

# International Crimes as Familiar Spectacles: Socially Constructed Understandings of Atrocity and the Visibility Politics of International Criminal Law

by

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A thesis submitted in conformity with the requirements  
for the degree of Doctor of Juridical Science

Faculty of Law  
University of Toronto

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## Abstract

This thesis examines the role aesthetic considerations play in the development of shared social and legal understandings of genocide, crimes against humanity, and war crimes. Utilizing a social constructivist, interactional legal theory analytical framework, I argue that aesthetic considerations play a major role in identifying these international crimes. The “visibility politics” resulting from this heavy reliance on aesthetic factors in turn, influence social interactions through which shared understandings of these crimes are developed, resulting in shared understandings of genocide, crimes against humanity, and war crimes being embedded in a particular aesthetic model of atrocity. According to this model, atrocity crimes are expected to manifest themselves as familiar spectacles of violence and abuse that are both shocking and intuitively “criminal” in nature. While at first glance, this understanding may appear to merely reflect the extraordinary scale of atrocity crimes themselves, the notion that such crimes will necessarily manifest themselves according to this aesthetic model ignores the complexities of mass harm causation, and the substance of international criminal law (ICL).

Chapter one, combining insights from interactional legal theory and the field of neuroaesthetics, theorizes ICL as an environment conducive to aesthetic considerations influencing relevant norm development processes. Chapter two, through an analysis of how the language of atrocity is

deployed within ICL discourses, argues that shared understandings of atrocity crimes are grounded in an aesthetic model of atrocities as familiar spectacles of violence and abuse. Chapter three demonstrates that this aesthetic model fails to account for the complexity of real-world atrocity situations and the wide variety of means through which genocide, crimes against humanity, and war crimes may be committed. Chapter four examines how visibility politics have shaped social and legal understandings of processes of mass killing and abuse in Khmer Rouge era Cambodia and elsewhere. Chapter five argues that visibility politics undermine the aims of ICL and negatively influence historical memory and the distribution of human rights, transitional justice, and peacebuilding resources. Chapter six, returning to interactional legal theory, argues that the visibility politics of ICL also impair the legality legitimacy of ICL itself, by undermining ICL's adherence in practice to interactionalism's criteria of legality.

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## Introduction

Since the early 1990s the field of international criminal law (ICL) has experienced a period of sustained growth. After being relegated to the realm of academic curiosity during the Cold War, ICL burst back onto the scene with the creation of the various ad hoc United Nations (UN) courts and tribunals and the International Criminal Court (ICC). Indeed, ICL's influence has grown so much that international criminal justice is now routinely conflated with the more general pursuit of global justice.<sup>1</sup>

While the current preoccupation with ICL as a means of improving global justice may or may not be a positive development, the fascination with ICL has real-world implications. Although only a tiny fraction of international crimes are ever prosecuted, labeling an event an atrocity, i.e. a situation involving the commission of genocide, crimes against humanity and/or war crimes, nonetheless entails an array of real-world repercussions.<sup>2</sup> Placing harms within the rubric of atrocity signals that they are products of human wrongdoing, rather than natural disasters or causally amorphous structural causes. Moreover, atrocities are viewed as especially serious and pressing global justice issues, increasing political pressure to take some form of ameliorative action. States accused of participating in, or tolerating the commission of atrocities, may face diplomatic repercussions, sanctions, or even armed intervention. Individuals accused of leading or participating in atrocity crimes are branded, socially, if not legally, "enemies of all mankind" (*hostis humani generis*), limiting their ability to participate in certain political fora or organizations. Peacebuilding, foreign aid, and transitional justice activities also tend to be focused predominantly on sites of recognized atrocity crimes. Finally, the denial that atrocities were committed against a specific victim group often correlates with their continuing oppression,

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<sup>1</sup> For discussions of the ways in which ICL has begun to monopolize global justice and human rights discourses, see Sarah MH Nouwen & Wouter G Werner, "Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity" (2015) 13:1 *Journal of International Criminal Justice* 157; Karen Engle, "Anti-Impunity and the Turn to Criminal Law in Human Rights" (2015) 100:5 *Cornell Law Review* 1069.

<sup>2</sup> Although ICL is not limited strictly to the categories of genocide, crimes against humanity, and war crimes, this thesis focuses exclusively on these categories of international crimes. Throughout this thesis, the term "atrocity crimes" is used to refer generally to these three categories.

highlighting the importance of whether historical narratives are couched in the language of atrocity and international crime.<sup>3</sup>

Given the importance of these and other ramifications associated with whether a situation is socially understood as involving the commission of atrocity crimes, how atrocities are identified and labelled as such becomes important. Currently, an intuitive “know it when you see it” approach predominates in identifying atrocity situations. This approach is evident in the rhetoric of ICL, which tends to describe atrocities using emotionally evocative, but definitionally vague language. In this thesis, I argue that aesthetic considerations play a major role in the identification of atrocity crimes, and that over time, this has led to a general expectation that such crimes will conform to a specific aesthetic model. According to this model, atrocity crimes are expected to manifest themselves as familiar spectacles of violence and abuse. That is, international crimes are socially understood as events that, in the words of Justice La Forest of the Supreme Court of Canada, “assault our eyes” whenever we are exposed to them.<sup>4</sup> To date, ICL practice has for the most part, borne out this dominant understanding of international crimes as spectacles of violence.<sup>5</sup>

At first glance, the notion that international crimes will manifest themselves as violent spectacles may appear to simply reflect the extraordinary nature of mass atrocity crimes themselves. Such crimes involve harm causation on a massive scale, and it seems logical to assume that such

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<sup>3</sup> The correlation between the denial of past atrocities and continuing oppression is a core theme in scholarship on the histories of unacknowledged historical atrocities and genocide. See generally, Alexander Laban Hinton, Thomas La Pointe & Douglas Irvin-Erickson, eds, *Hidden Genocides: Power, Knowledge, Memory* (New Brunswick, NJ: Rutgers University Press, 2014). Two examples of groups who were victims of atrocity crimes that have been subject to some degree of denial and continue to suffer social marginalization and oppression are the Romani population in Europe and Assyrians in present-day Turkey. The Romani were targeted along with Jews and other social groups for destruction during the Holocaust, while Assyrians were also targeted along with Turkish Armenians and other perceived “non-Turks” by the Young Turks during the Armenian Genocide of 1915-1917. See Riccardo Armillei, Nikki Marczak & Panayiotis Diamadis, “Forgotten and Concealed: The Emblematic Cases of the Assyrian and Romani Genocides” (2016) 10:2 *Genocide Studies & Prevention* 98.

<sup>4</sup> *R v Finta*, [1994] 1 SCR 701, 1994 CanLII 129 (SCC), p 87 (La Forest, J, dissenting on unrelated grounds).

<sup>5</sup> The horrific atrocities committed during World War II, especially the Holocaust, provided the impetus for the creation of ICL and since its inception, ICL has primarily been applied in the aftermath of similarly shocking atrocities in Rwanda, the former Yugoslavia, Sierra Leone, Cambodia, and elsewhere.

crimes will necessarily manifest themselves in spectacular fashion. Upon more careful consideration, however, this assumption becomes less obviously accurate. Nothing in the substance of ICL limits the array of means through which international crimes may be committed. Moreover, because international crimes are overwhelmingly committed by large groups that wield power on a fundamentally different scale than even the most organized domestic criminal organizations, such groups are able to cause harm through various means not necessarily available to domestic criminal actors.<sup>6</sup>

Meanwhile, actually assessing whether a real-world situation involves the commission of genocide, crimes against humanity, and/or war crimes is, in most cases, a difficult exercise. ICL remains in its formative stages, consisting of a complex and still-evolving patchwork of public international law and domestic criminal law doctrine. As it evolves, ICL retains significant areas of ambiguity, within which the substance of the law is imprecise or open to more than one interpretation. Such ambiguity renders ICL's potential applicability hazy in many circumstances. This feature of ICL is exacerbated by its highly selective enforcement, which impedes common law processes of clarification through adjudication. Thus, unlike in most of the Western criminal law regimes after which ICL is modelled, where the baseline assumption is that all serious crimes will be thoroughly investigated and prosecuted given sufficient evidence, in ICL, most international crimes are never formally investigated, let alone prosecuted.

The difficulty of forecasting ICL's applicability is compounded by the scale and complexity of mass atrocities themselves. Unlike most domestic manifestations of criminality, mass atrocity crimes tend to be complex phenomena that unfold dynamically over significant expanses of time

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<sup>6</sup> Unlike domestic criminals, groups that perpetrate mass atrocity crimes often wield power over victim populations typically associated with the state, or at least operate in open defiance of state authorities. The fact that international crimes are overwhelmingly committed by large, powerful groups, and often involve state criminality is well-accepted, to the point that such factors are often viewed as the leitmotif of mass atrocity crime. See e.g. James G Stewart, "Overdetermined Atrocities" (2012) 10:5 *Journal of International Criminal Justice* 1189; Adil Ahmad Haque, "Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law" (2005) 9:1 *Buffalo Criminal Law Review* 273; Jens David Ohlin, "Group Think: The Law of Conspiracy and Collective Reason" (2007) 98:1 *Journal of Criminal Law & Criminology* 147; Mark Drumbl, "Collective Violence and Individual Punishment: The Criminality of Mass Atrocity" (2004) 99:2 *Northwestern University Law Review* 539; Jens David Ohlin, "Organizational Criminality" in Elies van Sliedregt & Sergey Vasiliev, eds, *Pluralism in International Criminal Law* (Oxford: Oxford University Press, 2014) 107.

and space. Such phenomena typically involve actors operating at multiple levels to produce mass harm through a varied set of overlapping, mutually reinforcing methods.

This thesis examines the role of “visibility politics”—i.e. politics of vision and recognition grounded in aesthetic considerations and perceptive processes—in shaping social understandings of mass atrocity and international crime.<sup>7</sup> Adopting a social constructivist “interactional” theory of legal norm development at the international level, this thesis demonstrates that the structure and substance of ICL create a prime environment for the operation of visibility politics, which in turn ground shared understandings of mass atrocity and international crime in a particular aesthetic model. According to this model, genocide, crimes against humanity, and war crimes are expected to exhibit two key aesthetic characteristics: *familiarity*, in terms of the ease with which relevant harm causation processes are identifiable as “criminal” in nature, and *spectacularity*, in terms of the high degree of visibility of relevant harms. This aesthetic model, however, only captures a subset, albeit a highly visible one, of actual international crimes, excluding various forms of genocide, crimes against humanity, and war crimes. Consequently, atrocity crimes failing to conform to the dominant aesthetic understanding of atrocity are systematically obscured.

