# The Politics of International Criminal Justice

## German Perspectives from Nuremberg to The Hague

Ronen Steinke

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Ronen Steinke, October 2011, Munich

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# *Introduction*

WHAT CAN STATE actors expect from courts of international criminal justice and what thus motivates them to support some of these courts with resources, while they ignore or even oppose other, similar ones? The entanglement of international criminal justice with interests of particular State actors has sparked great academic attention recently, especially since the fierce political debates surrounding the creation of the International Criminal Court (ICC). Much theory has already been generated, based primarily on the example of the United States. Most assuredly, this has led to some excellent analyses of the power politics behind US opposition to an independent ICC. Remarkably however, the power political interests associated with the political position *in opposition* to that of the United States – that is, Europe's advocacy of an entirely independent ICC – has remained almost a blind spot in analyses. This is where, it is hoped, this book will offer new insights.

One important motive for pursuing this line of enquiry, with a view particularly on Germany, is to allow for a fresh look at the still heated debates surrounding the ICC. Germany played a key role in pulling Europe towards the ultimately prevailing argument for an independent ICC in the 1990s, going against the initial reluctance of France and the United Kingdom, which, like the United States, preferred to envision the ICC as a court under the control of the UN Security Council. This places Germany in an interesting, exemplary position to anyone setting out to explore the politics at the heart of this entire debate. Germany today stands as an example for the European position in the debate on the ICC, which can be labelled cosmopolitan because it rests on the idea that international criminal justice should serve only humankind and not States (this is in contrast to the United States' sovereigntist position).[1] The political dispute between proponents and critics of the ICC's independence on either side of the Atlantic has often been portrayed as a clash between the particular interests of a Great Power – the United States – on the one side and the idealism of a democratic, post-Westphalian project on the other side. But are we really witnessing a struggle of brute power politics versus liberal values? Or which role, if any, do considerations of power political interest play in defining the policies at *both* ends of this spectrum?

[1] See, eg Jason G Ralph, *Defending the Society of States* (Oxford, Oxford University Press, 2007).

The example of Germany is particularly interesting not only because of Germany's exemplary position at one end of this spectrum, but also because of the particular way in which Germany came to its current position. Germany's politics of international criminal justice display a history of radical shifts. For many years, West Germany actually harboured what was perhaps the most rigorous criticism of international criminal law per se throughout western democracies. This is examined in detail in chapter two. In the early days of Germany's post-war democracy, German legal scholars and policymakers widely denied the legal validity of the Nuremberg Trials. These attempts to delegitimise Nuremberg were, for the most part, openly driven by self-interest, as has been analysed by numerous fine authors. It would take the better part of half a century for Germany's legal community to reconsider their position. Only in 1989, with Germany facing the crimes of the fallen communist regime in East Germany, would the mainstream of German policymakers and scholars officially accept the legal rationales established at Nuremberg (particularly regarding the principle of *nullum crimen sine lege*), thereby allowing German courts to put the crimes of communism on trial. Only from this point in time did Germany redefine its stance. And only after which in the 1990s did Germany become a supporter of the nascent system of international criminal justice at the level of the UN in general and of an independent ICC in particular.

Such a series of fundamental shifts in policy obviously raises the question what drove them?

*Liberal theories* in the study of international relations could view Germany as a prime example for the (belated) triumph of liberal rule-of-law ideals over the jealous protection of self-interest. In the perspective of liberal theories, 'The values and practices of domestic political life are apt to be preferred in international politics.'[2] In this vein, Samuel Huntington has sought to analyse much of American foreign policy as an attempt to transpose domestic successes – in particular, the security provided by the rule of law and contract – to the international level.[3] For Immanuel Kant, the classic liberal, such a transposition even presented the path to perpetual peace: Kant emphatically recommended a republican constitution for the international order.[4] Consequently, Jürgen Habermas, one of Kant's most eminent followers, analyses the recent political efforts towards the creation of an international criminal judiciary as welcome steps in exactly this direction (while Habermas asserts that this project is currently promoted primarily by Europe as the other half of the West, the United States,

[2] David H Lumsdaine, *Moral Vision in International Politics* (Princeton, Princeton University Press, 1993) 22.

