

**“BRING FORTH THE ACCUSED!”
DEFENDANT ATTITUDES AND THE INTIMATE LEGITIMACY OF
THE INTERNATIONAL CRIMINAL TRIAL**

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The accused is, oddly, the great forgotten figure of the international criminal trial. There is much interest in the rights of the accused as a generic figure, but very little attention to the actual role of the accused in his own trial. This article argues that the agency of the accused and its impact on both the dynamics, impact, and legitimacy of international criminal justice has been considerably underestimated. In fact, the accused is one of the most central figures of the international trial, and his decisions and attitudes will have considerable repercussions on what international criminal justice can hope to achieve. Drawing on socio-legal scholarship and the idea that law is also produced by its subjects, this article proposes a comprehensive typology of defendant attitudes towards their trial. The four attitudes are: (i) defiance - the attitude of a defendant who denies a tribunal any legitimacy to prosecute him, (ii) engagement - that of a defendant who defends himself conventionally by denying the charges against him but not the legitimacy of his judges, (iii) sacrifice - that of a defendant who does not contest that he is guilty of something but casts the reasons for his trial differently than a tribunal does, and (iv) repentance - the attitude of contrition and remorse of an accused who acknowledges the crimes he committed. The article is not a normative defense of any particular attitude but an attempt to understand them for what they are and examine their logic, manifestations and impact on the trial. The article concludes with a few thoughts on how tribunals might understand their relationship to defendants as a result of a better taking into account of such attitudes

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I. INTRODUCTION

One would think that there would be considerable literature on the place of the defendant in the international courtroom. Yet, the accused is arguably and paradoxically the great absent figure of trials before international criminal tribunals. There is much focus on the key institutional players of international criminal

tribunals, notably judges,¹ prosecutors,² and even defense counsel,³ but much less on the defendants themselves. Even the victim, a relative newcomer on the scene

¹ Theodor Meron, *Judicial Independence and Impartiality in International Criminal Tribunals*, 99 AM. J. INT'L. L. 359 (2005); Michael Bohlander, *Pride and Prejudice or Sense and Sensibility? A Pragmatic Proposal for the Recruitment of Judges at the ICC and Other International Criminal Courts*, 12 NEW CRIM. L. REV. 529 (2009); Patricia M. Wald, *Reflections on Judging: At Home and Abroad*, 7 U. PA. J. CONST. L. 219 (2004); Jared Wessel, *Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication*, 44 COLUM. J. TRANSNAT'L L. 377 (2006); Geoffrey Nice, *Trials of Imperfection*, 14 LEIDEN J. INT'L. L. 383 (2001); Diane Marie Amann, *Impartiality Deficit and International Criminal Judging*, SSRN (Jan. 7, 2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=955431; MICHAEL BOHLANDER, THE INTERNATIONAL CRIMINAL JUDICIARY PROBLEMS OF JUDICIAL SELECTION, INDEPENDENCE AND ETHICS, in *International Criminal Justice: A Critical Analysis of Institutions and Procedures* 325 (2007); Louise Chappell, *Gender and Judging at the International Criminal Court*, *Politics and Gender* 484 (2010).

² Héctor Olásolo, *The Prosecutor of the ICC before the Initiation of Investigations: A Quasi-Judicial or a Political Body?*, 3 INT'L CRIM. L. REV. 87(2003); Brian D. Lepard, *How Should the ICC Prosecutor Exercise His or Her Discretion? The Role of Fundamental Ethical Principles*, 43 J. MARSHALL L. REV. 553 (2010); Richard John Galvin, *The ICC Prosecutor, Collateral Damage, and NGOs: Evaluating the Risk of a Politicized Prosecution*, 13 U. MIAMI INT'L & COMP. L. REV. 1 (2005); Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510 (2003); Alexander K. A. Greenawalt, *Justice without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT'L L. POL. 583 (2007); Allen S. Weiner, *Prudent Politics: The International Criminal Court, International Relations, and Prosecutorial Independence*, 12 WASH. U. GLOBAL STUD. L. REV. 545 (2013); Dov Jacobs, *A Samson at the International Criminal Court: The Powers of the Prosecutor at the Pre-Trial Phase*, 6 L. PRACT. INT'L COURTS TRIB. 317–341 (2007); William A. Schabas, 'O Brave New World': *The Role of the Prosecutor of the International Criminal Court*, FRIEDENS-WARTE 11–31 (2008); Lenore F. Horton, *Prosecutorial Discretion Before International Criminal Courts and Perceptions of Justice: How Expanded Prosecutorial Independence Can Increase the Accountability of International Actors*, 7 EYES ICC 5 (2010); Richard Goldstone, Leigh Swigart & David P. Briand, *An interview with Richard J. Goldstone for the Ad Hoc Tribunals Oral History Project* (2015), <http://ir.brandeis.edu>

[/handle/10192/30837](http://handle/10192/30837) (last visited Jan 20, 2016); LUC REYDAMS, JAN WOUTERS & CEDRIC RYNGAERT, *INTERNATIONAL PROSECUTORS* (2012); Jenia Iontcheva Turner, *Policing International Prosecutors*, 45 N.Y.U. J. INT'L POL. 175 (2012); Luc Côté, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, 3 J. INT'L. CRIM. JUST. 162, 162–86 (2005).

³ Mark S. Ellis, *Achieving Justice Before the International War Crimes Tribunal: Challenges for the Defense Counsel*, 7 DUKE J COMP INT'L L. 519 (1996); Mark S. Ellis, *Defense Counsel Appearing Before International Tribunals.: Past Experiences and Future Challenges*, 4 J. HUM. RIGHTS 491 (2005); B Joseph A. Ross, *Göring's Trial, Stahmer's Duty: A Lawyer's Defense Strategy at the Nuremberg War Crimes Trial, 1945-46*, 5 MADISON HIST. REV. 3 (2014).

of international criminal trials, has seemed to garner more attention.⁴ Of course, at a certain level the accused is evidently *present* at the trial, and the latter is in almost every respect *about* the defendant. There is great interest on the part of the prosecution and victims in convicting and punishing the person sitting in the dock, not to mention a general historical, political, psychological, and sociological interest in the accused and what may have led them to commit crimes.⁵ Indeed, intellectual, popular, and media portrayals of leading accused in international criminal justice as larger than life, if inscrutable figures, abound.⁶ The accused is also an object of attention as an emerging legal subject under international law, capable of challenging the legality of international tribunals in his own name.⁷ And of course,

⁴ This is true domestically. See Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515 (1982); see generally Juan Cardenas, *Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. PUB. POL. 357 (1986); Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM CRIM. REV. 233 (1990); Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years after the President's Task Force on Victims of Crime*, 25 NEW ENG. J. CRIM. CIV. CONFIN. 21 (1999); C.P. Trumbull, *Victims of Victim Participation in International Criminal Proceedings*, 29 MICH. J INT'L L. 777 (2007); Marie-Bénédicte Dembour & Emily Haslam, *Silencing hearings? Victim-Witnesses at War Crimes Trials*, 15 EUR. J. INT. LAW 151–177 (2004); Carsten Stahn, Héctor Olásolo & Kate Gibson, *Participation of Victims in Pre-Trial Proceedings of the ICC*, 4 J. INT'L. CRIM. JUST. 219, 219–238 (2006); Sam Garkawe, *Victims and the International Criminal Court: Three Major Issues*, 3 INT'L. CRIM. L. REV. 345 (2003); Christine H. Chung, *Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding Promise*, 6 N.W. U. J. INT'L HUM. RTS. 459 (2007); Elisabeth Baumgartner, *Aspects of Victim Participation in the Proceedings of the International Criminal Court* (2008); Christine Van den Wyngaert, *Victims before International Criminal Courts: Some Views and Concerns of an ICC trial judge*, 44 CASE W. RES. J. INT'L L. 475 (2011); David Boyle, *The Rights of Victims Participation, Representation, Protection, Reparation*, 4 J. INT'L. CRIM. JUST 307 (2006); B. N. McGonigle, *Bridging the Divides in International Criminal Proceedings: An Examination into the Victim Participation Endeavor of the International Criminal Court*, 21 FLA. J. INT'L LAW 93 (2009); M. Cohen, *Victims' Participation Rights Within the International Criminal Court: A Critical Overview*, 37 DENV. J. INT'L POL. 351 (2009).

⁵ SLAVENKA DRAKULIĆ, *THEY WOULD NEVER HURT A FLY: WAR CRIMINALS ON TRIAL IN THE HAGUE* (2005); G. M. GILBERT, *NUREMBERG DIARY* (Ferrar, Straus & Co. Ed.)(1947); ALFRED A. KNOFF *THE NUREMBERG INTERVIEWS*, (Robert Gellately ed. 2004); see also Saira Mohamed, *Of Monsters and Men: Perpetrator Trauma and Mass Atrocity*, COLUM. L. REV. 1157 (2015) (On the impact of atrocities on the defendant himself).

⁶ HANNAH ARENDT, *EICHMANN IN JERUSALEM* (1963); Tim Judah, *The Star of The Hague (The Trial of Slobodan Milosevic)*, 49 N.Y. REV. BOOKS 37–39 (2002); Gary J. Bass, *Milosevic in the Hague*, 82 FOREIGN AFF 82 (2003); Michael B. Dobbs, *General Mladic in The Hague*, FOREIGN POL'Y, (June 17, 2012, 8:51 PM).

⁷ See Kenneth S. Gallant, *Criminal Defence and the International Legal Personality of the Individual*, REV. QUEBECOISE DE DROIT INT. 75 (2010).

he⁸ is someone whose due process rights, long a concern of international law,⁹ are the focus of considerable attention in the international courtroom.¹⁰ Finally, the attitude of the accused in trial has begun to be taken into account as a factor in assessing sentences before international tribunals.¹¹

But concern for the rights of the accused or his acts prior to being prosecuted are not the same thing as an *interest in the role of the accused in sustaining the fundamental judicial and legal dynamics of the trial*. Although studies of individual accused are sometimes interspersed with references to his

⁸ For convenience and out of recognition that the vast majority of accused before international criminal tribunals have been men, this article will use the masculine pronoun, although I acknowledge that there have been a very small minority of female defendants.

⁹ PIETER DIJK & STUDIE-EN INFORMATIECENTRUM MENSENRECHTEN (NETHERLANDS), *THE RIGHT OF THE ACCUSED TO A FAIR TRIAL UNDER INTERNATIONAL LAW* (1983).

¹⁰ There is obviously a vast literature on this characteristically legal issue. Benjamin B. Ferencz, *Nurnberg Trial Procedure and the Rights of the Accused*, 39 J. CRIM. L. CRIMINOLOGY. 144 (1948); Colin Warbrick, *International Criminal Courts and Fair Trial*, 3 J. CONFLICT & SEC. L. 45 (1998); Sara Stapleton, *Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation*, 31 N.Y.U. J. INT'L POL'Y 535 (1998); P. L. Robinson, *Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia*, 11 EUR. J. INT'L L. 569 (2000); Mercedeh Momeni, *Why Barayagwiza Is Boycotting His Trial at the ICTR: Lessons in Balancing Due Process Rights and Politics*, 7 ILSA J. INT'L & COMP. L. 315 (2000); Jonathan A. Bush, *Lex Americana: Constitutional Due Process and the Nuremberg Defendants*, 45 ST. LOUIS U. L. J. 515 (2001); Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 YALE J. INT'L L. 111 (2002); Göran. Sluiter, *International Criminal Proceedings and the Protection of Human Rights*, 37 NEW ENG. REV. 935 (2002); Andrew J. Walker, *When a Good Idea is Poorly Implemented: How the International Criminal Court Fails to be Insulated from International Politics and to Protect Basic Due Process Guarantees*, 106 W. VA. L. REV. 245 (2004); Olivia. Q. Swaak-Goldman, *The ICTY and the Right to a Fair Trial: A Critique of the Critics*, 10 LEIDEN J. INT'L L., 215 (1997); Göran Sluiter, *Fairness and the Interests of Justice: Illusive Concepts in the Case*, 3 J. INT'L CRIM. JUST. 9 (2005); Enrique Carnero Rojo, *The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From "No Peace without Justice" to "No Peace with Victor's Justice?"*, 18 LEIDEN J. INT'L L. 829 (2005); Gillian Higgins, *Fair and Expeditious Pre-trial Proceedings The Future of International Criminal Trials*, 5 J. INT'L CRIM. JUST. 394 (2007); Mary McGowan Davis, *Fair Trial Rights: A Case Study at the ICTR*, 14 NEW ENG. J. INT'L COMP. L. 267 (2008); Miranda Sissons & Ari S. Bassin, *Was the Dujail Trial Fair?*, 5 J. INT. CRIM. JUST. 272 (2007); Daniel Naymark, *Violations of Rights of the Accused at International Criminal Tribunals: The Problem of Remedy*, 4 J. INT'L L. & INT'L REL. 1 (2008); J. Patrick Robinson, *The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY*, 3 PUBLICIST 1 (2009); Wolfgang Schomburg, *The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights*, 8 NW. J. INT'L HUM. RTS. 1 (2009); Mirjan Damaska, *Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals*, 36 NCJ INTL COM REG 365 (2010); Salvatore Zappalà, *The Rights of Victims v. the Rights of the Accused*, 8 J. INT'L CRIM. JUSTICE 137 (2010).

¹¹ Mark A. Drumbl & Kenneth S. Gallant, *Sentencing Policies and Practices in the International Criminal Tribunals*, 15 FED. SENT. REP. 140–144 (2002).

behaviour in the courtroom, there is, with one possible exception,¹² no single scholarly treatment of the accused as a *generic judicial actor* before international criminal tribunals. By and large, the accused is seen as a silent and passive figure awaiting his fate, the *object* of international criminal justice rather than (one of) its *subjects*, let alone its key subject.¹³ The days of his evil agency are in the past as he awaits a verdict, facing the witnesses to his purported crimes, a spectator to his own trial. The accused is often used as a pretext to discuss the larger issues that frame his presence in court, not a defining feature of that framing. He is more interesting to the legal system for his acts than for his person, typically acting as a unit of attribution of responsibility rather than a locus of ongoing agency.¹⁴ In fact,

¹² See BJÖRN ELBERLING, *THE DEFENDANT IN INTERNATIONAL CRIMINAL PROCEEDINGS: BETWEEN LAW AND HISTORIOGRAPHY* (2012). Elberling's book however is ultimately a relatively conventional legal study of the rights of the accused as they emerged before international tribunals, rather than a work taking the defendants' point of view as its starting point.

¹³ Even domestically, the literature that there is on defendants is typically focused on the correlation between some of their characteristics and sentencing, but rarely specifically takes into account their agency more generally. See Dale W. Broeder, *The Negro in Court*, DUKE L. J. 19 (1965); see also David B. Gray & Richard D. Ashmore, *Raising influence of Defendants' Characteristics on Simulated Sentencing*, 38 PSYCHOL. REP. 727 (1976); see also Sheila R. Deitz & Lynne E. Byrnes, *Attribution of Responsibility for Sexual Assault: The Influence of Observer Empathy and Defendant Occupation and Attractiveness*, 108 J. PSYCHOL. 17 (1981); see also Bruce W. Darby & Devon Jeffers, *The Effects of Defendant and Juror Attractiveness on Simulated Courtroom Trial Decisions*, 16 SOC. BEHAV. PERS. INT'L. J. 39 (1988); see also John E. Stewart II, *Defendant's Attractiveness as a Factor in the Outcome of Criminal Trials: An Observational Study*, 10 J. APPLIED SOC. PSYCHOL. 348 (1980); Nona J. Barnett & Hubert S. Feild, *Character of the Defendant and Length of Sentence in Rape and Burglary Crimes*, 104 J. SOC. PSYCHOL. 271 (1978); see also Charlan Nemeth & Ruth Hyland Sosis, *A Simulated Jury Study: Characteristics of the defendant and the jurors*, 90 J. SOC. PSYCHOL. 221 (1973); Ronald M. Friend & Michael Vinson, *Leaning Over Backwards Jurors' Responses to Defendants' Attractiveness*, 24 J. COMMUN. 124 (1974); Richard Izzett & Leslie B. Fishman, *Defendant Sentences as a Function of Attractiveness and Justification for Actions*, 100 J. SOC. PSYCHOL. 285 (1976); Leslie A. Zebrowitz & Susan M. McDonald, *The impact of Litigants' Baby-Facedness and Attractiveness on Adjudications in Small Claims Courts*, 15 L. HUM. BEHAV. 603 (1991); see also Steven K. Jacobson & Charles R. Berger, *Communication and Justice: Defendant Attributes and Their Effects on the Severity of His Sentence* (1974); see also Gloria Leventhal & Ronald Kratochwill, *Physical Attractiveness and Severity of Sentencing*, 40 PSYCHOL. REP. 315 (1977); Ronald L. Micheli & Stephan R. Snodgrass, *Defendant Characteristics and Juridic Decisions*, 14 J. RES. PERSONALITY. 340 (1980); see also Millicent H. Abel & Heather Watters, *Attributions of Guilt and Punishment as Functions of Physical Attractiveness and Smiling*, 145 J. SOC. PSYCHOL. 687 (2005); see also Jack P. Lipton, *Racism in the Jury Box: The Hispanic Defendant*, 5 HISP. J. BEHAV. SCI. 275 (1983); Robert J. MacCoun, *The Emergence of Extralegal Bias During Jury Deliberation*, 17 CRIM. JUST. BEHAV. 303 (1990).

¹⁴ The one exception within legal scholarship, but it is a very limited short one and tellingly written by non lawyers is Jerrold M. Post & Lara K. Panis, *Tyranny on Trial: Personality and Courtroom Conduct of Defendants Slobodan Milosevic and Saddam Hussein*, 38 CORNELL INT'L L. J. 823 (2005).

aspects of the criminal law and procedure may actively militate against his visibility.¹⁵ In short, international criminal justice may be sympathetic to the defendant's rights, but it is hardly empathetic towards the defendant's person.

If anything, the image of the accused is filtered by an emphasis on his legal defense counsel, who translates his every move into something recognizably and reassuringly legal. The defendant is often reduced to silence, whilst his attorney produces torrents of words.¹⁶ The assumption seems to be that the attorney takes over for the defendant and entirely mediates between him and the Court. The professional and sometimes social familiarity between law professionals on all sides (defense, prosecution, judges) may, in effect, go as far as to 'squeeze out' the accused as "a secondary figure in the court system, which is a complex organization whose task is to coordinate the activities of a variety of actors who are both competitive and interdependent."¹⁷ For the dominant scholarship of international criminal justice, the criminal defendant himself is a relatively empty vehicle, not one that is seen as particularly inhabited by varying personalities.

There is reason to suspect that this disregard of the place of the defendant is not only intellectually poor but may hamper some of the very goals of the international criminal trial. As one author noted, one of the gravest limitations of current international criminal justice is "its near total disregard for the psychological conditions, sociological realities, and historical situations of the indicted and convicted perpetrators of grave international crimes."¹⁸ The failure to appreciate the active and dynamic role that defendants play may hinder an understanding of some of international criminal justice's persistent legitimacy deficits, as well as how it could orient itself more effectively, via defendants, to its various goals (not just neutralization of the convicted but also peace making, reconciliation, elaborating a historical record, etc).

By contrast, this article's main contention that the accused is central to the elucidation of how international trials play out; in fact, that he may be the implicitly pivotal figure of international criminal trials, aside from the question of his guilt or innocence. This is somewhat counterintuitive because the fact that many defendants choose not to take the stand in international trials means that they can appear as largely mute figures. However, this does not mean that, at least in the

¹⁵ John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477 (2008).

¹⁶ Interestingly, this is a matter of concern even in the theory of the fair trial domestically. See e.g., Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 NYU L. REV. 1449, 1504 (2005). So much so, in fact, that changes have been suggested to criminal procedure that might encourage defendants to testify. Jeffrey Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules that Encourage Defendants to Testify*, 76 U. CIN. L. REV. 851 (2008); see also Ted Sampsell-Jones, *Making Defendants Speak*, 93 MINN. L. REV. 1327 (2009).

¹⁷ Abraham S. Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession (1966)*, 1 L. SOC. REV. 15, 21 (1996).

¹⁸ Dejo Olowu, *Therapeutic Jurisprudence: An Inquiry into its Significance for International Criminal Justice*, 76 REVISTA JURIDICA UNIVERSIDAD PUERTO RICO 129, 139 (2007).

background, defendants do not exercise a powerful agency. First and foremost, they do so by deciding on their strategy, instructing their counsel accordingly, and offering more or less cooperation or resistance to international criminal tribunals. An accused may be silent but active. Contrary to a dominant view of the accused as an ‘object’ of international criminal proceedings, therefore, this article will seek to rehabilitate his role as that of a *subject*, actively shaping the very trial that seeks to determine his guilt or innocence. To be clear, this is quite a distinct question from the classical question of the subjectivity of the accused under international law per se,¹⁹ and relates to his socio-legal subjectivity in the courtroom. Hence the call to, almost literally, “bring forth” the accused in the sense of putting him at the center of legal inquiry in a more profound way

In this, the article seeks to contribute to a small but emerging debate on the place of defendants in international criminal trials. It draws inspiration, in particular, from critical legal pluralist literature²⁰ that emphasizes the degree to which it is not only the law that shapes individuals, but individual agents who also shape the law. The ‘accused,’ one might argue, is not just ‘produced’ by the legal system that identifies it as such, but also helps “fashion[s] the very structures of law that contribute to constituting [his] legal subjectivity.”²¹ In fact, the trial itself is not simply a struggle over guilt or innocence, but over the very notion of the accused’s agency. This agency is, of course, the agency of the defendant at the time when he is accused of having committed his crimes, a fundamental concern in oppressive or conflict situations where agency may be minimized.²²

But it is also his agency *in the courtroom* where a sound defense involves significant participation. In other words, every action of the defendant is also a way of affirming his continued capacity for action even in the face of a procedure that has reduced his liberty and threatens to punish and stigmatize him further. In the process, it is an affirmation of the very possibility of guilt or innocence which are classically premised on the notion of individual autonomy and *libre arbitre*. The distinctiveness of this article’s approach, then, is that whilst it will lead us to indirectly revisit a number of procedural and substantive themes. e.g., court room etiquette, plea bargains, sentencing, that have been the object of significant attention, it proposes to do so, uniquely, from the standpoint of the accused and his efforts to give meaning to his presence in the international criminal trial.

But why should the very person who is accused of some of the worst crimes imaginable have such an influence on the system that judges him? Indeed, why should we care what defendants think of international criminal justice and the

¹⁹ See Gary Komarow, *Individual Responsibility Under International Law: The Nuremberg Principles in Domestic Legal Systems*, 29 INT’L. COMP. L. Q. 21(1980); see also Alexander Orakhelashvili, *The Position of the Individual in International Law*, 31 CAL. W. INT’L L. J. 241 (2000); see also CIARA DAMGAARD, *INDIVIDUAL CRIMINAL RESPONSIBILITY FOR CORE INTERNATIONAL CRIMES: SELECTED PERTINENT ISSUES* (2008).

²⁰ See Martha-Marie Kleinhans & Roderick A. Macdonald, *What is a Critical Legal Pluralism*, 12 CAN. J. L. SOC. 25 (1997).

²¹ *Id.* at 38.

²² MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 38–41 (2007).

impact it has on them? After all, the criminal trial is conducted *against* rather than strictly for the benefit of a defendant, even if the prosecutorial urge stands to be moderated by due process principles. There is certainly little sympathy for those defendants who taunt witnesses, brag about their crimes, and insult their judges. Yet there is no reason to think that the latter are anything but a small minority. Instead, it will be contended that, aside from being interesting in and of themselves for historians and psychologists, the accused have a distinct role in framing the meaning of their presence in court and are active participants in the negotiation of international criminal justice's symbolic political and legal meaning. The significance of their attitudes in international criminal trials, thus, matters in at least three crucial ways.

First, the accused will shape the *dynamics* of international trials. Whether an accused decides to cooperate, criticize his judges, or testify, will have a formidable influence on the very pace and fluidity of a case. Defendants who refuse to conventionally defend themselves or mount hostile politicized defenses can, as will be seen, have a considerably disruptive influence on the courtroom.²³ They can draw out proceedings, engage in deleterious procedural maneuvers or even intimidate victims and witnesses. By contrast, defendants who broadly cooperate with international criminal justice greatly facilitate its work. Certain claims may be accepted, some accusations conceded, and at any rate the procedure allowed to progress apace. Moreover, defendants may help in securing state cooperation. This is especially so given the fact that the long arm of some defendants extends beyond the courtroom and can reach all the way into their country of origin, directly or indirectly. Defendants may urge local authorities to cooperate or not cooperate with international tribunals, effectively connecting with powerful political forces that may have vowed to kill international trials in their tracks.²⁴ In a context where excessive delays have often plagued international criminal justice,²⁵ a cooperating defendant is at least one factor, all other things being equal, which should prevent delays from stretching even further.

Second, the attitude of defendants is also a significant component of the *impact* of international trials. Perhaps more than any trial, international criminal trials have a broad function beyond proving the guilt or innocence of the accused.²⁶ They are also meant to be part of larger transitional justice efforts in the societies

²³ This angle –the defendant as nuisance –is the one that is frequently noted by authors whose main emphasis is on the good conduct of proceedings. See GIDEON BOAS, *THE MILOŠEVIĆ TRIAL: LESSONS FOR THE CONDUCT OF COMPLEX INTERNATIONAL CRIMINAL PROCEEDINGS* 11 (2007) (“the personality of the deposed dictator/accused is an interesting factor in the conduct of international criminal proceedings against them” and disruptive behavior makes “the trial of these people extremely difficult.”).

²⁴ Victor Peskin & Mieczysław P. Boduszyn'ski, *International justice and domestic politics: post-Tudjman Croatia and the international criminal tribunal for the former Yugoslavia*, 55 EUR.-ASIA STUD. 1117–1142 (2003).

²⁵ Alex Whiting, *In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered*, 50 HARV. INT'L L. J. 323 (2009).

²⁶ M. Damaska, *What Is the Point of International Criminal Justice*, 83 CHI-KENT REV. 329 (2008).

wherein the crimes were committed and beyond.²⁷ Moreover, they have often been expected historically to have a more immediate pacifying function, helping to stop or at least prevent further violence in societies experiencing major upheaval (this was, for example, the official motivation for the creation of the former-Yugoslavia and Rwanda tribunals by the United Nations Security Council). In that respect, the accused in international criminal trials, contrary to most domestic ones, always stand for more than themselves, despite the focus on seemingly isolated individuals.²⁸ Typically, for example, the accused will have been (or even in some cases still are) in positions of authority at the time they committed their crimes, and have had significant following and support, at times even democratic legitimacy. As a result, their attitude is often powerfully framed by expectations at home and watched closely by friends and foe alike as a barometer of the present and future of domestic political contests.

The international criminal trial must, thus, be understood as part of an overall political context that gives it meaning. It involves, for example, the validity of broad truth-claims of a historical nature (a genocide was or was not committed; someone did or did not start the war, etc.).²⁹ Much hinges on the recognition of such hotly contested claims for a return to normalcy in traumatized societies. As we shall see, a hostile defendant who claims that his prosecution is a conspiracy and denies his jailors any legitimacy is one whose rhetoric may well feed into societal tensions at home. On the contrary, we may speculate that a defendant who uses his time in court to extend an olive branch to the ‘other side’ may soothe relations and substantially contribute to reconciliation. In other words, aside from his ‘guilt’ or ‘innocence,’ the accused’s presence matters because of what it can excite or temper politically on a stage that is invariably broader than the court’s.

Third and for all these reasons, the attitude of defendants will have crucial implications for the *legitimacy* of international criminal trials. International institutions, in general, and international criminal tribunals, in particular, crave for

²⁷ See ALEXANDER LABAN HINTON, *TRANSITIONAL JUSTICE: GLOBAL MECHANISMS AND LOCAL REALITIES AFTER GENOCIDE AND MASS VIOLENCE* (2010); see also Diane F. Orentlicher, ‘*Settling Accounts*’ *Revisited: Reconciling Global Norms with Local Agency*, 1 INT’L J. TRANSITIONAL JUST. 10 (2007).

