Until lions have their own historians, tales of the hunt shall always glorify the hunter. (Ibo proverb)

**Sudan, December 2008**

In a camp for displaced persons in Darfur, children have tied a cord around a hedgehog’s neck. ‘This is President Bashir and we are taking him to the International Criminal Court.’ Awaiting the BBC and CNN, spokespersons for the displaced chant: ‘We need NATO, the EU and the ICC.’ Tribal leaders, asked why they no longer use traditional justice mechanisms, explain: ‘This is genocide and only the International Criminal Court can address genocide.’ New-born boys have been named ‘Ocampo’, after the Court’s Prosecutor. Bolstered by ‘brother’ Ocampo’s request for an arrest warrant for the Sudanese President on charges of genocide, crimes against humanity and war crimes, one of the rebel movements has launched an attack on the Sudanese capital and another has refused to participate in peace talks, arguing that one should not negotiate with ‘war criminals’. The Sudanese government, in turn, publicly denounces the International Criminal Court (ICC). Driving from the airport into Khartoum one is greeted by enormous billboards showing a strong President and reading: ‘Ocampo’s Plot: A Malicious Move in the Siege’, ‘Protect the International Law from Ocampo’s Illusions’ and ‘No for the Oppression of Peoples under the Name of International Law’.

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1 Unless otherwise provided, the quotes and stories from Uganda and Sudan provided in this chapter can be found in Nouwen (2012) (in press).

2 By equating international criminal law with international criminal tribunals, the story fails to mention the more established field of international criminal law concerning inter-state cooperation in addressing domestic crimes. It also omits the important role that domestic courts play in the enforcement of international criminal law.

**The attraction of international criminal justice**

For an international criminal lawyer it is gratifying to write a chapter on her specialisation: her field is attractive.

First, the field’s accepted history is one of success. The judges at the Nuremberg tribunal planted the seeds of a new sub-discipline of international law by declaring that ‘[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced’ (Nuremberg Judgment 1947, 221). For some time, the Cold War froze the development of international criminal tribunals. However, with the emergence of a ‘new world order’, the UN Security Council could agree on the establishment of international criminal tribunals for the former Yugoslavia and Rwanda. The creation of the two ad hoc tribunals with limited territorial jurisdiction gave momentum, and a different direction, to the project of a permanent court with a potentially world-wide jurisdiction. The year 2002 saw the entry into force of the Rome Statute, creating a permanent International Criminal Court with jurisdiction over persons for the most serious crimes of international concern (article 1), namely genocide, crimes against humanity, war crimes, and – once defined – aggression. Meanwhile, in places such as Sierra Leone and Cambodia, a new category of international criminal tribunals emerged: so-called ‘hybrid’ or ‘internationalised’ courts. These courts apply international as well as national law or/and their bench and prosecution teams are composed of both nationals and foreigners. In sum, in a few ‘generations’ (Romano, NolliKaempfer and Kleffner 2004, x), international(ised) criminal courts have spread around the world, ‘from Nuremberg to The Hague’ (Sands 2003), via Tokyo, Arusha, Dili, Phnom Penh and Freetown, prosecuting crimes committed in the Balkans, Rwanda, Cambodia, East Timor, Sierra Leone, Beirut, Uganda, Darfur, the Democratic Republic of the Congo, the Central African Republic, Kenya, Côte d’Ivoire and Libya. Meanwhile, the ICC Prosecutor closely monitors Colombia, Georgia, Afghanistan, Guinea and Palestine. International criminal law has grown not only institutionally but also in substantive terms.
The tribunals’ case-law has, for instance, determined the legal threshold for armed conflict (international and non-international); established that violations of international humanitarian law during non-international armed conflicts are also crimes; found that rape may constitute an act of genocide, a crime against humanity and a war crime; and set out the modalities of individual criminal responsibility. In addition, the tribunals have developed previously non-existent international criminal procedural law. International criminal law has become a voluminous body of international law.

