

Prof. Dr. Carsten Stahn

**Between 'faith' and 'facts':  
By what standards should we assess international  
criminal justice?**



Universiteit Leiden

Between 'faith' and 'facts':  
By what standards should we assess international  
criminal justice?

Inaugural lecture by

Prof.dr. Carsten Stahn

on the acceptance of his position of professor of  
International Criminal Law and Global Justice

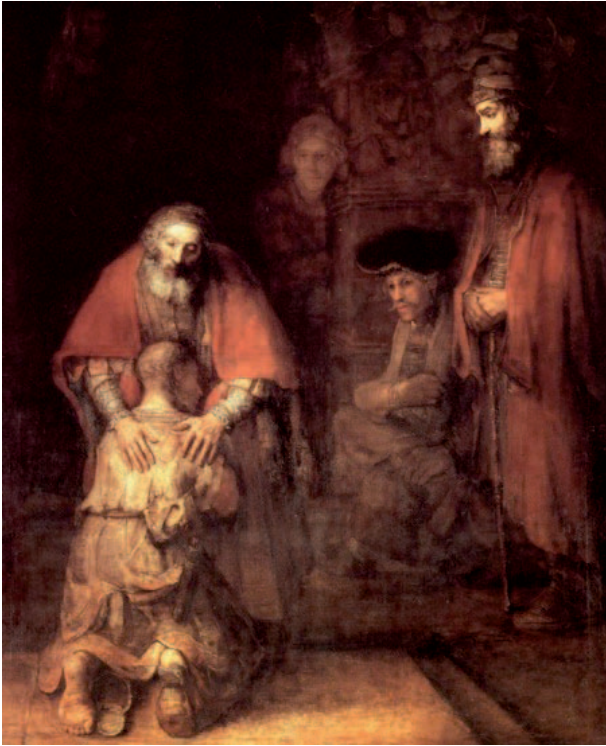
at the Universiteit Leiden

on Monday October 31, 2011



Universiteit Leiden





The Return of the Prodigal Son (1668)  
Rembrandt Harmensz van Rijn

Hermitage, St. Petersburg

Luke 15:21

## Table of contents

1. Introduction
2. Beyond 'faith' versus 'fact'
  - 2.1 'Homecoming' and 'identity'
  - 2.2 The 'assessment' paradox
    - 2.2.1. Effectiveness
    - 2.2.2. Fairness
    - 2.2.3. Fact-finding
    - 2.2.4. Legacy
3. Reconciling 'realism' and 'idealism'
  - 3.1. International criminal justice and 'realism'
    - 3.1.1. The role of expressivism
    - 3.1.2 'Realism' and 'faith'
  - 3.2. Domestic justice and idealism'
  - 3.3. Reconciling the two
4. Not a conclusion
5. Vote of thanks

This inaugural lecture examines the role of ‘faith’ and ‘fact’ in the treatment and assessment of international criminal courts, through four core themes (‘effectiveness’, ‘fairness’, ‘fact-finding’, and ‘legacy’) addressed in Andre Gide’s version of the parable of *The Return of the Prodigal Son*. It argues that, in its ‘homecoming’, international criminal justice would benefit from a greater degree of realism by openly accepting its limitations and embracing its expressivist function. It cautions at the same time against exclusively quantitative understandings of impact, arguing that the power of international courts and tribunals lies not so much in their quantitative record as in their role in setting a moral or legal example or shaping discourse. It concludes that a better match between ‘idealism’ and ‘realism’ requires greater attention to the interplay between ‘international’, ‘domestic’, and ‘local’ responses to conflict, as well as recognition of their legitimate differences.

## 1. Introduction\*

*Father:* My son, why did you leave me?

*Prodigal son:* I felt too clearly that the House is not the entire Universe.

*Mother:* What were you looking for?

*Prodigal son:* I looked for ... who I am.

Andre Gide, *The Return of the Prodigal Son* (1907)

*Rector Magnificus, dear Members of the University Board, Dean of the Law Faculty, Dean of Campus The Hague, Your Excellencies, distinguished colleagues and friends,*

31 October marks 'Halloween' and 'Reformation Day'. It is thus tempting to relate an address to a story. The choice is between a 'ghost story' and a 'biblical' narrative. I chose a midway. I will do so by addressing the theme of my lecture through a literary narrative, namely this dialogue from the parable of *The Return of the Prodigal Son*. The dialogue is part of Andre Gide's version of Luke's Gospel.<sup>1</sup> The theme of 'homecoming' itself is famously depicted in art history, perhaps most notably in Rembrandt's work.<sup>2</sup> Gide's treatment is distinct because it portrays the journey of the son less as a 'loss' and more as a 'quest' for identity. In this sense, the parable depicts perhaps better than other images the contemporary status quo of international criminal justice. Its form also represents the idea of timelessness - a virtue that I have come to appreciate in scholarship.

Why is this parable so pertinent? International criminal justice is at a turning point. In the first half of the twentieth century, it embarked on its journey. It has been vested with some inherent faith and capital, and some historical heritage.<sup>3</sup> It has gone through a series of experiments in the first half of the twen-

tieth century. We have seen a multiplication of international justice mechanisms over the past decades, encompassing truly international, hybrid, or internationalized institutions. On this journey, international criminal justice has witnessed a growing emancipation from related branches of law<sup>4</sup> or established legal traditions.<sup>5</sup> Like the 'prodigal son', our object of inquiry has made its first trial and errors. It has spent considerable capital, and has lost some initial credit on the way. Now, there is a growing sense that the time of experiments is over.

The ad hoc tribunals for the former Yugoslavia and Rwanda are defining their closure strategy. The Special Court for Sierra Leone (SCSL) is about to close after the *Charles Taylor* trial. Proceedings in other situations are gradually taken on by specialized entities and states. The International Criminal Court (ICC) is about to complete its long-awaited first trial. Domestic legal systems are gradually facing the burden of investigation and prosecution, by virtue of the principle of complementarity. In a nutshell, international criminal justice is about to return to its normative 'home',<sup>6</sup> which lies in the space between traditional areas of international law (i.e. general public international law, international humanitarian law, and international human rights law) and domestic jurisdiction.

As in the parable, this 'homecoming' creates some fear and uncertainty. It causes curiosity, affection, and critical reflection. What should we make of this journey? What was the original cause of the departure? Was it worth it? And, more fundamentally, how can we build a better common ground for understanding, and facilitate dialogue and acceptance in the process of 'homecoming' among distinct family members in the house? Views range from loyalty or admiration to scepticism and deception.

The process of 'homecoming' is connected to an ongoing search for the identity of international criminal justice and its 'constituency'. Queries such as 'What are tribunals here for?' or 'How we can assess whether they actually make a difference?'

have largely remained unanswered since the international 'justice cascade'<sup>7</sup> of the 1990s and the establishment of the ICC in 2003. In recent years, different working models have been developed by the ICC (developed by the presidency, the prosecutor, and the registrar) to assess capacity. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the SCSL are developing criteria to determine their own 'legacy'.<sup>8</sup> There is growing empirical research on the goals and effects of international criminal trials in terms of deterrence, fact-finding, or sentencing.<sup>9</sup> But there remains a fundamental tension between 'faith' (i.e. belief in the value and worthiness of the project) and 'facts' (i.e. actual and demonstrable record). In particular, the fundamental question as to how and by what standards one should assess success or failure remains unanswered. International criminal justice is still partly in search of its 'identity'.<sup>10</sup>

6 As in the Gospel, there is no space here to provide a comprehensive account of successes or failures of the journey itself - this is primarily a task for historians. I will focus on the process of 'homecoming' and reactions to it. As Gide shows in his rendition of the Gospel (which expands Luke's original text), it is not necessarily the unconditional 'acceptance' of the return itself or its moral judgement that makes the return a 'homecoming', but rather the dialogue and interaction with others and the interplay between 'faith' and 'facts'.

The particularity of Gide's treatment of the theme lies in the fact that he treats the son as a 'returning', rather than as a 'lost' member of the family, and that he adds additional dialogues to the classical biblical text. He includes conversations with the mother and the youngest brother, in addition to the father and the elder brother. In Gide's version, the younger brother himself is considering departing from 'home': 'I am leaving before the end of the night, Tonight, this night, as soon as it grows pale .... I have girded my loins. Tonight I have kept on my sandals' (p. 233).<sup>11</sup> The mother seeks to prevent the departure of the younger brother through the conversation with the 'return-

ing' son: 'Tell him what disappointment you met on your way. Spare him' (p. 221).

Each of these conversations provides a different perspective on the reasons for departure and return. Gide contrasts the biblical dialectic between sin, mercy, and forgiveness by motive analysis and reason. When asked by the younger brother whether he felt that he did wrong, the 'prodigal son' explains his return by his physical condition, rather than guilt or remorse. He says that he was duty-bound to leave, that he 'suffered', and that this 'made' him 'reflect' (p. 227). It is this syn-ergetic and non-apologetic treatment of the interplay between 'reason', 'faith', and pragmatism that marks the modernity and strength of the text.

This vision reflects the unanswered relationship between 'faith' and 'facts' in the history of international criminal justice.<sup>12</sup> In the 1940s and 1990s, the turn to international courts and tribunals started largely as a 'faith-based' project.<sup>13</sup> Although it was officially presented as a product of 'reason',<sup>14</sup> it was born partly out of hope, necessity, and lack of alternatives. 'Faith' and 'morality' were closely intertwined.<sup>15</sup> The atrocities committed during the Second World War were seen as attacks on human identity. At Nuremberg, it was predominantly American 'faith' in the judicial culture that prevailed over British plea for summary executions of Nazi leaders.<sup>16</sup> The US Prosecutor at Nuremberg, Justice Robert Jackson, made this point distinctly in his Opening Statement for the Prosecution before the tribunal, noting that '[t]he common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people.'

In 1998, Secretary-General Annan spoke of the ICC as a 'gift of hope' when the Rome Statute was adopted in 1998.<sup>17</sup> This reflected a common sentiment that international courts 'do good' and the strong 'faith' of civil society in the project that was fundamental for its development. In the absence of better information, international criminal courts were assessed on

the basis of the 'values' and preferences that they represent.<sup>18</sup> It was popular to rely on 'fictions' that embody a 'shared identity'. International criminal courts comfortably accepted rendering decisions on behalf of the 'international community' as a whole.<sup>19</sup> There was strong support for the idea of the *jus cogens* nature of international crime prohibitions.<sup>20</sup> Several of the first judgements (*Tadić*, *Akayesu*, and *Blaškić*) received almost unanimous blessing and acceptance by states. Some of the more problematic aspects of the practice of international tribunals (i.e. concerns regarding the principle of legality, legal certainty, evidence, and the presumption of innocence or equality of arms)<sup>21</sup> were sidelined by the enthusiasm of the victim-centred and prosecution-driven human rights movement, which saw - to borrow the imagery of Judge Christine Van den Wyngaert - its traditional (human rights) 'shield' reinforced by a new 'sword' (of criminal justice).<sup>22</sup> During this 'honeymoon period', international criminal courts became the symbols of a secular 'culture of faith'<sup>23</sup> in a similar way to human rights becoming 'yardsticks' of the progress of humanity.<sup>24</sup>

Today, we are witnessing a shift in a different direction. We are used to the presence of international criminal courts. The idea of 'faith' (i.e. trust that does not rest on proof or evidence) has become unpopular in international discourse and the 'DNA' of The Hague. International justice is increasingly treated as a rational and fact-driven project, with a strong sense of agnosticism. One is reminded of the words of the 'doubting' Apostle Thomas in the face of resurrection ('Except I shall see ... I will not believe'<sup>25</sup>). 'Idealism' has been partly overtaken by 'realism'.<sup>26</sup> There is often an obsession with numbers, be it as part of conflict statistics (e.g. on contextual elements of crimes, victim numbers) or court evidence. The strength of international tribunals (i.e. their role as agents of global justice) has partly turned into a weakness. With growing budgets and increasing interference of international tribunals with sovereignty interests and domestic jurisdiction, the very process of criminal adjudication has taken on 'transactional' features.

In today's judicial landscape, courts are no longer exclusively legal agents, but are also employers,<sup>27</sup> service providers, negotiators, and communicative agencies. International criminal justice has, to some extent, become a justice 'industry'<sup>28</sup> - some speak of the 'business' of international justice. With this, new methods, technologies, and models of accountability have entered the field. It is common to assess performance and validity of courts against quantitative or technical criteria, such as economic cost-benefit analysis and rational source allocation.<sup>29</sup> Institutions face burdensome budgetary control and audit procedures. They are bound to 'quantify' and validate their performance in numbers, even in areas in which results are difficult to quantify or measure.<sup>30</sup> At the same time, many of the facts gathered in investigations are never used at trial.

This move towards facts and quantification is partly a natural phenomenon. It is a logical consequence of the extension of the mandate of international jurisdictions, which encompasses a diversity of functions: the 'core judicial' mandate (i.e. trial and prosecution), administrative duties, as well outreach and diplomacy (e.g. negotiation, co-operation).<sup>31</sup> But it poses at the same time novel risks for the international judiciary. It imposes onerous and expensive duties of data collection and analysis on institutions, as well as heavy reporting obligations. When taken to the extreme, such scrutiny may actually impede the actual problem-solving capacity of courts. The most evident example is the impact of budgetary control on selection of cases and number of proceedings.<sup>32</sup> It is thus critical to take a fresh look at the use and organization of factual knowledge in international justice.



## 2. Beyond 'faith' versus 'facts'

I would argue that the assessment of the 'homecoming' of international criminal justice may require greater differentiation in the use of 'faith' and 'facts'. The assumption of 'faith' appears to go against the very nature and the rational foundation of the legal process. But the two concepts are in fact complementary, rather than competing, factors, not only in the history of ideas, but also in actual practice. I would like to make a threefold argument:

1. First, there may be a need for a greater degree of realism (i.e. a better factual understanding of international criminal justice) in order to assess its strengths and weaknesses. It is fundamental to move from a 'faith'-based to a 'fact'-based vision, and to refine methods of assessment in order to achieve a better scientific grounding of the discipline. This will reduce unrealistic expectations.
2. At the same time, it is necessary to acknowledge the limitations of facts and empirical assessment. Not all outcomes of international criminal justice can be reliably assessed or quantified. Any investigation and prosecution carry a certain degree of uncertainty.<sup>33</sup> To require 'absolute certainty' is neither always necessary<sup>34</sup> nor always desirable.<sup>35</sup> In fact, one of the most important virtues of international criminal justice may actually lie in the fact that it upholds normative values and idealism.
3. The key to solving contemporary dilemmas is thus not always a drive for ultimate clarity, predictability, or measurable outcomes. Rather, the main challenge is to define acceptable limits (e.g. 'tolerable doubt') and to develop techniques to manage these limitations in a way that is best compatible with the goals of international criminal justice. This requires a fresh perspective on the interplay between different levels: the 'international', the 'national', and the 'local'.