²⁸ Frédéric Mégret, *Les Angles Morts de la Responsabilité Pénale Individuelle en Droit International*, 71 REV. INTERDISCIP. DÉTUDES JURID. 83 (2013).

²⁹ See Nigel Eltringham, “*We are not a Truth Commission*”: *Framged Narratives and the historical record at the International Criminal Tribunal for Rwanda*, 11 J. GENOCIDE RES. 55 (2009); see also James Burnham Sedgwick, *Memory on Trial: Constructing and Contesting the ‘Rape of Nanking’ at the International Military Tribunal for the Far East, 1946–1948*, 43 MOD. ASIAN STUD. 1229 (2009); see also R. A. Wilson, *Judging history: The historical record of the International Criminal Tribunal for the former Yugoslavia*, 27 HUM. RIGHTS Q. 908–942 (2005); See also B. ELBERLING, *The Next Step in History-Writing through Criminal Law: Exactly How Tailor-Made Is the Special Tribunal for Lebanon?*, 21 LEIDEN J. INT’L. L. 529 (2008); see RICHARD ASHBY WILSON, *WRITING HISTORY IN INTERNATIONAL CRIMINAL TRIALS* (2011).

legitimacy,³⁰ both on principled and practical grounds. That legitimacy can never be taken for granted in an international system where its basis remains generally problematic. The legitimacy problem is in fact apparent even in domestic criminal systems when it comes to more intensely political trials.³¹ But the issue of legitimacy is especially fraught in international criminal trials that are constantly suspected of political motives in a distrustful international environment.³² If political trials are the exception domestically and the assumption is most often that one is witnessing the ordinary delivery of justice, that presumption tends to be reversed internationally where the appearance of normality often barely hides strong political undertone.³³ Even the sort of purportedly ‘normalized’ international criminal justice incarnated by the International Criminal Court (ICC) arises against the background of a very thin concept of society, not backed by any world sovereign, and in an environment criss-crossed by power relations and deep cultural divisions.³⁴

This is why so much of international criminal justice seems dedicated to proving its merits and establishing its credentials.³⁵ Trials, particularly international criminal trials, are battlegrounds for symbolic legitimacy understood as a recognition that tribunals incarnate a certain claim to justice. International criminal tribunals seek not only to convict the accused but to simultaneously assert their standing in and as a result of doing so. There has been much emerging work on the legitimacy of international criminal tribunals in the last decade.³⁶ Some of this work is largely theoretical in nature, emphasizing how one might justify the existence of

³⁰ For international law, see generally Mattias Kumm, *The Legitimacy of International Law: A Constitutional Framework of Analysis*, 15 EUR. J. INT'L L. 907(2004); see also Danner, *supra* note 2; Stuart Ford, *A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms*, (2011); see TOM R. TYLER, *LEGITIMACY AND CRIMINAL JUSTICE: AN INTERNATIONAL PERSPECTIVE* (2007).

³¹ In the US context for example, the issue has attracted the curiosity of criminologists for several decades. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006); see also Jeffrey Fagan, *Legitimacy and Criminal Justice-Introduction*, 6 OHIO ST. J. CRIM. L. 123 (2008).

³² See M. Glasius, “*We ourselves, we are part of the functioning*”: *The ICC, victims, and civil society in the Central African Republic*, 108 AFR. AFF. 49 (2009).

³³ Martti Koskeniemi, *Between impunity and show trials*, 6 MAX PLANCK YEARB. U. N. L 1 (2002).

³⁴ See Frédéric Mégret, *The International Criminal Court and State Sovereignty: the “Problem of an International Criminal Law” Re-examined*, in *INTERNATIONAL HUMANITARIAN LAW: CHALLENGES AHEAD* (John Pritchard & Bill Dunlap Carey, John Pritchard, & William Dunlap eds., 2006).

³⁵ See generally Frédéric Mégret, *The Anxieties of International Criminal Justice*, 29 LEIDEN J. INT. L. 197 (2015).

³⁶ See Sergey Vasiliev, *Between International Criminal Justice and Injustice: Theorising Legitimacy*, in *THE LEGITIMACY AND EFFECTIVENESS OF INTERNATIONAL CRIMINAL TRIBUNALS* (Nobuo Hayashi & Cecilia Baillet eds., Forthcoming).

international criminal tribunals in terms of liberal theory;³⁷ other scholarship is more sociological and relational in nature in that it focuses on how various actual constituencies perceive international tribunals. Clearly the legitimacy of any criminal justice system is not unidirectional; it depends on how various actors respond to it.³⁸ Tribunals will be considered as legitimate if, for example, mandate givers (states) and stakeholders (various international organizations) consider them to be so.³⁹ These perspectives, useful as they may be, have a significant macro and external connotations, i.e., they adopt a birdseye view of legitimacy focused on constituents ‘receiving’ international criminal justice from outside.

A significant push to reframe legitimacy both from outside and within is exemplified by the way in which *victims* are increasingly seen as central to the legitimacy of tribunals.⁴⁰ Looking at victims is somewhat analogous to the inspiration for this article, namely seeing legitimacy as framed by an internal dialogue directed at some of the participants in international criminal justice. This is the ‘legitimacy of the intimate’ referred to in the sub-title to this article, the sense that legitimacy must be understood as occurring at the very heart of the international criminal trial in the complex and close-quarters interaction between its participants. However, victims are only a very partial constituency. For the majority of international criminal justice’s history, they had no place in the trial itself; even now, in the ICC context, only a part of the victims of international crimes are actually represented as participants in the trial. Their contribution remains relatively marginal, based as it is on a “right to be heard” on questions of interest.⁴¹

What the focus on victims seems to miss and further obscure, in fact, is the centrality for the day-to-day legitimacy of international criminal justice of those that are its very targets, namely defendants. On the one hand, defendants are uniquely placed to challenge that legitimacy and have probably done more to discredit international criminal tribunals when they have put their mind to it than any other actor. On the other hand, in the not-so-rare cases where defendants provide a modicum of cooperation with and recognition to those who prosecute them (and, as we shall see, they occasionally do much more), they arguably provide tribunals with

³⁷ See Aaron Fichtelberg, *Democratic Legitimacy and the International Criminal Court A Liberal Defence*, 4 J. INT. CRIM. JUST. 765 (2006).

³⁸ See Anthony Bottoms & Justice Tankebe, *Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice*, 102 J. CRIM. CRIMINOLOGY 119 (2012).

³⁹ See Nienke Grossman, *The Normative Legitimacy of International Courts*, 86 TEMPLE L. REV. 2014 (2013); Fichtelberg, *supra* note 37; see also Beth A. Simmons & Allison Danner, *Credible Commitments and the International Criminal Court*, INT. ORGAN. 225–256 (2010).

⁴⁰ See Jo-Anne Wemmers, *Victims and the International Criminal Court (ICC): Evaluating the Success of the ICC with Respect to Victims*, 16 INT’L. REV. VICT. 211, 211–227 (2009).

⁴¹ See Trumbull, *supra* note 4; see also Sara Kendall & Sarah Nouwen, *Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood*, 76 L. CONTEMP PROBS 235 (2013); see also Beat Dold & Lisa Yarwood, *Victim Participation at the ICC: Valid Potentiality or Vanguard Pandering*, 13 AFR. Y.B. INT’L L. 159 (2005).

one of their best claims to legitimacy: namely, that the persons that stand to lose most from their work, *in fine*, recognize that they are legitimate. This is indeed potentially, a formidable homage paid by vice to virtue.

Note that this is clearly not the same thing as *demanding* that the accused recognize his guilt, something characteristic of the worst kinds of show trials. This is something that international criminal justice, in its liberal understanding, cannot possibly ask because the accused's guilt is precisely the question. Rather it is a demand that at the very least the accused recognize the legitimacy of the process by which he is made to stand trial. The legitimacy of an institution here is understood not as support for everything that this institution does (indeed, one may be strongly in disagreement with it) but as recognition that this institution is, nonetheless, *authorized* to make these choices.⁴² Legitimacy and authority in that respect closely track each other when it comes to defendants: a tribunal is legitimate in no small part because its authority to adjudicate is recognized as such. In other words, thinking that an international criminal tribunal is legitimate is not to be equated with thinking that everything it does is just: one might think that the ICC is legitimate but that it rendered an unjust or unfair decision against oneself. To recognize that an institution is legitimate is not to abdicate all power to contest its judgments in advance, but precisely to think that it is an institution worth engaging to obtain the most just outcome. In theory at least, the recognition that a tribunal is authorized should lead one to accept its judgment, even if one disagrees with it.

In fact, we have reason to think that this legitimacy-constituting dimension of the trial has been internalized by defendants and that their engagement with tribunals' legitimacy is not only motivated by instrumental rationality (that is, the extent to which it may maximize the odds of being freed or obtaining some other benefit)⁴³ but is often consciously part of the broader symbolic struggle over the legitimacy of criminal institutions. In turn, international criminal justice's legitimacy crucially rests on its ability to broadcast the message and obtain the recognition that it functions in a way that is *specifically juridical*, and is not simply the continuation of politics by other means, victors' justice, or a personal vendetta (that international criminal justice also, *de facto*, has political effects is a different issue). In other words, for defendants to recognize a tribunal as legitimate is to treat it fundamentally as a legal institution, that does not merely use the law as a cloak for something else, is validly established and operates according to legally compelling standards. Note that there is nothing particularly implausible or necessarily onerous about such a demand: criminal defendants domestically are typically required, even if they think themselves innocent and the victims of a tragic mistake, to 'play the game' and, if they feel they are innocent, to chalk up their trial

⁴² This is the definition that is routinely accepted, for example, in the understanding of the U.S. Supreme Court's legitimacy. See James L. Gibson, *The Legitimacy of the U.S. Supreme Court in a Polarized Polity*, 4 J. EMPIR. LEG. STUD. 507, 510–511 (2007); see also Michael J. Petrick, *The Supreme Court and Authority Acceptance*, 21 WEST. POLIT. Q. 5, 5–6 (1968).

⁴³ See TYLER, *supra* note 31.

to the fallibility and occasional mistakes of any system of criminal adjudication.⁴⁴ It is for the most part not appropriate for a defendant, faced with an accusation that may be wrong and unfair, to become a fugitive, engage in disobedience, or loudly denigrate a court.

This article, thus, aims to be one of the first to seek to understand how the fundamental nature of international criminal justice might better be understood through the eyes of the accused, or at least through the encounter of accused with the processes that have taken over their lives. In this respect, it is important to begin with a preliminary methodological observation, to note that we know little – at least in the way of systematized social scientific knowledge – about what is going through the accused’s mind while they are engaged with international criminal tribunals. In practice, knowing what the accused thinks and even what he does is complicated methodologically by the fact that the accused’s subjectivity is, in liberal systems and formal terms at least, mediated by a trial lawyer.

Of course, one can ascribe some of what the lawyer does to what the defendant has instructed her to do, but it remains difficult to dissociate the study of defendants from the study of patterns of representation by defense attorneys. Moreover, at least in certain legal systems, defense counsel have a dual role as agents of their client but also as ‘officers of the court’ and therefore cannot and indeed ought not be counted on to provide a raw and unmediated representation of what the accused wants. The problem is compounded by the fact that, especially in adversarial systems, the accused’s privilege against non-incrimination means that he is frequently incited not to testify in court, further limiting the degree of direct access one may have to his psyche.

Nonetheless, there does seem to be ways in which one can access what the defendant thinks and does during the trial. Work has begun to emerge, for example, in the post-trial phase on how individuals convicted by the International Criminal Tribunal for the former Yugoslavia (ICTY) view the process.⁴⁵ At the very least, one can assume that broadly speaking, defense lawyers are implementing a strategy that conforms to their clients’ wishes.⁴⁶ In rehabilitating the figure of the accused as key to an understanding of the legal dynamics of trials, this article wants to suggest that the defendant’s agency is expressed in multiple ways that go much

⁴⁴ The issue has long generated a lively debate in moral and political philosophy. See A. D. Woozley, *Civil Disobedience and Punishment*, ETHICS 323-331 (1983); see also Richard W. Momeyer, *Socrates on Obedience and Disobedience to the Law*, 8 PHILOS. RES. ARCH. 21, 21–53 (1982); see also Gabriel Danzig, *Crito and the Socratic Controversy*, 23 POLIS J. SOC. GREEK POLIT. THOUGHT 21–45 (2006); see also George P. Fletcher, *Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape*, 26 UCLA L. REV. 1355, 1364-69 (1989).

⁴⁵ Such work is currently being undertaken in the context of the ICTY by Damien Scalia and Mina Rauschenbach. See GENEVA ACADEMY, <http://www.geneva-academy.ch/docs/projets/>

ICTY/SciencePart_ICTY.pdf (Last visited May 2, 2019).

⁴⁶ This is of course a complex question that raises a range of ethical issues, but practically the conclusion seems inescapable. Warren Lehman, *Pursuit of a Client’s Interest*, 77 MICH. L. REV. 1078, 1078-97 (1979).

deeper than broad instructions given to defense counsel or even legal strategy generally (if that were the case, the study of the accused and of defense counsel would be one and the same thing). One of the challenges of this article, in fact, is to unearth the ‘raw’ defendant, unmediated by his professional counsel, who in some cases will already be suspected of being embedded in the workings of international criminal justice. The effort is therefore based on a study and observation of the ‘ways of being’ of the accused in court including of course, as the case may be, their testimony. It will also pay attention to such diverse and tell-tale signs as body language or declarations made during or after the trial that help make sense of his attitude.⁴⁷ As a result, the article draws on a range of available material, including notable transcripts of proceedings before international criminal tribunals and existing testimonies and *mémoires* by some defendants, as well as the occasional existing, including psychological, close observation of sets of defendants.⁴⁸

What we can speculate from the outset is that facing an international criminal tribunal, expected or not expected, must confront the accused with some stark existential dilemmas: assess one’s responsibility; possibly decide how much one values freedom and life in relation to politics; determine how truthful one wants to be with the Court; and adopt a strategy. It seems elementary that the issue of guilt or innocence will weigh heavily on the accused’s conduct, but it is not the only one and he may simultaneously seek to speak, through his performance at the trial, to relatives, or to society at large. As will quickly become evident, the range of possible psychological dispositions to trials is quite vast and goes far beyond the most notorious cases of straightforward opposition to their work. Attitudes will depend on the crimes the defendant is accused of, the reality of whether he committed them, and his knowledge/beliefs about whether he actually committed them,⁴⁹ as well as a host of other factors including the psychological make-up of individual defendants, their degree of socialization in preventive detention, and the extent to which they receive family or political support ‘back home.’

From there on, one might speculate that a range of possible typical

⁴⁷ The relevance of this has not been lost on international criminal tribunals. See e.g., *Prosecutor v. Brima* SCSL-04-16-A-0659, Response Brief of the Prosecution, ¶ 8.85 (Oct. 04, 2007), <http://www.scsldocs.org/documents/view/4995> (“The question of whether a statement is a genuine expression of remorse is, apart from anything else, not just a question of the actual words spoken. It is a question that needs to be assessed by the Trial Chamber having regard to the demeanour of the accused at the sentencing hearing and throughout the trial.”).

⁴⁸ These include a veritable cornucopia of detailed research by psychologists who had the opportunity to interview leading Nazis at Nuremberg. DOUGLAS MCGLASHAN KELLEY, *22 CELLS IN NUREMBERG* (1961); see also GILBERT, *supra* note 5; see also LEON GOLDENSOHN, *THE NUREMBERG INTERVIEWS* (2007).

⁴⁹ It is fair to assume the accused will have at least specific and intimate knowledge of whether he committed the crimes he is accused of or not, although it is also worth underlining that given the complexity of some international offences, even such a basic assumption will not always hold. Moreover, an accused may not know from the outset whether he is guilty or not, and international criminal justice is at least in part a steep learning process for defendants.

psychological dispositions before international courts are available, including: (i) individuals who committed the crimes but do not think that they did or at least deny that they did; (ii) individuals who did not commit the crimes and claim they are innocent; (iii) individuals who do not necessarily think they committed the crimes they are accused of but nonetheless take responsibility for them or at least decide to accept their judicial fate; and (iv) individuals who committed the crimes and are ready to recognize that they did so. These different combinations, then, can help frame, respectively, what this article will describe as four possible ideal-typical attitudes before international criminal tribunals: defiance (I); sacrifice (II); participation (III); and repentance (IV). It is contended that these four attitudes, synthesized and explored across the range of past and existing international tribunals, largely exhaust the possible psychological strategies of coping with a trial.⁵⁰ To the author's best knowledge, no such categorization has been proposed in the literature.

For each of these postures, the article will focus on: (i) the fundamental logic at work, understood as what defendants specifically are trying to achieve and how it fits within their larger personality and worldview; (ii) the typical manifestations of the attitude understood as the sort of courtroom strategy and behavior most characteristic of it; and (iii) the impact on the authority and legitimacy of the international criminal trial. For the purposes of simplicity, the article mostly focuses on the five principal international criminal tribunals (Nuremberg, Tokyo, the ICTY, the International Criminal Tribunal for Rwanda (ICTR), and the ICC) but will occasionally look at hybrid or semi-international proceedings especially when highly relevant for illustrative purposes. Finally, the article stops short of canvassing the reaction of international criminal tribunals to various types of defendant attitudes outside the conclusion, partly because this work has already been done and partly because it is left for future inquiry.

Furthermore, it is important to note that this article does not deal with the actual validity of the claims made by the accused both against and in support of international criminal tribunals, or whether in any deeper sense certain attitudes are preferable over others. Rather, claims made by defendants are treated as having distinctive symbolic, performative, and even ritualistic dimensions that are interesting in and of themselves and tell us much about the dynamics, impact, and

⁵⁰ I therefore deliberately leave aside individuals who have become insane and are not in a position to project anything meaningful in their trial (Hess comes to mind). I also leave aside (i) individuals who are indifferent to their fate and simply want to get it 'over with.' For example, Erich Rader, former-commander in Chief of the German Navy insisted that "I have no illusion about this trial. Naturally, I will be hanged or shot. I flatter myself to think that I will be shot; at least I will request it. I have no desire to serve a prison sentence at my age" GILBERT, *supra* note 5 at 341; (ii) individuals who are, out of moral corruption for example, ready to do 'anything' to be acquitted or given a lower sentence even if that means hypocritically acknowledging the legitimacy of the system and/or their guilt; and (iii) individuals who are ready to do anything to trick and cheat the system, intimidate witnesses, plant evidence, lie under oath. All of these strategies, even though they may be relatively common, basically abandon any possibility of meaningful engagement with international criminal justice for the benefit of some purely individual goal.

legitimacy of international trials. Put simply, the aim of the article is to distinguish between these different postures in a largely typological vein, and to map their significance for our understanding of the evolving fortunes of international criminal justice, not to determine conclusively whether they show tribunals to be legitimate. At any rate, the very diversity of attitudes that this approach suggests militates against any easy conclusion as to international criminal justice's legitimacy.

II. DEFIANCE

Defiance is perhaps the most notorious of defendants' attitudes before international criminal tribunals, and the only one that has garnered specific intellectual coverage.⁵¹ The defiant accused is one who fundamentally does not accept the legitimacy of his presence in court, and would probably have remained a fugitive if he could.⁵² Although defiance can occur domestically and in ordinary criminal trials, it is particularly prevalent internationally. Domestically, the more common attitude is for the accused to deny their crime (be they innocent or guilty), but it is more rare for them to deny the tribunals that judge them any legitimacy, except in cases that are perceived or constructed as political.⁵³ Internationally, the emphasis is more often on decrying the legitimacy of tribunals than on specifically rebutting the charges against oneself. There are, of course, many arguments to be made about why international criminal tribunals are indeed illegitimate in certain cases,⁵⁴ but to stress this point again, this article is not interested in assessing these as truth-claims as much as examining their productive value for the international trial. The point is that for the defiant accused, neither the authority nor a fortiori the legitimacy of the relevant tribunal is accepted.

A. Logic

The motivation of defiance may vary in depth. A defendant may merely distrust his judges or be convinced that he is the object of a conspiracy. The roots of defiance will sometimes go deep and be part of older patterns of presenting

⁵¹ See Post & Panis, *supra* note 14.

⁵² For a study of the possible justifications of fleeing prosecutions for war crimes in the post-war Japanese context, see AKIRA YOSHIMURA, *ONE MAN'S JUSTICE* (2004).

⁵³ This typically only occurs when domestic courts are involved in some of the very same type of caseload that international criminal tribunals have to hear. On denying domestic tribunals any legitimacy, see Kevin Boyle, Tom Hadden & Paddy Hillyard, *Ten Years on in Northern Ireland: The Legal Control of Political Violence* 75–76 (1980); see also Katrin Mattaei, *Chad's Former Dictator Under Trial*, DW NEWS <http://www.dw.com/en/chads-former-dictator-under-trial/a-18596044> (last visited July 20, 2015).

⁵⁴ See Tiphaine Dickson & Aleksandar Jokic, *Hear No Evil, See No Evil, Speak No Evil: the Unseen Case*, 19 INT'L. J. SEMIOT. L. 355 (2006).

oneself as a sort of martyr of international law more generally.⁵⁵ In such a case, the trial will be a further opportunity to emphasize feelings of scapegoating at the hands of the international community.⁵⁶ At any rate, defiant defendants believe that their trials are fundamentally political trials and that their judges therefore have no legitimacy.⁵⁷ Rudolf Hess could not have been clearer when he said, “I do not defend myself against accusers to whom I deny the right to bring charges against me and my fellow-countrymen.”⁵⁸ The bottom line for defiant accused is that international criminal tribunals have often been created in an ad hoc fashion, with only a particular set of crimes and defendants in mind and in ways that protect the judges from accountability.

Perhaps the most dramatic and typical objection, therefore, is to the very legality of a court, assuming such an objection can be brought in the first place.⁵⁹ Challenging the legality of international criminal tribunals is of course a perfectly legitimate defense strategy and it may be pursued by defendants that are not defiant; however, the notion that international criminal tribunals have no valid legal basis at all is an argument that resonates particularly strongly with defiant defendants. The attorneys at Nuremberg, for example, had complained that the tribunal was essentially based on the application of retrospective law, ironically one of the very crimes that the Nazis were accused of.⁶⁰ Tadic and Kanyabashi argued before the ICTY and the ICTR respectively and unsuccessfully that the UN Security Council never had the power, in general or in the circumstances, to create the tribunals.⁶¹ In that respect, defiant defendants clearly point out what they see as a gap between

⁵⁵ For example, long before he was arrested, Milosevic had drawn on both the register of international law to denounce the bombings of Serbia and the identification of both him and Syria as martyrs under the West’s bombs. In that sense, there was a continuity between his pre-trial and in-trial rhetorical register.

⁵⁶ Consider Mladic: “I’m an old man and I can’t do anything so quickly. I’m not so fit as you are. You are on your own ground, you are fit, you have knowledge of international law, you are trying me and my people instead of those who devastated and keep devastating other countries.” *Prosecutor v. Ratko Mladic*, Case no. IT-95-18-I, Trial Transcripts, 214 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 23, 2012).

⁵⁷ See e.g., Edward Wong, *Prosecutors Detail Atrocities in Hussein’s Trial*, N. Y. TIMES (Aug. 22, 2006) <https://www.nytimes.com/2006/08/22/world/middleeast/22iraq.html>.

⁵⁸ The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg Germany, Vol 22, Two Hundred and Fourteenth Day, Tuesday, 29 August 1946, AVALON PROJECT (YALE LS) 372, <http://avalon.law.yale.edu/imt/08-29-46.asp> (last visited Feb 10, 2016).

⁵⁹ At Nuremberg such a challenge was not possible. See Charter of the International Military Tribunal, art. 3 (“Neither the Tribunal, its members nor their alternates can be challenged by the prosecution, or by the Defendants or their Counsel.”).

⁶⁰ Motion Adopted by All Defense Counsel, THE TRIAL OF GERMAN MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG, GERMANY, 20TH NOVEMBER, 1945 TO [1ST OCTOBER 1946], Vol. 1. (1947), 168-69.

⁶¹ *Prosecutor v. Dusko Tadic a/k/a “Dule”*, Case No. I-94-1, Decision on the defence motion for interlocutory appeal on jurisdiction, ¶¶ 32-40 (Int’l Crim. Trib. For the Former Yugoslavia App. Chambers Oct. 2, 1995).

positive legality and justice, but also fault the tribunals for what they see as a deeper failure to adhere to the rule of law.

Little that the tribunals do will convince defiant defendants otherwise. For example, a tribunal's finding that it was created 'legally' will not shake the conviction of the accused about the deeply political character of the trial. No defiant accused before the ICTY for example was simply swayed by the insuperable logic of the Tadic decision on the legality of the creation of the tribunal.⁶² This is because aside from the legality of their creation, it is often also the very operation of the international criminal tribunals that defiant defendants find objectionable. Typically, this will be based on a variation on the 'victors' justice' argument or pointing to some other deficiency of international tribunals in terms of the fairness of their creation. As early as Nuremberg, defense counsel complained, "[t]he Judges have been appointed exclusively by States which were the one party in this war. This one party to the proceeding is all in one: creator of the statute of the Tribunal and of the rules of law, prosecutor and judge."⁶³ Barayagwiza, one of the accused before the ICTR, "refus[ed] to associate himself with a show trial the outcome of which is dictated by the government of Rwanda" and pointed out that "allowing the current leadership of Rwanda to be this Tribunal's puppeteer is even more outrageous in the face of the undisputed facts that they are responsible for killing thousands of Rwandans who opposed their takeover of the country in 1994."⁶⁴ Charles Taylor insisted that the Special Court for Sierra Leone (SCSL) "is an attempt to continue to divide and rule the people of Liberia and Sierra Leone."⁶⁵ And Hissene Habré was even more to the point before he was removed from his own trial: "Down with imperialists! It is a farce by rotten Senegalese politicians! African traitors! Valet of America!"⁶⁶

As a result, defiant defendants seem to argue international tribunals cannot understand the nature of the justice they have been asked to deliver. As Charles Taylor put it at the end of his trial in an awkwardly patronizing way:

Your Honours were also handicapped by not having the benefit of

⁶² See e.g., Karadzic's refusal to enter a plea or Mladic's refusal to be tried by a "NATO court": Prosecutor v. Radovan Karadzic, Case No. IT-95-5/18, Trial Transcripts, 133 (ICTY Mar. 3, 2009); Prosecutor v. Ratko Mladic, Case No. IT-95-18-I, Trial Transcripts, 212 (Feb. 2, 2012).

⁶³ Motion Adopted by All Defense Counsel, *supra* note 60, at 169-70.

⁶⁴ Barayagwiza's Lawyers Contest Court Order, Ask to Withdraw, Justiceinfo.net, 30 November 2001 <https://www.justiceinfo.net/en/hirondelle-news/15976-en-en-barayagwizas-lawyers-contest-court-order-ask-to-withdraw67426742.html> (last visited Sep 30, 2019).

⁶⁵ Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-01-PT, Initial Appearance Transcripts, 14 (Special Court for Sierra Leone Apr. 3, 2006).

