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INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

The Anxieties of International Criminal Justice

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Abstract
International criminal justice is on one level a project of hubris and promise, but on another level a project arguably riddled by anxieties. These anxieties are linked to the dizziness of choices available to it, and the degree to which every move to compensate for anxieties produces its own form of anxiety. This article surveys ten distinct anxieties that are deemed to be constitutive of the movement. Ultimately, it argues that the neurotic nature of international criminal justice can be the source of its creativity and resilience.

Key words
international criminal justice; International Criminal Court; anxieties; international criminal tribunals; international criminal law

1. INTRODUCTION

International criminal justice is in some ways a booming enterprize, one that comes with an unmistakable aura of progress and promise. Moreover, it is an enterprise that at first glance seems free of some of the anxiety that characterizes the international legal discipline's proceduralism and substantive shallowness. Indeed it is the privileged receptacle of many of international law's new-found certainties: the absolute evil of certain deeds, the unquestionable need to punish them, the existence of a notion of Humanity that transcends sovereigns, etc. Its relative youth, natural hubris and sense of possibilities protect it from some of the precariousness that is so familiar to the project of international legal order within which it is embedded. Yet for all its millenarian promise, and as this article will argue, the discipline has hardly avoided some of the very sources of anxiety of the international legal discipline from which it emanates: international criminal justice's very *raison d'être* is periodically questioned, its foundation often appears remarkably thin, and its politics doubtful and even suspicious. Moreover, in embracing the criminal law, the project had to

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deal with the specific anxiogenic baggage of criminal justice, in a context where the marriage of international and criminal law tends to exacerbate their proclivity to self-doubt. I suggest that, beneath the veneer of righteousness lurks a field that is much more deeply ambivalent about where it is going, and characterized by a condition of chronic angst.

Although a condition of anxiety is sometimes hinted at as resulting from various types of deconstructive critiques of international law,[1] and anxiety is often held to more generally arise from the decay of legal thought,[2] the nature of that anxiety and its impact are rarely detailed. This article argues that we should take anxiety seriously as a concept that helps understand the dynamics and developments of the field of international criminal justice.[3] To date, the one strand of scholarship that has seriously analysed the role of anxieties in the production of law is the scholarship influenced by Lacan's work on the law and human rights, most notably illustrated by the work of Costas Douzinas[4] and Maria Aristodemou.[5] Although this article acknowledges the heuristic value of this scholarship, the notion of anxiety on which it relies is one that is less psychoanalytical than philosophical and broadly existential.[6] In particular, this article touches on the angst associated with freedom, and the endless possibilities of actualizing the international legal project.[7]

An existentialist style of writing on international law – focused on the agent, his sensuous rapport with his surroundings and, above all, his feeling of being simultaneously part of and alienated from the world – was pioneered by David Kennedy (although he might not describe it quite like that),[8] and arguably extended from the individual to entire fields of practice.[9] Although there are evident problems with applying theories of anxiety developed with the human subject in mind to institutions, socio-legal fields with a discrete existence – such as international criminal justice – possess some characteristics that make the analysis apt: a form of (shared) subjectivity and self-direction, a sense of being and indeed of existing, a broad economy of desire and fear, and a continuing search for meaning. The fact that the field is

1 M. Koskenniemi and P. Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 LJIL 553.

2 P. Goodrich, 'Book Review: Law-Induced Anxiety: Legists, Anti-Lawyers and the Boredom of Legality' (2000) 9 *Social & Legal Studies* 143.

3 For an attempt to use anxiety as a structuring factor in the very different field of architecture, see P. Hogben, 'Maintaining an Image of Objectivity: Reflections on an Institutional Anxiety' (2001) 6 *Architectural Theory Review* 63. See also P. Jackson and J. Everts, 'Anxiety as Social Practice' (2010) 42 *Environment and Planning A* 2791.

4 C. Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (2000).

5 M. Aristodemou, *Law and Psychoanalysis: Taking the Unconscious Seriously* (2014).

6 I recognize that the two are not entirely irreducible. In particular, psychoanalysis has long shown interest in existential philosophy. Costas Douzinas incorporates references to the 'existential problem of the international lawyer'. Nonetheless, existentialism's basic proposition and methodology are indebted to an intellectual tradition that is irreducible to psychoanalysis.

7 See S. Kierkegaard and A. B. Anderson, *The Concept of Anxiety: A Simple Psychologically Orienting Deliberation on the Dogmatic Issue of Hereditary Sin* (Reidar Thomte ed., 1981). For Kierkegaard, anxiety is associated with the 'dizziness of freedom', itself closely tied to a simultaneous process of destruction and creation that creates a constant feeling of guilt.

8 D. Kennedy, 'Spring Break' (1984) 63 *Tex. L. Rev.* 1377. For a personal narrative specifically in the context of international criminal justice, see I. Tallgren, 'We Did It? The Vertigo of Law and Everyday Life at the Diplomatic Conference on the Establishment of an International Criminal Court' (2004) 12 LJIL 683.

9 D. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (2004).

dominated by young institutions that are in large part creatures of their own making only radicalizes the dilemmas of becoming. Indeed, an existential approach to international criminal justice takes seriously the notion that its essence (cosmopolitan, liberal, etc.) is almost impossible – and perhaps even uninteresting – to define in the abstract independently of the actual, lived trajectory of international criminal justice. Specifically, the article suggests a concept of legal anxiety that is at once ontological, disciplinary, and institutional. The anxiety is ontological because it relates to the very existence of the project and its ultimate nature (what *is* international criminal justice?); it is disciplinary because of how it affects a field of professional practice centered on certain shared assumptions; and it is institutional because this particular discipline has developed into a range of institutions from which it has become virtually indistinguishable. I will refer broadly to 'international criminal justice' as a complex subject made up of the totality of persons (lawyers, academics, administrators) and institutions (NGOs, journals, and of course tribunals) invested at any one point in the field and that seek to make sense of it.

But what is the anxiety of international criminal justice? It could be said, to begin with, that its very existence is the product of a fundamental anxiety: that the operation of a pluralist international legal system based on liberal values that entail the peaceful coexistence of sovereign entities will lead to results (the toleration of massive crimes as a result of deferral to sovereignty) that are incompatible with those very values. Anxiety abounds in the response to past and present atrocities: that nothing will be done; that the past will be repeated; that the international legal project will compromise itself and not live up to its potential for moral indignation. This anxiety, then, is the anxiety of birth, the often painful process by which international criminal jurisdictions come to be; the occasionally dubious character of their filiation, and how the circumstances of this birth mark their destiny. As international criminal law emerges from the certainties of theory and confronts the actual reality of the international system, it experiences crushing self-doubt. It experiences, moreover, the anxiety of coming to the world invested with the full weight of the expectations of an entire discipline, one that has strenuously upped the ante of its normative ambition. Having defined itself in such morally imperious terms ('never again!') and having set such high goals, it comes as no surprise that the discipline is anxious about its prospects.

Second, at the other end of the spectrum, international criminal justice also experiences the anxiety of demise, the anxiety of not being – always a possibility in a world where the continued existence of international institutions is precarious, at best. It is not only that the absence of international criminal tribunals might bring 'back' some of the atrocities that they were supposed to suppress, but also that the end of international criminal justice would probably come on the heels of its failure. International criminal justice behaves at times as if it has an eternity ahead of it and, at other times, as if keenly aware that it is living on borrowed time – an experiment on a short leash, engaged in a race against the clock to prove its worth. The sentiment of finitude abounds in the context of recurring attempts to close down international criminal tribunals, the painful efforts to delay the inevitable, and the ongoing concern about 'legacy'. Even the inevitable feeling of finitude linked, for

example, to the passing of various *ad hoc* tribunals needs to be sublimated for the greater good of the project.

