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Justice civilisatrice?

The ICC, post-colonial theory, and faces of 'the local'

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Introduction

In past decades, local-based approaches have gained increased attention in humanitarian action. The focus on 'the local' is a natural counterpoint to internationalism and globalisation in international affairs. Its ambiguity is its strength. There is no unified local. 'The local' has many faces. Depending on context, 'the local' may mean a country, a community, a group, a neighbour and so on. In contemporary discourse, the notion of 'the local' is mostly used as a structural argument. It is popular in the field of development, where the notion of 'local ownership' became a central concept to reduce the divide between external interference and domestic capacity in development action.[1] 'Local ownership' was initially associated with 'national ownership'.[2] Its meaning has evolved over time. It has been associated with broader policy objectives governing interaction of stakeholders, such as inclusiveness, consultation and participation of domestic political, social and community actors in processes of transition and emancipatory rationales.[3] After the *Brahimi Report*,[4]

[1] See OECD, Development and Assistance Committee, 'Development Partnerships in the New Global Context', May 1995; B. Pouligny, *Supporting Local Ownership in Humanitarian Action*, Humanitarian Policy Paper Series (Berlin: Global Public Policy Centre, 2009); T. Donais, *Peacebuilding and Local Ownership: Post-conflict Consensus-Building* (London: Routledge, 2012).

[2] Ownership is not strictly tied to powers of possession. It includes 'different components of local involvement, participation, capacity, accountability and empowerment'. See Pouligny, *Ownership*, 9.

[3] See generally O. Richmond, 'Emancipatory Forms of Human Security and Liberal Peacebuilding', *International Journal*, 62 (2007), 459–478.

[4] See Report on the Panel on United Peace Operations, UN Doc. A/55/305, S/2000/809, 21 August 2000.

'local ownership' became a key component of UN peacebuilding and transitional justice doctrine.[5] The need to pay greater attention to local priorities was presented as one of the 'lessons learned' from the shortcomings of multidimensional peace operations in the seminal 2004 report of the UN Secretary-General on the Rule of Law and Transitional Justice.[6] The concept was meant to mitigate certain criticisms of liberal peacebuilding (e.g., paternalism, norm entrepreneurship, lack of sustainable 'exit' strategies[7]), and leave space for context-sensitive justice responses (e.g., hybrid courts, community-based reconciliation).[8] But it remained underdeveloped conceptually,[9] and has been subject to various critiques (e.g., indeterminacy, circularity). It provides a discursive space to a accommodate divide between 'inside' and 'outside' in the struggle over political authority and legitimacy.

In other fields, 'the local' has developed into a lens to analyse and evaluate action and to critically study its effects. Local interests and perceptions have gained greater importance in the fields of transitional justice,[10] restorative justice[11] and peacebuilding,[12] and perception-based

[5] S. Chesterman, 'Ownership in Theory and in Practice: Transfer of Authority in UN Statebuilding Operations', *Journal of Intervention and Statebuilding*, 1 (2007), 3; T. Donais, 'Empowerment or Imposition? Dilemmas of Local Ownership in Post-Conflict Peacebuilding Processes', *Peace & Change*, 34 (2009), 3.

[6] See UN Secretary-General, *Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, UN. Doc. S/2004/616, 3 August 2004, para. 17.

[7] See R. Paris, 'International Peacebuilding and the "Mission Civilisatrice"', *Review of International Studies*, 28 (2002), 637.

[8] D. Roberts, *Global Governance and Liberal Peacebuilding: Beyond the Metropolis* (London: Routledge, 2011).

[9] See D. Sharp, 'Addressing Dilemmas of the Global and the Local in Transitional Justice', *Emory International Law Review*, 29 (2014), 71, 73.

[10] A. Hinton (ed.), *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence* (New Brunswick, NJ: Rutgers University Press, 2010); L. Waldorf, R. Shaw, and P. Hazan (eds.), *Localizing Transitional Justice: Interventions and Priorities After Mass Violence* (Stanford: Stanford University Press, 2010); P. Lundy and M. McGovern, 'Whose Justice: Re-Thinking Transitional Justice from the Bottom Up', *Journal of Law and Society*, 35 (2008), 265; E. Baines, 'The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda', *International Journal of Transitional Justice*, 1 (2007), 91; P. Vinck and P. Pham, 'Ownership and Participation in Transitional Justice Mechanisms: A Sustainable Human Development Perspective from Eastern DRC', *International Journal of Transitional Justice*, 2 (2008), 398.

[11] See M. Findlay and R. Henham, *Transforming International Criminal Justice* (London: Routledge, 2012); J. Doak and D. O'Mahoney, 'In Search of Legitimacy: Restorative Youth Conferencing in Northern Ireland', *Legal Studies*, 31 (2011), 305–325.

[12] G. Millar, *An Ethnographic Approach to Peacebuilding Understanding Local Experiences in Transitional States* (London: Routledge, 2014).

research more generally.[13] In these contexts, 'the local' provides a counter-perspective or reaction to top-down approaches and processes of bureaucratisation and technocratisation in humanitarian action, such as mainstreaming,[14] programming, packaging and so on. The local perspective places greater emphasis on narratives, experience, empathy and perception of international action. It enquires how such action affects local collectivities or individuals, and how it is perceived. This focus on 'the local' may serve as a parameter to consider the legitimacy of an institution, or it may trigger a different vision of goals or success or failure of action.[15]

In international criminal justice, local perspectives have thus far only received limited attention.[16] Localisation of international justice has been discussed in specific contexts, such as institutional decentralisation,[17] rule of law reform[18] or court management (in situ proceedings).[19] But local approaches are mostly regarded with suspicion from an accountability perspective. They are typically assessed through a universal lens, criticised in light of international standards (e.g., duty to investigate and

[13] See e.g., P. Pham et al., *Forgotten Voices: A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda* (New York and Berkeley, CA: Center for International Transitional Justice and Berkeley Human Rights Center, 2005); P. Pham et al., *When the War Ends: A Population-Based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Northern Uganda* (New York and Berkeley: Center for International Transitional Justice and Berkeley Human Rights Center, 2007); P. Vinck et al., *Living with Fear: A Population-Based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Eastern Democratic Republic of the Congo* (Berkeley: Human Rights Center, 2008).

[14] M. Koskenniemi, 'Human Rights Mainstreaming as a Strategy for Institutional Power', *Humanity*, 1 (2010), 47.

[15] A good example is the development of localised peace indicators. See R. MacGinty, 'Indicators+: A Proposal for Everyday Peace Indicators', *Evaluation and Program Planning*, 36 (2013), 56.

[16] See H. Weinstein and E. Stover (eds.), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge: Cambridge University Press, 2004); M. Glasius, 'What is Global Justice and Who Decides? Civil Society and Victim Responses to the International Criminal Court's First Investigations', *Human Rights Quarterly*, 31 (2009), 496; M. Saul, 'Local Ownership of the International Criminal Tribunal for Rwanda: Restorative and Retributive Effects', *International Criminal Law Review*, 12 (2012), 427.

[17] W. Burke-White, 'Regionalization of International Criminal Law Enforcement: A Preliminary Exploration', *Texas International Law Journal*, 38 (2003), 729.

[18] See Open Society Justice Initiative, *International Crimes, Local Justice* (New York: Open Society Foundations, 2011).

[19] See S. Ford, 'The International Criminal Court and Proximity to the Scene of the Crime: Does the Rome Statute Permit All of the ICC'S Trials to take Place at Local or Regional Chambers?', *John Marshall Law Review*, 43 (2010), 715.

prosecute, procedural fairness, proportionate sentencing) or accepted as a 'necessary evil'.[20] International criminal justice often blends out social realities, since it is predominantly focused on crimes and perpetrators, rather than on the underlying social crisis.[21] Local effects are sidelined. The Statute of the International Criminal Court (ICC) contains certain balancing factors, through its increased focus on complementarity, victims and reparation. The Kampala Review Conference considered a '[t]urning' of 'the lens' on victims and affected communities in the context of its stocktaking exercise.[22] But this review was centred on narrow institutional dimensions, and is at best still in its infancy. The ICC thus navigates between institutional self-interest (e.g., preservation of institutional autonomy and independence, integrity and efficiency of proceedings) and justification of action through vindication of the rights of 'others'. Local dimensions are typically considered through a vertical lens, which places the 'international' at the centre and uses it as a benchmark against regional, domestic or local responses. Domestic societal concerns are reflected indirectly, namely through the filter of specific institutional goals, such as complementarity,[23] completion[24] or procedural mechanisms (victim participation, reparation).[25]

[20] On gacaca, see P. Clark, *The Gacaca Courts and Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers* (Cambridge: Cambridge University Press, 2010). On amnesties, see M. Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge: Cambridge University Press, 2009).

[21] See D. Rothe, J. Meernik, and T. Ingadóttir (eds.), *The Realities of International Criminal Justice* (Leiden/Boston: Martinus Nijhoff, 2013); C. Schwöbel (ed.), *Critical Approaches to International Criminal Law* (London: Routledge, 2014).

[22] ICC, 'Turning the Lens: Victims and Affected Communities on the Court and the Rome Statute System', RC/ST/V/INF.2, 30 May 2010, at www.icc-cpi.int/iccdocs/asp_docs/RC2010/Stocktaking/RC-ST-V-INF.2-ENG.pdf; Assembly of States Parties, 'The Impact of the Rome Statute on Victims and Affected Communities', RC 11 (2010), at www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-11-Annex.V.a-ENG.pdf.

[23] S. Nouwen, *Complementarity in the Line of Fire* (Cambridge: Cambridge University Press, 2013); C. Stahn, 'Taking Complementarity Seriously: On the Sense and Sensibility of "Classical", "Positive" and "Negative" Complementarity', in C. Stahn and M. El Zeidy, *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge: Cambridge University Press, 2011), 233–281.

[24] See K.J. Heller, 'Completion', in Luc Reydams, Jan Wouters, and Cedric Ryngaert (eds.), *International Prosecutors* (Oxford: Oxford University Press, 2012), 886–925.

[25] S. Kendall and S. Nouwen, 'Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood', *Law and Contemporary Problems*, 76 (2014), 235; A. Sagan, 'African Criminals/African Victims: The Institutionalised Production of Cultural Narratives in International Criminal Law', *Millennium – Journal of International Studies*, 39 (2010), 3.

This chapter examines the 'international/local' divide in ICC policies and practice. It draws on insights from post-colonial theory[26] to discuss the relationship between justice intervention and ownership. It argues that the ICC is vulnerable to some of the dilemmas that other liberal and emancipatory projects face in their engagement with 'the local', such as paternalistic and missionary features, perpetuation of structural inequalities or distorting effects of de-localisation.[27]

Engagement with 'the local' is based on a fundamental paradox. The ICC defines itself partly in opposition to 'the local' in the exercise of its core criminal mandate, and derives justification from this distinction. But it needs local 'buy in' and support to realise some of its long-term objectives, that is, to leave a lasting footprint for domestic societies, to ensure that 'justice is seen to be done' or to contribute to justice in everyday life. Narratives and representations of 'the local' shift in the course of proceedings. While functionalist and utilitarian approaches prevail in the framing of situations and case-related litigation, specific community-based and local perspectives gain some attention in the closure of cases (e.g., reparation) and situations (e.g., exit strategy).

