**The trial’s the thing:**

**performance and legitimacy in international criminal trials**

**Abstract:**

This paper explores the relationship between performance and legitimacy in international criminal trials through the lens of the International Criminal Court. I begin by analysing the deployment of theatrical tropes by different legal scholars, such as Hannah Arendt, and David Luban, arguing that such analogies serve as a policing mechanism for the author to distinguish what they perceive to be the ‘good’ or ‘bad’ theatre of the trial. I then move beyond analogy, drawing on legal sociology and performance theory to read the criminal trial as ritual-like, normative performance. Using the ICC as a case study, I will examine how performance is deployed to create, reinforce and naturalise the role of the ICC in international criminal law. Through focusing on issues of performance and community I offer a different way of looking at what may constitute legitimacy in international criminal law from that which is offered by other legal scholars.

**Key Words**: Cultural Criminology; Socio-legal Studies; International Criminal Justice; Theatre; Performance; Ritual;

A trial resembles a play in that both begin and end with the doer, not with the victim. A show trial needs even more urgently than an ordinary trial a limited and well defined outline of what was done and how it was done. In the centre of a trial can only be the one who did - in this respect, he is like the hero in the play – and if he suffers, he must suffer for what he has done, not for what he has caused other people to suffer (Arendt 1963: 8).

The curious feature about ICL [international criminal law] is that in it the emphasis shifts from punishment to trials. Thus it is often said that the goal of ICL lies in promoting social reconciliation, giving victims a voice, or making a historical record of mass atrocities to help secure the past against deniers and revisionists. The legitimacy of these goals can be questioned, because they seem extrinsic to purely legal values. But what is often overlooked is that, legitimate or not, they are goals of trials, not punishment. Indeed, the punishment of the guilty seems almost an afterthought (not to them of course). Perhaps that is because, as one often says, no punishment can fit crimes of such enormity; or because compared with their trial, their punishment lacks didactic or dramatic force (Luban 2008).

When Hannah Arendt made the above comments based on her observation of the trial of Adolf Eichmann in 1963, she articulated a question central to international criminal law (leading to what Martti Koskenniemi termed the “constitutive paradox” (2002, 1): to what extent does, can, or should international criminal trial process incorporate the perspective of the alleged victims? For Arendt, the inclusion of multiple witness testimonies at the Eichmann trial offering stories not directly relevant to the charges – Israeli Attorney General Gideon Hausner’s deliberate emphasis on the “living record of gigantic human and national disaster”– detracted, quite literally, from the legitimacy of the proceedings (1966: 291). In her opinion, the focus of any criminal trial, and particularly a ‘show trial’ such as Eichmann’s, must be on the individual criminal accountability of the defendant. Arendt’s attitude is in step with the body of international criminal law that focuses on individual criminal accountability for the “most serious crimes of concern” (UN Rome Statute 1998, Preamble).[[1]](#endnote-2)

In addition though, and key to this paper, is that in making her point Arendt reaches for theatrical allusions to begin to articulate what she feels a criminal trial (either domestic or international in its scope) should and shouldn’t be.[[2]](#endnote-3) Arendt does not argue that trial process *shouldn’t* be theatrical; rather she uses analogy to differentiate between the ‘good’ theatre and the ‘bad’ theatre of the trial. Arendt uses Aristotelian metaphor—that of classical dramatic structure—to set up the defendant as the protagonist in criminal trial process. In so doing, she aligns the ideal international criminal trial and classical theatre, with its focus on didacticism, catharsis and its emphasis on the education of the audience.[[3]](#endnote-4) Her homology between classical theatre and an ideal trial process sets up the possibility of corruption if a trial becomes overly show-y: whilst for Arendt, all trial processes have theatrical qualities, the more the trial becomes a show, the less it can fulfil its function as legal process, what other writers have identified as the potential of the courtroom to “degenerate into mere theatre” (Thompson and Dillon, 1875). This happens when the trial is no longer *like* a theatre, but rather *is* a theatre.[[4]](#endnote-5)

Whilst this use of theatrical analogy may seem peripheral to discussion of international criminal law, my purpose throughout this paper is to do two things: firstly, to show simply that it matters. How theatrical allusion is used to position the purpose of any criminal trial is frequently revealing about the perceived roles occupied by different participants: these assumptions go to questions of fairness, access, and participation. This is obviously the case in international criminal law where, as above, there is an on-going debate about the potential incorporation of victims’ stories. Some scholars deploy theatrical analogy at this juncture to criticise such an inclusion as being where the trial risks becoming some kind of show. But this is a reductive way of understanding what ‘show’ can mean in relation to the trial. All trials are show trials. As with Arendt, all this accusation tends to mean is that for the author in question the trial has gone from ‘good’ theatre to ‘bad’ theatre. And no one can agree on where that line is or should be in international criminal law.[[5]](#endnote-6) For example, whilst Arendt is concerned that the concentration on victim testimony draws disproportionate attention to the trial as a thing in itself, this is precisely what David J Luban identifies as its “didactic and dramatic force”.[[6]](#endnote-7) For Luban it is the consciously public, performative dimension of the international trial process that sets it apart from domestic criminal trial. For him the trial as a ‘show’ is entirely the point.