⁶⁶ Aislinn Laing, "African traitors!" *Chad dictator trial in Senegal has a chaotic start*, July 20, 2015, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/chad/11751047/Former-Chadian-dictator-Hissene-Habre-faces-trial-in-new-African-courtHissene-Habre.html> (last visited Feb 13, 2016).

the full contextual picture of why and how I ended up before this court. That contextual matrix is uniquely political and not legal in nature, and having ensnared Charles Taylor at this time, only time will tell how many other African heads of state stand to be destroyed in its continued wake. These handicaps were not the fault of Your Honours, to be sure, in the sense that you could not be asked to know of so much that was never meant to ever see the light of day.⁶⁷

Another familiar complaint is the fact that one is being prosecuted *rather than others*. Where international criminal tribunals emphasize their pursuit of *retributive* justice and international judges are unlikely to review the exercise of prosecutorial discretion, the defiant accused is more likely to see and emphasize the degree to which international criminal tribunals implement a form of *distributive* justice.⁶⁸ It may be that the prosecutor legally exercised her discretion in a technical sense, but that she did not do so legitimately because the law requires that defendants be treated equally and the nature of international tribunals made that all but impossible. Adolf Eichman famously asked during his trial by an Israeli court:

Why me? Why not the local policemen, thousands of them? They would have been shot if they had refused to round up the Jews for the death camps. Why not hang them for not wanting to be shot? Why me? Everybody killed the Jews.⁶⁹

Similarly, the defense of Tadic was keen to emphasize the apparent opportunism that led to his arrest and selection for prosecution:

A further problem is the lack of clearly defined criteria for the prosecution of the accused. Bearing in mind the fact that not everyone who might be suspected would actually be prosecuted, it is unfortunate that the Prosecution has not been clear as to what criteria it is applying. Thus, it appears that the prosecution of those accused is not based upon established guidelines, but on arbitrary consideration such as the availability of data and suspects. This gives rise to the question of whether Dusko Tadic would ever have been prosecuted had not the Germans come across him by accident in Munich; we shall probably never know. It is clear, however, that the lack of defined and public criteria has blown the case against Dusko Tadic out of all proportion. Already

⁶⁷ Prosecutor v. Taylor, Case No. SCSL-2003-01-PT, Transcripts, 49723 (Special Court for Sierra Leone May 16, 2012).

⁶⁸ C.f. Frédéric Mégret, *What Sort of Global Justice is "International Criminal Justice"?*, 13 J. INT'L CRIM. JUST. 77, 77–96 (2015).

⁶⁹ LESLIE ALAN HORVITZ & CHRISTOPHER CATHERWOOD, *ENCYCLOPEDIA OF WAR CRIMES AND GENOCIDE* 140–141 (2009).

the danger seems evident that the case is viewed as a symbol of everything that happened in the area, and that Dusko Tadic has been portrayed as the prototype of a war criminal. It requires little argument to show that this has a disproportionate effect on the evidence in the case and it may influence the judgment of that evidence.⁷⁰

Defiance may also relate to some more intermediary claim, for example, that a tribunal is unable or unwilling to do everything that is necessary to protect the right to a fair trial. This in and of itself may be a perfectly valid complaint and is compatible with an attitude of “engagement” as described in the next section (after all, it may very well be that tribunals *are* violating the rights of the accused). But the stridency and repetition with which the claim is made may be part of an effort to more fundamentally delegitimize a court. The main quarrel of many accused with the ICTR, for example, was the fact that they could not choose the counsel of their liking.⁷¹ Although presented as a “fair trial” issue by those defendants and of course part of broader debates about the right to representation,⁷² the intensity of the protests often betrayed a frustration with the denial of access to attorneys who were willing to mount purely “political” defenses. It can therefore be understood as part of a larger defiance towards the court.

At any rate, concern about rights sooner or later intersects with broader concerns about the independence and impartiality of the judges. Barayagwiza, for example, “challenged the ability of the ICTR to render an independent and impartial justice due, notably, to the fact that it is so dependent on the dictatorial anti-hutu regime of Kigali to which two of you paid recently a working visit aimed at strengthening relations to the detriment of my rights.”⁷³ In other words, the critique of respect for due process standards—an in itself perfectly legitimate approach – can lead in certain cases to defiant defendants’ default argument, which is that the trial is a parody. As Karadzic put it (leaving little doubt which direction he thought his own trial was going), “just as a human being cannot be half girl/half mermaid or half fish, this either has to be a fair trial or *no trial at all*.”⁷⁴ Pushed to its extreme conclusion, therefore, the critique that international criminal tribunals fail to protect due process rights can be a critique that they are offering a trial at all.

In denying tribunals any of the hallmarks of justice, defendants deny them

⁷⁰ Prosecutor v. Tadic, Case No. IT-94-1-T, Trial Transcripts, 56-57 (ICTY May 7, 1996).

⁷¹ See e.g., Prosecutor v. Akayesu, Case no. ICTR-96-4-A, Appeal Judgment, 44 (Jun. 1, 2004).

⁷² Kelly Xi Huei Lalith Ranasinghe, *The Sacrifice of Jean Kambanda: A Comparative Analysis of the Right to Counsel in the International Criminal Tribunal for Rwanda and the United States, with emphasis on Prosecutor v. Jean Kambanda*, 5 JICL 7, 7 (2005).

⁷³ *Id.* ¶ 5.

⁷⁴ Prosecutor v. Karadzic, Case No. IT-95-5/18, Trial Transcripts, 43 (ICTY Sep. 17, 2008).

the right to try them.⁷⁵ At times, the accused have not hesitated to heap scorn on their accusers. Various expressions of contempt of the tribunals generally, of the prosecutor or, more rarely, of the judges, also serve to instill a poisonous atmosphere. At the ICTY, Seselj for example continuously expressed his contempt for the prosecution, insisting that:

I feel so superior in relation to the Prosecution that I am not worried at all that perhaps I am going to disclose quite a few of my arguments to the Prosecution. I would prefer to have a reader Prosecution, not those who have this lack of readiness. For four years, they didn't read the material that I sent them. I am informing them about everything so they would be as ready as possible because this is a chance of a lifetime for me to prove my superiority.⁷⁶

Milosevic also used language that came very close to having him held in contempt of court: “please read out those judgements that you have been instructed to read and don't bother me and make me listen for hours on end to the reading of texts written at the intellectual level of a seven-year-old child -- or rather -- let me correct myself -- a retarded seven-year-old.”⁷⁷ The accused Stankovic notoriously addressed the ICTY as “the Monstrous Fascist Hague Tribunal.”⁷⁸ Such language seems designed to destroy the possibility of even grudging cooperation between the accused on the one hand, and the prosecutor and the judges on the other.

One of the hallmarks of a defiant attitude is a strident denial that one might have committed any of the crimes that one is accused of. Such an attitude is of course entirely acceptable under the law, and one might even think there was nothing unethical about defendants who know themselves to be guilty to it this in order to ensure that the prosecution proves its case beyond a reasonable doubt. Nonetheless, systematic denial by defendants who know themselves to be guilty may make the trial more impracticable and may offend victims' sense of justice. Up to the end, many accused at Nuremberg refused to shoulder any responsibility for their deeds and offered the unseemly sight of a “ready lexicon of exculpation.”⁷⁹ For example, upon hearing of his conviction Joachim Von Ribbentrop claimed that he was “held responsible for the conduct of a foreign policy which was determined

⁷⁵ See *Prosecutor v. Karadzic*, Case No. IT-95-5/18, Trial Transcripts, 133 (ICTY Mar. 3, 2009). (“This Tribunal does not have the right to try me.”).

⁷⁶ *Prosecutor v. Seselj*, Case No. IT-03-67-PT, Trial Transcripts, 734 (ICTY Nov. 8, 2006).

⁷⁷ *Prosecutor v. Milošević*, Case No. IT-02-54, Trial Transcripts, 64 (ICTY Oct. 30, 2001).

⁷⁸ *Prosecutor v. Jankovic & Radovan Stankovic*, Case No. IT-96-23/2-PT, Decision following registrar's notification of Radovan Stankovic's request for self-representation, ¶23 (ICTY Aug 19, 2005).

⁷⁹ JEFFREY K. OLICK, *IN THE HOUSE OF THE HANGMAN: THE AGONIES OF GERMAN DEFEAT, 1943-1949* 115 (2005).

by another,”⁸⁰ essentially shifting the blame on Hitler despite an abundance of evidence as to his responsibility. Others insisted that they would do the same again (Admiral Donitz);⁸¹ that they did not know what was really going on (Julius Streicher,⁸² Walter Funk)⁸³; or emphasized that they had merely done their duty to the German people (Göring).⁸⁴ In fact a small minority of the accused made it clear that they took pride in what they did. Rudolf Hess’s last statement before the verdict at Nuremberg seemed destined to leave no doubt that he would concede nothing to his jailors:

I was permitted to work for many years of my life under the greatest son whom my people has brought forth in its thousand year history. Even if I could, I would not want to erase this period of time from my existence. I am happy to know that I have done my duty, to my people, my duty as a German, as a National Socialist, as a loyal follower of my Fuehrer. I do not regret anything.⁸⁵

More recently, many of the accused before the ICTR have not only denied their personal involvement but sought to challenge the dominant narrative of the 1994 genocide either by claiming that it did not exist or insisting that it was followed by a reverse genocide against the Hutu.⁸⁶

An attitude of defiance may involve more generally defying expectation that one will appear humbled or chastised as a result of being brought to answer charges before an international criminal tribunal. Some defendants seem to have made a point of behaving as an indomitable force before their accusers, to the point of provocation. Goering is perhaps the classic case of this sort of attitude, one who attracted a certain fascination even from some of the Allies present at the Nuremberg trial. As Victor Bernstein noted, “the ex-Reich Marshal does not consider himself broken. He shows, indeed, immense vitality, and his expressive moon face is by turns defiant, cynical, [and] appreciative.”⁸⁷ His charisma and panache seemed to directly challenge the technocratic authority of the Nuremberg tribunal.

The ultimate goal of defiance is to upset the trial process. In the most blatant cases, defiant defendants seek to intimidate and even threaten the Court, including their judges. This will be possible in certain transitional contexts where forces of the ancient regime continue to have a certain nuisance power and the threat is not merely rhetorical. For example, Saddam Hussein’s initial appearance before

⁸⁰ The Trial of German Major War Criminals, *supra* note 58, at 372.

⁸¹ *Id.* at 389.

⁸² *Id.* at 385.

⁸³ *Id.* at 386-87.

⁸⁴ OLICK, *supra* note 79, at 114-115.

⁸⁵ The Trial of German Major War Criminals, *supra* note 58.

⁸⁶ See THIERRY CRUVELLIER, COURT OF REMORSE: INSIDE THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 32-37 (2010).

⁸⁷ Victor H. Bernstein, *Final Judgment The Story of Nuremberg*, 3 (1947).

the Iraqi Special Tribunal (IST) has been understood as a clear case of intimidating its young judge,⁸⁸ in an environment where several individuals associated with the trial would get killed in the months that followed. More often, it is accusing witnesses who have been threatened. Hence Seselj is alleged to have suggested that prosecution witnesses would meet a terrible end, whether self-inflicted or otherwise: “Serbs do not like false witnesses; they are disgusted by them and therefore despise them. Serbs believe that God punishes false witnesses, and not just false witnesses, but their families and decedents . . . a situation will arise in which all the prosecution’s false witnesses will have committed suicide.”⁸⁹

Often, however, the logic of defiance is more subtle yet more pernicious. At least the inflammatory defendants can be dismissed as deranged or can be dealt with expeditiously by the Court, e.g., through removal. More sophisticated challengers of international criminal justice refuse, essentially, to allow themselves to be portrayed as defendants at all. This is manifested in various ways that will be dealt with in greater detail in the next sub-section, but one characteristic episode is Saddam Hussein’s insistence that he be addressed as the ‘President of Iraq’⁹⁰ which, whatever else he might have been, he clearly was no longer by the time of his trial. Similarly, Mladic on the occasion of his first hearing at the ICTY, insisted that “I do not want to have a single letter or sentence of that indictment read out to me.”⁹¹ The refusal to even hear an indictment suggests a profound refusal to accept the position that one is in, and the fact that one cannot quite be a defendant if one fails to even take cognizance of the charges against oneself. Refusing to endorse the mantle of defendant is to fundamentally refuse to ‘play the game’ of the trial. It deprives the process of its adversarial dynamics. It also makes a point about the inability of the judicial machinery set up by one’s enemies to constitute one as an accused (and if one was never a defendant, then one can never become a convict) and, on the contrary, one’s power to define one’s own status. If one is merely an accused but not a defendant, then there is in a sense no trial in the first place. Mladic could not have made his thoughts clearer when he exclaimed to the ICTY: “you’re not a court.”⁹²

There may be something slightly surreal about such denials of the obvious, but such efforts make sense if one understands them as part of a broader attempt to redefine the meaning and therefore legitimacy of the trial. Indeed, one of the characteristics of defiance is that it is directed both at the courtroom, and the larger “court of public opinion.” In other words, defendants are seeking to undermine the trial but not simply in a purely functional way. The goal is not so much to make the

⁸⁸ Rory McCarthy, “*I am Saddam Hussein, the President of Iraq*,” THE GUARDIAN (July 2, 2004) <http://www.theguardian.com/world/2004/jul/02/iraq.rorymccarthy2>.

⁸⁹ Seselj cited in *Prosecutor v. Vojislav Seselj*, *supra* note 76.

⁹⁰ McCarthy, *supra* note 88.

⁹¹ *Prosecutor v. Ratko Mladic*, Case No. IT-95-18-I, Trial Transcripts, 11 (ICTY Jun. 3, 2011).

⁹² *Prosecutor v. Ratko Mladic*, Case No. IT-95-18-I, Trial Transcripts, 89, 93 (ICTY Jul. 4, 2011), p. 47; *see also* *Prosecutor v. Taylor*, Case No. SCSL-2003-01-PT, Initial Appearance Transcripts, 14 (Special Court for Sierra Leone Apr. 03, 2006) (“I do not recognize the jurisdiction of this Court.”).

trial capsize, which is highly unlikely and may merely appear as a bonus, but to make its verdict appear illegitimate to a larger audience. In the process, the court is made to appear as less central than it claims to be. Ideally, such defendants must reason, the pacifying and reconciliatory function of international criminal justice will be undermined, and they will escape unscathed, if not before international law at least in terms of their political reputation.

One common denominator of at least the more sophisticated defiant defendants, is that they seek through their very acts and words to make international criminal tribunals “stumble” and, in a sense, reveal, what they deem to be, their true colors. The goal is to ‘call the bluff’ on international criminal justice’s claim to operate according to the rule of law. Instead, the claim is that it is engaged in “show trials” that only have the appearance of justice. For example, the accused often seek to sabotage the trial from within by making an element of it unworkable. In representing themselves in sub-standard fashion or refusing to even show up, for example, they help to make evident the very point they are supposedly basing their defiance on. In this way defendants seek to make their trial the living proof of what they are trying to demonstrate – namely, the fundamentally unfair and arbitrary character of the enterprise.⁹³

There is thus a self-fulfilling prophecy aspect to defiance: the accused is the one contributing to make his own trial unfair. But because he may do so within the very parameters that have been set by liberal legalism, he simultaneously exposes its very real limits. One might deplore, for example, that he who represents himself has a “fool for a client” in that self-representation actually diminishes the chances of an acquittal or lenient sentence,⁹⁴ but that would largely miss the point: the accused will have in a sense given up on such notions, and be merely interested in turning himself into a living exemplar for the illegitimacy of international justice.⁹⁵ He may in fact know perfectly well that he will not be a competent defender in the sense that this term is understood by international criminal lawyers, but that is precisely not what he seeks to be.

Perhaps the most common characteristic of all defiant defendants is their attempt to re-politicize what criminal justice has sought to legalize. In other words, where international criminal tribunals would see only rules and questions of fact and are part of broader attempts at deploying legalization in international affairs, defiant defendants see the constant hand of politics. Where international criminal tribunals seek to put them in their place and treat them like ordinary defendants, they assert their grandiosity and elevated political status. Even if they do not deny

⁹³ For example inequality of arms may be a real problem before international criminal tribunals, but it is certainly magnified by the fact that self-representing accused refuse to avail themselves of some of the supporting staff normally available to defense counsel. Iain Bonomy, *The Reality of Conducting a War Crimes Trial*, 5 J. INT'L. CRIM. JUST. 348 (2007).

⁹⁴ Slobham Morrissey, *Foolish Like a Fox*, 90 A.B.A. J. 22 (2004); see also Post & Panis, *supra* note 14, at 834 (pointing out Saddam Hussein’s lack of legal training and the likelihood that he will “overestimate his own legal brilliance.”).

⁹⁵ Marko Milanović, II., *The Arrest and Impending Trial of Radovan Karadžić*, 58 INT'L. COMP. L. Q. 212, 218 (2009).

the existence of the crimes in question in international law—indeed, they rarely do, preferring to accuse their accusers of having committed them instead—they challenge the process by which they were brought to trial. The claim is not only one about innocence (although it is also that); it is a claim implicitly or explicitly about being a *victim*, perhaps the only real victim of the proceedings, and the accuser being in some way the oppressor. Thus, for example, Milosevic played heavily on Serb acrimony about the North Atlantic Treaty Organization’s (NATO) Kosovo bombings, in an attempt to “turn the table” on his accusers and present them as engaged in a terrorist campaign against his people.⁹⁶ This was reflected in his ironic mimetism of the prosecution’s language, as when he described the tribunal as “part of a joint criminal enterprise.”⁹⁷

Finally, defiance seems to be dedicated to performatively invalidating some of the founding myths of international criminal justice. Defendants have variously decried: trials’ deterrent potential (Hess: “If I were to begin all over again, I would act just as I have acted, even if I knew that in the end I should meet a fiery death at the stake.”);⁹⁸ the erasing of frontiers between the domestic and the international (“I will not discuss accusations which concern things which are purely German matters and therefore of no concern to foreigners”);⁹⁹ the primacy of the domestic over the cosmopolitan (Alfred Jodl: “For I believe and avow that a man’s duty toward his people and fatherland stands above every other”);¹⁰⁰ the ability of trials to render historical truth (Von Ribbentrop: “This Trial will go down in history as a model example of how, while appealing to hitherto unknown legal formulas and the spirit of fairness, one can evade the cardinal problems of 25 years of the gravest human history.”);¹⁰¹ the taking away of immunities (“I’m not defending myself in actual fact. What I am defending are the people over there who have suffered. I’m defending other people, the heads of other states, the civilian heads of other states, which will be at the forefront of the onslaught of this alliance after this exception of taking to trial a head of state”), and, of course, the very existence of crimes (the Nuremberg defendants’ apparent incredulity at proof of the Holocaust).

B. Manifestations

Defiance can take a wide variety of forms, partly based on its intensity, its motivation, the personality of the accused, and the nature of the tribunal. Simply defending oneself cannot, of course, be understood as defiance, or reveal the process

⁹⁶ Post & Panis, *supra* note 14, at 832.

⁹⁷ Marlise Simons, *Lessons From a “Textbook” War Crimes Trial*, N. Y. TIMES, Sept. 19, 2004, <http://query.nytimes.com/gst/fullpage.html?res=9A05E4DD1439F93AA2575AC0A9629C8B63> (last visited Oct 17, 2015).

⁹⁸ The Trial of German Major War Criminals, *supra* note 58, at 372.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 399.

¹⁰¹ *Id.* at 372.

to indeed be merely a show trial. However, a certain style and extravagance in the defense may lead to an inference that the accused is trying to communicate something about the overall nature of the proceedings that is defiant rather than defensive. That threshold is reached when the issue is not with any aspect of a trial but with its very existence. Of course, the question here is not as such whether defiance is legitimate, but merely how it manifests itself in the trial. The line will sometimes be hard to draw between a vigorous defense and an attitude of outright defiance to a tribunal,¹⁰² but it is one that must be drawn in law.¹⁰³ Below are some examples of the type of behavior that may betray defiance.

At the very least, defiance may occur through various strategies of withdrawal from the trial process. In the Cambodian context, Nuon Chea (Brother Number Two) repeatedly decided to walk out of his trial.¹⁰⁴ ICTR defendants have often engaged in individual and collective hunger strikes to protest the actions of the tribunal.¹⁰⁵ Repeated absences for health reasons may also occasionally reflect a desire to avoid the trial, or at least reflect a psychosomatic reaction to it. If present, the accused may decide to refuse to make their voice heard in the courtroom, or even ignore questions asked to him.¹⁰⁶ In particular, the accused may refuse to enter

¹⁰² Consider for example Karadzic's characteristically ambiguous statement: "Regardless of what I think about this institution, with all due respect to you personally, I will defend myself before this institution as I would defend myself before any natural catastrophe, to which I also deny the right to attack me". *Prosecutor v. Radovan Karadzic*, Case no. IT-95-5/18, Trial transcripts, 20 (ICTY Jul. 31, 2008). In other words, Karadzic decides to engage even whilst defying, denying the court the authority to prosecute him but still defending against the charges. This hybrid attitude may be seen as a way of 'edging one's bets,' simultaneously disparaging the institution for political purposes, but safeguarding the possibility that one be found forensically innocent under its regime.

¹⁰³ See ELBERLING, *supra* note 12, at 91 ("What is interesting is where legal systems draw the line between behavior that is merely uncooperative (which is, after all, the point of putting up a defence at all) and behaviour that violates some kind of duty to the court or legal system.").

¹⁰⁴ Anthony Jensen, *The Cambodia Daily, Nuon Chea's Defense Stages Walkout at Tribunal*, (2015), <https://www.cambodiadaily.com/news/nuon-cheas-defense-stages-walkout-at-tribunal-100643/> (last visited Feb 7, 2016).

¹⁰⁵ They did so in 1998 in solidarity with convict Jean-Paul Akayesu and to protest against perceived violations of their rights, notably the fact that they could not have the lawyer of their choice; again in 2001 to protest restraints on their defence lawyers. RWANDA: ICTR detainees on hunger strike, IRINNEWS, <http://www.irinnews.org/report/21877/rwanda-ictr-detainees-on-hunger-strike> (last visited Feb 11, 2016) ; in 2007 (Kevin Jon Heller, ICTR PRISONERS ON HUNGER STRIKE - OPINIO JURIS OPINIO JURIS, <http://opiniojuris.org>

[/2007/10/10/ictr-prisoners-on-hunger-strike/](http://2007/10/10/ictr-prisoners-on-hunger-strike/) (last visited Feb 11, 2016), and 2011 to protest transfers to Rwandan courts (14.07.11 - *ICTR/Detainees - ICTR Detainees Announce Hunger Strike*, HIRONDELLE NEWS AGENCY (2011), <http://www.hirondellenews.com/ictr-rwanda/404-ictr-institutional-news/25337-en-en-140711-ictrdetainees-ictr-detainees-announce-hunger-strike-1438814388> (last visited Feb 11, 2016).

¹⁰⁶ "Je suis ici de façon tout à fait illégale ; j'ai fait l'objet d'un enlèvement, d'un kidnapping. La question de la légalité des chambres africaines est en cause [...] de ce fait, je

a guilty or non-guilty plea. Although this is an obstacle that international tribunals deal with expeditiously by entering a non-guilty plea in lieu of the accused, the symbolic dimension of refusing even that basic communication is striking: the accused is essentially saying that he refuses to defend himself and to even allow the case to proceed by minimally framing it (whether the accused then follows through and does not defend the charges is another question). Some have gone as far as to instruct their lawyers to file motions for withdrawal of their mandate to represent their clients on the basis that the “trial against [them] will not be just and fair.”¹⁰⁷ Perhaps Milošević best summed up the defiant’s attitude of malign neglect. Asked “do you want to have the indictment read out or not?” His answer was characteristically provocative: “That’s your problem.”¹⁰⁸

But even silence is rarely entirely silent. Defiance can still be expressed through composure and facial expressions: sneers, eyes raised to the sky, nodding negatively, sighing, all in ways that ensure that the audience is aware of them. It is revealing that a picture of Slobodan Milošević eating a large sandwich in the courtroom is widely believed to be true (it was, in fact, produced by The Onion, a parodic e-zine); probably because it only minimally seemed to stretch credibility.¹⁰⁹ Hissene Habré is said to have napped during his appearances before the Senegalese Court prosecuting him on the basis of universal jurisdiction.¹¹⁰ Refusing to follow courtroom decorum is a clear way of denying a trial’s solemnity. The tendency of defendants more generally observed in political trials, to “engage in disruptive tactics by deviating from the passive role expected of them” in the process, violating “informal, ceremonial rules of face-to-face interaction, including standards of deference and demeanour”¹¹¹ has been noted. Refusing to adopt a conventional attitude of deference, then, is a first way in which one can manifest one’s fundamental resistance to one’s trial. Defiance may sometimes reach the point where the accused seeks to sabotage a trial, including behind the scenes by putting pressure on witnesses. Seselj was notorious for this in The Hague, making it clear that he did not intend to follow the tribunal’s rules.¹¹² Saddam Hussein was one of

refuse de répondre à vos questions, ne reconnaissant pas la compétence des chambres que je considère comme un service administratif...”. PROCUROR, PROCES DE HISSENE HABRE LUNDI 20 JUILLET 2015, <http://www.chambresafricaines.org/index.php/le-coin-des-medias/communiqu%C3%A9-de-presse/627-vid%C3%A9o-proc%C3%A9s-de-hissein-habr%C3%A9-lundi-20-et-mardi-21-juillet-2015.html>.

¹⁰⁷ The Prosecutor v. Jean-Bosco Barayagwiza, Case No. ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw, ¶ 1 (Int'l. Crim. Trib. for the Rwanda Nov. 2, 2000).

¹⁰⁸ Prosecutor v. Milošević, *supra* note 77, at 2.

¹⁰⁹ The Onion, *Defiant Milosevic Eats Big, Sloppy Sandwich During Trial*, (Mar. 20, 2002), <http://www.theonion.com/graphic/defiant-milosevic-eats-big-sloppy-sandwich-during--8753> (last visited Feb 7, 2016).

¹¹⁰ PROCUROR, *supra* note 106.

¹¹¹ Steven E. Barkan, *Political Trials and the “Pro Se” Defendant in the Adversary System*, 24 SOC. PROBS. 324, 326 (1977).

¹¹² See Prosecutor v. Seselj, *supra* note 76, at ¶ 53 (“The accused has made general statement on various occasions that he did not intend to follow the Rules, Practice Directions, or specific rulings of the judges or of the Chamber”); on witness pressure, see Balkan Insight,

the most hostile defendants to have graced a war crimes courtroom, describe the court as a “whore house” and spitting at people,¹¹³ whilst Barzan al-Tikriti wore pyjamas to the trial, and collectively the defendants frequently turned their backs to the judges.

Somewhere in between withdrawal and outright antagonism, defiance may also more subtly manifest itself in a refusal to don the mantle of a “normal” accused, in particular by not engaging in the sort of arguments that international criminal tribunals expect – typically factual ones (denying evidence) or legal ones (debating the finer points of the law). Some accused for example have refused to enter pleas. Perhaps the most evident strategy of defiance, conversely, involves mounting a political defense to a legal accusation in ways that challenge the law of the accusation as merely another form of politics. As Hermann Goering put it in his trial at Nuremberg, “[t]his is a political trial by the victors and it will be a good thing for Germany when they realize that. . . .”¹¹⁴ As Mladic stated before the ICTY:

You are a NATO court and you are trying me on behalf of NATO. You are trying me and my people. You have no right to that because the NATO struck against my people as they're striking against poor people in Africa and Asia. You are a biased NATO court. This is no place for me and my fellow fighters. This is a place for those who destroyed Yugoslavia, who destroyed the Republic of Serbian Krajina, who devastated so much across the Republika Srpska and Serbia.¹¹⁵

Similarly, Karadzic engaged in a characteristic critique of the universalism of international criminal justice, faulting it for being only really the mouthpiece of a particular political constituency:

I'm deeply convinced that this Court is representing itself falsely as a court of the international community, whereas it is in fact a court of NATO whose aim is to liquidate me. It is, therefore, very hard for me to express my standpoint on anything before this is cleared up. I have stopped using a false name so I think all parties should do the same.¹¹⁶

Another typical move is a variant of the ‘tu quoque’ argument, suggesting

Serbian Radicals Charged With Threatening Witnesses, December 2, 2105, <http://www.balkaninsight.com/en/article/serbia-yet-to-decide-about-icty-charges-12-01-2015> (last visited Feb 7, 2016).