This chapter starts with an examination of the dilemmas of the ICC as an agent. It then discusses different faces of 'the local' in the ICC context: (i) 'the local' as 'other', (ii) 'the local' as object, (iii) 'the local' as subject

[26] Post-colonial theory has a long tradition. It is grounded in humanitarian, economic, political or religious critiques of colonial and imperial forms of power (i.e., relationships of oppression, domination, inequality and dependence), and their continuing manifestation in contemporary society. See E. Said, *Orientalism* (New York: Vintage, 1978); L.S. Rukundwa and Andries G. van Aarde, 'The Formation of Postcolonial Theory', *Theological Studies*, 63 (2007), 1171; R. Young, *Postcolonialism: An Historical Introduction* (London: Blackwell, 2001); D. Ivison, *Postcolonial Liberalism* (Cambridge: Cambridge University Press, 2002). Post-colonial legal theory draws on the intellectual legacy of colonialism to examine divides and asymmetric power relations within domestic, international and global contexts. See E. Darian-Smith, 'Postcolonial Theories of Law', in R. Banakar and M. Travers (eds.), *An Introduction to Law and Social Theory* (Oxford: Hart, 2nd ed., 2013), 247; A. Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities', *Third World Quarterly*, 27 (2006), 739; B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003). 'TWAIL' scholarship is one strand of postcolonial research. See J. Gaathi, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography', *Trade, Law and Development*, 3 (2011), 26.

[27] On missionary features, see A. Anghie and B.S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflict', *Chinese Journal of International Law*, 2 (2003), 77, 91; C. Nielsen, 'From Nuremberg to The Hague: The Civilizing Mission of International Criminal Law', *Auckland University Law Review*, 14 (2008), 81.

and (iv) 'the local' as pattern of justification. It shows that ICC justice produces certain forms of influence and domination that bear synergies with dilemmas articulated in post-colonial discourse, that is, centre-periphery divides, artificial constructions of 'otherness', disparities of knowledge, logics of imitation and structural dependencies. It cautions against an instrumentalist vision of 'the local' that blends out such effects and contradictions.

The ICC and dilemmas of agency

The ICC is an entity with multiple identities. It is partly a judicial actor and partly an executive agent, with certain humanitarian or human rights–related functions. In official discourse, the Court refrains from branding itself as a humanitarian or development actor. Like other agents, the ICC seeks to de-politicise its action. It typically stresses its mandate as independent judicial actor when its role in conflict is discussed.[28] ICC actions are typically presented under the inconspicuous label of justice. But the judicial nature of activities does not absolve the Court from tensions of protectionism and agency that are inherent in its mandate.

ICC justice and protection

As highlighted later in this volume by Kamari Clarke[29] and Sara Kendall,[30] the exercise of justice has certain transformative features that share synergies with other articulations of power in the humanitarian space.[31] ICC interventions differ from classical humanitarian action.[32] This distinction is reflected in Pictet's famous *dictum* that one cannot be a champion of 'charity' (compassion) and 'justice' at the same time.[33] It

[28] See Chapter 3 by Koller in this volume. [29] See Chapter 11 by Clarke in this volume.

[30] See Chapter 14 by Kendall in this volume, analysing dilemmas of restorative justice through the lens of humanitarian discourse.

[31] On the concept of 'humanitarian space', see D. Thürer, 'Dunant's Pyramid: Thoughts on the "Humanitarian Space"', *International Review of the Red Cross*, 89 (2007), 47.

[32] Classical humanitarianism is grounded in the application of the principles of humanity (e.g., alleviating human suffering), impartiality (no discrimination as to nationality, race, religious beliefs, class or political opinions), neutrality (no involvement in conflict or taking sides for a party) and independence (e.g., autonomy). See proclamation of the Fundamental Principles of the Red Cross, at www.icrc.org/eng/resources/documents/misc/fundamental-principles-commentary-010179.htm.

[33] See J. Pictet, *Commentary on the Fundamental Principles of the Red Cross* (Geneva: International Federation of Red Cross and Red Crescent Societies, 1979), 22–23.

applies to a certain extent to the ICC. ICC action is selective by nature and geared to take side for a specific cause, namely to combat 'impunity'. It is justified by legal obligation, rather than empathy, and aimed at providing judgment on violations. But as Clarke and Kendall show later in this volume, ICC interventions are part and parcel of a broader protective movement geared at remedying harm and restoring rights of victims of conflict.

Some of these interventionist features result from the fact that ICC justice is related to global protection schemes, such as the 'Responsibility to Protect'.[34] The Court is used as an actor to promote security, prevention or protection and connected to peacebuilding strategies, such as 'capacity-building'.[35] ICC engagement is associated with certain transformative goals, such as producing a 'catalytic' effect on domestic law reform (e.g., implementing legislation) or institution-building. In human rights discourses, ICC frameworks and definitions are presented as a model for domestic justice, sometimes with a pull towards over-compliance.[36] The Court is viewed as a saviour for all types of societal problems, ranging from the protection of civilians to electoral politics, as well as for remedying gender biases or specific patterns of victimisation.

The flip side of this trend is rarely investigated. Conflicts with domestic choices are swept aside by formal reliance on state consent. The broader conditions, under which this consent emerged, are rarely critically reflected.[37] The assumption that the Court can create 'domestic capacity' has a patronising quality. This normative embedding makes ICC justice vulnerable to criticisms from different strands of thought, such as Third

[34] The 2009 Report of the Secretary-General branded the Rome Statute expressly as 'one of the key instruments relating to the responsibility to protect.' See Report of the Secretary-General, 'Implementing the responsibility to protect', UN. Doc A/63/677, 12 January 2009, para. 19.

[35] For a critique of the term, see Pouligny, *Ownership*, 7. On the ICC context, see M. Bergsmo, O. Bekou, and A. Jones, 'Complementarity After Kampala: Capacity Building and the ICC's Legal Tools', *Göttingen Journal of International Law*, 2 (2010), 791.

[36] See F. Mégret, 'Too Much of a Good Thing? Implementation and the Uses of Complementarity', in Stahn and El Zeidy, *Complementarity*, 361, 364–376.

[37] See N. Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods', *American Journal of International Law*, 108 (2014), 1. Weiler argues that 'the consent given by [most] "sovereign" states is not much different to the "consent" that each of us gives, when we upgrade the operating system of our computer and blithely click the "I Agree" button on the Microsoft Terms and Conditions.' See J. Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 64 (2005), 547, 557.

World Approaches To International Law (TWAIL) critiques[38] or humanitarian critiques.[39] The Court is easily perceived as an entity that serves as an instrument of foreign power, or as a mechanism that markets and exports a cosmopolitan vision of justice.[40]

Some of these tensions are inherent in the Court's role and mandate. ICC action creates certain relationships of power. The use of crime labels and the choice of sites of intervention produce certain stigmas and narratives. ICC intervention entails certain forms of coercive action, vis-à-vis states, individuals or groups, and certain paternalistic features that are part of protective action. It interferes with the liberty of action of collectivities and individuals, and overrides individual agency in the name of a broader good (e.g., collective values, protection needs and interests of humanity).[41] In some cases, individual choice is restricted directly through coercion. In other cases, ICC action restricts choice indirectly or gradually, through the use of 'soft powers' or incentives that create dependencies. Some of the coercive dimensions or effects may be non-intended, or even unwarranted by the Court.

Court action involves conflicts of agency. The Court needs to satisfy conflicting imperatives. It requires distance from the site of conflict, in order to be perceived as impartial. But it must at the same be sufficiently close to local reality and actors, in order to be able to speak credibly on behalf of others. This dilemma runs through ICC activities, from

[38] See, e.g., the Statement by Palitha Kohona (Sri Lanka), General Assembly, Thematic Debate on International Criminal Justice, 11 April 2013, UN. Doc. GA/11357, arguing that the current international criminal justice system 'only pays lip service to the cultural backgrounds of the rest of the world.' On TWAIL critiques, see Anghie and Chimni, 'Third World Approaches', 89–92.

[39] See e.g., D. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton, NJ: Princeton University Press, 2004); M. Barnett, *Empire of Humanity: A History of Humanitarianism* (Ithaca, NY: Cornell University Press, 2011); B. Leebaw, 'The Politics of Impartial Activism: Humanitarianism and Human Rights', *Perspectives on Politics*, 5 (2007), 223; D. Rieff, *A Bed for the Night: Humanitarianism in Crisis* (New York: Simon & Schuster, 2003).

[40] G.M. Gordon, 'The Innate Cosmopolitan Tradition in International Law', *Cambridge Journal of International and Comparative Law*, 2 (2013), 906; P. McAuliffe, 'From Watchdog to Workhorse: Explaining the Emergence of the ICC's Burden-Sharing Policy as an Example of Creeping Cosmopolitanism', *Chinese Journal of International Law*, 13 (2014), 259.

[41] See also A. Branch, *Displacing Human Rights: War and Intervention in Northern Uganda* (Oxford: Oxford University Press, 2011). On forms of paternalism (hard v. soft, broad v. narrow, weak v. strong, pure v. impure), see G. Dworkin, 'Paternalism', *The Monist*, 56 (1972), 84; M. Barnett, 'International Paternalism and Humanitarian Governance', *Global Constitutionalism*, 1 (2012), 485.

preliminary examination to judgment. A prime example is the role of intermediaries. The Court requires intermediaries to gather information, carry out outreach or provide public information in countries. But the use of intermediaries enhances risks of misconduct and interference, as demonstrated by Déirdre Clancy later in this volume.[42] The Court has struggled to accommodate this tension. In the *Lubanga* case the outsourcing of investigations nearly led to a collapse of the trial, in light of undue witness coaching.[43] The Court further struggles with mediation problems. They emerge by definition in the operation of victim participation, which forms part of the constituent features of the Court. The Court must give voice to victims (Art. 68 (3) ICC Statute). But it is at the same time required to mediate that voice through representation, in order to be able to run proceedings. The Court is still in search of a model that reconciles individualised recognition of victimhood with the need for collective representation.[44] In particular those victims who fall outside the scope of charges brought by the prosecutor remain marginalised.[45]

ICC justice poses ethical dilemmas for the relationship between agent and protected subject. ICC intervention creates expectations of help and protection. It derives empathy and support from the idea of humanitarian crisis. But as with other types of crisis response, the responsibility that follows protecting is often neglected. Attention shifts quickly to other sites of crisis. The response remains ICC centred. Little is done to provide continuing protection of witnesses and victims when situations and cases are dropped.[46] There are no direct forms of accountability between agent and protected subject.

