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ORIGINAL ARTICLE

The expressive turn of international criminal justice: A field in search of meaning

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Abstract
As the glow that accompanied the kinetic judicialization of the field of international criminal justice has faded over time, scholars have increasingly turned to expressivist strands of thought to justify, assess, and critique the practices of international criminal courts. This expressive turn has been characterized by a heightened concern for the pedagogical value and legitimating qualities of international criminal courts. This article develops a unique typology of expressivist perspectives within the field of international criminal justice, distinguishing between three strands of expressivism: *instrumental* expressivism, which concerns the justification of different practices of international criminal courts in terms of the instrumental value of their expressive qualities; *interpretive* expressivism, which concerns the identification of expressive avenues for improving the sociological legitimacy of international criminal courts; and *critical* expressivism, which concerns the illumination of the expressive limits of international criminal courts, as well as unveiling the configurations of power that underpin the messages and narratives constructed within such courts in different institutional contexts. Reflecting on the limitations of these perspectives, the article elaborates a nascent strand of expressivism – *strategic* expressivism – which concerns whether and how different actors in the field may harness the expressive power of international criminal justice in line with their strategic social and political agendas.

Keywords: critique; expressivism; international criminal justice; legitimacy; strategy

1. Introduction

Over the course of the past two-and-a-half decades, the field of international criminal justice has experienced a degree of judicialization that few thought imaginable.[1] During this period international criminal justice has not only become normalized but also prioritized as a response to episodes of mass atrocity.[2] The vocabulary of international criminal law is now an entrenched part of the international lexicon, permeating debates in both legal and political discourse and

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[1]On international criminal justice as a 'field', see generally M. J. Christensen, 'Preaching, Practicing and Publishing International Criminal Justice: Academic Expertise and the Development of an International Field of Law', (2016) 17 ICLR 239; P. Dixon and C. Tenove, 'International Criminal Justice as a Transnational Field: Rules, Authority and Victims', (2013) 7 IJTJ 393; J. Hagan and R. Levi, 'Crimes of War and the Force of Law', (2005) 83 *Social Forces* 1499.

[2]C. E. J. Schwöbel, 'The Comfort of International Criminal Law', (2013) 24 *Law and Critique* 169, at 172.

becoming an increasingly dominant frame for defining issues of justice.[3] Accompanying and to a certain extent driving the field's kinetic institutionalization was a sense of hope and promise in the progressive potential of international criminal courts. Whether to secure support from states to establish and sustain international criminal courts or as a result of an unbridled faith in the transformative qualities of international criminal prosecutions, international criminal justice became strongly associated with a host of ambitious objectives, including the deterrence of future atrocities, the reconciliation of local communities, and the provision of redress for victims.[4] Buoyed by these 'exaggerated normative fantasies',[5] a sense of romanticism surrounded both the creation and initial practices of international criminal courts. For a wide range of actors in the field – including policy-makers, practitioners, civil society groups, and scholars – the struggle to end impunity became 'both the rallying cry and a metric of progress'.[6]

Examining the evolution of the discourse as it began to emerge from the 'messianic thinking' that characterized this 'honeymoon period' for international criminal justice,[7] this article argues that the field experienced an expressive turn – an increasing reliance on expressivist strands of thought to justify, assess, and critique the practices of international criminal courts.[8] The turn to expressivism has been particularly prevalent within international criminal scholarship, which forms the focus of this article; however, a number of other actors in the field – including prosecutors, defendants, victims, judges, states and civil society groups – have also become increasingly conscious of the expressive qualities of their practices and interactions within the field.

Although expressivism encompasses a range of ideas from different disciplines,[9] the animating assumption shared by most strands of expressivist thought is simple: social practices carry meanings and transmit messages quite apart from their consequences.[10] Importantly, from an expressivist perspective, *all* social practices are signifying practices. As David Garland has explained, 'even the most mundane form of conduct in the social world is also a possible source of expression, of symbolization, and of meaningful communication – every action is also a gesture'.[11] As such, rather than focusing narrowly on the effects that flow from verdicts and punishment, expressivism is concerned with the symbolic and aesthetic meanings generated by the broader range of social practices that comprise and surround international criminal proceedings.[12] Moreover, expressivism is interested not only in the *construction* of messages within international criminal courts, but also with their *reception* amongst different audiences beyond the courtroom.[13] As James Boyd

[3]S. M. H. Nouwen and W. Werner, 'Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity', (2015) 13 JICJ 157, at 160–2.

[4]See generally B. Sander, 'International Criminal Justice as Progress: From Faith to Critique', in M. Bergsmo et al. (eds.), *Historical Origins of International Criminal Law: Volume 4* (2015), 749.

[5]P. Akhavan, 'The Rise, and Fall, and Rise, of International Criminal Justice', (2013) 11 JICJ 527, at 529.

[6]K. Engle et al., 'Introduction', in K. Engle et al. (eds.), *Anti-Impunity and the Human Rights Agenda* (2016), 1 at 1.

[7]D. Luban, 'After the Honeymoon: Reflections on the Current State of International Criminal Justice', (2013) 11 JICJ 505, at 506–9.

[8]B. Sander, 'The Expressive Limits of International Criminal Justice: Victim Trauma and Local Culture in the Iron Cage of the Law', 5 *European Society of International Law Conference Paper Series* (2015). For a recent discussion of disciplinary turns, see generally J. Haskell and A. Rasulov, 'International Law and the Turn to Political Economy', (2018) 31 LJIL 243.

[9]On the disciplinary origins and influences of expressivist theories, see generally D. M. Amann, 'Group Mentality, Expressivism, and Genocide', (2002) 2 ICLR 93, at 117–24.

[10]C. R. Sunstein, 'On the Expressive Function of Law', (1996) 5 *East European Constitutional Review* 66, at 66; D. M. Kahan, 'What Do Alternative Sanctions Mean?', (1996) 63 *University of Chicago Law Review* 591, at 597.

[11]D. Garland, *Punishment and Modern Society: A Study in Social Theory* (1990), 255 (emphasis in original).

[12]F. Mégret, 'In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice', (2005) 38 *Cornell International Law Journal* 725; A. B. Houge, 'Narrative Expressivism: A Criminological Approach to the Expressive Function of International Criminal Justice', *Criminology & Criminal Justice* (forthcoming).

[13]R. D. Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law', (2007) 43 *Stanford Journal of International Law* 39, at 84; Amann, *supra* note 9, at 118.

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White famously observed, 'whatever it may purport to *say*, what a judgment shall come to *mean* is a matter for the parties and their audience to address and decide'.[14]

Against this background, this article sets out to make two distinct contributions to the field of international criminal justice. First, the article develops a novel typology of different expressivist perspectives that have been relied upon in existing scholarship.[15] Specifically, the article distinguishes between three strands of expressivism: first, *instrumental* expressivism, which concerns the justification of different practices of international criminal courts in terms of the instrumental value of their expressive qualities (Section 2); second, *interpretive* expressivism, which concerns the identification of expressive avenues for improving the sociological legitimacy of international criminal courts (Section 3); and finally, *critical* expressivism, which concerns the illumination of the expressive limits of international criminal courts, as well as unveiling the configurations of power that underpin the messages and narratives constructed within such courts in different institutional contexts (Section 4). With respect to each strand of expressivism, the article identifies their central claims and illuminates their limitations. Importantly, I do not suggest that the scholars examined in this article necessarily self-identify as 'expressivists' or with the specific categories of expressivism that I distinguish. Instead, I read the different strands of expressivism primarily as approaches that make similar claims or exhibit shared characteristics, rather than as people. Indeed, any given individual may adopt more than one approach.[16] Additionally, it is important to emphasize that the lines between the expressivist perspectives are not strict and inevitably blur to some degree around the edges.

Second, drawing on the insights and reflecting on the limitations of these existing expressivist perspectives, this article identifies a nascent strand of expressivism – referred to as *strategic* expressivism (Section 5). Strategic expressivism entails examining the extent to which different actors in the field may harness the expressive power of the vocabulary and institutions of international criminal justice to advance their strategic political and social agendas – whether a state attempting to advance its long-term policy objectives, a social movement struggling for emancipatory change, or a defendant seeking to promote a particular political project. As the expressive limitations and legitimating qualities of international criminal courts become increasingly exposed, this article argues that questions concerning whether and how different types of actors may harness the expressive power of international criminal justice to advance their strategic agendas are likely to become increasingly prominent in the years ahead.

2. Instrumental expressivism

Our point of departure is instrumental expressivism, a perspective that encompasses a diversity of studies that have sought to justify the practices of international criminal courts in terms of the meanings and messages they transmit. These accounts are united by a faith in the pedagogical qualities of international criminal courts, which, it is claimed, are capable of contributing to the achievement of various emancipatory outcomes – ranging from deterring future atrocities and reconciling divided local communities to censuring the wrongdoing of defendants and rendering justice for victims of mass atrocities.

[14]J. Boyd White, *Heracles' Bow: Essays on Rhetoric and Poetics of the Law* (1985), at 185 (emphasis added).

[15]The typology is not intended to be exhaustive. For instance, as one of the anonymous reviewers to this article pointed out, recent years have also witnessed a noticeable increase in the making of and scholarship concerning films and documentaries centred on issues of international criminal justice, a body of work that may be understood to constitute an additional strand of expressivism but which is not further explored here. See, for example, S. Rigney, '"You start to feel really alone": defence lawyers and narratives of international criminal law in film', (2018) 6 *London Review of International Law* 97.

[16]For a similar approach with respect to feminist scholarship see K. Engle, 'Feminist Governance and International Law: From Liberal to Carceral Feminism', (2017) *University of Texas School of Law Public Law and Legal Theory Research Paper Series No. 690*, at 2.

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The imposition of international criminal *punishment*, for example, has been justified in expressive terms by a range of scholars.[17] For some,[18] international criminal punishment constitutes an expressive means to vindicate the value of the victim that has been denied by the wrongdoer's crime.[19] For others,[20] punishment is a form of moral education, which can deter future atrocities by disavowing the transgressions of the wrongdoer and reaffirming – or even creating – societal norms and values.[21] Still others have contended that punishment can terminate or at the very least tame feelings of hatred,[22] vengeance, and revenge amongst victims of mass atrocities by symbolically restoring the moral and social equilibrium that was disturbed by the wrongdoer.[23]

Beyond punishment, instrumental expressivism has also been relied upon to justify international criminal *trials*. For instance, an increasing number of scholars have referred to international criminal trials as 'show trials', not in the pejorative sense that their results are preordained, but to the extent that they may be characterized as pedagogical performances, whose messages are transmitted to various audiences both within and beyond the courtroom.[24] Lawrence Douglas, for example, has argued that 'to call Holocaust trials show trials ... is to state the obvious' since they evidently constituted 'dramas of didactic legality' specifically orchestrated 'to show the world the

[17]The expressive significance of punishment is commonly traced to the work of Joel Feinberg in the domestic criminal law context. See, in particular, J. Feinberg, 'The Expressive Function of Punishment', in J. Feinberg, *Doing and Deserving* (1970), 95, reprinted in R. A. Duff and D. Garland, *A Reader on Punishment* (1994), at 73. For a critical examination of expressive theories of punishment in the international criminal context, see generally B. Sander, 'Justifying International Criminal Punishment', in M. Bergsmo and E. J. Buis (eds.), *Philosophical Foundations of International Criminal Law: Foundational Concepts* (2019) 167, at 192–232.