I will illustrate this argument in several steps. I will start with an analysis of the 'identity' of international courts and tribu-

nals (section 2.1). Then, I will move towards an assessment of the benefits and limits of 'faith'-based and 'fact'-based approaches in four core areas that form part of its current justification (section 2.2). I will then offer some thoughts as to how the dichotomy between 'faith' and 'fact' can be approached in order to facilitate 'homecoming' (section 3).

### 2.1. 'Homecoming' and 'identity'

Let us start with a stocktaking of 'identity' and return to our plot. In the parable, this issue is taken up by the returning son in his answer to the question of why he left and what distinguishes him from family members who stayed in the house. In Gide's treatment, the answer of the son differs in relation to the respective interlocutor. The answer to the father and the law-abiding brother is rather short, and focused on differentiation. The returning son answers the father: 'Because the House shut me in' (p. 205). He tells the elder brother, who lived by the traditional 'order': '[W]e aren't very much alike' (p. 209); 'It was exaltation which I also sought and found in the desert' (p. 211); 'I could not help imaging other cultures, other lands and roads' (p. 211). The most honest explanation is given to the inquiring mother's 'What were you looking for?': 'I looked for ... who I am' (p. 217).

This situation bears some resemblance to the contemporary reality of international judicial institutions. Institutionally, international courts are comparatively new entities. As in the case of our returning son, there are impediments to full 'domestic acceptance'. International criminal courts often enjoy a lesser degree of acceptance, due to their detachment from domestic constituencies and their partial deviation from domestic traditions and legal cultures. Even more than domestic courts, which can look back at a grown 'judicial' tradition, they have to conquer recognition and acceptance.<sup>36</sup>

Moreover, their *raison d'être* is not static, but developed through dialogue with, and in distinction from, other entities. There is no common agreement across tribunals on a cluster

of primary and secondary ‘goals’ of international criminal justice. The determination of goals and priorities depends on the mandate and varies even inside the same institution according to the respective stage of existence. In scientific literature, there are as many opinions as voices on the selection, definition (e.g. direct/indirect), or distinction (e.g. primary/secondary) of specific goals.<sup>37</sup> In his 2004 report on the ‘Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’, the UN Secretary-General outlined a list of broadly defined goals. These include: retribution (i.e. bringing responsible perpetrators to justice), ending violations and preventing their recurrence, ‘securing justice and dignity for victims’, establishing ‘a record of past events’, promoting national ‘reconciliation’, ‘re-establishing the rule of law’, and contributing to the ‘restoration of peace’.<sup>38</sup> The first two goals are common to domestic legal systems, while the other goals (i.e. fact-finding and ‘social transformation’) are more particular to international criminal justice as a discipline.<sup>39</sup>

But both the selection and the practical application of these goals remain highly controversial. For instance, some suggest that the mandate of international courts should remain restricted to classical criminal justice aims.<sup>40</sup> Others concede that domestic criminal-law goals may require adjustment in an international context and that there might be modest space for broader ‘transformative’ goals, even as secondary goals. In most situations, individual goals conflict with each other.<sup>41</sup> The debate of arrest warrants against acting heads of state (e.g. Omar Al Bashir, Muammar Gaddafi)<sup>42</sup> shows that the most immediate challenge is to prioritize among competing prerogatives, to manage a proper sequencing of proceedings (e.g. timing) or to determine accountability forums in a way that takes into context and conflicting interests. There is, in particular, a deeper friction between a security-oriented, a human rights-based, and a more traditional criminal justice-oriented reading of mandates.<sup>43</sup> For instance, some argue that ‘incapacitation’ of perpetrators or extremist elements might form part of the retributive or ‘peace-building’-related functions of international

criminal courts,<sup>44</sup> whilst others express doubts about whether extra-judicial motives could be part of the legitimate or primary goals of criminal justice.<sup>45</sup> Moreover, the prioritization of goals may shift gradually over time in line with the progression of the mandate of the relevant institution.<sup>46</sup>

International criminal justice is thus, to some extent, founded on a paradox. It is grounded partly in classical domestic and partly in international objectives. It may have to deal even more than other branches of law with a functional problem of ‘goal’ variety and ‘goal ambiguity’.<sup>47</sup>

## 2.2. *The ‘assessment’ paradox*

What, then, are valid parameters of assessment? Does it mean there can be no valid standards of assessment, since the respective outcomes cannot be reliably related to concrete goals or since there are hardly any viable projects with which international criminal justice can be easily compared?

I would argue that international criminal justice cannot be properly assessed without a better understanding of the interplay between ‘faith’<sup>48</sup> and ‘fact’.<sup>49</sup> There are some general denominators against which performance can be assessed. But a proper evaluation requires factual *and* normative judgement that is partly grounded in moral argument. I will illustrate this argument with respect to four themes that form part of the contemporary framework of assessing ‘success’ and ‘failure’ of international criminal courts: ‘effectiveness’, ‘fairness’, ‘fact-finding’, and ‘legacy’.

These themes reflect roughly the different perspectives that the returning son faces in the questions and encounters with different family members upon his return. As in the parable, existing deficiencies may not necessarily reflect individual institutional failure, but rather illustrate broader limitations of the discipline.

### 2.2.1. Effectiveness

Let us first examine effectiveness. This theme is of cardinal importance in the parable. The argument of 'effectiveness' is brought up in the conversation between the son and the father. The father seeks to understand the rationality of journey and to assess it in terms of economic viability. He asks: 'Why did you, the heir, the son, escape from the house?'; 'All that fortune you took away, you have spent recklessly?' (p. 205); 'Then, what made you come back, tell me?' (p. 207). The 'prodigal son' replies: 'At the cost of all my goods, I bought fervor' (p. 207). The father accepts him back at the house despite his spending.

How about international criminal justice? Should we also continue to accept it despite its apparent flaws related to the cost, selectivity, and pace of proceedings? Perhaps because there are no better alternatives?

Today, it is almost a 'cliché that international justice moves too slowly, and is too costly'.<sup>50</sup> Proceedings before international criminal courts count without doubt among the most expensive cases in terms of costs per defendant.<sup>51</sup> The United Nations, the Assembly of States Parties, and even individual judges have criticized the 'glacial' speed of some proceedings, and the significant delays in bringing suspects to trial.<sup>52</sup> The ICTY, the International Criminal Tribunal for Rwanda (ICTR), and the SCSL have faced deadlines for completion, but went on to revise their schedule on an annual basis. The ICC had to adjust its anticipated number of investigations and trials almost routinely since its inception. Despite various amendments to the Rules of Procedure and Evidence, and different expert recommendations to expedite proceedings,<sup>53</sup> cases such as the *Milošević* or the *Lubanga* trial have become reminders of the downsides of the typical pace of international criminal courts.

Doubts and criticisms about the 'pace' of proceedings (e.g. fears that 'justice delayed' means 'justice denied') are partly justified. There are a number of areas in which the institutional architecture of international criminal justice may be in need of procedural reform: these include, inter alia, the relationship be-

tween pre-trial and trial, the scope<sup>54</sup> and use<sup>55</sup> of live testimony, the timing of disclosure,<sup>56</sup> the use of interlocutory appeals,<sup>57</sup> judicial management (e.g. assignment of judges, length of decisions),<sup>58</sup> or interpretation/translation. In the context of the ICC, the Assembly of States Parties even went so far as to establish a study group on governance, which quickly turned to the theme of 'efficiency and effectiveness of the Court'.<sup>59</sup> But there is at the same time a need to reflect more fundamentally on the standards by which international criminal courts are assessed. Only a refined methodology allows a differentiated assessment of 'myths' and facts.

2.2.1.1. The dilemma of comparison. There is, first of all, a need to specify adequate objects of comparison. The cost and speed of international proceedings are often assessed against the benchmark of 'domestic' proceedings. Mark Drumbl, for instance, has argued that the best way to 'move from faith to science' is to 'treat the institutions that enforce international criminal law as subjects of study in the same way that domestic scholars treat domestic courts'.<sup>60</sup> The domestic analogy, however, is partly misleading.<sup>61</sup> Similarly to our returning son, international criminal proceedings share specific features that distinguish them from domestic members of the judicial family. A mere numeric assessment (i.e. of the number of defendants or cases, the defendant/cost ratio, or the length of investigations or trials) is too simplistic. A comparative survey of the length of proceedings shows that timing is influenced by a number of factors that are partly distinct to international criminal justice. The factors include, inter alia, the scope and complexity of the charges, the level of responsibility of the defendant, the number of suspects, and the number of motions filed.<sup>62</sup> It is thus misguided to compare the length of investigations or the trial statistics to traditional domestic cases. In fact, a more appropriate comparative may be transnational crime cases. In this context, it is not unusual that proceedings take between five and eight years from investigation to completion, due to their complexity.<sup>63</sup>

2.2.1.2. Goal relevance. More fundamentally, the assessment of the pace of proceedings needs to be placed in perspective in relation to the distinct goals of international criminal justice. This context sheds a different light on the assessment of time frames and performance.

This is shown by a recent comparative empirical study on the length of proceedings, based on a record of 307 cases adjudicated by international and hybrid courts by mid-2009. The study (undertaken by a former ICTY staff member) takes into account the pre-trial phase, the trial phase, and possible appeals. It comes to the astonishing conclusion that the actual pace of proceedings is less dramatic from a comparative perspective than conventional wisdom suggests, and that international cases are only 'modestly slower' than complex cases in domestic settings.<sup>64</sup> The study shows that cases at the ICTY or the SCSL have, in general, progressed at a 'reasonable pace' once defendants were in custody, namely in a time frame of 'four to five years per defendant from custody to completion' - a period that is 'on par with the timeframes for complex criminal cases in developed Western countries'.<sup>65</sup> The only exception is the ICTR, where the period from custody to completion has taken significantly longer, namely '5.9 years' on average.<sup>66</sup> Delays have been influenced by a number of factors, including those that are only partly attributable to international courts, such as the delays in arrest and the subsequent need for amendment of indictments/charges or long periods of detention prior to transfer/surrender.<sup>67</sup>

Of course, this record is deplorable and in need of perfection. Delays in investigation often impede the collection and quality of evidence, cause disillusion among victims, or contribute to prolongation of human suffering. Delays in prosecution (e.g. pre-trial detention without charge) compromise the rights of defendants and may actually cause detainees to be perceived as martyrs<sup>68</sup> - as evidenced by the 'show trial' character of some proceedings.<sup>69</sup> But the study shows that the overall record of international criminal courts cannot be reliably assessed from

the point of view of effectiveness without taking surrounding factors into account. Operational mechanics, such as the difficulty in obtaining evidence, the time between commission of offence and apprehension, the establishment of context, and crime linkage are crucial in the consideration of the relevant object of comparison.

More fundamentally, the overall assessment of effectiveness shifts if pace is assessed in relation to not only criminal adjudication, but also other contributions of international criminal justice, such as fact-finding, the establishment of a record, or transformative goals. A figure of four to five years may appear long for a trial, but it is less threatening if it is associated with a broader process of clarification of historical facts. In some instances, it may even be wise to postpone charges from an effectiveness point of view, in order to gradually build lines of responsibility or to improve the accuracy of charges or the completeness of justice.<sup>70</sup> The passage of time may thus, in some circumstances, represent an asset and result in a better pursuit of justice.<sup>71</sup> Some of the purported 'transformative' goals, such as capacity building or reconciliation, cannot be reached without longer-term engagement, since they are contingent on recovery and stabilization. The weighing of these goals may force international criminal courts to balance the 'desire for expediency' with the 'need for time', in order to secure an effective impact over time.

In our parable, individual family members and the father, in particular, recognize these observational dilemmas gradually in their conversation. They realize the difficulty of comparison and come to understand the complexity of the goals of journey. This changes their judgement of the return. A similar picture is emerging in the assessment of the record of international criminal justice. It has become evident that it is too simple to judge effectiveness by statistical trial figures or by the success or failure of individual cases. A proper assessment requires a fuller and more nuanced matrix, which identifies appropriate object of comparison and relates facts to individual

goals and resources.<sup>72</sup> Researchers are just beginning to develop such frameworks with respect to individual tribunals, such as the ICTY.<sup>73</sup> They need to be improved and extended to other courts, in order to gain a more realistic and credible account of effectiveness and cost–benefit in relation to international criminal justice as a whole.

2.2.1.3. Limits. At the same time, it is evident that not all goals of international criminal justice can be fully quantified or translated into concrete indicators and measurable outcomes. This dilemma is exemplified by the reply of the returning son to the father: ‘I changed your gold into pleasures, your precepts into fantasy, my chastity into poetry, and my austerity into desires’ (p. 207).

Traditional budgetary logic reaches its limits when it comes to the justification of the funding of international criminal courts. Today, many government agencies use cost-benefit analysis to justify public expenditure.<sup>74</sup> Generally, cost-benefit analysis consists of a comparison of the cost of the investment with the value of the harm avoided (i.e. the intended benefit). This methodology encounters difficulties in the justification of the budget of international criminal courts.<sup>75</sup> The intended benefits are difficult to quantify. It does injustice to international courts to judge effectiveness merely by a number of visible and quantitative outcomes, such as the number of cases or decisions that they render. In this sense, the by-now famous statement of the first ICC Prosecutor Luis Moreno Ocampo that ‘success’ cannot be measured by the ‘number of trials’<sup>76</sup> carries some wisdom. Some of the most important effects, such as the monitoring and denouncement of violations or the catalytic effect on domestic proceedings, are actually largely independent of the record of cases.

