The Idealist Advocate Meets the Legal Positivist. Untangling Christine Van den Wyngaert’s Approach to Interpreting International Criminal Law

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Untangling Christine Van den Wyngaert's Approach and Contribution to International Criminal Justice

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1. Introduction: The Katanga and Ngudjolo Opinions and Van den Wyngaert’s legal thinking

Judge Christine Van den Wyngaert is undoubtedly to be considered as a pioneer of International Criminal Law (ICL) as we know it today. Ever since obtaining her PhD at our common alma mater, the Vrije Universiteit Brussel (VUB) on the political offence exception to extradition¹, Judge Van den Wyngaert has been at the forefront to advocate for the further development and strengthening of ICL. As she notes herself during a recent lecture given at the Flemish Peace Institute, Judge Van den Wyngaert was one of the few idealist academics who brainstormed at conferences about establishing a permanent international criminal court.² Judge Van den Wyngaert and her colleagues thought of a permanent international criminal judicial institution as a distant dream that would not possibly be realized during their lifetime.³ Fifteen years after the International Criminal Court (ICC) has been established against Judge

3. Ibid.
Van den Wyngaert’s initial expectations, she remains deeply convinced of the value and necessity of the international criminal justice project. Despite the legitimacy crisis the ICC is currently facing considering the looming withdrawals by African states from the Rome Statute, Judge Van den Wyngaert affirms that international criminal justice must survive such difficulties. Apart from and notwithstanding this idealistic belief in the international criminal justice project that characterizes Judge Van den Wyngaert, her scholarship and international judicial practice also demonstrate a great attachment to legal positivism, which is for instance exemplified by her scrupulous application of the legality principle as a constraint on law-making. This contribution aims to further elaborate on this positivist side of Judge Van den Wyngaert’s legal thinking by focussing in particular on her judicial practice as an ICC Judge. More specifically, Judge Van den Wyngaert’s positivist approach to judicial interpretation will be demonstrated and analyzed by discussing her Minority Opinion to the Katanga Trial Judgment (the Katanga Opinion) and her Concurring Opinion to the Ngudjolo Trial Judgment (the Ngudjolo Opinion). In both Opinions, Judge Van den Wyngaert essentially argued that the majority interpretations were inconsistent with how the relevant legal provisions could be understood according to their ordinary meaning. This contribution discusses her views, while at the same time contrasting them with relevant but divergent views of other ICC Judges. Where the Katanga Opinion (on the organization requirement needed for crimes against humanity) only suggests the kind of approach to legal interpretation Van den Wyngaert has in mind, the Ngudjolo Opinion (on modes of liability under the ICC Statute) more explicitly addresses her methodology of interpretation. We start the discussion by elaborating on the relevant ICC jurisprudence on the organizational requirement for crimes against humanity, and end with elaborating on the Katanga Opinion (section 2 to 6). Subsequently, the same exercise will be carried out for what is concerned the relevant ICC jurisprudence on the modes of liability and the Ngudjolo Opinion (section 7 and foll.).

2. The ‘Organizational’ requirement for Crimes Against Humanity: Bringing to the Fore the Essence of Crimes Against Humanity

Under Article 7(1) of the ICC Statute, it is stipulated that crimes against humanity consist in certain individual acts (murder, extermination, deportation, etc.) “when committed as part of a widespread or systematic attack directed against any civilian...”