[18]See, for example, N. Roht-Arriaza, 'Punishment, Redress and Pardon: Theoretical and Psychological Approaches', in N. Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice* (1995), 13, at 17–21; S. Eldar, 'Exploring International Criminal Law's Reluctance to Resort to Modalities of Group Responsibility: Five Challenges to International Prosecutions and their Impact on Broader Forms of Responsibility', (2013) 11 JICJ 331, at 345.

[19]This perspective may be traced back to the work of Jean Hampton in the domestic criminal law context. See generally J. Hampton, 'The retributive idea', in J. G. Murphy and J. Hampton, *Forgiveness and Mercy* (1988), 111, at 122–43; J. Hampton, 'Correcting Harms Versus Righting Wrongs: The Goal of Retribution', (1991–1992) 39 *UCLA Law Review* 1659.

[20]See, for example, P. Akhavan, 'Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal', (1998) 20 HRQ 737, at 746–51; K. J. Fisher, *Moral Accountability and International Criminal Law: Holding Agents of Atrocity Accountable to the World* (2012), at Ch. 3.

[21]This perspective may be traced back to the work of Émile Durkheim in the domestic criminal law context. See generally É. Durkheim, *The Division of Labor in Society* (1933); É. Durkheim, *Moral Education: A Study in the Theory and Application of the Sociology of Education* (1961). For a useful overview of Durkheim's work on punishment, see generally Garland, *supra* note 11, at Chs. 2 and 3; S. Nimaga, 'An International *Conscience Collective*? A Durkheimian Analysis of International Criminal Law', (2007) 7 ICLR 561; I. Tallgren, 'The Durkheimian Spell of International Criminal Law', (2013) 71 *Revue interdisciplinaire d'études juridiques* 137.

[22]See, for example, A. Cassese, 'Reflections on International Criminal Justice', (1998) 61 *Modern Law Review* 1, at 6; and H. M. Weinstein and E. Stover, 'Introduction: conflict, justice and reclamation', in E. Stover and H. M. Weinstein (eds.), *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (2004), 1, at 14 (referring to this perspective as common amongst proponents of criminal trials).

[23]This perspective may be traced back to the work of James Fitzjames Stephens in the domestic criminal law context. See, in particular, J. F. Stephens, *A History of the Criminal Law of England* (1883), at 80–2; J. F. Stephen, *Liberty, Equality, Fraternity* (1967), at 152. For a more contemporary account of this perspective see J. G. Murphy, 'Hatred: a qualified defense', in J. G. Murphy and J. Hampton, *Forgiveness and Mercy* (1988), 88.

[24]See, for example, M. A. Drumbl, *Atrocity, Punishment, and International Law* (2007), at 174; D. Luban, 'State Criminality and the Ambition of International Criminal Law', in T. Isaacs and R. Vernon (eds.), *Accountability for Collective Wrongdoing* (2011), 61, at 75; M. Osiel, *Mass Atrocity, Collective Memory, and the Law* (1997), at 65. See also Mégret, *supra* note 12, at 743 ('One crucial function of international criminal trials ... should be to "represent" the nature of the crimes they are judging, by designating and acknowledging the communities that are being affected by them. The designation is a function that trials of international criminals fulfil by what they do ... *but also merely by what they are*. In that respect, international and domestic trials are precisely not functional equivalents and do send very different signals') (emphasis added). For a more critical characterization of atrocity trials as 'show trials', see generally M. Koskenniemi, 'From Impunity to Show Trials', (2002) 6 *Max Planck Yearbook of United Nations Law* 1; B. Sander, 'Justice as Identity: Unveiling the Mechanics of Legitimation in Domestic Atrocity Trials', (2018) 16 *Journal of International Criminal Justice* 203.

facts of astonishing crimes and to demonstrate the power of law to reintroduce order into a space evacuated of legal and moral sense'.[25] In a similar vein, David Luban has claimed that a curious feature of international criminal courts is that 'the centre of gravity so often lies in the proceedings rather than in their aftermath'.[26] For Luban, international criminal trials are justified in light of their role in norm projection, understood as their expressive capacity to 'communicate the inherent criminality of political violence against the innocent' and 'to assert the realm of law against the claims of politics'.[27] Antony Duff agrees that international criminal trials have a symbolic significance, but argues that they should be seen as attempts 'not simply to identify the guilty, or to express norms, but to engage the defendant in a communicative enterprise'.[28] Drawing on his extensive work on domestic criminal trials,[29] Duff argues that international criminal trials may be justified as mechanisms for calling wrongdoers to account and making them answerable for their crimes. In performing this function, trials show victims that their wrongs are taken seriously and demonstrate respect for perpetrators by treating them as responsible agents.[30]

It has also been suggested that international criminal trials may be justified as discursive phenomena that enable and facilitate 'civil discourse' between the antagonists within the courtroom and amongst audiences beyond it.[31] According to José Alvarez, for example, 'legal deliberation, by forcing parties to inhabit a common legal culture, can help to reconstruct social solidarity within nonlethal bounds and generate a measure of trust'.[32] International criminal trials have also been justified in terms of the expressive opportunities they provide to victims – whether through formal participation or witness testimony.[33] By empowering victims to construct their own narratives, trials are said to dramatize what Shoshana Felman has termed 'a conceptual revolution in the victim', whereby victims acquire 'historical authority, that is to say, *semantic authority* over themselves and over others'.[34]

International criminal *judgments* have also been examined in terms of their expressive qualities. Larry May, for example, agrees with Luban that norm projection is a viable goal of international criminal courts, but argues that this is primarily accomplished through the 'book-length treatises being written as the judgments from these courts'.[35] Others have pointed to the expressive value of international criminal judgments in terms of 'the crafting of historical narratives, their authenti-

[25]L. Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (2001), at 3.

[26]D. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (2010), 569, at 575.

[27]Ibid., at 576.

[28]R. A. Duff, 'Authority and Responsibility in International Criminal Law', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (2010), 589, at 593.

[29]See generally R. A. Duff, *Answering for Crime* (2007).

[30]Duff, *supra* note 28, at 594–5.

[31]J. E. Alvarez, 'Rush to Closure: Lessons of the Tadić Judgment', (1997–1998) 96 *Michigan Law Review* 2031, at 2084 *ff*. See similarly M. Damaška, 'What is the Point of International Criminal Justice?', (2008) 83 *Chicago-Kent Law Review* 329, at 346. Both Alvarez and Damaška rely on Mark Osiel's theory of civil dissensus. See generally M. Osiel, *Mass Atrocity, Collective Memory, and the Law* (1997), at 36–55 and 283–301.

[32]Alvarez, *supra* note 31, at 2085.

[33]See generally Sander, *supra* note 8, at 6–13.

[34]S. Felman, 'Theaters of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal Meaning in the Wake of the Holocaust', (2000) 1 *Theoretical Inquiries in Law* 465, at 498 and 502 (emphasis in original).

[35]L. May, *Aggression and Crimes Against Peace* (2008), at 334. For a narrower understanding of expressivism in international criminal judgments see R. Aloisi and J. Meernik, *Judgment Day: Judicial Decision Making at the International Criminal Tribunals* (2017), at 130 (defining and examining expressivist statements in judgments as those that '(1) do not serve a specific legal purpose; (2) represent a moral statement regarding the actions being litigated; and (3) are intentionally included in opinions by judges when they feel compelled to write as human observers rather than legal adjudicators'). On the expressive qualities of dissenting opinions in the international criminal context, see generally H. Mistry, 'The Paradox of Dissent: Judicial Dissent and the Projects of International Criminal Justice', (2015) 13 *Journal of International Criminal Justice* 449, at 456–8.

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cation as truths, and their pedagogical dissemination to the public'.[36] In performing this function, it is claimed that judges can invalidate unpersuasive interpretations of the past – thereby combatting denial and attempts at revisionism – whilst at the same time promoting societal solidarity around the narratives they declare as authoritative.[37] In addition, it has also been claimed that international criminal judgments can express renewed solidarity with the victims of mass atrocities by socially acknowledging their victim status and socially condemning the perpetrator's acts.[38]

Finally, various practices and policies at the *pre-trial* stage of international criminal proceedings have also been justified from an instrumental expressivist perspective. At the International Criminal Court (ICC), for example, the Office of the Prosecutor (OTP) has argued that there is a certain expressive value in the conduct of *preliminary examinations*, irrespective of whether or not they lead to the initiation of investigations. Specifically, the OTP has pointed to two expressive rationales of preliminary examinations:[39] first, encouraging states to carry out their primary responsibility to investigate and prosecute international crimes through positive complementarity; and second, performing an early warning function through the issuance of public, preventive statements that aim to deter the escalation of violence and put perpetrators on notice. As Carsten Stahn has observed, this expressive understanding of preliminary examinations identifies the added value of the ICC 'in its alerting function and its communicative power towards the creation of a broader "international system of justice"'.[40]

As this overview indicates, while instrumental expressivist accounts are diverse – both in terms of the practices they examine and the functions of international criminal courts they promote – they share an underlying concern for explaining the instrumental value of international criminal courts. In this regard, instrumental expressivism has proven particularly attractive in the field of international criminal justice for three reasons. First, by emphasizing the symbolic significance of international criminal courts, these accounts have attempted to make sense of the high degree of selectivity that characterizes international criminal justice. According to Nimaga, for example, 'a trial that is thoroughly prepared, sensitively executed, well publicized, and globally discussed' may have a significant impact 'for the reason that it is not seriously harmed by the limitations resulting from the relatively small numbers of cases that can be handled in such a manner'.[41]

Second, by pointing to the global reach of international criminal courts, these accounts have attempted to make a reasonable case for such courts becoming the types of trials that are well-suited to the expressive tasks of capturing the public's attention, promoting the value of the rule of

[36]Drumbl, *supra* note 24, at 173 (Drumbl goes on to illuminate some of the limits of the narrative function of international criminal courts). See similarly T. A. Borer, 'Truth Telling as a Peace-Building Activity: A Theoretical Overview', in T. A. Borer (ed.), *Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies* (2006), 1, at 20–1; C. Brants and K. Klep, 'Transitional Justice: History-Telling, Collective Memory, and the Victim-Witness', (2013) 7 *International Journal of Conflict and Violence* 37, at 45.

