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EDITORIAL

On Trajectories and Destinations of International Criminal Law Scholarship

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1. Opening questions

Taking up the torch from my fellow co-editors who have addressed substantive and methodological issues of international criminal law (ICL) in their contributions,[1] I propose to turn to the current state and prospects of its scholarship. The moment is opportune for such a reflection. The questions raised by the production and dissemination of international legal scholarship were the leitmotif of past editorials and its (changing) role was chosen as the theme of the latest LJIL symposium.[2] The professional functions of international legal scholars have been the subject of renewed interest and debate.[3] To give an impulse to a similar debate in ICL, I will try to capture the *zeitgeist* of its academia and offer some observations on the positioning of scholarship vis-à-vis practice in ICL. Perspectives from this specialized field may enrich the existing conceptualizations of international legal scholarship and provide a new angle on its place within the profession.

This editorial is directed to the following questions: What do the *status quo* and trajectories of ICL scholarship bode for the future? What are the criteria of relevance

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1 C. Stahn, 'Between "Faith" and "Facts": By What Standards Should We Assess International Criminal Justice?', (2012) 25(2) LJIL 251; E. van Sliedregt, 'Pluralism in International Criminal Law', (2012) 25(4) LJIL 847; V. Nerlich, 'Daring Diversity – Why There is Nothing Wrong with "Fragmentation" in International Criminal Procedure', (2013) 26(4) LJIL 777; D. Jacobs, 'Sitting on the Wall, Looking in: Some Reflections on the Critique of International Criminal Law', (2015) 28(1) LJIL 1.

2 'The Changing Role of Scholarship in International Law', The LJIL Symposium, 11 May 2015, The Hague Institute for Global Justice. See J. d'Aspremont and L. van den Herik, 'The Public Good of Academic Publishing in International Law', (2013) 26(1) LJIL 1; C. Stahn and E. de Brabandere, 'The Future of International Legal Scholarship: Some Thoughts on "Practice", "Growth", and "Dissemination"', (2014) 27(1) LJIL 1; F. Baetens and V. Prislan, 'The Dissemination of International Scholarship: The Future of Books and Book Reviews', (2014) 27(3) LJIL 559; C. Rose, 'International Lawyers as Public Intellectuals and the Need for More Books', (2015) 28(2) LJIL 393.

3 Notably, 'International Law as a Profession' was the theme of the 5th ESIL Research Forum (Amsterdam, 2013). A. Peters, 'Realizing Utopia as a Scholarly Endeavour', (2013) 24(2) EJIL 533; J. von Bernstorff, 'International Legal Scholarship as a Cooling Medium in International Law and Politics', (2014) 25(4) EJIL 977; G. I. Hernández, 'The Responsibility of the International Legal Academic: Situating the Grammarian within the "Invisible College"', in A. Nollkaemper et al. (eds.), *International Law as a Profession* (forthcoming, 2016), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2613508> (accessed 1 August 2015).

in ICL and (how much) have they changed along with the developments in the 'real world' of international criminal justice? What academic genres will be read in ICL in the years to come?

The dynamics of the production and dissemination of scholarship are in constant interplay. Besides academic curiosity or intuition and the prominence of certain debates at any given time, the 'moment of creation' – by which I mean the choices international law authors make in regard of research topics, approaches, and methods – is invariably informed by considerations of relevance and demand. Academic journals, like the LJIL, have a part to play in formulating those criteria and their agency in driving scholarly production needs to be highlighted (section 2). Next, I reflect on the current state of affairs in the ICL scholarship and the extent to which its various genres echo the different functions of academics within the professional community (section 3). This editorial can barely scratch the surface of these issues. The purpose is rather to stimulate thinking about the condition and exigencies of the sub-discipline that has long been one of the LJIL's focal areas. What special role there is for the LJIL in facilitating a dialogue on these matters is the subject of final remarks (section 4).

2. The chicken or the egg? Production of scholarship and agency of journals

At the cost of a long overture and in the interests of editorial transparency, I start with a preliminary discussion of the impact of the fora disseminating scholarship, and limitations of their policies and formats, on its production. The role of academic journals in shaping the research landscape is worth pondering here, not least because this is relevant to how this editorial is to be read. I imagine that, despite the usual caveats, the editors' concern and their public exchanges of views about the future of scholarship might give rise to questions. This could perhaps be perceived as a move to assert control over the production of scholarship by the actor who de facto dictates the terms of its dissemination. Similarly, regardless of the benefits of self-reflection, the editors' ongoing dialogue about the journal's identity might be interpreted as communicating to the potential authors what kind of works stand a chance of being published.

The two years I have spent with the LJIL strengthened me in the opinion that academic journals should be sensitive to the risk of such perceptions and cautious not to be (seen as) hegemons exercising power through the performative language of 'accept' and 'reject'. As for appearances, this is probably easier said than done. Whether one likes it or not, the form affects the substance. One way or another, editorial policies shape the substantive orientation and content of the published academic output. To an extent varying by journal and by field, they may unleash and stimulate or, on the contrary, stymie the creative process at the heart of scholarly endeavours. The relationship between the production and the dissemination is a feedback loop of mutual influence; what comes first is a 'chicken or the egg'. By analogy with the requirements and selection procedures applied by research funders, the

constraints and contingencies of the academic publishing industry shape the dynamics of knowledge production.

