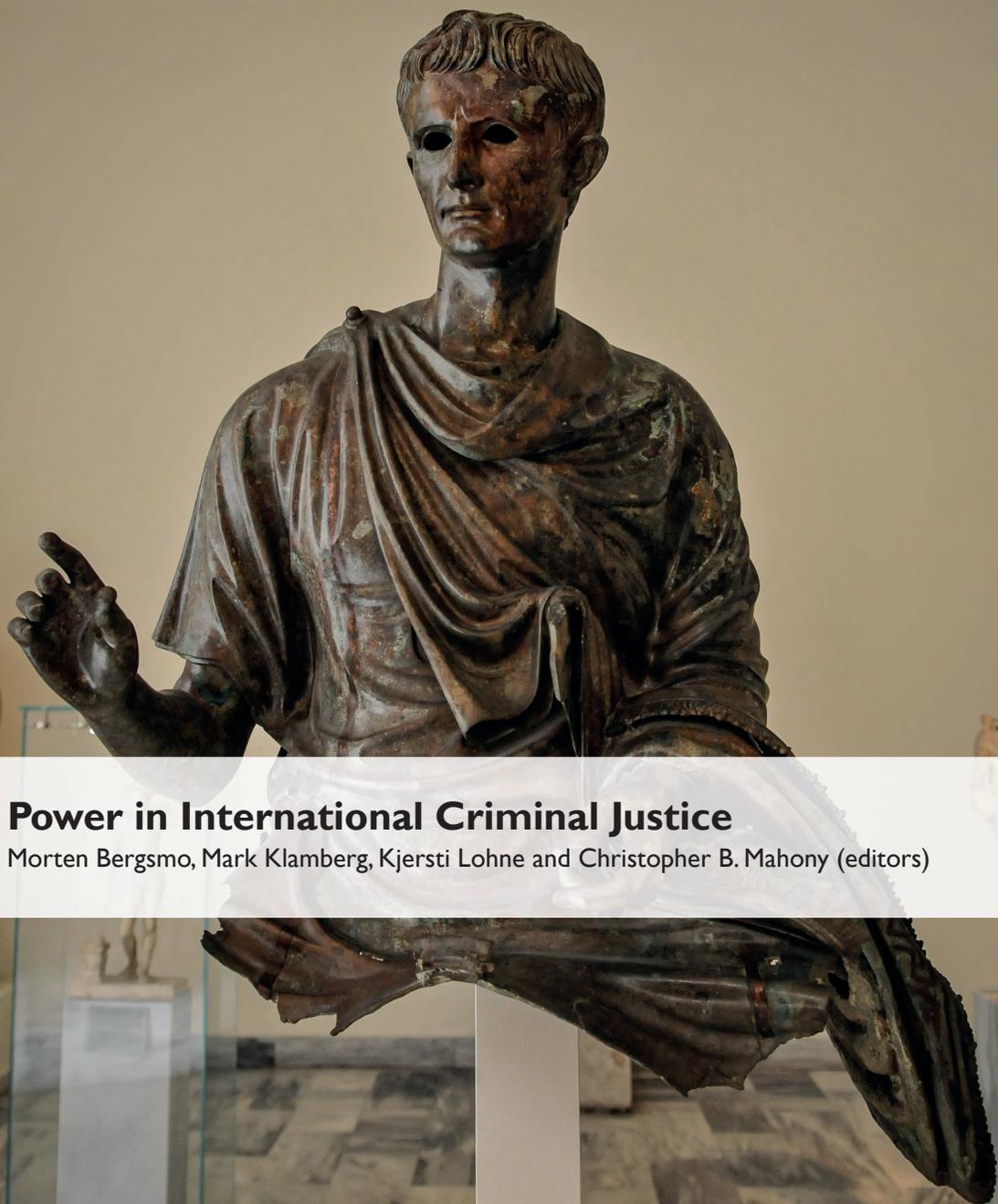


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Power in International Criminal Justice

Morten Bergsmo, Mark Klamberg, Kjersti Lohne and Christopher B. Mahony (editors)

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***Front cover:** Octavian, known as Caesar Augustus (63 BC–AD 14), the first Roman emperor, who enjoys a 2000-year old legacy as one of the most effective leaders in human history. He is a symbol of power. But this famous fragment of a bronze equestrian statue in the National Archaeological Museum of Athens is also a hollow mask. This book is about unmasking power.*

***Back cover:** Excerpt from Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report, 30 September 2020. The experts showed courage and incision by challenging power in the International Criminal Court system in their report.*

Towards a Sociology of International Criminal Justice

Kjersti Lohne*

2.1. Introduction

A week or so before the contributors of this volume came together for two intensive days of intellectual critique in Florence, Italy, stories were breaking across Europe on the (lack of) character of the International Criminal Court's ('ICC') very first Chief Prosecutor, the Argentine Luis Moreno Ocampo. Based on leaked documents, the media network European Investigative Collaborations disclosed how Ocampo had shared confidential information while in office. After leaving the ICC in 2012, he had continued to nurture and leverage staff at the Office of the Prosecutor ('OTP'), to the extent of receiving information from the OTP's advisor for international co-operation concerning investigations of the Libyan businessman Hassan Tatanaki, whom Ocampo at the time was working with and subsequently tried to shield from further investigations.¹ These alle-

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¹ Tjitske Lingsma, "How Ocampogate harms the International Criminal Court", in *Blog of the Groningen Journal of International Law*, 30 November 2017 (available on its web site).

gations are aggravated by experts and judges' criticism of Ocampo's careless approach to investigations and prosecutions,² but also, crucially, by recently published material on the inner workings of the OTP's early days. As made public in *Historical Origins of International Criminal Law: Volume 5*, an institutional culture of intimidation, fear – and one may add, nepotism – has been depicted,³ and a call has been made for a “more accurate mirror” of power in international criminal justice.⁴ That is the aim of this book.

Contrary to criminal justice institutions in established democracies, international criminal justice is not as readily subject to the checks and balances of democratic processes involving parliamentary committees, a critical media, and academic scrutiny – in short, to a democratic and public constituency.⁵ This is all the more significant as institutional power is more concentrated in international criminal justice than is the case with its domestic counterparts. Where the latter are composed of a patchwork of several State institutions – courts, correctional services, health care, police, and so on – the International Criminal Court, for example, is not only expected to adjudicate international crimes, but also to investigate and detain, provide protection and reparations to victims and witnesses, do outreach to a variety of communities, among other things⁶ – and to do all this in the context of international politics, by intervening, more often than not, in the midst of ongoing conflicts.⁷ Rather than by a State, international

² See, for example, Marta Minow, Cora True-Frost and Alex Whiting (eds.), *The First Global Prosecutor: Promise and Constraints*, University of Michigan Press, 2015; Morten Bergsmo, “Institutional History, Behaviour and Development”, in Morten Bergsmo, Klaus Rackwitz and SONG Tianying (eds.), *Historical Origins of International Criminal Law: Volume 5*, Torkel Opsahl Academic EPublisher, Brussels, 2017 (<http://www.legal-tools.org/doc/09c8b8/pdf>).

³ Bergsmo, Rackwitz and SONG (eds.), 2017, *ibid*.

⁴ Morten Bergsmo, Wolfgang Kaleck, Sam Muller and William H. Wiley, “A Prosecutor Falls, Time for the Court to Rise”, FICHL Policy Brief Series No. 86 (2017), Torkel Opsahl Academic EPublisher, Brussels, 2017 (www.toaep.org/pbs-pdf/86-four-directors/).

⁵ *Ibid*.

⁶ Carolyn Hoyle and Leila Ullrich, “New Court, New Justice? The Evolution of ‘Justice for Victims’ at Domestic Courts and at the International Criminal Court”, in *Journal of International Criminal Justice*, vol. 12, no. 4, p. 681.

⁷ Mark Kersten, *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace*, Oxford University Press, Oxford, 2016.

institutions, like the ICC, are legitimated by non-democratic claims,⁸ such as efficiency, rationality, and universal values of humanitarianism and protection of ‘the peace, security and well-being of the world’.⁹

However, the nobility of aims does not confer exemption from neither scrutiny nor accountability for one’s behaviour, and it is within this context that *transparency* within the institutions and practices of international criminal justice surfaces as an essential yardstick for the field. In short, we need a better grasp of how power operates within international criminal justice, so that people *in* power can be better equipped to make better choices for the future. This is because legitimacy – trust in institutions – is deeply sociological; it is a dialectic and continuous process of claims by power-holders, and the support of such claims by a diversity of constituencies.¹⁰ The time has therefore come to strengthen our sociological understanding of how power operates within and through international criminal justice, and the ambition of this book is nothing short of contributing to the consolidation of a sociology of international criminal justice.¹¹

To this end, this book brings together a bouquet of excellent scholars, practitioners, and judges, each bringing with him or her different sets of experiences, fields of expertise, insights and perspectives that shed light on the social dimensions of international criminal justice. Sociology of law is a rich body of research, offering a range of different sociological approaches to law and legal institutions, depending, largely, on their theoretical understanding of the social world. What we have put together is a collection of chapters that, given the diverse backgrounds of our authors, offer unique insights into some of the most important social dynamics and pressing issues facing authority and legitimacy in international criminal justice today. No single volume, of course, can do it all. Rather than a complete characterization of the social world that international criminal

⁸ Mikael Rask Madsen, “Unpacking Legal Network Power: The Structural Construction of Transnational Legal Expert Networks”, in Mark Fenwick, Steven Van Uytsel and Stefan Wrba (eds.), *Networked Governance, Transnational Business and the Law*, Springer Publishing, Heidelberg, 2014.

