, to return to the categories of disempowerment in Section 18.1., people with victim status are at *risk of harm* due to their direct interactions with tribunal staff but also due to the security context in their home country. Concerns about the *powerlessness and instrumentalization* of victims become clearer when we distinguish between their opportunities for channelled agency in international criminal justice processes, and their very limited opportunities to shift the type or timing of action that tribunals might take. This channelling, as well as the extensive selectivity of tribunals, also helps explaining why many survivors may find that the time, effort and hope that they invest in tribunals may not lead to new opportunities to pursue justice. This *displacement* of agency to promote justice can also occur when tribunals worsen survivors' opportunity structure to pursue justice via other institutions or political processes.

This chapter's analysis also provides another perspective on the power and weakness of international criminal tribunals, and in particular the ICC. On the one hand, the ICC and affiliated actors are privileged players in international and often domestic politics, able to mobilize the resources of the Court and often the support of States and civil society organizations. However, the effective power of the Court to pursue its stated aims for victims is often quite limited, and can put victims at risk. This is particularly clear when a government or other powerful local actors resist the Court. Paradoxically, then, the *weakness* of the ICC may increase risks that it will disempower victims. The arc of the ICC's activities in the Kenya situation provides a stark illustration of these challenges.

More research is needed to deepen this analysis. In particular, when it comes to the ICC, long-term, longitudinal studies of people granted victim status are needed to reveal how their interactions with the Court and their opportunities to pursue justice may shift over time. Such research can inform the practices and policies of international criminal justice institutions. Perhaps more importantly, it could help inform the strategies of survivors of injustice and their allies, so they can better decide when to pursue justice by engaging these institutions and when to direct their agency and hope elsewhere.

Capture, Tweet, Repeat: Social Media and Power in International Criminal Justice

Emma Irving and Jolana Makraiová*

19.1. Introduction

Cat memes, holiday snaps, breaking news, flood warnings, images of violence, political propaganda – the range of uses to which people put social media spans all subjects and topics. The increasing availability of the Internet and the greater accessibility of the technologies needed to access it (smartphones, tablets, laptops) has resulted in a global shift in how people communicate. Platforms such as Facebook, YouTube, and Twitter offer new ways to reach small and large audiences, and can overcome the barriers of geography and language.

This global shift has had a profound impact on power dynamics among local and global actors, disrupting traditional power hierarchies and empowering new actors. Nowhere is this clearer than in the political arena: social media have played a role in the overthrow of authoritarian

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governments, the jump-starting of new politico-social movements, and even in potentially influencing the outcome of elections.¹

Social media have also had a notable effect on power in conflict situations. Groups such as the Islamic State of Iraq and the Levant ('ISIS') have weaponised social media for recruitment, propaganda, and to terrorise populations in conflict areas and elsewhere. A sophisticated social media and online strategy was an important tool in attracting foreign fighters from around the world to travel to Syria and Iraq and bolster the ranks and military capabilities of ISIS. Furthermore, parties to a conflict now conduct the battle for hearts and minds in large part online, seeking control of the conflict narrative through social media. Social media have not only been a tool for parties to a conflict, but have also empowered individuals experiencing conflict to communicate about events on the ground. Information can now emerge from conflict zones in real time and unfiltered. In December 2016, for example, the world could follow the 'fall of Aleppo' as it happened through the Twitter posts from those trapped inside the city:

It is the doomsday inside Aleppo. Bombs are over the head
of civilians. people are running but don't know where to go.

@Mr.Alhamdo, Twitter, 12 December 2016

The inherent connection between conflict and international criminal justice means that the increasing importance of social media in the former is reflected by an increased role for social media in the latter. The accessibility and range of information that is now available on social media is highly relevant for international criminal justice. The content posted – photos, videos, reports – may depict incidents that amount to violations of international criminal law, international humanitarian law, and international human rights law. This material may be useful as evidence in crimi-

¹ Jonathan Bright, Scott Hale, Bharath Ganesh, Andrew Bulovsky, Helen Margetts and Phil Howard, "Does Campaigning on Social Media Make a Difference? Evidence from candidate use of Twitter during the 2015 and 2017 UK Elections", Cornell University, 27 July 2018; Bence Kollanyi, Philip Howard and Samuel Woolley, "Bots and Automation over Twitter during the First US Presidential Debate", Comprop Data Memo 2016.1, 14 October 2016; John Aldrich, Rachel Gibson, Marta Cantijoch and Tobias Konitzer, "Getting the vote out in the social media era: Are digital tools changing the extent, nature and impact of party contacting in elections?", in *Party Politics*, 2016, vol. 22, no. 2, pp. 165–178; however, the connection between elections and social media is by no means fully established, see, for example, James Gomez, "Social Media Impact on Malaysia's 13th General Election", in *Asia Pacific Media Educator*, 2014, vol. 24, no. 1, pp. 95–105.

nal trials, at both the domestic and international levels.² In addition to this potential evidentiary value, the use of social media in conflict could be having a more systemic and fundamental impact on international criminal justice. This chapter considers whether the disruptive effect that social media have on power dynamics in global politics and conflict is reflected in international criminal justice. To that end, it will explore and map the ways in which social media may affect power dynamics in international criminal justice. Do social media and an increased usage of digital technology empower victims, and afford them a greater say in the direction and focus of international criminal justice? Will the abundance of conflict related content on social media factor into the decision-making of the United Nations ('UN') Security Council when it comes to referring a situation to the International Criminal Court ('ICC')? Would the ICC's power *vis-à-vis* un-co-operative States increase if social media can be used for investigations? This chapter lays the groundwork for considering these questions.

First, the chapter will explore how social media have affected power dynamics in global politics, and will use this as the background for exploring how social media have affected power dynamics in conflict (Section 19.2.). Second, through using selected examples, the chapter will look at the role of social media in the practice of the ICC (Section 19.3.). This leads to Section 19.4., which discusses how social media's increasing role in ICC practice may affect power dynamics among international criminal justice actors.

While the operation of international criminal justice is not confined to the ICC, the chapter focuses on this institution because of the central position that it occupies in the international legal landscape, and because it is the only international criminal justice institution dealing with conflict situations that have occurred in the digital age, and for which social media will therefore be relevant.³ The section on ICC practice will examine the

² See, for example, Keith Hiatt, "Open Source Evidence on Trial", in *The Yale Law Journal Forum*, 2016, vol. 125, p. 323; *The New Forensics: Using Open Sources to Investigate Grave Crimes*, Human Rights Center, UC Berkeley School of Law, 2018; Alexa Koenig, Stephen Cody, Eric Stover and Camille Crittenden, *Digital Fingerprints: Using Electronic Evidence to Advance Prosecutions at the International Criminal Court*, Human Rights Center, UC Berkeley School of Law, 2014.

³ Another institution that the actors would consider to be an 'international criminal justice institution' is the International, Independent, and Impartial Mechanism for Syria ('IIIM') which is mandated to put together dossiers on individual perpetrators in the Syrian conflict

role of social media in the work of civil society organisations (‘CSOs’) engaging with the ICC, and the role that social media play in the practice of the ICC itself.

Before proceeding to the following sections, there are two preliminary points to be made. The first is a limitation to the scope of the contribution. The analysis in the chapter does not specifically address questions as to how information from social media should be approached from an evidentiary point of view. Questions concerning admissibility, evidentiary weight, and probative value in relation to social media are garnering increasing attention from scholars and practitioners, and the discussions on many of these issues are still ongoing and developing. While procedural questions of admissibility, weight, chain of custody, and so forth may indeed play a role in power dynamics in international criminal justice, the goal of this contribution is to lay an introductory groundwork and pose broad questions about social media and power in this field. As such, while this issue is raised at points where it is particularly relevant, it is not discussed at length. It would be worthwhile to return to the issue of social media and evidentiary standards in the present context once the scholarship, practice, and policy is better established.

The second point to note concerns the perennial problem of social media content’s verifiability. The nature of social media is such that it is just as easy to post misinformation as it is to post genuine information, and content on social media is notoriously difficult to authenticate. Information on social media platforms may have been modified, misappropriated, and/or misrepresented – either by the original poster of the content, or by another user. This could be done for a number of reasons, among which could be an intention to mislead international criminal justice actors. While the issue of verifiability will be raised in some parts of this contribution, the chapter as a whole should be read with this general caveat in mind.

19.2. Social Media in Global Politics and Conflict

The noteworthy increase in the use of social media across the world has left its mark on global politics, debate, and policy. In today’s world, most conversations about important social issues take place, in large part at

for use by future international, regional, and domestic criminal tribunals. Established by the UN General Assembly, the IIIM is not a judicial institution, but its work is aimed at assisting with future criminal prosecutions.

least, on and through social media platforms. Social media have also profoundly affected conflict situations, with recruitment, propaganda, relief co-ordination, and documentation (among other things) happening in the online sphere. This section will outline a few examples (by no means exhaustive) to explore first, how social media have disrupted traditional power dynamics in global politics, and second, how social media have created new power distributions in situations of conflict and widespread violence. The disruptive effect of social media on power dynamics in global politics is more extensively researched than in relation to conflict, and so a discussion of social media in global politics lays the foundation for discussing social media in conflict. The section is prefaced by a short description of what social media are and their core characteristics.

19.2.1. An Introduction to Social Media

Many people have an intuitive grasp of what social media are, and several web sites immediately come to mind, such as Facebook, Twitter, YouTube. Beyond this intuitive idea, coming to a precise definition of social media is very challenging, due in large part to the fact that they are constantly evolving and changing.⁴ What may be a popular social media platform today will be outdated by tomorrow, and with each new incarnation, social media sites will have new features and new ways to engage with content.

Social media can be understood as a result of the advent of the ‘Web 2.0’. Web 2.0 is the term used to describe a change that took place, around 2004, in the way that Internet users and software developers use the world-wide web. Web platforms were developed that enabled users to transform from passive consumers to active participants in the cyber arena. Content was no longer developed and published by a (relatively) limited number of individuals for consumption by others, but instead web platforms allowed for content to be continuously modified by all users in a collaborative and participatory fashion.⁵ One can understand this change

⁴ Jonathan A. Obar and Steve Wildman, “Social Media Definition and the Governance Challenge: An Introduction to the Special Issue”, in *Telecommunications Policy*, 2015, vol. 39, pp. 745, 745–6; Jonathan A. Obar, Paul Zube and Clifford Lampe, “Advocacy 2.0: An Analysis of How Advocacy Groups in the United States Perceive and Use Social Media as Tools for Facilitating Civic Engagement and Collective Action”, in *Journal of Information Policy*, 2012, vol. 2, pp. 1, 7.

⁵ Andreas M. Kaplan and Michael Haenlein, “Users of the world, unite! The challenges and opportunities of Social Media”, in *Business Horizons*, 2010, vol. 53, p. 61.

by comparing a traditional hardcopy encyclopedia to Wikipedia. Traditionally, if a person wanted information about a given topic, they could turn to the hardcopy encyclopedia and look up the relevant entry. The person would read, and so be a passive consumer of, the information contained in the encyclopedia; but opportunities to contribute to, and have one's writing included in, the encyclopedia would be rare. With the advent of Wikipedia, this is now very different. A person can still use Wikipedia as they would an encyclopedia – to passively inform themselves about a given topic – but now it is possible for anyone to actively contribute to the content on Wikipedia. Social media sites (of which Wikipedia is indeed an example) are the epitome of collaborative and participatory web-platforms.

Beyond the fact that they are Internet-based applications, the characteristics that social media have in common, and which are relevant to the issues explored in this chapter, are as follows. First, social media are accessible to anyone who has the necessary hardware (smartphone, tablet, laptop) and an Internet connection. As such, the range of users with access to social media is very broad and numbers very high: in 2017, the number of Facebook users, for instance, passed the two billion mark.⁶ Secondly, it allows users to be both passive recipients of content, as well as active creators. Users can create and upload content (photos, videos, and so on), which is then accessible to the other social media users. In this way, social media offer two-way communication.⁷ Thirdly, because of the instant nature of social media, content posted to a platform can reach large numbers of people very quickly and across a large geographical area. These characteristics enable social media to have a disruptive effect on power dynamics on a global scale.

19.2.2. Social Media in Global Politics

There is no lack of examples from recent years of the ways in which social media can affect global politics and decision making. This chapter will outline three notable examples that demonstrate how social media can change the way that power is distributed between different groups of ac-

⁶ Josh Constine, “Facebook now has 2 billion monthly users [...] and responsibility”, *Tech Crunch*, 27 June 2017.

⁷ Volker Wulf, Kaoru Misaki, Meryem Atam, David Randall and Markus Rohde, “‘On the Ground’ in Sidi Bouzid: Investigating Social Media Use During the Tunisian Revolution”, *Social Networks During Major Transitions*, Proceedings of the 2013 conference on Computer supported co-operative work, San Antonio, 2013, p. 1409.

tors: the #MeToo campaign, the Arab Spring, and recent US presidential elections.

The first example is also the most recent: the #MeToo campaign. Despite having been around as an idea for some time, the campaign took off in October 2017 when actress Alyssa Milano asked Twitter users to post their stories of sexual harassment and assault using the MeToo hashtag, in order to highlight the breadth of the problem.⁸ What followed within hours was a barrage of social media posts, across different platforms, that shone a light on the pervasiveness of sexual misconduct around the world.⁹ The #MeToo campaign in the English speaking world was mirrored by equivalent campaigns in other languages. The campaign led to the proposal of new legislation in different countries,¹⁰ to changes in policies in major corporations,¹¹ and to a change in attitude towards people speaking out about sexual harassment.¹²

The #MeToo campaign exemplifies how social media can be used to empower and to amplify the voices of disenfranchised groups. Those participating in the #MeToo campaign were able to raise awareness of the pervasiveness of sexual harassment and assault despite resistance from the status quo and prevalent societal attitudes, and were able to bring about changes to law and policy. The campaign gave rise to further movements, such as #TimesUp, which continue the global conversation.

The second example of how social media can disrupt power dynamics in global politics is the Arab Spring, which was perhaps the first political upheaval in which social media played a particularly prominent role:

⁸ Rozina Sini, "How 'Me Too' is exposing the scale of sexual abuse", *BBC News*, 16 October 2017.

⁹ CBS News, "More than 12M 'Me Too' Facebook posts, comments, reactions in 24 hours", 17 October 2017; Andrea Park, "#MeToo reaches 85 countries with 1.7M tweets", *CBS News*, 24 October 2017.

¹⁰ In France, legislation has been proposed to fine individuals who engage in aggressive cat-calling, see Sarah Wildman, "France's 'Me Too' campaign may come with legislation", *Vox*, 18 October 2017; in the US, a bill was proposed to change policies on sexual harassment on Capitol Hill, see Cristina Marcos, "Lawmakers unveil 'ME TOO Congress' bill to overhaul sexual harassment policies", *The Hill*, 15 November 2017.

¹¹ Chris Morris, "Microsoft Changes Its Sexual Harassment Policies in the Wake of #MeToo", *Fortune*, 19 December 2017.

¹² The men and women who spoke out during the #MeToo campaign have been awarded 'Person of the Year' by Time Magazine and labelled as 'The Silence Breakers', see Stephanie Zacharek, Eliana Dockterman, and Haley Sweetland Edwards, "The Silence Breakers", *Time Magazine*, December 2017.

Egypt is said to have had a ‘Facebook Revolution’ and Tunisia a ‘YouTube uprising’.¹³ The Arab Spring, which began in 2010, saw a range of demonstrations and protests across North Africa and the Middle East. Calls for greater political freedom and democratic governance led to the overthrow of governments in some countries (Tunisia, Egypt), protracted civil wars in others (Syria), and in some cases both (Libya). In a study which analysed social media posts before and during the 2011 uprisings in Egypt and Tunisia, it was shown that in the lead-up to mass demonstrations, there was a spike in posts about democracy, freedom, and liberty. People used social media as an online civil society space to engage on a single issue and come together around a common goal.¹⁴ These online discussions spread across borders, with social media users in neighbouring countries also participating in the online conversations.¹⁵ Online activism and conversations then spilled over into real world activism and unrest. The leader of the study, Philip Howard, noted that “although social media did not cause the upheaval in North Africa, they altered the capacity of citizens to affect domestic politics”.¹⁶ While the political change across the region must be attributed to a number of factors, social media were one of the elements that contributed to a shift in power dynamics.¹⁷

The third example concerns the power shift that can be seen in presidential elections, away from the political establishment towards political ‘outsiders’. One can consider Donald Trump’s transformation from businessman and TV personality to President of the United States, which was

¹³ Sahar Khamis, Paul B. Gold and Katherine Vaughn, “Beyond Egypt’s ‘Facebook Revolution’ and Syria’s ‘YouTube Uprising’: Comparing Political Contexts, Actors and Communication Strategies”, *ResearchGate*, 2012.

¹⁴ Wulf, Misaki, Atam, Randall and Rohde, 2013, p. 1409, see above note 7.

¹⁵ Philip N. Howard, Aiden Duffy, Deen Freelon, Muzammil Hussain, Will Mari and Marwa Mazaid “Opening Closed Regimes: What Was the Role of Social Media during the Arab Spring?”, in *Project on Information Technology and Political Islam*, 2011, p. 1.

¹⁶ Catherine O’Donnell, “New Study Quantifies Use of Social Media in Arab Spring”, *University of Washington News*, 12 September 2011.