Other contributions, such as norm development or the spin-over effects across international institutions, are qualitative in nature. Budgetary contributions are thus rather an investment into a ‘justice’ system, based on prediction and adherence to a

‘common’ system of goals, or the benefits related to this association,<sup>77</sup> than a strict comparison of ambitions and outcomes of a specific institution. Bert Röling and the late Judge Antonio Cassese have reminded us of this when arguing that the ‘[t]he principal purpose and function of criminal law ... is not that occasionally a criminal should be sentenced. The very function of criminal law is to strengthen and fortify moral opinions.’<sup>78</sup> Whether the specific organization or ‘system’ meets its self-proclaimed or externally set goals through outputs (e.g. decisions, outreach) is largely a normative assessment.<sup>79</sup> It carries with it a large degree of uncertainty and might ultimately not even adequately explain the reasons for adherence/non-adherence.<sup>80</sup>

Perhaps the best illustration of the limits of cost-benefit analysis is the ongoing debate about prevention and deterrence. No institution is actually discarding this rationale in its toolbox of proclaimed goals but, again, none of the existing courts has managed to prove that it has actually created impact. As we know from domestic criminal law, the very argument that international criminal proceedings deter potential abusers is based on speculation. The logic of deterrence relies on a hypothesis. Specific deterrence relies on the fiction that lawyers can ‘read the mind’ of perpetrators and that rational cost-benefit determines the behaviour of defendants. General deterrence relies on the broader demonstration effect of criminal justice and changes in the perception of costs/risks more generally. Both theories entail a great degree of uncertainty, i.e. faith in the logic of the model of deterrence.<sup>81</sup>

There are some indicators of success. International criminal justice may improve the degree of ‘threat’, since it increases the probability of ‘punishment’.<sup>82</sup> Proponents point towards greater ‘compliance rates’ with human rights decisions/monitoring<sup>83</sup> or a correlation between ‘justice’ threats and crime statistics in individual situations.<sup>84</sup> But examples such as Milošević’s campaign in Kosovo or Joseph Kony’s continuing atrocities in the Great Lakes Region indicate that there are still

at least as many counterfactuals. Hardly any empirical study has managed to demonstrate impact credibly and to trace clear patterns of causation and weigh intermediate causes.<sup>85</sup> There is a thin line between rational criminal policy and moral justification.<sup>86</sup> The impact of international criminal courts may lie more in contribution to a larger 'culture in which humanitarian law and human rights law are better integrated in the fabric of society and therefore adhered to more'.<sup>87</sup> International criminal justice may thus not necessarily stop violations. It rather adds constraints and influences attitudes towards their disapproval or acceptance.

An overambitious reliance on the presumed impact of deterrence can sometimes even be detrimental to the overall goal of effectiveness. A recent example is the increasing opening of preliminary examinations at the ICC, without subsequent investigation. To make an active use of *proprio motu* powers is a priori desirable from a point of view of prevention. But, if the monitoring of multiple situations is not followed by further action or is unlikely to result in any visible 'sanction' (e.g. due to capacity restraints or lack of 'gravity'), it may actually reduce the impact or threat of the ICC on the long run, since it decreases leverage.<sup>88</sup>

Ultimately, we may thus sometimes be better off if we accept these limitations more openly,<sup>89</sup> since it would avoid unrealistic expectations - just like the father in our parable, who admits the limits of his comprehension ('I was waiting for you at the end of the road. If you had called me ... I was there' (p. 209)) before accepting the son back at the house ('Go now. Go back to the room I had prepared for you. Enough for today. Rest' (p. 209)).

### 2.2.2. Fairness

Let us now examine fairness (i.e. the second central theme associated with the process of 'homecoming') and its assessment.

In the parable, the argument of 'fairness' is represented by the elder brother. In contrast to the father, the elder brother

is the guardian of order in the house ('he who makes the law' (p. 209)). He stresses the importance of rules in the community and confronts the returning son with the question of 'fair treatment' in terms of the 'what if' question: 'Think what could have happened if, like you, I had deserted our Father's House. Servants and thieves would have pillaged all of our goods. My brother, indiscipline is over' (p. 213). This argument is linked to the call for 'equal treatment'. It contrasts with the more 'reconciliatory' logic of justice applied by the father and the non-material justification offered by the 'returning son' ('the House is not the entire universe' (p. 211); 'I was catching sight of other goods' (p. 213)).

This dialectic reflects the both the foundation, as well as the dilemmas, of our contemporary system of international criminal justice. Today, fairness is not only one but perhaps the most important justification advanced in support of 'International Criminal Justice'.<sup>90</sup> The argument that 'justice' and 'fairness' are too precious to be traded off against vengeance and effective sanction was at the heart of the creation of the Nuremberg and Tokyo tribunals.<sup>91</sup> It has become ever more important since then. Richard Goldstone, the first ICTY prosecutor, famously argued that the success of international courts should not be measured by the number of convictions, but by the fairness of the trial.<sup>92</sup> The thousands of decisions that international criminal courts have rendered on issues of substantive and procedural justice are testimony to this.<sup>93</sup>

At the same time, 'fairness' is difficult to measure. There are no clear indicators. The level of 'fairness' is predominantly a normative judgement. International criminal courts are struggling to strike a balance between a more 'retributive' conception of justice (which emphasizes the vindication social norms and rules, procedural fairness, and punishment) and a more 'restorative' vision of justice (which devotes broader attention to the needs of victims, offenders, and affected communities). Behind this tension lies a deeper conflict behind 'action' and 'perception'.

On a formal level, international criminal justice has gone a long way in improving fairness. In terms of codification and procedure, international criminal law has adopted and developed some of the most advanced and sophisticated due process and fair-trial protections available to defendants in domestic systems. The list of guarantees enshrined in judicial documents not only represents a ‘minimum degree’ of protection, but also ascribes to the highest available standards, based on international human rights instruments. Some impulses from international criminal law have even come to serve as a model for adjudication and reform in domestic penal systems.<sup>94</sup>

As in the field of ‘effectiveness’, there is room for improvement. With the gradual extension of the case load at the ICTY and the ICC, in fact, both the prosecution and the defence have taken issue with matters such as disclosure duties, managerial powers of judges, questioning and protection of witnesses, standards of evidence, self-representation, or sentencing determinations. In the ICC, the application of victims for participation in proceedings is increasingly perceived as a burden by all organs of the court (including the registry) and their processing is hampered by capacity constraints.<sup>95</sup> The two subsequent stays of proceedings in the *Lubanga* trial have made it clear that it remains a delicate choice to determine appropriate remedies for abuses of process, including alleged prosecutorial misconduct.<sup>96</sup> Allocation of defence resources often remains a bone of contention. Moreover, procedures and judicial choices on core issues often differ among different courts or chambers, in the absence of judicial hierarchy.

But, on a broader historical trajectory, the overall record is encouraging. There is some progress in terms of transparency and on a normative level. Today, every move in the courtroom and outside the courtroom is watched. Alleged violations of procedural fairness and corresponding remedies are subject to intense scrutiny. Hardly any issue escapes the critical eye of the increasing number of trial monitors and NGOs (non-governmental organizations) active in the field.<sup>97</sup> Rules and

procedures are open to amendment and have been adjusted frequently. There is ongoing interaction and cross-fertilization among different courts and tribunals on ‘due process’ standards and best ‘judicial practices’.<sup>98</sup> ‘Fairness’ has become the most prominent justification of international justice among courts and institutions, and their distinction from competitive forums (e.g. domestic courts, quasi-judicial mechanisms).

One of the greatest challenges, however, lies in the remaining gap between form and perception, and the broader ‘restorative’ dimension of justice. Inside tribunals, there is a tendency to assess ‘fairness’ predominantly from a ‘normative’ and ‘procedural’ point of view - that is, the fair treatment of participants in the process and the equal and unbiased application of norms and standards. In reality, however, ‘fairness’ is often as much about ‘action’ as it is about ‘perception’. On that front, the record of international criminal courts and tribunals is less convincing.<sup>99</sup>

International criminal justice shares striking parallels with our parable. Like the choice of the father, it often creates paradoxes in the eyes of the ‘affected’ that are difficult to explain from the perspective of equality. In non-Western traditions, the very transfer of defendants to ‘The Hague’ is often perceived as a reward rather than as a punishment by victims, or even defendants, in light of the welfare standards and penalty regimes associated with it (penalties, plea-bargaining). Many states, and even some defendants, prefer proceedings in The Hague over proceedings ‘at home’, due to security and other concerns. This choice comes at the price of lesser proximity and access to justice by victim communities and a more limited ‘therapeutic’ of proceedings. Core witnesses or information providers, including ‘insider’ witnesses (who may have been implicated in violence), often benefit from witness-protection schemes or health treatments. Many of the immediate victims of crimes, particularly those who fall outside the ‘prosecution’ case, are left without benefit or recognition. Often, charges remain focused on specific incidents, crimes, or perpetrators, although

others may deserve equal attention.

These inherent contradictions make international criminal justice vulnerable in terms of perception.<sup>100</sup> There is no easy fix or remedy for these dilemmas. What can be done, however, is to provide a better justification and explanation of these dilemmas, in order to improve perception. One challenge, in particular, runs like a 'red thread' through the history of international criminal justice from the beginning of the twentieth century until today: the perception of independence (i.e. freedom from external interference) and impartiality (i.e. lack of bias and investigation of all sides to a conflict). This requirement is a key prerequisite of 'fairness'. Social science research indicates that there is a link between the perception of fairness of proceedings and 'views about the appropriate decision-maker'.<sup>101</sup> Despite criticism of experiences such as Nuremberg and Tokyo, international criminal courts still struggle to reconcile selectivity with the perception of independence and impartiality. Because of the existing resource constraints, it is particularly important for these courts to demonstrate 'impartiality' and to be seen to look at all sides of a conflict equally.

This balance has not always been reached. The practice of the ICC Office of the Prosecutor has been criticized for a lack of sustainability and deficiencies related to even-handedness, coherence (e.g. chain of command), or explanation of decisions not to prosecute in relation to the situations in the Democratic Republic of Congo, Uganda, Central African Republic, and Darfur.<sup>102</sup> Similar risks arise in the context of the Libyan situation. SC Resolution 1970, which contains the referral of the situation in Libya, was primarily directed towards governmental criminality, by virtue of its reliance on the concept of crimes against humanity and its initial focus on Benghazi.<sup>103</sup> In this situation, as in any other internal armed conflict, it is evident that only a handful of incidents can be investigated and prosecuted. In such circumstances, the challenge and virtue of the ICC lie not so much in the number of cases, but rather in its approach and in the example that it sets in relation to judi-

cial independence and impartiality, and its ability to withstand political pressure.<sup>104</sup>

A recent empirical study on victims' attitudes towards the ICTY confirms this dilemma. It comes to the conclusion that the perception of fairness in the delivery of justice remained largely dictated by group identity and inter-group relations - that is, affiliation to 'defeated' or 'defended' communities, rather than standards of 'procedural fairness'.<sup>105</sup> According to the study, the tribunal faced difficulties in discarding perceptions of bias by Croats and Serbs or instilling the idea that each group consists of 'both offenders and victims'.<sup>106</sup> This example shows that there is a gap between 'action' and 'perception'. These contradictions cannot be fully resolved by judicial practice alone. But judicial institutions would gain greater credibility, and pay better tribute to their mandate, if they provide greater clarity and transparency in justifying selectivity. It is through this 'demonstration' and 'explanation', more than quantitative record, that international criminal courts fulfil their key function: to maintain 'faith' in law and institutions.

15

### 2.2.3. Fact-finding

For many people, 'fairness' is only one among many other factors associated with international criminal justice. It is complemented by a search for facts and a hope to grasp at least a short moment of justice or part of a larger 'truth'.

This vision is presented by the mother in Gide's version of the parable. The figure of the mother is not included in Luke's Gospel. In Gide's treatment, she combines the process of 'homecoming' with an inquiry for a deeper understanding of facts and motives. She wants to know whether the son suffered and turns the attention to the experience of the journey. She asks: 'Why did you leave me for such a long time?' (p. 215); 'Never did I give up hoping for you' (p. 217); 'Doubtless your bed was not made every evening, nor the table set for all your meals' (p. 217); 'At least did you suffer only from hunger?' (p. 219).



This conversation reflects the ongoing dilemma between ‘fact-finding’ and ‘truth’ in the assessment of international criminal proceedings.<sup>107</sup> To what extent can international criminal justice be viably assessed by its contribution to fact-finding?

The expectations are high. In particular, for many victims, concrete factual elements, such as the finding and recovery of bodies or the acknowledgment of specific facts,<sup>108</sup> are often more important than elaborate procedural or legal assessments. Many core crimes require the showing of a specific context (e.g. systematic or widespread violence<sup>109</sup>), gravity, or intent to harm a group (e.g. genocide, persecution). This means that - more than in domestic trials - evidence must go beyond the conduct of the defendant and extend to clarification of context.<sup>110</sup> But the means are limited. There is significant controversy as to whether ‘fact-finding’ and establishment of the ‘truth’ are ‘ends’ in themselves, rather than ‘means to an end’ in rendering justice.<sup>111</sup>

The ability of criminal trials to serve as a foundation for history and memory has formed a bone of contention in international criminal justice since its first experiments.<sup>112</sup> Robert Storey, the Executive Trial Counsel at Nuremberg, and later Hannah Arendt argued that ‘[t]he purpose of the trial is to render justice, and nothing else; even the noblest ulterior purposes - “the making of a record ...” can only detract from the law’s main business: to weigh the charges brought against the accused, to render judgment and to mete out due punishment.’<sup>113</sup>

Today, this ‘purist’ understanding is contested. As Lawrence Douglas has shown in his study of the *Eichmann* and *Demjanjuk* trials (‘Memory of Judgment’), judicial proceedings sometimes actually mark a tribute to history and memory, in light of their specific set-up and orchestration.<sup>114</sup> The duty to seek the ‘truth’ is inherent in the mandate of judges and sometimes an express prosecutorial duty.<sup>115</sup> Historical knowledge is often used to support evidence. The factual findings of international courts and tribunals are increasingly presented as a potential

basis for restorative purposes (e.g. reconciliation). But, as in our parable (in which the account of the facts and the reasons for departure differ in relation to the protagonist), there is typically not ‘one version’ of facts, or one layer of ‘truth’. Fact-finding is often a judgement of probability in a criminal process, based on competing narratives - and sometimes different layers of ‘truth’.<sup>116</sup> ‘Historical truth’ and ‘legal truth’ do not always coincide.<sup>117</sup> This is due to a number of factors that are rooted in the structure and methods of criminal investigations and prosecutions.

Due to the growing focus of contemporary legal proceedings on ‘accountability’, historical facts are often presented selectively.<sup>118</sup> Investigation or prosecutions typically cover only a part of a specific situation or incident. The selection of facts and circumstances presented in proceedings depends largely on what the prosecution believes it can prove at trial. Experts typically act for a given side. Judges commonly lack a set of pre-determined judicial guidelines to assess expert evidence.<sup>119</sup> Therefore, trials often present only a partial reflection of reality.

Even more importantly, historians and lawyers use different methods when assessing facts (e.g. lines of causation, factual determinations). International criminal law is about individualizing roles and attributing responsibility. Within this context, lawyers are typically inclined to think in terms of hierarchies or ‘vertical’ and ‘horizontal’ lines of authority. They seek to bring ‘order’ into chaos. They ‘systematize’ patterns of conduct and isolate specific events and acts, in order to provide clear answers. Historical and social science research enjoys greater flexibility. It is open to broader causality models and not necessarily focused on ‘sampled’ facts. This starting point provides greater leeway to admit complexity in reasoning and to deal more openly with uncertainty and limits in determining ‘what actually happened’. These factors distinguish historical and judicial fact-finding.