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4. Ibid.
population, with knowledge of the attack."6 Article 7(2)(a) ICC Statute clarifies and specifies that the "Attack directed against any civilian population" under Article 7(1) ICC Statute means "a course of conduct involving the multiple commission of acts (...) against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."7

The ICC Statute is the first ICL document that explicitly requires some kind of policy, either by a State or an organization. Within ICC jurisprudence and ICL scholarship the exact interpretation of the 'organizational' notion has been subject to considerable debate. This seemingly technical and specific interpretative issue hides an important discussion about the essence of crimes against humanity, and, more specifically, the extent to which the law of crimes against humanity should cover the crimes of non-State actors.8 Views strongly differ as to whether crimes against humanity should include crimes by terrorist organizations,9 human trafficking organizations,10 drug trafficking organizations11 and so on.12 Indeed, the interpretation of the organization is an important aspect to determine the dividing line between crimes against humanity and 'ordinary' crimes, and thus the role and scope of ICL in general.13 As will be explained in subsequent sections, the dominant ICC case law has adopted broad interpretations that could be understood as human rights (IHRL) inspired, which Judge Van den Wyngaert took issue with in her Minority Opinion to the Katanga Trial Judgment.

6. Article 7(1) ICCSt.
7. Article 7(2)(a) ICCSt.

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3. The Broad and Functional Conception of the Organizational Notion in the Kenya Authorization Decision and the Kenya Confirmation of Charges Decisions

Crimes against humanity were the only charges available to the ICC prosecutor in an effort to use his *propria mota* powers to investigate the post-election violence that gripped Kenya from December 2007 to February 2008, following its presidential election. Unlike in previous situations that came under the jurisdiction of the ICC, the crimes in the Kenya Situation were not carried out by armed groups and did not occur in the context of an ongoing armed conflict.

When focusing on the concept of organization, the majority of the judges of Pre-Trial Chamber II adjudicating the Kenya Authorization Decision quickly concluded that this concept encompasses non-State entities. The Pre-Trial Chamber held that the "formal nature of a group and the level of its organization should not be the defining criterion". Instead, in the opinion of the majority, "a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values".

To back up its interpretation, the majority referred to a Commentary to the 1991 ILC Draft Code and an article by Marcello Di Filippo who was first to propose this

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14. In 2007, Kenya held closely contested national elections pitting incumbent president Mwai Kibaki of the Party of National Unity (PNU) against the main opposition candidate Raila Odinga of the Orange Democratic Movement (ODM). When Kenya's Electoral Commission declared that President Kibaki had been re-elected, the news triggered 'violent demonstrations, and targeted attacks in several locations within Kenya,' The scale of the violence resulted in a 'reported 1,133 to 1,220 killings of civilians, more than nine hundred documented acts of rape and other forms of sexual violence, with many more unreported, the internal displacement of 350,000 persons, and 3561 reported acts causing serious injury.' It took place in waves during which 'gangs of young men armed with traditional weapons' targeted specific groups from 'other tribes perceived as political opponents (...). During the initial phase of the violence, attacks appeared largely to target PNU supporters; subsequent attacks were directed at ethnic groups perceived to be affiliated with the ODM; and the police attacks appeared to have been directed towards ethnic communities perceived to be opposed to their own ethnic affiliation, or otherwise against gang members; see Request for Authorization of an Investigation Pursuant to Art. 15, Situation in the Republic of Kenya (ICC-01/09-3), Office of the Prosecutor, 26 November 2009, §§ 3-22.
15. E. Chaitou, 'The ICC Case Law on the Contextual Elements of Crimes Against Humanity', in M. Bergsmo and S. Tianying (eds), *On the Proposed Crimes Against Humanity Convention* (Brussels: Torkel Opsahl Academic EPublisher, 2014) 47-99, at 76. The protagonists in the conflict were different groups of individuals across the country, who made their appearance as a group only during the material time and are believed to have interacted on a horizontal level.
17. Ibid., at § 91.
‘human rights test’ (‘do the private organizations have the capacity to infringe basic human values?’).18

Based on this distinction, the majority elaborated some non-exhaustive criteria for the Court to determine whether an entity could be qualified as an organization under the Rome Statute.19 This ‘basic human values’ test was simply reiterated by the majority in both the Kenya Confirmation of Charges Decisions:20