¹¹³ Case No. 1/9 First/2005 Al-Dujail Lawsuit, Judgment. Available at <http://gipi.org/wp-content/uploads/dujail-first-instance-eng.pdf>.

¹¹⁴ GILBERT, *supra* note 5, at 377.

¹¹⁵ Prosecutor v. Mladic, Case No. IT-95-18-I, Trial Transcripts, 212 (ICTY Feb. 23, 2012).

¹¹⁶ Prosecutor v. Radovan Karadzic, Case No. IT-95-5/18, Trial Transcripts, 31 (ICTY Aug. 29, 2008).

that similar behavior went on on the other side. At Nuremberg, Seyss-Inqart on the last day of the proceedings engaged in a lengthy justification of his behavior suggesting that the pursuit of a German Lebensraum was no faultier than the Allies' own decisions about Eastern German territories, comparing the evacuation of the Jews with the evacuation of Germans in the same territories.¹¹⁷ Rudolf Hess emphasized the British responsibility in creating concentration camps in South Africa leading to the death of "26,370 Boer women and children."¹¹⁸ At the ICTY, Seselj insisted that he was being unfairly singled out:

It is my intention to show, through this, through it, that in Croatia, among the Muslims in Bosnia, among the western politicians, leaders and public figures, there were much more intensive, much more vitriolic forms of hate speech than those ascribed to me. [...] So I'm seeking to prove [...] that the OTP has inappropriately pointed, singled out just me from this whole group of people and events that I have just described a moment ago.¹¹⁹

Charles Taylor, after lauding the prosecutor for a statement to the effect that, "No person, no matter how powerful, is above the law," commented: "I could not agree more. President George W. Bush not too long ago ordered torture and admitted to doing so. Torture is a crime against humanity. The United States (US) has refused to prosecute him. Is he above the law? Where is the fairness?"¹²⁰ And before an assembled crowd of supporters, Omar Al-Bashir, the President of Sudan who is sought by the ICC, shouted, "[t]hey killed millions of Indians.... Why are they not on trial."¹²¹

Typically, some of the accused intend to make the trial less a place of procedural and forensic debate than an opportunity to appraise and project their larger political legacy. They speak past the judges directly to public opinion at home, to the public opinion of the states they perceive as indicting them, or perhaps to world public opinion or future generations. Where the tribunal seeks to focus all attention on individuals qua individuals, defendants do their best to appear as standing for much broader constituencies. For Karadzic, in fact:

I'm not defending myself in actual fact. What I am defending are the people over there who have suffered. I'm defending other people, the heads of other states, the civilian heads of other states, which will be at the forefront of the onslaught of this alliance

¹¹⁷ The Trial of German Major War Criminals, *supra* note 58, at 403–404.

¹¹⁸ *Id.* at 370.

¹¹⁹ Prosecutor v. Seselj, *supra* note 76, at 730–731.

¹²⁰ Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-01-PT, transcripts, 49724 - 49724 (Special Court for Sierra Leone May 16, 2012).

¹²¹ Sudan's Bashir threatens more expulsions in Darfur, *REUTERS*, March 9, 2009, <http://www.reuters.com/article/us-sudan-warcrimes-idUSTRE52620620090309> (last visited Feb 12, 2016).

after this exception of taking to trial a head of state.¹²²

Hence one is frequently left with the impression that tribunals and accused are talking past each other. Occasionally, defendants have sought to invoke a distinct ‘international community’ beyond the international tribunal at hand. This is the case of some of the accused before the ICTR who perhaps strangely – given that the tribunal is a creature of the UN itself – chose in a collective letter to appeal to the UN to complain about the court’s partiality.¹²³

More specifically, the attack on the tribunals’ legitimacy is also manifested in defiance towards the defense counsel that the tribunals consider acceptable, with some accused suspecting them of being yet another part of the system that persecutes them. Stankovic for example described his counsel as “an immoral bastard who works for this grotesque Hague Tribunal” and to be “a notorious scumbag”, and, in conjunction with the prosecution, “fascist spies and complete bastards.”¹²⁴ The refusal of the mediation of defense counsel, even independent ones who could be relied upon to mount a vigorous defense, is quite a radical gesture. It suggests that defendants are ultimately less concerned about their fate (whose prospects is highly likely to be improved by reliance on professional counsel) than not being seen as in any way cooperating with an illegitimate international criminal tribunal.

In this context, it should come as no surprise that the issue of self-representation by defendants before international criminal tribunals has become one of the main bone of contentions between them, unruly defendants, and one of the most written about points of international criminal procedure.¹²⁵ The attempt by

¹²² Prosecutor v. Radovan Karadzic, Case No. IT-95-5/18, Trial transcripts, 43 (ICTY Sep. 17, 2008).

¹²³ See generally HEIKELINA VERRIJN STUART & MARLISE SIMONS, THE PROSECUTOR AND THE JUDGE: BENJAMIN FERENCZ AND ANTONIO CASSESE, INTERVIEWS AND WRITINGS 88 (2010).

¹²⁴ Prosecutor v. Gojko Jankovic & Radovan Stankovic, Case No. IT-96-23/2-PT, Decision following registrar’s notification of Radovan Stankovic’s request for self-representation, ¶ 23 (ICTY Aug 19, 2005).

¹²⁵ N. H. B. Jorgensen, *The Right of the Accused to Self-representation before International Criminal Tribunals*, 98 AM. J. INT. LAW 711–26 (2004); Constantinos Hotis, *Fair and Expeditious Trial: A Reappraisal of Slobodan’s Right to Self-Representation before the International Criminal Tribunal for the Former Yugoslavia, A*, 6 CHI J. INT’L L. 775 (2005); Nina HB Jørgensen, *The Problem of Self-Representation at International Criminal Tribunals Striking a Balance between Fairness and Effectiveness*, 4 J. INT. CRIM. JUST. 64, 64–77 (2006); Michael P. Scharf & Christopher M. Rassi, *Do Former Leaders Have an International Right to Self-Representation in War Crimes Trials*, 20 OHIO ST J. DISP. RESOL. 3 (2005); Michael P. Scharf, *Self-Representation versus Assignment of Defence Counsel before International Criminal Tribunals*, 4 J. INT. CRIM. JUST. 31, 31–46 (2006); Joanne Williams, *Slobodan and the Guarantee of Self-Representation*, 32 BROOK J INT’L L. 553 (2006); Mirjan Damaska, *Assignment of counsel and perceptions of fairness*, 3 J INTL CRIM JUST 3 (2005); Gideon Boas, *Self-Representation Before the ICTY A Case for Reform*, J. INT. CRIM. JUSTICE (2010); Jarinde Temminck Tuinstra, *Assisting an Accused to Represent Himself Appointment of Amici Curiae as the Most Appropriate Option*, 4 J. INT. CRIM. JUST.

some accused to represent themselves or to have defense who they choose freely and who are willing to engage in political defenses for them is part of the process of challenging the court, and probably one of the issues about which the accused have felt most passionately. Defending themselves allows defendants to avoid the intermediation inherent in trained counsel who, unlike the defendants, remain submitted to a certain professional discipline vis-à-vis the bar and may be tempted in at least some small measure to act as “officers of the court.” More concretely it gives the accused much more space to present his own version of events than he would as a simple witness susceptible to cross-examination within a framework defined by others. It is thus a defining characteristic of many political trials, one that sees the defendant seek to maximize the confrontation with his accusers in the hope of bringing about a trial’s collapse.¹²⁶ It is also a way of affirming one’s refusal to defend oneself conventionally in a way that might even obliquely reinforce the prestige of the Court. Milosevic made the link clearly between his perception of the ICTY and his refusal to be represented: “I consider this tribunal a false tribunal and the indictment a false indictment. It is illegal being not appointed by the UN General Assembly, so I have no need to appoint counsel to [an] illegal organ.”¹²⁷ Moreover, self-representation, aside from being one of the classic ways in which a defendant can undermine the fairness of his own trial, has a powerful symbolic and even visual dimension. For example, it has allowed to “generate the illusion that he was a solitary individual pitted against an army of foreign lawyers and investigators.”¹²⁸

Self-representation does provide us with one of the clearest views we have of what is going on through the accused’s mind, and the most “unmediated” form

47, 47–63 (2006); Eugene Cerruti, *Self-Representation in the International Arena: Removing a False Right of Spectacle*, 40 *GEORGET. J. INT. LAW* 919 (2009); Kate Kerr, *Fair Trials at International Criminal Tribunals: Examining the Parameters of the International Right to Counsel*, 36 *GEO J INTL L* 1227 (2004); Schomburg, *supra* note 7; Mark S. Ellis, *Saddam Trial: Challenges to Meeting International Standards of Fairness with Regard to the Defense*, 39 *CASE W. RES. J. INT’L L.* 171 (2006); N. H. B. Jorgensen, *The right of the accused to self-representation before international criminal tribunals: Further developments*, 99 *AM. J. INT. LAW* 663–668 (2005); Michael P. Scharf, *The Perils of Permitting Self-Representation in International War Crimes Trials*, 4 *J. HUM. RIGHTS* 513, 513–20 (2005); Nicole L. Camier, *Controlling the Wrath of Self-Representation: The Icty’s Crucial Trial of Radovan Karadzic*, 44 *VAL. U. L. REV.* 957 (2009); Steven W. Kay, *Fair Trials and the International Criminal Tribunals-Whose Case Is It Anyway? The Right of an Accused to Defend Himself in Person before International Criminal Courts*, 4 *INT. COMMENT. EVID.* (2007); Ilaria Zavoli, *The Right to Self-Representation in International Criminal Justice. Between Legal Fairness and Judicial Effectiveness*, *LEG. FAIRNESS JUDIC. EFF. JULY 17 2014 DIRIT. PENALE CONTEMP.* (2014); Paul Bassett, *Right to Self-Representation before International Criminal Tribunals, While Not Absolute, Should Only Be Denied in Limited Circumstances*, 62 *N IR LEG. Q* 235 (2011); Paul Gunning, *Fair Trial and the Right to Self-Representation in International Criminal Law*, 6 *HIBERNIAN L. J.* 1 (2006); RABEEA ASSY, *INJUSTICE IN PERSON: THE RIGHT TO SELF-REPRESENTATION* (2015).

¹²⁶ Barkan, *supra* note 111.

¹²⁷ Prosecutor v. Slobodan Milošević, *supra* note 77, at 2 (emphasis added).

¹²⁸ Scharf & Rassi, *supra* note 125, at 4.

of defense. One can see emerge, before international criminal tribunals, a particular style of self-representation characterized by: emphasis on “essentially peripheral matters at length,” notably “the historical and political background of the conflict;”¹²⁹ the filing of frivolous motions; the refusal to speak any language than one’s own even when one has knowledge of other languages; inattention to procedural issues, petty or otherwise; professional inexperience leading to a sub-par trial; insistence on oral rather than written evidence; lack of concern with the trial being drawn out, for example, initially announcing that he would call 1,600 witnesses; a dismissive or cavalier attitude towards witnesses; no prospect of acting like a reasonable friend of the court; and blatant partiality.

The fear of international criminal tribunals is obviously that self-representation will allow the trial to become a political platform – but it seems ultimately there is very little that the tribunals can do to entirely avoid the possibility. International criminal tribunals seem to have hesitated considerably about the principle and scope of self-representation, eventually settling for its possibility, at least in cases where the defendant does not abuse it to delay the trial. Suggestions that the right to self-represent be withdrawn,¹³⁰ regardless of their validity in law, expose the tribunal to accusations that it is unwilling to hear or have heard what the defendant is willing to say. This, however, is a painstaking and difficult task, especially when confronted with accused such as those who are experts at navigating the line between what is acceptable and what is not and manage to continuously self-represent themselves.¹³¹ The solution of appointing lawyers as “friends of the court” or standby counsel who represent the defense but who the accused steadfastly refuses to communicate with may even make things worse. The irony of course is that denial of self-representation is framed as something that will not only “disrupt the conduct of the proceedings,” but also “seriously impair the effective and fair defence of the accused.” The accused, then, is presented as his own worst enemy in spite of his clearly expressed aspiration to represent himself come what may. It is to this judgement that the court substitutes its own that he would be better protected by a conventional defense – in a sense denying the accused even the ability to know what is good for him.

It seems that, in insisting on self-representation (and, for the most part, winning that argument¹³² despite the best attempts to challenge them,) ¹³³ some defendants have found one of the chinks in international tribunals’ protections and essentially trapped them in their own liberal commitments. The danger that self-representation constitutes for the legitimacy of international criminal tribunals is illustrated by the fact that some scholarly commentary on the issue starts from that

¹²⁹ Bonomy, *supra* note 93, at 350.

¹³⁰ Cerruti, *supra* note 125.

¹³¹ Williams, *supra* note 125.

¹³² See *Prosecutor v. Slobodan Milosevic*, *supra* note 77, ¶ 11 (“Defendants before this Tribunal, then, have the presumptive right to represent themselves notwithstanding a Trial Chamber’s judgment that they would be better off if represented by counsel”).

¹³³ Scharf & Rassi, *supra* note 125.

very premise, rather than any principled statement in favor of defense rights.¹³⁴

Finally, although it is of course difficult to describe various forms of sickness or even death as variations on the theme of defiance, that may be precisely what they are in some cases. However, insistence upon withdrawal from the trial for difficult to substantiate health reasons may be part of a pattern of defiance, albeit of a less forthright kind. Moreover, defendants have certainly been keen to protest (as is their right, of course) the assignment of counsel to represent them in their absence. It has been pointed out in the case that “even if he is legitimately ill, he has very adroitly made use of his poor health to stymie the court proceedings.”¹³⁵ Specifically, the pursuit of hunger strikes and other forms of civil disobedience may represent extreme patterns of defiance that hold a tribunal hostage to the accused.¹³⁶

Death, whether by suicide or perhaps by melancholic abandonment is the ultimate defiance, a form of uncivil disobedience to the purported rule of international law, withdrawing one’s body from the hangman or a life of confinement and sometimes the trial itself. Several individuals who would end up being prosecuted by international criminal tribunals sought to commit suicide just before or as they were apprehended. General Tojo’s failed suicide (and apology to those who found him that he had not died quicker) or Goering’s dramatic last hour escape by cyanide are among the most famous examples. The last-ditch search for a contrarian form of agency by Goering – whose guilty agency as part of the Third Reich had just been solemnly affirmed - was clearly an attempt to escape the fate that the Allies had planned for him. Goering was famously unhappy that his demands to be shot, as a soldier, rather than hanged had been ignored, and taunted his jailors for not finding as many as three cyanide pills that he had managed to conceal at his capture and during his months of incarceration. In death as in life, he seemed to challenge the very rationale for the Nuremberg tribunal.

Some suicides, Slavko Dokmanovic and Milan Babic, seem to have been almost designed to take the tribunals by surprise, perhaps secretly aspiring to reveal them as tools of persecution. And as to Milosevic’s death, it was at the very least well-timed in that it pulled the rug out from under a trial that had, by then, lasted for months and cost hundreds of thousands of dollars, leaving international criminal justice orphaned of a verdict in this most symbolic of cases. Indeed, Carla del Ponte conceded that his death had “deprived victims of justice,” that “in an instant everything was lost,” and that this “represents for me a total defeat.”¹³⁷ Of course, Milosevic did not actually die to frustrate the trial, although both his parents had committed suicide, but it is interesting that his death had always featured

¹³⁴ See *id.* (cautioning against the extension of the Milosevic precedent to the Hussein trial in their introduction).

¹³⁵ Post & Panis, *supra* note 14, at 833.

¹³⁶ Göran Sluiter, *Compromising the Authority of International Criminal Justice How Vojislav Šešelj Runs His Trial*, 5 J. INT’L CRIM. JUST. 529–536 (2007).

¹³⁷ Swissinfo, *Carla Del Ponte feels “total defeat,”* SWI SWISSINFOCH, <http://www.swissinfo.ch/eng/carla-del-ponte-feels--total-defeat-/5063708> (last visited Feb 7, 2016).

prominently in his discourse surrounding the Hague.¹³⁸

C. Impact

Defiance is arguably the worst possible scenario for international criminal justice. If nothing else, it can contribute, through delaying tactics and constant opposition, to increasing delays in the administration of justice.¹³⁹ It also distracts the international trial from the core issues towards a range of questions raised by the defendant's behavior that are lateral to the issue of his guilt or innocence. Even more worryingly, the defiant accused can inflict further trauma to victims, adding insult to injury and revictimizing witnesses. It was perceived in Bosnia, for example, that "the way in which Milosevic had conducted the trial led to the revictimization of many of the witnesses."¹⁴⁰ It has been noted that the "involuntary relationship" that forms between criminals and victims "is most harmful when offenders appear defiant, remorseless, and unemotional."

Moreover, defiance is likely in some cases to inspire continuing bitterness and form the basis for practices of revisionism.¹⁴¹ It is undeniable that in the long run the defiant attitude of some accused in Nuremberg or Tokyo has weakened the precedential and pedagogical value of these trials by appealing to at least some sectors of their population. Indeed, Milosevic managed to have himself elected as a member of the Serbian parliament whilst standing trial.¹⁴² Moreover, defendants have managed to significantly divide the bench, and all kinds of commentators in the background, thus effectively successfully politicizing international criminal justice. This was true in Tokyo, for example, where Judge Pal was evidently quite drawn by some of the anti-imperialist sub-text of some of the Japanese

¹³⁸ He had for example threatened to kill himself and his family when the police came to arrest him in Belgrade. Steven Erlanger, *Serb Authorities Arrest Milosevic to End Standoff*, THE N.Y. TIMES, (Apr. 1, 2001), <https://www.nytimes.com/2001/04/01/world/serb-authorities-arrest-milosevic-to-end-standoff.html> (last visited Sep 30, 2019).

¹³⁹ Jody Lynée Madeira, *When It's So Hard to Relate: Can Legal Systems Mitigate the Trauma of Victim-Offender Relationships*, 46 HOUS REV 401, 405–406 (2009).

¹⁴⁰ Safia Swimelar, *Guilty without a verdict: Bosniaks' Perceptions of the Milosevic Trial*, in THE MILOSEVIC TRIAL: AN AUTOPSY, 189 (Timothy William Waters ed., 2013).

¹⁴¹ Thomas Doerfler, RUDOLF HESS AS A "MARTYR FOR GERMANY". THE REINTERPRETATION OF OF HISTORICAL FIGURES IN NATIONALIST DISCOURSE, <https://www.academia.edu/651178/>

Rudolf_Hess_as_a_Martyr_for_Germany.The_Reinterpretation_of_of_Historical_Figures_in_Nationalist_Discourse (last visited Mar 18, 2014).

¹⁴² OSCE/ODIHR Election Observation Mission Report, REPUBLIC OF SERBIA - PARLIAMENTARY ELECTION 28 DECEMBER 2003 - 005 (2003), <http://www.osce.org/odihr/elections/serbia/24521?download=true> (last visited Feb 15, 2016).

defendants.¹⁴³ If nothing else, defendants can expose deep ideational rifts within tribunals such as when one ICTY judge is said to have threatened to resign in open court if Seselj was imposed counsel against his wish to self-represent.¹⁴⁴ Defiant defendants have in fact profited from and exploited some of the major controversies that have agitated international criminal tribunals – such as whether Judge Meron had been under US and Israeli influence when he authored a decision restricting the scope of complicity.¹⁴⁵

Fundamentally, a successful defiant posture deprives or seeks to deprive the international trial of its legitimacy as a locus of pronouncement of guilt. Where international criminal justice seeks to normalize through law, defiance reasserts the primacy of the political. “You are only pretending to try me” the defendant seems to be saying, “but you and I know very well that what you are doing is a travesty of justice, so let us be done with it.” Whilst the tribunals think of themselves as deciding the accused’s guilt, the accused is convinced and determined to prove to the world otherwise. Hence the impression that accused and tribunal are fundamentally speaking past each other; in effect, their temporal and thematic frameworks are radically different. The tribunals are focused on past events, appreciated in a narrow, forensic fashion; the accused are interested in the present and the future, and broader questions of political responsibility. Goering, who could not have entertained many doubts about his eventual fate, is better understood as performing a sort of political testament aimed at vindicating a particular Nazi reading of the Second World War and the events that led to it, rather than truly defending himself.

As a result of such defiance, international criminal tribunals have often been locked in battle with defendants over their legitimacy, a constant effort to rein them in and discipline them to respect their authority. International criminal tribunals have devoted considerable attention to how they might make trials fair notwithstanding the unhelpful drive by the accused to make this impossible.¹⁴⁶

¹⁴³ Norimitsu Onishi, *Decades After War Trials, Japan Still Honors a Dissenting Judge*, THE NEW YORK TIMES, August 31, 2007, <http://www.nytimes.com/2007/08/31/world/asia/31memo.html> (last visited Feb 15, 2016).

¹⁴⁴ Alexander Zahar, *Legal aid, self-representation, and the crisis at the Hague Tribunal*, 19 CRIM. L. FORUM 241–263, 262 (2008), <http://link.springer.com/article/10.1007/s10609-008-9063-z> (last visited Oct 16, 2015).

¹⁴⁵ *Falling Out of Love with the Hague Tribunal: Balkan Insight*, <http://www.balkaninsight.com/en/article/falling-out-of-love-with-the-hague-tribunal> (last visited Feb 1, 2016); *see also* ICTY, *Prosecutor v. Vojislav Šešelj, Decision On Defence Motion For Disqualification Of Judge Frederik Harhoff And Report To The Vice-President*, 28 August 2013.

¹⁴⁶ Norimitsu Onishi, *Decades after war trials, Japan still honors a dissenting judge*, 8 N. Y. TIMES 2007 (2007); Ashis Nandy, *The Other within: The Strange Case of Radhabinod Pal’s Judgment on Culpability*, NEW LIT. HIST. 45–67 (1992); Kei Ushimura, *Pal’s “Dissentient Judgment” Reconsidered: Some Notes on Postwar Japan’s Responses to the Opinion*, NICHIBUNKEN JPN. REV. 215–223 (2007); Latha Varadarajan, *The Trials of Imperialism: Radhabinod Pal’s Dissent at the Tokyo Tribunal*, EUR. J. INT. RELAT. 793 (2014); Elizabeth S. Kopelman, *Ideology and International Law: The Dissent of the Indian*

They have expressly and emphatically expressed their displeasure at the defendants' actions,¹⁴⁷ they have resorted to such measures as expelling the accused from the courtroom or holding contempt of court proceedings, or, in the case of some of Milosevic's tirades, turning off the microphone; and sentences have been extended as a result of the attitude of the defendant in court, and his lack of cooperation.¹⁴⁸ The occasional denial of self-representation requests has also been a particularly powerful way of seeking to "punish" those accused who refuse to "play the game" of international criminal justice. Even though the tribunals have at times allowed self-representation, they have drawn on U.S. Supreme Court case law to the effect that "the right of self-representation is not a licence to abuse the dignity of the courtroom" and that "judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct."¹⁴⁹ And at times, tribunals have simply given in to some of the more fastidious demands of defendants to avoid any perception of bias and, as it were, steal their thunder.¹⁵⁰

But it is unclear that they have succeeded, and the nuisance power of recalcitrant defendants is real. The problem is that such measures may only reinforce the accused's perception as being persecuted and thereby enhance his ability to portray his fate in such a way to the outside world. Defiance seems a case of damned if you do and damned if you don't for international criminal tribunals: to accommodate the defiant defendant's demands risks making tribunals seem weak and the defendant as having the upper hand; to not give in to his demands risks making the tribunal appear authoritarian and heavy handed.¹⁵¹ The defiant accused,

Justice at the Tokyo War Crimes Trial, 23 NYU J. INT'L POL. 373 (1990); Shuvra Dey, *Dissenting Opinion of Justice Radhabinod Pal on the Notion of Aggressive War*, 8 J. EAST ASIA INT'L L. 213, 213–26 (2015).

¹⁴⁷ Prosecutor v. Gojko Jankovic & Radovan Stankovic, Case No. IT-96-23/2-PT, Decision Following Registrar's Notification of Radovan Stankovic's Request for Self-Representation, ¶ 22 (ICTY Aug. 19, 2005) ("Until now, the Accused's behaviour has been deliberately disrespectful and inappropriate to say the least. At all hearings in this case, the Accused deliberately obstructed the smooth and effective functioning of the proceedings with inflammatory and abusive language. Such language is also contained in all his written submissions and demonstrates without a doubt the Accused's intention to disrupt the conduct of the proceedings.")

¹⁴⁸ See e.g. Prosecutor v. Kayishema, Case No. ICTR-95-1-T, ¶ 17 (ICTR Trial Chamber, May 21, 1999).

¹⁴⁹ Scharf, *supra* note 125, at 37 (citing *Faretta v. California*).

¹⁵⁰ See Michael A. Newton, *Near Term Retrospective on the Al-Dujail Trial & (and) the Death of Saddam Hussein*, 17 TRANSNATL. LAW CONTEMP. PROBL. 37, 40 (2008). ("Rather than succumbing to the manipulation of the murderers, the judges expressed their sympathy, granted defense requests for delays, ensured that procedures were in place to preserve the defendants' right to the assistance of counsel, scuritized security precautions for trial participants, and forged ahead")

¹⁵¹ One instance of a tribunal seeking to not overreact to a defendant's provocations is the Iraqi special tribunal in the al-Dujail trial. In its judgement the Court described the conduct of the defendants as "anarchist" and an "organized offensive course" but nonetheless insisted that it would demonstrate "magnanimity and tolerance. . . . for the purpose of serving

in short, presents an intractable problem for the legitimacy of international criminal justice, one most apt to encourage critical and skeptical narratives. This is all the more the case when, for various reasons, he receives the unexpected support of some judges who seem to jump ship and essentially adopt his arguments. The extensive dissenting opinion of Judge Pal in Tokyo (which was promptly translated into Japanese and earned him a subsequent, somewhat triumphant, tour in Japan)¹⁵² or, more subtly, the acquittal by a majority of the Appeal Chamber in *Gotovina* are in that sense boons to the defiant accused, a chink in the armour of condemnation.

III. ENGAGEMENT

Engaged defendants are understood here as defendants who concede their accusers' main point: that there are charges worth recusing on their own terms. In other words, unlike defiant defendants, they do not challenge the very legitimacy of international criminal tribunals or international criminal law and instead seek to have their innocence upheld. It is the attitude one would most expect domestically, but one that, as we have seen, cannot be readily assumed internationally. Nonetheless, engagement is the default position for many defendants, more in fact than one might think, leading Björn Elberling to point out that "the vast majority of defendants will likely not experience international trials much differently than they would experience trials before national courts for similar crimes."¹⁵³ One contributing factor is that engagement will likely have the broad support of defense counsel, who may be disinclined to represent defendants who merely want to politicize trials.¹⁵⁴ More specifically, this category arguably covers two quite distinct types of individuals. First, defendants who think they are likely guilty of the crimes they are accused of but still think they can somehow defeat the case. And second, defendants who think they are innocent, believe they can prove it, and who decide to trust institutions of international criminal justice to find them so.

A. Logic

Being accused of international crimes can obviously have negative political and personal implications, if nothing else. Some of those in this situation,

the desired justice." Case No. 1/9 First/2005 Al-Dujail Lawsuite, Judgment, <http://gipi.org/wp-content/uploads/dujail-first-instance-eng.pdf>.

¹⁵² Kopelman, *supra* note 146; Nandy, *supra* note 146; Timothy Brook, *Radhabinod Pal on the rape of Nanking: The Tokyo judgment and the guilt of history*, 2 NANKING ATROCITY 1937-38 COMPLICAT. PICT. 149 (2007); Yoshiaki Kataoka, *Japan's Innocence?: Post-war Representations of Justice Radhabinod Pal's Dissenting Opinion at the Tokyo Trial: this Dissertation... is Submitted in Partial Fulfilment of the Requirements of the University of Otago, [Dunedin, New Zealand] for the Degree of Bachelor of Arts with Honours in History*, 2011.