This leads to the second, and primary purpose of this paper: what is the relationship between performance and legitimacy in international criminal trials? Arendt and Luban see theatricality as an embellishment and therefore (either positively or negatively) not strictly legal; my point throughout is to show that the relationship between the international criminal trial and performance is not peripheral, but central. I will argue that performance is essential for the legitimation of the (relatively) new concept of international criminal law [ICL] and the very new concept of a permanent International Criminal Court [ICC] that can adjudicate on these matters. Moving beyond analogy, I will draw on legal sociology and performance theory to read the criminal trial as a ritual like activity and a normative performance. Using the ICC as a case study, I will examine how performance is deployed to create, reinforce and naturalise the role of the ICC in international criminal law and international criminal law itself in what has been termed (not without difficulty) the ‘international community’. [[7]](#endnote-8) Through focusing on issues of performance and community I hope to offer a different way of looking at what may constitute legitimacy in international criminal law from that which is offered by other legal scholars.[[8]](#endnote-9) This way of looking concentrates on the importance of the trial as an event. As Luban (almost) said, the trial’s the thing.

In this paper I use the term performance rather than theatre to distinguish my argument from the traditional pejorative connotations of ‘theatrical’ as employed by other writers. As evidenced with Arendt, ‘theatricality’ tends to rely on a narrow understanding of the theatre.[[9]](#endnote-10) This is particularly the case in legal literature where legal comparisons of law and theatre tend to rely on a traditional stage, a dramatic script and, most notably, the lawyer as the protagonist (Leader, 2007). My usage of performance is, instead, intended to encompass a broader range than this model. Lowell Lewis notes that only by defining what performance *isn’t* may we maintain the term as a ‘useful analytical tool’ (2013: 3). As Richard Schechner argues, “behaviour is Performance Studies’ ‘object of study’” (2002:1). As such, throughout this paper, I am delimiting what I believe to be the role of performance in the international criminal trial.

**The Trial as Performed Ritual:**

Every ceremony is par excellence a dramatic statement against indeterminacy in some field of human affairs. Through order, formality, and repetition it seeks to state that the cosmos and social world, or some particular small part of them are orderly and explicable and for the moment fixed. A ceremony can allude to such propositions and demonstrate them at the same time (Falk Moore and Myerhoff ,1977: 17).

In the field of legal anthropology and legal sociology, a trial is not primarily about individual legal accountability. Rather, scholars in this area emphasize the trial as a communal ritual: where a private dispute is taken over by the state and witnessed by a community. A ritual, in this context, may be loosely defined as a performed social process within a marked out discursive and reflexive space within a community (Pyle, 1984: 392). This is in keeping with anthropologist Victor Turner’s schema of ritual and its role in social life in *The Anthropology of Performance*. Turner argues that the pattern of a community over time is essentially ‘dramatic’, calling it ‘social drama’. Turner divides social dramainto the four stages of disruption in the community’s on-going existence: breach, crisis, redress, and either reintegration or irreversible schism if the redress fails (1988: 182; 1990: 181). Turner argues that it is the redressive stage from which all ritual and performance arises. The ritual itself, Turner argues (following Van Gennep), consists of three parts: separation, liminality and re-aggregation (Van Gennep, 1977: 11). A ritual succeeds only if the participant(s) is removed from normal life, usually through entry into a specific space which takes them out of temporality. In this space for a ritual to work, a state of ‘liminality’ must be attained. The liminal phase involves complex symbolism and is a space where the community “tells stories about themselves”.

Whilst this is seemingly quite a traditional reading of Turner’s schema, I take into account Lowell Lewis’s more recent (2013) scholarly work, which refines our understanding of Turner in clearly distinguishing ritual and ritual-like events from play derived performance. Lewis’s distinction is of particular value here as in doing so, Lewis underlines the comparative importance of the former. The criminal trial is, if not actual ritual, certainly ritual-like. Following Lewis’s updated schema for what defines ritual derived performance, the criminal trial concerns events of the highest importance to wider society, it is done in service of a ‘higher authority’: that of the Law, and it involves a genuine transformation of status (Lewis, 2013: 58). This sounds like a kind of value judgement, and of course it is, but it is always important to recall that when discussing the criminal trial weare talking about the highest of high stakes: the labelling of an individual as a criminal, the potential deprivation of an individual’s liberty, and the administering of state-sanctioned punishment.

Indeed it is only when considering the severity of the potential outcome of the ritual activity that legal sociologists and Turner’s schema part company. Whereas Turner talks about ‘re-aggregation’ as the final step in a successful ritual, for many legal sociologists the final step is the effective social out-casting of a convicted offender. Howard Garfinkel’s influential 1956 article “Successful Status Degradation Ceremonies” argues that the purpose of the trial is to ritually ‘cast out’ an offender through the transformation of their status to that of an outsider. Garfinkel’s work has consequently been particularly influential for scholars who study the sociology of deviance.[[10]](#endnote-11) Garfinkel’s model of the trial as ceremony shares marked similarities with Turner (Garfinkel 1956: 422-423). Crucially, both models are all-reliant on the active ‘witnessing’ of the community in the status transformation:

The public denunciation effects such a transformation of essence by substituting another socially validated motivational scheme for that previously used to name and order the performances of the denounced. It is with reference to this substituted, socially validated motivational scheme as the essential grounds, i.e., the first principles, that his performances, past, present, and prospective, according to the witnesses, are to be properly and necessarily understood. Through the interpretive work that respects this rule, the denounced person becomes in the eyes of the witnesses a different person (1956: 422).

