The Future of the International Criminal Court. On Critique, Legalism and Strengthening the ICC's Legitimacy

Marieke de Hoon

Assistant Professor of International Law, Faculty of Law,
Vrije Universiteit Amsterdam, the Netherlands;
Senior Counsel and Director Netherlands Office at the Public
International Law & Policy Group

M.de.Hoon@vu.nl

Abstract

While the International Criminal Court (ICC) strives for justice for atrocity crimes throughout the world, increasingly, its legitimacy is undermined: powerful states refuse to join, African states prepare to leave, victims do not feel their needs for justice are met. This article argues that this is due to contradicting assumptions and too many objectives attached to the expectations of international criminal justice, which pull and push what the criminal trial is supposed to do in too many directions, undermining what it can do, raising too high expectations, and leading to disappointment. The article analyses the critique as rooted in a misunderstanding of what 'justice' is, what a criminal trial can do, and how inherently political international criminal justice is and only can be. It concludes with some observations on what this entails for strengthening the legitimacy of the ICC by matching expectations to what it can and cannot do.

Keywords

International Criminal Court (ICC) – law and politics – legitimacy – international criminal justice – international criminal law – critique – Africa

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1 Introduction

The 1990s saw an incredible revolution of international criminal justice that broke decidedly with the past of impunity for the most horrific crimes imaginable. Within only a few years, a previously considered utopia became reality: with a number of *ad hoc* courts and the permanent International Criminal Court (ICC) in the Hague, supranational judges were provided with jurisdiction and courtrooms and started convicting state leaders for crimes committed in other, sovereign jurisdictions. Although these developments had their roots in previous developments – most notably the prosecutions that took place after the Second World War¹ – and could build on that legacy and their experiences, the ambitions in the 1990s were unprecedented both in geographical and moral scope. Nothing less than universality became the ethos and pathos of international criminal justice. This developed not only as a field of law, practice and studies, but also as a way of thinking along the lines of cosmopolitan thought. The logic that ensued was that the international sphere should no longer be conceptualized as a spatiality of bordered sovereign territories in which states and their leaders could have their relative freedom from one another. Instead, the world should be understood as a cosmos, as a unity innate to humanity as a whole,² within (or over) which a global judicial authority could condemn and punish for what was universally wrong.

Norm entrepreneurs from many parts of the world and society joined forces to create a sense of need and urgency, and, with that, a momentum to break through deeply engrained understandings of state sovereignty and jurisdictional immunity in international law and relations. Although the ICC by no means works as a perfect instrument, considering that indeed there now is a threat for those in power that they may be held accountable for their actions one day, the development of international criminal justice can easily be considered a huge success. Indeed, compared to only a few decades back, there is now more attention and wider condemnation not only for atrocities that take place elsewhere but also for the lack of action to intervene and punish those responsible. Moreover, the laws on state sovereignty and jurisdictional

1 The Nuremberg and Tokyo tribunals were created by the victorious powers of the Second World War to prosecute German and Japanese leaders for their role in planning, preparing, initiating or waging a war of aggression, war crimes and crimes against humanity.

2 Geoff Gordon, 'Legal Equality and Innate Cosmopolitanism in Contemporary Discourses of International Law', in Janne Nijman and Wouter Werner (eds.), *Netherlands Yearbook of International Law 2012* (T.M.C. Asser Press, The Hague, 2012), pp. 183–203, p. 185. He moreover explains the adoption of the crime of aggression amendment in Kampala 'as a step in an innate cosmopolitan project to establish public order for an inclusive world community, one founded on states as equal members'.

immunity have opened up here and there to allow legal proceedings against norm violators. There are international courts and tribunals as well as national judicial systems that act against foreign and own (previous) leaders. And a new field of studies that sparked an immense and still increasing amount of interest, Master's programs, PhD positions and academic journals dedicated to it. How is it possible then that the quintessential exponent of this development, the ICC, is hardly ever seen in such positive light or celebrated as a great success?

On the contrary, the legitimacy of this permanent international criminal court in the Hague is increasingly challenged. These challenges include that the Court and its prosecutorial office are continuously the object of legal and political criticism. There is a discrepancy between what victims hope to find in terms of justice and what the Court is able to offer; the accession to the Rome Statute, the ICC's founding treaty, has come almost to a standstill. Year after year, tensions between African and 'Western' states intensify during the annual Assembly of States Parties (ASP) diplomatic conventions.³

A number of states (such as Kenya, Namibia, Burundi and South Africa) take active preparations to leave the Court, and may, in their calls upon other states to follow suit, unleash an undermining chain reaction. And the African Union meanwhile adopted several anti-ICC resolutions,⁴ is exploring the feasibility of a plan to withdraw collectively based upon a decision taken in the AU Summit of January 2017,⁵ and continues to welcome one of the ICC's

3 Most notably around the issues of cooperation and the prudence and legality of prosecuting heads of state, particularly with regard to the Kenya situation and ICC members states that welcome Sudanese President Omar al-Bashir, as well as with regard to discussions on the ICC's alleged anti-African bias.

4 In particular, the resolution by the AU that AU Member States should not cooperate with the ICC regarding the indictment of Sudanese President Omar al-Bashir, *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)* (Assembly/AU/Dec.245(XIII) Rev.1), adopted on 3 July 2009; and the decision by the AU to adopt the Malabo Protocol, which provides for immunity from prosecution before the African Court of Justice and Human Rights for sitting heads of state and other senior officials, *Decision on the Draft Legal Amendments* (Doc. Assembly/AU/8(XXIII)), adopted on 27 June 2014.

5 At the January 2017 Summit, the AU adopted its 'ICC Withdrawal Strategy', which entails developing a strategy to withdraw from the ICC collectively as well as contains a number of proposed amendments to the ICC Statute. The adopted texts has not officially been shared on the AU website at the time of writing, but advanced drafts of the decision and the annexed withdrawal strategy are available here: https://www.hrw.org/sites/default/files/supporting_resources/assembly_au_draft_dec._1_-19_xxviii_e.pdf, and https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf, accessed on 12 February 2017.

most prominent indictees, the Sudanese President Omar al-Bashir, to its high-profile summits, provoking the ICC recently to ask the UN Security Council to act against these states that host rather than extradite Bashir.

The loss of legitimacy of the Court is worrisome. Justice mechanisms, including criminal law trials, function only by the grace of legitimacy. Without it, justice is not recognized as such, nor accepted, and the exercise becomes futile. But it is exactly this legitimacy that is fundamentally challenged by those whom the Court seeks to champion and by states that have in the past fought to create the Court. This is problematic: foremost because the Court has the potential to contribute in very important and even essential manner to the promotion of respect for and enforcement of human rights and international peace and security.