⁹ Rome Statute of the International Criminal Court, 17 July 1998, Preamble (‘ICC Statute’) (<http://www.legal-tools.org/doc/7b9af9/>).

¹⁰ David Beetham, “Revisiting Legitimacy, Twenty Years On”, in Justice Tankebe and Alison Liebman (eds.), *Legitimacy and Criminal Justice*, Oxford University Press, Oxford, 2013.

¹¹ See also Kjersti Lohne, *Advocates of Humanity: Human Rights NGOs in International Criminal Justice*, Oxford University Press, Oxford, 2019.

justice is constituted by and of, this book offers a long-awaited attempt to hold it still – if only for a moment – so that it may be brought under scrutiny.

This chapter proceeds to outline the potential of a sociology of international criminal justice. Following a seven-step approach, the next section identifies trends in international criminal justice that make a greater engagement with sociology critical. It then provides an inventory of the conceptual make-up of the sociology of law, before, fourthly, briefly addressing its methodologies and research strategies. Fifthly, the emergent field of sociology of international criminal justice is outlined. After that, the chapter provides an overview of the themes to which a sociology of international criminal justice might contribute, by introducing the contributions of this volume in their various approaches to power in international criminal justice. Finally, a brief conclusion is offered.

2.2. The Need for a Sociology of International Criminal Justice

International criminal justice is today faced with predicaments of legitimacy, identity, and its constitutive role in global society. Recent years have seen increasing criticism towards international criminal justice and the ICC in particular, on issues ranging from (its lack of) procedural justice to (challenges of) normative legitimacy.¹² Apart from the leaks concerning Ocampo, the most potent point of critique has been accusations of the ICC ‘targeting Africa’, with all of its pending cases against African nationals and all but one of its 11 situations under investigation taking place on the continent.¹³ While the Court’s interventions in African conflicts are often explained by the high rate of African States Parties to the Rome Statute, and the fact that most of the situations are self-referrals, images and perceptions matter. Riding on charges of colonialism and imperialism, the critique culminated in the threat of a mass exodus of African States Parties from the Court in late 2016. And yet, while several ex-

¹² George P. Fletcher and Jens David Ohlin, “Reclaiming Fundamental Principles of Criminal Law in the Darfur Case”, in *Journal of International Criminal Justice*, 2005, vol. 3, no. 3; Dov Jacobs, “A Tale of Four Illusions: The Rights of the Defence before International Criminal Tribunals”, in Colleen Rohan and Gentian Zyberi (eds.), *Defence Perspectives on International Criminal Justice*, Cambridge University Press, Cambridge, 2017; Nobuo Hayashi and Cecilia M. Baillet (eds.), *The Legitimacy of International Criminal Tribunals*, Cambridge University Press, Cambridge, 2017.

¹³ See, for example, Kamari Clarke, *Africa and the ICC*, Cambridge University Press, Cambridge, 2016.

pressed their intentions to leave the Court, Burundi is the only one to have done so far (in an attempt to escape from legal accountability, as the situation is currently under ICC investigations).¹⁴ The road ahead will be no less difficult, as indicated by the OTP's investigatory attempts into the situations of Georgia and Afghanistan, the latter of which was effectively shut down by Pre-Trial Chamber II in a novel interpretation of the "interest of justice".¹⁵ The political friction against the ICC must be seen alongside a changing geopolitical landscape, where the cosmopolitan rhetoric of a post-Westphalian liberal world order has lost traction in the face of the (re-)emergence of a multipolar one.¹⁶ However, an equal if not more critical challenge to the international criminal justice project is the frequent rejection and distain from those in whose names justice is done. For the survivors of violence coded as international crimes, international criminal justice has been accused of being 'too little, too late', of destabilizing and disrupting peace negotiations, and of crowding out alternative paths towards peace, justice and reconciliation in the aftermath of mass violence.¹⁷ Yet, the fight against impunity continues to harness significant discursive, political, and material power.¹⁸ There is thus fundamental friction in the relationship between those advocating and representing international criminal law, its institutions and ideas in international politics on

¹⁴ Following internal legal and political quagmires, South Africa and The Gambia rescinded their notices of withdrawal from the Court. As of 17 March 2019, the Philippines became the second country to leave the ICC.

¹⁵ See Mark Klamberg, "Rebels, the Vanquished, Rogue States and Scapegoats in the Crosshairs: Hegemony in International Criminal Justice", chap. 14 below.

¹⁶ Andrew Hurrell, *On Global Order: Power, Values, and the Constitution of International Society*, Oxford University Press, Oxford, 2007; see also G. John Ikenberry, "The end of liberal international order?", in *International Affairs*, 2018, vol. 94, no. 1.

¹⁷ For example, see Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa*, Cambridge University Press, Cambridge, 2009; Adam Branch, *Displacing Human Rights: War and Intervention in Northern Uganda*, Oxford University Press, Oxford, 2011; Sarah Nouwen and Wouter Werner, "Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity", in *Journal of International Criminal Justice*, 2015, vol. 13, no. 1.

¹⁸ Karen Engle, Zinaida Miller, and Denys Mathias Davis, *Anti-Impunity and the Human Rights Agenda*, Cambridge University Press, Cambridge, 2016; Anette Bringedal Houge and Kjersti Lohne, "End Impunity! Reducing Conflict-Related Sexual Violence to a Problem of Law", in *Law & Society Review*, 2017, vol. 51, no. 4; Lohne, 2019, see above note 11; see also Barrie Sander, "The Anti-Impunity Mindset", chap. 7 below.

the one hand, and the societies most affected by its practices on the other.¹⁹

The volatile state of international criminal justice is also reflected in its scholarship. International criminal justice is now frequently depicted as in a state of “identity crisis”,²⁰ with several diagnoses offered of its “acute ontological anxiety”.²¹ As a field of legal practice, anxiety is associated with the over-saturation of the field, having peaked in terms of institution-building last decade and is now slowly shrinking, as illustrated by the recent closure of the International Criminal Tribunals for Rwanda (‘ICTR’) and the former Yugoslavia (‘ICTY’).²² While this seems not to have affected the generation of scholarship – quite the contrary, one might argue – it appears that, found by a fear of losing its relevance and validity, it is moving in too many directions too fast, at the risk of becoming not only a fragmented body of scholarship but distant and disconnected to practice. Accordingly, and as called for by Sergey Vasiliev, “there needs to be a collective deliberation on the question of what (new) intellectual projects it should reinvest itself in the near future in order to preserve its validity, particularly (though not only) *vis-à-vis* practice”.²³ However, the current condition also seems to speak to broader and deeper notions about the ‘identity’ of the international criminal justice project – what it ‘is’ compared to other systems of justice – and to a strained self-image as a result of the recurrent criticism on the gaps between its promises and the realities of what it can (be expected to) deliver. Indeed, it seems a standard critique of international criminal justice these days is to find some lofty ideal of the ICC (easily found in the Rome Statute’s Preamble or in celebratory speeches by representatives of the Court, States Parties, or the NGO community) and demonstrate how the ICC is unsuccessful in

¹⁹ Immi Tallgren, “The Voice of the International: Who Is Speaking?”, in *Journal of International Criminal Justice*, 2015, vol. 13, no. 1.

²⁰ Darryl Robinson, “The Identity Crisis of International Criminal Law”, in *Leiden Journal of International Law*, 2008, vol. 21, no. 4.

²¹ Sergey Vasiliev, “On Trajectories and Destinations of International Criminal Law Scholarship”, in *Leiden Journal of International Law*, 2015, vol. 28 no. 4, p. 705. See also Frédéric Mégret, “The Anxieties of International Criminal Justice”, in *Leiden Journal of International Law*, 2016, vol. 29, no. 1.

²² Mikkel Jarle Christensen, “From Symbolic Surge to Closing Courts: The Transformation of International Criminal Justice and its Professional Practices”, in *International Journal of Law, Crime and Justice*, 2015, vol. 43, no. 4.

