

Chapter 5

A Sophisticated Beast?

On the construction of an 'ideal' perpetrator in the opening statements of international criminal trials

1. Introduction

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.³⁴⁰

The concept of (in)humanity has always been the centre of many philosophical debates, and its connection to international criminal law has received ample theoretical attention over the past years. But, as van Beers, Corrias and Werner argue, “‘humanity’ itself needs to be enacted; it derives its meaning from its use, its application and the ways in which it is contested in a wide variety of practices.”³⁴¹ Through a microanalysis of how (in)humanity is concretely shaped in the courtrooms of international criminal courts and tribunals, this chapter aims to contribute to the discussion in such a practice-oriented way. International criminal trials are practices *par excellence* where the meaning of being human is negotiated, particularly when introducing the defendants. This chapter sheds light on the similarities and differences between the ways in which trial participants engage with the defendant’s (in)humanity by exploring the perspectives on perpetrators of international crimes that prevail in trial discourse. It examines how the specific trial context gives rise to certain stereotypical features and considers, in analogy with Nils Christie’s famous ‘ideal victim’ stereotype,³⁴² the construction of an ‘ideal perpetrator’. The first

³⁴⁰ S. Drakulić, *They Would Never Hurt a Fly: War Criminals on Trial in the Hague* (Penguin, 2004), 166.

³⁴¹ Van Beers, Corrias, and Werner (2014).

³⁴² N. Christie, 'The Ideal Victim', *From crime policy to victim policy* (1986). This endeavour that has also been taken up in the international arena, see C. Schwöbel-Patel, 'Nils Christie's 'Ideal Victim' Applied: From Lions to Swarms', *Critical Legal Thinking blog*, 30 August 2016 2015, available at <http://criticallegalthinking.com/2015/08/05/nils-christies-ideal-victim-applied-from-lions-to-swarms/> (last visited 7 February 2017); J. van Wijk, 'Who Is the 'Little Old Lady' of International Crimes? Nils Christie's Concept of the Ideal Victim Reinterpreted', *International Review of Victimology* (2013) 19. In line with the approach of Christie, Schwöbel and van Wijk, the analysis of the 'ideal perpetrator' does not refer to the search for an actual existing perpetrator but to the exploration of the common elements that are ascribed to perpetrators in international criminal trials. The 'ideal perpetrator' is as much a fiction

part of the chapter analyses the concrete portrayals of different defendants at different international criminal courts and tribunals in an attempt to find out whether there is such a stereotypical perpetrator of international crimes, and what that stereotype and the conceptualization of his (in)humanity look like.³⁴³ The second part of the chapter connects the empirical findings to the widely discussed philosophical problem of the human being who commits inhuman crimes; it theorizes the functioning of the stereotype and discusses how it serves a particular understanding of the purpose and value of contemporary international criminal trials.³⁴⁴

In order to analyse how and why trial participants understand and construct a particular stereotype, one has to turn to these moments in trial that focus on the perpetrator's character, which happens prominently in the opening statements. While arguably not entirely in line with the presumed ethics of criminal law, opening statements in international criminal trials usually assign a certain personality to the defendants, rather than merely describing the wrongness of the crimes he or she allegedly committed.³⁴⁵ Partly because the opening statement is not regarded as evidence,³⁴⁶ 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.³⁴⁷ Because it sets the tone of the trial, the opening statement is a unique moment for attaching a personality to the individual that will be connected to certain actions and responsibilities throughout the trial. This initial characterization of the defendant benefits from being the 'first impression', which is likely to be remembered, and persists throughout the trial.³⁴⁸ The fierceness of the direct responses of the defence and the judges to these personality sketches reveals that trial participants care about these depictions and that they matter for the unfolding proceedings. Furthermore, as noted in the

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.

³⁴³ In the remainder of this article the male pronoun is used when referring in general terms to the stereotypical perpetrator, for the sake of convenience and because all individual defendants that are discussed are male.

³⁴⁴ On the goals that are attached to ICL see Tallgren (2002); Damaška (2008).

³⁴⁵ Describing personalities for example contrasts what Douzinas described as the foundational assumption of liberal law: '[c]riminal law condemns wrong behavior not evil thoughts.' C. Douzinas, 'History Trials: Can Law Decide History?', *Annual Review of Law and Social Science* (2012) 8 283. The use of character information by the prosecution in international criminal trials is generally deemed 'improper and prejudicial', see for example C. Gosnell, 'Admissibility of Evidence', in KA Khan, C Buisman & C Gosnell (eds.), *Principles of Evidence in International Criminal Justice* (2010), 434. On improper emotional or prejudicial opening statements in Anglo-American domestic trials see Carney Jr and Vitali (2012).

³⁴⁶ See Chapter 1, p. 23. Specifically, see Lucas (1991) 355; Vasiliev (2012) 746. See also Special Court of Sierra Leone, Rules of Procedure and Evidence, Rule 84; SCSL, *the Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (hereinafter RUF); SCSL-04-15-T, Transcript 5 July 2004, Judge Thomson, p. 6.

³⁴⁷ Lucas (1991); Powell (2001); Snedaker (1986); Tanford (2009).

³⁴⁸ See Lucas (1991) 93.

previous chapters, the opening statement in the international arena serves not only as an introduction to the case but it is also a moment where trial participants emphasize and justify the importance of the trial, the tribunal, and the international criminal law (ICL) project as a whole.³⁴⁹ In this light, analysing the specific depiction of the defendants in these opening narratives can expose yet another set of assumptions of trial participants with regard to the role and meaning of ICL.

Section 2 of this chapter will focus on *how* the character of the perpetrator is portrayed in the opening statements of the prosecution (section 2.1-2.2), followed by an analysis of the defence's responses to these depictions (section 2.3). For this analysis, four contemporary tribunals were selected: the International Criminal Tribunal for the former Yugoslavia (ICTY), the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the International Criminal Court (ICC), representing different regions and different types of courts. The analysis considers high profile cases that are from the outset more likely to engage with the 'criminal mastermind' prototype and are arguably more dramatically oriented towards a broad audience, such as the cases against Slobodan Milošević, Charles Taylor and Nuon Chea. To see whether these prominent statements are representative of a wider phenomenon, the analysis also includes some of the more mid- and low-level cases as for example *Tadić* and *Limaj et al.* before the ICTY and *Duch* before the ECCC. In their four cases, the SCSL tried a wide range of different types of defendants; all four opening statements were included in the analysis. Also, all opening statements that were performed at the ICC up till 2014 were included.³⁵⁰

The red thread throughout the analysis in section 2 is the tension between portraying 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. Section 3 connects this analysis to other theoretical discussions that engage with a similar human/inhuman paradox, in order to place this way of talking about perpetrators of mass crime in a broader context and to consider what the function of a particular 'ideal' type might be. In line with the overall approach of the book, this discussion of the stereotypical construction of the perpetrator does not aim at making normative claims about the appropriateness of these portrayals. Neither does it claim that there are no alternative depictions possible; there will always be variation amongst cases, tribunals, prosecutorial teams, and individual prosecutors with different personal styles coming from

³⁴⁹ See specifically Chapter 1 and 2.

