

Daedalus or *Icarus*?

Footprints of International Criminal Justice Over a Quarter of a Century

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Abstract

International criminal justice has taken a long journey over the past quarter of a century. This essay analyzes the evolution through an analogy to the Greek myth of *Daedalus* and *Icarus*. It argues that, similar to the flight in the tale, the journey of international criminal justice is marked by rise and fall and need for re-orientation. It examines some of the major developments and critiques through a contextualization of seven key moments: (1.) *Tadić*: The Grounding of the Humanist Tradition, (2.) *Akayesu*: New Consciousness Regarding Sexual and Gender Based Violence, (3.) *Krstić*: The “New Law” on Genocide, (4) the *Al-Bashir Arrest Warrant*: Law vs. Politics, (5.) *Lubanga*: The Global Victim as Constituency, (6.) *Charles Taylor*: Even-Handedness and Dilemmas of Accessory Liability, and (7.) *Saif Gaddafi and Al Senussi*: The New Frontiers of Complementarity. It shows that

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each of them marks an important turning point for modern understandings of international criminal justice. It concludes that like *Icarus*, international criminal jurisdiction is ill-advised to fly too close to the sun, and too low to the sea.

I. Introduction

“Daedalus knew there was no way to escape by sea. [...] So Daedalus, the great inventor, the master craftsmen, drew on all his skills and made, for each of them, a pair of huge wings. ‘These wings will take us away from this place and to freedom’, he said to his son. ‘However, there is one thing you must not forget. These wings are held together by wax. If it gets too hot, it will melt and the wings will fall apart. So do not fly too close to the sun. Stay low and we will be safe.’

[...] Icarus could not contain his excitement a moment longer. ‘We’re free’, he yelled to the empty sky around him. ‘Free and we’re flying, we’re flying with the birds.’ [...] ‘Icarus, not too high, not too close to the sun’, his father screamed in desperation. ‘The wax on your wings will melt. Stay close to me and stay low.’ But his words fell on deaf ears. [...].

It was only the briefest of sounds but he heard it clearly, even above the sound of the foaming waves and crying gulls – ‘Father, help me’ [...].”¹

Hardly any tale in Greek mythology is as famous as the tragic story of *Daedalus* and his son *Icarus*. *Daedalus* and *Icarus* manage to escape from the tyranny of King *Minos* through a labyrinth. But they have to cross the water to flee from the island of Crete. *Daedalus* builds wings out of bird feathers and wax. He instructs *Icarus* not to fly too high, nor too low. *Icarus* disregards the advice. The wax melts, the feathers float away, and *Icarus* plunges into the sea where he drowns. *Daedalus* survives, but remains haunted by the loss of *Icarus*.

This myth reflects the tension between “Idealism and Realism”.² It symbolizes some of the tensions that are inherent in the journey of international criminal jurisdiction over the past two and a half decades. This journey is marked by rise and fall, and need for re-orientation.³

¹ See Myths and Legends, Daedalus and Icarus, at <<http://myths.e2bn.org>>.

² See C. Tomuschat, Human Rights: Between Idealism and Realism, 2014.

³ For recent accounts, see P. Akhavan, The Rise, and Fall, and Rise, of International Criminal Justice, JICJ 11 (2013), 527; D. Luban, After the Honeymoon: Reflections on the Current State of International Criminal Justice, JICJ 11 (2013), 505.

International criminal justice has seen an astounding revival in the 1990s, after the silence of the Cold War, the fall of communism and revitalization of the collective security system. It has grown in terms of norms, institutions and procedures. Its renaissance was driven by different factors: the wish to respond to the Rwandan genocide and the Yugoslav crisis at the doorsteps of Europe, the rise of global media which exposed atrocities, advocacy by non-governmental organizations, and undoubtedly certain feelings of shame or neglect regarding the failure to prevent crisis.

Like the flight in our tale, international criminal justice is a relatively pioneering enterprise that seeks to cross boundaries. It has a complex relationship with State authority.⁴ It struggles with the tension between judicial independence and stakeholder dependency. International criminal justice seeks to overcome limitations or failings of State authority. But it remains at the same time heavily dependent on State consent and cooperation. It differs from domestic criminal justice.⁵

In domestic criminal systems, the State is typically the guardian of legality, as law-giver, law-adjudicator and law-enforcer.⁶ International criminal justice turns this logic around. International criminal justice is a means to constrain State power.⁷ State agents, or state supported actors, are often involved in the commission of offences. International criminal justice stresses the obligation-related side of sovereignty. It makes state action answerable, not only internally, that is in the domestic realm, but also externally, that is on the international plane. It has a dual function: It serves as a *shield* against violations, and as a *sword* to hold perpetrators accountable.⁸

International criminal tribunals have faced new challenges in the 1990s. The Nuremberg and Tokyo trials targeted a particular category of persons, namely the vanquished enemy party.⁹ Modern tribunals have a more objective focus. They typically look into particular situations of crisis. Interna-

⁴ See generally *B. Broomhall*, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, 2003.

⁵ See *L. Douglas*, *Truth and Justice in Atrocity Trials*, in: W. Schabas (ed.), *Cambridge Companion to International Criminal Law*, 2016, 34, 36 et seq.

⁶ *R. A. Duff*, *Answering for Crime: Responsibility and Liability in the Criminal Law*, 2007, 44 et seq.

⁷ See *F. Mégret*, *ICC, R2P, and the International Community's Evolving Interventionist Toolkit*, *FYBIL* 21 (2010), 21.

⁸ See *F. Tulkens*, *The Paradoxical Relationship between Criminal Law and Human Rights*, *JICJ* 9 (2011), 577, with reference to the imagery used by *Christine van den Wyngaert*.

⁹ See generally *C. Tomuschat*, *The Legacy of Nuremberg*, *JICJ* 4 (2006), 830; *G. Mettraux* (ed.), *Perspectives on the Nuremberg Trial*, 2008; *Y. Tanaka/T. McCormack/G. Simpson* (eds.), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited*, 2010.

tional criminal jurisdiction remained thus largely an experiment, despite the historical precedents.

Many operational aspects were unforeseeable. There were significant doubts whether international tribunals would get off the ground. In the case of the *ad hoc* tribunals, and the International Criminal Court (ICC), many feared that they would not have any cases to deal with.¹⁰ The *ad hoc* tribunals struggled with obstacles of lack of staff and funding, insufficient intelligence cooperation, inability to do investigations, and doubts in relation to deterrence from the start. The ICC was deemed to be crippled at birth, due to its jurisdictional limitations and rejection by Great Powers.¹¹ These fears have proved to be overly pessimistic. All of these tribunals got off the ground – somehow.

The options for pursuing international criminal justice have diversified. They include international tribunals, like the ICC or the *ad hoc* tribunals, hybrid courts, internationalized domestic courts, and regional courts.¹²

The International Criminal Tribunal for the former Yugoslavia (ICTY) has conducted proceedings relating to 154 accused over more than two decades.¹³ All ICTY fugitives have been arrested. The Tribunal has issued 83 sentences, and 19 acquittals. The International Criminal Tribunal for Rwanda (ICTR) has conducted proceedings against 85 accused.¹⁴ Three remaining ICTR fugitives are sought by the Mechanism for International Courts and Tribunals (MICT), the successor court of the ICTY and the ICTR, which combines residual functions with genuine *ad hoc* functions relating to the completion of the work of the two *ad hoc* tribunals (e.g., hearing remaining appeals, holding re-trials or conducting contempt cases).¹⁵

¹⁰ See C. Tomuschat, International Criminal Prosecution: The Precedent of Nuremberg Confirmed, in: R. Clark/M. Sann (eds.), *The Prosecution of International Crimes*, 1996, 17 et seq.

¹¹ See A. Cassese, On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law, *EJIL* 9 (1998), 13.

¹² See also generally, C. Stahn, The Geometry of Transitional Justice, *LJIL* 18 (2005), 425, S. Williams, Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues, 2012.

¹³ ICTY Facts and Figures (September 2016), at <<http://www.icty.org>>.

¹⁴ ICTR Key Figures of Cases (September 2016), at <<http://unictr.unmict.org>>.

¹⁵ MICT was established by Security Council Resolution 1996 (2010). It has its own Statute, its own Rules of Procedure and Evidence, and its own Headquarters Agreement with the host State. See generally G. McIntyre, The International Residual Mechanism and the Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, *GoJIL* 3 (2011), 923.

The ICC has currently nine situations under preliminary examination, including three situations involving P5 Members of the Security Council (Afghanistan, Iraq/UK, Ukraine), and ten situations under investigation.¹⁶ It has finished four trials (*Lubanga*, *Katanga*, *Bemba* and *Al Mahdi*). Further trials are held against *Laurent Gbagbo* and *Blé Goudé* (Côte d'Ivoire), *Bosco Ntaganda* (Democratic Republic of the Congo [DRC]) and former Lord's Resistance Army (LRA) leader *Dominic Ongwen* (Uganda). One accused, *Mathieu Ngudjolo Chui* was acquitted. Cases against two suspects, *Callixte Mbarushimana* (DRC) and *Abu Garda* (Sudan) were not confirmed at pre-trial. Cases against Kenyan President *Kenyatta* and Vice President *Ruto* were terminated. There is a worrying number of proceedings for contempt of court, due to witness interference.¹⁷

The Special Court for Sierra Leone (SCSL) has carried out proceedings against 21 defendants. 16 were convicted, two were acquitted, and three died prior to the conclusions of proceedings.¹⁸

Two other hybrid tribunals have more limited output, partly due to their special context. The Extraordinary Chambers in the Courts of Cambodia (ECCC) are concluding their second case against former members of the Khmer Rouge.¹⁹ The Special Tribunal for Lebanon holds a *trial in absentia* against three defendants (*Ayyash et al.*), relating to one incident, the killing of *Hariri*.²⁰ The Kosovo Specialist Chambers, a mixed regional domestic court, has been vested with jurisdiction to investigate and prosecute transnational and international crimes that have been left aside by the ICTY or preceding European Union Rule of Law Mission (EULEX) panels in Kosovo, including illicit trafficking in human organs.²¹

International criminal jurisdiction is at a critical juncture. There is a certain fatigue towards international criminal jurisdiction. There is little appetite for new *ad hoc* tribunals. United Nations (UN) Assistant Secretary-General *Ralph Zacklin* argued at the turn of the millennium that the *ad hoc* tribunals exemplify an "approach that is no longer politically or financially

¹⁶ ICC, Situations and Cases (September 2016), at <<https://www.icc-cpi.int>>.

¹⁷ Art. 70 charges have been brought *inter alia* in the cases of *Barasa*, *Gicheru* and *Bett* and *Bemba II*. On the power relating to contempt proceedings, see *M. Bohlander*, International Criminal Tribunals and Their Power to Punish Contempt and False Testimony, *Criminal Law Forum* 12 (2001), 91.

¹⁸ See SCSL Facts and Figures (September 2016), at <<http://www.rscsl.org>>.

¹⁹ For a full survey, ECCC, Caseload, at <<https://www.eccc.gov>>.

²⁰ On Special Tribunal for Lebanon (STL) cases (September 2016), see <<http://www.stl-tsl.org>>.