Western states and the ICC itself often respond with annoyance to the critique and mostly try to refute or nuance the criticism and explain the blessings of the Court yet again. This is partly understandable: the criticism by African states cannot always be separated from the self-interest of leaders such as Bashir. Notwithstanding, it is misguided and unfair to dismiss the critique from victims and African communities and states as mere misunderstanding or propaganda for criminal leaders. The critique goes deeper than that, and is rooted in i) an oversimplification and unhelpful generalization of what justice means for different people and societies in different conflicts and circumstances and the related inability to 'deliver' justice in a one-size-fits-all and top-down manner, and ii) a misconception of what a criminal trial is able to do and not do. Moreover, they are iii) exponents of a misunderstanding that international criminal justice is and could in some way be detached from political decision-making, choice and prioritization.

This article delves deeper into these roots of critique to get a better picture of the problem that underlies the manner in which international justice is administered and relates this to the more fundamental problem of a denial of the inherent politics of international justice that comes with its predominantly legalist conceptualization. It moreover offers some reflections on how to try and move beyond: strengthening the legitimacy of the ICC by reconceptualising international justice, matching expectations to what the ICC can and cannot do, and work towards policy decisions and scenarios that better meet the needs of those that are affected by mass atrocities.

2 Oversimplifying 'Justice'

The founders of contemporary international criminal justice generated a field of law that is rationalized around the idea that recognizes both the individual

and humanity as a whole as requiring protection by the international legal order. In order to do that, they had to break through assumptions and structures of an international legal order that is predominantly constructed around state consent and maintains a high reluctance against supra-state authority. The new international legal order, which has increasingly recognized the individual, peoples and humanity since particularly the Second World War (although this development started before), empowers individuals to file claims and be recognized as victims at international institutions. It moreover commissions such international institutions (and for example its prosecutors) to act on behalf of humanity, in the fight against serious breaches of the international legal order; or, put in moralistic terms, to stand up for the good in the fight against evil.

However, conceptualizing humanity as a whole, and individuals as its proxies and members, assumes that what is articulated as right and wrong is universally applicable; that what is good and evil can authoritatively be distinguished and function as the foundation of global law enforcement. In reality, however, this assumption is problematic and encounters much discussion. This is usually not much of a problem when discussions remain in the abstractness of generalities, i.e. that crimes against humanity, wars of aggression and gross human rights violations for example are condemnable. But when it becomes more concrete, namely in considering whether particular behaviour indeed qualifies as such serious violations and crimes, fundamental disagreement appears on what is and should be understood to be within the scope of such norms, on whose violations are worse and at the root of the conflict or instead a response to the other, legitimate for one or another reason, and so forth. Indeed, this was the legitimization of sovereign immunity to begin with, responding to the problem that cross-boundary judicial interference in one another's affairs leads to conflict and even war because norms differ between societies and perceptions of reality between any adversary.

The rationalization for the development of the rules, procedures and courts that make up international criminal law is that they aim to provide the means through which people (and society at large) can find justice when norms are violated. However, it is usually unclear what is meant by 'justice' because it carries in itself also a variety of assumptions. In legalist international criminal justice discourse, 'justice' is often assumed to be an objective notion: a determinable and universal ideal that can be 'done' and even 'delivered', in particular, through a criminal trial. An understanding of 'justice' as an objective notion suggests that justice means the same thing for different people and societies.⁶

6 For an insightful account on conceptions of justice through anthropological field research in a number of African countries and a sharp critique on the 'universality' of justice, see Kamari

However, social psychological research as well as research in communities that are affected by mass atrocities shows that justice is inherently subjective, and that social psychological and cultural differences as well as diverse historical, political and social contexts prevail regarding what is considered justice, for whom, by whom, how to choose one interpretation of justice over another, and whose justice is taken into consideration at the cost of another's.⁷ And therefore, externally with regard to different contexts and circumstances *between* societies, and internally with regard to differences among people *within* any affected society, different needs and wishes exist as to what would contribute to a satisfactory degree of justice for what was done to them. This can vary between, for example, criminal accountability for perpetrators, truth-seeking and fact-finding to have an authoritative historical account, reparations programs to help victims overcome the consequences of abuse such as through restitution, compensation, rehabilitation and memorialization, and institutional reform, each of which comes in various forms and aims at a number of objectives such as coming to terms with the past occurrences, preventing future violence and placing blame where this is due.⁸ Importantly, rather than seeing these mechanisms as alternatives, combining a number of these mechanisms usually better addresses the needs of the affected societies and the particular circumstances involved.⁹ These ways of addressing mass violence, in and outside of criminal courts, are often described as mechanisms of 'transitional justice'. Transitional justice is meant to capture that these mechanisms seek to

Maxine Clarke, *Fictions of Justice. The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge University Press, New York, 2009).

- 7 Rawls also points out that 'no general moral conception can provide a publicly recognized basis for a conception of justice in a modern democratic state' in John Rawls, 'Justice as Fairness: Political Not Metaphysical', 14 *Philosophy & Public Affairs* (1985) 223–251, p. 225. See also Duncan Ivison, 'Justifying Punishment in Intercultural Contexts: Whose Norms? Which Values?', in Matt Matravers (ed.), *Punishment and Political Theory* (Hart Publishing, Oxford, 1999), p. 88; and studies on (procedural) justice in social psychology and criminology, such as E. Allan Lind and Tom R. Tyler, *The Social Psychology of Procedural Justice* (Plenum Press, New York, 1988). See also Clarke, *supra* note 6; and Sarah Nouwen and Wouter Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', 21 *European Journal of International Law* (2010) 941–965.
- 8 See for example Office of the High Commissioner of Human Rights in Nepal, *What is Transitional Justice?*, 1 (12 April 2007).
- 9 Secretary-General, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*, 9 (March 2010); International Center for Transitional Justice, *What is Transitional Justice?*, 2 (2009); Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General, delivered to the Security Council* (U.N. Doc. S/2004/616), Aug. 23, 2004, para. 26.

aid affected communities come to terms with the conflict ('justice') in a period of transition, moving from conflict to whatever lies beyond in terms of a stable post-conflict society.¹⁰ Yet, recently, transitional justice is also increasingly recognized not only as a normative instrument addressing a state's or individuals' conduct in conflict and as such as instrument of retribution or deterrence, but as an important component of human security, focused on fostering peace and security on the ground.¹¹

Importantly, there is not one, generalizable way to accommodate the justice needs of all affected people: not by means of criminal accountability, nor by any other mechanism. Instead, different situations require different mixtures of various mechanisms to try and respond to victims' needs. Since the meaning of justice inherently means different things to different people, the assumption of an objective meaning of justice seems therefore obviously flawed. Moreover, the thereupon built assumption that a one-size-fits-all solution from a court in The Hague can address such varied needs and can 'deliver justice', from the outside, in a top-down manner and by means of criminal accountability, seems likewise problematic. To understand what justice needs the affected community concerned has, inherently and logically requires careful listening, to continue doing so throughout the post-conflict period and to tailor any action to suit those needs, also when they change. Part of that ongoing dialogue should be to question the role of law, and international criminal trials in particular. More concretely, those involved should critically assess whether and in what ways criminal accountability contributes to the justice needs of the affected community concerned, and how trials should best relate to other transitional justice mechanisms in the particular situation at hand.