³⁵⁰ The difference between high versus low profile cases is relatively hard to assess in the context of this new and permanent court, in which all cases held so far are framed to have a high-profile character, albeit for different reasons.

different legal traditions. What this chapter aims to demonstrate is that, despite these differences, conceptualizing the (in)human is to a certain degree unavoidable when introducing a perpetrator of mass atrocity on the opening day. Even in the opening statement of the *Kordić and Čerkez* case, discussed in section 2.2 as an example that clearly deviates from the stereotype, one can identify implicit references to the inhuman human. The search for a stereotype recognizes that there are different types of perpetrators, perhaps even as many types as there are perpetrators. The aim here is not to ‘correctly’ characterize what perpetrators of international crimes are *actually* like or to answer questions about the nature of evil.³⁵¹ Rather, the chapter examines the shared characteristics of their portrayals in the opening statements at international criminal tribunals and the way in which these characteristics are mobilized to make them suitable for an international criminal trial context.

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,³⁵² he also is hotly passionate in his greed and lust for power.³⁵³ Defendants are smart³⁵⁴ hence 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 even contradictory, interpretations of the perpetrator’s character by the prosecution as well as the counter-image that is presented by the defence.

2.1 *A despicable human character*

As mentioned, the boundary between behaviour and personality seems to collapse when talking about the perpetration of mass atrocity. While technically only specific deeds are on trial, the

³⁵¹ On the variety of types of perpetrators of international crimes, see for example A. Smeulers, ‘Perpetrators of International Crimes: Towards a Typology’, in A Smeulers & R Haveman (eds.), *Supranational Criminology: Towards a Criminology of International Crimes* (Intersentia, 2008). For a normative account on how and why international criminal tribunals should attempt to understand how people turn into perpetrators of mass atrocity see for example S. Mohamed, ‘Deviance, Aspiration, and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law’, *Yale Law Journal* (2015) 124.

³⁵² SCSL, *The Prosecutor v. Sam Hinga Norman, Moinina Fofana and Allieu Kondewa* (hereinafter *CDF*), SCSL-04-14-T, Transcript 3 June 2004, opening statement of the Prosecution, p. 20; *The Prosecutor v. Kaing Guek Eav alias ‘Duch’* (Case 001; hereinafter *Duch*), 001/18-07-2007-ECCC/TC, Transcript 31 March 2009, opening statement of the Prosecution, p. 5.

³⁵³ For example, *The Prosecutor v. Slobodan Milošević*, IT-02-54, Transcript 12 February 2002, opening statement of the Prosecution, p. 9 and 22; ICC, *the Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Transcript 26 January 2009, opening statement of the Prosecution, p. 24.

³⁵⁴ The prosecutor in *Lubanga* repeatedly emphasizes that Lubanga is an ‘educated man’, 24 and 26; Milošević is described as an ‘excellent tactician’, *Milošević*, opening statement of the Prosecution, 9.

motivation for committing crimes is often connected to consistent character traits.³⁵⁵ The cases below show the recurrent ways of building a perpetrator personality by sketching his habits and vices.

The first feature concerns intellect, and how it can amount to ‘calculated cruelty.’³⁵⁶ The prosecutor’s task to prove a sophisticated criminal plan obviously leads to the presentation of a smart and deceitful defendant. A description of the accused as skilful manipulator that betrayed friends,³⁵⁷ is insincere toward the court³⁵⁸ or even managed to deceive the entire international community³⁵⁹ paints a picture of structural lying as a character trait. For example, according to the ICC’s prosecutor Thomas Lubanga deployed ‘opportunistic’ methods, ‘played’ with and ‘misled’ the international community, and ‘pretended’ to be loyal.³⁶⁰ Lubanga is not only accused of specific crimes, he is also persistently portrayed as a manipulative person that consequently misuses his intellectual capacities in different contexts, sketching an intrinsically bad character. In several opening statements, references to personal habits of the defendant are used to predict or explain his behaviour in conflict as well as his behaviour in court.³⁶¹ Even attempts to contribute to peace, efforts of demobilization, and apologies in court can in this narrative be qualified as dishonest or irrelevant.³⁶² Ideals are put away as hollow, hiding ‘real’ motives as greed and lust for power.³⁶³ The emphasis on the intellectual capacities of the defendant is crucial to the presentation of a sophisticated strategy; skilful lying is presented as way to disguise cruel intent. Interestingly, being smart is not only consistently equated with being manipulative but also

³⁵⁵ 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 J.A. Tanford, ‘An Introduction to Trial Law’, *Missouri Law Review* (1986) 51 655.

³⁵⁶ Jackson (1945). See also *Milošević*, opening statement of the Prosecution, p. 3; ECCC, *Nuon Chea, Ieng Sary, Khieu Samphan* (hereinafter *Nuon Chea et al.*), 002/19-09-2007-ECCC/TC, Transcript 20 November 2011, opening statement of the Prosecution, p. 14; SCSL, *Alex Tamba Brima, Ibrahim Bazzy Kamara and Santigie Borbor Kanu* (hereinafter *AFRC*), SCSL-2004-16-T, Transcript 7 March 2005, opening statement of the Prosecution, p. 21.

³⁵⁷ ICTY, *the Prosecutor v. Duško Tadić*, IT-94-1, Transcript 7 May 1996, opening statement of the Prosecution, p. 35; see also *Nuon Chea et al.*, opening statement of the Prosecution, p. 52, in which Khieu Samphan is described to encourage the execution of traitors and saw enemies everywhere ‘even amongst long-term friends’.

³⁵⁸ *Duch*, opening statement of the Prosecution, p. 47.

³⁵⁹ *Lubanga*, opening statement of the Prosecution, p. 30; *Milošević*, opening statement of the Prosecution, 8.

³⁶⁰ *Lubanga*, opening statement of the Prosecution, p. 25, 31, 35.

³⁶¹ This is by no means restricted to opening statements in international criminal trials. See for example J.M. Post and L.K. Panis, ‘Tyranny on Trial: Personality and Courtroom Conduct of Defendants Slobodan Milosevic and Saddam Hussein’, *Cornell International Law Journal* (2005) 38. Post and Panis use personal histories to explain courtroom behavior of Milošević and Hussein.

³⁶² *Duch*, opening statement of the Prosecution, p. 58. *Lubanga*, opening statement of the Prosecution, p. 30; *Nuon Chea et al.*, opening statement of the Prosecution, p. 44. While in *Duch*, apologetic behaviour is treated with suspicion, not being apologetic is equally bad, see for example ICTY, *the Prosecutor v. Vojislav Šešelj*, IT-03-67-T, Transcript 7 November 2007, opening statement of the Prosecution, p. 1795.

³⁶³ See *Milošević*, opening statement of the Prosecution, p 9: “One must not seek ideals underlying the acts of the accused”. See also *RUF*, opening statement of the Prosecution, p. 20-22, claiming that the mere ‘ideological pretensions’ mask motives of greed and senseless destruction.

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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.’³⁶⁴ The paradox is clear: a rational plan cannot be devoid of reason while, simultaneously, it seems difficult to mark these acts as reasoned in any way.

