Criminal Law, Philosophy
https://doi.org/10.1007/s11572-018-9469-6

ORIGINAL PAPER

The Bête Noire and the Noble Lie: The International Criminal Court and (the Disavowal of) Politics

Christof Royer[1]

Abstract For the traditional legalistic discourse on the International Criminal Court (ICC), "politics" is a bête noire that compromises the independence of the Court and thus needs to be avoided and overcome. In response to this legalistic approach, a burgeoning body of literature insists that the Court does not exist and operate "beyond politics", arguing that the ICC is an institution where law and politics are intimately connected. The present article seeks to contribute to this "non-traditional" literature by addressing two of its fundamental weaknesses: First, writers of the "non-traditional camp" often present a rather limited view of "politics"; in particular, they have shied away from taking the radical step of portraying and analysing the ICC as a "political actor". This undermines both its critical and constructive potential. Secondly, these commentators offer a simplistic explanation as to why "traditionalists" treat politics as the ICC's bête noire: Traditionalists, they claim, are "legalists" with scant interest in and understanding of politics. By focusing on the ICC's nature as a political actor, this article does not only paint a more nuanced picture of the ICC but also demonstrates the constructive potential of this understanding of the ICC to shed light on the so-called "peace versus justice dilemma". And secondly, it demonstrates that precisely because the ICC is and ought to be a prudent political actor, it must officially disavow politics. The "noble lie" of disavowing politics, therefore, is a prudential strategy to avoid dangerous moral and political consequences and, ultimately, to secure the continued existence of the ICC itself.

Keywords International criminal justice · International Political Theory · International Criminal Court · Carl Schmitt · Judith Shklar · Noble lie

✉ Christof Royer
christof_royer85@yahoo.de

[1] University of St Andrews, Rathelpie, Kennedy Gardens, St Andrews KY 169 DJ, Scotland, UK

Published online: 25 May 2018

1 Introduction

Many advocates of international criminal justice have gone to great lengths to portray the International Criminal Court (ICC) as an apolitical—even anti-political—institution. International lawyers, for example, who have traditionally dominated the discussion on humankind's first permanent ICC, tend to portray it as a strictly legal institution and to study it from an exclusively legal perspective. The view that the ICC is and must be isolated from politics has also been expressed by the Court's prosecutors who are anxious to paint a picture of the Court as an unyielding pursuer of legal justice that is completely detached from politics. This "traditional approach"[1] has created a legalistic narrative in which politics is portrayed as the ICC's *bête noire*.

In response to this legalistic approach, a burgeoning body of literature on international criminal justice has begun to emerge, which insists that the ICC cannot be adequately understood from an exclusively legal perspective. The gist of this literature's arguments is that the Court does not exist and operate "beyond politics" since the ICC is an institution where law and politics are intimately connected. While I am sympathetic to this non-traditional camp, I also believe that this body of literature suffers from two serious weaknesses: first, these writers often present a rather limited view of "politics" or the political"; in particular, they have shied away from taking the radical step of portraying and analyzing the ICC as a "political actor." This, I contend, undermines the critical and constructive potential of the non-traditional camp. Second, these commentators tend to offer a rather simplistic explanation as to why "traditionalists" treat politics as the ICC's *bête noire*: traditionalists, they claim, are "legalists" with scant interest in and understanding of politics. I propose, however, that there might be a much more sophisticated strategy behind the official disavowal of politics: disavowing politics and portraying the ICC as an unyielding pursuer of legal justice might well be a prudential strategy to avoid devastating moral and political consequences. This strategy is what I will call the "noble lie."[2]

This article, then, represents an attempt to address both weaknesses of the non-traditional camp. After having sketched the traditionalists' view of politics as the ICC's *bête noire* in the first section, it sets out to develop the idea of the ICC as a political actor. This idea, I suggest, has two dimensions: first, the ICC has a political interest in combatting its own enemies, whom it stigmatizes as "enemies of all mankind." As such, the Court cannot escape what Carl Schmitt has famously called "the political"—the distinction between "friend" and "enemy." Simultaneously, the ICC is engaged in a broader political struggle against mass atrocities. From this perspective, the Court's interventions must pursue the ultimate purpose of creating a world

[1] I employ the term "traditionalists" to describe the group of scholars who portray politics as the ICC's "*bête noire*." While it should be clear that the categories of "traditionalists" and "non-traditionalists" are ideal-types, this distinction is, I believe, a useful way of approaching the complex question of the relationship between law and politics in international criminal justice.

[2] I understand the term "noble lie" as the strategic creation and repetition of a lie in order to avoid dangerous moral and political consequences.

in which the evil of mass atrocities rears its ugly head less frequently. Subsequently, I demonstrate the constructive potential of this idea by analyzing the relationship between the two dimensions: by bringing the discussion—which is usually framed as a metaphysical struggle between "peace" and "justice"—back to the realm of concrete political consequences and political interests, I demonstrate that the two dimensions are in a more harmonious relationship than might be assumed and, consequently, that the underlying problem of the "peace versus justice dilemma" is less intractable than often claimed.

In the final section, I turn to the question of why Court officials disavow politics and develop the argument that it is vital that they continue to do so. I suggest that portraying politics as a *bête noire* can be understood as a noble lie to avoid what I shall call "perverse incentives." The argument is that if the Court's officials acknowledged that they are guided by pragmatic political considerations, in particular by considerations as to whether ICC interventions prolong or exacerbate bloody conflicts, it would become all too easy for the perpetrators of mass atrocities to evade prosecution simply by threatening to commit further crimes. Paradoxically, then, the threat of prosecution could create "perverse incentives" to commit atrocities, and the only strategy to avoid this trap is to cultivate the noble lie of an inherently apolitical Court.

The main purpose of this article is to contribute to a better understanding of the ICC by bringing into clearer focus some of the vexed conundrums the Court faces, and the role it can and should play in world politics. My central argument is that the ICC must act as a prudent political actor on the one hand, but must uphold the noble lie of a strictly apolitical Court on the other.[3] In other words, precisely because the ICC is and ought to be a political actor, it must disavow politics. The noble lie, therefore, is a prudential strategy to avoid dangerous moral and political consequences and, ultimately, to secure the continued existence of the ICC itself.

2 Politics as the ICC's *Bête Noire*

When the ICC was established in 1998, advocates of international criminal justice were elated. Bassiouni (1999, 555), for example, asserted that the establishment of the ICC is "a triumph of all peoples of the world." Kofi Annan, then UN Secretary-General, presented the creation of the Court as the ultimate triumph of universal morality and the progressive march towards universal human rights and an international rule of law (United Nations 1998a, b). And for Philippe Kirsch, the Chairman of the Committee of the Whole at the Rome Conference, the ICC represented nothing less than "really the future of humanity" (United Nations 1998a).

[3] Note, however, that the ICC is composed of a number of organs with different tasks (e.g., the Office of the Prosecutor, the Assembly of State Parties, the pre-trial chamber, the trial chamber, etc.). The argument that the ICC must "act politically," which is developed in this article, is limited to the Office of the Prosecutor (and the prosecutor herself), since I do not go so far as to suggest that the ICC should act politically when adjudicating.

For most proponents of international criminal justice, the creation of the ICC was a historical achievement primarily because they interpreted the creation of the Court as a major triumph of law over politics. At last, they argued, the international community had found a way to civilize states, to avoid the worst excesses of *realpolitik*, and to tame the pernicious consequences of unrestrained power politics. In other words, the legal prosecution and punishment of perpetrators of massive human rights abuses was presented as a crucial step towards a world in which the evil generated by politics rears its ugly head less frequently. Again, Bassiouni's words at the Rome Conference are illustrative (1999, 555):

> The ICC reminds states that *realpolitik,* which sacrifices justice at the altar of political settlement, is no longer accepted. It asserts that impunity for … perpetrators … is no longer tolerated. In that respect, it fulfils what Prophet Mohammed said, that "wrongs must be righted." It affirms that justice is an integral part of peace and thus reflects what Pope Paul VI once said, "If you want peace, work for justice." These values are clearly reflected in the ICC's Preamble.