The majority held in the Muthaura et al. case11 that the Mangiki, an ethnic organization that was vertically directed by its incarcerated leader who transferred authority to control the organization to the defendants in the case, could constitute an organization for the purpose of Article 7(2)(a) ICC Statute.23 In the same vein, in the Ruto et al. case,21 the majority confirmed the charges by concluding that the ‘Network’, an ad hoc group of perpetrators who co-operated to commit attacks against civilians.24

18. Ibid., at § 90; See M. Di Filippo, ‘Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes’ 19(3) European Journal of International Law (2008) 533-570, at 567: ‘the associative element, and its inherently aggravating effect, could eventually be satisfied by ‘purely’ private criminal organizations, thus not finding sufficient reasons for distinguishing the gravity of patterns of conduct directed by ‘territorial’ entities or by private groups, given the latter’s acquired capacity to infringe basic human values.’

19. More specifically, these criteria could include: (i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfills some or all of the abovementioned criteria.

20. Decision on the Confirmation of Charges, Ruto, Kosgey and Sang (ICC-01/09-01/11), Pre-Trial Chamber II, 23 January 2012, § 33; Decision on the Confirmation of Charges, Muthaura, Kenyatta and Ali (ICC-01/09-02/11), Pre-Trial Chamber II, 23 January 2012, § 112.

21. The ICC Prosecutor presented the charges to Pre-Trial Chamber II as two separate cases. In the case which concerns the government’s supporters’ actions against the opposition, Francis Muthaura, Uhuru Kenyatta, and Mohammed Ali were charged with five counts of crimes against humanity.


23. In the second case in the Kenya Situation which concerns the Orange Democratic Movement’s supporters’ actions against the supporters of the government, William Ruto, Henry Kosgey, and Joshua Sang were charged with four counts of crimes against humanity.

We note in passing that both decisions, triggered two lengthy Dissenting Opinions by Judge Kaul, the third judge of Pre-Trial Chamber II, who asserted that only ‘State-like’ organizations can be accountable for a policy to commit crimes against humanity. However, Judge Kaul’s interpretation did not gain traction, as the discussion of the more recent ICC jurisprudence on the organizational notion will demonstrate.

4. The Capacity-Based Approach to the Organizational Notion Endorsed and Developed in the Katanga and Bemba Trial Judgments

Trial Chamber II, which declared Germain Katanga guilty on 7 March 2014, is the first ICC-Trial Chamber that has paid considerable attention to the interpretation of the organizational notion. The majority’s approach is slightly different from the majority’s approach in the Pre-Trial Chamber but again focusing on capacity (this time linked not to ‘basic human values’ but to ‘attack’) and with a similar broad result. The Trial Chamber II relies on two main lines of argumentation.

First, the Chamber heavily focuses on ‘the existence of an attack’ within the meaning of Article 7(2)(a). More specifically, the majority of Pre-Trial Chamber II held that

the connection of the term “organisation” to the very existence of the attack and not to its systematic or widespread nature presupposes that the organisation has sufficient resources, means and capacity to bring about the course of conduct or the operation involving the multiple commission of acts referred to in article 7(2)(a) of the Statute. It therefore suffices that the organisation have a set of structures or mechanisms, whatever those may be, that are sufficiently efficient to ensure the coordination necessary to carry out an attack directed against a civilian population.25

The majority’s interpretation could be labelled as a ‘capacity-based’ interpretation, since it places emphasis on generic structural features, such as capacity, coordination

and cohesion necessary to carry out the widespread or systematic attack against a
civilian population.\textsuperscript{27}

This 'capacity-based' interpretation has gained some support in scholarship,\textsuperscript{28} but
it is a rather vague approach, since the majority does not spell out any definitional
requirements that an organization under Article 7(2)(a) needs to possess. This allows
all kind of entities to come under the purview of the Statute.\textsuperscript{29}

The majority, secondly, relies explicitly on the object and purpose of the Statute to
justify the capacity test and to reject more restrictive understandings of 'organisation'
that require that these possess quasi-State characteristics.\textsuperscript{30} The majority
states that this '(...) would not further the Statute's goal of prosecuting the most
serious crimes'.\textsuperscript{31}

