

# Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity

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## Abstract

Over the past two decades, international criminal law has been increasingly institutionalized and has become one of the dominant frames for defining issues of justice and conflict resolution. Indeed, international criminal law is often presented as the road towards global justice. But the rise of international criminal law and its equation with global justice come with a profound risk: alternative conceptions of justice can be marginalized. Based on field work in Uganda and Sudan, we present five examples of alternative conceptions of justice that in fact have been side-lined: the restoration of relationships, putting an end to on-going violence, redistribution, non-criminal law forms of punishment and equality. However, international criminal law's monopolization of discourses of justice threatens not only alternative conceptions of justice, but also international criminal law itself. It frustrates one of its main aims: the protection of diversity.

## 1. Monopolizing Global Justice

Human longing for justice stands in a paradoxical relation to the institutional practices designed to satisfy this desire. While the ideals of justice need institutional translation in order to be effective, the very same institutionalization may corrupt the ideals that we hold dear. As Jack Balkin has observed:<sup>1</sup>

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<sup>1</sup> For a more elaborate treatment of Balkin's position in relation to cosmopolitanism see R. Pierik and W. Werner (eds) *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (Cambridge: Cambridge University Press, 2010).

Human law, culture, and convention are never perfectly just, but justice needs human law, culture, and convention to be articulated and enforced. There is a fundamental inadequation between our sense of justice and the products of culture, but we can only express this inadequation through the cultural means at our disposal...Hence, our laws are imperfect not because they are bad copies of a determinate Form of justice, but because we must articulate our insatiable longing for justice in concrete institutions, and our constructions can never be identical with the longings which inspire them.<sup>2</sup>

The implication is that because positive laws and institutions are imperfect articulations of justice at best, they should always be open to contestation and revision. Specifically, existing institutions need to leave room for alternative articulations of justice and thus refrain from attempts to monopolize discourses on justice.

The caution against the monopolization of discourses on justice is even more pertinent when claims are made in the name of 'global justice'. Adding the adjective 'global' implies that something bigger and higher is at stake than in the case of 'local', 'ordinary' or 'national' justice. In the case of 'global' justice, the issues concerned transcend the values, institutions and interests of directly affected communities. The promotion of global justice is invoked as a justification for interventions by outside agents acting in the name of the values and interests of a cosmopolitan community. However, the global society in which global justice is supposed to operate is even more pluralist than its domestic or subnational counterparts. Within the pluralist global society, numerous articulations of justice coexist, overlap and compete.<sup>3</sup> Conceptions of global justice that effectively silence or marginalize alternative interpretations of what is just are therefore deeply problematic (just like 'non-global' conceptions of justice that do the same). Defining socio-political issues in terms of 'global' requires openness to the various alternative articulations of justice that could be longed for, experienced and struggled for in the situations at hand.

In theory, international criminal law and the aim of protecting diversity, including diversity in conceptions of justice, go hand in hand. For one of the justifications for the international criminalization of certain conduct is that this conduct amounts to, in Hannah Arendt's famous words, 'an attack on human diversity as such, that is, upon a characteristic of the "human status" without which the very words "mankind" or "humanity" would be

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<sup>2</sup> J. Balkin, 'Being Just With Deconstruction', available at: <http://www.yale.edu/lawweb/jbalkin/articles/beingjust1.htm> (accessed July 24, 2012), at 1.

<sup>3</sup> For an analysis of pluralism as moral and political value see, *inter alia*, K. Ferguson, *William James: Politics in the Pluriverse* (Blue Ridge Summit: Rowman & Littlefield Publishers, 2007).

devoid of meaning'.<sup>4</sup> To Arendt, plurality — 'the fact that men, not Man, live on the earth and inhabit the world' — is so essential because all politics and human action are conditional upon it: 'While all aspects of the human condition are somehow related to politics, this plurality is specifically the condition — not only the *conditio sine qua non*, but the *conditio per quam* — of all political life.'<sup>5</sup> In this sense, the quest for justice also presupposes plurality, because articulations of justice can be questioned, challenged and revised only through human (political) action. Plurality, therefore, is essentially related to what it is to be human: 'Plurality is the condition of human action because we are all the same, that is, human, in such a way that nobody is ever the same as anyone else who ever lived, lives or will live.'<sup>6</sup> In sum, for Arendt, crimes against humanity are international crimes because they transcend domestic boundaries; and they transcend domestic boundaries because they are an attack on human diversity as such. Crimes against humanity threaten the very conditions for politics and human action by corrupting the idea that the world is a place to be shared by peoples living in a multitude of cultures, habits, identities and indeed, conceptions of justice.<sup>7</sup>

Of the various justifications for international criminal justice, the Preamble of the Rome Statute establishing and governing the permanent International Criminal Court (ICC) also reflects the rationale of protecting diversity, acknowledging as it does the existence of a pluralistic humanity in the form of 'peoples (...) united by common bonds, their cultures pieced together in a shared heritage', while expressing concern 'that this delicate mosaic may be shattered at any time' by 'unimaginable atrocities that shock the conscience of mankind'. At least part of the rationale for the establishment of the ICC is thus to achieve accountability for crimes that constitute an attack on the idea of a pluralistic humanity. Through the prosecution of some of the crimes within its jurisdiction, the ICC is to promote and protect diversity.

Arendt's justification for international criminalization of certain conduct is one among many and cannot be regarded as *the* justification for international criminal law.<sup>8</sup> However, its

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<sup>4</sup> H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin, 1964), at 268-269. For a discussion of Arendt's viewpoints see D. Luban, 'Hannah Arendt as a Theorist of International Law', 11(3) *International Criminal Law Review* (2011), 621-641.

<sup>5</sup> H. Arendt, *The Human Condition* (2<sup>nd</sup> ed., Chicago: University of Chicago Press, 1958), at 7.

<sup>6</sup> *Ibid.*, 8.

<sup>7</sup> For this argument see also Luban, *supra* note 4.

<sup>8</sup> International crimes have developed over time, and different crimes (for instance, war crimes, crimes against humanity, genocide) have had different justifications, at different times. Even for one and the same category of international crimes, different authors have supported different theories. With respect to crimes against

acceptance as *one* of the rationales for international criminal law denotes important boundaries for international criminal law itself. It implies that international criminal law, irrespective of its other rationales, should itself never undermine the fundamental aim that it is meant to promote: the protection of diversity.

To be sure, we do not directly attribute this argument to Arendt, for whom the need to protect human diversity mainly functioned as a justification for international criminal law.<sup>9</sup> However, now international criminal law has established itself as one of the dominant frames through which political conflicts are read, it is necessary to rethink the relation between international criminal law and the need to protect human diversity. May it also be the case that international criminal law is endangering the very plurality it is meant to protect?