Third, between existence and non-existence is the anxiety of *being*, that with which this article is most concerned. International criminal justice must *be* in the world in ways that are reasonably meaningful, or succumb to crushing depression and melancholy. Because not being is not an option, international criminal justice only exists to the extent it is institutionally incarnated. No one in the field wishes for a return to the Cold War years when the discipline existed in a pristine but ultimately meaningless inchoate academic state. To have become meaningful institutionally is the most exhilarating thing that has happened to international criminal justice, and it is not about to abandon that gain simply because of the predictable difficulties of being in the world. Yet international criminal justice cannot simply *be*; it must also *act* since the very principle of its existence cannot be derived from the mere facts of its being. International criminal justice is nothing if not action-oriented and must always be on the move to sustain its institutional dynamic; to continue to excite enthusiasms and adherence. This action-oriented framework, however, creates a problem of choice that is at times remarkably unconstrained. Although the ontology of international criminal justice is anchored in an absolutist repudiation of atrocities that creates a sense of certainty, its praxis constantly seems to belie the purity of that design, offering only the vertigo of difficult, if not impossible, choices. International criminal justice cannot be one thing and its contrary; it only becomes what it is by shedding some of what constituted it to itself, and in the process experiments something akin to the sentiment of the tragic.

This is perhaps where social fields of practice differ most from the experiences of individual human beings. Where existentialist philosophy posits (perhaps implausibly) the need for human beings to radically free themselves from all inauthentic codes, a field of practice cannot do so without undoing itself: there is no irreducible subjectivity to the field, no true 'self' lurking behind all the codes that gradually come to constitute it. Anxiety, then, is the constant playing out of the contradictions that characterize the project. In what follows, some themes familiar from critical conversations about international criminal justice will be revisited, but in a way that emphasizes how they can be better understood under the broad banner of anxiety as a concept. The article will suggest, not unlike Darryl Robinson recently in this journal,[10] that anxieties are traceable to fundamental and never entirely resolved tensions. However, where Robinson is interested in ultimately finding ways to transcend these tensions, this article will suggest that they cannot be transcended without undermining the project. Each attempt to break out of its constitutive dilemmas threatens to destroy the project and must therefore be met by compensatory moves that condemn international criminal justice to a sort of *fuite en avant*. Instead, it is by accepting international criminal justice's deeply neurotic nature that anxiety can be creatively channeled.

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

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2. Power and the anxiety of dependence

One of the deepest anxieties of the project of international criminal justice is that it appears as merely a tool for the powers that be, an association that could surely doom its credibility as a project of justice. The field has therefore long aspired towards emancipation from international politics. This is evident from the general move from *ad hocism* (associated with victors' justice) to permanence, or the way in which international criminal justice has emphasized the need to disconnect its triggering from any blatantly political decision. It is also evident from a certain messianic vision of international criminal justice that sees it as coming with the full power of the human rights ideals it embodies. Indeed, the project is not content with being dominated by politics: it would, if it could, dominate politics. In their more excited moments, advocates for international criminal justice see states bowing to the reality of its *dignitas*.

At the same time, international criminal tribunals are created by a number of international actors (states, international organizations, civil society), and would not exist without their support. International criminal tribunals are not self-generated, even though they may loosely toy with that fantasy when performatively examining the legality of their own creation.[11] International criminal lawyers, moreover, are keenly aware that international criminal justice, as a project, cannot come about without some political power. The need for enforcement is particularly felt when it comes to a project involving criminal law, one whose association with force is almost ontological and would be meaningless if some individuals, at least, were not made to answer for their crimes. To exist and to operate, international criminal tribunals must enlist the support of powerful patrons. These include states and international actors, such as the UN Security Council. In effect, not only the *ad hoc* international criminal tribunals but, increasingly, the ICC itself is crucially dependent on the continued support of the Security Council to extend its jurisdictional reach and guarantee its authority.

Yet international criminal tribunals must also guard against being absorbed by those powers or risk being (and being seen as) merely an extension of them. The suspicion of 'victors' justice' is perhaps one that international criminal tribunals are most keen to dispel. They must woo the states that are needed for their effectiveness, without falling prey to them. A considerable source of anxiety for international criminal justice, therefore, is its ability to develop a level of autonomy from the power that gives it its authority.[12] Traditionally, international lawyers focus on the cut-off point between the giving of a mandate and its implementation: tribunals should do what they are asked to do, even to the detriment of their creators. In practice, however, there is no clear distinction between creation and existence: the tribunals live their lives embedded in structures of authority that define them and which they can never entirely ignore. International criminal justice constantly

11 See ICTY, *Prosecutor v. Dusko Tadić a/k/a "Dule"*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

12 See for example, B. R. Roth, 'Coming to Terms with Ruthlessness: Sovereign Equality, Global Pluralism, and the Limits of International Criminal Justice' (2010) 8 *Santa Clara J. Int'l L.* 231.

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struggles with the fact that it is not created immanently as the realization of an ideal of justice, but rather comes into being through an old-fashioned act of foundational violence.

A whole repertoire of practices deployed by international criminal tribunals, then, is geared towards trying to minimize these tensions. States must be wooed or shamed into cooperating with them. At one level, international criminal tribunals must vigorously reject any notion that they are somehow subservient to states. Simultaneously, they will occasionally be expected to know, more or less implicitly, who their true 'patrons' are. Over time, the option of ignoring power at the risk of irrelevance may well be less attractive than the option of embracing power at the risk of corruption. Becoming discreetly subservient to (powerful) states and the Security Council at least preserves a semblance of activity. The impossibility of both relying on the powers that be and remaining at a safe distance from them underscores one of the crucial dimensions of international criminal tribunals' anxiety vis-à-vis the question of power: the difficulty of claiming to constrain the very actors one relies on.

3. Neutrality and the anxiety of politics

It is not clear that emancipation from the powers that be, even if it could be achieved without the loss of the effectivity of international criminal justice, will provide much respite. International criminal justice was by and large based on a rejection of the politics of amnesty and the realism of geopolitics which would be transcended by adherence to the international rule of law, characteristic of an aspiration to political neutrality. Yet emancipation immediately creates the conditions of international criminal tribunals' *own* politics. The more international criminal tribunals move away from states or the Security Council (if and when they do), the 'freer' they become, the more likely they are to become painfully aware of the exercise of their own form of power. Indeed, if the Security Council or states are kept at bay at all, it is through the corollary boosting of the power of tribunals, particularly of their prosecutors. Although initially this is seen as a major victory in the context of the ICC against the power politics of the Council, or the manipulations of states, it gradually gives way to an inevitable sense of unease with these powers, especially as their actual use tests the prosecutor's legitimacy.

The choices may be presented as fairly simple. They involve technical decisions about prosecuting those most responsible for the worst crimes. In practice, though, they raise intensely political questions,[13] even more so when those suspected and tried by international tribunals remain popular and hold official posts in their countries. The choice of who should be tried among the thousands who could possibly be worthy of international prosecutions involves highly contentious determinations with clear distributive effects, for example, because they designate 'friends' and

13 B. Cooper, 'The Limits of International Justice', [2009] *World Policy Journal* 91.

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'enemies' of the international community.[14] The political character of the process is reinforced by perceptions on the ground, and the implicit rejection of the basic assumption of international criminal law, namely that it is only about individual agency. Individuals are almost always seen locally as members of a group first, and the decision to prosecute some as reflecting an assessment of the group's relative responsibility. The decision as to who should be prosecuted is not the only political one. Deciding which charges should be brought can also be a complex political process, one in which various constituencies vie for attention but none can ever be entirely satisfied. Finally, international criminal tribunals must reconcile themselves with the notion that even purportedly strictly law-inspired decisions have real political consequences on the ground for which the tribunals will be held responsible (if not in Law, at least in the court of public opinion).