In many statements, the prosecution also assigns to the accused a more blunt and vain lust for power that has little to do with intellectual strategies.³⁶⁵ An example comes from the SCSL where accused 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.³⁶⁶

The defendant is depicted as posturing himself as a superhuman, revealing a very human arrogance. Similar descriptions of a defendant’s vanity appear in other opening statements.³⁶⁷ Several statements expose a defendant who holds a proud or even sadistic attitude towards the mass crimes. At the ICTY, Šešelj is described to brag about his hate speeches and the effectiveness of his elite units.³⁶⁸ In *Limaj et al.*, the prosecutor claims that ‘there is no doubt that this man enjoyed the infliction of gratuitous and brutal violence’³⁶⁹ and the beating of prisoners is cynically labelled as ‘sport for guards’.³⁷⁰ In *Katanga and Ngudjolo*, Prosecutor Moreno-Ocampo tells:

³⁶⁴ SCSL, *The Prosecutor v. Charles Taylor*, SCSL-2003-01-T, Transcript 4 June 2007, opening statement of the Prosecution, p. 299; See also *RUF*, opening statement of the Prosecution, p. 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*, opening statement of the Prosecution, p. 20. See also *Milošević*, p. 2.

³⁶⁵ For literal references to this lust for power, see for example the opening statements in *Milošević*, p. 9 and 22 and *Lubanga*, p. 24.

³⁶⁶ *CDF*, opening statement of the Prosecution, p. 24.

³⁶⁷ See also for example *Šešelj*, opening statement of the Prosecution, p. 1796. The prosecutor notes how Šešelj ‘describes himself as the only Serbian Chetnik Vojvoda, or duke’. Another example is Mladic, 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.’ ICTY, *the Prosecutor v. Ratko Mladić*, IT-09-92-T, Transcript 16 May 2012, opening statement of the Prosecution, p. 443.

³⁶⁸ *Šešelj*, opening statement of the Prosecution, p. 1807 and 1840.

³⁶⁹ ICTY, *Fatmir Limaj, Isak Musliu and Agim Murtezi* (hereinafter: *Limaj et al.*), IT-03-66, Transcript 15 November 2004, opening statement of the Prosecution, p. 342.

³⁷⁰ *Ibid.*, p. 344.

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 [sic]. Everything was wiped out."³⁷¹

In a way, these claims present evidence for the role of the accused in the ordering and planning of atrocity. The words 'boast', 'bluntly' and 'laugh' however serve yet another purpose; they contribute to the construction of a specific personality. 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 acknowledgment of the crimes, but depicting the officers as self-congratulatory drunks mainly establishes a picture of sadism and cruelty.³⁷² While the sadistic attitude entails 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 of the *Mladic* case, pictures of the exhumation site in Srebrenica are shown after pictures of Mladic attending a wedding that took place at the time as the massacre. The prosecutor notes that 'Mladic is seen here smiling, celebrating a wedding, all the time knowing that innocent men were being murdered as he did.'³⁷³

In order to present being violent as an internalized norm that is part of the defendant's character, the establishment of a consistent pattern of behaviour is crucial. For example, in *Lubanga* the prosecutor notes that, '[a]s is his custom, Lubanga dealt with the situation violently and deftly',³⁷⁴ introducing violence not as 'just' a criminal deed but as one of Lubanga's habits. Another way to establish a consistent pattern of violent behaviour is to present a pattern in the defendant's personal history. While the elaboration of international prosecutors on the course of life of the defendant prior to the acts for which he is indicted is not widely approved of, such personal histories frequently occur in the opening statements.³⁷⁵ A sentence like "Tadic had an enduring

³⁷¹ ICC, *Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-T-80, Transcript 24 November 2009, opening statement of the Prosecution, p. 26; See also for example *Duch*, opening statement of the Prosecution, p. 36.

³⁷² *Katanga and Ngudjolo*, opening statement of the Prosecution, p. 25 and 38. The same scene is discussed in Chapter 3, p. 70. The serenity of the landscape is contrasted with the cruelty of the accused, which strengthens the stereotype.

³⁷³ *Mladic*, opening statement of the Prosecution, 17 May 2012, p. 521-522.

³⁷⁴ *Lubanga*, opening statement of the Prosecution, 27, (emphasis added).

³⁷⁵ See for example *Tadic*, opening statement of the Prosecution, p. 44 onwards, going back all the way to primary school; *Lubanga*, opening statement of the Prosecution, p. 24 onwards; *Duch*, opening statement of the Prosecution, p. 58 onwards. In the international context, the ICTY judges decided that 'evidence of the accused's character prior

interest in Karate³⁷⁶ can be understood as contextual information that attributes a certain love for violence to the defendant. Tadic 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 not only describe the crimes but also a certain type of personality.

Not only consistency but also contrast is used to establish the uncanniness of the defendant's behaviour. 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 'renowned for its charm and diversity, the capital of a multi-ethnic republic'.³⁷⁷ To sketch a peaceful historical and personal context emphasizes the cruelty of the defendant. In line with the observations made earlier in chapter 3, prosecutors deploy multiple descriptions of the nice, the peaceful, and the innocent in contrast with the 'ugly' character of the accused. This can be as ostensibly trivial as a reference to the weather or the location where the crimes took place.³⁷⁸ Even more commonly, the accused is contrasted with innocent civilians, mainly the harmless woman and children, who have 'very little political awareness'.³⁷⁹ The local population is depicted as good and innocent versus a bad defendant. While intuitively this distinction makes sense, it sits uncomfortably with some traditional criminal law values. Carney and Vitaly note how in 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'.³⁸⁰ Nevertheless, this good-bad antagonism is often invoked in international criminal cases. The contrast culminates in the previously described

to the events for which he is indicted before the International Tribunal is not a relevant issue', ICTY, *the Prosecutor v. Kupreskic et al.*, ICTY, 'Decision on evidence of the good character of the accused and the defence of Tu Quoque', 17 February 1999, online at <http://www.icty.org/x/cases/kupreskic/tdec/en/90217MS25407.htm> (last visited 8 February 2017).

³⁷⁶ *Tadic*, opening statement of the Prosecution, p. 26.

³⁷⁷ ICTY, *the Prosecutor v. Radovan Karadžić*, IT-95-5/18-T, Transcript 27 October 2009, opening statement of the Prosecution, p. 515. See also *Taylor*, opening statement of the Prosecution, p. 298, speaking of 'ordinary folks on the countryside nothing to do with politics'.

³⁷⁸ See for example *RUF*, opening statement of the Prosecution, p. 18, 'on a warm spring day'; *Taylor*, opening statement of the Prosecution, p. 270, in which Freetown is described as 'the Athens of Africa'; *Tadic*, opening statement of the Prosecution, p. 25, which describes the village where Tadic lived; *Nuon Chea et al.*, opening statement of the Prosecution, p. 18, 'The trim walkways and flower-scented parks were submerged under a heaving mass of homeless families, weeping, lost children, all increasingly afraid.' See also chapter 3.

³⁷⁹ *Šešelji*, opening statement of the Prosecution, p. 1788. See also *Lubanga*, opening statement of the Prosecution, p. 5, 47, 6, in which prosecutors and victim representatives keep emphasizing that children were abducted while doing normal, innocent things as going to school or playing football. The prosecutor in *Taylor*, who speaks of 'poor, defenceless civilians, ordinary folks on the countryside who had nothing to do with politics, governance or corruption', p. 298.