[37]See, in this regard, T. Waters, 'A Kind of Judgment: Searching for Judicial Narratives After Death', (2010) 42 *George Washington International Law Review* 279, at 285 (discussing the 'authoritative narrative theory'). See also D. F. Orentlicher, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia* (2008), at 93; M. Ignatieff, 'Articles of Faith', (1996) 25 *Index on Censorship* 110, at 117–18.

[38]See, for example, J. Doak, 'The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions', (2011) 11 ICLR 263, at 275; J. O'Connell, 'Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?', (2005) 46 HILJ 295, at 317 and 321–2.

[39]ICC Office of the Prosecutor, 'Policy Paper on Preliminary Examinations', November 2013, paras. 100–6. See similarly Luban, *supra* note 7, at 511 (identifying complementarity as the 'single most important achievement' of the ICC from an expressivist perspective).

[40]C. Stahn, 'Damned If You Do, Damned If You Don't: Challenges and Critiques of Preliminary Examinations at the ICC', (2017) 15 JICJ 413, at 420.

[41]Nimaga, *supra* note 21, at 616. See similarly S. Bibas and W. W. Burke-White, 'International Idealism Meets Domestic-Criminal-Procedure Realism', (2010) 59 *Duke Law Journal* 637, at 652; M. M. deGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court', (2012) 33 *Michigan Journal of International Law* 265, at 315; C. Stahn, 'Between "Faith" and "Facts": By What Standards Should We Assess International Criminal Justice?', (2012) 25 LJIL 251, at 280.

law, and serving as 'intergenerational "signposts" in history'.[42] Finally, given the gradual nature of the norm-nurturing process, instrumental expressivism has also invited international criminal courts to view their work as part of a longer-term process rather than to expect immediate impact.[43] As a consequence, these accounts have attempted to offer more plausible explanations of how international criminal courts can contribute to emancipatory goals such as the deterrence of future atrocities and the reconciliation of divided communities.[44]

However, instrumental expressivist accounts have also been limited in three significant respects. First, these accounts have tended to cast the expressive power of international criminal courts in essentially benign terms. According to these accounts, to the extent that the expressive power of international criminal courts can be faulted, it tends to be for 'not expressing enough' or 'not expressing clearly enough', but not for 'expressing'.[45] Second, these accounts have tended to focus on the messages constructed within international criminal courts to the neglect of examining how judicial messages have been received within different audiences beyond the courtroom. In fact, despite the intuitively appealing logic of their claims, there has been a notable dearth of empirical grounding to instrumental expressivist accounts. Finally, instrumental expressivist accounts have also tended to be inattentive to the diversity of messages constructed by different, often competing, actors as part of the daily struggles that are waged both within and outside international criminal courtrooms.[46]

3. Interpretive expressivism

Whereas instrumental expressivism is concerned with illuminating the instrumental value of the messages transmitted within international criminal courts, *interpretive* expressivism is concerned with improving the *sociological legitimacy* of such messages. In this context, 'sociological legitimacy' refers to the acceptance of the authority of the messages and narratives constructed within international criminal courts amongst different audiences.[47] Bearing this definition in mind, two strands of interpretive expressivism may be distinguished.

A first strand of interpretive expressivism encompasses a number of accounts, which have claimed that international criminal courts can improve their sociological legitimacy by more closely aligning their narratives concerning the causes and conditions of international crimes with insights drawn from the fields of sociology and psychology.[48] Saira Mohamed, for example, has criticized the tendency of international criminal courts to artificially portray the perpetrators of international crimes as deviants from ordinary standards of behaviour despite social psychological research demonstrating that such perpetrators are often ordinary persons operating in exceptional circumstances.[49] Mohamed argues that recognizing the ordinariness of perpetrators need not

[42]Drumbl, *supra* note 24, at 175. See similarly D. Golash, 'The Justification of Punishment in the International Context', in L. May and Z. Hoskins (eds.), *International Criminal Law and Philosophy* (2010), 201, at 218; A. M. Danner, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing', (2001) 87 *Virginia Law Review* 415, at 491.

[43]See, for example, Sloane, *supra* note 13, at 71; Akhavan, *supra* note 20, at 747.

[44]See, for example, Alvarez, *supra* note 31, at 2107; Drumbl, *supra* note 24, at 174.

[45]F. Mégret, 'International criminal justice: A critical research agenda', in C. Schwöbel (ed.), *Critical Approaches to International Criminal Law: An Introduction* (2014), 17, at 23.

[46]See, in this regard, F. Mégret, 'Practices of Stigmatization', (2013) 76 *Law and Contemporary Problems* 287; T. Meijers and M. Glasius, 'Trials as Messages of Justice: What Should Be Expected of International Criminal Courts?', (2016) 30 *Ethics & International Affairs* 429.

[47]A. Buchanan and R. O. Keohane, 'The Legitimacy of Global Governance Institutions', (2006) 20 *Ethics and International Affairs* 405, at 405. See also M. Glasius and T. Meijers, 'Constructions of Legitimacy: The Charles Taylor Trial', (2012) 6 IJTJ 229, at 231–2; deGuzman, *supra* note 41, at 268 and 276.

[48]See generally Z. Bohrer, 'Is the Prosecution of War Crimes Just and Effective? Rethinking the Lessons from Sociology and Psychology', (2012) 33 *Michigan Journal of International Law* 749.

[49]S. Mohamed, 'Deviance, Aspiration, and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law', (2015) 124 *Yale Law Journal* 1628.

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preclude their being held responsible for international crimes. Ordinary perpetrators may still be held culpable, but for failing to live up to an aspirational standard of behaviour, one which recognizes that even if the average or ordinary person may have behaved just as the defendant had done, 'the criminal law may still legitimately punish, as the law does more than just reflect average behaviour: it can function as a voice of our moral imagination and move us to aspire beyond the ordinary.[50] According to Mohamed, recognizing the capacity of international criminal courts to punish deviations from *aspirational* standards of behaviour would improve their sociological legitimacy by enabling judges to send a powerful message about how ordinary people are drawn into mass violence.[51]

Somewhat in tension with Mohamed's conclusions, other scholars have advocated for the recognition and application of a general mistake of law defence under international criminal law, one which would excuse the criminal responsibility of defendants if it could be demonstrated that they acted without consciousness of wrongdoing and that their ignorance of the law was unavoidable or reasonable.[52] These accounts have tended to emphasize how the embeddedness of individuals within particular social and cultural contexts may sometimes have the effect of blinding them to the wrongfulness of acts that amount to international crimes. In such circumstances, rather than holding individuals culpable for failing to live up to aspirational standards of behaviour, international criminal law should excuse them provided that their mistake of law was unavoidable or reasonable.

Rather than relying on social psychological studies, a second strand of interpretive expressivism posits that, in the exercise of their discretion, prosecutors and judges should strive to align their practices with the broader norms and values of relevant communities. This perspective is premised on the notion that the practices of international criminal courts always carry a 'social meaning', which derives not from the intent of the authors of such practices, but from the ways in which relevant communities understand such practices against the background of existing social norms.[53] For this reason, social meaning as a constraint on the exercise of discretion has been referred to as 'the "Humpty Dumpty" constraint', based on the assumption that practices mean not what prosecutors or judges would have them mean but what they do in fact mean to the public.[54]

With respect to international prosecutors, for example, several scholars have argued that case selection within international criminal courts should be aligned so far as possible with the norms and values of relevant communities. While selectivity is inevitable in any criminal justice system, what distinguishes international criminal courts is the sheer scale of selectivity given the large numbers of individuals typically implicated in the commission of international crimes within any given mass

[50]Ibid., at 1636–7.

[51]Ibid., at 1677–80. See also M. A. Drumbl, 'Victims who victimise', (2016) 4 *London Review of International Law* 217, at 244–6 (calling for international criminal courts 'to clarify – rather than occlude – how atrocity spreads and, particularly, the roles that those who are dually victims and perpetrators play in that process').

[52]See, for example, A. Eser, 'Mental Elements – Mistake of Fact and Mistake of Law', in A. Cassese et al., *The Rome Statute of the International Criminal Court: A Commentary Volume I* (2002), 889, at 945–6; K. Ambos, *Treatise on International Criminal Law: Volume I: Foundations and General Part* (2013), at 375–6; A. van Verseveld, *Mistake of Law: Excusing Perpetrators of International Crimes* (2012), at 97; I. Mann, 'Eichmann's Mistake' (draft manuscript on file with author). See also, with regard to superior orders, M. J. Osiel, 'Obeying Orders: Atrocity, Military Discipline, and the Law of War', (1998) 86 *California Law Review* 939, at 1017; A. Smeulers, 'Why Serious International Crimes Might Not Seem "Manifestly Unlawful" to Low-level Perpetrators: A Social-Psychological Approach to Superior Orders', (2019) 17 *Journal of International Criminal Justice* 105.

[53]deGuzman, *supra* note 41, at 313.

[54]D. M. Kahan, 'What's *Really* Wrong with Shaming Sanctions', (2005–2006) 84 *Texas Law Review* 2075, at 2087 (referring to the following famous passage from Carroll, *Through the Looking-Glass and What Alice Found There*, in M. Gardner (ed.), *The Annotated Alice: The Definitive Edition* (2000), at 213: '"When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean-neither more nor less." "The question is," said Alice, "whether you *can* make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master – that's all."').

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atrocity situation.[55] Importantly, this high degree of selectivity has tended to transform the individuals targeted for international prosecution into symbolic representatives of the groups and organizations with which they are affiliated.[56] As Frédéric Mégret has observed, individual defendants before international criminal courts 'are almost never reduced to their "bare individuality" but always stand, in at least some symbolic manner, for broader systemic problems to which they are associated'.[57] With this in mind, the relative distribution of prosecutions within a given situation between different factions, geographical locations, and types of criminality can significantly affect how prosecutorial selection decisions are interpreted and understood by audiences beyond the courtroom. Indeed, there is evidence that international prosecutors are aware of the symbolic significance of their selectivity decisions. At the International Criminal Tribunal for the former Yugoslavia (ICTY), for example, the distribution of indictees across the different ethnic groups that participated in the conflict in the former Yugoslavia suggests that prosecutors tried to ensure individuals from different factions were prosecuted – even if the relative gravity of the crimes committed by some factions was lower than others – in an apparent attempt to promote interethnic reconciliation.[58]

Against this background, the question for interpretive expressivists has been less whether prosecutors *should* be constrained by the social meaning of their selectivity decisions, but rather *how* and – more specifically – *according to which community of interest*. According to Margaret deGuzman, for example, an expressivist approach to the exercise of prosecutorial discretion at the ICC 'requires not just agreeing that expression is the appropriate focus for the ICC, but also determining which norms are most appropriate for ICC expression and what the appropriate priorities should be among such norms'.[59] This is a complex task in light of the failure of the international community to provide the ICC with clear priorities among its various objectives, audiences and norms. With this in mind, deGuzman contends that the OTP should publicly explain the grounds for its selection decisions, specifically highlighting the reasons underlying the priority accorded to certain norms, rather than relying on opaque factors such as gravity or the interests of justice. It would then be up to the ICC's different audiences – including states, victims, local communities, and civil society groups – to react with feedback on the choices made. By engaging in this 'dialogic process', deGuzman argues that over time it *may* be possible to make incremental progress towards greater consensus concerning which norms should be prioritized in selection decisions.[60] Although the OTP has become increasingly transparent in recent years regarding the criteria relied upon to select and prioritize cases,[61] deGuzman's approach arguably goes further by advocating greater candour at the moment each individual case is selected.

