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Of Fallen Demons: Reflections on the International Criminal Court's Defendant

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Abstract
The defendant in international trials is presumed innocent until proven guilty but is often judged by the 'court of popular opinion' even before the trial begins. This article provides reflections on how the image of a malevolent individual emerges with regard to those brought/to be brought before international courts. In such a situation, coming before the Court and subsequently being convicted or acquitted can mean little. It is coming before the Court that is, in itself, the end of the line. The manner in which the International Criminal Court has functioned has contributed, both advertently and inadvertently, to the maintenance of the image of the defendant as a malevolent being. Specifically, the purposes of historiography and the ever present discourse of deterrence, breed the suspicion that this 'demonizing the defendant' effect might be endorsed by the manner in which the Prosecutor has popularized the Court and it's functions and aims. This is a conflict that gets to the heart of international criminal law. It is the dilemma of how one must simultaneously fulfil two of the law's essential aims: to presume innocence (and thus abide by a fundamental tenet of international criminal law) and to deter, educate and pacify (and thus for the law to have a reason to exist).

Key words
defence; pre-trial; presumption of innocence; criminology; ICC

1. Introduction

It has been the *métier* of criminologists to observe and comment on the tendencies of criminal law and critically appraise its repercussions for society. However, the relevance of this criminological discourse has not so far been sufficiently tested against international criminal law and its functions in our 'global society'.[1] Much criminological work dealing with international crimes has been published in the last decade.[2] Even though mass crimes such as genocide, crimes against humanity

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1 But see, O. Olusanya, 'A Macro-Micro Integrated Theoretical Model of Mass Participation in Genocide', (2013) 53 *British Journal of Criminology* 843. See also, J. Galbraith, 'Good Deeds of International Defendants: A Response', LJIL Symposium Vol. 25–3, 10 October 2012 opiniojuris.org/2012/10/10/ljil-symposium-vol-25–3-good-deeds-of-international-defendants-a-response/); A. Woods, 'Moral Judgements & International Crimes: The Disutility of Desert', (2011) 52 *Virginia Journal of International Law* 633.

2 For an overview see, D. Friedrichs, 'Towards a Criminology of International Crimes', in A. Smeulers and R. Haveman (eds.), *Supranational Criminology* (2000), 29 at 36.

and – to a lesser extent – war crimes have attracted the interest of criminologists, the focus of most of their work remains on the crimes themselves. This includes their root causes,[3] modes of perpetration,[4] their socio-psychological background and group dynamics,[5] and their nature as crimes of obedience.[6] Criminologists largely agree that the 'international criminal' differs from the 'ordinary criminal'.[7] They have rightly observed that the international community in general, and international criminal courts and tribunals in particular, fail to sufficiently take note of these differences in their endeavour to address mass atrocity.[8] As Drumbl notes, 'the modality of punishment, theory of sentencing and process of determining guilt or innocence' remain rather 'ordinary'.[9] Indeed, upon looking at how international criminal trials play out, we observe striking similarities with 'ordinary' domestic trials. Therefore, there appears to be some room for an import of insights from the domestic to the international arena in order to explain that which almost anyone with some critical appraisal of the field of international criminal law would come to conclude: the facility with which the interpretations prevailing in and constituting the field breed the image of an 'international criminal'[10] (with all the negative connotations that this term carries), is disconcerting. Clearly, the word 'criminal' in itself is hardly neutral and while it would be commendable if we were not to stigmatize those we call 'criminals', it is impossible to strip the word of its negative, shaming attributes.

What is remarkable then, is not that the label 'international criminal' comes with negative connotations; it is the relative ease with which this term (or some variant of it) comes to be placed upon those who are yet to be proven guilty and, in many cases, who are yet to even present themselves before international tribunals. Within the international community, the domain where international criminal law plays out and its tendencies and repercussions can be fathomed, a *defendant* comes to be affiliated with much the same imagery as a *convict*. *Prima facie*, one should find such a scenario disconcerting in light of the fundamental principle of presumption

3 See, M. Drumbl, *Atrocity, Punishment, and International Law* (2007), 26; H. Kelman, 'The policy context of international crimes', in H. van der Wilt and A. Nollkaemper (eds.), *System Criminality in International Law*(2009), 26 at 31.

4 Drumbl, *supra* note 3, at 39.

5 A. Smeulers, 'Perpetrators of International Crimes', in A. Smeulers and R. Haveman (eds.), *Supranational Criminology* (2000), 233; A. Smeulers and B. Hola, 'ICTY and the Culpability of Different Types of Perpetrators of International Crimes', in A. Smeulers (ed.), *Collective Violence and International Criminal Justice* (2010), 175; A. Chouliaras, 'Discourses on International Criminality', in A. Smeulers (ed.), *Collective Violence and International Criminal Justice* (2010), 65 at 72; K. Ambos, 'Criminologically explained reality of genocide, structure of the offence and the "intent to destroy"', in A. Smeulers (ed.), *Collective Violence and International Criminal Justice* (2010), 153 at 155 et seq.; S. Mohamed, 'Deviance, Aspiration and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law', (2015) 124 *The Yale Law Journal*1628. For an analysis of the influence of group dynamics on the perception of international trials see, S. Ford, 'A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts', (2012) 45 *Vanderbilt Journal of Transnational Law* 405; L. Fletcher and H. Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation', (2002) 24 *Human Rights Quarterly* 573.

6 See, Kelman, *supra* note 3, at 26.

7 Smeulers, *supra* note 5, at 234, 236.

8 See, e.g., Chouliaras, *supra* note 5, at 65, 67; Smeulers and Hola, *supra* note 5, at 177; Mohamed, *supra* note 5, at 1648.

9 Drumbl, *supra* note 3, at 6.

10 Drumbl, *supra* note 3, at 4 refers to the 'enemy of all humankind'.

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of innocence.[11] Despite the rights of the defendant being ardently upheld by the judges, the heated discourse generated outside the courtroom[12] leads to him being treated akin to persons already found guilty. In such circumstances, the judgment is rendered largely meaningless, and it is the investigative and pre-trial stages that become most critical to the defendant's fate.

To better grasp this tendency, one can draw on the discourse criminologists have deployed within the domestic realm to explain how and why societies have grown in levels of punitiveness despite crime rates remaining relatively stable.[13] No such claim about being excessively punitive can be made about international criminal law. On the contrary, the punishments and sentences issued by international criminal courts and tribunals are rather mild in comparison, supporting the oft-made opposite claim that international criminal law is relatively toothless and inadequate in its responses.[14] Many of the reasons identified for excessive criminalisation, over-incarceration and punitiveness in the domestic sphere, however, could also explain how we – from all political sides and certainly also from what is a very vocal 'political left'[15] – come to pre-judge, in the absence of a verdict, those who are yet to be tried in the international sphere. Such a transplanting of ideas from the ground where they were bred (the domestic penological landscape) to where they are also considered relevant (international society) is appropriate not only because of overlapping themes and sentiments in the respective bodies of literature; but also because the human demand that criminality be responded to, even if to assuage mere retributive sentiment, is essentially the same regardless of where it is made: within or across boundaries. It is this demand that mandates a criminal law in the first place, and insofar as it differs between the domestic and international society, it is likely to be the magnitude and vehemence of this demand that varies, as a function of the scale of criminality and atrocity. In commenting on issues similar to those discussed here, Mégret has said, 'the distinction between the domestic and the international is arguably less pertinent. The internationalisation of criminal law does not change its fundamental nature: rather, it merely extends its reach'.[16]

With attention to the peculiarities of international criminal law, this article reflects on how the image of a malevolent individual emerges with regard to those brought and to be brought before international criminal courts. These individuals are almost uniformly assumed to be 'bad', if not also 'evil'.[17] They are tried, so to speak, by the court of popular opinion the minute they come to be indicted, as

11 W. Schabas, *The International Criminal Court. A Commentary on the Rome Statute* (2010), article 66, at 784 highlights the practical irrelevance of the principle. See also, F. Mégret, 'Beyond "Fairness": Understanding the Determinants of International Criminal Procedure', (2009), 14 *UCLA J. Int'l. & Foreign Aff.* 37, at 53.

12 F. Mégret, 'Practices of Stigmatization', (2013) 76 *Law & Contemporary Probl.* 287, at 300.

13 See, e.g., D. Garland, *The culture of control: crime and social order in contemporary society* (2002), 67–103; J. Young, *The exclusive society: social exclusion. Crime and difference in late modernity* (1999), 30–96.