The seeming strength of international criminal law, particularly when compared with some other fields of international law, is a second attractive feature of the field. International lawyers are constantly challenged that their law is not ‘real’ law because its enforcement is so decentralised. While international criminal tribunals, too, are sometimes aptly described as giants without limbs (Cassese 1998, 13), their enforcement handicap is overcome once the accused is in the dock. The record suggests that even powerful leaders can be subjected to international law.

International criminal law is also one of international law’s most sensational fields. As a theatre of human drama, the criminal court-room, domestic or international, attracts attention. Public interest may be lost in procedural labyrinths and legal detail, but is awakened by indictments, arrests and scandals. A court-room confrontation between a top model and a war lord, revealing the beast in the beauty, puts international criminal justice on the front page (SCSL–2003–01–T 2010, 4561–5489).

A fourth facet is the modernity of international criminal law: it fits with die Zeitgeist. In dominant globalisation discourse, states are out and non-state actors in, sovereignty and immunity mere shields for human rights violations, global institutions the solution, and individuals either heroic forces of progress or despicable sources of misery. International criminal courts, at least in name, are global institutions that pierce state sovereignty and assign responsibility to individuals.

But perhaps the most attractive element of international criminal law is that it offers the idealist lawyer a profession in which she can express her humanitarian interest and fulfil her part of the ‘global responsibility to protect’. In doing so, she follows in the footsteps of giants, the lawyers who convinced the Allies of the importance of a legal response to the major crimes of the Second World War; the heroic lawyer-activists – some themselves victims of the crimes that international criminal law proscribes – whose prolific writing and legal drafting kept the idea of a permanent International Criminal Court alive when the esprit du temps was against it; the diplomats negotiating the Rome Statute, at least as committed to the project of international criminal justice as to their national briefs; the legal scholars who nourished the field with concepts, structured it with detailed commentaries and enthused their students; the dedicated lawyers at international tribunals, attempting to overcome politics with law; and the many national and international non-governmental organisations (NGOs) that have been the beating heart of the international criminal justice movement.

In the spirit of John Donne (‘any man’s death diminishes me, because I am involved in Mankind’), the international criminal justice movement advocates for humanity by accusing, condemning and punishing in its name. Or at least, it protects the idea of a common humanity: ‘If the international community cannot prevent, at least it must not condone’ (Grentlicher 1991, 2615). International criminal justice inspires hope (see Tallgren 2002, 593). The project of international criminal justice assuages the moral hunger for a response to visible and yet unimaginable human suffering, reassures the idealist of her own identity (‘I am a good person who responds to bad things’, Koller 2008, 1034) and nurtures a sense of belonging to an ‘international community’.

**Darfur, December 2008**

‘Why do Darfurians need the ICC?’, asks the interviewer to the person who stated ‘We need NATO, the EU and the ICC’.

For justice.

*What is justice?*

Justice is the end of the war.

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

By arresting President Bashir and his party.

*And then?*

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

*What is real justice?*

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

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3 Author’s interview, Nyalal, December 2008.
The tragedy of international criminal justice activists

The discrepancy between the universal ideals that drive her and the actual consequences of the work to which she is contributing, reveals to the international criminal justice activist the tragedy of her field. As de Waal has observed with respect to the humanitarians' tragedy, '[r]ather than a litany of woe, tragedy is properly seen as a clash between rights, determined by a world in which human ideals fail to match the realities of the human condition' (de Waal 2010, 130). The tragedy 'arises from a mismatch between a universal idealism and a reality of horrific constraint' (de Waal 2009, 1; see also Chapter 14). The international criminal justice activists' tragedy stems from a commitment to the idea of an ideal type independent court that functions in accordance with the ideal type trias politica, whereas international criminal justice in fact operates in the fog of war and is heavily dependent on actors with various (legitimate) interests other than the enforcement of international criminal law. The ensuing tragedy is that 'the impulse to ameliorate suffering leads [the activist] into the unwelcome situation of acting cruelly' (de Waal 2010, 130).

