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Nomos

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Vorwort

Vor wenigen Wochen starteten an der Andrássy Universität Budapest (AUB) die Vorlesungen und Seminare eines neues Wintersemesters. Als 20 Jahre zuvor die neugegründete Universität ihren Studienbetrieb aufnahm, da geschah dies noch nicht im schönen Festetics-Palais, sondern in einer angemieteten Büroetage und unter Umständen, die denen, die damals dabei gewesen sind, wohl immer in Erinnerung bleiben werden. Der Gedanke, den neuen Band des Jahrbuches für Vergleichende Staats- und Rechtswissenschaft dem 20. Geburtstag der AUB zu widmen, lag vergleichsweise nahe. Eine andere Frage ist es gewesen, wie man hierbei konkret vorgehen sollte. Wir haben uns dafür entschieden, vor allem Alumni der AUB aus unterschiedlichen „Generationen" einzubeziehen. Das ist uns gelungen, auch wenn uns viele, die gerne mitgemacht hätten, absagen mussten, weil ihnen die berufliche Belastung die Anfertigung eines längeren wissenschaftlichen Beitrages nicht erlaubt hat. Das Studium an der AUB scheint also nicht unbedingt einen geruhsamen Berufsalltag zu garantieren.

Schön wäre es gewesen, ein doppeltes Jubiläum zu begehen und zum 20. Geburtstag der AUB den 10. Band unseres Jahrbuches vorzulegen. Dass wir erst bei Nummer 9 sind (die ersten beiden Bände erschienen in einem anderen Format bei einem anderen Verlag) und nach dem Jahrbuch 2018/2019 nun in gewisser Weise „eine Lücke klafft", ist in erster Linie den Pandemie-Zeiten geschuldet, in denen nicht nur die Vorbereitung der Lehrveranstaltungen viel mehr Zeit in Anspruch genommen hat, sondern auch die Studentinnen und Studenten wegen vielfältiger zusätzlicher Belastungen den Abschluss ihres Studiums und die Anfertigung der Magisterarbeit häufig hinausschieben mussten. Umso mehr freuen wir uns, nun endlich wieder ein in thematischer Hinsicht facettenreiches Jahrbuch vorlegen zu können.

Oliver Diggelmann, vormals an der AUB Inhaber der Professur für Völkerrecht, widmet sich den Besonderheiten internationaler Strafgerichte im Vergleich mit Straftribunalen entwickelter Rechtsstaaten. Er analysiert, weshalb seit den Anfängen der internationalen Strafjustiz deren Tätigkeit stets als „politischer" und – im Licht rechtsstaatlicher Standards – prekärer wahrgenommen wird, selbst wenn Anklage und Gericht an professionellen Standards gemessen sorgfältig arbeiten. Zur Sprache kommen u.a. Themen wie die Auswahl der zu beurteilenden „Situationen", die Festlegung der Anklagestrategie und die Verantwortlichkeit einflussreicher Elitenmilieus.

International Criminal Tribunals and their Background Dilemmas

Oliver Diggelmann[*]

Inhaltsübersicht

Abstract

The article offers a systematic explanation of the "more political" functioning of international criminal tribunals compared with their domestic counterparts in states with high rule of law standards. A better understanding of the patterns underlying this functioning and of the criticisms connected to it seems important for developing realistic expectations towards the ICC and potential similar institutions. The article treats "recurring criticisms" formulated against international criminal tribunals – throughout their history from Nuremberg to the ICC – as a source of insight. It understands them as indications for structural particularities of international

* I wish to thank my research assistants Matthias Emery, Livia Enzler, Daniel Rüfli and Larissa Tschudi for their most valuable support.

criminal justice and describes "political background dilemmas" behind them. This article argues that the dilemmas influence, and, to some extent, determine the functioning of international criminal tribunals and cause what is termed "balancing of legitimacy risks" by the tribunals. The article also links the findings to the general characteristics of international law. Its multipolar structure and the uncertain relationship between international criminal tribunals and international stability, this article argues, are key for their higher degree of politicization.

Keywords: international criminal justice; international criminal tribunals; politicization of tribunals; legitimacy of tribunals; rule of law

A. Introduction

The sentence "Ordinary walks differ from walks on the moon with respect to where they take place" obviously expresses some truth. Nevertheless, it is misleading. Not mere location, but the difference in gravitational force marks the key difference. This article poses the question, metaphorically speaking, about the difference in gravitational force between the functioning of international criminal tribunals and their domestic counterparts in states with a highly developed rule of law culture and an independent judiciary.[1] The article is mainly concerned with – given the current crisis of the ICC and of international criminal justice in general – the *general patterns* of the functioning of international criminal tribunals.[2] It argues that, on the whole, this functioning can be described as much "more political" than the manner in which the judiciary in the reference states functions. The term "more political", of course, needs clarification at the outset.

1 In this article, "most stable" states such as Finland, New Zealand, Netherlands, Switzerland, Japan, Denmark, Luxemburg, Norway, Australia, and Belgium are treated as reference states. These ten states (plus Hong Kong SAR) are best ranked in the World Economic Forum's 2019 "Judicial Independence" survey: World Economic Forum, The Global Competitiveness Report 2019 (2019), at 67, 71, 91, 187, 219, 267, 307, 355, 419, 423, 439, 535.

2 Of the partly devastating criticisms, two seem widely uncontested: the poor balance of only 14 judgments and 10 convictions in 19 years (until 15 August 2021), and the too long exclusive concentration on situations on the African continent.

The core idea underlying this article is: In the course of the history of international criminal tribunals, a bundle of criticisms has crystallized which keeps resurfacing. Their recurring character is treated as an indication for structural particularities of international criminal justice here – as a hint that there might be a deeper problem. This article argues that behind a few of such recurring criticisms one can detect what is termed "political background dilemmas" here. Understanding these dilemmas is key to understanding the functioning of international criminal justice. They cause, overall and despite all necessary relativizations, international criminal tribunals' *less consequent orientation towards rule of law principles* (such as equal treatment of perpetrators and victims, impartiality, good faith, presumption of innocence etc.) compared with the judiciary in the reference states. These dilemmas are the central reason why international criminal tribunals occasionally and unadmittedly engage in what is termed "balancing of legitimacy risks" here. The aim is to offer a systematic explanation of what is going on when international criminal tribunals act differently from what could be expected from their domestic counterparts in the reference states.

Literature addresses several – to a higher or lower degree – "political" aspects of international criminal justice. As far as I can see, however, there exists no attempt to systematically describe the general patterns. Contributions on "political" aspects cover topics such as the influence of powerful actors on tribunals, prosecutor decision-making, and struggle of the tribunals with their "constant legitimacy crises".[3] Many of them touch upon the topic of this article. Two articles were particularly helpful for my research. Darryl Robinson argues in "Inescapable Dyads: Why the International Criminal Court Cannot Win" that awareness of the patterns of the functioning of international criminal justice – in his semantics: "inescapable dyads" – could lead to a more generous debate on the ICC which would better acknowledge the difficulties and uncertainty of choosing

3 See, instead of many: Sergey Vasiliev, *The Crises and Critiques of International Criminal Justice*, The Oxford Handbook of International Criminal Law (K. Heller et al. eds., 2020) 626 (i.a. on the "ever-recurring" and "intractable" legitimacy crisis); Jessica Almqvist, *A Human Rights Appraisal of the Limits to Judicial Independence for International Criminal Justice*, 28 Leiden J. Int'l L. 91 (2015) (on the tribunals' independence in case of Security Council involvement); Yuval Shany, Assessing the Effectiveness of International Courts (2013), at 97–116 (i.a. on impartiality, finding constrained independence with respect to the ICTY and ICTR in particular).

among flawed options.[4] I entirely share this view. More attention to what I term "dilemmas" here seems both necessary and essential. In his article "The Anxieties of International Criminal Justice", Frédéric Mégret touches on some of the topics discussed here. He looks at international criminal law through the lens of "anxieties" of its agents. Mégret mentions, *inter alia*, the anxieties of being merely a tool of power and of not being neutral enough which cause what I regard as dilemmas.[5] He primarily focuses on agents, whereas this contribution is more interested in the general perception of the handling of the dilemmas by international criminal tribunals.

The terms "political" or "more political" – used in this article to characterize the functioning – need some explanatory remarks. Of course, one can argue that any tribunal is "political" in a wider sense. The conception of an independent judiciary is political, as is the idea of rule of law. Both are connected to the broad stream of liberal political philosophy.[6] "Critical international legal theory" would add that there also exists no objective meaning of legal norms, so the idea of an – even relatively – apolitical judiciary is an illusion anyway. Judges are guided by convictions and ideologies and decide between political options in this "critical" perspective.[7] One could also point to the obviously "sad reality" of criminal justice tribunals in a high percentage of countries; possibly even in most states, there exists a powerful executive that judges are wary to contradict. So, *a priori*, the distinction between relatively unpolitical domestic and more political international tribunals could only make sense with respect to a minority of states with a strong rule of culture and an independent judiciary in particular. This is, however, the category of states and judiciaries one needs to be interested in in my view if one wants to understand why international criminal justice is in its current – or even a constant – state of crisis. Using

4 Darryl Robinson, *Inescapable Dyads: Why the International Criminal Court Cannot Win*, 28 Leiden J. Int'l L. 323 (2015).

5 Frédéric Mégret, *The Anxieties of International Criminal Justice*, 29 Leiden J. Int'l L. 197 (2016).

6 See already The Federalist No. 78 by Alexander Hamilton (independent judiciary as a key element of limited government).