[42] See Chapter 9 by Clancy in this volume.

[43] C. De Vos, 'Prosecutor v Lubanga: "Someone who comes between one person and another": Lubanga, Local Cooperation and the Right to a Fair Trial', *Melbourne Journal of International Law*, 12 (2011), 217.

[44] S. Vasiliev, 'Victim Participation Revisited: What the ICC is Learning About Itself', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford: Oxford University Press, 2015), 1133.

[45] See, e.g., ICC, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04 OA4 OA5 OA6, 19 December 2008, para. 58. See also Kendall and Nouwen, 'Representational Practices', 244–245.

[46] On witnesses, see E. Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (Philadelphia, PA: University of Pennsylvania Press, 2005).

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Many of these problems are not new or unique to the ICC. They have arisen in other contexts, such as decolonisation or development action.[47] They may not be entirely solvable.[48] They involve trade-offs whatever choice the Court makes. But it is fundamental to analyse and understand the underlying frictions and risks. Otherwise, ICC practice will reflect binaries and stigmas that may render justice suspect in the eyes of those in whose interests it is carried out.

There is a danger that ICC practice repeats some of the pitfalls that have been associated with internationalism throughout the twentieth century. Traditional discourses of civilisation[49] have been largely banned from official UN vocabulary in relation to states;[50] but they re-emerge in different forms today, that is, in the social or political organisation of domestic societies, including societies in transition.[51] International justice has been associated with narratives of civilisation since its inception. At Nuremberg and Tokyo, international justice was justified in the name of civilisation.[52] In the heroic pioneering phase of UN ad hoc tribunals, former ICTY president Cassese qualified the project of international criminal law as 'the only civilized alternative to . . . desire for revenge'.[53] Today, there is a fear that international justice may develop into a new benchmark to 'divide and judge the world'.[54] Through the push for

[47] D.P. Fidler, 'The Return of the Standard of Civilization', *Chicago Journal of International Law*, 2 (2001), 137; F. Mégret, 'From "Savages" to "Unlawful Combatants": A Postcolonial Look at International Humanitarian Law's "Other"', in A. Orford (ed.), *International Law and Its Others* (Cambridge: Cambridge University Press, 2006), 265–317. On progress, see T. Skouteris, *The Notion of Progress in International Law Discourse* (The Hague: TMC Press, 2010).

[48] D. Robinson, 'Inescapable Dyads: Why the ICC Cannot Win', *Leiden Journal of International Law*, 28 (2015), 323.

[49] See e.g., Article 22 of the Covenant of the League of Nations ('sacred trust of civilisation').

[50] Article 78 UN Charter bans trusteeship in relation to UN member states.

[51] See B. Bowden, *The Empire of Civilization: The Evolution of an Imperial Idea* (Chicago, IL: University of Chicago Press, 2009).

[52] See Nielsen, 'Civilizing Mission', 105.

[53] See the First Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc, A/49/342, S/1994/1007, 29 August 1994, para. 15; A. Cassese, 'Reflections on International Criminal Justice', *Journal of International Criminal Justice*, 9 (2011), 271 ('criminal justice is among the most civilized responses to . . . conflict').

[54] See in relation to human rights, D. Otto, 'Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference', in E.-D. Smith and

universality of the Rome Statute and context-neutral mainstreaming, ICC justice may easily turn into a modern form of *justice civilisatrice.*[55] This critique is distinct, and in some respects more difficult to discard than the traditional victor's justice argument,[56] since it questions the foundations of individual criminal responsibility and its use as global concept.

The ICC differs formally from hegemonic projects of the nineteenth and twentieth centuries, which were grounded in the idea of superiority of Western state authority.[57] The Court has increasingly countered the perception that it is dependent on the authority of a few powerful states.[58] It is rather a success of the power of small states in international law and the cardinal role of civil society movements. It particularly empowers the role of individuals as holders of rights against oppression.[59] In this sense, the project of the ICC reflects a certain democratisation in international relations. The Statute avoids clear lines of hierarchy and domination. The idea that justice rendered by the ICC is superior to other forms of justice was intentionally mitigated by the drafters of the Rome Statute through various mechanisms, such as the choice for complementarity rather than primacy, the lack of a firm statutory legal duty to implement core crimes into domestic jurisdictions (preamble), the conduct and process-based conception of admissibility (Art. 17 and 20), the space left for variety of penalties at the domestic level (Article 80) or the possibility for the Court not to act 'in the interests of justice'. The Statute is visibly aimed at preserving diversification of legal traditions.[60] But these ideals are difficult to maintain in practice.

P. Fitzpatrick (eds.), *Laws of the Postcolonial* (Ann Arbor: University of Michigan Press, 1999), 145–180.

[55] On 'mission civilisatrice', see A.L. Conklin, *A Mission to Civilize: The Republican Idea of Empire in France and West Africa 1895–1930* (Stanford, CA: Stanford University Press, 1997); M. Koskenniemi, *Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2002), 105.

[56] On victor's justice, see e.g., William A. Schabas, 'Victor's Justice: Selecting "Situations" at the International Criminal Court', *John Marshall Law Review*, 43 (2010), 535.

[57] See E. Jouannete, 'Universalism and Imperialism: The True-False Paradox of International Law', *European Journal of International Law*, 18 (2007), 379.

[58] For a critique, see M. Mamdani, 'Responsibility to Protect or Right to Punish?', *Journal of Intervention and Statebuilding*, 4 (2010), 53, 60–67.

[59] See Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, A/HRC/21/46, 9 August 2012, para. 30.

[60] See E. van Sliedregt and S. Vasiliev (eds.), *Pluralism in International Criminal Law* (Oxford: Oxford University Press, 2014).

Many of the Court's first operational steps suggest that ICC practices entail a strong degree of influence and control over domestic choices and a risk to silence alternative approaches. Unlike in colonial projects of the past, this role is not exercised through direct territorial control or formal legal subjugation. It emerges incrementally, through more subtle forms of threats and incentives, and pressures created through informal channels and networks (e.g., multilateral diplomacy, NGOs, institutional interconnectedness). The ICC does not directly proscribe how domestic justice should look like, nor does it have the power to enforce such a vision through regulatory action. But it actively shapes such choices, through narratives, policies and procedures. It translates underlying problems into procedure. In some cases, it steers inequalities inadvertently, not so much through positive action, but rather through inaction. This entrenches fears of double standards and perceptions of injustice that have fuelled discontent.

Certain policies and mechanisms have emancipatory or missionary features. The Rome Statute establishes a treaty-based system of justice. Through its outreach policy, and in particular its projected claim towards universality, the Court has actively sought to push the boundaries of this regime. This is reinforced by efforts in UN practice to mainstream international justice in UN policies.[61] But little groundwork has been done to substantiate shared communality.[62] In particular, the promotion of the global 'fight against impunity' has taken on certain missionary features. The concept is a double-edged sword. Due to its action-related framing ('fight') and its substantive ambiguity, it can be used as a pretext for a government to justify any type of repressive measure (e.g., prosecution of political opponents for corruption), rather than equal prosecution for core crimes. More cynically, appeal to this notion empowers a global justice industry versus grassroots-driven approaches.[63] It induces pressures of compliance and emergence of justice mechanisms that are oriented towards global priorities.[64] Coupled with socio-economic incentives, this approach may create strong discrepancies between

[61] Critically in relation to human rights, see Koskenniemi, 'Mainstreaming', 51–54.

[62] For a defence of universalism, based on 'anthropological human identity' and re-appropriation, see D. Tladi, 'The African Union and the International Criminal Court: The Battle for the Soul of International Law', *South African Yearbook of International Law*, 34 (2009), 57, 66.

[63] See C. Schwoebel, 'The Market and Marketing Culture of International Criminal Law', in C. Schwoebel (ed.), *Critical Approaches to International Criminal Law – An Introduction* (London: Routledge, 2014), 264–275.

[64] See S. Nouwen and W. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', *European Journal of International Law*, 21 (2010), 941;

'ordinary' justice and elitist international justice regimes – which ultimately run counter to the objective of effective and long-term justice enforcement. A too close alignment of the ICC with the global 'impunity' movement may thus create frictions with statutory objectives. As noted in critical scholarship, there is a risk that the expansion of the ICC as global accountability project may effectively narrow or reduce, rather than broaden, the options of justice.[65]

Moreover, the de-contextualisation of social reality through criminal procedures produces certain frictions. It focuses on 'the local' predominantly as a site of conflict, evil and violence. This creates a particular stigma that may perpetuate sentiments of inferiority and exclusion.[66] This dilemma is reinforced by the selectivity of ICC justice. The ICC is focused on mass atrocity and leadership responsibility, which foster certain asymmetries. The broader influence of economic and political policies of Western leaders and corporations on conflict is rarely explored.[67] The failure to address these underlying factors may ultimately constrain the effectiveness of international justice.[68] It also stands in contrast with the premise to prevent atrocities. In many contemporary conflicts, violence does not emanate from state power, but from non-state armed groups that challenge state authority, governance and territorial control through externally backed force and popular appeal. Blending out the external influences on conflict fails to address underlying problems, such as the emergence of illicit power structures or recourse to violence.[69]

Some of the weaknesses are illustrated by the rhetoric in relation to the ICC's engagement in Africa.[70] In 2005, Sudan employed a critical

S. Kendall, 'Donor's Justice: Recasting International Criminal Accountability', *Leiden Journal of International Law*, 24 (2011), 585.

[65] S. Nouwen and W. Werner, 'Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity', *Journal of International Criminal Justice*, 13 (2005), 157, 163; M. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2007), 122.

[66] For instance, in the controversy over the ICC and the African Union, Kenya did not want to be seen as a state that is subject to an Article 16 deferral, and thus portrayed as a 'threat to international peace and security'.

[67] See W. Schabas, 'The Banality of International Justice', *Journal of International Criminal Justice*, 11 (2013), 549–550.

[68] See Anghie and Chimni, 'Third World Approaches', 91.

[69] See D. Beswick, 'The Challenge of Warlordism to Post-Conflict State-Building: The Case of Laurent Nkunda in Eastern Congo', *The Round Table*, 98 (2009), 333, 342–343.

[70] See generally K. Mills '"Bashir is Dividing Us": Africa and the International Criminal Court', *Human Rights Quarterly*, 34 (2012), 404; A. Branch, 'Uganda's Civil War and the Politics of ICC Intervention', *Ethics and International Affairs*, 21 (2007), 179.

position that had been developed elsewhere by TWAIL scholars to oppose ICC action. It rejected the referral of the Security Council to the Court inter alia on the ground that

> the [International] Criminal was originally intended for developing and weak States, and that it is a tool for the exercise of the culture of superiority and to impose cultural superiority. It is a tool for those who believe that they have a monopoly on virtues on this world, rife with injustice and tyranny.[71]

These points later were later echoed by Jean Ping, former president of the Commission of the African Union, who argued that the ICC is discriminatory since it focuses on Africa and disregards crimes perpetrated by 'Western powers' in states such as Iraq, Afghanistan and Pakistan.[72]

These statements must be read with some caution.[73] They are (i) over-assertive in their assumption of discriminatory intent, guided by specific geo-strategic motives, and (ii) reductionist in their presentation of non-Western (e.g., African) views, which differ considerably. Criticising the Court for geographical discrimination in selection strategy is only a slogan version of a more sophisticated post-colonial critique. The core of the argument goes deeper. It lies in deeper structural factors underlying the reach and orientation of international criminal justice and contested impact and effects of international courts and tribunals, such as marginalisation of claims, perpetuation of inequalities or, at worst, the validation of injustice. It is these factors that merit closer analysis.