As is widely known, (European) law journals orchestrate a rigorous peer-driven system of quality control. This serves as gateway to the arena where legal arguments and opinions compete for the position of authority and, ultimately, for the certification as 'legal scientific knowledge' by the epistemic community. Due to their selectiveness, top-echelon journals play a crucial role in steering academic debates towards, or away from, particular themes. Nor is it beyond their reach to contribute to naturalizing – or marginalizing – specific approaches and methods, depending on their perceived heuristic potential (originality, innovativeness, interdisciplinarity, etc.). The agenda of guarding the discipline's substantive boundaries or its methodological autonomy could come into play.[4] The more distinguished the platform, the greater influence it wields in validating a given account of law as legal knowledge or, for that matter, a research methodology as 'scientific', thereby putting it on the map for the purpose of the subsequent accretion of knowledge.[5]

Law journals are the actors of power in legal academia as they structure and demarcate the field into the 'mainstream' and the 'periphery'. On the one hand, this imbues the field with 'stability' that is said to enable an orderly and productive contestation of semantic authority among scholars.[6] On the other hand, this potentially turns journals into the agents of hegemony who replicate and enforce the power relations that structure the knowledge production in the legal scholarship. Any hierarchies between the 'leading' scholars with influence in the field and the 'less established' ones are thus perpetuated.[7] With power come responsibilities. The LJIL editorial team has always welcomed submissions from younger scholars and is prepared to go the extra mile to ensure that new voices can be heard – the policy inspired by the Journal's origins, multidisciplinary identity, and commitment to epistemic diversity.[8]

Against this backdrop, are the objectives of the knowledge production properly within the cognizance of editors? Or should journals mind their (primary) business of publishing works fitting broadly in the relevant discipline and meeting the quality standard and academic conventions? I submit that questions where the discipline is and should be going can pertinently be raised. They certainly enjoy priority as far as this Journal is concerned. However, this is not the matter of having a programmatic vision of what knowledge is necessary and deserves to be disseminated, and much less about imposing it from the position of an academic super-structure. Rather, this

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4 T. E. Aalberts, 'The Politics of International Law and the Perils and Promises of Interdisciplinarity', (2013) 26 LJIL 503, 507–8; I. Venzke, 'What Makes for a Valid Legal Argument', (2014) 27(4) LJIL 811, 815.

5 On the construction of semantic authority in the production of legal knowledge, see J. d'Aspremont and L. van den Herik, 'The Digitalization of the Assembly Line of Knowledge about Law: A Reinvention of the Confrontational Nature of Legal Scholarship?', ACIL Research Paper 2013–20, 4.

6 Ibid., at 5.

7 Ibid., at 4 and 5 ('the struggle for the power to produce knowledge' takes place in 'a strongly organized and hierarchical semantic and social system that is far from egalitarian').

8 See a retrospective in L. van den Herik, 'Introduction: LJIL in the Age of Cyberspace', (2012) 25(1) LJIL 1, 1–4. For further reflections on the LJIL identity, see e.g. d'Aspremont and van den Herik, *supra* note 2, 1; Aalberts, *supra* note 4, 503; Venzke, *supra* note 4, 814; Jacobs, *supra* note 1, 2.

boils down to the editors' ability to perform their day-to-day tasks responsibly and in a manner promoting the 'public good' of academic publishing.[9]

By way of illustration, the LJIL regularly publishes ICL scholarship and, in that, it complements and constitutes an alternative forum to a number of specialized journals.[10] Upon the quality check (much credit for which is due to the generosity of our reviewers), we decide which of the numerous submissions are worth pursuing. The selection is carried out in the way calculated to maximize the 'public good'. Editors are guided by the criteria of quality, which, even if generally known and uncontroversial, give much scope for subjectivity when applied *in concreto*.[11] Are the validity and persuasiveness of legal arguments (however defined) and the quality of presentation the only things that matter?[12] Or are the substantive focus and methodological leanings also a legitimate part of the metric?

These issues are at the core of the editorial responsibility, not only vis-à-vis individual authors, but also the discipline as a whole. Our conceded 'inextricable scientific, institutional, methodological and conceptual biases'[13] can only be retained as an aspect of policy if grounded in the notions of relevance resonating with the epistemic community and capable of advancing the 'public good' of knowledge enhancement. Besides the aforementioned disciplinary stability, this goal requires – crucially in my view – the removal of obstacles to critical engagement and deconstruction of dogmas.[14] It is the responsibility of journals to provide sufficient opportunities for unsettling the existing hierarchies and unraveling the (sometimes only illusionary and self-produced)[15] scholarly consensus. Neither the knowledge production nor the rejuvenation of the discipline would be possible without regular injections of instability, an antidote against stagnation. As the key players and linchpins of the academic establishment, journals are best placed to be the conduits of this antidote.

Understandably, editorial policies must enable a careful weighing of the merits of individual works and the broader responsibilities towards the discipline. Other than that, I think that one may rightfully be suspicious of an academic journal – an intermediary between the producers and consumers of knowledge – taking upon itself the setting of the research agenda in a certain field. I leave to one side that this is a mission impossible in the cyber era of legal blogging and open access, whereby academic journals are faced with the dramatic diversification of

[9] D'Aspremont and van den Herik, *supra* note 2, 1–2 (journals serve the purpose of the 'crystallization of knowledge' through 'quality control' and 'order'); Stahn and de Brabandere, *supra* note 2, 8 (adding a 'filtering' function, i.e. 'limiting the quantity of published output').

[10] The *Journal of International Criminal Justice*, the *International Criminal Law Review*, as well as *Criminal Law Forum* and the *International Journal of Transitional Justice*.

[11] See also d'Aspremont and van den Herik, *supra* note 2, 3.

[12] Venzke, *supra* note 4, 814; d'Aspremont and van den Herik, *supra* note 5, 8.

[13] D'Aspremont and van den Herik, *supra* note 2, 1.

[14] The LJIL's motto as formulated by a former EiC: 'to pry and to provoke rather than to solve and to settle': van den Herik, *supra* note 8, 3.