Instead, the 'legalist' logic that tends to prevail in international criminal justice reinforces a rather unhelpful discrepancy between the utopian ideals that international criminal justice is believed to be able to bring and what it actually can contribute. In the legalist understanding, law is considered to be something external to politics, where 'law' is popularly understood as a neutral set of rules that places bounds on the acceptable limits of state behaviour, and 'politics' as the realm of the unrestrained free will of states.¹² The logic goes that whereas committing atrocities within state borders was once unrestrained because they were shielded from outside interference, international

10 Ruti Teitel, *Transitional Justice* (Oxford University Press, New York, 2000).

11 Ruti Teitel, 'Transitional Justice Globalized', 2(1) *International Journal of Transitional Justice* (2008) 1–4.

12 For a thorough critique on legalism, see Judith Shklar, *Legalism. Law, Morals, and Political Trials* (Harvard University Press, Cambridge, MA, 1964).

criminal law limits the space of (bad) politics through means of (good) law. This presumes that politics is something that can be suspended by a neutral rulebook providing what is 'justice' and not. However, what 'justice' means, for whom and in what form, remains deeply contested, and this fundamental disagreement cannot be resolved by merely using the language of law and treating it as an objective notion. It instead requires an acknowledgement of the inherent political nature of seeking 'justice' for those affected by atrocities. This therefore requires a more complex understanding of law and politics than legalism tends to portray.¹³

In its justification for existence, the ICC and its proponents have created unrealistically high expectations of what a court in The Hague can do in terms of addressing atrocity crimes throughout the world and ending impunity for them.¹⁴ Credos like 'ending impunity' and 'delivering justice' would never be found credible in a domestic criminal law system, since all criminal law can do is strive after *reducing* impunity and *contributing* to feelings that justice is served, in close cooperation with other enforcement and support systems that aid these causes too. With the added complications that the transnational space brings, such strange and utopian promises should have no place in international criminal law.

If the 1990s were characterized by great zeal for international criminal law's potential, that was able to spur an unprecedented revolutionary momentum in realizing a body of law that prosecutes and holds accountable those that commit the worst imaginable atrocities, the time is now ripe to scrutinize the normative foundations of the project. What is needed now is a more reflective understanding of the politics that international criminal law interacts, represents and reproduces; to engage with the critique seriously and consider what it can and cannot do; and on that basis manage and adjust expectations to a realistically achievable level. Rather than veiling in legalist assumptions the political realities that international criminal justice cannot escape, and rather than imposing its own creations of universal justice, international criminal

13 For an elaboration of this argument in the context of the regulation and criminalization of aggressive use of force, see Marieke de Hoon, *The Law and Politics of the Crime of Aggression*, Ph.D. dissertation Vrije Universiteit Amsterdam, Marieke de Hoon Publishing, Amsterdam, 2015).

14 For a critique on the abundance of goals that the international criminal justice project proclaim, see Mirjan Damaška, 'What Is the Point of International Criminal Justice?', 83 *Chicago Kent Law Review* (2008) 329–368. He observes that 'the problem of goals' of international criminal law lies in their overabundance and therefore impossibility to achieve all, the tensions that come from the incompatibility of these goals, and the competence that a judicial court has in setting an accurate historical record.

courts and tribunals should instead consider thoughtfully and earnestly their limitations, and through it, come to an appreciation of what they *can* bring.

3 The Limitations yet Seemingly Unlimited Objectives of the Criminal Trial

What they *can* bring is, in principle, trials against alleged perpetrators of international crimes, on the basis of international criminal law, where courts have jurisdiction. However, while international criminal trials may contribute importantly to social repair of affected communities, they also have a number of important limitations, particularly on the international level.

One of these limitations is that mass violence is usually characterized by large numbers of actors who directly or indirectly profited from the events, bystanders that did not intervene or even cheered the violence on, those who elected a war criminal to represent them, and other (international and national) actors that contributed to the violence.¹⁵ Yet, while criminal law allows prosecution of various different types of actors, the wider group of actors (such as those that looked away, those that voted or otherwise helped the perpetrators into their powerful positions, geopolitical factors that allowed the occurrences unfold in one and not another way) usually cannot be held responsible for their roles in the violence through a criminal trial, but may well be relevant factors to address in the healing process of societal repair. Moreover, the practical reality of international criminal trials is that due to, for instance, limited resources, the difficulty of obtaining sufficient and reliable evidence, limited jurisdiction, and the difficulty of obtaining custody over the individual concerned, prosecutorial selectivity must single out a relatively very small number of the far more numerous perpetrators that will face a trial.

Because criminal trials by themselves are very limited in their ability to address the more complex reality of the conflict's consequences and post-conflict transition, and without them, transitional justice also tends to miss a crucial component, transitional justice scholarship shows the need for a multi-dimensional approach.¹⁶ However, Fletcher and Weinstein observe that

15 For further analysis, see Laurel E. Fletcher and Harvey M. Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation', 24 *Human Rights Quarterly* (2002) 573–639, p. 580.

