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Making ICL History: On the need to move beyond pre-fab critiques of ICL

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INTRODUCTION

Since Schwarzenberger’s provocative statement in 1950 that there is ‘no such thing as an international criminal law’ and nor ought there to be (Schwarzenberger 1950), international criminal law (ICL) has been given a relatively easy ride by critics. According to Schwarzenberger, most of what others called ICL was in fact internationally prescribed or authorized municipal criminal law. He queried the need for an ‘international’ criminal law *per se*. This he illustrated by discussing the then newly created Genocide Convention, and quoting Hartley Shawcross, ‘murder remains murder whether committed against one or a million’ (Schwarzenberger 1950: 292).¹ Schwarzenberger adds, ‘in either case a criminal can only be hanged once’ (id.). The crimes covered by what others might call ICL were covered by domestic law in most cases, and a horizontal extension of jurisdiction, plus international cooperation on extradition, evidence gathering, etc. could be used to cover crimes committed by citizens abroad. This therefore begged the question (although Schwarzenberger did not explicitly pose it himself), if ICL was not needed for the purpose it was said to have been created – the accountability of the Nazi leadership - what *was* it really, and what was it *for*?

Today, the ontological question is no longer asked and critics are mostly concerned with how we can improve and *complete* ICL. In recent years the phrases ‘war crimes’ and ‘crimes against humanity’ have become ubiquitous, in the media, on the streets, in legal practice and also in the academy. There are high expectations that ICL will be deployed to remedy many ills in the world, and these have, in the first ten years of ‘mature’ ICL practice only been ‘realistically tempered’. For example, a mood of only marginally cautious celebration pervades the ICC’s 10th birthday issue of the JICJ (e.g. Akhavan, Schabas, Roht-Arriaza: 2013). Elsewhere I have argued that law, and lawyers’ role in capitalism amounts to a ‘congealing’ of capitalism (Baars 2012a; 2012b). Law, by virtue of its very form, which approximates the commodity form (Pashukanis 1978: 38), is a sine qua non of the capitalist mode of production (see also Miéville 2005; Knox 2011). Lawyers (as part of a global class of administrators or global governance bureaucrats) are important agents in the construction of law, the (continually evolving) frame or skeleton around which capitalism congeals. I am interested in the dialectical relationship between the material world in which certain intellectual concepts arise, how these ideas are translated by lawyers into legal discourse and abstracted legal concepts and then, sets of processes, rules and institutions, that in turn affect material reality. In this essay I focus on one of the important ways lawyers (here: legal scholars) congeal capitalism, namely through creating what I will call the ‘knowledge’ of law, and specifically, the *idea of ICL*. The core argument of this essay is that ICL lawyers’ congealing of capitalism works through this ICL knowledge by creating its own critique, which in turn serves to strengthen and legitimize ICL as a legal regime, and as an essential part of capitalist

international law. In this paper I return to Schwarzenberger's ontological question, describe how 'the idea of ICL' was constructed, how ICL became the accountability tool of choice and why it is seemingly so critique-proof. My aim is, through reopening the ontological question, to provide impetus and pointers to a radical critique of ICL.

What immediately becomes apparent when attempting to describe ICL knowledge is that it is not homogenous but exists in a slightly different configuration in different interpreters' minds and texts. In a typology of mainstream scholarship constructing the foundational narrative ('dominant knowledge') of ICL I distinguish four main strands: the humanitarian, the institutional, the positivist and the pragmatist perspective. The four strands implicitly connect with different legal traditions and cultures, consequently respond to different expectations of what 'makes' an area of law, set (slightly) different parameters, and employ different markers. Yet, I argue in this essay, together these four form the mutually reinforcing building blocks of dominant 'ICL knowledge'.

The descriptive exercise - making us see that which is so close to us that we normally do not see it (Orford 2013:618) - of the production of ICL knowledge, evinces the 'productive character' of ICL knowledge. Each of the four approaches I identify produces, within scholarship and what we could call the 'policy-world', their own critique. Each such 'pre-fab' critique serves to resolve the 'problematic' suggested by the approach itself. This insight reveals that *current ICL critique* such as it is, is produced by, and remains within the parameters of, hegemonic ICL knowledge. Moreover, as I will show, critiques that reach beyond are foreclosed. In Section 4 below I comment further on how this productive character of ICL relates to the specific function of ICL in neoliberal governance and the capitalist mode of production.

That this global *status quo* warrants changing is a matter of broad agreement and need not be elaborated here (e.g. LRIL editorial 2013:2). It is hoped that the description of ICL knowledge construction and its pre-fab and foreclosed critiques, in other words the work of *law(yers) congealing capitalism through ICL*, brings into view the *contradictions* where space to drive a wedge of 'critical knowledge' exists (Orford 2012:622; Baars 2012a; Marks 2000: Ch.6). Such critical knowledge (or: immanent, transformative, or radical critique (Marx 1978; Horkheimer 1972)), should then aid in 'dissolving' ICL knowledge, and form part of a broader effort to resist neoliberal hegemony.

This essay proceeds as follows: I first describe the construction of ICL's knowledge, or *the making of ICL*, which occurred after the World War II trials at Nuremberg. In the third part of this essay I discuss the ICL knowledge and 'pre-fab' critiques produced by the four approaches within dominant ICL knowledge and show which critiques are foreclosed by the dominant narrative. In my final section I offer a more detailed example of one such foreclosed, or radical, critique, that of what I call 'commodified morality', before concluding.