7 "Critical international legal scholarship", even though not being a straightforward application of CLS scholarship to the international sphere, typically draws on the latter's rejection of the idea of a "correct" interpretation of the law. For a (classical) summary of CLS critique of "objectivism": Roberto Unger, *The Critical Legal Studies Movement*, 96 Harvard L. R. 561 (1983), at 567–570). A collection of "critical" writing on international criminal law can be found in: Critical Approaches to International Criminal Law (C. Schwöbel ed., 2014).

such rule of law-wise paradigmatic states as the reference helps to make the patterns of the functioning of international criminal tribunals visible. This is a central idea here. The – relatively – strict orientation of reference states towards rule of law principles informs our intuition about the instances when an international tribunal acts in a problematic way and when it does not. Accordingly, "to a higher degree political" means "less consequently oriented towards rule of law principles" here.[8] The principles at the centre of this article are: equal treatment of perpetrators and victims, impartiality, good faith, and respect for the presumption of innocence. A (serious) journalist would call a decision on an indictment strategy "political" that treats perpetrators of one conflict party substantively different from perpetrators of another, whatever the reasons may be. "Political" does not mean illegal. A tribunal can act entirely lawfully and nevertheless appear as less consequently oriented towards rule of law principles than the judiciaries in the reference states.[9] It is not the abstract commitment to the rule of law which matters. The ICTY, e.g., was an institution to uphold the rule of law, and nevertheless a few of its decisions, as will be discussed, were questionable in light of the presumption of innocence. "More political" means more departing from the strict rule of law orientation than one would expect from tribunals in the reference states.

"Balancing of legitimacy risks" equally needs some preliminary remarks. The article argues that "background dilemmas" – caused by the structural particularities of international criminal justice – to a large extent explain why international criminal tribunals occasionally and unadmittedly engage in "balancing of legitimacy risks" (and that this balancing renders their functioning more political in the defined sense). The article highlights how the tribunals occasionally balance risks connected with *strict rule of law orientation* and risks connected with *partial departure from rule of law principles*. Both options imply risks for the acceptability of the tribunals. Here, "legitimacy" means – following the Max Weberian

8 Also in most stable states with a highly independent judiciary, judges engage, of course, in some balancing of risks, for example to avoid being accused either of judicial activism or of being too timid in upholding rights.

9 A decision can be perceived as "political", when the discretion of the decision-maker is large and the decision *appears*, overall, as primarily guided by personal preferences. On the tension between "rule of law" and large discretion: Tom Bingham, The Rule of Law (2010), at 48–54 ("Law not Discretion"). Bingham points out that excessive and unchallengeable discretion, even though formally lawful, may undermine the rule of law (ibid., at 49).

understanding of the notion – acceptability in the sociological sense.[10] The cardinal problem addressed under the heading of "balancing of legitimacy risks" is that the acceptability of the tribunals depends, on the one hand, on respect for rule of law principles to a large extent. On the other hand, rigid or "politically" blind rule of law orientation creates acceptability risks, too. This article sheds light on how the tribunals "manoeuvre" in this field, why they engage in balancing risks, which renders their perception "more political" than the one of their counterparts in the reference states.

"Recurring criticisms" also play a key role in the argument of this article. Such criticisms are treated as an important source of possible insights, as the smoke which indicates fire. A man whose relationships fail again and again because of the same problems is well advised to ask himself whether he understands well enough why this is the case. This article, by adopting such a perspective, sees a common ground between international criminal tribunals centre stage – fully conscious, of course, of the many differences between them and throughout their history. This article focuses on shared problems and characteristics – the structural particularities of international criminal tribunals – and the *functioning patterns* connected to them. Accordingly, it looks at the criticisms formulated against the Post World War II tribunals, the "modern" tribunals – ICTY, ICTR, and ICC – and occasionally also hybrid tribunals as the Special Court for Sierra Leone, the Special Tribunal for Lebanon, and the Extraordinary Chambers in the Courts of Cambodia. The sample is small and heterogeneous. Criticism, which crops up again and again, however, informs us, with a certain likelihood, of an underlying problem, a pattern. The criticism of insufficient witness protection is an example.[11] It is well known from the practice of the ICTY, the ICR and the ICC. Insufficient witness protection may, of course, be the result of incapable, naïve, or reckless decision-making in a specific case. The persistence of the problem, however, suggests that a different framing might be more appropriate. The same may be said of the notorious problem of proving the involvement of political leaders in the concrete crimes. The persistence of the problem, according to the

10 In this sense: Richard H. Fallon, *Legitimacy and the Constitution*, 118 Harvard L. R. 1787 (2005), at 1794–1796. The philosopher Wilfried Hinsch, following on Weber, suggests "sincere approval" as the criterion for legitimacy: Wilfried Hinsch, *Legitimacy and Justice*, Political Legitimization without Morality? (Jörg Kühnelt ed., 2008), 39, at 40.

11 See *infra* Part B.V.

article's argument, tells us something about how international criminal justice functions. This is the road taken.[12]

This article proceeds as follows. After these introductory remarks, six "political background dilemmas" are identified, which strongly influence the functioning of international criminal tribunals. The article shows the structural particularities, which cause them and how they influence or impregnate the functioning of the tribunals – and how legitimacy risks are being balanced. The dilemmas concern the fields of "conflict selection", "indictment strategy", "elite accountability", "gathering of evidence", "witness protection", and "standard of proof". In the concluding remarks, the findings are linked to the general characteristics of international law. Its multipolar structure and the uncertain relationship between international criminal tribunals and international stability, the article argues, to a large extent explain their higher degree of politicization.

B. Political Background Dilemmas and Recurring Criticisms

I. Conflict Selection: Victor's Justice

The first "background dilemma" sets the scene at the beginning of any international criminal proceeding. It concerns "conflict selection". Which conflicts, wars, or "situations" are provided a status, which enables a prosecutor to prosecute the crimes committed during them? Most conflicts, in which international core crimes occur, are not selected. They remain "internationally untriable". In the history of international criminal justice, most selection decisions were made by the political actors which established the tribunal. After World War II, the main Allies (Nuremberg) and the US alone (Tokyo) selected the crimes of the "major war criminals" of the "European Axis" and "in the far east" (sic) for prosecution. In 1993 and 1994, when the crimes committed in former Yugoslavia since 1991 and during the civil war in Rwanda in 1994 were selected, it was the Security Council which made the decision. Only in the case of the ICC,

12 Some may object that unwelcome judgments always are criticized by some as "political". Any ICC decision that benefits Israel, for example, immediately is harshly attacked with such semantics. Here, however, not the criticism of being "political" as such is of interest, but the recurring character of a specific criticism. It is treated as an indication for a problem which is difficult or impossible to solve – a "deeper" problem.

selection decisions are delegated to the tribunal itself. Since its creation, 8 *proprio motu* investigations were approved by the Pre-Trial Chamber.[13] In the reference states, in contrast, decisions on prosecutions are (almost) always made exclusively by the judiciary itself.[14] In principle, only the gravity of the crime and the likelihood of provability are decisive factors determining whether crimes are prosecuted.

The recurring criticisms connected with selection decisions of international criminal tribunals are the "victors' justice" criticism and the denouncement of openings of preliminary investigations or investigations as "political". Although they are, obviously, often levied for strategic purposes, they touch on a sensitive point.[15] World War II victors mainly selected the crimes of the elite of the defeated, while they claimed to act on behalf of all humanity.[16] The Security Council, too, is dominated by a cartel of the most powerful, and its origins lie in the outcome of World War II.[17] The decisions by the Allies and the Security Council were made against defeated or, at best, third class powers. In the case of the ICC, the situation presents itself fundamentally differently only at first sight. A closer look, however, reveals the similarities.[18] On its surface, the creation of the ICC was a move to get away from "political" conflict selection as in the past. In the first two decades of its existence, however, most selected situations concerned weak, failing or politically isolated states or actors.[19]

13 By 21 July 2022.

14 Exceptions being cases involving immunities granted by domestic or international law: to members of parliaments, government officials, witnesses with witness immunity, diplomats etc.

15 Mégret describes this aspect from the perspective of international criminal justice's attempt to get away from "ad hocism" and to disconnect the triggering from "blatantly political decision": Mégret, *supra* note 5, 201.

16 See, i.a.: Richard H. Minear, Victor's Justice: The Tokyo War Crimes Trial (1971).

17 On the UN's original character as a continuation of the Allied war alliance with special status of great powers see Oliver Diggelmann, *The Creation of the United Nations: Break with the Past or Continuation of Wartime Power Politics?*, 93 Die Friedens-Warte (2020) 371, at 374–377.

18 Noteworthy in this context: according to ILC plans, the selection decision originally was meant to lie with the Security Council or the state parties. See ILC, Report of the International Law Commission to the General Assembly, UN Doc. 1/49/10, 22 July 1994.

19 For a criticism of the "politicization" of selection decisions and the risk of abuse: William A. Schabas, *Victor's Justice: Selecting Situations by the Prosecutor of the International Criminal Court*, 43 John Marshall L. R. 535 (2010), at 540–550.

Openings of preliminary examinations were regularly criticized as arbitrary or political,[20] and neither decisions to select or not to select a situation for prosecution appear to be foreseeable in the sense of being guided by the law itself.[21] Decisions typically have a taste of *singularity*.[22]

The cardinal reason is the extreme scarcity of resources, financially and politically. Proceedings before international criminal tribunals are extremely expensive. Some figures may illustrate this. By the end of 2020, the costs for the ICC were 1'893'180'446 € in total,[23] with an annual budget for 2020 of 149'205'600 €.[24] Each of the 12 judgments delivered by then roughly cost 157 mio € on average. The ICTY cost overall 2'726'309'572 $,[25] with a balance of 108 judgments in 161 cases. The average costs for a judgment accordingly were roughly 25 mio $. In the reference states, where criminal justice can, in principle, rely on adequate funding, costs are much lower, even for cardinal crimes. In the UK, for example, average total costs for a homicide case are 812'740 £.[26] The scarce political resources are the second and hardly less important factor. Whereas in the reference states, no democratic party can afford not to support criminal justice, there currently exists a *de facto* joint opposition in the international sphere by the biggest military powers against the ICC.[27] Motives are made explicit.