²¹ See generally *S. Williams*, The Specialist Chambers of Kosovo: The Limits of Internationalization?, *JICJ* 14 (2016), 25.

viable”.²² Proposals relating to tribunals concerning to MH17 or Syria failed to gain approval in the Security Council. The ICC faces “heavy waters” with the uneasy relationship with the African Union, the controversy over the withdrawal by several African states,²³ and worsening relations with the Security Council after Darfur and Libya.²⁴ The yearly budget of the ICC’s Office of the Prosecutor is less than the one of major Non-Governmental Organizations (NGOs) such as Human Rights Watch or Amnesty. States have become more reluctant to assert universal jurisdiction.²⁵ There is a new sense of realism, if not skepticism about the future of international criminal jurisdiction.²⁶ Hybridity is witnessing a revival, partly due to concerns relating to the efficiency and cost-effectiveness of international justice, and the desire to connect justice more directly to affected populations. Examples are the Special Criminal Court in the Central African Republic²⁷ which complements ICC action, the Extraordinary African Chambers in Senegal which prosecuted former President *Hissene Habré*²⁸ or the Special Jurisdic-

²² R. Zacklin, *The Failings of Ad Hoc International Tribunals*, JICJ 2 (2004), 541, 545.

²³ Burundi has filed a notice of withdrawal. South Africa and Gambia have filed withdrawal, but revoked their initial requests. The African Union contemplated a collective withdrawal of AU members. On the AU withdrawal strategy, see AU Withdrawal Strategy Document, 12.1.2017, at <<https://www.hrw.org>>. For a discussion, see P. Labuda, *The African Union’s Collective Withdrawal from the ICC: Does Bad Law Make for Good Politics?*, EJIL Talk, 15.2.2017, at <<https://www.ejiltalk.org>>. On the relationship between the ICC and Africa, see G. Werle/L. Fernandez/M. Vormbaum (eds.), *Africa and the International Criminal Court*, 2014; Evelyn A. Ankumah (ed.), *The International Criminal Court and Africa: A Decade On*, 2016.

²⁴ See C. Stahn, *Marital Stress or Grounds for Divorce? Re-Thinking the Relationship Between R2P and International Criminal Justice*, Criminal Law Forum 26 (2015), 13.

²⁵ See general R. O’Keefe, *Universal Jurisdiction. Clarifying the Basic Concept*, JICJ 2 (2004), 735. There is a trend to limit universal jurisdiction to cases where the perpetrator is in the custody of the host State, or where the territorial State or the State of the nationality of the offender is either unwilling or unable to act (“horizontal complementarity”). See C. Rynjaert, *Applying the Rome Statute’s Complementarity Principle: Drawing Lessons from the Prosecution of Core Crimes by States Acting under the Universality Principle*, Criminal Law Forum 19 (2008), 153.

²⁶ See e.g., C. M. Bassiouni, *The ICC – Quo Vadis?*, JICJ 4 (2006), 421; D. Luban (note 3), 505; C. de Vos/S. Kendall/C. Stahn, *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, 2015; C. Schwöbel (ed.), *Critical Approaches to International Criminal Law: An Introduction*, 2014.

²⁷ See G. Musila, *The Special Criminal Court and Other Options of Accountability in the Central African Republic: Legal and Policy Recommendations*, International Nuremberg Principles Academy, Occasional Paper No. 2, 2016.

²⁸ K. Seelinger, *The Landmark Trial Against Dictator Hissène Habré*, Foreign Affairs, 16 June 2016.

tion for Peace which was foreseen under the peace agreement with the Fuerzas Armadas Revolucionarias de Colombia (FARC) in Colombia.²⁹

Even more fundamentally, some of the justifications of international criminal jurisdiction have come under challenge.

First, atrocity crimes are extraordinary, but that the modalities of determining guilt or innocence and sentencing remain relatively ordinary.³⁰ The individualization of responsibility has become the mantra of international criminal justice. It poses an intractable tension: namely to individualize evil that is structural and mostly collective in nature.³¹

Second, international criminal justice is still in search of its purpose. Overall, the number of international cases remains modest. There is no agreement on goals. Like in the domestic system, it is difficult to establish a deterrent effect. The exercise of international jurisdiction may at best serve as a broader form of “social deterrent”.³² In certain cases, it may be a reward, rather than a punishment. Justice procedures struggle to strike a balance between retributive justice, restorative features and fairness towards the defence. The virtue of international criminal jurisdiction lies increasingly in expressivist features, such as the condemnation of certain types of violations or pattern of crime³³ or performative aspects, such as the demonstration of fairness in proceedings.³⁴

Third, some of the effects of international justice remain disputed. Certain critiques, like victor’s justice never disappeared completely, or arise in novel forms.³⁵ It remains a challenge to bring hard cases that threaten pow-

²⁹ For a critique, see Human Rights Watch, Colombia: Prosecution of False Positive Cases under the Special Jurisdiction for Peace, 28.3.2016, at <<https://www.hrw.org>>.

³⁰ See *M. Drumbl*, Atrocity, Punishment and International Law, 2009, 1 et seq.

³¹ This tension has existed since the inception of international criminal law. See *H. Kelsen*, Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals, Cal. L. Rev. 31 (1943), 530. For a modern account, see *M. Ositel*, Making Sense of Mass Atrocity, 2009; *G. Simpson*, Law, War and Crime: War Crimes, Trials and the Reinvention of International Law, 2007, 73; *T. Isaacs/R. Vernon* (eds.), Accountability for Collective Wrongdoing, 2012; *L. Fletcher*, A Wolf in Sheep’s Clothing?, Transitional Justice and the Effacement of State Accountability for International Crimes, Fordham Int’l L. J. 39 (2016), 447.

³² For an account, see *B. Simmons*, Can the International Criminal Court Deter Atrocity?, at <<http://papers.ssrn.com>>.

³³ See generally *R. D. Sloane*, The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law, Stanford J. Int’l L. 43 (2007), 39; *M. de Guzman*, Choosing to Prosecute: Expressive Selection at the International Criminal Court, Mich. J. Int’l L. 33 (2012), 265.

³⁴ See *I. McDermott*, Fairness in International Criminal Trials, 2016.

³⁵ On post-colonial critiques, see *A. Anghie/B. S. Chimni*, Third World Approaches to International Law and Individual Responsibility in Internal Conflicts, Chinese Journal of

erful states.³⁶ There is a fear that global justice may stifle local or domestic responses, or create disparities between victims. In certain instances, the exercise of international criminal justice has hardened opposition between ethnic, or empowered new elites. The role of bystanders, companies, and other drivers of conflict has been largely ignored in international practice.³⁷

It is thus a fine line between the promise of *Daedalus*, and the fate of *Icarus*.³⁸

II. Footprints of International Criminal Justice: Seven Key Moments

Looking back at more than two and a half decades, it is easy to point out the failings of international criminal justice. The list is long. In this contribution, I would like to revisit some of the major challenges of international criminal jurisdiction through the lens of certain key moments in the intellectual history of the project.

There are certain structural parallels in the life of international criminal courts and tribunals. First, all entities had “teething problems”.³⁹ Relatively small cases broke the ice. At the ICTY, it was *Tadić*, a mid-level leader of Bosnian Serb paramilitary forces, at the ICTR, *Akayesu*, a former mayor, and at the ICC, *Lubanga* who is to some extent a variation of *Tadić*.⁴⁰ These cases had an important symbolic effect: They were as much about the identity of the tribunals themselves as about the defendants.

International Law 2 (2003), 77; C. Stahn, Justice Civilisatrice? The ICC, Post-Colonial Theory, and Faces of “the Local”, in: C. de Vos/S. Kendall/C. Stahn (note 26), 46. On the idea of “TWAiLing” international criminal law, see M. Burgis-Kasthala, Scholarship as Dialogue? TWAiL and the Politics of Methodology, JICJ 14 (2016), 921.

³⁶ See e.g., W. Schabas, The Banality of International Justice, JICJ 11 (2013), 545.

³⁷ Some attention to this deficit is devoted in the 2016 Policy Paper of the ICC Office of the Prosecutor on Case Selection and Prioritisation. The OTP argues that in its consideration of gravity, it “will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, *inter alia*, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land”. See OTP, Policy Paper on Case Selection and Prioritisation, 15.9.2016, § 41.

³⁸ See D. Robinson, Inescapable Dyads: Why the International Criminal Court Cannot Win, LJIL 28 (2015), 323.

³⁹ A. Cassese, Is the ICC Still Having Teething Problems?, JICJ 4 (2006), 434; M. Shahabuddeen, Teething Phase of the ECCC, Chinese Journal of International Law 10 (2011), 469.

⁴⁰ *Lubanga* was an easy pick since he was in detention by the DRC authorities.

Second, all tribunals faced what is typically called the “big fish vs. small fish” dilemma.⁴¹ The cardinal question became: Do they have enough “teeth” to go after the most responsible perpetrators? For instance, the completion strategy urged both *ad hoc* tribunals to concentrate on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes, and to transfer cases involving intermediate- and lower-rank accused to competent national jurisdictions. The ICC recognized the need for “a strategy of gradually building (cases) upwards”.⁴² Lastly, all entities have struggled with the question of how to leave a sustainable record in a situation. They have adopted self-centered approaches towards legacy which are in need of refinement.⁴³

Overall, there is no clear linear line of progress between historical exercises and modern experiments, in the sense of a scale of justice models.⁴⁴ The development of international criminal justice rather occurred through particular moments of justice, and trial and error.

In the following, I would like to examine some of the major developments and critiques through a contextualization of seven key cases: (1.)

⁴¹ See *M. O’Brien*, The Big Fish/Small Fish Debate and the Gravity Threshold, JICJ 10 (2012), 525.

⁴² See OTP, Strategic Plan 2012-2015, § 22 (“The Office would therefore first investigate and prosecute a limited number of mid- and high-level perpetrators in order to ultimately have a reasonable chance to convict the most responsible. The Office will also consider prosecuting lower level perpetrators where their conduct has been particularly grave and has acquired extensive notoriety. Such a strategy will in the end be more cost-effective than having unsuccessful or no prosecutions against the highest placed perpetrators.”).

⁴³ It is helpful to distinguish at least, five different categories of legacy: (i) juridified legacy, i.e., legacy based on judicial or legal output. It includes case-law, judgments, files, or symbolic expressivism, such as award of collective reparation; (ii) systemic/institutional legacy, i.e., legacy of courts as institutional role model, including lessons learned; (iii) performative legacy, i.e., legacy based on narratives and counter-narratives in proceedings and the role of actors (e.g., Judges, parties and participants); (iv) documentary and reproductive legacy, i.e., legacy based on reproduction of knowledge, such as memorialization/archiving, outreach or transmission of proceedings (e.g., video-streaming of trials); and (v) receptive legacy, i.e., legacy through discourse and reception. See *C. Stahn*, Re-Constructing History Through Courts? Legacy in International Criminal Justice (9.6.2015), at SSRN: <<http://ssrn.com>> or <<http://dx.doi.org/10.2139/ssrn.2616491>>. On legacy, see also *V. Dittrich*, Legacies in the Making: Assessing the Institutionalized Legacy Endeavour of the Special Court for Sierra Leone, in: *C. Jallow* (ed.), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law*, 2013, 663; *E. Evenson/A. Smith*, Completion, Legacy and Complementarity at the ICC, in: *C. Stahn* (ed.), *The Law and Practice of the International Criminal Court*, 2015, 1259; *S. Kendall/S. Nouwen*, Speaking of Legacy: Toward an Ethos of Modesty at the International Criminal Tribunal for Rwanda, University of Cambridge Legal Studies Research Paper Series, Paper No. 20/2016, April 2016.

⁴⁴ But see *H. Koh*, *International Criminal Justice 5.0*, at <<http://www.state.gov>>.