¹⁷ For literature placing social media use during the Arab Spring in a broader context, see, for example, Merlyna Lim, “Clicks, Cabs, and Coffee Houses: Social Media and Oppositional Movements in Egypt 2004–2011”, in *Journal of Communication*, 2012, vol. 62, pp. 231–249; Gadi Wolfsfeld, Elad Segev, and Tamir Sheaffer, “Social Media and the Arab Spring: Politics Comes First”, in *The International Journal of Press/Politics*, 2013, vol. 18, no. 2, pp. 115–137; Zeynep Tufekci and Christopher Wilson, “Social Media and the Decision to Participate in Political Protest: Observations from Tahrir Square”, in *Journal of Communication*, 2012, vol. 62, pp. 363–379.

enabled, to a degree, by his deployment of Twitter to speak directly to his voter base.¹⁸ President Trump remarked in an interview “I doubt I would be here if it weren’t for social media, to be honest with you”. Looking back to 2016, social media played a number of roles in the 2016 US election: in addition to providing a platform for Trump to communicate to his supporters in an unfiltered way, it was also used by domestic and foreign powers as a vehicle to attempt to interfere with US politics. Tactics included attempts to control the opinion of Facebook users on key issues by creating bogus accounts, buying advertising space, and promoting particular news stories and posts.¹⁹

While one must avoid the trap of technological determinism that attributes more importance to social media tools than to the actors who use them,²⁰ it is undeniable that social media played a role in changing the political landscape over the last few years. While research on this is still emerging, it is evident that social media have changed the conflict landscape also.

19.2.3. Social Media in Conflict

Just as there is no scarcity of examples of how social media have affected global politics, there is similarly no lack of examples of how social media play a role in conflict. Social media are increasingly becoming an integral part of the conflict environment.²¹ What is particularly interesting about the use of social media in conflict is the range of purposes to which they

¹⁸ Chris Wells, Dhavan V. Shah, Jon C. Pevehouse, YANG Jung Hwan, Ayellet Pelled, Frederick Boehm, Josephine Lukito, Shreenita Ghosh and Jessica L. Schmidt, “How Trump Drove Coverage to the Nomination: Hybrid Media Campaigning”, *Political Communication*, 2016, vol. 33, pp. 669–676; WANG Yu, LUO Jiebo, Richard Niemi and LI Yuncheng, “To Follow or Not to Follow: Analyzing the Growth Patterns of the Trumpists on Twitter”, The Workshops of the Tenth International AAAI Conference on Web and Social Media, News and Public Opinion, Technical Report WS-16-18.

¹⁹ Matthew Rosenberg, Nicholas Confessore and Carole Cadwalladr, “How Trump Consultants Exploited the Facebook Data of Millions”, *The New York Times*, 17 March 2018 (available on its web site); Jon Swaine and Marc Bennetts, “Mueller charges 13 Russians with interfering in US election to help Trump”, *The Guardian*, 17 February 2018 (available on its web site); Olivia Solon and Sabrina Siddiqui, “Russia-backed Facebook posts ‘reached 126m Americans’ during US election”, *The Guardian*, 31 October 2017 (available on its web site); Jane Mayer, “How Russia helped swing the Election for Trump”, *The New Yorker*, 24 September 2018 (available on its web site).

²⁰ Khamis, Gold and Vaughn, 2012, see above note 13.

²¹ Thomas Elkjer Nissen, *#TheWeaponisationofSocialMedia @Characteristics_of_Contemporary_Conflicts*, Royal Danish Defence College, 2015, p. 8.

are put, and the range of actors that use them. In each case there is potential for the power dynamics between different parties involved in conflict to be affected. This section will set out a number of examples of how social media are used in conflict, in order to illustrate the diversity of roles they can play and the ways in which power can be affected.

The group known as ISIS has become notorious for its use of social media in the context of the conflict in Iraq and Syria (and beyond²²). While the gruesome videos of beheadings became particularly infamous,²³ the group's use of social media was much more extensive, including recruitment, target-selection, propaganda-distribution, narrative-building, and fundraising.²⁴ Social media have allowed ISIS to communicate its message and vision to a global audience and garner worldwide attention for its activities, increasing its ability to project and control the narrative. In terms of power on the battlefield, social media played an important role in the recruitment of foreign fighters from around the world, with estimates of between 30,000 and 40,000 foreign nationals from 85 countries having travelled to Syria and Iraq to fight with ISIS.²⁵ The Somali Al-Qaida-affiliated group, Al-Shabaab, has similarly used social media to draw attention to its operations, including the live-tweeting of the group's attack on the Westgate Mall in Nairobi, Kenya in 2013.²⁶

The use of social media in conflict is by no means confined to extremist groups: States and international organisations that are parties to conflict also make use of social media platforms. During the intervention

²² ISIS-led and -co-ordinated attacks have also taken place elsewhere – including in Europe, see Mark Hanrahan and WANG Jessica, “Number of fatal terrorist attacks in western Europe increasing, data show”, *Reuters*, 12 July 2017 (available on its web site); Jacob Wirtschafter and Karim John Gadiaga, “Africa becomes the new battleground for ISIS and al-Qaeda as they lose ground in Mideast”, *USA Today*, 25 October 2017 (available on its web site).

²³ David Carr, “With Videos of Killings, ISIS Sends Medieval Message by Modern Method”, *The New York Times*, 7 September 2014 (available on its web site).

²⁴ Nissen, 2015, p. 49, see above note 21; James P. Farwell, “The Media Strategy of ISIS”, in *Survival*, 2014, vol. 56, p. 49; Imran Awan, “Cyber-Extremism: Isis and the Power of Social Media”, in *Society*, 2014, vol. 56, p. 138.

²⁵ Les Picker, “Where are ISIS's Foreign Fighters Coming From?”, *The National Bureau of Economic Research* (available on its web site); Lamont Colucci, “Data Analysis: ISIS Fighters Returning to the West”, *Ami News Wire*, 22 January 2018 (available on its web site).

²⁶ Nissen, 2015, p. 76, see above note 21; Ken Menkhaus, “Al-Shabaab and Social Media: A Double-Edged Sword”, in *Brown Journal of World Affairs*, 2014, vol. 20, p. 309.

in Libya in 2011, NATO used social media to track the movements of armed forces and to monitor armed attacks. A series of volunteers monitored chatter on social media platforms for information that could assist NATO in targeting and military attacks.²⁷ States also turn to social media in the “battle for hearts and minds”. During the 2014 conflict between Israel and Gaza, the two sides fought an “intense social media battle”, each seeking to establish themselves as victim and the other as aggressor.²⁸ This has also been the case in a number of other conflicts.²⁹ A study of social media reactions to the 2012 Gaza conflict indicate that social media may have an effect on decision-making in conflict, including decisions on whether or not to escalate the conflict.³⁰

Social media are not only used to gain military advantage, and it is not only used by parties to the conflict. The “redistributive effect on international power relations”³¹ that social media can have in contemporary conflicts extends to a multitude of actors who use social media for a range of reasons.

Social media can be used by humanitarian actors to try to mitigate the harmful effects of conflict. For example, social media can help civilians avoid active conflict areas through the use of ‘crisis maps’, a less often heard about type of social media. Crisis maps combine crowd-sourced³² data with online maps (similar to Google Maps) in order to topographically depict armed conflicts, humanitarian crises, or natural disasters.³³

²⁷ Anne Herzberg and Gerald M Steinberg, “IHL 2.0: Is There a Role for Social Media in Monitoring and Enforcement”, in *Israel Law Review*, 2012, vol. 45, no. 3, pp. 506–7; Graeme Smith, “How social media users are helping NATO fight Gadhafi in Libya”, *The Globe and Mail*, 26 March 2017 (available on its web site).

²⁸ For example, see Sarah Fowler, “ Hamas and Israel step up cyber battle for hearts and minds”, *BBC News*, 15 July 2014 (available on its web site); “Gaza Conflict: the social media front line”, *The Week*, 18 July 2014 (available on its web site).

²⁹ For a detailed analysis of how social media is used to construct and control narratives in conflict see Nissen, 2015, chap. 3, see above note 21.

³⁰ Thomas Zeitzoff, “Does Social Media Influence Conflict? Evidence from the 2012 Gaza Conflict”, in *Journal of Conflict Resolution*, 2018, vol. 62.

³¹ Nissen, 2015, p. 9, see above note 21.

³² Crowd-sourcing refers to the practice of obtaining services or information through contributions from a large group of people, principally from the online community.

³³ Herzberg and Steinberg, 2012, p. 507, see above note 27.

An early example was the crisis map used during the post-election violence in Kenya in 2007. A platform called Ushahidi³⁴ was developed, which collected reports of violent events from individuals on the ground via email or SMS. This information was then attached to a given location on an online map. Users could access the map via the Internet and, by clicking on a location on the map, see what had taken place in that area. Crisis maps were also developed to cover the conflicts in Libya and Syria.³⁵ These graphic representations on maps allow users to understand the geographic areas where violence is concentrated, and the types of events taking place in a given area.

In addition to helping civilians stay away from violence hot spots, crisis maps can also be used to help co-ordinate the distribution of humanitarian aid in conflict areas. Such was the case with the Libya crisis map, which was created through a collaboration between the UN Office for the Coordination of Humanitarian Affairs and other actors.³⁶ A further practical use of social media is the identification of the deceased. In countries such as Libya, where the conflict has led to a total breakdown in the structures of the State, identifying the dead can be challenging. Through pictures posted on social media platforms such as Facebook, families and friends can be alerted to the death of a loved one and informed of the location of the body.³⁷

Other uses of social media pertain to raising awareness of the events taking place in a conflict area, which are often inaccessible to the outside world. For example, during the fall of Aleppo in December 2016,³⁸ and the siege of Eastern Ghouta in the first months of 2018, people took to social media to communicate to the world about events on the ground and

³⁴ ‘Ushahidi’ translates to ‘testimony’ in Swahili.

³⁵ Several such maps exist for Syria, for example: Syrian Civil War Map (available on its website); Live Universal Awareness Map (Liveuamap) (available on the Liveuamap’s web site).

³⁶ Andrej Verity, “The [unexpected] Impact of the Libya Crisis Map and the Standby Volunteer Task Force”, *Standby Task Force*, 19 December 2011 (available on its web site). Crisis mapping was also used to co-ordinate the distribution of humanitarian relief in the aftermath of the earthquakes in Haiti and Chile, see Jessica Ramirez, “‘Ushahidi’ Technology Saves Lives in Haiti and Chile”, *Newsweek*, 3 March 2010 (available on its web site).

³⁷ Examples are detailed in *Benghazi’s Descent into Chaos: Abductions, Summary Killings, and Other Abuses*, Amnesty International, London, 2015 (<https://legal-tools.org/doc/4pb3ei>).

³⁸ “People are sending their final goodbyes from within Aleppo”, *Twitter*, 13 December 2016.

call on the international community to intervene to save the lives of civilians. In raising awareness of events on the grounds, social media users may also call attention to particular violent events or particular alleged perpetrators. Posts of this type have been especially prevalent surrounding chemical weapon attacks in Syria, with social media posts purporting to show videos and photos of victims of these attacks. Often accompanying content of this type (although by no means always) are accusations against one party to the conflict for having carried out the attack.³⁹ In the context of chemical weapon attacks in Syria, these accusations regularly focus on Assad's forces, but there is no shortage of social media posts seeking to refute these allegations and attribute blame elsewhere.

Closely related to the above is the use of social media for documentation and accountability purposes. Whereas in previous years, the collation and analysis of evidence of human rights violations and international crimes was centralised in organisations such as Truth and Reconciliation Committees, international courts and tribunals, and NGOs, the increased availability of technology has decentralised conflict documentation.⁴⁰ Through social media individuals can record events on their smartphones, tablets, laptops, and cameras, and can share this information on social media platforms, where it can be stored.⁴¹ The nature of social media is such that other users can then access this information and use it in accountability processes.

These examples of social media use by non-parties to the conflict demonstrate the potential that social media have for empowering individuals present in conflict zones, who are generally rendered powerless by the fighting, to communicate with the outside world, contribute to the

³⁹ Lamia Estatie, "Syria 'chemical attack' prompts social media messages", *BBC News*, 5 April 2017 (available on its web site).

⁴⁰ Todd Landman and Jonathan Crook, "The Democratization of Technology and Conflict Analysis", in *The Politics of International Diffusion: Regional and Global Dimensions*, 2013, p. 6.

⁴¹ A note of caution is necessary on this point, as reliance on social media platforms for documentation storage can be problematic given possibility that these platforms may remove the content for violating their community standards. See Avi Asher-Schapiro, "YouTube and Facebook are Removing Evidence of Atrocities, Jeopardizing Cases Against War Criminals", *The Intercept*, 2 November 2017 (available on its web site); Malachy Browne, "YouTube Removes Videos Showing Atrocities in Syria", *The New York Times*, 22 August 2017 (available on its web site); Armin Rosen, "Erasing History: YouTube's Deletion of Syria War Videos Concerns Human Rights Groups", *Fast Company*, 7 March 2018 (available on its web site).

global narrative and debate, and influence decision- and policy-making. However, the flip-side of this phenomenon must also be borne in mind, as social media use by individuals present in conflict zones can have negative outcomes. For example, photos and videos may lead to certain individuals being targeted by parties to the conflict, and crisis maps may indicate concentrations of civilians in given areas and render them vulnerable to attack.

Social media clearly play an increasingly notable role in global politics and modern conflict. The range of uses to which they are put, and the influence that this can have on power dynamics, is hard to accurately map at present, but is undeniably present, just as it is in global politics. However, as cautioned in the introduction, not all social media users aim to convey truthful and genuine information. Just as social media may be used by individuals to document particular attacks and to attribute blame to particular parties to the conflict, so may it be used to manufacture disinformation about attacks and attribute blame inaccurately. Social media therefore play a further role in conflict: that of facilitating the spread of disinformation. With this in mind, the next section will turn to focus on international criminal justice, and in particular how the power shifting potential of social media play a role in the practice of the ICC.

19.3. Social Media in the Practice of the International Criminal Court

The aim of international criminal justice is to hold perpetrators of atrocities to account, and given that such atrocities very often take place in the context of a conflict, there is an intrinsic connection between the two. As such, the question arises as to whether the increasing use of social media in conflict, and their disruptive effects on power dynamics in those conflicts, is reflected in international criminal justice processes. Given its central position in the international criminal justice landscape, and given that it is the only active international criminal court or tribunal dealing with a conflict that has taken place in the social media age, attention is focused on the ICC.

In order to explore the ways in which social media could play a role in international criminal justice, this section examines both the practice of the ICC and the practice of organisations pursuing accountability through engagement with the ICC, such as NGOs and international civil society. This provides a more comprehensive picture of the role that social media

play in the international justice process. Particularly in relation to the ICC's practice, there is a discernible trend towards allocating social media a more central role in the pursuit of justice.

The examination of practice in this section informs the final section of this chapter, which will offer some thoughts on the ways in which the use of social media in the practice of the ICC may affect the power dynamics between different actors involved in international criminal justice. As such, the aim of this section is not to provide a comprehensive overview of all of the issues raised by the different situations, but rather to demonstrate how social media have come to play a role in the practice of the ICC.

19.3.1. Social Media and International Criminal Justice: Civil Society Organisations

The movement to combat impunity and secure justice for victims of crimes committed in conflict is the concern of many organisations active at both the domestic and international level. Given the prominence of the ICC in the international criminal justice arena, many such organisations seek to engage the ICC in their accountability work (for example, by raising awareness and campaigning for the opening of an ICC investigation). The work of NGOs and international organisations in this area is meaningful considering the ICC's limited resources and its inability to investigate each and every situation which may potentially fall within its jurisdiction.

Four conflict contexts were chosen, as illustrative examples, to explore and show how social media play a role in the work of CSOs, especially in areas where those organisations seek to engage the ICC. These are Israel–Palestine, Ukraine, Syria, and Mexico.

The episodic outbreaks of intense fighting that occur between Israel and Palestine have attracted a great deal of attention on social media. During the 2014 Gaza War, the hashtag #GazaUnderAttack was reportedly used in more than four million Twitter posts.⁴² The report of the UN Commission of Inquiry into the 2014 Gaza Conflict relied on YouTube videos, Tweets, and other open-source material to support its documenta-

⁴² *Aljazeera*, "Gaza and Israel: War of the hashtags", 22 July 2014 (available on its web site); Adam Groves, "'From Gaza to the streets of Britain': British social media coverage of the 2014 Israel-Gaza conflict", *Jewish Culture and History*, 2017, vol. 18, no. 3, p. 331.

tion of the conflict.⁴³ In the same report that references this material, the members of the Commission of Inquiry call on Israel to accede to the Rome Statute, and call upon the parties to the conflict and the international community to actively support the work of the ICC in relation to the Occupied Palestinian Territory.⁴⁴ In January 2015, the Government of Palestine lodged a declaration accepting the ICC's jurisdiction over crimes committed in the occupied Palestinian territory, including East Jerusalem, as of 13 June 2014. As of April 2015, Palestine acceded to Rome Statute.⁴⁵

A similar connection between social media content and civil society engagement with the ICC can be seen in 'Article 15 communications' concerning Israel–Palestine. The Rome Statute, in Article 15, provides the possibility for external actors – such as States, organs of the UN, inter-governmental and non-governmental organisations, among others – to submit information to the ICC Prosecutor concerning crimes within the jurisdiction of the Court. These Article 15 communications are classified as confidential communications and so are not made public by the ICC; however, sometimes the CSOs that compose these communications do publish them. One such communication was presented to the ICC by Palestinian human rights organisations and victims groups concerning alleged crimes against humanity and war crimes committed in the context of Operation Protective Edge, during the 2014 Gaza Conflict.⁴⁶ Sections of this communication are supported by YouTube videos showing bombardments and the aftermath of bombardments.⁴⁷

⁴³ Report on the Independent Commission of Inquiry established pursuant to Human Rights Council resolution S-21/1, UN Doc. A/HRC/29/52, 24 June 2015 (<https://www.legal-tools.org/doc/8f37fd>).