This conceptual and legal backgrounding of unspectacular, unfamiliar atrocity crimes produces a host of problematic repercussions. By obscuring certain atrocity processes, dominant aesthetic understandings of atrocity perpetuate oversimplified, inaccurate understandings of atrocity processes themselves and misrepresents the boundaries of ICL as currently constructed. This backgrounding process also entails a host of broader problematic repercussions. It undermines ICL’s retributive, utilitarian, and expressive aims. It distorts historical memory and implicates ICL in the broader backgrounding of socio-economic and structural global justice issues. It also negatively influences the distribution of aid and human rights, transitional justice, and

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<sup>7</sup> The term “visibility politics” is most often used within the realm of cultural studies to describe the set of politics surrounding demands for social recognition by marginalized and/or stigmatized groups, such as the LBGTQ community or those living with HIV/AIDS, and can be generally “defined as theory and practice which assume that 'being seen' and 'being heard' are beneficial and often crucial for individuals or a group to gain greater social, political, cultural or economic legitimacy, power, authority, or access to resources.” Dan Brouwer, “The Precarious Visibility Politics of Self-Stigmatization: The Case of HIV/AIDS Tattoos” (1998) 18:2 Text & Performance Quarterly 114 at 118. For the purposes of this article, the term is used to refer more generally to the politics that shape recognition and acknowledgment of particular groups, events, or processes.

peacebuilding resources. Finally, from the perspective of interactional legal theory, visibility politics undermine the legal legitimacy of ICL itself, by impairing the degree to which ICL conforms to key criteria of legality, such as generality of application, clarity, stability, and congruence between the law and official action, in practice. As such, this thesis concludes that there is a need to re-conceptualize atrocity crimes, to understanding them in a more holistic manner that acknowledges their complex, dynamic nature and the wide variety of means through which they may be committed.

## 1 Theoretical Framework: Interactional Legal Theory

This thesis adopts an interactional approach to understanding lawmaking, legality, and legitimacy at the international level, as developed by Jutta Brunnée and Stephen Toope.<sup>8</sup> This relatively new theory represents a practice-based, social constructivist account of lawmaking, legitimacy, and legality at the international level, built on a merger of social constructivist research in the field of international relations and Lon Fuller’s work on the procedural or internal “morality” of law. Brunnée and Toope build on Fuller’s work by adapting his criteria of legality to the international level, where, they contend, a broad spectrum of social actors, ranging from individuals to states, continually make, and refine (or unmake) international law through complex interactive processes.<sup>9</sup>

Interactional legal theory views international law as made up of a web of widely shared, socially constructed normative understandings that have been instantiated into law in substantial accordance with eight criteria of legality and thereafter sustained by practices of legality over time.<sup>10</sup> These “criteria of legality,” based on Fuller’s work,<sup>11</sup> are:

1. generality;

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<sup>8</sup> Jutta Brunnée & Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (New York: Cambridge University Press, 2010).

<sup>9</sup> See Jutta Brunnée & Stephen J Toope, “Interactional International Law: An Introduction” (2011) 3:2 *International Theory* 307 at 309.

<sup>10</sup> See generally Brunnée & Toope, *Legitimacy and Legality*, *supra* note 8.

<sup>11</sup> See Lon L Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1969).

2. promulgation;
3. non-retroactivity;
4. clarity;
5. non-contradiction;
6. possible to follow;
7. constancy (or stability); and
8. congruence between the law and official action.<sup>12</sup>

Fuller famously argued that only when rules substantially satisfy these characteristics can they be accurately be labelled “law.”<sup>13</sup> Thus, for Fuller, rules purporting to be law that substantially depart from these criteria’s requirements fail to exhibit the necessary basic characteristics of law, and hence represent some form of rulemaking or normative force making false claims to legality. Aside from mere issues of proper labelling, Fuller, and in turn Brunnée and Toope, claim that only norms and rules properly labelled as “law” attract the unique value-added status of legality, that of habitual obedience, or “fidelity” amongst those to whom the law is addressed. That is, only when putative international legal rules and norms are actually instantiated into law in substantial accordance with the eight criteria of legality, and for Brunnée and Toope, are also thereafter supported by robust practices of legality, do such norms and rules create a sense of legal obligation.

Whether a norm or rule attracts legal fidelity however, is not a binary, yes or no assessment. Because Fuller’s eight legality criteria can both cumulatively and individually be satisfied in degrees, law itself can concomitantly *exist* in degrees under interactional theory.<sup>14</sup> This spectral view of legality, along with characterizing practices of legality as shaping such legality dynamically over time, combines for Brunnée and Toope to create a view of international lawmaking (or unmaking) as a dynamic, ongoing process, rather than a sequential formula with a distinct beginning and end. The degree to which purported international legal norms are subject to widely shared understandings, have been instantiated into law in accordance with Fuller’s

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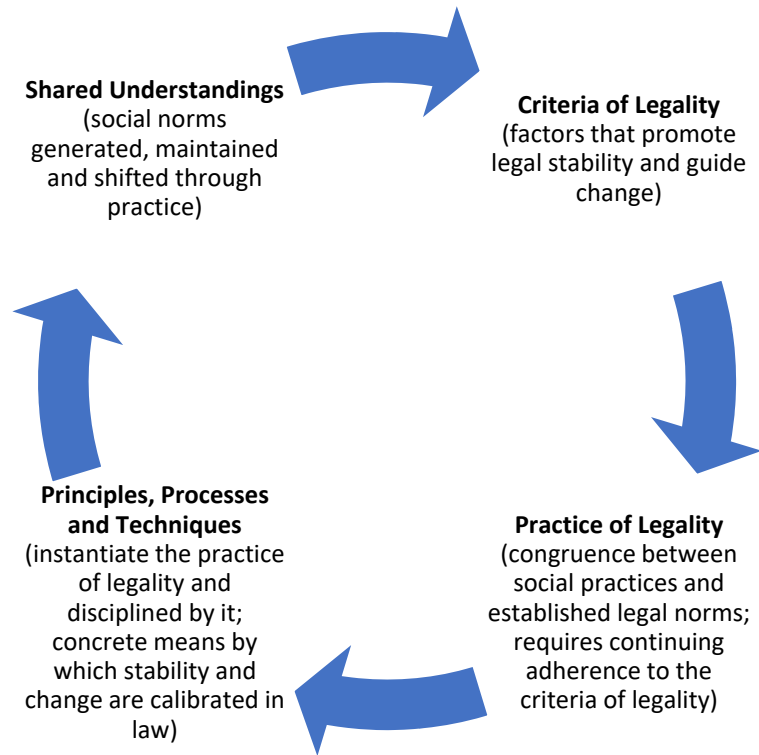
<sup>12</sup> Brunnée & Toope, “Interactional International Law” *supra* note 9 at 310.

<sup>13</sup> This legitimation as true “law” is in turn, key, for Brunnée and Toope because for them true (interactional) law attracts a special “sense of commitment among those to whom law is addressed.” Brunnée & Toope, *supra* note 9 at 308; Brunnée & Toope, *Legitimacy and Legality*, *supra* note 8 at 52-55.

<sup>14</sup> Fuller referred to this dynamic as law’s ability to “half-exist.” See Fuller, *The Morality of Law*, *supra* note 11 at 122-123.

criteria of legality, and have been subject to robust practices of legality, therefore, dictate the degree to which Brunnée and Toope would characterize such norms as legitimate international law attracting fidelity. Thus, in the words of Brunnée and Toope, the “hard work” of international lawmaking is never done, but represents a continual, dynamic and non-linear enterprise.

### A Visual Model of Interactional Lawmaking<sup>15</sup>



Interactional legal theory provides the overarching methodological framework through which lawmaking, legality, and legal legitimacy are conceptualized in this thesis. Interactionalism is particularly useful as a methodological framework for exploring the normative epistemological forces underlying the current international criminal justice regime, and for identifying how such forces affect the substance and practice of ICL itself. First, interactional theory, particularly its notion of “shared understandings,” provides a helpful model for describing how widely shared

<sup>15</sup> Diagram appears in Jutta Brunnée & Stephen J Toope, “The Rule of Law in an Agnostic World: The Prohibition on the Use of Force and Humanitarian Exceptions” in Wouter Werner, Marieke de Hoon & Alexis Galan, eds, *Koskenniemi and his Critics* (Cambridge: Cambridge University Press, 2015) at 142.

assumptions of social actors may subtly shape the formation, interpretation, and evolution of international law. As such, interactional legal theory helps to describe and articulate how widely shared assumptions concerning the nature of and means through which international crimes are committed may help drive legal practices, and eventually even change the law.

Second, interactionalism also provides a method of analysis for differentiating between shared normative understandings that have and, have not, been instantiated into international law. Only understandings that have been instantiated into law in substantial accordance with Fuller's criteria of legality may legitimately lay claim to the label of "law" per interactional theory. This framework thus, facilitates an analysis of whether visibility politics *affect* the practice of ICL while remaining outside of the law, versus having become *part* of ICL itself. It is one thing for assumptions concerning the means through which international crimes may be committed to gradually shape the evolution of ICL to focus narrowly on such means. It is another thing entirely for such assumptions to shape legal practices, while themselves remaining outside of the law and unacknowledged.

Regardless of the legal status of the normative assumptions underlying ICL's visibility politics, interactionalism provides a useful analytic for assessing the broader ramifications for the legality of ICL systemically, by facilitating an analysis of how such politics operate to encourage congruence versus deviation from Fuller's criteria of legality in practice. This thesis argues that in the case of ICL, there exist widely shared normative understandings concerning the means through which international crimes may be committed that have not, in any meaningful way, been instantiated in this body of law itself. Despite not being instantiated into ICL, this understanding nonetheless deeply influences legal practices associated with ICL. Such influence undermines the generality and clarity of ICL in practice, along with the degree of congruence between the substance of ICL and the acts of relevant officials and legal actors. Consequently, from an interactional perspective, I argue that the visibility politics undermine the legal legitimacy of ICL.

## 2 Structure and Overview of Argument

Chapter one explains why ICL provides an ideal environment for visibility politics to shape shared understandings of atrocity crimes. Utilizing social constructivist models of norm development and an "interactive affordance" model of aesthetic perception within the field of



neuroaesthetics, I demonstrate that when social interactions occur in a context of uncertainty and lack of knowledge, actors involved in such interactions tend to rely more heavily on aesthetic perception. Aesthetic perception refers to emotional, intuitive evaluative processes that are “aesthetic” in nature in that they involve assessments of the “rightness” grounded in sensory experience, rather than reasoned judgments. While the field of neuroaesthetics provides a model of evaluating how visibility politics affect individual social interactions, social constructivist models of social learning help elucidate the aggregate effect of the accumulation of individual social interactions over time for norm development. Over time, individual social interactions shaped by aesthetic considerations mold norm development processes, resulting in the insertion of aesthetic considerations into shared understandings.

After introducing constructivism and aesthetic perception, I demonstrate that the structure and substance of ICL inject uncertainty and lack of knowledge into the social interactions between actors who play a role in the development of norms relevant to ICL. Broad zones of uncertainty and lack of knowledge are created by the combination of ICL’s normative and doctrinal ambiguity, the extreme selectivity of ICL, and the complex nature of real-world atrocity situations. This environment is conducive to actors relying heavily on aesthetic perception in forecasting ICL’s applicability. Over time, such visibility politics affect the development of shared social understandings of what constitutes an atrocity, which in turn, feed into both social and legal understandings of what kinds of situations ICL may be applied to.