20 See Celestine N. Ezennia, *The Modus Operandi of the International Criminal Court System: An Impartial or a Selective Justice Regime?*, 16 Int'l Crim. L. R. 448 (2016), at 456.

21 For a detailed analysis of the prosecutor's margin of discretion: Lovisa Bådagård & Mark Klamberg, *The Gatekeepers of the ICC: Prosecutorial Strategies for Selecting Situations and Cases at the International Criminal Court*, 48 Georgetown J. Int'l L. 639 (2017). For the authors, the selection decision is "almost by definition [...] at a crossroads between law and politics" (at 639).

22 Generally, on the selectivity in international criminal justice: Robert Cryer, Prosecuting International Crimes: Selectivity and the International Criminal Law Regime (2005), in particular at 191–186.

23 For information concerning costs and budgets see in particular the resolutions of the Assembly of the State Parties: ICC-ASP/2/Res.1, 12 September 2003 (A., para. 1) up to and including ICC-ASP/18/Res. 1, 6 December 2019 (A., para. 1).

24 See ICC-ASP/18/Res.1, 6 December 2019, A., para. 1.

25 Total amount calculated from the ICTY's annual reports (UN Doc. A/49/342, 29 August 1994, up to and including UN Doc. A/72/26, 6 August 2017).

26 Matthew Heeks et al., The Economic and Social Costs of Crime: Research Report by UK Home Office (2018), at 15.

27 This finding is relativized to some extent by the fact that the biggest powers, as members of the Security Council, twice have referred situations to the ICC (Sudan 2005 and Libya 2011). On this contradictory role and the legitimacy questions related to it: Tom Dannenbaum, *Legitimacy in War and Punishment:*

When the US decided not to sponsor it, US Deputy Secretary of Defense Paul Wolfowitz declared that the lack of a right of the US to political supervision constituted the problem.[28] The biggest powers – the strongest supporters of the ICC are middle range powers – avail of a range of possibilities to put international criminal tribunals under pressure. After NATO had bombed Serbia in the Kosovo War, ICTY prosecutor Carla Del Ponte had to face a factual impossibility to investigate on possible war crimes committed by NATO.[29] The tribunal depended too much on NATO's support in several aspects. When the ICC Appeals Chamber in 2020 greenlighted the OTP's request to open an investigation on the situation in Afghanistan,[30] which could lead to convictions of Americans, the US first reacted by adopting an executive order enabling it to proscribe the entry of ICC personnel and their immediate family to the US and to block assets of people involved in investigations.[31] Meanwhile the US has lifted sanctions imposed on two top ICC officials, among them, notably, the former chief prosecutor herself, Fatou Bensouda. As a matter of fact, however, the most powerful always were able to and can create *de facto* untouchable persons. Instances range from Stalin to protégés such as Bashir al Assad.

Resource scarcity and the rarity of selection decisions almost always provide the decisions a symbolic value. US Chief Prosecutor Jackson already described his mandate as defending civilization itself, of taming despotic power through the law,[32] and the establishment of the Tokyo Tribunal sent

The Security Council and the ICC, The Oxford Handbook of International Criminal Law (K. Heller et al. eds., 2020) 129.

28 Gordon N. Bardos, *Trials and Tribulations: Politics as Justice at the ICTY*, 176 World Affairs 15 (2013), at 16.

29 Carla Del Ponte, Im Namen der Anklage (2016), at 88.

30 Judgement on the Appeal against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, Situation in the Islamic Republic of Afghanistan (ICC-02/17 OA4), Appeals Chamber, 5 March 2020.

31 Executive Order 13928 of June 11, 2020 (Blocking Property of Certain Persons Associated with the International Criminal Court). Order repealed by Executive Order 14022 of April 1, 2021 (Termination of Emergency with Respect to the International Criminal Court).

32 See Stephanos Bibas and William W. Burke-White, *International Idealism Meets Domestic-Criminal-Procedure Realism*, 59 Duke L. J. 637 (2010), at 660–661. The historian Francine Hirsch writes that all main Allies were intent on using the trials to both put forward their own history of the war and to shape the postwar future according to their ideas: Francine Hirsch, Soviet Judgment at Nuremberg: A New History of the International Military Tribunal after World War II (2020), at 5.

the signal that an attack against the most powerful state is perceived as something different from other wars between states. The ad hoc tribunals of the 1990s gained their symbolic meaning against the background of their time, too. The establishment of the ICTY sent the signal that crimes of such a scale shall not be tolerated on European soil, and that the Western powers' passivity has come to an end; the creation of the ICTR signalled recognition that the time of different standards for the former colonial sphere must be overcome. In the ICC's practice, sending the right signal also played a key role. When the OTP selected the situation in Uganda for preliminary examination in 2004, neither the number of casualties nor the gravity of the crimes were decisive, but the politically "ideal" character of the situation.[33] There was a "good" and cooperative government of President Yoveri Museveni, who had been an opponent of dictator Idi Amin, and a "bad" criminal movement with a brutal leader, the Lord's Resistance Army with war lord Joseph Kony. In the selection decision with respect to the situation in Georgia, the point of sending the right signal is not unlikely to have played a key role, too.[34] It was hastily taken, probably to dispel the notion of the ICC as an "international Caucasian court" over Africa.[35] The situation in Caucasian Georgia presented itself as "ideal" to send the countersignal to prove that the ICC was race blind. Selection decisions evidently are complex multi-factor decisions. The margin of discretion given to the OTP by Art. 53 (a) Rome Statute is extremely wide. Legal criteria and political considerations interplay in a way that typically makes the outcome not foreseeable.[36] This, in principle, is different in states with very high rule of law standards.

The fundamental problem of international criminal justice in this context is that both blind and not blind conflict selection create their own legitimacy risks. Selecting a conflict because of the symbolic value of the decision – to demonstrate, e.g., one's sensitivity for geographic equity – means not selecting other conflicts because of this political preference.

33 Sarah H. Nouwen & Wouter G. Werner, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, 21 Eur. J. Int'l L. 941 (2011), at 947.

34 Decision on the Prosecutor's Request for an Authorization of an Investigation, Situation in Georgia (ICC-01/15-12), Pre-Trial Chamber I, 27 January 2016 (preliminary examination opened in 2015).

35 African Union Accuses ICC of "Hunting" Africans", BBC News, 27 May 2013 (available at: www.bbc.co.uk/news/world-africa-22681894).

36 I.a. due to the vagueness of the selection criterion "interest of justice": see Bådagård & Klamberg, *supra* note 21, at 683.

The perpetrators and victims of one conflict and those of the other are treated differently. Of course, one might suggest, this is an unavoidable part of international criminal justice; but the problem is: Justitia is not blind here. Justitia with her eyes wide open is always a problem and has a price. Politically "blind" selection decisions, on the other hand, can cause different legitimacy problems. Enduring conflicts with the strongest powers opposing the decision damage the perception of the tribunal as legitimate, too. Tribunals cannot avoid the dilemma. Eyes wide shut, as the narrative goes, and wide open, as eyes in practice are in international criminal justice, both relate to legitimacy risks.

II. Indictment Strategy: Lack of "Representativity" of the Dock

A second "background dilemma" concerns decisions on the indictment strategy.[37] The prosecutor must decide whose crimes are being prosecuted and who ultimately could sit in the dock. In international criminal proceedings, a key fact is that the concerned individual is not just seen as an individual. In the wider public, he or she probably predominantly is seen as a member of a group or community or nation or even as a high representative of this group. Group membership is a key aspect of the perception of the prosecuted and, accordingly, also of the activities of the tribunal. In criminal proceedings in the reference states, in contrast, group membership only occasionally plays a role for the perception.[38]

The recurring criticism in this context is that of a "lack of representativity of the dock". In Nuremberg and Tokyo, one-sidedness of the dock was part of the concept.[39] The victors exempted themselves from the jurisdiction. Prosecution both of the Soviet Union's attack on Poland and

37 For an in-depth analysis of the complexity of decisions on the indictment strategy at the ICC see in particular: Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 Michigan J. Int'l L. 265 (2012), at 276–289 (arguing for objective selection criteria).

38 Exceptions being, for example, racist crimes, youth crimes, and crimes committed by migrants.

39 On the criticism already by H. Kelsen: Jochen von Bernstorff, *Peace and Global Justice through Prosecuting the Crime of Aggression? Kelsen and Morgenthau on the Nuremberg Trials and the International Judicial Function*, Hans Kelsen in America: Select Affinities and the Mysteries of Academic Influence (in D.A. Jeremy Telman ed., 2016) 85, at 95.