In the Bemba Trial Judgment, the 'capacity-based' interpretation was restated and
endorsed.\textsuperscript{32}

5. The Trend Towards a IHRL-Inspired Understanding of the Organizational Notion

It seems that, with the Katanga and Bemba Trial Judgments, discussed in the previous
section, a broad, functional interpretive approach to the organizational notion has
become entrenched in ICC jurisprudence. Most recently, in an \textit{obiter dictum} in the
Kenya Vacation of Charges Decision, Judge Eboe-Osuji has conceived the organiza-
tional concept even more broadly by arguing that the 'organizational policy' notion
does not entail the establishment of an 'aggregate entity', but means a 'coordinated
course of action' which can be executed by an individual. To support this interpreta-
tion, Eboe-Osuji also relies on a teleological interpretation invoking the object and

\textsuperscript{27} Ibid., § 1120.
\textsuperscript{30} Judgment Pursuant to Article 74 of the Statute, Katanga (ICC-01/04-01/07-3436), Trial Chamber, 7 March 2014, § 1122.
\textsuperscript{31} Ibid.
\textsuperscript{32} Judgment pursuant to Article 74 of the Statute, Bemba (ICC-01/05-01/08), Trial Chamber III, 21 March 2016, § 158.

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purpose of the Rome Statute, which in his view, is the ‘cardinal principle of treaty interpretation’.33

These broad and functional understandings of the notion of organization could be labelled as International Human Rights Law (IHRL)-inspired interpretations. IHRL places great emphasis on enhancing the object and purpose of protecting human dignity, it often adopts a ‘liberal’, ‘broad’ or ‘progressive’ attitude to interpretation.34 Under IHRL, the meaning of a provision is often construed in a way that effective protection is achieved.35 Furthermore, the teleological interpretive method, as explicitly invoked by the Katanga Trial Judgment and Judge Eboe-Osuji, is commonly accepted under IHRL.36

6. Can the IHRL-Inspired Understanding Be Squared With the Interpretive Disciplining Rules under the Rome Statute?

The foregoing might not seem problematic to the human rights lawyer, but the relevant question is whether it is appropriate in ICL and more specifically in the context of the Rome Statute.

In our view, within the realm of ICL and the ICC Statute more specifically, applying the teleological or purpose ambit under Article 35(1) of the Vienna Convention on the Law of the Treaties (VCLT)37 should be invoked with a great degree of caution.38 The most important disciplining rules to interpret provisions under the Rome Statute are Articles 21 and 22 ICC Statute on the applicable law and nullum crimen sine lege respectively. Both Articles 21 and 22 implicitly seek to constrain the bench by insisting on the prioritization of a literal or ordinary textual approach to the interpretation of

33. Decision on Defence Applications for Judgments of Acquittal, Ruto and Sang (ICC-01/09-01/11) Trial Chamber V(a), 5 April 2016, § 303.
norms of substantive ICL such as the organizational requirement under Article 7(2) (a) ICC Statute.\textsuperscript{39}

Under Article 21 of the Statute, the predominance attached to the ordinary meaning of a statutory provision is reflected in the inclusion of the phrase under Article 21(1) (a) ICC Statute that the Court shall apply ‘(i)n the first place’ the ‘Statute, Elements of Crimes and its Rules of Procedure and Evidence’.\textsuperscript{40} The primacy given to the internal law of the ICC aims to restrain judges who would be inclined to interpret a provision expansively and/or creatively by resorting to sources external to the Statute.\textsuperscript{41}

In the same vein, the interests of certainty and predictability that the legality principle under Article 22 aims to protect, also aim to confine judges and to ensure that they do not widen the scope of a provision beyond its literal meaning.\textsuperscript{42}

The different open-ended interpretations of the organizational requirement as outlined above seemingly disregard these interpretive disciplining rules under Articles 21 and 22, since they often do not even make any effort to construe an interpretation on the basis of a textual interpretation.