Having demonstrated that ICL represents an environment conducive to aesthetic perception influencing norm development processes, chapter two, explores the content of resultant aesthetic model of mass atrocity and international crime, referred to as the “atrocity aesthetic.” This chapter argues that the role of aesthetic considerations in shaping the development of norms related to ICL is evidenced by the tendency to present mass atrocity crimes as familiar spectacles of violence and abuse. Per this understanding, atrocities, as the presumed subject matter of ICL, are assumed to manifest themselves in ways that will be highly visible and self-evident. This assumption explains both the fact that the term “atrocity” has no legal meaning and the “know it when you see it” approach that currently predominates in the identification of atrocity crimes.

To substantiate this argument, chapter two provides an analysis of shared understandings of “atrocity,” both as a general concept, and as a means of referring to the kinds of situations ICL

applies to. This analysis demonstrates that shared understandings of atrocity as a concept are grounded in unspecific, highly subjective assessments of what types of action are especially brutal or horrific. Because such assessments are highly subjective and many atrocities manifest themselves in ways that are both easily recognizable and spectacular in terms of their scale, visual characteristics, and highly public nature, I argue shared understandings of mass atrocity and international crime have over time become grounded in an aesthetic model of atrocities as familiar spectacles.

Chapter three assesses the degree to which the atrocity aesthetic accurately captures the full spectrum of forms atrocity crimes may take. This chapter argues that the atrocity aesthetic oversimplifies the highly complex nature of most instances of mass harm causation and misrepresents the boundaries of ICL in relation to such processes. The atrocity aesthetic fails to capture the complexity of mass harm causation processes as social phenomena which unfold dynamically over large expanses of time and space through a host of overlapping, mutually reinforcing means. Many such means, particularly those which are attritive or socio-economic in nature, fail to conform to the atrocity aesthetic and hence, tend to be conceptualized outside the rubric of mass atrocity.

The atrocity aesthetic has also contributed to inaccurate social understandings of the boundaries of ICL liability. Unspectacular means of mass harm causation, such as famine, corruption, or interference with humanitarian aid delivery tend to be backgrounded within ICL practice. While often such backgrounding is assumed to be a product of the doctrinal limitations of ICL, a growing body of research suggests that well-established international crimes can, and regularly are, committed through such modalities.

Chapter four grounds the preceding analysis by providing examples of real-world situations involving the apparent commission of genocide, crimes against humanity, and/or war crimes through means failing to conform to the atrocity aesthetic. First, a detailed overview of the multiple, overlapping and interacting causal pathways through which mass suffering and death were produced by the Khmer Rouge regime leadership is provided. This example demonstrates how various forms of harm causation within even the most paradigmatic atrocity situations interact dynamically to produce mass suffering and death. Second, following the in-depth case study analysis of Khmer Rouge era Cambodia, I provide brief overviews of a host of additional

situations, both historical and contemporary, involving the apparent commission of atrocity crimes through unspectacular and/or unfamiliar means. In their totality, these examples demonstrate that atrocities are complex social phenomena that may take many forms and involve the production of harm through various, interactive methods. Such examples also demonstrate that a host of different methods of mass harm causation failing to conform to the atrocity aesthetic may violate well-established provisions of ICL, yet continue to be dominantly viewed as structurally excluded from the purview of ICL.

Chapter five explores the repercussions of these visibility politics for the goals of ICL and in terms of their effects on historical memory, notions of global justice, and the distribution of human rights, transitional justice, and peacebuilding resources. I argue that, beyond perpetuating oversimplified understandings of the means through which atrocity crimes may be committed, the visibility politics of international criminal justice also work to undermine the retributive, utilitarian, and expressive goals of ICL. In terms of retributive goals, visibility politics problematically insert extralegal, morally irrelevant factors into determinations of what constitutes an international crime, who should be held accountable, and how the extremely scarce resources of international criminal justice should be allocated. In terms of utilitarian goals, visibility politics create the risk that any deterrent effect ICL may have, presently or in the future, may be undermined, by allowing those responsible for mass atrocities to enjoy impunity, so long as they commit such atrocities through unspectacular, unfamiliar means. Finally, the expressive value of ICL is also undermined by the current preoccupation with visibility and spectacle. The salutary effects of ICL, of attaching social stigma to certain harmful behaviors, and those responsible therefor, and in recognizing the victimhood of those harmed, are undermined by expressing that harms that fail to manifest themselves as shock-provoking spectacles are tolerable.

In addition to these problematic ramifications in terms of the traditional justifications used to defend punishment via ICL, visibility politics also negatively affect historical memory and the distribution of global justice resources and aid. Histories of oppression and atrocity may be misremembered or the culpability of those responsible obscured through the operation of visibility politics, which shift the tenor of the language used in discussing such histories from that of criminal law, imbued with notions of human causation and culpability, to more causally ambiguous language, such as the causally neutral language of tragedy or mistake. In terms of

material repercussions, given ICL's highly influential position within the architecture of global justice, visibility politics affect the distribution of material resources earmarked as contributions to human rights, transitional justice, and peacebuilding. The tendency to understand atrocities aesthetically thus, tends to cut off civil society actors and social justice activists from being able to access certain resources and sources of funding if they in a location where mass harms have been caused through means not in accordance with the atrocity aesthetic.

In Chapter six, returning to interactional legal theory, I consider the ramifications of visibility politics for the legal legitimacy of ICL. Using interactional legal theory's models of legality and legitimacy, I argue that visibility politics undermines ICL's legal legitimacy. In doing so, I argue that such politics undermine key interactional criteria of legality, including generality, clarity, stability, and congruence between the substance and actual practice of the law. In particular, I argue that visibility politics distort practices of legality associated with ICL, jeopardizing the gains ICL has made towards legal legitimacy in terms of the instantiation of relevant legal norms. I explain this process of distortion by returning to neuroaesthetic research on processes of aesthetic perception, particularly the "interactive affordance" model. I argue that this model helps explain how the uncertainty and lack of information regularly experienced by actors interacting with the world through the rubric of ICL encourage such actors to rely on processes of aesthetic perception in identifying atrocity crimes and assessing ICL's doctrinal boundaries. Over time, repeated reliance, subconscious or self-aware, on cognitive processes of aesthetic perception in this manner, cumulatively build shared understandings concerning the nature of atrocity crimes and the means through which they may be committed as such actors interact with one another in various for a and communities of practice. Because such understandings are grounded in largely unacknowledged cognitive shortcuts, they themselves tend to be viewed as merely reflecting the realities of mass harm causation and doctrinal structure of ICL, thereby subtly inserting extralegal considerations into understandings of the subject matter of ICL and associated practices of legality.

The overarching conclusion this thesis reaches is that there exists a widespread assumption that mass atrocity and international crime will adhere to a specific, easily recognizable aesthetic model. This model combines elements of familiarity (visceral recognisability) and spectacle (large-scale public acts of violence and abuse). Crucially, this model captures only a subset, albeit a large and highly visible one, of the ways in which mass atrocity and international crime

manifest themselves. As such, there exists a need to reconsider the forms mass atrocity may take, and means through which international crimes may be committed.

Specifically, greater acknowledgment is needed of the fact that although mass atrocity crimes are extraordinary in terms of their scale and the collective nature of their perpetration, such extraordinariness does not always translate directly into the production of familiar spectacles of violence. Greater recognition is needed of the reality that one of the extraordinary characteristics of mass atrocities is that they may be committed through unspectacular means precisely because they are such large-scale collective endeavors. Thus, just as Hannah Arendt famously identified the oft-banal nature of those who participate in mass atrocities, I argue that there exists a need to acknowledge and grapple with the consequences of the fact that one of the ways in which atrocity crimes are extraordinary is that they may be committed through rather ordinary, even banal means. Only by engaging in such an honest assessment, can the role ICL can and should play in preventing atrocities and properly punishing those who participate in them, be assessed.

## Chapter 1 – Visibility Politics and International Criminal Law Norm Development: An Interactional Account

This chapter explores the role aesthetic considerations play in the development of shared social and legal understandings of atrocity crimes. It does so by assessing the substance and structure of ICL in light of insights from social constructivism, interactional legal theory, and the field of neuroaesthetics. Through this analysis, this chapter argues that the ambiguity and selectivity of ICL combine to make ICL an ideal environment for visibility politics to influence social norm development processes. Social constructivism demonstrates that shared normative understandings develop through social interaction. Interactional legal theory contends that such shared understandings form the raw material out of which international law is made. Recent neuroaesthetic research, meanwhile, describes how virtually all human interactions with the world are shaped to some degree by aesthetic considerations, and that we become more reliant on aesthetic assessments when such interactions occur amidst uncertainty.

This framework helps elucidate how the ambiguity and selectivity of ICL combine to create an environment conducive to aesthetic factors influencing the identification of and interactions with atrocity situations and how such influence shapes the development of shared understandings of atrocity crimes.<sup>16</sup> It does so by providing a model of norm development predicated on social interaction, while also demonstrating how individual actors rely more heavily on intuitive assessments of “rightness” when interacting with the world or each other amidst a high degree of uncertainty. This blend of social constructivism and insights from neuroaesthetics, provides a framework for conceptualizing how the uncertainty bred by the ambiguity and selectivity of ICL leads social actors to rely heavily on intuitive notions of aesthetic “rightness” in determining whether and how ICL applies to a given situation. Interactional legal theory provides a framework for recognizing how, over time, such assessments progressively imbue shared understandings of atrocity and international crime with aesthetic factors.

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<sup>16</sup> As is elaborated *infra* at 12-20, in this context ambiguity refers to the fact that ICL lacks any widely agreed-upon normative foundation and continues to contain areas of substantive imprecision. The term selectivity meanwhile, refers to the fact that ICL is actually applied to a small subset of international crimes. The multiple levels of selectivity that operate within ICL are elucidated *infra* at 20-25.

This chapter first provides overviews of constructivist social learning models integral to interactional legal theory. It then turns to aesthetic theory, the sub-field of neuroaesthetics, and the notion of “aesthetic perception.” More specifically, Ioannis Xenakis and Argyris Arnellos’ “interactive affordance” model of aesthetic perception is presented as a particularly useful framework for conceptualizing the role aesthetic perception plays in social learning processes, and the conditions under which aesthetic considerations play a more or less significant role in social norm development. The implications of this framework for the development of social norms relevant to ICL are then considered.

Through this analysis this chapter demonstrates that because ICL suffers from significant normative and doctrinal ambiguity, and is subject to highly selective application, relevant actors interact within environments marked by uncertainty and lack of information. Neuroaesthetic research, particular Xenakis and Arnellos’ interactive affordance model of aesthetic perception, demonstrate that such environments are especially conducive to the insertion of visibility politics into social learning processes, as actors faced with uncertainty while conferred with broad discretionary powers, are apt to rely heavily on aesthetic perception.