²³ Vasiliev, 2015, p. 708, see above note 21.

achieving it. In response, the enthusiasm of ICC advocates, academics and practitioners for an expanding international legal regime is now frequently replaced by the need to ‘manage’ expectations.²⁴

International criminal justice thus finds itself in the paradoxical situation of not living up to its expectations, but also failing those beyond the immediate application of its legal institutions. Perhaps animated by the initial enthusiasm for the project – and certainly against its limits – international criminal justice has become a dominant global framework and interpretative tool for framing global grievances. The language of crime and individual criminal responsibility are invoked to de-legitimize violence globally, reflecting an important normative development where particular criminal acts and violations of rights are codified as issues of universal concern, as a matter of common responsibility in a perceived shared sense of humanitarian consciousness. Questions thus need to be asked not only about the implications of juridifying the complex social phenomena that mass violence is, but more profoundly about what kind of global society is constituted by international criminal justice.²⁵

From this brief stocktaking follows a simple observation: any attempt to resolve the current predicaments of international criminal justice must be preceded by an understanding of the dynamics and processes through which these circumstances have arisen. What this entails, essentially, is that in order to understand power in and of international criminal justice, there is a need to understand the social conditions that make this power possible. In comparison with international legal scholarship generally, sociology of international criminal justice approaches its research objects in a broader institutional context. Whether this concerns the particular institutionalized forms of judicial practice of international criminal law, or the ICC’s role in shaping the global social order, sociology’s impulse to engage critically with questions of power and legitimacy – including social classes, identities, and ways of life structuring social prac-

²⁴ For a recent discussion on the ICC’s ‘turn to the practical’, see Mark Kersten, “Whither the Aspirational ICC, Welcome the ‘Practical’ Court?”, *EJIL: Talk!*, 22 May 2019 (available on its web site). There is an interesting parallel to domestic criminal justice discourses in late-modern Western democracies from the 1960s to the 1980s, which saw a shift from a strong faith in the transformative effects of criminal justice to ‘nothing works’, and then onwards to ‘what works’. See Francis T. Cullen and Paul Gendreau, “From Nothing Works to What Works: Changing Professional Ideology in the 21st Century”, in *The Prison Journal*, 2001, vol. 81, no. 3.

²⁵ Lohne, 2019, see above note 11.

tices – makes it a disciplinary lens particularly apt for studying the current state of international criminal justice.²⁶ For example, whereas international legal scholarship generally deals with legitimacy as legality or as abstract politico-philosophical aims, a sociological approach to legitimacy is concerned with whether power is acknowledged as ‘rightful’, ‘appropriate’, or ‘just’ by relevant agents; in short, to what extent claims to legitimacy gain social acceptance.²⁷ What matters, then, is the *processes* through which an authority justifies its power, and comes to be reflective (not necessarily representative) of society.

Moreover, following Max Weber’s basic observation that only individuals – not institutions and laws – have intentions, the *actors* inhabiting those institutions and prescribing those laws become key to understanding the developments of these very same institutions and laws.²⁸ For example, in a recent publication, I have demonstrated how the aforementioned identity crisis of international criminal justice can be understood through the prism of NGO representatives lobbying the ICC and States Parties. I have shown there how they perceived that international criminal justice is intended to provide a type of ‘victims’ justice’ connected with transitional justice justifications of establishing truth, memory and public recognition of suffering, rather than fairness in a substantive, international, criminal justice sense.²⁹

At the same time, sociological approaches are attuned to how actors and processes are embedded in, and productive of, social *structures* – relatively stable patterns of arrangements, such as class, or socioeconomic stratification, networks, institutions, and norms. In international criminal justice, it seems particularly important to situate power mainly in relation to patterns of global organization, not least because it mobilizes universalist assumptions – humanity, justice, global law – that disguise the fact of

²⁶ On the potential of sociological approaches to international ‘objects’, see Mikael Rask Madsen, “Reflexivity and the Construction of the International Object: The Case of Human Rights”, in *International Political Sociology*, 2011, vol. 5, no. 3; Mikael Rask Madsen, “Sociological Approaches to International Courts”, in Cesare P.R. Romano, Karen J. Alter, and Yuval Shany (eds.), *The Oxford Handbook of International Adjudication*, Oxford University Press, Oxford, 2014.

²⁷ Beetham, 2013, see above note 10.

²⁸ Madsen, 2014, see above note 26.

²⁹ Kjersti Lohne, “NGOs for International Justice: Criminal or Victims’ Justice?”, in Andreas Føllesdal and Geir Ulfstein, (eds.), *The Judicialization of International Law: A Mixed Blessing?*, Oxford University Press, Oxford, 2018.

situatedness. Yet, it is created and practiced in particular spaces by particular individuals that occupy particular positions in the global stratified order. Mindful that the founding fathers of sociology of law approached law and legal institutions as shapers of modernity,³⁰ a question may be asked about what kind of globality, or global society, is constituted by international criminal justice. Thus, a sociological approach that sees international criminal law from the ‘outside’ – as constitutive of and by society – enables an empirically founded critique of the power that international criminal justice embodies.

Finally, and notwithstanding examples to the contrary, the sociological distance involved in ‘objectivizing’ international criminal justice as a field of research also enables more attention to the role of emotions, logic, and *representations* in international criminal justice. As an empirical social science, this also means – generally – a stronger distinction between the ‘is’ and the ‘ought’. The normativity of sociological approaches is often – not always – much less prominent than much of the scholarship that characterizes international criminal justice. In a field as troubling, emotional, and horrifying as international criminal justice truly is, this can be a particular challenge. It can be difficult to be ‘objective’ or maintain what can be called academic distance regarding people and institutions that strive to do good, especially when one is confronted with representations of the suffering they are attempting to address and aspiring to put a stop to. However, the difficulty this may entail – in confronting and unpacking power in a field that above all is filled with good intentions – is at the same time a critical pointer to the moral outrage on which international criminal justice depends. Indeed, it remains a sociological pointer to what Didier Fassin would refer to as ‘the morally driven, politically ambiguous, and deeply paradoxical strength of the weak’.³¹ Understanding how such humanitarian reason – or governance – works through international criminal justice is a question for the sociology of international criminal justice.³²

³⁰ Émile Durkheim, *The Division of Labour in Society*, MacMillan Publishing, London, 1984; Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, University of California Press, Berkeley, 1978.

³¹ Didier Fassin, *Humanitarian Reason: A Moral History of the Present*, University of California Press, Berkeley, 2011.

³² Kjersti Lohne, “Penal Humanitarianism beyond the Nation State: An analysis of International Criminal Justice”, in *Theoretical Criminology*, Sage Journals, 2018. See also Sara

2.3. Conceptual Orientations in the Sociology of Law

The discipline of sociology has a long and significant tradition of studying law and legal institutions. Its founding fathers – Émile Durkheim and Max Weber – and contemporary giants – Jürgen Habermas, Pierre Bourdieu, Michel Foucault, Niklas Luhmann and Bruno Latour – have all engaged law, in some way or another, as a point of departure for inquiry into the social ordering of society and its development.³³ Whereas legal studies generally engage in efficiency-oriented studies of law ‘on their own terms’ in order to understand law’s internal workings, or, alternatively, undertake external and evaluation-oriented approaches that focus on law’s normative justifiability, the sociology of law places law in the context of society and social sciences, as *law-in-society* whose basic problematique is concerned with how law influences society, how society influences law, and how law and society are co-constituted.³⁴ The sociology of law is thus the body of research concerned with external and empirically oriented analyses of the characteristics of systems of law, their causes, developments, and effects, and the functions and objectives of legal institutions and practices.³⁵

To approach law – and thus also legal actors, institutions and practices – from the perspective of sociology means, perhaps to no surprise, to actuate theories of society. These theories, or sociological approaches to law, can generally be conceptualized by four conceptual couplets: viewing law from *internal* – *external* perspectives, in relation to *consensus* – *conflict* in society, as determined by *structure* – *agency*, and as analysed at the

Kendall and Sarah Nouwen, “International Criminal Justice and Humanitarianism”, *Research Paper 69*, University of Cambridge Faculty of Law, 2018.

³³ Durkheim, 1984, see above note 30; Weber, 1978, see above note 30; Jürgen Habermas, *The Theory of Communicative Action, Vol. 2*, Beacon Press, 1984; Pierre Bourdieu, “The Force of Law: Toward a Sociology of the Juridical Field”, in *Hastings Law Journal*, 1986, vol. 38; Michel Foucault, *Discipline and Punish: The Birth of the Prison*, Pantheon Book, 1977; Niklas Luhmann, *Law as a Social System*, Oxford University Press, Oxford, 2004 (1993); Bruno Latour, *The Making of Law: An Ethnography of the Conseil D’état*, Polity Press, 2010.

³⁴ Thomas Mathiesen, *Retten i samfunnet: En innføring i rettssosiologi*, Pax, Oslo, 2001.

³⁵ Kjersti Lohne and Kristin Bergtora Sandvik, “Bringing Law into the Political Sociology of Humanitarianism”, in *Oslo Law Review*, 2017, vol. 4, no. 1; see generally Mathieu Deflem, *Sociology of Law: Visions of a Scholarly Tradition*, Cambridge University Press, Cambridge, 2008. For a difference between sociology of law and socio-legal studies, see Reza Banakar and Max Travers, *Theory and Method in Socio-Legal Research*, Bloomsbury Publishing, 2005.

micro – macro levels. These categories are in themselves so-called Weberian ‘ideal types’ – simplifications used as analytical tools in sketching out the main theoretical approaches to law and society. This means that there are, of course, several nuances within the classifications; they may blur into one another, and they are not always mutually exclusive. Indeed, while these conceptual couplets have often been treated as analytical binaries, many contemporary studies in the sociology of law and sociology generally stress the importance of bridging these gaps and treating them as co-constitutive of one another as will be further explained below.