[3] Samuel P Huntington, *The Soldier and the State* (Cambridge, Massachusetts, Belknap Press, 2002).

[4] Immanuel Kant, *Perpetual Peace* (first published in 1795)

has somewhat lost its commitment).[5] Adding to this, Gary Bass has argued that liberal democracies are presently more inclined to help build international criminal justice because they value the ideals of this judicial system more than illiberal States do.[6]

Perhaps unsurprisingly, this theoretical explanation is supported and promoted as an explanation for Germany's recent politics of international criminal justice by German policymakers themselves. Professor Claus Kreß, who has been a personal protagonist of Germany's politics of international criminal justice since the late 1990s, suggests that Germany 'made its peace with Nuremberg'[7] after the end of the Cold War to pursue a new, values-inspired approach to international criminal law, promoting the rule of law on the international level. Hans-Peter Kaul, perhaps the most important political mind behind Germany's advocacy of an independent ICC in the late 1990s, reinforces this idealist explanation by pointing to Germany's own atrocious history. Kaul argues that German guilt for unparalleled international crimes in the twentieth century inspired policymakers in the 1990s with a feeling of 'historical duty' towards the project of establishing a system of international criminal justice.[8]

*Neoliberal institutionalism theorists* have illustrated that the promotion of liberal ideals might not actually be as purely idealistic as it occasionally presents itself. This is because the interests of transnational economic actors (not only States) are best served by the integration and, ideally, the political and legal homogeneity of larger regions. Transnational norms reduce transaction costs. Thus, transnational actors benefit from them.[9] In this perspective, international tribunals, like all institutions that enforce a set of rules that transcend national borders, can be seen as political integrators: they serve to make different political systems more homogenous.[10] Yet, if this perspective is only seldom adopted with respect to international criminal justice, it is because the legal and political homogeneity promoted here is, or course, primarily in respect of the most basic guarantees of humanitarian law. Admittedly, there is the hope that international criminal tribunals will reduce the frequency and scope of

[5] Jürgen Habermas, *The Divided West* (Cambridge, Polity, 2006) 113–93.

[6] Gary J Bass, *Stay the Hand of Vengeance* (Princeton, Princeton University Press, 2000).

[7] Claus Kreß, 'Versailles – Nürnberg – Den Haag: Deutschland und das Völkerstrafrecht' (2006) 61 *JuristenZeitung* 986.

[8] Kaul interview (6 August 2009, The Hague)

[9] Robert O Keohane, *International Institutions and State Power* (Boulder, Westview Press, 1989) 3. See also Christian Reus-Smit, 'The Politics of International Law' in Christian Reus-Smit (ed), *The Politics of International Law* (Cambridge, Cambridge University Press, 2009) 18–21.

[10] Mark A Drumbl, 'Policy Through Complementarity: The Atrocity Trial as Justice' in Carsten Stahn and Mohamed El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge, Cambridge University Press, 2011) argues that the complementarity regime of the ICC coerces diverse States into subscribing to Western-style liberal criminal trials even where alternative, non-punitive mechanisms for dealing with crimes may hold a long tradition.

atrocities. All State actors can hope to gain from this.[11] However, in terms of the level on which international criminal tribunals take effect, theories about integrators such as the World Bank or the World Trade Organisation can nonetheless not easily be transposed.

Both of the aforementioned theoretical approaches – liberal theories and neoliberal institutionalism theories – explain State support for international criminal justice with the underlying support for certain international *norms*. This is different with the third line of theories.

*Realist theories* in the study of international relations work with the assumption that State actors – who, as a group, find no sovereign above themselves to enforce any rules and are therefore in a natural state of dangerous anarchy[12] – permanently competing with one another. Since altruistic idealism in international politics is a 'luxury that states can ill afford',[13] their policy choices with respect to international lawmaking will always reflect their pursuit of relative gain over other State actors. If particular State actors choose to devote their resources to distant international organisations – such as an international court – or to relinquish part of their sovereignty to international treaties, then this can only be explained by their expectation of some gain over others.[14] To John Mearsheimer, for instance, 'institutions are basically a reflection of the distribution of power in the world' and they 'are based on the self-interested calculations of the great powers'.[15] Specifically in the field of international criminal justice, this means that States will support particular tribunals insofar as they expect to gain from them, while they then oppose other tribunals that are not deemed advantageous despite the fact that all of these tribunals enforce the exact same abstract norms. As Frédéric Mégret nicely summarises, 'The conventional explanation from a realist perspective since Nuremberg, put simply, is that states create international criminal tribunals to legitimize their goals and because they think or know they can control them.'[16]