These provisions also cast a critical light on judge Eboe-Osuji’s assertion that the teleological interpretation is the ‘cardinal principle of treaty interpretation’.

As will be further explained in the next section, arguably for this reason Judge Van den Wyngaert took issue with her colleagues’ in her Minority Opinion to the Katanga Trial Judgment.

\textsuperscript{40} Article 21(1)(a) ICCSt.
\textsuperscript{42} \textit{Ibid.}, at 495-496.
7. The Findings with Regards the Organizational Notion in the Minority Opinion of Judge Van den Wyngaert in the Katanga Trial Judgment

Judge Van den Wyngaert attached a Minority Opinion to the Katanga judgment delivered by the majority, in which she stated that she was unable to enter a conviction for Katanga on the basis of Article 25(3)(d)(ii) of the Statute, citing both legal reasons and a lack of sufficient evidence.40 She took the view that 'the available evidence does not allow one to conclude beyond reasonable doubt that at the relevant time the Ngiti fighters of Walendu-Bindi formed either an "organisation" in the sense of article 7 of the Statute, or even a "single militia"'.41 In the opinion of Van den Wyngaert, with regards the 'Ngiti fighters of Walendu-Bindi', the relevant organization in the Katanga Trial Judgment, 'the Majority is unable to explain with any level of precision how the so-called militia of the Ngiti fighters of Walendu-Bindi was structured or how it supposedly operated'42 and she is furthermore 'of the view that there is no evidence showing that, at the relevant time, the militia of Walendu-Bindi were anything more than a loose coalition of largely of autonomous units'.43

She concludes by that stating that it is 'difficult to speak of an organization in the sense of Article 7 ICC Statute, regardless of which definition of "organisation" one adheres to.'44

Thus, Van den Wyngaert is of the opinion that the Ngiti fighters of Walendu-Bindi were a loose network of groups of fighters rather than a pre-established structured entity. Van den Wyngaert does not provide her own definition of the organizational concept and mainly raised concerns about the lack of evidence that could bring the majority to the acceptance of the existence of an organization. Nonetheless, it is possible to deduct from her findings how she views the organizational concept in broad terms. Twice, she implies that an organization for the purposes of Article 7(2) (a) ICC Statute needs to consist of an integrated structure.45 She arguably views an organization as a pre-established entity that needs to possess some cohesiveness and uniformity and thus seems to understand the organizational requirement according

43. Minority Opinion of Judge Christine Van den Wyngaert, Jugement rendu en application de l'article 74 du Statut, Katanga (ICC-01/04-01/07), Trial Chamber II, 7 March 2014, §§ 1-3.
44. Ibid., at § 198.
45. Ibid., at § 205.
46. Ibid., at § 206.
47. Minority Opinion of Judge Christine Van den Wyngaert, Jugement rendu en application de l'article 74 du Statut, Katanga (ICC-01/04-01/07), Trial Chamber II, 7 March 2014, § 206.
to its literal, textual meaning. This is demonstrative of Christine Van den Wyngaert’s legal positivist approach to ICL, and the paramount importance she attaches to interpretative disciplining rules under Articles 21 and 22 ICC Statute. Under the subsequent sections, Van den Wyngaert positivist approach to the judicial interpretive process will be more explicitly demonstrated by discussing her Concurring Opinion of Judge Van den Wyngaert in the Ngudjolo case.


The previous sections showed that Judges often resort to the object and purpose of the ICC Statute to give teeth to normative and judicial policy arguments about the importance of protecting victims of crimes or giving effect to the Court’s jurisdiction to end impunity. At times however, ICC Judges have also relied on a textual interpretive approach to mask or conceal a normative agenda. As Gleider Hernandez has put it, ‘judges shield their decisions through an outward show of judicial technique, behind which judges shield themselves from the accusation that they are engaging in law-creation rather than merely the interpretation of the law’. 