⁴⁴ *Ibid.*, pp. 20–22.

⁴⁵ ICC, "Palestine declares acceptance of ICC jurisdiction since 13 June 2014", 5 January 2015, ICC-CPI-20150105-PR1080.

⁴⁶ Al-Haq Al-Mezan Center for Human Rights, Aldameer Association for Human Rights and Palestinian Centre for Human Rights, "Palestinian Human Rights Organizations & Victims' Communication to the International Criminal Court Pursuant to Article 15 of the Rome Statute Requesting Investigation and Prosecution of High-level Israeli Officials for Crimes Against Humanity and War Crimes, Committed in Gaza, Palestine in the course of 'Operation Protective Edge'", November 2015 (<https://legal-tools.org/doc/oqupu3>).

⁴⁷ "لحظة استهداف برج الطائر 4", *YouTube*, 23 August 2014; "Israeli sniper killing wounded civilian", *Youtube*, 22 July 2014.

Turning to Ukraine, the violent clashes which broke out in early 2014 also played out very visibly on social media. Indeed, the three-month-long protests, which involved violent confrontations with police, were sparked by a Facebook post by a Ukrainian journalist, calling on people to protest on Maidan square.⁴⁸ The events surrounding the protests led to Ukraine lodging a declaration accepting the jurisdiction of the ICC on 17 April 2014 (extended on 8 September 2015).⁴⁹ Ukraine is not party to the Rome Statute; however, it has granted the ICC jurisdiction over the events related to the ‘Euromaidan’ protest, beginning on 21 November 2013, and over other events from 20 February 2014 onwards. The Office of the Prosecutor (‘OTP’) opened a preliminary investigation into these events in April 2014 in relation to crimes against humanity.⁵⁰

The OTP has received a number of Article 15 communications relating to the situation in Ukraine. Two of the CSOs that submitted Article 15 communications also published reports on these communications (although not the communications themselves). In 2015, the International Federation for Human Rights (‘FIDH’) published its report “The Price of Freedom”, which provides a summary of FIDH’s findings on crimes against humanity committed during the Euromaidan period.⁵¹ This report relies on many social media sources, including posts relating to the attack on Rostislav Shaposhnikov,⁵² and other videos from local news. The International Partnership for Human Rights also issued a report in 2015 summarising its Article 15 communication in relation to Ukraine, which

⁴⁸ Tetyana Bohdanova, “Unexpected revolution: the role of social media in Ukraine’s Euro-maidan uprising”, *European View*, 2014, vol. 13, no. 2, p. 133.

⁴⁹ ICC Office of the Prosecutor, “Report on Preliminary Examination Activities 2017”, 2017, para. 83 (<http://www.legal-tools.org/doc/e50459/>).

⁵⁰ ICC, “Preliminary Examination: Ukraine” (available on its web site).

⁵¹ International Federation for Human Rights (‘FIDH’), “The Price of Freedom, Summary of the public report of human rights organizations on crimes against humanity committed during the period of Euromaidan (November 2013 – February 2014)”, 2015 (<https://www.legal-tools.org/doc/098f64>).

⁵² On page 1 of the above-mentioned report, a reference is made to attacks on journalists. The report references a news article from the site Road Control, which in turn links to social media videos. For an unofficial translation, see “‘Attack on the head of the Road Control R. Shaposhnikov was not a robbery, but robbery’ – the prosecutor’s office (VIDEO)”, *Road Control*, Ukraine, 28 March 2012 (available on its web site).

similarly relies on social media, in particular videos from YouTube.⁵³ Some of these videos have been removed by YouTube, which raises concerns relating to the accessibility of evidence.⁵⁴

In relation to Israel–Palestine and Ukraine, the engagement of CSOs with the ICC relates to ongoing preliminary investigations; the opening of an investigation has not yet been possible in relation to the remaining conflict contexts that this section will examine: Syria and Mexico.

The conflict in Syria has been ongoing since the nationwide uprising in 2011, which began in the context of the Arab Spring. The conflict has intensified over time and become increasingly complex, with the splitting of the opposition into various groups, the use of chemical weapons, the rise of ISIS, and the involvement of different countries.⁵⁵ Syria is the most challenging conflict context of the four being discussed in terms of establishing ICC jurisdiction. As Syria is not party to the Rome Statute, a UN Security Council referral would be necessary to establish ICC jurisdiction over the crimes committed in the conflict.⁵⁶ Given steadfast opposition from P5 members to such a move, a referral has thus far proved impossible and at the time of writing continues to seem an unlikely prospect.

Syria is, however, the conflict context that is best known for its representation in social media. Images and videos from the conflict in Syria, have ‘gone viral’ and been seen all over the world.⁵⁷ One report described the Syrian civil war as “the first YouTube conflict in the same way that Vietnam was the first television conflict”.⁵⁸ Syria is not the only contender for the title of ‘social media conflict’. Other conflicts that have taken place in a similar time frame – including Libya, Mali, and Yemen – are

⁵³ International Partnership for Human Rights, “Fighting Impunity in Eastern Ukraine: Violations of International Humanitarian Law and International Crimes in Eastern Ukraine”, October 2015 (<https://legal-tools.org/doc/zl6qpf>).

⁵⁴ Avi Asher-Schapiro, 2 November 2017, see above note 41.

⁵⁵ “Syria profile – Timeline”, *BBC News*, 7 February 2018 (available on its web site).

⁵⁶ Rome Statute of the International Criminal Court, 17 July 1998, Article 13(b) (<http://www.legal-tools.org/doc/7b9af9/>).

⁵⁷ Examples of social media content from Syria going viral include the picture of the boy sitting in the back of an ambulance after a bomb blast: Elle Hunt, “Boy in the ambulance: shocking image emerges of Syrian child pulled from Aleppo rubble”, *The Guardian*, 18 August 2016 (available on its web site).

⁵⁸ Quote from Justin Kosslyn, the product manager of Google’s Jigsaw programme, Armin Rosen, “Erasing History: YouTube’s Deletion of Syria War Videos Concerns Human Rights Groups”, *Fast Company*, 7 March 2018 (available on its web site).

also represented on social media, although content emerging from these conflicts has not garnered the same public attention as that from Syria.

In the Syrian context, social media play a particularly prominent role in monitoring and documenting the conflict, with documentation and accountability NGOs turning to social media to collect information.⁵⁹ A notable example of the way that social media have been used to document the conflict concerns the ‘Caesar files’. In 2014, a Syrian forensic photographer who worked for the government military police – codenamed Caesar – succeeded in smuggling out thousands of pictures that he took of detainees who died in detention. This fuelled calls to end impunity and deliver justice to the victims, but also served an important documentation role. Following the release of these photos through various media channels, Facebook groups and other social media platforms have been used to help identify the people in the photos, and thereby record who has been disappeared, detained, or killed in Syria.⁶⁰

Social media content is also important for documentation efforts at the inter-governmental level. In December 2016, the UN General Assembly voted to establish the International, Impartial and Independent Mechanism on international crimes committed in the Syrian Arab Republic (‘IIIM’). This body is mandated to “collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files in order to facilitate and expedite fair and independent criminal proceedings [...] in national, regional or international courts”.⁶¹ Reports indicate that social media content, and in particular videos, will play into the work of the IIIM.⁶² Furthermore, the Independent International Commission on Inquiry on the

⁵⁹ For example, the well-known documentation centre The Syrian Archive collects information from social media to collect and preserve evidence of human rights violations which can be used to support the work of advocates, human rights organisations, and so on: Syrian Archive, “Research Methodology” (available on its web site).

⁶⁰ Human Rights Watch, “If the Dead Could Speak: Mass Deaths and Torture in Syria’s Detention Facilities”, 16 December 2015 (<https://legal-tools.org/doc/8ltbki>).

⁶¹ International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, UN Doc. A/RES/71/248, 11 January 2017, para. 4 (<https://www.legal-tools.org/doc/fecaf0>).

⁶² Armin Rosen reports that the technology non-profit Benetech has teamed up with the IIIM to develop software that can search and organise the estimated four million videos related to the Syrian conflict. The IIIM will, in turn, facilitate the use of these videos in court if alleged perpetrators face trial, see Rosen, 2018, see above note 41.

Syrian Arab Republic (a body established by the Human Rights Council that is separate from but co-operates with the IIIM), has issued reports which take note of, among other things, videos on YouTube that purport to show killings by anti-government armed groups in Aleppo. It stipulates that it has been unable to verify those videos.⁶³

The work of the IIIM and the Commission of Inquiry for Syria are not currently connected to ICC proceedings, but given the mandate of the IIIM to put together prosecution files for international criminal courts, they could come to be connected in the future. Indeed, there have been multiple calls over the years by the UN Secretary-General⁶⁴ and the chief of the Office of the High Commissioner for Human Rights ('OHCHR')⁶⁵ to refer the situation in Syria to the ICC. A March 2018 meeting of the Human Rights Council, in which a report of the Commission of Inquiry for Syria was discussed, concluded with a number of delegations calling for an ICC referral.⁶⁶ The findings of this report are supported by a number of videos, which although not attributed to a source, are of a type that are very often obtained from social media.⁶⁷

In addition to documentation, social media also play a role in the Syrian context through Article 15 communications submitted to the ICC by NGOs. While these do not appear to have been made public by the NGOs, the ICC Prosecutor has acknowledged their receipt, particularly in

⁶³ Report of the independent international commission of inquiry on the Syrian Arab Republic 2013, UN Doc. A/HRC/22/59, 5 February 2013, para. 22 (<https://www.legal-tools.org/doc/802b1c>).

⁶⁴ "UN Chief calls for Syria referral to ICC", *SBS News*, 27 January 2018 (available on its web site).

⁶⁵ UN News, "UN human rights chief renews call on Security Council to refer Syria to ICC", 2 July 2012 (available on its web site); United Nations Human Rights Office of the High Commissioner, "Pillay renews call to refer Syria to world criminal court", 13 February 2013 (available on its web site).

⁶⁶ United Nations Human Rights Council, "Human Rights Council holds interactive dialogue with the Commission of Inquiry on Syria", 13 March 2018 (available on its web site).

⁶⁷ For example, paragraph 3 of the reports refers to video footage "of the aftermath of the attack" on the al-Rahma cave; paragraph 22 refers to video footage and photos to support the finding that that day in question was a "clear day"; paragraph 24 states that video footage corroborates a finding that a wave of airstrikes hit a market street killing and maiming civilians and destroying property. While it is certainly possible that these videos were sourced otherwise than from social media, footage from the immediate aftermath of attacks is very often posted to and retrieved from social media. See Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/37/72, 1 February 2018, paras. 3, 22, 24 (<https://www.legal-tools.org/doc/b01552>).

relation to the violations committed by ISIS in Syria and Iraq.⁶⁸ In so doing, the Prosecutor herself noted that ISIS “have publicised their heinous acts through social media”.⁶⁹ Given this awareness in the OTP and the extensive documentation facilitated by social media, social media will likely play a notable role if and when the ICC is able to prosecute crimes committed in Syria.

Turning now to the final conflict context to be considered: Mexico. The centrality of drugs and organised crime to the violence in Mexico makes the situation complex from an international criminal law point of view;⁷⁰ that said, it is uncontroversial that the widespread and intense violence has given rise to several human rights abuses. Human Rights Watch and other organisations have noted, among others, violations including enforced disappearances, extrajudicial killings, abuses by the military, torture, and attacks on journalists and human rights defenders.⁷¹ Social media have been used as a means to document and combat these abuses.⁷²

From 2016 onwards, an activism movement has been growing in Mexico urging the ICC to probe alleged crimes against humanity.⁷³ To that effect, FIDH and others submitted a joint Article 15 communication, requesting that the OTP open a preliminary examination into crimes committed in Mexico. The communication explains that one of the

⁶⁸ ICC OTP, “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS”, 8 April 2015.

⁶⁹ *Ibid.*

⁷⁰ With respect to war crimes, questions are raised as to whether a conflict can be said to exist, given that the parties involved are criminal organisations rather than armed groups in the traditional sense. With respect to crimes against humanity, questions are raised as to whether the cartels have a sufficient degree of organisation to fulfil the State policy requirement.

⁷¹ Human Rights Watch, “World Report 2018: Mexico Events of 2017”, 2018 (available on its web site). See also Human Rights Watch, “Mexico’s Disappeared: The Enduring Costs of a Crisis Ignored”, 20 February 2013 (available on its web site); Human Rights Watch, “Neither Rights Nor Security: Killings, Torture, and Disappearances in Mexico’s ‘War on Drug’”, 9 November 2011 (available on its web site).

⁷² Andres Monroy-Hernandez, Emre Kiciman, Danah Boyd and Scott Counts, “Narcotweets: Social Media in Wartime”, Cornell University, 5 July 2015; “Residents turn to social media to fight Mexico cartel violence”, *CNN*, 5 March 2012; Shannon Young and Marco Werman, “Cartel Violence and Social Media in Mexico”, *Pri*, 11 October 2011 (available on its web site).

⁷³ Jesus Perez Caballero, “Will the International Criminal Court Investigate Mexico’s ‘Drug War’?”, *InSight Crime*, 5 November 2014 (available on its web site); “Mexico activists seek ICC investigation of drug war”, *BBC News*, 25 November 2011 (available on its web site).

sources relied on was media reports, including visual, written, and electronic media.⁷⁴ While it does not explicitly mention social media, a number of YouTube videos are referred to in the communication. Furthermore, the communication acknowledges the role played by social media in the Mexico situation when it quotes a news report concerning the actions of one of the cartels: “Often they would videotape their atrocities and put them on YouTube”.⁷⁵

This section has sought to establish that civil society, broadly understood as including NGOs, inter-governmental bodies, and other actors, has incorporated social media content into its accountability work. This carries over, in many cases, into the engagement by these CSOs with the ICC. In this way, social media content comes to attention of the ICC, and has the potential to affect the power dynamics in international criminal justice. Sometimes this link can be seen quite clearly, as where social media content is incorporated into Article 15 communications, whereas at other times the link is less direct. However, what can be discerned is that social media’s increasing role in conflict is translated into an increasing role in the work of CSOs pursuing accountability in the context of those conflicts. Nevertheless, as is also the case with respect to the work of the ICC itself, this contribution has only examined instances where CSOs indicate their use of social media content publicly – it is likely the case that it plays a more prominent role still in the investigative process and information gathering activities of different civil society actors.

19.3.2. Social Media and International Criminal Justice: The International Criminal Court

The above discussion indicates that social media content may work its way into the operation of the ICC from external actors; this section will demonstrate the use of social media in the practice of the ICC itself. Social media have, over time, gained a more central place in the Court’s work: first in documents from the OTP, then through the building of institutional capacity, and finally with the issuance of the first arrest warrant citing social media. While this is presented in a broadly chronological way, the developments are not strictly linear. This section has been written using publicly available information only, and so does not comment on the

⁷⁴ FIDH, “Mexico Coahuila: ongoing crimes against humanity, Communication to the International Criminal Court”, 2016, p. 14 (<https://legal-tools.org/doc/mg2xh6>).

⁷⁵ *Ibid.*, p. 23.

use of social media in confidential processes, where they are likely to also play a (sometimes notable) role.⁷⁶

Social media first begin to appear in ICC proceedings through the work of the OTP with respect to Libya, Côte d'Ivoire, and Burundi. The situation in Libya was referred to the ICC by the UN Security Council in 2011 under Resolution 1970. The referral provided the ICC with jurisdiction over crimes committed on the territory of Libya from 15 February 2011 onwards. Three months after the opening of the investigation, the ICC Prosecutor requested an arrest warrant for Muammar Gaddafi, Saif Al-Islam Gaddafi, and Al-Senussi – respectively (prior to the conflict) the President of Libya, his son and *de facto* Prime Minister,⁷⁷ and the Libyan intelligence chief. In a number of the annexes to the OTP request for an arrest warrant, there were references to different types of social media: YouTube videos, Tweets (including photos), blog posts, and a screenshot of a crisis map.⁷⁸

In the same year that the investigation into Libya began, an investigation was also opened into Côte d'Ivoire. Côte d'Ivoire declared its acceptance of the ICC's jurisdiction in 2003, although it did not formally ratify the Rome Statute until 2013.⁷⁹ The investigation into the 2010–11 post-election violence in the country was opened *proprio motu* by the OTP. According to Article 15 of the Rome Statute, the Prosecutor must request authorisation from the Pre-Trial Chamber to do so, which the OTP did. In the annexes that support its request, the OTP included a video uploaded to the video sharing social media platform Dailymotion in Annex 5.⁸⁰ Annex

⁷⁶ For example, in Alexa Koenig, Felim McMahon, Nikita Mehandru and Shikha Silliman Bhattacharjee, “Open Source Fact-Finding in Preliminary Examinations”, in Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Preliminary Examination: Volume 2*, Torkel Opsahl Academic EPublisher, Brussels, 2018 (<https://www.legal-tools.org/doc/6706c9>), the authors set out how open source information, including social media evidence, plays a role in preliminary investigations at the ICC.

