Philosophical Foundations of International Criminal Law: Foundational Concepts

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Front cover: *The old library in San Marco Convent in Florence which served as an important library for the development of Renaissance thought from the mid-1400s. The city leadership systematically acquired original Greek and Latin texts and made them available in the library, which offered unusually open access for the time. They became part of the foundations of the Renaissance.*

Back cover: *Detail of the floor in the old library of the San Marco Convent in Florence, showing terracotta tiles and a pietra serena column. The clay and stone were taken from just outside the city, faith-ful to the tradition in central Italy that a town should be built in local stone and other materials. The foundational building blocks were known by all in the community, and centuries of use have made the buildings and towns of Tuscany more beautiful than ever. Similarly, it is important to nourish detailed awareness of the foundational building blocks of the discipline of international criminal law.*

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From Open Normativity to Normative Openness: Addressing the Elephant in the Room, That Is, the Fact of Justificatory Pluralism in International Criminal Justice

Christoph Burchard*

1.1. Introduction

Now that the honeymoon is over,[1] international criminal justice struggles with coming to terms with its own normativity. What are its rationales, objectives and aims, among others? What serves as a coherent and convincing justification for criminalising core international crimes, for administering justice on an international level, and for selectively prosecuting and possibly punishing certain individuals for the alleged commission of international crimes? These are but some of the foundational questions of international criminal justice, and answers are numerous of course. Due to the overabundance of practical and theoretical conceptualisations of international criminal justice,[2] there is a lack of agreement, at times even rudimentary, amongst the pertinent stakeholders about just what interna-

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1 As famously observed by David Luban, "After the Honeymoon: Reflections on the Current State of International Criminal Justice", in *Journal of International Criminal Justice*, 2013, vol. 11, no. 3, p. 505.

2 As famously observed by Mirjan R. Damaška, "What is the Point of International Criminal Justice?", in *Chicago-Kent Law Review*, 2008, vol. 83, no. 1, p. 331.

tional criminal justice is or ought to be. This I will label the *open normativity of international criminal justice*.[3] Since this is but an expression of the fact of justificatory pluralism[4] in international criminal justice, I feel that we should not hastily seek normative closure, that is, a clear and determinate normative programme for international criminal justice. Rather, I contend, by way of a brief outlook, that we should switch our analytical and normative focus by moving from open normativity to normative openness of international criminal justice; only this approach allows us to address and come to terms with the fact of justificatory pluralism in international criminal justice.[5] My argument begs the question: Is the open normativity of international criminal justice not a normal, even trivial and banal restatement of the many normative debates about the meaning and purposes of criminal law in general and international criminal law in particular? Why should we still focus on this triviality and banality? My answer to this challenge is that the open normativity of international criminal justice is the proverbial elephant in the room, a phenomenon that is so obvious and conspicuous that it is rarely addressed as such; and, or so I will argue, our normal way to address the open normativity of international criminal justice, that is, to seek normative closure, is not to address it.[6]

1.1.1. On Terminology and Methodology

Before venturing on to my observations on the open normativity of international criminal justice, I need to set the stage, by explicating, however briefly, the terminology I use, and by hinting at my research interest and methodology.

For me, the administration of international criminal justice represents an administration of power, which eventually requires a normative justification. However, from this account, it is all but clear *what* interna-

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3 See *infra* Section 1.2.

4 The 'fact of pluralism' is a famous concept coined by John Rawls, "The Idea of an Overlapping Consensus", in *Oxford Journal of Legal Studies*, 1987, vol. 7, no. 1, p. 1. Justifications and reasons are intrinsically linked so that the 'fact of justificatory pluralism' is largely synonymous with the 'fact of a pluralism of reasons', which then points to the 'indeterminacy of rational justification' in a non-ideal world (on the latter see Gerald F. Gaus, *The Order of Public Reason*, Cambridge University Press, Cambridge, 2011, pp. 36 ff.).

5 See *infra* Section 1.4.

6 See *infra* Section 1.3.

tional criminal justice actually is and whether it is something coherent and enclosed. Our traditional *modus operandi*, the legal justification of power,[7] may well obfuscate the power, and thus possibly the violence, of legal justifications.[8] Therefore, we must not easily glance over the fact that the law can easily be considered an instrument of power and violence.[9]

In order to appreciate the power, and possibly also the violence, of international criminal justice, I suggest that we look to the (lack of) *power of justifications and public reasons*[10] because justifications and reasons move persons through acceptance, irrespective of whether these justifications are acceptable. "Justifications are basic, not interests or desires" (nor values or ideologies, among others, one might add) so that reasons are "better suited to explaining why people act in a certain way and how power functions."[11] This, then, is a *non-normative reading of normativity*, one that does not label justifications as justifiable or public reasons as normatively authoritative. Fundamentally, my explorations of the open normativity of international criminal justice rest on a sociological, or rather socio-theoretical, approach to justifications and reasons. It seeks to explain and understand how international criminal justice administers normative power. Since international criminal justice has emancipated itself,[12] or so the dominant story goes, from the individual motives of its

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7 For example, the International Criminal Court ('ICC') was set up by international law, and at times even operates with *ius cogens* prescriptions.

8 Christoph Menke, *Recht und Gewalt*, August Verlag, Berlin, 2011, p. 10.

9 See generally John Mearsheimer, "The False Promise of International Institutions", in *International Security*, 1994, vol. 19, no. 3, p. 13; Susan Marks, "Empire's Law", in *Indiana Journal of Global Legal Studies*, 2003, vol. 10, no. 1, p. 449; Frédéric Mégret, "In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice", in *Cornell International Law Journal*, 2005, vol. 38, no. 3, p. 740.