Tadić, (2.) *Akayesu*, (3.) *Krstić*, (4.) the *Al-Bashir Arrest Warrant*, (5.) *Lubanga*, (6.) *Charles Taylor*, and (7.) *Gaddafi and Al Senussi*. I argue that each of them marks an important turning point for modern understandings of international criminal justice.

1. Moment # 1: *Tadić* (1995) – The Grounding of the Humanist Tradition

One of the most formative moments of the modern era of international criminal justice is the 1995 *Tadić* Interlocutory Appeal Decision.⁴⁵ The *Tadić* case remains far less known to the public than historical judgments like Nuremberg or Tokyo. *Tadić* was a relatively minor figure in the Yugoslav conflict, namely President of a Local Board of the Serb Democratic Party in Kozarac. But the case has shaped the identity of international criminal law like hardly any other.⁴⁶ It posed the ontological question: Where is international criminal justice situated?

International criminal law was largely a legal laboratory in the 1990s. It has its origins in different strands of law, public international law, international humanitarian law, human rights and principles of criminal law. *Tadić* situated international criminal law firmly in the humanist tradition, and most notably the influence of human rights instruments.⁴⁷ This move is reflected in the historical *dictum* that

“A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well.”⁴⁸

⁴⁵ ICTY, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-I-A, Appeals Chamber, 2.10.1995.

⁴⁶ For commentary, see C. Greenwood, International Humanitarian Law and the Tadic Case, EJIL 7 (1996), 265; J. E. Alvarez, Nuremberg Revisited: The Tadic Case, EJIL 7 (1996), 242; M. Swart, Tadic Revisited: Some Critical Comments on the Legacy and the Legitimacy of the ICTY, GoJIL 3 (2011), 985.

⁴⁷ See generally A. Peters, Beyond Human Rights: The Legal Status of the Individual in International Law, 2016.

⁴⁸ *Tadić* 1995 Interlocutory Appeal, § 97.

It was reflected, in modified form, only one year later in the declaration of International Court of Justice (ICJ) President *Bedjaoui* in the *Nuclear Weapons Case*.⁴⁹

Tadić is a “blessing” and a “curse”. It marked the emancipation of the idea of judicial independence from executive power, through its assessment of the legality of the establishment of the Tribunal by the Security Council.⁵⁰ It prompted a justification for a whole range of progressive decisions that have re-shaped the very foundations of international law. But it also created a friction between human rights and criminal justice that remains a challenge until the present. It related the idea of human rights predominantly to humanitarian protection, rather than the protection of the rights of defendants in a liberal justice context.⁵¹

The 1995 Interlocutory Appeal decision is a post-modern reflection of the Nuremberg dilemma.⁵² It derived the idea of individual criminal responsibility in non-international armed conflict from a mix of moral and legal considerations. It relied on “elementary considerations of humanity and common sense” to find that “[w]hat is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife”.⁵³ It applied, what *Theodor Meron* later called a “relaxed approach” towards customary law.⁵⁴ It derived *opinio juris* primarily from primary sources (e.g. treaties), other instruments of international law (e.g. UN documents), judicial decisions, or other instances of practice.⁵⁵ This reasoning provided the conceptual space to Judges to broaden the spectrum of evidence available to establish the existence of a customary rule and to operate “within” rather than “outside” the process of formation of interna-

⁴⁹ Declaration President *Bedjaoui*, appended to the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, delivered on 8.7.1996, § 13 (“The resolutely positivist, voluntarist approach of international law which still held sway at the beginning of the century ... has been replaced by an objective conception of international law, a law more readily seen as the reflection of a collective juridical conscience and as a response to the social necessities of States organized as a community.”).

⁵⁰ *Tadić* 1995 (note 48), §§ 26 et seq.

⁵¹ See generally *D. Robinson*, The Identity Crisis of International Criminal Law, LJIL 21 (2008), 925.

⁵² See above note 9.

⁵³ *Tadić* 1995 (note 48), § 119.

⁵⁴ See *T. Meron*, The Making of International Criminal Justice: A View From the Bench, 2011, 31.

⁵⁵ *Tadić* 1995 (note 48), § 99 (“In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.”).

tional law. *Ad hoc* tribunals have *inter alia* relied on the case-law of domestic courts, military law, UN resolutions or even practice by non-state-actors, such as the findings of the International Committee of the Red Cross (ICRC), sometimes without detailed analysis to what extent they constitute evidence of State practice or *opinio juris* under Art. 38 of the ICJ Statute.⁵⁶

This approach was partly born out of necessity, namely the absence of a body of established norms and rules. It has enabled some of the most far-reaching developments in the interpretation of atrocity crimes. It has facilitated the application of crimes to non-state actors,⁵⁷ and set into motion a trend of the “humanization” of war crimes law.⁵⁸

Certain developments were visionary and legitimized *ex post*.⁵⁹ Key elements of the 1995 *Tadić* decision were codification in the ICC Statute three years later: the wide definition of armed conflict,⁶⁰ including armed violence between States and non-actors, and between organized armed groups, the absence of a link between armed conflict and crimes against humanity, or the idea of individual criminal responsibility in non-international armed conflict.⁶¹ In 2010, the Kampala amendments extended the prohibition of poisonous weapons to non-international armed conflict in the spirit of *Tadić*.⁶² ICC jurisprudence relied on *Tadić* to support the broad interpretation of the policy requirement of crimes against humanity beyond the

⁵⁶ For a discussion, see *L. van den Herik*, *The Decline of Customary International Law as a Source of International Criminal Law*, in: C. Bradley (ed.), *Custom's Future: International Law in a Changing World*, 2016, 230.

⁵⁷ The ICTY acknowledged the possibility that crimes against humanity may be conducted by organizations distinct from a State, see ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgment, 7.5.1997, para. 654, noting that “[i]n this regard the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have de facto control over, or are able to move freely within, defined territory”.

⁵⁸ See generally, *T. Meron*, *The Humanization of International Law*, 2006; *A. Cançado Trindade*, *The Construction of a Humanized International Law*, 2014.

⁵⁹ See *T. Meron*, *Cassese's “Tadić” and the Law of Non-International Armed Conflicts*, in: Lal Chand Vohrah/F. Pocar/Y. Featherstone/O. Fourmy/M. F. Graham/J. Hocking/N. Robson (eds.), *Man's Inhumanity to Man*, 2003, 533 et seq.

⁶⁰ *Tadić* 1995 (note 48), § 70 (“protracted armed violence between governmental authorities and organised armed groups or between such groups within a State”).

⁶¹ For a unified regime of war crimes, see *J. Stewart*, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, *Int'l Rev. of the Red Cross* 85 (2003), 313.

⁶² See Amendments to Art. 8 of the Rome Statute, Resolution RC/Res.5, 10.6.2010, *A. Al-amuddin/P. Webb*, *Expanding Jurisdiction Over War Crimes Under Article 8 of the ICC Statute*, *JICJ* 8 (2010), 1219.

State⁶³ which allows investigation and prosecution of crimes by actors like the Islamic State of Iraq and Syria (ISIS) or Boko Haram.

But this approach had also certain drawbacks. Chinese Judge *Li* criticized the *Tadić* approach as “an unwarranted assumption of legislative power” in his 1995 Separate Opinion.⁶⁴ The *Tadić* precedent created a certain distrust of States vis-à-vis the powers of Judges in the negotiations of the ICC. The drafters curtailed the power of judicial interpretation heavily in the Elements of Crime, partly in fear of judicial overreach.⁶⁵ Moreover, the application of the “relaxed approach” has allowed some questionable judicial creations. I would like to provide two examples.

The first one is the customary foundation of the famous Joint Criminal Enterprise (“JCE”) doctrine, developed in the *Tadić* 1999 decision.⁶⁶ There is no question that JCE I and JCE II, “basic” and “systemic” JCE, are consistent with customary international law. JCE III, the “extended” joint criminal enterprise raises doubts from the perspective of individual culpability (“Just Convict Them All”).⁶⁷ It was repeatedly invoked in jurisprudence of the *ad hoc* tribunals⁶⁸ and the Special Court for Sierra Leone, but rejected by ECCC. The ECCC openly questioned whether the World War II (WWII) authorities and Italian cases cited by *Tadić* supported the customary nature.⁶⁹ None of the twelve Nazi trials conducted under Control

⁶³ See ICC, Kenya Authorization Decision, 3.3.2010, para. 86, fn. 79 (referring to *Tadić* 1997) and 90.

⁶⁴ *Tadić* 1995 (note 48), Separate Opinion, Judge *Li*, § 13.

⁶⁵ *M. Politi*, Elements of Crimes, in: A. Cassese/P. Gaeta/J. R. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2002, 443.

⁶⁶ ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeal Judgment, 15.7.1999, paras. 185 et seq.

⁶⁷ See *M. Elewa Badar*, “Just Convict Everyone!” – Joint Perpetration: From *Tadić* to *Stakić* and Back Again, *IntCrimLRev* 6 (2006), 293. Critically also *M. Sassòli/L. M. Olson*, The Judgment of the ICTY Appeals Chamber on the Merits in the *Tadić* Case, *Int'l Rev. of the Red Cross* 839 (2000), 739; *J. D. Ohlin*, Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise, *JICJ* 5 (2007), 69; *K. Ambos*, Joint Criminal Enterprise and Command Responsibility, *JICJ* 5 (2007), 159, 174.

⁶⁸ See e.g., *V. Haan*, The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia, *IntCrimLRev* 5 (2005), 167; *A. Cassese*, The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise, *JICJ* 5 (2007), 109.

⁶⁹ Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), Case File No: 002/19-09-2007-ECCC-OCIJ, Pre-Trial Chamber, 20.5.2010, paras. 79 et seq.

Council Law No. 10 adopted the concept of liability for foreseeable acts.⁷⁰ There is a risk that once a precedent is established, it is blindly followed.

A second example is the framing of terrorism as an international crime by the Special Tribunal for Lebanon.⁷¹ It relied expressly on the “legal parameters suggested by the ICTY Appeals Chamber in the *Tadić* Interlocutory Decision”, in order to establish the “existence of a customary rule outlawing terrorism”.⁷² It found that such a norm exists at least in time of peace, despite the diversity of definitions at the domestic level.⁷³ Incidents like this highlight the shadow side of *Tadić*. The humanist foundation may be used as a short-cut by courts to find comfortable solutions to complex problems, rather than engaging in the more difficult grounding of normative propositions.

2. Moment # 2: *Akayesu* (1998) – The Turn to Sexual and Gender Based Violence

A second key moment that has shaped the identity and *raison d'être* of international criminal jurisdiction is the *Akayesu* case.⁷⁴ *Akayesu* counts for several “firsts”. It was the first conviction for genocide in the 1990s. Moreover, it addressed an issue that has long remained a blind spot: the role of sexual and gender based violence in mass atrocity. It has been labelled as “the most important decision rendered thus far in the history of women’s

⁷⁰ L. Yanev, The Theory of Joint Criminal Enterprise at the ECCC: A Difficult Relationship, in: S. Meisenberg/I. Stegmüller, The Extraordinary Chambers in the Courts of Cambodia, 2016, 203, 253.

⁷¹ STL, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/I/AC/R176bis, 15.2.2011.

⁷² STL Terrorism (note 71), § 103.

⁷³ STL Terrorism (note 71), § 85: “a number of treaties, UN resolutions, and the legislative and judicial practice of States evince the formation of a general opinio juris in the international community, accompanied by a practice consistent with such opinion, to the effect that a customary rule of international law regarding the international crime of terrorism, at least in time of peace has indeed emerged”.