Whilst Garfinkel’s use of the term performance is different to the context in which I apply it here (Garfinkel uses the term from Parson and it relates to individual behaviour: ‘what a person may be expected to have done and to do’, whereas I am talking about the trial itself as a form of performance), his article hinges on the notion of the ‘total identity’ – it is the ‘social actor’ and his or her ‘total identity’, not the private individual, effected by ritual transformation. Most importantly, this ritual transformation only happens through the observation of others. Transformation of status is only effective if the ‘denounced’ is understood to be different in the eyes of the witnesses*.* This underlines directly the link between performance and legitimacy: rituals must be seen to be done. Whilst the transformation of status happens *to* an offender, it happens in the eyes ofthe witnesses, and it is this witnessing that gives ritual its potency as a redressive and didactic form that moves beyond simple conflict resolution.

For both Garfinkel and Turner, no trial, then, is simply about the remedy of a particular harm; it is also part of a broader pattern of social regulation.[[11]](#endnote-12) But whilst for Turner, ritual is of course conservative, for Garfinkel, ritual is darker. As Braithwaite and Mungford (1994) put it, Garfinkel’s ritual stages might best be understood as disapproval, degradation and exclusion. As such, Garfinkel and some legal scholars are more explicit than many performance scholars about the degree of violence potentially involved in these kinds of ritual.[[12]](#endnote-13)

This emphasis on the productive effects of violence of course brings us to Foucault’s work in *Discipline and Punish*: “We must show that punitive measures are not simply ‘negative’ mechanisms that make it possible to repress, to prevent, to exclude, to eliminate; but that they are linked to a whole series of positive and useful effects which it is their task to support” (1975: 24). For Foucault the ultimate goal of juridical process is the exploitation of the “political technology” of the body. It is the body that is crucial in constructing legitimacy and this process is always violent. The body is forced to “perform ceremonies, to emit signs” because “it is always the body that is at issue—the body and its forces, their utility and their docility, their distribution and their submission” (1975: 25). The criminal trial exemplifies this through the apparently voluntary submission of a defendant to the process (which is of course not voluntary at all). When a defendant walks into a courtroom, for example, this is a means by which “the Law”, via the state, asserts authority over an individual. But this “power is exercised, rather than possessed”. (26) It is the repeated walking into the courtroom of the defendant that constructs the process itself as legitimate, and it is reliant on repeated performance. In this way each individual trial does not reflect the authority of the law; rather it helps to manufactures it (Leader: 2007).

The two important strands I want to take from the anthropological and sociological writings above are, firstly, fundamental to the conception of effective redress is the acceptance by the concerned community that the process of adjudication is legitimate. Secondly, this legitimation is realised performatively. For the trial to be an effective ritual (or ritual-like activity) it requires the courtroom to be a communal sacred space both removed from daily life but still a recognisable part of that community. But a space cannot be sacred in and of itself, it can only be sacred if a community *believes* that it is: this belief is based on the fact that it has been done before and will be again. Performance Studies scholar Elin Diamond remarked:

While a performance embodies traces of other performances, it also produces an experience whose interpretation only partially depends on previous experience. Hence the terminology of ‘re’ in discussions of performance, as in *re*member, *re*inscribe, *re*configure, *re*iterate, *restore*. ‘Re’ acknowledges the pre-existing discursive field, the repetition within the performative present, but ‘figure’, ‘script’, and ‘iterate’ assert the possibility of something that *exceeds* our knowledge, that alters the shape of sites and imagines new, unsuspected subject positions (1995: 2).

In other words, no trial is the same, but each performance can only be interpreted intertextually; through previous understandings. Marvin Carlson, a theatre theorist who writes about ‘ghosting’ in the theatre, commented when discussing cultural production:

This complex recycling of old elements, far from being a disadvantage, is an absolutely essential part of the reception process. We are able to ‘read’ new works–whether they be plays, paintings, musical compositions or, for that matter, new syntactic structures that make the claim of artistic expression at all–only because we recognise within them elements that have been recycled from other structures of experience that we have experienced earlier (2001: 4).

Pierre Bourdieu terms these forms of signification *homologies*: a continual pattern of tying the present to the past whereby past markers of authority are retained to increase the antiquity and authority of the trial, emphasising its universality and timelessness (Bourdieu 1993: 44). It is Bourdieu’s work that is pertinent when considering how repeated performance can naturalise processes or, as he termed it, perform ‘social magic’. As Bourdieu commented:

Symbolic force, that of a performative utterance, and especially of an order, is a form of power which is exercised on bodies, directly, and as if by magic, without any physical constraint; but the magic works only on the basis of previously constituted dispositions, which it “triggers” like springs (2000: 169).

Each criminal trial “triggers” submission from its participants. But more than one single trial, the repeated performance of the criminal trial:

[…] is the canonical form of (all this) social magic. It can function effectively only to the extent that the symbolic power of legitimation, or more accurately of naturalization (since what is natural need not even ask the question of its own legitimacy), reproduces and heightens the immanent historical power which the authority and the authorization of naming reinforces or liberates.(1987: 840).

