

ORIGINAL ARTICLE

INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

Between show-trials and Utopia: A study of the *tu quoque* defence

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Abstract

Tu quoque, meaning in Latin ‘you too’, is a fallacy of relevance which targets the hypocrisy of the arguer rather than the truth of the advanced argument.

In international criminal tribunals, defendants who advance the defence choose not to argue for their innocence, but rather seek to shift the spotlight on the crimes committed by the prosecuting authority or by the opposing side to the conflict, so as to delegitimize the entire prosecution as a form of ‘victor’s justice’. According to legal doxa, the argument has never been accepted in court. As a consequence, it has also been completely neglected within academia. Yet, the *tu quoque* defence is extremely powerful, as not only proven by its recurrent use over time, but also by its ability to turn trials into ‘show-trials’. This delegitimization of international prosecutions not only does impact the memory and reconciliation of war-torn communities, but also weakens the edifice of international criminal law.

‘The Tu Quoque Argument as a Defence to International Crimes, Prosecution or Punishment’, written by Sienho Yee in 2004 is the only existing in-depth treatment of the defence. Departing from a critique of Yee’s theorization, this article attempts to fill the scholarly lacuna that exists around *tu quoque*. It departs from a critique of Yee’s theorization and questions whether the defence can be legally legitimate. The article concludes that the defence is legally void, but international criminal tribunals and academia must not disregard its underlying argument because of its political pertinence.

Keywords: international criminal law; international tribunals; show-trials; *tu quoque* defence; victor’s justice

1. Introduction

In 1948, the German defendants in the *Ministries* case argued *tu quoque* as a defence to the allegations that condemned them for crimes against peace.¹ Indicted for several aggressive acts during the Second World War, including against Poland, the defendants claimed that Russia, which had enacted the laws under which they were being tried, not only had consented to the German invasion, but was itself an aggressor that had sent its own armed forces against the country.²

‘*Tu quoque*’, meaning in Latin ‘you too,’ is a legal defence that has traditionally been invoked in international criminal prosecutions where the victor of an armed conflict prosecutes the vanquished side for crimes that both sides committed.³ The core claim underpinning the defence is: ‘You should not be able to prosecute and punish me, because you have committed the same

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¹‘*Case von Weizsaecker, et al. (Ministries Case)*’ (1949) XIV *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, at 314–21 (hereinafter TWC).

²*Ibid.*

³S. Yee, ‘The Tu Quoque Argument as a Defence to International Crimes, Prosecution or Punishment’, (2004) 3 *ChinJIntLaw* 87, at 93.

crimes.⁴ Thus, when raising the *tu quoque* defence before the *Ministries* tribunal in 1947, the defendants chose not to focus on their culpability or guilt, but rather shifted the spotlight onto disputing the authority of the tribunal itself. Because the Allies had allegedly committed the same, or similar, crimes as the German nationals, the defendants argued that it was inequitable for the Allies to institute legal proceedings against the accused – to do so simply demonstrated the bias of the Nuremberg Military Tribunal (NMT) and the hypocrisy of proceedings based on ‘victor’s justice’. The *Ministries* tribunal, however, rejected the *tu quoque* claim and the notion of ‘victor’s justice’ it entailed.⁵ Its decision was consistent with previous rulings of the International Military Tribunal at Nuremberg (IMT) and thus contributed to a legacy that has been consistently upheld in international criminal law ever since.⁶

The *tu quoque* defence has been dismissed by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Kupreškić* case as ‘fallacious and inapplicable’ because it is based on *ad hominem* reasoning.⁷ Certainly, the culpability of the prosecutor for crimes similar to the accused does not exculpate the accused from his guilt: two wrongs do not make a right, particularly in an era in which international law has moved from reciprocal obligations between states to *erga omnes* obligations.⁸ Yet, the idea of a guilty state prosecuting and punishing citizens of another state for crimes its own citizens have committed disrupts the fulcrum of the scale held by Themis and undoes the knot of her blindfold; it contravenes the ‘Golden Rule’ of fairness at the heart of law. Put more simply, it is difficult to deny that the *tu quoque* principle has ‘an enduring appeal to the human conscience’.⁹ This is the reason why, despite its categorical dismissal in court, the *tu quoque* defence relentlessly endures in international criminal trials despite consistent legal rejection.¹⁰

In spite of its historical and present-day relevance, the *tu quoque* argument has attracted relatively little scholarly legal attention. Dismissed within academia in accordance with its failure in legal proceedings, the defence has simply not been adequately addressed.¹¹ Very few academic works deal with *tu quoque* exclusively, as it is common for the defence to be treated in partnership with broader issues of international criminal law.¹² The rare exception is an article by Sienho Yee, ‘The *Tu Quoque* Argument as a Defence to International Crimes, Prosecution and Punishment’, which provides an all-encompassing technical theorization of the defence.¹³ As the title indicates, Yee formulates a tripartite conceptualization of *tu quoque* and contends that the most viable formulation of the argument is *tu quoque* as a defence to punishment.¹⁴

This article provides a doctrinal critique of the *tu quoque* argument, attempting to establish to what extent, if at all, *tu quoque* can represent a legitimate defence in international criminal law. It reviews Yee’s conceptual framework and appraises his claim that the use of *tu quoque* in its ‘defence to punishment’ formulation can be legitimate. It also critically assesses Yee’s argument that the defence to punishment strand of *tu quoque* finds a precedent in the case of Admiral Karl Doenitz at the IMT.¹⁵ The article concludes that the plea cannot constitute a valid legal defence in any of its formulations, although as an argument against selective prosecution it does have

⁴*Ibid.*, at 87.

⁵K. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (2011), at 297.

⁶*Ibid.*, at 298.

⁷*Prosecutor v. Kupreškić et al.*, Judgement, Case No. IT-95-16-T, T.Ch, 14 January 2000, at paras. 515–17.

⁸F. Harhoff, ‘Tu Quoque Principle’, in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), at 553. See also K. Saunders, ‘Informal Fallacies in Legal Argumentation’, (1993) 44 *South Carolina Law Review* 343, at 373.

⁹Yee, *supra* note 3, at 387. See also Heller, *supra* note 5, at 298.

¹⁰R. Wilson, *Writing History in International Criminal Trials* (2011), at 157.

¹¹*Ibid.*, at 156.

¹²R. Provost, *International Human Rights and Humanitarian Law* (2004), at 226–7. See also M. Bassiouni, *Crimes Against Humanity* (2011), at 634–7. See also R. Cryer, *Prosecuting International Crimes* (2005), at 199–202.

¹³Yee, *supra* note 3.

¹⁴*Ibid.*, at 124.

¹⁵*Ibid.*, at 104.

strong theoretical appeal. In relation to the practical use of the plea, the article contends that the ‘defence of rupture’ conceptualized by the French lawyer Jacques Vergès best exemplifies the use, implementation, and reasons for rejection of *tu quoque*.¹⁶ In fact, the real relevance of the argument lies not in its legal application, but rather in its political consequences. The article thus suggests that although international tribunals correctly reject the argument from a legal perspective, they must work towards developing international criminal law in a manner that does not provide legitimacy and space for the argument to be formulated in the first place.

In order to support this thesis, the article will begin (Section 2) by contextualizing the *tu quoque* defence in the legal framework of ‘victor’s justice.’ It will then (Section 3) present Sienho Yee’s tripartite theory of the defence, so as to subsequently (Section 4) criticize it and assess the legal validity of *tu quoque* in its formulation as a defence to the crime, to prosecution, and to punishment. Each formulation will be examined through relevant cases from international criminal tribunals. Finally (Section 5), the article will analyze the tendency of *tu quoque* to turn trials into show-trials, focusing on the *Procès de Rupture* theorized by the French lawyer Jacques Vergès.