The 'international/local' lens provides an important perspective to analyse and unpack these risks and divides. As noted before, ICC practice is built on a paradox. In its own discourse, the Court relies on complementarity, integrative procedures and dialogue with 'local' actors, in order to mitigate concerns of justice export or imposition. All organs of the Court seek to avoid that the ICC is perceived as 'gentle civilizer' of justice systems. But the institutional architecture of the Court, and the

71 See statement of Mr Erwa (Sudan), Security Council, 5158th meeting, Thursday, 31 March 2005, UN. Doc. S/PV.5158, at 12.

72 See Associated Press, 'African Union calls on Member States to Disregard ICC Arrest Warrant against Libya's Gadhafi', 2 July 2011, at www.foxnews.com/world/2011/07/02/african-union-calls-on-member-states-to-disregard-qaddafi-arrest-warrant/.

73 Their weaknesses and internal contradictions have been exposed elsewhere. See Tladi, 'African Union'; M. du Plessis, A. Louw, and O. Maunganidze, *African Efforts to Close the Impunity Gap*, ISS Paper 231 (ISS Africa, 2012) at www.issafrica.org/uploads/Paper241.pdf.

framing of cases, creates a drive for de-contextualisation, and homogenisation that stands in contrast to this imperative. It embraces a functional logic, with different narratives and representations of 'the local'.

Us vs. them: 'the local' as other

The ICC is vulnerable to arguments of division and exclusion,[74] since it tends to encourage abstractions and certain binary visions of justice. Although the Court seeks to mitigate divides ('us vs. them') through dialogue and certain managerial techniques (e.g., outreach and prospects of local proceedings[75]), it requires a certain distance to 'the local'. This distinction emerges incrementally through proceedings, namely analysis and judicialisation, which rely on abstraction and fiction.[76]

Periphery vs. centre

The 'us vs. them' divide is rooted in deeper frictions relating to the relationship between periphery and centre.[77] Formally, the ICC is a treaty regime, based on consent. Unlike other global order treaties, such as the UN Charter,[78] it does not contain an express universalising mandate. But willingly or unwillingly, the Court is frequently moved to the heart of the accountability debate, be it for strategic, activist or apologetic reasons. Where the Court is not taking this role on its motion, it is placed into this position by other actors who pursue specific rationales and interests (e.g., states who associate certain benefits with ICC activity, civil society actors or, at times, the Security Council). The ICC is thus put at the centre of accountability strategies. This move is driven by an urge for immediate response. But it neglects underlying tensions. The ICC is put 'at the

[74] See Nielsen, 'Civilizing Mission', 103.

[75] See ICC, *Prosecutor* v. *Bosco Ntaganda*, Trial Chamber VI, Recommendation to the Presidency on holding part of the trial in the State concerned, ICC-01/04-02/06, 19 March 2015.

[76] On fiction, see K. Clarke, *Fictions of Justice* (Cambridge: Cambridge University Press, 2009).

[77] On 'periphery' and 'centre' in post-colonial theory, see D. Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton, NJ: Princeton University Press, 2000); Darian Smith, 'Postcolonial Theories', 252.

[78] According to Art. 2 (6) of the UN Charter, the UN 'shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security'. The ICC Statute lacks such a provision.

forefront of the fight against impunity', although it is 'not . . . necessarily the most liberal regime of criminal justice'.[79]

The ICC regime is ab initio built on a certain structural inequality.[80] ICC jurisdiction is geared at atrocity violence. The statutory mandate steers ICC action towards intervention in fragile conflict and post-conflict settings. These crimes are less likely to occur in stabilised societies. When they are committed by major Western powers, they often occur in the context of protective or military action in foreign states. The ICC as such is neither the source (i.e. the cause) of this discrepancy, nor does it apply unequal standards per se. But ICC intervention may entrench existing divides, that is, consolidate or create deeper distinctions between developed and less developed states. In cases where the Court does not act, the model of justice that it represents may be seen as unduly limited in choice.[81] These dynamics are at the heart of discontents voiced against ICC justice.

Once the ICC machinery is brought into action, it tends to portray conflict in specific categorisations. ICC procedures involve choices of prioritisation and distinction to separate sites of intervention from sites of inaction. This operation entails a (i) move towards centralisation of justice and (ii) a process of abstraction that simplifies and reconstructs social reality. Both processes create a distance between the ICC and 'the local'. Court action becomes essentially an engagement with the 'other'. This opens ICC justice to a range of critiques that have been articulated against other international judicial mechanisms, such as (i) marginalisation of claims, (ii) de-contextualised knowledge production, (iii) perpetuation of structural inequalities or (iv) even validation of outcomes that are perceived as 'unjust' locally.[82]

Centralising features of ICC action

The Rome Statute was meant to create a greater space for domestic justice options. But the existence of the Court as justice mechanism centralises justice discourse to the detriment of other approaches to mass conflict. There is a stark contradiction between reality and perception. Although

[79] See Mégret, 'Implementation', 389, fn. 80. [80] See Nielsen, 'Civilizing Mission', 107.
[81] Drumbl, *Atrocity*, 143.
[82] On global judicialisation, see B. Kingsbury, 'International Courts: Uneven Judicialization in Global Order', in J. Crawford and M. Koskenniemi (eds.), *Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012), 203–227.

the Court's institutional capabilities are limited, the role of the ICC is often regarded as central. This centralisation is not necessarily driven by the Court itself, but rather by the movement behind it. As noted by Adam Branch:

> 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.[83]

There is a thus certain irony in the way in which centralisation operates. It may even occur against the Court's will.

When the ICC itself takes action, it applies certain formal lenses that shape its focus of enquiry. Patterns of conflict are first of all analysed in terms of jurisdictional parameters. This logic requires the Court to look at local reality through an abstract lens, namely territoriality or nationality.[84] Both concepts are tied to the state. This lens creates a rift between the ICC and 'the local'. The latter is categorised, if not subsumed, by affiliation to the state. Local culture and identity are largely blended out. The relationship between the 'international' and the 'national' forms the focus of enquiry.

Where justice choices are contested, this contestation remains largely dependent on the state. Both states and defendants can challenge the admissibility of proceedings.[85] But the ultimate choice on the forum of justice is made on the basis of the action, will and capacity of the state, as determined by the Court.[86] 'The local' is thus essentially treated as the 'national'. Local issues are subsumed into national processes. If a state is unwilling or unable to act, an individual defendant cannot reverse ICC engagement.

When investigation starts, the focus shifts quickly to the other end of the spectrum, namely the individual. ICC investigations and prosecutions are predominantly concerned with determination of individual criminal responsibility. This focus has particular attraction. It prevents

[83] See A. Branch, 'What the ICC Review Conference Can't Fix', 11 March 2010, at http://africanarguments.org/2010/03/11/what-the-icc-review-conference-can%E2%80%99t-fix/.

[84] For legal analysis, see M. Vagias, *The Territorial Jurisdiction of the International Criminal Court* (Cambridge: Cambridge University Press, 2014).

[85] Art. 19 (2) ICC Statute. [86] Art. 19 (1) ICC Statute.

formal assignment of responsibility to collectivities, such as whole ethnic and religious groups. This may ultimately prevent resentment, hatred and frustration caused by feelings of collective guilt. But it also has downsides. The turn to individual responsibility makes it more difficult to capture structural dimensions of violence. It privileges punishment of individuals over enquiry into the causes of atrocity.[87] The role of collectivities and groups is brought in through quantitative and qualitative nexus assessment in the context of contextual elements of crimes or linkage factors. But it is examined through the perspective of individual responsibility. One of the dangers of a strict focus on individualised guilt in institutional responses is that it 'may contribute to a myth of collective innocence'.[88]

Collectivities as such rarely have a voice; their interests are typically mediated. They are mainly reflected in collective forms of victim representation[89] or indirectly in prosecutorial strategies, namely in determinations whether individual cases represent major patterns of victimisation in conflict or the role and involvement of groups in crimes. One direct option for consideration of community interests is the 'interest of justice' clause under Article 53 of the Rome Statute.[90] It is framed in negative terms. It allows the ICC to take a decision not to proceed 'in the interests of justice'. This clause provides an entry point for consideration of local justice approaches. Consideration of the 'interests of justice' involves enquiry into the interests of victims (Article 53 (1)(c)). In its policies, the Office of the Prosecutor (OTP) has presented this provision as a means to conduct a 'dialogue' with victims and representatives of local communities.[91] In the first ICC situations (e.g., Uganda and Democratic Republic of Congo), the OTP has formally engaged a wide range of actors in this discourse, namely intermediaries and 'local leaders (religious, politically, tribal)', as well as 'other states, local and international intergovernmental and nongovernmental organizations'.[92]

This methodology is slightly contradictory. The openness towards consultation and local input seems to suggest that ICC justice can be

87 For a critique, see Nielsen, 'Civilizing Mission', 99.

88 See L. Fletcher and H. Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation', *Human Rights Quarterly*, 24 (2002), 573, 580.

89 See Rule 90 (2) of the ICC Rules of Procedure and Evidence.

90 See Chapter 5 by Newton in this volume.

91 See OTP, Policy Paper Interests of Justice (September 2007), 6, at http://icc-cpi.int/iccdocs/asp_docs/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf.