⁷⁴ See ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2.9.1998. See generally B. van Schaack, Engendering Genocide: The Akayesu Case Before the International Criminal Tribunal for Rwanda, in: D. R. Hurwitz/M. L. Satterthwaite/D. Ford (eds.), Human Rights Advocacy Stories, 2008, 193; C. McKinnon, Defining Rape Internationally: A Comment on Akayesu, Colum. J. Transnat'l L. 44 (2006), 941.

jurisprudence”.⁷⁵ It posed the question: How does international criminal justice deal with some of its existing biases?

There was a sense of historical neglect after World War II. The Tokyo trial was silent on sexual slavery suffered by the so-called “comfort women”. Control Council Law No. 10 recognized rape as a crime against humanity. But the International Military Tribunal at Nuremberg did not expressly prosecute sexual violence. *Akayesu* was the first signature case which established an express connection between the use of sexual violence and the political motives underlying identity-based conflict. It marked the first international trial judgment which defined rape and sexual violence.⁷⁶

The importance of *Akayesu* lies not only in the fact that it addressed a legal gap, but rather how this occurred. The silence was broken through testimony. The Prosecution had failed to bring charges relating to sexual violence against *Akayesu*, partly due to fears of victims to come forward, and lack of sufficient evidence regarding the link between acts of sexual violence and the accused. At trial, one witness, Witness J, stated, almost as an aside, that her six-year-old daughter had been raped. The transcripts reads:

A. I was with my daughter, who had been raped.

Q. When was she raped?

A. They raped her when they had come to kill my father.

Q. How many men did rape your daughter?

A. Three men.

Q. Was this question ever put to you by the investigators of the Tribunal?

A. No, they did not ask me this question. ...

Q. I would like to ask you one question, which I skipped when I was asking concerning the rape of your daughter. How old was your daughter?

A. She was six years old.

Q. I don't have any more questions, Mr. President. Thank you.

MR. PRESIDENT: Your daughter was raped by three men you say? Do you know these three men or some of the three men?

THE WITNESS: Yes, I know them.”⁷⁷

Later, a second witness, witness H, testified at trial. Witness H confirmed that *Akayesu* was present while rapes occurred. None of the parties made

⁷⁵ K. Askin, *Women's Issues in International Criminal Law: Recent Developments and the Potential Contribution of the ICC*, in: D. Shelton (ed.), *International Crimes, Peace and Human Rights: The Role of the International Criminal Court*, 2000, 47, 52.

⁷⁶ See K. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, *AJIL* 93 (1999), 104.

⁷⁷ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Transcript, 27.1.1997, at 00101-00102.

interventions. It was the Judges who asked the witness to elaborate where *Akayesu* was and what he was doing while women were being raped. This broke the silence. A coalition of NGOs (Coalition for Women's Human Rights in Conflict Situations) filed an amicus brief, by which it requested the Chamber to invite the Prosecution to include charges for rape and other serious acts of sexual violence into the indictment.⁷⁸ The Prosecution charged the crime against humanity of rape, the crime against humanity of inhumane acts, and the war crime of outrages upon personal dignity.

The Trial Chamber found *Akayesu* guilty of crimes against humanity of rape and "other inhumane act".⁷⁹ It added that

"[s]exual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole".⁸⁰

The Chamber noted that the "interest shown in this issue by non-governmental organizations" is "indicative of public concern over the historical exclusion of rape and other forms of sexual violence from the investigation and prosecution of war crimes".⁸¹ *Akayesu* is thus partly a result of the active role of Judges at the trial and the influence of the NGO community. It prompted former Prosecutor *Richard Goldstone* to create a sexual violence investigation team at the *ad hoc* tribunals. The *Tadić* trial at the ICTY marked the first case which examined charges of sexual assault against men.⁸²

These developments created a new sensitivity to the role of sexual and gender based violence in atrocities. The Chief Prosecutor of the Special Court for Sierra Leone integrated charges of sexual violence into virtually

⁷⁸ Coalition for Women's Human Rights in Conflict Situations, Amicus Brief Respecting Amendment of the Indictment and Supplementation of the Evidence to Ensure the Prosecution of Rape and Other Sexual Violence within the Competence of the Tribunal, 27.5.1997, at <<https://www.essex.ac.uk>>.

⁷⁹ "The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. ... The Tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence were occurring". *Prosecutor v. Akayesu* (note 74), §§ 687 et seq.

⁸⁰ *Prosecutor v. Akayesu* (note 74), § 731.

⁸¹ *Prosecutor v. Akayesu* (note 74), § 417.

⁸² ICTY, *Prosecutor v. Tadić* (note 57). See generally *S. Sivakumaran*, Sexual Violence Against Men in Armed Conflict, EJIL 18 (2007), 253.

all indictments, including novel paradigms, such as “forced marriages”.⁸³ More than 30 persons have been convicted by the ICTY for crimes involving sexual violence.⁸⁴ The ICC Statute contains one of the most modern and extensive list of sexual and gender-based crimes⁸⁵ that is far ahead of many domestic jurisdictions. In the *Ntaganda* case, the Pre-Trial Chamber of the ICC recognized that sexual violence crimes committed against child soldiers by members of their own military force can constitute war crimes.⁸⁶ It noted:

“to hold that children under the age of 15 years lose the protection afforded to them by IHL merely by joining an armed group, whether as a result of coercion or other circumstances, would contradict the very rationale underlying the protection afforded to such children against recruitment and use in hostilities”.⁸⁷

This idea of “intra-party protection”⁸⁸ deviates from a purely reciprocity based understanding of obligations under international humanitarian law.⁸⁹ In March 2016, the ICC entered its first conviction relating to sexual and gender based crimes. Former Congolese Vice President *Jean-Pierre Bemba* was convicted for rape as a war crime and crimes against humanity, due to

⁸³ See generally *C. Aptel*, Child Slaves and Child Brides, JICJ 14 (2016), 305; *V. Oosterveld*, The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments, Cornell Journal of International Law 44 (2011), 49, 64 et seq.

⁸⁴ See ICTY, Crimes of Sexual Violence, In Numbers, at <<http://www.icty.org>>. For a full account, see *S. Brammertz/M. Jarvis* (eds.), Prosecuting Conflict-Related Sexual Violence at the ICTY, 2016.

⁸⁵ Sexual and gender based crimes are included in the list of crimes against humanity and war crimes. Gender is listed as a ground of persecution. The Elements of Crime offer a possibility to consider acts of sexual violence as an element of genocide. For a survey of prosecutorial strategy, see OTP Policy Paper on Sexual and Gender Based Crimes, June 2014, at <<https://www.icc-cpi.int>>.

⁸⁶ ICC, *Prosecutor v. Ntaganda*, Decision Pursuant to Art. 61(7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda (“Confirmation of charges decision”), ICC-01/04-02/06-309, 9.6.2014, Pre-Trial Chamber II.

⁸⁷ *Prosecutor v. Ntaganda* (note 86), § 78.

⁸⁸ See *S. Sivakumaran*, Law of Non-International Armed Conflict, 2012, 246 et seq.

⁸⁹ This deviates from the case law of the SCSL which held that the “law of international armed conflict was never intended to criminalize acts of violence committed by one member of an armed group against another, such conduct remaining first and foremost the province of the criminal law of the State of the armed group concerned and human rights law”. See SCSL, *Prosecutor v. Sesay, Kallon, Gbao* (RUF Case) (SCSL-04-15-T), Trial Chamber, 2.3.2009, § 1453. For a discussion, see *T. Rodenhäuser*, Squaring the Circle? Prosecuting Sexual Violence against Child Soldiers by their “Own Forces”, JICJ 14 (2016), 171.

his failure to prevent or punish such crimes as a military commander.⁹⁰ It included a conviction for sexual violence against men as rape.⁹¹ *Bemba* was sentenced to 18 years for rape – the highest sentence pronounced at the ICC.

But many problems remain. First of all there are evidentiary problems. It remains difficult to bring out evidence related to such charges at trial, and to link perpetrators to the crimes, without specialized expertise and long term engagement in a situation. At the ICC, charges for sexual violence were brought, but failed to be established in the trials of *Germain Katanga* and *Mathieu Ngudjolo*. Similarly, German courts dropped charges for sexual violence in the first proceedings under the German International Crimes Act related to the responsibility of two Rwandan leaders in the Congo conflict, in light of evidentiary concerns and the expeditiousness of proceedings.⁹²

Second, there are certain deeper concerns regarding the trend to “mainstream’ sexual and gender based violence” in the “fight against impunity”.⁹³ International criminal justice and gender discourses do not always coincide. The criminal justice trial is not necessarily well equipped to mete out gender-based inequalities. It is typically perpetrator-focused, rather than victim-focused, and gender-inclusive.

Critics claim that the representation of sexual violence in atrocity trials reduces the complexity of victim identities.⁹⁴ The justice lens portrays them predominantly as vulnerable or passive “victims”, rather than as “survivors” or agents in their community. The special treatment of victims of sexual violence may create inequalities among victim populations. Moreover, the criminal trial typically struggles to target the societal norms and stereotypes in societies that facilitate such crimes.

Akayesu illustrates thus both: the ability of international criminal jurisdictions to mitigate certain historical silences, and their inherent limitations. One key lesson is that international criminal jurisdictions are distinct from

⁹⁰ ICC, *Prosecutor v. Bemba*, Judgment pursuant to Art. 74 of the Statute, ICC-01/05-01/08, 21.3.2016.

⁹¹ *Prosecutor v. Bemba* (note 90), § 100. See generally *S. Sivakumaran* (note 82), 253.

⁹² See ECCHR, *Weltrecht in Deutschland? Der Kongo-Kriegsverbrecherprozess: Erstes Verfahren nach dem Völkerstrafgesetzbuch*, 2016, 131 et seq.

⁹³ See *C. S. Mibenge*, *Sex and International Tribunals: The Erasure of Gender from the War Narrative*, 2014.

⁹⁴ On the outfalls of imagery, see *M. Mutua*, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, *Harv. Int'l L. J.* 42 (2001), 201, 204.

human rights mechanisms, and that they must be more attentive to the narratives and unintended effects that they may produce in local societies.

3. Moment # 3: *Krstić* (2001) – The “New Law on Genocide”

The third key moment is the famous *Krstić* judgment of the ICTY.⁹⁵ It is the ICTY’s first genocide conviction. It branded Srebrenica as genocide. It is illustrative of the close nexus between history and justice. It illustrates the temptation of international criminal justice to build legacy through law.⁹⁶

Neither Nuremberg nor Tokyo had pronounced convictions for genocide. The ICTY prosecution was under pressure to bring genocide charges. *Krstić* is the case which facilitated a whole series of genocide convictions, including later rulings such as *Tolimir*⁹⁷ or *Karadžić*⁹⁸ which are part of the legacy of the tribunal. The attempt to bring atrocities within the realm of the law is expressed in the unusually strong words of the Appeals Chamber. It affirmed “that the law condemns, in appropriate terms, the deep and lasting injury inflicted”, and recalled the need to call “the massacre at Srebrenica by its proper name: genocide”.⁹⁹

Srebrenica differed from systematized and massive group destruction that characterized the holocaust. *Krstić* extended the protective scope of genocide through a dynamic and fluid approach to the construction of genocidal intent. It set in motion a new line on genocide law.