Hence, the message conveyed during the creation process of the ICC was unambiguous: unrestrained politics has brought about the great catastrophes of the twentieth century and human suffering on an unimaginable scale; politics, therefore, must be tamed, restrained, and civilized. The most viable way to do so is through the creation of an impartial judicial body that prosecutes and punishes the world's worst perpetrators. And precisely because the ICC has been constructed as a response to the evils of politics—indeed, the evil of politics—the Court must exist and operate strictly beyond politics. Politics, in short, was the *bête noire* during the ICC's creation process.

The question, of course, is whether the ICC is still framed in these terms. Is the framework within which the ICC is portrayed, understood, and studied still based on this stark dichotomy of law and politics? The answer, at least if we focus on the dominant view expressed by Court officials and academics for the moment, is a clear "yes." Academic studies of the ICC are dominated by international lawyers, who are anxious to stress the autonomy of the discipline of international law in general and the exclusively legal nature of the ICC in particular. Politics, international lawyers often argue, is the realm where power is scrupulously used to pursue narrow self-interests; the "empire of law"—to use Dworkin's (1998) term—however, is marked by fairness, the application of neutral rules, and Justitia's legendary blindness, which guarantees objectivity of and equality before the law (Shaw 2014, 8). This legalistic mindset finds its clearest expression in the words of Hans-Peter Kaul, who insists (2010) that "The ICC must be detached from political or other inappropriate considerations" and that "[i]t remains essential that the ICC continues to show—through the way it conducts all … activities—that it is a purely judicial, objective, neutral, and non-political institution."[4]

[4] For similar expressions of the legalistic mindset, see Bassiouni (2006) and Cassese (1999).

This apolitical, even anti-political, discourse is by no means limited to the academic sphere. In fact, numerous officials of the ICC have taken the same line. The former president of the Court, Philipe Kirsch, faced with allegations of "politicization" of the ICC, sought to fend off this critique by insisting that "there is not a shred of evidence … that the Court has done anything political. The Court is operating purely judicially" (Herman 2006). In a similar vein, the former Chief Prosecutor, Luis Moreno Ocampo, made his interpretation of the role of an international prosecutor crystal clear (2010, 6): "I shall not be involved in political considerations. I have to respect scrupulously my legal limits … This is the only way to build a judicial institution … I apply the law without political considerations." A particularly interesting aspect of this statement is the prosecutor's purported disregard for "political considerations"; Moreno Ocampo, it seems, was determined to interpret his role in strictly legal terms without considering the potential political (and moral) ramifications of his actions. What are the potential ramifications of the prosecutor's actions? The most serious of them is, of course, the effects the prosecution of perpetrators can have on ongoing conflicts. The problem—known as the "peace versus justice dilemma"—is that in some cases the prosecution of perpetrators can have profoundly negative effects on peace processes with the potential to exacerbate and prolong bloody conflicts (Kastner 2011; Kersten 2016; Krzan 2016). In a policy paper on the interpretation of Article 53 of the Rome Statute (1998)—the famous "interest of justice clause"—the Office of the Prosecutor (OTP) addressed this "peace versus justice dilemma" by claiming that it is simply a "non-issue" for the prosecutor. Questions of peace and security, the policy paper argues, are inherently "political"; consequently, these questions are not considered as legitimate reasons not to proceed with an investigation or prosecution under Article 53. "The broader matter of international peace and security," the paper emphasizes, "is not the responsibility of the Prosecutor; it falls within the mandate of other institutions" (2007, 9).[5] More recently, Moreno Ocampo's successor, Fatou Bensouda, has reaffirmed this view (2012):

> The Court and the Office of the Prosecutor itself are not involved in political considerations. We have to respect our legal limits. The prospect of peace negotiations is therefore not a factor that forms part of the Office's determination on the interests of justice. The international community has put in place some clear divisions of responsibility. The UN Security Council is in charge of peace and security. The ICC is doing justice.

Again, the message conveyed seems to be clear: the prosecutor, who, after all, "embodies in one person the ideas behind the ICC" (Minow et al. 2015, 360) is not interested in politics, not even in the political consequences of his or her actions. Justice must be done even if the world perishes because it is the prosecutor's (and the ICC's) only task to prosecute and punish those who have violated the law. Or, to put it in the words of the former president of the ICC, Judge Sang-Hyun Song, "accountability must prevail. Always and everywhere" (2012).

[5] I.e., the UN Security Council.

We can see, therefore, that academic commentators as well as officials of the Court try to develop a clear vision of the ICC: the ICC represents only the scales of justice and eschews the sword of politics. Law and politics are two fundamentally distinct realms, and it is the task of the Court to isolate itself completely from political dynamics and political considerations. Justice at the international level is just as "blind" as it is at the domestic level; and if the ICC is to become a legitimate and effective judicial body, it must ensure that politics remains external to the Court. Politics, therefore, is still portrayed as the *bête noire* of the ICC.

3 The ICC as a "Political Actor"

While "traditionalists" frame the ICC as an apolitical, even anti-political, institution, more recently, a body of literature has emerged that refuses to accept the strict isolation of the ICC from politics. This non-traditional camp takes seriously the fact that the ICC exists in a "world of power politics" (Bosco 2014); consequently, these authors insist that international criminal justice must be "more than the unfolding of law's master-plan" (Megret 2002, 1262). A strictly legalistic perspective is inappropriate, they assert, because the ICC does not operate from "some Archimedean point of nowhere devoid of politics and political interests" (Kersten 2016, 5), but rather "in the midst of politics and not detached from them" (Simpson 2007, 14). In sum, "politics is central to the court's actions" (Hoover 2013, 281) and we can only begin to understand this institution if we accept that the ICC is shaped by the "convergence of politics, ethics and law" (Roach 2006). The core of this burgeoning body of literature is that the ICC does not and cannot transcend politics; as such, it directly attacks the dominant view of the ICC as a strictly apolitical institution.

There is certainly a lot to be said for this open-minded, less legalistic approach to studying the ICC; these non-traditionalists almost by definition do not shy away from straddling different disciplines, most importantly, international criminal law, international relations and political theory. And yet, the critical and constructive potential of this scholarship is seriously undermined by its own weaknesses. One of these weaknesses is that these scholars often present a rather limited view of "politics" or "the political." What they routinely refer to is that the ICC is a "politicized Court" that cannot elude the political influence of internal or external actors (Köchler 2003; Roach 2006; Ainley 2011; Dana 2014; Tiemessen 2014, 2016). This, to be sure, is a vital aspect of the Court's political nature; but there is another dimension of "politics" at play here, one that is even more controversial and less frequently discussed than "politicization": this is the notion of the ICC *as* a "political actor." For proponents of the non-traditionalist view, their own unwillingness to discuss the ICC as a political actor generates a serious problem: while they seek to develop a more realistic understanding of the Court's role in world politics, their account of this role must remain extremely fuzzy as long as they refuse to take the nature of the ICC as a political actor seriously. The aim of this section, therefore, is, first, to develop a clearer vision of the Court's role in world politics based on the argument

that the ICC is a political actor,[6] and second, to demonstrate the constructive potential of this vision in shedding light on one of international criminal justice's most complicated problems.

The argument that the ICC is a political actor rejects the idea of law as an autonomous realm detached from politics, and of the legal trial as something that takes place beyond political interests and goals; it strikes at the heart of the idea that the ICC intervenes as a "disinterested party" (Ralph 2007, 115). And yet, this is precisely the picture of the ICC that I wish to draw in this section. This picture, while not denying the status of the ICC as a legal institution, rejects the notion of a dichotomy between the "scales" of law and the "sword" of politics. Portraying the ICC as a political actor means to reject the idea of a binary opposition of law and politics and to accept that these discourses are "flip sides of the same coin" (Loughlin 2000, 17). This intertwining of law and politics, in turn, expresses itself in two dimensions: first, the ICC is an actor with its own political interests; as such, the ICC itself pursues political goals. Second, law, as the critical theorist Otto Kirchheimer argued (2015), is used "for political ends"; the ICC, therefore, is used as a tool to achieve certain political objectives. Let us look at both of these dimensions more closely.