[55]See similarly, from the perspective of victimhood, S. Kendall and S. M. H. Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood', (2013) 76 *Law and Contemporary Problems* 235, at 241.

[56]R. Steinke, *The Politics of International Criminal Justice: German Perspectives from Nuremberg to The Hague* (2012), at 16 ('To place a person in the dock in this particular judicial system with its symbolic trials means to *symbolically* place a (political or military) group in the dock') (emphasis added).

[57]F. Mégret, 'What Sort of Global Justice is "International Criminal Justice"?', (2015) 13 JICJ 77, at 88 and 90.

[58]See, in this regard, S. Ford, 'Fairness and Politics at the ICTY: Evidence from the Indictments', (2013) 39 *North Carolina Journal of International Law and Commercial Regulation* 45, at 69 (calculating that the largest number of indictees at the ICTY were ethnically Serbian (68%), followed by smaller numbers of Croatians (21%) Bosniaks (4%), Kosovar Albanians (4%), Macedonians (1%)); L. Côté, 'Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law', (2005) 3 JICJ 162, at 176 (describing how prosecutorial reliance on criteria related to whether a potential indictee belonged to or was affiliated with a particular group was 'an open secret').

[59]deGuzman, *supra* note 41, at 317. See also B. Kotecha, 'The Art of Rhetoric: Perceptions of the International Criminal Court and Legalism', (2018) 31 *Leiden Journal of International Law* 939 (arguing that the ICC Prosecutor's general message of legalism constitutes a weak tactic of legitimation and offering recommendations to help the OTP improve its rhetoric towards communities that are essential to the Court's perceived legitimacy).

[60]Ibid., at 318. See also Damaška, *supra* note 31, at 349 ('a high priority demand on international criminal courts should be to establish effective lines of communication with local audiences').

[61]See generally, ICC Office of the Prosecutor, 'Policy Paper on Case Selection and Prioritisation', 15 September 2016, available at www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf (accessed 23 July 2019).

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Beyond prosecutorial discretion, a number of scholars have argued that the exercise of judicial discretion should also be informed by the social meaning of the categories of crimes and culpability they interpret in their decisions and judgments.[62] Diane Amann, for example, has argued that the social meaning of genocide imposes certain constraints on the interpretation that judges should give to the protected group element of the crime:[63]

> The requirement that a perpetrator acted with "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" sets genocide apart from all other offenses. This group mentality element has fostered understanding, shared by jurists and lay public alike, that genocide is the most awful crime. As expressivist writings demonstrate, *that social meaning constrains judges to exercise care in determining whether a victim group fell within the proscription of genocide* ... On the one hand, too loosely declaring groups protected could undercut the understanding that genocide is unique. On the other hand, too rigidly withholding protection from deserving groups could give rise to perceptions that the law is unfairly selective, or that it fails to comprehend the true nature of today's tragedies.

Amann's position is complemented by Alison Danner's proposal for the establishment of a hierarchy of international crimes for the purposes of sentencing. Specifically, Danner has argued that the crime of genocide should be subject to heavier sentences than other international crimes in order to reflect 'the importance of this category of crimes *to contemporary conditions and values*, and therefore the seriousness of a defendant's contravention of these precepts'.[64] Failure to reflect the 'popular impressions' of genocide at the sentencing stage would only serve to detract from the legitimacy of the international criminal courts in question.[65]

Similar sentiments have also been put forward with respect to categories of culpability. Mirjan Damaška, for example, has argued that judges should be sensitive to 'moral distinctions shared by ordinary people' in their development of modes of participation doctrines such as superior responsibility and joint criminal enterprise.[66] According to Damaška, judicial reliance on overly-broad modes of participation doctrines 'detracts from the moral authority of international criminal courts and impairs the readiness of the local community to accept their messages'.[67]

Interpretive expressivist accounts have grown in importance in recent years in light of the contemporary crisis in faith that has emerged regarding international criminal justice in general and the ICC in particular.[68] However, despite their growing significance, interpretive expressivist accounts have been limited in two significant respects.

[62]For an examination of the cultural sensitivity of international criminal courts in their evaluation of evidence, see generally Sander, *supra* note 8, at 13–16.

[63]Amann, *supra* note 9, at 142–3 (emphasis added).

[64]Danner, *supra* note 42, at 495 (emphasis added).

[65]Ibid., at 495. For a further illustration of this type of reasoning see F. O'Regan, '*Prosecutor vs. Jean-Pierre Bemba Gombo:* The Cumulative Charging Principle, Gender-Based Violence, and Expressivism', (2012) 43 *Georgetown Journal of International Law* 1323, at 1354 (concerning the ICC Pre-Trial Chamber's decision to decline a number of cumulative charges concerning acts of gender-based violence).

[66]Damaška, *supra* note 31, at 350–6. See similarly M. Aksenova, 'Symbolism as a Constraint on International Criminal Law', (2016) 30 LJIL 475, at 494–7.

[67]Ibid., at 351. For an examination of calls for international criminal courts to rely on anthropological experts to inform their interpretation of modes of participation doctrines in different cultural contexts, see generally Sander, *supra* note 8, at 17–18.

[68]For recent overviews of this crisis of faith see J. Kyriakakis, 'Corporations before International Criminal Courts: Implications for the International Criminal Justice Project', (2017) 30 LJIL 221, at 224 *ff*; D. Guilfoyle, 'This is not fine: The International Criminal Court in Trouble', *EJIL Talk!*, 21–25 March 2019 (*a three-part series of posts*), available at www.ejiltalk.org/part-iii-this-is-not-fine-the-international-criminal-court-in-trouble/; T. Cruvellier, 'Mark Drumbl: "Law Cannot Solve the Biggest Problems We Face"', *Justiceinfo.net*, 16 July 2019, available at www.justiceinfo.net/en/justiceinfo-comment-and-debate/in-depthinterviews/41932-mark-drumbl-law-cannot-solve-the-biggest-problems-we-face.html (accessed 23 July 2019).

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First, these accounts have sometimes struggled with the dilemma of determining who should be the primary target audience of the messages constructed within international criminal courts. According to Diane Amann, for example, international criminal courts will not enjoy legitimacy 'unless they are seen to operate according to the values of the expressivist Everyone, both the society directly affected by a tragedy and the amorphous, sometimes legalistic audience known as "international society"'.[69] Yet, notably absent from many interpretive expressivist accounts is any guidance as to how prosecutors and judges should prioritize between different audiences when faced with dissensus on particular issues.[70] This is significant, since the background of social norms against which prosecutors and judges are supposed to exercise their discretion can vary considerably between the various states, cultures, and societies that comprise the international community.[71] On the one hand, this challenge seems to undermine the plausibility of interpretive expressivist accounts since cross-cultural social consensus on particular issues may simply be unachievable in practice.[72] On the other hand, while these accounts will not always be able to match their aspirations, they arguably retain intrinsic value in their promotion of transparent decision-making and open debate about the reasons behind the value choices of prosecutors and judges in practice.[73] In other words, the fact that it may not always be possible to overcome value pluralism does not detract from the benefits of public reasoning and open discussion concerning the value choices that are inescapably made by prosecutors and judges in practice.

Second, interpretive expressivism has tended to neglect the contextual factors that constrain the exercise of discretion within international criminal courts in practice. International prosecutors, for example, do not exercise their discretion in a vacuum but are confronted by a range of jurisdictional and practical constraints – including restrictions in co-operation and funding received from states – that affect which cases are selected and prioritized for investigation and prosecution in any given context.[74] By neglecting the configurations of power that underpin the exercise of discretion within international criminal courts, interpretive expressivists have sometimes provided normative accounts of how discretion *should* be exercised without sufficient regard

[69]Amann, *supra* note 9, at 132. See similarly J. Cockayne, 'Hybrids or Mongrels? Internationalized War Crimes Trials as Unsuccessful Degradation Ceremonies', (2005) 4 *Journal of Human Rights* 455, at 462; deGuzman, *supra* note 41, at 278; Glasius and Meijers, *supra* note 47, at 252; Fisher, *supra* note 20, at 65.

[70]See, in this regard, Damaška, *supra* note 31, at 348 (acknowledging in general terms that while circumstances exist in which 'global horizons of concern clearly should prevail', nonetheless 'the importance of considering local responses to the decisions of international criminal courts can hardly be overemphasised'). At least in terms of categories of culpability, however, some scholars have begun to outline specific avenues for the judicial development of a more pluralistic form of international criminal law, one informed by a heightened sensitivity to different local cultural contexts. See, for example, I. Mann, *supra* note 52 (putting forward a version of international criminal law which 'recognises the reality of global cultural and moral difference, without relinquishing the discipline's commitment to account for the worse of crimes'); W. L. Cheah, 'Courts as Cross-cultural Translators: An Expressivist Analysis of the Judicial Accommodation of Cultural Evidence in International Criminal Law Trials', paper presented at 2018 European Society of International Law Annual Conference, 13–15 September 2018, Manchester University (manuscript on file with the author) (arguing that international criminal courts should act as 'cross-cultural translators that accommodate, rather than ignore or dismiss, cultural evidence' and suggesting that the language of international criminal law 'has the potential and flexibility to accommodate different cultural perspectives').

[71]Sloane, *supra* note 13, at 84.

[72]deGuzman, *supra* note 41, at 319 (acknowledging that '[t]here is no guarantee that the dialogic process ... will succeed in generating consensus over time' and that '[t]he various audiences may simply disagree about the norms the ICC should promote').

[73]Ibid., (noting the advantages of 'transparency about values ... and the open debate it engenders' if a dialogic approach to prosecutorial discretion were adopted in practice at the ICC). See also C. Laverty, 'What lies beneath? The turn to values in international criminal legal discourse', *EJIL Talk!*, 23 April 2018 (arguing that 'inquiring into exactly what norms and values may be articulated by prosecutions for particular crimes would seem critical for a better understanding of what international criminal justice is actually doing, or has the potential to do'), available at www.ejiltalk.org/what-lies-beneath-the-turn-to-values-in-international-criminal-legal-discourse/ (accessed 23 July 2019).