Many courts have grappled with the question how to establish genocide. *Krstić* made at least two key contributions to the interpretation of genocide law. The first one relates to geographical scope of genocide. *Krstić* accepted the argument that genocide may occur even when the exterminatory intent extends only to a limited geographic zone – something that has been called “localized genocide”.¹⁰⁰ The size of the Bosnian Muslim population in Sre-

⁹⁵ ICTY, *Prosecutor v. Krstić*, IT-98-33-T, Judgment, 2.8.2001 (*Krstić* Trial Judgment); *Prosecutor v. Krstić*, IT-98-33-A, Judgment, 19.4.2004 (*Krstić* Appeal Judgment).

⁹⁶ See generally *L. Douglas*, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust*, 2001; *R. Wilson*, *Writing History in International Criminal Trials*, 2011.

⁹⁷ ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-A, Appeal Judgment, 8.4.2015.

⁹⁸ ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Judgment, 24.3.2016.

⁹⁹ *Krstić* Appeal Judgment (note 95), §§ 37-38.

¹⁰⁰ *W. Schabas*, *Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia*, *Fordham Int’l L. J.* 25 (2001), 23, 42.

brenica amounted to approximately forty thousand people prior to its capture by the Army of the Republika Srpska (VRS) forces in 1995. This number constituted only a fraction of the small percentage of the overall Muslim population of Bosnia and Herzegovina at the time. *Krstić* acknowledged expressly that the importance of the Muslim community of Srebrenica “is not captured solely by its size.”¹⁰¹

The Trial Chamber stated:

“Physical destruction may target only a part of the geographically limited part of the larger group because the perpetrators of the genocide regard the intended destruction as sufficient to annihilate the group as a distinct entity in the geographic area at issue.”¹⁰²

This point was reaffirmed on appeal:

“By seeking to eliminate a part of the Bosnian Muslims, the Bosnian Serb forces committed genocide. They targeted for extinction the forty thousand Bosnian Muslims living in Srebrenica, a group which was emblematic of the Bosnian Muslims in general.”¹⁰³

This interpretation is compatible with the victim-centered framing of genocide.¹⁰⁴ It facilitates conviction of mid or low level perpetrators, such as municipal leaders. But it lowered the importance of a genocidal plan or policy, compared to previous precedents.

Second, *Krstić* accepted that genocidal intent may be shown through circumstantial evidence. In the holocaust, and Rwanda, the killing of women and children was used as an argument to support the establishment of genocidal intent. In the context of Srebrenica, the order to kill only related to the destruction of around 7,000 militarily aged men and boys in Srebrenica. The Prosecution argued that the intent to kill the men and boys was to eliminate the community as a whole. It claimed that the

“community survives in many cases only in the biological sense, nothing more. It’s a community in despair; it’s a community clinging to memories; it’s a community that is lacking leadership; it’s a community that’s a shadow of what it once was”¹⁰⁵.

¹⁰¹ *Krstić* Appeal Judgment (note 95), § 15.

¹⁰² *Krstić* Trial Judgment (note 95), § 590.

¹⁰³ *Krstić* Appeal Judgment (note 95), §§ 37-38.

¹⁰⁴ See generally C. Kress, The ICC’s First Encounter with the Crime of Genocide: The Case against Al Bashir, in: C. Stahn, Law and Practice (note 43), 669; K. Ambos, What Does “Intent to Destroy” in Genocide Mean?, Int’l Rev. of the Red Cross 91 (2009), 833.

¹⁰⁵ *Krstić* Trial Judgment (note 95), § 592.

The *Krstić* judgment used three main arguments:

First, Bosnian Serb forces could not have failed to know “that this selective destruction of the group would have a lasting impact upon the entire group”. Their death “precluded any effective attempt by the Bosnian Muslims to recapture the territory”.¹⁰⁶

Second, “the Bosnian Serb forces had to be aware of the catastrophic impact that the disappearance of two or three generations of men would have on the survival of a traditionally patriarchal society”.¹⁰⁷

Third, “the combination of those killings with the forcible transfer of the women, children and elderly would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica.”¹⁰⁸

This inference of intent was not without critics. For instance, *William Schabas* argued that this reasoning “distort[ed] the definition unreasonably”.¹⁰⁹ He argued that the intent to have a “lasting impact on the group” is not the same as physical destruction, and that there may have been other plausible explanations for the destruction of 7,000 men and boys in Srebrenica.¹¹⁰

But the *Krstić* interpretation marked to some extent a point of no return, both in moral and in legal terms. No other Chamber has called into question the qualification of Srebrenica as genocide. In 2007, the ICJ showed a great degree of deference on this point to the ICTY in the *Genocide* case. It relied heavily on *Krstić* and found that the “Court has no reason to depart from the Tribunal’s determination that the necessary specific intent (*dolus specialis*) was established” in relation to Srebrenica.¹¹¹ In 2009, the ICC used a similar methodology in the arrest warrant against *Al Bashir*. In 2012, this argument was extended to Žepa —the other Bosnian-Muslim “safe zone” overtaken in July 1995 by the Bosnian-Serbs. The *Tolimir* Trial Chamber held, by majority, that the removal of the Bosnian Muslim civilian population from Žepa, the demolition of their homes and the mosque, and the killing of three of the most prominent local leaders, amounted to genocide. In the *Karadžić* trial judgment, the Chamber made a double inference. It first inferred knowledge from coded conversations with *Miroslav Deron-*

¹⁰⁶ *Krstić* Trial Judgment (note 95), § 595.

¹⁰⁷ *Krstić* Trial Judgment (note 95), § 595.

¹⁰⁸ *Krstić* Trial Judgment (note 95), § 595.

¹⁰⁹ *W. Schabas* (note 100), 47.

¹¹⁰ *W. Schabas* (note 100), 46 et seq.

¹¹¹ ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia*), Judgment of 26.2.2007, §§ 295, 296.

jić, the civilian administrator of the Srebrenica region.¹¹² It then derived *Karadžić's* intent from the inferred knowledge, implying that he must have had genocidal intent.¹¹³

This “new law on genocide” is built on a paradox. It seeks to reinforce the prohibition of genocide, and to express its extraordinary nature in legal judgment, in order to bring some sense of closure to historical injustice. But it weakens at the same time the nature of the underlying norm. An interpretation of genocidal intent which infers the intent to destroy largely from circumstantial evidence, such as elements of a genocidal plan or policy, is *de facto* not far from the alternative approach, the knowledge-based approach, which argues that perpetrator’s knowledge of the specific intent of the main perpetrators and organisers is sufficient.¹¹⁴ Moreover, it makes the distinction to crimes against humanity more fluid. It implies ultimately that genocide is not necessarily more grave than crimes against humanity.

4. Moment # 4: *Bashir Arrest Warrant* (2010) – Law vs. Politics

A fourth symbolic moment of the past two and a half decades is the issuance of the arrest warrant by the ICC Pre-Trial Chamber against *Omar Al Bashir*. The warrant represented the hope that law would prevail over politics. It posed the hard question to what extent international criminal justice can overcome the constraints of *Realpolitik*.

The arrest warrant was prompted out of a sense of frustration over lack of cooperation with the ICC in the Darfur situation. It is part of a certain trend to charge acting heads of state (*Al Bashir, Kenyatta*). It was guided by the rationale to address one of the most fundamental challenges of international criminal justice, namely its selective application. If political leaders remain out of reach, international criminal justice loses much of its impetus and credibility.

The decision of the ICC Prosecutor to charge heads of state was a bold move. But it did not come out of the blue. The *Pinochet* decision of the House of Lords had made it clear that former heads of State are not immune

¹¹² See *Karadžić Trial Judgment* (note 98), § 5805.

¹¹³ *Karadžić Trial Judgment* (note 98), § 5830. For a discussion, see *M. Sterio*, *The Karadžić Genocide Conviction: Inferences, Intent and the Necessity to Redefine Genocide*, *Emory Int'l L. Rev.* 31 (2017), 271, 289.

¹¹⁴ See *A. Greenawalt*, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, *Colum. L. Rev.* 99 (1999), 2259.

from prosecution.¹¹⁵ *Pinochet* sent a message that international criminal law can target political elites. Criminologists began to observe a “Pinochet syndrome”¹¹⁶, whereby heads of states would face prospects of arrest when travelling abroad. The ICJ *Arrest Warrant* decision in 2000 marked the beginning of a doctrine of exceptionality in relation to international criminal jurisdiction regarding immunity.¹¹⁷ In 2001, *Milošević* was arrested by Serb authorities and transferred to the ICTY, under pressure of the EU. This marked a symbolic moment for the ICTY. In 2004, the Special Court for Sierra Leone relied on the infamous para. 61 of the *Arrest Warrant* decision to dismiss immunity claims by *Charles Taylor*, even before his arrest and initial appearance in spring 2006.¹¹⁸ The referral of the Darfur situation by the Security Council to the ICC gave a new boost to the Court. *Christian Tomuschat* qualified it as “a litmus test for the viability of the system of international criminal justice launched at Nuremberg”.¹¹⁹

If it was indeed such a test, it failed to a large extent. It certainly produced more unintended, than intended effects. This failure may be explained by several reasons.

First, the success of the Darfur referral depended on a constructive interaction between the ICC and the Security Council. This relationship started on a wrong premise. The referral shifted of the financial burdens on the ICC despite the contrary assumption in Art. 115 (b) of the Statute.¹²⁰ The cooperation duties of States not Parties to the Statute were framed in “soft” language. When the ICC required Council support to enforce warrants of arrest or deal with non-compliance by States with requests for cooperation, it was largely left in the dark. In the case of Libya, the ICC came to be seen as the prolonged of military intervention. This created a sense of divide. As former ICTY Prosecutor *Louise Arbour* noted, there is fear that “in the end,

¹¹⁵ House of Lords, *R v. Bow Street Magistrates’ Court ex parte Pinochet (No. 3)*, 24.3.1999, ILM 38 (1999), 581; *J. C. Barker*, The Future of Former Head of State Immunity after ex parte Pinochet, ICLQ 48 (1999), 937; *A. Bianchi*, Immunity versus Human Rights: The Pinochet Case, EJIL 10 (1999), 237.

¹¹⁶ *B. Crossette*, The World; Dictators Face The Pinochet Syndrome, New York Times, 22.8.1999, at <<http://www.nytimes.com>>.

¹¹⁷ See ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, 14.2.2002, § 61.

¹¹⁸ SCSL, *Prosecutor v. Taylor*, Decision on Immunity from Jurisdiction, SCSL-2003-01-1, 31.5.2004, § 50.

¹¹⁹ *C. Tomuschat* (note 9), 844.

¹²⁰ Art. 115 (b) makes reference to “funds provided by the United Nations ... in particular in relation to the expenses incurred due to referrals by the Security Council”.

Council referrals may in fact underscore the Court's impotence rather than enhance its alleged deterrent effect".¹²¹

Second, the ICC struggled to offer a convincing explanation for the inapplicability of immunities. The existing law allows the possibility to issue charges and warrants of arrest against highest political leaders. Neither Art. 27 of the ICC Statute, nor the ICJ *Arrest Warrant* decision preclude such action, in relation to a situation in a state party (e.g. Kenya) or a non-state party that is subject to a Security Council referral (Sudan). But ICC jurisprudence has offered conflicting readings as to how the Darfur referral affects immunity conflicts in the relationship between ICC States Parties and Sudan. There are at least three readings.

According to one reading, reflected in early jurisprudence, the referral entails the applicability of the ICC Statute to Sudan, including the immunity exception under Art. 27.¹²² This interpretation relies on the idea that it would be unreasonable to expect that the Security Council wanted heads of States to be treated differently.¹²³ Under this reading, States Parties facing arrest would face no conflict as to head of State immunity.¹²⁴

According to a second reading, reflected in the early Malawi/Chad decision, there is no conflict because the tribunal exception under para. 61 of the ICJ *Arrest Warrant* decision has crystallized into customary law, also in re-

¹²¹ See *L. Arbour*, *Doctrines Derailed?: Internationalism's Uncertain Future*, at <<http://www.crisisgroup.org>>.