Understanding the ICC as a political actor means, first, to accept that, like any other political actor, the ICC has its *own* interests and objectives. The main political interest of the Court is the elimination of its enemies, which the ICC stigmatizes as *"hostes humani generis"*—enemies of all mankind. As such, the ICC cannot escape what Schmitt (2007) has famously called "the political." The political, as Schmitt pointed out, is the distinction between "friend" and "enemy," which "denotes the utmost degree of intensity of a union or separation, of an association or dissociation" (Schmitt 2007, 26). Importantly, conflicts with "the enemy" can never be decided by a "disinterested and therefore neutral … party" (Schmitt 2007, 27). The ICC cannot escape the political because its judicial interventions are inevitably based on the decision of whom to prosecute—who is "the enemy"—and whom to spare—who is "the friend." To say it slightly differently, the ICC purports to prosecute *hostes humani generis*; but the Court must still render a not always self-evident decision as to whom it stigmatizes as such an "enemy of all mankind" in a particular conflict. In intervening in a particular conflict, the ICC ineluctably must make a distinction between "friends" and "enemies," and it is illusory to think that the Court is able to make this decision as a disinterested or neutral party. This view is confirmed by Sarah Nouwen and Werner Wouter: "The political" they observe "is not something external to the Court, not just a force which potentially compromises the independence of the Court and needs to be overcome … [for] … the ICC does not replace politics but enacts them" (2010, 943). The ICC's reliance on a Schmittian concept of the political, Nouwen and Wouter demonstrate, became particularly apparent in the case of Uganda, where the ICC branded the Lord's Resistance Army as "the enemy" and thereby legitimated Uganda's government simultaneously. Their case study leads them to the following conclusion (2010, 962):

[6] To be clear, I do *not* argue that the ICC is not a "legal institution"; my argument is that the ICC is, in fact, both a legal institution and a political actor.

> The ICC provides a vocabulary with which opponents can label the enemy as violators of universal norms, and thereby as the enemy of humanity itself. Adjudicating on genocide, war crimes and, most notably, crimes 'against humanity', the Court brands some as enemies of mankind ….

Obviously, then, an important consequence of the ICC's nature as a political actor is that its interventions often have a major effect on "conflict narratives" insofar as they stigmatize some conflict parties as *hostes humani generis* while legitimizing others. As Mark Kersten demonstrates, such a conflict narrative was also generated in Libya in 2011, when the ICC selected Muammar Gaddafi as an enemy of all mankind, legitimized the opposition forces and thereby contributed significantly to the eventual toppling of Gaddafi (Kersten 2016, 118–125). Hence, while the ICC might be a legal institution acting according to prearranged rules, it is also a political actor with an interest in combatting its enemies. Viewed from this perspective, ICC trials must be understood as "political trials" in the way Kirchheimer defined them: "elimination[s] of a political enemy … according to some prearranged rules" (2015, 6). At this point, however, we must note a second political interest of the ICC: the interest in being regarded as a *legitimate* actor. Legitimacy is helpfully defined by Ian Hurd as "an actor's normative belief that an … institution ought to be obeyed" (2007, 7). As a form of normative authority, legitimacy is of crucial importance for the ICC because the Court's lack of enforcement capabilities often makes it reliant on the cooperation of states (e.g., to enforce arrest warrants). Thus, the ICC's primary political interest of eliminating its enemies hinges to a considerable degree on its ability to appear to be a legitimate actor. It is widely accepted that an important source of the Court's legitimacy is the fairness of its trials (Luban 2010; McDermott 2016): the ICC must, therefore, make sure that its trials are not conducted as "show-trials." While it is inevitable and legitimate that the ICC *combats enemies*, the Court does not and must not *destroy foes.* For that reason, it is vital that even "enemies" are granted fundamental due process rights, most importantly, that their guilt or innocence is determined in a fair trial. Judge Jackson was surely right when he warned in his opening statement of the Nuremberg trials that "to pass these defendants a poisoned chalice is to put it to our lips as well" (1945). For if international criminal law is itself regarded as a "poisoned chalice" that rides roughshod over the most fundamental due process rights, the ICC's legitimacy suffers—and deservedly so. Thus, it is indeed in the ICC's interest to bolster its legitimacy through the conduct of fair trials that, in turn, enables the Court to combat its enemies.

The second dimension of the claim that the ICC is a political actor situates the Court within its broader political, ethical, and social environment. This dimension is also based on the notion that law and legal institutions should pursue "political ends"; however, it focuses not primarily on the ICC's struggle against *hostes humani generis*, but portrays the Court as an actor—in some ways even as a tool—in a global political struggle against mass atrocities. Lawyers largely neglect this dimension. This is hardly surprising; after all, this dimension seems to deny law's elevated position and to relegate law to a servant of political goals rather than seeing it as the master over politics. Nonetheless, this neglect is somewhat curious given the fact that the global struggle against mass atrocities has been given a prominent place in

the Rome Statute. For the Statute's Preamble highlights the Court's role in combatting "unimaginable atrocities that deeply shock the conscience of humanity," atrocities that threaten to shatter the "delicate mosaic" of humanity. This dimension of the ICC's political nature, then, reveals the picture of a legal institution that is part of a broader political objective. Such an understanding of the role of law and legal institutions chimes with Judith Shklar's account in her book *Legalism* (1986). *Legalism* attacks the idea that it is possible, let alone useful, to separate social life into distinct "spheres" (e.g., a "sphere of law," a "sphere of politics," a "sphere of morality," etc.) that exist in isolation from each other. "Law is politics … but not every form of politics is legalistic," Shklar writes in a central passage of the book (1986, 144). The first part of this quotation obviously denies the autonomy of law as a realm detached from politics; even legal institutions, such as the ICC, are ultimately tools to pursue broader political goals. The broader political goal Shklar has in mind is the creation of a social order based on what she calls a "barebones liberalism," a minimalist form of liberalism committed only to the values of toleration and social diversity (1986, 5). The equally important second part of the quotation confirms that politics can but does not necessarily have to be legalistic[7]; that is, in some situations, law will be an effective weapon to achieve broader political goals, and in other situations it will be an obstacle. It is of crucial importance, Shklar insists, to acknowledge that "law is a form of political action, among others, which occasionally is applicable and effective and often is not. It is not an answer to politics, neither is it isolated from political purposes and struggles" (1986, 143). Shklar's account, then, legitimizes the view that the ICC is a part of—or a tool in—a global political struggle against mass atrocities. As such, the Court's interventions are not to be judged against lofty and often vacuous ideals of justice (Megret 2015, 26–27), but must pursue concrete political and moral goals; ultimately, Shklar writes, "it is the political [and moral] result that counts" (1986, 145). Such an emphasis on the concrete consequences of the ICC's actions means that, precisely because the Court's interventions have far-reaching and serious ethical and political ramifications, prudential calculations must guide its actions. Thus, Shklar helps us to understand the importance of the ICC's identity as a political actor; she helps us to realize the positive potential, but also forces us to acknowledge the limitations of the ICC in the struggle against mass atrocities. Law, according to Shklar, can be a particularly useful way to pursue political ends because of the legitimacy it lends to political action; Kirchheimer's view of the strength of law is similar when he points out that judicial proceedings are the preferred means to achieve political ends because they "authenticate" political action (2015, 6). But neither Shklar nor Kirchheimer are blind to the limits of law; and contrary to many modern legalists they insist that if law becomes an obstacle to the achievement of political ends, other means must be employed. Law, according to this view, is a tool not a panacea precisely because it is "ultimately … the political [and moral] result that counts" (Shklar 1986: 145).

[7] Shklar defines "legalism" as "the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules" (1986: 1).