16 See for example Paul Gready, *The Era of Transitional Justice. The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond* (Routledge, Abingdon, 2011); Teitel, *supra* note 10; Clarke, *supra* note 6.

criminal trials tend to fail to integrate with other capacity-building measures that are required for repairing a 'sick society', such as the need for rule of law development, humanitarian assistance, democracy building and economic development.¹⁷ Moreover, the responses to mass violence in the last decades suggest that many diplomats, international criminal justice practitioners and scholars, and human rights advocates prioritize criminal trials above other transitional justice mechanisms.¹⁸ As Nouwen and Werner show, the tendency to focus on criminal trials and to look at societal repair through the lens of criminal accountability tends to marginalize other articulations of justice, and as such other types of transitional justice processes.¹⁹ Likewise, Fletcher and Weinstein also assert: 'while transitional justice scholars recognize that many forms of reckoning are necessary, our reading of the human rights literature and international practice suggests that individual criminal trials – whether national, international, or a hybrid – have become the benchmark of accountability against which all other forms of reckoning, such as truth commissions, must be judged'.²⁰

However, rather than integrating with other transitional justice mechanisms in a more holistic approach to mass violence and viewing the criminal trial not as starting point but as *part of* a pallet of options that each serve different and complementary societal needs, international practice shows that, instead, criminal trials try to include elements into the trial that conceptually fit uncomfortably with what a criminal trial is able to provide. Thereby, the objectives that a trial is associated with (and thus the expectations for it) are stretched in too many directions. For example, not only are trials supposed to aid retribution for the committed crimes and prevention for future crimes, they also are expected to have expressive value, serve symbolic purposes as well as historic truth-telling and didactic purposes. Or as Ruti Teitel raises, to what extent is international criminal law supposed to simply represent past wrongdoing and to what extent it is intended to be transformative of that past wrongdoing?²¹ As Damaška observed, 'the problem of goals' of international criminal law lies in their overabundance and therefore impossibility to achieve

17 Fletcher and Weinstein, *supra* note 15, p. 580.

18 For a thorough explanation of this phenomenon, see Sarah Nouwen and Wouter Werner, 'Monopolizing Global Justice. International Criminal Law as Challenge to Human Diversity', *Journal of International Criminal Justice* (2015) 157–176.

19 *Ibid.*

20 Fletcher and Weinstein, *supra* note 15, p. 582.

21 Ruti Teitel, 'The Universal and the Particular in International Criminal Justice', 30 *Columbia Human Rights Law Review* (1999) 285–303.

all, the tensions that come from the incompatibility of these goals, and the competence that a judicial court has in achieving such ambitious goals.²²

Much has been written about the limitations of international criminal trials in terms of retribution and prevention. With regard to retribution, many scholars assert that prosecutions of merely a few individuals could never be sufficiently vengeful in relation to the sheer scale and gravity of the crimes that were committed,²³ that retributive sentiments may actually prove counter-productive and disruptive to the restoration and maintenance of peace,²⁴ or that retribution would be barbaric.²⁵ Likewise, there is much critique on the preventive value of international criminal trials. Immi Tallgren concluded that whatever logical inconsistencies, behavioural uncertainties, or practical difficulties national systems face with 'ordinary' criminality, trying to fit these theories to the international criminal justice system 'multiplies them exponentially'.²⁶ She holds that '[t]he basic pre-conditions for the effectiveness of the mechanisms according to the prevailing theories either do not exist or remain unfulfilled. The efforts to make them fit any current empirical examples seem out of place, artificial, even ridiculous, falling into the fictive, rhetorical universe of international speech situations'.²⁷ Deterrence research has found that there is evidence of a link between the certainty of punishment and crime rates.²⁸ This is extremely low in case of international crimes due to the

22 Damaška, *supra* note 14, pp. 331–340.

23 Such as Luban who raises the question whether there is a way in which law can be applied in a manner that matches with the crimes that occur in situations of mass-violence. David Luban, 'Hannah Arendt as a Theorist of International Criminal Law', 11 *International Criminal Law Review* (2011) 621–641. Koskeniemi likewise observes with regard to the Eichmann trial that no sentence (not even one death sentence of one individual) could redress the enormity of the crime that the individual is held accountable for. Martti Koskeniemi, 'Between Impunity and Show Trials', 6 *Max Planck Yearbook for United Nations Law* (2002) 1–36, p. 3.

24 Stuart Beresford, 'Unshackling the Paper Tiger – the Sentencing Practices of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda', 1 *International Criminal Law Review* (2001) 33–90.

25 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books, New York, 2006), p. 254.

26 Immi Tallgren, 'The Sensibility and Sense of International Criminal Law', 13 *European Journal of International Law* (2002) 561–595, p. 590.

27 *Ibid.*

28 Mark Maguire, Rod Morgan and Robert Reiner (eds.), *The Oxford Handbook of Criminology*, 5th edn (University of Oxford Press, Oxford, 2012); see also A. Bottoms and A. Von Hirsch, 'The Crime Preventive Impact of Penal Sanctions', in P. Cane and H. Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, New York, 2011);

difficulty for international courts to obtain jurisdiction and for national courts to prosecute their own leaders.²⁹ And in any event, a trial of a war criminal in one part of the world does not seem to deter war criminals elsewhere to stop committing atrocities. As Mark Kersten says, '[t]hat's just not how deterrence works – even if some people wish it would'.³⁰

Although thus problematic, international trials are equated with justice for exactly those purposes: their retributive ability to punish as a reckoning for a committed wrong and provide redress for the victims of the crime and society at large, to strive for justice, and (thereby) maintain order in society;³¹ and their ability to prevent others to commit crimes (general prevention) and to prevent the same offender to commit more crimes in the future (special prevention).

In addition, as Teitel explains, accountability trials are also considered to be part of a broader international commitment to human security, and as such aimed at fostering peace and security.³² The international criminal trial then is also expected to establish the truth of what happened and, moreover, support

A. Doob and C. Webster, 'Sentence Severity and Crime: Accepting the Null Hypothesis', 30 *Crime and Justice: a Review of Research* (2003) 143.

29 See for example Damaška, *supra* note 14, at pp. 344–345. See also Immi Tallgren, who observes that the deterrent and preventive effect of international criminal law is not convincingly demonstrated in any empirical study, nor by any logical extrapolation. The idea that those engaged in the crimes that fall within the scope of international criminal law will be deterred and prevented from committing such crimes by the very small chance that an international criminal tribunal will take interest and gather sufficient evidence to prosecute is widely recognized as problematic, she holds. See Tallgren, *supra* note 26. In contrast, Harmon and Gaynor argue that 'there is some evidence that the international justice system is forcing western military commanders to listen more closely to their legal advisers when selecting targets and weapons for bombing missions'. Mark Harmon and Fergal Gaynor, 'Ordinary Sentences for Extraordinary Crimes', 5 *Journal of International Criminal Justice* (2007) 683–712, p. 695. Critical discussions of the punishment rationales are also provided by, for instance, Mark A. Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press, New York, 2007); and Mirko Bagaric and John Morss, 'International Sentencing Law: In Search of a Justification and Coherent Framework', 6 *International Criminal Law Review* (2006) 191–255.

30 War crimes conviction a significant victory for international court, says U of T expert (23 August 2016), available at <https://www.utoronto.ca/news/war-crimes-conviction-significant-victory-international-court-says-u-t-expert>.