14 See, W. Schabas, *An Introduction to the International Criminal Court* (2011), ix-xiii; Drumbl, *supra* note 3, at 30.

15 See, Drumbl, *supra* note 3, at 9 with further references.

16 égretF. M, 'Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project', (2001) 12 *Finnish Yearbook of International law* 193, at 196.

17 As Hannah Arendt, *Eichmann and the Holocaust* (2005), and many others have amply pointed out, international defendants are rarely 'psychopaths' or 'lunatics' but are often reasonable and polite sometimes even charming individuals. See also, Smeulers and Hola, *supra* note 5, at 176–7.

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highlighted by the concept of 'guilt by mere association' (Section 2). In such a situation, convictions or acquittals tend to mean little. It is the indictment and coming before the court that is, in itself, the end of the line (Section 3). Further, the manner in which the International Criminal Court (ICC)[18] functions has contributed, both advertently and inadvertently, to the maintenance of this image of the defendant as a malevolent being. Specifically, the operation of the Office of the Prosecutor (OTP) and its constant rhetoric of deterrence breeds the suspicion that the effect of demonising the defendant might be endorsed by, if not also have its mother lode in, the way in which the OTP has popularized the Court and its functions and aims (Section 4). Accordingly, we are left with a conflict that goes to the heart of international criminal law. It is the dilemma of how one must simultaneously fulfil two criminal law essentials: (1) to presume innocence (and thus abide by a fundamental tenet of criminal law) and (2) to deter, educate, and pacify (and thus for the criminal law to have a reason to exist).

2. How is the defendant demonized and why?

The criminologists' ideas of interest in the context of this discussion originally pertain to growing levels of punitiveness among developed nations.[19] Punitiveness – understood as an inclination towards harsher sentencing and an increased scope of criminal law to maintain law and order within society – is not (yet) one of international criminal law's tendencies. What causes punitiveness within nations may help explain the occurrence of pre-verdict 'judgments' of defendants within the international community.

2.1 The individual (criminal) in the foreground

> *If the defendant is taken as a symbol and the trial as a pretext to bring up matters which are apparently more interesting than the guilt or innocence of one person, then consistency demands that we bow to the assertion made by Eichmann and his lawyer: that he was brought to book because a scapegoat was needed, not only for the German Federal Republic, but also for the events as a whole and for what made them possible — that is, for anti-Semitism and totalitarian government as well as for the human race and original sin.*
>
> -Hannah Arendt-[20]

According to Jakobson, the famous linguist and literary theorist, when an entity is put into the foreground or brought into focus, it serves the function of obscuring the background elements against which it is likely to have developed and from which it derives its real meaning.[21] Through such 'foregrounding', contextual elements are made opaque. The main function of the communicative act (which he called 'a poetic function') is then symbolic. It is to have the foregrounded entity make an

18 This article focuses mainly on the ICC. While other international criminal tribunals share some of its characteristic features, they will not be discussed *in extenso* to keep the article compact.

19 On this subject see, N. Lacey, *The prisoners' dilemma: political economy and punishment in contemporary democracies* (2008), 1–55.

20 Arendt, *supra* note 17, at 113.

21 See, D. Chandler, *A dictionary of media and communication* (2011), 324.

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impression on its own, pre-empting further enquiry into the background elements and an understanding of the fuller picture. In political debate surrounding deviance and criminality, there has been a concerted effort to push the criminal into the foreground.[22] Seeing him as the locus of responsibility has shifted attention away from the societal causes that contributed to his deviance. Attention to the structural causes of crimes, such as, illiteracy, poor job opportunities, and poverty, would reveal the inadequacies of governments in curtailing crime and implicate their responsibility. There is little reason to appropriate such responsibility when it can be shed. Garland[23] and Young[24] rightly point out that it has proven to be politically sensible for governments to adopt instead an 'individualizing' discourse, showing how 'he is the thief' without enquiring into how and why this thievery came about.

A similar (albeit more simplistic)[25] individualizing discourse has arisen in international criminal law, despite the collective nature of the crimes in question.[26] In the face of large-scale atrocities, such as the Second World War, the conflicts in the former Yugoslavia, Rwanda, Sudan, and now Syria, the 'victors' and the 'international community' have been compelled to respond.[27] To do so legitimately has meant to deploy the criminal law with its armoury aimed at protecting defendants' rights.[28] To not have reacted in any way at all would have been a dereliction of the international community's moral responsibility and a blemish on its image.[29] Yet, situations of mass atrocity – described famously as 'problem(s) from hell[30] – have been quite complex. They are rife with the ambiguity as to who did what, not to mention also the complicity (if not criminality) of the Allied nations, the Great Powers, or the 'West' as they have variously come to be known. In such a scenario, it has been deemed politically unwise to delve too deeply into the causes of these conflicts, making it convenient instead to uphold moral responsibility by indicting and trying certain individuals.[31] This has entailed developing a narrative and history that emphasizes their blame and finds in them (alone) the primary locus of responsibility.[32] Hence, Drumbl observes, 'international criminal law's rhetorical

22 See, Young, *supra* note 13, at 96–121.
23 Garland, *supra* note 13, at 75–103.
24 Young, *supra* note 13, at 1–56.
25 See, Chouliaras, *supra* note 5, at 67.
26 Drumbl, *supra* note 3, at 9.
27 See, Drumbl, *supra* note 3, at 3.
28 See, G. Bass, *Stay the hand of vengeance: the politics of war crimes tribunals* (2000), 147–206 where he outlines the decision-making process and the various proposals put forward for dealing with the Nazis.
29 See, Young, *supra* note 13, at 130, warning against the folly of treating crime as a blemish that needs to be cleared up, as opposed to investigating its underlying causes.
30 See, S. Power, *A problem from hell: America and the age of genocide*, (2003), referring to an expression chosen by Warren Christopher.
31 Chouliaras, *supra* note 5, at 78 notes that the collective dimension is 'dexterously downplayed'. See also, Fletcher and Weinstein, *supra* note 5, at 579, 603 et seq.; J. Balint, 'Dealing with International Crimes', in A. Smeulers and R. Haveman (eds.), *Supranational Criminology* (2000), 311 at 325; Mohamed, *supra* note 5, at 1685 et seq.; M. Drumbl, 'Toward a Criminology of International Crime', (2003) *Washington & Lee Public Law and Legal Theory Research Paper Series*, at 14, referring to the failures by the international community.
32 For the general contours of the argument see, G. Simpson, *Law, war and crime: war crimes trials and the reinvention of international law* (2007), 11–30.

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preoccupation with individual culpability'[33] and even the 'international criminal lawyers' fear of collective responsibility'.[34]

However, in international criminal law, holding individuals responsible might in fact have the salutary effect of not allowing guilt to become unduly entrenched within communities for years to come. It could be cathartic, even if somewhat disingenuous,[35] to say that they, the larger populace, had little to do with the mass criminality that unfolded, that it was all a conspiracy that was bred and executed by those few individuals in the upper echelons of society, on whom, therefore, the primary guilt can be placed.[36] Moreover, given the limited resources of international tribunals, it has become a matter of policy to only try those 'most responsible'.[37] Oftentimes, these individuals are furthest away from the physical act of committing the crime and might not even be known to the victims. Their prosecution might be, depending on individual circumstances, less than capable of catering to victims' needs[38] Further, they tend to be heads of state, military leaders, and other government officials whose connection with criminality has sometimes been established through tenuous modes of liability, such as Joint Criminal Enterprise (JCE) and conspiracy, JCE's predecessor at Nuremburg and Tokyo.[39] The symbolism of holding accountable these high-ranking individuals – who are often portrayed as criminal masterminds[40] – is priceless.[41] Through such a foregrounding of the individual, the focus is diverted from the international community's responsibility for criminality. Indeed, with the rise of individual criminal responsibility in international law, first conceived by the 1919 Commission on the Authorship of the War after the First World War[42] and implemented at Nuremberg and Tokyo after the Second World War, it has been easy to apportion blame. Today, a shift in focus from collective to