[15] The vulnerability of 'consensus claims' was usefully pointed out by Lianne Boer in her LJIL symposium presentation '"The Greater Part of Jurisconsults": On the Construction of Authority in Legal Scholarship' (*supra* note 2).

media disseminating legal scholarship.[16] Due to their insistence on excellence, journals will retain a distinctive niche in the 'assembly line'.[17] However, their role is facilitative and consists in helping authors produce top-quality scholarship and serving the profession as a forum for the exchange of arguments and opinions about international law. In this light, the next section is *not* meant to spell out the universal or LJIL-specific criteria of relevance; nor is it a prognosis of what kinds of ICL scholarship the board contemplates publishing. Instead, what follows is, first, an invitation to the academic community to reflect on what research output may be needed most at present and, second, an attempt to situate the LJIL among the journals publishing ICL scholarship, as a part of the editors' collective effort to define the Journal's identity.

3. Getting ICL scholarship ...

The previous discussion goes some way to clarify the point (and propriety) of pondering the current status and the future of international legal scholarship in this forum. The rest of this editorial is devoted to a reflection on the trajectories and destinations of ICL scholarship. This *tour d'horizon* only conveys personal impressions that may be far from representative.

3.1. ... from here (snapshot)

ICL finds itself in exciting times and so does its scholarship. The sense of excitement, however, is a euphemistic cover for an acute ontological anxiety. This condition is caused by the *status quo*, characterized by an oversaturation of the field, and the anticipation of the imminent changes this state is bound to bring about. As an area of legal practice, ICL reached the apex of institutional growth at the supranational level towards the end of the last decade and has been steadily imploding since. The wind-down of international and hybrid courts to which the discipline owes its florescence, most notably the UN ad hoc tribunals, has led to the exodus of legal staff and the exponential increase in the number of professionals available on the international legal job market. Supply is not nearly matched by demand in the shrinking field of ICL, given the limited capacity of the International Criminal Court (ICC), the residual Mechanism for International Criminal Tribunals, and the surviving hybrid courts, the Khmer Rouge Tribunal and the Special Tribunal for Lebanon (STL).[18]

As matters stand, ICL is likely to become a career dead end for many. But the long-term prospects may be not so bleak after all.[19] Under a glass-half-full view, the two formative decades of its modern renaissance are to be followed by the stage of qualitative development and fine-tuning. Furthermore, ICL has made new

[16] Van den Herik, *supra* note 8, 4–8; d'Aspremont and van den Herik, *supra* note 2, 4–5; Stahn and de Brabandere, *supra* note 2, 6–7.

[17] D'Aspremont and van den Herik, *supra* note 2, 2–4.

[18] M. J. Christensen, 'From Symbolic Surge to Closing Courts: The Transformation of International Criminal Justice and its Professional Practices', (2015) *International Journal of Law, Crime and Justice* 1 (assessing that, due to the completion of the tribunals' mandates, about 3,200 positions in the field of ICL are disappearing).

[19] I am grateful to Carsten Stahn for inviting me to reconsider my initial pessimism.

habitats and is likely to preserve its practical relevance and normative pull even after its international enforcement system is significantly downsized. One could think of several manifestations of this 'spillover effect': first, the continued reliance on ICL for the purpose of international fact-finding not going directly to the application of criminal law (e.g. commissions of inquiry, fact-finding missions, panels of experts etc.); second, its domestication and increased enforcement within national legal orders, including through the newly-established special and hybrid tribunals; and, third, the use of ICL as a framework for addressing the world's contemporary problems and its possible extension to cover additional categories of crimes. Despite ICL's post-modern expansion and potential vitality in institutional settings, legal orders, and subject-matter areas other than those currently associated with international criminal justice, the field is undeniably on the brink of restructuration which will have profound effects on practice; venues, modalities, and actors will not all be the same.

As for the scholarly discipline, ICL shows no signs of recession. The proliferation of specialized journals, books, and articles published and conferences held on international criminal justice exceeds by far the dynamics in contiguous fields, even excluding the output addressing ICL only tangentially. The number of unsolicited ICL-related manuscripts the LJIL receives regularly would have sufficed to fill an entire Leiden Journal of International *Criminal* Law following the most rigorous selection. The profusion of scholarship in ICL attests to its current prominence within international law, giving credence to claims that it has crowded out other legal discourses due to its marketing culture.[20] ICL continues to entice scholars from disciplines other than public international law and criminal law and procedure, its dual core. The bulk of research on international criminal justice is now done on the (ever-shifting) margins of the field and at the intersections with non-legal disciplines: international relations, political science, anthropology, sociology, criminology, psychology, statistics, and methodology of social sciences. As the ICL epistemic community welcomes new incomers, its disciplinary space becomes more pluralized, without getting 'overcrowded' as much as fragmented.

The frenzy of expert and public interest in ICL is kept alive by dozens of dedicated blogs and online media hubs and portals that have mushroomed in recent years. These expert mediators, some run by ICL scholars and practitioners and others by professional journalists, provide short analyses and up-to-date information about the current events and debates. These platforms popularize – explain and market – this field among wider audiences and, unlike traditional scholarship, often have mass readership. Their modus operandi is to reach out to legal and other experts and induce exchanges on newsworthy developments on the social media where anyone with interest can partake. As the linkage between expert opinion makers and the general public, they take on functions not all legal scholars consider as the integral part of the role of an academic. One positive effect of the online media presence is that it helps bridge general knowledge gaps and fosters awareness about

[20] C. E. J. Schwöbel, 'The Comfort of International Criminal Law', (2013) 24 *Law and Critique* 169, 170; C. E. J. Schwöbel 'The Market and Marketing Culture of International Criminal Law' in C. E. J. Schwöbel (ed.), *Critical Approaches to International Criminal Law: An Introduction* (2014).

the work of international criminal tribunals, so the inaccessibility of information is no longer an excuse for ignorance. Another is that these platforms galvanize debates, consolidate the interpretive community around certain themes, and activate experts in the public domain; staying 'out of the fray' is less of an option.