92 *Ibid.*

negotiated. But the normative space for dialogue is in fact very limited. In its 2007 Policy Paper, the OTP has made it very clear that there is a 'presumption in favour of investigation or prosecution' under the Statute, and that the Prosecutor would use Article 53 'only in exceptional circumstances'.[93] The office used a rather authoritative rhetoric to justify this approach. It denied freedom of choice, arguing that:

> a new legal framework has emerged and this framework necessarily impacts on conflict management efforts. The issue is no longer about whether we agree or disagree with the pursuit of justice in moral or practical terms: it is the law.[94]

This argument leaves hardly any room for contest and persuasion, since it implies that there can be no 'neutral' debate on the issue of accountability. The OTP conceded in a footnote that the concept of 'justice' in Article 53 'must be broader than criminal justice'.[95] But it failed to acknowledge that 'other forms of justice decided at the local level' could serve as a bar to ICC proceedings under Article 53. It merely stated the need for a 'comprehensive approach' under which ICC justice and local justice mechanisms are 'as complementary as possible'.[96] These statements are framed in the language of legal pluralism. But they have an underlying centralising effect on justice discourse. They divide the world into an accountability universe of the ICC ('us'), and a parallel system of 'other forms of justice', pursued locally ('them'). This juxtaposition itself has strong effects on conflict dynamics. It presents ICC justice as idealised framework of reference. ICC policy remains strongly one-directional. As has been rightly suggested by Priscilla Hayner, '[w]hat may be missing is a process by which the prosecutor could more comfortably evaluate the likely impact and timing of her actions in each different national context.'[97]

De-localisation and social engineering

ICC proceedings entail a significant degree of de-localisation and social engineering. This process occurs incrementally, in multiple segmented steps. It involves different steps: dislocation, disaggregation, translation

[93] *Ibid.*, 3.
[94] For a different narrative on the state of the art, see Freeman, *Necessary Evil.*
[95] OTP Policy Paper, *Interests of Justice*, 8, fn. 13. [96] *Ibid.*, 8.
[97] See Priscilla Hayner, 'Does the ICC Advance the Interests of Justice?', 4 November 2014, at www.opendemocracy.net/openglobalrights/priscilla-hayner/does-icc-advance-interests-of-justice.

and reconstruction. The steps are shaped by different filters applied in the analysis.

Methods

Like other criminal tribunals, the ICC analyses historical events mainly through the lens of crimes.[98] Historical context informs the contextual elements of crimes or narratives of conflict in pleadings. In proceedings, facts and events are filtered through the rationality of the law. The legal process seeks to bring order into chaos. It is geared at clarifying and simplifying social reality. It relates facts, conduct and events to legal concepts and tangible normative constructs. It analyses human conduct through certain ordering structures, hierarchies and chains of causation, and it uses constructed knowledge and fictions to fill gaps.[99]

Typically, domestic conflict and violence are branded in specific language and judicial vocabulary. Atrocities are translated into crimes labels that form part of the ICC's jurisdiction. The very use of these labels might influence dynamics. Specific incidents and patterns of victimisation serve as a sample for enquiry. This is followed by (i) the framing of the situation that forms the subject of enquiry (preliminary examination), (ii) the initiation of international investigation and prosecutions, (iii) the shaping and identification of the identity of the 'case' and (iv) recognition of specific victims through the regime of victim participation. In this context, social reality is disaggregated, and then reconstructed, based on evidence available.

This process involves friction, and at times contradiction, with domestic narratives. There is a certain virtue and necessity for the ICC to override domestic articulations and justification of conduct. As argued by Damaška, a message appropriate *orbi* need not be appropriate *urbi:*

> Circumstances exist in which global horizons of concern clearly should prevail. International judges should not be swayed by hostile local responses to their decisions if they are generated by values or attitudes whose transcendence is the pedagogic aim of international criminal justice.[100]

[98] On history and trials, see L. Douglas, *The Memory of Judgement: Making Law and History in the Trials of the Holocaust* (London: Yale University Press, 2000). R.A. Wilson, *Writing History in International Criminal Trials* (Cambridge: Cambridge University Press, 2011).

[99] See M. Damaška, 'What Is the Point of International Criminal Justice', *Chicago-Kent Law Review*, 83 (2008), 329.

[100] Id., at 348.

At pre-trial as well as at trial, this information is presented through the lens of multiple agents that pursue different, and sometimes conflicting, interests (prosecution, defence, victims, judges, state representatives, NGOs, etc.). This culminates in different narratives.

Each of these steps (dislocation, disaggregation, translation and reconstruction) involves a certain degree of de-localisation. It entails multiple layers of abstraction and knowledge production, geared at providing judgment. The process of judicialisation rationalises the view on facts and conduct. But it also entails risks and negative side effects.

Global/local dilemmas

De-localisation creates certain structural paradoxes from the perspective of the goals of justice. In the eyes of 'the local', the very trial of perpetrators in The Hague may not be seen as punishment but as a reward. The ICC is bound by higher human rights standards than certain domestic jurisdictions. The ICC might thus appear as 'justice light' in terms of punishment and sentencing in comparison to domestic proceedings. This paradox became apparent in the context of Rule 11*bis* proceedings at the ad hoc tribunals where some of the defendants pleaded that they were high-level, rather than medium- or low-level, perpetrators, in order to be tried in The Hague rather than locally.[101] Similar claims were made in the ICC context. In the Libyan situation, Saif Al-Islam Gaddafi and Abdullah Al-Senussi expressly requested surrender to the Court.[102] The Gaddafi Defence supported ICC admissibility, arguing that '[j]ustice [would] not be served by domestic proceedings', since they are 'so ineliminably tainted by violations of domestic law that . . . proceedings will go down in history as a manipulated spectacle of victor's revenge'.[103] The Al-Senussi Defence adopted a similar line, invoking 'recognised standards of due process under international law'.[104] In both cases, the

[101] O. Bekou, 'Rule 11 BIS: An Examination of the Process of Referrals to National Courts in ICTY Jurisprudence', *Fordham International Law Journal*, 33 (2009), 729.

[102] *Gaddafi and Al-Senussi, Situation in Libya*, Defence Response on behalf of Mr Abdullah Al-Senussi to 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute', ICC-01/11-01/11-356, 14 June 2013, para. 11.

[103] *Gaddafi and Al-Senussi, Situation in Libya*, Public Redacted Version of the 'Response to the "Libyan Government's further submissions on issues related to admissibility of the case against Saif Al-Islam Gaddafi"', ICC-01/11-01/11-281-Red2, 18 February 2013, para. 11.

[104] See *Prosecutor* v. *Saif Al-Islam Gadaffi and Abdullah Al-Senussi*, Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's 'Decision on the

preference for ICC justice over 'local' trials was visibly shaped by the absence of the death penalty in ICC sentencing.

Second, de-localisation produces certain tensions in relation to knowledge production. A judicialised way of reading conflict may produce reconstructions of reality that are at odds with local perspectives. One particular problem is the representation of the role of non-state actors. In many contexts where atrocity crimes occur, the state is at best one among many actors influencing people's lives. International criminal justice goes beyond the state-centric logic of general international law or peacebuilding strategies, by highlighting accountability of non-state actors in both classical civil war contexts and conflicts between opposing armed groups. But it struggles with a representation of non-state violence. It uses certain social ideal types (i.e., ideas of organisation, formation of plan and policy, use of command) to categorise this violence, which may not always offer a proper fit. The underlying picture is often constructed through mediated knowledge, that is, information from states, NGOs or international organisations that have a normative interest in the use of specific labels and their connotations.

At the ICC, these epistemological dilemmas became evident in the *Katanga* case.[105] The judgment rested on the theory that Katanga contributed to a campaign by Ngiti fighters to 'wipe out' out the village of Bogoro and its Hema population, since it occupied a strategic position for the Union des patriotes congolais (UPC) in the Ituri conflict.[106] But key foundations of this theory, such as the concept of 'militia', ethnic foundations or an 'alleged anti-Hema ideology', remained underdeveloped. The weaknesses were outlined in the Minority Opinion of Judge Christine van den Wyngaert. Van den Wyngaert questioned key categorisations of organisational violence. She argued that the judgment failed to explain 'with any level of precision how the so-called militia of the Ngiti fighters of Walendu-Bindi was structured or how it supposedly operated',[107] or 'how and when the "thousands" of individual members of the Ngiti fighters of Walendu-Bindi would have adopted the alleged common

admissibility of the case against Abdullah Al-Senussi', ICC-01/11-01/11-474, 4 November 2013, para. 3.

105 See C. Stahn, 'Justice Delivered or Justice Denied: The Legacy of the Katanga Judgment', *Journal of International Criminal Justice*, 12 (2014), 809.

106 ICC, *Prosecutor* v. *Germain Katanga*, Jugement rendu en application de l'article 74 du Statut, ICC-01/04-01/07-3436, 8 March 2014.

107 Minority Opinion of Judge Christine Van den Wyngaert, ICC-01/04-01/07–3436-AnxI, 8 March 2014, para. 205.

purpose to attack the Hema civilian population'.[108] She claimed that 'so little is known about how, when and by whom most of the crimes against civilians were actually carried out that it is totally impossible to form any opinion about the systematic nature of it'.[109]

Her critique attacks the trend to present and construe the world through pre-fabricated legal constructs. Van den Wyngaert cautions against the risks of undue categorisation and oversimplification, including the 'danger of treating entire populations, or vast categories within a population, as abstract entities with a mind of their own'.[110] Her argument goes to the heart of the limits and risks of global knowledge production in a judicial context:

> it is factually wrong to reduce this case, and especially the reasons of the different Ngiti fighters and commanders for participating in the operation against the UPC, to ethnic fear and/or hatred. Such oversimplification may fit nicely within a particular conception of how certain groups of people behave in certain parts of the world, but I fear it grossly misrepresents reality, which is far more complex. It also implicitly absolves others from responsibility.[111]

Ultimately, such reliance on social ideal types might produce narratives that are seen as perpetuating injustice at the local level.[112]

Third, de-localisation entrenches certain knowledge disparities. In post-colonial and critical scholarship, global institutionalism is often criticised for its technocratisation and bureaucratisation, that is, the application of standardised or self-serving decision-making processes or forms of organisation to complex societal structures.[113] This critique applies in a different form to judicialisation. When a case is pursued before the ICC, it triggers a multiplicity of judicial decisions and motions. The sheer amount of materials created through pleadings and proceedings makes it very hard to follow the case. The Court speaks to some extent in its own language. ICC proceedings introduce specific vocabulary and technical procedures that are often difficult to understand by outsiders. Various organs of the Court represent different voices, while differences between procedures and the justification of certain judicial

[108] *Ibid.*, para 207. [109] *Ibid.*, para. 274. [110] *Ibid.*, para. 258. [111] *Ibid.*, para. 318.

[112] See generally A. Branch, 'International Justice, Local Injustice', *Dissent*, 51 (2004), 22.

[113] See U. Baxi, 'Postcolonial Legality', in H. Schwarz and S. Ray (eds.), *A Companion to Postcolonial Studies* (Oxford: Blackwell, 2000), 540, 551–552; M. Barnett, 'Humanitarianism as Scholarly Vocation', in M. Barnett and T. Weiss (eds.), *Humanitarianism in Question: Politics, Power, Ethics* (Ithaca, NY: Cornell University Press, 2008), 235, 255; Kennedy, *Dark Sides*, 26–28.

outcomes are not always clear. This creates risks of misrepresentation and misunderstanding that cannot be solved by mere translation and interpretation.[114] It also has certain disempowering effects. It ultimately implies that knowledge, expertise and professionalisation relating to the adjudication of international crimes develop mostly internationally, rather than domestically or locally.[115] This creates a vicious cycle. It fosters a spin towards a monopolisation of justice that forecloses local input and might remain unresponsive to local needs and particularities.