## 1 Interactional Legal Theory and Social Constructivist Models of Norm Development

One of the premises underlying interactional legal theory is the notion that “collectively held background knowledge, norms or practices,” which Brunnée and Toope refer to as “shared understandings,” constitute the raw material out of which international law is created.<sup>17</sup> Such understandings “do not simply exist, or miraculously emerge as agreed among actors ... [but are] generated and maintained through social interaction.”<sup>18</sup> This notion of the centrality of social interaction in norm development processes is rooted in social constructivism, a core premise of which is the notion that “[t]hings—including even nature—are not simply given, revealed, fully determined, and as such, unalterable. Rather, things are made, and made up, in and through

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<sup>17</sup> Brunnée & Toope, *Legitimacy and Legality*, *supra* note 8 at 64.

<sup>18</sup> *Ibid.*

diverse social and cultural processes, practices, and actions.”<sup>19</sup> Thus, constructivism “represents a way of thinking which explicitly thematizes cognitive operations and social practices as processes of construction”.<sup>20</sup> As such, it follows that from the perspective of social constructivism, all factors that affect cognitive operations and social interactions necessarily play some role in the development of collectively held background knowledge and norms that form the basis of international law from an interactional perspective.

This recognition of the broad array of inputs that contribute to constructivist models of norm development is reflected interactional theory. Brunnée and Toope adopt an inclusive view of what actors and institutions participate in interactional norm development and lawmaking processes, arguing that “existing patterns of participation in international law-making where norms, although formally sanctioned by states alone, in fact are influenced strongly by a diversity of actors.”<sup>21</sup> This insight rings particularly true within the realm of ICL. While states negotiate the conventions and treaties that outline the basic elements of certain international crimes, and create ICL institutions such as the United Nations (UN) ad hoc tribunals and the ICC, a much broader array of actors are involved in developing the doctrinal substance of ICL itself, and making crucial policy choices, such as what situations to investigate and whom to prosecute.<sup>22</sup>

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<sup>19</sup> Joseph W Schneider, “Social Constructionism” in George Ritzer, ed, *Encyclopedia of Social Theory* (Thousand Oaks, CA: SAGE Publications, 2005) 724 at 724.

<sup>20</sup> Armin Nassehi, “Social Constructivism” in Austin Harrington, Barbara L Marshall & Hans-Peter Müller, eds, *Encyclopedia of Social Theory* (New York: Routledge, 2006) 98 at 99.

<sup>21</sup> Brunnée & Toope, *Legitimacy and Legality*, *supra* note 8 at 36.

<sup>22</sup> For example, the International Law Commission has been integral to the development of ICL, especially through the production of various draft codes of ICL. Civil society actors and non-governmental organizations (NGOs) meanwhile, have been integral to advocacy for the advancement of various legal norms related to ICL, such as the Responsibility to Protect (R2P), and development of new international crimes to provide greater coverage over sexual and gender-based crimes, and crimes against children. Furthermore, much of the substance of contemporary ICL was developed within the jurisprudence of the various ad hoc UN courts and tribunals.



For the most part, Brunnée and Toope remain agnostic concerning the pathways through which shared understandings may emerge.<sup>23</sup> Regardless of their ultimate genesis, what is important from an interactional perspective is the basic social constructivist premise that shared understandings “emerge, evolve or fade through processes of social learning.”<sup>24</sup> Given that from this perspective, social learning is a perpetual, non-linear enterprise, norm development and lawmaking are also viewed by Brunnée and Toope as open-ended enterprises, subject to continual processes of revision and calibration.

Despite their agnosticism concerning the pathways through which shared understandings emerge, Brunnée and Toope do highlight three theories of norm development, each of which spotlights the role of particular actors in social learning processes.<sup>25</sup> First, the “norm cycle” model, developed by Martha Finnemore and Kathryn Sikkink, is grounded in the notion that “norm entrepreneurs,” encompassing states, non-governmental organizations, and individuals, work to establish “new logic[s] of appropriateness” that gain social traction over time.<sup>26</sup> As such norms gain traction, they gradually gain social acceptance, and hence, normative force. Second, the “epistemic community” approach focuses on the role of expertise within “knowledge-based networks,” which tend to be “focused on technical matters” and whose members tend to be viewed as relatively impartial experts.<sup>27</sup> The technocrats who populate such epistemic communities interactively develop their own specialized languages and background understandings in order to facilitate further, more efficient interactions. In the process, new norms emerge, which over time, may be adopted more broadly outside the confines of the epistemic communities themselves.

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<sup>23</sup> See generally Brunnée & Toope, *Legitimacy and Legality*, *supra* note 8 at 57-62

<sup>24</sup> *Ibid* at 65.

<sup>25</sup> *Ibid* at 57–65.

<sup>26</sup> *Ibid* at 57.

<sup>27</sup> *Ibid* at 59.

While Brunnée and Toope acknowledge the importance of these two theories and the roles of norm entrepreneurs and epistemic communities in social norm development processes relevant to international law, it is the third, non-linear social learning theory they assess that they view as best encompassing the diverse range of social interactions through which international legal norms are generated. These theories are grounded in social norm development processes involving what Etienne Wenger describes as the “continuous negotiation of collective meanings” within social communities involved in “relations of mutual engagement”.<sup>28</sup> According to this approach, actors within such “communities of practice,” defined as “knowledge-based networks,” continually develop shared understandings, while simultaneously refining the structure of such communities themselves.<sup>29</sup> Brunnée and Toope agree with Wenger that “learning is not simply a discrete activity through which individuals acquire knowledge, but is part and parcel of everyday life and occurs through continuing social engagement.”<sup>30</sup> Within communities of practice, social relations are guided by “particular norms or procedures” which provide “reference points in the ongoing negotiation of meanings”.<sup>31</sup> Such communities of practice need not be formal or even recognized by the actors operating within them, but can develop organically as actors interact. Furthermore, the actors within such communities need not even be aware of their role in developing new social norms, as such norms too may emerge organically, as actors communicate with one another and share ideas.

Thus, while Brunnée and Toope acknowledge the important roles of norm entrepreneurs and epistemic communities in social norm development processes relevant to international law, it is the third, non-linear social learning theory they assess that they view as best encompassing the diverse range of social interactions through which international legal norms are generated. This emphasis is evident in their concluding comments on the concept of shared understandings,

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<sup>28</sup> *Ibid* at 63, citing Etienne Wenger, *Communities of Practice: Learning, Meaning, and Identity* (Cambridge, UK: Cambridge University Press, 1998) at 73.

<sup>29</sup> *Ibid* at 62.

<sup>30</sup> *Ibid*.

<sup>31</sup> *Ibid*.

which they view as “inherently interactional, created through communities of practice that shape the mutual engagement of various actors in international society[,] engagement [that] is framed by existing norms and social structures, and the active participation of actors in turn maintains and re-shapes both norms and structures.”<sup>32</sup> Thus, both the substance of shared understandings and the structure of the communities of practice within which they are developed are fluid and continually evolving, per interactionalism.

## 2 Aesthetic Perception and Social Norm Development

Given interactionalism’s expansive view of the social processes through which shared understandings are developed and evolve over time, a virtually unlimited set of factors arguably play some role in influencing such understandings. This section considers the role aesthetic considerations play in shaping shared understandings of atrocity crimes. It does so by overlaying insights from the field of neuroaesthetics concerning the role of aesthetic perception in individual interactions with the world onto the constructivist models of social learning previously outlined. This combination of social constructivism and neuroaesthetic insights demonstrates how over time, individual interactions with the world that are heavily influenced by aesthetic considerations shape social interactions, and in turn, the shared understandings produced through social learning processes. As will be demonstrated, aesthetic influences affect all three models of norm development described previously and relied on by Brunnée and Toope in their interactional theory of international law.

I further argue however, that ICL, as a fulcrum point around which various communities of practice are loosely organized, represents an environment especially conducive to reliance on aesthetic considerations in the development of shared understandings of what constitutes an atrocity crime. I contend that ICL is such a favorable environment because actors within ICL-related communities of practice, such as diplomats, international lawyers and judges, ICL institutions, advocacy groups, NGOs, academics and the like, are apt to rely significantly on aesthetic factors as reference points. From an interactional legal theory perspective, these

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<sup>32</sup> *Ibid* at 86.

reference points may be likened to the normative “reference points” or “shortcuts” in the continual “negotiation of meanings” referred to by social constructivists and relied on by Brunnée and Toope.<sup>33</sup> Thus, a constellation of aesthetic reference points concerning what actors are talking about, when discussing “atrocities” and “international crimes” have emerged, facilitating interaction amongst such actors within various communities of practice. Rather than describing what they are talking about when they generally refer to atrocity crimes, such actors are able to simply use terms such as atrocity to generally refer to a commonly understood general subject matter with which ICL is concerned. This facilitates more efficient interaction between such actors, despite the uncertainty and lack of information injected into ICL by its ambiguity, selectivity, complexity, and politicization. Per interactionism, over time, aesthetic factors become woven into the substance of these widely shared understandings of atrocity crimes, especially in terms of the forms such crimes may take and means through which they may be committed.

This section first provides a basic overview of aesthetics as a philosophical concept and describes the emergent field of neuroaesthetics. After introducing aesthetics as a subject of philosophical and scientific study, the concept of “aesthetic perception” as a specific kind of cognitive process is described. Finally, Xenakis and Arnellos’ “interactive affordance” model of aesthetic perception is explained and proposed as a particularly useful framework for modelling both how aesthetic considerations shape social learning processes generally, and the set of circumstances amidst which such considerations play an especially prominent role in such processes.

## 2.1 Aesthetics

While aesthetics are typically associated with the study of art, beauty, and taste, the term aesthetic itself is borrowed from the ancient Greek term *aisthētikos* (αἰσθητικός), which roughly translates as “of or relating to sense perception”.<sup>34</sup> This reference to sense perception

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<sup>33</sup> See *ibid* at 62.

<sup>34</sup> James Shelley, “The Concept of the Aesthetic” in Edward N Zalta, ed, *Stanford Encyclopedia of Philosophy*, winter 2015 ed (2015) online: Stanford <<https://plato.stanford.edu/archives/win2015/entries/aesthetic-concept/>>;

underscores that aesthetic philosophy is grounded in the twin empirical realities that cognitive processes of sensory perception mediate our interaction with the world, and certain arrangements of sensory inputs attract and hold our attention more so than other ones, even eliciting strong emotional responses in certain cases.<sup>35</sup> In addition to their role in capturing attention and eliciting emotional responses, aesthetics also play a role in processes of perception and social interaction, by shaping intuitive assessments of the “rightness” of an object or state of affairs.<sup>36</sup> Within the realm of aesthetic scholarship, such assessments of rightness are referred to as the aesthetic “experience” or “perception,” of an object or state of affairs.