The most striking example in ICC case law in this regard is the highly controversial interpretation of the contours of individual criminal responsibility provided for in Article 25 of the Rome Statute, and, in particular, the institution of the ‘control of the crime’ theory in the context of co-perpetration and indirect co-perpetration under Article 25(3)(a) by the Lubanga and Katanga Pre-Trial Chambers.

A detailed discussion of this 'control of the crime' theory goes beyond what can be debated in this contribution. For the purpose of the current discussion, it is most essential to note that both the Lubanga and Katanga Pre-Trial Chambers, while purporting to resort to a textualist interpretive approach, almost exclusively relied on German criminal legal theory and more specifically, the scholarship of Claus Roxin.\textsuperscript{53} The Lubanga Pre-Trial Chamber for instance did at no point intimate that the adoption of the German model was made necessary by virtue of a glaring statutory lacuna. Rather it seems that its adoption was a bald normative choice as the perceived necessity to distinguish between principals and accessories. In essence, the adoption of the control over the crime theory was an issue of policy, rather than purely one of statutory interpretation.\textsuperscript{54}

In her Concurring Opinion to the Ngudjolo judgment, Judge Van den Wyngaert voiced a scathing critique of the institution of the control over the crime theory by the Lubanga and Katanga Pre-Trial Chambers. She first remarked that '[c]onsidering its universalist mission, the Court should refrain from relying on particular national models, however sophisticated they may be.'\textsuperscript{55} She articulates her support for a textualist interpretive approach, by asserting that ICC Chambers "must strive to the maximum extent to give them their 'ordinary meaning'" as required by Article 31(1) of the Vienna Convention on the Law of Treaties.\textsuperscript{56}

Furthermore, Van den Wyngaert pointed out the inconsistency of both the control theory and the notion of indirect co-perpetration with the requirement of strict construction provided for under Article 22(2).\textsuperscript{57} Indeed, for Van den Wyngaert, Article 22(2)'s institution of strict construction was to be given interpretative primacy with respect to substantive law and modes of liability.\textsuperscript{58} She opines that requirement of strict construction as one of the imperatives of the legality principle under Article 22 of the Rome Statute should override the teleological method of interpretation under VCLT. More specifically, she states that:


\textsuperscript{55} Concurring Opinion of Judge Christine Van den Wyngaert, Judgment pursuant to Art 74 of the Statute, Ngudjolo, Situation in the Democratic Republic of the Congo (ICC-01/04-02/12-4), Trial Chamber, 18 December 2012, §§ 5 and 17.

\textsuperscript{56} Ibid., at 11.

\textsuperscript{57} Ibid., at §§ 6 and 7.

\textsuperscript{58} Ibid., at § 18.
Whereas these methods of interpretation may be entirely adequate for interpreting other parts of the Statute, I consider that for interpreting articles dealing with the criminal responsibility of individuals, the principles of strict construction and in *dubio pro reo* are paramount.59

Subsequently, Judge Van den Wyngaert elaborates on the *lex certa* component of the legality principle under Article 2a. She argues that such an interpretive rule was necessary in the interests of certainty and predictability of the law, both of which are amongst the central tenets of the rule of law and the right to a fair trial.60

Judge Van den Wyngaert’s strong attachment to legal certainty and predictability is very well exemplified by the following quote:

> Individuals must have been in a position to know at the time of engaging in certain conduct that the law criminalised it. The Grand Chamber of the European Court of Human Rights has given considerable weight to the elements of “accessibility” and “foreseeability” in its assessment of the legality principle. I doubt whether anyone (inside or outside the DRC) could have known, prior to the Pre-Trial Chamber’s first interpretations of Article 25(3) (a), that this article contained such an elaborate and peculiar form of criminal responsibility as the theory of “indirect co-perpetration”, much less that it rests upon the “control over the crime” doctrine.61

The quote demonstrates her priority to the principle of legality that demands for a pre-existing, specific, foreseeable and accessible law as a quintessential constraint on lawmaking.62

9. How Could the Divergence of Interpretive Methods Used within ICL Be Explained?

In our view, there are two main factors here that can explain the divergence of interpretive methodologies used within ICL.