¹⁵³ ELBERLING, *supra* note 12, at 194.

¹⁵⁴ Turner, *supra* note 6, at 532.

therefore, are understandably keen on getting rid of that blemish on their reputation, even if it means taking a chance with international criminal justice. At times they simply may not have the choice, either because they have been arrested and transferred to an international court, or because it is politically and personally unsustainable to resist an arrest and transfer. However, in a case where having to face one's accusers is all but inevitable, it may make sense to simply make the best of a bad situation and seek to defend oneself successfully. This explains why some accused have, essentially, thrown themselves at the mercy of international criminal tribunals, effectively entrusting them with their fate.

Of course, cooperating with the trial process is a gamble, in that if one is eventually convicted one will find it difficult to be defiant *a posteriori* vis-à-vis a tribunal that one had been seen to cooperate with.¹⁵⁵ In other words, cooperating with a tribunal by defending oneself conventionally is a way of endowing it with a certain legitimacy. But it is a gamble that can largely pay off in case of an acquittal. An acquittal will significantly cleanse the accused of the stigma weighing on him and can count as a significant personal, legal and political victory. For the accused who believe themselves to be innocent, being tried for atrocity crimes is an unpleasantness, but it is one that they can correct by emerging victorious. After all, many prosecutions rely on quite uncertain evidence and all the defendant may need is the time and space to make his case. Of course, even an accused who thinks of himself as guilty of at least some of the charges against him may still think he can beat the prosecution and emerge with a partial or total acquittal.

Contrary to the defiant defendant, the defendant engaging international criminal justice at least gives it the benefit of the doubt. The attitude is one of dynamic, if initially reluctant, engagement with international criminal justice from which the accused believes he will ultimately emerge stronger. Reasonable if combative cooperation is its hallmark. The accused, in other words, accepts that he has been charged and even that the crimes alleged may have been committed but not that he is guilty. He intends to frame his behaviour within what is expected of him by international criminal justice even though he may have qualms about the entire process. Indeed, he welcomes the opportunity to defend himself to "clear his name" as it were, and perhaps even take the opportunity to forcefully present an alternative narrative of his behaviour than that presented by the prosecution. For example, Franz Von Papen noted that "I've been portrayed as an intriguing devil. But I can prove I have always worked for peace. I . . . am glad to have the truth brought to light through this trial."¹⁵⁶ Hjalmar Schacht insisted that he was "not afraid of the outcome" of the trial and that "all I wanted was to build up Germany industrially. . . . The only thing they can accuse me of is breaking the Versailles Treaty."¹⁵⁷ Gotovina's statement at the ICTY is characteristic of an attempt by a sophisticated defendant to present a plausible middle way that ultimately shows him in the best light whilst not straining credulity in the way defiant accused do by

¹⁵⁵ The case of Jean Kambanda is illustrative of this. See *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence (Sept. 4, 1998).

¹⁵⁶ GILBERT, *supra* note 5 at 29.

¹⁵⁷ *Id.* at 18.

claiming that nothing happened:

Throughout the war, I was tasked with difficult duties and responsibilities. To this day, I remain convinced that I fulfilled my duties to the best of my ability. As a man, I know that with hindsight, it is possible to say that things could have been different. But, as a commander, I did not have the benefit of hindsight at the time of the crimes charged. During Operation Storm, we were engaged in a life and death struggle against another military force to liberate our country whilst trying to protect the lives of our men and that of civilians. I lay no claim to perfection and I hope I will not be convicted on that basis. Even though I have made mistakes in my time, such as not surrendering to the Tribunal, you can be sure that I am the first person to regret them. You may find fault with my judgement, but you will be hard-pressed to find any willingness or consent on my part to hurt, abuse, or deny the rights of any man, be he a civilian or a soldier, simply because he is a Serb or is of Serb ethnicity. I know and can live with the fact that the way I acted during Operation Storm was appropriate and my orders bear testimony to that.¹⁵⁸

Even though engaged defendants may not be confident about their acquittal, they may at least hope that the trial gives them an opportunity to clear their names morally and in the public opinion, notably at home. For example, Hans Fritzsche hoped that the Nuremberg trial would allow him and fellow defendants to “explain our position to the world, so that at least we won’t die under this awful burden of shame.”¹⁵⁹

If the strategy succeeds, the actual payoffs for being found innocent and acquitted vary. After the Second World War those few acquitted at Nuremberg found their respite short-lived as they were hauled before denazification tribunals and, in most cases, ended up spending time in jail.¹⁶⁰ Although they may have cleansed themselves of some of the worst accusations of crimes against peace or crimes against humanity, they could ultimately not escape the stigma of their close association with the Nazi party machine. On the other hand, some of the accused before the ICTY have arguably emerged strengthened. There is the quality of an ordeal to contemporary international criminal trials, one that can yield great benefits for those who pass it successfully, to the point of “cleansing” them of any guilt. Even though an individual will only have been acquitted of the particular charges that were raised against him, these finer details may be lost domestically, and he may even return to a hero’s welcome. Upon hearing of their acquittal, for example,

¹⁵⁸ Prosecutor v. Gotovina et al., Case No. IT-06-90, Transcripts, 222-223 (ICTY May 14, 2012).

¹⁵⁹ GILBERT, *supra* note 5 at 40.

¹⁶⁰ The three who were acquitted at Nuremberg, - Schacht, von Papen and Fritzsche – were immediately rearrested and proceedings before the German Denazification Court brought against them. Schacht and von Papen were condemned to 8 years, and Fritzsche to 9 years.

supporters of Generals Gotovina and Markac hugged and clapped in the gallery. Simultaneously, thousands cheered in Zagreb's main square where they were amassed in front of giant screens. The acquitted were given a red carpet when arriving back in Zagreb thanks to a specially dispatched Croatian government plane. Similarly, the acquittal of Haradinaj, an Albanian Kosovar rebel commander, was met by fireworks and cheering after it was announced in a giant screen in Pristina. Finally, the fizzling out of the ICC case against Uhuru Kenyatta has largely been hailed as a formidable victory for him and his co-accused.¹⁶¹ In fact, one can speculate that had Kenyatta refused to come to The Hague in the first place, his case might have been drawn out longer and weakened him politically. The acquitted may even envisage resuming political careers interrupted by international criminal justice.

Engaging with international criminal tribunals is therefore not incompatible with strongly worded statements of innocence.¹⁶² In fact, it is the very point that one thinks one is being wrongly accused. But there is a difference between thinking one is wrongly accused and trashing the whole enterprise of international criminal justice. Engagement implies a basic trust in the system and its ability to determine right from wrong, and innocence from guilt. And it is precisely because of this investment that the defendant is unlikely to want to undermine the dignity of the tribunal that he hopes will eventually exonerate him. The attitude of the combative defendant may thus still be confrontational, but in a moderate enough way to stand a chance of succeeding, and that accepts in advance the judgments of the courts. For example, there is a difference between an accused before the ICTY such as Tadic challenging the legality of the creation of the tribunal but, having lost that part of the argument, then defending himself on the merits; and an accused such as Milosevic for whom the same tribunal is unlawful and illegitimate regardless of what it may have to say about it. If the strategy of engagement fails and the defendant is convicted, then of course he may come to regret his cooperation.

¹⁶¹ Simon Allison, *Analysis: Kenyatta escapes the ICC, and shows others how itoperti*, (Feb. 6, 2014), <http://www.dailymaverick.co.za/article/2014-02-06-analysis-kenyatta-escapes-the-icc-and-shows-others-how-its-done/#.ViQypaSraGQ> (last visited Oct 19, 2015); Defiant Uhuru hits back at ICC, rivals, DAILY NATION (Oct. 9, 2014), <http://www.nation.co.ke/news/politics/Defiant-Uhuru-hits-back-at-ICC-rivals-/1064/2481086/-/rc14r6z/-/index.html>.

¹⁶² See, e.g., the statements of Ruto during his initial appearance at the ICC (alleging that the charges against him "could only be possible in a movie" such that "an innocent person like me to be dragged all the way here is a matter that baffles me"). Despite these declarations and although the difference between alleging a blatant denial of justice and outright defiance may be relatively thin, Ruto did fundamentally engage the case against him at the level of facts and law. Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Case no. ICC-01/09-01/11, Public court record ICC-01/09-01/11-T-1-ENG ET WT 07-04-2011 1-24 PV PT, 12, 14 (Apr. 7, 2011).

B. Manifestations

Engagement is perhaps the most difficult defendant attitude to trace because it normally entails acceptance of the exigencies of professional representation, and it becomes very difficult to disentangle the defendant's own worldview from that of his counsel's. This, of course, provides one of the keys to what many engaged defendants are, *i.e.*, defendants who are less likely to self-represent themselves, trusting professional counsel to make a better job of defending them. Almost no engaged defendants have sought to self-represent. Engaged defendants may also decide to volunteer to take the stand, in an unusual and daring effort to show that they have nothing to hide.¹⁶³ In addition to these issues of representation, a number of telltale signs signify engagement in non-trivial ways.

First, engaged defendants are more likely to surrender to international criminal tribunals. Although voluntary surrender cannot always be equated with a desire to engage with international criminal justice (an accused might simply be tired of being on the run, or repentant), the likes of Haradinaj (ICTY) or Kenyatta (ICC) at least evidenced a desire not to run away from the challenge of a trial. This would be inconceivable for a defiant accused who cannot conceive of why he would want to face his accuser(s) except for purely political reasons. International criminal tribunals have formally welcomed surrender and some accused seem willing to entrust their fate to them.¹⁶⁴ Surrender is also treated as a mitigating factor in sentencing if an accused is eventually found guilty, suggesting that at least a priori acceptance by the defendants of the broad authority of the courts, if not necessarily of one's guilt, is well regarded.¹⁶⁵ In fact, one may speculate that at least symbolically, the fact of surrendering may favorably predispose trial authorities, the international community and public opinions. They may see such surrender as evidence of a 'clear conscience.' Haradinaj, for example, the former Kosovar Prime Minister was praised as a "close partner and friend" by the head of UNMIK upon having surrendered himself to The Hague and was allowed to continue political activity in Kosovo.¹⁶⁶

Second, engaged defendants may express a vote of confidence to their judges. Indeed, although they are not necessarily the majority, several accused have

¹⁶³ Tom Maliti, *Kenyatta Takes a Huge Gamble by Volunteering to take the Stand at the ICC*, IJMONITOR (Sep. 15, 2011), <http://www.ijmonitor.org/2011/09/kenyatta-takes-a-huge-gamble-by-volunteering-to-take-the-stand-at-the-icc/>.

¹⁶⁴ VOLUNTARY SURRENDER OF SEFER HALILOVIC TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA., [HTTP://WWW.ICTY.ORG/SID/7951](http://www.icty.org/sid/7951) (LAST VISITED MAR. 8, 2014).

¹⁶⁵ Prosecutor v. Tihomir Blaskic, Case no. IT-95-14, Judgement, ¶ 776 (ICTY Mar. 3, 2000); Prosecutor v. Zoran Kupreskic, Case no. IT-95-16, Judgement, ¶ 853 (ICTY Jan 14, 2000).

¹⁶⁶ UN NEWS, *UN administrator urges calm in Kosovo after premier is indicted for war crimes*, (March 8, 2005), <http://www.un.org/apps/news/story.asp?NewsID=13570&Cr=Kosovo&Cr1=#.VsJiOdDBaAM>; *Appeals Chamber Modifies the Conditions of Ramush Haradinaj*, ICTY PRESS (Mar. 10, 2006), <http://www.icty.org/sid/8795>.

historically cast a vote of relative confidence *in advance* in the courts that tried them. Von Papen said that he was “confident in American justice, and . . . glad to have the truth brought to light through this trial” and Hjalmar Schacht declared ““I have full confidence in the judges, and I am not afraid of the outcome”.”¹⁶⁷ They were both acquitted.¹⁶⁸ Ante Gotovina also assured his judges that “if this Chamber were to examine my actions in light of such a context [a complex operation by Croatia of retaking some of its territory], I would be entirely satisfied and would ask for nothing more.”¹⁶⁹ Laurent Gbagbo’s initial appearance before the ICC was marked by the following characteristic statement:

If I am being accused, it means that there is evidence on the basis of which I am being accused, and then I appear, I would like to see what that evidence is, I will challenge that evidence and then you hand down your judgment. So what I’m saying is it is a good thing not to try and play hide and seek.¹⁷⁰

Third, the engaged accused may also be more likely to express sympathy for victims, acknowledge their existence, and more generally express their adherence to the values of international law, upon which the indictments against them are based (while maintaining that they are not responsible for the crimes for which they are charged). Several of the accused at Nuremberg, for example, privately and publicly expressed their horror at testimony and evidence they had seen regarding the Holocaust, even as they denied they had any knowledge of it.¹⁷¹ Ante Gotovina insisted in Court that “as a human being, of course, I am extremely sorry for the loss of civilian lives and the destruction of civilian objects in the aftermath of the operation. I cannot, however, be held accountable for what others may have done or failed to do while I was engaged in and conducting operations in Bosnia.”¹⁷²

C. Impact

The engaged posture is of generally positive, albeit potentially ambiguous, symbolic significance for international criminal justice. On the one hand, it seems to concede the most important point, which is that international criminal tribunals

¹⁶⁷ GILBERT, *supra* note 5 at 18.

¹⁶⁸ *Id.*

¹⁶⁹ Prosecutor v. Gotovina et al., Case No. IT-06-90, Transcript of Record at 19-21, 223 (Int’l Crim. Trib. for the Former Yugoslavia May 14, 2012).

¹⁷⁰ Prosecutor v. Laurent Koudou Gbagbo, Case no. ICC-02/11-01/11, Initial Appearance Transcripts ICC-02/11-01/11-T-1-ENG ET WT 05-12-2011 1/9 PV PT, 7 (Dec. 5, 2011), https://www.icc-cpi.int/Transcripts/CR2011_21612.PDF

¹⁷¹ *See generally*, GILBERT, *supra* note 5.

¹⁷² *Prosecutor v. Gotovina et al.*, Case no. IT-06-90, Transcript of Record at 18-22, 222 (Int’l Crim. Trib. for the Former Yugoslavi May 14, 2012), <http://www.icty.org/x/cases/gotovina/trans/en/120514ED.htm>.

have legitimacy even when the accused believes them to be mistaken. Although defense counsels have sometimes been criticized for “permitting the immediate aim of the acquittal of the defendants to subordinate the greater and ultimate purposes of the case,” going as far, in the “facilitat[ion] [of] the interest of their clients . . . to sacrifice the common international good,”¹⁷³ such statements are clearly not in conformity with the contemporary ethos of international criminal justice. Aggressively defensive defendants and attorneys are the default position in adversarial proceedings, whatever their costs may be.¹⁷⁴ Even acquittals help reinforce the legitimacy of international criminal tribunals as they underline their fundamental fairness, so that evidently striving for an acquittal cannot be interpreted as a real challenge to international criminal tribunals (only to the prosecutor’s judgment in a particular case). Moreover, strictly speaking, the innocence of an accused does not mean that no crimes were committed, or that there not persons guilty of committing them. Remarkably, the Croat Prime Minister Zoran Milanović noted that “Gotovina and Markac are obviously innocent, but that doesn’t mean that the [independence] war wasn’t bloody, that mistakes were not done.”¹⁷⁵

In other words, an attitude of engagement with the international criminal trial is not one that is revisionist or denying the obvious as much as one that takes seriously the trial’s focus on *individual* guilt, in the best liberal tradition. Finally, the cooperative attitude of some defendants may show the way and incite others to fall in line, thus exerting an added beneficial effect on the international criminal trial. For instance, the Haradinaj precedent was frequently cited in the Kenyan press to criticize Kenyatta’s initial invocation of immunity and to urge him to cooperate as others had done successfully before. Engaged defendants may also have a role in subduing the ardour of their domestic supporters,¹⁷⁶ urging them to wait for a verdict and trust international justice.¹⁷⁷ There is thus no doubt that overall engaged defendants are far preferable than defiant ones, although they may not result in as beneficial effects as repentant ones.¹⁷⁸

On the other hand, there remains the possibility that the accused will manipulate the system and be able to extract significant rewards for collaborating whilst ultimately not paying much in terms of consequences. This is especially so in a case like Kenya in which the accused were not under preventive detention and successfully managed to reduce the stigma of the trial to a minor disturbance, a

¹⁷³ RICHARD H. MINEAR, *VICTORS’ JUSTICE: TOKYO WAR CRIMES TRIAL* 176 (1971) (quoting JOSEPH KEENAN, *CRIMES AGAINST INTERNATIONAL LAW*, 1950).

¹⁷⁴ See generally MARVIN E. FRANKEL, *PARTISAN JUSTICE* (Hill and Wang 1980).

¹⁷⁵ Boris Pavelic, *Croats Celebrate Acquittal of Gotovina and Markac*, BALKAN INSIGHT, (Nov. 16, 2012), <http://www.balkaninsight.com/en/article/croatians-celebrate-acquittal-of-gotovina-and-markac> .

¹⁷⁶ See, e.g., *Kenya: Ruto Calls for Calm Ahead of ICC Ruling*, ALLAFRICA (Jan. 19, 2012), <http://allafrica.com/stories/201201200371.html>.

¹⁷⁷ *Kosovo ex-PM surrenders to court*, BBC NEWS, (last updated Mar. 9, 2005) <http://news.bbc.co.uk/2/hi/europe/4331457.stm>.

¹⁷⁸ See *infra* section V.

misunderstanding to be clarified from a distance by statesmen.¹⁷⁹ Haradinaj also seems to have obtained significant benefits as a result of his cooperation with the ICTY, including the ability to continue his involvement in Albanian politics.¹⁸⁰ Moreover, engaged defendants certainly do not protect international criminal tribunals from negative reactions to their verdicts, both acquittals¹⁸¹ and convictions.¹⁸² Even if the accused himself is willing to trust the system, his supporters may not, and the convicted may lambast his if and after he is convicted.

In the case of a conviction, supporters of the defendant may feel as if his engagement was not recompensed and he was, in a sense, doubly wronged. The conviction may reinforce the sense that international criminal justice was political in the first place. In the case of acquittal, international criminal justice may retrospectively appear, in the eyes of the accused's supporters, as a costly and even vindictive enterprise that got its facts predictably wrong or could not pass professional muster to convict the accused. Institutionally, it may be seen as having failed in framing a particular historical episode according to its own logic. The 'victim side' may feel as if its version of history was not heard and as if a tribunal was fundamentally unfair, as was certainly the case for some populations touched by the work of the ICTY.¹⁸³ The acquitted will be able to portray themselves as having withstood the test of international justice in order to restore the national good

¹⁷⁹ See e.g., *Uhuru Kenyatta's Trial: A Case Study in What's Wrong with the ICC*, PUBLIC RADIO INTERNATIONAL, <https://www.pri.org/stories/2014-02-06/uhuru-kenyattas-trial-case-study-whats-wrong-icc> (last visited Sep 30, 2019)

¹⁸⁰ ICTY PRESS, *supra* note 166.

¹⁸¹ Marija Ristic, *Belgrade Protest Over Croatian Generals Acquittal*, BALKAN INSIGHT (Nov. 26, 2012), <http://www.balkaninsight.com/en/article/belgrade-protest-over-generals-acquittal>; see also *ICTY: Flag burning in Belgrade to protest Haradinaj acquittal*, ANSAMED (Nov. 30, 2008) http://www.ansamed.info/ansamed/en/news/sections/generalnews/2012/11/30/ICTY-Flag-burning-Belgrade-protest-Haradinaj-acquittal_7883870.html; see also Edmund Kagire, *Survivors, govt protest string of genocide suspect acquittals*, THE EAST AFRICAN, (Feb. 16, 2013), <https://www.theeastafrican.co.ke/rwanda/News/Controversial-acquittals-put-ICTR-legacy-at-stake/1433218-1695956-ffkdb1z/index.html>; see also James Karuhanga, *IBUKA considers protests over ICTR acquittals*, THE NEW TIMES RWANDA (Oct. 5, 2011) <http://www.newtimes.co.rw/section/article/2011-10-05/35606/>.

¹⁸² Sinisa Jakov Marusic, *Tarculovski's Supporters Protest ICTY Verdict*, *Balkan Transitional Justice* (May 19, 2010), <http://www.balkaninsight.com/en/article/tarculovski-s-supporters-protest-icty-verdict>.

¹⁸³ Julie Mertus, *Findings from focus group research on public perceptions of the ICTY*, SÜDOSTEUROPA. ZEITSCHRIFT FÜR POLITIK UND GESELLSCHAFT 107–117 (2007); Mirko Klarin, *The impact of the ICTY Trials on Public Opinion in the Former Yugoslavia*, 7 J. INT'L CRIM. JUST. 89 (2009); Olga Martin-Ortega, *Lost in translation? Perceptions of the ICTY in the former Yugoslavia, Prosecuting War Crimes* 103–115 (2013); Tamara Banjeglav, *The micro legacy of the ICTY in Croatia—a case study of Vukovar*, TRANSITIONAL JUSTICE AND RECONCILIATION: LESSONS FROM THE BALKANS 81 (2015); Donna E. Arzt, *Views on the ground: the local perception of International Criminal Tribunals in the Former Yugoslavia and Sierra Leone*, 603 THE ANNALS OF THE AMERICAN ACAD. OF POL. & SOC. SCIENCE 226–239 (2006).

name. For example, Milanović expressed gratitude to Gotovina and Markac “for withstanding so much for Croatia,”¹⁸⁴ and the African Union presented the failed case against Kenyatta as “a major victory for the entire continent.”¹⁸⁵

Of course, there is nothing wrong per se with the phenomenon of acquittals, and every acquittal, partial or total, should be seen as a victory of international criminal justice’s liberal and defendant-protective aspirations against some of its more repressive instincts.¹⁸⁶ Gripes about particular acquittals may reflect a misunderstanding of what international criminal law and justice are about, or blatant political agendas. For example, it has been pointed out that acquittals in some of the more factually and legally complex cases that the ICTY has tried to reflect “an honest attempt by the judges to maintain jurisprudential consistency and, importantly, respect the right to a fair trial.”¹⁸⁷ Moreover, it is not clear that acquittals are directly a function of engagement, and a defiant or sacrificial accused might conceivably be acquitted, despite themselves as it were. At least a defendant who engages the courts is one that is not willing to condemn in advance the outcome of the trial and therefore minimally pays its respects to it.

Nonetheless, concerns may arise that those acquitted following successful engagement with the courts will claim more than their acquittal entitles them to, especially in the fraught political contexts within which international criminal justice operates. For example, they may insist not only that they are innocent of the accusations levelled against them, but also that they are more generally and fundamentally heroes of sorts. The accused will emerge “whiter than white” with potentially negative consequences for future international criminal justice and transitional justice efforts. Their profile as ‘martyr defendants’ before international criminal justice may enhance their political careers as was almost certainly the case with Uhuru and Ruto who “were skillful at mobilizing their communities by capitalizing on Kenya’s painful colonial history and the universal human tendency to dislike being lectured.”¹⁸⁸ Engaged but aggressive and politically savvy defendants may in fact be more successful than defiant defendants in fundamentally questioning the legitimacy of international trials, especially if they can suggest a degree of prosecutorial harassment. For example, the retrial of Haradinaj was widely seen by critics of the court as suggesting, correctly or not, that tribunals were biased against some defendants.¹⁸⁹

¹⁸⁴ Croats Celebrate Acquittal of Gotovina and Markac, *supra* note 175.

¹⁸⁵ Murigi Macharia, *Africa: President Kenyatta's Failed ICC Case Is Victory for Africa*, *Says AU*, ALL AFRICA (Jan. 30, 2015), <https://allafrica.com/stories/201502020617.html>.

¹⁸⁶ See generally Allison Marston Danner & Jenny S. Martinez, *Guilty associations: Joint criminal enterprise, command responsibility, and the development of international criminal law*, 93 CAL. L. REV. 75 (2005).

¹⁸⁷ Falling Out of Love with the Hague Tribunal, *supra* note 145.

¹⁸⁸ Michela Wrong, *Indictee for President!*, N.Y. TIMES: LATITUDE (Mar. 11, 2013, 7:44 AM), <https://latitude.blogs.nytimes.com/2013/03/11/being-prosecuted-by-the-i-c-c-helped-uhuru-kenyattas-chances-in-kenyas-election/>.

¹⁸⁹ *Haradinaj Acquitted: Biased Court?*, ST ANDREWS FOREIGN AFFAIRS REVIEW (Feb. 7, 2013), <http://foreignaffairsreview.co.uk/2013/02/hardinaj/>.

Furthermore, individual acquittals may be interpreted as having an emblematic character, conferring innocence on all those involved on their side of the conflict. For example, after the Gotovina/Markac acquittals, one interviewee in Zagreb summed up the predominant feeling that the nationalist narrative had been vindicated: “Our generals are heroes because they risked their lives to save our country and liberate the people.”¹⁹⁰ The acquittal may even reawaken narratives of (ir)responsibility that are quite corrosive of some of the fundamental tenets of international criminal justice, such as the idea that it is ultimately the state and not individuals who are liable for crimes. Hence even Milanović’s recognition that crimes were committed, following several high-profile acquittals of Croat defendants, must be seen in light of his statement that “[t]here were mistakes, *and for them the Croatian state is responsible*. To all these we did harm, Croatia will repay.”¹⁹¹

The ICTY has been wary of the possibility that acquittals be interpreted as meaning more than they do. In effect, some of its acquittals have perhaps inevitably been controversial in the region, appearing to recompense some defendants with a virtual absolution. On its official website, the Tribunal insists in characteristically chosen terms that:

Most of the acquittals at the Tribunal have come about in cases in which the evidence presented by the Prosecution was either insufficient to establish that specific crimes occurred, or insufficient to demonstrate that the accused bore criminal responsibility for the commission of the crime.¹⁹²

Indeed, the Appeals Chamber has been careful to note that acquittals are, technically, only a failure by the Prosecution to meet the very high standard of proof characteristic of international criminal trials.¹⁹³ Nonetheless, it is not really for international criminal tribunals to determine how their verdicts are received, and it remains unavoidable that successful engagement with them may be interpreted in ways that are not consonant with the goals of international criminal justice.

¹⁹⁰ *War court clears Croatia generals*, BBC NEWS (Nov. 17, 2012), <http://www.bbc.co.uk/news/world-europe-20352187>.

¹⁹¹ Croats Celebrate Acquittal of Gotovina and Markac, *supra* note 175 (emphasis added).

¹⁹² *Acquittals*, International Criminal Tribunal for the Former Yugoslavia, <http://www.icty.org/en/about/chambers/acquittals> (last visited Feb 9, 2016).

¹⁹³ See e.g. Prosecutor v. Hadžihasanović, IT-01-47-A, Judgement, ¶ 231 (ICTY Appeals Chamber Apr. 22, 2008); Prosecutor v. Orić, IT-03-68-A, Judgement, ¶ 189 (ICTY Appeals Chamber Jul. 3, 2008).

IV. SACRIFICE

Another, more discreet, type of attitude of defendants toward international criminal justice is what might be termed the sacrificial attitude. The sacrificial defendant is one who does not believe he is guilty but who thinks that someone must nonetheless take the blame and that international justice must be cooperated with, even if it is unjust. This may be either because the accused thinks he is guilty of something (although not precisely what the tribunals accuse him of) or because he kowtows to the authority of his judges. Such an attitude is relatively rare since it reflects a very ambivalent form of simultaneously deferring to international justice and reading it at cross-purpose.