10 Using the term 'public reasons' is delicate, as there is an immense, mostly normative, debate behind it. I use the term in an idiosyncratic descriptive sense that makes use of the original meaning of 'public' reasons – reasons that are used in public, that is, openly, because they are communicatively accepted in a specific communicative forum. I shall not inquire what is 'accepted' (note: not acceptable!) and what is not accepted in international criminal justice in this chapter.

11 Rainer Forst, "Noumenal Power", in The Journal of Political Philosophy, 2015, vol. 23, no. 2, pp. 112, 118.

12 See, for example, Frédéric Mégret, "A Special Tribunal for Lebanon: The UN Security Council and the Emancipation of International Criminal Justice", in *Leiden Journal of International Law*, 2008, vol. 21, no. 2, p. 499. See also Carsten Stahn and Göran Sluiter, "From 'Infancy' to Emancipation? A review of the Court's First Practice", in *idem* (eds.),

decision-makers, agents, stakeholders and critics, we need to look to the systemic rationales, purposes and objectives as they are attached to international criminal justice as a normative order in its own right in order to explain, and understand, how and why these rationales, purposes and objectives move people in accepting, or resisting, international criminal law.[13] This allows us to bridge the observer with the participant perspective on international criminal justice.

Casting international criminal justice as a normative order is, of course, a blatant simplification, and perchance even an illusion or myth.[14] Therefore, I am mostly concerned with authoritative decisions, arguably decisions about the undecidable, because it is in authoritative decisions that the normative (im)potence of international criminal justice becomes apparent. The first and descriptive question of power, therefore, is whether, and why, certain legislative, adjudicative or administrative decisions about introducing, deploying, enforcing and resisting legal prescriptions in the context of international criminal justice move people to either follow or resist the law.

This brings me to an important clarification. Although I will argue that international criminal justice is normatively open, or fluid, in that it reconciles many ambivalent and at times even incommensurable normative projects, I will argue that 'the' law and its interpreters must seek normative closure in many instances. Indeed, and perhaps this is what characterizes law as law – the law, and its makers, enforcers and critics, must render *decisions* that seek to bring about normative closure within the law from an internal perspective, although normative openness will prevail from an external perspective from outside the law. The act of choosing and deciding indeed moves to the centre of interest, and with it the inclusions and exclusions that it brings about. The crucial point here is simple, and yet disconcerting, as I treat authoritative decisions about the law as the legal manifestation of decisive authority, which operates on justifications and reasons that move people, addressors, addressees and third parties alike, to either accept or resist these decisions.

The Emerging Practice of the International Criminal Court, Martinus Nijhoff Publishers, Leiden, 2008, p. 1.

13 I will return to this in *infra* Section 1.3.4.

14 See *infra* Section 1.3.2.

1.2. The Open Normativity of International Criminal Justice: Observations

The open normativity of international criminal justice is a descriptive account of the current state of play, which compiles two observations: international criminal justice is at heart a normative enterprise.[15] Its foundational normativity, however, is un(der)determined, fluid, ambivalent, and hence malleable, that is, open.[16]

1.2.1. The Normativity of International Criminal Justice

First on the (non-normative) *normativity* of international criminal justice. The deliberations, discussions, negotiations and disputes and even the critique, struggles and fights that we find in and about international criminal justice – including those that are rooted in power interests or emotions – will usually appeal to publicly accepted justifications that offer public reasons to obey and even value or to disobey, at least be critical of, international criminal justice. Put simply, international criminal justice is normative, because (and when) it needs to be justified, and because (and when) its defence and critique utilises reasons. Speaking of the latter, in current international criminal justice mere allusions to domination or emotional affects, among others, are off the table. Or can we, as of today, reasonably imagine a dictator 'rationalising' the genocide of her people with her brute capability or her mere pleasure to do so?[17] Or, on the other side of the aisle, can we reasonably imagine the International Criminal Court ('ICC') 'justifying' that countries on the periphery are to be 'civilised' by the means of international criminal justice?[18]

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15 See *infra* Section 1.2.1.

16 See *infra* Section 1.2.2.

17 Note that such rationalisations may very well find bases in normative theories that for example cherish power for the sake of power or that elevate a master over an inferior race. However, such normativity is no longer acceptable, and rightly so, and therefore excluded from the acceptable justifications. This very exclusion then bolsters the normativity of international criminal justice, for this exclusion is an expression of 'normative power' – a concept to which I will return immediately.

18 Note that public reasons have not necessarily replaced and can thus be 'corrupted' by apocryphal reasons, such as domination and emotion. For example, the critique that the ICC is, on a subliminal level, a neo-colonial and racist institution turns on ICC's public justifications, trying to illustrate that they are a mere façade that obfuscate 'sinister' ambitions.

Moreover, international criminal justice cannot be but a primarily normative project, since its coercive apparatus is highly limited. The ICC, for example, and as it is well-known, only has coercive powers over defendants once it acquired them, but no coercive investigatory powers 'on the ground' or even to enforce obligations to co-operate against States Parties.[19] I am, of course, not claiming that the normativity of international criminal justice is overriding the influence of domination or emotion, among others – as it can be marshalled pro and contra international criminal justice in general or against individual decisions in or about the law, in particular. But domination, emotion or other non-accepted reasons are being – from the vantage point of both the addressors and the addressees of international criminal justice – normatively reconfigured and brought into a justificatory space of public reasons. Sub-species, by their very legalisation, questions of factual domination, among others, are being transformed into normative ones so that they require justificatory answers that in turn need to be supplemented with public reasons.