## 2.2 Neuroaesthetics

While early research on aesthetic perception tended to be dominated by the humanities and to focus on human experiences of the arts, more recently, scientific researchers have pioneered emergent field of neuroaesthetics, branching out to investigate the cognitive functions involved in aesthetic experiences.<sup>37</sup> Within the field of neuroaesthetics, “[t]he term aesthetics is used broadly to encompass the perception, production, and response to art, as well as interactions with objects and scenes that evoke an intense feeling, often of pleasure,” while the term “neuroaesthetics” may also be “used broadly as a domain that has something to do with

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*The Oxford English Dictionary*, online ed, *sub verbo*, “aesthetic”, online: <<http://www.oed.com/>>. Though the etymological roots of term aesthetic date back to the Greeks, the term was not regularly used as a philosophical term of art until the 18<sup>th</sup> century, until famously deployed thusly by Alexander Gottlieb Baumgarten in his 1735 thesis, *Philosophical Meditations Pertaining to Some Matters Concerning Poetry*. See Dana LaCourse Munteanu, “Introduction” in Dana LaCourse Munteanu, ed, *Tragic Pathos: Pity and Fear in Greek Philosophy and Tragedy* (Cambridge: Cambridge University Press, 2011) 1 at 21; Paul Guyer, “18th Century German Aesthetics” in Edward N Zalta, ed, *Stanford Encyclopedia of Philosophy*, winter 2016 ed (2016) online: <<https://plato.stanford.edu/entries/aesthetics-18th-german/>>.

<sup>35</sup> Munteanu, *ibid*,

<sup>36</sup> For a helpful overview of the notion of aesthetic perception, see Ioannis Xenakis & Argyris Arnellos, “Aesthetic Perception and its Minimal Content: A Naturalistic Perspective” (2014) 5 *Frontiers in Psychology*, online: <<http://journal.frontiersin.org/article/10.3389/fpsyg.2014.01038/abstract>> at 1–3.

<sup>37</sup> See e.g. Anjan Chatterjee, “Prospects for a Cognitive Neuroscience of Visual Aesthetics” (2004) 4:2 *Bulletin of Psychology and the Arts* 55; Anjan Chatterjee, “Neuroaesthetics: A Coming of Age Story” (2011) 23:1 *Journal of Cognitive Neuroscience* 53; Bianca Bromberger et al, “The Right Hemisphere in Esthetic Perception” (2011) 5 *Frontiers in Human Neuroscience*, online: <<http://journal.frontiersin.org/article/10.3389/fnhum.2011.00109/abstract>>; Xenakis & Arnellos, *supra* note 36; Shaw Bronner & James Shippen, “Biomechanical Metrics of Aesthetic Perception in Dance” (2015) 233:12 *Experimental Brain Research* 3565.

properties of the brain as it engages in aesthetics.”<sup>38</sup> It is these definitions of aesthetics generally as a term relating to sense perception, especially when such perception elicits intense feelings, and “aesthetic perception” as a means of referring to the properties of the brain as it engages in sense perception, that are utilized in this thesis.

Neuroaesthetic research has undermined certain assumptions embedded within classical aesthetic philosophy. One such assumption that has been largely debunked by neuroaesthetic research is the Kantian categorization of experiences as being either intrinsically aesthetic or non-aesthetic in nature, depending on the qualities of what is being perceived.<sup>39</sup> For example, according to outdated views of aesthetics, certain objects, performances and the like may be properly described as “aesthetic” in nature, while others, not. Thus, a carefully crafted vase could be considered an aesthetic object, while an empty jar designed to transport foodstuffs would likely be viewed as non-aesthetic in nature, despite the fact that flowers could be placed in both objects. Recent neuroaesthetic research undermines this presumed dichotomy of experience, demonstrating that to some degree, aesthetics and aesthetic perception shape all human interactions. For example, according to a recent study, neuroimaging data suggests that a consumer’s aesthetic experience of a product not only factors into purchasing decision-making processes, but influences the consumer’s overall experience of a product, including assessments of the product’s utilitarian functionality.<sup>40</sup> On a neural level meanwhile, “brain areas activated in response to artworks overlap with those activated during the aesthetic appraisal of other objects of evolutionary importance, such as food and potential mates ... emphasize[ing] the utilitarian goals of aesthetic appraisals.”<sup>41</sup> Consequently, the researchers conclude that “object beauty is of

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<sup>38</sup> Chatterjee, “Neuroaesthetics” *ibid* at 53.

<sup>39</sup> This traditional Kantian view may be summarized as the notion that “aesthetic objects are valued for their own sake and that the evaluation of beauty in objects is independent of desire (liking without wanting) and other utilitarian goals, or in other words, ‘disinterested’.” Veena Chattaraman et al, “Form ‘Defines’ Function: Neural Connectivity between Aesthetic Perception and Product Purchase Decisions in an fMRI Study” (2016) 15:4 *Journal of Consumer Behaviour* 335 at 335, citing Immanuel Kant, *Critique of Judgement*, translated by JH Bernard (New York, NY: Hafner, 1951).

<sup>40</sup> Chattaraman et al, *ibid* at 345.

<sup>41</sup> *Ibid* at 335.

critical importance in consumer products because it triggers emotions and utilitarian motivations such as the ‘desire to use’ products, which drive the decision to purchase or own the product. Importantly, emotional response to product beauty emerged as a neural trigger for things to follow.”<sup>42</sup> Thus, this study demonstrates how, to some degree, aesthetic experiences shape our all of our interactions with the world.

The basic insight that our aesthetic experiences influence all aspects of cognitive assessment establishes that, from a constructivist point of view, visibility politics grounded in aesthetic considerations must play some role in all social learning processes. Consequently, from the perspective of interactional legal theory, aesthetics must also figure in the development of shared understandings that form the basic material of international law, as such understandings are produced accretively through continuing interactions between social actors.

### 2.3 Aesthetic Perception and the “Interactive Affordance” Model

Given that visibility politics shape all social learning environments to some degree, the question of under what circumstances aesthetic considerations play an especially prominent role in norm development comes to the fore. In answering this question Xenakis and Arnellos’ “interactive affordance” model of aesthetic perception provides helpful insights.<sup>43</sup> According to this model, cognitive processes involved in aesthetic perception serve as a coping mechanism that helps us to “better understanding the world by reducing the uncertainty of interaction”.<sup>44</sup> Xenakis and Arnellos contend that what actors “may perceive as aesthetic ... is any combination of indications that could aid them in reducing their uncertainty of interaction and to accordingly feel like they are clearing their path toward a successful choice for an optimal interaction.”<sup>45</sup> Accordingly, “a particular perception [may be] considered aesthetic when an emotional evaluation with anticipatory features assigns values to interactive indications (interactive

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<sup>42</sup> *Ibid.*

<sup>43</sup> Xenakis & Arnellos, *supra* note 36.

<sup>44</sup> *Ibid* at 12.

<sup>45</sup> *Ibid.*

affordances) in situations that are mainly characterized by high degrees of uncertainty and minimal knowledge."<sup>46</sup>

Put more simply, Xenakis and Arnellos view aesthetic perception as a specific kind of cognitive process, one grounded in intuition and emotion, rather than more detached, reasoned evaluation. We rely more heavily on such cognitive processes when engaged in interaction with the world within situations “characterized by high degrees of uncertainty and minimal knowledge.”<sup>47</sup>

Xenakis and Arnellos follow the trend of other neuroaesthetic scholars in viewing all situations as involving aesthetic perception, arguing that aesthetic perception plays a role in all decision-making processes. Hence, there are not aesthetic and non-aesthetic objects or experiences, but rather situations that provoke more or less reliance on emotional evaluation. Conceptualized as such, aesthetic perception operates as a sort of cognitive shortcut, which allows use to creatively interact with the world despite uncertainty.

When understood in this way, as cognitive “shortcuts,” aesthetic perception arguably plays a similar role on an individual level to the role that the development of specialized language and other shared communal background knowledge plays in social constructivist processes of social knowledge-building. While aesthetic perception occurs during individual human interactions with the world, rather than social interactions, we are apt to rely more heavily on such perceptive processes when placed in a particular kind of environment, one marked by uncertainty and lack of knowledge. When a normative environment, such as ICL, is itself marked by chronic uncertainty and lack of knowledge, actors within communities of practice relevant to such environment are apt to rely on aesthetic perception, which will naturally influence their interactions with one another. This may also lead, as I argue in this thesis, to the insertion of aesthetic factors into shared understandings, insofar as such understandings represent shared reference points within such communities.

Being firmly grounded in social interaction, Xenakis and Arnellos’ “interactive affordance” model of aesthetic perception squares nicely with social constructivism and interactional legal

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<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*



theory. While aesthetic perception focuses on the cognitive processes involved when individuals interact with the objects and situations (“states of affair”), rather than interhuman interactions, how we individually make sense of the world clearly plays a significant role in shaping our social interactions with one another. Xenakis and Arnellos’ position that the role aesthetic perception plays in any interaction with the world is a question of *degree*, rather than a binary, yes or no assessment, also squares nicely with interactional legal theory’s spectral view of legality. These factors generally support the notion that it is through interaction that we build knowledge.

### 3 The Structure of International Criminal Law: Ambiguity and Selectivity

This chapter has thus far argued that aesthetic considerations play a role in all human interaction with the world and hence, play a role in social norm development, especially amidst environments marked by “high degrees of uncertainty and minimal knowledge.”<sup>48</sup> The remainder of this chapter considers the role aesthetic consideration play in the development of social norms relevant to ICL, ultimately concluding that ICL represents a normative and social environment especially conducive to a high degree of reliance on aesthetic perception, thereby injecting visibility politics into understandings of atrocity crimes. I argue that ICL creates such favorable conditions because it suffers from normative and doctrinal ambiguity, along with highly selective application.

#### 3.1 Normative Ambiguity: What is an International Crime?

Identifying the essence of an international crime is a surprisingly difficult task. In a strict sense, there is a widely agreed-upon answer to this question: “an act qualifies as an international crime only if that act is universally criminal under international law.”<sup>49</sup> As noted by Kevin Jon Heller, the requirement of universal criminalization, at least for “true” international crimes, refers to

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<sup>48</sup> *Ibid.*

<sup>49</sup> Kevin Jon Heller, “What is an International Crime? (A Revisionist History)” (forthcoming) 48:2 Harvard International Law Journal at 2, online: SSRN <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2836889](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2836889)>.

criminalization through international law, and not merely universal domestic criminalization.<sup>50</sup> Thus, at a “most basic level international crimes are distinctive from purely national crimes insofar as the origin of the norm is found in international law and/or it is not entirely left to states to decide whether or not the conduct should be criminalised domestically.”<sup>51</sup>

Beyond this somewhat circular definition of international crimes as conduct rendered criminal directly by international law, attempts to arrive at an accurate description of the general characteristics of an international crime invariably end in a mix of vagueness and contestation. While certain individual international crimes are now subject to detailed definitions after being refined through processes of adjudication and codification, there is no universally agreed-upon common thread that ties together all international crimes. Terms such as “atrocities” or “mass violence” are commonly used as shorthand methods of referring to the primary subject matter the international criminal justice regime is concerned with.<sup>52</sup> Yet, nowhere in international law are

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<sup>50</sup> *Ibid.*

<sup>51</sup> Evelyne Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* (New York, NY: Cambridge University Press, 2015) at 62. Accordingly, genocide, crimes against humanity, war crimes and aggression, which are all directly criminalized by public international law, are the paradigmatic examples of true international crimes. There is disagreement in both the practice and literature of international law concerning whether additional offences, such as terrorism, torture, and various others universally (or at least near-universally) prohibited acts, qualify as true international crimes. This ongoing debate is outside the scope of the current inquiry, which is concerned solely with genocide, crimes against humanity, and war crimes, which are all well-established international crimes. For an overview of this debate, see *ibid* at 62–67. Furthermore, while individual states cannot unilaterally declare a particular course of conduct to not be an international crime, states may choose not to incorporate ICL into domestic criminal law and as such, may avoid prosecuting any international crimes in domestic courts. While this undermines the enforcement of ICL significantly, it does not alter the fact that international crimes are directly criminalized under international law.