2. Contextual framework: Victor’s justice

Until the end of Second World War, states, not persons, were the exclusive subjects of international criminal law.¹⁷ After First World War, however, international justice started a ‘humanization’ process that introduced universalistic moral notions into the international legal system through a shift from reciprocal to universal norms and from state to individual accountability.¹⁸ This process reached its apotheosis with the establishment of the first international criminal tribunals following the Second World War.¹⁹ These courts, as Heller has explained, were devoted ‘to the idea that the principal goal of a criminal trial is to separate the guilty from the innocent and impose sentences that reflect the moral culpability of the convicted’.²⁰

Yet, in executing this task of assigning moral responsibility for international crimes, the post-Second World War military tribunals themselves suffered from a deep moral flaw, as the prosecutions were unilaterally directed at judging the crimes committed by the vanquished.²¹ Although all of the nations involved in the conflict had committed war crimes, the jurisdiction of the tribunals did not extend to the grave offences committed by the Allies.²² The uneven application of the law triggered criticisms both inside and outside the courtroom, and gave rise to questions concerning the authority of the tribunals.²³ For instance, Radhabinod Pal, the Indian judge to the International Military Tribunal for the Far East (IMTFE), rejected the verdict handed down by the other ten Allied justices, which convicted Japan’s top wartime leaders.²⁴ He questioned the validity of the trial in light of its politicization, depicting it as ‘formalized vengeance’ and an expression of victor’s justice.²⁵ Pal observed that ‘the setting up of a tribunal like the [IMTFE]

¹⁶J. Vergès, *De la stratégie judiciaire* (1968).

¹⁷D. Zolo, *Victor’s Justice: From Nuremberg to Baghdad* (2009), at ix. See also J. Klabbbers, *International Law* (2013), at 218. See also M. Bassiouni, ‘The Perennial Conflict between International Criminal Justice and Realpolitik’, (2006) 22 *Georgia State University Law Review* 541, at 543–4. T. Isaacs and R. Vernon (eds.), *Accountability for Collective Wrongdoing* (2011), at 5.

¹⁸Kupreškić, *supra* note 7, at para. 518.

¹⁹Bassiouni, *supra* note 17, at 555.

²⁰Heller, *supra* note 5, at 369.

²¹J. Hoover, ‘Moral Practices: Assigning Responsibility in the International Criminal Court’, (2013) 76 *Law & Contemp Probs* 263, at 263.

²²Provost, *supra* note 12, at 227.

²³Bassiouni, *supra* note 12, at 319.

²⁴G. Bass, *Stay the Hand of Vengeance* (2000), at 8. See also N Onishi, ‘Decades after War Trials, Japan Still Honors a Dissenting Judge’, *The New York Times*, 31 August 2007, available at www.nytimes.com/2007/08/31/world/asia/31memo.html.

²⁵R. Pal, *International Military Tribunal For The Far East Dissident Judgment of Justice Pal* (1999), at 21–4.

is much more a political than a legal affair, an essentially political objective having thus been cloaked by a juridical appearance.²⁶

Beginning with the IMT, the double standard of international law has significantly undermined the credibility of international tribunals, which seem to sacrifice justice at the altar of politics, echoing the unethical principle voiced by Thrasymachus in Plato's Republic that 'justice is in fact what is good for the stronger'.²⁷ This sentiment continues even in the post-Nuremberg era, despite the creation of international tribunals by international agreement rather than by the self-appointed authority of the victorious nations in a conflict.²⁸ In fact, although international courts are often idealized as neutral mechanisms for the application of impartial justice, international tribunals, as Kingsley Moghalu has observed, act in a political context of sovereign states and power hierarchies, making the notion that juridical-institutional universalism is detached from political interference a legalistic utopia.²⁹ The change in the establishment of international tribunals and the creation of the International Criminal Court, which is designed to give a definitive solution to the stigma of politicized justice, has merely corresponded to a change in the dynamics of 'victor's justice'. Specifically, the concept has moved from being strictly related to the victors and the vanquished of a conflict toward a new arrangement whereby international justice is subjugated to the diplomatically, militarily, financially and politically powerful states of the international system.³⁰ As Danilo Zolo has pointed out, 'there is a justice tailored to the major powers and their political and military authorities, who enjoy impunity for war crimes . . . and then there is the victor's justice applied to the vanquished and weak'.³¹

The *tu quoque* defence is embedded in this framework, representing the conversion of the victor's justice critique into a legal defence. Writing in 1960 with reference to Nuremberg, B.V.A. Röling, who had served as a judge at the IMT, defined *tu quoque* as 'related to the fact that the victor handles two standards of judicial appreciation . . . that the victor too violated the same or similar rules of war'.³² A Russian nest doll provides an apt metaphor: the biggest *matryoska* is the wider issue of politicization of international law; the middle-sized *matryoska* is the more specific issue of victor's justice; and the smallest *matryoska* is the *tu quoque* plea – the quintessentially political defence that denounces victor's justice. Whilst different in size and scope, the dolls are concentric, for they all share the same core. Specifically, they share questions of fairness and allegations of hypocrisy within war crimes tribunals.

3. Conceptualizing *tu quoque*: The theory of Sienho Yee

Having recounted this historical background, it is now possible to theorize the *tu quoque* defence itself. Transplanted from the realms of philosophy and rhetoric into law, *tu quoque* is a fallacy of relevance – it targets the hypocrisy of the arguer rather than the truth of the advanced argument.³³ Even if one accepts that within the sphere of logic the argument is evidently faulty, however, it does not necessarily follow that it is also obviously flawed when advanced as an argument for fairness in the courtroom.³⁴ Bassiouni and Provost defined *tu quoque* as a defence relating to individual penal responsibility based on the principle of reciprocity, conceiving it as a primarily

²⁶*Ibid.*, at 21.

²⁷Platone, *la Repubblica* (1997), at 338e–9a.

²⁸G. Brennan, 'Preface', in Y. Tanaka, T. McCormack and G. Simpson (Eds.), *The Tokyo War Crimes Trial Revisited* (2011), at XI.

²⁹K. Moghalu, *Global Justice* (2006), at 5. See also Hoover, *supra* note 21, at 264. See also M. Koskeniemi, *From Apology to Utopia* (2005), at 10.

³⁰Zolo, *supra* note 17, at xii.

³¹*Ibid.*

³²B. Röling, 'The Law of War and the National Jurisdiction Since 1945', (1960) 100 RdC 323, at 389.

³³S. Aikin, 'Tu quoque argument and the relevance of hypocrisy', (2008) 28 *Informal Logic* 155, at 157.

³⁴Saunders, *supra* note 8, at 344.

retributive argument.³⁵ Yet, although reciprocity can be constitutive of the plea, it provides only one possible version of *tu quoque*.³⁶ The defence is, in fact, multi-faceted and can present itself in various versions, each expressing different claims and consequently resulting in different impacts on the prosecution.

Sienho Yee has addressed the possible formulations of the defence, categorizing them in different groups according to the rationale behind them. He identifies two core *tu quoque* categories. In the first, *tu quoque* is an argument for equal treatment, which means that in a case where the prosecuting authority committed the same crimes as the defendant, *tu quoque* is used to plead for the two parties to face the same consequences. In the second, *tu quoque* is a proxy for the equitable clean-hands doctrine, according to which he ‘who comes to equity must come with clean hands’. This *dictum* is converted into the principle that ‘he who comes to international trials as a prosecutor, must come without having committed similar, or indeed, any crimes’. The differentiation of these two possible categories (equal treatment and clean-hands doctrine) is important, because it gives specific meaning to the use of the defence in court. In fact, stemming either from the first or the second category, *tu quoque* can be advanced in a trial in three different ways: as a defence to the crime, as a defence to prosecution, or as a defence to punishment.