The exuberance of scholarship and alternative sources of information is not usually seen as a sign of crisis. But to be sure, it also has downsides, the contours of which are only looming on the horizon. First, the implications of the informational deluge for the dynamics of the production of scholarship and the well-being of the field remain to be seen.[21] Can the quality standards be preserved with the daunting pace and dimensions of scholarly production, along with the constant proliferation of outlets and the inundation of information? To put it more dramatically, will too much ICL scholarship kill ICL scholarship?[22] Second, it appears as if the ICL academia has lost the sense of direction, which it is trying to recover by moving in too many directions at the same time. There is anecdotal evidence that it is afflicted by anxieties related to its current and future role within the professional community.

One of them, anxiety of validity and impact, is rooted in the uncertainty of what exactly the point is of scholarly enterprises in ICL. What difference does the ICL scholarship make and for whom? How should scholars position themselves vis-à-vis practice? In particular, what place should they strive for in between the extreme of, on the one hand, subordinating to the doctrinal and, more prosaically, referencing needs of practitioners and, on the other hand, the 'over-theoretical withdrawal'? Another anxiety relates to the fear of stagnation. It is underlain by the perception that, for a while now, and despite the constant flow of judicial developments providing new insights and issues for research, the ICL scholarship has been lagging behind. It has been running in circles, ruminating on the same topics and rehashing old truths, with no stunning breakthroughs, meaningful impact on practice, and 'eureka!' moments. The ICL academics' recent turn to interdisciplinarity,[23] or their consensus that such a turn is necessary, is remarkable. It comes with an increased emphasis on empiricism as a way of ascertaining ICL's actual impact.[24]

This trend signals fatigue with conventional discourses and formats of legal scholarship and discomfort over the idea that the discipline would continue on its present course. Cross-fertilizing it with insights, perspectives, and (empirical) methods of social sciences is viewed as an escape route to salvation from an impending intellectual impasse. One waits to see whether interdisciplinarity will be genuinely pursued or prove but a fleeting flirtation. It cannot be excluded that a segment of the ICL

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21 On the downsides of uncontrolled growth, see Stahn and de Brabandere, *supra* note 2, 7–8.

22 D'Aspremont and van den Herik, *supra* note 2, 2 ('the proliferation of legal thinking … can be extremely harmful for the discipline as a whole').

23 E.g. S. M. H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (2013); J. N. Clark, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunals for the Former Yugoslavia* (2014). See also the LJIL symposium on 'Integrating a Socio-Legal Approach to Evidence in the International Criminal Tribunals' published in issues 26(4) and 27(1).

24 Stahn, *supra* note 1; C. Kreß, 'Towards a Truly Universal Invisible College of International Criminal Lawyers', FICHL Occasional Paper Series (2014), 24–25. On the parallel development in international law, G. Shaffer and T. Ginsburg, 'An Empirical Turn in International Legal Scholarship', (2012) 106(1) AJIL 1.

academia will develop an allergy to the disciplinary over-inclusion and seek refuge in the protectionist agenda of counterdisciplinarity.[25] The disciplinary autonomy would be guarded against the moves by the 'intruders' from other fields of knowledge making claims to expertise both in and beyond ICL in an attempt to take control of its normative and methodological apparatus. Now would be the right time to reflect on the pros and cons, if any, of such disciplinary politics.

The question can also arise whether the anxiety of stagnation has basis, considering that the field has recently spawned many promising lines of research. In line with developments in international legal scholarship, the ICL academia has increasingly concerned itself with the history,[26] philosophy,[27] and sociology of field,[28] also turning to itself as an object of study.[29] A growing number of inquiries operate on a meta-level and scrutinize discrepancies, vulnerabilities, and blind spots of mainstream narratives, discourses, and methods.[30] This self-reflectivity is not mere soul-searching and navel-gazing in the absence of better subjects and ways of applying oneself. It is an indicator of the ICL academic community's self-aware effort to construct a critically informed philosophical, ideological, and political history of the project.

From that vantage point, the ICL academia would be better able to situate itself in the present and articulate a future research agenda that corresponds to its purported functions – which may also need to be renegotiated. The ICL academia is now repositioning itself in relation to the field of practice that, over and above its usual dynamism, is undergoing major transformations. Regardless of the anxieties of the transitional phase, it seems that ICL scholarship has sufficient room for further growth and prospects for renewal. If the impression that it is at a turning point is accurate, there needs to be a collective deliberation on the question of what (new) intellectual projects it should reinvest itself in the near future in order to preserve its validity, particularly (though not only) vis-à-vis practice.

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[25] M. Koskenniemi, 'Law, Teleology and International Relations: An Essay in Counterdisciplinarity', (2012) 26 *International Relations* 3; J. Kammerhofer and J. d'Aspremont, 'Introduction: The Future of International Legal Positivism', in J. Kammerhofer and J. d'Aspremont (eds.), *International Legal Positivism in a Post-Modern World* (2014) 9.

[26] K. J. Heller and G. Simpson (eds.), *The Hidden Histories of War Crimes Trials* (2013); M. Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919–1950* (2014); M. Bergsmo et al. (eds.), *Historical Origins of International Criminal Law, Vols. 1 and 2* (2014).