<sup>52</sup> These terms are employed regularly by scholars as a method of referring to the kinds of situations that international criminal justice is concerned with. For usage of the term “atrocities” see e.g. Mark A Drumbl, *Atrocities, Punishment and International Law* (New York, NY: Cambridge University Press, 2007); Gideon Boas, “What is International Criminal Justice?” in Gideon Boas, Michael P Scharf & William Schabas, eds, *International Criminal Justice: Legitimacy and Coherence* (Northampton, MA: Edward Elgar, 2012) 1 at 1. For usage of the term “mass violence” see e.g. Margaret deGuzman, “Choosing to Prosecute: Expressive Selection at the International Criminal Court” (2012) 33:2 Michigan Journal of International Law 265 at 312 (“As currently configured, the ICC does not have the resources or proximity to local populations to make significant direct contributions to restoring victims or communities that have suffered mass violence.”); Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston, MA: Beacon Press, 1998).

these terms defined, and the underlying concepts of atrociousness, violence, and massiveness, are each rather definitionally vague themselves.<sup>53</sup>

Beyond these vague concepts, there exist a large and growing number of proposed normative and descriptive theories of ICL, and its constituent sub-parts, such as genocide and crimes against humanity.<sup>54</sup> While a full overview of the numerous proposed normative and descriptive theories of ICL is outside the scope of the present inquiry, a few examples suffice to demonstrate the wide variation in their substance. For instance, Adil Haque proposes a “group retributivist” theory of ICL, according to which the “relational structure of retributive justice” is applied to groups, rather than individuals, which challenges the legitimacy of the state, and thereby explains and justifies international intervention.<sup>55</sup> Frédéric Mégret, meanwhile, proposes a distributive theory of international criminal justice, whereby the international community, through ICL, attaches heightened stigma to certain types of behavior.<sup>56</sup> Alejandro Chehtman in turn, advocates a jurisdictional theory of ICL, grounded in the fact that international crimes are, unlike the vast majority of crimes, not subject to territorial jurisdictional limits.<sup>57</sup>

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<sup>53</sup> See *Oxford English Dictionary*, *supra* note 34, *sub verbis*, “atrocious”, “atrocious”, “mass”, “violence”; see also Eugene Aisenberg et al, “Defining Violence” in Todd I Herrenkohl et al, eds, *Violence in Context: Current Evidence on Risk, Protection, and Prevention* (Oxford: Oxford University Press, 2010) 13. These concepts are explored in greater depth in Chapter 2.

<sup>54</sup> See Sarah Nouwen, “International Criminal Law: Theory All Over the Place” in *The Oxford Handbook of the Theory of International Law* (Oxford, UK: Oxford University Press, 2016) 738. For examples of proposed theories of ICL and its constituent parts, such as crimes against humanity, see e.g. David Luban, “A Theory of Crimes against Humanity” (2004) 29:1 *Yale Journal of International Law* 85; Larry May, *Crimes Against Humanity: A Normative Account* (New York, NY: Cambridge University Press, 2005); Alejandro Chehtman, “Contemporary Approaches to the Philosophy of Crimes against Humanity” (2014) 14:4–5 *International Criminal Law Review* 813; Kai Ambos, “The Overall Function of International Criminal Law: Striking the Right Balance Between the Rechtsgut and the Harm Principles: A Second Contribution Towards a Consistent Theory of ICL” (2015) 9:2 *Criminal Law & Philosophy* 301; Frédéric Mégret, “In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice” (2005) 38:3 *Cornell International Law Journal* 725; Richard Vernon, “What is a Crime Against Humanity?” (2002) 10:3 *Journal of Political Philosophy* 231; Heller, *supra* note 49.

<sup>55</sup> Haque, *supra* note 6.

<sup>56</sup> Frédéric Mégret, “Practices of Stigmatization” (2013) 76:3–4 *Law & Contemporary Problems* 287.

<sup>57</sup> Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (New York, NY: Oxford University Press, 2010).

Additional layers of normative muddiness concerning the justifications for and purposes of ICL are added by the numerous competing theories of ICL's constituent parts. Theories of genocide, crimes against humanity, war crimes, aggression, other proposed international crimes, and the modes of liability through which such crimes are prosecuted abound. For example, the normative foundations and basic elements of crimes against humanity remain unclear and contested.

Hannah Arendt defines the essence of crimes against humanity as the fact that they represent an "attack upon human diversity as such".<sup>58</sup> Larry May, meanwhile, proposes an "international harm principle," which justifies the existence of crimes against humanity by positing that such crimes are of a scale that harms the international community, rather than ordinary crimes, which harm only specific victims.<sup>59</sup> The gravity and harm based theories of scholars such as Arendt and May can be contrasted with theories grounded in the perceived political nature of crimes against humanity, proposed by scholars such as David Luban and Richard Vernon. Luban characterizes crimes against humanity as "politics gone horribly wrong",<sup>60</sup> while Vernon views crimes against humanity "as an abuse of state power involving a systematic inversion of the jurisdictional resources of the state."<sup>61</sup>

This small sample of some of the competing theories of ICL demonstrates the basic fact that the normative values and underlying commitments of ICL itself, and international criminal justice as

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<sup>58</sup> Arendt famously observed:

It was when Nazi regime declared that the German people not only were unwilling to have any Jews in Germany but wished to make the entire Jewish people disappear from the face of the earth that the new crime, the crime against humanity—in the sense of a crime 'against the human status' ... or against the very nature of mankind— appeared. Expulsion and genocide, though both are international offenses must remain distinct. The former is an offense against fellow nations, whereas the latter is an attack upon human diversity as such; that is, upon a characteristic of the human status, without which the very words 'mankind' and 'humanity,' would be devoid of meaning.

Hannah Arendt, "Eichmann in Jerusalem-V", *The New Yorker* (16 March 1963) 58 at 123–124.

<sup>59</sup> May, *supra* note 54.

<sup>60</sup> Luban, *supra* note 54 at 108.

<sup>61</sup> Vernon, *supra* note 54 at 242.

a global project, remain very much up for grabs.<sup>62</sup> The upshot of this combination of normative vagueness and contestation is that a widely shared principled normative understanding of what the essential elements of an international crime are simply does not exist.

### 3.2 Doctrinal Ambiguity

The ambiguity concerning the normative foundations of ICL both contribute to and are a consequence of the fact that, doctrinally, ICL remains in its formative stages and hence, continues to lack specificity and clarity in many important areas. While the mountain of jurisprudence churned out by the various ad hoc UN courts and tribunals, and the increasing codification of ICL in instruments such as the Rome Statute of the ICC have led to increased clarity in many areas, ICL doctrine continues to be far from settled. Many of the areas within ICL that remain unclear and/or unsettled touch on issues that may affect fundamental questions of guilt or innocence, or be determinative of ICL's very applicability to certain situations.

One example of an important doctrinal question that remains unclear concerns the precise set of prerequisites for crimes against humanity to be applicable to a given situation. In a general sense, as a legal term of art, the phrase "crimes against humanity" refers to a set of individual crimes, that are considered crimes against humanity when committed as part of a widespread or systematic attack against a civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."<sup>63</sup> This definition however, remains subject to areas of ambiguity and contestation. The meaning of the term "attack" in this context for example, remains unclear and unsettled.<sup>64</sup> In particular, as discussed *infra* within chapter three of this

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<sup>62</sup> On how the increasing awareness of the brittleness of the normative assumptions upon which ICL has been constructed and the ramifications of such awareness, see Frédéric Mégret, "The Anxieties of International Criminal Justice" (2016) 29:1 *Leiden Journal of International Law* 197.

<sup>63</sup> See e.g. *Rome Statute of the International Criminal Court*, 17 July 1998, UN Doc A/CONF.183/9 (entered into force 1 July 2002) [*Rome Statute*] art 7(1); see also generally Luban, *supra* note 54; May, *supra* note 54; Chehtman, "Contemporary Approaches", *supra* note 54.

<sup>64</sup> For example, in relation to the meaning of the term attack as codified in the Rome Statute, see e.g. Schmid, *Taking Economic, Social and Cultural Rights Seriously*, *supra* note 51 at 76-80. The Rome Statute does state that the phrase "[a]ttack directed against any civilian population' means a course of conduct involving the multiple commission of acts [constituting the *actus reus* of the various individual crimes against humanity listed in the Rome Statute] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit

thesis, it is unclear whether the requisite attack required for crimes against humanity to be applicable to a given situation must involve the commission of acts of violence, and if so, how “violence” is conceptualized within this context.<sup>65</sup>

The applicability of crimes against humanity is further complicated at the ICC by the insertion in the Rome Statute of the requirement that crimes against humanity be committed “pursuant to or in furtherance of a State or organization policy.”<sup>66</sup> It is unclear whether and to what degree this “policy” element narrows the applicability of crimes against humanity at the ICC. For example, it is unclear whether a policy document or announcement must exist evincing an explicit policy to commit international crimes, or whether the commission of crimes may be an incidental, yet foreseeable consequence of an otherwise non-criminal policy. It is also unclear whether non-state “organizations” must resemble states, and if so, how and to what degree.<sup>67</sup> As the determination of these questions will be, in many cases determinative of the very applicability of crimes against humanity to an entire situation, their interpretation will ultimately contribute significantly to dictating the outer boundaries of crimes against humanity applicability at the ICC.

Another area of ambiguity and contestation is that of ICL’s distinctive “modes of liability.” In many cases, legal findings concerning these modes of liability are determinative of guilt or innocence, as they are the means through which individuals are held accountable for collectively perpetrated crimes. The UN ad hoc tribunals utilized a variety of modes of liability to attach individual liability for collective crimes. One of the most controversial of these modes was that of joint criminal enterprise (JCE), which was held to be a mode of “commission” and has been

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such attack”. *Rome Statute, ibid*, art 7(2)(a). However, this definition provides little in the way of clarification, as its plain language suggests that the requisite “attack” simply requires the commission of multiple individual crimes against humanity.

<sup>65</sup> See *infra* at 79-85.

<sup>66</sup> *Rome Statute, supra* note 63, art 7(2)(a).