In international criminal justice, then, what is really at stake is 'normative power',[20] that is, social and institutional discursive power. In other words, when looking to power, we are looking into the capacity to offer acceptable reasons that may motivate someone else to think and do something that he or she would otherwise not have thought and done.[21]

For example, arguing that a State Party will withdraw from the ICC because it threatens the reign of a dictator is hardly convincing. The argument is no longer discursively accepted. But what about a withdrawal that contends that the ICC is but a neo-imperialistic "Western Court to try African crimes"?[22] If one finds this argument accepted and not per se excluded, one comes close to accepting the withdrawal in principle. This holds water even if one would thereby sanction that the withdrawal may

[19] For this critique see, for example, Antonio Cassese, "Reflections on International Criminal Justice", in *The Modern Law Review*, 1998, vol. 61, no. 1, p. 1, at p. 10; Jack Goldsmith, "The Self-Defeating International Criminal Court", in *The University of Chicago Law Review*, 2003, vol. 70, no. 1, p. 89, at pp. 92 ff.

[20] James Bohman, *Democracy Across Borders: From Demos to Demoi*, MIT Press, Cambridge, Massachusetts, 2007, p. 7.

[21] The latter is the definition of 'noumenal power' by Forst, 2015, p. 115, see *supra* note 11.

[22] Mahmood Mamdani, "The New Humanitarian Order", in *The Nation*, 10 September 2008 (available on *The Nation* web site).

eventually be motivated by our dictator's naked will to stay in power. At first glance, the *Al-Bashir* disaster offers a counter-example. But a closer look reveals that it rather delimits international criminal justice from politics. Where no proper reasons are offered, for example, by the UN Security Council, for why it does not 'comply' with its initial referral of the Sudan situation to the ICC,[23] international criminal justice proper ends and politics begins.

1.2.2. The *Open* Normativity of International Criminal Justice

This leads me to the second dimension of the open normativity of international criminal justice. The *openness* of this normativity condenses its indeterminacy, possibly its undecidedness, indeed its malleability. In this respect, I am not lamenting that we – as the epistemic community of international criminal lawyers – 'simply' have not found common answers to the foundational questions of international criminal justice. Nor do I lament any "theoretical deficits"[24] in the raising and responding to these questions. As, to the contrary, there is an overabundance[25] of normative theories – justifications and reasons, including critique – on the starting grounds as well as the finalities and rationalities of international criminal justice,[26] which is not only a problem of theory but one of practice.[27]

1.2.2.1. Open Set of Questions

In order to illustrate the open normativity of international criminal justice, let us turn to four sets of open questions.

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23 On this see, for example, Louise Arbour, "The Relationship Between the ICC and the Security Council", in *Global Governance*, 2014, vol. 20, no. 2, p. 200; Stuart Ford, "The ICC and the Security Council: How Much Support Is There for Ending Impunity", in *Indiana International and Comparative Law Review*, 2016, vol. 26, no. 1, pp. 40 ff.

24 Carl-Friedrich Stuckenberg, "Völkerrecht und Staatsverbrechen", in Jörg Menzel, Tobias Pierlings and Jeannine Hoffmann (eds.), *Völkerrechtsprechung*, Mohr Siebeck, Tübingen, 2005, p. 772. See also Kai Ambos, *Internationales Strafrecht*, 5th edition, C.H. Beck, München, 2018, p. 101.

25 Damaška, 2008, p. 331, see *supra* note 2.

26 See *infra* Section 1.2.2.1.

27 See *infra* Section 1.2.2.2.

First, we are far from a common *theory of criminalisation* on the international level.[28] Here are some of the challenges we face:

- How do we justify the criminalisation of international offences?
  - By the protection of individual and/or collective human rights?[29]
  - And/or the protection of world peace?
  - And/or the 'cleanliness' of warfare and armed conflict, among others?
- And from where do we start?
  - From a moral perspective which scourges core international crimes as pre-institutional, pre-legal, and/or pre-criminal *mala in se*?[30]
  - And/or from a political perspective? This would make criminalisation dependent on a prior political theory,[31] for example, liberal cosmopolitanism or international institutionalism. As a consequence, core crime offences would communicate and stabilise the authority of the international

[28] It comes as no surprise that the same holds true on a national level. Cf. the introduction to R.A. Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo and Victor Tadros, *Criminalization: The Political Morality of the Criminal Law*, Oxford University Press, Oxford, 2015, p. 2.

[29] It should be noted that human rights are thereby reconfigured from the *status negativus* to the *status positivus*. They no longer serve as a defence of the individual against a commonwealth (bottom-up defence), but justify (top-down) the infringement of the personal liberties of the offender, because it infringes upon the human rights of fellow human beings, which prompts a protective responsibility by the commonwealth.

[30] This convincing distinction of 'pre-'ness is expounded by Robin Antony Duff, "Political Retributivism and Legal Moralism: Comment", in *Virginia Journal of Criminal Law*, 2012, vol. 1, no. 1, p. 189. For a recapitulation of the 'moral turn' in Anglo-American criminalisation theory see *ibid*., pp. 186 ff.

[31] See generally Malcolm Thorburn, "Justifications, Powers, and Authority", in *The Yale Law Journal*, 2008, vol. 117, no. 6, p. 1070. With regard to international criminal justice, see, for example, Adil Ahmad Haque, "Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law", in *Buffalo Criminal Law Review*, 2005, vol. 9, no. 1, pp. 320 ff.; Marlies Glasius, "Do International Criminal Courts require Democratic Legitimacy?", in *The European Journal of International Law*, 2012, vol. 23, no. 1, pp. 63 ff.; Mégret, 2005, pp. 741 ff., see *supra* note 9.

community, which in turn may or may not be synonymous with Western domination.[32]

- And/or from the (in moral or political terms allegedly neutral) perspective of the harm principle or the protection of *Rechtsgüter*, with the multitude of definitions that this concept holds?[33]

Second, we are also far from a *theory of criminal procedure and punishment* in international criminal justice. To again only offer some superficial insights into what is at stake:

- Do we need a different set of reasons for criminal punishment than as regards criminalisation, so that the aesthetic[34] and perchance moralistic[35] distinction between criminalisation and sanctioning would collapse?
- Why do we punish offenders?
  - To redress a moral wrong?
  - And/or to deter?[36]

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[32] See generally Michael McFaul, "Democracy Promotion as a World Value", in *The Washington Quarterly*, 2004, vol. 28, no. 1, p. 155; Martti Koskenniemi, "International Law in Europe: Between Tradition and Renewal", in *The European Journal of International Law*, 2005, vol. 16, no. 1, p. 115; Dawn Rothe and Christopher W. Mullins, "'International Community': Legitimizing a Moral Consciousness", in *Humanity and Society*, 2006, vol. 30, no. 3, p. 273.