Recently, international criminal courts have faced increasing criticism in relation to the uncertain evidentiary foundations of their rulings.<sup>120</sup> Since there is often no documented record of orders or actions, international trials rely heavily on eyewitness testimony. This practice creates practical difficulties. 'Educational, cultural or linguistic differences' between witnesses and court staff complicate communication and reliability assessments. Judge Patricia Wald put it nicely when she said 'I know no judge in [an international] tribunal who does not acknowledge that he or she is totally at the mercy of the translator in the courtroom.'<sup>121</sup> Not all testimonial deficiencies are detected or reflected in legal decisions. Nancy Combs, for instance, has reviewed nearly all cases of the SCSL and some ICTY cases. Her study comes to the conclusion that 'more than 50 percent of prosecution witnesses appearing in these trials testified in a way that was seriously inconsistent with their pre-trial statements'.<sup>122</sup> This finding does not necessarily call into question the final legal determinations. But it challenges the view that international criminal courts are particularly well equipped to carry out comprehensive fact-finding.

At pre-trial, there is almost a move towards the other extreme. Pre-trial submissions and motions often rely on documentary evidence and supporting material in relation to key points.<sup>123</sup> Judges have limited fact-finding capacity. Judicial adjudication relies to a large extent on NGO reports, public documents, and summaries of evidence. The reliability and factual accuracy of these materials are often difficult to verify.

In light of these factors, it seems difficult to present historical 'fact-finding' as a primary objective of international criminal proceedings.<sup>124</sup> Incidentally, judicial fact-finding has a highly pragmatic value - that is, an evidentiary use. It is inherent in juridical reasoning, with all its strengths and weaknesses. It also serves a certain pedagogical function. The judicial process may, in particular, reduce the complexity of violence to a 'manageable narrative'.<sup>125</sup> Robert Jackson framed it adequately at Nuremberg when he said that a trial might 'establish incred-

ible events by credible evidence'.<sup>126</sup> Experience from criminal trials shows that a single videotape, such as the film on Nazi concentration camps in Nuremberg or the scorpions footage in the *Milošević* trial, may have greater impact than an entire judgment, if rightly introduced and tested in court. Ultimately, 'judicial fact-finding' might also limit the mystification of acts and perpetrators. Through their 'evidentiary' filters and their publicity, international criminal proceedings may render certain facts less contestable. In this way, they may leave less room for the 'denial' of atrocity.<sup>127</sup>

But it would go a step too far to equate judicial fact-finding with accurate historiography, or even a broader 'truth-finding' procedure aimed at societal reconciliation. The acceptance and internalization of facts are processes that are shaped by other factors, such as media, inter-ethnic contact, or local politics.<sup>128</sup> This is evidenced by the experience of the ICTY in which the 'judicial truth' established in The Hague often remained detached from the 'local truth'.<sup>129</sup>

This result is not necessarily an institutional failure, but rather an indication of the limitations of international criminal justice. The key is to make 'best use' of the virtues of judicial fact-finding. The record of international criminal courts will always remain selective. In recognition of this reality, the main task is to make the best use of selective knowledge and the quality (rather than the quantity) of facts and information. This does not mean that there is no room for improvement.

One possible way to reduce gaps between international and domestic perception is the extension of channels to share evidence. Only a fraction of the evidence gathered by international investigators and prosecutors is currently used in international criminal proceedings. It should be rethought about whether and under what conditions this material can be shared more effectively with domestic jurisdiction or other fact-finding bodies.<sup>130</sup>

Second, further progress could be made in the analysis of judicial records. One distinct advantage of witness testimony, documents, and transcripts lies in their recording and availability after completion of the trial. Unfortunately, this record is often so complex that even judges or defence counsel have difficulties in processing it. A useful way to improve impact might be to systematize and order judicial records in a way that makes it more accessible for lawyers and non-lawyers in future research.

#### 2.2.4. Legacy

This leads me to the last theme: if judicial truths remain partial and if judicial fact-finding carries an inevitable degree of uncertainty, what remains? What is the legacy of these tribunals?

In the parable, the younger brother addresses this question to the returning son in the last of his conversations. The younger brother has witnessed the glorious welcome of his brother by the father: 'I saw you come covered with glory'; 'And I saw what our father did. He put a ring on your finger, a ring the like of which our brother does not have' (p. 225). Like his brother, he is eager to depart from home, and wants to learn from his journey. He asks: 'Did you find nothing but disappointments on your wanderings? Is all that I imagine outside and different from here, only an illusion?' 'Didn't you mistake the road?' (p. 229).

The returning son gives an encouraging reply. He admits some of his own failures ('Yes, I feel it clearly now, I failed' (p. 231)) but realizes that the journey marked a way to 'find' his younger brother ('[without coming back] I would never have known you' (p. 229)). He then encourages his younger brother to leave against the will of the mother, in order to enable him to make his own experiences ('It is for me to admire you, and for you to forget me' (p. 233)).

This dialogue captures the essence of the debate about 'legacy' in international criminal justice. What do tribunals leave behind after completion of cases in a specific situation, or even

after closing investigations and prosecutions in the entire situation?

Here, again, 'realism' contrasts with 'expectations' that are difficult to meet. There are increasing efforts to assess the 'legacy' and lessons learned from individual tribunals. Different organs within international criminal courts and tribunals (presidency, registry) work on 'legacy', in order to provide greater clarity on record and performance. Conferences and volumes are devoted to the theme.<sup>131</sup> But there are hardly any agreed criteria to establish 'legacy'<sup>132</sup> or reliable methods to test it. In fact, the very notion is somewhat daring. 'Legacy' is not something that can be unilaterally construed or created. Rather, it depends on external judgement and develops incrementally over time. Emerging scholarship on the theme admits the limits of empirical methods (e.g. the fragility of 'population surveys') and the subjectivity of judgement.<sup>133</sup> A recent study on the impact of the ICTY, for instance, comes to the conclusion that 'the level of support for the ICTY is lower in recent years than it was at the time the ICTY began its trials'<sup>134</sup> and that its acceptance ranges from almost 'non-existent' in certain parts (Serbia) to overwhelming in others (Kosovo).<sup>135</sup> Again, this finding is not so much a testimony of individual institutional failure. It rather shows that it is essential to track how attitudes develop over time and to explore the rationales underlying such change<sup>136</sup> in order to provide credible results.

Currently, impact is mainly associated with two parameters, which bear resemblance with the main themes of 'homecoming' in the parable, namely interaction with domestic entities (e.g. capacity-building) and reconciliation. I will deal with them consecutively.

2.2.4.1. Capacity-building. There is a growing awareness that international justice is only sustainable if it is not only done internationally, but seen to be done in affected communities and followed by consecutive domestic action.<sup>137</sup> This is a lesson learned from decades of UN experiences in peace-building. It

is gradually implemented in the field of international criminal justice.

In the ad hoc tribunals, this move was born out of necessity. It resulted from the need to deal with a backlog of cases involving lower-level perpetrators. By now, the Yugoslavia Tribunal has referred more than ten cases to the Bosnian War Crimes Chamber.<sup>138</sup> Rwanda abolished the death penalty in order to be eligible to receive cases.<sup>139</sup> The ICC Statute contains a more systemic turn towards interaction between international and the domestic legal systems, by application of the principle of complementarity.<sup>140</sup> The court is developing criteria to translate this imperative into disengagement strategies in individual situations. This reflects a certain paradigm shift: international justice is no longer judged solely by its own investigation, trial, and sentences, but also by its ability and capacity to incentivize genuine domestic proceedings.<sup>141</sup>

But real practice shows that the actual contribution is often difficult to assess. There is a great deal of disparity across situations and untested assumptions about cause and effect (e.g. catalytic effect).<sup>142</sup> ICC intervention, for instance, has produced a wide range of vastly different effects on domestic communities.<sup>143</sup> In some situations, such as Darfur or Kenya, it has predominantly shaped political discourse or transformed the political landscape.<sup>144</sup> In other contexts (such as Colombia or the Democratic Republic of Congo), it has prompted some legal transformation or legal reform.<sup>145</sup> This has produced very different results for distinct actors.

In some cases, it has led to the disempowerment of armed groups or accepted political elites. In other instances, such as Uganda, it has been followed by the empowerment of political or religious leaders in the local sphere. In other situations, such as Palestine or the Korean U-boat incident, it had hardly any traceable effect.<sup>146</sup>

With the further increase in situations and ongoing budgetary

restraints (e.g. zero-growth budgets), there is an even greater risk that attention will shift too quickly from one ‘troubleshoot’ to another, without lasting mitigation of the causes that triggered justice intervention in the first place<sup>147</sup> - as in decades of UN peace operations.

This challenge may not be solved in the short term. But perhaps a greater degree of modesty might actually produce better results. I will just provide two examples here.

Paul Seils, formerly Head of Situation Analysis in the ICC Office of the Prosecutor, has made this point powerfully in relation to the relationship between the ICC and domestic jurisdictions. He has argued that the ‘most positive thing’ the prosecutor can do at this stage in time to promote national proceedings is ‘to have a clear and consistent line on what he expects national prosecutions to produce within a reasonable time and to act without fear if what he expects does not materialize’.<sup>148</sup>

Similarly, on a normative level, the strength of international criminal courts may rather lie in the persuasive power of ideas and legal obligations than in the imposition of rules and standards. Take the implementation of norms, for instance. Research on norm acceptance in conflict situations (e.g. Uganda<sup>149</sup>) shows that international standards require a certain degree of adaptability and ‘local’ translation in order to fit the specific context.<sup>150</sup> International criminal courts may thus be best placed to highlight key issues and debates rather than seeking to engage in domestic reform.<sup>151</sup>

2.2.4.2. Reconciliation. A similar logic applies in relation to ‘reconciliation’. Whether and to what extent international criminal justice can successfully contribute to reconciliation is still an open question.<sup>152</sup> According to statutory texts, reconciliation is not expressly part of the mandate of international criminal courts.<sup>153</sup> Proponents of restorative justice rightly point to the benefits of broader access to justice and victim

participation: victims can overcome trauma if the injustice done to them has been recognized publicly, if they receive an opportunity to make their personal story known, and if they themselves learn about the details of what has happened. International criminal justice deserves to be praised for its progress in this area, which often goes further than in most domestic settings.

But it is again difficult to judge the performance of international criminal courts by their contribution to reconciliation. 'Judicial fact-finding' and 'outreach' alone do not suffice to bring about 'reconciliation'. They may sometimes even cause deeper divisions.<sup>154</sup> Impact relies on other factors, such as media, inter-ethnic contact, positive experiences, etc.<sup>155</sup> Research on the impact of the ICTY in the Balkans has shown that the attitudes of individuals in conflict or post-conflict settings are largely shaped by 'group identity' and perception of 'victimhood'.<sup>156</sup> More fundamentally, reconciliation pre-supposes that each group has a willingness to inquire into the extent to which it bears collective responsibility through the actions of its members and, in particular, its leadership. There is no guarantee that such a process will indeed effectively take place. Examples of Germany or Serbia show that society often takes a very long time to recognize the moral wrong committed and to condemn its own involvement in it.<sup>157</sup>

Therefore, many experts caution rightly against overambitious expectations in relation to the role and impact of international trials on reconciliation.<sup>158</sup>

### 3. Reconciling 'realism' and 'idealism'

Where does this lead us? I would argue that the proper 'homecoming' of international criminal justice requires differentiated thinking concerning the relationship between 'faith' and 'fact'.

As in our parable, the key appears to lie in a better match between 'idealism' and 'realism'. Like the returning son, who spent part of his heritage on the way, our object of inquiry may

require a greater degree of 'realism' in order to find his proper place between international law and domestic jurisdictions. At the same time, the 'domestic' might benefit from a greater degree of 'idealism', as illustrated by the impact of the returning son on the younger brother. Or, to put it more concretely, international criminal justice might benefit from a greater degree of realism, while domestic justice might embrace - as Stephane Bibas and William Burke White put it rightly - a greater dose of 'idealism'.<sup>159</sup> Achieving this balance requires a better interplay between 'international', 'domestic', and 'local' responses to conflict.

#### 3.1. *International criminal justice and 'realism'*

Let me start with the first argument. In line with the tenor of Gide's treatment of the theme, I would argue that the journey of international criminal justice over the past decades is not a 'loss' or 'failure', but a process of 'homecoming'. In order to enable a better embedding (i.e. a successful 'homecoming'), it is necessary to recognize the limits of the discipline. The number of cases tried will remain limited and charges will remain selective. International criminal justice will not be able to meet all expectations. Tribunals try to individualize guilt. Victims and affected communities have partly contrasting prerogatives, such as the question as to what extent judgements or decision recognize victimhood of a broader group or collectivity, or a specific narrative of conflict. Impact will always be hard to assess in light of the discrepancies between accepted and non-accepted goals and the lack of fully quantifiable indicators or assessment methods. Attitudes and behaviours are shaped by non-controllable factors. These limitations are not necessarily institutional failures, but inherent in the very project.

##### 3.1.1. The role of expressivism

The challenge is to make better use of these limitations. One key element in this process is the improvement in the 'expressive function' of international criminal courts.<sup>160</sup> By this, I do not mean a sheer strengthening of outreach or an increase in the 'show' dimensions of trials (which are, in reality, mostly rather

dry and technical exercises), but a broader vision of the function of proceedings. International courts have a more 'attentive public' than most other judicial entities.<sup>161</sup> They have a 'global reach' and 'audience'. Like supreme courts or other highest judiciaries in a domestic system, their strength and virtue may lie in their ability to 'send messages', shape debates and discourse, and influence the generation and perception of norms.<sup>162</sup>

Expressivism can be partly traced back to the Nuremberg trials, which were associated with the idea that judicial proceedings are a key instrument in transforming society in post-war Germany.<sup>163</sup> Today, this approach is as relevant as ever in international criminal justice. International criminal courts cannot merely be judges by their quantitative record. They are, most of all, entities that frame controversies and issues, highlight the value of norms, or send signals.<sup>164</sup> Expressivism places some of their perceived weaknesses in relation to 'effectiveness', 'fairness', and 'impact' into perspective and allows them to make best use of their limitations.