'The local' as object

Although the ICC Statute is systemically open to pluralism, the functioning of the Court remains self-centric. 'The local' is predominantly an object. ICC practice does not repeat stereotyped versions of civilising discourse as reflected in the Covenant of the League of Nations or Article 38 of the ICJ Statute, that is, formal distinctions between advanced and primitive nations as well as between the civilised and the savage.[116] Access to the Rome Statute is not subject to a determination of the ability and standards of a domestic system. The Statute avoids formal claims of superiority over domestic justice.[117] It is also less vertical than other international justice mechanisms (e.g., the 'primacy'-based ad hoc tribunals).[118] It does not impose clear-cut substantive justice standards. It judges domestic action in terms of processes and outcomes. But it represents an instrumentalist logic that exposes the Court to similar criticisms as other 'global governance' actors. ICC action has caused

[114] On dilemmas of acquittals, see J. Clark, 'Courting Controversy: The ICTY's Acquittal of Croatian Generals Gotovina and Markač', *Journal of International Criminal Justice*, 11 (2013), 399.

[115] For democratisation of access to information, see M. Bergsmo, *Complementarity and the Challenges of Equality and Empowerment*, FICHL Policy Brief Series No. 8 (2011), 3–4.

[116] Article 38 para. 1 lit. c. of ICJ Statute refers to 'general principles of law recognized by civilized nations' as one of the sources of international law. See G.W. Gong, *The Standard of 'Civilization' in International Society* (Oxford: Clarendon Press, 1984), 3; L. Obregón, 'The Civilized and the Uncivilized', in B. Fassbender and A. Peters (eds.), *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012), 917.

[117] In colonial policy, decolonisation implied that 'a society first had to be educated to be civilized' and to gain access to self-determination before its recognition as an equal sovereign. See N. Matz, 'Civilization and the Mandate System under the League of Nations', *Max Planck Yearbook of International Law*, 9 (2005), 47, 61.

[118] F. Mégret, 'In Search of the "Vertical": Towards an Institutional Theory of International Criminal Justice's Core', in C. Stahn and L. van den Herik (eds.), *Future Perspectives on International Criminal Justice* (The Hague: TMC Asser Press, 2010), 178.

resentment since it entails features of disempowerment and emancipatory rationales. Two factors are of key importance in this regard: (i) the ICC regime fosters a (re-)orientation of the domestic realm towards the international, and (ii) it pushes certain forms of emancipation and dependency.

Marginalising choice

The mandate of the Court is geared at limiting choice. This is inherent in its mandate of ensuring accountability that prioritises legal justice. There is widespread agreement on the underlying rationale of accountability. But the way it is implemented has given rise to concern.

There is a fear that ICC policies marginalise domestic agency and foster ICC-centric imitation.[119] The principle of complementarity offers a basic choice that is now largely uncontested in international justice: A state must either investigate or prosecute crimes, or leave space for another forum to take action if it fails to do so. This can be either the ICC or another state ('horizontal complementarity'). This commitment itself is rarely challenged on ideological grounds.[120] But its application has come under criticism.

The ICC has adopted a rather strict approach towards the required degree of symmetry between domestic and ICC action. The 'case' before the ICC serves as main point of comparison. States must adjust their criminal strategy to this focus of enquiry and model their own action after ICC proceedings, in order to be able to challenge admissibility successfully.[121] It is this structural dependency that causes unease from a critical perspective. The very idea that a state must construct its accountability approach after a pre-set international case policy evokes certain parallels to historical critiques of international justice.[122] At Tokyo, the Indian judge Pal famously branded the trial as an imperial

119 See K. Clarke and M. Goodale (eds.), *Mirrors of Justice: Law and Power in the Post-Cold War Era* (Cambridge: Cambridge University Press, 2014).

120 But see Nielsen, 'Civilizing Mission', 108, arguing that the choice under the complementarity model as such is 'imperialistic', since 'the "other" is brought within the universal standards of civilization set by international criminal law'.

121 See R. Rastan, 'What Is a "Case" for the Purpose of the Rome Statute?', *Criminal Law Forum*, 19 (2008), 435.

122 See L. Varadarajan, 'The Trials of Imperialism: Radhabinod Pal's Dissent at the Tokyo Tribunal', *European Journal of International Relations*, 21 (2015), first published on 10 December 2014 as doi:10.1177/1354066114555775; Y. Totani, *The Tokyo War Crimes Trial* (Cambridge, MA: Harvard University Press, 2009).

project by Allied Powers,[123] geared at creating 'an international legal community in their own image'.[124] The ICC glanced over these sensitivities. It expressly used the 'mirror' imagery to determine complementarity. It held that admissibility requires a 'judicial assessment of whether the case that the State is investigating sufficiently mirrors the one that the Prosecutor is investigating'.[125]

This language is unfortunate. It evokes fears that complementarity is a concept with missionary features, geared at domestic replication.[126] In its jurisprudence, the Court accepted that domestic investigations and prosecutions must not necessarily use the same crime labels as the ICC.[127] But it restricted flexibility through an 'incident'-specific interpretation of the 'sameness' of the case. It held that it is 'hard to envisage a situation in which the Prosecutor and a State can be said to be investigating the same case in circumstances in which they are not investigating any of the same underlying incidents'.[128] This leaves de facto limited space for deviation.

The strict focus on congruence between the ICC and the domestic case has critical repercussions. It has been vividly challenged by Kenya and Libya. Kenya argued that this symmetry approach leaves virtually no prospects for domestic justice, 'since a national jurisdiction may not always have the same evidence available as the Prosecutor and therefore may not be investigating the same suspects as the Court'.[129] Libya

[123] Pal argued that the tribunal would be an 'ideological cloak, intended to disguise the vested interests of the interstate sphere and [. . .] serve as a first line for their defence'. See IMTFE, Dissentient Judgment of Justice Pal (Kokusho Kankokai, Tokyo, 1999), 117.

[124] E. Kopelman, 'Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial', *New York University Journal of International Law and Politics*, 23 (1991), 373, 375.

[125] *Gaddafi and Al-Senussi, Situation in Libya*, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi', ICC-01/11-01/11 OA 4, AC, ICC, 21 May 2014, para 73 ('*Gaddafi* Appeals Judgment'); in the same vein *Gaddafi and Al-Senussi, Situation in Libya*, Judgment on the Appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October entitled 'Decision on the admissibility of the case against Addullah Al-Senussi', ICC-01/11-01/11 OA 6, AC, ICC, 24 July, para. 119 ('*Al Senussi* Appeals Judgment').

[126] On 'mimicry' as a feature of post-colonial critique, see D. Robinson, *Translation and Empire: Postcolonial Theories Explained* (Manchester: St Jerome Publishing, 1997), 19–20; Darian Smith, 'Postcolonial Theories', 253.

[127] *Al-Senussi* Appeals Judgment, para. 119 [128] *Gaddafi* Appeals Judgment, para. 72.

[129] See Appeals Chamber, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', ICC-01/09-02/11 O A, 30 August 2011, para. 42.

submitted that it conflicts with the need to '[empower] national jurisdictions in challenging transitional situations'.[130]

Existing jurisprudence runs the risk of entrenching inequalities in international society, that is, differences between developed and developing states and between stable and unstable democracies. It makes it even harder for conflict-torn societies to take justice in their own hands. It provides limited weight to a more cooperative-oriented approach towards justice, that is, the idea that 'the overall goal of the Statute to combat impunity can also be achieved by the Court through means of active cooperation with the domestic authorities'.[131] This contradiction has been aptly identified by Judge Ušacka:

> Instead of complementing each other, the relationship between the Court and the State would be competitive . . . such an approach could potentially preclude a State from focusing its investigations on a wider scope of activities and could even have the perverse effect of encouraging that State to investigate only the narrower case selected by the Prosecutor.[132]

Ultimately, a strict admissibility jurisprudence might deprive a domestic society from an indigenous process of trial and error.

Ethics of emancipation

A second dilemma in the agent-object relationship relates to the ethics of emancipation. The idea of complementarity as such carries a certain emancipatory impetus. Legally, states are not forced to model their own justice system after the ICC. But the ICC framework provides an incentive for legal adaptation through the 'unability' and 'unwillingness' exception. States might need to adjust and strengthen their national jurisdiction in order to avoid being found 'unable' or 'unwilling'. Complementarity thus creates incentives for structural reform, such as perfecting the state, encouraging accountability and transparency and strengthening civil society.

These dynamics open the Court to emancipatory dilemmas known from (post-)colonial discourse.[133] States need to adopt certain

130 *Gaddafi* Appeals Judgment, para. 76.
131 *Gaddafi* Appeals Judgment, Dissenting Opinion of Judge Anita Usacka, ICC-01/11-01/1 l-547-Anx2 (OA 4), para. 65.
132 *Ibid.*, paras. 52 and 55.
133 On legal hybridity in colonial and post-colonial relations, see J. Comaroff and J. Comaroff (eds.), *Law and Disorder in the Postcolony* (Chicago, IL: University of Chicago Press, 2006); Darian Smith, 'Postcolonial Theories', 255.

international narratives and structural measures in order to gain 'ownership' over justice. Practice in some of the first ICC situations (e.g., Uganda, DRC) has shown that the logic of complementarity has certain distorting side effects. As illustrated in this volume by Christian De Vos[134] and Patryk Labuda,[135] there is a risk that states implement international standards primarily to satisfy international audiences, such as the ICC itself, international donors and NGOs.[136] External incentives and pressure for quick solutions encourage a move towards targeted institutional responses that satisfy international audiences, but remain exceptional in the domestic context. One example is the creation of the International Crimes Division (ICD), a special division of the High Court of Uganda.[137] It has had a curious career. It was initially deemed to be part of the comprehensive peace agreement with the Lord's Resistance Army, but has re-branded itself 'as a court of "complementarity" with respect to the International Criminal Court', in order to '[fulfill] the principle of complementarity stipulated in the preamble and Article 1 of the Rome Statute'.[138] It dealt with only one 'core crimes' case, the *Kwoyelo* case.[139] This case was hampered by controversies between the Constitutional Court and the Supreme Court over the effects of Ugandan amnesty legislation.[140] When Dominic Ongwen was arrested in 2015, ICD proceedings were not even considered. Nor did the ICD look into violations committed by the Uganda People's Defence Force. It has thus remained a partly artificial construct, as Stephen Oola's chapter in this volume examines in greater detail.