Allied war crimes were excluded.[40] The ad hoc tribunals of the 1990s were formally neutral, nevertheless alleged lack of "representativity" rapidly became a hotly debated issue. The ICTY was quickly accused of indicting far too many Serbs and not enough Croatians and Bosniaks.[41] The prosecution, according to rumours, which were never verified, is said to have reacted with a sort of informal target ratio – approximately 70 percent Serbs, 20 percent Croatians, and 10 percent Bosniaks were supposed to be indicted.[42] However, as justified or as made up as such rumours may have been, the logic underlying them is one of "group guilt". The ICTR, too, was confronted with this criticism. As investigations were exclusively directed against Hutu militias for a long time, who were evidently the main culprit responsibles, the formula of a "tribunal against the Hutu" entered the world.[43] Prosecutor Carla Del Ponte started prosecutions on crimes by members of the Tutsi militia RPF, which was allegedly involved in a massacre in Kigali, but she had to drop it because of a lack of co-operation by the Rwandan government and international political pressure.[44] With respect to the ICC, the situations in Libya and Mali can be cited as examples.[45] The general pattern can probably be formulated as follows: typically, there is one conflict party generally deemed to be the main responsible, on whom the prosecutor allegedly concentrates "too much". Then, there is another party or several other parties who, at first sight, are clearly less guilty and seem to get away almost unpunished.

40 See Hirsch, *supra* note 32, at 701.

41 Mayeul Hiéramente & Patricia Schneider, *Die Kleinen hängt man, die Grossen lässt man laufen*, 25 Peace and Security 65 (2007), at 69.

42 The long-term numbers roughly corresponded with these numbers which were, however, never confirmed in scientific literature. See Stuart Ford, *Fairness and Politics at the ICTY: Evidence from the Indictments*, 39 North Carolina J. Int'l L. and Commercial Regulation 45 (2013), at 69.

43 Hiéramente & Schneider, *supra* note 41, at 69.

44 The Rwandan government stopped witnesses from travelling to Arusha to give testimony, and the ICTR in this situation could no longer investigate in Rwanda itself. See Victor Peskin, International Justice in Rwanda and the Balkans. Virtual Trials and the Struggle for State Cooperation (2008), at 228.

45 See Leslie Vinjamuri, Is the International Criminal Court following the Flag in Mali?, 22 January 2013 (available at: www.politicalviolenceataglance.org/2013/01/22/is-the-international-criminal-court-following-the-flag-in-mali/).

The litany of international criminal judges in this context is that their only task is to try individuals and not groups or nations.[46] As true as this is, formally speaking, this fact creates mistrust among members of "overrepresented" groups. Groups have a highly developed sense of differences in yardsticks, effective or imagined, with respect to other groups – when they are to their disadvantage. The deeper problem here is that international core crimes, due to their organizational component, are typically committed in a group conflict or group rivalry context. Neither Milošević nor Hitler waged wars by themselves. Indictments and convictions immediately become part of the group narratives. The number of perpetrators is always much higher than the number of indictable persons. The indictment strategy decides – in the general perception – on which crimes become the "historical representatives" of the crimes committed in the conflict. During the Balkan wars, an estimated 200'000 people were involved in crimes in one form or another; with respect to the Rwandan genocide some estimates speak of 100'000 "génocidaires".[47] Accordingly, decisions on indictments, against the declared will of the tribunals, become a kind of "official" statement on each group's share of the crimes socially. Convictions and acquittals, particularly of former high-ranking *representatives*, buttress or weaken one's own narrative. They sometimes are euphorically celebrated or deeply mourned as historical victories or defeats of the entire group. When Ante Gotovina, a legendary general for many Croatians, was acquitted in 2012, there was a huge celebration in Zagreb, widely covered by the world media. After an arrest warrant was issued against the Sudanese Minister for Humanitarian Affairs because of war crimes, the people of the province of South Kordofan protested by electing him governor.[48] Even though tribunals regularly emphasize that recording the historical truth is not within their mandate, their activities unavoidably

46 E.g., former ICTY President Theodor Meron in a Presentation at Harvard Law School, 24 March 2021 (Being an International Judge).

47 Estimates hugely diverge, of course, and often are not supported by evidence. See, e.g., Del Ponte, *supra* note 29 (Anklage), at 104; Scott Straus, *How Many Perpetrators were there in the Rwandan Genocide? An Estimate*, 6 J. of Genocide Research 85 (2004), at 95.

48 Amanda Hsiao, Election in Sudan's Southern Kordofan Marred by Disputed Results, 17 May 2011 (available at: www.csmonitor.com/World/Africa/Africa-Monitor/2011/0517/Election-in-Sudan-s-Southern-Kordofan-marred-by-disputed-results).

interplay with group narratives.[49] The tribunals are not allowed to take this into account, of course, but they know about the problem and, unsurprisingly, behave ambivalently. The ICTY, for example, went rather far in writing the "official history" of the Yugoslav wars. The case of Serbian nationalist Vojislav Šešelj is an extreme example. The prosecutor started his prosecution with a testimony about Serb nationalist tracts from almost two centuries; he was interested in countless aspects, and the result of the historiographical ambition was that ten years after the beginning of the proceedings, Šešelj was still waiting for his trial to conclude.[50] Decisions on the indictment strategy are complex decisions, too, of course.[51] There are the official criteria, such as the gravity of the crimes, the position of a person in the political or military hierarchy, the prospects of getting through to the top level through low level investigations etc. In addition, there is, within an extremely wide margin of discretion, the necessarily unofficial factor of the overall picture within which representativity aspects are most likely to play a role, for the reasons explained.

The fundamental problem for international criminal tribunals is that they both cannot officially recognize and ignore the "representativity" problem. Prosecuting crimes of a perpetrator because of his group membership contradicts the idea of blind Justitia,[52] and ignoring the representativity element may create the impression of a politically biased tribunal. A blind Justitia can ultimately be just as damaging to the tribunal's legitimacy as a non-blind one, paradoxically as it sounds. International criminal tribunals may come into situations in which balancing of legitimacy risks is essential for their survival, at the price of becoming vulnerable to further criticism of being "too political" compared with a strictly rule of law-oriented judiciary in a reference state.

49 On the "right to truth": Leora Bilsky, *The Right to Truth in International Criminal Law*, The Oxford Handbook of International Criminal Law (K. Heller et al. eds., 2020) 473 (making the claim of an "emerging truth regime").

50 Bardos, *supra* note 28, at 22.

51 See deGuzman, *supra* note 37, at 276–289.

52 In the ICTY Delalic et. al. Case, camp guard Esad Landžo appealed on the ground that he was subject to what he perceived as a selective prosecution policy. The Appeals Chamber did not follow his argument and found that the decision could not be described as discriminatory: Judgement, Delalic et al. (IT-96 21-A), Appeals Chamber, 20 February 2001, paras. 206-213.

III. *Elite Accountability: Overinclusive Concepts*

A third dilemma concerns elite accountability. International core crimes such as genocide, crimes against humanity and the crime of aggression – war crimes might be an exception to some extent – typically cannot be committed without the support by an "elite milieu". The contributions by this elite milieu, however, are often elusive. The boundaries between mere moral support and concrete involvement are often fluid; individual attribution is a fundamental problem in the field. The history of international criminal justice shows a wide range of attempts to include elites and their specific guilt into criminal liability, and it probably is no exaggeration to say that most of these attempts move on very thin ice. A broad sketch may suffice. When international criminal justice started, the solution was mainly seen in "inventing" *ex post* accountability devices.[53] After World War I, Emperor Wilhelm II was widely regarded as the figure symbolising the outbreak of the war and the main responsible politically, but he had not been the decision-maker with respect to concrete crimes. To prevent a potential acquittal, the crime of "supreme offence against international morality and the sanctity of treaties" was invented and included into Art. 227 of the Versailles Treaty.[54] After World War II, the story repeated itself in principle. "Crimes against humanity", a new crime, was supposed to mainly capture the events in the extermination camps; the "elite crime" par excellence, the "crimes against peace", which by definition only can be committed by the highest leadership level, targeted those responsible for the war as such. That Robert Jackson called it the "supreme crime"[55] reflects the central role of elite accountability in the whole undertaking. The crimes of "conspiracy" – to commit one of the other three Nuremberg crimes – complemented the "safety net". Its spiritus rector, Murray Bernays, an official in

53 I do not engage in the retroactivity debate whose recurring arguments can be traced back to the post World War I period. See Kirsten Sellars, *Treasonable Conspiracies at Paris, Moscow and Delhi: The Legal Hinterland of the Tokyo Tribunal*, Trials for International Crimes in Asia (Kirsten Sellars ed., 2015) 25, at 28–29.

54 The US called Wilhelm II. the "arch-criminal", and the US Secretary of State considered the planned tribunal to be "manifestly... an instrument of political power" to assess the case from the "viewpoint of high policy and to fix the penalty accordingly": Sellars, *supra* note 53, at 27, 32.

55 Benjamin B. Ferencz, *The Crime of Aggression*, Substantive and Procedural Aspects of International Criminal Law (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000) 33, at 37.

the US War Department, advocated the idea that the Nazi leadership and the Nazi Party were one big conspiracy to commit murders and to destroy peaceful populations. In Tokyo, the conspiracy concept was gratefully welcomed; much more than in Nuremberg; the trials suffered from a lack of concrete evidence, and it was therefore no coincidence that the exceptionally vague crime of "conspiracy" played a more important role here.[56] The Tokyo Tribunal also made use of another post-war invention relevant in this context. In 1945, a US military commission in Manila had invented "command responsibility".[57] The Tokyo Tribunal used it in several important cases as it allowed the charge of commanders for crimes committed by subordinates about which they *should* have known.[58] The device opened up a new path to convict passive military elites whose criminal contribution is to not use their often enormous influence in order to prevent crimes. The ad hoc tribunals created in the 1990s proceeded more subtly than their predecessors. Their most far-reaching innovation was to acknowledge the "joint criminal enterprise" (JCE) as a mode of commission.[59] The construction enabled holding senior leaders accountable. In principle, they shared the intent to commit the crimes and in one way or another contributed to the criminal purpose.[60] The ad hoc tribunals regarded the loosely formulated statutes as not exhaustive and read the JCE into them. The ICC, in principle, continued on this path and included the "joint commission" into its statute. It could be understood, theoretically, as a direct descendent of the JCE, but practice interpreted the device as giving less leeway to the tribunal and having a strong emphasis on control of the

56 Sellars, *supra* note 53, at 50–51.

57 Trial of General Tomoyuki Yamashita, United States Military Commission, Manila, 8 October – 7 December 1945, reprinted in Law Reports of Trials of War Criminals 1, vol. IV (1948), in particular at 3–4. The commission was established by General MacArthur and, due to *ad hoc* determined procedural rules, belonged to the most controversial proceedings in the Far East. Neither the indictment nor the judgment made clear what Yamashita exactly was guilty of.