Several of the cruelties that de Waal identifies as consequences of the humanitarians' tragedy also confront international criminal justice activists. For the cruelty of 'feeding dreams of an alternative but unattainable reality', we only have to consider the expectation amongst the displaced persons in Darfur that the ICC will end the war. Another cruelty is 'compromising clearly held principles': for international criminal justice activists this is the acceptance that justice is done only selectively, the selection being based on where cooperation could be forthcoming. The cruel outcome of this reality is that the ICC, de jure independent but de facto constrained by the interests of powerful states, 'not only mak[es] justice conform unapologetically to power, but also mak[es] justice an unaccountable tool of further violence and injustice' (Branch 2010). Finally, the cruelty of '[i]nsisting on a normative standard that cannot in practice be realized' (de Waal 2009, 10) arises when the international criminal justice activist (rightfully) insists that criminals must be arrested instead of appealed (Moreno-Ocampo 2010b, 5) but in practice the quest for a perfect peace and 'for justice for yesterday’s victims ... [i]s pursued in such a manner that makes today’s living the dead of tomorrow' (Anon. 1996, 258).

Coping mechanisms

How does the international criminal justice activist, who has committed her life, or at least career, in all genuineness to standing up for victims, to combating 'evil' and to doing 'justice', respond to the dissenting voices of people in whose interests she thought to act, who scream that justice is something else than criminal law and that criminal justice itself can be evil? How does she grapple with the fact that good intentions can have disastrous consequences? How does she deal with 'the clash between the values that constitute an individual’s sense of self and the actions carried out'? In other words, how does she cope with 'cognitive dissonance'? (de Waal 2010, 132 citing Milgram and Cooper)

Amongst her colleagues, the prevailing coping strategy is that of argumentative defence. Rational arguments are put forward to reason the observed dissonance away. One such argument decouples justice from peace. It holds that while peace may be a welcome derivative of ICC-style justice, only the latter is the objective. Thus, justice must be done irrespective of its consequences and should never be sacrificed in negotiations. On this account it is in fact praiseworthy if the ICC’s involvement precludes a peace agreement that would have resulted in impunity.

The strength of this defence is its deontological character: it cannot be rebutted by empirical arguments. But this is also its weakness. By dismissing empirical arguments, this defence relies exclusively on morality, whereas even on moral grounds retribution has since long been discredited as justification of criminal law (see Koller 2008, 1025; Tallgren 2002, 591).

In view of the limited persuasiveness of deontology, advocates of ICC-style justice turn to consequentialist arguments. They argue, for example, that irrespective of the consequences in the situation concerned, the ICC, by not giving in on justice in that situation, has positive consequences for peace across the world.

A second consequentialist argument is that negative consequences in fact prove the Prosecutor’s assertions about the need for ICC-style justice. In this line of argument there is no peace because the ICC’s arrest warrants have not been executed. In this vein the ICC Prosecutor has tried to convince the Security Council to arrest Ahmed Harun when arguing:

Impunity is not an abstract notion ... [Ahmed Harun] was sent to Abyei to manage the conflict. And Abyei was burned down, 50000 citizens displaced. (Moreno-Ocampo 2008b, 3)
The Prosecutor’s message is a *contra rio*: had Harun been arrested, the violence in Abyei would not have occurred.

A third argument is that it is good if the ICC’s involvement obstructs a peace agreement that – in seeking acceptance from both parties – would anyway lack accountability and therefore would not last. This argument is encapsulated in the mantra ‘no peace without justice’. Note how in this argument, in contrast to the peace-by-incapacitation justification, the term ‘peace’ is read as ‘positive peace’ (see also Mégret 2001, 202). A lack of accountability is presumed to be one of the causes of the violence. The assumption is that without addressing this cause, negative peace will never turn into positive peace.