A. Logic

Individuals have been known to offer themselves up to international criminal justice, but on the basis of an understanding that their local constituencies will see them to be victims of an international, Western, or foreign persecution. Sacrifice, then, describes the attitude of defendants who consider that they are either innocent or at least not guilty of the crimes of which they are accused, but who nonetheless decide to adopt neither an attitude of defiance nor even of engagement or repentance. Defendants may go into a trial intent on sacrificing themselves, but sacrifice may also give *ex post facto* meaning to their passage through an international trial and resulting conviction; or sacrifice may appear as the only option in a trial which the accused perceives as rigged from the start, in order to make a point about the system's injustice; or it may be a deliberate choice not to defend oneself in order to make a larger political point; or it may be based on an understanding that, even though one does not (fully) recognize oneself as responsible for the crimes of which one is accused, one acknowledges that someone has to take the blame, either out of adherence to a strong concept of leadership responsibility or to protect others.

General Tojo is perhaps the best-known example of an attitude of sacrifice. Towards the end of his trial he made the following declaration:

It is natural that I should bear entire responsibility for the war in general, and, needless to say, I am prepared to do so. Consequently, now that the war has been lost, it is presumably necessary that I be judged so that the circumstances of the time can be clarified and the future peace of the world be assured. Therefore, with respect to my trial, it is my intention to speak frankly, according to my recollection, even though when the vanquished stands before the victor, who has over him the power of life and death, he may be apt to toady and flatter. I mean to pay considerable attention to this in my actions, and say to the end that what is true is true and what is false is false. To shade one's words in flattery to the point of untruthfulness

would falsify the trial and do incalculable harm to the nation, and great care must be taken to avoid this.¹⁹⁴

The statement is characteristically ambiguous, and one needs to read between the lines. At times, it verges on repentance and Tojo would ultimately seem to take that course. Yet his taking of responsibility is not based on a recognition that he committed the crimes he was accused of as much as on (i) how it might clear the path for world peace, (ii) what might or might not do harm to the nation, and (iii) a certain ethics of speaking the truth. A few hours before his execution, he confided in a Buddhist priest that his death would be a “move toward peace and the rebuilding of Japan.”¹⁹⁵ In his final statements before being hanged he urged the Americans to be compassionate towards the Japanese people, acting as a sort of responsible father figure towards his countrymen.¹⁹⁶

At Nuremberg, Keitel also minimized his guilt,¹⁹⁷ but expressed the hope that “from the clear recognition of the causes, the pernicious methods, and the terrible consequences of this war, may there arise the hope for a new future in the community of nations for the German people.”¹⁹⁸ Karl Doenitz insisted that he was not guilty of crimes in conducting German submarine warfare, but nonetheless that “my life was devoted to my profession and thereby to the service of the German people. As the last Commander-in-Chief of the German Navy and as the last Head of the State, I bear the responsibility towards the German people, for everything which I have done and left undone.”¹⁹⁹ Finally, at the ICTY, even as an accused such as Župljanin pled not guilty, he insisted that:

It is necessary for all of us to learn a lesson once again, aware of the fact that we can and need to live with each other as human beings, without desire for revenge or ambitions for domination; and I will be happy if my sacrifice is the last sacrifice in that territory. . . . In essence . . . I truly want the entire proceedings to be carried out for historic truth and re-establishment of trust.²⁰⁰

The fundamental nature of “sacrifice” has perhaps best been summarized in a psychological evaluation of one of those convicted by the ICTY, Bala, who was described therein as “not assum[ing] responsibility for his actions” but “accept[ing]

¹⁹⁴ BILL YENNE, *THE IMPERIAL JAPANESE ARMY: THE INVINCIBLE YEARS 1941–1942*, 337 (2014).

¹⁹⁵ M. V. KAMATH, *PHILOSOPHY OF LIFE AND DEATH*, 346 (1993).

¹⁹⁶ JOHN TOLAND, *THE RISING SUN: THE DECLINE AND FALL OF THE JAPANESE EMPIRE, 1936–1945*, 873 (2003).

¹⁹⁷ The Trial of German Major War Criminals, *supra* note 58, at 377. (“It is tragic to have to realize that the best I had to give as a soldier, obedience and loyalty, was exploited for purposes which could not be recognized at the time, and that I did not see that there is a limit set even for a soldier's performance of his duty. That is my fate.”).

¹⁹⁸ *Id.* at 377.

¹⁹⁹ *Id.* at 390.

²⁰⁰ Prosecutor v. Župljanin, Case No. IT—99-36/2, Transcripts, 21 (Jul 21, 2008).

the sentence in an extremely self-effacing manner. He chalks this up to ‘politics, as though it were a manner of sacrificing some few for the sake of the higher cause of peace.’²⁰¹ In other words, sacrifice is a deeply contradictory attitude, evidencing both elements of denial of the charges and acceptance of one’s fate.

B. Manifestations

This attitude of sacrifice manifests itself in ambiguous ways and may thus at times be hard to distinguish from other attitudes. The sacrificial defendant is one who may moderately cooperate with the international criminal trial but in a way that is passive and resigned. Sacrifice is understood as acceptance of one’s fate but can also coincide with an effort to reframe the meaning of one’s actions, typically vis-à-vis a domestic audience. The accused seeks to reclaim agency, almost turning the table on tribunals to make the condemnation appear to be his own doing. If he cannot escape conviction, at least the trial and its meaning are to be framed on his own terms: “Where the tribunal is telling you that I am condemned because I committed these crimes,” the accused seems to be saying, “I tell you that am indeed punished but because I voluntarily submit myself to punishment and for some other reason, for example because I was a bad leader, because someone has to take the blame, or because I fall on my sword to better protect you.”²⁰² For example, Franz Von Papen insisted “When I examine my conscience, I do not find any guilt where the Prosecution has looked for it and claims to have found it.” He went on to add, however, “where is the man without guilt and without faults?” and detailed his historical responsibility as he understood it, including what he described as merely the failure to stand up to Hitler in 1932.²⁰³

Others, however, have been even less willing to recognize that there is anything behind their sacrifice than a a response to a form of scapegoating, even though they may come to accept their fate. Saddam Hussein was, interestingly, executed on the morning of Eid-UI-Adha, a celebration of Abraham’s willingness to conduct a ritual sacrifice of his son Ishmael at God’s urging. Hussein viewed himself as a martyr dying for his country and wrote in a letter “I sacrifice myself. If God wills it, he will place me among the true men and martyrs.”²⁰⁴ It was evident from the tone of his letter that he was far from accepting the verdict of the tribunal that had condemned him, preferring instead to blame “the enemies of your country,

²⁰¹ Prosecutor v. Haradin Bala, Case No. IT-03-66-ES, Decision on Application of Haradin Bala for Sentence Remission, ¶ 19 (ICTY Oct. 15, 2010), <http://www.icty.org/x/cases/limaj/presdec/en/101015.pdf>.

²⁰² Carl Boyd, *Exaltation and Hindsight* 3 MONTCLAIR J. SOC. SCI. & HUMAN. 79, 79-96 (1974).

²⁰³ See The Trial of German Major War Criminals, *supra* note 58, at 400.

²⁰⁴ *Saddam sees death as “sacrifice,”* BBC, (Dec. 27, 2006), http://news.bbc.co.uk/2/hi/middle_east/6212393.stm (last visited Mar 8, 2014).

the invaders and the Persians” for having broken Iraqi unity.²⁰⁵ Sacrifice thus often falls clearly short of repentance. Although General Yamashita regretted that he did not commit suicide when so many of his soldiers had died in battle, deplored his failures of leadership in leading them to combat,²⁰⁶ and felt himself deeply responsible for the harm that resulted, he did not in fact think he was dying for the crimes that the Allies had convicted him of. Similarly, when accused Seselj speaks of ‘sacrifice’ before the ICTY, he means it in a way that is, in fact, highly defiant and hardly accepting of his fate.²⁰⁷

Indeed, Jean Kambanda, the Rwandan Prime Minister at the moment of the genocide, made his unease about the sacrificial role he was being made to play clear in a letter to the Registry:

Without going as far as putting into question my voluntary and conscious decision to tell the truth to the whole of humanity about the drama of the Rwandan people, regardless of the consequences to myself, permit me to cast doubt over certain practices surrounding my trial and the illusion that some people seem to entertain of having found the sacrificial lamb which will erase the responsibilities of others in the extermination of the Rwandan people.²⁰⁸

The posture, then, is one in which one concedes the usefulness, or even the validity, of the trial for some reason extraneous to the trial itself, even as one signals that one is unfairly condemned. Presumably, this is done because one believes that there is something higher involved than one’s personal destiny, and that instinct for personal survival should not take precedence over the opportunity to make a political point with one’s life. As Albert Speer put it:

²⁰⁵ *Id.*

²⁰⁶ Yuki Tanaka, *Last Words of the Tiger of Malaya, General Yamashita Tomoyuki*, 3 ASIA-PAC. J. 5 (2005) (“Due to my carelessness and personal crassness, I committed an inexcusable blunder as the commander of the entire [14th Area] Army and consequently caused the deaths of your precious sons and dearest husbands.”).

²⁰⁷ Prosecutor v. Vojislav Seselj, Case No. IT-03-67-R77.3, Transcripts, 99 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2011) (“For all I know there might be another ten trials where I will stand accused. I will certainly do my best to have at least another ten contempt trials instituted against me. I will not be deterred by anyone. As the great leader of all Korean people says, Kim Jong-il, “Whoever fights sincerely in the interest of truth and freedom must be prepared to sacrifice, to make a sacrifice.” I followed his shining example and I have demonstrated my readiness to make sacrifice, even if I should face death itself. Until my conditions are met and fulfilled, I will do my best to cope with whatever I may be subjected to here. I have since become indestructible and I will remain indestructible to the bitter end.”).

²⁰⁸ *Former Rwandan Prime Minister’s Appeal to be Heard This Month*, Justiceinfo.net – Hironellenews, (Nov. 30, 2001) <https://www.justiceinfo.net/en/hirondelle-news/15761->

[en-en-former-rwandan-prime-ministers-appeal-to-be-heard-this-month65276527.html](https://www.justiceinfo.net/en/hirondelle-news/15761-en-en-former-rwandan-prime-ministers-appeal-to-be-heard-this-month65276527.html).

[T]his Trial must contribute towards preventing such degenerate wars in the future and towards establishing rules whereby human beings can live together. Of what importance is my own fate after everything that has happened in comparison with this high goal?²⁰⁹

Sacrifice is a way, when all else has failed, to manifest the hope that at least one's conviction will serve the purposes of reconciliation and help past enemies to move on. It may in some cases manifest a sort of exceedingly charitable attitude vis-à-vis the system, one in which one does not begrudge one's wrongful conviction, on the basis that mistakes happen, that one may even have had a part in one's own demise, or that it is necessary as part of the greater design of history even though it is unfair from a strict criminal justice point of view. But it may also constitute an affirmation of one's innocence even as one more or less willingly endorses the mantle of the scapegoat.

C. Impact

The sacrificial attitude is morally ambiguous in those situations where the accused does not challenge the accusation against him, for it seems to assume that the system would be incapable of seeing evidence of innocence for what it is. It thus deprives tribunals of the benefit of the good faith of innocents fighting for their innocence to help the system correct its potentially misguided ways. Sacrifice provides an opportunity to reframe the trial's legitimacy entirely under the guise of accepting it. Moreover, the sacrifice accepted may be one that is not for international criminal justice as much as for one's nation or community, subtly shifting attention away from the universalist goals of the trial. In effect, the system is tricked, albeit presumably at some short-term gain, in ways that have little to do with, and display little understanding of its specific pursuit. Indeed, if sacrifice brings any benefit it is only because "those complicit in the scapegoating mechanism cannot be aware that they are scapegoating—there cannot be an institutional framework that justifies scapegoating, for to be conscious of the scapegoat is to recognize the scapegoat's innocence and, consequently, one's own guilt."²¹⁰ International criminal justice succeeds only at the cost of being duped by itself on the true nature of what it is up to.

International criminal justice may therefore both welcome and be wary of an attitude of sacrifice. Judges may be reluctant to have a defendant sacrifice even some of his rights during trial in a way that might make it easier for him/her to challenge an eventual verdict, or at least make it seem as if the entire trial is somewhat pointless. For example, after the defense of Ljubicic hinted at a possible "sacrifice" because of the unavailability of certain documents and its desire to go to

²⁰⁹ The Trial of German Major War Criminals, *supra* note 58, at 406.

²¹⁰ Nathan Kensey, *Scapegoating the Guilty: Girard and International Criminal Law*, in *VIOLENCE, DESIRE, AND THE SACRED, VOLUME 2: RENAL CRIMINAL LAWERTIES*, 75 (Scott Cowdell, Chris Fleming, & Joel Hodge eds., 2015).

trial, nonetheless, Judge El Mahdi insisted that “[t]here should not be any sacrifice in justice, which we all have to respect here. And I think that everybody has to act in such a manner so that the final imperative, the truth, can be achieved.”²¹¹ Similarly, when Haradin Bala, one of those convicted by the ICTY, argued for a sentence remission, the Prosecutor’s Office insisted (to better deny such a remission) that he had “made use of his incarceration to start reflecting upon his past deeds and has instead opted to portray himself as a person who is sacrificing himself for a noble cause.”²¹²

But in its purer and non-opportunistic form, however rare, it does contain a certain flicker of promise for international criminal justice, for it seems to accept that even if criminal justice is wrong in one particular case, it is at least still *international criminal justice*. Here, a Socratic attitude powerfully reinforces the idea that international criminal justice is not merely a form of power which one should feel no shame in resisting, but already a form of justice such that, in Plato’s terms, one “destroys the city in leaving.”²¹³ As is well known, Socrates had an opportunity to escape his unjust death sentence and decided instead to drink the poison he had been given. Under one reading of this famous episode, Socrates did so because he had bound himself to the city’s laws and had therefore committed himself to honor the “social contract,” even if society were to do him harm.²¹⁴ Of course, defendants before international criminal tribunals may not have the option of actually escaping, but they can metaphorically at least decide to “swallow the poison.”

A Socratic attitude in this context is the ultimate recognition of international criminal justice’s function, since it equates the international community with the *polis*, emphasizes the accused’s embeddedness within it, and perhaps the extent to which he has benefited from it. For example, one could imagine an accused who felt that he was wrongly convicted of war crimes, but who acknowledged that his fate as a soldier had always been bound up in the prohibition of war crimes and who had benefited from that prohibition. That accused would, in a sense, owe it to the prohibition and the society that stood for it to accept his punishment in order to advance its exemplariness. It follows that he could not deny international criminal tribunals of their legitimacy merely because he felt he had been treated unjustly and should willingly endorse his status as a sort of sacrificial lamb. The sacrificed understand that precisely what matters in sacrifice is not whether one has to answer charges but that one willingly sacrifices oneself out of obedience to some injunction (although not necessarily that of international criminal justice).

²¹¹ Prosecutor v. Ljubicic, Case No. IT-00-41, Transcripts, 178 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 22, 2004). <http://www.icty.org/x/cases/ljubicic/trans/en/040422SC.html>.

²¹² Prosecutor v. Haradin Bala, Decision on Application of Haradin Bala for Sentence Remission, Case No. IT-03-66-ES, ¶ 19 (Int’l Crim. Trib. for the Former Yugoslavia 15 October 2010).

²¹³ Plato, *Crito*, in COMPLETE WORKS 50a-50d (John Cooper ed., 1997).

²¹⁴ Debra Nails, *The Trial and Death of Socrates*, in A COMPANION TO SOCRATES (Sara Ahbel-Rappe & Rachana Kamtekar eds., 2008).

This is a recognition that is almost too good to be true for international criminal tribunals – deferring blindly to their authority, although it is also probably misleading and morally challenging. Indeed, it is worth noting that there is an interesting twist to the obligation to respect international criminal justice as expressed in the attitude of Socratic sacrifice: it requires of the defendant that he ultimately prioritize strict respect for the law and the institutions of international society even at the expense of his conscience’s admonition to revolt against what he knows intuitively to be unjust about that order – for example prosecuting and condemning what he deems to be an innocent, or focusing only on certain parties to the benefit of others. In other words, with a different design, it requires the defendant to do what it simultaneously blames him for having done when he committed his crimes, namely, to have blindly prioritized adherence to the law above a sense of justice. In that respect, one cannot help thinking that an attitude of sacrifice is ultimately an attitude of moral abdication that makes too much of the obligation to respect one’s judges. This is especially in a context where those judges’ legitimacy ought to be won through the exemplariness of their administration of justice, and not merely by appeal to their sheer authority.

V. REPENTANCE

Perhaps the most startling attitude of defendants vis-à-vis international criminal trials is that of repentance. Repentance describes the attitude of an accused who engages the tribunal but on the basis of a recognition of his guilt. The repentant defendant is to be distinguished from the sacrificial one in that he in a sense repents ‘for the right thing,’ thus limiting the risk of a judicial *quid pro quo*.

A. Logic

The first building block of repentance is that one is indeed guilty of some of the crimes one is accused of. An accused who repents for crimes he did not commit is either deluded, sacrificial, or the victim of a show trial. In other words, not all defendants are candidates for repentance and this article should clearly not be construed as suggesting that there is something intrinsically valid about any defendant expressing contrition. Engagement is a perfectly valid, as well as legally and morally satisfactory, attitude for someone who is indeed innocent. Nonetheless, it stands to reason that there are defendants before international criminal tribunals who are indeed guilty,²¹⁵ and that a proportion among those will at least be aware that they are, whether at the outset of the trial or as a result of the slow effect of its pedagogy. Among that group, it may be that an even smaller minority will come forward to actually, publicly, and formally acknowledge their crimes. In other words, they will not seek to consciously ‘game’ the system by obtaining their

²¹⁵ In the sense of having committed the crimes they are accused of, even though they may not have technically been convicted for them yet.

acquittal on the basis of insufficient evidence or a technicality. Note that there is no precise legal obligation for them to do so (aside from being truthful if they take the stand),²¹⁶ but that to come forward and take responsibility for one's acts is at least an ethical imperative.²¹⁷ Hence the second building block of repentance is that one be willing to acknowledge the crimes that one has indeed committed.

Even if such individuals exist—and as we shall see, they surely do in at least small numbers—it is worth noting that there is a strong case, all other things being equal, against the occurrence of repentance before international tribunals. For one thing, repentance requires considerable personal courage (if only because those who repent may come under threat as having broken the conspiracy of silence) and sense of moral obligation to the community. If nothing else, it means accepting one's guilt, which also means accepting one's sentence, despite the many resources of the psyche to elude responsibility. It falls to reason that some, perhaps many, accused who may otherwise think of themselves as guilty would still seek to 'beat the system' by engaging denial on the offchance that a prosecutor will fail to prove their guilt beyond reasonable doubt. Moreover, international criminal procedure, because it is designed to protect the innocent, may, itself, encourage denial from the guilty. Needless to say, defense attorneys do not think of themselves principally as encouraging and accompanying confessions, and there is a legitimate wariness about repentance in general given its historical use as part of show trials.²¹⁸

Despite this, repentance is a fascinating and more frequent occurrence in international criminal justice than is commonly thought. It has presumably occasionally emerged against the best advice of defense counsel seeking a more conventional attitude of combative engagement from their clients, although some lawyers have clearly been sympathetic to their client's will to repent.²¹⁹ In some cases, individuals have surrendered to tribunals out of remorse, even though they

²¹⁶ See Elberling, *supra* note 12 (discussion of the law, ethics, and rewards for the defendants who cooperate).

²¹⁷ Donald Liskov, *Criminal Defendant Perjury: A Lawyer's Choice Between Ethics, the Constitution, and the Truth*, 28 NEW ENG. REV. 881, 882, 902 (1993) (On a related note, defence counsel who are aware that their client is guilty encounter steep ethical challenges, but at least they have to weigh the truth against a certain fidelity to their client and commitment to the adversarial nature of the trial); William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1713 (1993) (using aggressive defenses to portray that defendant is another person and not guilty of the crime.); Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925 (1999) (there is less of an evident compelling interest that the defendant might invoke against his duty of candor).

²¹⁸ See, e.g., *Compilation of Statements of Apology Made by Kaing Eav Alias Duch During the Proceedings*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (2012) http://www.eccc.gov.kh/sites/default/files/publications/Case001Apology_En_low_res.pdf (last visited Feb. 10, 2016) [hereinafter: *Compilation of Statements*].

²¹⁹ *KAING Guek Eav alias Duch Case*, Case No. 001/18-07-2007-ECCC/TC, Transcript of Trial Proceedings, 90 (Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia Mar. 31, 2009), https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/E1_6.1_TR001_20090331_Final_EN_Pub.pdf.

probably would not have been pursued by the relevant tribunal.²²⁰ Among the most famous penitents in Nuremberg were Hans Frank, and to a lesser extent Albert Speer or Fritz Sauckel. Tojo is said to have apologized for his crimes after the Tokyo trial.²²¹ And there has been an even bigger stream of repentants before the ICTR (Kambanda, Ruggiu, Serushago) and the ICTY (Nikolic, Erdemovic, Blavsic). Finally, the most important trial before the Extraordinary Chambers of Cambodia, led “Comrade Duch” to offer a complex repentant figure at his trial.

The motivations for sincere repentance are presumably many. Repentance may be instrumental in that one repents in the hope of, for example, a more lenient sentence. The incentives before international criminal tribunals for such a motivation to emerge may include that an attitude of contrition is one that will be taken into account as a mitigating circumstance in sentencing.²²² Nonetheless, skepticism has been expressed about the attractiveness of such reductions to defendants who otherwise stand to lose so much reputationally from confessing to their guilt.²²³ At any rate, repentance at best only leads to marginal reductions in sentencing if at all, and those accused who have combined repentance with a non-guilty plea in order to obtain an acquittal or who hoped for drastic reduction in sentences have clearly aimed too high.²²⁴ International criminal tribunals are not truth commissions who can simply absolve individuals on the basis of their apologies, and no amount of mental suffering for one’s own crime can substitute for a just punishment.²²⁵

Typically, then, repentance, if and when it has been forthcoming, has often been anchored in a deeper epiphany about one’s responsibilities. Indeed, it is not unusual for some individuals appearing before international criminal tribunals to have been crushed by sentiments of culpability. For example Wilhelm Keitel said to the Nuremberg prison psychologist that he “will suffer more agony of conscience and self-reproach in this cell than anybody will ever know.”²²⁶ Such sentiments may be produced by the trial itself, and one should not assume that the accused will

²²⁰ Prosecutor v. Drazen Erdemovic, Case No. IT-96-22-T, Transcript of Sentencing Judgement, ¶ 96 (Nov. 29, 1996), <http://www.icty.org/x/cases/erdemovic/tjug/en/erd-ts961129e.pdf>.

²²¹ See TOLAND, *supra* note 196 at 873.

²²² Prosecutor v. Drazen Erdemovic, *supra* note 220, ¶ 55; Prosecutor v. Omar Serushago, Case No. ICTR-98-39-S, Sentence, ¶¶ 40-42 (Feb 5, 1999), http://www.worldcourts.com/ict/eng/decisions/1999.02.05_Prosecutor_v_Serushago.pdf.

²²³ See generally Nancy Combs, *Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentencing Discounts*, 59 VAND. L. REV. 69 (2006) (some defendants who are innocent even plead guilty to avoid risks of longer sentences).

²²⁴ Olivia Swaak-Goldman, *International Decisions*, 95 AM. J. OF INT’L L. 656, 661, 658 (2001); Nancy A. Combs, *Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentence Discounts*, 59 VAND. L. REV. 67, 70-73 (2006).

²²⁵ See Lyn Graybill, *To Punish or Pardon: A Comparison of the International Criminal Tribunal for Rwanda and the South African Truth and Reconciliation Commission*, 2 HUM. RIGHTS REV. 3, 15 (2001) (showing the stark difference between plea discounts and personal remorse).

²²⁶ GILBERT, *supra* note 5, at 110.

be entirely aware of the nature and consequences of their acts *ab initio*. Much evidence suggests that the ability to commit atrocity crimes relies in part on mechanisms of psychological self-protection that involve not giving too much thought to such matters.²²⁷ Those who are accused of dereliction in the pursuit of their command may *a fortiori* not have taken the full measure of the acts carried out by their subordinates until confronted with evidence.²²⁸ The testimony of victims and the inevitably human face it puts on suffering may also precipitate greater awareness of the impact of one's decisions. At any rate, some statements of repentance are startling in their depth and breadth. Consider for example Comrade Duch's statement before the Extraordinary Chambers in Cambodia:

[W]henever I recall the past, I am deeply pained and I am racked with remorse. I am appalled whenever I recall the activities which I was ordered to carry out, and the orders I gave to others that affected the lives of many innocent people, including women and children. . . . I am sure that the general public now regards me as a cowardly and inhumane person. I sincerely and respectfully accept all these arguments. . . . At present, I have the deepest sorrow and regret, and I feel ashamed and uneasy. As a perpetrator, I know that I am personally guilty before the entire Cambodian people and nation, before the families of all the victims who lost their lives at S-21 and before my own family, some of whom also lost their lives.²²⁹

Repentance may come from individuals at various rungs of the responsibility ladder. When not purely instrumental, it manifests an effort to come to terms with both one's legal and moral responsibility. The accused becomes his foremost accuser. Notably, Duch insisted that he confessed to "make people recognize me again as part of mankind."²³⁰ In a sense, his confession was meant to make him "human" where he had so often been described as a "monster," exposing his complexity and redeemability.²³¹

There may be, as we shall see, more than a passing whiff of sacrifice in the repentant's attitude, but the sacrifice also accompanies genuine remorse—it is not simply an opportunity to signal one's greatness and *noblesse oblige* at the expense of international criminal justice. Consider, for example, the quite striking guilty

²²⁷ See STANLEY COHEN, *STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING* (John Wiley & Sons, 2013).

²²⁸ See Michal Stryszak, *Command Responsibility: How Much Should a Commander be Expected to Know?*, 11 U.S. A.F. ACAD. J. LEGAL STUD. 27–82 (2002).

²²⁹ *Compilation of Statements*, *supra* note 218, at 3.

²³⁰ *Id.* at 15.

²³¹ ALEXANDER LABAN HINTON, *MAN OR MONSTER?: THE TRIAL OF A KHMER ROUGE TORTURER* (Duke University Press Books, 2016).

plea statement by Dragan Obrenovic, a Serb and Bosno-Serb army commander who was accused of many massacres in Srebrenica:

I find it very hard to say this truth. I am to blame for everything I did at that time. I am trying to erase all this and to be what I was not at that time. I am also to blame for what I did not do, for not trying to protect those prisoners. Regardless of the temporary nature of my then-post, I ask myself again and again, what could I have done that I didn't do? Thousands of innocent victims perished. Graves remain behind, refugees, destruction and misfortune and misery. I bear general part of the responsibility for this. There is misfortune on all sides that stays behind as a warning that this should never happen again. . . . I stand by this. I am responsible for this. The guilt for which I feel remorse and for which I apologise to the victims and to their shadows. I will be happy if this contributed to reconciliation in Bosnia, if neighbours can again shake hands, if our children can again play games together, and if they have the right to a chance. I will be happy if my testimony helps the families of victims, if I can spare them having to testify again and thus relive the horrors and the pain during their testimony. It is my wish that my testimony should help prevent this ever happening again, not just in Bosnia, but anywhere in the world. It is too late for me now, but for the children living in Bosnia now, it's not too late and I hope that this will be a good warning to them.²³²

As can be seen, repentance involves a form of introspection that does not simply seek to impose an extraneous grid of interpretation on the trial, but instead takes it seriously along with the charges it brought. Duch's repentance is interesting because of the number of times it was repeated, its depth, and the very clear intent to frame it in a certain way.

It is worth noting in this respect that the repentant seems to engage in an act of moral agency ("I can choose to recognize my guilt and repent *because* I am a moral agent") that validates, retroactively, the very moral agency on which the international criminal law system is predicated (individuals *do* have choices even in harsh circumstances).²³³ One of the main reasons for creating the Nuremberg tribunal after the calamitous Versailles settlement, was precisely to avoid branding an entire nation guilty.²³⁴ At Nuremberg, the defendants were much derided for claiming that they did not know or could not do anything about orders they were

²³² Prosecutor v. Dragan Obrenovic, No. IT-02-60/2 Transcript of Court Case at 1556 (2003).