Within the category of *tu quoque* as a claim for equal treatment, Yee differentiates an argument from reciprocity, which gives rise to *tu quoque* as a defence to the crime, and an argument for non-discrimination, which gives rise to *tu quoque* as a defence to prosecution and punishment. The reciprocity strand is based on the claim that ‘If you committed a crime, I can (or I was entitled to) commit that crime too’. Conversely, the non-discrimination strand expresses the idea that ‘since we both committed a crime, we must both be prosecuted and punished’. It is clear that both cases are an appeal for equal treatment, because the main argument is for the prosecutor and prosecuted to either be entitled to engage in the same behaviour or to face the same consequences as a result of that behaviour.

The clean-hands doctrine represents a category *per se*. Like the non-discrimination strand, it views *tu quoque* as a defence to prosecution and punishment. Yet these two uses of *tu quoque* differ from their non-discrimination equivalents because they have at their core a question regarding the legitimacy of the judging authority. In fact, this category is not concerned with the prosecutor and prosecuted being equally treated. Instead, the clean-hands doctrine affirms as a requirement of justice the rule that says a guilty party cannot prosecute, punish, or even judge another guilty party.³⁷

The conceptual structure of the defence can be visualized as proposed in Fig. 1:

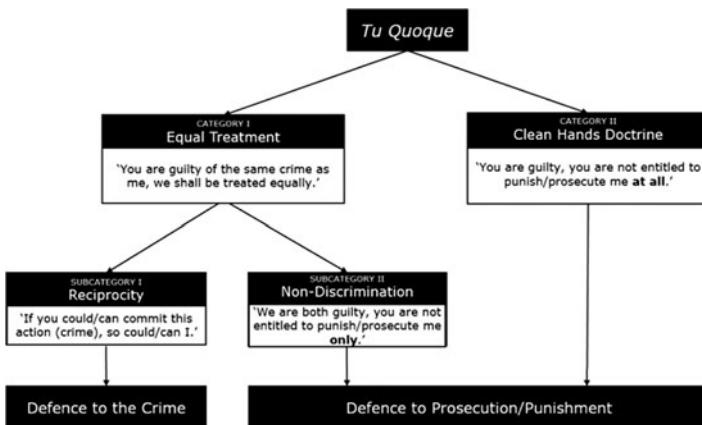


Figure 1. Conceptual structure of the *Tu Quoque* defence.

³⁵Bassiouni, *supra* note 12, at 634. See also Provost, *supra* note 12, at 227.

³⁶Yee, *supra* note 3, at 92.

³⁷*Ibid.*

It is now possible to revise the aforementioned *tu quoque* categories and subcategories through their practical use in court as a defence to the crime, to prosecution, and to punishment.

3.1 Defence to the crime

The principle of reciprocity, as mentioned above, is expressed in *tu quoque* as a defence to the crime. According to Yee, the claim underpinning this defence can be voiced as follows: ‘I violated the same law that you violated, so my violation becomes a non-violation; I am not guilty of any crime.’ This strand treats the behaviour of the other belligerent as a justification for the defendant’s conduct, formulating the argument in light of the principle of reciprocity, and more broadly, of equal treatment. In Yee’s theory, therefore, it can be either forward or backward-looking – where forward-looking means that the crime committed by the enemy triggered the defendant’s decision to violate the law and backward-looking means that the enemy’s crime had no role in the defendant’s decision to violate the law but prohibits *post-facto* prosecution – Yee rightly concludes that since the contemporary international criminal legal system has moved from the idea of a bilateral exchange of rights to *erga omnes* obligations, this strand of the *tu quoque* argument is obsolete because rules are no longer formed through reciprocal commitments, but instead apply always and to everyone. Yee thus distinguishes this use of *tu quoque* from reprisals and retaliation. With regard to the latter, he claims that retaliation entails the prosecutor to have been the first violator, while the *tu quoque* defence does not. And he differentiates reprisals from *tu quoque* because the scope of reprisals is much narrower. In fact, reprisals use the ‘minimal necessary evil’ in order to end a legal violation committed by the other side of the conflict. The *tu quoque* defence has no such aim.³⁸

3.2 Defence to prosecution

Tu quoque as a defence to prosecution can be based on either non-discrimination or clean hands. In the first case, the argument goes as follows: ‘If you have committed the same crime as me, we should be both prosecuted.’ In the second case, the defence stands for the idea that ‘if the prosecuting authority has hands stained with crime, the tribunal has no legitimacy and therefore I cannot be prosecuted at all’. Both formulations focus on post-conduct prosecution and thus do not undermine the normative power of international law, as happens with *tu quoque* as a defence to crime. Yee contends, therefore, that this strand is potentially valid. He nevertheless ultimately discards *tu quoque* as a defence to prosecution as too radical, because it is aimed at averting or voiding the prosecution and thus, if accepted, makes the entire prosecution unlawful.

Yee also identifies a ‘self-imposed’ strand of *tu quoque* as a defence to prosecution. In this case prosecutors abstain from prosecution because of the need to avoid hypocrisy. The argument goes like this: ‘our hands are dirty of a crime: we have no right to prosecute the defendant for an analogous crime’. Yee provides as an example the bombing of cities during the Second World War: although the practice contravened a norm generally accepted before the war, the Allies – who were themselves guilty of the destruction of cities through aerial warfare – did not prosecute anyone for that type of crime.³⁹ When prosecutors disregard the fact that their side has also committed crimes, their implied thesis is: ‘We might have violated the law, but this is not as important as the fact that you have violated the law.’ or ‘We are here to do justice in our individual capacity, not as representative of any state.’⁴⁰

³⁸*Ibid.*, at 97–100.

³⁹Röling, *supra* note 32, at 389.

⁴⁰Yee, *supra* note 3, at 95.

3.3 Defence to punishment

Tu quoque as a defence to punishment is also a post-conduct plea. It claims that the defendants can be convicted but, because of the guilt of the prosecuting authority, cannot be punished. Analogous to the defence to prosecution strand, the message conveyed by *tu quoque* as a defence to punishment can be based either on a non-discrimination argument, which is partial ('we are both guilty; you cannot punish *only* me'), or on the clean-hands doctrine, which is categorical ('you are guilty; you cannot punish me *at all*'). According to Yee, the advantage of this defence is that, by preserving the conviction of the defendants – which supposedly bestows upon them the stigma of guilt – the trial would still serve an educational and deterrent function. Yee thus argues that it is 'the best in principle [and] it is also the only one which has received in practice the blessing of any official body so far'. In fact, he asserts that *tu quoque* as a defence to punishment was accepted by the IMT in the case of Admiral Karl Doenitz (a controversial topic that this article will return to), who stood accused of unrestricted submarine warfare and, although found guilty, was not punished for the crime in light of the fact that the American Admiral Nimitz had engaged in the same practice.⁴¹

4. Critique of Yee

Yee's work is an essential point of departure to theorize, and consequently establish the validity of, the *tu quoque* defence. Yet some aspects of his articulation of *tu quoque*, as well as his final judgments concerning its viability, are disputable. This article first reviews one unsatisfactory conceptual feature of *tu quoque* deriving from reciprocity and then criticizes Yee's conclusions concerning the validity of its different versions.