The (Re-)Making of ICL: Constructing ICL's foundational narrative

In this section I show the process of law(yers) congealing capitalism in the 'making of ICL'. ICL as we know it today, was largely (re-)constructed, while building on the post-WWII experience, by lawyers, state representatives, and other members of the

same class *post-Cold War*. Here, I focus on academic² lawyers' role in constructing ICL's foundational narrative: the knowledge that contains (constructs) its history, meaning and purpose. At Nuremberg (and Tokyo) what became known as ICL was employed and generally understood as a political intervention (e.g. Taylor 1992). ICL was criticized predominantly by lawyers and on *legal* terms – it was said, for instance, that it had been applied retrospectively (e.g. Kelsen 1947:153; Schwarzenberger 1946-1947:351; Jescheck 2008:408 (originally published in 1957)). Some also argued that by virtue of its selectivity (failure to try Allied crimes) Nuremberg and Tokyo had amounted to victors' justice (Minear 1971; Koskeniemi 2002). Overwhelmingly, however, legal scholars took up the task of turning the political tool of ICL into a (respectable, neutral) legal regime. In this process, during the 1940s and 50s, but mostly in the past two decades, from the *partial*, particular geopolitical circumstance of the application of ICL post-WWII, a *universal* ICL was fashioned.

It is legal scholars' task (habit, or even compulsion) to take legal events (such as Nuremberg and Tokyo) and make doctrinal sense of them. ICL in this mode is treated as a found object, or an *unreturnable* gift left to us by a previous generation. It needs to be studied, analysed, its parts named and explained. In particular, we need to figure out how it fits into our pre-designated categories (or: whether it requires new categories?) and how it fits into our broader system of law, that abstracted, artificial 'whole'. Academic lawyers perform a post-hoc legal rationalisation of an event, attach to it a history and a logic and send it forward into 'progressive development'.³ Lawyers' explaining, legitimating and rationalisation may or may not be consciously 'ideological devices' (see Marks 2000: 18-25) - but they inevitably become so. These are then employed by state negotiators (and the official law-makers, e.g. Parliaments), civil society groups, business people and others (potentially members of different classes) to negotiate over, and struggle for. Lawyers are thus not the 'myopic handmaidens' of this world order, but active 'chefs' (Scott 1997: 435), members of the 'invisible college' (Schachter 1977:223) 'ruling' elite, *congealing capitalism* (Baars 2012).

Academic lawyers' provision of a foundational narrative of ICL, providing it with a history, a sense of 'where it came from' can be contrasted with the way history has been written out of the mainstream international law texts. This is because international law is considered mature and settled in its identity (Koskeniemi 2004), as opposed to ICL, which to some extent is still fluid. Yet while ICL is acknowledged to be new (e.g. Boas 2010:501), there is also a felt need to historicize it, for it to gain venerability.⁴ Although lawyers' construction of ICL knowledge serves partly to *congeal* ICL's fluidity, it has resulted in different views on the related questions of the meaning of 'international criminal law', what constitutes an 'international crime', and subsequently what ICL's purpose is. This construction is where one can see structural dynamics and individual agency at work, dialectically.

The parameters and markers delimiting ICL now range from the cosmopolitan 'justice' approach of Cassese, to the strict doctrinal (positivist) approach adopted by Werle and others, and the very narrow approach (one could call this an institutional approach) adopted by Cryer et al. These first three approaches I discuss here are variants of what Kreß in the *Max Planck Encyclopaedia of International Law* calls ICL '*stricto sensu*' (Kreß 2009); a fourth is the 'omnibus' approach espoused by policy-oriented⁵ authors (Cryer 2005:1; Ratner 2008:12). In the penultimate section of this essay I show how

each of these four approaches contributes to the overall making of ICL – by forming ICL’s ‘ideological backbone’.

Against all atrocities: A distinction based on morality

The ICL narrative with by far the strongest appeal, including outside of legal academia, is the ‘humanitarian’ school of thought on ICL, of which the late Antonio Cassese was a major proponent. With clear echoes of Jackson’s Nuremberg orations, Cassese described the *telos* of international criminal law (in line with the ICC Statute Preamble) ‘protecting society against the *most harmful transgressions* of legal standards of behaviour perpetrated by individuals’ (Cassese 2008:20 emphasis added). In this perspective, international crimes are something qualitatively different from ‘ordinary’ crimes, and should have their own, exclusive, ‘area’ of law. Calling ICL a *new* branch of international law, Cassese explicitly excludes piracy, as, in his view, the concept has not only become obsolete, but it ‘does not meet the requirements of *international crimes proper*’ (Cassese 2008:12). Piracy was not punished for the purpose of protecting a *community value*, and not thought so *abhorrent* as to amount to an international crime. Cassese further stated: ‘the notion of international crimes does not include illicit traffic in narcotic drugs and psychotropic substances, the unlawful arms trade, smuggling of nuclear and other potentially deadly materials, or money laundering, slave trade or traffic in women (Cassese 2008:13). This is because these are normally perpetrated by private individuals or criminal organisations, ‘states usually fight against them, often by joint action. ...as a rule these offences are committed against states.’ (Cassese 2008:13). Apartheid is also excluded as according to Cassese the prohibition has not yet reached the status of a customary international law (CIL) norm (Cassese 2008:13). Cassese restricts ICL to offences occurring predominantly in the ‘public sphere’, and perpetrated mostly by public actors for political motives. He includes as international crimes, war crimes, crimes against humanity, genocide, torture, aggression and terrorism (Cassese 2008:3), which shows that even among the authors who limit their understanding of ICL to ‘core crimes’, crimes *stricto sensu* or ‘international crimes proper’, there is disagreement over what those are.