[74]See, for example, A. Whiting, 'Dynamic Investigative Practice at the International Criminal Court', (2013) 76 *Law and Contemporary Problems* 163.

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for the contextual factors that inhibit how such discretion can *plausibly* be exercised in particular institutional contexts.

4. Critical expressivism

If instrumental and interpretive strands of expressivism have generally sought to identify and maximize the expressive *potential* of international criminal courts, *critical* expressivism has sought to illuminate their expressive *limits*. Drawing on methodologies as diverse as ideology critique, critical legal studies, social psychology, and anthropology, critical expressivism is concerned with unveiling the limits of the *construction* of messages within international criminal courts and their *reception* amongst audiences beyond the courtroom.

In terms of message *reception*, considerable energy has been devoted to illuminating the gap that tends to exist between the messages constructed within the courtroom and the messages received by different audiences beyond it. In practice, the social relay of judicial messages has generally been restricted by two sets of factors – both of which are to a large extent beyond the control of international criminal courts.

First, from a *social psychological* perspective, an individual's perception and interpretation of judicially constructed narratives will often be influenced by a number of motivational and cognitive biases.[75] For instance, in the aftermath of episodes of mass violence, it is not uncommon for local communities to experience competitive victimhood, with different groups possessing 'a strong wish – and thus also striv[ing] – to establish that their ingroup was subjected to *more* injustice and suffering at the hands of the outgroup than the other way around'.[76] As a result, members of rival local groups often interpret the messages transmitted by international criminal courts against the background of their communal attachments to particular factions to the underlying conflict.[77] The more a particular judicial message challenges or destabilizes an individual's self-serving narrative of collective victimhood – for example, by holding a member of an individual's faction criminally responsible – the greater the likelihood that the message will be rejected or ignored in practice.[78]

Second, from a *practical* perspective, the geographical, cultural, and linguistic remoteness of international criminal courts from their local audiences has sometimes resulted in judicially constructed narratives failing to reach members of local communities at all.[79] In other instances, judicial narratives have only reached local audiences after first being filtered through international and/or local carrier groups.[80] In particular, national politicians and local media outlets have often proven particularly influential in shaping how judicially constructed narratives are received and

[75]See generally S. Ford, 'A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms', (2012) 45 *Vanderbilt Journal of Transnational Law* 405; M. Milanović, 'Establishing the Facts about Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences', (2016) 47 *Georgetown Journal of International Law* 1321; M. Milanović, 'Courting Failure: When are International Criminal Courts Likely to be Believed by Local Audiences?', in K. J. Heller et al. (eds.), *The Oxford Handbook of International Criminal Law* (forthcoming).

[76]M. Noor et al., 'When Suffering Begets Suffering: The Psychology of Competitive Victimhood Between Adversarial Groups in Violent Conflicts', (2012) 16 *Personality & Social Psychology Review* 351, at 352.

[77]L. E. Fletcher and H. M. Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation', (2002) 24 HRQ 573, at 588.

[78]A number of empirical studies have confirmed this trend. See, for example, with respect to the ICTY, M. Milanović, 'The Impact of the ICTY on the former Yugoslavia: An Anticipatory Postmortem', (2016) 110 AJIL 233.

[79]J. N. Clark, 'The Impact Question: The ICTY and the Restoration and Maintenance of Peace', in B. Swart, A. Zahar and G. Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (2011), 55, at 76.

[80]See generally N. Henry, *War and Rape: Law, Memory and Justice* (2011), 119–22; Milanović (2016), *supra* note 75, at 1330–6.

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understood by local audiences in post-conflict societies.[81] These carrier groups have sometimes attempted to distort the messages transmitted by international criminal courts, thereby further widening the gap between international courtrooms and local communities.

Beyond illuminating the limits of message reception, critical expressivism has also highlighted the limits of message *construction*. According to Larissa van den Herik, for example, international criminal law acts as a 'spotlight' that 'filters realities through the use of precise definitions and categories of responsibility including concomitant rules of interpretation guiding their application, as well as through the use of the highest evidentiary standards and other strict rules of procedure'.[82] Through this process of filtration, certain voices and narratives are acknowledged and foregrounded, whilst others are marginalized and excluded from view.

The expressive capacities of international criminal courts to provide a platform for the voices of victims of mass atrocities, for example, have been highly constrained in practice. First, not all causes of victimhood fall within the scope of the 'juridified' conception of victimhood recognized by international criminal courts, which is generally narrowed according to jurisdictional limitations, the exercise of prosecutorial discretion, procedural requirements, and resource constraints.[83] Second, whether as witnesses or participants, the expressive interests of victims have always been to some extent subordinated to an international criminal court's primary adjudicative function of determining the culpability of the accused.[84] Even at the ICC, which provides a formal system of victim participation, the Court has tended to prioritize direct participants that will be most beneficial to its own adjudicative interests,[85] whilst victims representatives have inevitably had to distil – and some would argue essentialize – the interests of indirect participants within a larger pool of victims.[86] Finally, international criminal courts typically constitute awkward environments for victims, with judges primarily operating pursuant to a 'true-false discourse' concerned with identifying 'the facts' in contrast to victims who typically operate within a 'discourse of suffering' concerned with recounting 'their experiences'.[87]

[81]See, for example, E. Ramulić, 'Victims' Perspectives', in R. H. Steinberg (ed.), *Assessing the Legacy of the ICTY* (2011), 103, at 105; R. HodžiJunkć, 'A Long Road Yet to Reconciliation: The Impact of the ICTY on Reconciliation and Victims' Perceptions of Criminal Justice', in R. H. Steinberg (ed.), *Assessing the Legacy of the ICTY* (2011), 115, at 117; M. Klarin, 'The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia', (2009) 7 JICJ 89, at 90.

[82]L. van den Herik, 'International Criminal Law as a Spotlight and Black Holes as Constituents of Legacy', (2016) 110 *AJIL Unbound* 209, at 210. See similarly L. Douglas, 'The Didactic Trial: Filtering History and Memory into the Courtroom', (2006) 14 *European Review* 513, at 515–16. On the historical function of international criminal courts, see generally B. Sander, 'History on Trial: Historical Narrative Pluralism Within and Beyond International Criminal Courts', (2018) 67 *International & Comparative Law Quarterly* 547; B. Sander, 'Unveiling the Historical Function of International Criminal Courts: Between Adjudicative and Sociopolitical Justice', (2018) 12 *International Journal of Transitional Justice* 334; B. Sander, 'The Method is the Message: Law, Narrative Authority and Historical Contestation in International Criminal Courts', (2018) 19 *Melbourne Journal of International Law* 299.

[83]Kendall and Nouwen, *supra* note 55, at 241–7.

[84]See, for example, M.-B. Dembour and E. Haslam, 'Silencing Hearings? Victim-Witnesses at War Crimes Trials', (2004) 15 EJIL 151; L. E. Fletcher, 'Refracted Justice: The Imagined Victim and the International Criminal Court', inC. de Vos et al. (eds.), *Contested Justice: The Politics and Practices of International Criminal Court Interventions* (2015), 302; C. Schwöbel-Patel, 'Spectacle in International Criminal Law: The Fundraising Image of Victimhood', (2016) 4 *London Review of International Law* 247.

[85]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* (2015), 1133, at 1185.

[86]C. van den Wyngaert, 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge', (2011) 44 *Case Western Reserve Journal of International Law* 475, at 477.

[87]S. Stolk, 'The Victim, the International Criminal Court and the Search for Truth: On the Interdependence and Incompatibility of Truths about Mass Atrocity', (2015) 13 JICJ 973, at 984 and 989. See also M. Elander, 'The Victim's Address: Expressivism and the Victim at the Extraordinary Chambers in the Courts of Cambodia', (2013) 7 IJTJ 95, at 110–12.

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By illuminating the expressive limits of international criminal courts, critical expressivism has often sought to unveil the dynamics of power that underpin the messages and narratives that are constructed within such courts in practice. As Antony Skillen has explained in the domestic criminal law context:[88]

> For what [a critical conception of expressivism] does is to pose this simple question: what do these … practices *actually show* about people and about societies? What priorities do they manifest? … Such an objective focus, one which is prepared to go behind declared intentions to ask what laws and punishment 'betray', to ask of what they are symptomatic, transforms a concern with 'expressions' from an apologetic to a critical one.

In this vein, critical expressivism has often taken an interest in the productive power of international criminal courts,[89] encompassing the various ways in which such courts offer an important medium for the rendering of contestable distributional choices – for constructing winners and losers, friends and enemies, blamers and blamed, victims and perpetrators, and prioritizing some voices at the expense of others.[90] As Sara Kendall has explained, 'humanity is not liberated through juridical forms, but is instead subjected to new configurations of power'.[91] In this vein, critical expressivism has tended to direct attention towards the relations of domination and exploitation that are enabled by the messages transmitted by international criminal courts in different institutional contexts.

For instance, by fastening their gaze on the responsibility of individuals, international criminal courts have risked masking the collective dimensions of responsibility for international crimes behind the depoliticized veil of the individuals on trial.[92] By relying upon a legal form directed towards the specific over the structural, international criminal courts have risked focusing the attention of their audiences on 'the *abnormality* of conjunctural violence, rather than with the *normality* of the forces – including economic and legal structures – that lurk beneath'.[93] By examining incidences of spectacular political and military violence, international criminal courts have also risked contributing to the normalization of structural violence.[94] And by depicting individual defendants, together with the groups and organizations with which they are affiliated, in uniform terms as the causes of mass violence, international criminal courts have risked diverting attention

[88]A. J. Skillen, 'How to Say Things with Walls', (1980) 55 *Philosophy* 509, at 513 (emphasis in original).

[89]See, in this regard, M. Foucault, *Discipline and Punish: The Birth of a Prison* (1991), 194 ('We must cease once and for all to describe the effects of power in negative terms: it "excludes", it "represses", it "censors", it "abstracts", it "masks", it "conceals". In fact, power produces: it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production').

[90]See similarly Z. Miller, 'Effects of Invisibility: In Search of the 'Economic' in Transitional Justice', (2008) 2 IJTJ 266, at 267; D. Buss, 'Performing Legal Order: Some Feminist Thoughts on International Criminal Law', (2011) 11 ICLR 409, at 411; S. Löytömäki, *Law and the Politics of Memory: Confronting the Past* (2014), at 10; B. Golder, 'Beyond redemption? Problematising the critique of human rights in contemporary international legal thought', (2014) 2 *London Review of International Law* 77, at 83.