31 Antonio Cassese understood the retributive rationale as follows: 'justice dissipates the call for revenge, because when the Court metes out to the perpetrator his just deserts, then the victims' call for retribution are met'. Antonio Cassese, 'Reflections on International Criminal Justice', 61 *The Modern Law Review* (1998) 1–10, p. 6.

32 Teitel, *supra* note 11.

the wider goals of peace and justice through its communicative or expressive function. In the expressivist rationale, the international criminal trial serves to record 'the truth' and declare it to the world.³³ Mark Drumbl notes that expressivism claims as central goals the creation of historical narratives as representations of 'truth' and their pedagogical dissemination to the public.³⁴ The goal of punishment then is to proactively embed the normative value of law within the community.³⁵ On the one hand this aims at setting or articulating values for the international society at large, and on the other it aims at those that have been affected by the crime directly.

There are a number of problems to note with regard to this set of objectives, such as the difficulty of articulating universal values in a pluralist world (compare with the justice discussion above) and the danger that this expressive goal of the trial becomes a persuasive one, or even coercive project, in favour of one particular conception of justice that does not necessarily coincide with what is perceived as just for those involved.³⁶ The idea is that through the expressivist, didactic and historical truth-telling functions, the international criminal trial aims to enable a wider community, consisting not only of the victims, but also perpetrators, bystanders and not directly affected individuals, to know what happened and why and on that basis recreate the conditions of viable social life.³⁷

However, including historical, political and educational objectives into the trial also complicates further the already complex process of prosecuting individuals for atrocity crimes. A didactic and expressive function relies on what

33 For an analysis of the trials of the Nazi leaders Eichman, Demjanjuk, Barbie and Zundel as show trials and how these trials tried to do justice to both to the defendants and to the history and memory of the Holocaust, see Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (Yale University Press, New Haven, 2001). See also Drumbl, who explains expressivism as aimed at strengthening 'faith in rule of law among the general public, as opposed to simply because the perpetrator deserves it or because potential perpetrators will be deterred by it', in Drumbl, *supra* note 29, p. 173.

34 Drumbl, *ibid.* See also Marlies Glasius and Tim Meijers who explain that in the expressivist rationale, the *raison d'être* of the trial is the crafting of historical narratives and their pedagogical dissemination to the public. Marlies Glasius and Tim Meijers, 'Constructions of Legitimacy: The Charles Taylor Trial', *The International Journal of Transitional Justice* (2012) 1–24, p. 19.

35 Drumbl, *supra* note 29, p. 61.

36 For an elaboration on this argument, see De Hoon, *supra* note 13.

37 Koskeniemi, *supra* note 23, at 3–4. See also Antonio Cassese, 'On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', 9 *European Journal of International Law* (1998) 2–17, pp. 9–10.

the narrative is that is disseminated. The Court therefore needs to be able to set such a historical record, through which right can be distinguished from wrong, individuals are indicated as responsible, and victims recognized. However, a criminal trial as means to set a historical record is problematic because historical truth-telling and establishing criminal accountability require contradicting rationales. Legal and historical truths are far from identical. Historical truth-telling demands a widening of the context so that it can include larger systemic factors such as political, social and economic structures that provided the setting and conditions in which the mass violence took place.³⁸ Instead, the legal procedure seeks to exactly exclude such factors and reduce occurrences down to single events, tangible conduct, and perpetrators against whom evidence is available. The wider the scope of a trial becomes, the more complex it becomes for the trial to grasp it in terms of the accountability of the individual in the dock. On the other hand, the narrower the focus, the less the trial would provide any profound historical and contextualized understanding of the situation and its structural causes and effects. Rather than achieving both the objectives of criminal accountability and the setting of an authoritative historical narrative, the legal process inevitably distorts the wider context of what has occurred by reducing facts and circumstances down to the particular events that make up the particular criminal charge of the particular individual that is in the dock.

The rationale behind the criminal trial's individualization of guilt is that it is based on the assumption that accountability of a few individuals promotes group reconciliation, while collective responsibility would produce the opposite effect. Historical truth-telling is based on the contradicting assumption that bringing out systemic factors and placing occurrences in their wider context promotes societal repair and reconciliation. The criminal trial therefore presents the perpetration of international crimes as induced by a small group of 'most responsible' while often a historically more accurate account provides that such policies enjoyed widespread popular support.³⁹ Fusing the objective of historical truth-telling into the criminal trial thereby not only raises false expectations that both the objectives of criminal accountability and creating an authoritative historical narrative can be met in the setting of a criminal trial, they also undermine one another in the process of trying to accomplish this fusion.

This is merely one example that warns against attaching too many objectives to the international criminal trial. Other examples of tensions between

38 Koskenniemi, *supra* note 23, p. 14.

39 Damaška, *supra* note 14, pp. 332–333.

assumptions that underlie the expectations of international criminal trials include, for instance, trying to meet the needs of victims in a trial that is instead conceptualized around finding guilt for a perpetrator; producing/presenting 'universal' values and standards while also meeting the particular needs of the victims of the particular conflict at hand; and spending large resources on expensive trials while victims may feel that distributive justice through economic incentives or rebuilding their broken homes is a higher priority and more effective for societal repair.

Different mechanisms serve different objectives and address different needs that victims of mass violence may have. Each conflict and each society is unique, and therefore each approach to address an occurrence of mass violence must also be unique in the way it balances different mechanisms. International criminal trials try to include elements of different mechanisms into the trial, to in that way address various justice needs in a coordinated because centralized manner. Yet this misunderstands and overestimates what a trial is able to do and not do. Neither of the various objectives and justice needs in principle and generally overrides another, but should not be confused with each other either. This ill-serves the needs of the victims, as well as undermines the legitimacy of the trials and courts because these in turn are unable to meet the unrealistic expectations thus raised. This is also what Darryl Robinson points to when he discusses how the ICC's contradictory assignment allows the ICC to be criticized for always breaching one of its contradictory expectations.⁴⁰

4 International Criminal Trials are (also) Political

Managing post-conflict situations through justice mechanisms thus requires i) choices and prioritization of needs and interests from various actors and on various levels (individual victims, affected communities, the state(s) involved, the region, international community, humanity), and ii) decisions on which transitional justice mechanisms can contribute to post-conflict societal repair. Addressing these varied and complex justice needs is thus a highly complex political decision-making process.⁴¹ In that process choices are made through which a narrative is produced, victims are recognized, root causes are identified, and those responsible may be held to account, in whichever form. 'Doing

40 Darryl Robinson, 'Inescapable Dyads: Why the International Criminal Court Cannot Win', 18 *Leiden Journal of International Law* (2015) 323–347, p. 330.