Having outlined these two political dimensions, two closely related questions must be addressed: first, what is the relationship between these two dimensions? And second, apart from arguably providing a more realistic picture of the Court, has an understanding of the ICC as a political actor the (constructive) potential to shed light on some of international criminal justice's most complex problems?

It might be tempting to diagnose an unresolvable tension between the two dimensions of the argument that the ICC is a political actor: the first dimension, after all, emphasizes the *individual* institutional interests of the ICC. From this perspective, the ICC is a legal institution pursuing its own political goals. The second dimension, in turn, emphasizes *broader* political interests and objectives; here the ICC itself becomes a tool to achieve political ends—and these broader political ends can be but are not necessarily congruent with the ICC's narrower individual objectives. These two dimensions, it might be argued, collide at the exact moment when the ICC's individual interest in eliminating its enemies becomes an obstacle to the broader political goal of combatting mass atrocities; they clash when an ICC intervention would prolong and/or exacerbate bloody conflicts. Indeed, this line of reasoning closely resembles the vexing problem of the so-called "peace versus justice dilemma."[8] The "dilemma," in short, is that efforts to pursue "justice" (in the form of prosecution and punishment) constitute a double-edged sword with regard to "peace": while prosecution and punishment can be powerful tools to contain a conflict and facilitate the creation of a peaceful environment in some cases, judicial intervention can constitute a serious obstacle to the creation of peace and prolong and/or exacerbate grueling human rights violations in others; in the latter cases, we are thus faced with a "peace versus justice dilemma." A recent book-length analysis arrives at the conclusion that the dilemma is, in fact, unresolvable (Kersten 2016, 201), and, indeed, there seems to be some truth in that: for the fundamental problem at the heart of this controversy does indeed exist; sometimes the pursuit of "justice" can be detrimental to "peace," and there is certainly no "magic formula" to conjure away this underlying problem of the dilemma. I would suggest, however, that the current framing of the underlying problem as a "peace versus justice dilemma" is extremely unhelpful as it perpetuates the view of an unresolvable conflict of interests at the heart of international criminal justice. This dichotomy is obviously presented as one between "justice" and "peace," but also as one between "law" (justice is equated with law) and "politics" (politics is equated with peace). Hence, the "peace" versus "justice" framing leads to two mutually exclusive options: *either* justice *or* peace, *either* law *or* politics; and, most importantly, it is by no means clear how this dilemma should be resolved by the ICC in practice. This is precisely the point where the alternative understanding of the ICC as a political actor unfolds its constructive potential by clearly suggesting a solution of how the Court should decide in cases in which it is faced with such a (seemingly) tragic choice. Its constructive potential is that it allows us to see that the two political dimensions are by no means as diametrically opposed as it might appear and that the choice the ICC faces in these hard cases is less tragic than it might seem. The key to arriving at this important

[8] See also the discussion and citations above.

insight is to understand that, by framing the underlying problem as a *political* rather than a *metaphysical* (i.e., a dilemma between "peace" and "justice") conundrum, the problem is brought back to the sphere where it can be addressed more effectively: to the realm of politics, or, more precisely, the realm of political action and its consequences. This shift, in turn, helps us to understand and accept that the ultimate justification for ICC action is to be found in the concrete political and moral consequences it generates. Just as Shklar demands in *Legalism*, then, the concrete political and moral consequences become the yardstick against which ICC action is to be measured; and this perspective, as we shall see, reveals that the tension between the two political dimensions constitutes by no means an irresolvable dilemma.

What, then, are the potential moral and political consequences of ICC intervention? Here we must distinguish between long-term and short-term consequences. It is often argued that the effects of the ICC should be measured on a long-term scale. Bruce Broomhall, for example, writes that the ICC can contribute to the development of a "deeply rooted culture of accountability" (2004, 3; see also Akhavan 2013). The effects of ICC intervention, in other words, are projected into the future where—so it is hoped—a culture of accountability will create a world less plagued by the evil of mass atrocities. Such a long-term perspective is in alignment with the statements made by ICC officials: as we have seen, Moreno Ocampo and Bensouda have repeatedly argued that "political considerations," understood here as the short-term effects of ICC intervention, are irrelevant for the strictly apolitical Court. The underlying logic of this argument is that any appearance of "being political" might seriously undermine the ICC's legitimacy and threaten its long-term mission of creating a culture of accountability for mass atrocities. The short-term perspective, on the other hand, focuses on the immediate effects of ICC interventions on a particular —especially an ongoing—conflict. This, apparently, leads to a problem that should be familiar by now: ICC interventions can prolong/exacerbate ongoing conflicts and generate—in the short run—more human suffering than non-intervention. From a long-term perspective, however, intervention would (probably) help to create a future world in which evil rears its ugly head less frequently; non-intervention, in turn, would have positive short-term effects (compared to intervention) but would have detrimental consequences in the long run. So, have we arrived at the *aporia* of the "peace versus justice dilemma" again? No, we have not. This apparent clash between the long-term and the short-term consequences of ICC intervention (or non-intervention) poses by no means an irresolvable dilemma for the Court's interests for the simple reason that negative short-term effects would have devastating consequences for the ICC's legitimacy and effectiveness. For being regarded as a blind pursuer of "justice whatever the cost" would ineluctably trigger skepticism as to whether the ICC is a positive force in the world or if the Court is, in fact, a highly dangerous catalyst for human rights violations and suffering. Such skepticism would certainly plunge the ICC into an existential crisis and potentially sound the death knell for this legal institution. Let me be clear, however: the argument here is not that long-term effects of the ICC are irrelevant; the argument is, rather, that, in cases in which a clash between long-term and short-term effects of intervention becomes apparent, it is in the ICC's *individual interest* to prioritize the latter. This insight, to be sure, does not conjure away the very real problem that sometimes the ICC's

interest to prosecute and punish might indeed be at odds with the broader interest in combatting mass atrocities; but this framing of the problem demonstrates that in such cases it is in the ICC's *predominant* interest to refrain from prosecution and punishment. Thus, the ICC's individual interest cannot be isolated from the broader political interest in combatting mass atrocities as the perception of the ICC as an obstacle in the struggle against massive human rights violations would ultimately be detrimental to the legitimacy of the Court and threaten its very existence.

Thus, although the ICC pretends not to be interested in "political questions," it must take political considerations into account. Prudential political action is a crucial source of the Court's legitimacy and ultimately the most viable strategy to ensure the ICC's survival as a legal institution and a political actor.

4 The Disavowal of Politics as a Noble Lie

Despite the conclusion I have reached in the previous section, many advocates of the ICC adamantly insist on the strictly apolitical nature of the Court. Their insistence leads to two questions: *how* do these commentators defend the idea of an apolitical ICC? And, even more importantly, *why* do they do so?

To start with the first question, defenders of the idea of an apolitical ICC argue that the ICC already exists as an independent legal institution. While they do not necessarily turn a blind eye to the issue of "politicization" (Heyder 2006; Dicker and Stevenson 2013; Onishi 2015; Woolaver and Palmer 2017), they point to the pivotal role of the politically independent OTP that selects the cases to be investigated and the individuals to be prosecuted (Danner 2003; Bensouda 2012; Scheffer 2015). And the prosecutor, as Moreno Ocampo and Bensouda have repeatedly stressed, acts beyond the poisonous influence of politics and strictly in pursuit of legal justice. And, from a normative perspective, these authors argue that this is, of course, precisely how it should be: it is imperative for the ICC as a central institution of global justice to be objective, fair, and predictable—justice, after all, is a matter of fairness (Rawls 1985). There is, however, a compelling counterargument to this narrative: while it is certainly true that the OTP is politically independent from other actors, the prosecutor[9] herself does not act exclusively according to legal principles. The Rome Statute vests the prosecutor with a considerable degree of "prosecutorial discretion," and this discretion is almost by definition not subject to rigid, predetermined rules (Greenawalt 2007; Lepard 2010; Davis 2015). As Benjamin Schiff observes (2015, 160):

> The ICC … is formally a non-political organization. The scrutiny of the ICC should be triggered when crimes under its Statute appear to be taking place *regardless* of a separate international determination of the state's legitimacy. Unfortunately, the Prosecutor often has to make political and pragmatic deci-

[9] The OTP is the independent organ of the ICC, the person of the prosecutor heads this organ (see Article 42 Rome Statute).