4.1 Definitional elements: Issues of reciprocity

Theorizing the strand of *tu quoque* that derives from the principle of reciprocity as having both a forward-looking and a backward-looking function is controversial. Although Yee distinguishes *tu quoque* from reprisals and retaliation by arguing that *tu quoque* can also be backward-looking *besides* being forward-looking, this definition still renders all three concepts comparable.⁴² This is problematic, because within academia there already exists confusion between the three concepts, with scholars like Bassiouni considering the defence analogous to reprisals and Antonio Cassese equating it to retaliation.⁴³ Analogously, these concepts have been conflated in court. For example, in the aftermath of the *Guerra Sucia* in Argentina, during the 1985 Trial of the Military Juntas, the defence of former Junta member Eduardo Emilio Massera advanced a *tu quoque* defence to the crime.⁴⁴ However, the defence intertwined it closely with the concept of reprisals, to the extent that in his analysis of state terrorism, Ernesto Valdes explains the rationale behind *tu quoque* as the 'howl of the wolf', specifically, citing the defence of Armando Lambruschini in the same legal process, 'when one lives among wolves, one needs to howl just like they do' (meaning that in response to terrorism, the state is entitled to resort to terrorism).⁴⁵

Yee's inclusion of a forward-looking component serves to only compound this inaccuracy, further undermining the validity of the argument without providing *tu quoque* with a useful additional theoretical element. In fact, *tu quoque* is a jurisdictional defence, one that serves as an estoppel

⁴¹*Ibid.*, at 100–13.

⁴²*Ibid.*, at 96.

⁴³Bassiouni, *supra* note 12, at 634. Cassese, *supra* note 8, at 449.

⁴⁴24 *El Diario del Juicio* (5 November 1985), at 5.

⁴⁵30 *El Diario del Juicio* (17 December 1985), in E. Garzon Valdes, 'El Terrorismo de Estado', (1989) 65 *Revista de Estudios Políticos* 35, at 43 (translation by the author).

against the enemy's attempt to call into question the lawfulness of the same kind of conduct.⁴⁶ As such, it does not directly influence primary conduct and it cannot be forward-looking – in contrast to retaliation and reprisals.

4.2 An examination of *tu quoque* as a defence to the crime

Yee's presentation of *tu quoque* as an argument that has never been accepted and that is inadmissible in its strand as a defence to the crime is certainly correct.⁴⁷ The claim that a perpetrator's crime should be exculpated because the other side of the conflict has committed the same crime contravenes the very foundation of modern international criminal law.⁴⁸ In fact, the reason why the *tu quoque* defence is so maligned in international law is that the argument is solely understood as a defence to the crime, voicing the claim that 'two wrongs make a right'.⁴⁹ No judgment or scholarly work suggests that this form of *tu quoque* is valid,⁵⁰ for one simple reason: it depends entirely on the principle of reciprocity, which international criminal law now rejects.⁵¹ Most notably, in the *Kupreškić* case the ICTY emphasized the shift in the character of international humanitarian law from reciprocal to absolute obligations, thus categorically dismissing *tu quoque* as a defence to the crime.⁵²

In *Kupreškić*, six defendants were accused of massacring the Muslim inhabitants of the Bosnian village of Ahmici in 1993, during the Bosnian War. In response to the accusation, the defendants claimed that similar attacks had been made by the Muslim forces on Croats, thus advancing *tu quoque* as a defence to the crime.⁵³ In its judgment of 14 January 2000, the Trial Chamber stated that the '*tu quoque* argument is flawed in principle [since it] envisages humanitarian law as based upon a narrow bilateral exchange of rights and obligations'.⁵⁴ The judgment then noted the absolute nature of fundamental rules of humanitarian law, as expressed in Common Article 1 of the 1949 Geneva Conventions.⁵⁵ This Article establishes that the High Contracting Parties must respect the Convention 'in all circumstances', thus categorically rejecting the idea of reciprocity.

⁴⁶A. Von Knieriem, *The Nuremberg Trials* (1959), at 312.

⁴⁷Yee, *supra* note 3, at 99.

⁴⁸*Kupreškić*, *supra* note 7, at para. 511.

⁴⁹Cassese, *supra* note 8, at 553.

⁵⁰Heller, *supra* note 5, at 298.

⁵¹Yee, *supra* note 3, at 92.

⁵²*Kupreškić*, *supra* note 7, at para. 515.

⁵³*Ibid.*, at para. 32.

⁵⁴*Ibid.*, at para. 60.

⁵⁵Art. 1 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31. See also *Kupreškić*, *supra* note 7, at para. 517. The judgment also emphasized that the *tu quoque* plea had never been accepted by the post-Second World War tribunals. In particular, the judges referred to the *High Command* case from the NMTs, where it was stated that 'under general principles of law, an accused does not exculpate himself from a crime by showing that another has committed a similar crime, either before or after the commission of the crime by the accused'. ('Trial of Wilhelm von Leeb et al' (1948) XI TWC, at 481, hereafter: *High Command Case*). On several occasions NMT defendants had invoked the *tu quoque* plea. Besides the aforementioned *Ministries* (*Ministries Case*, *supra* note 1, at 317) and *High Command* (*High Command Case*, at 482) cases, the defence was also invoked in the *Einsatzgruppen* ('Trial of Otto Ohlendorf et al' (1948) IV TWC, at 467) and the *Hostage* case. In the latter two cases the defendants claimed that they could not be convicted of crimes against humanity and war crimes because of the civilian deaths caused by the Allies' bombings. The NMT rejected their arguments in the *Hostage* case ('Trial of Wilhelm List et al' (1948) XI TWC, at 1317, in Heller, *supra* note 5, at 298). In point of fact, in its judgment on the 27 October 1948, the *High Command* tribunal recognized a limited use to *tu quoque* as a mitigating element in reference to Otto Woehler. Woehler, who served as Commander in Chief of the 8th Army, stood accused of using prisoners of war for the construction of field positions in the combat area. The NMT declared that similar use of German prisoners of war from the Allies constituted a factor in mitigation, but not in defence (*High Command Case*, at 684).

Tu quoque as a defence to the crime is clearly inadmissible, because it is rooted in the principle of reciprocity. This formulation of the defence is based on a dangerous logic: not that there was no law to violate in the first place, but that the similar actions of the opposing sides to a conflict mean that the once-valid law is no longer applicable. If this strand of *tu quoque* is valid, any action would be lawful as long as both sides of a conflict engaged in it.⁵⁶

Yet, whilst the *Kupreškić* trial is seen by scholars to have laid to rest *tu quoque* once and for all, it would be more correct to state that it marks the rejection of the version of *tu quoque* as a defence to the crime, as opposed to *tu quoque* as a defence to prosecution and punishment.⁵⁷ In fact, the *Kupreškić* judgment provides only a partial understanding of *tu quoque*, one limited to the strand based on reciprocity. That formulation is the least coherent given the nature of the defence.⁵⁸ *Tu quoque* is an *ad hominem* fallacy, and as such its aim is to delegitimize the prosecuting authority rather than justify the commission of a crime.⁵⁹ The argument is thus less concerned with issues of reciprocity and culpability than with issues of even-handedness and legitimacy. As a result, the categories of non-discrimination and clean hands expressed by *tu quoque* as a defence to prosecution and punishment are more consistent with the original purpose of the plea.

4.3 An examination of *tu quoque* as a defence to prosecution

The core claim underpinning *tu quoque* as a defence to prosecution is that ‘your side has also committed the crimes for which I am facing trial, so it is unfair for you to prosecute me’. As mentioned earlier, *tu quoque* as a defence to prosecution can derive from either the non-discrimination principle or from the clean-hands doctrine. The core idea in the first case is to emphasize the unilaterality of a trial, whereby only the vanquished are prosecuted. By contrast, in the second case, the claim takes a step back and emphasizes the immorality of having a prosecuting authority guilty of the same crimes as the defendant, thereby demanding an end to the prosecution as opposed to emphasizing the need for multilateral trials.

Yee recognizes that *tu quoque* as a defence to prosecution has potential validity, yet he contends that it is inapplicable because its acceptance would undermine the validity of prosecution itself.⁶⁰ He thus does not delve into this strand of the argument. Other scholars have similarly neglected this strand of the defence.

