
A Sophisticated Beast? On the Construction of an ‘Ideal’ Perpetrator in the Opening Statements of International Criminal Trials

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Abstract

International criminal trials expose a paradox with regard to the portrayal of the defendants. While criminal law is based on the idea that perpetrators are responsible agents – human members of a community who can be held accountable before the law – speaking about mass atrocity involves a dimension of inhuman evil that places the accused outside the realm of humanity. This article interrogates how, concretely, the dual attribution of a despicable human character as well as inhuman evilness to the defendants takes shape in international courtrooms. It analyses the depiction of the defendants in the opening statements of the prosecution and the subsequent responses of the defence teams in 17 cases at four international criminal courts and tribunals. Opening statements are unique media moments that engage with describing the personality of the defendant rather than merely focusing on his deeds. The empirical material reveals how, in these statements, trial participants conflate humanizing and dehumanizing language and create an ‘ideal’ stereotype of the inhuman human. The article theorizes the function of this stereotype and argues that it is mobilized in order to fit the defendant into a narrative that aims to legitimize international criminal trials and attempts to balance their multiple, contradictory goals.

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1 Stories of (In)humanity

[T]he purely evil of these deeds of destruction are so horrific, terrible and devastating in their scope, words in any language do not describe the offences committed by these indictees.¹

How can one describe acts of unimaginable, unspeakable mass atrocity? And how does one portray an individual who allegedly committed such offences? This challenge has been taken up by philosophers, novelists and lawyers alike. Key to this endeavour is the conceptualization of (in)humanity. In international criminal trials, this has resulted in a remarkably paradoxical depiction of the alleged perpetrator. On the one hand, international criminal law (ICL) relies on the foundations of liberal democracies by treating perpetrators as accountable agents; exactly because they are part of humanity, they have the responsibility to adhere to its norms and values and can and should be held accountable before an international criminal tribunal.² On the other hand, these horrendous crimes appear to be difficult to classify as human acts, which warrants the invocation of a beastly, evil perpetrator with whom it is hard to identify and who is placed ‘on the outer borders of humanity’.³ Consequently, defendants are located both inside and outside the all-encompassing community that is invoked and created at international criminal courts and tribunals.⁴

The paradoxical (in)humanity of perpetrators of mass atrocity has received ample theoretical attention over the past decades in the field of international criminal justice.⁵ This article contributes to this discussion with an empirical analysis of how this paradox is concretely shaped in courts and tribunals that deal with cases of mass atrocity. It examines how the specific trial context gives rise to certain stereotypical features and considers the construction of an ‘ideal perpetrator’ in analogy with Nils Christie’s famous ‘ideal victim’ stereotype and similar research on the ‘ideal victim’ in

¹ Opening Statement, *Sesay, Kallon and Gbao (RUF)* (SCSL-04-15-T), Trial Chamber I, 5 July 2004, at 29.

² Duff, ‘Authority and Responsibility in International Criminal Law’, in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (2010) 589, at 595; Douzinas, ‘History Trials: Can Law Decide History?’, 8 *Annual Review of Law and Social Science* (2012) 273, at 283.

³ Mégret, ‘Practices of Stigmatization’, 76 *Law and Contemporary Problems* (2013) 287, at 302. For a discussion on the historical origins of the ‘enemy of humanity’ concept, see D. Heller-Roazen, *The Enemy of All: Piracy and the Law of Nations* (2009); Krever, ‘Hostis humani’, 195 *Radical Philosophy* (2016) 61; Simpson, ‘Piracy and the Origins of Enmity’, in M. Craven, M. Fitzmaurice and M. Vogiatzi (eds), *Time, History and International Law* (2006) 219.

⁴ Corrias and Gordon, ‘Judging in the Name of Humanity International Criminal Tribunals and the Representation of a Global Public’, 13 *Journal of International Criminal Justice* (2015) 97.

⁵ H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (2006); Bikundo, ‘Humanity’s Exemplary Justice: From *Hostis* to *Hostia Humani Generis*’, in B. van Beers, L. Corrias and W. Werner (eds), *Humanity across International Law and Biolaw* (2014) 42; T. Cruvellier, *Master of Confessions: The Making of a Khmer Rouge Torturer* (2014); S. Drakulić, *They Would Never Hurt a Fly: War Criminals on Trial in the Hague* (2004); R.H. Jackson, ‘Opening Statement before the International Military Tribunal’, in *The Trial of German Major War Criminals: Proceedings of The International Military Tribunal Sitting at Nuremberg* (1945) 98; Mohamed, ‘Of Monsters and Men: Perpetrator Trauma and Mass Atrocity’, 115 *Columbia Law Review* (2015) 1157; Mohamed, ‘Deviance, Aspiration, and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law’, 124 *Yale Law Journal* (2015) 1628.

ICL.⁶ It discusses in particular how both dehumanizing and humanizing qualities are simultaneously assigned to the defendants and how this contradictory construction in the courtroom discourse reflects and contributes to a self-legitimizing narrative that emphasizes the importance of international criminal trials to the global community.⁷

Christopher Macleod's analysis of the different meanings and uses of 'humanity', particularly in the discourse on crimes against humanity, brings out the complexity of the (in)humanity paradox. He differentiates between the use of humanity as 'human-kind' – the collective of all human beings – or as 'human-nature' – that which makes one human.⁸ These different readings indicate what one considers the essence of the crimes committed: '[W]hether the specific wrong is something to do with the mass that violence is perpetrated upon (a human-kind reading) or rather that it is something to do with the evil needed by an agent to commit the act (a human-nature reading).'⁹ While Macleod's theoretical exercise convincingly disentangles the philosophical implications of the different definitions of 'humanity', this article aims to show empirically how and why these different uses of humanity are, indeed, often-times conflated, as Macleod also claims, specifically when the defendant is described in an international courtroom. Most depictions in this analysis connect to the different readings of the perpetrator's (in)humanity in relation to his human nature.¹⁰

⁶ Christie, 'The Ideal Victim', in E. Fattah (ed.), *From Crime Policy to Victim Policy* (1986) 17; C. Schwöbel-Patel, *Nils Christie's 'Ideal Victim' Applied: From Lions to Swarms* (2015), available at <http://criticallegalthinking.com/2015/08/05/nils-christies-ideal-victim-applied-from-lions-to-swarms/>; van Wijk, 'Who Is the "Little Old Lady" of International Crimes? Nils Christie's Concept of the Ideal Victim Reinterpreted', 19 *International Review of Victimology* (2013) 159. In line with the approach of Christie, Schwöbel-Patel and van Wijk, the analysis of the 'ideal perpetrator' does not refer to the search for an actual existing perpetrator but, rather, to the exploration of the common elements that are ascribed to perpetrators in international criminal trials. The 'ideal perpetrator' is as much a fiction as Max Weber's ideal types. What I try to address here is what the emphasized characteristics in these cases tell us about the ones who construct the type and about the context in which they are deployed rather than about the type itself.

⁷ On the construction of such narratives of international criminal law (ICL) institutions, see Glasius and Meijers, 'Constructions of Legitimacy: The Charles Taylor Trial', 6 *International Journal of Transitional Justice (IJTJ)* (2012) 229; Kendall and Nouwen, 'Speaking of Legacy: Toward an Ethos of Modesty at the International Criminal Tribunal for Rwanda', 10 *American Journal of International Law* (2016) 212; Koskeniemi, 'Between Impunity and Show Trials', 6 *Max Planck Yearbook of United Nations Law (MPYUNL)* (2002) 1; Werner, "'We Cannot Allow Ourselves to Imagine What It All Means": Documentary Practices and the International Criminal Court', 76 *Law and Contemporary Problems (LCP)* (2014) 319; Schwöbel-Patel, 'Spectacle in International Criminal Law: The Fundraising Image of Victimhood', 4 *London Review of International Law (LRIL)* (2016) 247; Nouwen and Werner, 'Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity', 13 *Journal of International Criminal Justice* (2014) 157; Dobson and Stolk, 'The Prosecutor's Important Announcements: the Communication of Moral Authority at the International Criminal Court', *Law, Culture and the Humanities* (2016); Stolk, "'The Record on Which History Will Judge Us Tomorrow': Auto-History in the Opening Statements of International Criminal Trials', 28 *Leiden Journal of International Law (LJIL)* (2015) 993. On the sentimental narratives in international law in general see Simpson, 'The Sentimental Life of International Law', 3 *LRIL* (2015) 3.

⁸ Macleod, 'Towards a Philosophical Account of Crimes against Humanity', 21 *European Journal of International Law (EJIL)* (2010) 286.

⁹ *Ibid.*, at 283.

¹⁰ In the remainder of this article, the male pronoun is used when referring to the defendant in general terms.

The defendant is ascribed a particular evil human nature. His deeds are rendered inhumane not only because they are contrary to the human nature of the perpetrator himself but also because they go against the human nature of his victims. Additionally, different human nature readings are conflated with a human-kind reading. In these readings, the defendant turns himself against all human beings. His deeds harm humanity as a whole because it shocks humankind, endangers its public order and diminishes or damages it.¹¹

In order to analyse how trial participants construct these conflated, stereotypical depictions, this article turns to the moments in trial that specifically focus on the perpetrator's character, which happens prominently in the opening statement. While arguably not entirely in line with the presumed ethics of criminal law,¹² international prosecutors usually assign a certain personality to the defendants in their opening statements, rather than merely describing the wrongness of the crimes he allegedly committed. Partly because the opening statement is not regarded as evidence,¹³ it is an opportunity for trial participants to somewhat freely describe the plot and the characters of the case and to paint a mental picture that appeals to the imagination and induces identification with, or detachment from, the main characters.¹⁴ Since it sets the tone of the trial, this is a unique moment to attach a personality to the individual that will be connected to certain actions and responsibilities. This initial characterization of the defendant benefits from being the 'first impression', which is likely to be remembered and persists throughout the trial.¹⁵ The fierceness of the direct responses of the defence and judges to these personality sketches reveals that trial participants care about these depictions and that they matter for the unfolding proceedings. Moreover, in the international arena, the opening statement not only serves as an introduction to the case, but it also is a moment where trial participants emphasize and justify the importance of the trial, the tribunal and the ICL project as a whole, directed at a broad audience.¹⁶ As such, the depiction of the perpetrator in the opening statement contributes to a wider narrative about the goals and meaning of ICL.