Optimists and Skeptics: A distinction based on enforcement mechanisms

The next most prominent perspective is one that builds on historical ICL enforcement attempts. It anchors ICL’s foundational narrative in international legal institutional development. Cryer et al. in *An Introduction to International Criminal Law* (the ‘first authoritative’ (O’Keefe, 2009:485) and now ‘market-leading’ (Cryer et al. 2010: *back cover*) textbook on the subject) define ICL as the law of the crimes over which international courts and tribunals have been granted jurisdiction in general international law (Cryer 2007:2; Cryer 2010:4). This covers what are also called ‘core crimes’, namely genocide, war crimes, crimes against humanity and the crime of aggression. Those that delineate ICL in relation to international enforcement mechanisms (but also other *stricto sensu* proponents), normally commence any discussion of substantive ICL with a historical progress narrative which traces ICL’s origin to the legendary trial of Peter von Hagenbach in 1474 (Cryer 2007:91) or the Allies’ attempts at prosecuting the German Kaiser Wilhelm II, and ends at the present day ICC (see e.g. Cassese 2008:30-1; Werle 2007:1-30; Bassiouni 1974:414; Schabas 2007:1; Ratner 2009:3-9). The narrative suggested by the lawyers at Nuremberg as a putative justification for the IMT trial – which emphasized that IL would only *make*

sense with a working enforcement mechanism (Taylor 1992:37), is here taken and naturalized. This narrative would list certain key moments in the development of the ICL enforcement regime, starting just before *Versailles*. Following World War I, seemingly unwilling to allow the Kaiser's self-imposed exile in The Netherlands to secure his immunity from prosecution for the heinous acts committed in Germany, the victorious Allies created a commission to look into the question of responsibility of the 'authors of the war'. The Commission reported to the 1919 Preliminary Peace Conference, that the Central Powers (the losing side in WWI) had committed numerous acts in violation of established laws and customs of war and the elementary laws of humanity (WWI Commission Report 1920). This led to the inclusion in the 1919 *Treaty of Versailles* of three clauses in which the states party ordered the prosecution of the Kaiser and almost 900 others by an international tribunal (Versailles Treaty). *Versailles* marks the first time the concept of individual criminal responsibility was explicitly mentioned in an international treaty. Thus, in this narrative, the ICL notions of war crimes and an emerging concept of crimes against the laws of humanity had been introduced at this point (Schabas 2007:4; Werle 2007:8; Ratner 2009:6).⁶ Histories of this kind then narrate the very tentative 1920 proposals for an ICC (Draft Statute 1927; Phillimore 1922-23), and following this the concrete proposal (which was supported by only thirteen member states (Werle 2009:18) by the League of Nations following the assassination of King Alexander of Yugoslavia in 1934 (ICC Convention 1937; Cryer 2007:92). Eventually, the determination of the World War II Allies led to the conclusion in 1945 of the 'London Agreement', with annexed to it the Nuremberg Charter, and the establishment of the two international military tribunals (IMTs) at Nuremberg and Tokyo (IMT Charter 1945; IMTFE Charter 1945, and on the latter, see esp. Boister and Cryer 2008). While the Allied post WWII trials are thus construed as laying the foundation for contemporary *global* ICL, its further development was taken over by the UN system. The United Nations General Assembly tasked its International Law Commission in 1947 to draft a 'Code of Offenses Against the Peace and Security of Mankind' based on the IMT Charter principles and judgment (*UNGARes. 177*; and see *ILC Nuremberg Principles* 1950 and *ICL Nuremberg Principles Commentary* 1950 and Ratner 2009:8). After formulating the draft code in 1954 (*ILC Draft Code* 1954), the ILC suspended its work until it neared the end of the Cold War impasse in 1983.

Such histories invariably describe the development of international criminal law gaining momentum after the end of the Cold War with the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). These momentous events were followed by the completion in 1996 of a new *Draft Code*, which then formed a basis for the negotiations over the International Criminal Court (ICC) Statute. Thus, the history of ICL *culminates* in the establishment of the ICC (Schabas 2007:1-21; De Than and Shorts 2003:271-341; Schwarzenberger 1950:263; Ambos 2002 uses the term 'gipfelt' which translates as 'culminates'). In this narrative, the ICC Statute forms the embodiment of a maturing system of ICL (Werle 2007:V; see also, Slidregt 2003:3; Werle 2009:4, 18; Ambos 2002:*title*). Strikingly, all cast their histories back *before* Nuremberg, not accepting that as its moment of origin (as Werle does, by calling the London Charter the 'birth certificate of ICL' (Werle 2007:14), but rather, considering Nuremberg just one step in a logical sequence. This has the effect of rendering the flaws many saw in Nuremberg (retrospectivity; selectivity) as specific to Nuremberg rather than *innate* to ICL.

German positivists: A distinction based on doctrine

The third narrative is *internal to law*, the ‘legal scientist’s perspective’ – the lawyer whose task it is to explain law and ‘legal happenings’ resulting from legal processes, as part of, and in terms of, a coherent, autonomous system of law. This perspective is dominant in German-speaking legal academia (Werle 2007:34;fn153), where *Völkerstrafrecht* (equivalent terms exist in Portuguese, Spanish, French and Italian but not in English - Kreß diplomatically suggests ‘international criminal law *stricto sensu*’ {Kreß 2009; Vitzthum 2010:19}) is defined as ‘all norms of PIL, that directly create, exclude, or in another way regulate criminal liability’ (Werle 2007:34;fn153). In their narrative, *Völkerstrafrecht* must be distinguished from *Internationales Strafrecht* (Werle 2007:35). In the French literature the same distinction is made between *droit international pénal*, on the one hand, and *droit pénal international*, on the other.⁷ Thus, the international crimes within this definition are what authors writing in English may call ‘core crimes’ (war crimes, crimes against humanity, genocide and aggression) (Cryer 2010:4). The subtle difference in terms of the content of the enforcement narrative above, is that this includes CIL crimes that do not fall under the jurisdiction of the ICC or the international tribunals, such as certain specific crimes in internal armed conflicts (Werle 2007:942), and single occurrences of war crimes and crimes against humanity and the CIL norms on crimes in civil war (some of) which are included in the jurisdiction of the ICTR and ICTY. The core crimes covered in *Völkerstrafrecht* are *as a category* included in the ICC jurisdiction and defined there, however, *Völkerstrafrecht* generally includes custom and other sources, where these crimes are also regulated (Ferdinandusse 2006:11). Implicitly, Art 22(3) of the ICC Statute itself evidences that there exist other IL crimes than those listed in the Statute. The bigger difference is the motivation for the distinction, in that the ‘German’ approach includes as *Völkerrechtsverbrechen* all those crimes the substantive content of which is found in IL, regardless of where (or even whether) these crimes may be prosecuted. It is thus a distinction that finds its source in doctrine *per se*. The substantive content of the *Völkerrechtsverbrechen* should be found *directly* in IL itself. Whether a domestic constitution does or does not permit the direct application of the international norm containing the crime in domestic law does not affect the validity of the norm in IL (Werle 2007:111). Crimes such as torture (in the *Convention Against Torture* sense)⁸ or certain crimes against air traffic are thus not ICL *stricto sensu*, but ‘international criminal law in the meaning of internationally prescribed/authorized municipal criminal law’ (Schwarzenberger 1950:266; and Werle 2007:111).