[33] See here the comparative analysis of Kai Ambos, "The Overall Function of International Criminal Law: Striking the Right Balance Between the Rechtsgut and the Harm Principles", in *Criminal Law and Philosophy*, 2015, vol. 9, no. 2, p. 301.

[34] As to this distinction see, for example, Claus Roxin, *Strafrecht Allgemeiner Teil*, 4th edition, CH. Beck, München, 2006, vol. 1, pp. 69 ff.; Ulfrid Neumann, "Institution, Zweck und Funktion staatlicher Strafe", in Michael Pawlik and Rainer Zaczyk (eds.), *Festschrift für Günther Jakobs*, Carl Heymanns, Köln, 2007, pp. 446 ff.

[35] As Emmanuel Melissaris, "Toward a Political Theory of Criminal Law: A Critical Rawlsian Account", in *New Criminal Law Review*, 2012, vol. 15, no. 1, p. 129 has convincingly argued, the more criminal law and punishment become "normalised" as an ordinary means of governance, that is, the more a moral theory that claims the uniqueness of criminal law is discounted, the more criminalisation and punishment become part of the same scheme that can be justified with the same reasons.

[36] See, for example, ICTY, *Prosecutor v. Tadić*, Trial Chamber, Sentencing Judgement, 11 November 1999, IT-94-1-T*bis*-R117, para. 60 (http://www.legal-tools.org/doc/5c2dde/). See also Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent

- And/or to incapacitate[37] or even to re-socialise?[38]
- And/or to communicatively generate or stabilise norms,[39] so that the very concept of 'show trials', which do not necessarily have to be unfair, would become acceptable?[40]

- If we look to the debates in international criminal justice, we must not stop there, since we are experiencing a *decentring of the discussion.* Punishment is no longer at its firm core.
  - So, do we punish in order to have a trial, because at rock bottom we seek to give victims a voice?[41]
  - And/or to (re)construct a historical record, among others?[42]
  - And to what degree do we accept pragmatic rationales for criminal trials? Do we, for example, accept functions like familiarising a court with a situation, as in Goldstone's fa-

Future Atrocities?", in *The American Journal of International Law*, 2001, vol. 95, no. 1, pp. 7 ff.

37 See, for example, Mark A. Drumbl, "Collective Violence and Individual Punishment: The Criminality of Mass Atrocity", in *Northwestern University Law Review*, 2005, vol. 99, no. 2, p. 589.

38 See, for example, Jessica M. Kelder, Barbora Holá and Joris van Wijk, "Rehabilitation and Early Release of Perpetrators of International Crimes: A Case Study of the ICTY and ICTR", in *International Criminal Law Review*, 2014, vol. 14, no. 6, p. 1177.

39 See, for example, Margaret M. deGuzman, "Choosing to Prosecute: Expressive Selection at the International Criminal Court", in *Michigan Journal of International Law*, 2012, vol. 33, no. 2, p. 270; Robert D. Sloane, "The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law", in *Stanford Journal of International Law*, 2007, vol. 4, no. 1, p. 44.

40 Also see Martti Koskenniemi, "Between Impunity and Show Trials", in *Max Planck Yearbook of United Nations Law*, 2002, vol. 6, no. 1, p. 35; Stephan Landsman, "Alternative Responses to Serious Human Rights Abuses: of Prosecution and Truth Commissions", in *Law and Contemporary Problems*, 1996, vol. 59, no. 4, p. 86.

41 See, for example, Charles P. Trumbull IV, "The Victims of Victim Participation in International Criminal Proceedings", in *Michigan Journal of International Law*, 2008, vol. 29, no. 4, pp. 801 ff.; Jo-Anne Wemmers, "Victims' Rights and the International Criminal Court: Perceptions within the Court Regarding the Victims' Right to Participate", in *Leiden Journal of International Law*, 2010, vol. 23, no. 3, pp. 639 ff.

42 Regina E. Rauxloh, "Negotiated History: The Historical Record in International Criminal Law and Plea Bargaining", in *International Criminal Law Review*, 2010, vol. 10, no. 5, p. 739.

mous case-building strategy at the International Tribunal for the former Yugoslavia ('ICTY')?[43]

Third, whilst the above-mentioned questions mirror discussions we have on a national level, international criminal justice brings with it *further complications* as we lack agreement about the addressees, the extent and the timing of international criminal justice.

- So, for whom do we administer international criminal justice?
  - For the international community as such (whatever that may be)?
  - Or primarily for Western communities, perchance even so that they have a fig leaf[44] for not intervening into or for even escalating conflicts, where international crimes are committed?[45]
  - Or for conflict-ridden regions or societies (the keyword here is 'local ownership')?[46]
  - Or even primarily for the victims, among others?
- Against whom[47] shall we bring international criminal justice to bear?
  - Against political, military, economic, bureaucratic, and/or other leaders?
  - And/or against paper-pushers, the Eichmann type perpetrators, who evidence the 'banality of evil'?

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43 See Richard J. Goldstone, *For Humanity: Reflections of a War Crimes Investigator*, Yale University Press, New Haven/London, 2000, pp. 101 ff.

44 See, for example, Thomas W. Smith, "Moral Hazard and Humanitarian Law", in *International Politics*, 2002, vol. 39, no. 2, p. 175.