[27] R. Cryer, 'The Philosophy of International Criminal Law', in A. Orakhelashvili (ed.), *The Research Handbook on the Theory and History of International Law* (2011); L. May and Z. Hoskins, *International Criminal Law and Philosophy* (2010); see also chapters by D. Luban and A. Duff in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (2010).

[28] Christensen, *supra* note 18; P. Dixon and C. Tenove, 'International Criminal Justice as a Transnational Field: Rules, Authority, and Victims', (2013) 7(3) *International Journal of Transitional Justice* 393; E. Baylis, 'Tribunal-Hopping with the Postconflict Junkies', (2008) 10 *Oregon Review of International Law* 361.

[29] Kreß, *supra* note 24; M. J. Christensen, 'Academics for International Criminal Justice: The Role of Legal Scholars in Creating and Sustaining a New Legal Field', iCourts Working Paper Series, No. 14, 2014.

[30] See contributions in C. E. J. Schwöbel (ed.), *Critical Approaches to International Criminal Law: An Introduction* (2014); D. Robinson, 'Inescapable Dyads: Why the International Criminal Court Cannot Win', (2015) 28(2) LJIL 323; *id.*, 'The Controversy over Territorial State Referrals and Reflections on ICL Discourse', (2011) 9(2) *Journal of International Criminal Justice* 355; S. M. H. Nouwen, '"As You Set Out for Ithaka": Practical, Epistemological, Ethical, and Existential Questions about Socio-Legal Empirical Research in Conflict', (2014) 27(1) LJIL 227; Jacobs, *supra* note 1.

3.2. . . . through functions and genres (trajectories)

Diagnosing the current state of ICL scholarship and pointing where it will be heading, is impossible without looking at its history. Although the past trajectories have much to reveal about how it has ended up where it is now, this is not the place to provide a retrospective.[31] Instead, the present purpose can be served well by recalling the main genres of ICL scholarship, both established and emergent. These denote the typical modes of scholarly engagement with 'practice', broadly understood as encompassing all activities having to do with the objectification (production, application, and enforcement) of law.[32] Genres are akin to converging lenses through which one can discern some of the functions academics have within the larger professional community – using Claus Kreß's expression, the nascent 'truly universal invisible college of international criminal lawyers' – namely *qua scholars*.

The latter qualification conveys that the functions of academics in respect of practice are not exhausted by scholarly contributions *par excellence*. On the contrary, the sociological picture is far more complex. Like generally in international law, it has not been out of ordinary for the members of the 'college' to combine and interchange roles of professors, activists, advisers, international civil servants, counsel, and judges. In fact, this has been the characteristic and consistent feature of the career dynamics across different sub-disciplines of international law, which is why the idea of the 'changing' role of international legal scholars may be no more than a suggestive hypothesis.[33] There are several ways in which the ICL expert community has invested in the construction of the field that has also come to structure that very community; the relationship of simultaneous mutual shaping that has aptly been termed 'co-constitution'.[34]

First, ICL as a (semi-autonomous) field began from the imaginings of idealistic scholars. It would not have become what it is at present – a developed system of norms and judicial institutions – without the contributions that legal academics have made all along, often under professional hats of government officials, international advisers, negotiators, judges, and court staff.[35] Second, we have seen many academic-to-judge-and-back career swaps in ICL, from the Nuremberg and Tokyo tribunals to the STL. In some instances this enabled the self-referential enforcement (and reinforcement) of the scholarly and the judicial authority consecutively exercised by the same professionals. For example, there have been cases of distinguished academics donning international judges' robes and giving judicial imprimatur to legal positions they had earlier endorsed in a scholarly capacity, only to refer to those judicial rulings in their further (academic) writings, thereby cementing

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31 E.g. Kreß, *supra* note 24, 1–10; Christensen, *supra* note 29, 9 et seq.

32 Thus, under 'genres', I mean not the forms of dissemination (monographs, treatises, articles, etc.) or research methods and approaches (formal legal, comparative, interdisciplinary), but a set of conventions defining the scholar's self-positioning in relation to the object of study.

33 As noted by Robert Cryer in his LJIL symposium presentation 'From Thought to Practice, and then to Where? The Changing Relationship between Scholars and Practitioners in International Law' (*supra* note 2).

34 A. Leander and T. Aalberts, 'Introduction: The Co-Constitution of Legal Expertise and International Security', (2013) 26(4) LJIL 783; Hernández, *supra* note 3, 2.

35 On the role of academics in the construction of international criminal justice, see Christensen, *supra* note 29.

semantic authority on both fronts.[36] The intertwining of career tracks in ICL presents an intriguing case of 'revolving doors'. Among others, it shows the co-constitutive relationship of the academia and the practice whereby the timely shifts in self-positioning enabled scholars to maximize their impact on the field. However, when we speak of scholarly genres, as we do here, this only relates to functions academics perform *qua* scholars (agents producing scholarship), as opposed to academics engaging with law *qua* practitioners.[37]

It may seem an attractive approach to break down the evolution of ICL scholarship over the past two decades into several 'generations', that roughly correspond to the key periods in the development of international criminal justice.[38] The scholars' emotional attitudes to the project and, accordingly, their contributions have varied significantly at different times. Put simply, the scholarly treatment has progressed from idealistic (as one may be about the project both utopian and necessary) in the era preceding the creation of the ad hoc tribunals and the ICC; to triumphant and defensive thereafter (on account of the euphoria of success attending the establishment of the courts and their perceived fragility in the early days); and, ultimately, to – reservedly at first and then increasingly – critical about their jurisprudence, practice, and effects.[39] Moreover, the disciplinary character of the scholarly investments has changed over time, given the prominence of different camps of legal specialists. In the formative period, public international lawyers and human rights lawyers exerted a decisive influence, whereas theorists and comparatists of (domestic) criminal law and procedure became especially visible when it came to the core business of the courts.