In this environment, international criminal tribunals deploy a range of strategies that seek to quiet but simultaneously reactivate anxieties characteristic of the political. For example, tribunals may think of themselves as refusing the exercise of political power, as being merely 'tools' of justice; but even to not use a power is to avail oneself of the power not to use it. At any rate, one may be very much criticized for failing to draw on the powers that one has, or could exercise. Likewise, tribunals may insist that they are only 'following the law', for example by emphasizing the extent to which they only prosecute the 'gravest crimes'. But soon the façade consensus about prosecuting international crimes breaks down in the face of real world debates about what the gravest crimes *are*, a matter that turns out to be remarkably contentious.[15] Another option is to rely on a purportedly rigid deontological line that 'all international crimes of a certain gravity shall be prosecuted', but such a strategy proves to be untenable except rhetorically since the number of atrocities largely dwarfs the ability of tribunals to prosecute them. The tribunals have no safe space to retire, to be free from the distributive repercussions of their decisions.

International criminal justice is therefore condemned to exercise power. In their bolder moments, international criminal tribunals may, as they are frequently encouraged to,[16] claim to engage in consequence-oriented politics that are sensitive to how they impact the world. Alternatively, they might seek to 'give each their due', prosecuting different kinds of individuals with different kinds of backgrounds for the offences that seem to be most characteristic. Likewise, they can adopt a policy more akin to battlefield medicine, in which those cases that are most urgent, and where international criminal tribunals can make most of a difference, are prioritized. Or they may simply go for what is 'practicable', prosecuting the likes of Tadić and Akayesu, if these are the only ones available. Such strategies are inevitable, but their discussion remains taboo because in breaking down carefully built distinctions between law and politics, they make it impossible for international criminal justice

14 S. MH Nouwen and W. G. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2010) 21 EJIL 941.

15 W. A. Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' (2008) 6 JICJ 731.

16 A. S. Weiner, 'Prudent Politics: The International Criminal Court, International Relations, and Prosecutorial Independence' (2013) 12 *Washington University Global Studies Law Review* 545.

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to have it both ways – that is to be both safely outside and inside the realm of the political.

4. Indeterminacy and the anxiety of method

The anxieties of international criminal justice about dependence, power and legitimacy might at least be assuaged if it could fold back on an unchallengeable discourse of method. This does turn out to be one of the project's preferred stratagems. One of its fundamental tenets is that it applies only law that already exists, according to the central maxim of *nullum crimen* (and *nulla poena*) *sine lege*. This is also a key protection for states that have long been reluctant to internationally criminalize sovereign acts. Hence the discipline is (or needs to be, in fact) solidly committed to the notion that there is a 'hard' international criminal law, probably even more so than public international law is. It invests heavily in its epistemology and its positivist, and technical credentials. The field experiences successive waves of standardization, dogmatization, and professionalization, and constantly distances itself from its 'naturalist' origins. If nothing else, landmark decisions provide the precarious foundation for the tribunals' jurisprudence, and can then be recycled in an autopoietic manner to provide a sense of closure.[17]

But investing in forms of positivism is of course not the same thing as positivism being truly determinative of legal outcomes in the way that positivist theory might require. International criminal justice as a project is not impermeable to the indeterminacy of legal discourse. The salience of the Koskenniemian deconstruction of international legal argument[18] remains largely applicable to international criminal justice, despite the latter's claim to transcend classical international law. In effect, international criminal law is particularly vulnerable to that critique because of its need to be both particularly apologetic (criminal law is linked to power, must be backed by it) and particularly utopian (it must occupy the moral high ground).[19] The preferred route for tribunals remains adherence to their founding instruments and the doctrine of sources of international law, but ambiguity abounds. When is a conduct a crime under international law? What does it mean for a crime to 'exist' in law at the time of its commission? Can international responsibility be incurred by individuals for acts committed in non-international armed conflicts? Do crimes against humanity and genocide require a 'state policy' component? Should duress count as a defense in international law? What modes of participation are substantively fair in international criminal law? What should the model be for international criminal procedure?

Although these are questions to which tribunals need to and do give answers, the element of sheer indeterminacy involved is all too evident, and arguably no one knows this better than the lawyers and judges whose daily work is to grapple with

17 S. Vasiliev, 'The Making of International Criminal Law', in C. Brölmann and Y. Radi (eds), *Research Handbook on the Theory & Practice of International Lawmaking* (2015).
18 M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2006).
19 Robinson, *supra* note 10.

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such issues. There is no single, but also no unproblematic, answer that would flow from 'the Law' to these riddles without involving countless theoretical preferences about the very nature of international criminal law, which in themselves are ultimately rooted in theories of justice whose validity can hardly be taken for granted. What is customary international criminal law? How will one weigh the element of practice and *opinio juris*? Do scattered references in military manuals make up a custom that can supersede the original intention of the drafters? Should international criminal law treaties be interpreted according to their *telos* and if so what is that *telos*? How does one infer a general principle of law recognized by the main legal systems, in a context where the accusatorial and inquisitorial traditions are at odds with each other on seemingly every element of procedural or substantive law?[20]

Moreover, it is not as if the law can be entirely dictated by a conservative and backward-looking approach, given the novelty of the enterprize and the need to rise to the occasion. International criminal law needs to be adapted to take into account developments. Gaps must be filled. The very place given to the judges of the *ad hoc* tribunals, in adopting their own procedure, testifies to the need for technocratic flexibility in crafting a new discipline. The positivist methodology of international criminal law, moreover, constantly risks belying its metaphysics: how can the state simultaneously be condemned via international crimes and elevated as the measure of all law? More often than not, the 'gap' is filled by an appeal to morality, natural law or its acceptable modern version, some broad historical *telos* or belief in, 'world opinion'. This only contributes to rendering more fragile the entire project's claim to have abstracted itself from such vague notions.[21] As for the historically optimist argument that international tribunals operate in a post-Westphalian world in which irreducible pluralism has been transcended by adherence to some at least thin moral horizon that should render adjudication more determinate, this notion breaks apart as soon as one moves beyond the bare agreement to consider certain behavior to be criminal internationally, to inquiring about a crime's proper scope. In the end, 'judicial activism' seems unavoidable, even as its reality is minimized to fit within the constraints of the law.[22] At any rate, even if over time the law stabilizes through circular self-reference, there remains the sheer and radical ambiguity of determining who should stand trial in the first place, as if the entire technical-legal enterprize of judging individuals hinged on a pure decisionist moment that was itself beyond the reach of legal method.

5. Authority and the anxiety of legitimacy

As a result of either being the victim of someone else's politics, or the dubious actor of its own politics, international criminal justice operates with a constant anxiety

20 These debates were foregrounded early on by the ICTY *Tadić* and *Erdemović* decisions which both showed the variety of approaches and outcomes that tribunals could espouse at any one time. R. Cryer, 'One Appeal, Two Philosophies, Four Opinions and a Remittal: The Erdemovic Case at the ICTY Appeals Chamber' (1997) 2 *Journal of Armed Conflict Law* 193.

21 Q. Wright, 'Legal Positivism and the Nuremberg Judgment' (1948) 42 AJIL 405.

22 S. Darcy and J. Powderly, *Judicial Creativity at the International Criminal Tribunals* (2010).

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about its legitimacy. In a context where a radical new form of power is exercised, questions are bound to arise about the nature of international tribunals' authority. To the extent that it imposes costs on receiving societies (real or imagined) and indeed on the international system itself, for example, in terms of forfeited opportunities for amnesties and reconciliation, or deferred peace agreements, questions are all the more likely to be asked about the source of its legitimacy. Failure to establish the legitimacy of international criminal tribunals on solid ground will expose the tenuous bases for their exercise of power.

The main challenge for the ICC in terms of legitimacy is that international criminal justice more generally is a rare case of criminal justice without a state (its many states-parties of course being no substitute). Even some of the more passionate defences of international criminal justice stop short (typically far short these days) of claiming that it is the embryo of a world government. This is in contrast to the domestic context where the obviousness of criminal justice has always depended largely, for better or for worse, on the obviousness of the state and, failing that, on the indisputable existence of a society that is alarmed by the 'crimes' committed in its midst. International criminal justice must make do with the fact that it has in a sense 'put the cart before the horse', throwing an idea conceived with a domestic context in mind into an environment that is its very opposite. International criminal tribunals cannot, therefore, easily claim the obviousness of a legal order to establish their credentials, and thus constantly experience forms of 'sovereign envy'.