The first factor has to do with the pluralism of disciplinarian perspectives. International criminal justice can be said to be intrinsically pluralistic, because it is a body of law that has developed through the encounter between different legal cultures, values, and ideologies.66 Within the intrinsic pluralism of international criminal justice, two other dimensions can be discerned. There is the pluralism of origins: ICL can be conceived as a sui generis merger of domestic legal concepts drawn from predominant legal traditions of common law and civil law.67 Next, one can determine an intrinsic pluralism of normative identities. It refers to the conflicting premises, ambitions, and aspirations at the heart of ICL which has often been a battle arena between the different goals, rationales, values and ideologies competing for priority in the enterprise of justice. Prime examples of dichotomies include ‘fair trial’ versus ‘fight against impunity’ and individual criminal responsibility versus more collective forms of responsibility. These intrinsic conflicts within ICL can be traced back to the oppositional ideological models of ‘retributive justice’ versus ‘restorative justice’ and ‘liberal justice’ versus ‘utilitarian justice’. These conceptions of justice strike a very different balance between legality, individual culpability, and the rights of the accused on the one hand and providing a remedy to and taking into account the interests of victims on the other hand.68 These adversarial identities of ICL have their roots in the fact that ICL is a blend of different legal fields with distinctive aspirations, methods, and philosophies. In essence, ICL is the outcome of a meeting between the different ideologies of general international law, criminal law and human rights and humanitarian law.69 General international law influences ICL by stressing that international law remains a project based on and dependent on State consent and cooperation. Otherwise, IHRL and IHL often pull ICL towards a more victim-oriented and ‘progressive’ humanitarian agenda, which, in turn, has the potential to come in conflict with fundamental criminal law principles such as the principle of legality and the principle of culpability.69 Haveman demonstrated this coexistence of various perspectives through an analysis of the wide variety of definitions of rape within ICL.66 In a domestic criminal justice system, the definition of rape does not give rise to a plurality of definitions. If one looks at the case law of the ICTY and the ICTR however, one is struck by the diversity of definitions of rape that are proposed and used within the respective jurisprudence of both tribunals. With both the pluralism of origins and the pluralism of normative identities of ICL in mind, this diversity is easier to grasp. Laywers with either a common law or a civil law background, who have been trained in either general international law, criminal law, human rights law

63. Ibid., at 29.
64. Ibid., at 30.
65. Ibid., at 32.
66. Ibid., at 23-24.
67. Vasiliev and van Sledregt, supra note 1, at 33.
68. Of course there are other illustrations of this tension. Think about controversies about like a liability and joint criminal enterprise, to name only one.
or humanitarian law, each have their own disciplinary perspective as to how the definition of rape is to be construed.

A second factor has to be found within criminal law itself. In various legal systems, a development has occurred after World War II that has departed from the strict application of in literature, this has been labeled as ‘autonomous law finding’.\textsuperscript{69} We are far away from the traditional image of judges who apply the law as careful and as precise as possible. Often, judges have mandated themselves or have been mandated by the lawmaker to create norms and to play the role of the lawmaker themselves.\textsuperscript{70} Many factors account for this. The role of human rights is a first factor. Their existence commands judges to go beyond the machine-like application of laws, and to review if the application of the law complies with human rights law. Another often quoted factor is the growing complexity and changeability of our societies. Not everything can be any longer be foreseen when adopting a law, and amending laws in a rapid fashion is not always feasible. As a consequence, more and more laws are formulated in relatively abstract and indeterminate term, giving leeway to judges to determine the content of a certain provision. Recourse to such ‘open textured’ rules is not limited to domestic law. Cupido has rightly underlined that ICL harbours many ‘open textured’ concepts such as for instance ‘intent’, ‘policy’, and ‘armed conflict’, and international criminal judges have been given a wide discretion to gradually give shape and substance to these often rudimentary legal concepts.\textsuperscript{71}

Both the disciplinarian pluralism of ICL as well as the ‘open-textured’ nature of many ICL norms help to explain the divergence in interpretive methods as well as interpretations that characterize ICL. Where can we situate Judge Van den Wyngaert within this debate?