58 See, in particular, the cases of Prime Minister Hirota Koki and General Matsui Iwane: IMTFE Judgments of 12 November 1948, The Tokyo War Crimes Trial: Annotated, Compiled and Edited (John Pritchard & Sonia M. Zaide eds., 1981), vol. 22, 49'788–49'792 (Hirota Koki), vol. 22, 49'814–49'816 (Matsui Iwane).

59 Judgement, Tadić (IT-94-1-A), Appeals Chamber, 15 July 1999, para. 220.

60 An author called the JCE an important contribution to recognizing "the reality of such joint actions": Guénaël Mettraux, International Crimes and the Ad hoc Tribunals (2005), at 292.

events.[61] In criminal justice in the reference states, no analogon exists to this "tradition" of elite accountability devices.[62] There are organizational crimes, such as membership in a criminal organization, which enable holding leaders accountable to some extent; but the whole field of elite accountability does not play a comparable role.

The recurring criticism in international criminal justice is the "over-inclusiveness" accusation – that the connection between crimes and elite conduct often is too tenuous. It also touches on a sensitive point. Macro crimes are typically the product of a complex interplay between high and low-level perpetrators and the support by elite milieus.[63] The contributions of the latter, on whom the more active perpetrators can rely on, are very often elusive.[64] Elite milieu involvement typically comes through the exercise of elite functions, elite contacts, through being part of a decision-making layer of society. It can take on countless forms. The commander of a military unit or of a police body and their professional friends in other units can keep what they know for themselves, which can have disastrous consequences. Many of these people have influence on the "atmosphere" and the ideology to which subordinates adhere. Mere commands or the possibility to give orders often does not grasp the involvement. The relationship between elite conduct as a potential cause of crimes and its effects

61 In particular: Decision on the Confirmation of Charges, KATANGA AND NGUDJOLO CHUI (ICC-01/04–01/07), Pre-Trial Chamber I, 30 September 2008, paras. 480–486.

62 In the reference states, the notion elite crimes primarily is associated with white-collar crimes. The term goes back to the 1930s and designates non-violent crimes by people with a high status and motivated by financial gains. On the phenotype and background of this category of crimes: Uwe Berghoff & Hartmut Spiekermann, *Shady Business: On the History of White-Collar Crimes*, 60 BUSINESS HISTORY 289 (2018), 289–304.

63 The fundamental problem with group criminality is that once criminal conduct is pursued at the collective level (e.g., by militias or criminal organizations), the intention to commit the crime and the culpability also shifts to the collective level – which in principle requires responsibility of all those who know what is going: Jens D. Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. J. (2007) 69, at 70. On the tensions between individual liability and the nature of collective crimes: NEHA JAIN, ABOUT PERPETRATORS AND ACCESSORIES IN INTERNATIONAL CRIMINAL LAW (2014); Mark A. Drumbl, *Accountability for System Criminality*, 8 SANTA CLARA J. INT'L L. (2010) 373.

64 A rare exception being the ICTR Akayesu Case in which a politician was involved in the concrete physical commission of crimes: Judgement, AKAYESU (ICTR-96-4-T), Trial Chamber, 2 September 1998, paras. 415, 714, 716.

unavoidably often remains unclear.[65] What, for example, is the significance of a minister silently supporting the conduct of more active members of the government? Elite conduct creates patterns in the background; habits, values, elites give examples. It often is the widespread nature of some crimes, which allows to infer that the actions of the physical perpetrators are coordinated, organized, influenced, and that high-ranking leaders must be involved.[66] Elite conduct often is both: crucial and extremely difficult to capture.[67]

The fundamental dilemma of international criminal tribunals in this field is that extensively *and* restraintly holding elites accountable creates high legitimacy risks. Far-reaching accountability means that the principle of individual responsibility may be weakened or even totally undermined. It can establish a *de facto* collective responsibility with hardly any possibility to exculpate oneself.[68] The fairness of the proceedings is at stake when the presumption of innocence *de facto* is undermined. The JCE, for example, was criticized as a form of "guilt by association", of liability based on membership in a group or organization.[69] Restraint elite account-

65 In the Ruto (and Sang) Case, the ICTR concluded that the relevant social hierarchies were not clear enough to prove William Ruto's involvement into the crimes. Ruto had official titles and titles under local custom, but the tribunal was not convinced that his influence on the local community was big enough that initiatives to attack the victims could not have been taken without his express or tacit approval. See Decision on Defence Applications for Judgements of Acquittal, RUTO AND SANG (ICC-01/09-01/11), Trial Chamber, 5 April 2016, para. 129.

66 Carla Del Ponte, *Investigation and Prosecution of Large-scale Crimes at the International Level: The Experience of the ICTY*, 4 J. INT'L CRIM. J. 539 (2006), at 547.

67 The Security Council therefore in 2003 passed a resolution in which it urged the ICTY to concentrate on the most senior leaders: SC Res. 1503 (2003), para. 7.

68 More inclusiveness of contributions, theoretically speaking, means a shift of accent from the concrete crime to "mere" subjective intent. If this idea is pushed too far, it ultimately can lead to the problematic situation that only the highest level is the "true" perpetrator. On this question see the remarkable essay by Sibylle Tönnies, *Töten mit einem Federstrich*, DIE ZEIT, 7 May 1997. Tönnies i.a. points to the "Ulmer Einsatzgruppenprozess", in which Hitler, Heydrich and Himmler were treated as the (dead) perpetrators, whereas the concrete indicted all were regarded as mere aids.

69 Del Ponte, *supra* note 66 (Investigation), at 551. For a brief survey of the many criticisms: Gunel Guliyeva, *The Concept of Joint Criminal Enterprise and ICC Jurisdiction*, 5 EYES ON THE ICC 49 (2008–2009), at 59–65. For an in-depth analysis of the phenomenon of "collective responsibility" in international law

ability, however, creates other legitimacy risks. If too many actors, who are generally regarded as responsible for the crimes, if too many figures like Milošević escape accountability, the tribunal risks being seen as a "failure" in its entirety. What is the point of having a tribunal when exactly these kinds of people get away with their deeds? Considering this dilemma, inconsistencies in the handling of matters related to elite accountability cannot come as a surprise. The ICC's formula in the Bemba Case Trial Chamber judgement that the threshold for exculpation in command/superior responsibility cases must be established "on a case-by-case basis", with a focus on the "material power" of the commander, perfectly fits with this finding – the tribunal retains leeway for *ad hoc* manoeuvring.[70]

IV. Gathering of Evidence: Compromising Alliances

A further dilemma, which has an impact on the functioning patterns of the tribunals can be discovered in the field of evidence gathering.[71] International criminal tribunals are structurally weak institutions compared with the judiciary in the reference states. They cannot rely on strong enforcement institutions and therefore depend on "constructive relationships" with conflict parties (and further actors). Such relations are essential for gathering evidence. They can, however, become "too close". The recurring criticism is the "compromising alliance" accusation.[72] It accompanies all tribunals created since the 1990s. The ICTY at some point was criticized for hardly gathering evidence against the Kosovo Liberation Army UÇK. Rumours had spread that UÇK members had harvested organs from captured Serbs, but the tribunal first remained relatively passive. The ICTR was heavily criticized for aligning too closely with the Tutsis. The criticism surfaced, as mentioned above, when the prosecutor dropped prosecutions of Tutsi militia RPF crimes; this was the case after the Rwandan government had interrupted cooperation which was indispensable for gathering

see Shane Darcy, Collective Responsibility and Accountability under International Law (2007), at 189–253.

70 See Judgement, Bemba Gombo (ICC-01/05-01/08), Trial Chamber, 21 March 2016, paras. 188, 197–198.

71 On this topic see also: Robinson, *supra* note 4, 338–341.

72 The criticism concerns a different aspect of the already mentioned and multifacetted neutrality problématique.

evidence on Rwandan territory.[73] The hybrid Cambodia Tribunal also found itself confronted with this accusation. It was called a "pawn" of the Cambodian government.[74] One of the instances where the ICC was accused of a lack of distance is the handshake between the first Chief Prosecutor and Uganda's President Yoveri Museveni in 2004. In the eyes of many Ugandans, it let the ICC look like Museveni's puppet.[75] A note of the OTP ICC, addressed to the President of the Ivory Coast National Assembly in 2012 was also regarded as delicate. In this letter, the chief prosecutor expressed his hope that the collaboration would continue with the same "quality".[76] A further, well-known instance is the welcome of Sudanese rebel leaders at the ICC in 2009.[77] The tribunal appeared as siding with the rebels against the Sudanese government.