This realist perspective is often used to explain why the United States support the UN ad hoc tribunals for the former Yugoslavia and Rwanda (neither of which target US nationals), while they oppose the ICC (which could, in theory, target US nationals). By contrast, Germany's shift towards the 'cosmopolitan position', as described above, appears particularly puz-

[11] Benjamin N Schiff, *Building the International Criminal Court* (Cambridge, Cambridge University Press, 2008) 4–9.

[12] Hedley Bull, *The Anarchical Society* (Houndmills, Palgrave, 2007).

[13] Bass, *Stay the Hand* (n 6) 17.

[14] See for instance John A Vasquez, *The Power of Power Politics* (Cambridge, Cambridge University Press, 1998). For a lively discussion, see Jeffrey W Legro and Andrew Moravcsik, 'Is Anybody Still a Realist?' (1999) 24 *International Security*.

[15] John J Mearsheimer, 'The False Promise of International Institutions' (1994) 19 *International Security* 7.

[16] Frédéric Mégret, 'The Politics of International Criminal Justice' (2002) 13 *European Journal of International Law* 1267.

zling from this realist perspective. While Germany assuredly made an effort in the 1990s to gain additional international influence through a permanent seat on the UN Security Council, Germany also argued against that political body maintaining any control over international criminal justice. When it came to debating the creation of the ICC, Germany was a strong voice within a group of States which advocated freeing the court of any such political control. That would minimise the influence of all States, including Germany itself. How could this improve Germany's position in relation to its competitors? Does realist theory – at least in this particular case – thus stand entirely corrected? Did the pursuit of political interests, which had previously been so closely connected to the entire subject within Germany, simply end in the 1990s, perhaps due to a new, more idealist generation taking the political stage in Germany, as several German protagonists of this development in the 1990s suggest? Or had the shape of their rational interests merely changed and with it the preferable strategy for the pursuit of these interests? These questions are the focus of this book.

The book begins by first gaining clarity with respect to the central term of political interest (chapter one) and then proceeds in the next four chapters (chapter two through chapter five) to chronologically examine (from 1949 to present day) the role that such interests played in shaping Germany's politics of international criminal justice.

Chronological accounts of the politics of international criminal justice often begin in Versailles or Leipzig, ie at the end of the First World War. By contrast, I have chosen to begin my analysis in 1949 with the founding of the same democratic West German State that still exists today. This is due to the particular focus of my enquiry. My aim is to analyse the various shifts in Germany's politics of international criminal justice over time. For this, it is helpful to refer to one and the same continuous political framework. To observe the fact that political debates can take a sharp turn when the participants in these debates are exchanged is not as remarkable – or as intriguing – as to observe such changes of paradigm within one and the same political context. For this reason, my analysis also does not focus on the debate in East Germany, which was politically split from the rest of the country from 1949 to 1989. Instead, it begins with the early days of the West German democracy and it follows policymakers and the legal community from there into the Germany of today. Along the way, I obviously pay more attention to certain episodes than to others, namely: Germany's reactions to Nuremberg as an important starting point in shaping Germany's particular perspective on the subject; the debate within Germany over the East German trials and with it the first change of (legal) paradigm in the early 1990s; and the subsequent support and active promotion of the International Criminal Tribunal for the former Yugoslavia (ICTY) and ICC by Germany. By contrast, Germany's involvement in

other tribunals – such as the UN tribunal for Rwanda, the Cambodian Extraordinary Chambers in the Courts of Cambodia (ECCC), or the Special Tribunal for Lebanon where a German national even briefly served as Chief Prosecutor – did not mark important milestones in Germany's overall politics of international criminal justice; therefore, they are not central to my particular inquiry.