33 Drumbl, *supra* note 3, at 38.
34 Drumbl, *supra* note 3, at 202.
35 See, G.P. Fletcher, 'The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt', (2002) 111 *The Yale Law Journal* 1499, at 1537–41; Drumbl, *supra* note 3, at 36; A. Gattini, 'A historical perspective: from collective to individual responsibility and back', in H. van der Wilt and A. Nollkaemper (eds.), *System Criminality in International Law* (2009), 101 at 106–7; Fletcher and Weinstein, *supra* note 5, at 580.
36 At Nuremberg, there was a concerted effort to have those in positions of responsibility in diplomatic, economic, political, and military leadership represented, see, W. Schabas, 'Victor's Justice: Selecting Situations at the International Criminal Court', (2010) 43 *J. Marshall L. Rev.* 535, at 539.
37 Whether the current ICC practice always measures up to the stated policy is certainly debatable. The Court will, however, have a narrower focus than the *ad hoc* tribunals.
38 For a good overview, see, M. Rauschenbach and D. Scalia, 'Victims and international criminal justice: a vexed question?', (2008) 90 *International Review of the Red Cross* 441. Fletcher and Weinstein, *supra* note 5, at 593 qualify the 'therapeutic' aspirations as generally too simplistic.
39 Justice Pal, the Indian judge at the Tokyo Tribunal objected to the charge of conspiracy. He decried the Tokyo trial as politicized and, in his dissenting opinion, acquitted all of the defendants, see, E. Kopelman, 'Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial', (1990) 23 *New York University Journal of International Law and Politics* 373. Regarding modes of individual liability to address collective crimes, see also, Drumbl, *supra* note 3, at 39; Gattini, *supra* note 35, at 121; E. van Sliedregt, 'System Criminality at the ICTY', in H van der Wilt and A. Nollkaemper (eds.), *System Criminality in International Law* (2009), 183 at 189 et seq.; Chouliaras, *supra* note 5, at 84 et seq.
40 See, Smeulers, *supra* note 5, at 244; Smeulers and Hola, *supra* note 5, at 180; Kelman, *supra* note 3, at 28–9; Sliedregt, *supra* note 39, at 183; Ambos, *supra* note 5, at 166.
41 See, Drumbl, *supra* note 3, at 17, describing the 'dramaturgical aspects' of holding former leaders responsible.
42 The commission considered appropriate trying the Kaiser for waging an aggressive war, see, Commission on the responsibility of the authors of the war and on enforcement of penalties, 'Report presented to the preliminary peace conference, March 29, 1919', (1920) 14 AJIL 95. See also, Gattini, *supra* note 35, 104 et seq.

individual responsibility is complete and efforts to declare organisations as criminal have lost relevance.[43] International lawyers have welcomed this shift as proof that international criminal law is not merely a paper tiger.

In commenting on developments since Nuremberg, Simpson states, 'abstract entities were out, flesh and blood human beings were in'.[44] The defendant is in the spotlight – and literally on the spot of the ICC webpage – becoming a symbol and a scapegoat.[45] This might have the – welcome or undesirable[46] – effect of absolving a community and its posterity from experiencing guilt.[47] It also leads to a scenario where establishing culpability, a core purpose of a criminal trial, could come to matter less than the symbolic scapegoating effect itself.

2.2 The rise of the victim

Across borders there has been a large-scale victims' rights movement that demands more compassion, more attention, and more restitution for the victims of crime. The narrative accompanying this focus on the victim was that in an insecure world, where identities could not be fixed with ease as borders became more diluted and populations more multi-racial, anyone could be the next victim.[48] The anger and insecurity this bred called for harsher measures to be taken against offenders. Where at one point, the offender had been seen as someone in need of assistance, reform, and reintegration, he was no longer worthy of such propitiating treatment. To be soft on the offender came to be seen as callous towards the victim. The relationship between the victim and the offender became a zero-sum game.[49]

A similar focus on victims and their rights has permeated the discourse in international criminal law. Providing victims with a sense of closure, justice, and reparation is more and more a salient objective of international criminal law.[50] At the ICC, victims' involvement in proceedings can be extensive, much more so than at the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). This has led to claims that their participation and the (excessive) attention paid to their precarious state can result in infringements of the due process rights of the defendant,[51] and defence safeguards being 'balanced away'.[52] The victims' right to participate in ICC proceedings and obtain reparations, together with the establishment of the Trust Fund for Victims and the Office of Public Counsel for Victims – by name and staffing apparently

43 Balint, *supra* note 31, at 316–17; Mohamed, *supra* note 5, at 1649.
44 Simpson, *supra* note 32, at 57. See also, Gattini, *supra* note 35, at 106; Mohamed, *supra* note 5, at 1639–41.
45 Chouliaras, *supra* note 5, at 93.
46 For a detailed discussion, see, Fletcher and Weinstein, *supra* note 5, passim. See also Gattini, *supra* note 35, at 116.
47 See also, M. Koskenniemi, 'Between Impunity and Show Trials', (2002) 6 *Max Planck UNYB* 1, at 14.
48 See, generally, Garland, *supra* note 13.
49 F. Zimring, 'Imprisonment rates and the new politics of criminal punishment', in D. Garland (ed.), *Mass Imprisonment, Social Causes and consequences* (2001), 145 at 147 (calling this the 'zero sum fallacy' and stating that the 'rhetoric in current politics often seems to assume that criminals and crime victims are engaged in a zero sum contest. . . . [A]nything that hurts the offender *by definition* helps the victim').
50 Mégret, *supra* note 11, at 39, 57.
51 M. Jouet, 'Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court', (2007) 26 *St. Louis U. Pub. L. Rev.* 249, at 263.
52 M. Damaška, 'Reflections on Fairness in International Criminal Trials', (2012) 10 JICJ 611, at 615.

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considered as important as the Office of Public Counsel for the defence – are just some of the visible indicators of an increasing focus on the victim, not to mention the burgeoning literature dealing with this topic.[53] As Kendall and Nouwen put it, '[d]iscursively, victims are presented as the *raison d'être* of the ICC.,[54]

Jacobs rightly refers to modern international criminal proceedings as having 'transformed into a tripartite affair'[55] with the defence facing opposition not just from the prosecution but also from victims. A dichotomy appears to have developed between the victim and the offender, such that sympathising with the victim has come to involve demonising the defendant. Given the shocking violence victims have often experienced, it is rather impossible for the media (or anyone engaging in telling a story, as the tribunals do), to elicit both sympathy for the victim and respect for the possibility that the defendant is innocent.[56] Arendt has remarked that the clear-cut division that needs to be maintained between perpetrator and victim results in grave omissions and even a false dichotomy of sorts. At the *Eichmann* trial, she thought one such omission was the missed opportunity 'to testify to the cooperation between the Nazis and the Jewish authorities and hence an opportunity to raise the important question: 'Why did you cooperate in the destruction of your own people, and, eventually, in your own ruin?'[57] Accordingly, focus on the victim and showing compassion with their plight, while necessary, may become a factor in the demonization of the offender. This entails adopting a reductionist rhetoric in order to maintain a coherent story of 'who did what' and 'who is responsible'.

2.3 An apophasis in a plural world

The word 'apophasis' means 'to say in negation'. Since we live in an increasingly complex and pluralistic world, where homogeneity in society and its predominant values is relatively diluted, we suffer, says Young, an 'ontological insecurity'.[58] The comfort of 'things working in a certain way' and the knowledge that cultural values are shared is threatened by, *inter alia*, higher levels of immigration and greater diversity in opinion. We find epistemic closure in saying who and what we are not, since it becomes particularly difficult to say who and what we are. We engage in an apophasis, or a defining ourselves through negation. One topic on which people cross-culturally agree is that crime is offensive and must be condemned, even if they disagree on how to curtail and condemn it. There is solidarity and a sense of

53 For an overview, see, D. Nsereko, 'The Role of Victims in Criminal Proceedings – Lessons National Jurisdictions can learn from the ICC', (2010) 21 *Criminal Law Forum* 399; A.H. Guhr, 'Victim Participation at the Pre-Trial Stage at the International Criminal Court', (2008) 8 *International Criminal Law Review* 109, at 128. See also S. Kendall and S. Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood', (2013) 76 *Law & Contemp. Probs* 235, at 236 decrying an '"usurpation" of the voices (and indeed authority) of the represented'.

54 Kendall and Nouwen, *supra* note 53, at 253. See also, Fletcher and Weinstein, *supra* note 5, at 592.

55 D. Jacobs, 'A Samson at the International Criminal Court: The Powers of the Prosecutor at the Pre-Trial Phase', (2007) 6 *The Law and Practice of International Courts and Tribunals* 317, at 332.

56 On the role of the media see, M. Drumbl, 'Kony 2012: Clicktivism and Child Soldiering', 20 April 2012 (opiniojuris.org/2012/04/20/kony-2012-clicktivism-and-child-soldiering/); M. Kersten, 'Kony 2012: Diverging Trajectories: Social Media and International Law', 19 April 2012 (opiniojuris.org/2012/04/19/kony-2012-diverging-trajectories-social-media-and-internationallaw/).