The "compromising alliance" criticism can undermine one of the most precious means of a tribunal: its credibility. Repeatedly brought forward, it can constitute a failure of the whole institution. The underlying problem is the necessity for tribunals to use evidence gathering capacity from conflict parties – or from third party actors – in order to be capable of doing their work *at all*. Mostly, state authorities become the co-operation partners. State authorities avail of the knowledge of the region and the institutional power to collect the evidence. Indicting senior political or military leaders of a rebel army, for example, requires sophisticated knowledge of political and military structures and their relationship in times of armed conflict.[78] International judges, who are not local, typically know little about regional geography, locations, distances, languages, cultural sensitivities, and the historical background of the crimes. State authorities often are ambiguous or dangerous partners, however. Alleged perpetrators may have become high officials or government members since the crimes were committed, as Kenia's President Uhuru Kenyatta, and authorities also sometimes have limited leeway towards perpetrators when they are popular among the population. Radovan Karadžić was arrested and transferred to The Hague only after thirteen years, even though the Serbian authorities knew where they could find him for most of the time. Presence of the UN or other

73 See Victor Peskin, *Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 4 J. of Human Rights 213 (2005), at 225–226.

74 Bibas and Burke-White, *supra* note 32, at 674.

75 Bibas and Burke-White, *supra* note 32, at 674.

76 Robinson, *supra* note 4, at 340.

77 Nouwen and Werner, *supra* note 33, at 954–961.

78 Del Ponte, *supra* note 66 (Investigation), at 552.

international forces in the region, where the crimes were committed, occasionally helps. In Bosnia-Hercegowina, for example, international armed forces provided assistance to the ICTY after the conclusion of the Dayton Peace Accord, and pressure from the EU proved to be helpful, too. To a large extent, the cooperation of Croatia, Bosnia-Hercegowina, and Serbia-Montenegro was the result of the EU's decision to treat cooperation with the ICTY as a pre-condition for EU accession, thus creating a strong positive incentive.[79] Negative incentives can have a similar effect, of course. Threats of the US to boycott a donors' conference influenced Serbia's decision to transfer Slobodan Milosevic to The Hague in 2001.

A key problem, however, is that truly neutral witnesses of international core crimes hardly exist. This further complicates the problem. Typically, such crimes have a group conflict background, and witnesses regularly are closer to one group than to the other; they are likely to share their group's socialization, sensitivities, and collective memory. They regularly defend its conduct as a reaction, as self-defense, to what they perceive as the wrong-doings of the other side, which may date back a long time.[80] Only in rare instances witnesses identify their own group as the one which initiated the conflict or committed the graver offences. Witnesses offered by "cooperating" conflict parties are likely to testify in that party's interest. If only one conflict party is co-operating and the other is not, the outcome of evidence gathering can be expected to be biased.[81]

The fundamental dilemma of international criminal tribunals has become evident. Both entering into problematic alliances and strictly avoiding them – and thereby upholding impartiality – creates legitimacy risks. Entering problematic alliances, as with Museveni, may create the impression that the tribunal is a "friend" to a conflict party. During ongoing conflicts, such alliances are even more problematic, as such "friendship"

79 See Klaus Bachmann et al., When Justice Meets Politics: Independence and Autonomy of Ad Hoc International Tribunals (2013), at 23–103.

80 Bosnian-Serbian General Radislav Krstić, who was sentenced to 35 years for aiding and abetting to genocide, had congratulated one of his brigades on their efforts to liberate centuries-old Serbian territories to prevent further genocide against the *Serbian* people: Judgement, Krstić (IT-98-33-T), Trial Chamber, 2 August 2001, para. 336 ("the moment has finally come to take revenge on the Turks here").

81 Sharply contrasting with this finding: Antonio Cassese, *On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 Eur. J. Int'l L. 2 (1998), at 9 (according to which international criminal tribunal build an "impartial and objective" record of events).

can turn into a conflict resource, particularly in case of positive media coverage.[82] Strictly avoiding alliances, however, rigidly keeping equal distance, may render prosecutions impossible – resulting in a complete "failure" of the tribunal to convict perpetrators. There is, quite simply, no easy route. Tribunals depend on alliances, but whenever they enter into them, they run the risk of becoming vulnerable to the criticism of partisanship. Therefore, tribunals have to secretly balance the legitimacy risks.

V. Witness Protection: Unkept Promises

A fifth dilemma concerns the protection of witnesses. The "threatened or dead witness" criticism is another recurring criticism, which accompanies international criminal justice since its rebirth after the end of the Cold War.[83] In the Haradinaj Case, to mention a well-known example, out of nine high-profile witnesses under a witness protection programme, several were killed.[84] An atmosphere of extreme fear was prevalent in this case, and many witnesses appeared only after numerous subpoenas and court orders to testify.[85] In the Milošević Case, the former FRY President made it a game to mention identifying information about several witnesses and

82 Robinson calls such situations – in which territories are not under control yet – "pre-transitional justice" situations: id., *supra* note 4, at 333.

83 The Nuremberg Tribunal mainly had relied on documentary evidence, witness protection was no major issue: Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 Columbia J. Transn'l L. 725 (1999), at 733, 744. For criticisms of and shortcomings in witness protection see, i.a.: Romana Weber, *Witness Protection at International Criminal Tribunals: Previous Experiences as Lessons for the Extraordinary Chambers in the Courts of Cambodia*, 2 City University of Hong Kong L. R. 137 (2010), at 144; Göran Sluiter, *The ICTR and the Protection of Witnesses*, 3 J. Int'l Crim. J. 962 (2005), at 965; Eric Stover, The Witnesses: War Crimes and the Promise of Justice in The Hague (2005), i.a. at 108.

84 The exact number is uncertain: Matthew Brunwasser, *Death of War Crimes Witness Casts Cloud on Kosovo*, New York Times, 6 October 2011; Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (Rapporteur: Jean-Charles Gardetto), The Protection of Witnesses as a Cornerstone for Justice and Reconciliation in the Balkans, AS/Jur (2009) 38, 3 September 2009, para. 16.

85 Judgement, Haradinaj et al. (IT-04-84-T), Trial Chamber I, 3 April 2008, para 22.

to sneak said information past the registrar.[86] He was thereby capable of demonstrating the limits of the tribunal with respect to protecting witnesses. Among the ICTR cases, the Akayesu Case needs particular mention. A Hutu woman and eight further persons – her husband and their four children and three further children – were killed after she had testified in this case.[87] The most prominent ICC examples are probably the proceedings against President Kenyatta and Deputy President William Ruto. In the Kenyatta Case, several witnesses were killed, and in the Ruto *et al.* Case, at least 16 of 42 witnesses ended their co-operation with the tribunal after they had been threatened or bribed.[88] Both proceedings ended with an acquittal – "no case to answer".

It is fair to suggest that a structural imbalance exists between the need of international criminal tribunals to obtain witnesses and their capacity to protect them.[89] Identifying leadership figures, clarifying the intentions of involved persons, investigating the details of their roles etc. is typically not possible without witnesses giving detailed testimony.[90] The witnesses' identity, however, in principle, has to be disclosed as early as possible to the defendant. The ICTY Rules of Procedure required disclosure as soon as "practicable", and ICC Rules of Procedure require the identity "sufficiently in advance" to allow the adequate preparation of the defence.[91] The nature of the crimes, however, exposes witnesses to much greater risks than in ordinary domestic proceedings in the reference states. After all, there is

86 See Mirko Klarin, Comment: Protected Witnesses Endangered, 22 February 2005 (available at: www.iwpr.net/global-voices/comment-protected-witnesses-endangered).

87 Immigration and Refugee Board of Canada, Rwanda: Whether People who Give Testimony at the Trials and Hearings of those Accused of Genocide and Crimes against Humanity are Being Harassed, Intimidated and Threatened, 1 January 1999 (available at: www.unhcr.org/refworld/docid/3ae6ac5950.html).

88 See, i.a.: Denis M. Tull & Annette Weber, Afrika und der Internationale Strafgerichtshof: Vom Konflikt zur politischen Selbstbehauptung (2016), at 14; Benjamin Duerr, Not Guilty, not Acquitted: Kenyan Ruling a Major Setback for ICC, 11 April 2016 (available at: www.theglobalobservatory.org/2016/04/international-criminal-court-kenya-ruto-kenyatta/).

89 On problems and prospects in this field: Robert Cryer, *Witness Tampering and International Criminal Tribunals*, 27 Leiden J. Int'l L. 191 (2014), at 199–203.

90 Only in Nuremberg the situation was different as prosecutors could rely on detailed accounts by the Nazi authorities themselves.

91 ICTY Rules of Procedure and Evidence, Rule 68, UN Doc. IT/32/Rev. 17, 7 December 1999; ICC Rules of Procedure and Evidence, Rule 67(2), ICC-ASP/1/3 and Corr.1 part. II.A., 3-10 September 2002.

much more at stake for the indicted. What witnesses say may be decisive for the prosecuted person's future life. It is not unusual that the indicted person is in a good position to assess which witness might be a good target for intimidation or even killing. Disclosure of a witness' identity is an extremely sensitive issue. Release of such information, however, is often difficult to prevent. The Serbian nationalist Vojislav Šešelj was convicted three times for contempt of the ICTY as he had released information related to protected witnesses.[92] In the ICC Bemba Case, intimidations of witnesses whose identity was released also constituted a major problem. In post-conflict situations and in situations of ongoing conflicts, in particular, often no stable authorities exist who are capable of preventing intimidations. Sometimes, the mere presence of leaders in a conflict region also increases the readiness to target witnesses. In "close-knit" societies, such as the ones in Rwanda and Kosovo, the situation is particularly complicated as perpetrators and survivors live side by side. Everyone knows each other, and allegiance to one's ethnic group or clan is taken for granted.[93] Those who speak against members of their group are most likely to be viewed as traitors, and mere contact with a tribunal or its local aids – various UN agencies locally help ICC investigation teams – may be perceived as a betrayal. In such societies, it is extremely difficult to assess when a witness is in danger and which protective measures might prove to be effective. For many witnesses in ICTR cases, going back to the home society after testifying was not a viable option, and searching a new home state proved extremely difficult, too.[94] Witness protection is a classical problem of international criminal law. For this reason, a UN expert group had recommended procedural improvements already in 1999.[95] The defendants' rights, however, set narrow limits in this respect.[96] Evidence based

92 Public Version of the Judgement Issued 30 May 2013, Šešelj (IT-03-67-R77.4-A), Appeals Chamber, 30 May 2013, paras. 3-5.