<sup>67</sup> A fulsome discussion of these issues is outside the scope of the present inquiry. For a helpful discussion of issues related to the so-called “policy” element of crimes against humanity in the Rome Statute, see Darryl Robinson, “Crimes Against Humanity: A Better Policy on ‘Policy’” in Carsten Stahn, ed, *The Law and Practice of the International Criminal Court* (Oxford University Press, 2014) [Robinson, “A Better Policy”].

subject to a steady stream of criticism.<sup>68</sup> The precise requirements of JCE have also fluctuated over time and remain somewhat unsettled, including in terms of critically important issues such as the minimum *actus reus* required.<sup>69</sup> In formulating JCE in the *Tadić* Appeal Judgment, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) held that an accused must “contribute” to a group operating with a common criminal purpose, however such contribution “need not involve commission of a specific crime ... but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.”<sup>70</sup> Subsequent decisions, recognizing that virtually any act, no matter how significant, might be characterized as a “contribution” to a criminal enterprise, inserted the qualifier that individual contributions must be “significant” in order to suffice under JCE, although such jurisprudence has been uneven and what counts as “significant” remains imprecise.<sup>71</sup>

As JCE was first formulated by the Appeals Chamber of the ICTY in 1999, shortly after the 1998 Rome Conference, the concept was not included in the Rome Statute and has not been adopted by the ICC, which contains its own set of modes of liability in Article 25.<sup>72</sup> Although the ICC has skirted the controversy associated with JCE by declining to adopt it as a mode of commission, Article 25(3)(d) of the Rome Statute nonetheless provides for liability in situations where an accused “[i]n any other way contributes to the commission or attempted commission of

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<sup>68</sup> For an overview of JCE and its historical antecedents in post-World War II ICL jurisprudence, see Jared L Watkins & Randle C DeFalco, “Joint Criminal Enterprise and the Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia” (2010) 63:1 Rutgers Law Review 193 at 206–263. For examples of criticism of JCE, see e.g. Allison Marston Danner & Jenny S Martinez, “Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law” (2005) 93:1 California Law Review 75; Jens David Ohlin, “Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise” (2005) 5:1 Journal of International Criminal Justice 69.

<sup>69</sup> On the fluctuation of the *actus reus* required under JCE liability, see Randle C DeFalco, “Contextualizing Actus Reus under Article 25(3)(d) of the ICC Statute: Thresholds of Contribution” (2013) 11:4 Journal of International Criminal Justice 715 at 718–721.

<sup>70</sup> *Prosecutor v Tadić*, Case No. IT-94-1-A, Judgment, para 227 (15 July 1999) (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), online: ICTY <<http://www.icty.org/>> [*Tadić* Appeal Judgement].

<sup>71</sup> For an overview of this body of jurisprudence, see DeFalco, “Contextualizing Actus Reus” *supra* note 69 at 718–721.

<sup>72</sup> *Tadić* Appeal Judgement, *supra* note 70 paras 185–22.

[a charged] crime by a group of persons acting with a common purpose.”<sup>73</sup> The phrase “in any other way” within Article 25(3)(d) seemingly encompasses all contributions to group crimes that are not captured elsewhere within Article 25 and the inclusion of the qualifier “any” suggests a very low *actus reus* threshold.<sup>74</sup> Predictably, the threshold *actus reus* required under Article 25(3)(d) has been a contentious issue at the ICC. Several judicial chambers have expressed opinions on this issue, with some judges favoring borrowing the “significant act” threshold of JCE, while others favoring alternative approaches.<sup>75</sup> As of yet, the ICC Appeals Chamber has not issued any clear opinion on the matter, leaving the bounds of liability at the ICC unclear in the process.

The doctrinal ambiguity concerning the applicability of crimes against humanity and the minimum *actus reus* requirements of JCE and Article 25(3)(d) contribution liability at the ICC touch on issues that are routinely critical to questions of ICL’s applicability to a situation and the guilt or innocence of specific accused. These determinations are but two of many fundamental doctrinal ICL questions that remain unsettled and at least somewhat ambiguous.<sup>76</sup> In common law legal regimes such questions would be progressively addressed and clarified through adjudication in courts. However, as is discussed below, such processes are extraordinarily selective within the realm of international criminal justice, considerably slowing, or even halting clarification processes in certain areas of the law. Indeed, ICL is so selective that ICL actors engaged in discretionary decision-making typically face little, if any, pressure to consider ICL’s potential applicability to situations other than those involving paradigmatic international crimes,

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<sup>73</sup> *Rome Statute*, *supra* note 63, art 25.

<sup>74</sup> For analyses of article 25(3)(d) liability, see generally Jens David Ohlin, “Joint Criminal Confusion” (2009) 12:3 *New Criminal Law Review* 406; DeFalco, “Contextualizing Actus Reus” *supra* note 69; Kai Ambos, “The ICC and Common Purpose: What Contribution is Required Under Article 25 (3)(d)?” in Carsten Stahn, ed, *The Law and Practice of the International Criminal Court* (New York: Oxford University Press, 2015) 592; Zurab Sanikidze, “The Level of ‘Contribution’ Required Under Article 25(3)(D) of the Rome Statute of the International Criminal Court” (2012) 83:1 *Revue Internationale de Droit Pénal* 221.

<sup>75</sup> DeFalco, “Contextualizing Actus Reus” *supra* note 69 at 721–734.

<sup>76</sup> Other examples of areas of ICL that remain unclear are defenses, other modes of liability, and how serious crimes must be to qualify under the ICC’s gravity threshold.



allowing questions concerning the boundaries of ICL liability to remain unexplored and hence, subject to continuing ambiguity.

### 3.3 Selectivity

Since its inception, and to this day, ICL continues to be extremely selective, in terms of the small number of international crimes that are prosecuted compared to the total number of such crimes committed.<sup>77</sup> This extreme selectivity represents perhaps the most fundamental challenge to the legitimacy of ICL, as one need not be a legal theorist to grasp why it may be problematic for a legal regime that purports to apply everywhere and to everyone, to be applied to only a fractional subset of situations and individuals that it declares itself applicable to. This selectivity is especially pernicious because it both directly undermines the intrinsically cosmopolitan ambitions of ICL.<sup>78</sup> The effects of ICL's selectivity are compounded by the multifaceted nature of such selectivity, which operates in numerous ways and on numerous levels.

Firstly, ICL is jurisdictionally selective. International crimes regularly occur in jurisdictional dark areas of ICL. Such areas vary in nature, as they may be geographic, temporal, subject matter, or personal, in terms of the nature of the jurisdiction element(s) preventing barring prosecution. For example, there exists no legal institution with standing jurisdiction over international crimes committed prior to 1 July 2002, when the ICC began operations, aside from the limited pockets of jurisdiction conferred on the various ad hoc UN tribunals. The forward-looking temporal jurisdiction of the ICC immediately leaves a litany of mass atrocity situations that occurred between the advent of modern ICL in the wake of World War II and 2002, without

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<sup>77</sup> On the topic of ICL's selectivity, see generally Timothy LH McCormack, "Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law" (1996) 60:3 Albany Law Review 681; Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (New York, NY: Cambridge University Press, 2005).

<sup>78</sup> One of the foundational claims made by ICL is that it is a body of law which has global geographic and personal jurisdiction. This renders ICL a deeply cosmopolitan project. On this subject, see Darryl Robinson, "A Cosmopolitan Liberal Account of International Criminal Law" (2013) 26:1 Leiden Journal of International Law 127.

any clear legal forum to pursue prosecutions within.<sup>79</sup> Similarly, all of the ad hoc UN courts and tribunals have had explicit temporal limits placed on their jurisdiction, preventing certain atrocities from being investigated and adjudicated.<sup>80</sup>

In addition to temporal limitations, many ICL courts and tribunals have limitations placed on the ambit of their personal jurisdiction,<sup>81</sup> and in policy documents, the ICC Office of the Prosecutor has stated its intention to pursue only suspects it considers most responsible for relevant crimes, given its scarce resources.<sup>82</sup> Moreover, the ICC itself, despite its very name being suggestive of it having global jurisdiction, only has standing jurisdiction over crimes committed either on the territory of a state party, or by a national of a state party.<sup>83</sup> Otherwise the Court is powerless to

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<sup>79</sup> See *Rome Statute*, *supra* note 63, art 11. While theoretically states with personal jurisdiction over a suspect involved in one such international crime could invoke the doctrine of universal jurisdiction, initial enthusiasm for this doctrine has quickly waned to the point of near-obsolence.

<sup>80</sup> For example, the illegal bombing of Cambodia by the United States under the Nixon administration from 1975-1979 appears to have involved the quite clear commission of war crimes and/or crimes against humanity and was integral to the Khmer Rouge's rise to power, yet the temporal jurisdiction of the Extraordinary Chambers in the Courts of Cambodia (ECCC) is limited to the time between April 1975 and January 1979, the specific time frame during which the Khmer Rouge held power. See *Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes committed during the Period of Democratic Kampuchea*, Cambodia and United Nations, 6 June 2003, available online: <<https://www.eccc.gov.kh/en/document/legal/agreement>> (accessed 17 May 2017) [ECCC Agreement].

<sup>81</sup> For example, the ECCC and Special Court for Sierra Leone (SCSL) have limited their prosecutions to a handful of suspects. The ECCC is limited to prosecuting either "senior leaders" or otherwise "most responsible" for crimes committed during the Khmer Rouge era, while the SCSL was mandated "to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996" onwards. See ECCC Agreement, *supra* note 80, art 1; UN Security Council, *Statute of the Special Court for Sierra Leone*, 16 January 2002 (As established pursuant to Security Council resolution 1315), online: Residual Special Court for Sierra Leone <<http://www.rscsl.org/documents.html>> (accessed 6 June 2017). These requirements are ultimately quite similar, as the language "most responsible" was also considered for the SCSL Statute. For a discussion of these terms and their similarities, see Randle C DeFalco, "Cases 003 and 004 at the Khmer Rouge Tribunal: The Definition of 'Most Responsible' Individuals According to International Criminal Law" (2014) 8:2 *Genocide Studies & Prevention* 45 at 45-53.

<sup>82</sup> ICC Office of the Prosecutor, "Prosecutorial Strategy 2009 – 2012," para 19 (1 February 2010) online: ICC website <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-rep-strategy-2010>> (accessed 6 June 2017).

<sup>83</sup> *Rome Statute*, *supra* note 63, art 12.

investigate past or ongoing atrocity crimes absent the extraordinary measure of a UN Security Council referral.<sup>84</sup>

In addition to falling within one of the various jurisdictional *lacunae* of ICL outlined above, many international crimes remain unprosecuted because of resource limitations and political realities. The scale and collective nature of most international crimes create unique practical challenges in terms of the selection of cases and suspects to pursue, even when an institution is conferred with unlimited jurisdiction in terms of how many individuals it is permitted to investigate and prosecute. The number of individuals complicit in the commission of mass atrocity crimes may run into the hundreds, if not thousands, rendering the prosecution of all suspects impossible. This was the case in Rwanda in the wake of the 1994 genocide, as the new government's pledge to pursue full accountability against all individuals involved in the genocide quickly proved impossible from a practical standpoint.<sup>85</sup> Thus, even in situations where full accountability is pledged, difficult prosecutorial selection decisions must be made. Such decisions typically necessitate triaging out even quite serious cases involving horrific acts of violence or even murder on a large scale.