In other contexts such as Kenya and Libya, complementarity has triggered an action/response game. Domestic accountability measures were adopted. But they were geared at avoiding ICC intervention, rather than appropriating accountability regimes. For instance, Libya adopted a

134 See Chapter 15 by De Vos in this volume.
135 See Chapter 16 by Labuda in this volume.
136 See also S. Kendall, 'Commodifying Global Justice: Economies of Accountability at the International Criminal Court', *Journal of International Criminal Justice*, 13 (2015), 113.
137 See Nouwen, *Complementarity*, 223.
138 See International Crimes Division, at www.judicature.go.ug/data/smenu/18/International_Crimes_Division.html.
139 On the *Kwoyelo* case, see Chapter 6 by Oola in this volume.
140 The Constitutional Court directed the ICD to cease the trial in light of the existing amnesty legislation. In April 2015, the Supreme Court held that the 'trial of the respondent by the International Crimes Division of the High Court is proper and should proceed'. See Supreme Court, *Uganda versus Kwoyelo*, Constitutional Appeal No. 01 of 2012, [2015] UGSC 5, 8 April 2015, at www.ulii.org/ug/judgment/supreme-court/2015/5.

draft decree, incorporating international crimes into domestic law, and a decree on reparation for victims of sexual violence, in order to strengthen its admissibility challenges.[141] This is likely to produce artificial results. If states strengthen domestic systems primarily for the sake of adjudicating specific cases domestically, reform efforts are geared towards ICC priorities rather than long-term domestic interests. This adjustment of national systems based on case-related strategic considerations may ultimately run counter to the objective of the Rome Statute, that is, to create a sustainable 'system of justice' and replicate failures of development policy (e.g., norm export, legal transplantation).[142]

'The local' as subject

The view of 'the local' as subject offers a counter-narrative to fears of disempowerment through ICC justice. The ICC embraces this vision. It differs formally from classical emancipatory projects where the interests of 'the local' were conveyed through state-based mediaries.[143] It stands in the tradition of liberal justice, which seeks to counter forms of organisation, domination or submission inherent in the commission of crimes and formal structures supporting their entrenchment in society. As Pablo de Greiff put it:

> criminal justice can be interpreted as an attempt to provide recognition to victims by denying the implicit claim of superiority made by the criminal's behaviour through a sentence that is meant to reaffirm the importance of norms that grant equal rights to all.[144]

ICC justice serves as both a shield for individuals and as a platform to voice the grievances of victims. It recognises the significance and value of persons in a dual capacity: as victims and as holders of rights. Both aspects are typically invoked as progress by supporters of international

[141] On the draft decree, see Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11, 1 May 2012, para. 84. On justice and Libya, see International Crisis Group, 'Trial by Error: Justice in Post-Qadhafi Libya', Crisis Group Middle East/North Africa Report N°140, 17 April 2013; see Chapter 18 by Kersten in this volume.

[142] On legal transplants and colonisation, see B.S. Cohen, *Colonialism and Its Forms of Knowledge* (Princeton, NJ: Princeton University Press, 2006), 58–75.

[143] On the petition system of the League, see A. Momirov, 'The Individual Right to Petition in Internationalized Territories: From Progressive Thought to an Abandoned Practice', *Journal of the History of International Law*, 9 (2007), 203.

[144] See *Report Special Rapporteur*, para. 30.

justice. But they create certain new dilemmas in their approach towards the victim as subject.[145]

Tensions of a rights-based approach

In past decades, there has been a large turn to a rights-based approach towards victims' claims.[146] This trend towards individualisation has its origin in the recognition of the rights of victims to an effective remedy.[147] It has been enshrined in multiple UN documents, such as the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[148] It has merits in the domestic adjudication of claims or in civil claims proceedings. But it cannot be transposed in an automatic fashion to international criminal justice. In a criminal process, adjudication of victims' claims remains an annex function to the process of judgment. This involves a typification of victims' claims and a certain instrumentalisation of their interests. Judicial action in support of victims is portrayed as an improvement of local interests, but the two do not necessarily coincide. Individualised victim protection does not necessarily correlate with improvement of local conditions and collective interests.

At the ICC, the rights-based approach towards victims entails strong tensions between individual and collective interests. Applications for participation and reparation are individualised.[149] The Court is mandated to provide significant attention to individualised factors, such as whether 'personal interests' of victims are affected by proceedings or individualisation of harm. But adjudication remains closely tied to the nexus to the prosecutor's case, including choice of perpetrators, incidents and localities and crimes charged (participation), as well as the link to the offender (reparation). This type of litigation may easily increase victim

[145] See also Chapter 11 by Clarke and Chapter 12 by Fletcher in this volume.

[146] On similar trends in humanitarian action, see P. Benelli, 'Human Rights in Humanitarian Action and Development Cooperation and the Implications of Rights-Based Approaches in the Field' (ATHA, June 2013).

[147] See Velasquez Rodriguez Case, Judgment of 29 July 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), para. 176.

[148] UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, para. 15.

[149] See Chapter 13 by Dixon and Chapter 14 by Kendall in this volume.

fatigue with the Court, struggles between individuals over identity and group affiliation or feelings of exclusion. In key decisions, that is, the trial judgment or decisions on sentencing and reparation, accountability is expressed towards victims collectively. In many instances, formal recognition of victimhood and expressivist or symbolic justice may be the only realistic prospect of proceedings.[150] The focus on individual rights and claims in the judicial process stands at odds with this outcome. The Court often struggles to relate this judicial outcome back to individual claims.

The rights-based approach provides a breeding ground for contestation. It may create new forms of hierarchy in the conceptualisation of 'the local'. The ICC system creates at least three different classes of victims: a broader category of victims whose general victimhood is testified in abstract terms (e.g., victims of situation-related violence), victims of the case (whose status is individualised) and victims entitled to reparation as a result of harm suffered by the convicted person.[151] This judicialisation of victimhood may cause new grievances among collectivities[152] or forestall a sense of closure with the past. It coincides with different types of benefits. While victims with a sufficient link to the conviction benefit from Court-ordered reparations under Article 75 (i.e. individual reparation, collective reparation or both),[153] other victims are at best eligible to come within the ambit of the Trust Fund's 'assistance mandate', which is humanitarian in nature.[154]

These tensions became apparent in the debate over the appropriate form of reparations in the *Lubanga* case. The Trust Fund for Victims argued that

> individual [reparations] awards which are dependent on successful applications to participate may not be the most appropriate approach in the

[150] See *Prosecutor* v. *Thomas Lubanga*, TC I, Decision on the Defence request for leave to appeal the Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06, 29 August 2012, para. 23.

[151] On the hierarchisation of victims through ICC proceedings, see Kendall and Nouwen, 'Representational Practices', 241–252.

[152] See M. Findlay, 'Locating Victim Communities within Global Justice and Governance', in A. Crawford (ed.), *International and Comparative Criminal Justice and Urban Governance: Convergence and Divergence in Global, National and Local Settings* (Cambridge: Cambridge University Press, 2011), 109–139.

[153] *Prosecutor* v. *Thomas Lubanga*, Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012, ICC-01/04-01/06 A A 2 A 3, Appeals Chamber, 3 March 2015 (AC Reparations Judgment), para. 65.

[154] AC Reparations Judgment, para. 183; Regulation 50 of the Regulations of the Trust Fund.

> present case, given only a small number of victims are currently participating and they are not necessarily representative of the wider group of victims.[155]

It added that 'community discontent' with the Trial Chamber's verdict 'could lead to former child soldiers and their families to refuse individual awards of reparations due to a fear of reprisals from within their own communities'.[156] The Trial Chamber sought to reduce such risks by endorsing 'a community-based approach' towards reparations.[157] This approach was partly reversed by the Appeals Chamber, which noted that any reparation to a community requires the establishment of a sufficient link between the harm suffered by community members and the crimes of the convicted person.[158]

This jurisprudence illustrates the shadow side of a 'rights-based' conception of victims. It creates distinctions between 'privileged' and 'less privileged' victims. This legal categorisation may implicitly fuel claims of superiority among victims, cause resentment on the part of marginalised victims or neglected local groups or even lead to embarrassment by affected victims, as Peter Dixon explores in his contribution to this volume. As one voice put it in the Kenyan context:

> I am concern[ed] of what to tell my community. How do I explain that you selected few victims? Many victims will be left aside of this process. Everyone I know would like to have a say in this process.[159]

Archetypes of victimhood

The second danger of the ICC's approach towards victims as a subject is related to the construction of subjectivity.[160] In the context of mass atrocity crimes, the victim is rarely regarded as he or she is, but is rather tailored and trimmed to fit certain roles and expectations. Victimhood is shaped by the social patterns of atrocity violence, and then framed and specified by case theory and Court discourses. In this context, personal

155 *Prosecutor* v. *Thomas Lubanga*, Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06, Trial Chamber, 7 August 2012 (TC Reparations Decision), para. 44.

156 *Ibid.* 157 *Ibid.*, para. 274. 158 AC Reparations Judgment, para. 212.

159 See ICC, 'Turning the Lens', 5.

160 On imagined subjectivity in post-colonial theory, see T. Mahmud, 'Postcolonial Imaginaries: Alternative Development or Alternatives to Development?', *Transnational Law & Contemporary Problems*, 9 (1999), 25; T. Ruskola, 'Legal Orientalism', *Michigan Law Review*, 101 (2002), 179, 200 et seq.

harm and suffering is of secondary importance. Subjectivity is a means to an end, that is, related to a cause. The individual victim becomes to some extent a 'universalised victim' that is emblematic of the harm and suffering caused to the international community as a whole.[161] There is a strong tendency to rely on archetypes of victimhood in order to mobilise empathy and support.

Victimhood becomes part of the identification of the Court.[162] This process transforms subjectivity and stresses particular narratives and features; there is an element of drama. Charging strategy and expressivist features of ICC justice focus on spectacular events and certain specific categories of victims (e.g., child soldiers, victims of sexual violence), as Kamari Clarke's work has shown,[163] rather than victims of everyday violence. There is interest in the 'victim' because of its extraordinary position. Victimhood is associated with certain characteristics, such as vulnerability, powerlessness, disadvantages, abuse and fear. This limits the space for contestation and contributes to the perception of justice as a heroic response. Representation of types of violence or policies is often a product of Western culture. It involves a certain degree of voyeurism, that is, viewing the drama of others,[164] and exhibitionist features. The discourse disregards that the label of victimhood has also certain disempowering effects. Some individuals do not want to be seen as (passive) victims but as individual subjects or agents who overcame atrocities they had suffered.[165] Cultivating a culture of victimhood is thus not always in the best interest of conflict-affected persons.

Paradoxically, this construction of victimhood has some parallels to the contradictions of guardianship in historical practice.[166] There is a

161 On victims as constituency of international justice, see also Chapter 1 by Mégret in this volume.

162 See Clarke (Chapter 11).

163 See K. Clarke, 'The Rule of Law Through Its Economies of Appearances: The Making of the African Warlord', *Indiana Journal of Global Legal Studies*, 18 (2011), 7; Clarke, *Fictions of Justice*, 105–109.

164 In the late nineteenth and early twentieth centuries, exhibitions of native people and traditions were a popular means of entertainment in Europe. See Matz, 'Civilization', 66.

165 See M. Mutua, 'Savages, Victims and Saviors: The Metaphor of Human Rights', *Harvard International Law Journal*, 42 (2001), 201; F. Ní Aoláin and D. Haynes, 'The Compatibility of Justice for Women with Analysis', in C. Stahn, J. Easterday, and J. Iverson, *Jus Post Bellum: Mapping the Normative Foundations* (Oxford: Oxford University Press, 2013), 161, 164.