2.3.1. Internal – External

The first conceptual couplet within the sociology of law concerns the question of boundaries, and that of defining the research object; in short, of what is considered analytically relevant to a study of power in international criminal justice. How one ‘objectivizes’ international criminal justice as a research object necessarily depends on one’s research questions and methodologies. Whereas scholars coming from a legal background will tend to emphasize the *internal* legal system, social scientists may stress *external* perspectives, as law and legal actors, discourses and practices are taken as points of empirical departure for an analysis of the ‘social’. Generally, this entails that one may not necessarily accept the readily available ‘scripts’ in international criminal justice, that is, the dominating and prescriptive discourses and *savoir faire* in the field.³⁶ For actors *in* international criminal justice, the questions that sociology and sociologists are interested in may seem rather trivial, often even naïve. However, sociology’s analytical strength is precisely to make sense of that which is taken for granted – what Pierre Bourdieu calls *doxa*.³⁷

The composition of the contributions to this book has a major advantage in this respect, in that it integrates both internal and external perspectives on power in international criminal justice through its unique blend of legal practitioners and interdisciplinary scholars. Indeed, one could argue that a volume of this sort is particularly equipped to offer what Jürgen Habermas refers to as a ‘double perspective’ of law, and to give a significant contribution to the ‘full reality’ of power in international

³⁶ Madsen, 2011, see above note 26.

³⁷ Pierre Bourdieu, *Outline of a Theory of Practice*, Vol. 16, Cambridge University Press, Cambridge, 1977.

criminal justice.³⁸ In other words, our approach is both attentive to the legal norms of international criminal law, including the perceptions of its legal actors, as well as the external mechanisms and social institutions that co-constitute this volatile world of international criminal law and international justice-making.

2.3.2. Consensus – Conflict

Most sociological approaches to law can be distinguished by their normative approach to law as reflecting consensus or conflict. For example, Émile Durkheim, one of sociology's founding fathers as mentioned above, sees the materiality of law as an observable manifestation of what he calls society's "collective consciousness", that is, the totality of beliefs and sentiments common to the average members of society (which, in turn, become a determinate system with a life of its own).³⁹ In this view, crimes are violations of the collective consciousness – as attacks upon something transcendent – and punishment of crimes not an act of personal vengeance, but "rather vengeance for something sacred" desacralized.⁴⁰ In this manner, criminal punishment becomes a 'speech-act'; a conversation that the social corpus is having with itself in order to ensure moral unity – bonds and boundaries – in society through differentiation, that is, processes of membership and exclusion. International criminal justice lends itself very well, on face value at least, to a Durkheimian analysis,⁴¹ keeping in mind

³⁸ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Polity Press, Cambridge, 1996.

³⁹ Émile Durkheim, "The Division of Labour in Society", Macmillan Publishing, London, 1984 (1893). The original French term *conscience collective* has been translated into English as both 'collective consciousness' and 'collective conscience', and should not be interpreted as reflective of any psychological state. Durkheim treats the concept of collective consciousness in various ways in his writings. For example, he sees it as a mode of integration in *The Division of Labour*, but treats it more as a general condition of society in Émile Durkheim and George E. G. Catlin, *The Rules of Sociological Method*, Free Press, New York, 1966. He replaces it with 'collective representations' in his later work – first discussed in Émile Durkheim, *Suicide: A Study in Sociology*, Free Press, New York, 1951. Here, he uses it to refer to the realm of social facts in society, along with his cultural or ideational intellectual trajectory. See also Steven Lukes (ed.), *The Rules of Sociological Method by Emile Durkheim*, The Free Press, New York, 1982; Denes Nemedi, "Collective Consciousness, Morphology, and Collective Representations: Durkheim's Sociology of Knowledge, 1894–1900", in *Sociological Perspectives*, 1995, vol. 38, no. 1, 1995.

⁴⁰ Durkheim, 1984, p. 56, 57, see above note 39.

international criminal justice's emphasis on legal expressivism,⁴² as the embodiment and materialization of a global morality (founded upon the ideology of humanism).⁴³

However, rather than seeing international criminal justice as a product of a self-evident morality, the point of departure for a sociology of international criminal justice attentive to power is concerned with how its contemporary form is the result of particular historical, political, and social struggles worthy of our critical attention. At the other end of the spectrum are scholars who approach law not as reflective of social consensus but as a product of social conflict – and ultimately, of domination and power. Yet also here, there are many variations. Whereas Marxist approaches view the legal system as part of a coercive and repressive toolbox of the dominant class, Weberian analyses would be more concerned with the forms of authority invoked in law's legitimation processes. Both of these perspectives have already made a significant impact on studies of international criminal justice (and international legal scholarship generally). Whereas Marxist approaches are easily read into much of the critical approaches to international criminal justice, including post-colonial and Third World Approaches to International Law (TWAAIL), a growing body of scholarship is concerned with the forms of authority at

⁴¹ Salif Nimaga, "An International Conscience Collective? A Durkheimian Analysis of International Criminal Law", in *International Criminal Law Review*, 2007, vol. 7, no. 4; Immi Tallgren, "The Durkheimian Spell of International Criminal Law?", in *Revue interdisciplinaire d'études juridiques*, 2013, vol. 71, no. 2.

⁴² Barrie Sander, "The Expressive Limits of International Criminal Justice: Victim Trauma and Local Culture in the Iron Cage of the Law", in *iCourts*, 2016, no. 38; Marina Aksenova, "Symbolism as a Constraint on International Criminal Law", in *Leiden Journal of International Law*, 2017, vol. 30, no. 2.

⁴³ Luigi D.A. Corrias and Geoffrey M. Gordon, "Judging in the Name of Humanity: International Criminal Tribunals and the Representation of a Global Public", in *Journal of International Criminal Justice*, 2015, vol. 13, no. 1.

play in international criminal justice,⁴⁴ with strong links to authority in global governance generally.⁴⁵

2.3.3. Agency – Structure

The third set of conceptual couplet in the sociology of law is concerned with whether behaviour is determined by social structures or human agency. Would Ocampo have acted differently if internal and institutional constraints, such as the Independent Oversight Mechanism (‘IOM’), were already in place during his term?⁴⁶ Are there structural explanations to the African critique of the Court or is it merely speech-acts from rogue States trying to escape criminal accountability? While the debate on structure and agency goes to the heart of sociological theory generally, it is important to be mindful of how it impacts legal thinking. For instance, whereas international criminal accountability presume an autonomous – and thus accountable – legal subject, the development of international criminal justice is driven by a strong faith in the ability of law in general – and criminal law in particular – to transform people and societies.⁴⁷ Indeed, the ‘fight against impunity’ for international crimes infers the “ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules”,⁴⁸

⁴⁴ Bert Swart, “Damaška and the Faces of International Criminal Justice”, in *Journal of International Criminal Justice*, 2008, vol. 6, no. 1; Peter Dixon and Chris Tenove, “International Criminal Justice as a Transnational Field: Rules, Authority and Victims”, in *International Journal of Transitional Justice*, 2013, vol. 7, no. 3; see also Hayashi and Bailliet, 2017, see above note 12. See also Leslie Vinjamuri, “The International Criminal Court and the Paradox of Authority”, in *Law & Contemporary Problems*, 2016, vol. 79.

⁴⁵ Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen (eds.), *International Court Authority*, Oxford University Press, Oxford, 2018. There is also a considerable literature on authority in international relations, such as those emphasizing the authority of epistemic communities, transnational advocacy groups, or international organizations generally. See work following the works of Peter M. Haas, “Introduction: Epistemic Communities and International Policy Coordination”, in *International Organization*, 1992, vol. 46, no.1; Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, Cornell, Ithaca, 1998; Michael Barnett and Martha Finnemore, “The Power of Liberal International Organizations”, in Michael Barnett and Raymond Duvall (eds.), *Power in Global Governance*, Cambridge University Press, Cambridge, 2005.

⁴⁶ The Independent Oversight Mechanism only became fully operational in 2017, although adopted by the ASP in 2009. Mr. Ocampo opposed the creation of the IOM during his office. See Bergsmo, Rackwitz and Tianying, 2017, see above note 3.

⁴⁷ Houge and Lohne, 2017, see above note 18.

⁴⁸ Judith N Shklar, *Legalism: Law, Morals, and Political Trials*, Harvard University Press, 1964.

presuming therefore that the *presence* of criminal accountability for international crimes will accordingly achieve their avoidance. However, deterrent rationalities presume rational actors who calculate the risks of detection and/or prosecution against the benefits of the crime.⁴⁹

Yet, in chaotic situations of war, conflict, and collective offenses – no matter how institutionalized and organized the violence may seem, to what extent is it possible to speak of individual, let alone calculated, rational – and moral – agency on the ground? Criminological, micro-sociological, and social-psychological research into excessive violence and war violence emphasize situational factors such as existential fears, extensive dehumanization processes, fatigue, peer pressures, orders, widespread propaganda and/or intoxication to explain the human potential for violent profusion.⁵⁰

This tension is presently epitomized in the *Ongwen* case before the ICC, as Dominique Ongwen is charged with international crimes he himself has been a victim of, as a former abductee and commander of the Lord's Resistance Army in Uganda.⁵¹

However, as said, few sociological theories would today undermine the importance of bridging the agency–structure debate. Pierre Bourdieu remains one of the most central social theorist concerned with resolving the distinction, using the concept of practice to recognize the relation between action and structure. Practice – practical activity – is always shaped by learning (*habitus*), contexts (*fields*), and structural conditions (distribution of *capital*), in addition to choice and creativity. Social structure is in other words embodied in our experiences as well as a matter of available resources or barriers. As will be returned to below, his conceptual framework also lends itself very well to the sociology of international criminal justice.