Let us consider 'selectivity'. Expressive theories do not deny capacity limits or inherent contradictions (i.e. the fact that condemnation does not reach all individual perpetrators). They seek to mitigate existing 'selectivity' and 'enforcement' problems, by relying on the power of transparency and persuasion of international criminal courts to denounce the wrong and reinforce society's norms. This makes it more difficult for 'big and powerful actors' to ignore atrocities.<sup>165</sup> Expressivism also addresses some fairness dilemmas. It does not ignore 'fairness' dilemmas inside international criminal justice, but places emphasis on the importance of the 'demonstration effect' - that is, the visibility and perception of independence and impartiality. In this sense, it seeks to enhance conditions under which international proceedings may serve as an example for national or local justice. Expressivism further reduces some of the narrative dilemmas, which are inherent in the rendering of international justice. It takes into account that there may be 'multiple' stories or version of 'truth' in society. Rather than denying this reality,

it relies on the pedagogical function of judicial fact-finding and evidence to sharpen perceptions. This moderation is fundamental at a time at which international criminal justice is under criticism for failing to meet some of its projected objectives.

### 3.1.2. 'Realism' and 'faith'

A new 'realism' implies at the same time the need to recognize the limits of 'facts' and the virtues of 'faith'. As David Koller put it so aptly: 'Rather than simply dismissing ... faith as irrational, we can learn a great deal about international criminal law and its prospects by seeking to understand the motivations for and the tenets of faith.'<sup>166</sup>

There is a need to resist the temptation to measure 'success' or 'failure' 'merely by rationalist theories'. Costs and benefits cannot be judged solely by rational choice theory or empirical facts. As has been shown above, factual and normative judgements are interrelated in international criminal justice, as in hardly any other area. It is thus too simplistic to deny the role of 'faith' in this context. In fact, the project still enjoys support precisely because many believe that it is better to live with it than without it.<sup>167</sup> This should not be ignored, but is part of reality.

### 3.2. *Domestic justice and 'idealism'*

This leads me to my second argument. While international criminal justice might thus merit some greater 'realism', domestic justice might, in turn, benefit from greater 'idealism'.<sup>168</sup>

One of the virtues of international criminal justice lies in its transparency and its highly developed 'culture' of informal accountability. Domestic justice differs in this respect. Although some high-level cases receive wide attention, many aspects of investigations and prosecutions receive little public scrutiny. Developing a more elaborate culture of transparency might be one of the incentives being derived from international criminal justice.

Second, domestic procedures might benefit from some of the

experiences and approaches in the international context. International criminal justice has been a laboratory of procedural innovation in the past decades, due to its need to accommodate diversity and to balance the features of inquisitorial and accusatory traditions.<sup>169</sup> There is something to learn from this experience, in both the national and the broader European contexts.<sup>170</sup> I will just provide one example: the approach towards the ‘restorative dimension’ of justice.

International criminal courts have greatly invested in the strengthening restorative features of proceedings, such as increased information and access of victims to justice, outreach to affected communities, the determination of reparation to collectivities, or best practices to deal with gender-related violence or violence against children. Domestic systems might benefit from these experiences, be it in the context of domestic trials of atrocity crimes, which might involve a large number of victims, or in lower-level crimes in which informal social pressure or victim-offender mediation might deserve greater attention.

### 3.3. *Reconciling the two*

How can the relationship between ‘idealism’ and ‘realism’ be improved? I would argue that a partial shift in perspective is necessary in order to facilitate a better ‘match’.

First, it is important to reconsider the ‘constituency’ of international criminal justice.<sup>171</sup> In the past, many choices have been made at the international level, with a focus on ‘international community’ or state interests. A proper ‘homecoming’ requires a pluralist vision - that is, a more systematic turn to individual and people’s interests. To be regarded as legitimate, and to increase its persuasion, justice by international courts must also be ‘seen as local justice’.<sup>172</sup> This shift in perspective (i.e. to treat ‘locals’ as subjects rather than as objects) is essential to counter some of the contemporary criticisms of international criminal courts, such as the ‘neo-imperial’ nature or their detachment from domestic communities.

Second, it is necessary to work towards a better communication between global, national, and local audiences.<sup>173</sup> International criminal justice is a two-way street: to The Hague and from The Hague. It is necessary to improve the conditions of this dialogue. In order to ensure better communication, it is essential not to seek a mere imitation of international approaches in the domestic sphere, but to work towards a better ‘translation’ into the specific ‘national’ or ‘local’ context.<sup>174</sup>

### 4. **Not a conclusion**

It is apparent that these challenges are too important to be left to lawyers alone, or to a single discipline. We live in a world in which the very meaning of ‘justice’ is reaching new boundaries and horizons. In the reality of today, the ‘justice’ ideal extends beyond far beyond criminal law or domestic legal systems. Justice plays a key role in the promotion or protection of broader ‘global public goods’, such as collective security, development or environmental protection, or fairness in international norms and institutions more broadly. Here again, in this emerging domain of ‘global justice’, it is fundamental to establish forms of communication and modes of interaction in which the ‘international’, the ‘domestic’ and the ‘local’ can meet.

The new Chair is set up in this spirit. It is meant to build ‘bridges’:

- bridges between criminal justice and international law,
- bridges between academia and the professional community,
- bridges between Leiden and the community in The Hague,
- bridges between International Justice and the broader aspiration of ‘global justice, and bridges across over disciplines.

It will be difficult to construct ‘physical’ bridges, as one of my predecessors did. But perhaps there is space to establish lasting ‘normative’ bridges. Together with the Grotius Centre, and our partners, here and abroad, will at least try, in our educational programmes in Public International Law,

and in the framework of the two NWO research projects on 'Post Conflict Justice and Local Ownership' and 'Jus Post Bellum'.

### 5. Vote of Thanks

Let me now pass on to the final part of my lecture - a word of appreciation. I would like to pay special tribute to the Board of the University, in particular the *Rector Magnificus* of the University, Professor Paul van der Heijden, and the Law Faculty and the Faculty Campus The Hague. It is an honour that both are represented by their Deans today. Without their warm welcome, their gratitude and support, this chair and today would not be possible.

For my further words, I would like to pass on the logic of the parable. Just like this toga presents an abstraction, I wish to thank symbolically.

I wish to thank:

- those who built the 'house', and those without whom I would not be here,
- those who make it such a wonderful experience and pleasure to be here, be it through collegiality, inspiration, conversation or friendship,
- those who keep loyalty, trust and friendship when I occasionally desert from 'the house,
- those who have crossed continents or countries to be here today, and who continue believe in the 'house', even though reality or routine might make this difficult.

I would also like thank those with whom we will continue to build the 'house', and those who are here today 'in spirit'.

Finally, I would like to express my particular gratitude and appreciation to the students: They are a source of inspiration. It is an honour to teach them, and to learn from them.

This brings me to my closing words. I wish to close these

reflections on 'constituency' and 'dialogue' with the 'shift of perspective' reflected in the final conversation between the departing brother and the returning son in our parable: this time, the younger brother says:

'Do you know why I was expecting you this evening? ... You opened the way for me' (p. 233).

The 'prodigal son' replies: 'It is time now. The sky turns pale .... Go quietly. I am holding the lamp' (p. 233).

*Ik heb gezegd.*



## Notes

\* This text is an extended version of my inaugural Lecture held on 31 October 2011, published in article format as a 25<sup>th</sup> anniversary editorial in (2012) 25 LJIL 251 - 282. It is part of a larger research project entitled 'Post-Conflict Justice and Local Ownership', carried out under the auspices of the Netherlands Organisation for Scientific Research. I wish to thank Larissa van den Herik, Joseph Powderly, Dov Jacobs, Jens Iverson and Kees Waaldijk for their comments and input.

<sup>1</sup> See A. Gide, 'Le Retour de l'enfant prodigue' ['Return of the Prodigal Son'] (1907), in W. Fowlie (ed.), *French Stories* (1993), 199-233. For a different treatment, see also H. J. M. Nouwen, *The Return of the Prodigal Son: A Story of Homecoming* (1992). I came across Gide's version when I studied 'Comparative Literature' in Berlin.

<sup>2</sup> See Rembrandt, *Return of the Prodigal Son* (1668), St Petersburg, Hermitage.

<sup>3</sup> On the human rights foundations of international criminal justice, see, e.g., C. Bassiouni, 'The Proscribing Function of International Criminal Law in the Process of Human Rights', (1982) 9 *Yale Journal of World Public Order* 1456.

<sup>4</sup> See, generally, A. Greenawalt, 'The Pluralism of International Criminal Law', (2011) 86 *Indiana Law Journal* 1063. On the relationship to International Humanitarian Law, see, e.g., T. Meron, 'The Humanization of Humanitarian Law', (2000) 94 *AJIL* 239-78; on the relationship with public international law, see K. Anderson, 'The Rise and Fall of International Criminal Law: Intended and Unintended Consequences', (2009) 20 *EJIL* 331-58, arguing that international criminal law has 'supplanted or even crowded other aspects and institutions of public international law'. For a bird's-eye view of international criminal law, human rights, and public international law, see, e.g., A. Clapham, 'Three Tribes Engage on the Future of International Criminal Law', (2011) 9 *JICJ* 689.

<sup>5</sup> On the '*sui generis*' nature, see, e.g., C. Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise', (2003) 1 *JICJ* 603-17; K. Ambos, 'The Structure of International Criminal Procedure: "Adversarial", "Inquisitorial" or Mixed?', in M. Bohlander (ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (2007), 429-503.

<sup>6</sup> For a treatment from the perspective of norm implementation, see G. Werle and F. Jessberger, 'International Criminal Justice is Coming Home: The New German Code of Crimes against International Law', (2002) 13 *Criminal Law Forum* 191-223. On the dialectics between international and domestic jurisdiction more generally, see C. Stahn and M. El Zeidy, *The International Criminal Court and Complementarity: From Theory to Practice* (2011).

<sup>7</sup> For this imagery, see K. Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (2011).

<sup>8</sup> See B. Swart, A. Zahar, and G. Sluiter, *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (2010); R. H. Steinberg, *Assessing the Legacy of the ICTY* (2011).

- <sup>9</sup> See, e.g., S. K. Ivakovic and J. Hagan, *Reclaiming Justice: The International Tribunal for the Former Yugoslavia and Local Courts* (2011); J. L. Clark, 'The Limits of Retributive Justice: Findings of an Empirical Study in Bosnia and Herzegovina', (2009) 7 JICJ 463; D. Orentlicher, 'Shrinking the Space for Denial: The Impact of the ICTY in Serbia', Open Society Justice Initiative (2008); P. McMahon and D. Forsythe, 'The ICTY's Impact on Serbia: Judicial Romanticism Meets Network Politics', (2008) 30 HRQ 412; H. van der Merwe, V. Baxter, and A. Chapman, *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (2010). See also D. Saxon, 'Exporting Justice: Perceptions of the ICTY among the Serbian, Croatian and Muslim Communities', (2005) 4 *Journal of Human Rights* 559. On the impact of the ICC, see E. Stover et al., 'The Impact of the Rome Statute System on Victims and Affected Communities', RC/ST/V/INF.4, 30 May 2010, available at [www.icc-cpi.int/iccdocs/asp\\_docs/RC2010/Stocktaking/RC-ST-V-INF.4-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Stocktaking/RC-ST-V-INF.4-ENG.pdf). On transitional justice more broadly, see O. N. T. Thoms, J. Ron, and R. Paris, *The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners* (2008).
- <sup>10</sup> On the 'identity crisis', see D. Robinson, 'The Identity Crisis of International Criminal Law', (2008) 21 LJIL 925-63. See also S. Ratner, 'The Schizophrenias of International Criminal Law', (1998) 33 Texas ILJ 237.
- <sup>11</sup> Citations and page numbers in the text are from the translation in note 1, *supra*.
- <sup>12</sup> For a treatment, see D. Koller, 'The Faith of the International Criminal Lawyer', (2008) 40 NYUJILP 1019; I. Tallgren, 'The Sensibility and Sense of International Criminal Law', (2002) 13 EJIL 561. For a study of the role of 'religion' and 'faith' in transitional justice, see, generally, D. Philpott, *Religion, Reconciliation, and Transitional Justice: The State of the Field* (2007); T. Brudholm and T. Cushman, *The Religious in Responses to Mass Atrocity* (2009); M. Duffy Toft, D. Philpott, and T. S. Shah, *God's Century: Resurgent Religion and Global Politics* (2011).
- <sup>13</sup> For an exploration of 'idealism', see G. Bath, *Stay the Hands of Vengeance: The Politics of War Crimes Tribunals* (2000), 1-36, 147-205; S. Krasner, 'Pitfalls of International Idealism', (2003) 8 UCLA JILFA 61. On a 'faith-like' commitment to human rights, see S. Hopgood, *Keepers of the Flame: Understanding Amnesty International* (2008).
- <sup>14</sup> See Justice Robert Jackson's Opening Statement at the Nuremberg Tribunal: 'That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.' The text is available at <http://law2.umkc.edu/faculty/projects/ftrials/nuremberg/Jackson.html>.
- <sup>15</sup> See, e.g., A. Zahar, 'Civilizing Civil War: Writing Morality as Law in the ICTY', in Swart, Zahar, and Sluiter, *supra* note 8, at 469.
- <sup>16</sup> See Jackson, *supra* note 14.
- <sup>17</sup> See Secretary-General, statement at the opening of the Preparatory Commission for the International Criminal Court New York, 16 February 1999, available at [www.ngos.net/un/icc.html](http://www.ngos.net/un/icc.html).
- <sup>18</sup> For a similar argument, see G. A. Caldeira and J. L. Gibson, 'The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support', (1995) 89 APSR 356.
- <sup>19</sup> See, e.g., ICTY, *Prosecutor v. Kupreškić*, Judgement, Case No. IT-95-16, 14 January 2000, para. 419 ('norms of international humanitarian law ... lay down obligations towards the international community as a whole, with the consequence that each and every member of the international community has a "legal interest" in their observance and consequently a legal entitlement to demand respect for such obligations').