A number of tropes are typically deployed to buttress the legitimacy of international criminal tribunals. The professionalism and technical proficiency of tribunals will go some way to assuaging fears about political adventurism. But if techno-legal authority is no longer the currency it once was, and we have every reason to doubt the claim that international criminal lawyers should simply be trusted because they 'know the Law', then what is the legitimacy of international criminal justice? Independence and impartiality obviously count for something, yet it is difficult to see how they can be anything more than minimal conditions for the development of international criminal justice. At any rate there is much suspicion that 'impartiality' can never prevent the existence of particular worldviews shaping the preferences of adjudicators. Claiming to be guided by 'fundamental ethical principles',[23] will only convince those who believe that such principles are unproblematic in the first place. Fairness to the accused – however necessary it may be – seems an improbably narrow basis for grounding the entire normative edifice of international criminal justice.[24] The legitimacy of international criminal tribunals may lie in what they can achieve, but there is much doubt about whether they can achieve the things they claim to achieve (deterrence, peace, and reconciliation). And finally, although the occasional panache of an international criminal prosecutor may provide a degree of

23 B. D. Lepard, 'How Should the ICC Prosecutor Exercise His or Her Discretion - The Role of Fundamental Ethical Principles' (2009) 43 *John Marshall Law Review* 553.

24 Cf. A. Fichtelberg, 'Democratic Legitimacy and the International Criminal Court A Liberal Defence' (2006) 4 JICJ 765.

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charismatic legitimacy, this is a very precarious foundation for the sustainability of international prosecutions.

As a result, international criminal tribunals have gradually reoriented themselves towards a politics of representation, of standing in for certain constituencies. They have done so through a form of self-effacement that makes them seem to appear to be part of bigger things than their immediate reality. They have foregrounded notions of consent as the ultimate test of international justice's legitimacy. It has the advantage of minimizing tribunals' agency and grounding them in some deeper enabling structure. Legitimacy may of course come from simply having been granted a mandate by states, directly or indirectly, to prosecute certain individuals. However, legality is not legitimacy, and a broad *ex ante* mandate is not a 'blank check' by states accepting in advance all the politics of international criminal tribunals. Moreover, it is hard to 'hold states against themselves' in a situation where they argue, against what may be a nominal commitment to the Rome Statute, that prosecutions are not in their national interest. It is even more so when they do so from a standpoint that is democratic; in a context where it is complicated for tribunals to be seen as bypassing democracy, especially when it comes to non-states parties.[25] Moreover, speaking the will of states is hardly an unproblematic foundation of legitimacy, even if this were indeed what tribunals do.

Alternatively, international criminal tribunals may claim to more deeply incarnate the 'true' aspirations of local or global public opinion, the masses, or the victims. They may, therefore, re-cast themselves as actors endowed with a certain democratic legitimacy. Tremendous efforts are deployed by international tribunals to claim to be speaking for these constituencies. Judges and prosecutors may invoke, in addition, their own meager democratic credentials by pointing out that they were elected. However, there is no mechanism to truly establish whether international tribunals 'represent' the constituencies they claim to represent, but there is much reason to suspect they do not, and no way to make them accountable. In fact, international criminal tribunals remain deeply ambivalent about whether they should behave democratically, and whether they might not in the process lose much of their autonomy.[26] The politics of international criminal justice often appear to be a-democratic at best and anti-democratic at worst. Moreover, globally international criminal justice does not even function as a sort of judicial component of some larger democratic whole. International criminal justice cannot simply and unproblematically claim to be an outgrowth of a global society in the making.

6. Voice and the anxiety of authenticity

A further anxiety for international criminal justice is that of being inauthentic, one of being in some way an impostor, and being exposed as such. Inauthenticity refers to the idea that one's existence is not real but is merely the result of habit and

25 M. Morris, 'The Democratic Dilemma of the International Criminal Court' (2002) 5 *Buffalo Criminal Law Review* 591.

26 M. Glasius, 'Do International Criminal Courts Require Democratic Legitimacy?' (2012) 23 EJIL 43.

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unquestioned acceptance of one's social identity at the expense of the 'real world'. In that respect, international criminal tribunals are always particularly wary of the critique that they engage in circular practices that refer back to themselves or that, for example, they are merely in the business of providing professional identities for a legal elite. It is thus crucial to establish their credentials as authentic spokespersons for the various constituencies that they have sought to represent over time, be they humanity as a whole, states, societies, or victims.[27] It is also particularly important, for obvious reasons, that they not be denied this quality by the very persons on whose behalf they claim to speak.

The internationalist credentials of international criminal tribunals are perhaps that which is least denied to them. Nonetheless, the anxiety of *not being international enough* is evident in old debates about whether the Nuremberg or Tokyo tribunals were 'really international tribunals', and the efforts of the Allies to make them appear as universal as possible. It is evident in contemporary debates regarding what exactly is an 'international' tribunal for immunity purposes,[28] and in discussions of whether the ICC is a tribunal based on the interests of a club of a limited number of states or one destined to become universal and only temporarily imperfectly so. Dichotomies are drawn between top-tier 'truly international' tribunals, and 'pseudo' or 'quasi' international tribunals (for example, the Special Court for Sierra Leone), or frankly hybrid tribunals (for example, the Extraordinary Chambers in the Courts of Cambodia). The anxiety of not being international enough is an anxiety where one will be suspected of partiality (Cambodia tribunal), idiosyncrasy (the Special Tribunal for Lebanon),[29] or the occasional plain misunderstanding of international law (the SCSL on whether having fought for the 'right' side in a non-international armed conflict should absolve one of war crimes).[30] It is also an anxiety of disintegration, that international criminal justice will be provincialized and dispossessed of its core message.

Note, however, that the more one asserts oneself as authentically international, the harder it will become to simultaneously claim that one is locally grounded. Universalism can quickly appear to be the more or less unresponsive concern of an international superstructure involved in its own project of self-fulfillment. It is the ability to appear locally authentic that is the real weak point of international tribunals.[31] The 'local', the 'field', the 'crime scene' are all fantasized as places in which the concrete and the universal meet. The international criminal justice movement is mortified at the suggestion that it might be perceived as fake, remote, or contrived. The reproach of victims is particularly biting given that international criminal

27 F. Mégret, 'In Whose Name ? The ICC and the Search for Constituency', in C. Stahn, S. Kendall and C. de Vos (eds), *The Politics and Practice of International Criminal Court Interventions* (forthcoming).

28 W. A. Schabas, 'The Special Tribunal for Lebanon: Is a "Tribunal of an International Character" Equivalent to an "International Criminal Court"?' (2008) 21 LJIL 513.

29 M. Milanovic, 'An Odd Couple: Domestic Crimes and International Responsibility in the Special Tribunal for Lebanon' (2007) 5 JICJ 1139.

30 Separate Concurring and Partially Dissenting Opinion of Hon. Justice Bankole Thompson, *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Case No. SCSL-04–14–5, Judgment, Trial Chamber I, 2 August 2007, paras. 69 and 90.

31 See generally, M. A Drumbl, *Atrocity, Punishment, and International Law* (2007).

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justice increasingly projects itself as defined by how it can bring succor to them. Hence international criminal tribunals engage in recurring patterns of proving that they speak for local societies, or at least for victims of international crimes. A whole range of institutional practices of communication and outreach are devoted to convincing those imagined as the ultimate constituents of international criminal justice that it is working with their interests genuinely at heart. Hybridization and regionalization are two ways in which international criminal tribunals seek to emerge as closer to the reality they seek to represent.