⁷⁷ ICC, “Case Information Sheet: Situation in Libya, *The Prosecutor v. Saif Al-Islam Gaddafi*, ICC-01/11-01/11”, August 2018, ICC-PIDS-CIS-LIB-01-013/18_Eng.

⁷⁸ ICC, Situation in Libya Arab Jamahiriya, Pre-Trial Chamber I, Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI, 16 May 2011, ICC-01/11-4-Red, Annexes 7, 9.10, 9.11, 9.24 (<https://www.legal-tools.org/doc/d49120>).

⁷⁹ ICC, “Investigation: Cote d’Ivoire, ICC-02/11” (available on its web site).

⁸⁰ ICC, Situation in the Republic of Côte d’Ivoire, Annex 5 to the Request for authorisation of an investigation pursuant to Article 15, 23 June 2011, ICC-02/11, no. 55 (the video is listed only). See also ICC, Situation in the Republic of Côte d’Ivoire, Pre-Trial Chamber

5 of the request is dedicated to media articles generally. These include articles noting the attacks on civilians, armed forces circulating the streets, inhabitants fleeing the district of Abidjan, and the finding of mass graves by the Red Cross.

More recently, when the OTP requested the Pre-Trial Chamber's authorisation to open an investigation into Burundi in 2017,⁸¹ social media also played a notable role in supporting the request. In this instance, the OTP incorporated social media into its authorisation request differently. Rather than include social media content in the annexes to the request, several references were made in the request itself to a report from FIDH.⁸² This report, in turn, makes extensive use of social media content, including multiple screenshots.⁸³ The connection between the OTP authorisation request and the social media content can be seen, for example, in relation to abductions and disappearances: the FIDH report refers extensively to social media content to attest to abduction and disappearance cases, and the OTP authorisation request in turn refers extensively to the FIDH report.⁸⁴ While the references to social media in this instance are mediated through an NGO report and thus are less direct than in the Libya and Côte d'Ivoire examples, social media are referenced more extensively than before.

The OTP has not, however, been uncritical in its approach to social media content when submitting requests to open investigations, or for arrest warrants. In requesting permission to open an investigation into Afghanistan, the OTP explicitly stated that some of the Taliban's claims of responsibility for killings and abductions have not been included in OTP figures for the very reason that they were made through the Taliban's

III, Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an investigation into the situation in the Republic of Côte d'Ivoire', 15 November 2011, ICC-02/11-14-Corr, para. 5 (<https://www.legal-tools.org/doc/e0c0eb>).

⁸¹ ICC, Situation in Burundi, Pre-Trial Chamber III, Public redacted version of "Request for authorisation of an investigation pursuant to article 15", 6 September 2017, ICC-01/17-5-US-Exp, 15 November 2017, ICC-01/17-5-Red ('Burundi Article 15 Request') (<http://www.legal-tools.org/doc/e47402/>).

⁸² FIDH, "Repression and genocidal dynamics in Burundi", November 2016 (<https://legal-tools.org/doc/2vdifo>).

⁸³ See, for example, *ibid.*, pp. 30, 57, 66–68, 72.

⁸⁴ See, for example, *ibid.*, p. 61.

Twitter accounts or web sites.⁸⁵ The OTP therefore seems acutely aware of the dangers of misinformation on social media.

In addition to supporting OTP requests for the authorisation of investigations and requests for arrest warrants, social media have also been submitted by the OTP as evidence at the confirmation of charges and trial phases. In the confirmation of charges hearing of Ahmad Al Faqi Al Mahdi, concerning the destruction of cultural heritage in Mali, numerous videos obtained from “open sources” and “the internet” were referred to and shown in Court.⁸⁶ In the trial phase, a large number of videos, some of which were open-source, were compiled into a digital platform that displayed the videos next to satellite images and photographs taken before and after the destruction.⁸⁷ As the defendant pleaded guilty, the platform and its contents were not challenged in court. Social media also played a role in the trial of Jean-Pierre Bemba Gombo and others. As Bemba’s trial for war crimes and crimes against humanity proceeded before Trial Chamber III, evidence of witness tampering by Bemba and Bemba’s defence counsel came to light. A separate case was started against five defendants, during which the screenshot of a Facebook photo was submitted as evidence of a connection between individuals involved in the witness tampering scheme.⁸⁸ Although the trial ended with a conviction, the Chamber did not rule on the objections raised by the defence to the photo, and so it is not clear what role it played in the decision.

While these examples may be considered minimal in isolation and when compared with the large body of other evidence submitted to the Court, taken together, they testify to the trend of social media inclusion (with the possible exception of Afghanistan). Furthermore, there may be more reliance on social media than is explicitly identified in the discussed

⁸⁵ ICC, Situation in the Islamic Republic of Afghanistan, Pre-Trial Chamber, Public redacted version of “Request for authorisation of an investigation pursuant to article 15, 20 November 2017, ICC-02/17-7-Conf-Exp”, fn. 143 (<http://www.legal-tools.org/doc/db23eb/>).

⁸⁶ ICC, Situation in the Republic of Mali, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Pre-Trial Chamber, ICC-01/12-01/15-T-2-Red2-ENG WT 01-03-2016 1-100 SZ PT, 1 March 2016, ICC-01/12-01/15-T-2-Red2, pp. 43, 46 (<http://www.legal-tools.org/doc/1a7bdc/>).

⁸⁷ “ICC Digital Platform: Timbuktu, Mali”, *SITU Research*, 2016 (available on SITU Research’s web site).

⁸⁸ For an analysis of this case and the digital evidence involved, see Lindsay Freeman, “Digital Evidence and War Crimes Prosecution: The Impact of Digital Technologies on International Criminal Investigations and Trials”, in *Fordham International Law Journal*, 2018, vol. 41, no. 2, pp. 326–9.

documents for two reasons. Firstly, ICC documents often refer to information obtained from ‘open source[s]’, but do not include a specific reference to a particular source.⁸⁹ The term ‘open source’ is used to denote material that is publicly available, and while it is not limited to social media content, it does include it.⁹⁰ As such, wherever ICC documents refer to open sources, this may include social media content. Secondly, through ICC documents it is only possible to see which social media sources have ultimately been relied on, but not which social media sources informed the direction and scope of the investigation. Information concerning the conduct of an investigation is justifiably kept confidential, but it does raise the question of whether social media play a bigger role than can be detected from the public ICC documents that result from these investigations.

Proactive efforts by the ICC to build institutional investigative capacity to deal with content posted to social media indicates strongly that social media play a role in investigations, even if the precise contours of this are understandably not disclosed. In the 2016–18 Strategic Report issued by the OTP, the Prosecutor noted that “access to the internet by victims, witnesses and perpetrators creates a dynamic environment to monitor and confirm the commission of ICC crimes”.⁹¹ The report goes on to point out a number of measures that have been taken by the Court in order to increase the ability to collect evidence other than witness statements: the creation of a cyber-unit, the establishment of a technology advisory board, the training of investigators in online investigations, and an increase in forensic capacity.⁹² In terms of recruitment, the Proposed Budget for 2016 mentions the need to hire three cyber investigators,⁹³ the

⁸⁹ As an example that is illustrative of this practice, see Burundi Article 15 Request, paras. 26, 83, 106, see above note 81.

⁹⁰ “Open Source Information is publicly available information. Open source information is not defined by its specific source (whether digital or analogue) or how that information is disseminated. Instead, it is information that can be accessed without the need to seek a warrant or employ other coercive or illegal measures”. See *The New Forensics: Using Open Source Information to Investigate Grave Crimes*”, Human Rights Centre, UC Berkeley School of Law, 2018, p. 7.

⁹¹ ICC OTP, OTP Strategic Plan 2016-2018, 6 July 2015, para. 23 (<http://www.legal-tools.org/doc/7ae957/>).

⁹² *Ibid.*, Annex 1, para 20.

⁹³ ICC ASP, Fourteenth Session, The Hague, 18-26 November 2015, Official Records, Volume II, para 228 (<https://www.legal-tools.org/doc/156059/>); See also Human Rights Centre UC Berkeley School of Law, 2018, para. 59, see above note 91.

Court has recruited investigators with expertise in open-source investigations, and vacancy announcements for investigation related roles often call for experience in open-source research, data-mining, and information-analysis software. Within the Investigations Division is the Crime Pattern Analysis Unit, which monitors ongoing crimes in the situations referred to the ICC by the UN Security Council, and monitors the commission of new crimes in all situations under investigation. These monitoring activities include monitoring social media,⁹⁴ and on the basis of its work, the Unit advises the Prosecutor on the selection of cases for investigation. An awareness of social media is therefore being built into the institutional structure of the Court.

The most recent development in the trend towards greater incorporation of social media content into the work of the ICC is the issuance of the first arrest warrant that is directly supported by social media evidence. Compared to the situations involving social media content set out above, this was the first time that social media content was relied on by ICC judges in a decision, rather than simply forming part of the materials provided to the judges by the Prosecutor (and which the judges did not expressly comment on). The arrest warrant, issued in the context of the Libya situation, was for a commander of the Al-Saiqa Brigade, Mahmoud Mustafa Busayf Al-Werfalli, alleged to have directly committed and ordered the commission of murder as a war crime in seven incidents, totalling 33 deaths.⁹⁵ These seven incidents are captured in seven separate videos posted to social media, and have reportedly taken place from around 3 June 2016 to about 17 July 2017.⁹⁶ The crimes allegedly took place during the Al-Saiqa's Brigade's participation in Operation Dignity, a coalition effort to fight terrorist groups in the Libyan city of Benghazi. One video is cited in the arrest warrant as having been posted on Facebook, while others were described as being posted to 'social media'. The arrest warrant is

⁹⁴ See, for example, ICC ASP, Report of the Court on the Basic Size of the Office of the Prosecutor, 17 September 2015, ICC-ASP/14/21, para 65(a) (<http://www.legal-tools.org/doc/b27d2a/>).

⁹⁵ ICC, Situation in Libya, *The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*, Pre-Trial Chamber I, Warrant of Arrest, 15 August 2017, ICC-01/11-01/17-2 ('Al-Werfalli Arrest Warrant') (<http://www.legal-tools.org/doc/881fb6/>); see also Emma Irving, "And So It Begins ... Social Media In An ICC Arrest Warrant", *Opinio Juris*, 17 August 2017 (available on its web site).

⁹⁶ Detailed analysis of the videos can be seen here, Christiaan Triebert, "Geolocating Libya's Social Executioner", *Bellingcat*, 4 September 2017 (available on its web site).

also supported by witnesses interviews, internal orders, and reports of international organisations, NGOs, and research centres, and as such is not solely based on social media evidence.⁹⁷ However, the fact that the seven videos are the only source of evidence that is discussed at length in the arrest warrant signals the central role that social media play in the case. At the time of writing, no arrest has been made, and social media continues to be used as a way to monitor and document alleged crimes committed by Al-Werfalli.⁹⁸

One of the major factors limiting the use of social media content as evidence in international criminal proceedings is the fact that such content is hard to verify, and the problem of ‘fake news’ is ever present. The challenges of establishing the authenticity of social media content, and addressing concerns relating to chain of custody, among others, are significant and are subject to evolving scholarship and discourse.⁹⁹

However, efforts are being made to overcome, or at least mitigate, these challenges. A number of organisations are developing tools and techniques to help increase the evidentiary value of social media content. For example, the Digital Video Vault is a tool that uses blockchain technology to certify that a given piece of content – whether a photo, video, or other type of digital document – existed online at a given point in time.¹⁰⁰ This can be used to prove when a piece of content was collected, and combined with other corroborating evidence, could enhance the value of the videos. Furthermore, efforts are being made to develop ways of identifying fake social media content. For example, researchers at the University of Albany have developed new methods for identifying ‘deepfakes’ (highly realistic fake videos generated with machine learning). These developments in the verifiability of social media content will no doubt contribute to the trend of affording such content a more central role in international criminal justice. The more verifiable social media content be-

⁹⁷ Al-Werfalli Arrest Warrant, para. 3, see above note 95.

⁹⁸ Christiaan Triebert, “What Werfalli Did – Haftar’s Commander Continues Executions in Defiance of ICC Arrest Warrant”, *Bellingcat*, 9 February 2018 (available on its web site); ICC OTP, “ICC Prosecutor, Fatou Bensouda, condemns recent violence in Benghazi, Libya”, 26 January 2018.

⁹⁹ See above note 2.

¹⁰⁰ Enrique Piracés, “The Future of Human Rights Technology”, in Molly Land and Jay Aronson (eds.), *New Technologies for Human Rights Law and Practice*, Cambridge University Press, Cambridge 2018, p. 300.

comes, and the more adept investigators become at identifying disingenuous content, the more it can be used in criminal investigations

19.4. Social Media and International Criminal Justice: Power Dynamics

In light of the practice discussed in the previous section, it is clear that the growing importance of social media in politics and conflict is reflected in its growing importance in international criminal justice; it is therefore pertinent to inquire whether social media's disruptive effect on power dynamics in politics and conflict is also reflected in international criminal justice. This section will suggest ways in which social media can alter the power dynamics that exist between different international criminal justice actors: the ICC, States, victims, and NGOs. In each case, it is possible to imagine ways in which the relative power position of each actor may grow or diminish in response to social media's role in international criminal justice.

At the outset, it must be noted that power dynamics will be affected by a range of factors, of which social media may be just one; power dynamics are neither static nor uniform across different situations and cases. This section does not purport to be a comprehensive and accurate mapping of power dynamics and their fluctuations; rather, it is the starting point for discussion and an indication of issues that should be monitored as the use of social media in international criminal justice continues to develop.

Beginning with the ICC itself, social media can afford the Court a greater power to fight impunity by helping it to overcome barriers to the investigation of cases. One such barrier is lack of State co-operation. The ICC's institutional framework renders it dependent on States for co-operation and assistance in the investigation and prosecution of crimes, particularly where the ICC is required to operate on a State's territory in order to collect evidence, or where the ICC requires a State to hand over certain documents and information. The collapse of the case against Uhuru Kenyatta illustrates how a lack of State co-operation can contribute to undermining an ICC case. Kenyatta was charged by the ICC with crimes against humanity in connection with the 2007 post-election violence in Kenya, but in 2013 he was elected President of Kenya. In 2014 the ICC

Prosecutor withdrew the charges and the trial was terminated,¹⁰¹ in part for reasons of a lack of State co-operation. Social media provide an avenue to (at least partially) side-step an un-co-operative State and conduct investigations remotely. This reduces the power of that State to limit the ICC's effectiveness, and empowers the ICC to take action. At the time of writing, the ICC has opened preliminary investigations into the Philippines and Myanmar, the governments of which have both indicated that they will not co-operate with the ICC.¹⁰² It will be interesting to monitor the extent to which social media content helps the ICC to overcome this obstacle. In relation to Myanmar, one has already seen social media play a role in accountability processes where co-operation from the government was not forthcoming and where the government would not grant access to the territory. The OHCHR Fact Finding Mission for Myanmar released a report in September 2018 in which the Mission alleges that genocide was perpetrated against Rohingya Muslims in Myanmar during 2017 and early 2018. A number of the Mission's findings, both on issues of fact and on the issue of genocidal intent, are supported by posts from social media.¹⁰³

In addition to a lack of State co-operation, the ICC's ability to carry out an investigation may also be hampered by security concerns and infrastructure constraints. Libya, for example, remains an active conflict area, with security concerns severely limiting access for investigators. The arrest of a four-member ICC legal team by an armed group in Libya in 2012 demonstrates the challenges that exist for investigating this situation.¹⁰⁴ Social media can open a window into an otherwise restricted area, allowing for accountability processes to extend their reach. In this sense, perpetrators and the armed groups of which they are a part are no longer as

¹⁰¹ ICC OTP, "Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of the charges against Mr. Uhuru Muigai Kenyatta", 5 December 2014.

¹⁰² Hannah Ellis-Petersen, "Rodrigo Duterte to pull Philippines out of international criminal court", *The Guardian*, 14 March 2018 (available on its web site); *Reuters*, "Myanmar to ICC: Rohingya jurisdiction request 'should be dismissed'", 9 August 2018 (available on its web site).

¹⁰³ For the full 441-page report, see Report of the detailed findings of the Independent International Fact-Finding mission on Myanmar, UN Doc. A/HRC/39/CRP.2, 17 September 2018 (<https://www.legal-tools.org/doc/0c0c69>); for commentary on specific sections of the report, see Emma Irving, "'The Role of Social Media is Significant': Facebook and the Fact Finding Mission on Myanmar", *Opinio Juris*, 7 September 2018 (available on its web site).

¹⁰⁴ *Aljazeera*, "ICC legal team held over Saif-al-Islam visit", 10 June 2012 (available on its web site).

shielded from ICC attention by factors such as limited access, and security and infrastructure challenges. It will be interesting to follow the Al-Werfalli arrest warrant, and potential future case, to see how this will reflect on the ICC's ability to investigate crimes despite the difficulties on the ground.

