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herausgegeben von
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Vorwort

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

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

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

Im Frühsommer 2021 sind zwischen § 326 und § 328 BGB 22 neue Paragrafen eingefügt worden, die unterdessen (am 1.1.2022) auch in Kraft getreten sind. Sie enthalten – in Umsetzung einer EU-Richtlinie – Bestimmungen für Verträge über digitale Produkte. *Hendrik Denkhaus*, der bereits als Freiburger Erasmus-Student ein Jahr an der AUB verbrachte, hat, nach Budapest zurückgekehrt, dieses neue Recht zu einem Schwerpunkt seines LL.M.-Studiums gemacht. In seinem Beitrag beschäftigt er sich mit zwei Regelungen, die wegen ihres neuartigen Ansatzes viele Fragen aufwerfen: Zum einen geht es um die in § 327f BGB geregelte Aktualisierungspflicht, die einen Unternehmer trifft, der digitale Inhalte oder Dienstleistungen bereitgestellt hat. Zum anderen wird die Vorschrift des § 327r BGB in den Blick genommen, welche – ebenfalls mit großer Bedeutung für die Praxis – zu bestimmen versucht, unter welchen Voraussetzungen der Unternehmer Änderungen an einem digitalen Produkt vornehmen darf, das bereits vom Verbraucher genutzt wird.

In Ungarn hat es in einem Vierteljahrhundert vier große Kodifikationen des Gesellschaftsrechts gegeben, wobei sich die Reformen jeweils nicht auf eine Änderung von Einzelregelungen beschränkten, sondern auch mit schwerwiegenden konzeptionellen Umbrüchen verbunden waren: Auf das „liberale" Gesetz über die Wirtschaftsgesellschaften aus dem Jahr 1988 folgte 1997 das „strenge" zweite und 2006 das „etwas weniger strenge" dritte Wirtschaftsgesellschaftengesetz, ehe 2013 mit der Einordnung des Gesellschaftsrechts in das Dritte Buch des Bürgerlichen Gesetzbuches (UBGB) eine „Wiedergeburt" der Gestaltungsfreiheit gefeiert werden konnte. Vor diesem Hintergrund ist unterdessen nicht nur eine weitere Neukodifikation des gesamten Gesellschaftsrechts zu befürchten gewesen, sondern auch ein erneuter Richtungswechsel des „konzeptionellen Pendels". Im Sommer 2021 hat sich der ungarische Gesetzgeber dann allerdings auf eine Novellierung der gesellschaftsrechtlichen Vorschriften des UBGB beschränkt. *Leszek Dziuba* stellt wichtige Eckpunkte der Reform vor und untersucht, inwieweit mit ihnen das 2013 verfolgte Konzept bestätigt oder verändert worden ist.

Felix Engelhard, der zu den ersten deutschen Absolventen des Masters für Europäische und Internationale Verwaltung der Andrássy Universität gehört, beschäftigt sich in seinem Beitrag mit einer Thematik, die in den zurückliegenden Pandemie-Jahren nicht nur Fachleute beschäftigt hat, sondern auch auf das Interesse der Medien und breiterer Bevölkerungskreise hoffen durfte: die Digitalisierung des deutschen Gesundheitswesens. Er stützt sich dabei auf Einblicke, die er nach seinem Studium an der AUB als wissenschaftlicher Mitarbeiter einer Abgeordneten im Deutschen Bundestag und als Fachreferent im Krankenkassen-Spitzenverband gewinnen

konnte. Kenntnisreich zeichnet er ein facettenreiches Bild von Erfolgen, „Dauerbaustellen" und enttäuschten Hoffnungen.

Joshua Heper gehört zu den „Pandemie-Jahrgängen" des Budapester LL.M.-Studienganges, also zu denjenigen Studentinnen und Studenten, die während ihres Studiums keine oder nur wenige Lehrveranstaltungen in den Seminarräumen und Hörsälen des Festetics-Palais genießen durften. Möglicherweise hat die „Verbannung" in den online-Unterricht die Auswahl des Themas für seine Magisterarbeit, die er der rechtlichen Regulierung internationaler Datentransfers gewidmet hat, mitangeregt. Sein Beitrag für das Jahrbuch baut auf dem Schlussteil dieser Arbeit auf und blickt in die Zukunft: Vor dem Hintergrund der „Schrems"-Urteile des EuGH werden unterschiedliche Ansätze zur Weiterentwicklung des Rechtsrahmens für internationalen Datentransfer untersucht und eingeordnet.

Einem hochaktuellen Thema widmet sich der Beitrag von *Christian Kovács*, der von 2007 bis 2009 als Wissenschaftlicher Assistent an der AUB wirkte. Der Verfasser untersucht die Rechtsprechung der Unionsgerichte zu Beihilfen für den Ausbau erneuerbarer Energien. Den wesentlichen Streitpunkt bei der Beurteilung der Frage, ob eine Förderung von Artikel 107 Abs. 1 AEUV umfasst ist, bildet das Tatbestandsmerkmal der „staatlichen Mittel". Ausgehend von der Rechtssache PreussenElektra wird die Rechtsprechung bis zu dem heute noch als Leitentscheidung geltenden EEG-Urteil nachgezeichnet. Der Verfasser zeigt, weshalb das EEG-Urteil für mehr Verwirrung als Klarheit gesorgt hat und wie es heute noch die Unionsgerichte beschäftigt. Er stellt die These auf, dass der EuGH über kurz oder lang von diesem Urteil wird abrücken müssen – in der aktuellen Rechtsprechung zeichne sich bereits eine Kurskorrektur ab.