In the German understanding, when *Völkerrechtsverbrechen* occur in the context of a systematic or massive attack or use of force, for which a collective, normally a state is responsible, the collective deed is the sum of all individual deeds (Werle 2007:4). *Völkerstrafrecht* thus forms part of a gapless system of IL, and borders the law on state responsibility. *Völkerstrafrecht* forms part of *Internationales Strafrecht* (lit. international criminal law), which includes all areas of criminal law that have international aspects (Werle 2007:52). This encompasses supranational criminal law (criminal law made by supranational organisations, which thus far does not exist), the law on the international cooperation in matters of criminal law (which includes e.g. extradition treaties), and national choice of law and jurisdiction norms (Werle 2007:54).⁹

A key aspect for the German approach is the *Individualisierung* of responsibility provided by ICL. Werle, moving outside of the *internal* perspective, explains how (*that*) this view of ICL correctly and appropriately mirrors our material experience:

[t]he individual allocation shows that international crimes are committed not by abstract entities such as states, but always require the cooperation of individuals. This individualization is important for the victims and their families because they have a right to the whole truth. The individualization of the perpetrators provides an opportunity to process their personal stake in the system crimes. Finally, it is important for society, because it rejects a theory of collective guilt. (Werle 2007:43)

No distinction: The catch-all ‘omnibus’ approach

Alternative narratives of ICL compared to the ones discussed above *do* start their account of its origins with the international norms applicable to piracy (e.g. Bantekas 2007:1). According to these, since the time of the Phoenicians and the Vikings piracy has been condemned as a crime against the law of nations (e.g. Ferencz 1995:1123). In this view, the activities of pirates, committing acts on the open seas that under most national jurisdictions would amount to crimes, led to the development and application of international rules (e.g. *ATCA* in the US; see also, e.g. *In re Piracy*). These histories also include early regulation of the slave trade, the opium trade, and other phenomena, *in addition to* the events and developments described above (Ferencz 1995:1126; Cryer 2005:57; Schabas 2007:10). In this narrative, slave trade and piracy were both crimes in CIL before treaties were adopted which included crimes with a similar content. Neither offences had (or have) specific international enforcement mechanisms attached to them, but ‘every state may seize a pirate ship ... and arrest the persons and seize the property on board’ (*In re Piracy*) according to treaty law the capturing state, and according to CIL, applying universal jurisdiction, *any* State may prosecute the pirate (generally: Guilfoyle 2008). The prohibitions, violations of which amount to crimes in this approach constitute *erga omnes* obligations, meaning that every state in the world has an interest in their observance. As the enforcement of the norms on piracy occurred only in national courts, *stricto sensu* authors argue that the CIL rule on piracy is merely jurisdictional (Cassese 2008: 28). Counter to this stands the ‘omnibus’ view that the crime of piracy is defined in IL (both the content of the crime and the fact that it is a crime), regardless where that norm may be enforceable. Crimes like piracy are thus considered ‘international crimes’ in this perspective regardless of enforcement, or even whether they are explicitly designated as ‘crimes’ or indeed ‘international crimes’ in international law (Bantekas & Nash 2007:6). Whether the ICL norm can be directly applied in a domestic court or needs the intermediation of a piece of domestic legislation does not detract from the ‘international’ nature of the crime (*ibid.*). This approach is the most *catholic* (Ratner 2008:12), pragmatic, problem-solving oriented approach.

As opposed to the German positivist approach which is to explain doctrinal inconsistencies or lacunae as deliberate exceptions or distinctions, the policy approach deals with a ‘messy’ reality by overriding inconsistencies in the name of a desired policy outcome. Such inconsistencies and lacunae exist, for example, where IL instruments do not clearly specify whether a crime in question is an ‘*international*’ crime (e.g. Art. 1 *Genocide Convention* 1949), or whether a crime is subject to international jurisdiction, to universal jurisdiction in national or international fora, or

whether the treaty only obligates or authorizes states to criminalize a certain event in domestic law (e.g. Arts. 5 *Organized Crime Convention*) and/or to prosecute or extradite a suspect (e.g. Art. 4 *Convention Against Torture*). In the omnibus approach, this situation is dealt with on a case-by-case basis, with authors coming to occasionally different conclusions (cf. lists of crimes considered ICL crimes in Van den Wijngaert 1996 and Steiner 2007:1136). Generally the crimes that Werle would designate as ‘international crimes’ are included.

ICL KNOWLEDGE, PRE-FAB CRITIQUES AND FORECLOSED KNOWLEDGES

Gramsci noted, ‘[n]eoliberal hegemony is not static and must continually renegotiate and reestablish itself as a result of complex social struggles and contradictions that emerge within, are shaped by, and shape, the structures and processes of capital accumulation’ (Gramsci 1971:xx). For ICL, this renegotiation becomes apparent in the description of the production of ‘pre-fab critiques’ and ‘foreclosed knowledges’ by ICL’s dominant knowledge.