One must, however, be mindful of the complexity of proceedings before the ICC, and it is important not to overstate the potential of social media within ICC proceedings. While it may help to facilitate investigations, and can bolster prosecutions where a suspect is already in the Court's custody, it is still necessary to secure 'real-world' or 'offline' assistance to carry out an arrest and have a suspect surrendered to the Court. Despite the facilitating role that social media played in the issuance of the Al-Werfalli arrest warrant, at the time of writing he has not been surrendered to the ICC, despite numerous opportunities.¹⁰⁵

It is also possible that the increased relevance of social media in international criminal justice may negatively affect the ICC in a variety of ways. First, international crimes are more present in the public eye than ever before, thanks to the global reach of highly graphic social media. In certain situations, such as Syria, this can bring into sharp focus the structural and functional limitations that result in the ICC's inability to address widespread criminal conduct, possibly resulting in a loss of credibility for the Court, such that it is not considered a relevant international actor. Second, while social media can draw attention to and document atrocities, it can also be used to create public outcry over 'fake' events. In such cases, the ICC may be criticised for failing to investigate crimes that never actually occurred, or that were misrepresented on social media. Third, social media can be used to construct and disseminate narratives that represent the ICC's work in a damaging light, such as those that paint the ICC as colonial, imperialist, or as otherwise illegitimately targeting particular individuals or countries. Yet, these examples can be contrasted with the ways in which social media can be used to construct a positive image of the ICC. The Court makes use of social media to disseminate information about its outreach programmes, victim-reparation programmes, and other work in affected communities.

Turning to States, and their power position in international criminal justice, here the potential effects of social media can vary widely. For

¹⁰⁵ *Bellingcat*, 9 February 2018, see above note 98.

States that are the subject of an ICC investigation, social media may diminish their ability to shield themselves from scrutiny, as described above. Social media may also be a source of pressure, both from within a State and outside it, to grant the ICC jurisdiction through a self-referral or to cooperate with an ongoing ICC investigation. If social media users come together in a public call for a State to engage with the ICC, this may constrain a State's decision-making in this regard by increasing the political cost of not engaging with the Court. By contrast, social media can also channel public sentiments against the ICC, and be used to pressure a government into not referring a situation to the Court or not co-operating with an ongoing investigation. Following the announcement by the ICC Prosecutor that a preliminary examination was being opened into the Philippines, the ICC's Facebook page was allegedly swamped with posts attacking the ICC from supporters of the Philippines' President, Rodrigo Duterte.¹⁰⁶

For States that are not themselves subject to an ICC investigation, but would like to see one opened elsewhere, social media can also be a useful tool. Through the collection and dissemination of information relating to crimes through social media – including, for example, graphic videos and photos – a public outcry can be prompted that could be used to exert pressure in appropriate forums. Where the ICC has jurisdiction, States can exert pressure on the Court to begin an investigation; where a Security Council referral is needed to give the ICC jurisdiction, States can exert pressure on the Security Council. Examples provided in Section 19.3.1. above illustrate how some States and inter-governmental actors have used social media to bolster their efforts in this regard. In September 2018, the first State-Party referral took place when Argentina, Canada, Chile, Colombia, Paraguay, and Peru jointly submitted a referral of the situation in Venezuela to the ICC.¹⁰⁷ One can speculate as to whether the visibility of the violence in Venezuela on social media might have contributed, to some degree, to this move.

The victims of international crimes will also likely feel the effects of social media on their power position within international criminal jus-

¹⁰⁶ Nikko Dizon, "Pro-Duterte trolls attack Facebook page of ICC", *Inquirer.net*, 14 February 2018 (available on its web site).

¹⁰⁷ ICC, "Referral to International Criminal Court", 26 September 2018 (available on its web site); see also Nicholas Ortiz, "Understanding the State Party Referral of the Situation in Venezuela", *EJIL:Talk!*, 1 November 2018 (available on its web site).

tice. On the one hand, social media provide a means for victims, and individuals affected by conflict generally, to communicate the harm they have suffered. It can act as a platform to amplify the voices of victims and give them greater influence over the international criminal justice process. It is common to find social media posts featuring calls by victims for justice and accountability, in relation to particular attacks, particular perpetrators, or concerning the conflict in general. This persistent presence of victims' voices in the public debate could potentially lead to the opening of an ICC investigation, or direct the focus of such an investigation to issues that victim groups find important.

On the other hand, the sheer volume of material posted to social media from conflict zones each day can also obscure the voices of victims. Individual victims may become one voice among many, their grievances and experiences eclipsed by those voices that garnered the most 'likes' and 'shares' on social media. Furthermore, when social media are used to spread disinformation, attention to 'fake news' events can override the voices of genuine victims. An increased role for social media in international criminal justice may also render certain categories of victims less visible, such as victims of sexual violence and victims from certain socio-economic classes or geographical areas. For victims of sexual violence, this reduced visibility may result from the fact that depictions and reports of sexual violence are much less common on social media than other types of crimes, such as murder or destruction of cultural heritage. For victims located in geographical areas with low Internet connectivity and technology penetration, it may be hard to access social media; the same is true for victims whose economic position does not permit the purchase of the hardware necessary to use social media, or whose level of (technological) literacy inhibits their use of it. An increased reliance on social media in international criminal justice may reduce the visibility and power of these categories of victims, such that they have less influence over its focus and direction.

As Section 19.3.1. has shown, CSOs play an important role in international criminal justice, and social media have the potential to affect their power position also. Both NGOs and inter-governmental organisations undertake documentation and investigation efforts that can contribute to the work of the ICC and other international criminal justice actors. Examples of the former include the Commission for International Justice and Accountability (further discussed elsewhere in this volume) and the

Syrian Archive; examples of the latter include the IIIM. These organisations help to fill the gap in investigative capacity that results from the limited resources of institutions such as the ICC. One of the annexes submitted in support of the OTP’s request to open an investigation in Côte d’Ivoire contains 29 NGO reports, totalling 392 pages;¹⁰⁸ another annex to the same request contains 21 reports from inter-governmental organisations, totalling 227 pages.¹⁰⁹ This illustrates the important role that CSOs play, particularly in the early stages of ICC proceedings. Social media can aid these efforts by facilitating the collection of evidence, thereby increasing the ability of CSOs to assist the Court. In providing this assistance, CSOs have the chance to put forward and highlight events and perpetrators that they want to see addressed by the ICC, thereby making their position more prominent. However, social media may also potentially render the ICC *less* reliant on the investigative work of CSOs. The ICC is actively building its institutional capacity to deal with and exploit social media as an investigative and prosecutorial tool. If the increased use of social media allows the ICC to do more with its limited resources, and gather social media evidence on its own behalf, this may reduce the role of CSOs.

Beyond their investigative roles, CSOs – and NGOs in particular – play an important advocacy role in international criminal justice. Here too social media can be an important tool that CSOs can leverage to exert pressure on other international criminal justice actors. In 2012, the NGO Invisible Children rose to prominence when it launched the ‘Kony 2012’ campaign. A video was made to highlight the crimes committed by the Lord’s Resistance Army, headed by Joseph Kony, in Uganda. At the time, and still at the time of writing, Joseph Kony was the subject of an ICC arrest warrant for war crimes and crimes against humanity. The video quickly spread on different social media platforms, and by 2018 the YouTube video had been viewed over 100 million times.¹¹⁰ The aim of Invisible Children in making the video was to see whether an online video could “make an obscure war criminal famous” and to see whether this

¹⁰⁸ ICC, Situation in the Republic of Côte d’Ivoire, Annex 4 to Request for authorisation of an investigation pursuant to article 15, 23 June 2011, ICC-02/11-3-Anx4 (<http://www.legal-tools.org/doc/e629d0/>).

¹⁰⁹ ICC, Situation in the Republic of Côte d’Ivoire, Annex 3 to Request for authorisation of an investigation pursuant to article 15, 23 June 2011, ICC-02/11-3-Anx3 (<http://www.legal-tools.org/doc/fc23ae/>).

¹¹⁰ “Kony 2012”, *YouTube*, 5 March 2012 (available on its web site).

would galvanise the world into working together to stop him.¹¹¹ As a result of the attention that the video attracted, Kony is now indeed a household name, and there is widespread knowledge of the arrest warrant issued by the ICC that is pending against him. Despite the global spotlight, he remains at large; however, the example demonstrates the power that NGOs can wield in public debate through social media.

Not only can social media affect power dynamics among the traditional actors in international criminal justice, they can also introduce new ones. As social media increase in importance, so do the social media companies themselves. Facebook, YouTube, Twitter, etc. are all corporations, and they host the videos, photos, and reports that are posted to social media on privately owned data servers. They may, in accordance with their own internal policies and in response to pressure from national governments, remove certain types of content from public view.¹¹² Content that is terrorist or radical in nature, or that depicts graphic scenes of violence, may be taken down and access is thereby restricted to material of potential evidentiary value for international criminal justice processes.¹¹³ In this way, social media companies become gatekeepers for large volumes of potential evidence, and there is little by way of legal framework to assist the ICC in gaining access to this material. Furthermore, in addition to the photos and videos themselves, social media companies also hold a great deal of data on users, such as location, email address, IP address, and so on. Such data could prove crucial in future international criminal investigations and proceedings.

Time, and further research, will tell the extent of the impact which social media have on power dynamics in international criminal justice. This section has discussed some international criminal justice actors, but more could be considered, such as witnesses and domestic prosecution

¹¹¹ *Ibid.*

¹¹² The European Commission has issued a series of recommendations to social media companies, urging them to put in place systems that ensure that illegal content is removed within 1 hour of it being flagged: see European Commission “Commission Recommendation on measures to effectively tackle illegal content online”, press release, 1 March 2018. In 2018, a German law came into effect that will impose heavy fines on social media companies that fail to remove unlawful content within specific time frames of it being flagged (the time frames differ depending on the complexity of the case). See Germany, Act to Improve Enforcement of the Law in Social Networks, 12 July 2017 (<https://legal-tools.org/doc/hfelsw>).

¹¹³ See above note 41.

authorities. While it is hard to say with certainty, it seems highly likely that the increasing role of social media in international criminal justice will lead to a shift in power dynamics in all, some, or more than the ways discussed above.

19.5. Conclusion

This chapter has focused on social media, and whether the power disruption that we see in global politics and modern conflict as a result of their increasing use might also be seen in international criminal justice. Beginning with instances from global politics where the effect of social media on power dynamics is well established and accepted, the discussion continued to set out the different ways that social media play a role in conflict. The effect of social media on power in conflict is also increasingly accepted and the subject of study. Less explored is how the prevalence of social media in modern conflict is reflected in international criminal justice.

In looking at the practice of the ICC, and that of CSOs engaging with the ICC, this chapter aims to begin to fill this gap. Both the ICC and CSOs remain justifiably cautious in their use of social media as a result of the ongoing issues of, for example, verifiability and reliability. However, there is a discernible trend towards making greater use of social media content – photos, videos, reports – in international criminal justice processes, especially in situations where on-the-ground investigation is hampered by challenges of security and geography. Social media can serve many ends, including helping to prompt investigations into particular countries or individuals, being used as an investigative tool, as evidence in trials, or by raising global awareness of international criminal accountability work. It might, however, also have a negative impact that must be taken into account when assessing changes in power dynamics.

There are many ways in which the discussion begun in this chapter could be broadened. A systematic study of practice at the ICC could examine how different actors there use social media: the OTP may approach social media differently from the defence for example, which in turn may differ from how the investigative teams and analysts approach it. Furthermore, it is worth inquiring into how social media content may be used differently to support different points: is it used more as crime-based evidence, or as linkage evidence? Might it be necessary to develop new rules

and procedures for this type of evidence, and how would such a development affect power dynamics?

The focus of this chapter has been social media, but discussion could easily be expanded to include other forms of technology that have been, and may in future be, employed in criminal proceedings at the ICC, such as satellite images, interactive digital platforms, and mobile phone data.¹¹⁴ These technologies, too, are growing increasingly important in international criminal justice processes, and may have their own impact on the way that power is distributed and flows among different actors.

Finally, the discussion could be expanded further by looking beyond the ICC. In the present chapter, the authors have chosen to narrow the focus to the ICC because it occupies a central position in the current international criminal justice landscape, and because it is currently the only fully functioning international criminal court dealing with cases that have arisen in the social media (and digital) age.¹¹⁵ However, social media also play an important role in domestic prosecutions of conduct amounting to international crimes. As people from conflict zones make their way to other countries, whether as refugees, as returning foreign fighters, or otherwise, they may face prosecution for crimes committed in that conflict on the basis of universal jurisdiction. Just as social media can bring violent events to the attention of *international* criminal justice actors, it can also bring these events to the attention of *domestic* criminal justice actors and prompt domestic prosecutions. Germany and Sweden are notable for having used reports and photos from social media as evidence when prosecuting individuals for war crimes committed in Syria.¹¹⁶ A comprehensive treatment of social media and power dynamics in international criminal justice should include domestic actors dealing with international crimes.

¹¹⁴ For a detailed discussion on how these technologies have been used at the ICC and elsewhere, see Freeman, 2018, see above note 88.

¹¹⁵ See above note 3.

¹¹⁶ See, for example, Anne Barnard, “Syrian Soldier Is Guilty of War Crime, a First in the 6-Year Conflict”, *The New York Times*, 3 October 2017 (available on its web site). For an overview of recent cases, see Eurojust Network for investigation and prosecution of genocide, crimes against humanity and war crimes, “Prosecuting war crimes of outrage upon personal dignity based on evidence from open, Legal framework and recent developments in the Member States of the European Union”, February 2018, p. 1.

This chapter is just a first attempt to map out the dynamics that could influence the decision-making power within international criminal justice and therefore the aims of greater accountability. Social media have profoundly altered the way that people around the world communicate, and have profoundly changed the way that conflict is fought, experienced, and documented. Based on recent developments, both at the ICC and in domestic jurisdictions, this change will be increasingly reflected in international criminal justice, making social media a noteworthy factor to account for in examining power in international criminal justice.

The Role of the International Criminal Court System in Modulating Political Behaviour in Africa: The Nigerian Example

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The very competitive nature of elections in Africa often exacerbates social, religious and ethnic fault lines. In some African States this democratic ritual occasionally descends into deadly violence of such nature that it constitutes core international crimes and triggers the intervention of the International Criminal Court ('ICC'). From the background of the ICC's prosecutorial focus on Africa, this chapter evaluates the effects of the ICC's interventions on the conduct of elections in Africa generally and in Nigeria particularly during the 2015 presidential election. The chapter highlights (i) modes of ICC intervention in the 2015 Nigerian presidential election *vis-à-vis* other past interventions by the ICC, (ii) the responses of critical stakeholders to the ICC's intervention, (iii) the wide acceptance by civil society groups of the ICC's role, (iv) the effect of the ICC's institutional reputation and prosecutorial strategy in Africa on the conduct of political actors in Nigeria, and (v) the overall effect of the Court on the boundaries of electoral behaviour in Nigeria and by extension Africa. While it is difficult to empirically allocate the exact quantum of the influence of the Court on the electoral process, the Court's imprint and prosecutorial reputation in Africa is apparent in how election and regional governance stakeholders frame narratives and respond to election results.

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20.1. Introduction

International criminal justice essentially operates in a sphere where the countervailing forces of culture, religion, law, politics and diplomacy struggle for dominance. It is an environment where a myriad of non-State actors as well as States, regional organizations and alliances, international institutions and private citizens interrelate. Despite the charged political space in which international criminal proceedings occur, it has gained ascendancy in the last two decades with international criminal tribunals initiating criminal trials of senior government officials in nine African and four European countries.¹ In all, more than 60 Heads of State and Government have been brought to trial for human rights violations and corruption at both national and international tribunals.²

Nigeria signed the Rome Statute on 1 June 2000 and ratified it on 27 September 2001, becoming the thirty-ninth State Party.³ Being a dualist State, Nigeria has tried three times, unsuccessfully, to incorporate the relevant provisions of the Rome Statute into its domestic criminal law to give effect to them, as required by the Nigerian Constitution.⁴ Just like Nigeria, 33 other African States have ratified or signed the Rome Statute and are obliged under international law to co-operate with the ICC and not to undermine the Court's stated objectives and purposes.⁵ Africa forms the largest regional bloc in the ICC and beyond that, 9 out of the 10 situations before the ICC were in Africa at the time of writing, and all persons currently charged are Africans.⁶

It is against this background of the ICC's prosecutorial focus on Africa that this chapter evaluates the effect of the ICC's intervention on the conduct of political leaders in Africa, and in Nigeria particularly, during the 2015 presidential election. I look at the response of stakeholders within the ICC and the African regional governance bloc to ICC intervention

¹ The countries are Central African Republic, Democratic Republic of the Congo, Kenya, Liberia, Rwanda, Sierra Leone, Sudan and Uganda.

² Aryeh Neier, *International Criminal Justice: Developing into a deterrent* (on file with the author).

³ International Criminal Court ('ICC'), *Situation in Nigeria, Article 5 Report*, 5 August 2013, para. 12 (<https://www.legal-tools.org/doc/508bd0>).

⁴ "Nigeria's obligation under the Rome Statute" *The Nation*, 6 August 2013.

⁵ Rome Statute of the International Criminal Court, 17 July 1998, Articles 86, 87 ('ICC Statute') (<https://www.legal-tools.org/doc/7b9af9>).

⁶ Max du Plessis, *The International Criminal Court that Africa wants*, Institute for Security Studies, Pretoria, 2010, pp. 172, vii.

in the political processes in Africa. At the core of the ICC's mandate is the enforcement and inducement of compliance with normative international law that seeks to outlaw impunity, making the Court one of the global pillars of the rule of law and accountability, not only for past violations but also in deterring future ones.