- <sup>20</sup> Ibid., para. 520 ('most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character'). See with respect to torture also ICTY, *Prosecutor v. Furundžija*, Trial Judgement, Case No. IT-95-17/I-T, 10 December 1998, para. 154 ('Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community'). On judicial creativity, see S. Darcy and J. Powderly, *Judicial Creativity at the International Criminal Tribunals* (2010).
- <sup>21</sup> For a discussion, see Anderson, *supra* note 4, at 331-58.
- <sup>22</sup> See C. van den Wyngaert, Award Ceremony Prize Human Rights League, 'Human Rights between Sword and Shield', Lecture Antwerp (2006). Ignatieff speaks of the 'enforcement revolution' in human rights. See M. Ignatieff, 'Whose Universal Values? The Crisis in Human Rights', *Stichting Praemium Erasmianum* (1999), at 11.
- <sup>23</sup> For a reminiscent in the ICC Statute, see para. 5 of the preamble ('Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes').
- <sup>24</sup> For a further-going analogy to 'religion', see Tallgren, *supra* note 12, at 593 ('International Criminal Law carries this kind of a religious exercise of hope that is stronger than the desire to face everyday life. Focusing on the idea of international criminal justice helps us to forget that an overwhelming majority of the crucial problems of the societies concerned are not adequately addressed by criminal law').
- <sup>25</sup> See Gospel of John, 20: 24-5 ('Except I shall see in his hands the print of the nails, and put my finger into the print of the nails, and thrust my hand into his side, I will not believe') and the reply by Jesus, 20:29 ('blessed are they that have not seen, and yet have believed').
- <sup>26</sup> See S. Bibas and W. Burke-White, 'When Idealism Meets Domestic-Criminal Procedure Realism', (2010) 59 *Duke Law Journal* 637.
- <sup>27</sup> For some of the downsides, see E. A. Baylis, 'Tribunal Hopping with the Post-Conflict Justice Junkies', (2008) 10 *Oregon RIL* 361.
- <sup>28</sup> See K. L. King and J. D. Meernik, 'Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia: Balancing International and Local Interests while Doing Justice', in Swart, Zahar, and Sluiter, *supra* note 8, at 7, 9.
- <sup>29</sup> See also Y. Shany, 'Assessing the Effectiveness of International Court: Can the Unquantifiable be Quantified?', Hebrew University of Jerusalem, Research Paper No. 03-10, September 2010.
- <sup>30</sup> See S. Engle Marry, 'Measuring the World: Indicators, Human Rights and Global Governance', (2011) 52 *Current Anthropology* 1. For an account of methodological approaches, see G. Dancy, 'Impact Assessment, Not Evaluation: Defining a Limited Role for Positivism in the Study of Transitional Justice', (2010) 4 *International Journal of Transitional Justice* 355.
- <sup>31</sup> It coincides further with an expanding 'audit culture' in human rights practice. See Engle Marry, *supra* note 30.
- <sup>32</sup> Budgetary scrutiny may, for instance, restrict universality, judicial independence, and the scope of protection provided.
- <sup>33</sup> Even the demanding 'beyond a reasonable doubt' standard, which applies to questions of guilt and innocence, requires only a high level of certainty.
- <sup>34</sup> Note, for example, the *Daubert* test for expert testimony, which requires that a theory or technique must be 'falsifiable, refutable and testable' (*Popper*). The test was developed by the US Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 28 June 1993, (1993) 113 S.Ct. 2786.
- <sup>35</sup> For a thoughtful critique of 'legal mimicry' in domestic norm implementation, see M. Drumbl, *Atrocity, Punishment and International Law* (2007), 123. For an illustration, see S. Nouwen, 'Complementarity in Uganda: Domestic Diversity or International Imposition?', in Stahn and El Zeidy, *supra* note 6, at 1120, 1145-51.

- <sup>36</sup> See also M. Klarin, 'The Tribunal's Four Battles', (2004) 2 JICJ 546 ('battle for hearts and minds').
- <sup>37</sup> See M. Damaska, 'What Is the Point of International Criminal Justice?', (2008) 83 *Chicago-Kent Law Review* 329.
- <sup>38</sup> See Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc. S/2004.616, 23 August 2004, para. 38.
- <sup>39</sup> See J. Galbraith, 'The Pace of International Justice', (2009) 79 Mich. JIL 79, at 85.
- <sup>40</sup> See, e.g., O-Gon Kwon, 'The Challenge of an International Criminal Trial as Seen from the Bench', (2007) 7 JICJ 360, at 372-3; I. Bonomy, 'The Reality of Conducting a War Crimes Trial', (2007) 7 JICJ 348, at 353.
- <sup>41</sup> See, e.g., E. Posner, 'Political Trials in Domestic and International Law', (2005) 55 *Duke Law Journal* 75, 151-2.
- <sup>42</sup> See African Union, 'Decision on the Meeting of African Parties to the Rome Statue of the International Criminal Court (ICC)', 3 July 2009, Assembly/AU/Dec.245, available at [www.africa-union.org/root/au/Conferences/2009/july/summit/decisions/ASSEMBLY%20AU%20DEC%20243%20-%2020267%20\(XIII\)%20\\_e.pdf](http://www.africa-union.org/root/au/Conferences/2009/july/summit/decisions/ASSEMBLY%20AU%20DEC%20243%20-%2020267%20(XIII)%20_e.pdf). For a discussion, see, e.g., L. Arbour, 'The Rise and Fall of International Human Rights', 27 April 2011, available at [www.crisis-group.org/en/publication-type/speeches/2011/the-rise-and-fall-of-international-human-rights.aspx](http://www.crisis-group.org/en/publication-type/speeches/2011/the-rise-and-fall-of-international-human-rights.aspx); D. Akande, 'The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities', (2009) 7 JICJ 333-52; P. Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?', (2009) 7 JICJ 315-32.
- <sup>43</sup> See with respect to the ICC, G. P. Fletcher and J. D. Ohlin, 'The ICC - Two Courts in One?', (2006) 4 JICJ 428, at 428-33.
- <sup>44</sup> For an application in the ICTY context, see D. Orentlicher, *supra* note 9, at 16, 41-2.
- <sup>45</sup> See, e.g., D. Saxon, 'The Legitimacy and Limits of "Incapacitation"', Hague Justice Portal, available at [www.haguejusticeportal.net/Docs/Commentaries%20PDF/](http://www.haguejusticeportal.net/Docs/Commentaries%20PDF/)

Saxon\_The%20Legitimacy%20and%20Limits%20of%20Incapacitation\_EN.pdf. For a critical study, see J. M. Darley et al., 'Incapacitation and Just Deserts as Motives for Punishment', (2000) 24 *Law & Human Behaviour* 659, at 676.

- <sup>46</sup> The most evident example is the ICTY. It started as a deterrence-based and retributive justice mechanism. In its first annual report to the UN Security Council, the President of the ICTY noted: 'One of the main aims of the Security Council [in establishing the ICTY] was to establish a judicial process capable of dissuading the parties to the conflict from perpetrating further crimes. It was hoped that, by bringing to justice those accused of massacres and similar egregious violations of international humanitarian law, both belligerents and civilians would be discouraged from committing further atrocities. In short, the Tribunal is intended to act as a powerful deterrent to all parties against continued participation in inhuman acts.' See ICTY, Annual Report, UN Doc. A/49/342, S/1994/1007, 29 August 1994, at 13. With the adoption of the 'completion' strategy, the focus shifted to a greater extent towards local empowerment.
- <sup>47</sup> On 'goal ambiguity' as a problem, see Shany, *supra* note 29, at 1.2.
- <sup>48</sup> For a study of the role of 'faith' and 'religion' in transitional justice processes, see D. Philpott, 'When Faith Meets History: The Influence of Religion on Transitional Justice', in Brudholm and Cushman, *supra* note 12, at 174; A. P. Boese-necker and L. Vinjamuri, 'Lost in Translation? Civil Society, Faith-Based Organizations and the Negotiation of International Norms', (2011) 5 *International Journal of Transitional Justice* 345. On the link between conflict and religion, see B. Grim and R. Finke, *The Price of Freedom Denied: Religious Persecution and Conflict in the 21st Century* (2010).
- <sup>49</sup> For a similar argument in the context of transitional justice, see O. N. T. Thoms, J. Ron, and R. Paris, 'State-Level Effects of Transitional Justice: What Do We Know?', (2010) 4 *International Journal of Transitional Justice* 329.

- <sup>50</sup> See, e.g., R. Zacklin, 'The Failings of the Ad Hoc International Tribunals', (2004) 2 JICJ 541, at 543, 545; S. Bourgon, 'Procedural Problems Hindering Expeditious and Fair Justice', (2004) 2 JICJ 526, at 527. Rabkin even qualifies international criminal justice as an idea 'whose time has passed'. See J. Rabkin, 'Global Criminal Justice: An Idea Whose Time has Passed', (2005) 38 CILJ 753.
- <sup>51</sup> For analysis, see D. Wippman, 'The Costs of International Justice', (2006) 100 AJIL 861; C. P. R. Romano, 'The Price of International Justice', (2005) 4 *The Law and Practice of International Courts and Tribunals* 281.
- <sup>52</sup> See, e.g., A. Fulford, 'Reflections of a Trial Judge', (2011) 22 *Criminal Law Forum* 215, at 218; Kwon, *supra* note 40, at 362.
- <sup>53</sup> See Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), annexed to UN Doc. A/54/634, 22 November 1999; Informal Expert Paper, 'Measures Available to the ICC to Reduce the Length of Proceedings', 2003; War Crimes Research Office, 'Expediting Proceedings at the International Criminal Court', June 2011, available at [www.wcl.american.edu/warcrimes/icc/documents/1106report.pdf?rd=1](http://www.wcl.american.edu/warcrimes/icc/documents/1106report.pdf?rd=1); International Bar Association (IBA), 'Enhancing Efficiency and Effectiveness of ICC Proceedings: A Work in Progress', January 2011, available at [www.ibanet.org/Human\\_Rights\\_Institute/ICC\\_Outreach\\_Monitoring/ICC\\_IBA\\_Publications.aspx](http://www.ibanet.org/Human_Rights_Institute/ICC_Outreach_Monitoring/ICC_IBA_Publications.aspx).
- <sup>54</sup> For a greater use of 'court-appointed experts', see Fulford, *supra* note 52, at 219. On the taking of 'judicial notice', see Rule 69 of the RPE.
- <sup>55</sup> See ICC, *Prosecutor v. Lubanga*, Decision on Practices of Witness Familiarization and Witness Proofing, ICC-01/04-01/06-679, 8 November 2006. On the 'pros' and 'cons' of witness proofing, see the exchange of views in LJIL: R. Karemaker, B. D. Taylor, and T. W. Pittman, 'Witness Proofing in International Criminal Tribunals: A Critical Analysis of Widening Procedural Divergence', (2008) 21 LJIL 683; K. Ambos, 'Witness Proofing in International Criminal Tribunals: A Reply to Karemaker, Taylor, and Pittman', (2008) 21 LJIL 911. See also Trial Chamber III, *Prosecutor v. Bemba*, Partly Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the Unified Protocol on Practices Used to Prepare and Familiarize Witnesses for Giving Testimony at Trial, ICC-01-05-01/08-1039, 24 November 2010, para. 21.
- <sup>56</sup> See, e.g., War Crimes Research Office, *supra* note 53, at 61-70.
- <sup>57</sup> See, e.g., International Bar Association, *supra* note 53, at 20; War Crimes Research Office, *supra* note 52, at 46-53 (suggesting time limits for the delivery of Appeals Chamber decisions).
- <sup>58</sup> See, e.g., D. Tolbert and F. Gaynor, 'International Tribunals and the Right to a Speedy Trial: Problems and Possible Remedies', (2009) 27 *Law in Context* 33, at 59.
- <sup>59</sup> See Assembly of States Parties, Resolution on the 'Establishment of a Study Group on Governance', ICC-ASP/9/Res.2 (2010). See also Report of the Bureau on the Study Group on Governance, ICC-ASP/10/30, 22 November 2011, available at [http://212.159.242.181/iccdocs/asp\\_docs/ASP10/ICC-ASP-10-30-ENG.pdf](http://212.159.242.181/iccdocs/asp_docs/ASP10/ICC-ASP-10-30-ENG.pdf).
- <sup>60</sup> See M. Drumbl, 'International Criminal Law: Taking Stock of a Busy Decade', (2009) 10 *Melb. JIL* 38.
- <sup>61</sup> See on the pitfalls of a plain domestic 'analogy' more generally, Tallgren, *supra* note 12, at 565-7.
- <sup>62</sup> See King and Meernik, *supra* note 28, at 44, footnote 13.

- <sup>63</sup> See European Commission for the Efficiency of Justice, ‘Length of Court Proceedings in the member States of the Council of Europe Based on the Case Law of the European Court of Human Rights’, 6-8 December 2006, available at [www.coe.int/t/dghl/cooperation/cepej/delais/Calvez\\_en.pdf](http://www.coe.int/t/dghl/cooperation/cepej/delais/Calvez_en.pdf).
- <sup>64</sup> Galbraith, *supra* note 39, at 142.
- <sup>65</sup> *Ibid.*, at 127–28. SCSL: 4.8 years.
- <sup>66</sup> *Ibid.*, at 128.
- <sup>67</sup> *Ibid.*, at 142.
- <sup>68</sup> See A. Whiting, ‘In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered’, (2009) 50 Harv. ILJ 323, at 331-3.
- <sup>69</sup> See, generally, M. Koskeniemi, ‘Between Impunity and Show Trials’, (2002) 6 MPYUNL 1.
- <sup>70</sup> See, e.g., the points made by Human Rights Watch, *Unfinished Business: Closing Gaps in the Selection of ICC Cases* (2011), 46. The report concludes: ‘In order to complete the work started by the Office of the Prosecutor in DRC, Uganda, CAR, Darfur, and Kenya and to deepen the ICC’s prosecutorial strategy, there is a need for additional investigations in each of these situations. Without further investigations or, in some cases, clear explanations of decisions not to prosecute, the ICC will fall short of delivering credible and meaningful justice.’
- <sup>71</sup> Whiting, *supra* note 68, at 326, invoking the *Karadžić* trial as a sample.
- <sup>72</sup> See, inter alia, Shany, *supra* note 29; King and Meernik, *supra* note 28, at 52-3.
- <sup>73</sup> *Ibid.*
- <sup>74</sup> D. M. Driesen, ‘Is Cost-Benefit Analysis Neutral?’, (2006) 77 *University of Colorado Law Review* 335.
- <sup>75</sup> For an illustration of the problem, see Romano, *supra* note 51, at 297, who argues that international criminal courts must put ‘an end to impunity for war crimes and gross violations of human rights’ in order to justify their costs.
- <sup>76</sup> Election of the Prosecutor, Statement by Mr Luis Moreno-Ocampo, New York, 22 April 2003, ICC-OTP-20030502-10: ‘The efficiency of the International Criminal Court should not be measured by the number of cases that reach the Court or by the content of its decisions. Quite on the contrary, because of the exceptional character of this institution, the absence of trials led by this Court as a consequence of the regular functioning of national institutions, would be a major success.’
- <sup>77</sup> On ‘donor justice’, see S. Kendall, ‘Donors’ Justice: Recasting International Criminal Accountability’, (2011) 24 LJIL 585.
- <sup>78</sup> See Remarks by the Late President Cassese, Hearing of 16 February 2011, available at [www.stl-tsl.org/en/media/press-releases/summary-of-president-cassese-s-speech?print=1&tmpl=component](http://www.stl-tsl.org/en/media/press-releases/summary-of-president-cassese-s-speech?print=1&tmpl=component). For an analysis of Röling’s role, see L. van den Herik, ‘The Dutch Engagement with the Project of International Criminal Justice’, (2010) 57 NILR 303, at 311.
- <sup>79</sup> Similarly, the closure of an institution is not necessarily an indicator of its ineffectiveness in terms of cost-benefit analysis.
- <sup>80</sup> See also Tallgren, *supra* note 12, at 591.
- <sup>81</sup> See J. Silk, ‘International Criminal Justice and the Protection of Human Rights: The Rule of Law or the Hubris of Law’, (2009) unpublished paper, at 6–7, available at [www.law.yale.edu/documents/pdf/Silk\\_International\\_Criminal\\_Justice\\_and\\_the\\_Protection\\_of\\_Human\\_Rights.pdf](http://www.law.yale.edu/documents/pdf/Silk_International_Criminal_Justice_and_the_Protection_of_Human_Rights.pdf).
- <sup>82</sup> See, generally, J. Mendez, ‘Justice and Prevention’, in Stahn and El Zeidy, *supra* note 6, 33, at 35–8. See also King and Meernik, *supra* note 28, at 44-5.
- <sup>83</sup> See Sikkink, *supra* note 7, Chapter 1 (‘[Human rights prosecutions] represent an advance ... over the complete lack of accountability of the past, and have the potential to prevent future human rights violations through material deterrence and symbolic communication’).