57 Arendt, *supra* note 17, at 125.

58 Young, *supra* note 13, at 14.

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community that is gained from engaging in this condemnation, from recognising that on this topic we, as law-abiding citizens, share consensus. So if we define ourselves as antithetical to the criminal, then the criminal becomes the 'other', one different from us in a way we condemn and vehemently disapprove. Garland calls this a 'criminology of the other,' which entails expressive forms of justice and basks in symbolism and even mischaracterisation.[59]

This also happens in the international community, diverse and divided, with each nation having its own set of values and political arrangements and its own socio-economic struggles.[60] We come together when our common 'conscience is shocked' by what 'others' have done, when our humanity is threatened, and our basic principles allowing co-existence are undermined and trammelled.[61] Although we may not always agree on how to approach shocking situations of mass criminality, we often do agree, in principle, that we should punish those most responsible for grave violations of human rights (whether or not this call for justice is politically opportune is another consideration). Since we like to distance ourselves from everything so clearly wrong and it is easier to 'talk than act',[62] we adopt the strongest and most inflammatory language towards those (supposedly) engaging in criminality. In vilifying them we vent the totality of our moral outrage. In demonizing those involved in indubitably reprehensible and shocking crimes, we are brought closer and solidarity is bred. Such an emergent consensus makes the demonization easier and less detectable as a 'wrong'; allowing for a slippery slope towards violations of defendants' rights.

2.4 The task of writing history and judging an individual

The need to engage in writing history has emerged as an important *topos* in international criminal law with repeated references to the need to establish a so-called 'truth' and to contribute to recording, as the Trial Chamber of the ICTY in the *Erdemović* case put it, 'the facts behind the evils perpetrated'.[63] Galbraith comments that upon 'reading international criminal judgments, one is immediately struck by how much of the opinions are spent on overall events rather on the specific defendants.'[64] Such a focus on the historical context and a resulting lack of inquiry into the personal background and motives of the defendant, Mohamed remarks, strengthens the impression of 'monstrosity', arguing 'it is easier to accept that a person took another's life or body or family because of the perpetrator's instinctive monstrosity than it is to accept that many people may well have done the same.[65]

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59 D. Garland, 'The limits of the Sovereign State: Strategies of Crime control in contemporary society', (1996) 36 *British Journal of Criminology* 445, at 462 ('the criminology invoked by the punitive strategy is of essentialised difference. It is … a criminology, which trades in images, archetypes and anxieties. … This is a criminology of the other, concerned to demonise the criminal, excite popular fears and hostilities.').

60 See also, Mohamed, *supra* note 5, at 1667–8.

61 See also, Koskenniemi, *supra* note 47, at 1 and 10 et seq.; Chouliaras, *supra* note 5, at 79 and 90 et seq.

62 Garland, *supra* note 13, at 22.

63 As quoted by B. Elberling, *The defendant in international criminal proceedings: between law and historiography* (2012), 200.

64 J. Galbraith, 'The Pace of International Criminal Justice', (2009) 31 *Michigan Journal of International Law* 79, at 90.

65 Mohamed, *supra* note 5, at 1679.

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Nevertheless, many observers tend to agree that writing history is an important task for international courts and tribunals to fulfil. Steinke has proposed that historiography is an acceptable goal of international trials and indeed has the ability to balance out the detrimental impact of individualisation, as discussed earlier.[66] This, however, only holds true if the process of establishing a historic narrative is done 'in good faith'. Given the selection of situations that come before international criminal courts and the further selection of individuals from within those situations who are indicted by these courts, the opportunity to engage in historiography 'in good faith' is, in itself, circumscribed and at times heavily politically influenced.[67] It is also influenced by the fact that the accused tends to be somewhat excluded from such 'truth-seeking'. Take, for example, a little-known episode from the ongoing trial against the Kenyan Vice-President Ruto, where the Presiding Judge requested the accused 'to refrain from making comments to the press on the case pending before this Chamber'.[68] This led Heller to comment that 'the Court has no authority under the Rome Statute to silence Ruto, much less impose some kind of sanction against him if he continues to criticize the prosecution's case.'[69] We can only agree with this statement. This is not to say that defendants are precluded from advocating their 'cause' and from providing their version of the 'truth'.[70] It is however, the explicit task of the prosecution to paint the bigger picture and to establish the presence of a 'genocidal policy' or a 'widespread or systematic attack'. As a result, the prosecution is often given leeway to venture into the historical and socio-political background of the case, while the courts seem rather averse to allowing the defendant to tell his story – a story which, even if presented, is only rarely picked up by the international media following the trial.

Elberling has closely examined the way in which every international and hybrid criminal tribunal produces a historical record and the influence this has on the rights of the defendant. He discusses a common claim that 'in varying degrees courts engage in the manipulation of the historical record and … (contribute to) the production of propaganda.[71] Simpson calls the function of deploying the law for pedagogical and educational purposes 'didactic legalism'.[72] In international criminal law, whilst determining the extent of the culpability of a single individual (the defendant), the court is simultaneously tasked with writing history and therefore accurately capturing the magnitude and forms of the brutality that took place in

66 R. Steinke, *The politics of international criminal justice: German perspectives from Nuremberg to The Hague* (2012), 12 and 33.

67 For a description of how 'judicial truth' is created, see, U. Ewald, 'Reason and Truth in International Criminal Justice', in A. Smeulers and R. Haveman (eds.), *Supranational Criminology* (2000), 399 at 407 et seq. See also, Fletcher and Weinstein, *supra* note 5, at 588.

68 *Prosecutor v. William Samoei Ruto*, Transcript of 25 October 2013, ICC-01/09–01/11-T-59-Red-ENG WT 25–10–2013 25/88 WN T.

69 K. Heller, 'Correcting my recent post on Ruto's public criticism of the OTP', 1 November 2013, opiniojuris.org/2013/11/01/updating-recent-post-rutos-public-criticism-otp/.

70 See, e.g., R. Wilson, *Writing History in International Criminal Trials* (2011), 70, 77 though he also observes a 'profound sense of disadvantage that defense lawyers frequently voice', at 141. Wilson states he considers historical evidence by the defense less valued because it is often viewed as tactical in nature, ibid., at 168.

71 Elberling, *supra* note 63, at 199.

72 Simpson, *supra* note 32, at 79 with references to L. Douglas, *The Memory of Judgment* (2001).

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the conflict. Simply through association with these horrific events, the defendant's guilt is implicated and assumed by the general (international)[73] public regardless of the exact form of his liability, if any at all. Wilson describes the way 'alleged crimes cease to be disconnected from one another as prosecutors use a narrative framework' leading to a 'slippage from context to person'; such that the prosecution can cast 'the character of the accused in a negative light without overtly doing so, in a matter that is both subtle and deniable'.[74]

While the mode and magnitude of the defendant's participation is something the court carefully considers, it can hardly be expected that such technical details will be given any attention outside of the courtroom and academic circles. Indeed, the notion of 'guilt by mere association'.[75] claims that it is sufficient for an individual to be even remotely affiliated with a negative construct for guilt to be apportioned to him and for negative attitudes towards him to develop.[76] If we consider that the proceedings do not remotely, but clearly and concertedly, attempt to link the defendant to the events that occurred, in the minds of most people the verdict is delivered as soon as the association is made. The impulse to demonize is instinctive.

2.5 Concluding remarks on demonization in international criminal law

The sheer scale of criminality involved in the situations that typically come before international criminal courts is both appalling and mind-boggling. The attempt to capture and reduce this criminality to a few individuals is sometimes the only (judicial) response possible. Crimes are committed by individuals and it seems to be natural that we find guilt in 'flesh and blood entities'.[77] Even courts cannot resist the temptation to obscure the background and attribute responsibility to the defendant. The *Jelisić* Trial Chamber at the ICTY found that 'the existence of an organisation or system serving a genocidal objective need not be a legal ingredient of the crime of genocide' and did not exclude 'the possibility of a lone individual seeking to destroy a group.'[78] Of the Chamber's conception of a 'lone genocidal maniac', Schabas has said that it is a preposterous hypothesis on which too much jurisprudential ink has been wasted, for it is one which belongs more to psychiatry than it does to law.[79] Even though the debate about the exact interpretation of the definition of genocide is a technical one, the conception of a lone genocidal maniac resonates with the general public's understanding of core international crimes and especially the crime of genocide. For most people, an association between 'maniac' and 'genocide' has been tested and strengthened over time through the repeated mention of, to name but a few, Hitler, Pol Pot, and Milošević as genocidal maniacs.