We argue that there are indeed signs that international criminal law runs the risk of undermining one of its own foundations. This paradoxical phenomenon is the end-result of four inter-related developments. First, international criminal tribunals are constantly confronted with the gap that Jack Balkin identified between the ideals of justice, on the one hand, and the institutional and political realities in which they operate, on the other. They have been created to satisfy a longing for global accountability, redress for victims and fairness for accused, but in practice only part of the world is called to account, victims find little redress in international criminal proceedings<sup>10</sup> and accused's fair trial rights suffer from

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humanity, for instance, Renzo, in contrast to Arendt, has argued that it is the inhumane nature of certain crimes that turns them into matters of concern for international criminal justice; what counts is the 'the violation of a value, humanness, which is offended by these crimes'. (M. Renzo, 'Crimes Against Humanity and the Limits of International Criminal Law', 31 *Law & Philosophy* (2012) 443–476, at 449). For a defense of international criminal law along the lines of Hannah Arendt see for example Luban *supra* note 4; L. May, *Crimes Against Humanity: A Normative Account* (Cambridge: Cambridge University Press, 2004). For a recent reading of 'crimes against humanity' inspired *inter alia* by Arendt see Harmen van der Wilt, 'Crimes against Humanity: A Category *hors concours* in (International) Criminal Law?', in B. van Beers, L. Corrias and W. Werner (eds), 'Humanity Across International Law and Bio-Law' (Cambridge: Cambridge University Press, 2013) 25-42.

<sup>9</sup> This is not to say that Arendt ignored the limits of international criminal justice. She fiercely opposed, for example, courts engaging in business other than rendering justice, such as recording history (see Arendt, *Eichmann in Jerusalem*, *supra* note 4, at 251). Moreover, as for example Seyla Benhabib has pointed out, Arendt 'is very sensitive that law, whether domestic or international, be seen by a self-governing people to be "its" law, and not be imposed by other instances'. S. Benhabib, 'International Law and Human Plurality in the Shadow of Totalitarianism: Hannah Arendt and Raphael Lemkin', 16(2) *Constellations* (2009) 331-350, at 344. The latter point comes close to the argument we make in this article.

<sup>10</sup> See S. Kendall and S. Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood', 76(3 and 4) *Law & Contemporary Problems* (2013) 235-262.

the embrace of illiberal criminal doctrines.<sup>11</sup> The reality produced by tribunals created to serve international justice (necessarily) falls short of the ideal of justice.

Secondly, the field of international criminal law — by which we mean international criminal tribunals and international criminal law scholars, states, international organizations and non-governmental organizations promoting international criminal justice — has responded to this harsh reality mostly by working on *more* international criminal law. With a view to overcoming the shortcomings, the field has argued for a wider personal and territorial jurisdiction of international criminal tribunals; more victim-oriented arrangements within international criminal law; and, to a lesser extent, more work on a fair procedure for the accused. International criminal law's limitations are thus neither accepted nor considered a reason to use less of it. Instead, the limitations are fought with attempts to have more and higher-quality international criminal law. Consequently, the search for justice is more and more institutionalized, and specifically, more and more tribunalized: international criminal tribunals are increasingly present and influential.<sup>12</sup>

The third development is that, partly as a consequence of this tribunalization, international criminal law has become an increasingly popular frame for defining issues of justice. The framing of political issues in terms of international criminal law already occurred before the spread of international tribunals, as is illustrated by the 'crime of apartheid'. However, with international tribunals enforcing the law, international criminal law has turned into an even more powerful frame to articulate injustices and to pursue political causes. Whilst the tribunals' physical enforcement powers may still be weak, its normative power holds sway all over the globe: irrespective of any actual court proceedings, those targeted by international criminal law are branded as enemies of mankind, whereas those who can side with the enforcement of international criminal law can rebrand themselves as friends of humanity.<sup>13</sup> The importance of international criminal tribunals thus goes way beyond the few cases that they try. As a result of the tribunals' work, international criminal law has become an important frame for the interpretation of the world.

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<sup>11</sup> See D. Robinson, 'The Identity Crisis of International Criminal Law', 21(4) *Leiden Journal of International Law* (2008) 925-963.

<sup>12</sup> On 'tribunalism' in international law generally, see T. Skouteris, 'The New Tribunalism: Strategies of (De)Legitimation in the Era of International Adjudication', XVII *Finnish Yearbook of International Law* 2006 (2006) 307-356. Skouteris's 'tribunalism' refers to 'international law's fascination with international courts and tribunals' generally. We focus on international criminal tribunals.

<sup>13</sup> S. Nouwen and W. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', 21(4) *European Journal of International Law* (2010) 941-965.

It is thus that in the past two decades complex questions of armed conflict, identity politics and wealth distribution have been redefined in the expert vocabulary of international criminal law. International criminal law has become so successful that all kinds of parties have framed their political causes in its terms. Greek citizens have cast their grievances about austerity measures in the mould of international criminal law;<sup>14</sup> electoral candidates have branded their opponents as international criminals and rebel movements have painted their opponents as *genocidaires*.<sup>15</sup> Without claiming that international criminal law is the only game in town in world politics today, let us give a few recent examples of the (re)framing of political issues in terms of international criminal justice. The Security Council referred the conflict in Darfur to the ICC;<sup>16</sup> so did it with respect to Libya in the Arab Spring.<sup>17</sup> The Government of Uganda for its part adopted the frame of international criminal law to redefine its two-decade old war against the Lord's Resistance Army.<sup>18</sup> Presidential candidate Alassane Ouattara in Côte d'Ivoire confirmed, at a time that his own presidency was still contested, the Ivorian acceptance of the ICC's jurisdiction to deal with violence surrounding the elections that he claimed to have won.<sup>19</sup> Advocacy groups and western states alike have been lobbying for a referral of the situation in Syria to the ICC. All these situations are (at least partially) framed in the language, concepts and structure of international criminal law.

At times international criminal law is even presented as an indispensable frame. Take the way in which the International Tribunal for the former Yugoslavia presents itself at its own website:

The Tribunal has laid the foundations for what is now *the accepted norm* for conflict resolution and post-conflict development across the globe, specifically that leaders

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<sup>14</sup> See 'Report/Request for the Initiation of a Proprio Motu Investigation', <http://www.abelmartin.com/tj/sokobanJS/sokoban-jd.blogspot/Complaint.pdf>, the petition 'Save Greece! Save the Cradle of Western Civilization!' (2012) ('As a citizen of the world, I support the legal battles of the Greek people and ask the Prosecutor of the International Criminal Court (ICC) to immediately activate procedures, to investigate the crimes being perpetrated in Greece and bring to trial anybody responsible for them.') and M. Lowen, 'Greeks Seek Austerity Trial at The Hague', BBC, 24 April 2012, <http://www.bbc.co.uk/news/world-europe-17811153> (visited 6 November 2014).