A final consequentialist argument is one which presents an alternative causal account: the negative consequences, for instance the absence of a peace agreement, do not stem from the ICC’s involvement but from other factors. Along these lines, the ICC Prosecutor commented on the Juba talks:

Kony will never make peace … When he is weak, he goes for peace negotiation. Then he gets money, he gets food, he buys weapons and he attacks again. How many times will he cheat?  (New Vision 2009)

Similarly, the Deputy Prosecutor commented with respect to Darfur:

[I]t is worth recalling that in 2008, before the Prosecutor’s application for an arrest warrant, there was no peace process … The ICC gave new life to the negotiations … President Al Bashir was cornered and needed to sound reasonable … His efforts to sound constructive led to renewed negotiations with the rebels.  (Bensouda 2010, 6)

These consequentialist arguments presume too much. Does any prosecutor have sufficient insight into a conflict to understand the causal processes at work? For instance, officials working on the ground have argued that Harun has been a check on, rather than a cause of, violence in Abyei. Many Sudan watchers will also take issue with the Deputy Prosecutor’s statement that there was no Darfur peace process before the Prosecutor’s application for an arrest warrant for President Bashir, or that it was the ICC that gave new life to the negotiations. The no-peace-without-justice argument, too, is contestable on empirical grounds: history is full of examples of lasting peace without criminal justice. Historically, one could argue that where criminal justice and peace have gone together, it has been peace that has made criminal justice possible, not vice versa. ‘Justice does not lead; it follows’ (Snyder and Vinjamuri 2003–2004, 6).

If tracing past causal relations is difficult, it is even more unrealistic to expect that an international prosecutor can predict correctly the consequences of judicial interventions in complex conflict dynamics. As Eric Blumenson has written, the consequentialist approach presents the Prosecutor with the ‘unavoidable but extraordinarily difficult task … to make decisions that invoke such magnificent hopes and terrible costs with so little predictive information’ (Blumenson 2005–2006, 829).

Consequentialist arguments also present a question of accountability. Even if the Prosecutor were to have sufficient information, he would have to weigh the consequences of his own decisions for others: the short-term versus the long-term, the local versus the universal, consequences for identified victims versus those for abstract future victims. To whom is the ICC Prosecutor accountable when he decides that short-term negative peace should be forfeited in the interest of long-term positive peace or in the interest of deterring crimes elsewhere in the world? Legally, the Prosecutor is accountable only to the Assembly of States Parties, and only for his professional conduct (Rome Statute, article 46(2)(b)).

Rhetorically, however, ‘the victims’ have become the overriding justification of the Prosecutor’s decisions, of the Court and of the international criminal justice movement. ‘We are their Court’, stated the Prosecutor, ‘all of them are contributing to the prosecution of perpetrators … and to the legitimacy of the system’ (Moreno-Ocampo 2010a, 12). A national prosecutor acts on behalf of the state; the international criminal justice movement has elevated ‘the victims’ to the level of its sovereign. This sovereign is easy to please and provides an inexhaustible justification: in the event that specific victims, those who participate in the proceedings, those who have been victimised by a particular accused or those who bear the consequences of ICC intervention, disagree with the justice conducted in their name, there are always other victims who can be invoked to ‘contribute[e] to … the legitimacy of the system’. Victims silenced by death or future victims make ready candidates. Cabined into one monolithic category, ‘the victims’ that are the alphabet and omega of the international criminal justice movement are not concrete persons of flesh, blood and water, with individual names and individual opinions, but a deity-like abstraction that is disembodied, depersonified, and most of all, depoliticised (see Clarke 2007 and 2009).

Finally, when deontological and consequentialist arguments fail to convince, there is the institutional defence. According to this bureaucratic argument, the ICC’s sole responsibility is to do ICC-style justice simply
because this is the mandate of this institution; other institutions should be responsible for the consequences. This ‘no-agency’ defence is implied in the ICC Prosecutor’s above-cited statement that ‘the “interests of justice” must of course not be confused with the interests of peace and security, which falls within the mandate of other institutions’.

The institutional defence successfully absolves the ICC of responsibility for the consequences of its actions, but it is difficult to maintain in the present international order. It is based on an analogy with ideal type domestic systems, in which institutions other than courts are responsible for maintaining law and order, and for adapting the law in view of court decisions’ adverse consequences. The international system, however, is not checked and balanced. With the ICC, an international (criminal) justice bulwark has been created, absent an equally strong world legislature or executive. If the ICC’s justice threatens security, there are few institutional safeguards to correct any imbalance. Even the Security Council can only defer ICC proceedings for one year at a time.