¹¹ *Ibid.*, at 286–288.

¹² Douzinas, *supra* note 2; Gosnell, 'Admissibility of Evidence,' in K. Khan, C. Buisman, and C. Gosnell (eds), *Principles of Evidence in International Criminal Justice* (2010) 383, at 434; Carney Jr and Vitali, 'The Opening Statement', in E. Blumenson and A. Leavens (eds), *Massachusetts Criminal Practice* (2012), available at www.suffolk.edu/documents/LawMCP/Ch31Openings.pdf.

¹³ Lucas, 'Opening Statement', 13 *University of Hawaii Law Review* (1991) 349; Vasiliev, 'The Trial', in L. Reydam, J. Wouters and C. Ryngaert (eds), *International Prosecutors* (2012) 700; see also Special Court of Sierra Leone Rules of Procedure and Evidence, 16 January 2002, Rule 84; *RUF*, *supra* note 1, at 6; This is also emphasized in the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (ICTY), 8 July 2015, International Criminal Tribunal for Rwanda, 13 May 2015, and Special Tribunal for Lebanon, 3 April 2017, in saying that each party may make an opening statement before the presentation of evidence.

¹⁴ Lucas, *supra* note 13; Powell, 'Opening Statements: The Art of Storytelling', 31 *Stetson Law Review* (2001) 89; Snedaker, 'Storytelling in Opening Statements: Framing the Argumentation of the Trial', 10 *American Journal of Trial Advocacy* (1986) 15; J.A. Tanford, *The Trial Process: Law, Tactics and Ethics* (2009).

¹⁵ Lucas, *supra* note 13, at 93.

¹⁶ Stolk, *supra* note 7.

If, as Immi Tallgren claims, 'ICL is a universe constructed in language', what does that process of construction look like?¹⁷ And when does it happen? It is not only in legal documents, academic works and judgments that this construction takes place; it is actively enacted in the courtroom.¹⁸ While most of the content of courtroom debates gets lost in large databases of trial transcripts, the opening statement stands out for its wide reach. This article zones in on this particularly performative moment of narration. During this moment, the defendant is presented as well as created. The words are doing work. A character who is physically present in the courtroom is brought to life through his or her linguistic description. This article does not study the effectiveness or the truth value of the narrative that is communicated through international criminal trials; rather, by dissecting the routine invocation of certain stereotypical depictions and their function within the courtroom discourse, it asks how it is produced and what it performs. It hypothesizes that the different readings of the inhuman and human defendant are important elements in a prevalent hyperbolic, self-legitimizing narrative about ICL in which international criminal trials are tasked to hold the 'most responsible' of the 'gravest crimes' to account in the name of humanity as a whole.¹⁹ In this narrative, trials are assigned multiple – and, at times, conflicting – purposes, including the traditional aims such as deterrence, retribution, rehabilitation, redemption as well as communicative and expressive aims related to education of the public, history writing and global community building.²⁰ The depiction of the defendant is not a mere stylistic choice; it is a precarious exercise in balancing these different loyalties and aims.

By taking the trial discourse seriously, the article subscribes to the idea that law and its power manifests itself in the details – in language – in 'micro-arenas' such as courtrooms.²¹ It highlights how ICL's universalist rhetoric (re)produces a language of boundaries, exclusion and stereotypes and, in doing so, embodies a claim on the power of international criminal trials to include or exclude individuals from humanity.²² The research connects to an emerging recognition of the need to look at the discourse of ICL and international criminal justice more closely and more comprehensively beyond

¹⁷ Tallgren, 'The Voice of the International: Who Is Speaking?', 13 *Journal of International Criminal Justice* (2015) 97, at 138.

¹⁸ Kelsall, 'Politics, Anti-Politics, International Justice: Language and Power in the Special Court for Sierra Leone', 32 *Review of International Studies* (2006) 587.

¹⁹ On this narrative, see Tallgren, *supra* note 17; Corrias and Gordon, *supra* note 4; Clarke, 'Rethinking Africa through Its Exclusions: The Politics of Naming Criminal Responsibility', 83 *Anthropological Quarterly* 625.

²⁰ Damaška, 'What Is the Point of International Criminal Justice', 83 *Chicago-Kent Law Review* (2008) 329; Tallgren, 'The Sensibility and Sense of International Criminal Law', 13 *EJIL* (2002) 561; Amann, 'Assessing International Criminal Adjudication of Human Rights Atrocities', *Third World Legal Studies* (2000) 169; M.A. Drumbl, *Atrocity, Punishment, and International Law* (2007).

²¹ Kelsall, *supra* note 18, at 588; J.M. Conley and W.M. O'Barr, *Just Words: Law, Language, and Power* (2005).

²² Schwöbel-Patel, *supra* note 7; Clarke, 'Refiguring the Perpetrator: Culpability, History and International Criminal Law's Impunity Gap', 19 *International Journal of Human Rights* (2015) 592; Clarke, 'The Rule of Law through Its Economies of Appearances: The Making of the African Warlord', 18 *Indiana Journal of Global Legal Studies* (2011) 7; Tallgren, *supra* note 19.

a narrow focus on rules and decisions.²³ By paying close attention to the construction of the dominant story in the opening statements of international criminal trials, this article investigates and challenges these persistent narratives of (in)humanity. A more detailed study of its stories can lead to a better understanding of the field, not by making concrete recommendations for improvement but, rather, by refining our thinking and use of certain terms²⁴ and creating some fertile ground for (self-)reflection and criticism in order to contribute to ‘a better conversation that can generate better insights’ about ICL.²⁵

The research is based on a close reading of the courtroom transcripts of 17 international criminal cases in English or, where applicable, the English translation. Descriptions of the accused and his character traits were collected from a first review of all of the opening statements of a selection of courts and tribunals and grouped under common headers (for example, intellect, lust for power, animal analogies, transcendental evil). All statements were manually coded by the author and categorized according to the two main themes discussed below in the sections on ‘a despicable human character’ and ‘inhuman evil’. This article does not claim to be an exhaustive quantitative analysis of all opening statements, but it aims to give a broad impression of recurring themes as a first attempt to take empirical analysis of these discourses seriously and to invite further scrutiny.²⁶

The selected cases appeared before four contemporary tribunals that engage with cases of mass atrocity, representing different regions, different times and different types of courts: the permanent International Criminal Court (ICC), the regionally focused International Criminal Tribunal for the former Yugoslavia (ICTY), the hybrid Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC). The analysis includes high-profile cases that are more likely to engage, from the outset, with a ‘criminal mastermind’ prototype that is arguably more dramatically oriented towards a broad audience as well as some more mid- and low-level cases.

For the ICTY, a selection of cases was made after a first reading of all of the opening statements. This selection includes the most ‘high-profile’ cases against Slobodan Milošević,²⁷ Radovan Karadžić²⁸ and Ratko Mladić²⁹ and a selection of mid-level cases

²³ Robinson, ‘Inescapable Dyads: Why the International Criminal Court Cannot Win’, 28 *LJIL* (2015) 323; M. de Hoon, ‘The Law and Politics of the Crime of Aggression’ (2015) (PhD thesis on file at Vrije Universiteit Amsterdam); Glasius and Meijers, *supra* note 7; Meijers and Glasius, ‘Expression of Justice or Political Trial?: Discursive Battles in the Karadžić Case’, 35 *Human Rights Quarterly* (2013) 720; Kendall and Nouwen, ‘Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood’, 76 *LCP* (2013) 235; van Sliedregt, ‘International Criminal Law: Over-Studied and Underachieving?’, 29 *LJIL* (2016) 1; Tallgren, *supra* note 20; C. Schwöbel-Patel, *Critical Approaches to International Criminal Law: An Introduction* (2014); Schwöbel-Patel, *supra* note 22; Werner, *supra* note 7; Dobson and Stolk, *supra* note 7.

²⁴ Macleod, *supra* note 8, at 288.

²⁵ Robinson, *supra* note 23, at 324.

²⁶ For a similar exercise, see Dobson and Stolk, *supra* note 7.

²⁷ Trial Transcript, *Milošević* (IT-02-54-T), Trial Chamber, 12 February 2002.

²⁸ Trial Transcript, *Karadžić* (IT-95-5/18-T), Trial Chamber, 27 October 2009.

²⁹ Trial Transcript, *Mladić* (IT-09-92-T), Trial Chamber, 16 May 2012.

that include the relatively well-known cases against Duško Tadić (first case of the ICTY)³⁰ and Vojislav Šešelj³¹ and the relatively unknown cases against Fatmir Limaj and his fellow defendants³² and Dario Kordić and Mario Čerkez,³³ the latter was specifically selected because of the strikingly limited length of the opening statement (compared to more high-profile cases). For the analysis in the third section, the sentence hearings of all cases where a plea deal was reached were included, and these hearings typically lack an opening statement. For the SCSL, the opening statements of all four trials were included in the analysis: those against the leaders of the Revolutionary United Front,³⁴ the Armed Forces Revolutionary Council,³⁵ the Civil Defence Forces,³⁶ and the Liberian president at the time Charles Taylor.³⁷ For the ECCC, the analysis includes the two trials that have taken place to date, Case 001 against Kaing Guek Eav (or Duch, as he is commonly called)³⁸ and Case 002 against Nuon Chea, Ieng Sary and Khieu Samphan.³⁹ Finally, the analysis includes all of the trials that have been opened at the ICC up until 2014, against Thomas Lubanga Dyilo,⁴⁰ Jean Pierre Bemba,⁴¹ Germain Katanga and Mathieu Ngudjolo Chui⁴² and William Ruto and Joshua Sang.⁴³

The remainder of this article consists of two main parts. The second section presents and analyses the empirical data. It highlights the tension between the portrayal of the defendant as a human being with human vices and the simultaneous depiction of the defendant as an inhuman figure outside the realm of humanity. The third section problematizes a strict separation between humanizing and dehumanizing rhetoric and connects the empirical findings to the widely discussed paradox of the human being who commits inhuman crimes. This section theorizes the functioning of the ambivalent stereotype and discusses how it serves a particular understanding of the goals and values of contemporary international criminal trials, followed by a conclusion in the fourth section.