ICL knowledge

Each of the four narratives described above contributes one of the vital elements of ICL knowledge. What we see is that the apparent disparities between the approaches, in fact serve to support a more or less coherent dominant knowledge. Each of the approaches fit into each other, complement each other. This linkage becomes apparent when authors acknowledge the validity of others’ narratives implicitly and occasionally explicitly.

First, Cassese’s approach provides ICL with the key element of the ideological justification, almost the emotional *need*, for intervention in ‘foreign’ jurisdiction ‘for the protection of higher values’ (Cassese 2008:11). This at once *universalizes* ICL, purports to serve us, our community interest and represent us, our collectively held values. It does not seem to matter that Cassese does not further explain what those values are and how we may discover them. Instead, in an attempt to defend and legitimate his position he uncomfortably moves into positivist territory, stating, ‘[t]he values at issue are not propounded by scholars or thought up by starry-eyed philosophers. Rather, they are laid down in a string of international instruments, which, however, do not necessarily spell them out in so many words’ (Cassese 2008:11).

Likewise moving outside of their comfort-zone, positivists would recognise that broad aspirational statements of ‘values’ are regularly found in preambles to treaties. Triffterer, for example, notes that those declarations found in the Preamble to the ICC Statute ‘echo, in the arena of international affairs, the loftiest aspirations of an ever advancing society’ (Triffterer 2008:6). The ‘humanitarian’ here shines through for positivists as both an explanatory (this is why we have ICL) as well as a legitimating factor.

Aside from such departures, the ‘German’ variant seems to approach law from a purely analytical, scientific perspective. It thus appears to be technical, value neutral. The differences and distinctions found by adherents to this school of thought may appear of limited value other than from the intellectual pursuit of studying law as a system. For

example, Kreß' remark that the ICC Statute contains crimes that are not in fact 'international crimes' (Kreß 2009) is likely to find resonance with only the smallest circle of specialists and would not likely concern even the ICC itself – something Kreß must realize. Yet, precisely such debates serve to give ICL *doctrinal credibility*.

Proponents of the 'omnibus approach', presumably like the ICC itself, display a more 'relaxed' approach to such questions, preferring to be more practice-oriented. Bantekas & Nash, for example, conceptualize ICL as a 'fusion of IL and domestic criminal law' and include in their textbook on ICL discussion of IOs' and NGOs' efforts on issues such as human trafficking (Bantekas & Nash 2007:1). Grant and Barker's *Deskbook of International Criminal Law* (a documents bundle, aimed at the ICL practitioner) contains conventions ranging from the 1926 Slavery Convention to the European Convention on Cybercrime (Grant & Barker 2006). Dugard and van den Wijngaert see ICL as a means for states to help each other in the application of their respective domestic criminal laws, necessitated by the internationalisation of crime – and thus come closest to interpreting ICL in the practical sense permitted in Schwarzenberger's critique (Dugard and van den Wijngaert 1996:1). Ramasastry, possibly at the pragmatic extreme of this group of scholars, expresses no view on the doctrinal nature of ICL, but asks only 'what it can do for us' (Ramasastry 2002).

Within the narrative focused on the enforcement mechanisms and possibilities of ICL, two strands can be detected: those that consider the court half full (e.g. Roht-Arriaza 2013) and those that consider it half empty (e.g. Schabas 2013). Both provide us with a history of how ICL was built up brick by brick, how this logical development *culminated* in an overarching ICC. What binds the two together, then, is that the ultimate desire, objective and mark of success is a *full court*,¹⁰ something they share first and foremost with the pragmatists. That ICL is a good thing, and should be improved, implemented and promoted, is not called into question by anyone within the four approaches.

Viewing these approaches as key 'ingredients' of today's ICL, we can see that ICL is a mixture (in varying quantities) of emotions, rationality, pragmatics and 'legal soundness' – altogether, an irresistible combination to lawyers, policy makers and the general public. The pragmatic element gives it flexibility, for example to develop new rules/policies in the 'war on terror' context, the positivist foundational narrative gives it 'academic kudos' while the enforcement focus supports efforts to strengthen institutions. Moreover, as ICL symbolizes 'justice' in IL (Mégret 2010:210, 220, 224, also Tallgren 2002a:580), it has become something to believe in: it 'carries a religious exercise of hope that is stronger than the desire to face everyday life' (Tallgren 2002a:593). Its crimes have become reasons (or rather, justifications) to invade other countries. *This* is why ICL is in fashion. It is something to propose as a remedy to a perceived problem (such as 'business in conflict' {e.g. Stewart 2013}), and, something to rally around, to continually work to improve. Most of all, ICL communicates to us, reassuringly, its *exceptionality* (e.g. Cassese's effort to exclude certain 'less grave' crimes), while also confirming to us, *these, these select international crimes, are the ills of international society*. All other problems pale in comparison or even disappear altogether.

The seeming contradictions between the four approaches described above do not pull apart, but rather serve to strengthen the cohesion of the dominant knowledge. They do so by implicitly accepting the main parameters of the knowledge, being silent as to the

ontology of the knowledge itself *and also*, by keeping much of the critical debate within the parameters of the knowledge itself.

Pre-fab critiques and foreclosed and subjugated knowledges

Above I noted that ICL is seemingly ‘critique-proof’. It would be more precise to say that critique rarely *sticks* or *is rarely radical*. This is not to say that there is no ICL critique – on the contrary, each of the four narratives outlined above generates its own specific set of critiques¹¹ and a lively academic debate around them (e.g. Van Sliedregt 2013). In this section I briefly outline the types of critiques produced by each approach. As opposed to such ‘constructive’ critiques, the critical scholar must generate critical knowledge (Marks 2003:Ch.6) or radical, transformative critique (Horkheimer 1972) thereby ultimately contributing to radical, systemic change. Here I offer some pointers towards such radical, transformative critiques.