The lack of scholarly attention to this strand of *tu quoque* is disconcerting because it actually has the potential to be the most persuasive version of the defence. To be sure, Yee correctly emphasizes that endorsing the clean-hands version of *tu quoque* as a defence to prosecution would make it impossible to prosecute a guilty perpetrator. This is obviously a problematic outcome because, quoting Röling, ‘the factual inequality of treatment is not a convincing argument for the thesis not to punish at all’.⁶¹ Moreover, whilst appealing in a context that pits the victors against the vanquished, the clean-hands version of the argument loses strength before truly international tribunals, where the prosecuting authorities are neutral and not guilty of the crimes examined in court.

Nevertheless, these two shortcomings of *tu quoque* as a defence to prosecution do not apply to the version that is based not on the clean-hands doctrine, but on the principal of equal treatment. This version must not be neglected. As explained earlier, rather than a procedural block impeding prosecution, the non-discrimination argument challenges the fact that tribunals do not prosecute all perpetrators guilty of analogous crimes. This defence is expressed by the appeal ‘why are you

⁵⁶Provost, *supra* note 12, at 229.

⁵⁷Cryer, *supra* note 14, at 199. See also Yee, *supra* note 3, at 113–23.

⁵⁸Yee, *supra* note 3, at 100.

⁵⁹H. Hansen, ‘Fallacies’, in *The Stanford Encyclopedia of Philosophy* (2015), available at plato.stanford.edu/entries/fallacies/.

⁶⁰Yee, *supra* note 3, at 100.

⁶¹Röling, *supra* note 32, at 393.

prosecuting me *only*?’ –and if accepted it would lead to further prosecutions.⁶² Thus, as underlined by the title of ‘selective prosecution’, the equal-treatment argument challenges the double standards of international criminal justice and denounces its political bias.

There is no question that the contrast between the claims of universal applicability and the politically-selective *modus operandi* of the international tribunals is one of the biggest weaknesses of international criminal justice.⁶³ As Wolfgang Kaleck notes, ‘the assessment of whether or not to prosecute crimes against international law is almost always a political decision’.⁶⁴ Denouncing the problem of selectivity is the core of the equal-treatment version of *tu quoque* as a defence to prosecution and it is, therefore, an extremely compelling use of *tu quoque*.

According to Kaleck it is possible to identify two main types of selectivity in international criminal trials: vertical and horizontal. Vertical selectivity refers to the choice of which individuals should be prosecuted for mass atrocity within one group of perpetrators. Although international tribunals are officially designed to prosecute the most meaningful high-ranking perpetrators, charges are mostly directed towards perpetrators who can be brought to justice at ‘low political cost’.⁶⁵ For example, during the *Pohl* trial at the NMT, one of the defendants lamented that his superior officer had not been indicted.⁶⁶ Analogously, at the hybrid tribunal for East Timor, an international prosecutor criticized the court for focusing solely on lower-ranking perpetrators whilst Indonesian commanders enjoyed impunity.⁶⁷

On the other hand, horizontal selectivity is the discretionary justice applied to perpetrators belonging to different groups guilty of equally grave crimes.⁶⁸ This is the ‘unfairness’ that critiques of victor’s justice emphasize. For instance, Alfred Rubin has pointed out that ‘[u]nless the law can be seen to apply to George Bush (who ordered the invasion of Panama) as well as Saddam Hussein (who ordered the invasion of Kuwait) . . . it will seem hypocritical’.⁶⁹ Along the same lines, Kaleck observes that ‘hardly any of those most responsible for torture at Guantánamo, the ill-treatment of detainees in Iraq or war crimes in Afghanistan, Colombia or Gaza have faced trial’.⁷⁰ A similar claim played a pivotal role in the defence of Slobodan Milošević, who condemned, during his trial, the impunity of the war crimes committed by the North Atlantic Treaty Organization (NATO).⁷¹ Certainly, besides providing Milošević with valid claims, the ICTY failure to prosecute the bombing of civilian targets by NATO and the war crimes committed by the Kosovo Liberation Army spurred cynicism towards the legitimacy of the ICTY and justified harsh criticism of former chief prosecutor Carla Del Ponte.⁷²

The use of *tu quoque* as a selective prosecution defence – best expressed by the Latin locution ‘*ei quoque*’ (they too) – voices a cry of anguish and disillusionment against the broken promise of what Kaleck defined as a ‘universal justice irrespective of a perpetrator’s office, race, nationality or political weight’.⁷³ The plea is designed to criticize the unfairness of international criminal trials. But although it successfully denounces the ‘double-way’ of international justice, this defence has been consistently rejected. For instance, the NMT rejected the plea on the ground that:

⁶²Yee, *supra* note 3, at 94, mentions the possibility of *tu quoque* as a defence to *selective* prosecution in reference to the use of the plea in national courts. Yet, he does not investigate it when pondering the validity of *tu quoque* as a defence to prosecution.

⁶³W. Kaleck, *Double Standards: International Criminal Law and the West* (2015), at 2.

⁶⁴*Ibid.*, at 7.

⁶⁵*Ibid.*

⁶⁶Heller, *supra* note 5, at 296.

⁶⁷Kaleck, *supra* note 63, at 56.

⁶⁸*Ibid.*, at 8.

⁶⁹A.P. Rubin, ‘International Crime and Punishment’, (Fall 1993) 34 NI 73, at 74, in Cryer, *supra* note 12, at 194.

⁷⁰Kaleck, *supra* note 63, at i.

⁷¹M. Koskeniemi, ‘Between impunity and show trials’, (2002) 6 MPIL 1, at 1.

⁷²Kaleck, *supra* note 63, at 49.

⁷³*Ibid.*, at i.

[t]he sole province of the tribunal is to judge those who are brought before it by the duly constituted prosecuting authorities who are entirely independent of the tribunals. The judicial power does not extend to the institution or launching of criminal proceedings.⁷⁴

Yet there are limitations to the plea beyond issues of jurisdiction. Supporters of international criminal law argue that questions of fairness are determined by the rectitude with which the trials are conducted and judged, not by balancing them against the possible wrongdoings of other actors.⁷⁵ Moreover, as Yee correctly observes, the argument can be easily neutralized by the promise of the judges to prosecute all perpetrators – and in such case the even-handedness of the judges can only be proven by whether deeds match words.⁷⁶ Indeed, a major reason for the dismissal of the plea is pragmatic: international tribunals do not have the resources to prosecute all guilty parties. As stated in the *Čelebići* appeal: ‘the entity responsible for prosecutions has finite financial and human resources and cannot realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdiction’.⁷⁷ Moreover, selective prosecution is unavoidable for political reasons. Not only can the prosecution of some perpetrators lead to violent political backlash from the states they belong to, the unwillingness of relevant powers to co-operate with tribunals can hinder prosecution and overwhelm the political resources of the courts⁷⁸ – as happened with the ICTY’s attempt to prosecute NATO forces.

Nevertheless, the failure to uphold a truly universal justice significantly undermines the legitimacy of international tribunals, above all in the eyes of civil society. Issues of selectivity haunt international tribunals and are underlined by the *ei quoque* defence. The legal acceptance of the plea is certainly improbable, largely because of the aforementioned financial, time-related, and political limits. Yet these limits exacerbate scepticism towards international criminal law, seen to bow to Realpolitik. The gap between the reach of international criminal law in theory and its agency in practice spurs dangerous disillusion and denialism among affected peoples, elevating perpetrators to the role of martyrs.⁷⁹ According to Koskenniemi, for example, the impunity of NATO for bombings during the Bosnian war contributed to the denial among Serbs of the horrors of the conflict.⁸⁰ Similarly, Nobuko observes that after the IMTFE, efforts to establish post-war reconciliation in Japan were hindered by the widespread cynicism propelled by the unilateralist nature of the trials.⁸¹ In her view, ‘the mistrust deriving from the sense of *tu quoque* . . . not only affected the Japanese views on the trials, but also seriously influenced the formation of historical awareness’.⁸² In fact, impunity for the Allies’ crimes led to a shared denial of Japanese responsibility for military actions following the 1931 Manchurian Incident and to the justification of Japan’s role in the 1931–1945 conflicts.⁸³ These cases prove that the much-promoted ‘renunciation of politics’ in international criminal law is only capable of spurring further distrust among civilian populations, which often view international tribunals as little more than political mechanisms.⁸⁴ Rather than accepting selective prosecution claims, therefore, international criminal law

⁷⁴Heller, *supra* note 5, at 296.