It is not the primary aim of this discussion of the stereotypical construction of the perpetrator to make normative claims about the appropriateness of these portrayals, to 'correctly' characterize what perpetrators of international crimes are actually like

³⁰ Trial Transcript, *Tadić* (IT-94-1), Trial Chamber, 7 May 1996.

³¹ Trial Transcript, *Šešelj* (IT-03-67-T), Trial Chamber, 7 November 2007.

³² Trial Transcript, *Limaj, Musliu and Bala* (IT-03-66), Trial Chamber, 15 November 2004.

³³ Trial Transcript, *Kordić and Čerkez* (IT-95-14/2-T), Trial Chamber, 12 April 1999.

³⁴ *RUF*, *supra* note 1, trial transcript.

³⁵ Trial Transcript, *Brima, Kamara and Kanu* (AFRC) (SCSL-2004-16-T), Trial Chamber I, 7 March 2005.

³⁶ Trial Transcript, *Norman, Fofana and Kondewa* (CDF) (SCSL-04-14-T), Trial Chamber I, 3 June 2004.

³⁷ Trial Transcript, *Taylor* (SCSL-2003-01-T), Trial Chamber II, 4 June 2007.

³⁸ Trial Transcript, *Kaing Guek Eav (Duch)* (001/18-07-2007-ECCC/TC), Trial Chamber, 31 March 2009.

³⁹ Trial Transcript, *Nuon Chea, Ieng Sary, Khieu Samphan* (002/19-09-2007-ECCC/TC), Trial Chamber, 21 November 2011.

⁴⁰ Trial Transcript, *Lubanga* (ICC-01/04-01/06), Trial Chamber I, 26 January 2009.

⁴¹ Trial Transcript, *Bemba* (ICC-01/05-01/08), Trial Chamber III, 22 November 2010.

⁴² Trial Transcript, *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-T-80), Trial Chamber II, 24 November 2009.

⁴³ Trial Transcript, *Ruto and Sang* (ICC-01/09-01/11-T-27), Trial Chamber V(A), 10 September 2013.

or to answer questions about the nature of evil.⁴⁴ There are different types of perpetrators, perhaps even as many types as there are perpetrators.⁴⁵ Rather than testing the appropriateness or correctness of the stereotype, the article examines the shared characteristics of their portrayals in international courtrooms and the way in which these characteristics are mobilized to make them suitable for an international criminal trial context and to explore the function of these stereotypes in the narrative about ICL that is put forward in the opening statement.

2 The ‘Ideal’ Perpetrator in the Opening Statement

Opening statements in international criminal trials introduce a perpetrator who is both a sophisticated manipulator as well as an inhuman beast. While ‘inhumanely’ cold-hearted and ruthless,⁴⁶ he also is hotly passionate in his greed and lust for power.⁴⁷ Defendants are not only smart⁴⁸ – hence, having accountable parts of humanity – but also thoughtless savages – hence, inhumane and hardly part of humanity. The following section sets out the recurrent patterns of different, sometimes contradictory, strategies of portraying the defendant by the prosecution as well as the responses and counter-images that are presented by the defence.

A *A Despicable Human Character*

While technically only specific deeds are on trial, the motivation for committing crimes is often connected to consistent character traits.⁴⁹ The boundary between behaviour and personality seems to collapse when talking about the perpetration of mass atrocity. The cases discussed below show the recurrent ways of building a perpetrator’s personality by sketching his habits and vices that are human, yet despicable.

1 *Smart Manipulation*

The first trait relates to intellect and how it can amount to ‘calculated cruelty’.⁵⁰ The prosecutor’s task to prove a sophisticated criminal plan obviously leads to the

⁴⁴ For a normative account on how and why international criminal tribunals should attempt to contribute to understanding how people turn into perpetrators of mass atrocity, see Mohamed, *supra* note 5.

⁴⁵ A. Smeulers, ‘Perpetrators of International Crimes: Towards a Typology’, in A. Smeulers and R. Haveman (eds), *Supranational Criminology: Towards a Criminology of International Crimes* (2008) 233.

⁴⁶ CDF, *supra* note 36, at 20; Duch, *supra* note 38, at 5.

⁴⁷ For example, Milošević, *supra* note 27, opening of the prosecution, at 9, 22; Lubanga, *supra* note 40, opening of the prosecution at 24.

⁴⁸ The prosecutor in *Lubanga* repeatedly emphasizes that Lubanga is an ‘educated man’. *Ibid.*, at 24, 26; Milošević is described as an ‘excellent tactician’ (at 9).

⁴⁹ Jackson, *supra* note 5. Interestingly, injecting ‘irrelevant side issues concerning the personalities and characteristics of the persons involved in the trial’ is explicitly prohibited in US domestic opening statements. See Tanford, ‘An Introduction to Trial Law’, 51 *Missouri Law Review* (1986) 623, at 655.

⁵⁰ See also Milošević, *supra* note 27, opening statement of the prosecution, at 3; Nuon Chea, Ieng Sary, Khieu Samphan, *supra* note 39, opening statement of the prosecution, at 14; AFRC, *supra* note 35, opening statement of the prosecution, at 21.

presentation of a smart and deceitful defendant. A description of the accused as a skilful manipulator that has betrayed friends,⁵¹ is insincere towards the court⁵² or even has managed to deceive the entire international community⁵³ paints a picture of systematic lying as a character trait. For example, according to the ICC's prosecutor Lubanga deployed 'opportunistic' methods, 'played' with, and 'misled', the international community and 'pretended' to be loyal.⁵⁴ Lubanga is not only accused of specific crimes, but he is also persistently portrayed as a manipulative person that consequently misused his intellectual capacities in different contexts, sketching an intrinsically bad character. In several statements, references to the personal habits of the defendant are used to predict or explain his behaviour in conflict as well as his behaviour in court.⁵⁵ Even attempts to contribute to peace, efforts of demobilization and apologies in court are qualified as dishonest in this narrative.⁵⁶ Ideals are assumed to be hollow – mere 'ideological pretensions' – that hide his 'real' motives of greed and lust for power.⁵⁷ The emphasis on the intellectual capacities of the defendant are crucial to the presentation of a sophisticated strategy; skilful lying is presented as a way to disguise cruel intent. Finally, being smart is not only consistently equated with being manipulative, but it is also accompanied by a consistent emphasis on thoughtlessness. For example, in *Taylor*, the prosecutor talks about 'mindless acts of violence, terror and degradation, devoid of any human reason'.⁵⁸ The paradox is clear – the violence is described as a rational plan that is devoid of reason at the same time; the acts of a person who has a conscience yet is conscienceless.

⁵¹ *Tadić*, *supra* note 30, opening statement of the prosecution, at 35; see also *Nuon Chea, Ieng Sary, Khieu Samphan*, *supra* note 39, opening statement of the prosecution, at 52, in which Khieu Samphan encouraged the execution of traitors and saw enemies everywhere 'even amongst long-term friends'.

⁵² *Duch*, *supra* note 38, opening statement of the prosecution, at 47.

⁵³ *Lubanga*, *supra* note 40, opening statement of the prosecution, at 30; *Milošević*, *supra* note 40, opening statement of the prosecution, at 8.

⁵⁴ *Lubanga*, *supra* note 40, opening statement of the prosecution, at 25, 31, 35.

⁵⁵ This is by no means restricted to opening statements in international criminal trials. For example, Post and Panis use personal histories to explain courtroom behaviour of Milošević and Hussein. Post and Panis, 'Tyranny on Trial: Personality and Courtroom Conduct of Defendants Slobodan Milošević and Saddam Hussein', 38 *Cornell International Law Journal* (2005) 823.

⁵⁶ *Duch*, *supra* note 38, opening statement of the prosecution, at 58. *Lubanga*, *supra* note 40, opening statement of the prosecution, at 30; *Nuon Chea, Ieng Sary, Khieu Samphan*, *supra* note 39, opening statement of the prosecution, at 44. While in *Duch*, apologetic posture is treated with suspicion, not being apologetic is equally bad, see, e.g., *Šešelj*, *supra* note 31, opening statement of the prosecution, at 1795.

⁵⁷ See *RUF*, *supra* note 1, opening statement of the prosecution, at 20–22. See also *Milošević*, *supra* note 27, opening statement of the prosecution, at 9: 'One must not seek ideals underlying the acts of the accused.'

⁵⁸ *Taylor*, *supra* note 37, opening statement of the prosecution, at 299; see also *RUF*, *supra* note 1, opening statement of the prosecution, at 29: 'The reality of these crimes done in Sierra Leone that were committed by the RUF are so much against nature, against logic, against life itself. These crimes in our joint indictment against Sesay, Kallon and Gbao certainly defy any logic, any reason; the purely evil of these deeds of destruction are so horrific, terrible and devastating in their scope, words in any language do not describe the offences committed by these indictees.' A similar argument is made in *AFRC*, *supra* note 35, opening statement of the prosecution, at 20; see also *Milošević*, *supra* note 27, opening statement of the prosecution, at 2.