The imbalance is exacerbated by the international criminal justice regime’s (natural) struggle for hegemony (see Koskenniemi 2004). Arguing that the ICC is responsible for ICC-style justice only, and that other actors are responsible for peace, international criminal justice advocates maintain at the same time that other ‘actors have to adjust to the law’ (Moreno-Ocampo 2010a, 6). In this view, there is a division of labour but the ICC is the supervisor, like courts in an ideal type domestic justice system. In the words of the ICC’s OTP:

With the entry into force of the Rome Statute, a new legal framework has emerged and this framework necessarily impacts on conflict management efforts. The issue is no longer about whether we agree or disagree with the pursuit of justice in moral or practical terms: it is the law. Any political or security initiative must be compatible with the new legal framework insofar as it involves parties bound by the Rome Statute. (OTP 2007, 4)

The hegemonic move is that the ‘new legal framework’ as interpreted by the OTP goes far beyond the obligations on states as provided for in the Rome Statute. Apparently acting within this framework, the OTP has criticised those who supported peace talks that concerned – but did not involve – persons sought by the ICC (e.g. Moreno-Ocampo 2008a, 5–6), even though the Statute does not include ‘a crime to talk’ (Afako 2006). The OTP has engaged in ‘dialogue with peace mediators … to ensure … that peace and political agreements exclude amnesties for Rome Statute crimes’ (OTP 2010, para. 49), even though the Rome Statute does not prohibit states to use amnesties. The Prosecutor has advised mediators how not to conduct their work, for instance sequencing peace and justice (e.g. Moreno-Ocampo 2009, 10); he has told diplomats what to do instead (e.g. Moreno-Ocampo 2010b, 5) and he has given the Security Council a lesson in world history and Sudanese politics, via an op-ed in the Guardian:

The world once claimed ignorance of the Nazi atrocities. Fifty years later, the world refused to recognise an unfolding genocide in Rwanda. On Darfur, the world is now officially on notice. Bashir will not provide the solution. He … makes peace agreements that result in new attacks. At the same time, he … is … laying the groundwork for new crimes against Darfuris and against the south of Sudan. … The council, which extensively reviewed its failure to act in Rwanda, should grab this opportunity. (Moreno-Ocampo 2010c)

The ‘civil society’ that backs the ICC has encouraged this hegemony of international criminal justice. For instance, when a joint communiqué of a UN high-level meeting on Sudan made no mention of a need for international accountability, the Coalition for the International Court issued a statement – preceded by the standard rider that ‘the CICC will not take a position on potential and current situations before the Court or situations under analysis’ – in which it

note[d] that the pursuit of justice and the fight against impunity in Darfur are inextricably linked to the achievement of sustainable peace in Sudan and deplore[d] the lack of any reference in the meeting’s outcome communiqué to the ongoing investigation by the … ICC … into crimes committed in Darfur, and the need for justice for victims. (CICC 2010)

The deontological, consequentialist and institutional arguments all have their strengths and weaknesses, but none is convincing. The way to sustain the defence is therefore constantly to jump from one kind of argument to the other. When peace appears possible without criminal justice, the mantra that there can be ‘no peace without justice’ is transformed into the safe tautology that there can be ‘no true peace without justice’. Or when ICC-style justice is in fact obstructing peace, the causal idea of ‘there can be no peace without (ICC-style) justice’ is read as ‘there shall be no peace without (ICC-style) justice’. While the project is promoted on account of promised
consequences, it is defended when the consequences turn out differently by transforming the project into a matter of principle rather than consequence. It is thus made immune to the challenge of contrary empirical evidence. As Benjamin Ferencz, in the avant-garde of the international criminal justice movement since he was a Prosecutor in Nuremberg, has advocated: [T]he law is an act of faith. But we have to believe in the deterrent effect of the law’ (quoted in Cryer 2010, 205).