20.2. ICC Prosecutorial Policy and Africa

At the time of writing, the ICC is currently investigating or prosecuting individuals involved in eight of Africa's deadly conflicts⁷ and conducting preliminary examinations into two other African countries.⁸ Is there anything continentally unique about the crimes committed during conflicts in Africa to warrant the almost exclusive focus of the ICC? What informs the ICC's prosecutorial focus on Africa?

Prior to answering these questions, it is important to state that some of the African situations before the Court are due to UN Security Council referrals and self-submission by individual African governments.⁹ More importantly, the 34 African countries that have ratified or signed the Rome Statute did so voluntarily and presumably understand the consequences of being subject to the jurisdiction of the Court.

The Preamble and Article 1 of the Rome Statute explicitly states that the ICC as an international institution "shall be complementary to national criminal jurisdictions". This effectively implies that the ICC, unlike the preceding international *ad hoc* tribunals, does not have primary jurisdiction over national authorities.¹⁰ The Court is only meant to act where the domestic criminal justice system fails to effectively investigate and prosecute crimes listed in Article 5 of the Statute. It can be said that the principle of complementarity absolutely regulates the decisions of the

⁷ Namely, the conflicts in Uganda, Democratic Republic of the Congo, Darfur, Sudan, Central African Republic, Kenya, Libya and Côte d'Ivoire.

⁸ Nigeria and Guinea.

⁹ Central African Republic, Democratic Republic of the Congo and Uganda.

¹⁰ Markus Benzing, "The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity", in Armin von Bogdandy and Rüdiger Wolfrum (eds.), *Max Planck Yearbook of United Nations Law*, vol. 7, Martinus Nijhoff Publishers, Leiden, 2003, p. 592.

Court as it relates to investigation and prosecution of international crimes.¹¹

The Office of the Prosecutor ('OTP') has opined that complementarity as a concept should be construed in a strict legal sense as a judicial sieve for determining admissibility and more importantly as a policy guideline regulating the relationship of the ICC with States Parties and other international actors.¹² There is currently no single document outlining the ICC's broad prosecutorial strategy or case selection guidelines; the Court relies on the rules outlined in the Rome Statute and the doctrine of complementarity.¹³

However, looking at the *modus operandi* of the OTP since the creation of the Court, several deducible patterns emerge as to the broad prosecutorial strategy of the ICC. The first is a deliberate focus on perpetrators who bear the greater responsibility for a crime. The Court in doing this emphasizes a building-upwards strategy by first investigating and prosecuting a limited number of mid- and high-level perpetrators in order to ultimately have a reasonable prospect of conviction for the most responsible.¹⁴ The Court focuses efforts on grave incidences of human rights violations as measured by "the scale of the crimes; the nature of the crimes; the manner of commission of the crimes; and the impact of the crimes"¹⁵ as well as prioritizing crimes with gender components. This prosecutorial strategy is apparent in the OTP's decision to investigate and prosecute only political leadership, military hierarchy and heads of militias and other non-State actors in order to maximize the impact of the ICC. The OTP strategy is particularly potent in shaping outcomes on a continent where internal institutions of accountability are largely cosmetic, and there exists "a long tradition of leaders who inflict great brutality on their own people

¹¹ Phil Clark, "Law, Politics and Pragmatism: ICC Case Selection in the Democratic Republic of Congo and Uganda", in Nicholas Waddell and Phil Clark (eds.), *Courting Conflict? Peace, Justice and the ICC in Africa*, Royal African Society, 2008, p. 37.

¹² Matthew Brubacher, "The ICC, National Governments and Judiciaries", in Waddell and Clark (eds.), 2007, p. 22, see *ibid*.

¹³ ICC Office of the Prosecutor ('OTP'), "Paper on some policy issues before the Office of the Prosecutor", September 2003, p. 4 (<https://www.legal-tools.org/doc/f53870>).

¹⁴ ICC OTP, "Strategic Plan 2016 – 2018", 6 July 2015, p. 15 (<https://www.legal-tools.org/doc/7ae957>).

¹⁵ OTP, 2003, p. 5, see above note 13.

and who, after flaunting their contempt for human rights, escape accountability for their actions as long as they remain in power”.¹⁶

The second prosecutorial policy is the ICC’s reliance on national prosecutions and other international institutions – where possible – for the prosecution of lower-ranking perpetrators of international crimes. This implies that the ICC will only be able to prosecute a small number of high-ranking perpetrators, as the bulk of accused persons would be processed in national criminal systems. This in reality means that the Court will never be able to address all the expectations of all victims of international crimes.¹⁷ Integral to this is the capacity for development of communication strategies which may effectively bridge the gap between the Court and victim communities, as part of the ways to fulfil the Court’s mandates and shape expectations with regards to its output.¹⁸

The third prosecutorial policy is advocacy and monitoring of activities in conflict zones to prevent the commission of international crimes. The rationale for this policy is the belief that monitoring could have a preventive impact on international crime and that it could increase the risk of punishment even before trials begin. Interestingly, this effect is not limited to the situations under investigation but extends to different countries around the world.¹⁹

The fourth is the indication by the ICC that it will be highly cautious in selecting cases to prosecute and that the Court will only act when it possesses enough evidence to ground a successful investigation and trial. Ultimately, in the discharge of its responsibility, the OTP has discretion in determining which cases should be selected and prioritized for investigation and prosecution.²⁰

The engineers of the Rome Statute envisaged that the ICC, for the most part, would be investigating past crimes and not in the context of ongoing and evolving conflicts. However, experience to-date shows that the ICC has repeatedly been called upon to exercise its jurisdiction in on-

¹⁶ Uju Okoye, “Ending Africa’s Culture of Impunity”, in *Diplomatic Courier*, 10 June 2016 (available on its web site).

¹⁷ OTP, 2015, p. 16, see above note 14.

¹⁸ ICC, “Integrated Strategy for External Relations, Public Information and Outreach”, undated, para. 4 (<https://www.legal-tools.org/doc/840afa>).

¹⁹ OTP, 2003, p. 6, see above note 13.

²⁰ ICC OTP, *Draft Policy Paper on Case Selection and Prioritization*, 2016, para. 5 (<https://legal-tools.org/doc/aa1cfc>).

going conflict situations.²¹ This expectation has influenced the prosecutorial choices of the Court and has come to define how the Court is perceived, especially in its relationship with Africa.

While the legal corpus of the ICC has no consideration for geographical or regional balance as one of the statutory considerations for the determination of a situation to be investigated,²² the Court has focused disproportionately on Africa to a point of controversy since its inception in 2002.²³ There is no way that any review of the operation of the Court in its first decade will overlook the Africa-centred operations as part of its legal history, whether or not the Afro-centricity is due to direct prosecutorial policy or a product of structural factors. Looking at the comparatively disproportionate number of cases processed by the Court, it can be said that the Court made Africa the centre of its operations, thereby influencing its relationship with the political institutions on the continent. This created a sharply divided perception there as to the purport of the Court, with one side branding the Court “a neocolonial institution and stooge of the West”,²⁴ and the other projecting it to be the answer to the problem of impunity on the continent.

20.3. The ICC and Electoral Violence in Africa

Since the third wave of democratization in Africa in the late 1990s,²⁵ elections and contests for political power have become the norm. While the frequency of elections has helped in deepening democratic culture, this process has been closely associated with violence and disruptions. While only between 19 and 25 per cent of elections conducted end up degenerating into violence, there is always a *risk* of violence that dogs the process

²¹ Fatou Bensouda, “Ending Impunity for Massive Crimes: Prosecutorial Strategies, At the Conference on Africa and the International Criminal Court (ICC): Lessons Learned and Synergies Ahead”, in *Africa Legal Aid*, 11 September 2014 (available on Africa Legal Aid’s web site).

²² ICC OTP, *Policy Paper on Preliminary Examinations*, November 2013, para. 11 (<https://www.legal-tools.org/doc/acb906>).

²³ At the time of writing, the ICC has heard 22 cases and indicted 36 individuals, all of them from Africa.

²⁴ Brendon J. Cannon, Dominic R. Pkalya and Bosire Maragia, “The International Criminal Court and Africa: Contextualizing the Anti-ICC Narrative”, in *African Journal of International Criminal Justice*, 2017, vol. 2. p. 6.

²⁵ Samuel Huntington, “Democracy’s Third Wave”, in *Journal of Democracy*, 1991, vol. 2, no. 2, p. 17.

in many African countries.²⁶ With these instances of electoral violence, criminal justice was often ineffective as neither are perpetrators prosecuted nor victims' loss redressed.²⁷

Globally, democratic transitions alongside adverse regime change, revolutionary war, ethnic war, genocide and politicide are the major drivers of instability.²⁸ A report by the United Nations and the World Bank identified access to power as one of the arenas for contestation and one of the major areas of conflict globally, highlighting the susceptibility of democratic elections and electoral transitions to cataclysmic violence.²⁹ Beyond the fact that the zero-sum game of the winner-takes-all political culture in Africa heightens the risks of violence by disrupting power dynamics, control of political power is also the basic determinant of how economic and other resources are distributed.

Because of the centrality of politics to other spheres of influence in governance on the continent, it is difficult for actors to increase access to the other policy arenas unless they have some presence in the political realm. This governance phenomenon has birthed the peculiar theory of 'prebendalism', which is described as "the appropriation of offices by officeholders, who use them to generate material benefits for themselves and their constituents and kin group".³⁰

The ICC's first intervention in the context of electoral violence in Africa was during the aftermath of Kenya's 2007 elections that resulted in the death of around 1,500 persons, the rape of 3,000 women and the displacement of around 300,000 Kenyan citizens.³¹ Even by African standards, the carnage that the election triggered was considered shocking, al-

²⁶ Dorina Bekoe, "Trends in Electoral Violence in Sub-Saharan Africa", on United States Institute of Peace, 10 March 2010 (<https://legal-tools.org/doc/mapoao>).

²⁷ Nordic Africa Institute, *Electoral Violence in Africa*, 2012, vol. 3.

²⁸ Monty G. Marshall, Ted Robert Gurr and Keith Jagers, *Polity IV Project: Political Regime Characteristics and Transitions, 1800–2015, Dataset Users' Manual*, Centre for Systematic Peace, 2016, p. 35 (<https://legal-tools.org/doc/d9v6l4>).

²⁹ United Nations and World Bank, *Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict*, World Bank, Washington, D.C., 2018, p. 141.

³⁰ Richard Joseph, "Prebendalism and Dysfunctionality in Nigeria", in *Africa Plus*, 26 July 2013 (available on Africa Plus' web site).

³¹ International Crisis Group, "Kenya in Crisis: Africa Report", 21 February 2008, no. 137. (<https://legal-tools.org/doc/2na3m9>); Human Rights Watch ('HRW'), "Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance", 2008, vol. 20, no. 1(A) (<https://legal-tools.org/doc/jomh9e>).

beit apparent ethnic cleavages and other fault lines were visible before the election.³²

Institutions of governance in Kenya failed in the aftermath of the crisis to exact accountability and assuage the loss of the victims by establishing a special tribunal to try those who bore greater responsibility as recommended by the Waki Commission.³³ The failure equally extended to prosecution in regular courts of those at the lower end of the spectrum of accountability, with a report stating that five years after the crisis, only seven convictions were recorded for crimes perpetrated during the violence.³⁴

This failure compelled Kofi Annan to forward names of persons who were responsible for the crisis to the ICC Prosecutor in July 2009. In doing so, he explicitly linked accountability with reconciliation as the only sustainable antidote to future impunity.³⁵ On 26 November 2009, the OTP, for the first time, exercised its *proprio motu* powers to initiate an investigation into the 2007 post-election violence in Kenya by requesting that the Judges of the ICC's Pre-Trial Chamber authorize investigation into the post-election violence.³⁶ On 15 December 2010, the ICC charged six Kenyans, including President Kenyatta and his deputy Ruto, with crimes against humanity for their roles in the 2007 electoral violence.³⁷

The second instance in which the ICC intervened in the context of electoral violence in Africa was in Côte d'Ivoire, after the 2010 presidential election between former president Laurent Gbagbo and current president Alassane Ouattara. The electoral body declared Alassane Ouattara the winner of the election. Laurent Gbagbo disputed the results, sparking a

³² Herve Maupeu, *Revisiting Post-Election Violence: The General Elections in Kenya 2007*, Mkuki na Nyota Publishers, Dar es Salaam, 2008, p. 187.

³³ Philip N. Waki, Report of the Commission of Inquiry into the Post-Election Violence, Government Printer, Nairobi, 2008 (<https://www.legal-tools.org/doc/a1063a>).

³⁴ HRW, "Turning Pebbles: Evading Accountability for Post-Election Violence in Kenya", December 2011 (<https://legal-tools.org/doc/7lkqgp>).

³⁵ Xan Rice, "Annan hands ICC list of perpetrators of post-election violence in Kenya", in *The Guardian*, 9 July 2009 (available on its web site).

³⁶ ICC, Situation in the Republic of Kenya, Pre-Trial Chamber, Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19-Corr (<https://www.legal-tools.org/doc/f0caaf>).

³⁷ Institute for African Studies, "The International Criminal Court's cases in Kenya: origin and impact", August 2012, no. 237 (<https://legal-tools.org/doc/8a4f67>).

five-month conflict that resulted in the death of more than 3,000 Ivoirians.³⁸

On 12 June 2014, Pre-Trial Chamber I of the ICC confirmed, by majority, four charges of crimes against humanity (murder, rape, other inhumane acts or, in the alternative, attempted murder and persecution) against Laurent Gbagbo and committed him to trial. The Chamber highlighted that “[t]he crimes charged were committed on political, national, ethnic or religious grounds”.³⁹ He was charged along with Charles Blé Goudé.⁴⁰

The cases against Kenyatta, Ruto⁴¹ and Gbagbo⁴² all collapsed.

Beyond the actual prosecution of the architects of electoral violence in Kenya and Côte d’Ivoire, it is inferable that the ICC is evolving an *extra-legal* and preventive mechanism against election-related impunities before their escalation. The OTP, through a combination of public statements and warnings, diplomacy, active engagement with civil society, and its prosecutorial direction, seeks to put the political leadership on notice of its culpability breakdown of law and order. The OTP issued a statement in 2010 on probable electoral violence in Guinea, warning that “electoral violence is liable to fall within the jurisdiction of the International Criminal Court” and that “all of the key figures in Guinea need to show the necessary restraint to avert a similar scenario there”.⁴³ The OTP followed the same regime in the 2015 elections in the Central African Republic,⁴⁴ Nigeria and Burundi. Despite the intervention of the OTP in the Burundi-

³⁸ BBC World News, “Laurent Gbagbo: Ivory Coast ex-leader denies war crimes”, 28 January 2016 (available on its web site).

³⁹ ICC, Situation in the Republic of Côte d’Ivoire, *The Prosecutor v. Laurent Gbagbo*, Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014, ICC-02/11-01/11-656-Red, para. 274 (<https://www.legal-tools.org/doc/5b41bc>).

⁴⁰ ICC, Situation in the Republic of Côte d’Ivoire, *The Prosecutor v. Charles Blé Goudé*, Decision on the confirmation of charges against Charles Blé Goudé, 11 December 2014, ICC-02/11-02/11-186 (<https://www.legal-tools.org/doc/0536d5>).

⁴¹ “Kenya and international justice: Obstruction of justice” *The Economist*, April 9, 2016; “International Criminal Court Drops Case Against Kenya’s William Ruto” *The New York Times*, April 5, 2016

⁴² “Laurent Gbagbo, Former Ivory Coast Leader, Acquitted of Crimes Against Humanity” *The New York Times*, January 15, 2019

⁴³ ICC OTP, “ICC Prosecutor Confirms Situation in Guinea under Examination”, 14 December 2009 (<https://www.legal-tools.org/doc/ceb4de>).

⁴⁴ UN News, “Central African Republic: ICC Prosecutor warns against election-related violence, atrocity crimes”, 23 December 2015 (available on its web site).

an elections, the political crisis worsened, and the OTP has opened a preliminary examination into the situation surrounding the elections in the country.⁴⁵

The ICC's past involvement in post-electoral violence situations on the continent raises the spectre, though unlikely, of a winner of a hotly contested election handing over an adversary to the ICC prior to the ICC conducting an investigating, as a means of eliminating a problematic competitor.

20.4. Nigeria and Electoral Violence

The scholarship on electoral violence is sparse and most researchers focus generally on a mixture of political and electoral violence. However, researchers have made efforts at identifying and characterizing this phenomenon that has greatly blighted political processes in Africa and disrupted social order. Fischer defines electoral violence (conflict) as “any random or organized act or threat to intimidate, physically harm, blackmail, or abuse a political stakeholder in seeking to determine, delay, or to otherwise influence an electoral process”.⁴⁶

To Igbuzor, electoral violence is:

any act of violence perpetuated in the course of political activities, including pre-election, during and post-election periods. It may include any of the following acts: thuggery, use of force to disrupt political meetings or voting at polling stations, or the use of dangerous weapons to intimidate voters and other electoral processes or to cause bodily harm or injury to any person connected with electoral processes.⁴⁷

The International Foundation for Election Systems defines electoral violence as “any violence (harm) or threat of violence (harm) that is aimed at any person or property involved in the election process or at disrupting any part of the electoral or political process during the election period”.⁴⁸

⁴⁵ ICC OTP, “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, in opening a Preliminary Examination into the situation in Burundi”, 25 April 2016.