93 Anne-Marie de Brouwer, *The Problem of Witness Interference before International Criminal Tribunals*, 15 Int'l Crim. L. R. 700 (2015), at 716–721.

94 D. J. Rearick, *Innocent until Alleged Guilty: Provisional Release at the ICTR*, 44 Harvard Int'l L. J. 577 (2003), at 592.

95 Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, UN Doc. A/54/634 (1999). Suggestions included, i.a., more closed session testimony, use of pseudonyms, facial and voice distortion etc.

96 On the limits see Andrew Trotter, *Witness Intimidation in International Trials: Balancing the Need for Protection Against the Rights of the Accused*, 44 George Washington Int'l L. R. 521 (2012), at 536–537.

on hearsay as well as anonymity is problematic for obvious reasons, and sometimes the tribunals themselves exacerbate the problem. In its early days the ICTY – the "common law phase", with its emphasis on the right to cross-examine – knew a rule, which excluded from evidence statements of deceased witnesses that relate directly to the actions of the accused.[97] It turned out to be an incentive to target key witnesses as mere affidavits were classified as less significant and important than live witnesses.[98] In one instance, in the Kordić and Čerkez Case, the tribunal rejected the highly important statement of a deceased witness, which was the only evidence available.[99]

Once again, the dilemma of international criminal tribunals is profound. On one hand, asking witnesses to give testimony while being aware of one own's limited capacity to protect them, may appear as a lack of concern for the real risks witnesses face. The idea of rule of law requires reliability of judicial institutions – to only ask things a fair partner would ask. Rigidly prioritizing absolute witness security, on the other hand, substantively would relativize or even undermine defendants' rights. They are the core of fair criminal proceedings. Doing away with them *de facto* in a central field unavoidably damages the perception of the tribunal as legitimate. Therefore, for structural reasons, international criminal tribunals are likely to manoeuvre themselves through these risks in a way, which may appear as problematic considering the rule of law principles of good faith and fairness. However, they cannot escape the dilemma.

VI. Standard of Proof: Overrigid Yardstick

The last dilemma exposed here concerns the handling of the "beyond reasonable doubt" proof standard.[100] On the surface, the topic seems to be

97 Ari S. Bassin, *Dead Men Tell No Tales. Rule 92bis: How the Ad Hoc International Criminal Tribunals Unnecessarily Silence the Dead*, 81 N.Y.U. L. R. 1766 (2006), at 1786–88.

98 See Patricia M. Wald, *To Establish Incredible Events by Credible Evidence: The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, 42 Harvard Int'l L. J. 535 (2001).

99 Decision on Appeal Regarding Statement of a Deceased Witness, Kordić and Čerkez (IT-95-14-2), Appeals Chamber, 21 July 2000, paras. 18, 29.

100 For the modern tribunals see: ICC Statute Art. 66 (3); ICTY Rules of Procedure and Evidence, Rule 87 (A); ICTR Rules of Procedure and Evidence, Rule 87 (A). In Nuremberg and Tokyo, a combination of national standards

a mere question of adequate interpretation of the law. In principle it seems to equally arise for international and domestic criminal tribunals. It shall be shown, however, that the way the standard is handled in the field of international core crimes is directly connected with a political dilemma affecting a tribunal's functioning and legitimacy.[101] As mainly international criminal tribunals deal with these crimes, the dilemma becomes characteristic for international criminal justice, compared with judiciaries in the reference states.

The more complex crimes are, the more difficult proving them becomes. More elements need to be proved "beyond reasonable doubts". More parts of the proof can fall apart. Due to their complexity, convictions in cases of international core crimes are often not possible without at least having a minimum of generalizing arguments. How much generalization or abstraction, however, is permissible? If the standard "beyond reasonable doubt" is understood and applied in a rigid way, "shock acquittals" become more likely. "Shock acquittals", "too high threshold of proof" etc. are recurring criticisms in the history of international criminal tribunals. In the practice of post-Cold-War tribunals, several well-known instances can be mentioned. The Čelebići Case, an infamous concentration camp case, became known in 1998 i.a. for the "shock acquittal" of Bosnian commander Zejnil Delalić. He was generally known as a powerful co-ordinator of Bosnian and Muslim forces against the Serbs in the area and a key figure in the armed incidents, which took place in the region. The tribunal did not view it as established "beyond reasonable doubt" that Delalić also acted as superior with respect to the crimes committed in the camp.[102] His role was unclear in several respects. Another ICTY instance is the acquittal of Ante Gotovina in 2012. As a colonel general in the Croatian army, he was involved as an operational commander in the "Operation

was applied. Robert Jackson repeatedly said that the major powers in principle agreed that an international trial must borrow from national systems those rules which are "workable, expeditious and fair". See Evan J. Wallach, *The Procedural and Evidentiary Rules of the Post-World War II Crimes Trials: Did They Provide An Outline For International Legal Procedure?*, 37 Columbia J. Transn'l L. 851 (1999), at 854.

101 On key questions concerning the evaluation of evidence: Mark Klamberg, *Epistemological Controversies and Evaluation of Evidence in International Criminal Trials*, The Oxford Handbook of International Criminal Law (K. Heller et al. eds., 2020) 450 (see in particular section III on whether the standard of proof for conviction is subjective or objective).

102 Judgement, Delalić et al. (IT-96-21-T), Trial Chamber, 16 November 1998, paras. 657–658.

Storm" in which Croatia recaptured the Krajina region. Gotovina ordered artillery attacks in the course of which civilians were targeted. Gotovina was deemed to be involved as the commander of those subordinates who committed crimes on civilians. The tribunal acquitted him both from having participated in a JCE and from liability as a commander. There were too many "reasonable doubts" with respect to his concrete involvement in the crimes.[103] Among the ICC cases, the Bemba Gombo and the Gbagbo acquittals are well-known examples. Jean-Pierre Bemba-Gombo was the leader of an opposition political party in the Democratic Republic of Congo and commander-in-chief of its military branch. In 2018, the Appeals Chamber found that the conclusion of the Trial Chamber that he had failed to take all necessary and reasonable measures in response to his troops' crimes against humanity of murder and rape and war crimes was not proven "beyond reasonable doubt".[104] Laurent Gbagbo was President of the Ivory Coast, but he refused to step down from his office after the end of his term. A bloody civil war-like conflict broke out in 2011, and he was deemed to have played a key role in the events. In 2021, the Appeals Chamber confirmed the Trial Chamber's acquittal as substantial doubts with respect to Gbagbo's precise involvement remained.[105]

In international core crimes cases, rigid proof is often not available. Senior perpetrators, having learnt their lesson from the Nuremberg Trials, rarely document the purpose of their undertaking. The interplay between persons and events, between words and conduct, is often most difficult, if not impossible to reconstruct. Eyewitnesses, on whom tribunals mainly have to rely on, typically give testimony years after the events occurred. They are interrogated under great pressure about details they experienced in moments of great emotional pain, and sometimes the areas where the crimes were committed are no longer accessible.[106] The use of coded language is a further problem. In the ICTY Krstić Case, which *i.a.* concerned the Srebrenica mass murder, an intercept played a central role. Krstić and

103 Judgement, Gotovina and Markač (IT-06-90-A), Appeals Chamber, 16 November 2012, para. 115.

104 Judgment, Bemba Gombo (ICC-01-05-01/08 A), Trial Chamber, 8 June 2018, paras. 183–194.

105 Judgement, Gbagbo and Blé Goudé (ICC-02/11-01/15 A), Appeals Chamber, 31 March 2021, paras. 295, 378.

106 During the war in Bosnia-Herzegovina, parts of the region were occupied by forces hostile to the ICTY and inaccessible for gathering evidence: Jonathan Hafetz, Punishing Atrocities through a Fair Trial: International Criminal Law from Nuremberg to the Age of Global Terrorism (2018), at 78.

his security chief mentioned 3'500 "parcels" which had to be "distributed".[107] How convinced must a tribunal be to assume the language is coded in exactly *this* moment? The possibility or even a certain likelihood are not enough. Limited accuracy of translations and the fact that in cultures with an oral tradition, like the Rwandan one, facts are typically reported as they are perceived constitute further obstacles. This often occurs irrespective of whether one has personally witnessed them or not.[108] The significance of "circumstantial evidence" is generally rather unclear. When can one infer from some facts to the facts in question with the use of some general knowledge, by way of generalization and abstraction? And when exactly does a generalization become a sweeping argument? In the Haradinaj et al. Case, the ICTY Trial Chamber regarded the circumstantial evidence as insufficient for a conviction.[109] In the Limaj et al. Case, it emphasized that each fact, which forms the basis for the conclusion must itself be proven "beyond reasonable doubt".[110] In other cases, however, circumstantial evidence was generously used. The ICC insists on its "*large pouvoir discrétionnaire quant'à l'examen de tous types d'éléments de preuve*".[111] Over time, international criminal tribunals generally tended to become more concerned with rigidly proving facts in order to prove their commitment to the rule of law. More "shock acquittals" were the consequence. The meaning of "beyond reasonable doubt", to generalize the problem, is as central a question as the answer is far from being clear. There exists no commonly accepted definition. International criminal tribunals cannot "just apply" a standard the contours of which are generally consented. Practice is highly heterogeneous. In the Delalić Case, for example, the ICTY referred to Lord Denning's famous formula, according to which the standard is met when there is only a "remote possibility left" which is, however, "not in the least probable".[112] In most cases, the standard is applied without being defined,

107 Judgement, *Krstić* (IT-98-33-T), Trial Chamber, 2 August 2001, para. 383.

108 Del Ponte, *supra* note 66 (Investigation), at 553.

109 Judgement, *Haradinaj et al.* (IT-04-84bis T), Trial Chamber, 29 November 2012, paras. 670–672.

110 Judgement, *Limaj et al.* (IT-03-66-T), Trial Chamber, 30 November 2005, para. 563. See also: Judgement, *Halilović* (IT-01-48-A), Appeals Chamber, 16 October 2007, paras. 111–113; Judgement, *Ntagerura et al.* (ICTR-99-46-A), Appeals Chamber, 7 July 2006, para. 174.