<sup>15</sup> Nouwen and Werner, *supra* note 13, at 956-957.

<sup>16</sup> SC Res. 1593 (2005).

<sup>17</sup> SC Res. 1970 (2011).

<sup>18</sup> See Government of Uganda, Referral of the Situation Concerning the Lord's Resistance Army submitted by the Republic of Uganda (16 December 2003) and S. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: Cambridge University Press, 2013) Chapter 3.

<sup>19</sup> Memorandum to the President of the ICC and the United Nations High Commissioner for Human Rights from counsel for Alassane Ouattara, *Situation in Côte d'Ivoire, Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-129-Anx51-tENG, 26 October 2012.

suspected of mass crimes will face justice. The Tribunal has proved that efficient and transparent international justice is possible.

The Tribunal has contributed to an indisputable historical record, combating denial and helping communities come to terms with their recent history.<sup>20</sup>

The Tribunal openly takes pride in having established what it regards to be *the* accepted norm for dealing with conflicts and mass atrocities.

The fourth development is that many of these situations have been framed not merely as a matter of international criminal law, international criminal justice, or justice more generally, but as a matter of ‘global justice’. The Ugandan government referred the ‘situation concerning the Lord’s Resistance Army’ to the ICC, stating that it turned ‘to the newly established International Criminal Court and its promise of global justice’.<sup>21</sup> As illustrated by the quotes in the Introduction to this Special Issue, proponents of international criminal tribunals in particular often equate the enforcement of international criminal law with the pursuit of global justice. In this way, some issues are elevated to a level beyond the local, the national and even the inter-national, thus paving the way for outside interventions in the name of a more encompassing global community.

In sum, in response to its shortcomings, international criminal law is increasingly expanded and institutionalized. As a result of that institutionalization, socio-political problems are more and more framed as matters of international criminal law, while international criminal law is ever more presented as the road to global justice.

## **2. The Dark Side of the Monopolization of Global Justice**

This process of increased institutionalization, framing of issues as matters of international criminal law and equating international criminal law with ‘global justice’ is consequential. It runs the risk of monopolizing the debate about global justice by international criminal law. The term ‘global justice’ may still have a broader meaning in the context of social struggles against poverty and for access to basic services, but in response to armed conflict and so-called mass atrocities, international criminal law has increasingly owned up the term.

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<sup>20</sup> <http://www.icty.org/sections/AbouttheICTY> (visited 6 November 2014) (emphasis added).

<sup>21</sup> Government of Uganda, Referral, *supra* note 18, 3-4.

The dark side of the rise, institutionalization and framing in terms of international criminal law, and its equation with global justice, is thus that alternative conceptions of global justice are in danger of being pushed to the margins. What Arundhati Roy says about the impact of globalization on the visibility of people, also holds for the rise of international criminal law with respect to alternative conceptions of justice:

... a light which shines brighter and brighter on a few people and the rest are in darkness, wiped out. They simply can't be seen. ... you stop seeing something and then, slowly, it's not possible to see it. It never existed and there is no possibility of an alternative.<sup>22</sup>

Just like the institutionalization of a particular meaning of development silences and disadvantages much of the world's population,<sup>23</sup> the institutionalization of global justice through international criminal tribunals potentially marginalises alternative conceptions of justice.<sup>24</sup>

The monopolization of debates about global justice by international criminal law thus does the opposite of what the gap between ideas of (global) justice and existing institutions requires, namely protecting openness towards alternative understandings of what justice means. And when the rise of international criminal law results in a marginalization of other articulations of justice, it risks corrupting one of the very ideals that international criminal law is meant to protect.

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<sup>22</sup> Arundhati Roy in an interview with M. Bunting, 'Dam Buster', *Guardian*, 28 July 2011.

<sup>23</sup> A. Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999).

<sup>24</sup> We are not the first to point to the possible detrimental effects of international criminal law on alternative conceptions of justice or of equating international criminal law with global justice. With respect to the former, Mark Drumbl has already observed how the transplant of international law to the domestic level leads to the 'squeezing out of local approaches that are extralegal in nature, as well as those that depart from the methods and modalities dominant internationally'. (See M. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge; New York: Cambridge University Press, 2007) at 122. See also chapters 5 and 7). With respect to the latter, Adam Branch has argued: 'Now, if the ICC were conceived as simply a technical mechanism for use in specific circumstances, there would be less of a problem. The problem, however, results from the ICC's effective monopolization of the language of global justice in Africa. Thus, there is a vast regime of institutions and organizations engaged in a massive pedagogical project trying to build support for the ICC as the exclusive arbiter of global justice. It is precisely through the ICC's mechanisms for victims' "participation" and "empowerment" that the Court restricts people's concepts of injustice and justice to those provided by the ICC and thus to put entire forms of domination, violence, and inequality beyond the scope of justice. This pedagogical "empowering" project thus furthers the management of Africa in the service of Western political and economic domination through the very discourse of global justice. The irony is that the discourse of global justice is uniquely positioned to challenge those forms of Western domination and international inequality, and so the ICC ends up impoverishing what should be the radical and emancipatory language of global justice.' (See A. Branch, 'What the ICC Review Conference Can't Fix' (2010), <http://africanarguments.org/2010/03/what-the-icc-review-conference-can%E2%80%99t-fix/> (visited 6 November 2014)). See also S. Moyn, 'Of Deserts and Promised Lands: The Dream of Global Justice', *The Nation* (19 March 2012).



### 3. Alternative Conceptions of Justice

We give five examples of possible alternative conceptions of justice<sup>25</sup> and illustrate how with the increasing equation of international criminal law with global justice, it has become more difficult for political groups to prioritise diverse conceptions of justice in a way that does not put international criminal law on top.

The five examples became apparent during research in Uganda and Sudan. Against this background, three preliminary clarifications are in place. First, we present these examples as alternative conceptions of ‘justice’ because they were presented as such, that is to say, as forms of ‘justice’. We intentionally refrain from adopting a fixed definition of justice. Indeed, our argument is based on the recognition that justice is an inherently political concept,<sup>26</sup> the meaning of which is and must be constantly subject to political contestation.