41 See on this also Teitel's 'Epilogue: The Return of the Political', in: Ruti Teitel, *Globalizing Transitional Justice. Contemporary Essays* (Oxford University Press, New York, 2014).

justice' is therefore itself an instrument of fighting an enemy and legitimizing a regime, whether it be a former one or new. However, importantly, although these processes are (also) political in essence, this does not preclude their legal character. Contrary to legalist assumptions that understand trials as either legal or political, there is no reason why a judicial process that results from political choice cannot and should not be held in accordance with rules and procedures that aim to protect the independence and impartiality of the judicial process, and provide rights to the defendant.⁴² A legal process that recognizes that it is also a reflection and enactment of a political process is therefore not necessarily an extra-legal political sham trial.

To a certain extent, any court and any trial is 'political' by which I mean that they involve questions of social power, legislative choice, prosecutorial discretion, and judicial interpretation.⁴³ However, international criminal trials are particularly political. The facts, causal relations and contexts are usually highly contentious in the cases that land before these judges. What these facts are and how they should be understood will usually form part of the conflict that is adjudicated. As the court needs to consider them, the court cannot avoid but take at least some political stance.⁴⁴ Yet this does not mean that such deliberations cannot occur in accordance with the rules of judicial interpretation and other legal procedural guarantees. Although they are also legal processes (if indeed observant of the legal rules of the game), international criminal trials are however also a space in which politics occur and materialize rather than a space liberated from politics, as international criminal tribunals and their advocates often would have us believe. That these trials are 'political' is not because they would merely reflect political forces or lack legal foundation, but because they are a space in which priorities of what should be adjudicated in the eyes of the world and in pursuit of 'global justice' are enforced and because they are a space in which the Court hears contested narratives and decides what narrative to endorse, notwithstanding the requirement (and prudence) to do so in

42 See Nouwen and Werner, *supra* note 7, pp. 944–946 for a discussion on a similar use of the political, connecting this to Carl Schmitt's friend-enemy distinction and Otto Kirchheimer's definition that the political nature of a trial does not necessarily preclude its legal character but instead to use the integrity of the legal system for a political fight, Otto Kirchheimer, *Political Justice. The Use of Legal Procedure for Political Ends* (Princeton University Press, Princeton, 1961); Carl Schmitt, *The Concept of the Political: Expanded Edition* (The University of Chicago Press, Chicago, 2007).

43 For a discussion on the political nature of trials, see also Gerry Simpson, *Law, War & Crime* (Polity, Cambridge, 2007), at 14.

44 For further discussion, see Koskenniemi, *supra* note 23, pp. 29–30.

accordance with legal rules and principles.⁴⁵ Moreover, as Nouwen and Werner explain, the point of a (political) trial is not to dismiss law as irrelevant, but rather to embrace the legal realm and use its independent and impartial image to legitimate the Court's cause and struggle, using the integrity of the legal system for a (political) fight,⁴⁶ which is deemed to be the fight worth fighting for the good, condemning what is evil.⁴⁷

Take for example the 2016 *Al Mahdi* case at the ICC, the first trial in which the ICC convicted an individual for destroying cultural heritage, the mausoleums in Timbuktu.⁴⁸ The choice of the ICC to take this case to court is remarkable: it is a signal that not only physical harm to people is grave enough for the Court, but also destruction of property: cultural heritage. This is understandable, because what is addressed is that destruction of cultural heritage is usually part of a policy of cultural cleansing, contributing to a wider policy of ethnic cleansing, of destroying the identity of a group and persecution, as it was here in Mali. We have also seen this in many other conflicts, such as in Syria, Iraq and Afghanistan. There, the ICC was unable to act against the perpetrators. But here, where *Al Mahdi* is caught on video committing the acts he is accused of and admitting his guilt, the ICC could, and so it did. The ICC thereby did much more than merely convict the individual concerned. It also signalled to the world that this too is an international crime that the Court will act on if it gets the chance.

Al Mahdi is also suspected to have committed murder, rape and torture, yet was not prosecuted for those crimes. The Court did not explain why. We can only speculate that the ICC does not have sufficient evidence to make this case, or that abstaining from prosecuting him for these counts was part of the plea bargain, perhaps in exchange for his remarkable call upon others during his trial not to destroy cultural heritage. What this case illustrates is that the obviously political nature of the Court's decisions can be perfectly justifiable. The Court can argue that in light of the many Islamic fundamentalist destructions of cultural heritage it was important to prioritize this case, particularly since the video evidence and admission of guilt made the case so easy and expeditious. They can also show through this case that being political does not mean that the Court cannot simultaneously uphold judicial impartiality and

45 See also Simpson, *supra* note 43, p. 11.

46 Nouwen and Werner, *supra* note 7, p. 946.

47 See also Marieke de Hoon, 'The ICC's *Al Mahdi* Case is (also) a political trial, and that is fine!', *EJIL Talk!*, 31 August 2016, available at <http://www.ejiltalk.org/the-iccs-al-mahdi-case-is-also-a-political-trial-and-thats-fine/#more-14533>.

48 *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, Judgment 27 September 2016.

independence and conduct the trial in accordance with the highest legal standards. In other words, the Court had the perfect opportunity to demonstrate that its inherent political nature as one Court in a world full of atrocity crimes requires choices and priorities does not take away its legal nature as court of law. But it shied away from doing so and from explaining its choices, although perhaps it is moving into this direction?

Namely, in its September 2016 policy paper, the ICC's Office of the Prosecution (OTP) explains some aspects of its case selection and prioritization policy for the purpose of 'clarity and transparency'. The most remarkable aspect of this policy paper is that the OTP indicates that it will give particular consideration to crimes that are committed by means of or that result in the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land.⁴⁹

After Chief Prosecutor Fatou Bensouda announced at the commencement of her term that she would address the issue of wartime sexual crimes as they are underprosecuted yet highly impactful on victims and societies, and with the *Al Mahdi* case that cultural cleansing as part of wider ethnic cleansing as well as Islamic fundamentalism are also part of the priorities in the ICC's prosecutorial policy, this policy paper announces that crimes that are committed in the context of robbing a society of their viability are also seen as so impactful that the Court will go after it if they can.