²³³ Kirsten Ainley, *Individual agency and responsibility for atrocity*, in *CONFRONTING EVIL IN INTERNATIONAL RELATIONS* 37–60 (Palgrave Macmillan, 2008).

²³⁴ See Christian Tomuschat, *The Legacy of Nuremberg*, 4 J. INT'L. CRIM. JUST. 830 (2006).

given to commit international crimes.²³⁵ In that respect, conversely, repentance performs one of the founding myths of international criminal justice, notably the idea that it is fundamentally premised on and an illustration of the primacy of individual responsibility. The repentant seems to be saying: “I am guilty because in expressing remorse I express forcefully the fact that I have, and therefore had, a *libre arbitre* in the first place.”

In contrast to the defiant or sacrificial accused who—whilst recognizing that some of the acts may have been committed—blames them on the system and argues that he was only a tool, the repentant convict accepts that he is indeed to blame, that there is such a thing as a blamable individual even in constraining systemic conditions. Hans Frank’s designation of the guilty “German people”²³⁶ can thus usefully be contrasted with, for example, the statement of Obrenović that “[m]y testimony and admission of guilt will also remove blame from my nation because it is individual guilt, the guilt of a man named Dragan Obrenović.”²³⁷ Some statements of remorse in this context seem to almost word for word replicate the basic injunction of international criminal justice that one should neither obey unlawful orders nor give any.²³⁸ As Comrade Duch put it before the Extraordinary Chambers in Cambodia for example:

[W]hen I bow my head to be tried in this Court it is to be tried for the crimes that I committed. I will not put the entire blame on my superior -- to my superior -- and I will not blame my subordinates as well. That means I will not go away from my responsibility. This crime, although it falls within the role of my superior, it is also falling within my role. At S-21 all the crimes I will be responsible for. I will not blame anybody or any subordinate; not at all.²³⁹

Duch insisted that he was “responsible in the eyes of the law, and . . . would like to be tried by the ECCC alone, and [did not] want [his] subordinates to be on trial too.”²⁴⁰ In addition, when it came to taking orders for his superiors, Duch endorses—only to acknowledge how he has failed it—the most ambitious reading of international law, the one that suggests that one should rebel and risk one’s life rather than run the risk of committing atrocities:

Though I acted out of respect for Angkar’s orders, I am still responsible for the crimes. During the S-21 era, I valued my life

²³⁵ See generally Robert Jackson, *Closing Arguments for Conviction of Nazi Criminals*, 20 Temp. L.Q. 107 (1946-1947).

²³⁶ GILBERT, *supra* note 5 at 276.

²³⁷ Prosecutor v. Obrenovic, *supra* note 232, at 1557.

²³⁸ MARK J. OSIEL, *OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE AND THE LAW OF WAR* (Routledge) (2017).

²³⁹ *KAING Guek Eav alias Duch Case*, *supra* note 219.

²⁴⁰ See *id.* at 58, 91.

and the lives of my family as more important than the lives of those who were detained at S-21. During that period I never dared even to think about disputing or opposing the orders from the top, despite knowing that they were criminal. . . . As the director of S-21, I did not dare to seek any alternatives to obeying the orders from the upper-echelon, despite knowing that carrying them out would lead to the loss of thousands of lives.²⁴¹

Similarly, at the ICTY, Damir Došen insisted that “a man, however small and impotent he may be, must not allow himself to be overcome by lack of courage and that he must sacrifice himself in such situations. This is the only way in which we can help future generations to overcome injustice and inhuman actions.”²⁴² In a sense this late confession counts as a form of repentant sacrifice to compensate for the actual sacrifice that was not forthcoming at the time of the crimes—a form of rehabilitative sacrifice.

The possibility of exercising moral freedom at a late hour—be it in the closing moments of the trial itself—even if one did not use it when it mattered most is evident as a redeeming motif. For example, prosecutor Peter McCloskey’s closing argument in the trial of Dragan Obrenovic:

No one can completely insulate himself from the pressures around him any more than he or she can step out of the confines of his own nature. More often than not, we're all somewhat cornered by our circumstances. But how one transcends those circumstances or fails to transcend them depends on him and him alone. Civilized society requires individual accountability. If one makes the right choice when others around him are headed down the wrong roads, then properly he becomes the hero to posterity. But if one makes the wrong choice, *that's not the end of the matter*. His responsibilities do not end and the book of his life is not yet closed. *He still must decide what he's going to do about his mistake*. Should he refuse to acknowledge it and fold himself into the comforting surroundings of others who have taken that—made that mistake and are also refusing to acknowledge it, or should he confront that mistake, admit the mistake, repent, and strive to earn forgiveness? *We submit that those who choose the latter road of repenting and seeking to remedy their wrongs and obtain forgiveness without question demonstrate an ability to overcome themselves. They also serve as models who provide*

²⁴¹ *Compilation of Statements*, *supra* note 218, at 3.

²⁴² Prosecutor v. Sikirica, Case No. IT-95-8, Trial transcripts, 5737 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 8, 2001), <http://www.icty.org/x/cases/sikirica/trans/en/011008ED.htm>.

*inspiration and support for the rest of us, as each of us faces our own comparatively mundane crises.*²⁴³

B. Manifestations

Repentance can occur at the outset of the trial, in the course of proceedings, or after a conviction. It is primarily affected through statements, but it can also be manifested through a certain attitude in the courtroom. For example, some of the accused, such as Funk at Nuremberg or Erdemovic at the ICTY, have occasionally been seen weeping following victim testimony, a powerful signal of empathy with witnesses. Repentance generally coincides with a full or partial recognition to relevant tribunals of the facts as alleged. In fact, repentance is often synonymous with a guilty plea.²⁴⁴ For example Dragan Nikolic made a statement to the following effect at the opening of this trial:

Your Honours, I am fully aware of all the things with which I am charged. I am aware of the acts that I have committed, and I confess to them count by count as they were read out to me here. I pleaded guilty, and I assume full responsibility for the acts that I have committed.²⁴⁵

In effect, the defendant is offering himself up to assist international criminal tribunals. For instance, Duch made it clear that he would “answer all the questions that the Co-Prosecutors may ask, and all the questions put by the civil parties who want to know the answers to such questions based on documented facts.”²⁴⁶

The sincerity of repentance may be evidenced when, for example, the accused “truthfully confessed his involvement in the massacre at a time when no authority was seeking to prosecute him in connection therewith, knowing that he would most probably face prosecution as a result.”²⁴⁷ By the same token, it is important to note that even clearly expressed acts of repentance can be ambiguous, and on several counts, so much so that assessing their sincerity has become a significant activity of tribunals, particularly for the purposes of sentence reduction. For example, even Duch’s much touted confession before the Extraordinary

²⁴³ Prosecutor v. Obrenovic, *supra* note 228, 1553-1554 (emphases added).

²⁴⁴ MOHAMED OTHMAN, ACCOUNTABILITY FOR INTERNATIONAL HUMANITARIAN LAW VIOLATIONS: THE CASE OF RWANDA AND EAST TIMOR Chapter 8, 287 (Springer) (2005).

²⁴⁴ Prosecutor v. Nikolic, Case No. IT-94-2, Sentencing transcript, 500 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 6, 2003), http://www.icty.org/x/cases/dragan_nikolic/trans/en/031106ED.htm.

²⁴⁵ *Id.*

²⁴⁶ *Compilation of Statements, supra* note 218, at 5.

²⁴⁷ *Prosecutor v. Dra` en Erdemovi*, Case No. IT-96-22-Tbis, Sentencing Judgment, ¶ 21 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 5, 1998), <http://www.icty.org/x/cases/erdemovic/tjug/en/erd-ts980305e.pdf>.

Chambers in Cambodia was arguably marred by his occasional emphasis on the lack of choice he had at the time and, even more strikingly, his appeal of his sentence.²⁴⁸ More specifically, three manifestations of repentance may subtly distort its impact on the international criminal trial.

First, repentance may be expressed in order to ‘save one’s own skin’ in bad faith. Although the ad hoc international criminal tribunals have been hesitant about being bound by formal plea bargains, they have often, but not always, granted more lenient sentences to those who express remorse, considering it to be a mitigating factor. This creates a legitimate fear that repentance will be feigned to avoid one’s full punishment. Indeed, Jean Kambanda’s and Drago Nikolic’s sudden refusals to further cooperate once they had been condemned to what they felt to be a higher sentence than their cooperation should have entitled them to, coloured their actions as a result of self-interest rather than true repentance. Genuineness presumably matters for international criminal tribunals, for what they are interested in is not only a validating pantomime (as in show trials, where the judges may be perfectly aware that repentance is coerced). Rather, judges are seeking evidence of true cooperation, and some degree of certainty that the accused will not subsequently taunt his victims.²⁴⁹ This is why international tribunals are attentive to whether a guilty plea is voluntary, informed, and unequivocal.²⁵⁰

Second, repentance may also subtly shift the blame, and problematically frame the contours of agency in the process. For example, it might coincide with more or less ambiguous attempts to project blame onto others.²⁵¹ Hence, Hans Franck basically recanted his own statement of regret when he said that:

There is still one statement of mine which I must rectify. On the witness stand I said that a thousand years would not suffice to erase the guilt brought upon our people because of Hitler's conduct in this war. Every possible guilt incurred by our nation has already been completely wiped out today, not only by the conduct of our war-time enemies towards our nation and its soldiers, which has been carefully kept out of this Trial, but also by the tremendous mass crimes of the most frightful sort which—as I have now learned—have been and still are being committed

²⁴⁸ *Compilation of Statements*, *supra* note 218, at 3 (“I have already told the Co-Investigating Judges that I was a hostage, a mere puppet in the criminal regime. . . [I]t was a matter of life and death for me and my family.”).

²⁴⁹ See generally Alan Tieger, *Remorse and Mitigation in the International Criminal Tribunal for the Former Yugoslavia*, 16 LEIDEN J. INT’L L. 777 (2003).

²⁵⁰ See generally Jenia Iontcheva Turner, *Plea Bargain and International Criminal Justice*, 48 U. PAC. L. REV. 219 (2017).

²⁵¹ Prosecutor v. Bijana Plavsic, Case No. IT-00-39&40/1-S, Transcript, 612 (Int’l Crim. Trib. For the Former Yugoslavia Dec. 17, 2002) (“I will, however, make one appeal, and that is to the Tribunal itself, the Judges, Prosecutors, investigators; that you do all within your power to bring justice to all sides. In doing this, you may be able to accomplish the mission for which this Tribunal has been created.”) <http://www.icty.org/x/cases/plavsic/trans/en/021217IT.htm>.

against Germans by Russians, Poles, and Czechs, especially in East Prussia, Silesia, Pomerania, and Sudetenland. Who shall ever judge these crimes against the German people?²⁵²

Less dramatically, repentance might be part of an attempt to portray one's guilt as merely revealing of that of one's people, thus diluting the sense of one's own responsibility. This is the meaning that must be given to Hans Frank's famous but very ambiguous statement: "A thousand years will pass and still Germany's guilt will not have been erased,"²⁵³ which is hardly a recognition of individual guilt even though it is cloaked in a language of contrition. Finally, and without blaming anyone in particular, repentance might be framed by a narrative in which one nonetheless presents oneself as a pawn in a larger game rather than as a truly acting agent. Repentance, in other words, may be subtly exculpatory and more akin to sacrifice than genuine contrition. An interesting cinematographic example of this is the former German Minister of Justice in "Judgment at Nuremberg," who both admits his guilt and tries to justify himself in the same breath but is cut off by the President of the court (Spencer Tracy) as engaging in criminal conduct.²⁵⁴ Consider also Todorovic's long-winded statement to the ICTY:

Your Honours, never in my life did I want to be the chief of police, but perhaps destiny or a set of unfortunate circumstances put me in that position, and at the worst possible time, the time of war, and here I am today standing before you, before world public opinion, and before God. War is hell. The town of Bosanski Šamac, as well as the police station, throughout the war were actually on the very front line. Artillery shells were falling almost daily on the town, as well as throughout the territory of the municipality. Frequent deaths, the wounding of soldiers, civilians, and children occurred. Attending the funerals of my relatives, friends, and acquaintances was frequent. . . . [E]vents followed one another at great speed, and at times, it was very difficult to act wisely. A great deal of fear, panic, fatigue, stress, and at times alcohol, too, influenced my actions. Under those circumstances, I made erroneous decisions and I committed erroneous acts.²⁵⁵

²⁵² See also *id.* at 371 (Joachim Von Ribbentrop: "I deplore the atrocious crimes which became known to me here and which besmirch this revolution. But I cannot measure all of them according to puritanical standards, and the less so since I have seen that even the enemy, in spite of their total victory, was neither able nor willing to prevent atrocities of the most extensive kind."); The Trial of German Major War Criminals, *supra* note 58, at 384.

²⁵³ GILBERT, *supra* note 5, at 276.

²⁵⁴ STUART & SIMONS, *supra* note 123, at 88.

²⁵⁵ *Prosecutor v. Todorovic, Case No. IT-95-9/1-S, Transcript, 59 (Int'l Crim. Trib. For the Former Yugoslavia May 4, 2001)*, <http://www.icty.org/x/cases/todorovic/trans/en/010504ED.htm>.

Repentance may also be framed in some idiosyncratic way that subtly reorients it away from full recognition of guilt by blaming leaders. For example, Albert Speer was willing to say to anyone who would listen that “Hitler has disgraced Germany for all time! He betrayed and disgraced the people that loved him! . . . I will be the first to admit my guilt.”²⁵⁶ This sense of intimate betrayal, of having been misled by one’s Führer would surely not appear from the outside as a true and honest rendition of the evil of Speer’s deeds. In fact, Speer spent much of the following 20 years mitigating his responsibility in the media under the guise of accepting his faults.

Third, repentance may be subtly phrased as a moral, rather than strictly legal, theme. For example, Walther Funk, the President of the Reichsbank during the Second World War, insisted that:

I signed the laws for the aryanization of Jewish property. Whether that makes me legally guilty or not, is another matter. But it makes me morally guilty, there is no doubt about that. . . Every one of us has this moral guilt. I don’t see how the court can acquit a single one of us.²⁵⁷

Similarly, it was pointed out by a psychologist who examined Erdemovic and duly noted his feeling of remorse that nonetheless “[h]e knew he killed innocent civilians, but he had no choice himself. There were other people who ordered him to shoot people. In a legal sense he doesn’t feel guilty of the crimes he is accused of.”²⁵⁸ This led the court to deplore that “The accused displays a tendency to feel the helpless victim.”²⁵⁹

In fact, the primary reason that repentance may appear not to be atonement vis-à-vis the community of human beings, but in relation to some deified presence. International criminal justice often seems to be in close competition with invocations of God and may often fail in and of itself to truly extract the sort of allegiance that it would claim. For example, Milan Babic, the former Prime Minister and President of the government of the self-declared Serbian Autonomous Region of Krajina declared to the ICTY:

I have asked help from God to make it easier for me to repent, and I am thankful to God for making it possible for me to express my repentance. I ask from my brothers, Croats, to forgive us, their brother Serbs, and I pray for the Serb people to turn to the future and to achieve the kind of compassion that will make it possible to forgive the crimes.²⁶⁰

²⁵⁶ GILBERT, *supra* note 5, at 275.

²⁵⁷ *Id.* at 406-07.

²⁵⁸ Prosecutor v. Drazen Erdemovic, *supra* note 220, ¶ 16.

²⁵⁹ *Id.* at ¶ 18.

²⁶⁰ Prosecutor v. Milan Babic, Case No. IT-03-72-S, Transcripts, 58 (ICTY Jan. 27, 2004).

This sort of statement is evidently ambiguous because it seems to inscribe repentance within a theological horizon, rather than the secular world of international criminal justice. Whether it constitutes an ultimate form of escapism or at least a preliminary step in enhancing international criminal justice's status will depend in part on international criminal tribunals' own response to it.

C. Impact

Having said all this, if and when repentance does occur, it is potentially the ultimate legitimizing ritual for international criminal justice. To begin with, repentance typically goes hand in hand with cooperation, a voluntary surrender, a guilty plea, or the occasional very useful testimony against one's co-accused that saves international criminal justice significant time and energy. Defendant cooperation may lead to the "[p]rovision of new information including names and identities of other perpetrators, substantiation and corroboration of existing information."²⁶¹ The tribunals have therefore essentially had nothing but good things to say about how repentance-induced cooperation saves time and energy and is profoundly conducive to the sort of justice that they seek to deliver. For example, the ICTR noted that Kambanda's guilty plea "occasioned judicial economy, saved victims the trauma and emotions of trial and enhanced the administration of justice."²⁶² On that point at least, most analysts concur: if nothing else, cooperative defendants maximize the time and resources of international criminal tribunals.

More deeply, however, repentance goes to the very symbolic legitimacy of international criminal justice because it signals recognition of both the reality of the charges and the legitimacy of the process by which they were brought. Like the cleansing or sacrificial postures, it expresses a fundamental vote of confidence for international criminal justice;²⁶³ but unlike those attitudes it involves a very intimate, and presumably painful, recognition that one has indeed committed the crimes of which one is accused. It inscribes the behaviour of the accused exactly within the perspective that international criminal justice has for it, validating both its broad legitimacy *and* the validity of its accusations.

International criminal justice thus appears not only generally legitimate, but also right and vindicated in its view of the crimes committed and the responsibility of the accused. Remorse involves a deep recognition, not only that one committed the acts, but that they are transgressive in the way international society describes them, that one is responsible for them in the way the prosecutor

²⁶¹ Prosecutor v. Drazen Erdemovic, *supra* note 220, at 17.

²⁶² Prosecutor v. Jean Kambanda, Case No. ICTR 97-23-S, Judgement and Sentence, (ICTY Sep. 4, 1998), 54; *see also* Prosecutor v. Mrdja, Case no. IT-02-59-S, Judgment, 31 March, 78.

²⁶³ *Prosecutor v. Milan Babic*, *supra* note 260, at 58 (Babic: "I place myself at the full disposal of this Tribunal and international justice.").

claims, and that they are painful in the way victims claim. Moreover, it signals that one is ready to shoulder responsibility for these acts, even if one did not act alone, and even if individual agency is not the only factor involved. In a deeper sense, one could say that repentance grounds international criminal justice beyond international legal positivism, international activism, or notions of international progress: *in the authenticity of sentiments*.²⁶⁴ It implicitly recognizes the stigmatization of the accused as genuine, by giving it the ultimate unction: that of the accused himself. “Yes” the convicted seems to be saying “you are right to stigmatize me, and I am happy (or at least at peace with) offering myself, my freedom even my life, to the reconstruction of the social edifice.”²⁶⁵

When repentance happens *despite* the evident flaws of the international criminal justice system, about which defendants may have misgivings even if they know themselves to be guilty, it is even more powerful. The accused seems to be saying something to the effect that: “for all the flaws of this process, such as its partiality, its procedural errors, I realize that you nonetheless stand for the truth, because I know in my heart and soul that I did indeed commit those acts in the way you have accused me of committing them, and in a sense that recognition is more important than my fleeting feelings of indignation about how I was occasionally instrumentalized.” The repentant appears almost magnanimous vis-à-vis his blundering accusers but, unlike the sacrificial figure, not because of some ulterior design or automatic deference to the authority law but because he subscribes to the broad project of condemnation for certain crimes, even if not to all its details.

In fact, such is the symbolic import of repentance that it has at times been described as the real goal of international criminal justice. One might say that punishment and stigmatization are required precisely to instill a sense of repentance in the accused and thus a lack of repentance by any accused betrays the failure of tribunals. At Nuremberg, after hearing the defence’s arguments against criminalizing certain organizations, and notably the idea that it would inflict on millions an indelible stigma, Sir David Maxwell-Fyfe, the British prosecutor exclaimed:

You have now seen and heard many witnesses who, some on their own admission, were themselves deeply involved in hideous crime. Have you been able to discern a sense of guilt or shame or repentance? Always it is someone who gave the orders that is to blame; never he who puts these orders into execution. Always it is some other agency of the State who was responsible; to support that State and co-operate with those other agencies is without criticism. *If this is the mind of these people today, there*

²⁶⁴ On the turn to sentiments in international law, see Gerry Simpson, *The Sentimental Life of International Law*, 3 LONDON REV. INT’L LAW 3, 3-29 (2015).

²⁶⁵ See generally Stephen P. Garvey, *Punishment as Atonement Symposium: The Future of Punishment*, 46 UCLA L. REV. 1801 (1998).

*can be no more pressing need nor greater justification for branding the guilty as criminal.*²⁶⁶

The extraordinary incidence of repentance is arguably that, in one swift blow, it collapses all the otherwise frustrating dichotomies of the international criminal judicial process: between the accuser and the accused, since the accused is cooperating fully with the accusation; between the accused and victims, since the accused makes generous space for the recognition of the latter's suffering; between the accused and other guilty parties, since it seems to show the way to other findings of guilt; between international and the national, since the repentant makes the former seem welcome in the latter. In other words, where the adversarial system naturally polarizes international criminal trials, repentance drives them in a much more restorative direction.²⁶⁷ It helps international criminal procedural law overcome "its inability to conceive the goal of justice beyond punishment," to include such things as "post-conflict peace, rehabilitation and reconciliation."²⁶⁸

Restorative justice is typically understood as the "process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future."²⁶⁹ It has definite affinities for the notion of "therapeutic jurisprudence" which Olowu Dejo has eloquently argued could be a worthy antidote to the "anti-therapeutic" effects of international criminal law and its tendency to undermine, by its very process, some of the goals it otherwise claims to pursue.²⁷⁰ There have long been calls to integrate a restorative dimension, specifically remorse,²⁷¹ into the criminal justice system, although by and large the former does not have a very central conceptual place within the latter. In fact, a restorative role can only function within the ambit of criminal trials in the relatively exceptional case of cooperative defendants. To be clear: international criminal justice was never, by and large, conceived as restorative and some of its more well-meaning restorative tendencies as they manifest themselves vis-à-vis contrite defendants—for example, through plea bargains—may very well go against its better retributive and punishing urge.²⁷² But the argument here is that it may fortuitously take on that connotation when dealing with a certain sort of defendant, and some have certainly argued for shaming to play a more central role in international criminal justice.²⁷³ In such a scenario,

²⁶⁶ The Trial of German Major War Criminals, *supra* note 58 (emphasis added).

²⁶⁷ In fact, repentance is often understood as one of the key "rituals" of restorative justice. See generally John Braithwaite, *Repentance rituals and restorative justice*, 8 J. POLIT. PHILOS. 115 (2000).

²⁶⁸ Olowu, *supra* note 18, at 139.

²⁶⁹ TONY F. MARSHALL, RESTORATIVE JUSTICE: AN OVERVIEW 5 (1999).

²⁷⁰ Olowu, *supra* note 18, at 145

²⁷¹ S. Bibas & R. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE LAW J. 85.

²⁷² Ralph Henham & Mark Drumbl, *Plea Bargaining at the International Criminal Tribunal for the Former Yugoslavia*, 16 CRIM. L. F. 49, 77 (2005).

²⁷³ See generally Mark A. Drumbl, *Punishment postgenocide: from Guilt to Shame to "Civis" in Rwanda*, 75 N. Y. UNIV. L. REV. 1221 (2000); Catherine Lu, *Shame, Guilt and*

international criminal trials may operate less like trials and more like truth commissions, thus overcoming some of the well-known limitations of the former whilst providing some of the advantages of the latter. One of the hallmarks of some of the most successful truth commissions is a reliance on full cooperation by those appearing before the commissions, including disclosure and adequate repentance for crimes.

More specifically, one can think of remorse by the accused as having at least six potential positive effects on international criminal justice. First, repentants lead by example, and indeed, some have made no secret of their desire for their remorse to show the way and more generally trigger similar reactions in others. For example, Hans Frank, the one-time Nazi ruler of Poland, confided to the Nuremberg prison psychologist, "Don't let anybody tell you that they had no idea. Everybody sensed there was something horribly wrong with the system."²⁷⁴ As such, the repentant threatens to break ranks among criminals, undermining the often obtuse and insulting solidarity of thieves.²⁷⁵ There is a hint that he will drag the others with him, thus undermining any attempt to create a wall of defiance. There is at least scattered evidence that defendants who claimed themselves entirely innocent have embarked on a path of introspection leading to a guilty plea after contact with other defendants who had taken such a course. Biljana Plavsic's confession is remarkable in that respect, because of the way it seemed almost designed to attack several stereotypes of persecution prevalent amongst Bosno-Serbs:

I have been urged that this is not the time nor the place to speak this truth. We must wait, they say, until others also accept responsibility for their deeds. But I believe that there is no place and that there is no time where it is not appropriate to speak the truth. I believe that we must put our own house in order. Others will have to examine themselves and their own conduct. We must live in the world and not in a cave.²⁷⁶

And as Babic put it:

I can only hope that by expressing the truth, by admitting to my guilt, and expressing the remorse can serve as an example to those who still mistakenly believe that such inhumane acts can ever be justified.²⁷⁷

Reconciliation After War, 11 EUR. J. SOC. THEORY 367; Of course the shaming here must be the right sort, namely shaming that is brought onto themselves by repentant defendants rather than the sort that is used to heavily stigmatize particular individuals or entire nations.

²⁷⁴ GILBERT, *supra* note 5, at 47.

²⁷⁵ NANCY COMBS, GUILTY PLEAS IN INTERNATIONAL CRIMINAL LAW: CONSTRUCTING A RESTORATIVE JUSTICE APPROACH 96 (2007), <http://www.loc.gov/catdir/toc/ecip0610/2006007572.html>.

²⁷⁶ Prosecutor v. Biljana Plavsic, *supra* note 251, at 612.

²⁷⁷ Prosecutor v. Milan Babic, *supra* note 260, at 57-58.

In fact, such is the attraction of this possibility that international criminal tribunals have recognized it as one reason why they should take remorse into account.²⁷⁸ As the ICTY put it, “[u]nderstanding of the situation of those who surrender to the jurisdiction of the International Tribunal and who confess their guilt is important for encouraging other suspects or unknown perpetrators to come forward.”²⁷⁹

Second, a repentant defendant may arguably be more conducive to the discovery of historical truth. This is something that international criminal tribunals are clearly alert to. As the ICTY put it,

The International Tribunal, in addition to its mandate to investigate, prosecute and punish serious violations of international humanitarian law, has a duty, through its judicial functions, to contribute to the settlement of the wider issues of accountability, reconciliation and establishing the truth behind the evils perpetrated in the former Yugoslavia. Discovering the truth is a cornerstone of the rule of law and a fundamental step on the way to reconciliation: for it is the truth that cleanses the ethnic and religious hatreds and begins the healing process.²⁸⁰

In effect, this is one domain where international criminal tribunals might work like some of the better-functioning truth commissions, which were even more directly premised on the notion that repentance might lead to the truth, both broad and contextual but also highly specific and local, e.g., where the disappeared victims were buried.²⁸¹ This is at least so long as plea-bargains end up at most in sentence reductions and not withdrawal of charges. In the former case, the truth-disclosing potential of international criminal justice remains intact and is probably instrumentally enhanced by the perspective of a reduced sentence for the accused (except in the relatively improbable case where the accused plead guilty to any charge even when they think they are innocent); in the latter case, cooperation is obtained at a potentially steep price in terms of truth-telling since certain charges are abandoned by the prosecution strategically that would presumably have been necessary to develop a full-picture of the atrocities.

Such a practice has arisen notably before the ad hoc tribunals. Before the ICTR, some accused such as Paul Bisengimana successfully marketed their

²⁷⁸ Prosecutor v. Georges Ruggiu, Case No. ICTR-97-32-I, Judgement and Sentence, ¶ 55 (ICTR Jun. 1, 2000) (“it is good policy in criminal matters that some form of consideration be shown towards those who have confessed their guilt, in order to encourage other suspects and perpetrators of crimes to come forward.”)