Secondly, we present neither of these alternative conceptions as inherently better than any of the other conceptions, including international criminal law. Recognition of the aim of protecting diversity should foreclose attempts to monopolise or close-off discourses on justice by invoking ‘local’ as presumably more ‘authentic’ articulations of justice just as much as it should foreclose such attempts by the invocation of international criminal law.<sup>27</sup>

Finally, it must be stressed that our argument is not a cultural relativistic one. We do not argue that the explanation for the alternative conceptions of justice is found in cultural differences; the alternative conceptions of justice that we discuss probably exist, to a greater or lesser extent, in all societies. How such societies prioritise these conceptions of justice will depend on the context. For instance, below we show how the Acholi, an ethnic group in northern Uganda, opposed ICC action against the Lord’s Resistance Army (LRA), at least partially on the ground that international criminal justice does not amount to ‘justice’ and that the justice they prefer is a justice that restores rather than punishes. However, the same people criticized the ICC for not investigating and prosecuting state actors; for state actors,

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<sup>25</sup> We do not claim to provide an exhaustive overview here — there may of course be more conceptions of justice. Our attempt is to sketch some prevailing conceptions of justice we encountered in our own field work. Nor do we claim that the boundaries of the conceptions of justice discussed here are water tight: many of the conceptions are overlapping. Our aim is to provide an overview of different emphases in conceptions of justice.

<sup>26</sup> See also M. Koskenniemi, ‘Speaking the Language of International Law and Politics’, keynote address at ‘The Politics of Justice: From a Human Rights Revolution to Global Justice?’, 12 October 2012 (‘Politics is about different conceptions of justice, and justice is inherently political’.)

<sup>27</sup> For a critical analysis of the invocation of ‘local’ justice, see T. Allen, ‘The International Criminal Court and the Invention of Traditional Justice in Northern Uganda, (107) *Politique Africaine* (2007) 147-166.

ICC-style justice was considered appropriate. Whether or not a particular action is considered as a form of ‘justice’ thus depended on the person’s relationship to the recipient of that ‘justice’, namely whether the person was considered part of the community or not.<sup>28</sup> Similarly, views on international criminal justice changed over the years. When the LRA was still in northern Uganda and a direct threat to people’s security, many Acholi criticized ICC-style justice for the LRA. Now the LRA is no longer in northern Uganda, fewer Acholi vehemently oppose this style of justice, simply because it is less directly relevant to them. Whether in northern Uganda, Sudan or anywhere else in the world, context matters for how justice is defined.

### ***A. Alternative Conception I: Restoration of Relationships***<sup>29</sup>

The first example of an alternative conception of justice is the most radical. It suggests not just that there are *alternative* concepts of justice, but even that international-criminal-style justice does not resonate with everyone as amounting to ‘justice’. In discussions about the mechanisms of the Acholi to address wrongs, one Ugandan explained that the term ‘justice’ does not exist as an Acholi notion.<sup>30</sup> The term used to cover the English word ‘justice’ means ‘correct judgment’ or ‘interpretation’.<sup>31</sup> More relevant to the Acholi experience of justice is *roco wat*, which means ‘to restore relationships’.<sup>32</sup> Where an official aim of international criminal justice is to incapacitate and to exclude, Acholi justice ceremonies are tailored to including, focused as they are on restoring relationships within the community. Essential to such restoration are community rituals and compensation.

Lobbying against ICC involvement in northern Uganda, Acholi leaders thus dismissed the type of justice done by the ICC. One religious leader, for instance, argued:

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<sup>28</sup> See also, and more elaborately, H. Porter, *After Rape: Justice and Social Harmony in Northern Uganda* (PhD thesis, London School of Economics and Political Science), [http://etheses.lse.ac.uk/717/1/Porter\\_After\\_rape\\_2013.pdf](http://etheses.lse.ac.uk/717/1/Porter_After_rape_2013.pdf) (visited 7 November 2014).

<sup>29</sup> This section heavily relies on S. Nouwen, *Complementarity in the Line of Fire*, *supra* note 18, at 141-159.

<sup>30</sup> Nouwen’s interview with an expert, Gulu, September 2008. On different understandings of the concept ‘justice’, see also C. Dolan, S. Tamale and J. Oloka-Onyango, ‘Prosecuting Crimes or Righting Wrongs: Where Is Uganda Heading To?’ (Press Release, Refugee Law Project, 11 August 2009).

<sup>31</sup> Nouwen’s interview with an expert, Gulu, September 2008.

<sup>32</sup> *Ibid.* The preference for the restoration of relationships matters especially for relationships within the community; other justice mechanisms have been considered more appropriate for people outside the community. See H. Porter, *After Rape*, *supra* note 28, at 13-15.

The court system is justice through punishment. The offender and offended are put aside. This leads to polarization which will lead to death.<sup>33</sup>

Instead, the Acholi leaders emphasized the merits of their own justice and reconciliation mechanisms.<sup>34</sup>

To some extent, this advocacy for an alternative conception of justice was successful: donors provided funding for the organization of Acholi justice and reconciliation events and one of the mechanisms, the *mato oput* ceremony ('drinking the bitter root') became not only part of the national vocabulary, but also gained international attention.<sup>35</sup> Scholars, international lawyers and transitional-justice activists visited northern Uganda to study the mechanisms.

However, Acholi justice and reconciliation mechanisms did not succeed in becoming an equal alternative to the framework of international criminal law. Since the ICC intervention, international criminal law was the international point of reference for 'justice' in Uganda. Acholi justice and reconciliation mechanisms were thus evaluated from the perspective, and within the framework, of ICC-style justice. More specifically, the question was whether the Acholi mechanisms could be used to challenge the admissibility of the Ugandan case before the Court, on the ground of the principle of complementarity, according to which domestic investigations and prosecutions enjoy primacy to the ICC.<sup>36</sup> International human rights NGOs who visited northern Uganda to assess the quality of Acholi justice from the perspective of ICC-style justice advised the Acholi leaders: 'If you want traditional justice to be credible, you'll have to adapt it so that it can deal with war crimes and crimes against humanity'.<sup>37</sup> In order to deal with international crimes, so it was argued, local justice<sup>38</sup> had to be transformed from being communal to individual, to mete out punishment

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<sup>33</sup> Interview with a religious leader, Kitgum, September 2008.

<sup>34</sup> See Nouwen, *Complementarity in the Line of Fire*, *supra* note 18, chapter 3 and T. Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London; New York: African Arguments, Zed Books, 2006).

<sup>35</sup> See, for instance, M. Lacey, 'Atrocity Victims in Uganda Choose to Forgive', *New York Times*, 18 April 2005, and B. Afako, 'Traditional Drink Unites Ugandans', *BBC Focus On Africa* magazine, 29 September 2006.

<sup>36</sup> Rome Statute of the International Criminal Court, Rome, 17 July 1998, 2187 UNTS 90, tenth preambular recital and arts 1 and 17.

<sup>37</sup> Nouwen's interview with an expert, Gulu, September 2008, citing international criminal justice experts commenting on whether traditional justice in northern Uganda meets ICC standards.