The problem is that the certainties of international criminal justice regularly seem to break down when localized. For example, the dominant language of international law will end up translating 'crimes of hate' into 'crimes of state',[32] leading to subtle but pernicious differences of understanding between the international and local levels. International criminal procedures often appear foreign and alien to local audiences. Highly technical debates on whether certain events constitute 'genocide' or not will not mesh well with victims' perceptions. In some cases, international criminal tribunals will encounter real resistance to designating certain behavior as criminal. For example, the attitude to child soldiers is one that varies considerably in certain regions of the Congo where, at the very least, recruitment of child soldiers is hardly seen as the worst international crime and, in some cases, is intimately linked to strategies of survival. Here the universalist urge to 'make a point' about the recruitment of child soldiers, linked as it is to a particular temporality of largely Western activism on children's rights, may clash with the more complex perceptions of actual societies. More generally, the emphasis on 'prosecuting at all costs' as one of the conditions of cosmopolitan justice may be in tension with domestic needs to 'move on' and to extract some degree of transitional justice however imperfect. Moreover, focusing too much on local demands will simultaneously quickly risk undermining the project's universalism, in a seemingly inevitable bind that condemns international criminal justice to never be authentic, both locally and internationally.

7. Instrumentalism and the anxiety of fairness

International criminal justice is constantly anxious that its aspiration to attain results will lead it to sacrifice principles, or that its rigid adherence to principles will require it to forsake some of its goals. Its 'deliverables' are a long laundry list that includes, aside from conviction of the guilty, pacification of conflicts, reconciliation of communities, truth production, etc. The magnitude and ambition of these goals create an almost imperious need to punish. International criminal justice was not created, fundamentally, to give a few accused a fair trial for the sake of it. Rather, it was created primarily to bring the guilty to justice, a goal that is rich with many other potentialities. In that context fair trials are merely a means, albeit conceivably a cardinal and central one.

32 J. E. Alvarez, 'Crimes of States/Crimes of Hate: Lessons from Rwanda', [1999] *Yale Journal of International Law* 365.

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As a result, the intense desirability of the goal is always at risk of being weighed against the constraints imposed by the means, which can quickly appear as mere obstacles.[33] In a context where crimes were committed with a considerable degree of publicity, it may be relatively easier to convince oneself of the guilt of those sitting in the dock. At times, most notably at Nuremberg, the desirability of the end led the creators of international criminal tribunals to take evident liberties with fairness, especially the requirement of non-retroactivity. However, the phenomenon was not confined to the post-Second World War tribunals. contemporary international criminal justice has often been accused of dubious procedural practices, particularly dynamic developments of the law that compromize the *nullum crimen* principle, as well as unduly broad understandings of its substantive law. In this context, an emphasis on the *exceptionality* of international trials is always tempting, in the understanding that the exception will pave the way to the rule (*ad hoc* tribunals will become permanent, primacy will pave the way to complementarity, etc). Even when the tribunals have faulted themselves for violating due process, they have almost never resorted to radical remedies such as releasing the accused.[34]

But are not liberal ends obtained through illiberal means a contradiction in terms? International criminal justice is haunted by its original sins, for example the invention of *quasi ex nihilo* of individual responsibility, the concept of crimes against humanity to deal with Nazi and Japanese criminality, or the 'discovery' that war crimes could be committed in non-international armed conflict in the former Yugoslavia. International criminal tribunals know they should renounce delivering on some of their goals if they do not have the means to attain them in ways that are minimally consonant with the rights of the accused. One particularly intimate reason why international criminal tribunals must be fair and be seen to be fair is to avoid resembling some of the very systems they are judging. For example, the Nuremberg judges in taking liberties with the legality principle engaged in some of the very practices of Nazi judges. The suggestion that international criminal justice is closer to the very illiberal instrumentalism that it denounces in others is, needless to say, an insufferable one. International criminal tribunals must normalize the treatment of international crime even if that means failing their mission.

But the problem is compounded by several unresolved riddles. Is international criminal justice's concept of fairness merely procedural, is it substantive, or is it distributive? Moreover, is it ultimately legal and informed by adherence to the rule of law, or does it also need to be moral in a deeper normative sense? The question remains: fairness to whom? One temptation is for the project to reinvent itself as offering a more mediating role between victims and perpetrators, a task that may seem more manageable, or at least gentler. For although illiberal sacrifice of the accused for some higher end may be averted, liberal sacrifice of the victim is always a risk. This is evident in the odd reference to procedure needing to be fair to 'both

33 M. Damaska, 'The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals' (2010) 36 *North Carolina Journal of International Law and Commercial Regulation* 382.

34 W. A. Schabas, 'Barayagwiza v. Prosecutor (Decision, and Decision on Prosecutor's Request for Review or Reconsideration) Case No. ICTR-97–19-AR72' [2000] AJIL 563.

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accused and victims', or in the more general effort to introduce victim participation and reparations at the ICC. In portraying its role as one of mediation, international criminal justice gives itself an enviable role. Yet, in suggesting that fairness is a zero-sum game, it opens itself up to being constantly torn between two constituencies. Moreover, going too far in the direction of victims will, aside from creating well-known liberal fears for the defendant, transform international criminal justice so as to deny it its very character as a criminal law enterprize.

These anxieties create a schizophrenic practice that is obsessively invested in the most minute detail of procedure but against a deeply problematic disproportion of means of accusation and defence; that relies heavily on the uncontested legitimacy of its offences but then develops such stretched modes of imputation of liability as to render it almost impossible to escape guilt; that idolizes the principle of *nullum crimen sine lege* but then gives such complex renderings of what law existed at the time of the offence that no 'fair notice' to the accused is possible. Yet throughout, a daunting feeling remains: even if international criminal tribunals were to conduct perfectly fair trials, an element of instrumentalism would persist. For all the investment in a concept of procedural and substantive justice, the accused are always chosen from among many for some ulterior purpose (other than simply prosecuting their crime). They are the ones who were chosen, were caught, and now await judgment. Even as the liberal proclivities of international criminal justice require it to treat individuals as ends rather than as means, international criminal justice has in a sense always been instrumentalist in that it targets individuals for larger patterns of responsibility. Moreover, the procedural concept of fairness championed by the tribunals can typically not begin to entertain challenges to its distributive fairness (such as, traditionally, the question why one is brought in court, as opposed to anyone else).

8. Ambiguity and the anxiety of moral clarity

International criminal justice experiences the anxiety of pretending to operate, and seeking to produce moral clarity, in a context of moral confusion. It is clearly more than a legal enterprize. It also is and sees itself, as a moral enterprize, albeit one that is in practice heavily mediated by the legal craft. The very concept of crime involves some notion of subjective moral turpitude: if crime were entirely determined by society, then there would be no crime. Crucial to sustaining that moral claim is the ability to develop narratives that highlight the moral depravity of the commission of atrocities and, by necessary contrast, the singular virtue of its judges. International criminal tribunals have developed an entire institutional and symbolic vocabulary to stigmatize evil, despite the constraints of liberal justice on ethical pathos.[35] In a context where some of the more traditional justifications of criminal justice come under criticism, at least moral pathos can silence the critics.

35 F. Mégret, 'Practices of Stigmatization' (2013) 76 *Law & Contemporary Problems*.

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Simultaneously, international criminal justice, through its emphasis on guilt and transitional justice, is committed to a certain concept of truth. The moral narrative of international criminal justice cannot be obtained at the cost of blatant distortions of the fact. This is where the edifying tales of international criminal law frequently encounter their limits. As we have known since at least Hannah Arendt, the dramatization of 'radical evil' risks encountering only the 'banality of evil' (regardless of whether this etiquette was rightly apposed to Eichmann himself), an uncomfortable tale of moral ambiguity.[36] More often than not, the defendants of international criminal justice have not been larger than life, outsized malefactors. In the Fritzsches, Erdemovićs, and Lubangas the share of moral fault and complex circumstances is at least difficult to disentangle. They may have been naïve and gullible, manipulated by larger systems or cornered by life circumstances, rather than engaged in individual projects to do harm on a grand scale. The evil of some of the accused is potentially underwhelming, whilst the grotesque nature of the evil of others makes it possible to dismiss them as pathological individualities. What the moral verdict of justice is in these circumstances may remain obscure. To make matters worse, it is international criminal justice itself, with its commitment to 'reducing genocide to law'" that constantly tends to create distance with the moral tale it relies on, as if everything it touched took on the cold quality of formalist law.[37]