2.3.4. Micro – Macro

The final conceptual couplet in the sociology of law concerns the analytical scale; here, whether power in international criminal justice is studied

⁴⁹ Mark A Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press, Cambridge, 2007.

⁵⁰ See Houge and Lohne, 2017, p. 779, see above note 18.

⁵¹ Erin K Baines, “*Complex Political Perpetrators: Reflections on Dominic Ongwen*”, in *The Journal of Modern African Studies*, 2009, vol. 47, no. 2.

at the *micro* or the *macro* level of analysis. Studies at the micro level emphasize face-to-face interactions and the social power dynamics within the institutions of international criminal justice, such as within the OTP. These types of sociological studies are concerned with how individuals and their interactions influence development and decision-making within legal institutions, the most prominent examples being the role of prosecutors' and judges' 'individual' inclinations for the outcome of cases.

Studies at the macro level are concerned, by contrast, with overarching social structures, and how international criminal justice is both a product of power, and productive of power, within these larger structures, whether it be the current geopolitical landscape or the use of law as a structuring component of global society altogether. However, many studies combine layers of different analytic scales; indeed, most prominent sociological studies on law and legal institutions combine detailed empirical analysis at the micro level with sociological explanation at a more structural and overarching level.

2.4. Methodologies and Research Methods

The methodologies of the sociology of law are intimately connected with its research objectives, which, as seen above, are animated by various theoretical approaches to law and the social. The question of whether the sociology of law requires a particular set of methods beyond that already used in social science, is subject to debate.⁵² That said, there is nonetheless a dearth of scholarship and reflection on methods and methodology in the sociology of law, which Banakar and Travers explain by reference to the disciplinary background of those inhabiting the field, with lawyers – rather than social scientists – dominating socio-legal research.⁵³

However, as concerned with law-in-society, the sociology of law is an empirical science. This has epistemological and practical implications, insofar as it means that knowledge is generated by sensational experience, as opposed to 'pure' theory or rational thought. Similar to how the sociology of law actuates theories of society in its approach to law, it is also impelled by sociology's research methods and methodology. These are often divided into quantitative and qualitative methods, depending on what type of empirical data – information gathered through the scientific method –

⁵² Banakar and Travers, 2005, see above note 35.

⁵³ *Ibid.*

that is of analytic interest. Quantitative methods yield quantitative data, often through surveys or register data, which through statistical measurements of large amounts of data enable the identification of behavioural patterns and societal arrangements, such as internal consistency in international sentencing,⁵⁴ or potential bias of international judges towards their nation States' political interests,⁵⁵ both relevant to the judicial independence and the authority of international criminal courts. Besides statistical measurements, there is an expanding use of computational techniques in (the sociology of) law, whose application of big data, algorithms, and statistical modelling shifts the scientific impetus from understanding social behaviour to predicting it. Qualitative methodologies, on the other hand, are more concerned with understanding, and may use interviews or observations of a smaller number of individuals to probe deeper into individual meaning-making, their behavioural motivations, interpretations, reasoning, and practices.⁵⁶ In larger research projects, however, sociological approaches often combine a number of methods, and may include mixed-method design,⁵⁷ including quantitative and qualitative methods to explore both significant patterns of behaviour as well as their explanation.

2.5. The Sociology of International Criminal Justice

Although arriving late to the table, sociological approaches to international criminal justice are no novelty. Sociologists have been engaged with international criminal justice and its institutions for some time, in addition to the increasing body of interdisciplinary scholarship on international (criminal) justice that, in various degrees and ways, draws on sociological insights and methodologies. As conscientiously observed by Mikkel Jarle Christensen, the main lines of sociological inquiry on international criminal justice have been predominantly characterized by two main approach-

⁵⁴ Barbora Holá, Catrien Bijleveld, and Alette Smeulers, "Consistency of International Sentencing: ICTY and ICTR Case Study", in *European Journal of Criminology*, 2012, vol. 9, no. 5.

⁵⁵ Michal Onderco, Barbora Hla, and Stijn Ruiter, "Testing Detachment of International Criminal Tribunals: Empirical Evidence from the ICTY", in *Transnational Legal Theory*, 2013, vol. 4, no. 3.

⁵⁶ This is the methodology most often used by sociological and interdisciplinary enquiries of international criminal justice and examples are provided in Section 5.

⁵⁷ See for example, Charles Teddlie and Abbas Tashakkori (eds.), *Handbook of Mixed Methods in Social & Behavioral Research*, Sage Publishing, 2003.

es, namely one concerned with the production of knowledge, and a relational one inspired by the work of Pierre Bourdieu.⁵⁸

Concerned with the social production of new legal ideas and practices in and around the institutions of international criminal justice, the first approach draws on the work of, predominantly, Habermas,⁵⁹ Foucault,⁶⁰ and Latour.⁶¹ In general, this literature demonstrates how international criminal justice is ‘brought into being’ by analysing the ‘products’ of courts, such as documents, discourses, and other legal artefacts as empirical data rather than as legal statements.⁶² In mapping out the processes and strategies inherent in the everyday operation of international criminal justice, these studies offer unique insight into the social dynamics that structure international criminal justice as a way of ‘being’ in the world.⁶³ This approach is often, but by all means not always, dominated by legal scholars venturing into non-legal disciplines. As such, it often offers an ‘insider perspective’, and one that is attuned to law as both social and legal practice.

⁵⁸ Mikkel Jarle Christensen, “The Emerging Sociology of International Criminal Courts: Between Global Restructurings and Scientific Innovations”, in *Current Sociology*, 2015, vol. 63, no. 6; Christensen, 2015, see above note 22; Mikkel Jarle Christensen, “Preaching, Practicing and Publishing International Criminal Justice: Academic Expertise and the Development of an International Field of Law”, in *International Criminal Law Review*, 2017, vol. 17, no. 2; Dixon and Tenove, 2013, see above note 44; Lohne, 2019, see above note 11.

⁵⁹ Michael Struett, *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency*, Springer, 2008.

⁶⁰ Kamari Maxine Clarke, “Global Justice, Local Controversies: The International Criminal Court and the Sovereignty of Victims”, in Marie-Bénédicte Dembour and Tobias Kelly (eds.), *Paths to International Justice: Social and Legal Perspectives*, Cambridge University Press, Cambridge, 2007.

⁶¹ Kirsten Campbell, “Reassembling International justice: The Making of ‘the Social’ in International Criminal Law and Transitional Justice”, in *International Journal of Transitional Justice*, 2013, vol. 8, no. 1.

⁶² See, for example, Anette Bringedal Houge, “Representations of defendant perpetrators in sexual war violence cases before international and military criminal courts”, in *British Journal of Criminology*, 2015, vol. 56 no. 3.

⁶³ See, for example, Sarah Nouwen and Wouter G. Werner, “Doing Justice to the Political: The International Criminal Court in Uganda and Sudan”, in *European Journal of International Law*, 2010, vol. 21, no. 4; Sara Kendall and Sarah Nouwen, “Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract victimhood”, in *Law & Contemporary Problems*, 2013, vol. 76; Houge and Lohne, 2017, see above note 18.

Sociologically trained scholars who approach international criminal justice as part of global restructurings, however, dominate the second approach. The work of John Hagan is not only perhaps the earliest contribution to the sociology of international criminal justice, but is also a more explicit institutional study, in which he, in *Justice in the Balkans*,⁶⁴ and in later work with Ron Levi,⁶⁵ demonstrates the individual agency at play in the legal and political crafting of a new legal regime. With Dixon, Chris Tenove has also demonstrated how international criminal justice is a social field crafted at the intersection of human rights advocacy, diplomacy, and criminal justice.⁶⁶ In developing a *relational* sociological approach to international criminal justice further, Christensen has in particular analysed the practices and social stratifications at work in international criminal justice, animated by Bourdieu's concept of a field as a social space that is both structured and structuring at the same time.⁶⁷ In this relational approach (that also bridges the aforementioned agency–structure dilemma), the role of elites, legal professionals and other transnational networks is studied as part of 'making' the global through their competing strategies and practices. The study of international criminal justice is thus shown to benefit from a point of departure of the adversarial nature of its social field, as shaped by the continuous competition between and among different actors and agendas. In this manner, rather than offering a 'grand theory' of the global, relational sociology offers a set of conceptual tools for empirically approaching actual position-taking and practices in international criminal justice. The work of Joachim Savelsberg deserves particular mention. As part of his extensive scholarship on violence and legal intervention,⁶⁸ his work on Darfur especially demonstrates how different

⁶⁴ John Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal*, University of Chicago Press, Chicago, 2010.

⁶⁵ Jon Hagan and Ron Levi, "Social Skill, the Milošević Indictment, and the Rebirth of International Criminal Justice", in *European Journal of Criminology*, 2004, vol. 1, no. 4; John Hagan and Ron Levi, "Crimes of War and the Force of Law", in *Social Forces*, 2005, vol. 83, no. 4.

⁶⁶ Dixon and Tenove, 2013, see above note 44.

⁶⁷ Christensen, 2015, see above note 58.