2 Lust for Power

In many statements, the prosecution also assigns to the accused a more blunt and vain lust for power that has little to do with his intellectual strategies.⁵⁹ An example comes from the SCLS where the accused, Allieu Kondewa, is portrayed as follows:

[H]e had a high pedestal stool and there was a little boy playing a guitar underneath the seat. That is remindful of King David with the boy playing the harp [sic] and that was the days of Kamajor. Kondewa, “King Kondewa”, as he called himself, to show how powerful he was and the authority which he commanded.⁶⁰

The defendant is depicted as posturing himself as a superhuman, revealing a degree of arrogance that might actually be very human. Similar descriptions of a defendant’s vanity appear in other opening statements.⁶¹ Several statements expose a defendant as holding a proud or even sadistic attitude towards their mass crimes. Šešelj is described as bragging about his hate speeches and the effectiveness of his elite units.⁶² In *Limaj, Musliu and Bala*, the prosecutor claims that ‘there is no doubt that this man enjoyed the infliction of gratuitous and brutal violence’,⁶³ and the beating of prisoners is cynically labelled as ‘sport for guards’.⁶⁴ In *Katanga and Ngudjolo*, Prosecutor Luis Moreno Ocampo explains:

Mr Katanga boasted that he had ordered and planned the attack and bluntly described its aims, openly documenting the atrocities that were committed. He said, I quote, ‘About Bogoro, which is a village predominantly Hema, the attack was carried out to take revenge on massacres perpetrated by the Hemas in another village.’ And laughing, he added that, ‘Nothing was spared, absolutely nothing: Chickens, goats, everything. Anywhere there was nothing left. There were nothing left. Everything was wiped out.’⁶⁵

In a way, these claims present evidence for the ordering and planning of atrocity. But the words ‘boast’, ‘bluntly’ and ‘laugh’ also serve another purpose for they contribute to the construction of a specific personality that enjoys his own cruelty. In the same statement, the description of a scene where commanders get together under the mango trees to celebrate the committed atrocities evidences some sort of acknowledgement of the crimes, but depicting the officers as self-congratulatory drunks mainly establishes a picture of malicious sadism.⁶⁶ While the sadistic attitude entails

⁵⁹ For literal references to this lust for power, see, e.g., *Milošević*, *supra* note 27, opening statement of the prosecution, at 9, 22; *Lubanga*, *supra* note 40, opening statement of the prosecution, at 24.

⁶⁰ *CDF*, *supra* note 36, opening statement of the prosecution, at 24.

⁶¹ See also, e.g., *Šešelj*, *supra* note 31, opening statement of the prosecution, at 1796. The prosecutor notes how Šešelj ‘describes himself as the only Serbian Chetnik Vojvoda, or duke’. Another example is Mladić, who is described as ‘quite unrepentant. He is a man who has no doubts, only a total assurance that he is right, the world wrong, and that his people have been slandered’. *Mladić*, *supra* note 29, opening statement of the prosecution, at 443.

⁶² *Šešelj*, *supra* note 31, opening statement of the prosecution, at 1807, 1840.

⁶³ *Limaj, Musliu and Bala*, *supra* note 32, opening statement of the prosecution, at 342.

⁶⁴ *Ibid.*, at 344.

⁶⁵ *Katanga and Ngudjolo*, *supra* note 42, opening statement of the prosecution, at 26; see also, e.g., *Duch*, *supra* note 38, opening statement of the prosecution, at 36.

⁶⁶ *Katanga and Ngudjolo*, *supra* note 42, opening statement of the prosecution, at 25, 38.

an active interest or enjoyment of the other's suffering, another dimension of the self-love ascribed to defendants entails a posture of indifference towards the victims. In the opening statement of the *Mladić* case, pictures of the exhumation site in Srebrenica are shown after pictures of Ratko Mladić attending a wedding at the time the massacre took place, noting that 'Mladić is seen here smiling, celebrating a wedding, all the time knowing that innocent men were being murdered as he did'.⁶⁷

3 Aggression

In order to present aggressiveness as part of the defendant's character, the establishment of a consistent pattern of violent behaviour is crucial. For example, in *Lubanga*, the prosecutor notes that, '[a]s is his custom, Lubanga dealt with the situation violently and deftly', introducing violence not 'just' as a criminal deed but also as one of Lubanga's habits.⁶⁸ Another way to establish this consistency is to present a pattern in the defendant's personal history. While the elaboration of international prosecutors on the course of the defendant's life prior to the acts for which he is indicted is not widely approved of, such personal histories frequently occur in the opening statements.⁶⁹ A sentence like 'Tadić had an enduring interest in Karate' can be understood as contextual information that attributes a certain love for violence to the defendant.⁷⁰ Tadić is not on trial for his interest in karate, and this information is not directly relevant to the specific deeds on trial, but it signals the need to describe not only the crimes but also a certain type of personality.

4 Good versus Bad

Not only is consistency used to establish the uncanniness of the defendant's behaviour but contrast is also employed. For example, Karadžić's war criminal personality is presented in contradiction with the peaceful situation he came from. The man 'who harnessed the forces of nationalism, hatred, and fear to implement his vision of an ethnically separated Bosnia' was, before that, 'simply a psychiatrist in Sarajevo', a city described as being 'renowned for its charm and diversity, the capital of a multi-ethnic republic'.⁷¹ Sketching a peaceful historical context emphasizes the cruelty of the defendant. Prosecutors deploy multiple descriptions of the nice, the peaceful and the innocent to contrast with the 'ugly' character of the accused. This can be as ostensibly

⁶⁷ *Mladić*, *supra* note 29, opening statement of the prosecution, at 521–522.

⁶⁸ *Lubanga*, *supra* note 40, opening statement of the prosecution, at 27 (emphasis added).

⁶⁹ See, e.g., *Tadić*, *supra* note 30, at 44ff, going back all the way to primary school; *Lubanga*, *supra* note 40, at 24ff; *Duch*, *supra* note 38, at 58ff. In the international context, the ICTY judges decided that 'evidence of the accused's character prior to the events for which he is indicted before the International Tribunal is not a relevant issue'. Decision on evidence of the good character of the accused and the defence of Tu Quoque, *Kupreskic* (IT-95-16), Trial Chamber, 17 February 1999.

⁷⁰ *Tadić*, *supra* note 30, opening statement of the prosecution, at 26.

⁷¹ *Karadžić*, *supra* note 28, opening statement of the prosecution, at 515; see also *Taylor*, *supra* note 37, opening statement of the prosecution, at 298, speaking of 'ordinary folks on the countryside nothing to do with politics'.

trivial as a reference to the weather or the location where the crimes took place.⁷² Even more commonly, the accused is contrasted with innocent civilians, primarily the harmless women and children who have ‘very little political awareness’.⁷³ The local population is depicted as good and innocent versus the bad defendant. While, intuitively, this distinction makes sense, it sits uncomfortably with some traditional criminal law values. J.W. Carney and Michael Vitali note how, within the US domestic criminal law setting, it is deemed ‘improper for the prosecutor to state in his opening that the evidence would show how different the victim and the defendant were ... even if true, it is not relevant that the victim is a “good” person and the defendant is a “bad” person’.⁷⁴ Nevertheless, this good–bad antagonism is often invoked in international criminal cases. The distinction culminates in the depiction of the suffering victims, who most powerfully symbolize the inhumanity of the defendant.

B *Inhuman Evil*

In international criminal trials, prosecutors do not only assign human vices to the defendant, they also call on a more transcendental or inhuman evilness. The latter appears in the form of ghosts, mythical creatures and evil forces as well as in the invocation of ‘unimaginable atrocity’ and ‘unspeakable horror’ that ‘strains the most agile of human reasoning’.⁷⁵ Justice Robert Jackson already argued in his famous opening statement at the Nuremberg International Military Tribunal that ‘these prisoners represent sinister influences that will lurk in the world long after their bodies have returned to dust’.⁷⁶ Prosecutor David Crane at the SCSL talks about the ‘jackals of death’,⁷⁷ ‘hounds from hell’⁷⁸ and ‘the beast of impunity’.⁷⁹ These are extreme

⁷² See, e.g., *RUF*, *supra* note 1, opening statement of the prosecution, at 18: ‘on a warm spring day’; *Taylor*, *supra* note 37, opening statement of the prosecution, at 270, in which Freetown is described as ‘the Athens of Africa’; *Tadić*, *supra* note 30, opening statement of the prosecution, at 25, which describes the village where Tadić lived; *Nuon Chea, Ieng Sary, Khieu Samphan*, *supra* note 39, opening statement of the prosecution, at 18: ‘The trim walkways and flower-scented parks were submerged under a heaving mass of homeless families, weeping, lost children, all increasingly afraid.’

⁷³ *Šešelj*, *supra* note 31, opening statement of the prosecution, at 1788; see also *Lubanga*, *supra* note 40, at 5, 6, 47, in which prosecutors and victim representatives keep emphasizing that children were abducted while doing normal, innocent things such as going to school or playing football. The prosecutor in *Taylor*, *supra* note 37, at 298, who speaks of ‘poor, defenceless civilians, ordinary folks on the countryside who had nothing to do with politics, governance or corruption’.

⁷⁴ Carney Jr and Vitali, *supra* note 12, at 4.

⁷⁵ *Tadić*, *supra* note 30, opening statement of the prosecution, at 11–12; see also, e.g., *Nuon Chea, Ieng Sary, Khieu Samphan*, *supra* note 39, opening statement of the prosecution: ‘Let us never for one moment forget in this trial that these are the malignant forces and this is the tragic legacy that these three elderly people represent’ (at 110–111) and ‘unleashed an ocean of blood’ (at 114). References to the ‘unspeakable’ are omnipresent. See, e.g., *Milošević*, *supra* note 27, opening statement of the prosecution, at 15; *RUF*, *supra* note 1, opening statement of the prosecution, at 30; *Lubanga*, *supra* note 40, opening statement of the prosecution, at 11.

⁷⁶ Jackson, *supra* note 5.

⁷⁷ *CDF*, *supra* note 36, opening statement of the prosecution, at 6.