45 This would make international criminal justice the '*prima ratio*', since prior political measures to prevent or pre-empt international crimes are too costly, in a wide sense.

46 See, for example, Janine Natalya Clark, "Peace, Justice and the International Criminal Court: Limitations and Possibilities", in *Journal of International Criminal Justice*, 2011, vol. 9, no. 3, pp. 534 ff.; Vasuki Nesiah, "Local Ownership of Global Governance", in *Journal of International Criminal Justice*, 2016, vol. 14, no. 4, p. 985.

47 See, for example, Hitomi Takemura, "Big Fish and Small Fish Debate: An Examination of the Prosecutorial Discretion", in *International Criminal Law Review*, 2007, vol. 7, no. 4, p. 677.

  - And/or against the so-called small fish, who, however, we must be mindful of, are the ones pulling the proverbial triggers or opening the proverbial gas taps?
- To which extent do we seek to administer international criminal justice?
  - Do we, at least eventually and in an idealised world, seek to mete out international criminal justice universally, that is against anyone anywhere?
  - Or are we content with selective prosecutions? For example, in order to have 'tainted' members of the *ancien régime* uphold order in the *nouveau régime*? Or simply for reasons of feasibility? Or do we indeed sign up to symbolic justice, where the 'guilt' of the many is symbolically appraised in the trial of the few?
- And finally, when does the administration of international criminal justice ought to begin and when does it ought to bear fruits?
  - Immediately, for example, whilst a conflict is ongoing in order to end it?
  - And/or in the near future, for example, in order to foster reconciliation in a war-torn community?
  - And/or in the far future, for example, like in Germany, where the Nuremberg account of the Holocaust only made it into public consciousness after decades?

Fourth, international criminal justice struggles hard with defining its exact relationship with 'neighbouring' disciplines, or rather social practices, like national criminal justice, transitional justice or peacebuilding efforts. The ever-present question is whether international criminal justice is part of or distinct from them, a question that becomes even more blurry when taking into account that the latter disciplines are normatively open as well. It comes as no surprise, then, that, for example, international criminal justice and transitional justice can either be seen as antipodes or as one social practice to come to terms with systemic mass violence.

1.2.2.2. From the Theory to the Practice of Open Normativity: Selectivity and Politicisation of International Criminal Justice

These are but some – but in my eyes the most pressing – foundational questions that international criminal justice faces. They have received close attention and thorough inquiries in academia, practice and politics. And they are not only of theoretical but of practical importance, that is, they call for decisive resolutions by the law in action. Since this does not warrant closer inspection, suffice it to very briefly recall two core problems of international criminal justice, selectivity and politicisation.

As regards selectivity, it is a commonplace that the ICC needs to decide how it spends its scarce resources. Which situation, time frame, region, party to a conflict, perpetrator, acts and offences does it focus on? This intricate set of practical questions are evidently linked to the foundational ones mentioned before. In *Lubanga*,[48] for example, the ICC Office of the Prosecutor ('OTP'), albeit not openly, resorted to pragmatism,[49] as it was done before in *Tadić*,[50] by going against an individual that was already in custody. Moreover, the OTP chose a communicative and symbolic agenda[51] by focusing on child-soldier related crimes in its charging decision. It goes without saying that each of these decisions can be, and were, easily assailed or defended.

And as regards politicisation, the attempt to hold politics accountable by means of criminal law may very well lead into a vicious circle where the legalisation of the political turns into a politicisation of the law. With the normativity of international criminal justice out in the open, de-

[48] For an overview see the ICC's collection of decisions, documents, press material, among others, available on ICC's Lubanga case web site.

[49] See, for example, Phil Clark, "Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda", in Nicholas Waddell and Phil Clark (eds.), *Courting Conflict? Justice, Peace and the ICC in Africa*, Royal African Society, London, 2008, pp. 39, 41; Thomas Obel Hansen, "A Critical Review of the ICC's Recent Practice concerning Admissibility Challenges and Complementarity", in *Melbourne Journal of International Law*, 2012, vol. 13, no. 1, pp. 221 ff.

[50] On the issues surrounding Tadić's extradition from Germany to The Hague, see Elizabeth Philipose, "Prosecuting Violence, Performing Sovereignty: The Trial of Dusko Tadic", in *International Journal for the Semiotics of Law*, 2002, vol. 15, no. 2, p. 171.

[51] Frédéric Mégret, "Practices of Stigmatization", in *Law and Contemporary Problems*, 2013, vol. 76, no. 3, pp. 298, 305.

cisions are susceptible both to political activism by international criminal justice's organs[52] and to political corruption from the outside.[53] For example, in the Colombia situation, the ICC has to decide whether it is in the interest of justice (Article 53 of the Rome Statute) to override, by means of determining Colombia unwilling under the complementarity regime,[54] a peace process that, at least initially, relied on amnesties and means of transitional justice to overcome a conflict that lasted for decades.[55] And in the (in)famous preliminary investigations of the ICTY into the North Atlantic Treaty Organization bombing campaign in Serbia,[56] the ICTY was under to pressure to possibly move against its own financiers and supporters.

1.3. The Open Normativity of International Criminal Justice: An Elephant in the Room

All that I have been saying on the open normativity of international criminal justice is, from an observer's point of view, a (superficial) synopsis of the many theoretical debates on, in, about and against international criminal justice that have turned practical in many instances. *Prima facie*, this will not come as a surprise to many. It may even sound trivial and banal, hearing that there are many disputes in international criminal justice, in-

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52 See generally Alexander K.A. Greenawalt, "Justice Without Politics? Prosecutorial Discretion and the International Criminal Court", in *NYU Journal of International Law and Politics*, 2007, vol. 39, no. 3, pp. 612 ff.