³⁸⁰ See Carney Jr and Vitali (2012). They cite the domestic case *Commonwealth v. Simpson*, 434 Mass. 570, 583- 584 (2001).

depiction of the suffering victims,³⁸¹ who most powerfully symbolize the inhumanity of the defendant, as will be described in the next section.

2.2 *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.’³⁸² Justice Jackson already argued in his famous opening statement at the Nuremberg International Military Tribunal (IMT) that ‘these prisoners represent sinister influences that will lurk in the world long after their bodies have returned to dust.’³⁸³ Prosecutor Crane at the SCSL talks about the ‘jackals of death’³⁸⁴, ‘hounds from hell’³⁸⁵, ‘the beast of impunity’.³⁸⁶ These are extreme examples of calling on transcendental evilness, but also less dramatic opening statements reveal a recurrent pattern of invoking the inhuman. For example, describing the crimes as a rational plan made up by a human being is alternated with a focus on the inhumanness of the crimes by labelling them as (medieval) savagery, barbarism, carnage, and being devoid of any *human* reason.

A prominent way in which inhumanness is emphasized in the opening statements is by referring to animal-like behaviour. In ICL language, animal metaphors often represent the ultimate opposite of human beings 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 of for example superiority versus inferiority and civilized versus non-civilized behaviour.³⁸⁷ In the opening statements, victims are recurrently

³⁸¹ See chapter 4.

³⁸² *Tadić*, opening statement of the Prosecution, p. 11-12; See also for example *Nuon Chea et al.*, 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’, p. 110-111, and ‘unleashed an ocean of blood’, p. 114. References to the ‘unspeakable’ are omnipresent, see for example the opening statements of the Prosecution in *Milošević*, p. 15; *RUF*, p. 30; and *Lubanga*, p. 11.

³⁸³ Jackson (1945).

³⁸⁴ *CDF*, opening statement of the Prosecution, p. 6.

³⁸⁵ *RUF*, opening statement of the Prosecution, p. 19.

³⁸⁶ *Ibid.*, p. 22 and 27; *CDF*, opening statement of the Prosecution, p. 6 and 7.

³⁸⁷ See R.A. Palmatier, *Speaking of Animals: A Dictionary of Animal Metaphors* (Greenwood Publishing Group, 1995), xi. On the use of metaphors in general see G. Lakoff and M. Johnson, *Metaphors We Live By* (The University of Chicago Press, 1980).

described to be treated inhumanely, being imprisoned or slaughtered like animals.³⁸⁸ All the more interesting is the simultaneous depiction of the perpetrator as a beast, behaving like an animal.³⁸⁹

The story of the suffering victims is an important element in the construction of the inhuman cruelty of the accused.³⁹⁰ It appears to be impossible to talk about the gravity of the offences without this language of cruelty and inhumaneness. Chapter 4 showed how the accounts of victims and explicit stories of their suffering are central to all opening statements. Expressing the pain of the innocent victims emphasizes the defendant's beastly ruthlessness.³⁹¹ As noted before, it seems inevitable to talk about the suffering of the victims in the opening statement, considering that acknowledgment of this suffering is often portrayed as one of the important goals of international criminal trials.³⁹² However, besides the difficulty of conflicting discourses described in chapter 4, to contrast the suffering victims with the character of 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, which include making hyperbolic statements as 'executed like animals', sketching events as 'one of the worst and most violent days' in history³⁹³ or telling how much the victim's family suffered.³⁹⁴ It is not that these types of statements are not uttered in domestic courts, but they will most likely give rise to objections. In international criminal trials, exactly these 'improper' stories that focus on the suffering of the victims form the main narrative of the opening statements of the prosecutor.

The 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 has been discussed in the previous chapters, and elsewhere.³⁹⁵ However, it is worth elaborating here on a particularly striking victim-perpetrator construction that demonstrates the dependence of

³⁸⁸ See for example the opening statement of the Prosecution in *Limaj et al.*, p. 303 and 305; *Karadžić*, p. 524; *Tadić*, p. 35; *Katanga*, p. 25; *Nuon Chea*, p. 42 (21 November). In *Mladić*, the conditions are described as 'insufficient to sustain farm animals, let alone humans', opening statement of the Prosecution, p. 464.

³⁸⁹ 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 CPK in Cambodia, which is also repeatedly cited in the opening statement of the prosecution in *Nuon Chea*, p. 49, 51 (21 November) and p. 59 (22 November). See also for example the references to dehumanizing speech in *Šešeljić*, opening statement of the Prosecution, p. 1802.

³⁹⁰ Clarke (2011) 12.

³⁹¹ Schwöbel-Patel (2015).

³⁹² See Kendall and Nouwen (2013).

³⁹³ Carney Jr and Vitali (2012) 4.

³⁹⁴ Tanford (1986) 655.

³⁹⁵ For such a discussion, see for example Kendall and Nouwen (2013); Clarke (2011); Schwöbel-Patel (2016); Stolk (2015).

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 a perpetrator.³⁹⁶ Obviously, a child soldiers as a 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,³⁹⁷ enforces the evilness of the accused. In the words of prosecutor Moreno-Ocampo: ‘the defendant stole the childhood of the victims’ and ‘victimized children before they ever had the chance to grow up into full human beings’³⁹⁸ while he ‘knew he was breaking the basic rules that the world established to protect those with the least power among us.’³⁹⁹ As Drumbl notes, these children are portrayed to ‘become neutered mechanical means used to fulfil nefarious ends over which they have no input,’⁴⁰⁰ which not only obscures the child soldier’s agency but also the rationales of the evil ‘crazed demented’ commanders.⁴⁰¹ 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 in many cases crucial to the demonization of the defendant, which would be disturbed if 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.

It is not common to break with the comfortable victim-perpetrator binary or to challenge the stereotypical perpetrator by introducing more ambivalent main characters.⁴⁰² However, it would be too easy to claim that all opening statements engage with talking about inhuman evil. Especially at the ICTY also more technical, concise, and ‘dry’ openings find their way in court. An example of that is the opening statement by prosecutor Mr. Nice in the *Kordić and Čerkez* case. In this speech, the prosecution almost refuses to talk about the persons on trial at all, which diametrically opposes the dramatic opening statement by the same prosecutor in the *Milošević*

³⁹⁶ M.A. Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press, 2012), 8. See also Clarke (2011).

³⁹⁷ K.M. Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge University Press, 2009), 115.

³⁹⁸ *Lubanga*, opening statement of the Prosecution, p. 34. While not in the context of recruiting child soldiers, also *Nuon Chea et al.* are accused of stealing the educational opportunities from children, being ‘thieves of time’, opening statement of the Prosecution, p. 67.

³⁹⁹ *Lubanga*, opening statement of the Prosecution, p. 35.

⁴⁰⁰ Drumbl (2012) 7.

⁴⁰¹ *Ibid.*, 12.

⁴⁰² *Ibid.*, 214. An interesting case in this respect will be the forthcoming trials of former child soldier Dominique Ongwen at the ICC. See ‘The Dominic Ongwen Trial and the Prosecution of Child Soldiers – A JIC Symposium’, at *Justice in Conflict Blog*, online at <http://justiceinconflict.org/2016/04/11/the-dominic-ongwen-trial-and-the-prosecution-of-child-soldiers-a-jic-symposium/> (accessed online 8 February 2017).