²⁷⁹ Prosecutor v. Drazen Erdemovic, *supra* note 228, ¶ 21.

²⁸⁰ *Id.*

²⁸¹ PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 98-99 (Psychology Press) (2001).

cooperation to the prosecutor in exchange for the dropping of genocide charges²⁸² (the deal was nonetheless rejected by the Chamber). ‘Charge bargaining’ has been successfully implemented at the ICTY but with considerable outside skepticism where it has been seen as occasionally privileging cooperation at the expense of the full pursuit of truth:²⁸³ in fact, the give-and-take simultaneously sheds light on the charges that are maintained and obscures facts relating to the charges that are withdrawn, and thus has a very ambiguous effect on truth-disclosure. Having said that, charge bargaining may be relatively more unlikely in the case of truly repentant defendants who are less likely to haggle over charges than engaged defendants tempted by a plea bargain for purely strategic reasons such as sentence reduction (although this is not impossible in that simply because defendants repent for some crimes does not mean they repent for all of the crimes they are accused of).²⁸⁴

Third and relatedly, repentance may open the way for reconciliation by building bridges across former enmities.²⁸⁵ By doing away with the need to prove events antagonistically in an adversarial trial, it softens the polarizing effect of the criminal process, one that may obtain conviction only at the cost of leaving victims and convicted simmering with mutual resentment.²⁸⁶ This in turn can create a sense of profound breach of trust that the criminal system can never remedy. Conversely repentance is a message directed not so much at the international community as to victim communities in particularized contexts. For Bijana Plavsic:

I can only do what is in my power and hope that it will be of some benefit, that having come to the truth, to speak it, and to accept responsibility. This will, I hope, help the Muslim, Croat, and even Serb innocent victims not to be overtaken with bitterness, which often becomes hatred and is in the end self-destructive.²⁸⁷

²⁸² Nancy A. Combs, *Plea Bargains in International Criminal prosecutions*, in INTERNATIONAL CRIMINAL LAW, VOLUME 2 MULTILATERAL AND BILATERAL ENFORCEMENT MECHANISMS, 570.

²⁸³ For a discussion see Henham & Drumbl, *supra* note 272, at 62.

²⁸⁴ In that respect, it is worth keeping in mind that this section is interested in repentant defendants per se, not merely the arguably broader category of defendants who take a plea bargain, some of whom may be imperfectly repentant. As Ralph Henham and Mark Drumbl noted “In the end...it seems odd to accept a guilty plea when there is no remorse or cooperation: the retributive, expressive, and narrative effects of such a plea seem thin.” *Id.* at 60.

²⁸⁵ Prosecutor v. Mrdja, Case No. IT-02-59-S, Sentencing Judgment, 79 (ICTY Mar. 31, 2004).

²⁸⁶ On the limits of the adversarial system, see Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 5, 5–44 (1996).

²⁸⁷ Prosecutor v. Biljana Plavsic, *supra* note 251, at 610-611.

Similarly, Nikolic urged:

I have admitted to my guilt, and as my counsel said—I wish to repeat it once again—I hope that all the three parties will be encouraged by my confession to assume their part of the responsibility for those terrible acts, because that is the only thing that would make it possible for people to become close again, for the three peoples to become close again in those parts. It should be clear to all of us that we are after all an important factor in this reconciliation and peaceful coexistence.²⁸⁸

Todorovic also expressed his “wish and hope . . . to go back to the wonderful prewar times that we had when all the people of Bosnia lived in unity and happily together.”²⁸⁹ In some cases, atonement leads to apologies directly to victims. *Duch* provided a veritable repertoire of apologies. Consider for example the following:

I am before the Court and responsible for all the crimes committed at S-21 legally and psychologically, and I do not intend to deny any crimes committed at S-21, and I would like to seek forgiveness from Madam Lefevre and other people who have lost their loved ones during the regime. That's all.²⁹⁰

It is difficult to gauge the exact impact of such apologies,²⁹¹ but one can surmise that in their breadth and apparent sincerity they will contribute significantly to mending ties within societies and allowing victims to move on.²⁹² Again, of course, if these sincere expressions of remorse are obtained only as a result of the prosecution having dropped key charges to make a plea bargain more palatable to the defendant then they may be badly received by victims and their reconciliatory (as opposed to their pure trial-facilitative aspect) potential damaged. In addition, reduction of sentences that are too dramatic—although it should be said there is little indication of this having happened often—might seem to excessively reward forms of contrition which, even if sincere, ought not to entirely expunge guilt or render international criminal tribunals facing defendants into little more than truth and reconciliation commissions which they were never intended to be. For example, it was often felt in the region and by commentators that the reduction of sentence

²⁸⁸ Prosecutor v. Dragan Nikolic *supra* note 244, at 501-502.

²⁸⁹ Prosecutor v. Stevan Todorovic, *supra* note 255, at 60.

²⁹⁰ *KAING Guek Eav alias Duch* Case, Case no. 001/18-07-2007-ECCC/TC, Transcript of Proceedings - Mr. François Roux (Defense), 47 1.1-5 (Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia Aug. 17, 2009).

²⁹¹ For a skeptical view, see Oliver Diggelmann, *International Criminal Tribunals and Reconciliation Reflections on the Role of Remorse and Apology*, 14 J. INT'L CRIM. JUST. 1073, 1073-1097 (2016).

²⁹² Janine Natalya Clark, *Plea bargaining at the ICTY: Guilty pleas and reconciliation*, 20 EUR. J. OF INT'L L. 415, 415-436 (2009).

of Biljana Plavsic to 11 years because of her stated remorse made a mockery of victims.²⁹³ Nonetheless, the notions propounded by the defendants themselves that their remorse is not purely a self-referential article (involving, for example, the salute of their soul) but a deeper social gesture is one to which international criminal tribunals have no doubt been sensitive.²⁹⁴

Fourth, repentance may even lead to personal rehabilitation, the otherwise poor cousin of international criminal justice. There is a tradition of thought in criminology that has emphasized the benefits to the *defendant* of repenting, particularly as a way of moving beyond the violence of shame by acknowledging shame in the open, known as “reintegrative shaming.”²⁹⁵ As John Braithwaite put it, “the deeper the evil, the more profound the comparative advantage of rituals of repentance and forgiveness over rituals of degradation.”²⁹⁶ In this context, “Therapeutic jurisprudence” is clearly oriented in part towards the psychological and moral needs of the defendant.²⁹⁷ Repentant defendants are ideal candidates for rehabilitation given the framing of their repentance as precisely a form of wanting to be “returned to humanity.”²⁹⁸ The international criminal tribunals have expressly pointed to the link between remorse and rehabilitation, noting that admission of guilt helped prospects of successful rehabilitation and therefore a relatively shorter sentence.²⁹⁹

Fifth, repentance will undoubtedly be an element in fighting future revisionism, for there is perhaps no stronger evidence that crimes were committed than a tranquil, reflective act of contrition.³⁰⁰ *Duch*, for example, seems to have deeply internalized the fact that his willing reception of adverse testimony would serve to consolidate historical truth.³⁰¹ In that respect, repentance may be future-

²⁹³ Henham and Drumbl, *supra* note 272, at 57.

²⁹⁴ Prosecutor v. Deronjic, No. IT-02-61 (July, 20 2004), ¶ 134; *see also* Prosecutor v. Plavsic, *supra* note 251, ¶¶ 70-80.

²⁹⁵ JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989).

²⁹⁶ Braithwaite, *supra* note 267, at 129.

²⁹⁷ Olowu, *supra* note 18, at 144. (“rather than cast an offender in the stereotyped perceptions of ‘wrongdoer’ leading to stigmatization as criminal law would, therapeutic jurisprudence seeks ways of modifying the impact of the conflict by offering a deeper insight into the behavioral causes and the phenomena that gave rise to the perceived ‘wrong’.”)

²⁹⁸ See *KAING Guek Eav alias Duch* Case, Case no. 001/18-07-2007-ECCC/TC, Transcript of Proceedings - Mr. François Roux (Defense), 92 (Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia Mar. 31 2009) (pointing out that the “real question” of Duch’s trial was whether “the hearings would allow one who has exited from humanity to return to humanity”).

²⁹⁹ Prosecutor v. Drazen Erdemovic, *supra* note 220, ¶ 16; *see also* Prosecutor v. Omar Serushago, *supra* note 222.

³⁰⁰ Tanaka, *supra* note 206, at 4 (Noting that Yamashita “clearly accepted responsibility as commander and the judgment” . . . by rigorous but impartial law.” It seems ironic that many conservative politicians who support Prime Minister Koizumi’s official visits to Yasukuni Shrine now claim that the war crime tribunals conducted by the Allied forces were simply “victor’s justice” and therefore had no legal validity.)

³⁰¹ *Guek Eav alias Duch* Case (transcripts), *supra* note 219, at 73 l.22 – 74 l.5 (“I would like to bow my mind and my body to acknowledge the testimony of this Ouk Neary

oriented and come with an interesting diagnosis of what precisely went wrong for atrocities to be committed, and a call to others, including future generations, to avoid repeating the mistakes of the past. For example, in his final statement before execution, Yamashita is understood to have ascribed war crimes committed by the Japanese, including himself, to a lack of “moral judgment” and sense of “personal responsibility” for their acts.³⁰² Similarly, Speer would come to reflect on what was wrong about Nazi Germany as the tendency “to separate oneself from the events that were unpleasant” and to feel “responsible only for one’s own sector.”³⁰³ Such reflections arguably could not have emerged outside an act of lucid contrition, and can pave the way to collective forms of *Vergangenheitsbewältigung*, the German term for the process by which Germany came to terms with its responsibility for the Holocaust.

Sixth, repentance may maximize the goals of the international criminal justice system more generally. The repentant defendant is one who is likely to be “self-deterred” by the horror that his own crimes inspire. In expressing shame and remorse, the accused also powerfully contributes to inculcating these feelings in others, and thus reinforces one of the goals of international criminal tribunals: to educate the broader public and deter the commission of crimes. Of course, to the extent that the repentant defendant benefits from a plea bargain or the simple indulgence of international criminal justice, his precedent may be less deterring than that of one condemned to a harsh sentence notwithstanding his repentance. There is evidently logic in the fact that taking into account contrition to reduce sentences creates a warped retributivist landscape that does not greatly improve the readability of international condemnation.³⁰⁴ Yet deterrence is not created by fear of punishment alone, as much as by fear of shame and in that respect expressive repentant defendants provide plenty of reasons to not want to emulate their path. The repentant’s emotions become emblematic of what all criminals should feel, not simply once they are caught and prosecuted, but before they even commit crimes. Repentance thus anchors the criminal justice system in a rich sediment of emotional reactions and aversions to crime that is far more constitutive than, say, any hypothetical international state-like authority. The defendant seems to be saying to the effect that “I refrain from committing crimes not because the state/international community says so or because of fear of the police but because of an authentic sentiment that to commit them is *wrong*.” In that respect, genuinely repentant

as an orphan who lost her father at S-21. This testimony is valuable. It is an historical document for the next generation not to forget the tragedy and not to allow the mankind into such crime. In the future, we could hear the testimonies of other orphans who lost their fathers and I am ready to receive those testimonies.”).

³⁰² Tanaka, *supra* note 206, at 4.

³⁰³ Cited in JOHN M. STEINER, POWER POLITICS AND SOCIAL CHANGE IN NATIONAL SOCIALIST GERMANY: A PROCESS OF ESCALATION INTO MASS DESTRUCTION 103 (1975).

³⁰⁴ Henham and Drumbl, *supra* note 272, at 57bl.

defendants may stand as living proof that restoratively oriented penal justice is not incompatible with deterrence.³⁰⁵

VI. CONCLUSION

This article has sought to produce a comprehensive, dynamic portrait of various types of attitudes adopted by defendants before international criminal tribunals. Its premise is that this attitude is not a detail in international criminal trial processes but, in fact, one of the fundamental ways in which their legitimacy is shaped. The accused does not hold all the keys, but he holds some precious symbolic ones, and in his behavior rests much of what we may come to view as the legal, political, and historical legacy of international criminal trials.

This article seeks to confirm the intuition that international criminal justice itself needs the accused to validate itself and its legitimacy. Hence the relationship of the accused to international criminal justice is best understood as one involving a dialectic of love/hate, or seduction/repulsion and at any rate as being part of a complex *interactional process*. The accused need international criminal tribunals who will respect their rights and listen to what they have to say. Even a defiant accused needs an international criminal tribunal to serve as an echo chamber for his broader claims about the politicization of justice and his victimization. But international criminal justice also sorely needs the assent of those it prosecutes. It needs them to at most deny their crimes but not to deny it any legitimacy. It needs, in short, ‘normal’ defendants, who take seriously its status as a ‘normal’ system of criminal justice, and not ‘political’ defendants who try to cast it as engaged in ‘political’ trials. In that respect, the four attitudes outlined in this article operate along a continuum going from struggle to harmony: the interests of defendants and tribunals may be radically opposed (defiance), broadly convergent (engagement), fully aligned (repentance), or somewhere in between (sacrifice).

If international criminal defendants exercise agency however, it is, needless to say, not principally to legitimize their judges. This result is partly fortuitous. Nor, in the greater order of things, are compliant defendants always what best serves international justice’s needs in the long run. Defiant defendants do indeed have a role to play when international criminal justice proceeds from glaring legitimacy deficits; even though they may be the last ones one wants to hear it from given some of the things they are accused of, it must be recognized that they have at times been ideally placed to judge their prosecutors. If nothing else, their accusatory charges may protect international judges and prosecutors from complacency. Indeed, one must also contemplate the possibility that international criminal justice will be in some ways swayed, influenced, disrupted, or energized by challenges. Defendants, including confrontational ones, have at times, even

³⁰⁵ On thinking of international criminal tribunals as institutions primarily directed at ‘stigmatizing,’ see Frédéric Mégret *Practices of Stigmatization*, 76 *LAW CONTEMP. PROBL.* 287 (2013).

found sympathetic ears on the bench and beyond.³⁰⁶ And engaged defendants are of course indispensable to international criminal trials, if only because in obtaining the occasional acquittal for themselves they paradoxically reinforce the legitimacy of international criminal justice by highlighting its liberal credentials.³⁰⁷ In other words, all defendants may play a role in undermining or sustaining the intimate legitimacy of international criminal trials.

It is worth noting that defendants' attitudes may evolve over time and switch from one attitude to another, ideally from the less to the more cooperative. At any time during a trial, and often late in the day after a conviction, certain strategies break down. Many accused may start as defiant, and then reframe their experience as one of cleansing upon acquittal. Conversely, if the innocent accused's belief in and cooperation with the criminal system is not recompensed, then there is presumably not much left to make sense of the experience as anything but one of pure, unmitigated injustice. There is also occasionally less that separates some of the postures than meets the eye. For example, the accused before the ICTR who signed an incendiary letter against the tribunal criticizing its politicization, also "affirm that [they] have no intention of running away from justice. On the contrary, we strongly and loudly demand the establishment of the truth and fair justice, which are required conditions to achieve reconciliation of the Rwandan people."³⁰⁸ In other words, if only the ICTR also indicted FPR leaders, maybe the defendants would be more willing to consider some of their own faults. It may well be that international criminal justice can gain in legitimacy from successfully imposing its will on defiant defendants.

Thinking of defendants' attitudes as something evolutive and changeable can also help us reconceptualize the trial beyond the mere emphasis on guilt or innocence. The trial process is also a wooing process, one in which international criminal justice seeks to seduce defendants into forms of compliance, and into becoming active participants in the proof of their innocence or guilt. In that respect, interaction with the accused is testimony to one of the great hidden fantasies of international criminal justice, namely that the accused will be swayed by the justness of their prosecutors to behave accordingly, whether as engaging, repentant or at least sacrificial figures—anything being better than defiance. Of course, cooperation from defendants is something that may ultimately escape international criminal tribunals' control, depending as it does on a host of factors ranging from personality and calculations of defendants, peer pressure, as well as local and international political dynamics.

Still, there is evidence that some defendants, whatever misgivings they may have had about being in the courtroom in the first place, or their feelings of innocence, have been, if not entirely charmed, at least sensitive to the degree of care

³⁰⁶ See generally Varadarajan, *supra* note 146.

³⁰⁷ CHRISTINE SCHWITEM, *CRITICAL APPROACHES TO INTERNATIONAL CRIMINAL LAW: AN INTRODUCTION* 125 (2014).

³⁰⁸ ICTR detainees, *STATUT DE PRISONNIERS POLITIQUES DES NATIONS UNIES* (2007), <http://006728b.netsolhost.com/shared/DeclarationHutuPrisonersArushaUNN ov2007ENG.pdf> (last visited Feb 11, 2016).

that was used in prosecuting them. For example, it is understood that General Yamashita was deeply affected by the way in which he had been prosecuted—which is ironic given that his trial at the hands of the US army is often understood to have been largely unfair—and gave a pass to his judges, insisting that he had been judged “by rigorous but impartial law.”³⁰⁹ In an article entitled “Sullen Milosevic seduced by the fairness and humanity of justice,” Geoffrey Robertson writes that “the most remarkable feature of the trial so far is how has become a willing and enthusiastic party” in a way that “has served to legitimize the proceedings.”³¹⁰ According to Robertson, the defendants in Nuremberg went through a similar process having become “fascinated by the fairness of the adversary procedures, and decided to play the justice game after all.”³¹¹ Mladic also made an about face into his trial, going from arch-defier to one who promised not to “attack” the prosecutors personally.³¹² Consider for example his statement in court that:

[S]ince you explained this nicely to me, I would like to improve my relationship with this Court, with all people involved. In the future, I'm going to rise when you enter, I will bow, and I will sit down when you tell me. Not because I respect you so much, but because I would like to take part in this as an accused, and I would like to do that in a fair manner. All you're going to get from me is the truth and nothing but the truth. Thank you.³¹³

Even though such changes of heart may well be hypocritical, this is at least the best that international criminal justice can wish for: the slow, grudging recognition by the accused themselves that it has not only the power or even just the authority but the legitimacy to try them.

What this brings to mind is the necessity for international criminal justice to develop in ways that might encourage the emergence of the sort of defendants that its successful operation seems to postulate. At the very least, as the ICTY has recognized, it is “in the interests of international criminal justice and the purposes of the International Tribunal to give appropriate weight to the cooperative attitude of the accused.”³¹⁴ International criminal tribunals need to be fair through and thorough if they are ever to elicit the sort of minimum cooperation their very

³⁰⁹ Tanaka, *supra* note 206, at 4.

³¹⁰ Sullen Milosevic seduced by the fairness and humanity of justice, SYDNEY MORNING HERALD (Dec. 21, 2002), <http://www.smh.com.au/articles/2002/12/20/1040174392666.html>.

³¹¹ Geoffrey Robertson, *Milosevic the advocate: Playing the odds in the justice game*, THE GUARDIAN (Dec. 12, 2002), <https://www.theguardian.com/world/2002/dec/19/warcrimes>.

³¹² Prosecutor v. Ratko Mladic, Case No. IT-95-18-I, Trial transcripts, 282 (ICTY Mar. 29, 2012).

³¹³ *Id.*

³¹⁴ Prosecutor v. Drazen Erdemovic, *supra* note 220, ¶ 21.

existence requires.³¹⁵ Although this topic would be worthy of a separate article, it warrants mentioning that international criminal tribunals have had some measure of success in obtaining cooperation from defendants, perhaps because they have often been successfully recognized for what they are: fallible and imperfect institutions that are nonetheless committed to offering trials that are fair both substantively and procedurally. In addition, they have no shortage of means by which they can encourage a conciliatory attitude: disciplining the courtroom when defendants are aggressive, offering plea bargains, refusing to hire certain defense attorneys known for their uncooperative tendencies, lack of preventive detention for those who surrender voluntarily, the prospect of a shortened trial, reduced sentences, or early release, in addition to the public recognition that one has not added insult to injury by disrespecting an international judicial institution.³¹⁶

By the same token, international criminal justice, notably in the context of plea bargains has at times been suspected of wanting defendant cooperation a little too much for its own good, even if it meant sacrificing some of its broader retributive, truth-telling, or reconciliatory functions. International criminal judges, in other words, should not be so “charmed” by remorse that they forget that their core mandate is not to absolve the contrite but punish the guilty.³¹⁷ Although hard legal and ethical dilemmas will inevitably arise between the pragmatics of seeking successful prosecutions—including by enticing defendants to cooperate through charge bargains—and the need to fully prosecute and punish all of the crimes that were committed, if only for the sake of victims, this article’s contribution to that debate is surely that a better understanding of the psychological profiles of defendants can give us unique insights into their strategic outlooks and how international criminal tribunals should react to them.

For example, even though reduced sentences for atrocity crimes as a result of cooperation remain problematic on a range of levels and notably, when they are justified on purely pragmatic-administrative grounds,³¹⁸ they are much less problematic for genuinely repentant defendants (who in the best of cases may in fact not seek a particularly ‘merciful’ plea bargain, only seek a marginal sentence reduction, and accept his fate even if it is not granted) than they are for a range of other defendants who are only seeking to benefit from renouncing their potential nuisance power in exchange for some ill-earned charge or sentence reduction.³¹⁹ At

³¹⁵ In that respect, defendant rights should be respected because they are inherent, but also because respecting the defendant’s rights is one of the ways in which the defiant defendant is wooed, the engaged defendant is involved, the sacrificial defendant is awed, and the repentant defendant is reassured that his contrition will not be abused.

³¹⁶ Michael P. Scharf, *Chaos in the Courtroom: Controlling Disruptive Defendants and Contumacious Counsel in War Crimes Trials*, 39 CASE W. RES. J. INT’L L. 155 (2007).

³¹⁷ See Prosecutor v. Momir Nikolic, Case No. IT-02-60/1-S, Sentencing Judgement, ¶¶ 65-67 (ICTY Trial Chamber Dec. 2, 2003).

³¹⁸ For a discussion of the ‘pragmatic’ model in opposition to the ‘legitimacy’ one, see Henham and Drumbl, *supra* note 272, at 76.

³¹⁹ This is what might be described as the ‘political economy’ of obtaining cooperative defendants. Relatively ‘cheap’ cooperative defendants come at almost no cost and considerable benefits: this is the case of those who are truly and fully repentant; relatively

the very least, in the former's case, there would seem to be less of a tension between the pragmatics and legitimacy of punishment because plea bargains are less a concession to the accused than they reflect a mutual agreement, cemented by the defendant's genuine remorse, to let punishment follow its course. One of the consequences may be that it is only in those relatively untainted circumstances that plea bargains should be recognized, or perhaps even that plea bargains could conceivably be entirely excluded, leaving room only for pure, unadorned expressions of remorse that cannot be suspected of having been motivated by the transactional benefits of an expedient *do ut des*.

One of the lessons to be learned is that international criminal justice may have to adapt narrowly to the challenges that each type of defendant poses: to be in its most conventional forensic role in relation to engaged accused, to be combative vis-à-vis the defiant, to nudge the sacrificial towards something more constructive, and to engage the full restorative potential of the repentant. Thinking of criminal justice as at least oriented by its encounter with particular types of defendants suggests quite a radical rethink of its finalities, from a stern focus on the forensics of the criminal trial and guilt and innocence, to the complex practical and symbolic management of various attitudinal inclinations that stand to constantly reshape the international criminal trial and its reception. International judges, prosecutors, and perhaps even defense counsel could think of themselves as either threatening, challenging, advising, cajoling, or confessing defendants of various stripes. Whether international criminal tribunals can 'bootstrap' themselves into becoming something other than what they were quite evidently intended to be is an intriguing question that this article will not attempt to answer, although it should be said that what tribunals were intended to be is obviously a very fraught question that can know no simple answer.

Ultimately, international criminal trials are a privileged locus to examine how evolving concepts of international criminal justice are being hammered out between different participants to the process. This article has suggested that thinking thoroughly about and through defendants—and particularly the hard case of repentant defendants who rob the trial of his truly adversarial component—forces us to choose between traditional retributivist concepts of international criminal justice and evolving standards of restorative justice, but also to think when and how the concerns of both might be maximized.³²⁰ Interestingly, to the extent that international criminal justice does not make these choices in a very deliberate way, it may well be—and probably already is the case—that it is defendants themselves who will have the last word, determining through their behavior the sort of

'expensive' cooperative defendants are those who cooperate less as a result of an inner feeling of repentance than because of what they may obtain as a result of cooperating: they come at a significant cost for international criminal justice in terms of discharging its fundamental functions.

³²⁰ For a similar conclusion in the context of a narrower but enlightening study of plea bargains at the ICTY, see Henham and Drumbl, *supra* note 272, at 77. As these authors very correctly argue, there may be ways in which the restorative potential of plea bargains can be reconciled with the truth-telling, crime deterring, and reconciliation-encouraging dimensions of international criminal trials; see *id.* at 81–84.

outcomes that international criminal justice can deliver. In effect, plea bargains for example, were sought out by the defendants themselves long before international criminal practitioners had given much thought to them; defiant defendants have precipitated the adoption of a range of defensive strategies to protect international criminal fora from their delegitimizing and politicizing influences. Where the conventional view sees defendants encountering a ready-made system of international criminal justice, the article has been much more inclined to envisage a system of international criminal justice that is constantly constituted by and under the influence of its defendants.

Moreover, the place of defendants can help problematize the relationship of law to justice, and of legal justice to political or divine justice. Confronted with the ordeal of an international trial, defendants often invest in strategies of psychological compensation in religion but also politics that evidence a sort of flight from the legal. The Judeo-Christian register, notably, has been quite present before international criminal tribunals, with both defiant and repentant accused. For example, Rudolf Hess finished his concluding statement by insisting that “[n]o matter what human beings may do, I shall someday stand before the judgment seat of the Eternal. I shall answer to Him, and I know He will judge me innocent.”³²¹ At the opposite end of the spectrum, Hans Frank, who was born a Catholic, made a return to his faith after being arrested that is largely credited for triggering his feelings of repentance.³²² Before the ICTY and the ICTR references to “God” are omnipresent in the statements of the repentant. Todorovic, for example, spoke of “thereby . . . aton[ing] for my sins up to a point, my sins towards men and to God” by living an exemplary life if he is acquitted.³²³ Finally, before the Extraordinary Chambers for Cambodia, Duch was said to have been compelled to confess his crimes as a result of having become a born-again Christian.³²⁴ Others gladly invoke History,³²⁵ or the nation³²⁶ as their ultimate judge. Such utterances, by pointing to something that transcends the secular, immediate and technical authority of

³²¹ The Trial of German Major War Criminals, *supra* note 58, at 372.

³²² GARRY OZOTERO, *THE BUTCHER OF POLAND: HITLER’S LAWYER HANS FRANK* (2013).

³²³ *Prosecutor v. Stevan Todorovic*, *supra* note 225, at 60.

³²⁴ Stephen Kurczy, *From Khmer Rouge torturer to born-again Christian*, CHRISTIAN SCIENCE MONITOR (April 6, 2009), <http://www.csmonitor.com/World/Asia-South-Central/2009/0406/p06s02-wosc.html>.

³²⁵ The Trial of German Major War Criminals, *supra* note 58, at 373 (Von Ribbentrop: “History will believe us when I say that we would have prepared a war of aggression immeasurably better if we had actually intended one.”).

³²⁶ *Id.* at 407 (Von Neurath: “I stand with a clear conscience not only before myself, but before history and the German people.”); *Id.* at 391 (Erich Raeder: “If I have incurred guilt in any way, then this was chiefly in the sense that in spite of my purely military position I should perhaps have been not only a soldier, but also up to a certain point a politician, which, however, was in contradiction to my entire career and the tradition of the German Armed Forces. But then this would have been a guilt, a moral guilt, towards the German people, and could never at any time brand me as a war criminal. It would not have been guilt before a human criminal court, but rather guilt before God.”).

international criminal justice may both reinforce and undermine its ‘intimate legitimacy.