This reveals another strategy to cope with cognitive dissonance: if rational arguments fail to convince, religion, the human way to accept life as an inevitable defeat (Leszcz Kolakowski, quoted in Otten 1999, 15) can bridge the gap between real and ideal. International criminal law, cloaked in rationality, has become a secular faith. In line with Engels’ description of the juridical worldview as a ‘secularisation of the theological’ in which human law replaces the divine and the state the church (1887, 492), international criminal courts, in which prosecutors ‘reckon with evil’ as if they were gods, help believers to make sense of the past, trust the future and provide comfort for the present. For the Security Council, international criminal tribunals are instruments of therapeutic governance, providing an acceptable compromise between despicable apathy and authorisation of military interventions that UN members are unwilling or unable to carry out: if not peace, then justice (see also Anderson 2009, 333–337; Mégret 2001, 209). In the temples of justice, legal rituals seem victorious over the chaos of war. Complex conflicts with intractable structural causes are distilled to individual agency (see also Koskenniemi 2002). Those who are not convicted, for instance those who stood by or benefited, are absolved by the law’s silence.

One of the comforting arts of faith is that ‘passing sentence’ equals ‘doing justice’ (Mulisch 2006, 11). This illusion is created by appropriating the rich concept ‘international justice’ for the narrow project of the application and enforcement of international criminal law, and focusing on a few emotive crimes that can be captured by image-based and minute-timed news coverage. Monopolising the definition of injustice, the international criminal justice movement quells advocacy to address less visible but more structural wrongs that have not been criminalised, for instance humiliating poverty and extreme inequality, the causes of which are located in the structure of the same international community in whose name ‘international justice’ is performed (see also Allott 2002, 62–69; Branch 2010; Tallgren 2002, 594–595). Even when confronted with these non-criminalised injustices, ‘faith’ can provide comfort, responding, with the eternal perspective that it shares with other faiths, that the injustice is only temporal.

Koller has defended international criminal justice as a faith, arguing: That the commitment to international criminal law is a matter of faith more than reason should not necessarily be taken as grounds for criticism. The recourse to faith is something the field of international criminal law shares with all other attempts to address important moral questions through law. In the absence of empirical answers to such questions, one can either act on the basis of faith or refuse to act until these questions can be answered ... In due course, empirical analysis will, ideally, bring us close to answers to the fundamental questions of whether and how we should pursue international criminal law. Until then, faith will continue to play a critical role in motivating human action in response to genocide, crimes against humanity, and war crimes. (2008, 1021–1022)

This argument leaves three fundamental questions. First, considering the lack of solid empirical evidence and the inapplicability of natural laws of causality, who bears the burden of proof with respect to establishing the positive or negative consequences of international criminal justice? In the procedural framework of the Rome Statute, the Prosecutor does not have to prove any positive impact, while those who suffer adverse consequences have no procedural avenue to rebut the assumption that international criminal justice is a force only for good. Secondly, what does this faith believe international criminal law to do? If, as Koller argues, ‘[t]he ultimate value of international criminal law may rest ... in its role in identity construction, in particular in constructing a cosmopolitan community identity embracing all of humanity’ (ibid., 1060), the faith in international criminal law is more important than the consequences of international criminal law; it is the shared faith, more than the actual consequences of the law, that constructs identity and a sense of belonging. Once the faith has become more important than the object of faith, proselytising is prioritised over realising the underlying aims (see also Kennedy 2004, 23, 116). Finally, of what relevance is empirical analysis once international criminal law has been adopted as a faith? When confronted with contrary empirical evidence, true believers continue to believe and doubters are advised to believe harder.

For an international criminal justice apostate, convinced neither by rational defences nor by faith, few mechanisms remain to cope with cognitive dissonance. One option is to deny the tragedy and to make it a taboo. Another is to blame those who point out the tragedy, for instance by portraying them as deniers or apologists of crimes, or by questioning their level of education. Final exit, less coping mechanism than sign of not coping: drug habits, or madness.