## SOURCES

In addition to literature available in the public domain, I was able to obtain copies of files from the archive of the German Ministry of Foreign Affairs, documenting the Ministry's communications throughout the 1990s regarding the ICC. These documents are available through the German Freedom of Information Act (*Informationsfreiheitsgesetz*). Although they offer a fascinating first-hand source, it should be noted for accuracy that there is no way of verifying how comprehensive the copies are that one receives. The Ministry of Foreign Affairs preselects documents before sharing them.

More importantly, I am grateful to a number of key participants and intimate observers of Germany's politics of international criminal justice, who kindly agreed to be interviewed in connection with this project. These discussions were insightful, thought-provoking and highly enjoyable. Any errors, of course, remain my own.

- Kai Ambos was a member of Germany's delegation to Rome and is presently Professor of International Criminal Law at the University of Göttingen (interviewed on 15 September 2009 in The Hague).
- Hans-Jörg Behrens was a member of Germany's delegation to PrepCom and Rome and is presently Deputy Head of the International Law Department at the German Ministry of Justice (interviewed on 15 April 2010 by telephone).
- Serge Brammertz was formerly Deputy Prosecutor of the ICC and presently the ICTY Prosecutor (interviewed on 14 October 2009 in The Hague).
- Josef Brink is presently Head of the Division for International Relations and Rule of Law Dialogue at the German Ministry of Justice (interviewed on 6 July 2009 in Berlin).
- Eberhard Desch is the Head of the Division of International Law at the Germany Ministry of Justice and was a member of Germany's delegation to Kampala (interviewed on 22 September 2010 by telephone).
- Hans-Peter Kaul was formerly Head of the International Law Department at the German Ministry of Foreign Affairs, as well as the Head of the German delegation at Rome and is presently judge and

Second Vice President at the ICC (interviewed on 6 August 2009 in The Hague).

- Claus Kreß was a member of Germany's delegations to Rome and Kampala and is presently Professor of International Criminal Law at the University of Cologne (interviewed on 6 September 2010 by telephone).
- Christian Tomuschat was formerly a member of the UN's International Law Commission and an adviser to the German Ministry of Foreign Affairs and is presently Professor emeritus of International Law at the Humboldt University in Berlin (interviewed on 27 October 2009 by telephone).
- Peter Wilkitzki was formerly Head of the Criminal Law Department at the German Ministry of Justice and a member of Germany's delegations to PrepCom and Rome (interviewed on 24 April 2010 by telephone).
- Andreas Zimmermann was a member of Germany's delegations to PrepCom and Rome and is presently Professor of International Law at the University of Potsdam (interviewed on 18 August 2010 by telephone).

# 1

# *The Politics of 'Historical Truth': An Outline*

WHAT CAN STATE actors expect from courts of international criminal justice? The more traditional penological goals, which are associated with criminal justice in the domestic realm, are less realistic in the international context. As Robert Sloane rightly notes, 'Justifications for punishment common to national systems of criminal law cannot be be transplanted unreflectively to the distinct legal, moral and institutional context of [international criminal law]'.[1] Systemic crimes, which international criminal justice deals with, are typically committed repeatedly over a long period of time, on a large scale and by numerous perpetrators; yet not all, and not even most cases, can realistically be prosecuted in the international forum. For purely practical reasons,[2] only a tiny fraction of cases from one conflict situation can be introduced into the international forum.[3] The system's promise of deterrence is, therefore, weak.[4] Additionally, since international criminal law, by definition,[5] targets persons who acted in conformity with the rules of their particular system for as long as it was in place, rehabilitative goals – at least in a conventional sense – would appear somewhat misplaced

[1] Robert D Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law' (2007) 43 *Stanford Journal of International Law* 40.

[2] Compare eg the former President of the International Criminal Tribunal for the former Yugoslavia, Theodor Meron, *The Humanization of International Law* (Leiden, Martinus Nijhoff, 2006) 141, illustrating the 'more mundane institutional and procedural problems' of atrocity trials: 'Often, the crimes charged, connected to entire military campaigns, occurred over the course of months or years, across many locations, and involved many defendants. The Milošević case offers one illustration. It is not typical, but it is not as far from the norm as one might think. Milošević is actually only one of four defendants who were originally indicted together. With 66 counts, hundreds of witnesses, tens of thousands of pages of documents – most of which must be translated from Serbo-Croatian into French and English, the Tribunal's working languages – trials are extremely complex.'