⁶⁸ For example, Joachim J Savelsberg, "Knowledge, Domination, and Criminal Punishment", in *American Journal of Sociology*, 1994, vol. 99, no. 4; Joachim J. Savelsberg and Ryan D. King, "Institutionalizing Collective Memories of Hate: Law and Law Enforcement in Germany and the United States", in *American Journal of Sociology*, 2005, vol. 111, no. 2; Joachim J. Savelsberg, *Crime and Human Rights: Criminology of Genocide and Atrocities*, Sage Publishing, Los Angeles, 2010.

professional sectors or social fields – the media, the diplomats, humanitarian and human rights NGOs – frame violence in different ways, and how judicial intervention affects these representations. He thus goes beyond a micro-level focus on courts to provide an understanding of how the world acknowledges and understands violence.⁶⁹

In addition, several different strains of sociological scholarship on international criminal justice are emerging. For example, more studies now emphasize the cultural and social aspects of international criminal justice, often from a perspective of ‘symbolic interactionism’ that emphasizes how international criminal justice is performed into being through images, representations, and face-to-face social interactions.⁷⁰ Some of this work has also revisited (and reworked) Durkheim in connecting these practices to the making of global social order – in short, to what functions international criminal justice serves with respect to implementing and integrating a global society.⁷¹

Finally, there is also significant sociological work concerned with the reception of these institutions in the communities and towards their diverse constituencies – in short, how law affects society.⁷² As concerns the ICC in particular, large-scale studies by the Human Rights Center at the University of California, Berkeley – in co-operation with the Court – have contributed empirical knowledge of victims’ and survivors’ needs in response to mass violence and in their engagement with the Court.⁷³

⁶⁹ Joachim J. Savelsberg, *Representing Mass Violence: Conflicting Responses to Human Rights Violations in Darfur*, University of California Press, 2015.

⁷⁰ Wouter G. Werner, “We Cannot Allow Ourselves to Imagine What It All Means: Documentary Practices and the International Criminal Court”, in *Law & Contemporary Problems*, 2013, vol. 76; Sofia Stolk, “‘The Record on Which History Will Judge Us Tomorrow’: Auto-History in the Opening Statements of International Criminal Trials”, in *Leiden Journal of International Law*, 2015, vol. 28, no. 4; Marieke de Hoon and Kjersti Lohne, “‘All the World’s a Stage’: Constituting International Justice at the ICC Assembly of States Parties Meeting”, in Lianne J.M. Boer and Sofia Stolk (eds.), *Backstage Practices of Transnational Law*, Routledge Taylor & Francis Group, 2019.

⁷¹ Tallgren, 2013, see above note 41; Lohne, 2019, see above note 11.

⁷² There is also a substantial literature in legal anthropology, see, for example, the work of Gerard Anders and Nigel Eltringham.

⁷³ Alexa Koenig, Stephen Smith Cody, Eric Stover and Robin Mejia, *Bearing Witness at the International Criminal Court: An Interview Survey of 109 Witnesses*, Human Rights Center, University of California, Berkeley, School of Law, Berkeley, 2014; Stephen Smith Cody, Eric Stover and Mychelle Balthazard, *The Victims’ Court?: A Study of 622 Victim Partici-*

2.6. The Contributions of This Volume by Themes

Beyond the general features of the sociology of law and of international criminal justice that have been outlined so far, the objective of this volume is to push the understanding of power in international criminal justice by attuning to the social space of which it is part. In addition to being animated by various disciplinary, methodological and theoretical approaches, the present volume reflects some of the diversity and multiplicity of this space. In the coming chapters, the authors address power in international criminal justice from various perspectives and approaches. Steven Lukes' three dimensions of power – as decision-making, agenda-setting, and ideology – can be a useful tool to conceptualize the forms of power engaged with by our contributors.⁷⁴ Some deal with the explicit display of power as the *power to decide*, others with actors that have the *power to set the agenda*, and others still with the more subtle but equally important *power of thought, ideas, and ideology* that gives shape to international criminal justice.

2.6.1. Part I: Power in International Criminal Justice Institutions

Part I goes to the heart of the title and objective of this book. It addresses power in international criminal justice institutions, approached through the exploration of typographies of power, the professionals, the networks, and the bureaucratic domination in the institutions of international criminal justice, and the relevancy of the civil-common law divide. For example, at the Florence conference the deliberations focused on how, and in spite of widespread claims to the contrary, there is no clear process of hybridization of legal traditions in the procedures and practices of international criminal justice institutions. Rather, it was asserted that tensions between civil law and common law continue to evolve and fluctuate, and that it depends, in large, upon the composition of Chambers and the legal background of the Presiding Judge. In this and other ways, Part I speaks to the power to decide, to make judicial decisions, and to punish the part

pants at the International Criminal Court, Human Rights Center, University of California, Berkeley, School of Law, Berkeley, 2015.

⁷⁴ Steven Lukes, *Power: A Radical View*, Macmillan International Higher Education, 2004. See also Mayesha Alam, "Agency, Authority, and Autonomy: The Role and Impact of Interactions with Transnational Civil Society on the International Criminal Court's Operations", chap. 17 below.

of humanity that inflicts atrocious suffering upon the other. It speaks to the power to judge on behalf of an international society.

Gregory S. Gordon opens up the book's central problematique by inviting us to consider the consolidation of both individual and national power in the institutions of international criminal justice. Through a sharp analysis of an early release decision by the International Residual Mechanism for Criminal Tribunals ('MICT'), the chapter addresses the relationship between American First Amendment sensibilities of the MICT's President, Judge Theodor Meron, and the early release of Ferdinand Nahimana. In December 2003, Nahimana was given a 30-year sentence on various genocide and crimes against humanity charges for directing the Radio Télévision Libre des Mille Collines in Rwanda. Tracing the biographic and legal trajectory of Judge Meron in relation to the Nahimana case, Gordon critically examines the fact that the same judge who made a unilateral decision on Nahimana's early release, also sat in judgement of the defendant during the merits phase, took issue with the basis of liability, and dissented on grounds that the sentence was too harsh. By addressing power on multiple levels, Gordon's chapter is a reminder of how national policy interests may seep into judicial decision-making in international justice.

Alexander Heinze is also concerned with the dichotomy – or not – between civil law and common law. Through an analysis of jurisprudence, he shows how these categories lack clarity and definition and are of limited descriptive value. He suggests that this does not render them ill-suited – on the contrary, they may in fact serve as a tool for gaining a better understanding of why certain procedural approaches are selected over others. Drawing on the models of Mirjan Damaška, and himself influenced by the work of Max Weber, Heinze's analysis seeks to identify and define the internal system of procedural rules at the ICC. Indeed, his socio-legal analysis of jurisprudence demonstrates how insight into the nature of a society's legal system is shaped by the kinds of individuals who dominate it.

This view resonates with **Mikkel Jarle Christensen's** research, who in his sociological approach moves outwards, toward an external view on power in international criminal justice institutions. His chapter investigates the main forms of institutional power animating international criminal justice, approaching the latter as a relational social field following the work of Pierre Bourdieu. By developing the sociological approach

to international criminal justice, Christensen identifies new ways to conceive of power in the institutions of international criminal justice by building on examples of how specific professional practices are used to craft and leverage influence. The focal point is on what is recognized as *poles of power*. These poles have a double nature. They mediate access to certain positions and enable agents in these positions to mobilize specific forms of resources and project them towards impacting legal developments (understood broadly). This analytic approach enables Christensen to reveal the less obvious social and professional power-battles that characterize the daily workings of the field of international criminal justice. Such inquiry matters for the agents' ability to create legal results, including the production of narratives and symbolism, as well as their connections to larger diplomatic processes such as the creation and negotiation of new courts.

2.6.2. Part II: Representational Power in International Criminal Justice

A sociology of international criminal justice is interested in more than law, more than legal system and jurisprudence; it is concerned with international criminal justice as a social 'complex', including its laws, its institutions, its practices, but also its discourses, its performances, its rituals and symbols.⁷⁵ We are interested in international criminal justice as a field embedded in social structure and cultural meaning. In this way, power is not only direct, linear, and factual in the sense of having the power to decide and to punish, but also encompasses the power to produce the context in which the power to punish arises. Part II focuses on what Lukes calls the third dimension of power, namely the normative and ideological kind – the power to control what people think is 'right'.⁷⁶ In this way, a sociology of power in international criminal justice becomes central to understanding the international, or global, as a particular site of crime, justice, and community.⁷⁷

Joachim J. Savelsberg initiates Part II through an impressive empirical study, probing into the question of whether international criminal courts have representational power – “the chance to impress on a global

⁷⁵ Lohne, 2019, see above note 11.

⁷⁶ Lukes, 2004, see above note 74.

⁷⁷ Nesam McMillan, “Imagining the international: The constitution of the international as a site of crime, justice and community”, in *Social & Legal Studies*, 2016, vol. 25, no. 2.

public, even against resistance, an understanding of mass violence as a form of criminal violence”.⁷⁸ As mentioned before, drawing on sociological theory and on data from extensive empirical research on responses to the Darfur conflict, he documents how international criminal justice institutions and their supporters are engaged in struggles of competing representations. For example, “these include diplomats who privilege representations that open up spaces for mediation and negotiation, and humanitarian organizations that advance narratives that allow for collaboration with the perpetrator State in the interest of the delivery of humanitarian aid”.⁷⁹ Moreover, there are significant constraints and impediments to the representational power of international criminal justice institutions. For example, their institutional logic emphasizes individual actors rather than structural forces, neglects historical context, and applies a simplifying binary logic of guilty or innocent, victim or perpetrator, good or evil. Against these constraints, however, Savelsberg’s theoretical argument and empirical data document substantial representational power of international criminal courts.