The most commonly aired critique today is of ICL’s selectivity when it comes to situations and defendants (e.g. Cryer 2005:esp. Ch.5; Heller 2010). This critique – and more generally questions regarding effectiveness and how to improve the workings of ICL institutions is produced by the enforcement approach. Other critiques produced regard the inadequate representation or protection by one or another group in the judicial process (witnesses, victims, women; the focus on some crimes but not on others - e.g. Charlesworth 1999 on sexual crimes). In regards to these latter two points, rather than arguing for an improved regime of inclusion, a more intricate, transcendental or *radical* critique could be made, e.g. regarding the way women are constructed as victims (and thus denied agency and responsibility in conflict) in trials relating to sexual offences (e.g. Engle 2005).

The implication of the pre-fab enforcement critiques is that all ICL’s problems will be resolved when we have strong, professional international institutions that apply the rules equally to all. The latter is also a concern for the German positivists. Both, however, assume that it is a structural possibility for this to become reality: these approaches therefore enable a ‘progressive’ debate and practical activity on improving and expanding ICL’s institutions. Curiously, at the same time, it also allows for the argument *not* to expand ICL enforcement: we must not grow too fast. Crawford has suggested that the current limitation of the ICC’s jurisdiction is quite simply motivated by the risk of the court being ‘swamped’ otherwise (Crawford 2003:122).

Both enforcement and pragmatic approaches favour the question of ‘how can we...?’ over ‘why are we not...?’. This becomes clear when examining Crawford’s argument more closely. The ‘size’ of the court merely depends on the funding governments make available. An analogous argument on the domestic level is almost inconceivable. This is despite the fact that more generally, restrictions impeding ICL’s effectiveness are often considered to be financial. For example, in his monograph, Cryer lays the cause of selectivity at the dependence of courts on states’ contributions – although he expects this situation to change with time. Finance appears as an external ‘fact of life’ to ICL. Any more fundamental critique, such as that which asks why governments are generally outwardly very supportive of ICL, but leave the courts to struggle with very limited funds, would be un-constructive, and almost, *unsportsmanlike*. Already, Cryer states, ‘the [ICC] represents a quantum leap beyond what went before’ (Cryer 2005:231). Radical critiques could start from the bureaucratic and political decision-making processes behind the budgeting of the ICL institutions or even the drafting of

budgetary provisions pre-adoption. It is interesting for a start – something rarely mentioned in the literature, that the ICC and the other tribunals are expected to, and in fact do, actively seek private, including corporate, funding for their activities (ICC Statute; Del Ponte 2005; PICT Report *undated*). In the manner suggested by Orford (2012), a descriptive study of, for example, the independent auditor's recommendations as to the reinforcement and clarification of the roles of the Prosecutors and the Registrar of the ICC (ICC Financial Statement 2012:9-10) could reveal budgetary constraints on the prosecutor's independence.

Rather than expressing disappointment with the achievements of the ICC 10 years since it opened its doors, most authors of the JICJ special anniversary issue urge readers to display pragmatic realism, e.g. 'the hangover after the euphoria [of 1992] should be used to correct the sky-high expectations' (Roht-Arriaza 2013:537). Yet, our faith in ICL is sustained (at most, pending another 'Pinochet moment' {Schabas 2013}) by the fantasy that one day, the likes of GW Bush and Tony Blair or their equivalents in a different time, *will* face justice.

What Cryer and others overlook is the fact that the impunity gap which exists as a result of selectivity, is itself also created through ICL. The makers of ICL create its inclusions as well as its exclusions. By analogy to Marks' 'planned misery' in relation to poverty, we could term this 'planned impunity' (Marks 2011). The recognition of the planned nature of such impunity is also a recognition that selectivity cannot simply be 'corrected'. Why, by whom and how such impunity is planned and what mechanisms are in place to cause us to believe it can be overcome are questions ripe for a radical critique.

Similarly, the almost anti-intellectualist pragmatist perspective forecloses fundamental theoretical questions in favour of constructive critiques aimed at achieving maximum effectiveness in the face of immediate, urgent and 'real' problems ('while babies are dying'). In a particularly apposite example, Stewart offers an, in his view, urgent, pragmatic, corrective to theories of corporate liability that are 'not sensitive to the complexities of reality' (Stewart 2012:38). The theories he discusses however are themselves reflective, and reconstitutive of that very same reality that produces the corporate exploitation Stewart wishes to eradicate. Such eradication requires instead a radical critique of the corporation itself (Spicer and Baars, forthcoming 2015).

A second often-heard critique relates to doctrinal issues. The positivist approach invites debate over whether this rule or that concept is properly interpreted, or within the purview of ICL. Much of the debate surrounds the proper interpretation by the three main international tribunals of their constituent instruments. For example, debates abound about the ICC Prosecutor's actions in relation to former Sudanese President Omar Al-Bashir (e.g. Luban 2013). Here, problems are often seen to be due to the inexperience of the courts' officials and critiques can also be *ad hominem*. Others surround the progressive development in the courts of ICL doctrine where such matters are not covered by the instruments – and where problems are thus thrown up by ICL being a 'new' and as yet not fully developed discipline. One example here is the debate over the correctness or otherwise of the joint criminal enterprise (JCE) doctrine (e.g. JICJ Symposium 2006). Lost in doctrinal detail, the critiques produced by the doctrinal approach guarantees bigger questions will not be asked. Most importantly, it sets the 'legal scientist' – who rightly only concerns herself with

questions of legal doctrine - apart from the *politician* and thus denies lawyers' role in, amongst others, congealing capitalism.