For our purposes, repeated enactment of the domestic criminal trial has naturalised it to the process to the point where it occupies a place in social belief: it has a history, a tradition. This does not mean that the trial is always an effective means of redress (and of course it is not); rather we believe that it is (more or less). [[13]](#endnote-14) It is this belief we hold, of the criminal trial’s relative consistency, of the nominal witnessing of the community, which renders its findings legitimate. In juridical terms, this history may be referred to as precedent. Precedent generally indicates the body of common law upon which judges can draw to ensure consistency. However, this paper contends that it is important to distinguish written precedent, and the particular role it plays in common law, from the crucial role played by the instantiation of the trial itself: the repetition of trial performances plays a central role in creating legitimacy; such repeated demonstrations provide a sense of continuity from past, to present to future; the antithesis of the arbitrary.

Advocates of international criminal justice, on the other hand, often find themselves defending international criminal law against charges of being arbitrary. For a start, the International Criminal Court [ICC] is only sixteen years old. Created under the Rome Statute of 1998, the court itself did not come into existence until 2002. I have argued that legitimacy of practice is formed and reformed through repeated performance, but international criminal law is (relatively) new, and has been applied primarily through *ad hoc* processes.[[14]](#endnote-15) How can legal agents defend international criminal justice against the charges of being arbitrary or inconsistent, particularly when the court is so young? The claim itself is, of course, not necessarily accurate. There is a working body of international criminal law that has been built up for well over half a century and that has also built on national pre-existing law. There have been numerous tribunals and international trials that have applied precedents from international criminal law with varying degrees of success. However, the *ad hoc* nature of the tribunals is a more difficult charge to respond to. The establishing of the ICC is of course in itself an attempted response to this potential charge. In the foundation of the ICC, here is the (literally) concrete manifestation of the permanence and stability of international criminal law in the world. The ICC is therefore the means by which international criminal law attempts to meet this challenge. However, this involves having to employ strategies to link itself to an older pedigree in order to overcome the awkwardness of its extreme youth. As I will show, examination of the ICC reveals a concerted attempt to create new “structures of experience” from old, familiar practices.

Eric Hobsbawm coined the expression “the invention of tradition” in 1992. For him it meant something slightly different to the context in which I am applying it here. For Hobsbawm, this referred to the sustaining of inequality through the crafting of mythology, however, taking a Foucauldian understanding of power–where power is generated and reinforced through repeated performance–the term invention of tradition is useful because it is powerfully evocative of ‘doing’ as a means of creating and naturalising “structures of experience”; the end goal being that through repeated doing these structures become recognised and that these goals are in their turn, therefore, legitimated and accepted.[[15]](#endnote-16) If, and as soon as, the ICC achieves a kind of ongoing recognition–if its procedures become accepted, this will not only anchor it by according it a kind of permanence, but through it there will be a larger recognition of the stable presence of international criminal law. The ICC is therefore a means by which international criminal law attempts to move from the contingent to the assumed. But how does it create these structures of experience and invent its tradition?

**The International Criminal Court and the invention of tradition:**

Firstly, this is done through the choice of place. By choosing The Hague as a site, the ICC is already linking itself to a pedigree of international law and cooperation. Since 1899 The Hague has been known as an ‘international city of peace and justice’. Here the League of Nations established the Permanent Court of International Justice, and the Permanent Court of Arbitration. Here, too, have been the sites for the ICTY and the appeals chamber of the ICTR: here is the UN. The very existence of this history is based on the idea of the neutrality of The Hague, a disinterested international space that has gained previous acceptance internationally. This focus on echoing international cooperation is continued in the ICC’s design fixtures: the UN logo and the justice scales in the ICC coat of arms. This serves to further emphasise the ICCs’ links to the UN and also allows itself to tie itself to this institution which has a much greater longevity than the ICC. Alongside the reinterpretation of old symbolism, there is an emphasis at the ICC on echoing the diversity of its member states. This is deliberately shown in the use of plants from all of the signatory nations in the visible gardens. This is also repeated in the constitution of the court where legal agents are representative from across the signatory nations. The robes the judges wear, again, are a fusion of previously accepted judicial forms. This is the hallmark of the ICC: the constant recycling of recognisable ‘courtroom’ features that are reinterpreted to deliberately try to create homologies: not just to a history of international cooperation, but also to the already legitimated ritual spaces of domestic criminal law. The design and placement of the ICC therefore attempts to “*re*inscribe”: new structures of experience based on the familiarity of the old.