Barrie Sander picks up the baton and addresses what he refers to as the “anti-impunity mindset”. As the call for criminal prosecutions has become the default response in response to mass violence, Sander examines the set of assumptions underpinning this mindset beyond the frame of criminal prosecution. By examining anti-impunity *as a mindset*, he illuminates its power and limits, both within and beyond the field of international criminal justice. He begins by defining the anti-impunity mindset through an examination of the human rights field’s struggle to end impunity for mass violence. He then turns to explore the *reach* of the mindset by examining three entities beyond the field of international criminal justice, namely truth commissions, local justice mechanisms, and civil human rights litigation. Despite their formally non-retributive nature, Sander shows how these three entities have all ended up embracing the assumptions of the anti-impunity mindset in practice. Next, the chapter demonstrates the *power* of the mindset by reviewing some of the principal critiques of the anti-impunity mindset, and its limits. Based on a thorough conceptual review, Sander argues that the capacity of the anti-impunity

⁷⁸ Joachim J. Savelsberg, “The Representational Power of International Criminal Courts”, see Chapter 6, below p. 281.

⁷⁹ *Ibid.*, pp. 282.

mindset to crowd out concern for issues of structural violence has been overstated.

Sarah-Jane Koulen continues the analysis of the anti-impunity mindset by probing the social and cultural spaces animating this particular set of meanings, understandings, and knowledge. Taking an ethnographic approach, Koulen beautifully draws us into the everyday world of international justice-making by teasing out its aesthetics and affects, taste, and texture. She is interested in the spaces in which the makers of international justice work, meet, and congregate, and how such spaces are arranged, built, or adorned to convey a particular set of meanings and understandings. In their expression of normative power, these cultural spaces also serve, she argues, to buttress against external critique. Her chapter focuses on an opening of an art exhibit on international criminal justice in New York City, bringing together several members of what she identifies as the field's 'cohort'. By doing so, she forces us to reflect on the role that affect, aesthetics, and social texture do for understanding the workings of power in international criminal justice, as well as the power of understandings within it.

Marina Aksenova continues the probing of international criminal justice's representational force by skilfully combining social theory and legal analysis. Her chapter focuses on how the ICTY was instituted with the representational aim of condemning evil deemed universal. In bringing to light symbolic expression as the underlying objective of the ICTY, she draws on Michel Foucault in analysing the content of its outputs as discourse. To make sense of how this discourse is structured – and productive – she relies on the anthropologist Maurice Bloch, who explained symbolic significance of rituals by connecting individuals to institutional structures transcending their consciousness. Aksenova thus analyses how symbolic expression at the ICTY manifests itself in a number of ways: through the process of its establishment, its institutional design, rhetoric in the judgments, and, finally, through the way in which the ICTY frames its achievements. In this manner, she not only demonstrates the representational power of the ICTY, but also engages the social functions of international criminal justice more generally.

2.6.3. Part III: State Power and Autonomy in International Criminal Justice

While the ICC's jurisdiction is based on delegated authority from States, by virtue of either State ratification or a Security Council referral, the legitimacy of international criminal justice as *international* criminal justice is nonetheless contingent on autonomy and independence from individual state power. Mindful of this delicate balance in the power of international criminal justice, Part III delves further into the relationship between state power and autonomy in international criminal justice.

Judge **William David Baragwanath** begins Part III by addressing the power of States to make, *or refuse to make*, international criminal law. Specifically, he is concerned with resisting terrorism, and how international law may be put to work for the creation, and thus, the international recognition of an international crime of terrorism, concerned with what role international criminal law can play in pursuing terrorism. While the ultimate power to make international law is possessed by States, Judge Baragwanath is also explicit, however, in his emphasis on the duties of the legal profession. In his contribution, he urges the legal profession to take up the challenge, and “to recognize that the legal response to terrorism must not be neglected by any of us anywhere in a position to make a relevant contribution”.⁸⁰ As such, his contribution is a sharp reminder of the role of transnational legal power networks to the shaping and making of international law,⁸¹ and their professional decoupling from the State.

Marieke de Hoon continues the probing into the making of international criminal law, but shifts the perspective from Judge Baragwanath's normative and forward-looking faith in law to solve global violence to an empirical investigation into the making of the crime of aggression at the intersection of international legal autonomy and State power. Based on document analysis and participant observations, de Hoon traces the trajectory of the negotiation history of the crime of aggression, and teases out the various positions and roles of States, and the role of diplomats as legal entrepreneurs in its creation. As such, she demonstrates the palpable tension yet diplomatic oeuvre of balancing State power and supra-State legal autonomy in the construction of the international legal order. Her analysis

⁸⁰ William David Baragwanath, “International Law-Making on Terrorism: Structural and Other Powers of Resistance”, see Chapter 10 below, p. 443.

⁸¹ Madsen, 2014, see above note 8.

demonstrates the influence of these actors for the ‘kind’ of law that is created, and how it comes into conflict with what a criminal legal system fundamentally aims to do, such as providing “equality before the law and to impose a vertical, authoritative and coercive power relationship upon those that violate it. The crime of aggression thereby sits somewhat uneasily with criminal law’s fundamental notion of equality before the law by adhering to State consent, the fundamental principle of public international law”.⁸²

Sergey Vasiliev zooms in on the exercise of power and autonomy *vis-à-vis* international and special or hybrid criminal tribunals by political-administrative bodies vested with responsibility for running them, referred to as international judicial governance institutions (*injugovins*). The practices of governance of these Tribunals and the functioning of *injugovins* has been subject to scant attention, and his chapter advances this emerging line of inquiry by placing those *injugovins* at the front and centre of the debate on power in international criminal justice. In testing the hypothesis that *injugovins* exercise agency of their own, and as such, impact the power individual States exert *vis-à-vis* the courts as part of collective entities, his chapter first outlines the relationship between judicial governance and power, and highlights the benefit of non-legal approaches to studying that relationship. Drawing on historical, comparative, and socio-legal perspectives, the chapter then examines past and present governance schemes of international criminal tribunals, and offers a classification of the main governance models including their features and challenges. Finally, the chapter reviews some of the limitations of the ICC model and addresses how its defects could be remedied. As Vasiliev sharply observes, “[t]he understanding of the power dynamics animating this field would remain fragmentary and imbalanced without looking also at the legal and institutional frameworks and practices used by States to delegate, exercise, contest and reclaim power over” international criminal tribunals.⁸³

Jacopo Governa and **Sara Pausco** move from the national to the regional, and offer a thorough analysis of the European Union’s (‘EU’) engagement with international criminal justice. They show that while EU

⁸² Marieke de Hoon, “Negotiating the Crime of Aggression: Between Legal Autonomy and State Power”, see Chapter 11 below, pp. 476–477.

⁸³ Sergey Vasiliev, “Judicial Governance Entities as Power-Holders in International Criminal Justice: A Plea for a Socio-Legal Enquiry”, see Chapter 12 below, p. 488.

competences in criminal law are still not directly involved in international criminal law, EU action – especially their external relations – are guided by the need to implement its policy interests. By mapping and documenting the EU’s external missions and their intersections with ICC interventions, Governa and Paiusco suggest that the EU and the ICC can complement one another in a more comprehensive approach to transitional justice in unstable regions. However, rather than fighting impunity for international crimes *per se*, they argue that it is the EU’s proper interests – border control, economy, security – that drive the EU’s engagement in rule-of-law reform, capacity-building, and the like. As such, they suggest that realist power may explain the EU’s approach to international criminal justice as part of their wider approach to external relations. This entails, they conclude, that “only if proper interest in international justice becomes part of the Union can there be identification between self-interest and normative advance in this field, as far as the EU as an actor is concerned”.⁸⁴

In the last chapter of Part III, **Mark Klamberg** scrutinizes State power and autonomy in international criminal justice from various theoretical positions in international law and relations. Exploring recent developments in international criminal justice such as the decision of the Pre-Trial Chamber II in the *Afghanistan* situation, Klamberg analyses whether international criminal justice is an independent system or is subject to power politics – or even a tool of hegemonic States. He engages the debate on structure and agency, and specifically, how structural constraints and room for agency play out in international criminal justice. He addresses the hegemonic tendencies of international criminal justice, yet concludes by presenting a nuanced defence for international criminal justice grounded in a cosmopolitan liberal approach.

2.6.4. Part IV: Non-State Power and External Agents in International Criminal Justice

Albeit authorized and dependent on States and State co-operation, a plethora of other *non-State actors* also engage with international criminal justice. Indeed, as aptly put by Philippe Sands in his keynote speech at the European Society of International Law’s 2016 annual conference, “[o]ur

⁸⁴ Jacopo Governa and Sara Paiusco, “Is the European Union an Unexpected Guest at the International Criminal Court?”, see Chapter 13 below, pp. 621–622.

legal world is no longer just about States”.⁸⁵ In this final part, the chapters concern themselves with non-State power and external agents seeking to shape the practice and development of international criminal justice, including the underlying arrangements and assumptions animating the field.