¹²² ICC, Pre-Trial Chamber I, *Prosecutor v. Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against *Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, 4.3.2009, § 45 ("by referring the Darfur situation to the Court, pursuant to article 13(b) of the Statute, the Security Council of the United Nations has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole").

¹²³ See also ICC, *Prosecutor v. Al Bashir*, Decision on the Cooperation of the Democratic Republic of the Congo Regarding *Omar Al Bashir's* Arrest and Surrender to the Court, ICC-02/05-01/09-195, 9.4.2014, § 29 ("[B]y issuing Resolution 1593 (2005) the SC decided that the 'Government of Sudan [...] shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution. Since immunities attached to Omar Al Bashir are a procedural bar from prosecution before the Court, the cooperation envisaged in said resolution was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities. Any other interpretation would render the SC decision requiring that Sudan 'cooperate fully' and 'provide any necessary assistance to the Court' senseless").

¹²⁴ *D. Akande*, *The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities*, JICJ 7 (2009), 333.

relationship to non-state parties to the ICC.¹²⁵ This claim is a progressive reading that stands in contrast to practice. It would imply the inapplicability of immunity also in the absence of a Security Council referral.

According to a third theory, the Security Council referral contained an implicit waiver of immunity.¹²⁶

This lack of clarity has made the ICC vulnerable to legal critique. South Africa sought further clarification of the relationship between Art. 27 and Art. 98 of the Statute.¹²⁷ The African Union (AU) called into question the immunity from ICC prosecution for sitting heads of state and other senior government officials.¹²⁸ The ICC opened non-compliance proceedings against South Africa under Art. 87 (7) of the Statute, based on the failure to

¹²⁵ ICC, Pre-Trial Chamber I, *Prosecutor v. Al Bashir*, Decision Pursuant to Art. 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*, ICC-02/05-01/09, 12.12.2011, § 43 (“[T]he Chamber finds that customary international law creates an exception to Head of State immunity when international Courts seek a Head of State’s arrest for the commission of international crimes”).

¹²⁶ ICC, Pre-Trial Chamber II, *Prosecutor v. Al Bashir* (note 123), § 29 (“the SC implicitly waived the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State”). See also Pre-Trial Chamber II, *Prosecutor v. Al Bashir*, Decision following the Prosecutor’s request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender *Omar Al Bashir*, ICC-02/05-01/09, 13.6.2015, §§ 6-8, and the submissions by the OTP, Prosecution’s Submissions in advance of the public hearing for the purposes of a determination under Art. 87(7) of the Statute with respect to the Republic of South Africa in the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, 17.3.2017, § 109.

¹²⁷ See Request by South Africa for the inclusion of a supplementary item in the agenda of the fourteenth session of the Assembly titled “Application and Implementation of Article 97 and Article 98 of the Rome Statute”, ICC-ASP/14/35, 27.10.2015. In its *Al Bashir* decision in March 2016, the South African Court was unable to hold that “there is an international crimes exception to the immunity and inviolability that heads of state enjoy when visiting foreign countries and before foreign national Courts”. It grounded the duty of South Africa to arrest in domestic legislation, namely the South African Implementing Legislation of the ICC Statute. This reasoning limits the effectiveness of the ICC regime, since it makes enforcement dependent on domestic law. Supreme Court of Appeal of South Africa, *The Minister of Justice and Constitutional Development v. The Southern African Litigation Centre*, Case No. 867/15, 15.3.2016, ZASCA 17 (2016).

¹²⁸ Art. 46*Abis* of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights provides: “No charges shall be commenced or continued before the court against any serving AU Head of State of Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.” See generally *R. Pedretti, Immunity of Heads of State and State Officials for International Crimes*, 2015.

arrest and surrender *Al Bashir* at the AU Summit in Johannesburg in June 2015.¹²⁹

Finally, the ICC became an object of “lawfare” after the cases against *Kenyatta* and *Ruto*. The cumulation of the *Al Bashir* warrant and the success of *Kenyatta* and *Ruto* in the 2013 Kenyan elections entrenched the ICC more deeply into politics than anticipated. The ICC is both a “victim” and “culprit” in this. Opponents of the Court mixed objections against the functioning of the ICC with broader discontents about the inability or reluctance of the Security Council to listen to African concerns. Some aspects of this critique are based on false premises, such as the neglect of differentiated positions inside African discourse, and existing support in civil society.¹³⁰ But the Court was unable to address these critiques effectively. It narrowed concerns about its selective focus too easily to perception problems. It resorted to technical legal concepts, such as gravity to explain the choice of situations and cases. These arguments alone did not suffice to counter critiques.

Ultimately, the targeting of heads of State did not strengthen the credibility of the ICC system, but weakened it. Justice became hijacked by politics. It promoted the creation of new regional mechanisms, such as the Criminal Chamber of the African Court of Justice and Human Rights, to shield African leaders from investigation and prosecution by the ICC.¹³¹

There are several lessons to learn from this experience. First, the traditional idea that Security Council referrals increase the effectiveness of international criminal justice has come under challenge. This relationship evolved essentially into a “one-way” street, namely as a “drop box” for the Council. This has turned against the ICC.

¹²⁹ Pre-Trial Chamber II, *Prosecutor v. Al Bashir*, Order Requesting Submissions from the Republic of South Africa for the purposes of proceedings under Art. 87 (7) of the Rome Statute, ICC-02/05-01/09, 4.9.2015. For a discussion, see *D. Tladi*, The Duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law: A Perspective from International Law, JICJ 13 (2015) 1027.

¹³⁰ See *O. A. Maunganiidze/A. du Plessis*, The ICC and the AU, in: C. Stahn, Law and Practice (note 43), 65.

¹³¹ The complementarity clause of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Art. 46H) lacks any reference to the ICC. The immunity provision under Art. 46*Abis* stands in contrast to Art. 27 of the ICC Statute, and the Statutes of other international criminal courts and tribunals. For a critique, see *B. Chigara/C. M. Nwankwo*, To Be or Not to Be? The African Union and Its Member States Parties’ Participation as High Contracting States Parties to the Rome Statute of the International Criminal Court, 1998, Nordic Journal of Human Rights 33 (2015), 243.

Second, it has become clear that it is risky to rely on calculated political effects to motivate prosecutorial choices, such as in the Kenyan context.¹³² Placing human security concerns at the center of justice-related decision-making processes may ultimately lead to a mission creep of international criminal justice.

Third, the timing of arrest warrants against high-level officials requires more care in prosecutorial strategy. The actual benefits of existing warrants have been minimal, and the political costs have been high. It may be more wise to build a broader pool of cases, before bringing such charges, or to proceed after they have lost power.

Fourth, it is important to re-think the role of regional organizations in international criminal justice. There seems to be some support for the idea that regionalism can have benefits for international criminal justice enforcement. Such advantages include geographical proximity to crimes, and the ability to reflect specific regional interests or priorities. But the Malabo Protocol has shown that regional approaches may also have significant downsides in relation to the definition of the crime base, complementarity or immunities.

5. Moment # 5: *Lubanga* (2012) – The Global Victim as Constituency?

A fifth crucial moment is the *Lubanga* trial. The judgment itself did not bring much innovation. It was built on a narrow set of charges relating to crime of the use of child soldiers in conflicts. The contours of this type of criminality have been extensively litigated before the Special Court for Sierra Leone.¹³³ But the trial marked a turning point in relation to the determination of the constituency of international criminal justice, in particular the turn to victim's rights.

Traditionally, the justice process is primarily related to the protection of fairness, in particular fairness towards the defendant. International criminal jurisdictions derive particular legitimacy from the protection of the interests of victims. They claim to dispense justice for victims, and not only for the

¹³² ICC action was guided to “transform Kenya into Sweden”. See Interview, 22.1.2014, at <<http://www.rnw.nl>>.

¹³³ See *N. Novogrodsky*, Litigating Child Recruitment Before the Special Court for Sierra Leone, *San Diego International Law Journal* 7 (2006), 421; *M. Drumbl*, Reimagining Child Soldiers in International Law and Policy, 2012.

community of states.¹³⁴ *Lubanga* was the first international trial in which victims acted as active participants in the criminal process.¹³⁵ It posed the question how victim's rights can be reconciled with the interests of the Defence.¹³⁶

The experiences are mixed. *Lubanga* marked in many ways an emancipation from the *ad hoc* and hybrid tribunals. The ICC discarded not only the doctrine of JCE and applied its own methodology in relation to modes of liability.¹³⁷ It sought to pursue a thicker vision of justice which embraces certain restorative elements, in addition to classical punishment and retribution.¹³⁸ Victims were no longer deemed to be spectators or objects of trials, but agents in criminal litigation.

But this has caused certain problems.¹³⁹ The ICC had to experiment with vetting procedures. In existing practice, the ICC has applied no less than five different models to organize victim participation. The system creates certain forms of prioritization or hierarchization among victims.¹⁴⁰ It encompasses at least three different classes of victims: a broader category of victims whose general victimhood is testified in abstract terms, namely victims of situation-related violence, victims of the case, whose status is individualized, and victims entitled to reparation. This system creates equality concerns. As one victim put it:

“I am concern[ed] of what to tell my community. How do I explain that you selected few victims? Many victims will be left aside of this process. Everyone I know would like to have a say in this process.”¹⁴¹

¹³⁴ C. Tenove, International Criminal Justice as a Transnational Field: Rules, Authority and Victims, *International Journal of Transitional Justice* 7 (2013), 393.

¹³⁵ For an account of jurisprudence, see S. Vasiliev, Victim Participation Revisited – What the ICC Is Learning About Itself, in: C. Stahn, *Law and Practice* (note 43), 1133.

¹³⁶ See generally S. Zappalà, *The Rights of Victims v. the Rights of the Accused*, *JICJ* 8 (2010), 137.

¹³⁷ See E. van Sliedregt, *Perpetration and Participation in Article 25 (3)*, in: C. Stahn, *Law and Practice* (note 43), 499.

¹³⁸ On victims and truth, see S. Stolk, *The Victim, the International Criminal Court and the Search for Truth*, *JICJ* 13 (2015), 973.

¹³⁹ For a critical account, see C. van den Wyngaert, *Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge*, *Case W. Res. J. Int'l L.* 44 (2011,) 475; C. P. Trumbull, *The Victims of Victim Participation in International Criminal Proceedings*, *Mich. J. Int'l L.* 29 (2007), 777.

¹⁴⁰ S. Kendall/S. Nowwen, *Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood*, *Law & Contemp. Probs* 76 (2013), 235.

¹⁴¹ See ICC, *Turning the Lens: Victims and Affected Communities on the Court and the Rome Statute System*, RC/ST/V/INF.2, 30.5.2010, 5.

In terms of substance, victims mainly complemented the Prosecution perspective in relation to charges, evidence or harm. The judges introduced safeguards to prevent that victims serve as a “second Prosecutor”. They allowed victims to file additional evidence only in an indirect way, namely through the power of judges.¹⁴² But doubts remain to what extent victims added greatly to the *Lubanga* trial beyond shadowing the Prosecution.

There is a risk that victim participation may raise unrealistic expectations. Many victims seek to participate because of the prospect of reparation. But the reparation system is limited and quite lengthy.¹⁴³ Reparations proceedings are a *sui generis* type of procedure that follows judgment and sentencing.