This attempted reinscription is echoed in the setting of the ICC itself. Recently moved to its permanent home, having previously been in a temporary home in a disused commercial building on the outskirts of The Hague, the ICC now forms the eastern tip of a triangle bounded by the ICTY, three kilometres away, and the ICJ, also three kilometres away. Once accessible only by car or an irregular bus (or a 45 minute walk from the town centre) past the fringes of town, the ICC is now in the centre of the court area of the Hague, described in one speech at the opening in April 2016 as ‘the crossroads of international justice’. This move, from being bounded by a railway line on one side, a number of other commercial premises in the same street, and a series of industrial warehouses, is significant in publicly declaring the permanency of the ICC from its previous ad-hoc setting (indeed the website emphasises the ICC’s ‘new permanent premises’). Whereas once, a considerable amount of space at the ICC, including the public information rooms and the entrance lobby, was located in a converted car park, the new buildings are soaring, glass structures that are the antithesis of the strange, bunker-like quality of the earlier location. The opening speech in April 2016 by Judge Silvia Fernandez made an explicit link between the new building and the legitimacy of the ICC itself:

With its innovative solutions, the building supports the judicial mission of the ICC. It helps us hold fair and transparent trials. It helps us protect witnesses and facilitate the participation of victims in our proceedings. In sum, it helps us safeguard the independence of the Court, its credibility, and, ultimately, its legitimacy (Fernandez, 2016). [[16]](#endnote-17)

Another pertinent attempted *re*inscription is the heavy presence of media equipment. A striking peculiarity of attending a trial at the ICC, compared with a domestic court, is the amount of technology dedicated to remote transmission. The ICC streams courtrooms’ proceedings whenever a trial is in session. These run on a 30 minute delay but run continuously, viewable on their website which also provides videos of previous weeks’ proceedings on request as well as rolling weekly summaries and transcripts of decisions. This means that in the courtroom, everywhere the eye turns, there are computers, wires and microphones. Coupled with this, the viewing panels for the public gallery are relatively small and members of the public remain separated from the participants by a pane of glass, leaving the impression of not feeling fully incorporated into the process. The overwhelming experience of attending as ICC trial in person, therefore, is that this kind of trial is not *designed* to be attended in person: the impression is not of a courtroom so much as that of a set of a courtroom.[[17]](#endnote-18) The ICC’s location in the Hague, its architectural layout and its use of technology therefore constructs a space that attempts to be both specific enough to meet the demands of a formal trial and yet is to some extent ‘dematerialised’ in the sense that it is only through viewing by a remote audience that the courtroom fully comes into being.[[18]](#endnote-19) I argue that this is directly linked to the ICC’s project of speaking to what they posit as the ‘international community’.

International criminal law is predicated on crimes of such seriousness that impunity under the guise of national sovereignty should no longer be permissible; this is the very basis for the existence of international criminal law. Indeed that is made explicit in the Rome Statue when it notes that the most ‘serious crimes of concern’ are of concern to the international community. This, as Dominic McGoldrick comments, positions the ICC as ‘an organ of [this] international community’ (2004: 46).[[19]](#endnote-20) However this also draws attention to the delicacy of the ICC’s position. Unlike other institutions, the ICC is dependent on the good will of the signatory countries and the cooperation of other organisations such as the UN as they have no police force to apprehend those for whom they issue arrest warrants. The ICC is therefore a product of compromise: it does not have routine jurisdiction over anyone perpetrating the most serious crimes of concern. Instead, it can only take on cases on referral and where the state in question cannot conduct its own trial, unless the prosecutor uses her *proprio motu* powers under Article 15.[[20]](#endnote-21) At the same time, though, Article 21 of the Rome Statute clearly delineates the primacy of international statute before the consideration of national laws.[[21]](#endnote-22) The trial therefore becomes a balancing act: where it needs to perform the ICC’s authority over a defendant without exposing how vulnerable this authority actually is.

The multilateral focus continually in evidence at the ICC is therefore not an empty gesture; rather it is a deliberate means to create an idealised space of international cooperation. Ultimately, the ICC is a kind of “secular cathedral” but this secular cathedral is not reflecting the concept of an international community, it is seeking to call it into being. As Dominic McGoldrick points out:

A system of “international criminal justice” might be thought to require some consensus on the existence and values of the “international community”. The existence of such a community in this sense and its values also remain contested (2004: 10).

The ICC trial is therefore a normative practice. The performing of the trial in the name of the international community is a kind of ‘social magic’: it helps bring it into being as a legitimate political concept (Bourdieu, 1987: 840). As Devika Hovell (2018: 20) points out, the development of the language of international community arguably comes at a time where any implied connection between the protection of the populace and state sovereignty is coming unstuck: as such, international community becomes a means “to explain the development of international legal principles to regulate the relationship between a state and individuals within its jurisdiction.” The ICC and the international community are therefore not only mutually dependent but also to some degree mutually constitutive. This was expressed by the outgoing secretary general Kofi Annan in 2001 when he said: ‘I believe it is now generally understood that certain crimes, as long as they are left unpunished, cast doubt on the very idea of an international community.”[[22]](#endnote-23)

The creation of an ‘international community’, however, is problematic. Implied within this idea of an international community is a universal subject that en masse constitutes this community. But this assumption of equality of circumstance and access to justice does not reflect the reality of the diversity of the 123 signatory nations. Critiques of the concept of an international community often hinge on the blurring of difference that is an inevitable consequence of such a label, as surely a community’s identity is forged through its differentiation from ‘other’. As Benedict Anderson points out:

No nation imagines itself coterminous with mankind. The most messianic nationalists do not dream of a day when all the members of the human race will join their nation in the way that it was possible, in certain epochs, for, say, Christians to dream of a wholly Christian planet (1993: 7).

Luban, too, is critical of any shared ‘humanity’ implicit in this international community, which is an idea that is too “contestable to anchor our intuitions about what makes humans special – all the more if these intuitions are supposed to be shared across confessions and cultures” (2004: 109).