- <sup>84</sup> See P. Akhavan, 'Are International Criminal Tribunals a Disincentive to Peace? Reconciling Judicial Romanticism with Political Realism', (2009) 31 HRQ 624; P. Akhavan, 'Preventing Genocide: Measuring Success by What Does Not Happen', (2011) 22 *Criminal Law Forum* 1-33.
- <sup>85</sup> See, e.g., Orentlicher, *supra* note 9, at 16 ('the factors contributing to recent patterns are too complex to admit of any facile conclusions', 17 ('the ICTY's deterrent effect is unknown'); J. Meerenik and K. L. King, 'The Effectiveness of International Law and the ICTY: Preliminary Results of an Empirical Study', (2001) 1 *International Criminal Law Review* 343, at 354.
- <sup>86</sup> See also Damaska, *supra* note 37, at 346, who argues that compliance and persuasion rely ultimately on human response to both 'self-interest' and 'moral values'.
- <sup>87</sup> See T. Meron, 'Does International Criminal Justice Work?', in T. Meron (ed.), *The Making of International Criminal Justice* (2011), 138, at 149.
- <sup>88</sup> See also Human Rights Watch, 'Course Correction: Recommendations to the ICC Prosecutor for a More Effective Approach to "Situations under Analysis"', June 2011, at 3-4, 13-27, available at [www.hrw.org/sites/default/files/related\\_material/HRW%20Course%20Correction\\_0.pdf](http://www.hrw.org/sites/default/files/related_material/HRW%20Course%20Correction_0.pdf).
- <sup>89</sup> See Shany, *supra* note 29, at 1.4.
- <sup>90</sup> See, e.g., Meron, *supra* note 87, at 147 ('With regard to this criterion, I believe that international criminal tribunals are doing very well indeed').
- <sup>91</sup> See, e.g., Opening Address Jackson, *supra* note 14: 'The former high station of these defendants, the notoriety of their acts, and the adaptability of their conduct to provoke retaliation make it hard to distinguish between the demand for a just and measured retribution, and the unthinking cry for vengeance which arises from the anguish of war. It is our task, so far as humanly possible, to draw the line between the two.'
- <sup>92</sup> See, e.g., R. Goldstone, Address before the Supreme Court of the United States, 1996 CEELI Leadership Award Dinner, 2 October 1996 ('Whether there are convictions or whether there are acquittals will not be the yardstick. The measure is going to be the fairness of the proceedings'), cited in M. Ellis, 'The Evolution of Defense Counsel Appearing Before the International Criminal Tribunal for the Former Yugoslavia', (2003) 37 *New England Law Review* 949; R. Goldstone, 'South-East Asia and International Criminal Law', (2011) 2 *FICHL Occasional Paper Series* 1, at 13 ('The principal advantage of the ICC over its *ad hoc* predecessors is that, in virtue of its permanence and its political independence, it is able to achieve this fairness and equality more fully').
- <sup>93</sup> See E. Lutz and K. Sikkink, 'The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America', (2001) 2 *Chicago JIL* 1-34.
- <sup>94</sup> See Bibas and Burke-White, *supra* note 26, at 703-4. See also G. Sluiter, 'The Effects of the Law of International Criminal Procedure on Domestic Proceedings concerning International Crimes', in G. Sluiter and S. Vasiliev, *International Criminal Procedure* (2009), 459, 476-483; C. Safferling, *International Criminal Procedure* (2012).
- <sup>95</sup> See, e.g., C. Chung, 'Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?', (2008) 6 *Northwestern Journal of International Human Rights* 459; F. McKay, 'Victim Participation in Proceedings before the International Criminal Court', *American University Human Rights Brief*, at 5 (speaking of a 'challenge for the Registry is how to process potentially large numbers of applications from victims'), available at [www.wcl.american.edu/hrbrief/15/3mckay.pdf?rd=1](http://www.wcl.american.edu/hrbrief/15/3mckay.pdf?rd=1). For a fact sheet, see ICC, Registry and Trust Fund: Fact Sheet, RC/ST/V/INF.3, 1 June 2010, available at [www.icc-cpi.int/iccdocs/asp\\_docs/RC2010/Stocktaking/RC-ST-V-INF.3-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Stocktaking/RC-ST-V-INF.3-ENG.pdf).

- <sup>96</sup> See Decision on Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, together with Certain Other Issues Raised at the Status Conference on 10 June 2008, ICC-01/04-01/06-1401, 13 June 2008; Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, ICC-01/04-01/06-2517, 8 July 2010. For a discussion of intermediaries, see C. De Vos, 'Someone Who Comes between One Person and Another: Lubanga, Local Cooperation and the Rights to a Fair Trial', (2011) 12 *Melb. JIL* 217.
- <sup>97</sup> See, e.g., International Bar Association, 'Fairness at the International Criminal Court', August 2011, available at [www.ibanet.org/Human\\_Rights\\_Institute/ICC\\_Outreach\\_Monitoring/ICC\\_IBA\\_Publications.aspx](http://www.ibanet.org/Human_Rights_Institute/ICC_Outreach_Monitoring/ICC_IBA_Publications.aspx).
- <sup>98</sup> For an illustration in relation to 'witness proofing', see note 54, *supra*. For a study, see R. Pati, 'Fair Trial Standards under Human Rights Treaty Law and the ICTY: A Process of Cross-Fertilization?', in T. Kruessmann (ed.), *The International Criminal Tribunal for the Former Yugoslavia and Human Rights: Towards a Fair Trial in International Criminal Procedure* (2008), 147; C. Brown, 'The Cross-Fertilization of Principles Relating to Procedure and Remedies in the Jurisprudence of International Courts and Tribunals', (2008) 30 *Loyola L.A. International and Comparative Law Review* 219; N. Croquet, 'The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights Jurisprudence?', (2011) 11 *Human Rights Law Review* 91.
- <sup>99</sup> See also J. Clark, 'The Impact Question: The ICTY and the Restoration and Maintenance of Peace', in Swart, Sluiter, and Zahar, *supra* note 8, at 70 ('Based on perceptions, therefore, there is little evidence that that ICTY has contributed to reconciliation via the dispensing of justice').

- <sup>100</sup> For a sobering assessment, see M. Clarin, 'The Impact of ICTY Trials on Public Opinion in the Former Yugoslavia', (2009) 7 *JICJ* 89 ('[I]f impact ... were to be measured exclusively by the poor perception of the Tribunal that prevails, perhaps the best course of action would be to shut its doors without waiting for the end of its mandate'). See also E. Stover, *The Witnesses* (2005), 103-105.
- <sup>101</sup> See, e.g., Ivaković and Hagan, *supra* note 9, at 157; Damaska, *supra* note 37, at 345. See also more generally, T. Tyler, *Why People Obey the Law* (1990), 64.
- <sup>102</sup> See Human Rights Watch, 'Unfinished Business', *supra* note 70, at 46.
- <sup>103</sup> See SC Res. 1970, 26 February 2011, preamble, para. 2 ('Deploring the gross and systematic violation of human rights, including the repression of peaceful demonstrators, expressing deep concern at the deaths of civilians, and rejecting unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government'), para. 6 of the preamble ('Considering that the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity').
- <sup>104</sup> The OTP acknowledged, *inter alia*, in its 2nd Report to the Security Council in November 2011 that 'allegations have been made *against all parties to the conflict* regarding the disproportionate use of force that could constitute a war crime in accordance with article 8(2)(b) of the Rome Statute' and that the 'Office [would] continue to examine these matters', depending 'on the funds available to the Office to conduct the Libya investigation'; see Second Report of the Prosecutor to the Security Council, 2 November 2011, para. 53 (emphasis added).
- <sup>105</sup> See Ivaković and Hagan, *supra* note 9, at 83, 159-60.
- <sup>106</sup> *Ibid.*, at 160.



- <sup>107</sup> See, generally, R. A. Wilson, *Writing History in International Trials* (2011); R. A. Wilson, 'Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia', (2005) 27 HRQ 908; N. Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (2010).
- <sup>108</sup> See Clark, *supra* note 99, at 70.
- <sup>109</sup> See, e.g., with respect to 'crimes against humanity' and 'war crimes', ICC Statute, Arts. 7(1) and 8(1).
- <sup>110</sup> See also A. Eser, 'Procedural Structure and Features of International Criminal Justice: Lessons from the ICTY', in Swart, Zahar, and Sluiter, *supra* note 8, 108, at 147 (arguing that 'an international tribunal's obligation to establish the truth certainly goes well beyond that of an ordinary domestic court'). See Wilson (2011), *supra* note 107, at 18–20, 218 ('History has legal relevance and is not merely a "chapeau" requirement emanating from the florid preamble of an international criminal tribunal statute').
- <sup>111</sup> See Eser, *supra* note 110, at 121.
- <sup>112</sup> See also Jackson, *supra* note 14 ('I should be the last to deny that the case may well suffer from incomplete researches and quite likely will not be the example of professional work which any of the prosecuting nations would normally wish to sponsor. It is, however, a completely adequate case to the judgment we shall ask you to render and its full development we shall be obliged to leave to historians').
- <sup>113</sup> See H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1965), 253.
- <sup>114</sup> See L. Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (2001). Douglas makes a powerful argument that the Eichmann and Demjanjuk trials, as well as the trials of Klaus Barbie and Holocaust denier Ernst Zundel, were aimed to do justice both to the defendants and to the history and memory of the Holocaust. See, with respect to the ICTY, Ivaković and Hagan, *supra* note 9, at 156 ('creating a war history for the former Yugoslavia'), 161.

- <sup>115</sup> See, e.g., ICC Statute, Art. 54.
- <sup>116</sup> See also Clark, *supra* note 99, at 73–4, citing the example of Bosnia 'where there [was] not one truth about the war, but rather three competing truths'.
- <sup>117</sup> See Koskenniemi, *supra* note 70, at 12 ('[L]egal and historical truth are far from identical. The wider context in which individual guilt has to be understood, and the more such understanding defers to the contingencies of historical interpretation, the more evident the limits of criminal procedure for reaching the "truth"').
- <sup>118</sup> See also Drumbl, *supra* note 35, at 176.
- <sup>119</sup> See Wilson (2011), *supra* note 107, at 221.
- <sup>120</sup> P. Wald, 'To "Establish Incredible Events by Credible Evidence": The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings', (2001) 42 *Harvard Journal of International Law* 535.
- <sup>121</sup> P. Wald, 'Running the Trial of the Century: The Nuremberg Legacy', (2006) 7 *Cardozo Law Review* 1559, at 1570–1.
- <sup>122</sup> Combs, *supra* note 107, at 4.
- <sup>123</sup> See, e.g., ICC Statute, Art. 58. On documentary evidence, see M. Nerenberg and W. Timmermann, 'Documentary Evidence', in K. Khan, C. Buisman and C. Gosnell, *Principles of Evidence in International Criminal Justice* (2010), 443–497.
- <sup>124</sup> See also Damaska, *supra* note 37, at 338 ('The best that can be expected ... is to provide fragmentary material as a scaffolding for subsequent historical research').
- <sup>125</sup> P. Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?', (2001) 95 *AJIL* 7, at 30.
- <sup>126</sup> See Jackson, *supra* note 14.
- <sup>127</sup> See Clark, *supra* note 99, at 77.

- <sup>128</sup> See Klarin, *supra* note 100, at 90 (‘[P]ublic opinion in the former Yugoslavia is influenced very little by what the prosecution and judges are actually doing in The Hague. Public perception is influenced to a much greater extent by the views of the local political, academic and cultural elites towards the ICTY, and by the manner in which the local media depict proceedings at The Hague’).
- <sup>129</sup> For Serbia, see Orentlicher, *supra* note 8, at 18–19. For Bosnia, see J. M. Selimović, ‘Victims and Perpetrators: Local Responses to the ICTY in Bosnia-Herzegovina’, (2010) 57 *European Journal of Anthropology* 50.
- <sup>130</sup> This process is starting in the context of the ICC. On the ICC Law Enforcement Network, see R. Gallmetzer, ‘Prosecuting Persons Doing Business with Armed Groups in Conflict Areas’, (2010) 8 JICJ 947. For the activities of the Registry, see S. Arbia, ‘Proactive Complementarity: A Registrar’s Perspective and Plans’, in Stahn and El Zeidy, *supra* note 6, 52, at 60–6.
- <sup>131</sup> See ICTY Legacy Conference, ‘Assessing the Legacy of the ICTY’, The Hague, 23–4 February 2010, available at [www.icty.org/sid/10293](http://www.icty.org/sid/10293); ‘ICTY Global Legacy’ Conference, 15–16 November 2011, available at [www.icty.org/sid/10405](http://www.icty.org/sid/10405).
- <sup>132</sup> In the ICTY, it is conceptualized as ‘that which the Tribunal will hand down to successors and others.’ It ‘includes, but is not limited to the findings of the Tribunal contained in its judgments, its contribution to the development international law, the records and archives of the Tribunal, its contribution to the rule of law in the former Yugoslavia and its advancement of international justice.’ See ICTY, ‘Assessing the Legacy of the ICTY’, available at [www.icty.org/sid/10293](http://www.icty.org/sid/10293). See also F. Mégret, ‘The Legacy of the ICTY as Seen through Some of its Actors and Observers’, (2011) 3 *GoJIL* 1011–1052.
- <sup>133</sup> See D. Backer, ‘Cross-National Comparative Analysis’, in van der Merwe, Baxter, and Chapman, *supra* note 9, 23, at 66 (‘the current wisdom on how different modes of transitional justice influence the attitudes and behaviour of individuals and communities is based primarily on rough assumptions and anecdotal evidence’).