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73 Regarding the local public, see, Ford, *supra* note 5, *passim*; Fletcher and Weinstein, *supra* note 5, *passim*.
74 Wilson, *supra* note 70, at 78–80.
75 E. Walther, 'Guilty by mere association: Evaluative conditioning and the spreading attitude effect', (2002) 82 *Journal of Personality and Social Psychology* 919.
76 See, Mégret, *supra* note 12, 300, describing trials as a constant theatre of efforts to up the ante of moral indignation at the accused.
77 Simpson, *supra* note 32, at 67.
78 *Prosecutor v. Jelisić*, Judgement, Case No. IT-95–10-T, T. Ch., 14 December 1999, para. 100.
79 See, W. Schabas, *War Crimes and Human Rights: Essays on the Death Penalty, Justice and Accountability* (2008), 755.

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The defendant has become more a symbol than a criminal. As Koskenniemi rightly puts it, '[i]f the trial has significance, then that significance must lie elsewhere than in the punishment handed out.'[80]

When a defendant becomes a symbol, it is the exceptional nature of the crimes committed that encourage interpretations of the law in manner that would be detrimental to the accused. By way of analogy, many tend to accept terrorists being targeted by drone attacks in Afghanistan and Yemen yet condone the inhumane conditions of detention at Guantanamo Bay, given that 'terrorists' are the new 'enemies of mankind' to whom such exceptional, illegal measures can apply.[81] Similarly, in international criminal trials, although attenuated in manner, the sense of emergency and exception becomes the breeding ground for regression in fair trial standards.[82] Consequently, such a state of exception not only determines the fate of the international criminal defendant, but it also becomes the first step towards demonising him as the 'other'.

3. Some implications of demonization

The ostracism of international defendants is only magnified by the (social) media.[83] Consider, for example, the Kony 2012 campaign, the public appearances of international celebrities such as George Clooney in human rights campaigns in support of victims in Darfur, and TV series like Crossing Borders portraying the ICC as an institution hunting down psychopathic maniacs. While the consequences of such ostracism are not unique, they are still different from those that an 'ordinary' criminal faces. The 'international criminal' is a celebrity in his own right, sharing the fate and sensationalized infamy of politicians (such as Dominique Strauss-Kahn), CEOs, pop-stars and the like: first comes the fall, then the trial (if at all). Even more, the fall from grace and power is often a *conditio sine qua non* to get the trial rolling; where political and personal isolation is not a regrettable side-effect but a practical necessity for the trial to even begin.

The nature of the crimes prosecuted by international criminal courts and the focus on the (presumably) most responsible persons makes the prosecution dependent on political, military, and moral support by the international community. Only in rare circumstances (such as those in the Kenya situation or in the *Ntaganda* case) will the accused be willing to surrender to the ICC for trial. In most cases this leaves the 'international community' with two options: either to wait for history to run its course and opt for *ex post facto* justice, or to make sure that the presumed-to-be-innocent accused loses political, economic, or military support and becomes an

80 Koskenniemi, *supra* note 47, at 3.
81 D. Burgess, 'The Dread Pirate Bin Laden', *Legal Affairs*, (www.legalaffairs.org/issues/July-August-2005/feature_burgess_julaug05.msp). See also, Ewald, *supra* note 67, at 412–17 referring to the impact of the new global security dialogue on international trials.
82 Mégret, *supra* note 11, at 60–2.
83 See also, K. Khan and A. Shah, 'Defensive Practices: Representing Clients before the International Criminal Court', (2013) 76 *Law & Contemp. Probs.* 191, at 192 (referring to the 'international media pushing a narrative that becomes accepted as the "truth" even before the clients appears in court').

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easier prey to isolate and catch.[84] As a permanent institution dealing with situations that are still ongoing[85] and requiring the assistance of state institutions – that are in themselves eager to use internationally sanctioned opprobrium against opposition politicians, rebels, etc. for their own political goals[86] – the ICC will often have to decide whether it is willing to accept, assist, or even instigate such a pre-trial 'isolation mission'. It will have to determine whether it is the role of a judicial institution to make sure that the Al Bashirs or Konys of this world lose their remaining power, which they will often not be able to recover in case of a future acquittal.[87] The first ICC Prosecutor, Luis Moreno-Ocampo, seemed to have opted for an aggressive isolation strategy. His constant media appearances were meant to ensure that the conflict in Darfur was not forgotten and that close ties with the Sudanese president would lead to political repercussions for (African) leaders willing to confer with the official Sudanese Head of State. A similar forceful stance was adopted in relation to Joseph Kony but not President Museveni. This led Nouwen and Werner to comment that an 'enemy of mankind' was thereby being created while the government – the other side to the conflict in Northern Uganda – was thus being vindicated.[88] Finally, the quick decision to apply for an arrest warrant against Muammar Gaddafi led observers to wonder whether swift political justice was at play.[89] Indeed, the mere issuance of an arrest warrant for Gaddafi certainly gave the coalition of Western states intervening in Libya additional political argument to legitimize their attempts at regime change. We will leave it to others to analyse in detail how the OTP under the leadership of Fatou Bensouda has positioned itself in the global media landscape and what discourse and demeanour it has adopted towards suspects and accused.

Besides the implications mentioned, it is noteworthy that the effects of demonization are often subtler and may permeate the ongoing proceedings in indirect and blurry ways. Witnesses can refuse to testify for the fear of being on the 'wrong side of history' or (inter)national politics. States may be reluctant to cooperate with the defence and refuse access to documents, witnesses, or crime sites.[90] This adds to the resource disadvantages most defence teams face and their difficult task of operating

84 Galbraith, *supra* note 64, at 92; A. Whiting, 'In International Criminal Law, Justice Delayed can be Justice Delivered', (2009) 50 *Harvard Journal of International Law* 323, at 328 ('Even just initiating an investigation of alleged war criminals can serve important short-term goals, such as beginning to identify and stigmatize accused war criminals').

85 See, V. Nerlich, 'The International Criminal Court, 2002–2010: a view from the inside', (2011) 22 *Criminal Law Forum* 199, at 205.

86 See, A. Tiemessen, 'The International Criminal Court and the politics of prosecutions', (2014) 18 *The International Journal of Human Rights* 444, at 445, 454.

87 This does not mean that defendants will lose (political) power under all circumstances as national groups often identify with 'their' leader facing trial, see, Ford, *supra* note 5, at 409, 425, 436. Some have certainly used international trials to their benefit – at least on the national level. For the Kenyan example, see, M. Hiéramente, 'Wahlen in Zeiten der Strafverfolgung. Die Situation in Kenia und der Internationale Strafgerichtshof', (2013) 88 *Die Friedens-Warte – Journal of International Peace and Organization* 187, at 194–8. On the ICTY, see, J. Clark, 'Courting Controversy: The ICTY's Acquittal of Croatian Generals Gotovina and Markač', (2013) 11 *Journal of International Criminal Justice* 399, at 419–20.

88 S.M.H. Nouwen and W. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', (2010) 21 *European Journal of International Law* 941, at 946 et seq. See also, Tiemessen, *supra* note 86, at 447.

89 G.-J. Knoops, 'Prosecuting the Gaddafis: Swift or Political Justice', (2012) 4 *Amsterdam Law Forum* 78.

90 Regarding difficulties the prosecution has faced in gathering evidence, see, *Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the withdrawal of charges against Mr. Kenyatta, ICC-01/09–02/11–1005, T. Ch. V(b), 13 March

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in a system with a complicated blend of common and civil law procedures.[91] The notion of equality of arms is a day-to-day struggle when representing a 'demonized' defendant.