Indeed analysis of the ICC court design yields the insight that what is seemingly ‘neutral’ isn’t neutral at all, but rather a dominant discursive inscription that has been repeated over time to the point where we fail to recognise its particular historical and political context. The symbolism referenced at the ICC carries particular histories: specifically a Western liberal tradition that presupposes the emergence of the individual secular subject. To some degree, too, the ICC project is inevitably linked with the emergence of international human rights law, which again are based on the concept of an individual subject (Decaux 2011: 597). Yet many cultures including those who are signatories to the ICC do not necessarily share this philosophy: most markedly, the division between the sacred and the secular, or the individual and the collective.

It is beyond the scope of this paper to critique the ICC in terms of its representativeness or efficacy further, as many, many other scholars such as Krever (2014) and Schwobel-Patel (2016) have already addressed this in much greater detail. This paper instead is assessing the ICC trial as a ritual-like performative practice. Within this framework, however, it *is* relevant to consider the efficacy of the concept of an “international community” in terms of *audience.* Can this international community effectively be an audience? As outlined earlier, audience is crucial in this ritual like model to the concept of redress; the trial must be witnessed for transformation of status to occur. It is here things become a little murky. Ifthe ICC is an organ of the international community, does this imply that the international community is the community in need of redress? And if so, is this even possible? [[23]](#endnote-24)

Raimond Gaita paraphrases Arendt noting that “genocide should be seen as a crime against ‘the order of mankind’, just as the murder of an individual is an offence, a ‘hurt’ against a community even when it does not have the potential to encourage more crimes of the same kind”(2002: 138). In this respect, the concept of an ‘international community’ in need of redress could be read as a fulfilment of this promise. But, as Arendt goes on to say, crimes against humanity are “an attack upon human diversity as such, that is upon a characteristic of the ‘human status’ without which the words ‘mankind’ or ‘humanity’ would be devoid of meaning” (1993: 269). We are not equal victims (and indeed, as Primo Levi observed, even “we, the survivors, are not the true witnesses” (1998: 84)). These crimes took place within and against particular communities; indeed the very definition of a crime such as genocide depends on victims having a shared identity (or shared perceived identity) that is directly responsible for their targeting. Surely one of the most significant factors of the Eichmann trial was that, despite using international law, it took place in Israel.

In a speech at The Hague in 2004, Martti Koskenniemi stated:

One cannot fail to wonder to what extent a process conducted in front of foreign judges in the Hague is able to attain the didactic purposes hoped for; to what degree Balkan memory may be constructed or directed by an international process...[...] All this follows as a matter of course in a criminal trial that looks for punishment. Anything more – ‘truth’, ‘lesson’, ‘catharsis’, ‘reconciliation’ – depends on how the tribunal will be able to deal with a constitutive paradox at the heart of its job (2002: 35).

Any trial conducted at the ICC remains removed from the community in which the wrongs take place. Not only does this symbolically undermine meaningful participation, it also quite literally impedes access, making it more difficult, and expensive for victims and local communities to participate. Thus the possibility of ritual transformation is, in this reading, not possible. Victim participation does not constitute a true ‘audiencing’ for the affected community so long as the trial takes place so far from this community.

The ICC therefore has a place problem, something of which the ICC is clearly aware. The mediatisation of the process – the dematerialisation of the courtroom itself– is a significant part of the ICC’s attempted performative *re*-inscription, potentially allowing the transmission of proceedings to the communities directly affected.[[24]](#endnote-25) In Kevin Gray’s assessment, the *re*-inscription techniques of the ICC trial constitutes a paradigmatic shift: evidence of the ICC’s attempts to escape the choice between individual criminal accountability and the trial as a ‘living record’, and thus account at least partially for both a local and international audience.

This paradigmatic shift is also manifested through the extensive and multi-layered inclusion of victims in the Rome Statute, starting in the preamble, which lays out the ICC’s stall as a victim-focused institution. In addition, the ICC’s inclusion in the Rome Statute of Victim Participation (Article 68) and the Victim Reparation Scheme (Article 75) constitutes a significant innovation. In the ICC founding statute, there is a deliberate enlargement of the scope of enquiry to create what becomes a hybrid institution.[[25]](#endnote-26) This hybridity is part of the ICC’s attempt to create a new “structure of experience” in the trial.[[26]](#endnote-27)

But, of course, whilst it is clear that the ICC is attempting to speak to both local and international audiences, this doesn’t necessarily dissolve the tension between these two approaches: it arguably compounds it. For example, the greater the inclusion of victim testimonies, the greater the potential to argue that a defendant’s right to a fair trial is potentially violated: as we saw in critiques of *Eichmann* from Arendt onwards. And at the same time, although the ICC clearly attempts to assert its victim credentials and break with past tribunals that were less successful in this regard, scholars such as Susan Sacouto (2012) argue that because victim participation at the ICC is fragmented and incomplete, the trial does not facilitate meaningful participation for them. So where does that leave us?