The generational narrative is, of course, too sweeping, not least because the importance of lone voices speaking not in cadence or in tune with the *zeitgeist* should not be discarded. Pigeonholing the existing lines of ICL scholarship into 'generations' neatly is impossible without doing violence to individual works. This is why the transversal approach of distinguishing cross-generational types or genres based on the nature of the author's engagement with the object of inquiry may be preferable.[40] This helps avoid some of the over-generalizations of the essentialist approach that links scholarship to different epochs in ICL. Due to their interpenetration and shared

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[36] R. Cryer, 'International Criminal Tribunals and the Sources of International Law: Antonio Cassese's Contribution to the Canon', (2012) 10 *Journal of International Criminal Justice* 1045, 1053; C. Steer, 'Non-State Actors in International Criminal Law', in J. d'Aspremont (ed.), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (2011) 303.

[37] This forecloses the question whether international judicial output – in particular, separate opinions emulating scholarly literature in style and purport (in view of the tenuous link to issues *sub judice*) – is an extravagant form of scholarship. The related query whether it may be a genre *in statu nascendi* is best left for another time. Stahn and de Brabandere, *supra* note 2, 2 (speaking of individual judicial opinions as 'scholarship in disguise').

[38] Elsewhere, I proposed to distinguish three recent 'generations' of ICL scholarship: 'like-minded' (1st), 'critical' (2nd), and 'methodological' (3rd): S. Vasiliev, *International Criminal Trials: A Normative Theory* (PhD 2014), 12–17.

[39] Kreß, *supra* note 24, 10–12 ('from ceremonial affirmation to constructive criticism'). While the second stage conjures up the notions of romance, euphoria, and triumph, the key words of the third are disillusionment, scepticism, and critique. D. Luban, 'After the Honeymoon: Reflections on the Current State of International Criminal Justice', (2013) 11(3) *Journal of International Criminal Justice* 505; P. Akhavan, 'The Rise, and Fall, and Rise, of International Criminal Justice', (2013) 11(3) *Journal of International Criminal Justice* 527.

[40] See Stahn and de Brabandere, *supra* note 2, 2 (distinguishing 'academic scholarship' and 'scholarship of action').

features, the typology of genres below is not waterproof. Besides, an average piece of scholarship would normally be a combination of elements characteristic for different genres, and scholars generally tend to work in several of them. Therefore, I will refrain from naming authors, works, and debates here (although any resemblance is probably not coincidental).

The first conventional genre is represented by *theoretical scholarship*. It aims to generate an understanding of the fundamentals of ICL through the systematic and analytical development of its foundational (legal) concepts and definitions.[41] The basic ideas about the history, nature, and purposes of ICL and its institutions are the discipline's lifeblood and groundwork on which other professionals, including scholars, can build their legal thinking and engagement with the field. To the extent that recourse is had to insights from history, politics, philosophy, sociology, etc., this genre is amenable to interdisciplinary approaches. This type of scholarship is predominantly proactive, in that it anticipates (and awakens) the cognitive needs of the epistemic community. It is also marked by an a priori acceptance of main rationales and principles of the project.

This feature can also be found in the contiguous genre of *doctrinal scholarship*. It engages with its objects of inquiry (law, jurisprudence, institutions, and practices) with a view to describing, analysing, classifying, and systematizing, and it does so in a relative autonomy from the large theoretical questions, to the extent it is possible to abstract from them.[42] Such scholarship is mostly reactive and produced in response to the articulated demand or perceived need for (systematic) knowledge as a framework of doctrines assisting in the comprehension and normative assessment of specific issues or developments. In case the doctrinal analysis reveals incongruences in the application of law or inconsistencies between practice and the principles, definitions, and categorizations the doctrine upholds, 'constructive' criticisms are advanced along with suggestions towards the rectification of errors. Much of the current ICL scholarship analyses the jurisprudence in light of the principles (nominally) defining of the project of international criminal justice – legality, culpability, fairness, sentencing proportionality, etc. – with an objective of addressing the perceived deviations.

Another genre that has always been and remains prominent in ICL, while not being unique to it, is *activist scholarship*.[43] It distinguishes itself by an overt pursuit of a legal policy agenda and advocates the necessity (or otherwise) of legal and institutional reforms on specific issues. Scholar-activists pursue the ambition of spurring and shaping the development of the law, political attitudes, and institutional practices in order to effect (what they consider) positive social change. Such scholarship may be reactive, triggered by the developments that are deemed undesirable, or proactive, seeking to contribute to the (re)construction of the field anew as a way to

[41] Broadly corresponding to the 'theoretical' and historical' functions of the ICL scholarship identified by Claus Kreß: Kreß, *supra* note 24, 13 and 25.

[42] See *ibid.*, 15–19 ('doctrinal function [of] refining the law').

[43] Stahn and de Brabandere, *supra* note 2, 2 (*doctrine d'action*). In Kreß's classification, the activist genre would probably come closest to the 'advisory function': Kreß, *supra* note 24, 19–20.

champion certain interests through the mobilization of intellectual, political, and administrative capital.