4. How might the ICC (inadvertently) exacerbate the demonizing effect?

The ICC has been called 'the brightest star in the cosmopolitan firmament' that has already 'accomplished a great deal at the symbolic level'.[92] While the amount it has accomplished, symbolic or literal, is subject to debate, what can be claimed with some confidence is that it has shown willingness not to lose sight of due process requirements, albeit sometimes on a more rhetorical level.[93] In the first case that came before the Trial Chamber, that of Thomas Lubanga Dyilo, the former President of the Union of Congolese Patriots, the Chamber ordered a stay of proceedings and a release of the defendant on account of 'wholesale and serious abuse'[94] resulting from the Prosecutor's failure to comply with the Chamber's instructions and making 'an unjustified intrusion into the role of the judiciary'.[95] While Turner criticizes 'the absolutist approach'[96] taken by the Chamber, saying that through such harsh decisions it risks wasting the scarce resources consumed in bringing an individual to the ICC, in addition to disappointing victims who pin much hope on the Court, the Trial Chamber's decision only highlights its (generally) keen attention to due process.[97]

Furthermore, in the courtroom and during the trial, the accused is treated with dignity. The judgment is not an *ad hominem* attack, focusing instead on the legal rules applicable to the facts at hand, as it should. However, as delineated thus far, upholding the rights of the accused within the courtroom to allow for a fair trial is only one, ostensibly small, consideration in the bigger picture. In this picture, if the final outcome (verdict) matters little and an acquittal cannot rehabilitate the defendant, then awareness of the potential pre-verdict damage to the defendant acquires greater importance.

4.1 The discursive dimension: The OTP

When the Prosecutor of the International Criminal Court speaks, the world is listening. Public statements by judges are rare and rarely reported by the media. The Registrar, who performs an essential and neutral function in the institution,

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2015; see also M. Hiéramente et al., 'Barasa, Bribery and Beyond: Offences against the Administration of Justice at the International Criminal Court', (2014) 14 *International Criminal Law Review* 1123.

91 Mégret, *supra* note 11, at 50.

92 Simpson, *supra* note 32, at 35.

93 Mégret, *supra* note 11, at 51.

94 C. M. De Vos, 'Prosecutor v. Lubanga – Someone who comes between one person and another: Lubanga, Local Cooperation and the Right to a Fair Trial', (2011) 12 *Melbourne Journal of International Law* 217, at 229.

95 *Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on the Prosecution's Urgent Request for Variation of Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, ICC-01/04–01/06–2517-Red, T. Ch. I, 8 July 2010, para. 27.

96 J. Turner, 'Policing International Prosecutors', (2012) 45 *International Law and Politics* 175, at 184–5.

97 For a good overview of the debate, see, Damaška, *supra* note 52, at 611.

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is hardly known to journalists, and the defence at the ICC is not represented by its own organ.[98] While the already mentioned OPCD is a vital actor speaking out for the rights of the defence, it forms part of the Registry and is therefore not institutionally independent – unlike, for example, the Defence Office at the Special Tribunal for Lebanon. The current level of independence is furthermore far from guaranteed.[99] The defence therefore lacks a wholly independent voice and is not in a position to effectively raise more general and structural concerns without the risk of antagonising the judges in a trial. It is also without easy access to the vital press release section of the Court's webpage and, consequently, is hardly heard by the international media. The Prosecutor is 'the face of the court' and widely perceived to be its spokesperson, thereby shaping the Court's public image and the perception of ongoing trials. By implication, the Prosecutor also influences, if not defines, the image of the accused. One does not need much imagination to picture how such an unfortunate imbalance in public perceptions plays out if the OTP is headed by an over-zealous prosecutor.

If the OTP intends to carry out its mandate as an impartial institution, it ought to refrain from public expressions of opinion in any form that could adversely affect the appearance of impartiality.[100] While the idea of prosecutorial impartiality is certainly somewhat extraneous to common law practitioners, it was decided at the Rome Conference to compel the OTP to strive for a more neutral approach to the investigation.[101] In light of this, one should consider an article in *The Guardian* that Moreno-Ocampo authored hot on the heels of Al Bashir's amended arrest warrant that added three counts of genocide. In the article, he stated that 'the Court found that Al-Bashir is deliberately inflicting … living conditions calculated to bring about physical destruction.' He also accused Al Bashir of 'laying the groundwork for new crimes against humanity'.[102] It is almost impossible from these statements to even comprehend that Al Bashir is yet to come before the Court. Consider also the interview given by him to *Vanity Fair* (a popular culture and fashion magazine) that led to Mr. Gaddafi asserting that his presumption of innocence had been violated and that the Prosecutor should therefore be disqualified.[103] In response to Mr. Gaddafi's claim, the judges ruled that the Prosecutor's engagements with the magazine were 'inappropriate in that [they] give the impression that factual issues yet to be determined by the judges had been determined or could not be contested.' They added that the Prosecutor had allowed the magazine to believe that

98 Regarding the worrisome plans to weaken the institutional support of the defense see, J. Rozenberg, 'UK's first ICC judge attacks proposed restructuring of international court', *The Guardian*, 4 November 2014.

99 Ibid.

100 See, L. Côté, 'Independence and Impartiality', in L. Reydams et al. (eds.), *International Prosecutors* (2012), 319 at 349. See also, *Daktaras v. Lithuania*, Judgment of 10 October 2000, para. 32, where the ECtHR found that of the two components of impartiality, the objective component required that the conduct *appear* impartial.

101 See, e.g., Art. 54(1)(a) ICC Statute.

102 L. Moreno-Ocampo, 'Now end this Darfur denial', *The Guardian*, 15 July 2010.

103 *Prosecutor v. Saif Al-Islam Gaddafi* and *Abdullah Al-Senussi*, Decision on the request for disqualification of the prosecutor, ICC-01/11–01/11–175, A. Ch., 12 June 2012, para. 1.

it is the Prosecutor who 'may decide [Mr. Gaddafi's] fate' and that the Prosecutor's 'behaviour was clearly inappropriate in light of the presumption of innocence.'[104]

It is also possible for a carefully worded statement to be prejudicial. When Chief Prosecutor Fatou Bensouda announced that charges against Kenyan President Uhuru Kenyatta had been dropped because of a lack of sufficient evidence, she explained *in extenso* that such a withdrawal of charges was not an acquittal and that the OTP would be willing to take the case up again if more evidence became available. She declared the withdrawal a sad event for seemingly *all* the victims who have suffered during the Kenyan post-election violence.[105] Restraint is certainly not the OTP's strongest suit.

If the credibility of the Court 'depends on whether the Prosecutor creates perceptions of bias or partiality'[106] and the Prosecutor's statements are 'often imputed to the Court as a whole',[107] that credibility is largely drowned by such statements. They lead the public to over-attribute culpability for large-scale atrocities to specific persons. In this regard, the Al Bashir 'arrest warrant intermezzo' is illuminating as it shows that even carefully weighed decisions by the members of the Court can affect public perceptions of the case and the individual concerned. After the Pre-Trial Chamber refused to issue an arrest warrant against Al Bashir for the crime of genocide, the OTP successfully appealed the decision and added the count of genocide to an already long list of accusations. Whether the reaction this elicited was intended is difficult to assess, but it certainly could have been predicted. Keppler, senior counsel at Human Rights Watch, promptly stated, 'President Al-Bashir's stonewalling on the initial ICC warrant against him appears only more outrageous now that he's also being sought for genocide.'[108]

The statements by the first Prosecutor should not, however, be easily reduced to his personality and his agenda to make the ICC known to the world. It is a sign of a more fundamental problem the ICC in general, and the OTP in particular, is facing. It is the rallying cry of 'never again' that, in the eyes of many, is the *raison d'être* for international criminal courts and tribunals and, ultimately, their best advertisement. We concur with Damaška when he claims of these courts that:

> they are not integrated in a supranational apparatus of governance and supported by its coercive power. They cannot function without outside help, help that may or may not be forthcoming – depending mainly on the vagaries of international politics. But although endogenously impotent, their *libido puniendi* seems stronger than that of national criminal justice.[109]

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104 Ibid., paras. 31–3.

105 F. Bensouda, 'Statement of the ICC Prosecutor on the withdrawal of charges against Uhuru Muigai Kenyatta', 5 December 2014 (www.youtube.com/watch?v=s3HORJn15Mg).

106 Côté, *supra* note 100, 357.

107 *Prosecutor v. Saif Al-Islam Gaddafi* and *Abdullah Al-Senussi*, Decision on the request for disqualification of the prosecutor, ICC-01/11–01/11-OA 3, A. Ch., 12 June 2012, para. 33.

108 Human Rights Watch, 'Sudan: ICC warrant for Al-Bashir on genocide', 13 July 2010, (www.hrw.org/news/2010/07/13/sudan-icc-warrant-al-bashir-genocide).

109 M. Damaška, 'Should national and international justice be subjected to the same evaluative framework?', in G. Sluiter et al. (eds.), *International Criminal Procedure: Principles and Rules* (2013), 1418 at 1419.