- <sup>134</sup> See Ivaković and Hagan, *supra* note 9, at 155.
- <sup>135</sup> *Ibid.*, at 156.
- <sup>136</sup> *Ibid.*, at 159.
- <sup>137</sup> See, e.g., Report of the Secretary-General, *supra* note 38, para. 17 (‘Ultimately, no rule of law reform, justice reconstruction, or transitional justice initiative imposed from the outside can hope to be successful or sustainable. The role of the United Nations and the international community should be solidarity, not substitution . . . . The most important role we can play is to facilitate the processes through which various stakeholders debate and outline the elements of their country’s plan to address the injustices of the past and to secure sustainable justice for the future, in accordance with international standards, domestic legal traditions and national aspirations. In doing so, we must learn better how to respect and support local ownership, local leadership and a local constituency for reform, while at the same time remaining faithful to United Nations norms and standards’).
- <sup>138</sup> See, generally, D. Tolbert and A. Kontić, ‘The International Criminal Tribunal for the Former Yugoslavia and the Transfer of Cases and Materials to National Authorities: Lessons in Complementarity’, in Stahn and El Zeidy, *supra* note 6, at 888; O. Bekou, ‘Rule 11 bis: An Examination of the Process of Referrals to National Courts in ICTY Jurisprudence’, (2009) 33 *Fordham ILJ* 723. For a critical appraisal, see A. Chehtman, ‘Developing Bosnia and Herzegovina’s Capacity to Process War Crimes Cases: Critical Notes on a “Success Story”’, (2011) 9 *JICJ* 547.
- <sup>139</sup> In June 2011, the ICTR decided for the first time to transfer an indicted genocide suspect for trial in Rwanda. See *Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11bis, Decision on Prosecutor’s Request for Referral to the Republic of Uganda, 28 June 2011.
- <sup>140</sup> See preamble, ICC Statute, Arts. 1 and 17.

- <sup>141</sup> For a study, see C. Stahn, 'Taking Complementarity Seriously: On the Sense and Sensibility of "Classical", "Positive" and "Negative" Complementarity', in Stahn and El Zeidy, *supra* note 6, at 233; C. Stahn, 'Complementarity: A Tale of Two Notions', (2008) 19 *Criminal Law Forum* 87.
- <sup>142</sup> For a critical account, see J. Snyder and L. Vinjamuri, 'Trials and Errors: Principles and Pragmatism in Strategies of International Justice', (2003) 28 *IS* 5, at 21-5.
- <sup>143</sup> For a survey, see E. A. Witte, 'Putting Complementarity into Practice: Domestic Justice for International Crimes in the Democratic Republic of Congo, Uganda and Kenya', Open Society Justice Initiative, January 2011, available at [www.soros.org/initiatives/justice/articles\\_publications/publications/complementarity-in-practice-20110119/putting-complementarity-into-practice-20110120.pdf](http://www.soros.org/initiatives/justice/articles_publications/publications/complementarity-in-practice-20110119/putting-complementarity-into-practice-20110120.pdf).
- <sup>144</sup> On Kenya, see, International Crisis Group, 'Kenya: Impact of the ICC Proceedings', Africa Briefing No. 84, 9 January 2011, available at [www.crisisgroup.org/en/regions/africa/horn-of-africa/kenya/b084-kenya-impact-of-the-icc-proceedings.aspx](http://www.crisisgroup.org/en/regions/africa/horn-of-africa/kenya/b084-kenya-impact-of-the-icc-proceedings.aspx); C. Alai and N. Mue, 'Complementarity and the Impact of the Rome Statute and the International Criminal Court in Kenya', in Stahn and El Zeidy, *supra* note 6, at 1222. On Sudan, see S. Baldo, 'Sudan: Impact of the Rome Statute and the International Criminal Court', 31 May 2010, RC/ST/V/M. 6, available at [www.icc-cpi.int/iccdocs/asp\\_docs/RC2010/Stocktaking/RC-ST-V-M.6-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Stocktaking/RC-ST-V-M.6-ENG.pdf); R. Cryer, 'Darfur: Complementarity as the Drafters Intended?', in Stahn and El Zeidy, *supra* note 6, at 1097.
- <sup>145</sup> On Colombia, see K. Ambos, 'The Colombian Peace Process (Law 975 of 2005) and the ICC's Principle of Complementarity', in Stahn and Zeidy, *supra* note 6, at 1071; J. Easterday, 'Deciding the Fate of Complementarity: A Colombian Case Study', (2009) 26 *Arizona Journal of International and Comparative Law* 46, at 49-111; on the DRC, see M. Adjami and G. Mushiata, 'Democratic Republic of Congo: Impact of the Rome Statute and the International Criminal Court', RC/ST/V/M.4, 31 May 2010, available at [www.icc-cpi.int/iccdocs/asp\\_docs/RC2010/Stocktaking/RC-ST-V-M.4-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Stocktaking/RC-ST-V-M.4-ENG.pdf); P. Clark, 'Chasing Cases: The ICC and the Politics of State Referral in the Democratic Republic of Congo and Uganda', in Stahn and Zeidy, *supra* note 6, at 1180.
- <sup>146</sup> For a survey of the status of preliminary examinations, see OTP, Report on Preliminary Examinations, 13 December 2001, available at [www.icc-cpi.int/NR/rdonlyres/63682F4E-49C8-445D-8C13-F310A4F3AEC2/284116/OTPreporton-PreliminaryExaminations13December2011.pdf](http://www.icc-cpi.int/NR/rdonlyres/63682F4E-49C8-445D-8C13-F310A4F3AEC2/284116/OTPreporton-PreliminaryExaminations13December2011.pdf).
- <sup>147</sup> See Human Rights Watch, *supra* note 70, at 46 ('The selection of specific cases is not the only determinant of the Court's legacy in a given country .... So too is the ability to communicate its activities in a manner that ensures justice is not only done, but seen to be done in affected communities and which permits victims to exercise their right of participation').
- <sup>148</sup> P. Seils, 'Maximizing the Limited Role of the Prosecutor', in Stahn and El Zeidy, *supra* note 6, at 1012-13.
- <sup>149</sup> For a study, see M. Wierda and M. Otim, 'Courts, Conflict and Complementarity', in Stahn and El Zeidy, *supra* note 6, at 1155.
- <sup>150</sup> See Report of the Secretary-General, *supra* note 38, paras. 15-17, 25, 35-37. On norm dynamics and internalization, see S. Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006); M. Finnemore and K. Sikkink, 'International Norm Dynamics and Political Change', (1998) 52 *IO* 887, at 905. On the Ugandan context, see Nouwen, *supra* note 35, at 1151-4.

- <sup>151</sup> For a critique of law reform through complementarity, see F. Mégret, 'Too Much of a Good Thing? Implementation and the Uses of Complementarity', in Stahn and El Zeidy, *supra* note 6, at 361; K. Heller, 'A Sentence-Based Theory of Complementarity', (2012) 53 Harv. ILJ 202.
- <sup>152</sup> For a study of historical factors underlying the influence and impact of trials, see L. Fletcher, H. Weinstein, and J. Rowen, 'Context, Timing, and the Dynamics of Transitional Justice: A Historical Perspective', (2009) 31 HRQ 163
- <sup>153</sup> See also King and Meernik, *supra* note 28, at 52.
- <sup>154</sup> For a critical account, see J. Subotić, *Hijacked Justice: Dealing with the Past in the Balkans* (2009).
- <sup>155</sup> Based on experiences in Bosnia, Serbia, and Croatia, Subotić argues that 'the domestic public is much more likely to support transitional justice if its political opponents (the other guys) are put on trial', *ibid.*, at 170. For a study of the role of public health, see P. N. Pham, P. Vinck, and H. Weinstein, 'Human Rights, Transitional Justice, Public Health and Social Reconstruction', (2010) 70 *Social Science and Medicine* 98.
- <sup>156</sup> See Ivaković and Hagan, *supra* note 9, at 7.
- <sup>157</sup> See also J. Halpern and H. Weinstein, 'Rehumanizing the Other: Empathy and Reconciliation', (2004) 26 HRQ 561-83.
- <sup>158</sup> See L. E. Fletcher and H. M. Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation', (2002) 24 HRQ 573; V. Peskin, *International Justice in Rwanda and the Balkans* (2008), 243; D. Mendelhoff, 'Truth-Seeking, Truth Telling, and Post-Conflict Peacebuilding: Curb the Enthusiasm?', (2004) 6 *International Studies Review* 355.
- <sup>159</sup> See Bibas and Burke White, *supra* note 26, at 703-4.
- <sup>160</sup> For an account of expressivism, see E. S. Anderson and R. H. Pildes, 'Expressive Theories of Law: A General Restatement', (2000) 148 *University of Pennsylvania Law Review* 1503; M. Drumbl, 'The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law', (2007) 75 *George Washington Law Review* 1165; Drumbl, *supra* note 35, at 17, 175-6. For a broader application in international law, see A. Geisinger and M. A. Stein, 'A Theory of Expressive International Law', (2007) 60 *Vanderbilt Law Review* 77. For a critique of expressivist theory, see M. D. Adler, 'Expressive Theories of Law: A Skeptical Overview', (2000) 148 *University of Pennsylvania Law Review* 1363, at 1369-70.
- <sup>161</sup> See Ivaković and Hagan, *supra* note 9, at 153; Koskenniemi, *supra* note 69, at 11.
- <sup>162</sup> For an argument in relation to the Dutch Supreme Court, see C. J. M. Schuyt, 'De veranderende plaats van de Hoge Raad in de sameleving', in De Hoge Raad der Nederlanden, *De plaats van de Hoge Raad in het huidige staatsbestel* (1988), 297.
- <sup>163</sup> See Jackson, *supra* note 14 ('They have so identified themselves with the philosophies they conceived and with the forces they directed that any tenderness to them is a victory and an encouragement to all the evils which are attached to their names').
- <sup>164</sup> See also Drumbl, *supra* note 35, at 175-6; Bibas and Burke-White, *supra* note 26, at 652. A contemporary illustration is the focus of ICC prosecutorial strategy on specific typologies of violence (i.e. child recruitment in the DRC or electoral violence in Kenya).
- <sup>165</sup> See Damaska, *supra* note 37, at 363.
- <sup>166</sup> See Koller, *supra* note 12, at 1022.
- <sup>167</sup> See also Damaska, *supra* note 37, at 362, who argues that it is necessary to 'show that international criminal justice is desirable despite its presently unavoidable blemish of selectivity'.

- <sup>168</sup> For an examination, see W. Ferdinandusse, *Direct Application of International Criminal Law in Domestic Courts* (2006).
- <sup>169</sup> See, e.g., A. Orié, 'Accusatorial v. Inquisitorial Approach in International Criminal Proceedings', in A. Cassese, P. Gaeta, and J. Jones, *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II (2002), 1439; G. K. Sluiter, 'Trends in the Development of a Unified Law of International Criminal Procedure', in C. Stahn and L. Herik (eds), *Future Perspectives on International Criminal Justice* (2010), 585-99; C. Safferling, *Towards an International Criminal Procedure* (2001); S. Zappala, *Human Rights in International Criminal Proceedings* (2003); C. Schuon, *International Criminal Procedure: A Clash of Legal Cultures* (2010). See also more generally on ideal types, B. Swart, 'Damaska and the Faces of International Criminal Justice', (2008) 6 JICJ 87.
- <sup>170</sup> For an account of 'best practices' in relation to defence issues, see War Crimes Justice Project, *Manual on International Criminal Defence* (2011), available at <http://wcjp.unicri.it/deliverables/manual.php>.
- <sup>171</sup> See King and Meernik, *supra* note 28, at 12.
- <sup>172</sup> Ivaković and Hagan, *supra* note 9, at 81; Damaska, *supra* note 37, at 349.
- <sup>173</sup> See Damaska, *supra* note 37, at 349 ('[A] high priority demand on international criminal courts should be to establish effective lines of communication with local audiences'). For a study, see A.-M. Slaughter, 'A Typology of Transjudicial Communication', (1994-95) 29 URLR 99.
- <sup>174</sup> For caution regarding the 'romanticizing' of 'local' justice responses, see T. Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (2006).

## PROF. DR. CARSTEN STAHN (BORN 1971)



- 2010 - Professor of International Criminal Law and Global Justice, Leiden University Campus The Hague & Faculty of Law
- 2008 - 2010 Associate Professor of International Criminal Law, Leiden University, Programme Director, Grotius Centre for International Legal Studies & Adv. LL.M. Public International Law
- 2007 - 2008 Reader in Public International Law and International Criminal Justice Swansea University, UK
- 2003 - 2007 International Criminal Court Legal Officer, Chambers/Pre-Trial Division
- 2006 PhD Humboldt University, Berlin, Germany (*summa cum laude*)
- 2000 - 2003 Max Planck Institute for Comparative Public Law and International Law, Heidelberg Research Fellow
- 2002 - 2003 LL.M., New York University (School of Law)
- 2002 2<sup>nd</sup> State Examination in Law, Rheinland-Pfalz, Germany
- 2000 1<sup>st</sup> State Examination in Law, Humboldt University Berlin

- 1997 - 1999 Research Assistant at the Institute of European Law and Public International Law, Humboldt University Berlin
- 1994 - 1996 Maîtrise en droits français et allemand, Paris I (Panthéon-Sorbonne)
- 1992 - 1996 LL.M., University of Cologne (School of Law), Cologne, Germany

Prof Dr Carsten Stahn is Programme Director of the Grotius Centre for International Studies, The Hague. He is author of *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (Cambridge University Press, 2008/2010) which received the *Ciardí Prize* 2009 of the International Society for Military Law and the Law of War. He has published numerous articles on international criminal law and transitional justice, and edited several collections of essays in the field (*The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge University Press, 2011, *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff, 2009, *Future Perspectives on International Criminal Justice*, T.M.C. Asser Press - Cambridge University Press, 2010). He directs two large research projects on 'Jus Post Bellum' (*Vidi*-project) and 'Post-Conflict Justice and Local Ownership', funded by the Netherlands Organization for Scientific Research (NWO). He is Senior ICC editor of the *Leiden Journal of International Law*, Executive Editor of the *Criminal Law Forum* and Correspondent of the *Netherlands International Law Review*. His work has been cited in the jurisprudence of the ICC, the ICJ and the European Court of Human Rights.