> sions rather than purely legalistic ones. The best the Court can do is to substitute good political judgment for putatively non-political judgment in situation and case-selection and public pronouncements. The actions of the Prosecutor are key.

Schiff's words reflect an interesting tension between his normative vision of the prosecutor (and the ICC) and his awareness of legal and political realities: Schiff *wants* the prosecutor to be "purely legalistic," but he must conclude, albeit rather grudgingly, that "unfortunately the Prosecutor often has to make political and pragmatic decisions." This confession, then, leads us half way back to the claim I have developed in the previous section: the prosecutor does not exercise her prosecutorial discretion in a political (and moral) vacuum. But, of course, my argument has been more radical than Schiff's: for I have contended that political and pragmatic decisions are not merely the unfortunate tribute the prosecutor must pay to the harsh realities of international political life, but, in fact, normatively desirable judgments to ensure the future existence of the ICC as a legal institution and a political actor.

This brings us to a crucial question: what explanation does the non-traditional camp have for the ICC's continued disavowal of politics? The answer is: most of these scholars do not address this question at all; and, if they do, they tend to provide a rather simplistic explanation for the disavowal of politics. Most advocates of the "traditional camp" (including the prosecutors), so their argument goes, are "legalists" with scant interest in and understanding of international politics. Their sole focus is on lofty rules and norms of international law, and their main desire is to salvage the autonomy of international law from the poisonous influence of politics. This utopianism, according to the non-traditional camp, constitutes a serious obstacle to developing a more realistic understanding of the ICC and, ultimately, also an obstacle to the Court's effectiveness in practice. Joseph Hoover, for instance, insists that "the agonistic character … of international criminal law suggests that the law never escapes politics … Politics … is central to the court's actions" (2014, 267). He continues that "the ICC's disavowal of politics is potentially limiting" (2014, 281) since "failing to embrace the political role of the ICC is damaging to this important institution because disavowing politics lends itself to naivety and a lack of self-criticism" (2014, 267). In a similar vein, Nouwen and Wouter argue that "defining away the ICC's political dimensions eventually undermines the Court by making it look either hypocritical or utopian" (2010, 946). Also, William Schabas, assessing the prosecutor's strategy in selecting cases and targeting individuals, takes the same line: "They [the prosecutors and members of the traditional camp] have undoubtedly convinced themselves that they have found a legalistic formula enabling themselves to do the impossible, namely, to take a political decision while making it look judicial" (2014, 89). The gist of these critiques, then, is that mantra-like asseverations portraying the ICC as an apolitical institution are mere expressions of a legalistic blindness to political realities or naïve attempts to save law's purity from the contaminating influence of politics. I posit, however, that there could be[10] a much more

[10] I address the problem of "proving" this argument in the Conclusion.

interesting aspect to these asseverations. I propose that ICC officials, most importantly the prosecutor, must officially renounce politics to avoid highly dangerous, even perverse, consequences. That is to say, it is of vital importance for the ICC to create and uphold the noble lie of an apolitical Court, the illusion of an institution determined to follow uncompromisingly the letter of the law, and to pursue justice whatever the cost. In the remainder of this section, I will probe three *potential* arguments for why the adoption of the noble lie is such a vital strategy: legitimacy, deterrence, and what I shall call "perverse incentive."

The problem of legitimacy is one of the standard explanations for why the ICC must (allegedly) stay the hands of politics (Danner 2003; Fichtelberg 2006; Murphy 2009; Takemura 2012; Tiemessen 2014). As I have pointed out above, legitimacy is of crucial importance for the ICC: the Court depends on the cooperation and support of states (financially, enforcement of arrest warrants, etc.) and it is, therefore, in the ICC's interest to be regarded as an authority that ought to be obeyed. It is certainly true, then, that a lack of legitimacy would jeopardize the entire project of the ICC. The more complex question, though, is where legitimacy comes from. What is the source of legitimacy? The "traditional camp," of course, has a straightforward answer to this question: the ICC's source of legitimacy, they claim, is its apolitical nature that stands as a bulwark of justice in an unjust world tainted by politics. Obviously, this account rests on a juxtaposition of law and politics: law is portrayed as neutral, objective, fair, and thus legitimate; politics, in turn, is portrayed as biased, subjective, unfair, and thus illegitimate (Hansen 2014, 5).

Undoubtedly, the perception that the ICC is "political" can to a certain extent compromise the Court's legitimacy. It might, for instance, motivate some states, facing the threat of ICC action, to play the "withdrawal card" and accuse the ICC of being politicized and pursuing selective justice. This, after all, is precisely what happened in 2016 when Burundi, Gambia, and South Africa announced their withdrawals (Allison 2016). However, it is also important to note that the traditional camp's account of the source of legitimacy is extremely narrow: it completely neglects the fact, for example, that the (external) politicization of the ICC through the UN Security Council is also a source of legitimacy and effectiveness for the Court. The UN Security Council, by referring a situation to the ICC (Article 13b Rome Statute), signals that the world's major powers support action taken by the Court and thereby confers its own legitimacy on the Court. Moreover, Article 13b expands the jurisdiction of the ICC and thus enhances the Court's effectiveness in prosecuting some of the worst evildoers; this, ultimately, also enhances the ICC's legitimacy. The ICC's legitimacy, then, is not only created by legal neutrality but also by practical effectiveness. As Steven Roach rightly observes: "Only in a perfect and non-conflictual world can we expect the ICC's legal impartiality to provide the exclusive source of its legitimacy" (2006, 9). In an imperfect and highly conflictual international environment, however, the relationship between legitimacy and effectiveness cannot be understood as a "one-way street": surely, legitimacy is an important ingredient for an international actor's effectiveness (Franck 1990; Clark 2007); at the same time, though, the very effectiveness of an actor also creates legitimacy—it produces what Georg Jellinek has long ago called the "normative power of the factual" (1929, 332–79) and is, therefore, a source of legitimacy. A second objection to the

traditional camp's legitimacy argument can be derived from the fact that the ICC has been constructed as a Court of "last resort" (Mendes 2011). The "doctrine of complementarity" establishes the ICC as an organ subsidiary to national jurisdictions that steps in only when national Courts fail to discharge their duties (Article 17 Rome Statute). Hence, the severity of the accusation that the ICC pursues selective justice—however justified it might be—is to a considerable degree defused by the fact that the state has failed to take action against the perpetrators of mass atrocities in the first place. Hence, if we follow Thomas Franck (1990, 40) in characterizing legitimacy in international politics as the "desire to be a member of the club, to benefit by the status of membership," we can see that states forfeit the "benefit" of launching serious critique on the injustices of the international society if they isolate themselves by violating the most basic rules of legitimate state action. These arguments suggest that "politics" is a less severe problem for the legitimacy of the ICC than the traditionalists claim. The attempt to defend the legitimacy of the ICC can thus be one, but by no means the most important, reason for the adoption of the noble lie.