⁷⁵Cassese, *supra* note 8, at 700.

⁷⁶Yee, *supra* note 3, at 94.

⁷⁷*Prosecutor v. Delalić et al.*, Judgement, Case No. IT-96-21-A, A. Ch., 20 February 2001, at para. 602.

⁷⁸Kaleck, *supra* note 63, at 49.

⁷⁹*Ibid.*, at 19. See also Moghalu, *supra* note 29, at 21.

⁸⁰Koskenniemi, *supra* note 71, at 9.

⁸¹K. Nobuko, ‘The Tokyo Trials and British-Japanese reconciliation’, in H. Dobson and K. Nobuko (eds.), *Japan and Britain at War and Peace* (2009), at 86.

⁸²*Ibid.*, at 82.

⁸³*Ibid.*

⁸⁴L. Vinjamuri, ‘The International Criminal Court and the Paradox of Authority’, (2016) 79 *Law&ContempProbs* 275, at 277.

ought to embrace its political role whilst working on defying and preventing the political limits imposed on it.

4.4 An examination of *tu quoque* as a defence to punishment

When analyzing *tu quoque* as a defence to prosecution and punishment, Yee recognizes that the punishment strand is ‘weaker’ than the prosecution strand. Yet, by limiting the reading of the defence to prosecution to one deriving from the clean-hands doctrine and rejecting it as too radical, Yee states that *tu quoque* as a defence to punishment is the most viable formulation of the plea.⁸⁵ His argument ignores the fact that, when accepted, this defence proves the political bias of the prosecuting authority, thus rendering the proceedings a show trial. Exempting a defendant found guilty from punishment is designed to shield him from criminal responsibility.⁸⁶ According to Provost, this proposition is inconsistent with the basic purpose of international criminal law. In the context of grave breaches of international humanitarian law, for example, a conviction without punishment neutralizes the symbolic and pedagogic function upheld by the criminalization of the violation.⁸⁷

As noted above, Yee cites the case of Admiral Doenitz before the IMT as the only case in which a *tu quoque* argument has ever been applied and argues that Doenitz’s case serves as precedent for the application of *tu quoque* as a defence to punishment.⁸⁸ In point of fact, the Doenitz case is not the only one in which *tu quoque* has been applied. The ‘defence of rupture’ of the French lawyer Jacques Vergès even better exemplifies the application of this strand of *tu quoque*.⁸⁹ Moreover, whereas the Doenitz trial has notoriously passed into history as a *tu quoque* case, the accuracy of that claim is contentious. Whilst figures like Röling, Von Knieriem, Harhoff and Taylor depicted the Doenitz case as one of *tu quoque*, scholars like Kaleck and Scharf disagree.⁹⁰ In order to understand the controversy, we need to take a closer look at the case.

4.4.1 The case of Admiral Karl Doenitz

Admiral Karl Doenitz, who succeeded Hitler as Head of State of Germany and was Supreme Commander of the German Navy, was indicted as a major war criminal at Nuremberg. Among the charges brought against him was one of unrestricted submarine warfare in violation of the Naval Protocol of 1936, to which Germany had acceded. The prosecution claimed that German U-boats had targeted all merchant ships in the Atlantic, attacking them without warning and intentionally killing all survivors of shipwrecked vessels, whether enemy or neutral. Defence Counsel Otto Kranzbuehler claimed that the US Navy had engaged in the same conduct in the Pacific and asked the tribunal’s permission to interrogate the American Admiral Chester Nimitz.⁹¹ However, Kranzbuehler’s claim was not one of *tu quoque*, for he did not aim at questioning the legitimacy of the prosecuting authority in light of the crimes that both sides had committed. On the contrary, the lawyer wanted to show that Doenitz’s conduct, in line with Nimitz’s, was utterly legal: he was advancing a ‘sources of law’ argument.⁹² Cryer defines Kranzbuehler’s strategy as one of ‘*faux naïf*’ and explains the reasoning behind it as follows:

⁸⁵Yee, *supra* note 3, at 100.

⁸⁶Provost, *supra* note 12, at 234.

⁸⁷*Ibid.*, at 235.

⁸⁸Yee, *supra* note 3, at 124

⁸⁹Cryer, *supra* note 12, at 202.

⁹⁰Röling, *supra* note 32, at 390. See also Knieriem, *supra* note 46, at 312; Harhoff, *supra* note 8, at 710; T. Taylor, *The Anatomy of the Nuremberg Trials* (1992), at 409; Kaleck, *supra* note 63, at 14; M. Scharf and G. McNeal, *Saddam on Trial* (2006), at 74.

⁹¹‘Trial of K Doenitz’, Judgement International Military Tribunal at Nuremberg, 1 October 1946, 1 IMT 171, at 310–15.

⁹²Scharf and Mc Neal, *supra* note 90, at 74.

'if the action was a crime, then the prosecuting states would prosecute its own nationals too. As they have not, it must be that the conduct was not considered to be unlawful'.⁹³

Faced with the evidence, however, the judges found themselves in an uncomfortable position: torn between explicitly admitting the selectivity of the trials and judging the conduct for its unlawfulness. Judge Biddle addressed this moral struggle in his memoirs, noting that 'if Dönitz had fought in the Atlantic precisely as Nimitz had fought in the Pacific, and the British Admiralty in the Skagerrak, how could we convict his client? . . . I said we would look like fools if we refused'.⁹⁴ Along the same lines, Telford Taylor stated that, 'If Doenitz and Reader deserved to hang for sinking ships without warning, so did [U.S. Admiral] Nimitz'.⁹⁵ In the end the judgment found Doenitz guilty of having violated the Protocol, but added:

In view of all the facts proved, and in particular of an order of the British Admiralty announced on 8 May 1940, according to which all vessels should be sunk at sight in the Skagerrak, and the answer to interrogatories by Admiral Nimitz that unrestricted submarine warfare was carried on in the Pacific Ocean by the United States from the first day that nation entered the war, the sentence of Doenitz is not assessed on the ground of his breaches of the international law of submarine warfare.⁹⁶

Although no legal rule was mentioned in the judgment, therefore, 'there is no doubt that the holding was based upon the principle of *tu quoque*'.⁹⁷ Yet, rather than a case of *tu quoque* as a defence to punishment, this case falls within the self-imposed strand of *tu quoque*. In fact, the argument underpinning the reasoning of the judgment is a '*nos quoque*' rationale: 'we too have committed the crime, so we cannot punish', not the accusation 'you too have committed the crime, you have no right to punish me' that underpins the defence to punishment strand of *tu quoque*. Yee's argument that the Doenitz case represents a case of *tu quoque* as a defence to punishment is therefore inaccurate.⁹⁸ So it comes as no surprise that no analogous judgments were established by the IMT.⁹⁹

4.4.2 Defence to punishment as a *procès de rupture*

Tu quoque as a defence to punishment has precedent. The half-Vietnamese, half-French lawyer Jacques Vergès turned the *tu quoque* defence into a legal strategy that he named a 'defence of rupture'.¹⁰⁰ Vergès is a controversial figure and was nicknamed the 'devil's advocate' for taking on 'indefensible' cases. The range of his clients extended from Algerian National Liberation Front independence fighters to the Gestapo member known as the 'butcher of Lyon', Klaus Barbie. The attorney's trademark legal technique consisted in disputing the legitimacy of the tribunal by emphasizing the structural bias of international criminal law.¹⁰¹ This defence represents the use of *tu quoque par excellence*, because it is consistent with its nature as an *ad hominem* argument. As earlier observed, this kind of argument aims at dismissing an accusation by contending that whoever advances it suffers from the same flaw that they are condemning. The plea, thus, confronts the

⁹³Cryer, *supra* note 12, at 229.