111 See, e.g., Décision relative à l'admissibilité de quatre documents, *Lubanga* (ICC-01/04-01/06), 13 June 2008, para. 24.

112 The formula was developed in the UK civil law case Miller v. Minister of Pensions [1947] 2 All ER 372.

though. In Prosecutor v. Laurent Gbagbo, the Trial Chamber, according to the Prosecutor, did not indicate on the basis of which criteria it based its decision.[113] Conscientiousness of a tribunal may occasionally transform the standard to a "no shadow of a doubt" standard which becomes almost impossible to meet.[114]

The dilemma is evident. It is mainly international criminal tribunals which deal with the complex international core crimes. Both generously and rigidly handling the "beyond reasonable doubt" standard in such cases creates specific legitimacy risks. Convictions based on generalizing arguments may undermine the presumption of innocence and contradict the idea of a fair trial. When there even exists a "culture of conviction" at a tribunal, which may be the case, the tribunal will unavoidably damage its legitimacy over time.[115] Rigidly applying the standard, however, may come at the price of the "shock acquittal" problem. Symbolic figures might get away and celebrate their acquittal as a victory of their group's narrative. An accumulation of such acquittals, as have recently piled up at the ICC, may create the impression that the tribunal misses its purpose. International criminal tribunals are likely to manoeuvre through these legitimacy risks in a way which is likely to appear as "more political" than the functioning of the judiciaries in the reference states.

C. *Concluding Remarks*[116]

This article has shed light on several "background dilemmas", which international criminal tribunals are confronted with. The purpose was to show how they influence the functioning of the tribunals and why the tribunals, overall, are perceived as "more political" than their domestic counterparts in states with a highly developed rule of law culture and an independent judiciary in particular. The connections between structural particularities

113 Judgement, Gbagbo (ICC-02/11-01/15 A), Appeals Chamber, 31 March 2021, paras. 343–349 (deemed not problematic).

114 Judgement, Delalić et al. (IT-96-21-T), Trial Chamber, 16 November 1998, para. 600.

115 Tribunal staff may regard convictions more important than respect for procedural guarantees: Bibas & Burke-White, *supra* note 32, at 662 (pointing out that such a mindset can be found in all three international branches: prosecutors, defense counsels, and chambers).

116 For the thoughts in this part I am particularly indebted to my collaborator Matthias Emery.

of international criminal justices and "inescapable background dilemmas" offer an explanation why international criminal tribunals occasionally engage in – or even to some extent are forced to engage in – balancing of acceptability risks. Therefore, tribunals appear as "more political" than the judiciaries in the reference states. The article has made the general patterns visible by contrasting international criminal justice with the judiciaries of (relatively) strictly rule of law-oriented states.

The findings shall now be put into the wider context of the general characteristics of international law. It needs to be emphasised that international criminal tribunals are as much *international* institutions as they are criminal tribunals. The way in which international law functions sets the general scene, not an "essence" of a Platonic idea of a criminal tribunal. For this article – which is interested in a fragile institution with high ambitions – international law can be characterized as a "multipolar" legal order with no clear institutional centre and enforcement body. There is neither an institution with a monopoly of law-production nor a clear hierarchy between law-interpretating bodies. The international legal order consists – to employ the language of regime theory – of a bundle of co-existing and partially co-ordinated sectoral regimes of varying strength, degree of legalization and institutionalization.[117] The regimes differ with respect to their participants, influence, and modes of operation. They partly overlap and concur with each other. Powerful states and alliances have great influence on the functioning of many of the regimes.[118]

For "emerging" international jurisdictional bodies, such as the ICC, and formerly the ICTY and the ICTR, such a constellation means the following: they are part of a universe of semi-competing and semi-coordinated regimes, and the bundle of these regimes is partly stable and partly unstable. In this context, the bundle is much more fragile than the domestic institutional framework in the reference states. Therefore, acceptance of the jurisprudence of "emerging" international jurisdictional bodies as the

117 See the forthcoming study Nina Hadorn, Regimekonflikt im Völkerrecht anhand des Beispiels UNHCR–IOM (in particular Part II.A–C, unpublished copy on file with author).

118 A pointed variant of this sociological model is advocated Andreas Fischer-Lescano and Gunther Teubner: Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 Michigan J. Int'l L. 999 (2004), discarding the idea of international law as a coherent legal order (ibid. at 1004). The thought is pushed too far in my view, but it has the merit of shedding light on the struggle of the regimes for influence and defining power.

ones mentioned above cannot be taken for granted. A clash of interests with powerful actors and groups can always threaten the functioning of such institutions. Even a complete disappearance is possible. At least, conflicts with powerful political actors matter more than for domestic courts in the reference states, which typically have the freedom to decide against influential groups.[119]

International criminal tribunals have a kind of double identity in this universe of regimes. As tribunals and legal institutions, above all, they have a "legal", official identity. They are bodies and agents of the law and committed – only committed – to the rule of law. Sociologically speaking, however, they are structurally weak actors in a field of rivalling actors. In their "sociological" identity, they are institutions which seek their place in an instable universe of international regimes. As such, they are under constant pressure to ensure acceptability which requires considering all effects of their decisions and activities.[120] They cannot afford Justitia's blindness in the full sense. When they act as tribunals, drawing on their first identity, occasionally their second identity may overwhelm them to ensure their survival.

The unclear relationship between international criminal tribunals and international stability in general also needs mentioning in this context. In the reference states, the relationship between criminal courts and stability is relatively established: the tribunals "defend" the stability, which ultimately results from the state's monopoly of power.[121] Stability is already there, tribunals buttress it by reliably applying the law. In the international sphere, however, stability cannot be pre-supposed. It is not an "already there", it is no common good, on which criminal tribunals can count

119 On attempts to tame the influence of the powerful on international jurisdictional bodies:
Eyal Benvenisti & George Downs, *Prospects for the Increased Independence of International Tribunals*, 12 German L. J. 1057 (2011).

120 See this light, i.a., the ICJ's elusive advisory opinions Legality of the Threat or Use of Nuclear Weapons (1996) and Accordance with International Law of the Unilateral Declaration of Independence of Kosovo (2010). Institutions, of course, work on positive narratives on themselves to increase their acceptability: see, e.g., Richard Clements, *From Burocracy to Management: The International Criminal Court's Internal Progress Narrative*, 32 Leiden J. Int'l L. 149 (2019).

121 The modern territorial state was a response to the horrifying civil wars between Christian confessions to which the monopoly of power of the state was the answer. See Oliver Diggelmann, Völkerrecht: Geschichte und Grundlagen (2018), at 19–20.

on *per se* when they start working. Accordingly, the tasks of criminal tribunals, theoretically speaking, are also less defined. Two models are possible. The "domestic model analogy" sees the tasks in "just" correctly applying the law and nothing else.[122] The second and less intuitive answer regards the tasks in applying the law *and* contributing to stability in the concrete situation as this stability is both fragile and essential.[123] The tasks of international criminal tribunals become less defined, and the idea of the tribunals as an actor with a certain "political functioning" becomes more plausible.[124] Intuitively, most people probably would favor the first conception. It deserves emphasis, however, that stability issues often were a or even *the* key concern when international criminal tribunals were created. The Post World War II tribunals were created out of concrete security concerns, and the *ad hoc* tribunals of the 1990s were established by the Security Council. All international core crimes have a security component – their commission constitutes a threat for the common good stability. The point here is that there are sound reasons to generously interpret the role of international criminal tribunals. The unclear relationship between tribunals and stability in the international sphere leaves room for more than one conception of their role. In order to avoid the further decline of international criminal justice may require replacing a stereotype model of international criminal tribunals by another conception, which takes the inescapability of the background dilemmas discussed here more into account. To conclude with another metaphor from psychoanalysis: curing a patient does not mean to undo all his vulnerabilities, but to show him how to consciously live with them – for the benefit of his own good and that of his environment.

122 Generally on the implications of transferring domestic public law concepts to the international sphere: Damian Cueni, Public Law Analogies for a Global Age (forthcoming, unpublished copy on file with author).

123 Differences in the understanding may directly influence the prosecutor's indictment strategy. See Frederiek de Vlaming's comparative analysis of the ICTY's first three prosecutors' strategies in which he calls Carla Del Ponte's emphasis on "peace and restoration" as a selection criterion a "risk of introducing political factors": Frederiek de Vlaming, *The Yugoslavia Tribunal and the Selection of Defendants*, 4 Amsterdam L. Forum 89 (2012), at 99.

124 Illustrative for such a reading: Franca Baroni, *The International Criminal Tribunal for the Former Yugoslavia and Its Mission to Restore Peace*, 12 Pace Int'l L. R. 233 (2000), at 238.