Fourth, while the elements of critique are ubiquitous and its potential angles numerous, a broad class of ICL works in which it is not merely incidental, but the very point of inquiry and the principal heuristic device, could be termed *critical scholarship*. The gist is in subjecting the ICL normative, conceptual, and methodological edifice to an out-of-box scrutiny whereby the evaluative criteria are sourced from outside of the field and may be extraneous to it; the latter's own internal criteria are either ignored or come under attack directly or indirectly. This genre seeks to expose the fundamental flaws and limitations of the project: the incommensurability of the 'mainstream' discourses and those whose 'other-ness' it ignores and suppresses; its tendency to originate from, mirror, and reproduce the existing power structures and systemic injustices; and its effects, both unproduced and unaccounted for, which cast a shadow on its legitimacy and are a thorn in the side of the project's 'defenders'.[44]

Fifth, the rise of *empirical scholarship* in ICL has already been pointed out.[45] This genre is characterized, first, by a distinct focus on the social reality of ICL norms, institutions, and practices and on the impacts they generate; and second, by empiricism (and hence interdisciplinarity), insofar as ICL's various parameters and effects are measured with research methods of social sciences. The objective of empirical studies in and about ICL is to test its normative 'articles of faith' against the 'hard data'. The claims and counterclaims regarding the impact and effectiveness sustained within the field or elsewhere (for example, with respect to the tribunals' deterrent and reconciliatory effects, acceptance and legitimacy within specific communities, and victim satisfaction) are appraised in light of facts established empirically. Unlike with the critical genre, empiricists employ the assessment criteria articulated within the field itself as their point of departure; empirical scholarship is therefore mostly reactive in relation to claims it seeks to verify. Even where verification results in an invalidation of putative 'truths', the empiricists' critical agenda remains 'constructive': substituting the correct data for the false premises and discredited axioms; calling for adjustments to discourses to ensure their conformity with an empirical reality; and enabling fact-driven reforms towards enhancing the effectiveness of norms and practices.

Finally, the increasingly important genre is *methodological*, or *meta-scholarship*. This type centres on the methodological sub-structure of practices constitutive of the field and argumentative strategies underlying its discourses. Such works are devoted to the critical and distanced reflection on the research methods and evaluative frameworks ICL scholars rely upon, often unquestioningly. The point is in showing how the (unpronounced) methodological preferences and cognitive limitations and biases impact on the subject's epistemological approach and self-positioning. The meta-scholarship naturally coalesces with the critical agendas and makes use of empirical insights, but its objective is not to champion a specific

[44] This is not reducible to the 'control' functions of ICL scholarship: cf. Kreß, *supra* note 24, 20–23 (on 'evaluating, enhancing and protecting the system's legitimacy' and 'questioning taboos').

[45] See also ibid., 24 ('empirical function').

methodology or normative position. It is instead to deconstruct and 'sanitize' the existing discourses while promoting methodological sensibility and self-awareness.

This inventory probably captures the prevalent and most familiar genres of today's ICL scholarship, but I do not pretend it to be complete; additions may be necessary. New genres will likely emerge from the interstices and current hybrids might claim a separate place on the list. As some genres gradually fall into desuetude and others come into favour, the landscape of the ICL scholarship will be transforming.

3.3. . . . to where it needs to be (destinations)

What are the destinations of the ICL scholarship and what genres will be defining of the ICL academia in the near future? Any prognoses can only be given subject to a wide margin of error. Scholarly production depends on a host of variable factors not lending themselves easily to prediction, including the individual and collective agency of academics, institutions facilitating ICL research, and vehicles for dissemination. The dynamics between the academic and practice communities are important, too. Practitioners in international courts and elsewhere are responsible for shaping and articulating demand. A lion's share of scholarship about international criminal justice produced so far (the doctrinal and, increasingly, empirical works) purports to satisfy it. Presumably, practice will continue driving the scholarly production to a considerable extent. Therefore, academics and practitioners need to do more to make their symbiotic relationship work, including by creating more platforms and formats for an open dialogue.

It is, however, clear that far from all ICL scholarship is meant to satisfy the needs of practitioners directly. Nor does it have to be subordinated to the needs of practice to be relevant: the validity of scholarship is not measured exclusively by the possibility of immediate practical valorization. Although the practice community is an important consumer of scholarly output, servicing it is not the beginning and the end of the academic function. Its multi-dimensional character entails that 'destinations' of ICL scholarship cannot be reduced to one or two. On the contrary, it has to follow a variety of trajectories, as represented by various genres, to arrive at different places. Because each genre is associated with an aspect of the academic function, all of them will likely have a place in the future landscape of ICL scholarship. Where predictions do not work, intuitions perhaps can. I would like to share two of them in particular.

First, I sense, and this is by definition subjective, that at the doctrinal and conceptual levels, the ICL scholarship has for a long time been lagging substantially behind the tribunals' in-house expertise and the pace of legal research and thought feeding into the judicial output. The dynamism of practice has made it difficult, if not impossible, for academics to keep up at all times, let alone be proactive in selecting issues for an in-depth treatment. As a result, scholarship has not always succeeded in providing practice with timely *ex ante* guidance when it may have been needed most. Much of it has been locked in a reactive, *post hoc* mode, being adjunct and collateral to practice. This does not mean, however, that doctrinal analyses and critiques of jurisprudence produced have not served the useful purpose of policing and reorientating practice *ex post facto.* The relevance of such scholarship has continued unabated – and will remain so as long as the courts keep supplying food for

academic thought and in turn are prepared to benefit from the 'applied science' of ICL. On this latter point, the occasional insensitivity of ICL practitioners to scholarly insights and debates – as a result of limited resources available for research or unwillingness to take guidance from pre-existing scholarship – is also the reason why the practical impact of academia has been underwhelming or is so perceived.