Hannes Rathke, Alumnus der AUB, widmet sich der Herzkammer der europäischen Demokratie, der Wahl des Europäischen Parlaments und aktuellen Debatten über die Reform des Wahlrechts. Sein besonderes Augenmerk gilt der Reformidee, den wahlberechtigten Unionsbürgerinnen und Unionsbürgern eine zweite Stimme zu geben. Mit ihr sollen transnationale Listen wählbar werden. Über die Listen, angeführt vom jeweiligen Spitzenkandidaten der Parteifamilien für das Amt des Kommissionspräsidenten, könnten 28 Parlamentssitze besetzt werden. Der Autor stellt fest, dass der Bundesgesetzgeber im Zuge der Zustimmung zum reformierten Direktwahlakt auf Zweidrittelmehrheiten in Bundestag und Bundesrat angewiesen sein dürfte.

Zu den „Pandemie-Jahrgängen" des LL.M.-Programms gehört auch *Jessica Reisinger*. Sie hat sich von den misslichen Umständen nicht abhalten lassen, viel Zeit und Energie in die Anfertigung ihrer Magisterarbeit zu investieren. Es hat sich gelohnt: Für die Arbeit wurde sie mit einem

der vier Donau-Exzellenz-Preise ausgezeichnet, die im Rahmen des von der PADME-Stiftung der ungarischen Nationalbank geförderten Projekts „DonAUB: Förderung internationaler Kooperationen in der Lehre und Forschung im Donauraum" für herausragende Masterarbeiten vergeben wurden. Ausgezeichnet wurden Arbeiten, die interdisziplinär angelegt sind und einen Bezug zum Donauraum haben. In ihrem Beitrag, der auf der Magisterarbeit beruht, werden die Auswirkungen der Achmea-Entscheidung des EuGH auf das Investitionsschutzrecht in den Mitgliedstaaten der Union untersucht.

Mechtild-Maria Siebke, Alumna der AUB, erörtert den Vorschlag der Kommission, eine europäische „Anti-Money Laundering Authority" (AMLA) einzurichten und mit Aufsichtskompetenzen auszustatten. Das Konzept zeitigt Konsequenzen auch für die Anwaltschaft und die den berufsständischen Kammern anvertraute Selbstverwaltung. Die europäische Geldwäscheaufsicht berührt das Anwaltsgeheimnis. Die Autorin diskutiert das anwaltliche Berufsgeheimnis im europäischen Rechtsstaat und meldet im Ergebnis verfassungsrechtliche Bedenken an.

Vanessa Steinert befasst sich mit der aktuellen Verschärfung der Wegzugsbesteuerung, einer 2018 angekündigten Reform, die seit dem Veranlagungsjahr 2022 umgesetzt wird. Ihr Beitrag erörtert die Anpassung des deutschen Außensteuergesetzes (AStG) an die Vorgaben der europäischen Anti-Tax-Avoidance-Directive (ATAD). Sie problematisiert insbesondere, dass die im Anschluss an frühere EuGH-Rechtsprechung verankerten Verschonungsregeln bei Wegzügen innerhalb der Union und des Europäischen Wirtschaftsraumes entfallen. Damit stellt sich neu die Frage nach der Vereinbarkeit des AStG mit dem Binnenmarktrecht. Die Autorin erläutert die mit der ATAD veranlassten Änderungen, sodann die AStG-Reformgesetzgebung am Maßstab des Unionsrechts.

Miklós Szirbik, der bereits im Jahr 2009 als Promotionsstudent der Andrássy Universität an einem Kommentar zur Verfassung der Republik Ungarn als Koautor mitgewirkt hat, widmet sich in diesem Band einer Fragestellung des Integrationsverfassungsrechts. Er erörtert den Europäischen Konstitutionellen Dialog und verortet neben der aktuellen verfassungsrechtlichen Rechtsprechung Deutschlands und Polens vor allem die Beschlüsse des ungarischen Verfassungsgerichts zum Verhältnis zwischen Unionsrecht und nationalem Verfassungsrecht. Der Vorrangfrage kommt integrationspolitisch zentrale Relevanz zu. Der Autor berücksichtigt die Rechtsstaatlichkeitsverfahren gegen Polen und Ungarn, betrachtet zudem mit einem Fokus auf die ungarische verfassungsgerichtliche Praxis Chancen und Risiken des Konstitutionellen Dialogs.

Die Herausgeber sind allen Autorinnen und Autoren dankbar verbunden, ebenso dem Nomos Verlag, namentlich Frau *Kristina Stoll* und Herrn *Peter Schmidt*.

Oliver Diggelmann
Ulrich Hufeld
Stephan Kirste
Peter-Christian Müller-Graff
Christian Schubel

Inhalt

International Criminal Tribunals and their Background Dilemmas

Oliver Diggelmann[*]

Inhaltsübersicht

Abstract

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

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

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

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

A. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 See *infra* Part B.V.

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

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

B. Political Background Dilemmas and Recurring Criticisms

I. Conflict Selection: Victor's Justice

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

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

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

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

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13 By 21 July 2022.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Elite Accountability: Overinclusive Concepts

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

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

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

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