In this regard, deterrence is one of the best selling points for the expensive product called 'international justice'. This leads to the following conundrum: if we are to curtail the extent, forms, and targets of our outrage at these atrocities for fear that this might impinge on the rights of potential defendants, how do we condemn and deter such acts? The deterrent function, which is an essential aspect of justifying the (international) criminal justice system,[110] relies critically on 'talking loudly and harshly', 'strongly condemning', and on 'shaming'. Indeed, Braithwaite and Petit[111] have constructed a philosophical justification of the system that hinges on this shaming and condemnation function. It is through shaming the convict that the collective conscience of society is built, and given the infant stage the global society is in, such a conscience needs to be built.[112] The difficulty then lies in ascertaining that it is indeed only the convict who is condemned. But this becomes problematic since it is 'the prosecutor who has the upper hand in launching the process of designating what is most worth stigmatising and therefore has a considerable power in the global economy of shame.'[113] Accordingly, when condemnation (or its more vehement form, demonization) is carried out in an unconstrained and non-differentiating manner, there is a real problem for the value and purpose of the courts as a whole, where their judgments no longer retain the impactful force they should.

This makes the task of an international court particularly difficult. At this point in time, it is simply impossible for the ICC to offer a discourse of deterrence based on convictions. The fact that there are only few convictions of relatively unknown mid-level offenders creates an argumentative gap in the Court's (and especially, the OTP's) marketing strategy. The result is that trials are pictured as successes; arrest warrants (especially those against sitting heads of states) become 'a leap forward' in the fight against impunity (which, was, in fact, the official 10-year motto of the entire ICC and not only the OTP); and the capture of an accused is cause for celebration. The customers (state parties and affected communities) are desperate for immediate successes that an international court with trials spanning a couple of years cannot deliver. Getting the job done is, unfortunately, not good enough for an international court. Budget constraints, high (or rather, exaggerated) expectations, and the (in)famous 24-hour news cycle breed a self-justifying communication strategy with the potential to over-emphasize any pre-verdict 'achievements'. Since deterrence is exercised through them, it is these 'achievements', and not the verdicts, that come to be ends in themselves.

4.2 The structural dimension: The Rome Statute and its interpretation

National legislators, to varying degrees, have realized that while negative pre-conviction effects cannot be totally prevented, they ought to be minimized as much as possible. This can be achieved through influencing public perceptions, for example, by imposing restrictions on the press (which is neither desirable nor feasible

110 For more see, H.L.A. Hart, *Punishment and Responsibility: Essays in the philosophy of law* (2008), 1–28.
111 J. Braithwaite and P. Petit, *Not just deserts: a republican theory of criminal justice* (1992), 86–155.
112 See also, Mégret, *supra* note 12, at 288.
113 Ibid., at 296.

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at the international level), or by presenting a more nuanced and balanced picture (which is difficult considering the pressures the Court faces, *inter alia*, in its historiographical function). But it is possible to impose restrictions on judicial players and introduce measures to ensure that certain procedural steps (e.g., the issuance of an arrest warrant or the confirmation of charges) are not sensationalized for the general public and that decisions benefiting the accused are not unduly delayed. It is to this latter option that we now turn our attention by sketching some of the problematic aspects of the Rome Statute and the way the Judges and the OTP have dealt with them in the past. The devil is, as always, in the detail.

The first point is that the evidentiary standards deployed at various stages of the process progress from the loosest ('reasonable grounds to believe') to most stringent ('beyond reasonable doubt'). The first and lowest standard of 'reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court', set out in Article 58 of the Statute, pertains to the issuance of an arrest warrant or a summons to appear before the court. The standard at the confirmation of charges stage is that of having 'sufficient evidence to establish substantial grounds to believe' (Art. 61(7)). For a conviction, finally, the guilt of the defendant must be proven 'beyond reasonable doubt' (Art. 66(3)). As we have argued before, for many of the high-ranking individuals, indictment by the Court is the first and often definitive step towards defeat and can entail an irreversible fall from grace outside the courtroom. The high standard of proof required for a conviction is of lesser significance if the 'damage is done' at an earlier stage. With the impact they have on the accused, the standards seem to work in reverse.

It would have been preferable if the drafters of the Rome Statute had opted for a higher standard of proof for intrusive procedural measures at pre-trial. For example, in German criminal procedure an arrest warrant can only be granted if there is high likelihood of a future conviction.[114] While one should refrain from easily importing concepts and solutions from the national to the international level, one ought to reflect on the underlying rationale that demonization and isolation of the defendant should be avoided as much and for as long as possible. Criminal investigations are as much about what happens in court as they are about the reactions they elicit from the general public.

The Sudanese case certainly serves as an example. In granting the application for an arrest warrant for Al Bashir, the Pre-Trial Chamber initially refused to add the genocide charge, finding that it did not meet the 'reasonable grounds to believe l Chamber initially rethis stage.[115] The Appeals Chamber reversed this decision;[116] saying it was based on 'an erroneous standard of proof because the level of proof required at the warrant of arrest stage is less rigorous than at later stages, demanding

114 Section 112 (1) of the German Criminal Procedural Code states: 'Remand detention may be ordered against the accused if he is *strongly suspected* of the offence and if there is a ground for the arrest' (emphasis added).

115 *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution's Application for Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05–01/09–3, Pre-T. Ch., 4 March 2009.

116 *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Judgment on the appeal of the Prosecutor against the 'Decision on the Prosecution's Application for Warrant of Arrest against Omar Hassan Ahmad Al Bashir', ICC-02/05–01/09-OA, A. Ch., 3 February 2010.

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an assessment more *prima facie* in nature at this stage'.[117] What this ruling meant was that Al Bashir was wanted for genocide merely because 'one reasonable conclusion that could be drawn from the material submitted' was that he had been involved.[118] To highlight the potentially weak connection between Al Bashir and the genocide charges levied against him, it is notable that while these charges have been approved by the Appeals Chamber of the ICC, the human rights NGO Human Rights Watch was unable to determine at the time whether all elements of the crime of genocide had been satisfied for Bashir's warrant to carry a charge of genocide.[119]

The mere fact that the standard in Article 58 is relatively low leads to the predicament that it allows the OTP to apply for an arrest warrant even though there is not (yet) sufficient evidence for a future trial and conviction. This gives the OTP the power to seek the arrest, isolation, and downfall of the accused in the expectation that his fall will bring along with it sufficient evidence and witnesses willing to testify. While this is not the stated policy, the investigatory practice indicates that the OTP has been taking a step-by-step approach to its cases. In this regard, Judge Hans-Peter Kaul has commented on the impropriety of the procedure adopted by the OTP in the Kenya situation, which led to what we have called 'evidentiary standards working in reverse'. Speaking of the OTP's piecemeal approach to gathering evidence just enough to meet the necessary evidentiary threshold, Judge Kaul said:

> as tempting as it might be for the Prosecutor to adopt such an approach, it would be risky, if not also irresponsible [were it to emerge that] it is impossible to gather further evidence to attain the decisive threshold of "beyond reasonable doubt".[120]
> If as a result, the case in question were to collapse at trial, this would mean 'unnecessary public stigmatisation and other negative consequences for the person over the foreseeable long time span of a trial.[121]

He therefore asked for cognisance to be made of the 'absolute necessity for the Prosecutor to exhaust all ways and means to make the investigation *ab initio* as comprehensive as possible'.[122] Judge Kaul cautioned against taking the path of least resistance or engaging in minimal effort to build a case, which has sometimes been the OTP's favoured approach. Indeed, the danger is that any information of even a fragmentary nature may satisfy the standard applicable in the initial stages simply because it is so low.

The sort of criticism voiced by Judge Kaul also applies to the confirmation of charges decisions. It is a common and unfortunate feature of previous OTP investigations that they have continued even after the formal confirmation of charges

117 *Prosecutor v. Bosco Ntaganda*, Decision on the request of Judge Akua Kuenyehia of 18 February 2010 to be excused from participating in the exercise to reclassify documents in the appeals proceedings related to the case of *The Prosecutor v. Bosco Ntaganda* and in all appeals in the case, ICC-01/04–584-Anx3, Presidency, 11 November 2010.

118 Human Rights Watch, *supra* note 108.

119 Ibid.

120 See, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey* and *Joshua Arap Sang*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09–01/11–373, Pre-T. Ch. II, Dissenting Opinion Judge Kaul, 23 January 2012, para. 47.