[3] This is highlighted by Payam Akhavan, 'Justice in The Hague, Peace in the former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal' (1998) 20 *Human Rights Quarterly* 774–77; also Luc Côté, 'Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law' (2005) 3 *Journal of International Criminal Justice* 165.

[4] Sloane, 'Expressive Capacity of International Punishment' (n 1) 71–75.

[5] Compare Kai Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (Berlin, Duncker & Humblot, 2002) 50.

here.[6] Finally, retribution remains painfully incomplete when the overwhelming majority of mid-level perpetrators will, inevitably, not be processed in the international forum at all.

As a result, many commentators point instead to the more communicative, educative function of international criminal justice: the expressive value of its judgements.[7] This goal has been described as the 'least controversial' function of international criminal tribunals[8] and this is true in the sense that most commentators would probably agree that it *can* work. Yet, what exactly is it that these trials express?

In this first chapter, I argue that the authoritative confirmation of a certain narrative of 'historical truth' is central to this system's effects and that, for a number of reasons, this narration can never simply result out of a neutral act of deduction but instead always depends on a series of sensitive policy choices to be made by the court of international criminal justice. The chances of making such choices with any claim to quasi-mathematical objectivity are regrettably slim where 'historical truth' and proportions of guilt are concerned. Political actors on all sides of a conflict will then typically hope for a tribunal to sway in their direction.

## 1. 'HISTORICAL TRUTH' AS A GOAL AND A PROBLEM

Two basic messages which every court of international criminal justice expresses through its trials are distinguishable.[9] While the first is more commonly emphasised by idealist proponents of international criminal justice, the second should prove more interesting to power political stakeholders (and thus to our enquiry).

### Combatting Impunity: Where All Trials are Similar

*First*, atrocity trials are hoped to express a symbolic protest against a 'culture of impunity',[10] which domestic penal systems (which are better

[6] Frank Neubacher, Kriminologische Grundlagen einer internationalen Strafgerichtsbarkeit (Tübingen, Mohr Siebeck, 2005) 423.

[7] See, eg Sloane, 'Expressive Capacity of International Punishment' (n 1) 70; Mark A Drumbl, 'The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Law' (2007) 75 *George Washington Law Review* 1182, 1195.

[8] Gary J Bass, *Stay the Hand of Vengeance* (Princeton, Princeton University Press, 2000) 302. Assuredly, it is not usually the first to be named among the numerous ambitious goals associated which international criminal justice. Compare eg Sloane, 'Expressive Capacity of International Punishment' (n 1) 45, who notes that these 'include combating impunity, individuating guilt, promoting accountability, contributing to the reestablishment of international peace and security, deterring future atrocities, achieving retribution, creating an accurate historical record, and fostering both national and international reconciliation.'

[9] See also Drumbl, 'The Expressive Value of Prosecuting and Punishing Terrorists' (n 7) 1182, 1195.

[10] See, eg Akhavan, 'Justice in The Hague' (n 3) 743, 748.

equipped to try large numbers of cases) are then hoped to respond to. Such proceedings are hoped to restore (or to create for the first time) confidence in the basic norms of international humanitarian law. Commenting on the International Criminal Tribunal for the former Yugoslavia's (ICTY) early proceedings in 1997, then New York law professor Theodor Meron noted, 'Without the establishment of the tribunal and the example of the Tadić trial, the *perception* that even the most egregious violations of international humanitarian law can be committed with impunity would have been confirmed' (emphasis added).[11] To Meron, the strong international interest in this trial was based on its enabling the international community 'authoritatively to disavow that conduct, to indicate symbolically its refusal to acquiesce in the crimes'.[12]

In even clearer terms, Payam Akhavan, working at the time as Legal Advisor at the ICTY Office of the Prosecutor, noted in 1998, 'The punishment of particular individuals . . . becomes an instrument through which respect for the rule of law is instilled into the public consciousness.'[13]

This, however, is what all trials express, quite regardless of which crimes and perpetrators they target. A generic interest in symbolically reinforcing international humanitarian law – the set of norms to which international criminal law per se gives teeth – can hardly explain why State actors would support one trial but not another or support one tribunal but not another.