<sup>38</sup> Local justice practices are sometimes also referred to as 'informal', 'alternative' or 'traditional' justice. All these terms are somewhat misleading. 'Informal' is incorrect in that these mechanisms often have formal procedures, albeit not always codified (see J. Quinn, 'Comparing Formal and Informal Mechanisms of Acknowledgement in Uganda' (International Studies Association Annual Meeting, San Diego, 23 March 2006)).

rather than provide compensation, to focus on the perpetrator instead of the victim, and to turn cleansing ceremonies into accountability mechanisms. For his part, an ICC judge, indeed the Ugandan judge, publicly stated:

Crimes against humanity, genocide, aggression against other states and war crimes are internationally condemned and cannot be tried by traditional courts but by the ICC ... You cannot expect someone who caused the death of 100 people to be tried in a traditional court if you are looking for justice to be done ... You must convince the international community that justice was done and that the punishment is proportionate with the crime.<sup>39</sup>

When crimes have been committed that ‘shock the conscience of mankind’ the primary concern is thus not to discover what conceptions of justice prevail in the communities that have been directly victimized (not just by the crimes, but also more generally by the conflict in the context of which the crimes took place). Rather, when an international criminal court is involved, the primary concern becomes ‘convinc[ing] the international community that justice [is] done’, that is, that the form of justice preferred by the ‘international community’ is done. Contrasted with the ICC’s ‘global justice’, other conceptions of justice all of a sudden appear as particular, local and traditional. Such traditions are accepted as forms of justice *in addition to* international criminal justice. But as *alternatives to* international criminal justice they are accepted only if they live up to the apparently ‘de-localized’, ‘modern’ and most of all ‘higher’ standards of ‘global justice’ applied by the ICC.

What is more, in order for alternative conceptions of justice to be heard as alternatives to international criminal justice, they must be articulated in the vocabulary of international criminal justice. Take for example the way in which the LRA delegation at the Juba peace talks advocated for Acholi forms of justice. Apparently aware of what Balakrishnan Rajagopal calls the ‘somewhat tragic reality that resistance must work, to some extent, within

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‘Alternative’ suggests that another mechanism is the standard, whereas for many people it is not. Moreover, official and local justice mechanisms are often complementary and not alternative. ‘Traditional’ may raise the incorrect impression of a static mechanism, whereas local justice mechanisms are alive, contested like other cultural practices and hence dynamic (see also E. Baines, ‘The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda’, 1(1) *International Journal of Transitional Justice* (2007) 91-114, at 96, and T. Harlacher, *Traditional Ways of Coping in Acholi: Cultural Provisions for Reconciliation and Healing from War* (Caritas Gulu Archdiocese, 2006), at 9-10). Moreover, some scholars have contested that these mechanisms ever ‘traditionally’ existed in the way that they are now propagated (see A. Branch, *Displacing Human Rights: War and Intervention in Northern Uganda* (New York: Oxford University Press, 2011), Chapter 5). With these caveats, this article uses the term ‘local’ justice practices because it acknowledges their pluriformity, but at times the article also refers to ‘traditional justice’, since relevant peace agreements and some Acholi leaders use this term.

<sup>39</sup> J. Maseruka, “‘Traditional Justice Not Applicable to War Suspects’”, *New Vision*, 30 June 2009.

the parameters established by that which is being resisted',<sup>40</sup> the LRA delegation insisted that the peace agreement described traditional justice in terms used by proponents of international criminal justice. Resisting the ICC, preferring Acholi forms of justice, and aware that the 'international community' had to be convinced of the merits Acholi justice, it insisted that the description of Acholi practices used the vocabulary of international criminal law. Thus, at the delegation's instigation, 'full accountability' was added to the definition of each and every practice listed in the Accountability and Reconciliation Agreement.<sup>41</sup> It is thus that the definition of *mato oput* in the peace agreement reads: 'the traditional ritual performed by the Acholi *after full accountability* and reconciliation has been attained between parties formerly in conflict, *after full accountability*.'<sup>42</sup> The deliberate duplication suggests that in the LRA delegation's view it could not be stressed enough that local justice practices, like the ICC, pursue 'full accountability'. Restorative justice practices are thus redefined in the language of international criminal law.

### ***B. Alternative Conception II: Ending Ongoing Violations***

A second example of an alternative conception of justice is that of *ending ongoing violations*, which usually means ending the conflict in the context of which the crimes take place. Thus, when a Darfurian who had stated 'We need NATO, the EU and the ICC' was asked why Darfurians needed the ICC, the conversation continued as follows:

For justice.

*What is 'justice'?*

Justice is the end of the war.

*How is the ICC going to end the war?*

By arresting President Bashir and his party.

*And then?*

Once there is peace in Darfur, the *ajaweed* [respected elders] will do *real* justice.

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<sup>40</sup> B. Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge: Cambridge University Press, 2003), at 10. See also S. Wastell, 'Presuming Scale, Making Diversity: On the Mischief of Measurement and the Global: Local Metonym in Theories of Law and Culture', 21(2) *Critique of Anthropology* (2001) 185-210, at 194.

<sup>41</sup> Nouwen's interview with a member of the Juba mediation team, Kampala, September 2008.

<sup>42</sup> See Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, Juba, 29 June 2007, clause 1 para. 9 (emphases added). See also clause 1 para. 8: "'Kayo Cuk" refers to the traditional accountability and reconciliation processes practiced [*sic*] by the Langi communities *after full accountability* and reconciliation has been attained between parties formerly in conflict, *after full accountability*' (emphases added).

*What is real justice?*

Real justice is done through *judiya* [a mix of mediation and arbitration between groups, resulting in compensation and arrangements for future co-existence].<sup>43</sup>

For this Darfurian ‘real justice’ focuses on restorative justice. The intermediate form of justice is an end to the conflict. To some extent, international criminal law indeed aims at ‘ending’: the aims of deterrence, prevention and incapacitation of offenders focus on ending crimes. However, ending crimes is different from ending conflict. More fundamentally, deontological in character, international criminal justice is enforced even if in a particular situation it does *not* appear to prevent further crimes or stop ongoing ones. In this context it is worthwhile to reconsider the ICTY’s claim that ‘[t]he Tribunal has laid the foundations for what is now the accepted norm for conflict resolution’. The question arises in what ways international criminal justice *resolves* conflicts. Did the ICTY resolve the conflict in Bosnia? Or did the Dayton agreement begin doing so, *in spite of* the ICTY? According to one writer on the Yugoslav peace process, the lesson from the former Yugoslavia is that ‘quest for justice for yesterday’s victims of atrocities should not be pursued in such a manner that it makes today’s living the dead of tomorrow. ... The pursuit of criminals is one thing. Making peace is another.’<sup>44</sup> In other places of the world, too, we have seen that arrest warrants that are difficult to enforce may make conflict more intractable, and thus may make the resolution of conflict, necessary for the ending of crime, more difficult.<sup>45</sup>

To the extent that the idea ‘no peace without criminal justice’ underpins international criminal law, it does so as a principled idea (an idea about right and wrong which cannot be easily resolved with reference to evidence) rather than as a causal idea (an idea about cause and effect, supported by evidence).<sup>46</sup> When international arrest warrants in fact make the conclusion of a peace agreement more difficult and therefore in effect lead to a continuation of the conflict and crimes, the pursuit of one type of justice (the enforcement of international criminal law) may thus prevent the realization of another type (the end of a conflict and the crimes committed in the context of that conflict).