[91]S. Kendall, 'Critical orientations: a critique of international criminal court practice', in Schwöbel, *supra* note 45, 54, at 56.

[92]G. P. Fletcher, 'The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt', (2002) 111 *Yale Law Journal* 1499, at 1514. See similarly Drumbl, *supra* note 24, at 153 (referring to a 'retributive shortfall'); K. Ainley, 'Excesses of Responsibility: The Limits of Law and the Possibilities of Politics', (2011) 25 *Ethics & International Affairs* 407, at 412 (referring to 'excesses of responsibility').

[93]T. Krever, 'International Criminal Law: An Ideology Critique', (2013) 26 LJIL 701, at 722 (emphasis in original). See similarly I. Tallgren, 'The Sensibility and Sense of International Criminal Law', (2002) 13 EJIL 561, 593–4; G. Baars, 'Making ICL history: On the need to move beyond pre-fab critiques of ICL', in Schwöbel, *supra* note 45, 196, at 206; Z. Miller, 'Anti-Impunity Politics in Post-Genocide Rwanda', in K. Engle et al., *supra* note 6, 149, at 169.

[94]See, for example, I. Kalpouzos and I. Mann, 'Banal Crimes Against Humanity: The Case of Asylum Seekers in Greece', (2015) 16 MJIL 1, at 1–4; A. Kiyani, 'International Crime and the Politics of Criminal Theory: Voices and Conduct of Exclusion', (2015) 48 *N.Y.U. Journal of International Law & Politics* 129, 183 *ff*; Miller, *supra* note 93, at 169.

away from and even legitimating how they are also the *symptoms* of systemic inequalities within the existing international order.[95]

In addition, critical expressivists have also revealed the capacity for certain states to co-opt the vocabulary and institutions of international criminal justice for their own political agendas. The situational focus of international criminal courts, for example, has consistently reflected inequalities between states within the international community.[96] In particular, international criminal courts have predominantly been established as *ad hoc* responses to specific crisis situations in accordance with the interests of powerful states – whether as a means of punishing the vanquished and legitimating new structures of global governance (the International Military Tribunal at Nuremberg and International Military Tribunal for the Far East at Tokyo) or assuaging public opinion by giving an impression of 'doing something' in response to a particular crisis situation (the ICTY and International Criminal Tribunal for Rwanda). Moreover, the inescapable dependency of international criminal courts on state co-operation and funding has enabled some states to instrumentalize international criminal courts to stigmatize and delegitimize domestic opposition groups in circumstances where incumbent governments are able to minimize the risk of accountability for themselves.[97]Asad Kiyani, for example, has revealed how the ICC Prosecutor's tendency to target only one side of the conflicts it investigates 'positions the impartial and neutral mechanisms of the Court in service of an oppressive regime, and implicates it in the ahistorical continuation of colonial policies and ethnic strife in the contemporary post-colonial state'.[98]

By identifying the expressive limits of message construction and reception, critical expressivism has also challenged the extent to which international criminal courts are capable of contributing towards the deterrence of future atrocities, the reconciliation of divided communities, or the provision of justice to victims. For example, by highlighting the judicial tendency to neglect the structural conditions of possibility of episodes of mass violence, critical expressivists have argued that international criminal courts can only offer at best a partial deterrent against future atrocities.[99] In addition, where prosecutorial targets are selected according to their relative political power, international criminal courts risk sending the message that the consolidation of political power constitutes a legitimate means of self-preservation against the clutches of international criminal justice.[100] One-sided prosecutions may also be viewed by victims of non-prosecuted crimes as 'a provocation, a denial of justice, and … a cause of grievance'.[101] Indeed, prosecutorial selectivity along factional lines may even intensify conflict by enabling states to use the intervention of an international criminal court as a pretext to legitimize military interventions in other states, as well as domestic law enforcement activity against political

[95]See, for example, Krever, *supra* note 93, at 715–22; M. Mamdani, 'Beyond Nuremberg: The Historical Significance of the Post-apartheid Transition in South Africa', (2015) 43 *Politics & Society* 61; V. Nesiah, 'Doing History with Impunity', in K. Engle et al., *supra* note 6, at 95.

[96]See, for example, G. Simpson, 'International criminal justice and the past', in G. Boas et al. (eds.), *International Criminal Justice: Legitimacy and Coherence* (2012), 123, at 144; S. M. H. Nouwen, 'Legal Equality on Trial: Sovereign and Individuals before the International Criminal Court', (2012) 43 *Netherlands Yearbook of International Law* 151; D. Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (2014), at 184–7; F. Cowell, 'Inherent Imperialism: Understanding the Legal Roots of Anti-Imperialist Criticism of the International Criminal Court', (2017) 15 JICJ 667.

[97]C. Hillebrecht and S. Straus, 'Who Pursues the Perpetrators? State Cooperation with the ICC', (2017) 39 HRQ 162, at 167–70.

[98]A. Kiyani, 'Group-Based Differentiation and Local Repression: The Custom and Curse of Selectivity', (2016) 14 JICJ 939, at 955. See similarly S. M. H. Nouwen and W. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', (2010) 21 EJIL 941; A. Branch, 'Uganda's Civil War and the Politics of ICC Intervention', (2007) 21 *Ethics and International Affairs* 179; A. Tiemessen, 'The International Criminal Court and the Politics of Prosecutions', (2014) 18 *International Journal of Human Rights* 444; F. Mégret, 'Is the ICC Focusing Too Much on Non-State Actors?', in M. M. deGuzman and D. M. Amann (eds.), *Arcs of Global Justice* (2018), 173.

[99]Krever, *supra* note 93, at 718.

[100]Kiyani, *supra* note 98, at 952.

[101]A. Branch, *Displacing Human Rights: War and Intervention in Northern Uganda* (2011), at 206.

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opponents.[102] Finally, even where international criminal courts *is* able to put members from different factions to a conflict on trial, the influence of local elites, in conjunction with cognitive and motivational biases amongst members of rival groups within local populations, may hinder the capacity of judicial narratives to reconcile divided communities in practice.[103]

As this overview suggests, critical expressivism has often been characterized by a sense of anxiety and discomfort.[104] In fact, a central concern for critical expressivist accounts has been the suspicion that international criminal justice tends to displace other emancipatory vocabularies, siphoning attention away from alternative justice modalities and marginalizing other ways of thinking about mass violence.[105] Yet, despite seeking to give expression to the excluded, silenced and suppressed,[106] critical expressivism has generally been limited in two important respects.[107] First, critical expressivism has typically neglected to explore in any significant detail the ways in which the language of international criminal justice may be relied upon *in tandem with*, rather than to the exclusion of, other emancipatory vocabularies. And second, while critical expressivism has often illuminated how particular states have been able to co-opt the language and institutions of international criminal courts to further their strategic agendas, they have generally neglected to explore more broadly how other types of actors may engage strategically in the field – for example, the extent to which social movements might strategically utilize international criminal justice as part of their struggles for social and political change. As such, while typically offering compelling critiques of the over-exuberant expectations that have been placed on international criminal courts, critical expressivism has sometimes neglected or undervalued the diversity of ways that international criminal courts and the language of international criminal law might be mobilized by different types actors in the context of concrete struggles for emancipatory change.[108]

5. Strategic expressivism

Building on the insights and reflecting on the limitations of existing expressivist perspectives, this article identifies a nascent strand of expressivist inquiry – *strategic* expressivism – which concerns examining whether and how different types of actors might mobilize the expressive power of the vocabulary and institutions of international criminal justice to advance their strategic agendas. Deconstructing this overarching definition, strategic expressivism may be understood to consist of three components.

First, similar to *instrumental* expressivism, strategic expressivism is concerned with illuminating the instrumental value of the expressive power of international criminal courts. However, rather than casting the expressive power of such courts in essentially benign terms, strategic expressivism recognizes that international criminal justice is a field of struggle in which different actors compete for the legitimation of their preferred messages and narratives. Similar to the language of

[102]Ibid., at 186.

[103]Milanović (forthcoming), *supra* note 75.

[104]See, for example, Schwöbel, *supra* note 2; F. Mégret, 'The Anxieties of International Criminal Justice', (2016) 29 LJIL 197.

[105]See, for example, Drumbl, *supra* note 24; M. Ajevski, 'International Criminal Law and Constitutionalisation: On Hegemonic Narratives in Progress', (2013) 6 *Erasmus Law Review* 50, at 578; C. Schwöbel, 'The market and marketing culture of international criminal law', in Schwöbel, *supra* note 45, 264, at 267–8; Nouwen and Werner, *supra* note 3.

[106]D. Koller, '... and New York and The Hague and Tokyo and Geneva and Nuremberg and ... The Geographies of International Law', (2012) 23 EJIL 97, at 105 ('By introducing new voices, crits ... identify where the law has failed to meet the needs of the excluded and chart a desired path for new progress'). See also C. Schwöbel, 'Introduction', in Schwöbel, *supra* note 45, 1, at 6 (describing critique as a political project).

[107]See similarly in the field of human rights P. O'Connell, 'Human Rights: Contesting the Displacement Thesis', (2018) 69 *Northern Ireland Legal Quarterly* 19; P. O'Connell, 'On the Human Rights Question', (2018) 40 HRQ 962.

[108]See, however, P. McAuliffe and C. Schwöbel-Patel, 'Disciplinary Matchmaking: Critics of International Criminal Law Meet Critics of Liberal Peacebuilding', (2019) *Journal of International Criminal Justice*, (2018) 16 *Journal of International Criminal Justice* 985 (examining what structural critiques of international criminal law and liberal peacekeeping may learn from each other, including the power of law and its institutions for 'tactical radical purposes').

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international human rights, strategic expressivism contends that international criminal law constitutes 'a language of both power and resistance ... of hegemony and counter-hegemony ... and the fact that it is a terrain of contestation ... for multiple deployments of both power and resistance'.[109] As such, strategic expressivism recognizes that actors participating in the field of international criminal justice face the constant risk that the vocabulary of international criminal law may prove redundant for their agendas and may even legitimate interests to which they are opposed. In other words, strategic expressivism situates the instrumental expressive potential of international criminal law in the context of concrete struggles for social and political change.

Second, similar to *interpretive* expressivism, strategic expressivism is concerned with improving the sociological legitimacy of the messages and narratives transmitted within international criminal courts. However, rather than examining how prosecutors and judges might improve the legitimacy of their practices within multiple – sometimes conflicting – audiences, strategic expressivism is concerned with identifying how different actors may rely on the language and institutions of international criminal justice to achieve specific expressive benefits for their *particular* communities of interest.

Finally, similar to *critical* expressivism, strategic expressivism is conscious of the expressive limits of international criminal courts and their legitimating qualities. However, rather than focusing on how those limits may undermine the emancipatory objectives that are often attributed to international criminal courts, strategic expressivism is interested in examining whether and how different actors may harness the expressive power of international criminal courts to advance their strategic political and social agendas.