⁴⁶ Jeff Fischer, *Electoral Conflict and Violence: A Strategy for Study and Prevention*, IFES White Paper, 2002, p. 3.

⁴⁷ Otiye Igbuzor, *Electoral Violence in Nigeria*, ActionAid, Nigeria, 2010, p. 3.

⁴⁸ International Foundation for Election Systems, *Electoral Violence Education and Resolution*, 2011 (on file with the author).

From the foregoing, I will define electoral violence as the unlawful deployment and utilization of violence in all its manifestations by any of the stakeholders in the electoral process in order to directly or indirectly influence outcomes and access political power. Violence is targeted at individuals, their psychological states, property or structures, collectives or communities. It can occur at any stage of the electoral process – before, during and after elections. It can also be intra- or inter-party. Electoral violence can be random or organized, extensive or isolated and perpetrated by participants and their partisans, security agencies, election management bodies, and/or ethnic and religious groups.

The history of electoral politics in Nigeria since independence in 1960 has been one deeply characterized by violence and disruptions. The first post-independence election in 1964 was marred by election-rigging, State-sponsored thuggery, violence and arson.⁴⁹ One of the opposition parties that participated in the elections alleged that “thousands upon thousands of our party supporters were dumped into jails like bundles of wood or animals; some were brutally killed [...] wickedness in its highest magnitude was let loose and the ordinary mass of men were terrorized, stunned to silence”.⁵⁰ Such was the violence that heralded the election that more than 100 persons were murdered in the Tiv region⁵¹ alone and in Western Nigeria, there were similar reports of high fatalities.⁵² The violence that attended the elections have been pointed to as one of the primary causative factors in the collapse of Nigeria’s first Republic and the military coup in 1966.⁵³

Elections in Nigeria’s second and third Republics⁵⁴ did not fare better. The 1979 election was criticized by international observers for being

⁴⁹ Emmanuel Ojo, “Leadership Crisis and Political Instability in Nigeria, 1964-1966: The Personalities, the Parties and the Policies”, in *Global Advanced Research Journal of History, Political Science and International Relations*, 2012, vol. 1. no. 1, p. 9.

⁵⁰ *Nigerian Citizen*, 26 August 1964.

⁵¹ *Nigerian Citizen*, 24 March 1965.

⁵² *West African Pilot*, 9 October 1964.

⁵³ Eghosa Osaghae, “Managing Multiple Minority Problems in a Divided Society: The Nigerian experience”, in *The Journal of Modern African Studies*, 1998, vol. 36, no. 1, p. 12; Ademola Adesote and John Abimbola, “Electoral Violence and the Survival of Democracy in Nigeria’s Fourth Republic: A Historical Perspective”, in *Canadian Social Science*, 2014, vol. 10, no. 3, p. 142.

⁵⁴ 1979–1984; 1992–1993.

massively rigged⁵⁵ and the 1983 election was even more violent. The large-scale rigging that characterized the elections sparked violent rioting, arson, looting and a general breakdown of law and order, especially in the Ondo and Oyo States in western Nigeria.⁵⁶

Since the return of Nigeria to democratic rule in 1999, the Independent National Electoral Commission has conducted five consecutive general elections. The quality of these elections has been contested by stakeholders, with the 2003, 2007 and 2011 elections particularly degenerating into violence.⁵⁷ In fact, the late President Umaru Yar'adua, in his inaugural speech, affirmed that the 2007 general election bringing him into office had "some shortcomings".⁵⁸ The human cost of the 2011 election alone has been estimated to be between 800⁵⁹ and 1,000 lives,⁶⁰ while another report puts the deaths from 915 electoral incidents between 2006 and 2014 at 3,934.⁶¹

The literature on the issue has compounded a number of causative factors for this repetitive phenomenon in Nigerian politics. Some of them are: abuse of electoral processes, greed, alienation and marginalization, access to electoral power, poverty and disempowerment, proliferation of arms, partisanship of security services, ineffective justice system, ethnic and religious animosities, among others.⁶² However, a culture of impunity

⁵⁵ Ahmed Abubaka, "History of elections in Nigeria from independence", in *People's Daily*, 28 March 2015 (available on its web site).

⁵⁶ Sam Egwu, "The Context and Lessons of the 2003 Elections in Nigeria", in Isaac Albert, D. Marco and V. Adetula (eds.), *Perspectives on the 2003 Elections in Nigeria*, Abuja, 2007, p. 7.

⁵⁷ Jibrin Ibrahim and Okechukwu Ibeanu, *Direct Capture: The 2007 Nigerian Elections and Subversion of Popular Sovereignty*, Centre for Democracy and Development, Lagos, 2009, p. 47.

⁵⁸ "Yar'Adua Admits Election Flaws" Thisday, 30 May 2007

⁵⁹ HRW, "Nigeria: Post-Election Violence Killed 800", 16 May 2011 (available on its web site).

⁶⁰ "Election Fuels Deadly Clashes in Nigeria" The New York Times, 24 April, 2011

⁶¹ Shamsudeen Bello, *Political and Electoral Violence in Nigeria: Mapping, Evolution and Patterns (June 2006 - May 2014)*, IFRA-Nigeria Working Papers Series, no. 49, p. 2 (<https://legal-tools.org/doc/ut90uv>); Billy Dudley, "Violence in Nigerian Politics", in *Transition*, 1965, vol. 5, no. 21, p. 24.

⁶² Kelvin Ashindorbe, *Electoral Violence and the Challenge of Democratic Consolidation in Nigeria*, *India Quarterly*, 2018, issue 74 no. 1, pp 92-105; Ukana B Ikpe, *Rethinking Electoral Violence and Democratic Consolidation in Nigeria*, 2014, *Journal of Asian and African Studies*, issue 50 V. 1, pp 96-108; Istifanus Ishaku Dafwang, *Election violence in Nigeria: causes and possible solutions*, Centre for Value and Attitudinal Reawakening, Study Series 2, Bukuru, 2014.

and weak institutions of governance are central to understanding this democratic anomaly behind the role of the ICC as an international accountability mechanism.

There is a culture of impunity in Nigeria that is compounded by the impotence of justice and security institutions in exacting accountability on behalf of victims of electoral violence. It is intriguing to note that between 1999 and 2015, the politicians and their partisans who were responsible for the myriad of electoral violence that has dogged the democratic process in Nigeria have not been brought to trial. If anything, they have been rewarded with appointments.⁶³ It is instrumental to note that during the same period, Nigeria recorded a number of high-profile politically motivated murders (principal among which is the assassination of the country's Attorney General), for which no one has been convicted.⁶⁴

The entrance of social media as a tool for political socialization and mobilization has further complicated the menace of political violence. When put in perspective, the fact that around 13.2 million Nigerians are active users of smart-phones and 63.2 million Nigerians had access to the Internet in 2015,⁶⁵ the impact of social media becomes more compelling. Literature abounds on the impact of the Internet in shaping political dialogue as a citizen platform.⁶⁶ Also, the role of the media in conflict-prone States has changed significantly, with the media playing a multidimensional role in triggering conflict.⁶⁷ Both the media and conflicts are irregular and complicated, with no structured processes. The media play

⁶³ Amnesty International, "Nigeria: Loss of Life, Insecurity and Impunity in the Run-Up to Nigeria's Elections", 2011; Chika Aniekwe and Joshua Kushie, *Electoral Violence Situational Analysis: Identifying Hot Spots in the 2011 General Elections in Nigeria*, National Association for Peaceful Elections in Nigeria, Abuja, 2011, p. 26; Laurent Fauchard, *A New Name for an Old Practice: Vigilante in South-western Nigeria*, Cambridge University Press, 2008, p. 17.

⁶⁴ International Crisis Group, "Nigeria: Want in the Midst of Plenty", 19 July 2006.

⁶⁵ Arne Holste, "Smartphone users in Nigeria 2014–2025", in *Statista*, 19 August 2019 (available on its web site).

⁶⁶ Henry Jenkins and Sangita Shresthova, "'It's Called Giving a Shit!': What Counts as 'Politics'?", in *By Any Media Necessary, The New Youth Activism*, New York University Press, New York, 2016, p. 257; Jayne Rodgers, *Spatializing International Politics: Analyzing Activism on the Internet*, Routledge, 2004, p. 44.

⁶⁷ Christopher B. Mahony, Eduardo Albrecht and Murat Sensoy, *The relationship between influential actors' language and violence: A Kenyan case study using artificial intelligence*, LSE-Oxford Commission on State Fragility, Growth and Development, 2019.

various roles with regard to both the government and the public, and have the ability to herald change in society.

20.5. The 2015 Presidential Election in Nigeria and the ICC

Nigeria operates a presidential system of government. Elections are held in four-year cycle, with the first in the current Republic held in 1999. The entire federation is considered a single constituency for the presidential election and a successful candidate must win “not less than one-quarter of the votes cast at the election in each of at least two-thirds of all the states in the Federation and the Federal Capital Territory, Abuja”.⁶⁸

As noted in preceding sections, elections in Nigeria are often very violent and divisive, but the 2015 elections primed the political and security temperature to the point of explosion due to a number of reasons. The first is the security challenges posed by the Boko Haram Islamist insurgency in north-eastern Nigeria that has rendered a large swath of territory ungovernable, with the insurgent group at the time controlling more than 20,000 km² of territory.⁶⁹ Beyond that, security services and resources are heavily invested in combating the insurgency, so much that a nationwide political crisis contesting the general elections would create a security nightmare. To this end, a number of stakeholders in the electoral process suggested postponing the election. In fact, the head of the Nigerian legislative assembly, Senate President David Mark, declared on the floor of the Senate that “there is no question of election; it is not even on the table. We are in a state of war”.⁷⁰ This, in particular, highlights the peculiar security and logistical environment in which the election occurred.

The opposition immediately condemned the statement, arguing that Mark was suggesting a possible tenure extension for the Jonathan administration. Concerns about his comments re-emerged in January 2015 when the prospect of postponing the 2015 elections became real. Overall, it is to the credit of all Nigerians that the 2015 elections indeed took place, though in the midst of a difficult political and security environment.

The second factor is the perennial agitation among many constituent ethnic and tribal groups in Nigeria and the deep ethnic and religious di-

⁶⁸ Nigeria, Constitution of the Federal Republic of Nigeria, 4 May 1999, Section 134(1)(b) (<https://www.legal-tools.org/doc/483a28>).

⁶⁹ Bosede Awodola and Caleb Ayuba, “Terrorism in Nigeria: The Case of the Boko Haram”, in *Journal of Social Sciences*, 2015, vol. 6, no. 4, p. 251.

⁷⁰ “Elections Not on the Table”, *Daily Trust*, 17 September 2014.

vide that the processes to the election have created. There has been a tendency for any crisis to be hijacked by ethnic groups for the promotion of sectional interests. A Nigerian political scientist and former Foreign Affairs Minister, in predicting the doom that the post 2015 electoral violence would elicit, said that “[t]he certainty of violence after the 2015 elections is higher than it was in 2011. If President Jonathan wins, the North would erupt into violence as it did in 2011. If Gen. Buhari wins, the Niger Delta will erupt into violence. I don’t think we need rocket science to make this prediction”.⁷¹

The third factor is the widely held notion in Nigeria that the country will unravel in 2015 and that the general election will be the precursor.⁷² This ‘urban legend’ is attributable to two sources: first, a discussion paper by the American National Intelligence Council,⁷³ a product of a conference to look into the status quo in sub-Saharan Africa; and second, a book by a former American ambassador to Nigeria, in which he highlighted Nigeria’s acclaimed mastery of “dancing on the brink without falling off” and the possibility of State failure that may be heralded by a failed general election in 2015.⁷⁴

The actions and speeches of some of the stakeholders in the election equally heightened tension. While the Nigerian Electoral Act expressly prohibits “political campaign or slogan [...] tainted with abusive language directly or indirectly likely to injure religious, ethnic, tribal or sectional feelings”,⁷⁵ these provisions have been violated with political impunity. A State governor in north-western Nigeria was caught on video urging his supporters to attack opponents that he referred to as “cockroaches”.⁷⁶ Another governor repeatedly took out front-page “death wish advertorials” in national newspapers insinuating that the presidential candidate of one of the major parties was likely to die in office.⁷⁷ Dame Patience Jonathan,

⁷¹ “Will Nigeria disintegrate in 2015?” *The Nation*, 31 December 2014.

⁷² “2015 - Revisiting Campbell's Prediction On Nigeria's Disintegration”, *The Leadership*, 11 January 2015 .

⁷³ National Intelligence Council, Mapping Sub-Saharan Africa’s Future, 2005 (<https://legal-tools.org/doc/j9qaiiv>).

⁷⁴ John Campbell, *Nigeria: Dancing on the Brink*, Rowman and Littlefield, 2011, p. 2.

⁷⁵ Nigeria, Electoral Act, Sections 95, 102.

⁷⁶ “Katsina Governor, Shema, caught on video urging supporters to ‘crush’, ‘kill’ political opponents”, *YouTube*, 19 November 2014.

⁷⁷ “Hate speech, Issue based Campaigns and the 2015 General Elections”, in Nigerian Civil Society Situation Room, *Election Update*, 2015, vol. 2, no. 1, p. 3.

the wife of the then president Goodluck Jonathan, called on her supporters at a political rally “to stone anyone that promises them change”.⁷⁸

It is into this miasma of political toxicity that the international community was forced to intervene diplomatically and call for caution in the build-up to the election, considering the implication of Nigeria’s governance in the West African region, a region just recovering from civil wars and unrest. Beyond diplomatic visits and statements by leading global diplomats and heads of multilateral organizations, it was only the ICC that lucidly informed political actors of their personal accountability for political violence. It was also only the ICC that Nigerian stakeholders considered effective and independent enough to intervene.

A Nigerian lawyer, Nihinlola Aluko-Olokun, highlighting the centrality of the ICC intervention to the 2015 electoral process, stated that the ICC’s intervention was a “welcome idea” as they were “an independent arbiter” and so the issue of bribery would not arise. The Court would “carry out its work dispassionately and deal with whatever is being alleged”.⁷⁹ Another lawyer, Festus Keyamo, went a step further by claiming that only early intervention by the ICC would bring sanity to the political landscape of Nigeria: “It’s high time the ICC took Nigeria seriously because our politicians have lost control. The only authority to bring them in line is [the] ICC. [The] ICC should intervene, the earlier it issues such statement, the better for contending parties”.⁸⁰ A support group for the then incumbent president, Transformation Ambassadors of Nigeria, also stated that anyone found to have engaged in violence before, during and after the forthcoming general elections should be sent to the ICC for trial as was being done in Kenya.⁸¹ Nigeria’s foremost diplomat, Ibrahim Agboola Gambari, also stated that “whoever plunges the country into violence by his or her action would be made to account for it at the International Criminal Court”.⁸²

In March 2015, the presidential campaign of the All Progressive Congress, one of Nigeria’s two major political parties, wrote a petition to

⁷⁸ “1st Lady Patience Jonathan says people should stone anyone that says change”, *YouTube*, 2 March 2015.

⁷⁹ “Nigeria: ICC and Nigeria’s Election”, *Daily Independent*, March 17, 2015.

⁸⁰ *Ibid.*

⁸¹ Information Nigeria, “TAN proposes trial in ICC for perpetrators of election violence”, 17 January 2015 (available on its web site).

⁸² “Gambari, others visit Obasanjo, condemn calls for Jega’s removal”, *The Guardian*, 18 March 2015.

the ICC accusing Patience Goodluck of “incontrovertible hate speech” and drawing a parallel between “her actions and those of Mrs. Gbagbo who was indicted for planning to perpetrate brutal attacks, including murder, rape, and sexual violence, on her husband’s political opponents in the wake of the 2010 elections”.⁸³ Another civil society group equally wrote a petition against the traditional ruler of Lagos, accusing him of “incitement of genocide against the Igbo ethnic group”.⁸⁴

Beyond that, the ICC prosecutor, Fatou Bensouda, visited Nigeria and met with various stakeholders intimating them with the consequences of instigating political violence during the elections. Importantly, the OTP released two statements ahead of the general elections in April 2015. In the statement of 2 February 2015, the Prosecutor stated that:

Any person who incites or engages in acts of violence including by ordering, requesting, encouraging or contributing in any other manner to the commission of crimes within [the] ICC’s jurisdiction is liable to prosecution either by Nigerian [c]ourts or by the ICC. No one should doubt my resolve, whenever necessary, to prosecute individuals responsible for the commission of ICC crimes.⁸⁵

Again, in March 2015, the Prosecutor released a statement stating that: “no one should doubt my Office’s resolve to prosecute individuals responsible for the commission of the ICC crimes, whenever necessary”.⁸⁶

In spite of some expectations that the elections would degenerate into violence and result in the implosion of Nigeria, the 2015 general election was conducted successfully and roundly applauded by election observers as being credible, with the head of the ECOWAS Election Observer Mission, John Kufuor, saying that the “the Nigerian elections are a pride, not only to Nigerians, but also to West Africa and the whole of the African continent”.⁸⁷ The high point of the election was the incumbent

⁸³ “APC drags First Lady to ICC over campaign comments”, *The Guardian*, 9 March 2015.

⁸⁴ Available on the Nigeria Master Web web site.

⁸⁵ ICC OTP, “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, ahead of the general and state elections in Nigeria”, 2 February 2015 (<http://www.legal-tools.org/doc/b474bb/>).