At the expense of being repetitious, I want to state again that this paper does *not* attempt to evaluate how successful the ICC’s attempted methods of *re*-inscription are; indeed, many scholars may easily argue that the choices of reinscription (such as being based in the Hague) may potentially *undermine*, rather than enhance the ICC’s legitimacy.[[27]](#endnote-28) Rather my object has been to read the ICC trial as a form of normative performance, including the way the ICC attempts to position itself for its multiple audiences. But it is worth noting that some of the criticisms of the failure of redress at the ICC may perhaps be being idealistic about the possibility of ritual transformation in *any* form of criminal trial. There is a very wide distance between accepted legal rituals that engender norms and the notion of ‘meaningful redress’: the former, processes that become habituated and the latter, perhaps always idealised and elusive. As such, criticisms of the ICC in many ways reflect the hope that may be engendered by the possibility of a process that can both end impunity and involve victims, and the disappointment that such a hybridity involves navigating impossible choices.

In saying this, I am by no means attempting to sidestep legitimate criticism of the ICC, nor to trivially relativise domestic and international criminal trials, which are distinct phenomena in some important ways. However I think it is worth noting that there is *always* a wide gap between ritual-like activity we have habituated over time and the elusive concept of ‘meaningful redress’, and we shouldn’t mistake one for the other. As I said earlier in this paper, domestic criminal trials are accepted by the community not because they are alway*s* fair or always representative, but because we *believe* they are, and this belief is sustained primarily by repeated practice, not because they are always successful transformative rituals.

**Conclusion:**

This paper has argued that trials at the ICC can be read as a form of performance. This performance attempts to demonstrate and construct the ICC’s own legitimacy, and through it the idea of international criminal law and the international community. For Kevin Gray, the ICC trial constitutes what he might call ‘good theatre’ – one that attempts to make up for the failings of traditional adversarial trial and allow a prominent role for history making. ([[28]](#endnote-29)). For Koskenniemi, though, the incorporation of multiple historical narratives risks fatally undermining a defendant’s presumption of innocence: “to didactically educate, you have to tell the truth and silence the accused – but that turns it into a show trial, and renders it illegitimate” (2002, 35). Here we arrive at not just ‘bad theatre’, but one that, as Gerry Simpson puts it, demonstrates “casual disregard” for the law (2007: 113).

However this article has tried to argue that such evaluations of ‘good’ and ‘bad’ theatre—on what constitutes ‘show’ in relation to international criminal trials—remains predicated on the subject position of scholars who seek to police the challenging and porous boundaries somewhere on the spectrum between a narrow drawing of individual criminal responsibility and that of greater victim participation. The ICC trial struggles for legitimacy, therefore, not because it is ‘good theatre’ or ‘bad theatre’, but because it is new, and it has an unclear audience. If the ICC trial seeks to appeal to an international community but also to provide some form of local redress for victims, it will struggle to do both. If it seeks to be both a history and memory maker as well as a legitimate authority of individual punishment it will struggle to do both. However, as Simpson points out,

The field of war crimes is constituted by a set of relationships – between politics and law; between local justice and cosmopolitan reckoning; between collective guilt and individual responsibility; between making history and performing justice; between legitimating dominant political forces and permitting the expression of dissident views; between the idea of impartial and honourable justice, and the spectre of the war crimes trial as a show trial (2007:1).

In other words, these tensions aren’t simply problems with the trial. All trials are show trials. The ICC’s troubled performance shows usthe unresolved dilemmas inherent in international criminal justice itself.