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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’.⁴⁰³ The prosecutor not only denies their monstrousness, but urges to not emotionally relate to the accused at all and to not attempt to understand his deeds, either in a positive or a negative way, in saying:

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 and for whose respect we must ensure a proper conclusion, by the proper adduction and testing of evidence in this case.⁴⁰⁴

This explicit denial of discussing the personality of the accused can be as uncomfortable as the dramatic inhuman. Moreover, underplaying the interest in the accused equally 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 worth sympathizing with in any human way. While this is not exactly the same as labelling someone or something as ‘inhuman’, both forms of dehumanization share their emphasis on the unspeakable and incomprehensible characters of the crimes and both strategies are deployed to detach humanity from these crimes and their perpetrator. 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 shortly, ending with the addition ‘well, I needn’t go on’⁴⁰⁵ 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.’⁴⁰⁶ The understatement emphasizes the obviousness of the magnitude of the drama and therefore highlights, albeit implicitly, the obviousness of the monstrousness of the acts.

A more frequent way in which the inhuman finds its way in low-level cases at the ICTY without direct accusation of evil, is by linking the case to ‘big fish’ like Milošević and Karadžić. A tribunal

⁴⁰³ ICTY, *the Prosecutor v. Dario Kordić and Mario Čerkez*, IT-95-14/2-T, Transcript 12 April 1999, opening statement of the Prosecution, p. 9.

⁴⁰⁴ *Kordić and Čerkez*, opening statement of the Prosecution, p. 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 way the ‘easier’ route. C.R. Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland*, vol. 1998 (HarperCollins New York, 1992), xx.

⁴⁰⁵ *Kordić and Čerkez*, opening statement of the Prosecution, p. 90.

⁴⁰⁶ *Ibid.*, p. 107.

seems to need at least one prototypical perpetrator, through which others can be labelled evil ‘by proxy’.⁴⁰⁷ Arguably, the fewer perpetrators a tribunal tries, the more prototypical they have to appear, for they have to represent the most responsible, serious, and real monsters. Contrary to the ICTY, some mid and low-level perpetrators have to carry that burden at the SCSL and the ICC, which is reflected in their opening statements. Obviously, all of the above has elicited responses from the defence teams. The next section considers how these responses undermine but also contribute to the (re)construction of the stereotypical inhuman human perpetrator.

2.3 Defending the (in)human

The adversarial procedure in international criminal trials prevents them from becoming unidirectional fora for accusation, dehumanization, and ‘othering’. The narrative of the defence is as much 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, ranging from accusations of scapegoating to the expression of remorse to the portrayal of the defendant as a victim of bad prosecution or an illegitimate tribunal.⁴⁰⁸

In the opening statement of the *Ruto and Sang* case, the defence counsel calls the prosecutor’s depiction of William Ruto a ‘caricature’⁴⁰⁹ and a ‘character assassination’⁴¹⁰ that portrays the accused in ‘the most hideous light.’⁴¹¹ Furthermore, he explicitly denounces the lust for power claim:

[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.⁴¹²

⁴⁰⁷ On the question of how international criminal tribunals ‘tie the big fish to the smaller fry’, see M. Osiel, *Making Sense of Mass Atrocity* (Cambridge University Press, 2009).

⁴⁰⁸ Steinitz (2005). See also Koskenniemi (2002) 17; Glasius and Meijers (2012); Meijers and Glasius (2013).

⁴⁰⁹ ICC, *the Prosecutor v. William Ruto and Joshua Sang*, ICC, ICC-01/09-01/11-T-27, 10 September 2013, opening statement of the Defence, p. 11; For a critical review of the perpetrator imagery in particularly the Kenya cases before the ICC see K.M. Clarke, ‘Refiguring the Perpetrator: Culpability, History and International Criminal Law’s Impunity Gap’, *The International Journal of Human Rights* (2015) 19.

⁴¹⁰ *Ruto and Sang*, opening statement of the Defence, p. 57.

⁴¹¹ *Ibid.*, p. 53.

⁴¹² *Ibid.*, p. 70.

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The defence counsel of Khieu Samphan before the ECCC also attacks the use of stereotypes and the attempt to put the responsibility of an entire conflict on one person. Criticising not only the prosecutorial strategy but in a way, perhaps unintentionally, also 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.⁴¹³

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 unleashing an ocean of blood they ask 'what is the size of the ocean?' and 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,⁴¹⁴ adding that the prosecution's opening statement 'sounded like a novel written by Alexandre Dumas.'⁴¹⁵ At the SCSL, the defence disputes the depiction of the defendants as 'dogs of war' and 'hounds of hell', which was sustained by the Judge.⁴¹⁶ After the prosecution's opening statement defence lawyer Mr. 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.'⁴¹⁷ The emphasis on the defendant's humanity and the calls for being more reasonable, rational, and nuanced attempt to put the prosecutor's depiction away as overdramatic, sensationalist, and unrealistic.⁴¹⁸

Before the ICC, the defence team of Joshua Sang deploys an interesting strategy by directing its appeal to a specific religious community; Sang is explicitly portrayed as a faithful Christian by himself and by his lawyers, which must account for his innocence.⁴¹⁹ The defence lawyer 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

⁴¹³ *Nuon Chea et al.*, Defence response, 23 November 2011, p. 42.

⁴¹⁴ *Ibid.*, p. 29-30.

⁴¹⁵ *Ibid.*, p. 39.

⁴¹⁶ *RUF*, p. 19. As noted in Chapter 1, raising objections during opening statements is not all that common, see specifically p. 25.

⁴¹⁷ *Ibid.*, p. 34.

⁴¹⁸ On sensationalism and simplicity in the ICL message see also C. Schwöbel-Patel, 'The Comfort of International Criminal Law', *Law and Critique* (2013) 24; Schwöbel-Patel (2016).

⁴¹⁹ *Ruto and Sang*, opening statement of the Defence, p. 3, 5, 10, 7, 8, 23, 31.

possibility to exit humanity when becoming a perpetrator of mass crimes by asking the audience whether the defendant still has a role to play in humanity.⁴²⁰ He expresses worries about the dehumanization of Duch and interrogates the in- and outside of humanity by wondering if, through the hearings, we can return humanity to the victims but also whether we are able to ‘allow those or the one who, had exited humanity to return to humanity.’⁴²¹ Interestingly, the prosecution in *Duch* claims that *we all* lost a bit of humanity ‘in the face of such horrors.’⁴²² So even humanity lost its humanity. In this, the trial is not only claimed to be representing and addressing humanity, but it is also explicitly put forward as a redemptive tool to give humanity back or to reconstitute it, which will be further discussed in section 3.