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<sup>43</sup> Nouwen’s Interview, Nyala, December 2008, first quoted in S. Nouwen, ‘Justifying Justice’, in J. Crawford and M. Koskeniemi (eds), *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012) 327-351, at 330.

<sup>44</sup> Anonymous, ‘Human Rights in Peace Negotiations’, 18 *Human Rights Quarterly* (1996) 249-258, at 258.

<sup>45</sup> More elaborately, see S. Nouwen, ‘The International Criminal Court: A Peacebuilder in Africa?’, in D. Curtis and G.A. Dzinesa (eds), *Peacebuilding, Power and Politics in Africa* (Athens: Ohio University Press, 2012) 171-192.

<sup>46</sup> See S. Khagram, J.V. Riker and K. Sikkink (eds), *Restructuring World Politics: Transnational Social Movements, Networks and Norms* (Minneapolis, London: University of Minnesota Press, 2002), at 14.

It was for this reason that in March 2005, six Acholi community leaders from northern Uganda went to The Hague to try and convince the ICC Prosecutor to discontinue his proceedings in northern Uganda.<sup>47</sup> The Acholi leaders stated that they had asked the Prosecutor ‘that he is mindful of our traditional justice and reconciliation process and that he is also mindful of the peace process and dialogue’.<sup>48</sup> On his part, the Prosecutor echoed that he was ‘mindful of traditional justice and reconciliation processes and sensitive to the leaders’ efforts to promote dialogue between different actors in order to achieve peace’.<sup>49</sup>

The Government of Uganda criticized the encounter between the Prosecutor and the Acholi leaders, arguing as it did that it was not the role of community leaders internationally to take political positions that went against that of the Government.<sup>50</sup> As a compromise, a new delegation was sent to The Hague which included, in addition to Acholi community leaders, many people affiliated with the Government. This time, the Prosecutor and the Ugandan delegation agreed on a joint statement and proclaimed:

The Lango; Acholi; Iteso and Madi community leaders and the Prosecutor of the ICC have agreed to work together as part of a common effort to achieve justice and reconciliation, the rebuilding of communities and an end to the violence in Northern Uganda.<sup>51</sup>

Seemingly similar to the first statement, this statement was fundamentally different in that it no longer referred to the one issue on which the ICC and the local leaders disagreed: the importance of a peace process. The Acholi leaders had insisted that a peace process was essential for ongoing violations to end, and thus for justice. But this conception of justice was eliminated from the joint press statement released by the ICC.

Almost a decade later, Acholi opposition to the ICC has diminished. The primary reason is that as a result of the Juba peace talks, the LRA has left northern Uganda and has become less of a direct threat to the Acholi. In northern Uganda, the situation is relatively peaceful. However, with the LRA continuing to make victims in South Sudan, the Democratic Republic of the Congo and the Central African Republic, the Juba peace talks

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<sup>47</sup> This episode has been recounted in W. ten Kate and S. Nouwen, ‘The Globalisation of Justice: Amplifying and Silencing Voices at the ICC’, forthcoming in J. Handmaker and K. Arts (eds), *The Politics of Justice* (Cambridge: Cambridge University Press, 2015).

<sup>48</sup> ICC-OTP, Statements by ICC Chief Prosecutor and the Visiting Delegation of Acholi Leaders from Northern Uganda (18 March 2005), [http://www.icc-cpi.int/pressrelease\\_details&id=96&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=96&l=en.html).

<sup>49</sup> *Ibid.*

<sup>50</sup> Nouwen’s interview with a representative of a donor government, May 2008.

<sup>51</sup> ICC-OTP, Joint Statement by ICC Chief Prosecutor and the Visiting Delegation of Lango, Acholi, Iteso and Madi Community Leaders from Northern Uganda, ICC-OTP-20050416-99-En, 16 April 2005.

were not successful in ending the conflict with, and crimes committed by, the LRA. After two years of on-and-off negotiations between 2006 and 2008, LRA leader Joseph Kony refused to sign the carefully negotiated Final Peace Agreement. Claims according to which the ICC arrest warrants served as a sword to bring the LRA to the peace table thus reveal only one side of the sword. Like every sword, the ICC arrest warrants were double-edged, the sharpest side being an insurmountable obstacle to developing Kony's trust in the value of any agreement.<sup>52</sup> Justice in the sense of ending ongoing violations by the LRA has thus not been done.

### ***C. Alternative Conception III: Redistribution***

A third alternative notion of justice is that of justice as *redistribution*. Whereas injustice in terms of violations of international criminal law is often the consequence of conflict, injustice in terms of distribution of wealth, power and opportunities is often its cause. The remedying of distributional injustices can thus be experienced as a genuine improvement in the lives of those who have suffered from such injustices, and therefore as justice. It is in this light that a traditional leader in Darfur responded when asked what justice meant: 'Justice is security, power-sharing and wealth-sharing'.<sup>53</sup> International criminal justice, by contrast, describes complex political struggles in terms of the criminal guilt of a few individuals and dismisses structural distributional issues as irrelevant or reduces these to 'context'.

Another element of the concept of justice as wealth distribution is justice as compensation for suffered harm. After many conflicts, victims of that conflict (as opposed to only victims of international crimes) often first and foremost want compensation. For those starving, the truism remains valid: 'without food, no justice'.<sup>54</sup> But compensation is a demand beyond avoiding starvation. To people who have been deprived of everything, compensation can make the difference between experiencing agency or total dependence on charity. In that sense, justice as compensation fundamentally differs from justice in the sense of enforcement of international criminal law. The former tends to treat the victim as an agent who, with the

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<sup>52</sup> See more elaborately, Nouwen, *Complementarity in the Line of Fire*, *supra* note 18, Chapter 3 and Nouwen, 'The International Criminal Court: A Peacebuilder in Africa?', *supra* note 45.

<sup>53</sup> Nouwen's interview with a traditional leader, Darfur, December 2008.