Schwarzenberger's critique (as set out at the start of this essay) pulls the rug from under the preceding justifications of ICL. If domestic and transnational criminal law worked, we would not need ICL. If ICL, new ICL norms and institutions, are not in fact needed to try 'murderers' and 'torturers' then why do we call for it? Designating certain behaviour as an *international crime* to be tried in an *international forum* implies another motivation and purpose than immediate practical necessity. What ICL allows for, and what cannot be 'done' in any way fitting law's configuration as it stands, is to intervene in other states to criminalize through supranational law acts that are not criminal in the relevant domestic law (or not prosecuted domestically), and to allow for their prosecution externally (or post-regime). In other words, by 'lifting' certain behaviour, events and individuals into international law, ICL creates the option of *centralising* the administration and management of this regime according to the interests (or disinterest) of the global ruling class directly. When stripped of the practical justifications, what remains is the violence of ICL, made possible by its ideology - namely the way that ICL designates certain behaviour as '*international crimes which form an attack on the fundamental values of the international community*' (ICC Statute). This ideological element has very real practical uses: one is, (through ICL prosecutions) to create specific explanations of conflicts that exempt/exonerate the economic/capitalism (e.g. Baars 2013), often, in the process of what Klein has called the post-intervention 'human rights clean-up operation' (Klein 2007:126). Another is to form the diversion or Trojan Horse for the intervention in states that goes much further than ICL, for the purpose of 'regime change', 'civilisation', or, indeed, 'capitalisation'. Both we have seen in Nuremberg and Tokyo, and also in the contemporary context in e.g. the former Yugoslavia (Baars 2012; Baars 2013). ICL thus forms an important function in legitimating other parts of, and actions under, international law.

This function appears to be beyond enquiry. Cassese's refusal to engage in the question where ICL's universal values come from – insisting instead they must thus be self-evident to us, forecloses, most importantly, the *why* question – and with that, any ontological critique of ICL knowledge. As noted, Schwarzenberger's reservations regarding the need for an ICL still stand today. Yet, the question is no longer posed (Cryer 2005:2). ICL continues to be constructed, and 'believed in' (Tallgren 2002a:593; also generally, Koskeniemi 2007; JICJ 2013).

Ultimately the designation 'more harmful' used by Cassese appears to be Cassese's own, to reflect his moral indignation. Yet, aside from the harm caused, a transcendental critique might note that Cassese also seems to imply that the emotive reaction to his 'international crimes proper' ('so abhorrent as to offend the international community as a whole' [ICC Statute: Preamble]) is universally felt and absent (or less) in the case of other crimes, or, for example, in the face of mass starvation, tens of thousands of children dying preventable deaths each day (Beckett 2012).

Schmitt famously quoted Proudhon, '[w]hoever invokes humanity wants to cheat' (Schmitt 1996:54). The humanitarian narrative was reconstructed, re-invented, re-emphasized after Nuremberg (and Tokyo). Importantly, it allows assertion of the moral high ground, a positioning of us (good) vs them (bad). Ferdinandusse recognizes such

normative claims in ICL ‘as techniques in a hegemonic struggle for greater control between different actors in international law’ (Ferdinandusse 2006:158). As a starter for a transcendental critique, therefore, ICL can be said to play an instrumental role in the distribution of power among global actors.

A critique of the ‘humanitarian’ narrative of ICL may be made analogously to Marks’ critique of the concept of ‘humanitarian intervention’ (Marks 2006). Presenting ICL as a necessity for the benefit of humanity, against atrocities, works as a rhetorical move, the function of which is to justify *inaction* of the political field vis-à-vis certain situations of suffering, and to ignore the root causes (Marks 2006:344; Marks 2011). This critique can be made in both a constructive way (Miller 2008: ‘if only global political focus was less selectively pointed towards hot conflict/away from structural problems’) and a transgressively through interrogating why the global leadership’s finger is pointed in that direction and not another (e.g. Franzki and Olarte 2013).

The essential contradiction between the factual and normative in Miller’s critique is visible in a slightly different way also in Ambos: ‘the worldwide impunity for grave human rights violations leads to a factual accountability gap, the closure, or at least the narrowing, of which ICL has made as its highest priority task.’ The author adds in a footnote: ‘[i]t concerns a *factual*, not a *normative* accountability gap, because the impunity can be traced back not to a lack of norms on international crimes, but on a lack of States’ political will to prosecute’ (Ambos 2001:39). Why, one might ask (Ambos does not), would state leaders create a body of norms to do something, that they do not in fact *want* to do? It only makes sense, if (a) that body of law is not, in fact, designed to do this thing, or (b) it is so designed, but only in relation to specific others, or exceptional, acceptable situations, or, (c) if it is done in response to a felt need (or public call) to be ‘doing something’ and the creation of these norms alone, with the promise of enforcement satisfies this need. ICL gives us faith that ‘something is being done’. In a realist/transcendental critique, Akhavan posits, ‘[i]n contrast to the prevention of ongoing atrocities through military intervention or peacekeeping, and substantial postconflict economic assistance and social rehabilitation, resort to international tribunals incurs a rather modest financial and political cost. However, the attractive spectacle of courtroom drama, which pits darkness against the forces of light and reduces the world to a manageable narrative, could lead international criminal justice to become an exercise in moral self-affirmation and a substitute for genuine commitment and resolve’ (Akhavan 2001:30). Or, indeed, a cloak for the systemic root causes of ‘crimes’, which may be endemic to the current mode of production (Baars 2013).

A popular demand for justice for certain occurrences in certain places is thus produced based on criminal law’s visceral appeal (Tallgren 2002a:591), and deployed, with Cassese’s emotive discourse providing the legitimising element. Critique following an historical materialist methodology should serve to elucidate exactly how ICL ‘works’ in this regard. As Tallgren suggests, ‘[p]erhaps [ICL’s] task is to naturalize, to exclude from the political battle, certain phenomena which are in fact the preconditions for the maintenance of the existing governance; by the North, by wealthy states, by wealthy individuals, by strong states, by strong individuals, by men, especially white men, and so forth’ (Tallgren 2002a:595).