In this context, it is important to specify the meaning of 'strategic'. A useful point of departure is the use of the term 'strategic' in the field of international human rights where 'strategic human rights litigation' has generally been relied upon to refer to 'litigation that pursue goals – or which concerns interests – that are broader than ... the particular victims or applicants at the centre of the particular case'.[110] Importantly, strategic human rights litigation generally constitutes only one change agent deployed in concert with other processes and forms of advocacy.[111] The term 'strategic' has also been deployed in the field of international criminal justice. Megan Fairlie, in particular, has recently examined the emergence of so-called 'strategic communications' before the ICC, a term used to refer to 'highly publicized investigation requests aimed not at securing any ICC-related activity, but at obtaining some non-Court related advantage'.[112] Although not identical in meaning, these conceptions of 'strategic' are united by the idea of using litigation

[109]B. Rajagopal, 'The International Human Rights Movement Today', (2009) 24 *Maryland Journal of International Law* 56, at 56.

[110]H. Duffy, *Strategic Human Rights Litigation: Understanding and Maximising Impact* (2018), at 3.

[111]Ibid., at 41 and 46. See also W. Kaleck, 'Seizing opportunities and broad strategy both essential in human rights litigation', *Open Global Rights*, 26 February 2019, available at www.openglobalrights.org/seizing-opportunities-and-broad-strategy-both-essentialin-human-rights-litigation/ (accessed 23 July 2019).

[112]M. A. Fairlie, 'The Hidden Costs of Strategic Communications for the International Criminal Court', (2016) 51 *Texas International Law Journal* 281, at 283. Fairlie's deployment of the term 'strategic' is, therefore, relatively narrow, excluding communications submitted to the ICC that are made with the genuine aim of securing action from the Court. See also M. A. Fairlie, 'A Newly-Revealed Cost of Article 15 Communications', *IntLawGrrls*, 29 June 2018, available at ilg2.org/2018/06/29/a-newly-revealed-cost-of-article-15-communications/ (accessed 23 July 2019). The notion of strategy has also appeared in discussions of 'lawfare' in the international criminal context, though typically with a narrow focus on the political agendas of states and the UN Security Council. See, for example, A. Tiemessen, 'The International Criminal Court and the lawfare of judicial intervention', (2016) 30 *International Relations* 409, at 414 (defining 'lawfare' in the ICC context as 'the coercive and strategic element of international criminal justice in which the ICC's judicial interventions are used as a tool of lawfare for States Parties and the UNSC to pursue political ends'); K. J. Fisher and C. G. Stefan, 'The Ethics of International Criminal 'Lawfare'', (2016) *International Criminal Law Review* 237, at 243 (defining 'international criminal lawfare' as 'the use of international criminal judicial interventions as a tool for states, parties to conflict, and other interested actors, including the UNSC, to pursue political ends').

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or particular aspects of legal processes to generate political and social change that extend beyond the immediate goals of an individual case or request.[113]

Further unravelling the meaning of 'strategic', recent Marxist international legal scholarship draws a distinction between 'strategy' and 'tactics'. As Robert Knox explains, in this context '*strategy* refers to the achievement of long term, structural (or organic) goals, whereas *tactics* refers to the achievement of short term, conjunctural ones'.[114] Relying on this distinction, John Reynolds emphasizes the importance of strategy and tactics being considered in tandem so that tactics become 'pragmatic and opportunistic interventions aimed at more immediate results that can contribute towards attainment of the larger strategic outcome'.[115] According to this view, while litigation is often purely tactical in nature because it is concerned with achieving a more immediate short-term end, what matters is the extent to which a tactical legal intervention has been dictated by and contributes towards a broader strategic objective.[116]

Drawing on these perspectives, 'strategic' in the present context may be understood to refer to the ways in which the expressive power of the language and institutions of international criminal justice may be invoked and mobilized by different actors in line with their longer-term political and social agendas.[117]

A clear illustration of a strategic expressivist intervention in the field of international criminal justice is the recent communication to the ICC OTP jointly submitted by the Global Legal Action Network (GLAN) and the Stanford International Human Rights Clinic.[118] The communication calls for the OTP to open an investigation into alleged crimes against humanity committed by Australian officials and private companies against refugees and asylum seekers held offshore in Nauru and Manus Island. The communication satisfies each of the criteria to be characterized as a strategic expressivist intervention.

First, the communication aims to instrumentalize the expressive power of the ICC. In particular, one of the reasons motivating the communication is to expressively counter the potential of the Australian immigration system 'to set a precedent, and to normalise subjecting vulnerable refugee populations to inhumane detention practices in order to deter future refugee flows'.[119]

[113]For an examination of the different levels of impact that strategic litigation may contribute towards, see generally Duffy, *supra* note 110, at Ch. 4 (outlining eight levels of impact: on victims, law, policy and practice, institutions, information gathering and truth telling, social and cultural change, mobilization and empowerment, and democracy and the rule of law).

[114]R. Knox, 'Strategy and Tactics', (2010) 21 *Finnish Yearbook of International Law* 193, at 227. For a recent example of reliance on the strategy-tactics distinction in the international law context, see C. Schwöbel, 'Populism, International Law and the End of Keep Calm and Carry on Lawyering', *Netherlands Yearbook of International Law* (forthcoming).

[115]J. Reynolds, 'Anti-Colonial Legalities: Paradigms, Tactics & Strategy', (2015) 18 *Palestinian Yearbook of International Law* 8, at 35.

[116]R. Knox, 'What is to be Done (with Critical Legal Theory)?', (2011) 22 *Finnish Yearbook of International Law* 31, at 44 (explaining how legal tactics may be '*dictated by* a broader political logic, which may at times be unconventional or even counterproductive in legal terms') (emphasis added); Duffy, *supra* note 110, at 41 ('What we explore then may be not so much whether litigation provided a *solution* (which will only rarely be the case, given the broad-reaching social or political problems that underpin many rights violations), nor whether change is *caused* by or attributable to it; rather we should consider the *contribution* – perhaps indirect and gradual – that litigation may have made alongside and in relationship with other processes and factors') (emphasis in original). See also Knox, *supra* note 114, at 227–8 ('actualising strategic concerns does not necessarily mean jettisoning practical interventions in everyday legal struggles, but rather *framing* these struggles in terms of the overall strategic goal') (emphasis added).

[117]See also S. Vasiliev, 'The Crises and Critiques of International Criminal Justice', in K. J. Heller et al., *The Oxford Handbook of International Criminal Law* (forthcoming), at 19 (noting how critical voices in the field rarely demand the dismantling of the system of international criminal justice and 'still deploy it to promote a specific agenda – for example, in strategic litigation – albeit without a true attachment to the discipline').

[118]GLAN and Stanford International Human Rights Clinic, 'The Situation in Nauru and Manus Island: Liability for Crimes Against Humanity in the Detention of Refugees and Asylum Seekers', *Communiqué to the Office of the Prosecutor of the International Criminal Court under Article 15 of the Rome Statute*, 13 February 2017, available at law.stanford.edu/publications/communique-to-the-office-of-the-prosecutor-of-the-international-criminal-court-under-article-15-of-the-rome-statute-the-situation-in-nauru-and-manus-island-liability-for-crimes-against-humanity/ (accessed 23 July 2019).

[119]Ibid., at 114.

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By relying on the vocabulary of international criminal law, the communication seeks to label the actions of Australia as 'crimes against humanity' in an effort to expressively counter the possibility of Australian policies 'being influential and being replicated elsewhere, specifically in other states that are receiving refugee flow'.[120]

Second, the communication aims to improve the sociological legitimacy of the ICC, but with a particular emphasis on ensuring international criminal justice does not become 'a mode of domination of the rich and powerful against the poor and weak'.[121] Specifically, the communication aims to recalibrate the prosecutorial policy of the ICC away from an exclusive expressive focus on 'spectacular violence, occurring in some of the poorer and less developed states in the world', towards a broader vision that includes the investigation and prosecution of 'banal' violence, encompassing acts that are 'potentially replicated, normalised and perceived as an acceptable, or at least inevitable, consequence of the current international system'.[122] As Kalpouzos and Mann have argued, to ignore the latter category of crimes would be to construct international criminal law 'as a law that, from the entire universe of prohibited acts falling under its *doctrinal* mandate, only criminalises those not committed by "Western" states'.[123]

Finally, the communication was submitted to the ICC as just one tactical contribution towards a broader strategy for socio-political change, together with an awareness of the expressive limitations of the institution.[124] At the launch event of the communication,[125] Kevin Jon Heller – one of the signatories to the communication – acknowledged that his expectations for the communication are self-consciously 'very modest'.[126] In particular, Heller accepted that there are obstacles to the ICC Prosecutor opening an investigation into the situation, not least the damage it might cause to the relationship between the ICC and Australia, which has traditionally been a strong supporter of the Court.[127] However, Heller added that the communication need not lead to a formal investigation to have an expressive impact: 'Just a statement from Fatou Bensouda taking it seriously and the media coverage … this has a real significant effect on the behaviour of the Australia government'.[128] In addition, rather than crowding-out other justice modalities or displacing other emancipatory languages, Diala Shamas – another signatory to the communication – emphasized that one of the aims of the communication is to support social movements in Australia who are campaigning at the domestic level for changes in Australian immigration and asylum practices.[129] As such, the

[120]Ibid.

[121]Kalpouzos and Mann, *supra* note 94, at 5.

[122]GLAN and Stanford International Human Rights Clinic, *supra* note 118, at 115.

[123]Kalpouzos and Mann, *supra* note 94, at 4. See similarly Kyriakakis, *supra* note 68, at 230–7.

[124]Several of the signatories to the communication have conducted highly critical examinations of the ICC in their academic capacity.

[125]'The Refugee Crisis and International Criminal Law', *City University of London*, 13 February 2017, available at echo360.org.uk/media/825021ac-6d90-4b4e-a9fa-a9b4a02ba001/public (accessed 16 April 2018).

[126]Ibid., at 1 hour 28 minutes.

[127]Ibid., at 57 minutes.

[128]Ibid., at 1 hour 28 minutes. For media coverage of the communication see B. Doherty, 'International Criminal Court told Australia's detention regime could be a crime against humanity', *Guardian*, 13 February 2017; R. Hamilton, 'Australia's Refugee Policy Is A Crime Against Humanity', *Foreign Policy*, 23 February 2017. See also, D. Jacobs, 'Jumping Hurdles Backwards: The Armenian Genocide and the International Criminal Court', (2014) *International Criminal Law Review* 274, at 288–9 ('because legal claims are but one dimension of Armenian strategies for recognition and reparations, legal action need not necessarily be premised on the chances of success. In this sense, one should not underestimate the symbolic dimension of approaching the ICC with the matter, despite the near certainty of actual failure … Indeed, addressing the Court will create a considerable amount of media attention that will necessarily keep the spotlight on the issue and be an additional tool of pressure for the Armenians').