In fact, international criminal justice is constantly at risk of perhaps unwittingly collapsing the victim/perpetrator dichotomies. Just as Hannah Arendt focused on the difficult question of the *Judenräte*, ambiguity often abounds in international trials: accused who may have saved lives; victims who may have been perpetrators, or may have insufficiently resisted. Child soldiers perhaps more than any other figure epitomize the difficulty of disentangling the quality of being both a perpetrator and a victim,[38] as exemplified in the case of Dominic Ongwen, an LRA commander who was abducted as a child. At a deeper level, the search for truth may uncover repressed memories. The Allies who so vigorously prosecuted the Nazis at Nuremberg, also committed crimes in Katyn, Dresden, and Hiroshima.[39] Ethnic cleansing by Bosnian Serbs and genocide in Rwanda are atrocious but were objectively aided by abject failures of the international community. For every condemnation that seeks to be final and definitive, it seems, there is a way in which the moral picture can be made more complex. Uncovering the full truth will come at the cost of the moral clarity of international tribunals, render them much murkier affairs, and indeed question their very justification. Hence international criminal tribunals have also developed a range of procedures to ensure that their narratives are not entirely undermined by attempts to turn the tables on the accusers (for example by narrowly defining personal and temporal jurisdiction, or excluding the *tu quoque* defense).

36 H. Arendt, *Eichmann in Jerusalem* (1963).
37 P. Akhavan, *Reducing Genocide to Law* (2012).
38 M. A. Drumbl, *Reimagining Child Soldiers in International Law and Policy* (2012).
39 M. Biddiss, 'The Nuremberg Trial Two Exercises in Judgment' (1981) 16 *Journal of Contemporary History* 597.

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9. Role and the anxiety of identity

International criminal tribunals are constantly asking themselves questions about the *role* they serve in the international system, and experience the anxiety of an identity that is forever hard to pin down.[40] For example, the identity of international criminal law as a discipline remains mired in doubt. Is international criminal law above all a branch of public international law, or is it about the extension of the criminal law beyond its natural sovereign habitat? The ICC Statute nods to all possibilities in highlighting the need to have judges with a background in those disciplines.[41] Over time, the investment in the field's identity as primarily a form of criminal law is a tempting option. It at least serves to contain doubts about the international dimensions of the work of international criminal tribunals, around a contained core of forensic practices.[42]

Identity is claimed through a process of being both 'like' and 'unlike' domestic criminal law practices and yet, ideally, somehow *sui generis*. For example, the identity of international criminal justice in practice involves some borrowing from both the common law accusatorial and the continental inquisitorial traditions (and a rarely discussed exclusion of almost every other tradition seen as beyond the liberal cannon). Ultimately, however, these domestic traditions will dictate the identity of international criminal law as they risk to provincialize it, because they are incommensurable, because they are hard to unhinge from their cultural environments, and because there is no principled criterion to decide between either. International criminal law must be able to claim an identity that is specific and irreducibly international. But what does it mean to be truly international, and is this something international criminal justice should aspire towards?

International criminal justice is forever caught between its cosmopolitan and internationalist identities, its aspiration to symbolically incarnate Humanity, and its more mundane existence in a world of states. The move that comes most naturally to the projects and corresponds to it is a sort of affirmation of its ego. International criminal justice is nothing if it does not incarnate a strong cosmopolitan identity. The whole movement in the history of international criminal tribunals suggests a gradual transcending of narrow divides, the reinforcement of common social bounds over the brute assertion of sovereignty. The very idea of 'crimes against humanity', when taken seriously, suggests that certain crimes are indeed committed against all of mankind, and not simply the victims of flesh and blood who contingently suffer from them. The history of international criminal tribunals is thus one of emancipation from the tutelage of public international law. This is evident, for example, in the relationship with domestic courts.[43] International criminal tribunals are presented as very much a manifestation of the supremacy of a vision of international law

40 M. Damaska, 'What Is the Point of International Criminal Justice' (2008) 83 *Chi.-Kent L. Rev.* 329.
41 Art. 36 of the ICC Statute.
42 D. Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 LJIL 925.
43 Immi Tallgren was the first to conceptualize the relationship to domestic courts as a central factor in the definition of the identity of international criminal tribunals. I. Tallgren, 'Completing the "International Criminal Order"' (1998) 67 *Nordic Journal of International Law* 107.

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anchored in Humanity. The fear is that one will be drawn into the complexities of the local, into its dirty irreducibility more than would be wise for the project's universalizing thrust. Crimes against humanity cannot be reduced to crimes against particular persons or groups (the Jews, the Tutsis). This is why the invocation of the victim-figure is also a double edged sword, lest her condition detract from the project's cosmopolitan ambition. Behind every anxiety about universalism is the fear that, rather than some super-cosmopolitan prophet, one will live the life of a provincial notary.

Yet international criminal justice must also acknowledge the extent to which it is embedded into international society, and not simply transcending it. Its flight into abstraction makes it appear ethereal; it cannot simply demand a cosmopolitanism that does not exist. It is also a creation of states, marked by the conditions of its creation and regularly reminded of them. At various junctures, it therefore becomes tempting for the ICC to play down its ability to impose an order *d'autorité*, and instead portray itself as merely a modest helper to states, an international public service of criminal repression at the disposal of those who need it. After the heady days of primacy of the *ad hoc* tribunals, for example, the ICC is based on the idea of the complementarity of its jurisdiction vis-à-vis domestic courts, and the need to help rebuild domestic jurisdictions.[44] Indeed, even the *ad hoc* tribunals have over time sought to recast their rather quixotic affirmation of primacy as something far gentler and oriented towards the return of their caseload, ideally, to the domestic courts of the region. The ICC itself has often erred on the side of a relatively easy practice of complementarity (for example by encouraging state self-referrals)

Yet this suppression of the id, this sacrifice of supranationalism for the sake of the pragmatic efficiencies of the anti-impunity struggle does not come easily. It is unclear whether it is open for international criminal justice to redefine itself consistently in this more modest way, and not simply because there is something vaguely implausible about international criminal institutions doing their utmost to make sure they have no case to try. Going too far in the direction of states will undermine the confidence that the project is transformative and deprive international tribunals of the opportunity to perform their cosmopolitan identity. What is repressed comes back to haunt international criminal justice in the form of the occasional outburst of the cosmopolitan ego and the affirmation, for example, of a quite domineering view of complementarity in the ICC context.[45]

10. Competition and the anxiety of status

The anxiety of status comes from international criminal justice operating within a dense field of competing professional and disciplinary logics. To be truly in the world, it must constitute itself as a separate disciplinary field that is not collapsible within,

44 E. Baylis, 'Reassessing the Role of International Criminal Law: Rebuilding National Courts through Transnational Networks' (2009) 50 BCL Rev. 1.

45 F. Mégret and M. G. Samson, 'Holding the Line on Complementarity in Libya The Case for Tolerating Flawed Domestic Trials' (2013) 11 JICJ 571.

for example, international law, international diplomacy, or politics. The question also arises, more intimately but no less powerfully, as to whether international criminal law is merely a branch of international law, or whether it is *the* new paradigm of international law. Furthermore, international criminal law is also required to mediate and to a certain extent arbitrate tensions between international human rights and international humanitarian law. Finally, international criminal lawyers are anxious about establishing their credentials as genuine criminal lawyers, and not merely anti-impunity crusaders circumventing the limits of the criminal law in their pursuit of human rights justice. Status as a function of the field of international criminal justice is linked to a sense of what one does, but also a sense of one's place in the world as an epistemological, institutional, and intellectual enterprize.[46] It is about being loved, respected, and feared. In this context, international criminal lawyers are understandably concerned with their place in history, pedigree, and clout.