⁷⁸ *RUF*, *supra* note 1, opening statement of the prosecution, at 19.

⁷⁹ *Ibid.*, at 22, 27; *CDF*, *supra* note 36, opening statement of the prosecution, at 6, 7.

examples not only of calling on transcendental evilness and threatening humankind but also of less dramatic opening statements that reveal a recurrent pattern of invoking the inhuman. Mainly, this happens by describing the defendant as acting contrary to human nature, labelling these acts as (medieval) savagery, barbarism and carnage and, as mentioned above, revealing the defendant as being devoid of any human reason.

1 *Humans versus Animals*

A prominent way in which inhumanness is emphasized in the opening statements is by using references to animal-like behaviour. In ICL language, animal metaphors often represent the ultimate opposite of human nature in two ways. First, when the defendant is referred to as a beast, the animal is the subject of perpetration. The perpetrator's behaviour is presented as the opposite of what it is to act like a human being. On the other end of the spectrum, animals are the objects of perpetration; being treated like an animal is the opposite of being treated like a human being. The use of these metaphors demarcates dichotomies, for example, of superiority versus inferiority and civilized versus non-civilized behaviour.⁸⁰ In the opening statements, victims are described recurrently as being inhumanely treated, imprisoned or slaughtered like animals.⁸¹ All the more interesting is the simultaneous depiction of the perpetrator as a beast, behaving like an animal.⁸²

2 *Against the Human Nature of the Victim*

The story of the suffering victims is another important element in the construction of the inhuman cruelty of the accused.⁸³ It appears to be impossible to talk about the gravity of the offences without this language of cruelty and inhumaneness. Groups of victims as well as personal stories of individual victims and explicit stories of their suffering are central to all of the opening statements. Showing the pain of the innocent victims emphasizes the defendant's beastly ruthlessness.⁸⁴ It makes sense to talk

⁸⁰ R.A. Palmatier, *Speaking of Animals: A Dictionary of Animal Metaphors* (1995), at xi.

⁸¹ See, e.g., *Limaj, Musliu and Bala*, *supra* note 32, opening statement of the prosecution, at 303, 305; *Karadžić*, *supra* note 28, opening statement of the prosecution, at 524; *Tadić*, *supra* note 30, opening statement of the prosecution, at 35; *Katanga*, *supra* note 42, opening statement of the prosecution, at 25; *Nuon Chea, Ieng Sary, Khieu Samphan*, *supra* note 39, opening statement of the prosecution, at 42. In *Mladić*, *supra* note 29, at 464, the conditions are described as 'insufficient to sustain farm animals, let alone humans'.

⁸² *CDF*, *supra* note 36, opening statement of the prosecution, at 6, 7; *RUF*, *supra* note 1, opening statement of the prosecution, at 19, 22, 27. Yet another interesting dimension is that animal metaphors occur frequently in hate speech cases. Famous is the example of calling the enemy 'cockroaches' in Rwanda. Other examples include the labelling of Buddhist monks as leeches by the Communist Party of Kampuchea in Cambodia, which is also repeatedly cited in the opening statement of the prosecution in *Nuon Chea, Ieng Sary, Khieu Samphan*, *supra* note 39, at 49, 51 (21 November) and 59 (22 November). See also, e.g., the references to dehumanizing speech in *Šešelj*, *supra* note 31, opening statement of the prosecution, at 1802.

⁸³ Clarke, 'Making of the African Warlord', *supra* note 22, at 12.

⁸⁴ Schwöbel-Patel, *supra* note 6.

about the suffering of the victims in the opening statement since the acknowledgement of this suffering is often portrayed as one of the important goals of international criminal trials.⁸⁵ However, to do so in contrast with the accused can be problematic with respect to criminal law's wariness of prejudicial statements. This is illustrated by some examples of improper prosecutorial behaviour in opening statements in US domestic criminal trials that include making hyperbolic statements such as 'executed like animals', sketching events as 'one of the worst and most violent days' in history⁸⁶ or telling how much the victim's family suffered.⁸⁷ It is not that these types of statements are not uttered in domestic courts but that they will most likely raise objections. In international criminal trials, it is exactly these 'improper' stories that focus on the suffering of the victims that form the main narrative of the opening statements of the prosecution.

A thorough discussion of this complex construction of the victims in the opening narrative and its crucial contribution to the establishment of the responsibility of the defendant and the legitimacy of the tribunal falls outside the scope of this article and has been done elsewhere.⁸⁸ However, it is worth noting a particularly striking victim–perpetrator construction that demonstrates the dependence of the prosecutor on a binary story of evil perpetrators and innocent victims: the child soldier. In ICL discourse, the child soldier is primarily portrayed, quite one-dimensionally, as a 'faultless passive victim' rather than as a perpetrator.⁸⁹ Obviously, a child soldier as perpetrator would not match the profile of the 'ideal' perpetrator of international crimes sketched above. Rather, the 'making' of child soldiers, the emphasis on the cruel use of children who are the most vulnerable part of humanity, enforces the evilness of the accused.⁹⁰ In the words of prosecutor Moreno Ocampo, 'the defendant stole the childhood of the victims' and 'victimised children before they ever had the chance to grow up into full human beings',⁹¹ while he 'knew he was breaking the basic rules that the world established to protect those with the least power among us'.⁹² As Mark Drumbl notes, these children are portrayed to 'become neutered mechanical means used to fulfill nefarious ends over which they have no input',⁹³ which not only obscures the child soldier's

⁸⁵ Kendall and Nouwen, *supra* note 23.

⁸⁶ Carney Jr and Vitali, *supra* note 12, at 4.

⁸⁷ Tanford, *supra* note 49, at 655.

⁸⁸ Kendall and Nouwen, *supra* note 23; Clarke, 'Making of the African Warlord', *supra* note 22; Schwöbel-Patel, *supra* note 22.

⁸⁹ Clarke, 'Making of the African Warlord', *supra* note 22; M.A. Drumbl, *Reimagining Child Soldiers in International Law and Policy* (2012), at 8.

⁹⁰ K.M. Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (2009), at 115.

⁹¹ *Lubanga*, *supra* note 40, opening statement of the prosecution, at 34. While not in the context of recruiting child soldiers, Nuon Chea, Ieng Sary, Khieu Samphan are also accused of stealing the educational opportunities from children, being 'thieves of time'. *Nuon Chea, Ieng Sary, Khieu Samphan*, *supra* note 39, at 67.

⁹² *Lubanga*, *supra* note 40, opening statement of the prosecution, at 35.

⁹³ Drumbl, *supra* note 89, at 7.

agency but also the rationales of the evil 'crazed, demented' commanders.⁹⁴ The prosecution enforces the evilness of the accused by explicitly contrasting it with the vulnerability of children. The child as the ultimate innocent and passive victim is crucial in many cases to the demonization of the defendant, which would be disturbed if the emphasis were put on the free will of the child soldier. The presentation of a more complex picture of a child soldier as both a victim and a perpetrator would challenge the dichotomized discourse that characterizes international criminal trials.

3 Evil by (Dis)connection

One way in which the inhuman finds its way in low-level cases at the ICTY without the direct accusation of evil is by linking the case to 'big fish' like Milošević and Karadžić. A tribunal seems to need at least one prototypical perpetrator through which others can be labelled evil 'by proxy'.⁹⁵ Arguably, the fewer perpetrators a tribunal tries, the eviler they have to appear, for they have to represent the most responsible, serious and real monsters. At the SCLS and the ICC, unlike at the ICTY, some mid- and low-level perpetrators have had to carry this burden, which is reflected by their opening statements.

It is not common to break with the stereotypical perpetrator by introducing more ambivalent main characters.⁹⁶ However, it would be too easy to claim that all opening statements engage with a description of inhuman evil. Especially at the ICTY, more technical, concise and dryly worded openings have also found their way into court. An example is the opening statement by Prosecutor Geoffrey Nice in the *Kordić and Čerkez* case. In this speech, the prosecutor almost refuses to talk about the persons on trial at all, which is diametrically opposed to the dramatic opening statement by the same prosecutor in the *Milošević* case. The prosecutor explicitly notes that 'this is not a case where the Prosecution suggests that these defendants or either of them embarked on what they did with an initial intention to commit crime or monstrous acts'.⁹⁷ The prosecutor not only denies their monstrousness but also urges the court not to emotionally relate to the accused at all and to not attempt to understand his deeds, either in a positive or a negative way:

Maybe, ... the Court will be interested to know how this could have happened, if it finds that it happened in the way the Prosecution allege, in war, to people who need not have led other than blameless lives. But, of course, in this case, as in all the cases before this Tribunal, where there is sympathy and understanding, it has to be for those who featured throughout this as victims

⁹⁴ *Ibid.*, at 12.

⁹⁵ See M. Osiel, *Making Sense of Mass Atrocity* (2009), at 17. He discusses the question of how international criminal tribunals 'tie the big fish to the smaller fry'.

⁹⁶ *Ibid.*, at 214. An interesting case in this respect is the ongoing case against former child soldier Dominique Ongwen at the International Criminal Court (ICC), *Ongwen* (ICC-02/04-01/15), Trial Chamber IX, trial began on 6 December 2016, available at www.icc-cpi.int/uganda/ongwen; M. Kersten *et al.*, 'The Dominic Ongwen Trial and the Prosecution of Child Soldiers: A Jic Symposium', available at <http://justiceinconflict.org/2016/04/11/the-dominic-ongwen-trial-and-the-prosecution-of-child-soldiers-a-jic-symposium/>; Branch, 'Dominic Ongwen on Trial: The ICC's African Dilemmas', 11 *IJTJ* (2016) 30.