This may signify a turning of the Court's own perception of its role, from one of solely a responding sentencing body, severely hampered by its limited resources and jurisdiction, to a court that speaks with moral authority what it considers to be the most grave and impactful crimes in the world, buttressed with the possibility to convict from time to time. In that sense, the role that is then embraced is one of a symbolic court that focuses on its expressive function by articulating where the eyes of the world should turn to. However, since any articulation of morality inherently raises objection for it is inherently disagreed with by one or another, it will also raise discussion. But this, I would argue, is a good thing. Because then at least the discussion can be held on what choices the Court should be making rather than deny that it does and has to. The Court makes choices about who it prosecutes and for what – choices that are unavoidably political – and that is not a problem in and of itself. What is a subject for concern is the Court's lack of transparency about its politics. We

49 ICC Office of the Prosecutor, *Policy Paper on Case Selection and Prioritisation* (15 September 2016), available at https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.

are entitled to an explanation from the Court about why it makes the choices it does, so that they can be the subject of debate and discussion.

5 Shaking Off Its Legalist Feathers?

Although these recent developments may be interpreted as careful steps into this direction, international criminal courts have not tended to do so in the past. Instead, throughout this recent era of institutionalization of international criminal justice that we observed since the early 1990s, international criminal courts and tribunals present their mandate as apolitical, one of pure legal considerations, staying clear of politics, subordinating politics to law and speaking law to power.⁵⁰ As Nouwen and Werner explain, politics is thereby 'portrayed as external to law, as something that needs to be overcome by independent organs acting on the basis of pre-given rules and principles'.⁵¹ In this legalist understanding, political reality is often experienced as an unfair playing field in which power wins and arbitrariness rules, and law is regarded as neutral, objective, and, if constructed carefully and fairly, an instrument of justice. It promises the depoliticization of issues of fundamental and deep-seated political contention.⁵² Law thus understood is regarded as an instrument for suspending the political. For example, as Malcolm Shaw writes in the opening pages of his *International Law* textbook:

Power politics stresses competition, conflict and supremacy and adopts at its core the struggle for survival and influence. International law aims for harmony and the regulation of disputes. It attempts to create a framework, no matter how rudimentary, which can act as a kind of shock-absorber clarifying and moderating claims and endeavouring to balance interests. In addition, it sets out a series of principles declaring how states should behave.⁵³

This contrasting of law against the political presents law as 'saviour' from the danger called politics, as a neutral and abstract bringer of good values aiming to subdue the politics of conflict.

⁵⁰ Nouwen and Werner, *supra* note 7, p. 942.

⁵¹ *Ibid.*

⁵² Simpson, *supra* note 43, p. 140.

⁵³ Malcolm N. Shaw, *International Law*, 6th edn (Cambridge University Press, Cambridge, 2008), p. 12.

In search for neutral and fair decision-making, and hoping to escape from the arbitrariness that politics is often associated with, envisioning law as able to suspend politics seems a tempting road to take. It, however, ignores the social context and diversity in which law functions. It fails to account that law is based on and is an outcome of political choice, that the legal language is also a particular form of politics, that the structure of legal argumentation represents what a (legal) community accepts as law and not, and that justice is what those that seek it experience as such.⁵⁴ It overlooks that law reflects the outcome of a political struggle and thus is the product of power, and as such may embody and reinforce structural inequalities, power relations and interests. Moreover, it ignores the constitutive or performative power of law: that by including and excluding what is recognized as legal, relevant and convincing, law *produces* reality, symbolic orders and power,⁵⁵ which constitutes in and of itself political force.

Law can thus not be contrasted with the political, as Shaw, many other 'mainstream' international lawyers and many lawyers and activists in and around international criminal justice tend to do, because it cannot take away the nature of the political. To paraphrase Judith Shklar, in a morally pluralistic world, international law and the search for justice do not hang above the political world but stand in its very midst.⁵⁶ Law and politics are phenomena through which can be observed how a society seeks to order itself and address social conflict in a most just manner. Social conflict must still be resolved, and in the ways in which conflict is addressed, both legal and political means are used and should therefore be understood rather than regarded as competitive instruments that could function separate from one another. Consequently, translating issues from political problems into legal ones does not take away the political nature of the problems and does not overcome moral diversity.

Yet, in the revolutionary zeal of the 1990s, such critique and appeal to appreciate the politics of international justice was dismissed as if it would undermine the importance and sincerity of the legal and the judicial. It seemed to be regarded as unhelpful for creating the support and momentum that was

54 See for instance Martti Koskeniemi, *From Apology to Utopia. The Structure of International Legal Argument. Reissue with New Epilogue* (Cambridge University Press, Cambridge, 2005); Wouter Werner, 'The Use of Law in International Political Sociology', 4 *International Political Sociology* (2010) 304–307, p. 305; Philip Liste, 'Articulating the Nexus of Politics and Law: War in Iraq and the Practice within Two Legal Systems', 2 *International Political Sociology* (2008) 38–55; David Kennedy, *International Legal Structures* (Nomos Publishers, 1987).

55 Werner, *supra* note 54, p. 305.

56 Shklar, *supra* note 12, p. 123.

needed to break through assumptions that the international legal order could only function by virtue of states as ultimate deciders over right and wrong, each for themselves as they saw fit. Instead, the supranational was presented as not invasive because only based on neutral, universal and apolitical law. The core instrument to achieve this and to silence or side-line critique was by framing moral outrage about impunity for mass atrocities in narratives of universality, progress, a conceptualization of justice that prioritizes criminal accountability vis-à-vis other forms that may lead to justice, and the portrayal of criminal accountability mechanisms as able to deliver justice and end impunity for mass atrocities. It moreover created momentum for further developments in domestic criminal legal systems to prosecute former leaders and international and domestic developments towards more active and comprehensive redress mechanisms through a variety of transitional justice and human rights mechanisms.

While back then it may well have been important to focus on the larger goal of breaking through deeply engrained assumptions of sovereign immunity to establish a new international legal order of global accountability, the current and increasing critique on the ICC suggests that it should seriously reconsider this strategy. To ignore and side-line critique any longer may well fatally undermine what the Court can and should contribute. The Court (together with its states parties) and the wider international criminal justice field should take critical signals more seriously and engage in dialogue with a more open attitude to avoid that this battle between the Court and (particularly) African states intensifies further, victims get more disillusioned, and the support for the Court deteriorates further. As part of this conversation, rather than denying its politics, the Court should recognize and explain its politics and choices, acknowledge the simple fact that, with its financial and jurisdictional limitations, this one court in The Hague can only be a symbolic court that can only prosecute a fraction of what occurs in a world so full of atrocities, and engage in an open dialogue with victims and stakeholders on the choices it thus needs to make. Thus, what the Court needs to do is shake off its legalist feathers as it unhelpfully clouds the already difficult task of understanding how the Court could best navigate the waters, recognize its politics, explain and justify its choices, and engage openly in dialogue with those it tries to support and address. By ignoring and denying such critique, it is not only not going away, the Court in fact counterproductively allows its opponents to mobilize the justified and constructive critique for the anti-ICC camp. It is time to change that course, and observing Bensouda's choices these first years since taking office, she may well be the person to lead international criminal justice into its next phase, bolstering it for a more sustainable future.