⁸⁶ ICC OTP, “Statement by the Prosecutor of the International Criminal Court, Fatou Bensouda, ahead of elections in Nigeria: “I reiterate my call to refrain from violence”, 16 March 2015 (<https://www.legal-tools.org/doc/db08e6>).

⁸⁷ “Appraising The Success Of 2015 Election” *Daily Independent*, 24 April 2015.

promptly congratulating the winner upon defeat, a very rare political occurrence in Nigeria. Comparatively, there was a sharp decline in post-election violence and a reduction in the number of post-election litigations.⁸⁸

Amidst the factors for the success of the 2015 presidential elections, a good number of participants in the process have highlighted the role of the ICC. The Nigeria Civil Society Situation Room, a platform comprising of 60 Nigerian civil society organizations, stated that it:

welcomes the statement by the Prosecutor of the International Criminal Court (ICC), Fatou Bensouda on [the] ICC's preparedness and willingness to observe the electoral process in Nigeria. [...] Coming on the heels of irresponsible and inciteful utterances by various political actors in Nigeria, the ICC is putting Nigerians on notice that conducts which trigger commission of mass crimes will not go unpunished. This comment also affirms the ICC's commitment to hold to account and prosecute all persons involved in subverting the conduct of free and fair elections in Nigeria.⁸⁹

Nnamdi Obasi, answering a question on what happened to change many warnings of almost inevitable violence during and after the election, stated that:

concerted pleas, warnings, and pressure from civil society, national and international actors are the principle reason why Nigeria avoided the larger scale violence that many had feared [...] the International Criminal Court (ICC) had warned that instigators of violence around the polls would be liable to prosecution.⁹⁰

20.6. OTP Prosecutorial Policy and Regional Governance Stakeholders Response

That the ICC has become a factor in governance and electoral processes in Africa is a fact that can be measured by many indicators: (i) the wide reference by a large component of civil society in Africa to the ICC for in-

⁸⁸ Lary Udu, "INEC and the 2015 General Elections in Nigeria: Matters Arising", in *Research on Humanities and Social Sciences*, 2015, vol. 5, no. 12, p. 101.

⁸⁹ *Report on Nigeria's 2015 General Elections*, Nigeria Civil Society Situation Room, Abuja, 2015 (<https://legal-tools.org/doc/waautn>).

⁹⁰ Nnamdi Obasi, "Nigeria's Unexpected Election Success", International Crisis Group, 2 April 2015 (available on its web site).

tervention in internal governance processes; (ii) the ongoing extensive and continent-wide controversies that the Court's relations with the continent evokes; (iii) the prosecutorial policy of the ICC that sidesteps the customary defence of immunity and State sovereignty and initiates criminal process against incumbent African political leaders; and (v) the international nature of the ICC structure. However, there is sharp divergence on how and where to situate the ICC's intervention in the electoral process on the continent.

One perception considers the ICC's intervention in electoral processes on the continent as an attempt by the Court at structuring political rivalries and electoral contestations in a particular way through criminalizing certain outcomes the Court considers problematic.⁹¹ Intervention is further complicated by the difficulty of the ICC setting up a uniform criminalization threshold that both satisfies the demand of the Rome Statute and widespread and systemic electoral violence and applies across the continent despite the socio-political and historical differences.

This ideological worldview questions the validity of using international criminal justice institutions and frameworks to determine the boundaries of legitimate political process for all countries.⁹² This worldview further posits that in light of the diverse political orientations that collectively make-up the international community, this aspiration is impracticable. Furthermore, is this aspiration of the ICC realizable through law?

Another well-worn narrative is that of neo-colonialism and external influence on the electoral processes of the continent.⁹³ It has been argued that the ICC is a proxy for Western economic interests which "had invested financial and moral resources towards a particular result during the elections",⁹⁴ and that the interventions often are to influence the outcome

⁹¹ John Amoda, "AU and the ICC: Issue of election violence in Africa", *Vanguard*, 4 June 2013.

⁹² US Senate, "Is a U.N. International Criminal Court in the U.S. National Interest?", hearing before the Sub Committee on International Operations of the Committee on Foreign Relations, Washington, D.C., 23 July 1998 (<https://legal-tools.org/doc/vz629c>).

⁹³ Manisuli Ssenyonjo, "The International Criminal Court and the Warrant of Arrest for Sudan's President Al-Bashir: A Crucial Step Towards Challenging Impunity or a Political Decision", in *Nordic Journal of International Law*, 2009, vol. 78, p. 379.

⁹⁴ Zaya Yeebo, "Pan African perspectives on the ICC, African elections and Western ire", on *Pambazuka News*, 6 August 2014 (available on its web site).

of elections on the continent and “blackmail Africa”⁹⁵ rather than promoting the integrity of the electoral process. The proponents of this position make reference to an interview by the former prosecutor of the ICC on the Court’s intervention in Kenya, Luis Moreno-Ocampo, that “there were some diplomats asking me to do something more to prevent Mr. Kenyatta or Mr. Ruto from running in the election”,⁹⁶ to buttress their position on the rationale behind the ICC’s intervention in Africa’s electoral process.

On the other side are proponents who argued for the necessity of having the ICC as an influence on the conduct of stakeholders in the electoral processes on the continent. For them, it is not so much about the ICC “chasing after Africans and African leaders *per se* but rather dealing with hard situations to protect the rights of victims and prevent future occurrence of abuses in Africa and other parts of the world”.⁹⁷

To verifiably evaluate and position the impact of the ICC on electoral processes and stakeholders on the continent would be very tricky, considering the uniqueness of the political economy of elections in each of Africa’s 54 States and the diversity of factors involved in elections across the continent. However, there are some factors that can be weighed to assess the legitimacy and propriety of the ICC’s intervention.

Firstly, does the Court have the institutional and procedural mandate to promote and enforce compliance with certain international standards in the conduct of elections on the continent? At the centre of the institutional mandate of the ICC, in a multilateral system, is the “end of impunity and establishment of the rule of law”,⁹⁸ and this is finely etched in the Preamble to the Rome Statute: “Determined to put an end to impunity for the perpetrators of the most serious crimes of concern to the International Community as a whole and thus contribute to the prevention of such crimes”.⁹⁹ The ICC system has a duty to enforce and induce compliance with certain norms of international law, which outlaw and seek to prevent mass atrocities. As long as mass violence is perpetrated or even threatened or envisaged in the context of elections on the continent, the

⁹⁵ “Kenya’s past as prologue”, *The Daily Nation*, 9 April 2013.

⁹⁶ “Kenya: Best of 2014 – Ocampo’s ‘Confession’”, *AllAfrica*, 30 December 2014.

⁹⁷ Lydia Nkansah, “International Criminal Court in the Trenches of Africa”, in *African Journal of International Criminal Justice*, 2014, vol. 1, no. 1, p. 13.

⁹⁸ Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, UN Doc. A/67/L.1, 19 September 2012.

⁹⁹ See above note 5.

Court has a definite responsibility to act. When one puts in perspective the incapacities of the national court systems in a number of African countries and the fact that some of the ruinous conflicts that have blighted the continent have their origin in electoral malfeasance,¹⁰⁰ the imperative to act becomes more apparent.

Secondly, what is the opinion of Africans on the intervention by the ICC in some of the troubled electoral processes and volatile spaces? This can be used as a proxy to measure the legitimacy, popularity and acceptability of the ICC's intervention on the continent. In Kenya, where ethnic affiliation is one of the primary political determinants,¹⁰¹ support for ICC prosecution of Kenyan political leaders is relatively high, with 61 per cent of Kenyans believing that the cases are an important tool for fighting impunity in the country.¹⁰² Furthermore, there is an pan-African perception of the prevalence of official impunity, as on average 56 per cent of Africans state that officials 'always' or 'often' go unpunished, underlying the need for an intervener outside the mould of what currently exists nationally in most African countries.¹⁰³

Thirdly, the opinions of stakeholders in electoral processes and the position of a wide constituent of the civil society groups on the continent accept the intervention of the Court in the electoral process in Africa. Political parties, contestants, social and ethnic platforms, election observers and even regional blocs¹⁰⁴ have urged the ICC to closely monitor and intervene in political processes on the continent. In the 2015 presidential election in Nigeria, the winner of the election, the All Progressive Congress, petitioned the ICC to intervene in the process prior to the election to prevent a descent into chaos.¹⁰⁵ After the 2010 elections in Guinea, Cellou Dalein Diallo and his UFDG (Union des forces démocratiques de Guinée) party sought to petition the ICC over electoral violence that accompanied

¹⁰⁰ Bekoe, 2010, see above note 26.

¹⁰¹ Thomas Wolf, "International Justice vs. Public Opinion? The ICC and Ethnic Polarization in the 2013 Kenya election", in *Journal for African Elections*, 2013, vol. 12, no. 1, p. 145.

¹⁰² Rorisang Lekalake and Stephen Buchanan-Clarke Lekalake, "Support for the International Criminal Court in Africa, Evidence from Kenya", Afrobarometer Policy Paper, 2015, no. 23.

¹⁰³ *Ibid.*

¹⁰⁴ "West African Leaders call for war crimes probe in Northern Mali", in *The World and All its Voices*, 8 July 2012 (available on its web site).

¹⁰⁵ *Leadership*, 17 March 2013.

the process.¹⁰⁶ Also, it has become commonplace in a number of public spaces in Africa to hear concerned citizens warn political actors of ending up on the dock in The Hague if they foment troubles during elections. For instance, Justice Julia Sebutinde, at a public forum in February 2016 in Uganda, warned that politicians who instigate violence during the country's election "will face the ICC".¹⁰⁷

Beyond that, there exists a large class of established African voices who consider the interventions of the ICC essential in the promotion of the rule of law. One of Nigeria's foremost human rights campaigners, Femi Falana, drew a connection between the ICC's trial of Kenyan political leaders for election related violence and the consequences it had on subsequent elections and political behaviour in Kenya and by extension Africa. He said that "as no political leader wanted to be charged before the ICC, the 2013 General Election in Kenya did not witness the orgy of violence that marred the previous election".¹⁰⁸ Abdullahi Boru Halakhe shares a similar sentiment, stating that:

Rather than compromise Kenya's stability, the ICC played a significant, although largely unheralded, deterrent role during the 2013 elections. Those senior political leaders facing charges, namely Kenyatta and Ruto, were all too aware that if they were to incite or aid in the commission of crimes they would potentially face additional ICC charges.¹⁰⁹

Abdul Tejan-Cole, a former prosecutor at the Special Court for Sierra Leone, argues that "while it is true that the ICC can be lambasted for inconsistent case selection, there is not a single case before the Court that one could dismiss as being frivolous or vexatious. They might all be African, but they are also all legitimate".¹¹⁰

Abdul Tejan-Cole's emphatic assertions, alongside other partisans, on the role of the Court in instilling accountability on a continent blighted by years and a history of impunity requires further analysis. There are ba-

¹⁰⁶ Joe Penney, "Cellou Dalein Diallo and His UFDG Party to Make Complaint to the International Criminal Court", in *Guinea Oye*, 27 November 2010 (available on its web site).

¹⁰⁷ Nelson Wesonga, "Anybody who cause election violence will face ICC – Sebutinde", in *The Daily Monitor*, 16 February 2016 (available on its web site).

¹⁰⁸ "How to stop political violence", *Vanguard*, 28 January 2015.

¹⁰⁹ Abdullahi Halakhe, "R2P in Practice: Ethnic Violence, Elections and Atrocity Prevention in Kenya", Global Centre for the Responsibility to Protect, Occasional Paper Series, no. 4, 2013, p. 15.

¹¹⁰ "Is Africa on Trial?", *BBC News* 27 March 2012.

sically three judicial and political actors involved on the continent in managing the aftermath of violent conflicts – the ICC, the African Union and other regional platforms and national peace and reconciliation panels. For a large part, these mechanisms have operated independently and have at other times acted competitively.¹¹¹ However, of all three mechanisms, the ICC has attracted the most attention, principally because of the Court's decision to go after sitting presidents and other political leaders. This has largely defined the narrative around violent conflicts on the continent since the indictment of the first African leader by the Court.

On a continent where the judiciary and other institutions of accountability are crude and largely ineffective in trying the 'big political fish', the ICC, in spite of its many noticeable flaws, some of which undermine the integrity and the independence of the Court, has been able to force the spectre of personal consequences into the consciousness of political leadership. The Court has driven forward the concept of accountability, both personal and institutional for the hitherto untouchable political leadership. This particularly is the undeniable and factual merit of the promoters of the Court in Africa and one of the spheres where this is noticeable since the Kenyan debacle is electoral contest and elections.

20.7. Conclusion

Globally, democratic processes are social in nature and, in the best of systems, the competitive nature of democratic politics tends to rend social fabric. That is why the rule of law and accountability are *sine qua non* for preventing a descent into conflict. According to the Mo Ibrahim Index of African Governance, between 2011 and 2015, 31 countries have shown declines in their safety and rule-of-law performance.¹¹² It is therefore not surprising that the deadly nature of elections and process of political successions in some African countries have attracted attention by international and regional institutions. Of all international and regional interveners in electoral processes in Africa, the ICC stands in a unique position because of its mandate to hold accountable individuals considered most responsible for atrocities.

¹¹¹ Ole Frahm, "Actors of Accountability in Africa: ICC, African Union and Nation-States", *Istituto Afari Internazionali Working Papers 15*, 12 May 2015, p. 2.

¹¹² Mo Ibrahim Foundation, "Index of African Governance, 2011- 2015" (available on its web site).

In light of recent violent African electoral experiences (especially in Kenya and Côte d'Ivoire), the ICC has included elections and electoral processes on the continent in its field of coverage and has thereby become a factor in elections on the continent. It is within this regional narrative that the 2015 presidential election in Nigeria is located. Political volatility and catastrophic regional consequences of State implosion heightened the incentive for intervention in Nigeria.

Empirically, can the real impact of the ICC's intervention in the success of the Nigerian election be determined or unbundled from a mangle of other factors? It is difficult to specifically pinpoint the exact percentile of the ICC's intervention and institutional reputation in Africa on the outcome of the election in Nigeria. There are a number of proxy factors, such as: (i) the wide acceptance by all stakeholders in the election of the ICC's institutional capacity to exact accountability, (ii) the appeal by some of the critical stakeholders to the ICC to intervene in the electoral process, (iii) the ICC's prosecutorial policy and reputation of uncompromisingly dealing with African 'political untouchables', and (iv) the ICC's warning statements and diplomatic visits. When considering these factors, the Court's impact on the process is more than marginal and no other international or regional organization currently has the capacity to exact influence in the same mould and manner as the ICC's. This is – to invoke the theme of this anthology – a power that international criminal justice has over a domestic electoral process in the State Party Nigeria. More specifically, it concerns the *de facto* power of the ICC Prosecutor linked to the threat of preliminary examination or investigation. The way this power is exercised in the coming years, will influence its evolution, including its effect on the power-relations between the statutory organs of the Court.

While the credibility, political independence and prosecutorial policy of the ICC system has not been without valid criticisms – especially its near total focus on Africa – as it stands at the time of writing, there is no other substitute to the role the Court system plays in the African electoral process. The fact that the Court focuses disproportionately on Africa is not a defence against accusations of atrocities in electoral processes. After all, it is proper African wisdom to say that other people's chicanery does not justify one's malfeasance.

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Power in International Criminal Justice

Morten Bergsmo, Mark Klamberg, Kjersti Lohne and Christopher B. Mahony (eds.)

This book comprehensively explores the role and manifestations of power in international criminal justice. Twenty chapters discuss this topic in four main parts: power in international criminal justice institutions (Part I), representational power in international criminal justice (Part II), state power and autonomy in international criminal justice (Part III), and non-state power and external agents in international criminal justice (Part IV). The book invites the crystallisation of a sociology of international criminal justice, and argues that among its focuses should be the wielding of power within and over international criminal justice institutions, just as this is a feature of sociology of law within several countries.

The contributors to this anthology are Marina Aksenova, Mayesha Alam, Helena Anne Anolak, David Baragwanath, Morten Bergsmo, Mikkel Jarle Christensen, Marieke de Hoon, Djordje Djordjević, Gregory S. Gordon, Jacopo Governa, Alexander Heinze, Emma Irving, Mark Klamberg, Sarah-Jane Koulen, Kjersti Lohne, Christopher B. Mahony, Jolana Makraiová, Jackson Nyamuya Maogoto, Benjamin Adesire Mugisho, Tosin Osasona, Sara Paiusco, Barrie Sander, Joachim J. Savelsberg, Jacob Sprang, Chris Tenove and Sergey Vasiliev. The chapters draw on papers presented at a conference held in Florence in October 2017 co-organized by the Centre for International Law Research and Policy (CILRAP) and the International Nuremberg Principles Academy.

ISBNs: 978-82-8348-113-6 (print) and 978-82-8348-114-3 (e-book).

candidate for prosecutor at the end of their term.

252. The Experts recognise the difficulty of applying a new tenure system to staff already in the Court, so they suggest that the system be applied only to new recruitments for P-5 and Director-level positions as these come vacant. This would not preclude the Court from encouraging senior staff who have served in the Court for a long time to consider taking early retirement, including through offering financial packages.
253. Notwithstanding that this would not apply to existing staff, there is likely to be considerable resistance to the introduction of tenure in many parts of the Court (even if there is also some enthusiasm for this approach in other quarters). But it is

the TOAEP this is a measure essential to addressing effectively
a r knesses of the Court. Not least it would bring fresh
appreciable contribution as more dynamism into the Court across all its
Or

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