53 See, for example, John R. Bolton, "The Risks and Weaknesses of the International Criminal Court from America's Perspective", in *Law and Contemporary Problems*, 2001, vol. 64, no. 1, p. 180; Elizabeth Nielson, "Hybrid International Criminal Tribunals: Political Interference and Judicial Independence", in *UCLA Journal of International Law and Foreign Affairs*, 2010, vol. 15, no. 2, pp. 306 ff.

54 See, for example, Diego Acosta Arcarazo, Russell Buchan and Rene Ureña, "Beyond Justice, Beyond Peace? Colombia, the Interests of Justice, and the Limits of International Criminal Law", in *Criminal Law Forum*, 2015, vol. 26, no. 2, pp. 300 ff.

55 For an overview see, for example, Kimberly Theidon, "Transitional Subjects: The Disarmament, Demobilization and Reintegration of Former Combatants in Colombia", in *The International Journal of Transitional Justice*, 2007, vol. 1, no. 1, p. 66.

56 "Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia" (http://www.legal-tools.org/doc/83feb2/); for a critical review of the report see, for example, Paolo Benvenuti, "The ICTY Prosecutor and the Review of the *NATO Bombing*. Campaign against the Federal. Republic of Yugoslavia", in *European Journal of International Law*, 2001, vol. 12, no. 3, p. 503.

cluding about its very foundation, and that these disputes mould the decisions taken by the agents of international criminal justice. I nonetheless think that the said open normativity of international criminal justice is lost in a blind spot. It is an elephant in the room, a phenomenon that is so obvious that one does not (want to) address it. We should at least explore four causes (not reasons) for why the open normativity of international criminal justice can be easily glanced over, and for why the normative openness of international criminal justice is commonly not addressed as such:

1.3.1. Pragmatism

A *first cause* roots in, albeit a very common-sense understanding of, pragmatism. Pragmatists amongst academics, practitioners and politicians, among others, may object that it is high time to face the doctrinal and procedural problems of international criminal justice, and leave the foundational ones be.[57] They might, and at least behind closed doors do, argue that the theoretical debates have so far only yielded the widening and deepening of the open normativity of international criminal justice, and that they have not brought us anywhere near agreement – or even a consensus – about where international criminal justice starts, stands and is oriented to. A subtler objection is that the open normativity of international criminal justice is not only nothing new,[58] but nothing special. After all, or so the objection goes, national criminal justice systems are normatively open as well,[59] so that one should not 'make a fuss' about it.

This, however, is not a particularly strong argument. To the contrary, it only begs the question why we do not address the open normativity of criminal law on a national level.

1.3.2. Seeking Normative Closure

A *second cause* for losing sight of the normative openness of international criminal justice rests in our legal academic culture, which may well have

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[57] See, for example, Kai Ambos, 2018, p. 102, see *supra* note 24.

[58] See also Klaus Günther, "Normativer Rechtspluralismus – Eine Kritik", in Thorsten Moos *et al.* (eds.), *Das Recht im Blick der Anderen*, Mohr/Siebeck, Tübingen, 2016, pp. 46 ff.

[59] This is explored in Christoph Burchard, "Die normative Offenheit der Strafrechtspflege", in Frank Saliger *et al.* (eds.), *Festschrift für Ulfrid Neumann*, C.F. Müller, Heidelberg, 2017, pp. 535 ff.

spilled over onto practice and politics, or indeed vice versa.[60] After all, are we not required to find definite and coherent answers to the open normative questions of our times?[61] Indeed, for those who are interested in international criminal law theory, the open normativity of international criminal justice is an ever-present incentive to come up with a, comprehensive or partial, but in all cases consistent, set of responses to the foundational questions of international criminal justice. *Consistent normative closure*, then, is the goal. Perhaps it makes us forget that these closures are only *intended* to bring closure and that they, *in fact*, will rarely do so. The 'ought', for example, that international criminal justice ought to communicatively generate the imperatives of humanity in the name of the world society, thus, lets us lose sight of the 'actually will be', that international criminal justice actually will be communicatively generating said imperatives.[62] Further, the 'ought' lets us lose sight of the 'was'. Indeed, rational and coherent normative prescriptions about how 'the' criminal law ought to be configured are rarely considerate of the contingencies of historical developments.

Again, this not only holds true on an international but even more so on a national level. As Lindsay Farmer has recently demonstrated, the notion of 'the' criminal law as a purposive institution is a historically contingent construct.[63] Yet, as brilliantly illustrated by Alice Ristroph in a review essay, this insight about the 'actual was' did not keep Farmer from falling for the quest, perchance even the crusade, for normative closure, as

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60 Zygmunt Bauman, *Modernity and Ambivalence*, Cornell University Press, Ithaca, 1991, even argues, from a sociological perspective, that the suppression of ambivalence is characteristic for modernity, but that this very suppression creates new ambivalences. See, for example, p. 3: "The struggle against ambivalence is both self-destructive and self-propelling. It goes on with unabating strength because it creates its own problems in the course of resolving them".

61 On this see, for example, Gerry Simpson, "International Criminal Justice and the Past", in Gideon Boas, William A. Shabas and Michael P. Scharf (eds.), *International Criminal Justice. Legitimacy and Coherence*, Edward Elgar, Cheltenham, 2012, pp. 125 ff.; Cassandra Steer, "Legal Transplants or Legal Patchworking? The Creation of International Criminal Law as a Pluralistic Body of Law", in Elies van Sliedregt and Sergey Vasiliev (eds.), *Pluralism in International Criminal Law*, Oxford University Press, 2014, p. 63.

62 This is no critique, as long as the research interest lies with justifying what ought to be.

63 Lindsay Farmer, *Making the Modern Criminal Law: Civil Order and Criminalization*, Oxford University Press, Oxford, 2016.

he himself sought to establish an 'ought' for the criminal law – civil peace, in his case.