Tremendous efforts go into developing the field's symbolic capital and know-how, notably through institutionalization. The field makes much of how different it is from projects that preceded it or with which it co-exists, particularly those that come dangerously close to operating on its turf (the competition over the definition of 'transitional justice' comes to mind). International criminal law insists, for example, that it is 'really law' because of the way its operation necessarily produces sanctions, unlike classical international law. Vis-à-vis human rights, the field also seeks to establish ascendancy by opposing itself to the irredeemably 'soft' nature of that regime, or its expansive and perhaps ultimately even illiberal nature.[47] Simultaneously, considerable energy is devoted to cordoning the field from neighboring disciplines that might threaten its status. This anxiety is evident in relation to (i) the traditional art of statecraft, and its claim to be better able to forge the sort of hard compromises required by transitions; (ii) the field of international diplomacy and its focus on peace settlements presented as more pragmatic and beneficial to local populations; and (iii) alternative responses to atrocities under the broader paradigm of 'transitional justice' that do not necessarily foreground criminal repression. The fear is that international criminal justice will become a bargaining chip in a larger negotiation and that its particular approach to conflict resolution and transition will be effectively sidelined.

Nonetheless, the field experiences the difficulty of abstracting itself entirely from neighboring fields that give it part of its status and on which it is parasitic. Various other approaches may present themselves as more efficient, just, or realistic. For example, international diplomacy may present the occasional amnesty as a better way to peace; international law may present itself as more grounded in the reality of international life and the need to respect at least some institutions of sovereignty; domestic criminal law at least operates against the background of set societal

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

47 A.M. Danner and J.S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2005) 93 *California Law Review* 75.

traditions. International criminal justice can borrow from these fields, but at the risk of being merely a patchwork of traditions, or of being absorbed by them. For example, international prosecutors may claim that they can make difficult decisions about whether it is 'in the interest of justice' to prosecute someone despite a democratically adopted amnesty; or they can borrow from domestic criminal law traditions liberally; or they may draw on the cachet of international law. But if the international criminal project merely claims to do what others do better, it will undermine itself. Its status must result from its ability to forge a highly and recognizably specific solution to certain ills. The problem is that radicalizing their specificity may leave them in a position in which dialogue with, and integration of, other logics sorely needed for the real-world operation of international criminal justice becomes impossible.

11. Failure and the anxiety of responsibility

Finally, international criminal justice experiences a deep, unrelenting anxiety of failure. It is deeply aware that it is a departure from the canon of international law, one that will be judged historically by its results. As a relatively new and improbable contender for the direction that international law should take, it bears the onus to prove its ability to deliver. Moreover, extreme, perhaps even unreasonable and crushing, expectations rest on its shoulders.[48] It itself contributes to the solidification of these expectations over time, by constantly upping the ante of what it can achieve. To the extent that it displaces other modes of dealing with grave violence and atrocities, it endorses unique responsibilities. In this context, perhaps one of its greatest anxieties is letting down those who have invested their hopes in it, and on whose support the project claims to rely. Failure can take many forms: failure to arrest, and the risk of finding oneself without cases to try; failure to convict (which is of course not specific to international criminal justice but which can be stinging to prosecutors and seen as a slap in the face of victims); finally, failure to have any of its claimed positive effects. Ultimately, the fear is that international criminal justice achieves very little, and that what little it achieves, it does at great cost.

The resulting obsession with the success of international criminal justice is illustrated by an entire genre devoted to the evaluation of the record of international criminal tribunals and their legacy.[49] International criminal tribunals regularly showcase their achievements, notably on their websites and a whole line of institutional practices, such as the development of quantitative indicators, which can be seen as designed to reduce anxiety about what it is that the tribunals actually do in the world.[50] In particular, the international criminal project will play on some of the real uncertainties about how one ought to define success. The basic dilemma is the

48 T. J. Farer, 'Restraining the Barbarians: Can International Criminal Law Help?' (2000) 22 *Human Rights Quarterly* 90.

49 M. Schrag, 'The Yugoslav War Crimes Tribunal: An Interim Assessment' (1997) 7 *Transnational Law & Contemporary Problems* 20; J. N. Clark, 'Judging the ICTY: Has It Achieved Its Objectives?' (2009) 9 *Southeast European and Black Sea Studies* 123.

50 'Achievements' <www.icty.org/sid/324> accessed 10 November 2014.

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following: defining success in narrow, internal[51] and institutionally-focused terms[52] increases the chance that one will be found to have achieved one's objectives. One recurring temptation in this context is to brusquely downsize the expectations that rest on international criminal justice. After years of inflationary discourse about what international criminal justice might achieve, it may prove useful to deflate the sense of ambition. International criminal tribunals will adopt a posture of humility, even of modest self-chastizement, typically centered on the idea that all that international criminal tribunals do is prosecute individuals. Today, almost no one in the field is a 1998 enthusiast, and almost every one is a reconstructed, savvy middle-of-the-roader. There is a time for grandstanding and claiming that international criminal justice may yield considerable progress, and there is a time for thoroughly relativizing such claims.

The attempt to soft-land the project is evident for example in the increasingly influential discourse of 'managing expectations'.[53] There are ways, moreover, in which one can fudge the issue of success institutionally. The perception of success can also be manipulated by extending the geographic and temporal scope of what international criminal justice does. For example, one may view international criminal tribunals as merely stepping-stones to a cosmopolitan future, such that the movements' failures can be discounted against some major future benefit. But deferring the benefits is bound to bring attention to the short-term costs (e.g., a renewal of violence in a fragile transitional context; the privileging of 'soft' targets at the expense of 'hard' targets) and therefore the need for the enterprize to deliver short-term benefits as well. One may also constantly blame institutional failures on outside actors, and present oneself as having one's hands bound by international reality.

Yet there is a cost to deflationary practices. One may be in a better position to demonstrate a success rate if one claims to achieve less, but that success will seem more meaningless and inevitably invite questions about whether it is worth the effort. In that respect, international criminal justice remains haunted by an anxiety of futility: that the existence of international criminal justice will amount to little; that it will not add much to what is already there, maybe simply ratify the status quo under the guise of changing it.[54] The years it has taken for the ICC to secure its first conviction, for example, must be a cause of concern for those who have stood by the international criminal justice system from the beginning, as had the apparent lack of impact of the ICTY in the former Yugoslavia in its days. Moreover, blaming failure on outside factors may make that failure more forgivable but it also powerfully weakens the notion that international criminal tribunals may one day

51 The tribunals can be conceived as producing their own institutional reality that exists independently of its impact on the world. For a dry, non-prescriptive example of this approach, see A. Smeulers, B. Holá and T. van den Berg, 'Sixty-Five Years of International Criminal Justice: The Facts and Figures" (2013) 13 ICLR 7.

52 L. A. Barria and S. D. Roper, 'How Effective Are International Criminal Tribunals? An Analysis of the ICTY and the ICTR' (2005) 9 *The International Journal of Human Rights* 349.

53 K. Cronin-Furman, 'Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity' (2013) 7 *International Journal of Transitional Justice* 434.

54 See F. Mégret, 'Apology of Utopia; Some Thoughts on Koskenniemian Themes, with Particular Emphasis on Massively Institutionalized International Human Rights Law, The' (2013) 27 *Temp. Int'l & Comp. LJ* 455.

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be able to achieve their goals. The suspicion of futility also arises in connection with the fear that international criminal justice only addresses a fragment of the problem of violence, and a relatively unimportant one. Indeed, its excessive individualization may be part of broader exculpatory processes.[55] In its worst moments of doubt the field contemplates the possibility that instead of having little to no effect, it actually has a negative effect on the theatres within which it operates.

12. Conclusion: Is International Criminal Justice Neurotic?

The study of international criminal justice as a field riddled by anxiety can help us make sense of where it comes from and where it is going. Where the project was naturally inclined to expect and project certainty, it finds only brittleness. As what is firm evaporates, we witness international criminal justice hesitating between chasing shadows at the expense of its relevance, or accepting itself for what it is and confronting its existential arbitrariness. The condition is made chronic by international criminal justice not being able to make the choices that would free it from anxiety without simultaneously undermining itself: what if a thorough acceptance of what international criminal justice is, revealed uneasy acquaintances with some of the very things it purports to combat? The movement thus remains seemingly stuck between the many polarities that define its existence, in a state of chronic unbalance.