A second potential explanation for the necessity of the noble lie is that it fosters the ICC's potential to deter future crimes. It is widely accepted that a central aim of criminal tribunals—domestic and international—is to prevent the perpetration of future criminal acts (Honderich 2005; Duff 2009; Brooks 2012, 35–50). Accordingly, it is one of the explicit goals of the ICC "to put an end to impunity for the perpetrators of these crimes [mass atrocities] and thus to contribute to the prevention of such crimes." The ICC, as stated earlier, should thus contribute to a "culture of accountability" in which potential perpetrators of mass atrocities face a credible threat of prosecution and punishment. For most members of the traditionalist camp, there is a direct correlation between the ICC's apolitical nature and its potential to deter future crimes. The rationale behind their argument is that the ICC must prosecute and punish perpetrators without taking into account political considerations; the only criterion for the ICC should be the occurrence of mass atrocities, and its only aim should be to bring the perpetrators—indeed, all perpetrators—of these crimes to justice. Politics is still the *bête noire*, but in this context it takes on the specific form of "selectivity" (Cryer 2011; deGuzman 2012).[11] Selectivity, so this argument goes, destroys the necessary illusion that each and every perpetrator is punished and thus seriously compromises the ICC's deterrence capabilities (Paternosterer 1987; Mullins and Rothe 2010; Chazal 2015, 26). Now, the previous section has demonstrated that the pursuit of justice whatever the cost would, in fact, run counter to the ICC's individual interests and potentially sound the death knell for this institution. The question here, however, is whether the deterrence argument can be regarded as the main reason for the adoption of the noble lie, that is, for upholding the necessary illusion of the consistent prosecution of every single perpetrator. In addressing this problem, we must note that the concept of deterrence is more complex than the standard narrative suggests. To begin with, no legal system can ever achieve perfect consistency and completely avoid selectivity; this is, of course, especially true for

[11] Of course, "selectivity" is often seen as a threat to the ICC's legitimacy as well.

international criminal law with its limited capacities to prosecute and punish (Cryer 2011). Confronted with this obvious problem, Moreno Ocampo has developed the metaphor of the "long shadow" of the ICC. That is, the long shadow cast by the ICC should motivate individual states to take effective action against perpetrators. According to Moreno Ocampo (2010), it is "the absence of trials by the ICC" that must be the ultimate goal of the ICC because this would mean that mass atrocities are effectively prosecuted at the domestic level. There is, in my opinion, a lot to be said for this approach; yet it cannot solve the most fundamental conundrum surrounding the question of deterrence: do (potential) perpetrators of mass atrocities make the rational means-ends calculations that are central to any theory of deterrence (Stahn 2010, 5)? Many authors are skeptical. David Wippman, for instance, writes (1999, 479):

> When the various motivations for attacks on civilians are combined … it is not surprising that a light risk of future prosecution will not have a major deterrent effect. Indeed, in a war of this type, it may be that even a significant risk of future prosecution will have relatively little impact.

In a similar vein, Kingsley Chiedu Moghalu believes that "using international war crimes trials as a frontline approach to preventing or deterring genocide is a failing policy … [because] … Courts … are inherently reactive" (2008, 178). To be clear, I do not necessarily agree with these rather pessimistic statements; nor do I disagree with them. Rather, my take on the question of whether the ICC can deter future atrocities must remain agnostic because the literature—from both theoretical and empirical perspectives—does by no means yield a clear answer to this question (Wippman 1999; Akhavan 2001; Chung 2008; Vinjamuri 2010; Bosco 2011; Buitelaar 2016; Hillebrecht 2016; Dancy 2017). And how could it be otherwise? After all, it is one of the characteristics of the concept of deterrence that it is almost impossible to measure and thus open to different interpretations. As Schabas notes: "Deterrence remains somewhat of an enigma … [because] … while we can readily point to those who are not deterred, it is nearly impossible to identify those who are" (2011, 61). In light of this "enigma," I conclude that, while the deterrence argument might at least be part of the explanation for the necessity of the noble lie, it cannot entirely explain the ICC's disavowal of politics.

The third argument that can be made for the adoption of the noble lie derives from the insight that ICC interventions might not only fail to have a deterrent effect on perpetrators but might, in fact, provide perverse incentives to commit further atrocities.[12] Let me elaborate this "problem of perverse incentive" by briefly returning to the previous section where I have demonstrated that it is in the political interest of the Court to act as a prudent decision-maker. A crucial factor to be taken into consideration is whether ICC intervention would exacerbate or prolong conflicts. If

[12] The concept of "perverse incentive" is used in various disciplines, most frequently, probably, in economics. It denotes a theory/system/institution/etc. that was created to produce specific behavioral incentives but, in actual fact, produces unintended incentives that are often contrary to the intended incentive of the creators of the theory/system/institution/etc.

the answer to this question is in the affirmative, I have argued, it is in the ICC's own interests to refrain from intervention.[13] However, the logical consequence of this anti-legalistic account of the ICC is that it creates incentives to commit further crimes or, at least, incentives to threaten the perpetration of further crimes. For, if the ICC openly admitted that questions of peace and security are part (and parcel) of the decision of whether to intervene, it would become all too easy for perpetrators to evade prosecution simply by threatening to commit further atrocities. The effects of such an acknowledgment would indeed be perverse: it would send a signal to perpetrators that a promising strategy to evade prosecution is the threat or actual perpetration of further atrocities. It is, I think, rather curious that so few scholars of international criminal justice have problematized this point. One of the very few who have at least broached this issue is Michael Struett, who sees clearly that:

> if political leaders who are guilty of serious international law crimes know that they will be treated more leniently if they can threaten more victims, and thereby trade the protection of those would-be victims for some form of amnesty or judicial leniency, then they will have every incentive to increase their commission of serious international law crimes. (2012, 84)

Struett, therefore, recognizes that ICC interventions can provide perverse incentives to increase the commission of mass atrocities and links this problem to the Court's appearance as a political actor. This, ultimately, allows us to see the predicament the ICC faces with striking clarity: the Court cannot act as a politically blind pursuer of justice because such an unyielding strategy would sooner rather than later sound the death knell for the ICC; simultaneously, any acknowledgment of the Court to take political considerations into account could easily turn the ICC into a catalyst for grueling human rights violations and seriously undermine its legitimacy. The only way out of this predicament is to become a prudent political actor and, at the same time, to disavow politics; the only solution to the ICC's predicament, in other words, is to continuously repeat the noble lie and thereby create and uphold the illusion of a strictly apolitical Court. Thus the ICC's disavowal of politics becomes in itself a deeply political act; for the noble lie is, in fact, nothing else than a prudential strategy to avoid perverse moral and political consequences and to prevent the ICC from digging its own grave. The ICC's disavowal of politics, then, becomes a testament to its nature as a prudent political actor. The irony of all this is obvious: the non-traditional camp attempts to develop a more realistic and more sophisticated understanding of the ICC by revealing its "political" or "politicized" nature. For these scholars, the ICC's disavowal of politics is simply the consequence of blind legalism, a lack of understanding of and interest in politics. In fact, however, it might well be that some of those who are discounted as politically blind legalists have understood the game of politics much better than most members of the non-traditional camp.

[13] This, of course, does not rule out intervention and prosecution in the future.

5 Closing Remarks

The ICC's former Prosecutor, Luis Moreno Ocampo, has recently stated that in his role he must make decisions "on problems that no national or international prosecutor had ever faced" (2015, 4). His most daunting challenge, he continues, was to identify the situations and select the cases that should be presented before the Court (2015, 4). The present article chimes with Moreno Ocampo's assessment. It argues that the challenges for the prosecutor, and by extension for the ICC, are indeed daunting and unique. However, it frames the fundamental predicament of the Court in very different terms: the ICC's most difficult challenge, I assert, is to act as a prudent political actor on the one hand, but to uphold the noble lie of a strictly apolitical, even anti-political, Court on the other. Indeed, the central thesis of this article is that the future of the ICC as a legal institution and a political actor will depend greatly on how well the Court manages to walk this tightrope.

It is not too difficult to anticipate two potential objections to this thesis. First, some commentators might question the idea of the noble lie and demand empirical evidence to corroborate the hypothesis. But, of course, it lies in the very nature of the idea of the noble lie that it cannot be directly proven. My response to this objection, however, is that there is little empirical evidence that the ICC has hitherto acted as a politically blind pursuer of legal justice; in fact, as Courtney Hillebrecht's empirical study concludes, "the Court does not enter into investigations or indictments lightly (2016, 616). And David Bosco confirms that "there is strong evidence that the Court has trodden very carefully [especially] in areas where major powers have strong interests" (2012). In turn, the most "concrete evidence" for the ICC's nature as an a(nti-)political institution is provided by the statements of its prosecutors insisting that they carry out their duties in complete isolation from political considerations. Schabas thinks he reveals an important truth when he writes (2014, 89): "They have undoubtedly convinced themselves that they have found a legalistic formula enabling themselves to do the impossible, namely, to take a political decision while making it look judicial." What he—along with numerous members of the non-traditional camp—does not seem to realize, however, is that the prosecutors do not try to convince "themselves" of the apolitical nature of their actions; what they try, rather, is to create and uphold the necessary illusion of an apolitical Court to avoid perverse moral and political consequences. Their adoption of the noble lie is a pragmatic strategy—an expression of prudent politics rather than blind legalism.