One remark that is particularly suitable to the theme of this chapter comes from the Tadic defence team. Tadic definitely does not enjoy a ‘big fish’ status and his legal team responds to the prosecution’s opening statement by warning 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.’⁴²³ Adding that:

[T]he lack of defined and public criteria has blown the case against Dusko Tadic 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 Tadic has been portrayed *as the prototype of a war criminal*.⁴²⁴

Many defence lawyers criticize the projection of exactly those prototypical characteristics analysed in the previous section. The danger of ‘scapegoating’ is likely to be evoked when countering claims of individual responsibility. However, while attempting to relieve their clients from the mark, the defence’s depiction of the accused can also *contribute* to this construction of a prototype. Ruto is not a monster because he works hard and promotes peace, Sang is not because he is a Christian, Duch is not because he shows remorse, Tadic is not because he is not the criminal mastermind, Morris Kallon is just an ordinary working man⁴²⁵ and Khieu Samphan did not attempt to destroy but to defend the Cambodian people, the people he claims to ‘love the most’.⁴²⁶ These depictions deny the applicability of the prototypical character traits to specific

⁴²⁰ *Duch*, Defence response, p. 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’ *Duch*, p. 63.

⁴²¹ *Duch*, Defence response, p. 91-92.

⁴²² *Duch*, opening statement of the Prosecution, p. 64.

⁴²³ *Tadic*, Defence response, p. 53 and 54.

⁴²⁴ *Ibid.*, p. 56 (emphasis added).

⁴²⁵ RUF, statement by Defence counsel, p. 72-73.

⁴²⁶ *Nuon Chea*, Defence response, p. 13 (23 November 2011).

individuals but leave open the possibility of the existence of these qualities for other, *really* prototypical war criminals. While these narratives challenge the branding of a particular accused, they do not challenge the prototype as such; their client just does not fit the bill. There are different ways to emphasize this; by placing the deeds in the larger scheme of the conflict or by blaming it on orders, on state interests or ideology, on threats, on lack of knowledge or even on 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 an actual human being who cares about (his) humanity.

The statements of both prosecution and defence show that to be labelled 'a man', a human being, is one of the trial's highest stakes. This also appears from 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 pleaded guilty are usually delivered at their sentence hearings and show a recurrent attempt to not only communicate deep regret, remorse, and apologies to the victims, but also the need to emphasize that the defendant him or herself is a human being. These statements speak of 'human regret'⁴²⁷, guilt in 'the human sense'⁴²⁸, the duty as a human being to contribute to the healing of the wounds⁴²⁹ and the duty of human beings to 'to restrain oneself and to respect the human dignity of others.'⁴³⁰ 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.'⁴³¹ These calls on a tribunal to recognize the human in the perpetrators emphasizes again how these trials not only struggle with the question of guilt or innocence but also inevitably with the question of humanity.

3. An ambiguous stereotype

The opening statements analysed above reveal an interesting paradox: 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, but speaking about mass atrocity seems to always involve a dimension of inhuman evil that places the accused outside the realm of humanness. On the one hand, ICL relies on the foundations of liberal democracies by treating perpetrators as accountable

⁴²⁷ ICTY, *the Prosecutor v. Dragan Kolundžija*, sentencing hearing, 9 October 2001.

⁴²⁸ ICTY, *the Prosecutor v. Miroslav Deronjić*, sentencing hearing, 28 January 2004.

⁴²⁹ ICTY, *the Prosecutor v. Dragan Obrenović*, sentencing hearing, 30 October 2003.

⁴³⁰ ICTY, *the Prosecutor v. Biljana Plavšić*, sentencing hearing, 17 December 2002.

⁴³¹ ICTY, *the Prosecutor v. Dragan Zelenović*, sentencing hearing, 23 February 2007.

agents;⁴³² 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. On the other hand, imagining unimaginable crimes, crimes ‘we’ apparently do not want to consider human, warrants the invocation of a beastly, evil perpetrator with whom it is hard to identify and who is, in the words of Fred Mégret, placed ‘on the outer borders of humanity.’⁴³³ Consequently, defendants are located both inside and outside the all-encompassing community that is invoked and created at the international courts.⁴³⁴ By addressing the human as well as the inhuman side of the accused, one can stay true to the principles of criminal law and simultaneously do justice to the gravity and magnitude of the crimes.

If the main aim of a trial would be to affirm and create an unbridgeable distance between monstrous perpetrators and ordinary human beings,⁴³⁵ the defendant could be presented as humanity’s absolute opposite. Portraying the defendant as a ‘non-human’ or ‘a-human’ possibly better reflects the hope that being capable of committing such horrendous acts is not human.⁴³⁶ However, criminal law cannot entirely deny the human in the perpetrator exactly because it needs to try an accountable human being and aspires to influence future *human* behaviour. 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,⁴³⁷ ascribes a redemptive function to international criminal law.⁴³⁸ The possibility of regaining humanity signals that the human is always still present in someone who commits inhuman crimes. The inhuman might signal something all too human after all.⁴³⁹ As Edwin Bikundo notes, ‘non-humans could never be guilty of inhumanity.’⁴⁴⁰ The

⁴³² Duff (2010) 595; Douzinas (2012).

⁴³³ F. Mégret, ‘Practices of Stigmatization’, *Law & Contemporary Problems* (2013) 76 302.

⁴³⁴ On the invocation of humanity in ICL as creative act see Corrias and Gordon (2015) 105.

⁴³⁵ Drakulić (2004). For a similar observation see S. Mohamed, ‘Of Monsters and Men: Perpetrator Trauma and Mass Atrocity’, *Columbia Law Review* (2015) 115 1211. See also M.C. Nussbaum, *Upbeavals of Thought: The Intelligence of Emotions* (Cambridge University Press, 2003), 450.

⁴³⁶ This is also noted by Nils Christie: the offender that creates the most ideal victim is a dehumanized non-person. See van Wijk (2013) 166.

⁴³⁷ If the process of dehumanization in cases of mass atrocity applies to both victims and perpetrators, one can wonder whether the term ‘dehumanization’ can cover both processes. The inhumanness of the victim seems a different type of inhumaneness than 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. On the different interpretations of ‘humanity’ see C. Macleod, ‘Towards a Philosophical Account of Crimes against Humanity’, *European Journal of International Law* (2010) 21.

⁴³⁸ This theme is particularly discussed in *Duch* by the prosecution as well as defence. See opening statement of the Prosecution, p. 63-64. For the position of the Defence see *supra* note 421 and 422.

⁴³⁹ On the inhuman as part of being human, see L. Corrias, ‘The Inhuman Stain: Representing Humanity in International Criminal Law’, in B van Beers, L Corrias & WG Werner (eds.), *Humanity across International Law and Biolaw* (Cambridge University Press, 2014).