This may seem counter-intuitive at first: how can international criminal justice be both all about projecting certainty (the absolute imperative to punish genocide, crimes against humanity, and war crimes) yet seemingly shaking at its foundations? The answer lies in part in the distance between the steely resolve of principles and the chronically messy nature of international reality. One could argue, perhaps provocatively, that international criminal justice is ultimately less about international crimes as such than it is about a complex investment in a highly peculiar *type of response* to international crimes (certain kinds of international tribunals operating in a certain fashion with a certain agenda, etc.). The project, in other words, is never merely about what it claims to be about, and is always about an infinity of more or less idiosyncratic institutional and legal choices that are much more susceptible to doubt than the focus on atrocities suggests. In fact, part of how international criminal justice projects an aura of certitude is precisely by emphasizing the non-contentiousness of the *jus cogens* norms it defends at the expense of highlighting the many complex, politically sensitive and distributive choices that give it its unique physiognomy.

This anxiety, moreover, is not a passing phenomenon, bothering only the more introspective and theory-sensitive participants in the legal conversation. Contrary to what a certain critical posture might suggest, anxiety is not a result of the 'discipline's eyes being opened' by the critique. Rather, anxiety is very much a chronic condition

55 L. Backer, 'The Fuhrer Principle of International Law: Individual Responsibility and Collective Punishment' (2003) 21 *Penn State International Law Review* 509.

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of legal existence and, although heightened levels of anxiety may be triggered by a particularly incisive critique, this anxiety only arises because the critique is pointing to something that is already intimately tormenting the discipline from within. In that respect, the lived reality of international criminal justice – today at least – is one that has internalized the critique, that is both aware of what it stands for and keenly conscious of its shortcomings. It is that aspect of the disciplinary conscience of international criminal justice that is the origin of its malaise. Practitioners of international criminal justice seek, on the one hand, to elaborate an understanding of their practice that does not collapse it within a larger field; yet on the other hand, they are also fully capable of seeing themselves from the outside as actors within such larger fields. It is this position of being both inside and outside that is one of the defining conditions of anxiety. To be both inside and outside is to be made constantly aware of the perilousness of one's path.

Anxiety manifests itself in a number of disciplinary and institutional disorders that are also, in their own way, ordering devices. Perhaps one of the most characteristic is hyper-activity. Even though it is a common refrain – and perhaps a facile critique – that international criminal tribunals achieve little in terms of concrete convictions, one can certainly not fault them for achieving those with any economy of means. Thousands of witnesses are heard, painstakingly scrupulous investigations go on for years, and judgments routinely run to hundreds of pages. International criminal justice is nothing if not industrious, fastidious, and more than a little logorrheic. International criminal tribunals are constantly encasing themselves in words. Such compulsive hyper-activity may serve to sustain the notion that even if international criminal tribunals achieve little they are at least very *busy*. And international criminal justice exhibits characteristics that one might describe in psychoanalytical terms as obsessive compulsive, involving the ritual repetition of maxims and dogmas ('no peace without justice'; '*nullum crimen sine lege*'; 'justice should not only be done but be seen to be done'). A focus on anxieties can help make sense of what may at first seem pathological and circuitous as simply the painful living out of the fundamental tensions that are the inevitable fate of the enterprize. Even the apparent contrast between the image of a hubristic discipline and one seemingly riddled by anxiety can be understood as a reaction to the ominous sense of doubt that threatens to engulf the discipline's optimism.

On one level, it should be clear that these practices merely delay the inevitable; they manage anxieties rather than ever dealing fully with the project's founding dilemmas. But it is also true that anxieties do not necessarily doom international criminal justice. Dilemmas are, paradoxically, a source of its resilience. For all its frailties, international criminal justice as a normative enterprize nevertheless presses on, steering a path through its chronic angst, using various strategies that orientate its anxiety in productive directions. Indeed, the present diagnosis is not intended to be particularly gloomy: in the right conditions, anxiety need not be paralyzing but stimulating and, most importantly, creative. Anxiety may not ever be entirely displaced but it can be managed, processed, instrumentalized for creative ends that endlessly defer the moment when the contradictions will become too apparent to ignore. The field is not simply biding its time and vacuously pulling itself by its

own bootstraps. Rather, it constitutes itself as the key link in this smooth deferral process (the solution to the problems its existence creates, as it were), and as such manages to monopolize significant capital within the broader field of transformative, humanitarian, and internationalist endeavors.

Nonetheless over time, a pattern seems to emerge, one in which practices designed to cope with anxiety create their own stress on the institution. Every compensatory move calls for a counter-move. Is there freedom or madness in international criminal justice? The field has regularly been called to task for its existential inauthenticity, i.e., the extent to which it believes itself to be about something else than it is, and remains stuck in some broader narrative that thwarts its true potential for development. There are those who would want the ICC prosecutor to display more candour about the politics of prosecution,[56] those who would have international criminal justice frankly admit that it produces show trials,[57] and those who urge it to accept its cosmopolitan urge and not pretend to be complementary.[58] David Kennedy has more generally asked humanitarian international lawyers to abandon the facticity of legal form to better come to terms with their place in the world as sophisticated humanitarian policy-makers.[59] But jumping ship is not as simple for fields that are intimately invested in legal-institutional forms (as surely international criminal tribunals are). It is unlikely that a full, lucid reckoning with what international criminal justice is – for example, an acceptance of its liberal will to power – would allow it to survive as a distinct form of practice. As Duncan Kennedy has pointed out, legal fields spend an inordinate amount of time and energy 'covering their tracks' as it were and exorcising the ambivalence lawyers feel towards adjudication.[60] It is perhaps too much to expect that an emerging legal enterprize vying to establish its credentials would renounce some of the key tools of its power.

Facing the precipice and the moment of reckoning, two temptations surface. First is the dramatic affirmation of an irreducible self in lieu of all else ('I prosecute, therefore I am!'). Anxiety, for example, is typically mediated by certain self-referential understandings of what international criminal justice is 'about' that make the highly contentious seem to be a matter of fact, and that precariously reestablish if not a sense of ontological certainty then some sense of existential direction. Socialization among the believers in, and practitioners of, international criminal justice at least serves to create a kindred community spirit, a 'hidden college' of international criminal lawyers.[61] Practice is, at least, the certainty that this is what 'we', as international (criminal) lawyers, *do*.[62] Second, as Immi Tallgren has brilliantly shown,

56 J. A. Goldston, 'More Candour about Criteria the Exercise of Discretion by the Prosecutor of the International Criminal Court' (2010) 8 JICJ 383.
57 M. Koskenniemi, 'Between Impunity and Show Trials' (2002) 6 *Max Planck Yearbook of United Nations Law* 1.
58 E. David, 'The International Criminal Court: What Is the Point?' in K. Wellens, *International Law: Theory and Practice, Essays in Honour of Eric Suy* (1998), 631.
59 D. Kennedy, *Of War and Law* (2006).
60 D. Kennedy, *A Critique of Adjudication [fin de Siecle]* (2009).
61 E. Baylis, 'Tribunal-Hopping with the Post-Conflict Justice Junkies', (2008) 10 *Oregon Review of International Law* 361.
62 On the sociological underpinnings of this move, see J. Hagan and R. Levi, 'Crimes of War and the Force of Law' (2005) 83 *Social Forces* 1499.

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international criminal justice ultimately relies on a form of faith[63] (in individual moral agency, in the ability of law to transcend politics, in better tomorrows), with practitioners as clergy and practices as rituals. Through practice, the field constantly elaborates on its social relevance, as it must, not only to others but also to itself. But faith, of course, is not the most widely shared currency in the international arena. Its questioning will inevitably invite perplexity and may lead to despair. International criminal justice cannot create by fiat a world that would make sense of its existence. It must make sense of its existence in the world as it is. In the end, anxiety is never entirely dominant nor entirely transcended; rather, it acts as a constantly shifting ground on which precarious paths to validity, power, or legitimacy must be constructed.

63 I. Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 13 EJIL 561.

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