Commodified Morality

By way of offering an example of how a further radical critique of ICL could be made I now propose the concept of ‘commodified morality’ as a Marxist critique based on Pashukanis’ *commodity form theory of law* (see further Pashukanis 1978; Baars 2012). Pashukanis analysed the particular element that makes criminal law (‘CL’) so attractive, and seem so necessary, and as something we cannot do without. Applying the commodity form theory to criminal law on the domestic level, he notes ‘this [criminal] procedure contains particular features which are not fully dealt with by clear and simple considerations of social purpose, but represent an irrational, mystified, absurd element. We wish ...to demonstrate that it is precisely this which is the specifically legal element’ (Pashukanis 1978:177). The practical social purpose he refers to is the compensation of victims (which is often absent in CL in any case), the protection of society (which could be achieved better in other ways) or the treatment and rehabilitation of the offender (which is likewise not normally a priority) (Pashukanis 1978:176-8). The value in CL according to Pashukanis lies in its ‘morality’ – which is present both in its demonstrative function and in the ‘compulsory atonement’ it demands of the convicted criminal (Pashukanis 1978:185-7). Criminal law functions as the ‘remoralisation’ of society after the imposition of the cash nexus in the transition to capitalism (Marx & Engels 1848) and analogous to the ‘humanitarian makeover’ of IL in the mid-20th C (Baars 2012a). Once law has replaced human relationships with legal relationships, law is – or, law-makers are - there to inform us what is right. ‘Law creates right by creating crime’ (Pashukanis 1978:167). This *commodified morality*¹² tells us when to feel revulsion, or when to ignore or forgive, it is ‘canned morality’, served up in the ‘bourgeois theatre’ (Orzeck 2012) of international criminal trials. It can be fostered and instrumentalized – and develop on its own according to the logic of the market. What ‘commodified morality’ does, then, is shape our response to certain instances of suffering and not others (e.g. Libya vs Syria, Palestine, Bangladesh) as part of a broader liberal-capitalist hegemony.

Commodified morality thus produces ‘accountability’ in the Weberian sense – meaning that by means of ‘calculable law’ costs, benefits and risks of political actions can be calculated, managed, and even optimized (Weber 1982:277). In other words, commodified morality can be deployed to control and optimize public sentiment in this or that situation. As the independence of the ICC Prosecutor and thus the unpredictability of the court’s activity is a major factor in ICL’s legitimacy, in particular a study of the financial and other constraints on the Prosecutor could reveal the actual power relations behind the scenes of ICL. Akhavan has noted that ICL produces spectator’s justice (Akhavan 2013:530). The public become passive consumers of spectacle (cf. ‘opium for the masses’) and simultaneously producers and reproducers of commodified morality – and reproducers of ICL, at time baying for ICL blood. Despite, and at the same time because, ICL’s individualising function, it unites us (significantly, in this *pluralist* time) *with* the state/elite against the accused, and *away* from structural questions. It is this move, which is being resisted sporadically, that legal scholars, through radical critique, must work to subvert.

CONCLUSION

I have tried to show in this essay how lawyers and legal scholars have played an important role in the construction of the knowledge known as ICL. They have created an almost critique-proof system through its four building blocks, of which the most

important is the humanitarian. The ‘epidermic’ humanitarian aspect contains the values that ‘ennoble ICL’ (Tallgren 2013) and cause an overwhelming ‘oceanic feeling’ (Schabas 2013:549) that we could not possibly resist or definitely not politely, refuse. I have argued that each of the four approaches within ICL knowledge creates its own ‘constructive critique’ which serves to strengthen ICL and perpetuate both ICL’s and implicitly, as part of IL, capitalism’s *status quo*. In certain instances also, the ready-made constructive critique silences other critiques. While this descriptive process in itself should create its own knowledge, I have also pointed to various different ways in which our critique can transcend problem-solving and create critical knowledge.

In conclusion, I have argued, a comprehensive, transcending, emancipatory critique of ICL must start by again posing Schwarzenberger’s ontological question, and challenging ICL’s hegemonic knowledge through ‘re-telling’ the story of ICL, what ICL *is* and what it is *for*. Rather than playing a part in congealing capitalism, we should work towards dissolving it.

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Notes

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¹ Hartley Shawcross was the head of the British prosecution team Nuremberg.

² As, especially in ICL, there is no *clear* separation between academic and practising lawyers, it would be more accurate to say, lawyers acting in their academic capacity.

³ The fact that ICL was taken up as a project for (re-)construction suggests that similar material circumstances existed to the latter half of the 1940s that – in the dominant ideology - required some manner of intervention. From within the discourse of IL, the ‘need’ for an ICL can be deduced from its role as the missing piece of the IL project (as perceived pre-Nuremberg: Baars 2012).

⁴ On this term, see Marks (2003) 19-20.

⁵ I use ‘policy-oriented’ here in the ordinary sense of the words rather than to refer to the New Haven policy oriented school of thought.

⁶ No individuals were in fact prosecuted under these provisions, although some were tried by domestic German tribunals in the ‘Leipzig Trials’.

⁷ The distinction on the same basis also exists in the Portuguese, Italian and Spanish legal tradition (Cassese 2003 15). See also Hollán 2000, Schwarzenberger 1950.

⁸ For the view that these and other crimes attracting universal jurisdiction should be counted as ‘Völkerrechtsverbrechen’ see also, Dahm 2002:999.

⁹ In Werle’s view, the source of the universal jurisdiction principle for Völkerrechtsverbrechen is domestic law (Werle 2007:54).

¹⁰ For Roht-Arriaza this is a full domestic court enforcing ICL rather than a full ICC (id).

¹¹ In Marxist and Durkheimian terms these ought rightly to be called ‘criticisms’ rather than critiques (Marx xxxx; Durkheim xxx).

¹² Or what Shamir calls ‘market-embedded morality’, Shamir (2008); see also Baars (2011).