6 Strengthening the Legitimacy by Doing Justice to Critique

Different and contradicting assumptions, rationales and objectives pull the ICC and the international criminal justice project in many directions, leaving it impossible to meet the high expectations that are associated with it.⁵⁷ It is simply not possible to make no sacrifice on either front by conflating mutually exclusive roles for the Court or the trial. Punitive justice and restorative justice often require different choices in whether, who and how to prosecute, or instead explore alternative transitional justice mechanisms. Historical truth-telling in a trial requires different context analysis methods than investigating the criminal responsibility of an individual for selected conduct, yet are blended in the international criminal trials that the international courts and tribunals have undertaken. And while what is justice for one is likely to differ from what is justice to another, the ICC and other tribunals employ little effort to assess whether their own preferred justice mechanism (accountability of the most senior perpetrators involved) meet the justice needs of the victims. But what else can a court do, really? By nature, its own logic as a criminal court of law frames a situation in terms of criminal accountability. Although, 'in the interest of justice', the ICC also has to take up its own responsibility to critically examine whether and how its involvement best addresses the needs of those it should act for.

It is easy, and important, to critically assess the ICC's performance, as its first decade of existence has left much to desire. Yet the fundamental problem lies deeper than the functioning of this institution. It lies in the failing to understand the plurality and complexity of the globalized human population and the atrocities that occur in it, that one-size-fits-all solutions make little sense in this context, and that the justice needs during and after atrocities require an essentially bottom-up approach, starting from the needs of those involved, understanding the complexity and particularities of the conflict at hand, and trying to assist rather than overrule those that are primarily affected. None of this is easy, of course, since within each conflict, various and contradicting voices are always present.

Ignoring this complexity has given us a Court that is increasingly experienced as antagonizing and is under severe attacks on its legitimacy and credibility. But merely recognizing and acknowledging its politics and listening to the critique will not turn things around either, although it is a helpful start. As this paper tries to show, rather than dismissed and ignored, the constructive

57 For an insightful analysis of some of the fundamental contradictions in the assumptions that underlie international criminal justice thinking, see Robinson, *supra* note 40.

critique that reveals the root of the problem should be taken seriously. This points to a discussion that must be had on the context in which the Court is supposed to function, and the type of Court it is supposed to be. Since this is left unarticulated, too many differing objectives, assumptions and rationales underlie the ICC. The ICC consequently suffers from unrealistic expectations and thus inherent disappointment. In order to understand the scenarios and policy choices that the Court as well as the international community have with regard to how best to assist affected communities in their efforts to seek justice, repair their own societies and move towards a more stable, post-conflict future, it is important to understand these assumptions, rationales and objectives, by whom they are held, and whom international criminal justice is supposed to address: the victim that was raped, the community that has to deal with its many victims, the larger society that tries to heal, the 'conscience of mankind' at large, all at once, in equal amount, differing per situation, how then? Each of those beneficiaries may well call for different considerations of what the best approach towards transitional justice mechanisms is, and again differently in each different conflict.

What is required is analysing and choosing what international criminal justice, and the ICC as part of it, is supposed to be and do. In what context are international criminal trials supposed to function? What limitations are found acceptable? What expectations match these choices? What costs are we prepared to pay for wanting one or another modality. Because, what seems like a nice idea on the one hand inherently comes at the detriment of other objectives. The ICC and other international criminal tribunals cannot be compared to a regular domestic criminal justice system in a well-functioning legal order, of which we may expect that it investigates all serious crimes and prosecutes where evidence can be found. International criminal trials have to deal with cases that are usually far more complex to prove, with limited resources and jurisdictional scope. Within those limitations, the court needs to execute its agenda as effectively as possible. And this requires choices. Rather than denying its political nature, the discussion should focus on: what choices, on what basis and with what objectives, for whom and by whom?

Seeking to unveil the varying and contradicting assumptions that the ICC and international criminal justice rely on and thus showing that their work is inherently political is not aimed at denouncing or discrediting the ICC and other justice mechanisms. My point is rather that by ignoring and denying their political dimensions, advocates of international criminal justice and the ICC will continue to diminish the international criminal justice's legitimacy and self-handedly and unwisely undermine their important work.

Justice is politics, no matter what legalists try to argue. Yet this does not mean that realists are right in arguing that therefore international law is irrelevant because it is nothing but political. Instead, law is a particular and special form of politics, through which prosecutorial priorities and selectivity are translated into judicial processes against those that are believed to be most needed to be held to account. And on the basis of crimes that are believed to be most needed to make a stance against (within the limiting circumstances of jurisdiction and availability of evidence, for instance).

A lot of important work has already been done in transitional justice and international criminal justice scholarship that help understand the nature, abilities and limitations of transitional justice mechanisms and the ways in which transitional justice worked out in and were experienced by various affected communities throughout the world. But more is needed particularly on the various assumptions, rationales and objectives of those that normatively affect the international criminal justice field to understand the different directions it is pulled in and expectations emerge from it, and on that basis work towards identifying policy choices and scenarios that clarify what is possible and what limitations we need to understand and accept. Rather than in an academic or political ivory tower, it is important that this development towards a reconceptualization of the phenomenon of international criminal justice and its place within a pallet of transitional justice mechanisms is an inclusive and bottom-up approach that takes the views of all relevant stakeholders serious instead of reject critical voices from this deliberation.

If international criminal justice is truly intent on developing as a universal system of justice throughout the world, it needs to be open to understanding what is universal and what is not. For transitional justice to work, in a holistic manner that includes the ICC as its criminal accountability mechanism where domestic courts are unable or unwilling, it needs to understand in what context it is expected to function. This difficult question has too long been sidestepped and the current legitimacy attacks are its direct result. To move beyond the currently heavily politicized and polarized discussions and save the ICC from its pending implosion requires a reconceptualization of international criminal justice as inherently political, taking critique seriously, engaging in an open dialogue with those that it seeks to address and champion, understanding in what context international criminal justice is expected to function and thus what its nature, abilities and limitations are. On that basis, the important goal of assisting communities that are victims of mass atrocities should be done in a context-based manner, on a case-by-case, bottom-up and holistic manner that suits the needs of those affected, taking into consideration what and who this is all about.