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1. **Notes**

 The emphasis on individual criminal responsibility is indelibly linked with the formation of international crl law as its primary goal was to prevent perpetrators sheltering within the protection of their nation state. (Lauterpacht 1937: 95) [↑](#endnote-ref-2)
2. Of course in discussing the Eichmann trial Arendt is talking about an *ad hoc* tribunal that was based in Israel but using a mixture of local and international law – however I take her understanding of ‘show trial’ to be reflective of its public, international dimension and therefore comparable to later international criminal trials, such as those that take place at the ICC or at the Yugoslavian (ICTY) or Rwandan (ICTR) tribunals. [↑](#endnote-ref-3)
3. This analogy could just as easily be called ‘pseudo-Aristotelian’ however, as I have called it elsewhere as it is based on a general and popular understanding of Aristotle, who was actually inconclusive and contradictory when explaining what he meant by catharsis (see Leader 2007). [↑](#endnote-ref-4)
4. Arendt is distinct in her definition of ‘show trial’ however, which she deliberately employs to point to its emphasis on education. For purposes of clarity, whereas I use the term ‘show trial’ in the sense that all trials are performative and didactic. See also Simpson’s outline (2007: 113-114) for further elaboration. [↑](#endnote-ref-5)
5. And indeed, this paper does not attempt to sketch this line either: my focus here is to draw attention to the degree to which this line varies based on different perceptions of ‘good’ and ‘bad’ theatre. [↑](#endnote-ref-6)
6. For Luban, the educative and didactic potential of ICL is to be found in the trial process due to the category of crimes. No sentence could ever be commensurate with acts of genocide or crimes against humanity; therefore we must look to the trial for a ‘show’ of public justice. [↑](#endnote-ref-7)
7. In using the terms ‘habituated’, ‘naturalised’ and the like, I am drawing on Bourdieu’s sociological theory of *habitus*, where he theorises how human beings acquire life knowledge, through twin processes of education and socialisation. For further discussion on *habitus* and legal process, see Bourdieu’s 1987 article, “On the Force of Law”. [↑](#endnote-ref-8)
8. There are of course many different arguments as to what constitutes legitimacy, more than can be named here. However, a good sample of the range includes Luban, who for example, argues that legitimacy is constituted in international criminal justice by the fairness of the trial process, Megret (2015) who argues that the notion of ‘distributive justice’ plays an important role in shaping legitimacy (and in this respect joins broader socio-legal oriented scholarship emphasising procedural and distributive justice) and Kumm (2004)who argues for a ‘constitutionalist model’ of legitimacy that enhances democratic legitimacy, and points to legitimacy founded in the respect of State sovereignty. [↑](#endnote-ref-9)
9. See also Barish (1981). Glen McGillivray (2004) critiques this model, however, arguing that it is an artificial delimitation used to valorize performance studies and limit the possibilities of the term theatrical that historically has covered a significantly wider remit. [↑](#endnote-ref-10)
10. See for example Becker (1963) and Erikson (1962). [↑](#endnote-ref-11)
11. This two pronged process–of resolution of a crime as well as broader social regulation is echoed in Fitzjames Stephens (1890). [↑](#endnote-ref-12)
12. It is important to emphasise that this is *not* the case for all legal scholarship. Euphemistic accounts of the trial as ritual abound. However, there is a distinct body of scholarship in law that does attempt to emphasise this darker side. See Morgan (1988); Halewood and Cover (1987). [↑](#endnote-ref-13)
13. I am of course not arguing that all trials are fair. I am arguing, however, that there is still sufficient social belief in the concept of the fair trial to sustain it in its current form. [↑](#endnote-ref-14)
14. This includes the ICTY and the ICTR for example. [↑](#endnote-ref-15)
15. Bourdieu’s concept of *symbolic violence* is particularly apt to describe the largely preconscious field-specific knowledge that aggravates said gap and often goes unnoticed by legal agents. The experience is a disempowering one for lay participants. See Bourdieu (1987: 833-834), [↑](#endnote-ref-16)
16. Thomas Skouteris (2010) has written about the link between ‘progress’ and the ‘new tribunalism’ arguing that the new court processes are explicitly being evoked as evidence of the development of international law. [↑](#endnote-ref-17)
17. In the previous ICC, one had the odd feeling of watching a reality TV show of a courtroom, rather than a courtroom itself. For more writing on these kind of peculiar overlaps, see Moran, Skeggs & Herz (2010). [↑](#endnote-ref-18)
18. I use the term ‘dematerialised’ from Linda Mulcahy’s monograph on courtroom architecture (2012:11). See also Mohr (2011). [↑](#endnote-ref-19)
19. This is of course a simplistic take as of course it is also the local community that requires redress in this understanding. As this paper considers, the ICC sits in a strange position where it must function supranationally yet be sufficiently attendant to the local processes as it relies on national cooperation to function effectively (the principle of complementarity). For further information on the fraught political negotiations involved in the complementarity principle, see El Zeidy (2008). [↑](#endnote-ref-20)
20. A third method is through exercising the *proprio motu* powers of the Prosecutor under Article 15 of the Rome Statute. This particular provision can be evidenced to demonstrate the ICC’s ability to act unilaterally, and not through consent or consensus. It is important to note, however, that this discretion is limited as the PreTrial Chamber must authorise the investigation and the Security Council can also defer such investigations for 12 months. In addition, any prosecutorial powers are still limited – as all ICC investigations are – by being dependent on state cooperation to arrest suspects when arrest warrants are issued. [↑](#endnote-ref-21)
21. See *Rome Statute* Article 21 - Applicable law 1. [↑](#endnote-ref-22)
22. This was expressed by the outgoing secretary general Kofi Annan (2001). [↑](#endnote-ref-23)
23. A community’s identity is forged through its differentiation from ‘other’. See Anderson (1993:7). See also Levi (1988: ix). [↑](#endnote-ref-24)
24. Judges in the Lockerbie case assumed that remote viewing sites of courtrooms can in fact be seen as literal extensions of the courtroom itself. See *BBC, Petitioners (no 2)* HCJ 13 Jun 2000. [↑](#endnote-ref-25)
25. I use the term hybrid here distinctly from that of Megret (2005), for example, who uses the term to talk about the operation of domestic and international proceedings in international criminal justice. [↑](#endnote-ref-26)
26. The extraordinary potential of this inclusion is already in evidence. At the trial of Thomas Lubanga, victims were allowed to give a ‘broader’ account of events than that defined by the scope of charges. They also had their own legal representation and were able to express the harm they experienced in a public forum. For more on the ‘truth telling’ function at the ICC as seen in Lubanga, see Garbett (2012). [↑](#endnote-ref-27)
27. Any argument in favour can be read negatively as well: for example, the independence of the ICC from the UN can be considered both positively and negatively; similarly, its close affiliation with the UN can be read positively or negatively: such an analysis is dependent on the viewpoint of the scholar as to what constitutes legitimacy—a greater link to an international history of cooperation, or a demonstration that the ICC is not tainted by the failures *of* that history. [↑](#endnote-ref-28)
28. This argument of the constitutive paradox leads us back to the real deficiencies of criminal trials as history makers. To protect a defendant’s presumption of innocence, facts outside the courtroom have to be re-established within them. This means, for example, that any trial of a Holocaust perpetrator arguably has to re-establish each time that these events occurred.

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