Second, the current condition of the discipline signals that the production of ICL scholarship categorized above as 'empirical', 'critical', and 'methodological' will grow and reach an apogee in the next few years. The emphasis on the methodology and interdisciplinarity will be defining of the bulk of scholarly work to be done in ICL in the middle-term perspective. Whether this is a sign of ICL's 'moment of crisis' or its moment of maturity at which meta-questions are bound to arise can be debated, but the present 'instability' of the discipline and the related 'push for change' are evident.[46] For the same reason, the critical agenda that seeks to reimagine the field through the deconstruction of its elementary structures and interrogation of its politics, will also gain prominence. The changes pushed for would be not exactly cosmetic: nothing short of a paradigm shift would suffice to rebuild the ICL project on a new – more politically, economically, and morally just – foundation.

4. ICL IN LJIL: IDENTITY, AGAIN

The status of ICL in the LJIL and, in turn, the LJIL's status as a forum disseminating ICL scholarship are the issues I wish to end this editorial with. At its core (as the title conveys), the LJIL is a generalist journal of international law.[47] It is therefore no less than a curious tribute to specialism that ICL is reserved a separate section (under a rather unwieldy title) within the LJIL's structure.[48] Moreover, ICL is the *only* specialized branch of international law enjoying this privilege. This presumably reflects the disciplinary predilections of the past (and present) editors. Moreover, the authors shape the Journal's identity at least as much as the editors. The fact remains that many of the LJIL's authors and readers are ICL scholars. Accordingly, there continues to be an influx of ICL-related manuscripts the authors believe would not be out of place in the LJIL. Hence, there must be more to the LJIL's special interest in ICL and its consequent cultivation of debates around this discipline. That is, ICL came to be one of the LJIL's pillars and focal areas at some point and this has not changed since.

Still, the LJIL's positioning along the generalist v. specialist lines raises questions about the *raison d'être* and orientation of the ICCT section. What is the reason for paying special attention to ICL in an international law journal and what is the added value of that section with respect to ICL-exclusive journals? I believe that the answers may lie in the recognized need to counteract the negative effects

[46] I. Venzke, 'International Law and its Methodology: Introducing a New *Leiden Journal of International Law* Series', (2015) 28(2) LJIL 185, 185.

[47] Venzke, *supra* note 4, 811; Y. Radi, 'In Defence of "Generalism" in International Legal Scholarship and Practice', (2014) 27(2) LJIL 303, 308.

[48] 'Hague International Tribunals: International Criminal Court and Tribunals' (ICCT).

of the increased specialization within the international legal discipline.[49] In the peculiar case of ICL – a disciplinary hybrid of international law and (comparative) criminal law and procedure – the specialization has been brought to the point of an almost complete autonomization vis-à-vis the generalist international law field. This process was enabled and catalysed by the emergence of specialized chairs, research centres, professional associations, journals, and LL M programmes.[50] While this was warranted in the era of an overwhelming demand for the ICL expertise posed by the rapidly expanding field, the limits of specialization have arguably been reached. The disciplinary bubble of ICL is set for gradual deflation, or else it would burst.

Another thing is that many international lawyers have seemingly ceded the entirety of ICL to criminal law specialists or, put simply, disowned it as the 'criminal law stuff'. This may perhaps be understandable as regards substantive and procedural criminal law 'technicalities'. But it does not square with the international-law character of a host of other matters arising in connection with ICL enforcement: institutional law aspects, jurisdiction, immunities, applicable law and interpretation, state co-operation, and so forth. This attitude has naturally contributed to the deepening of intra-disciplinary distinctions and the consummation of the ICL specialization. To address some of its harmful consequences, it is imperative to bridge the conceptual, methodological, and discursive gaps between international law and its specialized body. The necessary step towards that goal is to bring closer, if not reintegrate, their respective expert communities and debates.

ICL ought to be reconnected to its 'parent discipline' because, firstly, as Claus Kreß rightly notes, the internal compartmentalization is 'unhealthy' for the 'college' of ICL.[51] Accordingly, it is a positive development that an increasing number of ICL scholars make an effort to overcome the partiality of specialization. Many of them nowadays possess a good command of the fundamentals of international law and feel at home in both constituent fields. Second, general international lawyers ought to be mindful of the fact that international criminal law *is* international law – no less so for being a child from a troubled family of two 'parent disciplines'. Although neither international nor criminal lawyers can claim a monopoly over ICL, and much of its normative content originates from criminal law, ICL still is a sub-discipline of international law. As such, it shares many of the conceptual, methodological, and epistemological questions and challenges with the 'parent' field. The insights on a variety of issues taking centre stage in ICL weave neatly into the fabric of generalist debates and could greatly enrich the international law theory. It is therefore up to public international lawyers to unseal the ICL's 'disciplinary box'; they will find that there is much in it for them. One cannot be a true generalist without (also) being a specialist. It is impossible to reflect on international law as a unitary system without an appreciation of its disciplinary diversity and a degree of knowledge of

49 Radi, *supra* note 47, 303 and 305.
50 Kreß, *supra* note 24, 8; Christensen, *supra* note 29, 22.
51 Kreß, *supra* note 24, 8 ('This increasing sensitivity for international criminal law's belonging to two "parent disciplines" helps to avoid an unhealthy compartmentalisation within the college of international criminal law.').

its specialized branches (which does not need to reach the level of full mastery).[52] It would be contrary to the logic of 'generalism' for it to become a 'specialism' unto itself.

International law journals, such as the LJIL, have an important mission of keeping the field together by linking the different corners of the international legal profession and areas of knowledge, both generalist and specialist. In line with this objective, the LJIL's ICCT section reaches out to both general international lawyers and international criminal lawyers. Among others, it aims to serve them as the vital channel of communication and a platform for sustained debates on common issues. We on the editorial board are convinced that this dialogue benefits the international law discipline as a whole and are committed to fostering it by every means.

[52] See also Radi, *supra* note 47, 306 note 15 ('the acquaintance with specific legal regimes feeds the knowledge of the basic categories of international law and reflection on their evolutions').