121 Ibid., para. 56.

122 Ibid., para. 52.

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under Article 61 of the Rome Statute.[123] Post-confirmation investigations (such as those in the situation in Kenya) have been decried by Judge Van den Wyngaert in a concurring opinion: 'there are serious questions as to whether the Prosecution conducted a full and thorough investigation of the case against the accused prior to confirmation'.[124] In a similar vein, Judge Trendafilova stated that the prosecution has no *carte blanche* when it comes to post-confirmation investigations.[125] While judges have viewed such investigations with concern, they have been willing to accept them as a necessary evil. The fact that investigations are constantly progressing complicates the work of the defence, which has to adapt to continuously changing circumstances, and creates the real risk that prosecutions launched in the spotlight of the international media will eventually fail and yet be to the detriment of the defendant.

To the factual uncertainties caused by evidentiary standards working 'in reverse', one may add the legal uncertainties resulting from a postponement of the Appeals Chamber's scrutiny.[126] In an international setting, where trials often take several years and jurisprudence is relatively scarce, it is unfortunate that the Appeals Chamber can and will only rule on matters of law at a late stage of the proceedings. National trial courts rely on decades of jurisprudence for guidance and central provisions have often been amply discussed and analysed by higher courts and academia. The same does not apply to the ICC whose jurisprudence regarding procedural and substantive law matters is still scarce and will likely remain scarce in the years to come. Interlocutory appeals under Article 82 of the Rome Statute are hardly sufficient to allow for an early review.[127] Again, the Kenya situation is a case in point. When the OTP asked for permission under Article 15 of the Rome Statute to investigate the post-election violence in Kenya, one out of the three pre-trial judges forcefully objected, arguing that the alleged crimes committed in the aftermath of the presidential elections in 2007/2008 could not be considered crimes against humanity.[128] Dissenting Judge Kaul also objected to cases being opened against the current President and Vice-President of Kenya, given that the crimes they were charged with did not fall

123 See, D. Groome, 'No Witness, No Case: An Assessment of the Conduct and Quality of ICC Investigations', (2014) 3 *Penn State Journal of Law & International Affairs* 1; A. Whiting, 'Dynamic Investigative Practice at the International Criminal Court', (2013) 76 *Law & Contemp. Probs.* 163; Khan and Shah, *supra* note 83, at 201, 221 with special focus on late disclosure. On the disclosure aspect, see also, S. Swoboda, 'The ICC Disclosure Regime – A Defence Perspective', (2008) 19 *Criminal Law Forum* 449.

124 *Prosecutor v. Uhuru Muigai Kenyatta*, Decision on Defense Application Pursuant to Article 64(4) and Related Requests, ICC-01/09–02/11–728-Anx 2, T.Ch. V, 26 April 2013, para. 1.

125 *Prosecutor v. Uhuru Muigai Kenyatta*, Corrigendum to 'Decision on the "Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute"', ICC-01/09–02/11–700-Corr, Pre-T. Ch. II, 21 March 2013, para. 36.

126 Schabas, *supra* note 14, at 174 also warns – referring to a problematic Security Council referral – of the danger that 'the Court might rule on the legality of paragraph 6 and the resolution as a whole after a prosecution has already been undertaken and perhaps even after one had been completed'.

127 On the subject, see, A. Hartwig, 'Appeal and Revision', in C. Safferling (ed.), *International Criminal Procedure* (2012), 531 at 550.

128 *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09–19, Pre-T. Ch., Dissenting Opinion Judge Kaul, 31 March 2010.

within the ambit of the Rome Statute.[129] While the exact interpretation of Article 7 of the Rome Statute is subject to debate,[130] the worrying aspect is that all efforts to get the Appeals Chamber to decide on this purely legal issue failed, pushing the decision on such a critical issue to the end of the trial.[131]

As a matter of legal policy, one wonders whether such fundamental decisions ought to be delayed in this way, or whether it would in fact be wiser to address substantial issues from the beginning. Indeed, vindicating defendants at a later stage can achieve little.

5. Concluding remarks

Wicked people exist. Nothing avails except to set them apart from innocent people.

-James Q Wilson-[132]

The 'do-good' intention that the ICC harbours presents it with a sizeable, indeed noble, task. The scale of the atrocities it deals with, their complexity, and the politicized nature of the situations in which they occur, make differentiation between the guilty and the innocent difficult and correct apportionment of blame to the guilty even more difficult.

In taking cues from criminological literature, we note that it is the rhetoric adopted in the initial stages of the Court's proceedings that seals the fate of the accused, rendering the eventual judgment largely meaningless. A synecdoche occurs whereby the accused comes to encapsulate the totality of evils perpetrated and the international community engages in a catharsis by venting its moral outrage upon him. With an increased focus on victims there is an elemental opposition between the perpetrator and the victim. To sympathize with the latter has come to entail demonising the former. Indeed, in such a way, we fix our own identity and justify our moral superiority which, in a world where little certainty exists, creates solidarity that 'feels good'. Not to mention, the coherence this demonization of the 'other' lends to the historiographical function of international criminal law preventing guilt from being embedded in a larger community.

Yet we do recognize the need to shame, stigmatize, and deter, for those are the purposes of the criminal law. We also recognize that shaming necessitates strong language and that our 'global society' requires a sense of right and wrong that means calling abhorrent what is so. What we call for then is a cautionary approach whereby

129 See, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey* and *Joshua Arap Sang*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09–01/11–373, Pre-T. Ch. II, Dissenting Opinion Judge Kaul, 23 January 2012, para. 2; *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09–02/11–382-Red, Pre-Tr. Ch. II, Dissenting Opinion Judge Kaul, 23 January 2012, para. 2.

130 G. Werle and B. Burghardt, 'Erfordern Menschlichkeitsverbrechen die Beteiligung eines Staates oder einer "staatsähnlichen" Organisation?', (2012) 7 *Zeitschrift für internationale Strafrechtsdogmatik* 271.

131 See, Hiéramente, *supra* note 87, at 187. The ICTY's history has shown that the Appeals Chamber does heavily influence the outcome of the trials; so one should think about involving the appeal judges at an earlier point.

132 J.Q. Wilson, *Thinking about crime* (1985), 209.

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the losses that accrue to defendants before the Court only befall those found guilty. It is perhaps worthy of contemplation that in international criminal law, harshness lies not in the punishments meted to the convicted persons but in the way the international community handles the proceedings. One could, at times, have the impression that the relative (or at least perceived) leniency of punishment meted difficult operates as a subconscious 'excuse' for the treatment of the defendant as a 'convict-to-be' from the very start.

Besides dealing with defendants in an appropriate and cautious manner, it is important that acquittals do result in some sort of rehabilitation of the accused and – at least at a symbolic level – lead to reparations for time spent in court and in pre-trial detention. The possibility of obtaining reparations in case of wrongful detention (Art. 85(1)) and in case of grave and manifest miscarriage of justice (Art. 85(3)) is not sufficient.

We recognize that demonization of defendants, to a certain extent, is as inevitable as death and taxes. But it is of utmost importance that all the actors involved in international trials engage in constant self-reflection to address, step-by-step, such an undesirable imbalance. The Court and its Assembly of States Parties can strengthen such a process by, *inter alia*, giving the defence an institutionalized and better-funded voice, by including defence-related issues in press releases, and by creating the position of an official spokesperson of the ICC instead of *de facto* having the Chief Prosecutor occupy such a position.

It is, however, largely the OTP's approach to a case that determines the fate of the defendant. Whether or not the proceedings are fair, the standing of the accused can often not be rehabilitated in the eyes of the world even in the event of an acquittal. Unfortunately, the evidentiary requirements under the Rome Statute only exacerbate this problem by making it too easy to enmesh an individual even with a paucity of evidence. If the conviction based on the highest standard of 'beyond reasonable doubt' means little for the future of the accused, then these evidentiary standards work 'in reverse' in terms of the impact they have on him. Together, these factors result in a rather hollowed-out ideal of the presumption of innocence. Some may deem it to be an outdated ideal at worst or a technical rule at best, finding it necessary for international tribunals to go beyond a dry discussion of facts and feed on moral narratives of 'good' and 'evil'. However, the presumption of innocence is more than a mere technicality and forms a core principle of international criminal law that strives for an effective protection of the rights of victims and those of (presumed) offenders. It ensures that in the event of an acquittal the individual is not forever entrenched in the negative connotations that the pre-trial and trial stages placed upon him as a suspect and an accused. The presumption of innocence should serve as a reminder that fair trial rights are the achievements of a long struggle that are worth protecting. It does not suffice to militate against show trials; one also has to avoid the show before the trial.