166 Critics have argued that the mandates and trusteeship system were geared at maintaining power. See A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005).

certain conflation between self-interest and the protected subject. ICC justice promises more equality, freedom and justice through judicial intervention. This cause attracts input from and acceptance of the role of victims, but is partly a means for the Court to maintain its own power.

Us as them: the 'local' as pattern of justification

The turn to 'the local' as structural justification becomes particularly evident in the context of exit and disengagement strategy. At this stage, 'them' turns into 'us'. The relationship with national jurisdiction(s) and affected communities turns into a central tenet of ICC policy. The Court uses different types of connections to 'the local' to validate its mission.

In the context of non-engagement or exit from situations, considerable emphasis is placed on synergies between ICC intervention and the strengthening of domestic jurisdictions. Complementarity forms a main postulate of disengagement strategy. This transforms the perspective towards 'the local'. 'National ownership' becomes an important justification of ICC justice.

This lens is reflected in the Court's strategy towards 'Completion of ICC activities in a situation country'.[167] The strategy differentiates between 'completion', that is, progressive conclusion of investigative, prosecutorial and judicial activities,[168] and 'legacy'. This involves 'long-term post-completion projects, which begin prior to the institution's closure, such as outreach and institutional and capacity-building efforts, aimed at leaving a lasting positive impact on affected communities and their criminal justice systems'.[169]

Underlying policies reflect some of the transformative ethos of the ICC. Completion involves 'assessments of what assistance is needed to enable the relevant country's judicial system to handle any residual issues could be seen part of the exit strategies'.[170] Completion is treated in connection with the goal of 'legacy', which is defined by the Court as 'lasting impact on bolstering the rule of law in a particular society, by conducting effective trials to contribute to ending impunity, while also strengthening domestic judicial capacity'.[171]

The Court's legacy vision is centred on global implications and virtual symmetry between the ICC and domestic jurisdiction.[172] It imagines a

[167] Report of the Court on complementarity: Completion of ICC activities in a situation country, ICC-ASP/12/32, 15 October 2013.
[168] *Ibid.*, para. 19. [169] *Ibid.*, para. 17. [170] *Ibid.*, para. 26. [171] *Ibid.*, para. 27.
[172] *Ibid.*, para. 32.

natural continuum between ICC action and domestic action according to which 'national authorities should already be fully ready to pick up and effectively continue work', when 'the Court is exiting a given country'.[173] It operates on the premise that there are 'gaps' between international and domestic justice that can be filled through 'capacity building initiatives'.[174] It relies on consultation[175] and the 'willingness of a given State'[176] to address this vacuum. But it says very little about what 'national ownership' would entail.

Success or failure of cases is often explained with a reference to an 'ideal type' of victim. The focus shifts between 'global' and 'local' victims. Reference is made to the 'global' in order to mobilise sympathy and appeal. For instance, in *Lubanga* the OTP used 'the global child' as archetype. It defended the relatively low sentence of fourteen years as 'a symbol of hope' and 'an important step towards bringing an end to the suffering of tens of thousands of children still forced to fight, to kill and to die in conflicts around the world'.[177] An even broader notion of 'global victim' was used in order to limit concern about inaction in relation to ISIS.[178] The OTP emphasised 'our collective duty as a global community to respond to the plight of victims whose rights and dignity have been violated'.[179] Here, 'us' and 'them' appear to have merged.

Divisive actions or outcomes are often defended with reference to an ideal type of 'local victim'. This strategy was particularly visible in the *Katanga* and *Ndgudjolo Chui* cases. When the Appeals Chamber confirmed *Ndgudjolo Chui*'s acquittal, the OTP defended ICC proceedings by the abstract recognition of victimhood relating to the Bogoro attack. It noted that '[t]he decision does not negate the fact that crimes were committed in Bogoro or the suffering of the victims' in order to limit hostile local response.[180] In *Katanga*, the OTP used the interests of

173 *Ibid.*, para. 36. 174 *Ibid.*, para. 33. 175 *Ibid.*, para. 35. 176 *Ibid.*, para. 34.

177 Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following the Appeals Chamber decision on the verdict and sentence in the Lubanga case: Protecting children means preserving the future, 2 December 2014.

178 On the ICC and ISIS, see C. Stahn, 'Why the ICC Should Be Cautious to Use the Islamic State to Get Out of Africa: Part 1', at www.ejiltalk.org/why-the-icc-should-be-cautious-to-use-the-islamic-state-to-get-out-of-africa-part-1/.

179 Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS, 8 April 2015.

180 Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following the Appeals Chamber decision upholding the acquittal in the Ngudjolo Chui case, 27 February 2015.

victims as pattern of justification for the withdrawal of the appeal against the judgment. It justified agreement with the Defence on the ground that 'Germain Katanga has [. . .] played a part in addressing the need for accountability and justice as expressed by the victims', by 'acknowledging his participation in these crimes and in expressing his regret'.[181] The alleged interests of 'local victim' served as justification to mitigate criticism concerning the outcome of the judgment, that is, the thin basis of conviction and evidentiary problems regarding sexual and gender-based charges.[182] A similar strategy was invoked to explain the end of proceedings against *Kenyatta*. The Prosecutor noted:

> the hurdles we have encountered . . . delayed and frustrated the course of justice for the victims in this case . . . it is my firm belief that today's decision is not the last word on justice and accountability for the crimes that were inflicted on the people of Kenya in 2007 and 2008.[183]

This strategy illustrates the instrumentalist use of the 'the local' in ICC practice. The ICC is sold as a project for 'locals'. But there is hardly meaningful engagement with 'the local'. The 'local' is portrayed in a one-dimensional way, namely through the lens of the ICC. In its own discourse, the Court uses ideal types of 'victims' and 'locals', that is, those who cannot protest, as illustrated by Laurel Fletcher's analysis of the 'abstract victim' in this volume.[184]

Protection of 'the local' is a driving factor for ICC action. But what comes after ICC intervention is often less important. Victims are easily dropped after the end of the case. There is limited aftercare or psychosocial support. This burden is shifted back to the 'national', the 'local community' or the family. General assistance is outsourced to the non-judicial mandate of the Trust Fund, which is limited in scope.[185]

Conclusions

Civilising discourse has been part of international justice since its inception. It is a double-edged sword. It is used to glorify international action or to discredit it. The ICC is sometimes unfairly equated to an imperial

[181] Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on Germain Katanga's Notice of Discontinuance of his Appeal against his Judgment of Conviction, 25 June 2014.

[182] See Stahn, *Katanga*, 821, 833–834.

[183] Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr Uhuru Muigai Kenyatta, 5 December 2014.

[184] See Fletcher (Chapter 12). [185] See Dixon (Chapter 13).

project. It is in many ways an antidote to classical imperial or colonial forms of domination and subordination. But it raises equality and justice dilemmas that cannot merely be swept aside by reference to its noble cause. They do not arise in the form of traditional hierarchies or emancipatory claims relating to all spectrums of life ('mission civilisatrice'), but in a novel and more subtle way. Post-colonial theory, and its critique of constructed subjectivity, emancipation, asymmetric power and inequality,[186] provides a lens to reflect on these tensions, including the relationship between the ICC and 'the local'.

ICC justice offers protection against abuse and oppression, but it also involves assertion of power. This power might not always be directly perceived or experienced as coercive.[187] It is often exercised with some form of consent, or through soft, informal or indirect means. But it creates similar fears as other global institutions (e.g., international financial institutions, administrative standard-setting bodies). ICC actions and procedures create certain effects that divide and shape the world. While seeking to protect individuals from mass atrocity crime, they create new forms of international 'ownership', that is, ownership over narratives, knowledge production or branding of 'otherness', and structural dependencies. This occurs incrementally, that is, through practice.

Categorisations and notions used in the process of rendering justice produce certain binaries and distinctions that are easily perceived as stigma. For instance, the unreflected use of concepts, such as 'complementarity' or 'capacity-building', may steer distinctions between the 'able' and the 'unable', the 'knowing' and the 'unknowing', the 'progressive' and the 'regressive' and so on. This has disempowering effects. Similar tensions arise in relation to the use of the notion of victims. This label may have certain patronising implications for affected groups or individuals. It evokes images of vulnerability and passivity that may not always coincide with social reality or self-perception.

Moreover, there is an implicit risk that ICC interventions may encourage certain forms of justice that do 'not come from within', but are externally driven. Practices such as the strict application of the admissibility test and the use of the 'mirroring' imagery produce action/response schemes that may stifle or weaken domestic justice. They incentivise

[186] See above note 26.

[187] As noted by Mamdani: '[T]he colonial experience for most natives was one of rule mediated through one's own.' See M. Mamdani, 'Historicizing Power and Responses to Power: Indirect Rule and Its Reform', *Social Research*, 66 (1999), 859, 870.

domestic responses that are geared and construed to meet short-term policy objectives of the ICC, or serve as encouragement to dump the burden of investigations and prosecutions on the Court. Both approaches stifle creativity.

The 'local' as structural argument provides a certain counter-perspective to such tendencies. It highlights that social reality is more complex, and often more messy, than articulated in the language of law and justice. The 'local' is a concept with many faces. It forces the ICC to look at very different spectrums of its interventions, that is, regional implications; impact on states; effects on communities, groups, individuals; and so on. It thus provides a necessary balance to the mainstreaming of international justice in institutional politics. It implies that the benefits of ICC justice cannot be taken for granted, but must be constantly articulated, assessed and re-adjusted, if necessary.

Some of the paternalising and disempowering features of ICC justice cannot be solved. But they might be handled more constructively, with closer consideration of the faces of 'the local'. The ICC may legitimately override domestic preferences, or present alternative narratives or choices in specific contexts. But structurally, 'the local' is more than a means to an end.

Many of the complex historical and social realities of conflicts cannot be understood through short-term intervention. There is a need for deeper engagement with locality in ICC practice. This is crucial in the early part of proceedings, for example, as part of preliminary examination analysis, investigation and the framing of the case, rather than merely at trial (e.g., in situ hearings) or in the reparation phase. Initiatives to re-connect to the 'local' through field presences or outreach are likely to have limited impact, once the ICC case has been detached too far from local societies.

Where ICC action discards domestic or local interests, such action should be adequately reasoned and explained.[188] Its acceptance may depend on a number of factors: the way in which it was formed and conveyed; its grounding in knowledge and expertise, including local and regional expertise (rather than the presumptive superiority of 'the international'); and its verification and openness to challenge.

Finally, more attention needs to be paid to the negative or unintended side effects of ICC interventions, including the potential inequalities and injustices they produce. Among other things, this requires sensitivity to

[188] See Damaška, 'What's the Point', 387.

the forms of power and dependencies created through ICC action, attention to the injustices of inaction and caution in the use of the notion of victim. Existing contradictions will be less striking if the ICC shows greater responsibility towards its objects of care. It is these features that need to be addressed to counter fears of *justice civilisatrice*.