Second, it might be argued that the purpose of this article is self-defeating. For, if the thesis of the noble lie is correct, it is all the more important not to destroy this valuable illusion—not even through an academic article. This objection, though, is of a purely theoretical nature. My aim, as I have stated in the Introduction, is to bring into clearer focus some of the vexed conundrums the ICC faces and the role the Court can and should play in world politics. What I have hopefully demonstrated is that the ICC is a political actor that must—precisely because it is a political actor—disavow politics. But, surely, to worry that this

attempt to develop a better understanding of the ICC exposes the noble lie and could backfire in practice would be based on the somewhat far-fetched assumption that perpetrators of mass atrocities—the group of human beings who must be deceived by the noble lie—are interested in the academic literature on international criminal justice and will capitalize on its insights. While such worries would overstate the potential reach of academic literature, the intended audience of this article—those who want to understand the ICC's nature as a legal institution and a political actor and its role in world politics—can, or so I hope, benefit from its insights.

Acknowledgements I would like to thank Adam Bower, Mateja Peter, Erika Brady, Lina Malagon and two anonymous reviewers for helpful comments. The usual disclaimer applies.

References

Ainley, Kirsten. 2011. "The International Criminal Court on Trial." *Cambridge Review of International Affairs* 24 (3): 309–33.

Akhavan, Payam. 2001. "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" *The American Journal of International Law* 95 (1): 7–31.

Akhavan, Payam. 2013. "The Rise, and Fall, and Rise, of International Criminal Justice." *Journal of International Criminal Justice* 11 (3): 527–36.

Allison, Simon. 2016. "African Revolt Threatens International Criminal Court's Legitimacy." *The Guardian*, 27 October 2016, sec. Law. http://www.theguardian.com/law/2016/oct/27/african-revolt-international-criminal-court-gambia.

Bassiouni, M. Cherif. 1999. *Crimes Against Humanity in International Criminal Law*. Second revised edition. The Hague: Kluwer Law.

Bassiouni, M. Cherif. 2006. "The Perennial Conflict between International Criminal Justice and Realpolitik." *George State University Law Review* 22 (3): 541–60.

Bensouda, Fatou. 2012. "Reconciling the Independent Role of the ICC Prosecutor with Conflict Resolution Initiatives." https://issafrica.s3.amazonaws.com/site/uploads/10Oct2012ICCKeyNoteAddress.pdf.

Bosco, David. 2011. "The International Criminal Court and Crime Prevention: Byproduct or Conscious Goal?" *Michigan State International Law Review* 19 (2): 163–200.

Bosco, David. 2012. "Justice Delayed." Foreign Policy. https://foreignpolicy.com/2012/06/29/justice-delayed-2/.

Bosco, David. 2014. *Rough Justice: The International Criminal Court in a World of Power Politics*. Oxford: Oxford University Press.

Brooks, Thomas. 2012. *Punishment*. London: New York: Routledge.

Broomhall, Bruce. 2004. *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*. Oxford: Oxford University Press.

Buitelaar, Tom. 2016. "The ICC and the Prevention of Atrocities: Criminological Perspectives." *Human Rights Review* 17 (3): 285–302.

Cassese, Antonio. 1999. "The Rome Statute of the International Criminal Court – Some Preliminary Reflections." *European Journal of International Law* 10 (1): 144–71.

Chazal, Nerida. 2015. *The International Criminal Court and Global Social Control: International Criminal Justice in Late Modernity*. New York, NY: Routledge.

Chung, Christine. 2008. "The Punishment and Prevention of Genocide: The International Criminal Court as a Benchmark of Progress and Need." *Case Western Reserve Journal of International Law* 40 (1): 227–42.

Clark, Ian. 2007. *Legitimacy in International Society*. New edition. Oxford: Oxford University Press.

Cryer, Robert. 2011. *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*. Reissue edition. Cambridge: Cambridge University Press.

Dana, Shahram. 2014. "The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?" *Penn State Journal of Law & International Affairs* 3 (1): 30–112.

Dancy, Geoff. 2017. "Searching for Deterrence at the International Criminal Court." *International Criminal Law Review* 17 (4): 625–55.

Danner, Allison Marston. 2003. "Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court." *American Journal of International Law* 97 (3): 510–52.

Davis, Cale. 2015. "Political Considerations in Prosecutorial Discretion at the International Criminal Court." *International Criminal Law Review* 15 (1): 170–89.

deGuzman, Margaret 2012. "Choosing to Prosecute: Expressive Selection at the International Criminal Court." *Michigan Journal of International Law* 33 (2): 265–320.

Dicker, Richard, and Elisabeth Stevenson. 2013. "ICC Suspects Can Hide – and That Is the Problem." Human Rights Watch. https://www.hrw.org/news/2013/01/24/icc-suspects-can-hide-and-problem.

Duff, Antony 2009. *Trials and Punishments*. New edition. Cambridge: Cambridge University Press.

Dworkin, Ronald M. 1998. *Law's Empire*. New edition. Oxford: Hart Publishing.

Fichtelberg, Aaron. 2006. "Democratic Legitimacy and the International Criminal Court: A Liberal Defence." *Journal of International Criminal Justice* 4 (4): 765–85.

Franck, Thomas M. 1990. *Fairness in International Law and Institutions*. New edition. Oxford: Oxford University Press.

Greenawalt, Alexander. 2007. "Justice Without Politics: Prosecutorial Discretion and the International Criminal Court." *New York University Journal of International Law and Politics* 39 (583): 584–673.

Hansen, Thomas Obel. 2014. "The International Criminal Court and the Legitimacy of Exercise." SSRN Scholarly Paper ID 2394603. Rochester, NY: Social Science Research Network. https://papers.ssrn.com/abstract=2394603: 1–27.

Herman. 2006. "Japan's Expected to Support International Criminal Court." VOA. https://www.voanews.com/a/a-13-2006-12-06-voa14/311910.html.

Heyder, Corrina. 2006. "The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Criminal Court's Functions and Status." *Berkeley Journal of International Law* 24 (2): 650–71.

Hillebrecht, Courtney. 2016. "The Deterrent Effects of the International Criminal Court: Evidence from Libya." *International Interactions* 42 (4): 616–43.

Honderich, Ted. 2005. *Punishment: The Supposed Justifications Revisited*. Reprint edition. London: Pluto Press.

Hoover, Joseph. 2013. "Moral Practices: Assigning Responsibility in the International Criminal Court." *Law and Contemporary Problems* 76 (3&4): 263–86.

Hoover, Joseph. 2014. "Moral Practices: Assigning Responsibility in the International Criminal Court." *Law and Contemporary Problems* 76 (3–4): 263–86.

Hurd, Ian. 2007. *After Anarchy: Legitimacy and Power in the United Nations Security Council*. Princeton, NJ: Princeton University Press.

Jellinek, Georg. 1929. *Allgemeine Staatslehre*. Softcover reprint of the original 3rd edition 1929. Wien: Springer.

Kastner, Philipp. 2011. *International Criminal Justice* in Bello*?* Leiden and Boston: Martinus Nijhoff.

Kaul, Hans-Peter. 2010. "International Criminal Court (ICC)." Edited by Rüdiger Wolfrum. *Max Planck Encyclopaedia of Public International Law*. http://opil.ouplaw.com/oxlaw/entryview/viewoxlawoxchap/10.1093$002flaw:epil$002f9780199231690$002flaw-9780199231690-e42.