> Perhaps, instead, criminal law has no aims. Perhaps it has no purposes, no dreams, no coherence, and no limits. The persons who enact, enforce, justify, or critique criminal laws have aims, to be sure, and many of these people are indeed motivated to redress wrongs, prevent harms, or secure safety or civil order. But there is no consistent motivation across all of the people who make actual criminal laws or theories of criminal law, nor even are there consistent understandings of purported goals.[64]

The *genius loci* of this consideration is Nietzsche's *Genealogy of Morality*. Here, Nietzsche gives an early account of the fluidity (his words), the normative openness (my words), or the overall aimlessness (to paraphrase Ristroph) of punishment as an institution. To let him speak for himself:

> With regard to "*punishment*, we have to distinguish between two of its aspects: one is its relative *permanence*, the custom, the act, the 'drama', a certain strict sequence of procedures, the other is its *fluidity*, its meaning [*Sinn*], purpose and expectation, which is linked to the carrying out of such procedures. And here, without further ado, I assume […] that the latter was only *inserted* and interpreted into the procedure (which had existed for a long time though it was thought of in a different way), in short, that the matter is *not* to be understood in the way our naïve moral and legal genealogists assumed up till now, who all thought the procedure had been *invented* for the purpose of punishment, just as people used to think that the hand had been invented for the purpose of grasping. With regard to the other element in punishment, the fluid one, its 'meaning', the concept 'punishment' presents, at a very late stage of culture (for example, in Europe today), not just one meaning but a whole synthesis of 'meanings' [*Sinnen*]: the history of punishment up to now in general, the history of its use for a variety of purposes, finally crystallizes in a kind of unity which is difficult to dissolve

[64] Alice Ristroph, "The Definitive Article", in *University of Toronto Law Journal*, 2015, vol. 68, no. 1, p. 144.

> back into its elements, difficult to analyse and, this has to be stressed, is absolutely *undefinable*. (Today it is impossible to say precisely *why* people are actually punished: all concepts in which an entire process is semiotically concentrated defy definition; only something which has no history can be defined.)[65]

1.3.3. Obfuscating Power

Nietzsche not only brought to the fore that the traditional attribution of normative purpose and meaning is oblivious of historical contingencies. He also highlighted that this very act, that is, interpretatively giving a legal phenomenon purpose or meaning, is an act of power and domination, and hence possibly violence. To again quote him *in extenso*:

> There is no more important proposition or every sort of history than that which we arrive at only with great effort but which we really *should* reach, – namely that the origin of the emergence of a thing and its ultimate usefulness, its practical application and incorporation into a system of ends, are *toto coelo* separate; that anything in existence, having somehow come about, is continually interpreted anew, requisitioned anew, transformed and redirected to a new purpose by a power superior to it; that everything that occurs in the organic world consists of *overpowering*, *dominating*, and in their turn, overpowering and dominating consist of reinterpretation, adjustment, in the process of which their former 'meaning' [*Sinn*] and 'purpose' must necessarily be obscured or completely obliterated.[66]

Perhaps, then, this is the *third possible cause* for why the normative openness of international criminal justice lies in a blind-spot, for why it is an elephant in the room. In not focusing on the open normativity of law as such, one can readily glance over the power dimension of bringing about normative closure. In downscaling the disputes about the meanings and purposes of the law as something trivial, insignificant or normal, the very attribution of meaning and purpose to the law becomes equally trivial, insignificant or normal. For the criminal law theorist, this is liberating.

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65 Friedrich Nietzsche, *On the Genealogy of Morality*, trans. Carol Diethe, 2nd ed., Cambridge University Press, Cambridge, 2007, pp. 52 ff.

66 Nietzsche, 2007, p. 51, see *supra* note 65.

For politicians, on the other hand, it is empowering, since they are enabled to obfuscate the possible argumentative violence of a legal justification, for example, withdrawing from the ICC because it 'is' neo-imperial in 'nature', by referring to the argumentative justification of power.[67]

1.3.4. Relieving an Emancipated Law

A condensation of these considerations points to the most troubling insight, one that challenges the very fabric of 'our' – at least continental European[68] – understanding of law as an emancipated realm in its own right, which follows its own substantive rationalities[69] and autonomously stands next to, for example, the social, political or economic realm.[70] If 'the' criminal law in general and 'the' international criminal justice 'system'[71] in particular are but historically contingent regimes, which are continuously shaped by attributions of meaning that, in turn, are but (or, at least, also) acts of power and domination (and hence possibly violence) by individual decision-makers (who therefore should be recast as meaning-makers), the autonomy and unity of 'the' law become tenuous to uphold. The definite article 'the' turns into a myth.[72] Perhaps, then, one hopes to downplay the open normativity of 'the' law in order to relieve an allegedly emancipated law, which – or so the story goes – must not be driven by

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67 Note that conflicting justifications, for example, about justice, may well spiral into conflict, both rhetorical and physical. Justice, therefore, can propel conflict, or rather the open normativity of the justice concept can do so. See generally Christopher Daase and Christoph Humrich, "Just Peace Governance: Forschungsprogramm des Leibniz-Instituts Hessische Stiftung Friedens- und Konfliktforschung", *PRIF Working Papers No. 25*, 2015 (available on HSFK web site).

68 In the US, the (in)famous 'seamless web of the law' may actually serve as a counterpart, that is the idea of the interconnectedness of legal doctrine, and if this is too substantive a formulation, the interconnectedness of 'the' legal method.

69 That is the 'neo-formalist' argument in system's theory, which considers 'the' legal system as something separate and independent from the political, social, economic system, among others, see, for example, Niklas Luhmann, *Das Recht der Gesellschaft*, Suhrkamp, Frankfurt, 1993, pp. 407 ff.

70 See also Judith N. Shklar, *Legalism: Law, Morals and Political Trials*, Harvard University Press, Cambridge, Massachusetts, 1986, pp. 1 ff.