[129]'The Refugee Crisis and International Criminal Law', *supra* note 125, at 1 hour 23 minutes. See also Duffy, *supra* note 110, at 44 (observing how the failure of strategic litigation in the courtroom may still serve the function of 'exposing to public criticism and international scrutiny the extent of the denial of justice, or paving the way for … other forms of pressure'); A. Deeks, 'The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference', (2013) 82 *Fordham Law Review* 827, at 830 (examining the application in the legal field of the 'observer effect', namely 'the changes that an act of observation makes on the phenomenon being observed').

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communication offers an example of what Paul O'Connell has recently termed 'emancipatory multilingualism', namely the ability of social movements to utilize a particular emancipatory vocabulary – in this case, international criminal law – as part of a broader mobilization of multiple, complementary (and sometimes contradictory) discourses in their struggles for strategic political and social change.[130]

While the GLAN-Stanford communication to the ICC offers an example of a proactive intervention in the field of international criminal justice,[131] strategic expressivism also encompasses *defensive* interventions. Adam Branch, for example, has argued that Dominic Ongwen – the former child soldier and adult commander of the Lord's Resistance Army, currently on trial at the ICC – might consider a 'trial of rupture' in which his defence is conducted in the form of an attack on the system represented by the prosecution's case.[132] The aim would be to place Ongwen's alleged crimes 'in the context of the violence committed by those putting on and benefitting from the trial – the Ugandan government, its western supporters, even the ICC itself'.[133] In this context, rather than relying on the expressive power of legal *arguments*, the legal *situation* would be instrumentalized to directly promote the defendant's political goals.[134] As Jaques Vergès famously put it, the trial would be used 'less to acquit the accused than to illuminate his ideas'.[135] In addition, defensive interventions might include 'strategies against cooperation' on the part of states.[136] Geoffrey Lugano, for example, has recently illuminated how the Jubilee Alliance in Kenya was able to expressively reframe the ICC's intervention in the country as a form of neo-colonialism as one component of 'a calculated mix of both cooperation and non-cooperation, centred on balancing their commitment risks and their noncompliance risks'.[137]

Beyond these institutional interventions, strategic expressivism might also encompass reformist agendas. For instance, a number of scholars have recently reflected on how the personal and material jurisdictions of international criminal courts might be reformed in accordance with the strategic interests of Third World Approaches to International Law (TWAIL).[138] Joanna Kyriakakis, for example, has examined the expressive benefits, particularly among 'Southern audiences', of expanding the competence of international criminal courts to include corporate defendants.[139] Similarly, Reynolds and Xavier have explored how the types of violence criminalized under international criminal law might be reconceptualized to address 'many of the collective interests of global South peoples that are impacted by the structural violence of economic coercion, resource extraction, global wealth distribution and enforced impoverishment'.[140] What distinguishes these accounts is their strategic mindset, each weighing the risk that the

[130]P. O'Connell, 'Human Rights: Contesting the Displacement Thesis', *Critical Legal Thinking*, 18 June 2015, available at criticallegalthinking.com/?s=Human+Rights%3A+Contesting+the+Displacement+Thesis (accessed 23 July 2019). See also J. G. Stewart, 'Towards Synergies in Forms of Corporate Accountability for International Crimes', *Blog of J.G. Stewart*, 23 February 2019 (discussing 'possibilities of synergistic accountability').

[131]For further examples of proactive strategic interventions in the field of international criminal justice, see M. Kersten, 'Making a Distinction: the Rome Statute is not the ICC: it is much more than that', *Justice in Conflict*, 17 July 2018 (discussing the strategic deployment of the Rome Statute at the domestic level in India and the Democratic Republic of the Congo), available at justiceinconflict.org/?s=making+a+distinction (accessed 23 July 2019).

[132]A. Branch, 'Dominic Ongwen on Trial: The ICC's African Dilemmas', (2017) 11 IJTJ 30, at 49.

[133]Ibid.

[134]Knox, *supra* note 114, at 225.

[135]J. Vergès, *De La Stratégie Judiciaire* (1968), 104, cited in and translated by Knox, *supra* note 114, at 225. For a similar strategy utilized by dissenting judges see N. Jain, 'Radical Dissents in International Criminal Trials', (2017) 28 EJIL 1163.

[136]G. Lugano, 'Counter-Shaming the International Criminal Court's Intervention as Neocolonial: Lessons from Kenya', (2017) 11 IJTJ 9, at 19.

[137]Ibid.

[138]On TWAIL perspectives on international criminal justice, see generally Kiyani, *supra* note 94; and the papers that comprise the TWAIL Symposium in (2016) JICJ 915–1009.

[139]Kyriakakis, *supra* note 68.

[140]J. Reynolds and S. Xavier, '"The Dark Corners of the World", TWAIL and International Criminal Justice', (2016) 14 JICJ 959, at 981.

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reforms put forward may end up legitimating political agendas that are in opposition to the strategic interests of TWAIL perspectives.[141]

Finally, strategic expressivism also encompasses arguments *against* utilizing the vocabulary and institutions of international criminal justice in particular contexts. Mahmood Mamdani, for example, has argued that inclusive political processes – similar to the transitional process in South Africa known as Convention for a Democratic South Africa– that prioritize political justice over criminal justice constitute more strategically appropriate responses for rival groups emerging from the kinds of intra-state civil wars that typify contemporary episodes of mass violence in various states in Africa.[142] According to Mamdani, international criminal justice ill fits these contexts, which tend to be characterized by cycles of violence in which victims and perpetrators trade places.[143] In such circumstances, international criminal law's tendency to demonize the agency of the perpetrator and diminish the agency of the victim can result in expressively freezing their identities, 'leading to the assumption that the perpetrator is always the perpetrator and the victim is always the victim'.[144] By contrast, by focusing on cycles of violence and the underlying issues that threaten the foundation of the political community, political justice dares to reimagine a new community 'in which yesterday's victims, perpetrators, bystanders, and beneficiaries may participate as today's survivors'.[145]

In practice, whether a particular intervention in the field of international criminal justice is likely to support the broader strategic objectives of a particular actor will often depend on the context and may itself become a matter of contestation – potentially generating a degree of dissensus amongst members of particular social movements, officers within particular prosecution or defence teams, and officials within particular states and non-state actors. Importantly, however, an intervention in the field of international criminal justice need not harbour overly-ambitious objectives for this purpose. For example, a social movement might utilize the vocabulary and institutions of international criminal justice to garner media attention around a particular conflict or type of criminality as one limited tactical component of a broader strategic struggle for emancipatory change. At the same time, as Helen Duffy cautions, it is important to remember that a legal intervention 'is not a neutral enterprise that at worst does little good, while not doing any harm'.[146] Any legal intervention, even if intended to positively contribute towards a strategic objective, has the potential to be counter-productive and generate negative repercussions – whether by over-inflating victim and community expectations, establishing regressive jurisprudence, or providing a veneer of legal legitimacy around the practices under scrutiny.[147]

Ultimately, determining whether a particular intervention in the field of international criminal justice has a reasonable prospect of advancing an actor's broader strategic agenda will require assessing a range of factors, including weighing the potential positive and negative effects that different stages of international criminal processes may generate, as well as the extent to which a particular intervention is likely to facilitate or frustrate other forms of advocacy that are attempting to contribute towards the attainment of the same strategic objective.[148] Going forward, as actors become savvier to the limitations and legitimating qualities of international criminal courts, it is suggested that questions of how and when different types of actors may harness the expressive power of international criminal justice in support of their strategic agendas are likely to become increasingly prevalent.[149]

[141]Kyriakakis, *supra* note 68, at 238–9; Reynolds and Xavier, *supra* note 140, at 982–3.

[142]Mamdani, *supra* note 95.

[143]Ibid., at 80–1.

[144]Ibid., at 81.

[145]Ibid., at 81–2.

[146]Duffy, *supra* note 110, at 5.

[147]See generally Duffy, *supra* note 110, at 5 and 77–80; Fairlie, *supra* note 112, at 291–8.

[148]See generally Duffy, *supra* note 110, at 39–45 and Ch. 10.

[149]See, in this regard, A. B. Houge and K. Lohne, 'End Impunity! Reducing Conflict-Related Sexual Violence to a Problem of Law', (2017) 51 *Law & Society Review* 755, at 780–2 (identifying challenges of framing and communicating conflict-related sexual violence as a complex phenomenon within advocacy network strategies).

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6. Conclusion

As the gap between the over-exuberant aspirations and modest achievements of international criminal courts has become increasingly apparent, the glow that initially accompanied the field's judicialization has faded. Utopian ambitions have receded in favour of a humbler perspective that is increasingly concerned with managing unrealistic expectations. In this more critical climate, this article has identified an expressive turn in the field of international criminal justice. Each strand of expressivism offers a distinct way of seeing the field of international criminal justice, foregrounding and recognizing particular aspects of the operation of international criminal courts, whilst marginalizing and excluding others from view. With the recent closure of the UN *ad hoc* tribunals and the institutional focus of the field now centred more narrowly on the ICC – an unavoidably selective court with limited resources – together with a range of hybrid and domestic courts conducting international criminal trials,[150] the turn to expressivist strands of thinking is likely to become more entrenched in the years ahead. Looking to the future, therefore, this article suggests that a strategic expressivist perspective offers a useful vantage point from which to examine the field – one that continues the critical work of illuminating the limits and legitimating qualities of international criminal courts but with an eye to identifying how different types of actors may rely on the vocabulary and institutions of international criminal justice to further their strategic agendas.

[150]On the growing interest in creating hybrid courts in the field of international criminal justice, see generally M. Kersten, 'Hybrid Justice – A Justice in Conflict Symposium', *Justice in Conflict*, 12 March 2018, available at justiceinconflict.org/2018/03/12/hybrid-justice-a-justice-in-conflict-symposium/ (accessed 23 July 2019). On the growing practice of investigating and trying violations of international criminal law on the basis of universal jurisdiction before domestic courts, see generally M. Langer and M. Eason, 'The Quiet Expansion of Universal Jurisdiction', (forthcoming) *European Journal of International Law*. On the increasingly 'outside-the-box' thinking required to advance international criminal justice efforts given political constraints at the international level, see generally M. Cannock, 'International Justice Trends in Microcosm at the OPCW – Three Observations as States Adopt "Attribution Mechanism"', *Amnesty International*, 27 July 2018, available at hrij.amnesty.nl/three-observations-as-states-adopt-attribution-mechanism/ (accessed 23 July 2019).

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