<sup>54</sup> M. Ratip, 'African Lessons for the International Criminal Court: "Give Us Food. You Are Our Kind, but if You Do Not Feed Us Properly We Will Get Rid of You"', 11(1) *Studies in Ethnicity and Nationalism* (2011) 143-148.



compensation, has the means to reclaim ownership of a violated life; the latter acts in the name of the victim who remains a passive object of the benevolence of international criminal lawyers.<sup>55</sup>

The Rome Statute gives victims a more prominent role than other international criminal tribunals have done. However, whether or not one can obtain reparations through the Rome Statute system depends to a large extent on decisions by others than victims, in particular the prosecutor and judges. It depends, for instance, on where investigations are opened, which period is investigated, which crimes and which individuals are prosecuted and whether the accused is convicted.<sup>56</sup> In sum, the victim-oriented provisions remain secondary to that of the criminal trial and the redistributive conception of justice secondary to that of accountability and punishment.

#### ***D. Alternative Conception IV: Justice as accountability and punishment***

A fourth concept of justice is justice as *accountability and punishment*. This seems to be precisely what international criminal law is all about. However, methods of accountability and perceptions of punishment vary. To many people who have lost homes, jobs and food security, detention in Scheveningen and subsequent imprisonment in western prisons does not amount to punishment. As one Acholi elder argued:

If [the LRA leaders] are taken to The Hague, they will be locked up with air conditioning and will live the lifestyle of Ugandan ministers. But they will have to come here and make up with the community. Let them live with the people whose ears they have chopped off. Let them see for the rest of their lives what suffering they have caused. That is punishment. In our view, ICC punishment is very light. Let them morally come and confess.<sup>57</sup>

In this view, true punishment of LRA members would involve confession and living with the people whose lives they have wretched, to see what they have done and to share the same poverty.

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<sup>55</sup> See also K. M. Clarke, 'Global Justice, Local Controversies: The International Criminal Court and the Sovereignty of Victims', in T. Keller and M.-B. Dembour (eds), *Paths to International Justice: Social and Legal Perspectives* (Cambridge: Cambridge University Press 2007) 134-160, and Kendall and Nouwen, 'Representational Practices', *supra* note 10, at 255-256.

<sup>56</sup> Victims are particularly dependent on these decisions if they aim to obtain reparations as victims in a particular case. Some of these factors are less relevant in the work of the Victims' Trust Fund, which can provide assistance to victims in a situation more broadly, irrespective of the guilt of an accused, but obtaining reparations from the VTF is more a matter of charity than of right.

<sup>57</sup> Nouwen's discussion with two Acholi elders, Gulu, September 2008.

### *E. Alternative Conception V: Justice as Equality*

Finally, one other example of an alternative concept of justice is that of equality – not material equality (which relates more to distributive justice) but to equality before the law. International criminal justice institutions have often delivered *partial* justice – this is not to say that they are biased in a specific case, but that they cannot address all crimes and therefore select. Such selection is not problematic if the criteria used relate to, for instance, the seriousness of the crime or the potential deterrent effect of the prosecution. What is more problematic is that in fact selection has also been influenced by a host of external factors, including the extent to which co-operation is likely to be forthcoming. At the domestic level, states cooperate with the ICC if their enemies are put on trial, but not if the government is accused. At the global level, states cooperate if the international tribunal’s selection is in accordance with their own foreign policies. The result is not merely that in some cases there is cooperation and in others not, but that international criminal tribunals, so aware of their dependence on cooperation, do not threaten the cooperation they get in some cases by going after those on whose cooperation they depend or their protégées. At least in part as a result of such considerations, all the ICC’s investigations to date have been on the African continent.

In response to criticism of partial justice, the selectiveness has been justified on the ground that it is the result of an impartial assessment of what global justice requires. However, this only exacerbates the experience of injustice. Take for example how the ICC Presidency responded to the critique of the African Union that the ICC was targeting Africa:

The ICC operates strictly within the mandate and legal framework created by the Rome Statute, the founding treaty of the Court, and cannot take political factors into account. Decisions are taken independently on the basis of the law and the available evidence and are not based on regional or ethnic considerations.<sup>58</sup>

Of course, it is hardly surprising to find the Presidency of the ICC denying external influences on its decisions. Yet, the response from the ICC to the African Union intensifies the experience of injustice by presumptuously denying the legitimacy of concerns about the geographical bias of the Court’s selection procedures. The statement conveys that all the Court does is applying objective standards, and those who feel uncomfortable about the outcomes apparently fail to see how global justice is to be done by the ICC.

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<sup>58</sup> Press Release, ‘ICC underlines impartiality, reiterates commitment to cooperation with the African Union’, ICC-CPI-20130529-PR908, 29 May 2013.

Faith in international criminal law will make the international justice cup look half full rather than half empty: it is better to have some accountability than none. But if some groups or regions are targeted structurally while others are not, those who drink from a different justice cup, namely that of equality, will see the levels of justice in their cup going *down* as a result of the pursuit of international criminal law: more international criminal justice means the entrenchment of existing inequalities and thus *less* justice.

#### **4. Beyond endless complementarities, towards self-restraint**

We argue that these alternative conceptions of justice have been pushed to the margins by the increasingly dominant use of international criminal law to frame and thus to understand political issues and by tendencies to equate international criminal law with global justice. We do not criticise international criminal law for not itself promoting these alternative conceptions of justice. First, it is not international criminal law itself that is responsible for its own dominance — the promotion and prioritization of the international-criminal-law frame is done by those actors (courts, tribunals, NGOs, scholars) that present international criminal law as the primary, and as an indispensable, means to achieve global justice. Secondly, we do not argue that international criminal law should also promote alternative conceptions of justice.

Nor do we argue that international criminal law has extinguished these alternative conceptions.<sup>59</sup> In fact, most supporters of international criminal law do not claim that international criminal law is the only way in which international crimes should be responded to, or that international criminal law should have a monopoly on the use of the term global justice. Indeed, in response to these alternative conceptions of justice, international-criminal-justice advocates often recognise that the concept of justice can encompass more than only international criminal justice, pointing to the existence of the overlapping but broader field of transitional justice. Similarly, few of the alternative conceptions of justice presented above are mutually exclusive or indeed incompatible with international criminal justice. Most of the alternative conceptions intersect and could be pursued at the same time as justice through international criminal law. The proponents of alternative conceptions of global justice themselves are thus not necessarily always opposed to international criminal law. Rather,

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<sup>59</sup> On the contrary, in some instances, for example in northern Uganda, the application of international criminal law catalysed initiatives to promote alternative forms of justice. See Nouwen, *Complementarity in the Line of Fire*, *supra* note 18, at 141-159.

they oppose a practice of international criminal justice that does injustice to these alternative conceptions by prioritising international criminal law as the frame through which to analyse and address a situation and by presenting international criminal law as a primary and indispensable means to achieve global justice.