Kersten, Mark. 2016. *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace*. Oxford: Oxford University Press.

Kirchheimer, Otto. 2015. *Political Justice: The Use of Legal Procedure for Political Ends*. Princeton, NJ: Princeton University Press.

Köchler, Hans. 2003. *Global Justice or Global Revenge?: International Criminal Justice at the Crossroads*. Wien and New York: Springer-Verlag.

Krzan, Bartłomiej. 2016. "International Criminal Court Facing the Peace vs. Justice Dilemma." *International Comparative Jurisprudence* 2 (2): 81–88.

Lepard, Brian. 2010. "How Should the ICC Prosecutor Exercise His or Her Discretion? The Role of Fundamental Ethical Principles." *The John Marshall Law Review* 43 (3): 553–67.

Loughlin, Martin. 2000. *Sword and Scales: An Examination of the Relationship between Law and Politics*. Oxford and Portland: Hart Publishing.

Luban, David. 2010. "Fairness to Rightness: Jurisdiction, Legality and the Legitimacy of International Criminal Law." In *The Philosophy of International Law*, edited by Samantha Besson and John Tasioulas, 569–88. Oxford: Oxford University Press.

McDermott, Yvonne. 2016. *Fairness in International Criminal Trials*. Oxford Monographs in International Humanitarian & Criminal Law. Oxford: Oxford University Press.

Megret, Frederic. 2002. "The Politics of International Criminal Justice." *European Journal of International Law* 13 (5): 1261–84.

Megret, Frederic. 2015. "In Whose Name? The ICC and the Search for Constituency." In *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, edited by Christian De Vos, Sara Kendall, and Carsten Stahn, 23–45. Cambridge: Cambridge University Press.

Mendes, Errol P. 2011. *Peace and Justice at the International Criminal Court: A Court of Last Resort*. Cheltenham: Edward Elgar Publishing Ltd.

Minow, Martha, C. Cora True-Frost, and Alex Whiting. 2015. "Conclusion." In *The First Global Prosecutor: Promise and Constraints*, edited by Martha Minow, C. Cora True-Frost, and Alex Whiting, 360–65. Ann Arbor: University of Michigan Press.

Moghalu, K. Chiedu. 2008. *Global Justice: The Politics of War Crimes Trials*. Reprint edition. Stanford, Calif.: Stanford University Press.

Moreno Ocampo, Luis. 2010. "Keynote Address to the Council on Foreign Relations." www.cfr.org/content/publications/attachments/MorenoOcampo.CFR.2.4.2010.pdf.

Moreno Ocampo, Luis. 2015. "Prologue." In *The First Global Prosecutor – Promise and Constraints*, edited by Martha Minow, C. Cora True-Frost, and Alex Whiting, 1–19. Ann Arbor: University of Michigan Press.

Mullins, Christopher, and Dawn Rothe. 2010. "The Ability of the International Criminal Court to Deter Violations of International Criminal Law: A Theoretical Assessment." *International Criminal Law Review* 10 (5): 771–86.

Murphy, Sean. 2009. "Aggression, Legitimacy and the International Criminal Court." *European Journal of International Law* 20 (4): 1147–56.

Nouwen, Sarah and Wouter, Werner. 2010. "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan." *European Journal of International Law* 21 (4): 941–65.

Office of the Prosecutor. 2007. "Policy Paper on the Interests of Justice." https://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf.

Onishi, Norimitsu. 2015. "Omar Al-Bashir, Leaving South Africa, Eludes Arrest Again." *The New York Times*, 15 June 2015, sec. Africa. https://www.nytimes.com/2015/06/16/world/africa/omar-hassan-al-bashir-sudan-south-africa.html.

Paternoster, Raymond. 1987. "The Deterrent Effect of the Perceived Certainty and Severity of Punishment: A Review of the Evidence and Issues." *Justice Quarterly* 4 (2): 173–217.

Ralph, Jason. 2007. *Defending the Society of States: Why America Opposes the International Criminal Court and Its Vision of World Society*. Oxford: Oxford University Press.

Rawls, John. 1985. "Justice as Fairness: Political Not Metaphysical." *Philosophy & Public Affairs* 14 (3): 223–51.

Roach, Steven C. 2006. *Politicizing the International Criminal Court: The Convergence of Politics, Ethics, and Law*. Lanham, MD: Rowman & Littlefield Publishers.

Rome Statute of the International Criminal Court, opened for signature 17 July 1998, entered into force 1 July 2002. https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf.

Sang-Hyun Song, Speech 10th Anniversary of the Court, The Hague, 14 November 2012. https://www.government.nl/documents/speeches/2012/11/14/judge-sang-hyun-song-president-of-the-international-criminal-court-10th-anniversary-of-the-court-ridderzaal-hall-of-knights.

Schabas, William. 2011. *An Introduction to the International Criminal Court.* 4th edition. Cambridge: Cambridge University Press.

Schabas, William. 2014. *Unimaginable Atrocities: Justice, Politics and Rights at the War Crimes Tribunals*. Reprint edition. Oxford: Oxford University Press.

Scheffer, David. 2015. "False Alarm about the Proprio Motu Prosecutor." In *The First Global Prosecutor: Promise and Constraints*, edited by Martha Minow, C. Cora True-Frost, and Alex Whiting, 29–44. Ann Arbor: University of Michigan Press.

Schiff, Benjamin. 2015. "The ICC and R2P: Problems of Individual Culpability and State Responsibility." In *Trials and Tribulations of International Prosecution*, edited by Henry F. Carey and Stacey M. Mitchell, Reprint edition, 149–66. New York: Lexington Books.

Schmitt, Carl. 2007. *The Concept of the Political: Expanded Edition*. Translated and with an Introduction by George Schwab. With a foreword by Tracy B. Strong and Notes by Leo Strauss. Enlarged edition. Chicago: University of Chicago Press.

Shaw, Malcolm N. 2014. *International Law*. 7th edition. Cambridge: Cambridge University Press.

Shklar, Judith N. 1986. *Legalism: Law, Morals, and Political Trials*. Harvard: Harvard University Press.

Simpson, Gerry. 2007. *Law, War and Crime: War Crimes Trials and the Reinvention of International Law*. Cambridge: Polity Press.

Stahn, Carsten. 2010. "The Future of International Criminal Justice." *The Hague Justice Portal.* http://www.brandeis.edu/ethics/pdfs/internationaljustice/biij/BIIJ2013/stahn.pdf.

Struett, Michael. 2012. "Why the International Criminal Court Must Pretend to Ignore Politics." *Ethics & International Affairs* 26 (1): 83–92.

Takemura, Hitomi. 2012. "Reconsidering the Meaning and Actuality of the Legitimacy of the International Criminal Court." *Amsterdam Law Forum* 4 (2): 3–15.

Tiemessen, Alana. 2014. "The International Criminal Court and the Politics of Prosecutions." *The International Journal of Human Rights* 18 (4–5): 444–61.

Tiemessen, Alana. 2016. "The International Criminal Court and the Lawfare of Judicial Intervention." *International Relations* 30 (4): 409–31.

United Nations. 1998a. "Secretary-General Says Establishment of International Criminal Court Is Major Step in March towards Universal Human Rights, Rule of Law." http://www.un.org/press/en/1998/19980720.l2890.html.

United Nations. 1998b. "United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June-17 July 1998 – Official Records." http://legal.un.org/icc/rome/proceedings/contents.htm.

Vinjamuri, Leslie. 2010. "Deterrence, Democracy, and the Pursuit of International Justice." *Ethics & International Affairs* 24 (2): 191–211.

Wippman, David. 1999. "Atrocities, Deterrence, and the Limits of International Justice." *Fordham International Law Journal* 23 (2): 473–88.

Woolaver, Hannah, and Emma Palmer. 2017. "Challenges to the Independence of the International Criminal Court from the Assembly of States Parties." *Journal of International Criminal Justice* 15 (4): 641–65.