⁴⁴⁰ E. Bikundo, ‘Humanity’s Exemplary Justice: From *Hostis* to *Hostia Humani Generis*’, in B van Beers, L Corrias & W Werner (eds.), *Humanity across International Law and Biolaw* (Cambridge University Press, 2014), 52.

practical meaning of the idea that humanity simultaneously includes and excludes itself,⁴⁴¹ and is 'irreconcilably at odds with itself,'⁴⁴² becomes visible in the specific constructions of perpetrators that are described above. This fundamental paradox is however not hampering but enabling the construction of the perpetrator; it allows for humanity and inhumanity to coexist and for the rationales of responsible agents and inhuman evil to be combined in one narrative. According to Klabbers, we 'almost inevitably slip back into the picture of the war criminal as a monster, a demon, acting out of greed, covetousness, or simply acting out his or her sadistic soul.'⁴⁴³ However, this stereotypical defendant, who also features in the opening statements, is not only a monster but also a man. Greed, covetousness, and sadism signal the inhumanity of the defendant, but are also his *human* vices, the despicable character.⁴⁴⁴

That such a dual depiction remains an uncomfortable one appears from the recurring observation in reports on international criminal trials about the difficulty of reconciling the monstrous deeds of the accused with his actual appearance in court.⁴⁴⁵ 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.⁴⁴⁶ According to Hannah Arendt, criminal trials can have humanizing effects by focusing on individuals and transforming them back into accountable human beings,⁴⁴⁷ but also the defendants' presence in court may have humanizing effects in a very banal way. As Drakulić describes:

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. You watch their faces, ugly or pleasant, the way they yawn, take

⁴⁴¹ Ibid.

⁴⁴² D. Heller-Roazen, *The Enemy of All: Piracy and the Law of Nations* (Zone Books, 2009), 161.

⁴⁴³ J. Klabbers, 'Just Revenge? The Deterrence Argument in International Criminal Law', *Finnish yearbook of international law* (2001) 12 260.

⁴⁴⁴ One of the possible meaning of 'crimes against humanity' identified by MacLeod is 'an action contrary to the human-nature of the perpetrator.' Macleod (2010) 283. In this sense, it is indeed the humanity of the perpetrator that makes it possible to act contrary to that nature. Being human is the prerequisite for committing crimes against humanity.

⁴⁴⁵ Arendt (2006) 53; T. Cruvellier, *Master of Confessions: The Making of a Khmer Rouge Torturer* (Ecco Press, 2014), 53.

⁴⁴⁶ The prosecution in *Nuon Chea et al.* 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 et al.*, opening statement of the Prosecution, p. 110.

⁴⁴⁷ Arendt (2006); A. Smeulers and W. Werner, 'The Banality of Evil on Trial', in C Stahn, LJ Herik & J Dugard (eds.), *Future Perspectives on International Criminal Justice* (T.M.C. Asser Press, 2010).

notes, scratch their heads or clean their nails, and you have to ask yourself: what if this is a man?⁴⁴⁸

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, the other way around, how can humans be such monsters? 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 to have 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:

it 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, everybody could see that this man was not a “monster,” but it was difficult indeed not to suspect that he was a clown.⁴⁴⁹

Criminal trials seem unable to deal with a defendant who is ridiculous or totally unaware of his crimes; ignorance is rather disruptive for a trial that praises itself for its seriousness. Here, the actual presence of the defendant indeed problematizes 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 Eichmann were indeed ‘the most abnormal monster the word had ever seen.’⁴⁵⁰ However, she claims, Eichmann actually was ‘terrifyingly normal.’⁴⁵¹ At the same time, Arendt describes how, ‘under the conditions of the Third Reich only “exceptions” could be expected to react “normally.”’⁴⁵² So Eichmann was simultaneously normal and like many others, but also abnormal and an exception. While Arendt explicitly says that Eichmann was neither a pervert nor a sadist⁴⁵³ and critiques the approach of the prosecution to put him away as a monster, she simultaneously puts his human character in the same despicable light as the prosecutors in the contemporary cases described above, by

⁴⁴⁸ Drakulić (2004) 168. For a concrete example of such banalities during the opening statement, see *AFRC*, p. 39, where the opening statement is interrupted because the accused has to go to the toilet.

⁴⁴⁹ Arendt (2006) 54.

⁴⁵⁰ *Ibid.*, 276.

⁴⁵¹ On the controversy surrounding this thesis, see for example M. Ezra, ‘The Eichmann Polemics: Hannah Arendt and Her Critics’, *Demokratiya* (2007) 9.

⁴⁵² Arendt (2006) 26.

⁴⁵³ *Ibid.*, 276.

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assigning to him a certain lust for power⁴⁵⁴ and an arrogant attitude.⁴⁵⁵ 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.’⁴⁵⁶ Especially this lack of empathy and lack of imagination describes a man that is rather devious from normal, or at least socially inapt. He is, in Arendt’s words, ‘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.’⁴⁵⁷ It appears to be as difficult for others to understand Eichmann’s perspective, as it was for Eichmann to see someone else’s perspective. Arendt too seems not to be able to escape the portrayal of a person that is human and inhuman at the same time.

The struggle of international prosecutors to portray one man as a calculated person and a mindless monster at the same time supports theories that render a binary opposition of the human and the inhuman impossible; especially in an international criminal law setting the inhuman is part of the human.⁴⁵⁸ The false contrast between smart calculation and mindlessness draws attention to a recurring concept in the opening statements that has always been central to the discussion on what defines humanity in general and the subjects of (criminal) law in particular: reason.⁴⁵⁹ Law traditionally aligns itself with reason, and in the opening statements lawlessness, evil, and criminal behaviour are often connected to a certain form of *unreason*. The main motive Arendt ascribes to Eichmann, one that is difficult to judge in an international criminal trial, is thoughtlessness, not thinking.⁴⁶⁰ Obviously, not all (or perhaps none) defendants at international criminal trials resemble Eichmann, and the discussion on what Arendt meant by this particular phrase is ongoing. Nevertheless, the characterization of the defendant’s thoughtlessness has been widely taken up by international prosecutors. In many contemporary trials, the term is used to describe acts that display not mere ignorance or negligence but rather a

⁴⁵⁴ Ibid., 33.

⁴⁵⁵ Ibid. For example ‘[c]learly, bragging has always been one of his cardinal vices’, 29. See also p. 41, 46 and ‘his compulsion to talk big’, at 47.

⁴⁵⁶ Ibid., 47.

⁴⁵⁷ Ibid., 276.

⁴⁵⁸ See for example Corrias (2014) 81. Corrias engages with the work of N. Grimaldi, *L'inhumain* (Presses universitaires de France, 2011). For similar observations of the inhuman as part of the human see for example J.-F. Lyotard, *The Inhuman: Reflections on Time* (Stanford University Press, 1991); G. Agamben, *Remnants of Auschwitz: The Witness and the Archive* (Zone Books, 2002).

⁴⁵⁹ In the international criminal law context, this is most famously done by Justice Jackson in his opening statement before the International Military Tribunal in Nuremberg, where he states that bringing to trial the Nazi leaders is ‘one of the most significant tributes that Power has ever paid to Reason.’ Jackson (1945).

⁴⁶⁰ Arendt (2006) 287. See also H. Arendt, *The Life of the Mind, Part One: Thinking* (Harcourt Brace, 1978).

very conscience total disregard of human suffering.⁴⁶¹ How are we to understand expression in the opening statements such as ‘mindless violence, devoid of any human reason’? Does this indicate that the accused is not thinking and not seeing the wrongness of the deed? This would then be different from sadistic violence, which presumably involves knowing and liking the badness of the deeds. As such, it would jeopardize the idea that the subject of international criminal trials is a ‘reasonable agent.’ Yet, as shown above, these rational and irrational approaches towards criminal behaviour are conflated when it comes to perpetrators of mass atrocity. It appears to be difficult to distinct smart manipulation from barbarism from ignorance. Banally normal and blatantly monstrous both seem to involve a dimension of thoughtlessness.