Against this background it comes as no surprise that the word ‘complementarity’ is frequently invoked to argue that international criminal law does not have the monopoly on responses to mass atrocity or the term global justice. The argument is that other conceptions could and should be ‘complementary’ to international criminal justice. People desire, need and are entitled to, *and* restorative justice, *and* distributive justice, *and* equality before the law *and* retributive justice.

However, complementarity is not the solution for creating more space for alternative conceptions of justice. First, the meaning of complementarity as a legal concept deviates from the seemingly literal meaning of the term.<sup>60</sup> As set forth by articles 17 and 20 of the Rome Statute, complementarity is an admissibility rule that in the event of competing claims to jurisdiction in a specific case between a national jurisdiction and the ICC, grants priority to the domestic jurisdiction by declaring the case inadmissible before the ICC, as long as the state is willing and able genuinely to conduct those proceedings. For the state or defendant successfully to invoke complementarity, it must, however, conduct genuine ‘investigations’ or ‘prosecutions’. The text of the provisions indicates that the investigations must be with a view to prosecution, that is to say, criminal investigations.<sup>61</sup> Complementarity in a legal sense thus creates space for an alternative forum of criminal jurisdiction to that of the ICC, but not to an alternative conception of justice: for the purposes of complementarity, the domestic justice would have to be criminal justice.<sup>62</sup>

Secondly, even in the literal meaning of various forms of justice ‘complementing’ each other, ‘complementarity’ does not provide a solution. For in reality this is not a world of

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<sup>60</sup> See also W. Schabas, *An Introduction to the International Criminal Court* (3rd edn, Cambridge: Cambridge University Press, 2007), at 175, calling complementarity a ‘misnomer’.

<sup>61</sup> By referring to an investigation concluded by a decision ‘not to prosecute’, article 17(1)(b) suggests that investigations must have the potential to be followed by prosecution. Moreover, article 1 provides that the ICC ‘shall be complementary to national *criminal* jurisdictions’. Read in this context, ‘investigation’ in article 17 probably does not cover investigations by commissions of inquiry that can only recommend that other bodies further investigate with a view to prosecution.

<sup>62</sup> See also Drumbl, *supra* note 24, at 143: ‘Complementarity ... may encourage heterogeneity in terms of the number of institutions adjudicating international crimes, but homogeneity in terms of the process they follow and the punishment they mete out.’

endless ‘complementarities’ in which all conceptions of justice always seamlessly ‘complement’ each other. The real issue is not whether both restorative justice and distributive justice, as well as equality before the law and retributive justice can be *pursued* — which is obviously possible — but which conception of justice prevails in times of clashes or limited resources. In a world of horrific constraint, conceptions of justice compete for their realization.

In this political struggle, institutionalization serves to construct, defend and expand the values promoted. The institutionalization of international criminal law is a way to construct, defend and expand one particular type of justice, namely that of individual criminal accountability. As it is, other conceptions of justice than international criminal law do not enjoy similar institutionalization at the international plane and are thus in a weaker position.

The result is that international criminal law, with all its international tribunals enforcing it, is overpowering other conceptions of justice. In doing so, it threatens precisely one of the longings for justice that international criminal law was meant to realise: international criminal law was meant, among other aims, to protect human diversity; the idea that the world is made up of a multitude of individuals and cultures with their own perspective of history, identity and, importantly, justice.

The analysis that the dominance of international criminal law is due to its international institutionalization might suggest that, for a better protection of pluriformity, alternative conceptions of justice should also receive international institutionalization. International institutionalization could ensure that those other conceptions of justice are better protected and promoted at the international plane, for instance, through a global reconciliation commission, a global wealth distribution fund or a global equality commission. However, even then, such institutions may become subjected to one dominant discourse on justice that prevails over the other, for instance, in arguments that serious offenders must be taken to international criminal courts, whereas the smaller offenders can be taken to a truth and reconciliation commission.

Similarly, while international-criminal-law institutions themselves could demonstrate more respect for alternative conceptions of justice, we do not believe in amending their statutes to make the institutions more open towards approaches alternative to international criminal law. For in that case, international-criminal-law institutions would still be the arbitrators of the meaning and prioritization of justice.

Fundamentally, what is necessary is not more institutions to fill a ‘vacuum’ or a central institution from which to administer pluralism, but protection of precisely that ‘vacuum’ or the creation of space without a central justice administrator. A space must be protected where the meaning of justice can continuously be contested. At present, this requires first and foremost that the enforcers of international criminal law respect the limitations that flow from at least one of the rationales for international crimes: the protection of diversity. For the need to protect a pluralistic humanity not only offers a possible justification for international criminal law; the very same idea also sets significant *limits* to the project of international criminal justice. One such limit is that one particular type of justice, international criminal justice, cannot make an exclusive claim to global justice, a hierarchically superior type of justice.

A space must be protected that secures our awareness of the gap between our institutions and our ideals.<sup>63</sup> This calls for a qualification of the faith in institutions, including in international criminal law.<sup>64</sup> Whilst faith may bridge the gap between the awareness of shortcomings today and the hope for a future in which these shortcomings have been overcome, it makes one forget, ignore or deny that human law, culture and conventions will *always* be short of the justice we strive for because justice is mediated by men. The denial of this mediation, for instance in assertions that international criminal law *does* justice (instead of strives for it) or that it *represents* justice (rather than imperfectly mirrors an ideal) sows the seeds of intolerance, no matter how liberal the origins of international criminal law.<sup>65</sup> Justice, not unlike democracy or the rule of law, needs limitations on its enforcement and space for contestation for its preservation.

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63 Recently, Hans Lindahl has advocated for what he calls ‘collective self-restraints’ in cases where law is confronted with radical challenges to its boundaries. According to Lindahl, in one of its manifestations, collective self-restraint ‘abandons behaviour to a law-free domain, to a domain which ought to be preserved from the scope of joint action under law’. One of the examples Lindahl provides is the position of the Canadian Supreme Court in the Secession of Quebec case that ‘in the course of negotiations pursuant to the secession, “there would be no conclusions predetermined by law on any issue”’. H. Lindahl, *Fault Lines of Globalization, Legal Order and the Politics of A-Legality* (Oxford: Oxford University Press, 2013), respectively at 250-251 and 257. Lindahl refers to para 153 of *Reference re. Secession of Quebec* [1998] 2 S.C.R. 217.

<sup>64</sup> On international criminal law as a faith see D. Koller, ‘The Faith of the International Criminal Lawyer’, 40(4) *New York University Journal of International Law and Politics* (2008) 1019-1069.

<sup>65</sup> H. Arendt, *The Origins of Totalitarianism* (London: Ruskin House, 1958 (1951)), at 461-463.