⁹⁷ *Kordić and Čerkez*, *supra* note 33, opening statement of the prosecution, at 9.

and for whose respect we must ensure a proper conclusion, by the proper adduction and testing of evidence in this case.⁹⁸

This explicit refusal to discuss the personality of the accused can be as uncomfortable as describing him or her dramatically as inhuman. Moreover, underplaying the interest in the accused is an act of depersonalization. The explicit denial of an attempt to understand the accused can be regarded as a different strategy of emphasizing the inhuman; the defendant is presented as not being worth anyone's sympathy in any human way. While this is not exactly the same as labelling someone or something as 'inhuman', both forms of dehumanization put an emphasis on the unspeakable and incomprehensible nature of the crimes, and both strategies are deployed to detach humanity from these crimes and their perpetrators. A similar tactic of understatement is deployed in the same case when, contrary to most other statements, the suffering of the victims is discussed only very briefly, ending with the statements: 'well, I needn't go on'⁹⁹ and 'that's probably as much as I need say about that, another terrible attack, with houses left destroyed and bodies left of those who should be alive'.¹⁰⁰ This strategy emphasizes the obvious magnitude of the drama and, therefore, high-lights, albeit implicitly, the obviousness of the monstrosity of the defendants' acts.

C *Defending the (In)human*

Obviously, all of the above have elicited responses from the defence teams. The adversarial procedure prevents international criminal trials from becoming unidirectional fora for accusation, dehumanization and 'othering'. The narrative of the defence is as much a part of the construction of the perpetrator as that of the prosecution. By reviewing the vigorous responses of the defence to the opening statements, it becomes clear that these statements and their depiction of the accused actually matter for the defence and for the remaining trial proceedings. Defence teams do not uncontestedly accept the prosecutor's personality sketch, which is illustrated by the different counter-images they deploy, which range from accusations of scapegoating, to the portrayal of the defendant as a victim of bad prosecution or an illegitimate tribunal, to the expression of remorse.¹⁰¹ This section discusses how these responses not only undermine but also contribute to the (re)construction of the stereotypical inhuman human perpetrator.

⁹⁸ *Ibid.*, at 112. The accusation that an attempt to understand perpetrators of such horrendous crimes leads to empathizing with them is described by, for example, by Browning. Resorting to stereotypes and simplifications is, in a way, the 'easier' route. C.R. Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (1992), at xx.

⁹⁹ *Kordić and Čerkez*, *supra* note 33, opening statement of the prosecution, at 90.

¹⁰⁰ *Ibid.*, at 107.

¹⁰¹ Steinitz, "'The Milošević Trial—Live!': An Iconical Analysis of International Law's Claim of Legitimate Authority', 3 *Journal of International Criminal Justice* (2005) 103; Koskenniemi, 'Between Impunity and Show Trials', 6 *MPYUNL* (2002) 1, at 17; Meijers and Glasius, *supra* note 23; Glasius and Meijers, *supra* note 7.

In the opening statement of the *Ruto and Sang* case, the defence counsel calls the prosecutor's depiction of William Ruto a 'caricature'¹⁰² and 'character assassination',¹⁰³ which portrays the accused in 'the most hideous light.'¹⁰⁴ Furthermore, he explicitly denounces the claim of a lust for power:

[I]t is a good sound bite. It will capture the imaginations of the audience. It may get some headlines even. To tarnish somebody's hard work and their diligence and their reputations by saying they've got a thirst for power, it sells well.¹⁰⁵

The defence counsel of Khieu Samphan also attacks the use of stereotypes and the attempt to put the responsibility of an entire conflict on one person. Critiquing not only the prosecutorial strategy but also, in a way, perhaps unintentionally, the inherent character of ICL's targeting of individuals, he states:

Ladies and gentlemen, when you come to judge this reality, remember that you're looking at human beings. They caught – they were caught up in a holocaust and they suffered and made mistakes, but to paint them as monsters totally responsible for the situation is totally unreasonable. Let us try and be reasonable.¹⁰⁶

He furthermore refers to the prosecutorial depiction of the accused as 'fantastical', 'expressionist film language' and 'pure literature'. Samphan's defence team not only criticizes but also ridicules the prosecutor's use of dramatic language. Responding to the allegation of their client unleashing an ocean of blood, they ask: '[W]hat is the size of the ocean?', and they claim that 'playing with words is not ascertaining the truth. It's just displaying the art of using a language, and that illustrates widely in theatre or at cinema',¹⁰⁷ adding that the prosecution's opening statement 'sounded like a novel written by Alexandre Dumas'.¹⁰⁸ At the SCSL, the defence's objection to the depiction of the defendants as 'dogs of war' and 'hounds of hell' was sustained by the judge.¹⁰⁹ After the prosecution's opening statement, defence lawyer Andreas O'Shea repeats: 'I simply object to matters being raised in an opening statement suggesting that my client did not respect some peace treaty or that my client is evil, these are not things that my client is charged with.'¹¹⁰ These calls for being more reasonable, rational and nuanced and the emphasis on the defendant's humanity attempts to paint the prosecutor's depiction as overdramatic, sensationalist and unrealistic.

Before the ICC, the defence team of Joshua Sang directed its appeal at a specific religious community; Sang is explicitly portrayed as a faithful Christian by himself and by his lawyers, which attempts to account for his innocence.¹¹¹ The defence lawyer

¹⁰² *Ruto and Sang*, *supra* note 43, opening statement of the defence, at 11; see also Clarke, *supra* note 22. Clarke critically reviews the perpetrator imagery in, particularly, the Kenya cases before the ICC.

¹⁰³ *Ruto and Sang*, *supra* note 43, opening statement of the defence, at 57.

¹⁰⁴ *Ibid.*, at 53.

¹⁰⁵ *Ibid.*, at 70.

¹⁰⁶ *Nuon Chea, Ieng Sary, Khieu Samphan*, *supra* note 39, defence response, 23 November 2011, at 42.

¹⁰⁷ *Ibid.*, at 29–30.

¹⁰⁸ *Ibid.*, at 39.

¹⁰⁹ *RUF*, *supra* note 1, at 19. Interestingly, objections are rarely raised during opening statements.

¹¹⁰ *Ibid.*, at 34.

¹¹¹ *Ruto and Sang*, *supra* note 43, opening statement of the defence, at 3, 5, 10, 7, 8, 23, 31.

in *Duch* also appeals to a community and takes an intriguing position with regard to the meaning of ‘humanity’. In his response to the opening statement, François Roux explicitly points to the possibility of leaving one’s humanity behind when becoming a perpetrator of mass crimes by asking the audience whether the defendant still has a role to play in humanity.¹¹² He expresses worries about the dehumanization of Duch and interrogates the inside and outside of humanity by wondering if, through the hearings, we can give the victims back their humanity but also whether we are able to ‘allow those or the one who, had exited humanity to return to humanity’.¹¹³ Interestingly, the prosecution in *Duch* claims that we all lose a bit of humanity ‘in the face of such horrors’.¹¹⁴ So even humanity has lost its humanity. In this statement, the trial is explicitly put forward as a redemptive tool to give humanity back to those who have lost it or to reconstitute it.

One remark that is particularly suitable to the theme of this article comes from the Tadić defence team. Tadić definitely does not enjoy a ‘big fish’ status, and his legal team responds to the prosecution’s opening statement by warning the court to ‘be wary of the desires for revenge and a need for a scapegoat’ and to prevent ‘experiments with a defendant as a guinea-pig’.¹¹⁵ They add:

[T]he lack of defined and public criteria has blown the case against Dusko Tadić out of all proportion. Already the danger seems evident that the case is viewed as a symbol of everything that happened in the area, and that Dusko Tadić has been portrayed as *the prototype of a war criminal*.¹¹⁶

Many defence lawyers have criticized the projection of exactly these same prototypical characteristics. The danger of ‘scapegoating’ is likely to be evoked when countering claims of individual responsibility.¹¹⁷ However, while attempting to dispute the stereotypical depiction of their own client, the defence’s depiction of the accused can also contribute to the construction of a stereotype. Ruto is not a monster because he works hard and promotes peace, Sang is not one because he is a Christian, Duch is not one because he shows remorse, Tadić is not one because he is not a criminal mastermind, Morris Kallon is just an ordinary working man,¹¹⁸ and Samphan did not attempt to destroy the Cambodian people but, rather, to defend the people he claims to ‘love the most’.¹¹⁹ These depictions deny the applicability of the prototypical character traits for specific individuals but leave open the possibility that these qualities exist for other, real inhuman criminals. While these narratives challenge the branding of a particular

¹¹² *Duch*, *supra* note 38, opening statement of the defence, at 90; see also the prosecution’s remark that it is the strategy of the defence to try ‘to comprehend the psychological evolution that brings a human being to abandon his humanity and just to become the executioner’ (at 63).

¹¹³ *Ibid.*, at 91–92.

¹¹⁴ *Ibid.*, at 64.

¹¹⁵ *Tadić*, *supra* note 30, defence response, at 53, 54.

¹¹⁶ *Ibid.*, at 56 (emphasis added).

¹¹⁷ On scapegoating, see, e.g., Bikundo, ‘The International Criminal Court and Africa: Exemplary Justice’, 23 *Law and Critique* (2012) 21; R. Girard, *The Scapegoat* (1986).

¹¹⁸ *RUF*, *supra* note 1, statement by defence counsel, at 72–73.

¹¹⁹ *Nuon Chea, Ieng Sary, Khieu Samphan*, *supra* note 39, defence of Khieu Samphan, at 13.

accused, they do not challenge the stereotype as such; their client just does not fit the bill. There are different ways to emphasize this point: by placing the deeds in the larger scheme of the conflict or by blaming it on orders, state interests or ideology, threats, lack of knowledge or even good intentions. The prosecution's depictions are treated as misinterpretation and exaggeration. The personality sketches, not the acts of violence, are vigorously disputed in these first responses. While it is often acknowledged that there were victims and that there were crimes, the defence emphasizes that the client is not the inhuman human portrayed by the prosecution but, instead, an actual human being who cares about (his) humanity in both the human nature and human-kind sense of the concept.