Typically, need and demand exceeds capacity. The ability of perpetrators to do harm is greater than their capacity to repair it. In certain contexts, such as *Bemba*, the ICC has seized bank accounts, real estate and property for purposes of reparation. But in many cases, defendants are indigent. The budget of the ICC Trust Fund amounted to around € 12,7 million in 2016 – for all ICC situations.¹⁴⁴ Only a fraction, i.e. € 4,8 million, is reserved for reparations. This makes it necessary to consider a broad range of measures of collective reparation, such as education, memorials or health programs for the benefit of victim populations.

It is unclear how the ICC can deal with reparation if the number of victims moves up from several hundred to several thousands. Some voices argue that it might be best to leave reparative measures entirely to the Trust Fund.¹⁴⁵ One key challenge is to increase the number of voluntary contributions to the Trust Fund.

¹⁴² The Appeals Chamber ruled that the Statute and the Rules do not “preclude the possibility for victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence during the trial proceedings”. But it linked this possibility to the authority of the Trial Chamber to request the presentation of all evidence necessary for determining the truth pursuant to Article 69(3). See *Prosecutor v. Lubanga*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18.1.2008, ICC-01/04-01/06-1432, 11.7.2008, para. 3

¹⁴³ See *C. Stahn*, Reparative Justice after the Lubanga Appeal Judgment: New Prospects for Expressivism and Participatory Justice or “Juridified Victimhood” by Other Means?, JICJ 13 (2015), 801 et seq.

¹⁴⁴ ICC Press Release, New TFV Board of Directors: Prioritizing Victim Survivors in International Justice, ICC-TFV-20160426-PR1210, 26.4.2016.

¹⁴⁵ See *C. van den Wyngaert* (note 139), 495.

Even more fundamentally, ICC practice is marked by a gap between promise and expectation.¹⁴⁶ There is a risk that the cause of victims is instrumentalized or misrepresented in the practice of international criminal justice.¹⁴⁷ This may be counterproductive in the long run.

6. Moment # 6: *Charles Taylor* Judgment (2013) – Even-Handedness and Dilemmas of Accessorial Liability

The sixth moment is the *Charles Taylor* judgment. It marks the first completed criminal appeals process relating to a former Head of State, and the hallmark of the activity of the Special Court for Sierra Leone.¹⁴⁸ Initially, the creators of the Special Court wanted it to deliver justice within three years. But like all other temporary mechanisms, it turned out to last much longer. It took more than a decade to accomplish its mandate.

The *Taylor* moment is special since it addressed two fundamental challenges of international criminal justice: The argument of victor's justice and the role of remote agents.

Victor's justice is one of the longest standing critiques of international criminal justice.¹⁴⁹ Both Tokyo and Nuremberg stand as examples. Even-handedness of prosecution has remained a challenge. Over two thirds of the ICTY accused were Serbs. The acquittals of Croatian General *Gotovina* and Kosovo Albanian commander *Haradinaj* reinforced this impression. The Rwanda tribunal has been criticized for its one-sided focus on the genocide.¹⁵⁰ The same dilemma arose in new form in the ICC. Art. 54 of the ICC Statute mandates the Prosecution formally to look into all sides of a conflict. But in contexts, like Uganda, the ICC has been criticized for its selective focus of investigation. It has been said to focus on political enemies

¹⁴⁶ L. Moffett, *Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague*, JICJ 15 (2015), 28.

¹⁴⁷ See L. Fletcher, *Refracted Justice: The Imagined Victim and the International Criminal Court*, in: C. de Vos/S. Kendall/C. Stahn (note 26), 302.

¹⁴⁸ See generally C. Jallow (ed.), *The Sierra Leone Special Court and Its Legacy*, 2015.

¹⁴⁹ See above note 9.

¹⁵⁰ See V. Peskin, *Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, *Journal of Human Rights* 4 (2005), 213.

of the *Museveni* regime, rather than the criminality of Ugandan Defence forces (UPDF).¹⁵¹ Critics have called this the “new victor’s justice”.¹⁵²

The work of the Special Court stands as a particular counter-example to this critique. In its work, it has built cases related to the three major factions on the conflict, in addition to the case against *Charles Taylor*. It is thus nuanced in approach. Fighting a just war was expressly dismissed as a factor in sentence mitigation.¹⁵³

The second important element of the *Taylor* case is that it raised the crucial question how to deal with external actors fueling the civil war in Sierra Leone. *Taylor* never set foot in Sierra Leone where the crimes were committed. He operated from abroad, and never directly committed these crimes physically. This posed tremendous evidentiary problems to prove his involvement. Many elements had to be traced through hearsay witness testimony.

The Trial Chamber considered *Taylor* as an accessory.¹⁵⁴ It found that *Taylor* aided and abetted by providing practical assistance, encouragement or moral support to the Revolutionary United Front (RUF) in the commission of crimes during the course of their military operations in Sierra Leone from August 1997 to 18.1.2002. The *Taylor* Defence raised the key argument of the case. It argued that *Taylor* was convicted for actions that other heads of states would not have been charged with. It claimed the Trial Chamber’s articulation of aiding and abetting was:

“so broad that it would in fact encompass actions that are today carried out by a great many States in relation to their assistance to rebel groups or to governments that are well known to be engaging in crimes of varying degrees of frequency ...”.

¹⁵¹ See *P. Clark*, Chasing Cases: The ICC and the Politics of State Referral in the Democratic Republic of Congo and Uganda, in: C. Stahn/M. El Zeidy (ed.), *The International Criminal Court and Complementarity: From Theory to Practice*, 2011, 1180.

¹⁵² *V. Peskin*, The Principle of Evenhandedness and the New Victor’s Justice: Prosecutorial Selectivity from the Rwanda Tribunal to the ICC, at <<http://law.huji.ac.il>>.

¹⁵³ See SCSL, *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-A, Judgment, 28.5.2008, §§ 530-534. See also ICTY, *Prosecutor v. Kordic & Cerkez*, IT-95-14/2-A, Judgment (Appeals Chamber), 17.12.2004, § 1082 (“The unfortunate legacy of wars shows that until today many perpetrators believe that violations of binding international norms can be lawfully committed, because they are fighting for a ‘just cause’. Those people have to understand that international law is applicable to everybody, in particular during times of war. Thus, the sentences rendered by the International Tribunal have to demonstrate the fallacy of the old Roman principle of *inter arma silent leges* [amid the arms of war the laws are silent] in relation to the crimes under the International Tribunal’s jurisdiction”).

¹⁵⁴ SCSL, *Prosecutor v. Taylor*, SCSL-03-01-T, Judgment, 18.5.2012.

And that such assistance: “is going on in many other countries that are supported in some cases by the very sponsors of this Court”.¹⁵⁵

This reading conflicted with the position of the ICTY in the *Perišić* Appeals Judgment which held that “specific direction” is a necessary element of aiding and abetting. *Perišić* noted:

“[I]n most cases, the provision of general assistance which could be used for both lawful and unlawful activities will not be sufficient, alone, to prove that this aid was specifically directed to crimes of principal perpetrators. In such circumstances, in order to enter a conviction for aiding and abetting, evidence establishing a direct link between the aid provided by an accused individual and the relevant crimes committed by principal perpetrators is necessary.”¹⁵⁶

The *Taylor* Appeals Chamber rejected the *Perišić* standard. It carried out its own independent review of post-WWII jurisprudence. It showed that specific direction is not an element of aiding and abetting under customary international law.¹⁵⁷ It argued that the law on aiding and abetting criminalizes knowing participation in the commission of a crime where an accused’s willing act or conduct had a substantial effect on the crime.¹⁵⁸ It provided this greater space for accessorial liability. Appeals Chambers at the Special Court for Sierra Leone (SCSL) and ICTY have thus, within a seven month time frame, issued very different opinions on the elements of aiding and abetting under customary international law. The *Taylor* reasoning was later upheld by a different ICTY Appeals Chamber in *Šainović et al.*¹⁵⁹

Finally, the judgment raised the issue of sentencing. One paradox is that sentences for mass atrocity crimes may be lower than sentences for ordinary crimes at the domestic level. Less than 20 % received a life sentence. Approaches differ across tribunals. *Taylor* was convicted to 50 years. The Rwanda tribunal has issued 47 convictions, with sentences on average shortly above 22 years. At the Yugoslavia tribunal, sentences were on average

¹⁵⁵ Defense Oral Argument on Appeal, Appeal transcript, 22.1.2013, 49896.

¹⁵⁶ ICTY, *Prosecutor v. Perišić*, Judgment, IT-04-81-A, 28.2.2013, § 44.

¹⁵⁷ SCSL, *Prosecutor v. Taylor*, SCSL-03-01-A, Judgment, 26.9.2013, § 474.

¹⁵⁸ *Prosecutor v. Taylor* (note 157), §§ 482-483. It found that the accused’s acts or conduct must have a *substantial effect* on the crime; the accused must commit the acts with the *knowledge* that the acts will assist in the commission of the crime OR with *awareness* of the *substantial likelihood* that they will; and the accused must be *aware* of the *essential elements* of the crime which his or her acts or conduct assist.

¹⁵⁹ ICTY, *Prosecutor v. Šainović et al.*, IT-05-87-A, 23.1.2014, §§ 1649-1650.

around 15 years.¹⁶⁰ The first two convicted persons at the ICC, *Thomas Lubanga* and *German Katanga* received terms of imprisonment below 15 years.

This may appear unjust from a strictly retributive perspective. But it becomes more acceptable if the essence of punishment is seen in the expression of moral condemnation, the stigma associated with public proceedings, the reaffirmation of globally accepted norms and the educative functions of trials.¹⁶¹

Empirical analysis suggests that there are certain correlations. Genocide convictions typically entail a high sentence.¹⁶² Moreover, high-ranking perpetrators often face harsh sentences. *Taylor's* special status as Head of State at a time when he contributed to the crimes in Sierra Leone was considered as an aggravating circumstance. Discrepancies between institutions may be partly explained by situational differences.¹⁶³ For instance, the *ad hoc* tribunals had to consider domestic sentences practices. The higher average sentence of the Rwanda tribunal may be partly explained by the fact that it entered more convictions for genocide. But a fully harmonized practice might not be realistic, given the differences across atrocity crime situations.

7. Moment # 7: *Gaddafi and Al-Senussi*: The New Frontiers of Complementarity

At the last moment I wish to reflect on is the ICC's approach towards complementarity in the *Libyan* cases. It relates essentially to the future of international criminal jurisdiction, namely the interaction between international and domestic jurisdiction in a broader system of justice.¹⁶⁴ This relationship has developed significantly over past decades. International crimi-

¹⁶⁰ See generally *B. Hola/A. Smeulers/C. Bijleveld*, Is ICTY Sentencing Predictable? Empirical Analysis of ICTY Sentencing Practice, LJIL 22 (2009), 79; *B. Hola/A. Smeulers/C. Bijleveld*, International Sentencing Facts and Figures: Sentencing Practice at the ICTY and ICTR, JICJ 9 (2011), 411.

¹⁶¹ See *M. Drumbl*, Punishment and Sentencing, in: W. Schabas (note 5), 73.

¹⁶² See *S. d'Ascoli*, Sentencing in International Criminal Law, 2011, 224 et seq.

¹⁶³ See also *B. Hola/A. Smeulers/C. Bijleveld*, International Sentencing Facts and Figures (note 160), 421.