71 On a critical reading of systems' rhetoric in US criminal law, see Sara Mayeux, "The Idea of 'The Criminal Justice System'", *American Journal of Criminal Law*, forthcoming, 2018.

72 On this kind of use of the definite article, see again Ristroph, 2015, at p. 140 ff., see *supra* note 64.

external social, political, economic influences, among others, as it must operate on its own rationalities. Once we take note of the open normativity of international criminal justice, in contrast, international criminal law seems to lose its very core, its very meaning of the law as something other, as something, either substantively, or at least methodologically,[73] independent. And shall we really, to ask a question that is far from merely being a rhetoric one, cast the law as the continuation of the social, political or economic by other means?[74]

Put bluntly, taking note of the open normativity of international criminal justice introduces the shock of legal realism to this discipline, one that questions whether decisions about 'the' law are distinctively legal in nature, or whether other motives and parameters – starting from the proverbial good or bad breakfast, and ranging to less mundane, but equally 'realistic' ones, like personal ideologies and upbringing of the decision-maker – bore impact on legislative, administrative or adjudicative decision-making in the context of bringing to justice international criminals.

1.4. Outlook

In this chapter, I have argued that international criminal justice is normatively open. For years and years, it has not only operated despite the foundational fluidity, ambivalence and even incommensurability of its normative agendas, but perhaps because of it, that is because of the possible malleability to adapt justifications and public reasons to the addressor, the addressee, and the context of the argument in question. Curiously enough, the open normativity of international criminal justice is rarely addressed as such, and if it is, it is normally but taken as a starting point for bringing, or at least suggesting, normative closure. Hence, in addressing it, it is forgotten, and left in a blind-spot. It has become an elephant in the room of international legislation, adjudication and academia. We do not know, consequently, how international criminal justice as a normatively open

[73] (The choice of) method requires a substantive normative justification as well, as method is far less 'innocent' than meets the eye at first glance – just think about the discussion about originalism in the US. Albeit on a different, higher level, methodology thus has substantive implications as well.

[74] Herbert M. Kritzer, "Law Is the Mere Continuation of Politics by Different Means: American Judicial Selection in the Twenty-First Century", in *DePaul Law Review*, 2007, vol. 56, no. 2, p. 423, puts this question the same way, drawing on Clausewitz's famous dictum.

regime, which operates on normative power, actually functions, that is, whether and how it convinces people to follow or resist authoritative decisions on or about the law. We consequently do not know what actually needs to be justified normatively, that is, the normative power of international criminal justice.

Therefore, I suggest switching our focus, from the open normativity of international criminal justice, as a *prima facie* trivial insight, to its normative openness. The latter puts the very fluidity of justifications and public reasons in international criminal justice at the centre of our attention. This reorientation raises two research questions, which I can only hint here and which I will explore more closely in the future.

- *First*, how can normative openness be *explained and understood* from a sociological perspective? What functions does it serve? And which externalities does it trigger? Indeed, how stable is a normatively open criminal justice system? And is it considered legitimate by the pertinent stakeholders, for example, because it is normatively overdetermined, and hence capable of appealing to many a justificatory set of beliefs?
- *Second*, is normative openness desirable from a truly normative perspective?[75] Indeed, why should one prefer normative openness to normative closure or to concealing normative disagreement?

But why should we tackle these grand and *prima facie* 'cerebral' questions at all, and thus make headway from the open normativity to the normative openness of international criminal justice? My answer is simple, yet unsettling, as it highlights what international criminal justice, at least in its honeymoon phase, has tended to overlook. The open normativity of international criminal justice is but a manifestation of the fact of justificatory pluralism in a non-ideal world where normative choices are unavoidable, at least if justificatory over-determination fails, so that the objectively undecidable is to be authoritatively decided upon within and outside

[75] See for instance in this sense Christian Becker and Amadou Sow, "Eppur si muove. Inkommensurabilitätsstrukturen im Recht und im Werk von Franz Kafka", in Günther Ortmann and Marianne Schuller (eds.), *Was ich berühre, zerfällt Organisation - Recht - Schrift – Kafka* (on file with the author).

international criminal justice.[76] So my turn to normative openness is an appeal to address the fact of justificatory pluralism in international criminal justice; an appeal to explore justificatory pluralism both sociologically and normatively in the context of international criminal justice; and an appeal to not suppress justificatory pluralism by prematurely either decreeing normative closure or by readily glossing over it.[77]

[76] With a pluralistic context, the act of choosing and deciding moves to the centre of interest, and with it the exclusions it brings about. This holds water all the more, since international criminal justice is a normative enterprise situated in a 'non-ideal world', where decisions cannot rest on encompassing prior negotiations or deliberations. They require, for good or bad, 'leaps of faiths' and contingent value judgments, among others. Consequently, we have to assume that decisions do not necessarily rest on agreement or even consensus. For the very act of deciding, one has to pay the price of excluding the (public or apocryphal) reasons of certain stakeholders.

[77] The fact of justificatory pluralism distils that there may be no generally accepted normative standard for resolving justificatory conflicts. There is, for example and in remembering the critique of the Lubanga charging decision, no lexical priority rule establishing that gender related core crimes are more, or for that matter, less, grave than child-soldier related core crimes etc. One implication of justificatory pluralism is that quantitative approaches to the foundational questions of international criminal justice are delicate at best and impossible at worst. It comes as no surprise, then, that the quantitative situation selection strategy of the OTP – in a nutshell, the idea that the suffering of the many outweighs the suffering of the few – meets much and heavy resistance. Not only that it balances what, from a moral perspective, hardly seems balanceable: indefinite wrong plus indefinite wrong 'only' equates to indefinite wrong. It also disregards there is no objective order of prosecutorial policies, so that going after the gravest wrong does not necessarily outweigh communicative strategies according to which the OTP should go for cases that 'send the best messages' etc.

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