The statements of both the prosecution and the defence show that being labelled 'a man' – a human being who is part of humanity – is one of the trial's highest stakes. This also appears in the cases before the ICTY where plea agreements are reached, cases that typically lack an opening statement but include a declaration of the accused themselves. These short statements by the accused who has pleaded guilty, which are usually made at their sentence hearings, show not only a recurrent attempt to communicate deep regret, remorse and apologies to the victims but also the need to emphasize that the defendant is a human being. These statements speak of 'human regret',¹²⁰ guilt in 'the human sense',¹²¹ the duty as a human being to contribute to the healing of the wounds¹²² and the duty of human beings 'to restrain oneself and to respect the human dignity of others'.¹²³ Dragan Zelenović states: 'I am a human being with virtues and vices, and I didn't know how to deal with these vices when I should have.'¹²⁴ These calls on the Tribunal to recognize the human in the perpetrators emphasizes again how these trials struggle not only with the question of guilt or innocence but also inevitably with the question of humanity.

Finally, while the language of the prosecutor may introduce a dramatic persona, the daily reality of a trial at least partly demystifies the perpetrator by his participation in the sometimes rather dull routine of the courtroom where the voice, gestures, appearance, clothes, age, back pains, boredom and other ordinary features of the accused can hardly be ignored.¹²⁵ As Slavenka Drakulić describes in her account of the ICTY trials:

You sit in a courtroom watching a defendant day after day and at first you wonder, as Primo Levi did, 'If this is a man'. No, this is not a man, it is all too easy to answer, but as the days pass you find the criminals become increasingly human. Soon you feel you know them intimately.

¹²⁰ Sentencing Hearing, *Kolundžija* (IT-95-8), Trial Chamber, 9 October 2001.

¹²¹ Sentencing Hearing, *Deronjić* (IT-02-61), Trial Chamber, 28 January 2004.

¹²² Sentence Hearing, *Obrenović* (IT-02-60/2), Trial Chamber, 30 October 2003.

¹²³ Sentencing Hearing, *Plavšić* (IT-00-39 & 40/1), Trial Chamber, 17 December 2002.

¹²⁴ Sentencing Hearing, *Zelenović*, Case no. IT-96-23/2, Trial Chamber, 23 February 2007.

¹²⁵ The prosecution in *Nuon Chea, Ieng Sary, Khieu Samphan* shows to be aware of this, when warning not to be fooled by the age of the accused, which 'may tempt in you feelings of sympathy or compassion'. *Nuon Chea, Ieng Sary, Khieu Samphan*, *supra* note 39, opening statement of the prosecution, at 110.

You watch their faces, ugly or pleasant, the way they yawn, take notes, scratch their heads or clean their nails, and you have to ask yourself: what if this is a man?¹²⁶

A complete dehumanization of the accused is difficult to sustain when faced with his actual appearance in court.¹²⁷

3 An Ambiguous Stereotype

In the opening statements analysed above, different interpretations of the defendant's inhumanity coexist. The 'ideal' perpetrator stereotype that features in this ICL narrative addresses the humanity as well as the inhumanity of the accused and his deeds. In this way, one can stay true to the principles of criminal law and simultaneously do justice to the gravity and magnitude of the crimes. The paradox of the inhuman human appears on multiple levels. The defendant's (in)humanity is discussed in relation to his own human nature, the human nature of his victims and the effects of his acts on humankind, a community to which he does and does not belong. The stereotypical defendant is not only a monster but also a man. Human and inhuman at the same time.

The different goals that are set for ICL connect to different aspects of this conflated picture of (in)humanity. To move the perpetrator outside of humanity relates to the societal goals of trials to educate the public about humanity's communal values. Drakulić describes the dehumanizing effort of the ICL narrative as an attempt to put the blame outside of human nature itself, to affirm that these persons and their acts contravene the values that we as human beings share. She writes:

War criminals have committed indescribable acts and nobody wants to be connected to them in any way ... If we believe their perpetrators are monsters, it is because we wish to create as great a distance as possible between us and them, to exclude them from humanity altogether. We even go so far as to say that their crimes were 'inhuman', as if evil (as well as good) were not a part of human nature. At the bottom of such reasoning there is a syllogism: ordinary people could not do what these monsters did. We are ordinary people, therefore we cannot commit such crimes.¹²⁸

This part of the narrative wishes to affirm and create the desirable distance between monsters and ordinary people,¹²⁹ despite the omnipresent evidence and widely accepted thesis that everyone, even ordinary people, can indeed commit crimes of mass atrocity.¹³⁰

¹²⁶ Drakulić, *supra* note 5, at 168. For a concrete example of such banalities during the opening statement, see *AFRC*, *supra* note 35, at 39, in which the opening statement is interrupted because the accused has to go to the toilet.

¹²⁷ See also Arendt, *supra* note 5, at 53; Cruvellier, *supra* note 5, at 53.

¹²⁸ Drakulić, *supra* note 5, at 166.

¹²⁹ *Ibid.*, at 166.

¹³⁰ Smeulers, *supra* note 45, at 234; Smeulers and Werner, 'The Banality of Evil on Trial', in C. Stahn, L. Herik, and J. Dugard (eds), *Future Perspectives on International Criminal Justice* (2010) 24; Corrias, 'The Inhuman Stain: Representing Humanity in International Criminal Law', in van Beers, Corrias and Werner, *supra* note 5, 84; Browning, *supra* note 98; Klabbers, 'Just Revenge? The Deterrence Argument in International Criminal Law', 12 *Finnish Yearbook of International Law* (2001) 249; Mohamed, *supra* note 5.

However, to affirm and create an unbridgeable distance between monstrous perpetrators and ordinary human beings is not the sole aim of the trial.¹³¹ To present the defendant exclusively as humanity's absolute opposite – a non-human – would interfere with the more traditional goals of international criminal trials.¹³² A criminal trial cannot entirely deny the human in the perpetrator exactly because its procedures are designed to hold a human being to account and aspire to influence future human behaviour. For example, deterrence, which is one of the classical goals of a criminal trial, takes the humanity of the perpetrator as its starting point. The claim that trials aim to deter other human beings from committing similar acts assumes that these other human beings are potentially capable of such acts, which affirms, instead of denies, the humanity of the perpetrator. A similar call on the defendant's humanity underpins the recurrent idea that trials can offer catharsis for victims as well as perpetrators who lose (part of) their humanity in cases of mass atrocity,¹³³ ascribing a rehabilitating or even a redemptive function to ICL.¹³⁴ The possibility of regaining humanity signals that the human is always still present in someone who commits inhuman crimes; the inhuman might indicate something all too human after all.¹³⁵ The constant shifting of the human and the inhuman in the opening statement displays the negotiation between these different goals.

Apparently, the conceptualization of the (in)humanity of the perpetrators of mass atrocity runs into problems at both ends; how can these monsters be human and, vice versa, how can humans be such monsters? Humanity seems to be, at least theoretically, 'irreconcilably at odds with itself'.¹³⁶ In practice, this leads to the conflation of humanizing and dehumanizing language in the courtroom. In one of the most cited works on this theme, *Eichmann in Jerusalem*, Hannah Arendt describes the difficulty faced by the judges and the audience in having to deal with multiple depictions of the defendant at once: the prosecutor's portrayal of a monster, the trial's need for a smart accountable liar and the actual, rather silly, appearance of the defendant. She writes:

[I]t was essential to take him [Eichmann] seriously and this was very hard to do, unless one sought the easiest way out of the dilemma between the unspeakable horror of the deeds and the undeniable ludicrousness of the man who perpetrated them, and declared him a clever, calculating liar – which he obviously was not ... despite all the efforts of the prosecution,

¹³¹ Drakulić, *supra* note 5, at 450; Mohamed, *supra* note 5, at 1211; M.C. Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (2003).

¹³² This is also noted by Nils Christie, *supra* note 6; the offender that creates the most ideal victim is a dehumanized non-person. See van Wijk, *supra* note 6, at 166.

¹³³ The process of dehumanization in cases of mass atrocity applies to both victims and perpetrators. However, following Macleod, the inhumanness of the victim differs conceptually from the inhumaneness of that of the perpetrator. Moreover, the use of 'humanity' as opposed to animals is different from the use of 'humanity' in reference to the collective of all human beings. Macleod, *supra* note 8.

¹³⁴ This theme is particularly discussed in *Duch* by the prosecution as well as the defence. See, *Duch*, *supra* note 38, opening statement of the prosecution, at 63–64. For the position of the defence, see opening statement of the defence, at 64, 91–92.

¹³⁵ Corrias, *supra* note 130; Bikundo, *supra* note 5, at 52.

¹³⁶ Heller-Roazen, *supra* note 3, at 161.

everybody could see that this man was not a ‘monster,’ but it was difficult indeed not to suspect that he was a clown.¹³⁷

An ignorant defendant who is ridiculous or totally unaware of his crimes disrupts the logic of the criminal trial. Here, the actual presence of the defendant indeed problematizes not only the stereotypical depiction of the perpetrator as a monster but also the stereotype of the perpetrator as a despicable man. Arendt argues that it would have been more comfortable for the prosecutor if Adolf Eichmann were indeed ‘the most abnormal monster the world had ever seen’.¹³⁸ However, she claims, Eichmann actually was ‘terrifyingly normal’.¹³⁹ At the same time, Arendt describes how ‘under the conditions of the Third Reich only “exceptions” could be expected to react “normally”’.¹⁴⁰ So Eichmann was not only simultaneously normal and like many others but also abnormal and an exception. While Arendt explicitly says that Eichmann was neither a pervert nor a sadist and critiques the approach of the prosecution to put him away as a monster,¹⁴¹ she simultaneously puts his human character in the same despicable light as the prosecutors in the contemporary cases described above, by assigning him a certain lust for power¹⁴² and an arrogant attitude.¹⁴³ Is this despicable human character, then, ‘normality’? Arendt notes that ‘bragging is a common vice, and a more specific, and also more decisive, flaw in Eichmann’s character was his almost total inability ever to look at anything from the other fellow’s point of view’.¹⁴⁴ In particular, this lack of empathy and lack of imagination describe a man who is ‘abnormal’ or at least socially inept. In Arendt’s words, he is, ‘not stupid’, but her description of his social awkwardness makes him in a way less human rather than more normal. Interestingly, she also notes the ‘helplessness’ of the judges when confronted with their ‘task of understanding the criminal whom they had come to judge’.¹⁴⁵ It appears that it was as difficult for others to understand Eichmann’s perspective as it was for Eichmann to see someone else’s perspective. Arendt herself seems not to have escaped the portrayal of a person that is human and inhuman at the same time.