\textsuperscript{69} G.J. Wiarda, \textit{Drie typen van rechtsvinding}, 1999, Tjeenk Willink (4e druk); Walter van Gerven, \textit{Het beleid van de rechter}, Antwerp, Standaard, 1974
\textsuperscript{70} Many factors account for this: our society is growing complex and not everything can be any longer foreseen in laws. The role of human rights has also been mentioned as a factor. But there are others.
10. A *Lex Certa* about Christine Van den Wyngaert

In a 2016 publication on *Judicial Greatness and the Duties of a Judge*, Omri Ben-Zvi suggests a strong link between 'great judges' of our times (think Chief Justice Marshall or Justice Holmes) and their contribution to theory or methodological diversification. Great judges are revered because they successfully make a prima facie case for novel adjudicative methods. Then, and this is the more controversial part of Ben-Zvi's analysis, they become untouchable (like rock stars) and are exempted (to a certain degree) from certain judicial duties (like the duty to follow the law).

Judge Van den Wyngaert does by no means fit the image of the disruptive rock star judge, neither that of the diplomat-judge. Laconic statements, lack in sophistication and precision are absent in her work. There is definitely no will to brand a novel method. In literature, she is ranged amongst those who critically reflect about the progressive, court driven, judicial development of ICL and who are concerned about far-reaching implications of certain innovative decisions. For Cupido, Judge Van den Wyngaert's *Ngudjolo* Opinion, together with Judge Adrian Fulford's *Lubanga* Separate Opinion, is exemplary of international criminal jurisprudence which takes the lead of an 'ordinary meaning approach' in ICL. This approach propagates high respect for the principle of legality, which traditionally requires that the law is interpreted and applied in a strict, foreseeable and consistent way and the use of the plain text of statutory and conventional provisions as the primary benchmark for judicial decision-making, as opposed to progressively developing existing legal rules.

Cupido contrasts this 'ordinary meaning approach' with a certain legal scholarship that questions the feasibility of this method in an area of law infused with politics

74. *Prosecutor v Lubanga*, Separate Opinion of Judge Adrian Fulford, Case No. ICC-01/04-01/06-2842, 14 March 2012
and open norms. Novel unexpected applications cannot be avoided and should not be feared. International crimes are evil by nature (malum in se) and generally prohibited under domestic law: "It is therefore difficult to argue convincingly that the accused could not have foreseen the illegality of international crimes or the criminality of their conduct. In most cases, the creative use and progressive development of international criminal law does not cause any illegitimate uncertainty about the state of the law". 76

If there is on certain thing, one lex certa about Judge Van den Wyngaert, trained as an international law lawyer and a criminal lawyer, then it must be this: a nuanced conception of legality like the one that speaks from the previous lines is nothing of her taste, also not when defended in the name of human rights. In her Concurring Opinion to the Ngudjolo judgment, Judge Van den Wyngaert (discusses above in section 7) human rights are called upon to defend a not nuanced conception of legality and we are of the view that this position holds solid ground. The malum in se argument cannot explain why a person, suspected of having committed serious crimes, suddenly needs to accept why he or she in addition to domestic criminal laws, needs to confront ICL norms which are applicable as a result of an unexpected outcome of an innovative judge made decisions taken in The Hague. In times of political controversy about the position of the ICC there are also broader interests that explain why rigid adherence to classical criminal law principles of interpretation is the safer option.

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