⁹⁴F. Biddle, *In Brief Authority* (1962), at 452.

⁹⁵Taylor, *supra* note 90, at 409.

⁹⁶'Trial of K Doenitz', *supra* note 91, at 313.

⁹⁷Knieriem, *supra* note 46, at 317.

⁹⁸As opposed to a case of *tu/nos quoque*, it is also possible to read the judgment so that judges were persuaded by the sources of law argument, yet from Biddle's memoirs (see Biddle, *supra* note 94) it clearly transpires that the judgment was guided by a moral tension and worries about blunt incoherence, rather than by a recognition of the development of international customary law.

⁹⁹See, e.g., the treatment of those accused of the Katyn massacre at *Nuremberg Trial Proceedings* (1946) 7 IMT, at 425–8.

¹⁰⁰H. Ko, 'Bouhired, the Trial of Djamila' (1957), in A. Mikaberidze (ed.), *Atrocities, Massacres and War Crimes: An Encyclopedia* (2013), at 71–2.

¹⁰¹A. Chrisafis, 'I said to Klaus Barbie: I want people to see your human side', *The Guardian*, 15 May 2008.

prosecution's inconsistency concerning a particular type of conduct rather than contesting the illegality of the defendant's conduct itself. It is, therefore, an aggressive defence.

Vergès' first use of *tu quoque* took place in the trial of Algerian National Liberation Front member Jamila Bouhired, held in Algeria by a French Military Court in 1957.¹⁰² During an interview the attorney explained its use by saying that 'the problem was not to play for sympathy, as left-wing lawyers advised us to do . . . but to provoke them [the judges]', adopting the 'most offensive defence'.¹⁰³ Critically, the offensive aspect of this defence consisted not in denying the crime. On the contrary, it embraced the crime whilst politically challenging the authority of the tribunal.

When Vergès took her case, Bouhired was just 22 years old and had been sentenced to death by guillotine for the bombing of cafés in Algiers where French settlers were regular customers.¹⁰⁴ The lawyer framed his legal intervention in political-strategic terms, denouncing French colonialism in Algeria, which had caused the Algerian war of independence in the first place.¹⁰⁵ In doing so, Vergès did not aim at exculpating the defendant. This was clear when Bouhired stated during the trial that 'You know nothing about me. But you must know that if I am ordered to place a bomb, I will do it.'¹⁰⁶ Instead, the *tu quoque* defence was aimed at appealing to international public opinion, contrasting the bombings executed by Bouhired with the horrors committed by the French during colonial rule, including the torture suffered by Bouhired herself.¹⁰⁷

The contrast between acts of colonialism and acts of anti-colonial struggle were further emphasized by Georges Arnaud and Jacques Vergès' publication 'Pour Djamilia Bouhired', which transformed the defendant from a terrorist into a symbol of anti-colonial resistance.¹⁰⁸ The argument deployed by Vergès during the trial was thus a *tu quoque* defence to punishment stemming from the clean-hands doctrine. Simplified, his argument was: 'These are the atrocious crimes committed by the French government towards Algerian people and towards my client: a French military court has no right to punish her fight for freedom.' This use of *tu quoque* attracted media and intellectual attention, spurring worldwide support for Bouhired from civil society and in governmental circles. The political pressure exercised on the French government resulted in President René Coty pardoning the defendant.¹⁰⁹ Thus, Vergès' use of *tu quoque* in Bouhired's trial fulfilled its function as a defence to punishment, although arguing that it was 'accepted' by the tribunal is not exactly correct.¹¹⁰ The tribunal was coerced into applying the plea, and therefore its success cannot be considered to represent a legal precedent.

5. *Tu quoque* and show trials

A self-professed combatant in the cause of anti-colonialism, Vergès used *tu quoque* to denounce through a post-colonial lens the political inconsistencies and the hypocrisy of the allegedly 'universalist' international criminal law system.¹¹¹ His defence strategy was aimed, as legal scholar Emilios Christodoulidis has noticed, at reconfiguring the historical and didactic nature of trials.¹¹² In this sense, the most symbolic use of the defence was deployed by Vergès in 1987, in the trial of Klaus Barbie. Accused of crimes against humanity, Barbie's trial was designed by the French

¹⁰²Ko, *supra* note 100, at 71.

¹⁰³B. Schroeder, *Terror's Advocate* (2007, dvd).

¹⁰⁴*Ibid.*

¹⁰⁵E. Christodoulidis, 'Strategies of Rupture', (2009) 20 *Law Critique* 1, at 3.

¹⁰⁶*Terror's Advocate*, *supra* note 103.

¹⁰⁷Christodoulidis, *supra* note 105, at 10.

¹⁰⁸G. Arnaud and J. Vergès, *Pour Djamilia* (1961).

¹⁰⁹Ko, *supra* note 100, at 72.

¹¹⁰Christodoulidis, *supra* note 105, at 4–10.

¹¹¹*Ibid.*

¹¹²*Ibid.*, at 6.

government to be a 'pedagogic trial'.¹¹³ However, the use of *tu quoque* by the defence gave rise to one of the most controversial trials in modern legal history. Vergès used the trial to complain about the 'colour-blindness' of international criminal law.¹¹⁴ The lawyer related the horrors of Nazism to the horrors of colonialism, highlighting the similarity in the methods of torture the French used in Algeria and the ones used by the Gestapo in Lyon and underlining the different fate of the perpetrators of these allegedly analogous crimes.¹¹⁵ In addition, he declared that Barbie was being used as a scapegoat by the French, who were tarnished by their own wartime collaboration crimes.¹¹⁶ Vergès insisted during the trial that the Jews' suffering in Europe was 'a drop of European blood in the ocean of human suffering which, therefore, only concerned the white man'.¹¹⁷ He also argued, as Christodoulidis explains, 'the Jews were elevated to the dignity of the chosen martyrs in a move aiming to obscure the systematic suffering inflicted on the forgotten victims of Europe's genocides against the races of the South'.¹¹⁸ Vergès was not denying the ignominious horror of the Holocaust, nor did he aim at reducing its dimensions. Yet he instrumentalized the Holocaust to denounce, through *tu quoque*, the ethnocentrism of international law.¹¹⁹ 'France officially had 200,000 deaths during the German occupation for 40 million inhabitants. Algeria had during the French repression one million deaths for nine million inhabitants', the lawyer stated before the beginning of the case, then proceeding to profess during the trial that 'We', talking in the name of the victims of colonialism, 'bow our heads also in front of the martyrdom of the children of Izieus', for which Barbie was accused, 'because we remember the suffering of the children of Algiers'.¹²⁰

The reaction to Vergès' defence by intellectuals such as Alain Finkielkraut, who depicted Vergès' strategy as 'grotesque' and considered the trial as an insult to international criminal law, is understandable.¹²¹ When interviewed in 1983, Barbie defined himself as a 'convinced Nazi' who was 'sorry about every Jew that [he] did not kill'.¹²² Moreover, as the prosecuting authority insisted throughout the trial, the Holocaust was an event of historical singularity that witnessed the state-organized and intentional destruction of a people.¹²³ As Guyora Binder has observed, the French in Algeria had 'only killed whomever they could not control, whereas the Germans preferred murder to domination'.¹²⁴ The use of *tu quoque* in Barbie's case largely trivialized the complex causation and performance of the crimes of the Final Solution, and inaccurately conflated totalitarianism, fascism, Nazism, racism, colonialism, and anti-Semitism.¹²⁵ Nevertheless, the prosecuting authorities' constant rebuking of Vergès' *tu quoque* claims galvanized his use of the trial as a venue to advocate anti-colonialism, rendering the trial similar to a theatrical performance. Although Vergès' *tu quoque* arguments were all rejected by the court and Barbie was convicted of 341 charges of crimes against humanity and condemned to life imprisonment, the lawyer successfully used the plea as a tool to denounce the status quo of international criminal law and advocate justice for the crimes of colonialism.¹²⁶

¹¹³G. Binder, 'Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie', (1988) 98 YJIL 1321, at 1322.