The difficulty of straightforwardly describing the personality of the defendants who stand trial at international criminal tribunals becomes clear in the many accounts that attempt to do so.¹⁴⁶ The struggle of international prosecutors to portray one man as a calculated person and a mindless monster at the same time supports theories

¹³⁷ Arendt, *supra* note 5, at 54.

¹³⁸ *Ibid.*, at 276.

¹³⁹ On the controversy surrounding this thesis, see, e.g., Ezra, ‘The Eichmann Polemics: Hannah Arendt and Her Critics’, 9 *Democratija* (2007) 141.

¹⁴⁰ Arendt, *supra* note 5, at 26.

¹⁴¹ *Ibid.*, at 276.

¹⁴² *Ibid.*, at 33.

¹⁴³ *Ibid.*, e.g. ‘[c]learly, bragging has always been one of his cardinal vices’ (at 29); see also 41, 46 and ‘his compulsion to talk big’ (at 47).

¹⁴⁴ *Ibid.*, at 47–48.

¹⁴⁵ *Ibid.*, at 276.

¹⁴⁶ Arendt, *supra* note 5; Drakulić, *supra* note 5; Cruvellier, *supra* note 5.

that render a binary opposition of the human and the inhuman impossible; in the setting of an international criminal trial especially, the inhuman seems to be part of the human.¹⁴⁷ The image of the defendant that is created combines inhumanity with human vices. However, this dual appeal to humanity and inhumanity at the same time does not make the depiction of the defendant less stereotypical or more nuanced; rather, in light of Macleod's classification, it makes it more chaotic. The 'ideal' perpetrator is still a caricature, both in its human and inhuman ways. Arguably, this simplified depiction is at least partially due to the nature of the adversarial procedure; the particular depiction of the accused is always part of the prosecutorial strategy to 'up the ante of moral indignation at the accused'. Both the human and inhuman stereotypical descriptions are deployed in order to win the case.¹⁴⁸ Although such a one-dimensional depiction of the defendant has been criticized, the format of a criminal trial seems to radically limit the construction of a nuanced description of a defendant's complex nature.¹⁴⁹

The loss of complexity clearly appears from the near absence of differentiation between different types of perpetrators.¹⁵⁰ The above analysis suggests that perpetrators are portrayed in a similar manner, regardless of their rank. International criminal courts and tribunals purport to go after those who are 'most responsible' so, understandably, all defendants that come forward are claimed to have reached that threshold. The suitability of assigning human and inhuman features may be different for low- and high-level defendants, but in order to make them both fit into the narrative of the 'most responsible' and 'gravest crimes', they are portrayed in a similar stereotypical way. Low-level perpetrators can have a devious human nature, but their lower rank does not fit well with the narrative of evil mastermind. However, in the prosecutor's opening statement, these inhuman qualities are still assigned to them. On the other hand, for the high-level perpetrators, it is difficult to accept that they are human beings at all. A description of their smart and devious plans cannot do justice to the gravity of what has happened, and there is a need for stronger terms to describe the thoughtlessness and cruelty – the inhumanity. But, then again, this label cannot be applied so rigorously that perpetrators lose their human agency; we still need a person to embody the evil in order to prosecute it before a criminal tribunal. We end up with a stereotype that is adjusted and reversed multiple times throughout the statements to make it fit.

This is no harmless wordplay. By constructing these stereotypes and communicating them in an opening statement—an exceptional media moment that directs itself to a 'world audience' – a certain view of the world and the meaning of humanity is disseminated.¹⁵¹ This is not a descriptive, but a performative, act; invoking this certain

¹⁴⁷ Corrias, *supra* note 130, at 81.

¹⁴⁸ Mégret, *supra* note 3, at 300.

¹⁴⁹ Smeulers, *supra* note 45; Drumbl, *supra* note 89, at 11–12; see also Tadić, *supra* note 30, response of the defence, at 115, 116.

¹⁵⁰ Smeulers, *supra* note 45.

¹⁵¹ Vasiliev, *supra* note 13, at 748; Schwöbel-Patel, *supra* note 7, at 7; Stolk, *supra* note 7.

kind of humanity contributes to its making.¹⁵² Boyd White notes how ‘the meaning of the story, uncertain as it is, extends into the future, in the law and elsewhere, for stories about the real world are told as grounds for action’.¹⁵³ Narratives make meaning. One can wonder what kind of humanity this particular story creates and what it calls into action.¹⁵⁴ A courtroom narrative that enjoys wide attention has an impact on the public understanding of ‘humanity’ and communicates a moral message from an authoritative standpoint. This not only affects communal values and the prevention of future crimes in a positive way but can also bring about stigma, othering and exclusion.¹⁵⁵ There are risks in communicating a simplistic worldview that rigidly divides humanity into perpetrators and victims.¹⁵⁶ The reproduction of the stereotypical perpetrator as described above spreads a narrative of fearful tropes and boundaries.¹⁵⁷ Its dividing rhetoric places certain people and behaviour outside of the scope of humanity. This becomes problematic in light of the recurring criticism on the bias of international criminal tribunals. For example, the ICC’s focus on African situations has elicited serious accusations of neo-colonialism.¹⁵⁸ A similar tension has arisen at the ICTY, which faced criticism on its alleged anti-Serb bias. This article does not mean to falsify these accusations, but it does mean to highlight that stereotypical depictions of defendants contribute to a potentially divisive discourse and can aggravate the stigmatizing effect of the narrative that is (re)produced in international criminal trials. The tense context in which these stereotypical depictions are constructed marks the importance of their scrutiny and invites further discussion of ICL’s language to create room for more empirically grounded critical (self-)reflection.

4 Concluding Remarks

This article has analysed how the philosophical problem of the inhuman human translates practically into the international criminal trial discourse. The opening statements of the prosecution in these trials show a tendency towards not only characterizing the defendant as evil by nature but also constantly seeming to renegotiate his (in)humanity. The defendant appears to be a crucial figure in the prosecutor’s self-legitimizing narrative that aims to address evilness beyond human comprehension while simultaneously adhering to the rational human agent principles of criminal law. This process of simultaneously humanizing and dehumanizing the defendant

¹⁵² Tallgren, *supra* note 17; Corrias and Gordon, *supra* note 4.

¹⁵³ J.B. White, *Heracles’ Bow: Essays on the Rhetoric and Poetics of the Law* (1989), at 175.

¹⁵⁴ *Ibid.*, at 26.

¹⁵⁵ Schwöbel-Patel, *supra* note 7; Clarke, *supra* note 19; Clarke, ‘Making of the African Warlord’, *supra* note 22; Tallgren, *supra* note 17; Mégret, *supra* note 3; Nouwen and Werner, *supra* note 7.

¹⁵⁶ Simpson, *supra* note 7, at 20.

¹⁵⁷ Nouwen and Werner, ‘Doing Justice to the Political: The International Criminal Court in Uganda and Sudan’, 21 *EJIL* (2010) 941; Small, ‘Classing Sex Offenders: How Prosecutors and Defense Attorneys Differentiate Men Accused of Sexual Assault’, 49 *Law and Society Review* (2015) 109.

¹⁵⁸ K.M. Clarke, A.S. Knottnerus and E. de Volder, *Africa and the ICC* (2016).

results in a stereotypical 'ideal perpetrator' that is, paradoxically, human and inhuman at the same time.

An important function of the opening statement is to express commitment to the wider goals of ICL, such as deterrence, ending impunity and community building. Ascribing thoughtlessness, vanity, sadism and lust for power to the defendant might not directly contribute to proving the indictment, but it does reflect the aspiration within ICL to communicate a certain moral message about unacceptable human behaviour and the preferred global response. The appeal to the inhumanity of the perpetrator signifies a part of being human that is 'unimaginable' or difficult to acknowledge. However, the isolation of perpetrators of mass crimes from the rest of humanity is difficult to reconcile with the idea that criminal trials aim for reintegration, rehabilitation and, possibly, reconciliation. That these 'monsters' are inhuman but also human beings that can be held accountable before a tribunal characterizes the ambiguous underpinnings of the ICL narrative.

As Mark Osiel notes, 'the law's reach is thus at once too timid and too ambitious, both overinclusive and underinclusive vis-à-vis the actual distribution of responsibility'.¹⁵⁹ ICL appears to need a bit of both in order to hold on to the usefulness of technical trials about individual responsibility while still doing justice to a more abstract dimension of mass atrocity that cannot easily be translated into the language of the law. The inhuman human perpetrator serves the story of ICL by accounting for the particular response that it is offering: a criminal trial that deals with the most responsible for the gravest crimes, held on behalf of humanity. Crimes and responsibility require a human being, albeit with a despicable nature, while the gravity is emphasized by an appeal to an inhuman nature. Finally, speaking in the name of humanity aligns with a humankind interpretation of humanity. This simplistic, conflated perpetrator stereotype is not an unexpected outcome of the proceedings or a linguistic flaw that can be easily fixed by using better definitions. Rather, it suggests that an opening narrative that combines retelling incomprehensible drama with a criminal law ratio, and aims to stay true to ICL's multiple goals and allegiances, inevitably ends up with the paradoxical 'ideal' perpetrator stereotype of the sophisticated beast.

¹⁵⁹ Osiel, *supra* note 95, at 20.