¹⁶⁴ For a discussion, see *C. Stahn/M. El Zeidy* (note 151); *L. Carter*, The Future of the International Criminal Court: Complementarity as a Strength or a Weakness?, Washington University Global Studies Law Review 12 (2013), 451.

nal justice is no longer only a mechanism to fill justice gaps at the domestic level. It is in certain circumstances a means to strengthen domestic justice.

The referral of cases by the *ad hoc* tribunals to domestic jurisdiction under Rule 11*bis*¹⁶⁵ has facilitated the creation of new domestic mechanisms, such as the Bosnian War Crimes Chamber, or the strengthening of Defence rights and prison conditions in Rwanda. The ICC complementarity regime has prompted states to create specialized laws or prosecution units at the domestic level to investigate and prosecute international crimes, not only in classical Western democracies, but also in ICC situation countries, like Uganda, Kenya, DRC or Central African Republic.¹⁶⁶

At the ICC, new attention was devoted to the idea of “positive complementarity”, namely the use of international criminal jurisdiction as a means to strengthen domestic investigation and prosecution of crimes.¹⁶⁷ But the balance between faith in the ability of a domestic system to run proceedings, and the necessary degree of control and monitoring by international jurisdictions remains problematic. The *Libyan* cases against *Abdullah Al-Senussi* and *Saif Gaddafi* are emblematic.

Both defendants initially wanted to be tried internationally, rather than domestically to avoid the death penalty and domestic proceedings. The ICC took a “hands off” approach. It decided that *Al-Senussi* could be tried in Libya despite the security situation in the country and concerns regarding the fairness of domestic trials. It ruled that a trial that falls short of being a travesty of justice would be sufficient to meet the complementarity test.¹⁶⁸ It terminated proceedings. The ICC also decided that the case against *Gad-*

¹⁶⁵ See generally *O. Bekou*, Rule 11 BIS: An Examination of the Process of Referrals to National Courts in ICTY Jurisprudence, *Fordham Int'l L. J.* 33 (2009), 723.

¹⁶⁶ On the diverse effects of the ICC in situation countries, see *C. de Vos/S. Kendall/C. Stahn* (note 26).

¹⁶⁷ See generally *B. Burke-White*, Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice, *Harv. Int'l L. J.* 49 (2008), 53; *C. Stahn*, Complementarity: A Tale of Two Notions, *Criminal Law Forum* 19 (2008), 87.

¹⁶⁸ ICC, *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-565, Judgment on the appeal of Mr *Abdullah Al-Senussi* against the decision of Pre-Trial Chamber I of 11.10.2013 entitled “Decision on the admissibility of the case against Abdullah Al-Senussi”, 24.7.2014, §§ 229-230 (“Appeals Chamber would not envisage proceedings that are, in reality, little more than a predetermined prelude to an execution, and which are therefore contrary to even the most basic understanding of justice, as being sufficient to render a case inadmissible. Other less extreme instances may arise when the violations of the rights of the suspect are so egregious that it is clear that the international community would not accept that the accused was being brought to any genuine form of justice. In such circumstances, it is even arguable that a State is not genuinely investigating or prosecuting at all.”).

dafi stayed admissible before the ICC since the central government in Libya was unable to gain custody over *Gaddafi*.¹⁶⁹ There were thus parallel proceedings.

In July 2015, *Gaddafi* and *Al-Senussi* were tried by the Tripoli Court of Assize in a “trial of the symbols of the former regime”. This trial has many parallels to *Saddam Hussein’s* trial in Iraq.¹⁷⁰ Both defendants were sentenced to death after a procedure that posed fairness and security challenges.¹⁷¹ The UN Mission in Libya reported that they “fell short of international standards for fair trial”.¹⁷² *Gaddafi* was tried *in absentia* while continuing to be held by an armed group in Zintan. The Office of the Prosecutor took issue with *Gaddafi’s* death sentence. It argued that “Libya must refrain from any action that would frustrate the Court’s ability to exercise jurisdiction over Mr *Gaddafi*, including, most glaringly, carrying out any death sentence rendered against him”.¹⁷³ The government replied that *Gaddafi* would be entitled to a re-trial under domestic law since he was tried *in absentia*.¹⁷⁴ The trials sparked harsh international critique from a human rights perspective.¹⁷⁵

This episode highlights several contemporary challenges relating to the interplay between international and domestic jurisdiction.

First, the function of complementarity has become more ambiguous. Complementarity was initially meant to remedy shortcomings of domestic jurisdiction. The exercise of international justice derived its legitimacy from the fact that it is in some contexts better suited than domestic jurisdictions

¹⁶⁹ ICC, *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-547-Red, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31.5.2013 entitled “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”, 21.5.2014.

¹⁷⁰ See generally *M. Newton/M. Scharf*, *Enemy of the State: The Trial and Execution of Saddam Hussein*, 2008.

¹⁷¹ See Human Rights Watch, *Libya: Flawed Trial of Gaddafi Officials*, 28.7.2015, at <<https://www.hrw.org>>.

¹⁷² See Report of the Secretary General of the United Nations Support Mission in Libya, S/2016/182, 25.2.2016, § 53.

¹⁷³ See ICC, *Prosecutor v. Gaddafi*, CC-01/11-01/11, Prosecution Request for an Order to Libya to Refrain from Executing *Saif Al-Islam Gaddafi*, Immediately Surrender Him to the Court, and Report His Death Sentence to the United Nations Security Council, 30.7.2015, § 5.

¹⁷⁴ ICC, *Prosecutor v. Gaddafi*, ICC-01/11-01/11-612, Response to Prosecution’s “Request for an Order to Libya to Refrain from Executing *Saif Al-Islam Gaddafi*, Immediately Surrender Him to the Court, and Report His Death Sentence to the United Nations Security Council”, 20.8.2015, § 13.

¹⁷⁵ UNSMIL & OHCHR, *Report on the Trial of 37 Former Members of the Qadhafi Regime* (Case 630/2012) (2017), at <<http://www.ohchr.org>>.

to pursue accountability.¹⁷⁶ This assumption has been turned on its head. In situations of transition, international justice institutions struggle to complement gaps or weaknesses of domestic jurisdiction. In the *Gaddafi* case, the ICC and the national government mirrored each other's failures. Both were unable to arrest.

Second, the "time factor", including a change of circumstances, is not sufficiently contemplated in the contemporary application of complementarity. In the case of *Al-Senussi*, the proceedings were simply left to domestic authorities, without further interaction between the ICC and the Libyan government, or further monitoring. Complementarity was treated as an "all or nothing" decision at a specific moment in time. Subsequent changes in context were blended out. This runs against the idea of complementarity as a system of justice.¹⁷⁷

Third, the treatment of the *Libyan* cases raises concerns from a fair trial perspective. The ICC is not meant to act as a human rights Court. But it is problematic from a justice perspective if the ICC turns a "blind eye" to the fairness of proceedings at the domestic level.¹⁷⁸ The requirement that the ICC should only take into account violations that deprive the domestic process of "any genuine form of justice"¹⁷⁹ stands in contrast to Art. 21 of the Statute, which requires the Court to act consistently with "internationally recognized human rights". It deprives the chapeau element of Art. 17 (2) ("having regard to the principles of due process recognized by international law") of any independent value. Requiring certain assurances from state authorities, before finding a case inadmissible, might mitigate the risk that international criminal justice becomes merely a tool of domestic politics.

III. Conclusions

This brings me to my conclusions. They relate back to the image of *Daedalus* and *Icarus*.

¹⁷⁶ This is reflected in the "unwillingness" and "inability" limbs of admissibility under Art. 17 of the Rome Statute.

¹⁷⁷ See C. Stahn, Admissibility Challenges Before the ICC: From Quasi-Primacy to Qualified Deference?, in: C. Stahn, Law and Practice (note 43), 228, 247 et seq.

¹⁷⁸ E. Fry, Between Show Trials and Sham Prosecutions: The Rome Statute's Potential Effect on Domestic Due Process Protections, Criminal Law Forum 23 (2012), 35.

¹⁷⁹ See F. Mégret/M. Samson, Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials, JICJ 11 (2013), 571.

International criminal jurisdiction is in many ways imperfect, like the flight of *Daedalus* and *Icarus*. It is an instrument to enhance the well-being of humankind to some, and a potential cause of fear for others. The appeal of international criminal justice is grounded in the interplay between salvation and apology. It is driven by promise, moral ambition and faith. In many situations, it is presented like a “wing” that rises above the reality of human failure. It is presented as an instrument to restore peace through justice and accountability. But international criminal justice is often an attempt by its creators to come to grips with their own failings and the inability to prevent or mitigate human catastrophes. It is sometimes a convenient, and maybe a too convenient way to deal with the complexities of structural violence.

One of the first conclusions of the past decades is that there is a need for a sense of modesty. Like *Icarus*, international criminal jurisdiction is ill-advised to fly too close to the sun, and too low to the sea. International criminal justice is not the solution to all accountability problems, nor is international criminal justice in itself suited to “solve” or fix deeper societal divides. It might be counterproductive to present it as a source of salvation.

Second, less may be more. In some cases, doing less, but doing it well, might be better than covering a large scope of situations through international criminal jurisdiction. Experiences at the *ad hoc* tribunals and in ICC situations have shown that it is dangerous to associate or merge international criminal justice with broad rationales, such as ending impunity or improving human security. Such effects may well be a consequence of action. But they should not be turned into primary causes. The strengths of international criminal justice lie in atrocity alert, norm expression and enhancement of compliance.

Third, intervention in ongoing conflict remains a problem, and is likely to remain a challenge in the future. It is necessary to refine risk assessment, sequencing, timing and modalities of justice intervention.

Fourth, the success of international criminal justice is not so much tied to the performance of individual international criminal courts and tribunals, but its operation as a system of justice. The ICC Statute has been a success as a legal instrument, while the institution has succeeded to a lesser extent. Overall, the ICC did not suffer as heavily from the absence of big Powers as initially predicted. On the contrary, one of the surprising elements is that it suffered when it was aligned too closely to the Security Council, or when it was perceived as being too close to Western interests.

Fifth, international justice cannot be measured simply in terms of “bad guys” being convicted and innocent victims receiving reparation. Justice is

about the justice process. In terms of goals, it is necessary to distinguish between the purposes of the criminal process, and the function of the institution. The main purpose of the trial is quite narrow, namely to distinguish between culpable and non-culpable defendants. The function of the institution is broader. It encompasses retributive elements, such vindication of social norms and rules, procedural fairness, and punishment, and restorative features such as victim participation or repair of harm.

Sixth, one of the most important impacts of international criminal justice is that it contributes to a larger culture of accountability. Empirically, recent years have seen a rise in the number of prosecutions for the violation of core international rights. These prosecutions are part of a decentralized system of accountability. International criminal justice appears in 4D today: domestic, international, hybrid and regional. Domestic courts have conducted a large share of the trials. Many scholars argue that the future of international criminal justice is ultimately domestic.¹⁸⁰ But it should be borne in mind that the “domestic” has many faces: it might be national, regional or local. A key factor is that justice is internalized.

Finally, international criminal tribunals may get more rare in future years, or become the exception rather than the rule. But international criminal law as such is likely to gain in importance. It has an increasing impact on related fields: international humanitarian law, human rights law or refugee law, just to mention a few. The future lies in this interaction, that is broadly speaking “international criminal law and ...”.

¹⁸⁰ *A.-M. Slaughter/W. Burke-White*, The Future of International Law Is Domestic (or, The European Way of Law, *Harv. J. Int'l L.* 47 (2006), 327; *M. du Plessis*, The Future of International Criminal Justice Is Domestic, 17.9.2004, at <<http://ilawyerblog.com>>.