Thus, the ambivalent relation between the human and the inhuman and the fundamental tension between the inhuman character of crimes and the humanity of the person who commits them is a philosophical problem that has a very practical application in the courtroom: it makes possible the ambiguous stereotype. The works of Arendt on the Eichmann trial but also Drakulić on the ICTY and Cruvellier on the Duch case at the ECCC raise concerns similar to the one posed by the defence in *Tadic* about the appropriateness of the use of stereotypes.⁴⁶² In this light, the question comes up whether opening statements of the prosecution could nuance their personality sketch through, for example, differentiation between types of perpetrators.⁴⁶³ The analysis above shows 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 tension between the human and inhuman results in a similar prototypical depiction of both low and high level defendants. For the low-level perpetrators, the ‘thoughtless cogs’, ICL’s narrative cannot easily accept that they are no inhuman masterminds. They have to have a firm degree of agency for the establishment of responsibility and also some demon-like qualities in order to make sense of their capability to commit mass atrocity. For the high-level perpetrators, it is difficult to accept that they are human beings at all. A call on their smart and devious criminal master plan cannot do justice to the gravity of what happened, there is need for stronger terms to describe the thoughtlessness and cruelty: inhumanness. But then again, the label of inhumanness cannot be applied so rigorously that perpetrators lose their human agency; we still need a human being to embody the evil in order to deal with it before a criminal tribunal. As Mark Osiel notes: ‘the law’s reach is thus at once too timid and too ambitious, both overinclusive and

⁴⁶¹ Luban speaks for example of crimes against humanity as combining ‘maximum cruelty with maximum indifference’. D. Luban, ‘A Theory of Crimes against Humanity’, *Yale Journal of International Law* (2004) 29 120.

⁴⁶² Arendt (2006); Drakulić (2004); Cruvellier (2014).

⁴⁶³ See also Smeulers (2008).

underinclusive vis-a-vis the actual distribution of responsibility'.⁴⁶⁴ The prosecutor at the ECCC copes with this tension in an interesting way, by saying that Nuon Chea et al. 'set evil in motion'. This accounts for a real human act *and* supra(or sub)-human evil forces.⁴⁶⁵ ICL needs 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, held on behalf of humanity.

4. Conclusion

While (in)humanity is an ancient philosophical topic that has been widely discussed in relation to (international) criminal law, the practical meaning of its construction only becomes visible when studying how it is deployed in concrete situations. The opening statements of the prosecution in international criminal trials show a tendency towards characterizing the defendant as an evil person with an evil mind and personality, but also constantly renegotiate his (in)humanity. Hannah Arendt's ideal international criminal trial that solely focuses on the *deeds* of the accused does not seem to exist. To leave out 'all other questions of seemingly greater importance'⁴⁶⁶ in cases about mass atrocity is very unsatisfactory; while Arendt criticized the Eichmann trial for not being focused on the defendant,⁴⁶⁷ the IMT and also more recently the ICTY have been criticized for not paying enough attention to the suffering of the victims. To do justice to both the responsible agent *and* the unimaginable suffering, contemporary trials resort to images of the defendant that conflate despicable humans and monsters, which is clearly illustrated by the personality sketch in the opening statements.

That we cannot easily grasp the personality of the defendants who stand trial at international criminal tribunals becomes clear in the many accounts that attempt to do so.⁴⁶⁸ There seems to be a shared dissatisfaction with the prosecution's one-dimensional depiction of the defendant.⁴⁶⁹ A possible conclusion to draw from this is that there is a need for a more nuanced presentation of the perpetrators of mass atrocity. However, the analysis of their portrayal in opening statements shows that even in these rather stereotypical depictions there is room for many shades of evil and

⁴⁶⁴ See Osiel (2009) 20.

⁴⁶⁵ *Nuon Chea et al.*, opening statement of the Prosecution, p. 68.

⁴⁶⁶ Arendt (2006) 5. On Arendt's ideas on the purpose of international criminal trials, see 253.

⁴⁶⁷ *Ibid.*, 5.

⁴⁶⁸ *Ibid.*; Drakulić (2004); Cruvellier (2014).

⁴⁶⁹ Smeulers (2008); Drumbl (2012) 11 and 22.

many shades humanity. One could say that exactly this self-contradictory and confused picture of the inhuman human offers a blueprint of our messy understanding, or not understanding, of what it means to be human, especially in the situations where we are confronted with massively shocking events. Falling back on stereotypes facilitates putting into words the unimaginable, while at the same time these opening statements show that clear-cut human/inhuman stereotypes are not sufficiently addressing what is going on and need to be adjusted and reversed multiple times, even by the prosecutor. In the end, the depiction by prosecutor and defence cannot escape a certain level of simplification, arguably also because of 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’,⁴⁷⁰ deployed in order to win the case. Contemporary trials incorporate to a certain extent the idea that, besides the monster, it is also a man who stands trial, but if the aim of a trial is to really *understand* the perpetrator of mass atrocity, this might not be the most suitable forum.

An important function of the opening statement is to express commitment to the wider goals of ICL, such as deterrence, community building, and ending impunity. 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 of international criminal law to communicate a certain moral message about acceptable human behaviour. The appeal to the inhumanity of the perpetrator signifies a part of being human that is ‘unimaginable’ or difficult to acknowledge. Trials wish to affirm and create the desirable distance between monsters and ordinary people,⁴⁷¹ despite the omnipresent evidence and widely accepted thesis that everyone, even ordinary people, can indeed commit crimes of mass atrocity.⁴⁷² That even monsters are human and can be held accountable before a tribunal characterizes the ambiguous task that ICL sets for itself. International criminal trials attempt to prove that ICL can demobilize evil and prevent it from winning, but also acknowledge that this evil *is* human, which is reflected in statements as ‘this trial is a reaffirmation of our absolute refusal as human beings to accept the cynical inevitability of destroying each other from age to age.’⁴⁷³ As such, international criminal trials engage with ontological and ethical questions of humanness and its opposite; questions of who we are or who we want to be.⁴⁷⁴ As Klabbers notes, ‘when the evil becomes too gross to comprehend, we

⁴⁷⁰ Mégret (2013) 300.

⁴⁷¹ Drakulić (2004) 166.

⁴⁷² On the idea of ‘ordinary people in extraordinary circumstances’ see Smeulers (2008) 234. See also Smeulers and Werner (2010); Corrias (2014) 84; Browning (1992); Klabbers (2001); Mohamed (2015).

⁴⁷³ *Nuon Chea et al.*, opening statement of the Prosecution, p. 65-66.

⁴⁷⁴ On the ‘we’ in international criminal law, see Tallgren (2014); Tallgren (2015).

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reformulate it'. The concrete reformulations of evil studied in this chapter show how international criminal trials can simplify evil, but do not necessarily make it more comprehensible. The construction of the perpetrator has to fit a specific trial context, and exploits the tension between human and inhuman in order to do so. The study of such constructions might not help us to better understand the actual meaning of 'inhuman,' but it does illuminate the concrete ways in which the structure of an international criminal trial enforces a certain interpretation and gives rise to certain ambivalent stereotypes.