## Establishing 'Historical Truth': Where Each Trial is Different

*Second,* tribunals also reconstruct historical events in a particular way. They generate a narrative on 'historical truth'. Compared with domestic trials, 'International trials have a better chance of becoming the kinds of "popular trials" that define a debate' on one particular historical complex, as Mark Drumbl notes. The particular value of these trials lies in their serving 'as intergenerational "signposts" in history'.[14] In this respect, naturally, every trial expresses a different message of its own.

This presents us with a paradox. On the one hand, this second element to expressive trials (their clarification of 'historical truth') is no less soundly idealist than the first element (the reinforcement of international humanitarian law in general). To reveal the 'truth' is, of course, a noble goal and it will often even be the most a tribunal can do for surviving vic-

[11] Theodor Meron, *War Crimes Law Comes of Age* (Oxford, Oxford University Press, 1998) 283. The passage is a reprint of a 1997 article.

[12] Sloane, 'Expressive Capacity of International Punishment' (n 1) 71.

[13] Akhavan, 'Justice in The Hague' (n 3) 749.

[14] Mark A Drumbl, *Atrocity, Punishment, and International Law* (Cambridge, Cambridge University Press, 2007) 175.

tims. Commentators have pointed to the phenomenon of revisionist denial with which victims will often be faced in post-conflict scenarios,[15] noting that the official confirmation of 'truth' may help to defend the injured against such additional insult.[16] The authoritative confirmation of 'historical truth' was therefore openly presented as a central component of the newly-created UN tribunals' ideology at the beginning of the 1990s.[17] '[I]t is only the truth that can cleanse the ethnic and religious hatreds and begin the healing process', stated Madeleine Albright, then US Ambassador to the UN, during the Security Council deliberations that led to the establishment of the ICTY in 1993.[18] In what was perhaps the clearest expression of this idea, the UN even allowed the ICTY to hold courtroom hearings where the accused remains at large, which means that these proceedings are solely for the purpose of creating a historical record in what is almost a trial in absentia, albeit without a sentence.[19] In hindsight, some scepticism is surely in place as to how much the ICTY's 'truth-telling' has effectively contributed to pacifying the former Yugoslavia.[20] At least for some of the victims, though, it has doubtlessly had meaning.

On the other hand, any dedication to establishing the 'historical truth' of a conflict obviously raises the question of whose 'truth'. After a conflict, the 'truth' of what has transpired, of which party bears which part of historical responsibility and of who has victimised whom is usually a controversial matter. After all, this is the very reason why the tribunal's task of establishing a historical record is important in the first place. And the harder it is to see through a chaos of misinformation and denial, the larger the victims' need for an authoritative clarification becomes.

[15] See, eg Gerhard Werle, 'Menschenrechtsschutz durch Völkerstrafrecht' (1997) 109 *Zeitschrift für die gesamte Strafrechtswissenschaft* 822.

[16] Frank Neubacher, 'Strafzwecke und Völkerstrafrecht' (2006) 59 *Neue Juristische Wochenschrift* 969.

[17] Akhavan, 'Justice in The Hague' (n 3) 765–66.

[18] UN Doc S/PV.3217 (25 May 1993).

[19] Compare Rule 61 of the ICTY Rules of Procedure and Evidence. Available at www.icty.org. A series of Rule 61 hearings was held in 1996 particularly to shed light on the massacre in Srebrenica, inter alia as a case against Radovan Karadžić and Ratko Mladić (IT-95-05/18). For a vivid account, see Pierre Hazan, *Justice in a Time of War* (Station, Texas A&M University Press, 2004) 76–89. After taking over as ICTY Prosecutor in 1996, Louise Arbour stopped this practice. See ibid 96.

[20] It has been noted that the local media have seldom taken an interest in communicating the findings of the ICTY accurately. Carla Del Ponte, *Madame Prosecutor* (New York, Other Press, 2009) 333, for instance, complains that '[t]he prosecution of the Bosnian Croat leadership . . . would garner little attention beyond doses of disinformation administered through Croatia's press.' Moreover, the interest of local political actors in reconciliation is, of course, not automatically fuelled by such 'truth'. See also Sloane, 'Expressive Capacity of International Punishment' (n 1) 84.