¹¹⁴*Terror's advocate*, *supra* note 103.

¹¹⁵Christodoulidis, *supra* note 105, at 5.

¹¹⁶'Barbie denies sending Jews to their deaths', *The Guardian*, 4 July 2008, available at www.theguardian.com/theguardian/2008/jul/04/5.

¹¹⁷Christodoulidis, *supra* note 105, at 6.

¹¹⁸*Ibid.*

¹¹⁹*Ibid.*, at 8.

¹²⁰S. Holland, 'Jacques Vergès: Barbie's lawyer is a mystery man', *UPI*, 16 May 1987, available at www.upi.com/Archives/1987/05/16/Jacques-Verges-Barbies-lawyer-is-a-mystery-man/8993548136000/.

¹²¹Christodoulidis, *supra* note 105, at 7.

¹²²Binder, *supra* note 113, at 1328.

¹²³*Ibid.*, at 1341.

¹²⁴*Ibid.*, at 1361.

¹²⁵*Ibid.*, at 1381.

¹²⁶Chrisafis, *supra* note 101.

Klaus Barbie's trial epitomizes the reason why the *tu quoque* defence is categorically rejected in legal scholarship: its potential to turn a trial into theatre. Nevertheless, the paradox lies in the fact that the aim of *tu quoque* is precisely to delegitimize international criminal law by promoting an image of it as nothing more than show business. Barbie's trial serves as a good example. The symbolic charge of Barbie as the embodiment of Nazism rendered his punishment crucial for educational purposes and made the trial more sacrificial than judicial.¹²⁷ This sacrificial component is a premise of individual criminal responsibility in international criminal law. The ambition of rendering the most extreme expressions of what Kant defined as 'radical evil' into something intelligible through a trial necessarily entails the demonization of the accused, who becomes a monster representing the horrors of mass atrocity.¹²⁸ Much has been written on the tension between individual responsibility and mass responsibility, on the implications of the former and the possible ways to tackle the latter; this article has no intention of delving into this discussion.¹²⁹ Nevertheless, the importance of the demonization of evil is central to the *tu quoque* defence. In fact, by pointing a finger at the prosecuting authority, the defendant arguing *tu quoque* subdues his demonic dimension. By showing the different fates of perpetrators committing analogous crimes, the plea indicates in Orwellian terms that 'all animals are equal, but some animals are more equal than others' in the realm of international criminal law.¹³⁰ Such an argument opens a space to contest law as a legal system harnessed to an imperialist logic and perpetuating forms of victor's justice.

6. Conclusion

This article has provided an analysis of the validity of the *tu quoque* defence in international criminal law. The defence is quintessentially political and is aimed at delegitimizing international tribunals, painting them as mechanisms for the exercise of 'victor's justice' in light of the impunity of perpetrators of crimes analogous to the ones for which the defendant is put on trial. Departing from Sienho Yee's work on *tu quoque*, the article has considered the plea in its formulation as a defence to the crime, as a defence to prosecution, and as a defence to punishment. In accordance with Yee, *tu quoque* as a defence to the crime has been dismissed as untenable, because the international legal system has shifted from reciprocity to *jus cogens* norms. The *Kupreškić* case represents a landmark for the dismissal of this version of the plea. Nevertheless, this strand is the least consistent with the nature of *tu quoque* as an *ad hominem* fallacy – specifically, to shield the defendant by tarnishing the role of the prosecuting authority. *Tu quoque* as a defence to prosecution and punishment based on the equal treatment and clean-hands doctrines, by contrast, is more in line with the central purpose of the defence.

This article has criticized Yee's position that both of these versions are viable, demonstrating that, in fact, neither is legally tenable. To begin with, the article has shown that the defence to prosecution strand must be considered in both its clean-hands version and its equal treatment version. Whereas Yee only delves into the former, this article considers both. It finds the former to lose strength in an international prosecution with neutral judges and dismisses it as legally invalid because its acceptance would undermine the prosecution of a guilty perpetrator. The inequality of the law is not a valid argument to void either the prosecution or punishment of someone found culpable of violating *jus cogens* norms. On the other hand, the version of the argument stemming from equal treatment is very persuasive. It corresponds to the defence of selective prosecution, which does not lose its appeal at international tribunals and is thus best expressed by the claim '*ei quoque*'. This strand voices the 'victor's justice' complaint of the

¹²⁷Binder, *supra* note 113, at 1346.

¹²⁸I. Kant, *La religione entro i limiti della sola ragione* (1980), at 32–4. See also K. Jaspers, *Il male radicale* (2011), at 88.

¹²⁹See, e.g., Isaacs and Vernon *supra* note 17.

¹³⁰G. Orwell, *Animal Farm* (1987), at 192.

tu quoque plea. It sheds light upon the inequality and inconsistency of international tribunals in not addressing analogous crimes for political reasons. Yet this version is not viable both for jurisdictional and for pragmatic reasons, the latter focusing on tribunals' limited financial and temporal resources.

That said, acceptance of *tu quoque* as a defence to punishment would only feed the accusation of hypocrisy implied in the plea, for it accepts the accusation of guilt by the prosecuting authority. This defence, if applied, would contravene the basic juridical principle that a legal violation must correspond to a sanction, undermining the pedagogic and symbolic role of international criminal trials. In relation to this plea, the article has also contested Yee's claim that the case of Admiral Doenitz before the IMT provides a precedent for the application of this strand of *tu quoque*, since the case is rather one of *nos quoque*, where the judges applied a self-imposed version of the argument in response to a 'sources of law' claim advanced by the defendants.

The final issue that the article has considered is the degeneration of international trials into show trials as a political consequence of the use of *tu quoque*. Jacques Vergès' use of the defence as a tool to denounce the colonial legacy of international law in the case of former Gestapo officer Klaus Barbie exemplifies this problem. The use of the plea leads to a relativization of international crimes that can trivialize the prosecuted offences. Nevertheless, the relativization of crimes contributes in shedding light upon the nature of individual penal responsibility as necessarily entailing show trials, which serve political and symbolic purposes through a sacrificial mechanism rather than a judicial function, and which therefore necessarily imply the demonization of evil. The latter is a major problem in international criminal trials because considering perpetrators as extraordinary people gives their crimes an aura of exceptionality, focusing on the person who committed them rather than on the circumstances that allowed their commission. In this way, a lucid understanding of events is compromised, as is the avoidance of future analogous circumstances.

Overall, whereas the *tu quoque* argument is untenable for political, financial and technical reasons, its influence on civil society's opinion of international trials has a fundamental role to play in post-conflict memory and reconciliation issues. In fact, when formulated, the defence is not directed only to the tribunal but also towards the wider public. The shortcomings of international law highlighted by the use of *tu quoque*, rather than bringing to the acceptance of the plea, must be matched by an effort to develop an increasingly equitable international legal system.