Djordje Djordjević and **Christopher B. Mahony** consider the nexus between the fields of international criminal justice and development, an area of increasing relevance considering the growing attention to domestic prosecutions of international crimes under the aegis of positive complementarity. The authors point to how, since the early 2000s, development actors have garnered increasing attention for their potential contributions to develop national capacity for prosecutions of conflict-related crimes – often considered among the most sensitive tasks in transitional and post-conflict settings. In spite of these connections in practice, however, the authors note how “the nexus between complementarity and development was never systematically explored by researchers to identify risks and added value for national prosecutions”.⁸⁶ Taking this research gap as the point of departure, they address the critical questions of how development actors can adequately take on this challenge, and if so, what the advantages of this form of engagement are.

In the next chapter, **Jacob Sprang**, **Benjamin Adesire Mugisho**, **Jackson Nyamuya Maogoto** and **Helena Anne Anolak** interrogate yet another set of external actors, as they consider the relationship between the ICC, the African Union (‘AU’) and the proposed African Court of Justice and Human Rights (‘ACJHR’). They explain how the ICC indictment against the former Sudanese President Omar Al-Bashir sparked the flames of discontent amongst African States towards the ICC, which arguably escalated the process to establish a regional court of human rights in Africa. Seeking to provide the ICC a way to overcome its critiques and challenges to its authority by African States, the authors suggest that the ICC should embrace the proposed ACJHR, instead of trying to squeeze out what they view as a new, viable alternative approach. While considering challenges of complementarity and co-operation, they assert that “institutionalizing a relationship between the ACJHR and the ICC would allow

⁸⁵ Philippe Sands, “Reflections on International Judicialization”, in *European Journal of International Law*, 2017, vol. 27, pp. 885–89.

⁸⁶ Djordje Djordjević and Christopher B. Mahony, “Development and National Prosecutions: Addressing Power and Exclusion for Sustainable Peace and Development”, see Chapter 15 below, p. 651.

for African States to come to the table as partners in shaping the international legal framework, rather than obstructing a system that they are excluded from”.⁸⁷

Mayesha Alam continues the exploration of non-State actors’ significance and influence on dimensions of power in international criminal justice by considering the role of transnational civil society in their interactions with the ICC. Specifically, she is concerned with the modes, mechanisms, and motivations that drive transnational civil society interactions with the Court, and examines the agency, authority, and autonomy of transnational civil society *vis-à-vis* the ICC. Based on empirical data, this enables her to analyse the impact of transnational civil society interactions on the Court’s operations. She finds that, “while unlikely and unable to compel the ICC to act in accordance to their wishes, transnational civil society groups continue to hold authority and wield power through agenda-setting, technical expertise, and moral accountability”.⁸⁸ She notes how while the ICC’s resource constraints necessitate collaboration and cooperation with a range of non-State partners including transnational civil society, this also, however, has implications for the autonomy of the latter.

As Alam, **Chris Tenove** also offers an empirical contribution based on qualitative analysis of interview data. Based on focus group discussions and interviews with survivors of conflict and international crimes in Kenya and Uganda, he examines the ways in which international criminal justice processes may empower or disempower victims in their pursuit of justice. Critically engaging with the vast literature that holds the ICC, and international criminal justice generally, to be either empowering or disempowering for victims, Tenove argues that these oppositional narratives of survivors’ experiences is reductionist and cursory. Instead, he suggests that “tribunals are *selective* about who receives victim status, they *channel* people’s agency in particular ways, and their impact is highly *context-dependent*”.⁸⁹ As a result, victim status is not simply empowering or dis-

⁸⁷ Jacob Sprang, Benjamin Adesire Mugisho, Jackson Nyamuya Maogoto, and Helena Anne Anolak, “The Power of Narratives: The African Union’s Bid to Develop an Alternative International Criminal Law Narrative”, see Chapter 16 below, p. 710.

⁸⁸ Mayesha Alam, “Agency, Authority, and Autonomy: The Role and Impact of Interactions with Transnational Civil Society on the International Criminal Court’s Operations”, see Chapter 17 below, p. 714.

⁸⁹ Chris Tenove, “International Criminal Justice and the Empowerment or Disempowerment of Victims”, see Chapter 18 below, p. 744.

empowering – “it enhances the agency of some people in some contexts to pursue some justice aims, but it can also pose serious risks and constraints”.⁹⁰ He further considers the implications of this framework for understanding the power of international criminal justice, and for evaluating the capacity of international criminal tribunals to advance justice for victims.

Emma Irving and **Jolana Makraiová** engage with an increasingly important set of external actors and practices shaping the content of international criminal justice, namely the role of social media. Aptly labelled “Capture, Tweet, Repeat: Social Media and Power in International Criminal Justice”, their chapter examines ways in which social media may affect power dynamics among international criminal justice actors. They consider how social media have significantly altered the way people communicate, and how these shifts in communication have influenced power dynamics in conflict – and, as a consequence, conflict responses. Besides their potential evidentiary value, the authors point to how the use of social media in conflict could potentially have a systemic and fundamental impact on international criminal justice, providing, for instance, an avenue to (at least partially) side-step an un-co-operative State and collect evidence remotely. However, the authors also consider the potential negative effects of the increased relevance of social media in international criminal justice. Among issues considered are loss of credibility in the Court as a result of its impotence *vis-à-vis* graphical, visible and continuous violence (in Syria, for example), or obscuring the voice of victims that do not garner the most ‘likes’ and ‘shares’ on social media. Moreover, the authors note how, with the increased interaction of social media and international criminal justice, yet another set of non-State actors enter the field of international criminal justice, namely social media companies.

In the volume’s final contribution, **Tosin Osasona** considers the influence of the ICC upon electoral processes in Africa, and specifically in Nigeria. Against the background of ICC’s prosecutorial focus in Africa, and consideration of critiques concerning such practice, Osasona evaluates the effect of the ICC’s intervention on the conduct of political leaders in Africa. As a case study, he focuses on Nigeria during the 2015 presidential electoral process. Considering the Nigerian political context, Osasona notes that while a number of factors have been highlighted as being

⁹⁰ *Ibid.*, pp. 744–745 below.

responsible for the success of the 2015 presidential elections, the role of the ICC in the process has been especially underlined. For instance, he points out that Nigerian stakeholders considered only the ICC effective and independent enough to report to intervene. He argues that as long as mass violence is perpetrated, threatened, or envisaged in the context of elections, the ICC has a definite responsibility to act. However, at the same time, he recognizes the potential problematic nature of the ICC intervening in the domestic affairs of electoral politics, as that practice may fuel perceptions of the Court as criminalizing outcomes it considers problematic. Above all, Osasona's contribution demonstrates the reach of power in international criminal justice.

2.7. Conclusion

Through our participation at the Florence conference, and in our work on this volume, we share the goal of moving towards a deeper understanding and critical scrutiny of the various forms and expressions of power in international criminal justice – indeed, to work for a “more accurate mirror” of power in international criminal justice.⁹¹ This has been our analytic aim, not a cynical and destructive one. We have only begun to outline the ways in which a sociology of international criminal justice may contribute to such a pursuit. We believe the coming chapters demonstrate the significance of such an approach to a more reflexive engagement with power in international criminal justice across policy, practice, and scholarship.

⁹¹ Bergsmo, Kaleck, Muller and Wiley, 2017, see above note 4.

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Power in International Criminal Justice

Morten Bergsmo, Mark Klamberg, Kjersti Lohne and Christopher B. Mahony (eds.)

This book comprehensively explores the role and manifestations of power in international criminal justice. Twenty chapters discuss this topic in four main parts: power in international criminal justice institutions (Part I), representational power in international criminal justice (Part II), state power and autonomy in international criminal justice (Part III), and non-state power and external agents in international criminal justice (Part IV). The book invites the crystallisation of a sociology of international criminal justice, and argues that among its focuses should be the wielding of power within and over international criminal justice institutions, just as this is a feature of sociology of law within several countries.

The contributors to this anthology are Marina Aksenova, Mayesha Alam, Helena Anne Anolak, David Baragwanath, Morten Bergsmo, Mikkel Jarle Christensen, Marieke de Hoon, Djordje Djordjević, Gregory S. Gordon, Jacopo Governa, Alexander Heinze, Emma Irving, Mark Klamberg, Sarah-Jane Koulen, Kjersti Lohne, Christopher B. Mahony, Jolana Makraiová, Jackson Nyamuya Maogoto, Benjamin Adesire Mugisho, Tosin Osasona, Sara Paiusco, Barrie Sander, Joachim J. Savelsberg, Jacob Sprang, Chris Tenove and Sergey Vasiliev. The chapters draw on papers presented at a conference held in Florence in October 2017 co-organized by the Centre for International Law Research and Policy (CILRAP) and the International Nuremberg Principles Academy.

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candidate for prosecutor at the end of their term.

252. The Experts recognise the difficulty of applying a new tenure system to staff already in the Court, so they suggest that the system be applied only to new recruitments for P-5 and Director-level positions as these come vacant. This would not preclude the Court from encouraging senior staff who have served in the Court for a long time to consider taking early retirement, including through offering financial packages.
253. Notwithstanding that this would not apply to existing staff, there is likely to be considerable resistance to the introduction of tenure in many parts of the Court (even if there is also some enthusiasm for this approach in other quarters). But it is

the TOAEP this is a measure essential to addressing effectively
a Torkel Opsahl Academic EPublisher knesses of the Court. Not least it would bring fresh
approach, which will as more dynamism into the Court across all its
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