Political realities also narrow the practical jurisdiction reach of institutions tasked with investigating and prosecuting international crimes. Because such institutions depend on the cooperation of states in gathering evidence and apprehending suspects, political realities often stymie investigations, or prevent the effectuation of arrest warrants. The ICC, for example, has struggled in many cases to gather evidence, due to poor security conditions in areas where investigation sites are located or lack of local political support. For instance, the ICC saw cases related to the post-election violence that occurred in Kenya from late 2007 to early 2008

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<sup>84</sup> *Ibid.*, arts 12-13.

<sup>85</sup> For example, in the wake of the 1994 Rwandan Genocide and following the creation of the ICTR, “over 120,000 lower-level suspects remained in Rwandan prisons, and the government soon realized it would take its dilapidated domestic judicial system over 200 years to try all cases” leading to the creation of a local quasi-judicial mechanism referred to as *Gacaca* Courts. Shannon E Powers, “Rwanda’s Gacaca Courts: Implications for International Criminal Law and Transitional Justice”, *American Society of International Law Insights* (23 June 2011), online: *ASIL* <<https://www.asil.org/insights/volume/15/issue/17/rwanda%E2%80%99s-gacaca-courts-implications-international-criminal-law-and>> (accessed 6 June 2017).

collapse.<sup>86</sup> The suspects in these cases included current Kenyan President Uhuru Kenyatta, whose case was indefinitely stayed due to lack of evidence in 2014, along with Deputy President William Ruto and former broadcaster, Joshua Sang, who were co-accused in a case dismissed for lack of evidence.<sup>87</sup> Serious acts of witness tampering, including the commission of acts of violence against witnesses, were reported as the cases deteriorated.<sup>88</sup> The Kenyatta-led Kenyan government has also reportedly considered withdrawing from the ICC altogether.<sup>89</sup>

Another example of political power frustrating efforts to prosecute international crimes is the ICC's failure to effectuate the arrest warrant it issued against Sudanese President Omar al-Bashir and several of his associates in 2009 on various charges related to atrocities committed in the Darfur region and other areas of Sudan.<sup>90</sup> Al-Bashir has in fact, visited numerous countries while the warrant has been valid, including various ICC state parties, who have failed to execute the warrant.<sup>91</sup>

These various jurisdictional, practical, and political limitations on the reach of ICL, create overlapping forms of selectivity. This selectivity progressively narrows the number of total situations, cases, suspects, and charges that are ever investigated and prosecuted. First, many large-scale international crimes occur each year in jurisdictional gaps, where, absent extraordinary action, such as a Security Council referral to the ICC, or a domestic judiciary

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<sup>86</sup> Human Rights Watch, "ICC: Kenya Deputy President's Case Ends", (5 April 2016), online: *Human Rights Watch* <<https://www.hrw.org/news/2016/04/05/icc-kenya-deputy-presidents-case-ends>>.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> Rael Ombuor, "Kenya Signals Possible ICC Withdrawal", (13 December 2016), online: *Voice of America* <<http://www.voanews.com/a/kenya-signals-possible-icc-withdrawal/3634365.html>>.

<sup>90</sup> For an overview of the charges against al-Bashir, see *Prosecutor v al Bashir*, ICC-02/05-01/09, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir (12 July 2010) (International Criminal Court, Pre-Trial Chamber I), online: ICC <<https://www.icc-cpi.int/>>.

<sup>91</sup> For example, al-Bashir visited Jordan on March 29, 2017, to attend the 28th summit of the Arab League. Human Rights Watch, "Jordan: Bar Entry or Arrest Sudan's Bashir", (26 March 2017), online: *Human Rights Watch* <<https://www.hrw.org/news/2017/03/26/jordan-bar-entry-or-arrest-sudans-bashir>>; Sudan Tribune, "Sudan's Bashir Arrives in Jordan for Arab Summit", (28 March 2017), online: *Sudan Tribune* <<http://www.sudantribune.com/spip.php?article62037>>.

invoking universal jurisdiction, there simply is no competent adjudicative body with jurisdiction over such crimes. Second, in the event that international crimes occur and an institution, such as the ICC, has jurisdiction, such institutions lack the resources to investigate more than a handful of situations at a time. Third, even if an institution such as the ICC has jurisdiction and the desire to investigate, there is no guarantee that such investigation will be permitted to proceed and be successful in gathering evidence. Fourth, even in situations where evidence is available, the security situation and political climate permit its gathering, and relevant authorities faithfully execute arrest warrants, prosecuting authorities still must engage in triage. Because of the massive scale of such crimes, such authorities must make difficult decisions concerning where to investigate, whom to investigate, and ultimately, what charges to bring.

Selectivity thus operates at on multiple levels and in multiple ways. In doing so, such selectivity both perpetuates the uncertainty of ICL's normative commitments and doctrinal substance, and confers discretionary powers on ICL actors in terms of how they allocate their scarce resources. Unsurprisingly, within this environment, the selection of whom to investigate has been subject to persistent controversy and contestation within ICL.<sup>92</sup>

## 4 The Role of Aesthetic Perception in International Criminal Law Norm Development

The ambiguity and selectivity of ICL inject uncertainty into assessments of ICL's applicability to real-world situations and forms of harm causation. Exacerbating the effects of this uncertainty are the facts that atrocity situations tend to be complex, politically contentious, and to evolve and

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<sup>92</sup> See e.g. Cryer, *supra* note 77; deGuzman, "Choosing to Prosecute" *supra* note 52; Ifeonu Eberechi, "'Rounding Up the Usual Suspects': Exclusion, Selectivity, and Impunity in the Enforcement of International Criminal Justice and the African Union's Emerging Resistance" (2011) 4:1 African Journal of Legal Studies 51; DeFalco, "Cases 003 the ambiguity and selectivity of ICL inject uncertainty into the environments within which social actors interact with one another and through such interactions, produce shared understandings. Furthermore, due to the complex, politically contentious nature of most of atrocity situations, norm entrepreneurs, technocratic experts, and other actors, all must routinely interact while lacking key factual knowledge. Situations amidst which atrocities are perpetrated tend to be complex and may change rapidly. Factions in conflict with one another are apt to actively hide evidence of their wrongdoing, or to falsely accuse their opponents of committing atrocities. Efforts to independently verify such claims are also often hampered by lack of access for journalists, investigators, and the like, due to security concerns or outright restrictions on travel. Consequently, such actors are apt to rely heavily on aesthetic considerations in interacting with ICL, relevant real-world situations, and each other. The end result of this injection of uncertainty into such interactive processes is the development of shared understandings of mass atrocity and international crime deeply influenced by aesthetic factors and 004 at the Khmer Rouge Tribunal" *supra* note 81.

change dynamically over time, rendering it difficult to obtain reliable and coherent factual knowledge. For example, factions in conflict with one another are apt to actively hide evidence of their wrongdoing, or to falsely accuse their opponents of committing atrocities. Efforts to independently verify such claims are also often hampered by lack of access for journalists, investigators, and the like, due to security concerns or outright restrictions on travel.

It is against this backdrop marked by uncertainty and lack of full factual knowledge, that social actors interact with one another in relation to ICL, and in doing so, from an interactional perspective, develop and refine relevant shared understandings. If one applies Xenakis and Arnellos' interactive affordance model of aesthetic perception to this dynamic, one may argue that such uncertainty leads to ICL actors relying more substantially on aesthetic perception in identifying and categorizing atrocity crimes than in other legal regimes which are not subject to such a high degree of uncertainty.<sup>93</sup> Consequently, such actors are apt to rely heavily on aesthetic considerations in interacting with ICL, relevant real-world situations, and each other. As the remainder of this chapter demonstrates, although such considerations manifest themselves differently within different norm development processes, the basic fact remains that understandings of atrocity crimes, and in particular the forms they may take and means through which they may be committed, are deeply imbued with aesthetic references.

All three social constructivist social learning models referenced above—norm entrepreneurship, epistemic communities, and communities of practice—are influenced by aesthetic factors within the realm of ICL. Shared understandings relevant to ICL are developed most visibly within epistemic communities of legal experts. These experts interact in a variety of fora. The most obvious such fora are the various institutions, such as the ad hoc tribunals and ICC, explicitly empowered to investigate and prosecute international crimes. These institutions create environments within which large groups of actors with legal and other forms of expertise (investigators, translators, judicial assistants, etc.) engage in sustained interactions with one another. While the direct purpose of such institutions is the investigation and adjudication of

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<sup>93</sup> As will be discussed *infra* in chapter two, this tendency to aesthetically perceive atrocity crimes, is further encouraged by the highly visible, easily recognizable ways in which many atrocities manifest themselves.

international crimes, from the perspective of interactional legal theory, such institutions also serve as environments for social interaction and norm development.

Epistemic communities relevant to ICL are however, not strictly limited to adjudicatory institutions such as the ICC. Actors with expertise relevant to ICL also fill the ranks of state departments throughout the globe and interact regularly at various functions and meetings, both large and small. Other legal organizations, such as the International Law Commission, or communities of experts, such as legal academics, operate as epistemic communities, generating and refining shared understandings through interaction within communities of specialized expertise. Such communities have been integral to the development of ICL, as they have been deeply involved in designing treaties such as the Genocide Convention and the Rome Statute, and further developing the substance of ICL through adjudication.

The rather soft legal edges of ICL, and the jurisdictional, political, and resource limitations that combine to shorten the reach of ICL present legal experts within such epistemic communities such as the ICC and the ad hoc UN courts and Tribunals with considerable uncertainty and lack of knowledge. Crucial areas of law may be unsettled or ambiguous, evidence may be difficult to access, and political cooperation may not be forthcoming. Consequently, ICL's applicability, both generally and as applicable within a relevant institutional setting, may be difficult for legal actors, even ones possessing a great deal of expertise and training, to assess. Moreover, the human and financial resources such actors have at their disposal are typically quite limited. Given these circumstances, such actors must quite carefully select which situations and suspects to pursue, even within the potentially narrow ambit of their jurisdictional and practical abilities.

If one applies an interactive affordance model of aesthetic perception to this scenario, relevant actors will rely more heavily on cognitive processes of aesthetic perception in order to act despite facing such uncertainty and lack of knowledge. Consequently, even ICL legal experts, such as judges, prosecutors or defence lawyers, who may be perceived as technocrats who are relatively detached from the often highly emotional subject matter that ICL deals with, are apt to seek out recognizable patterns of sensory inputs when identifying atrocity situations or assessing ICL's applicability to a given situation. Such reliance may be entirely subconscious, but may still significantly, if subtly, influence how they interact with both ICL and how they perceive the subject matter it deals with. Over time, through the repetition of such individual interactions,

patterns concerning the forms atrocity crimes may take begin to emerge, and actors are apt to actively look for such patterns as cognitive shortcuts to avoid or reduce uncertainty and fill in gaps in factual knowledge. As such individuals interact socially with one another, in both legal and non-legal settings, and discuss matters related to ICL, a distinctive language and set of normative understandings, both imbued with aesthetic considerations, emerge and become widely shared.

A similar, yet differently incentivized tendency to rely on aesthetic perception plays out within communities of norm entrepreneurs, which themselves often incorporate actors, such as legal scholars, or international lawyers, who are members of epistemic communities.<sup>94</sup> The most visible norm entrepreneurs are advocacy groups and non-governmental organizations (NGOs) such as Amnesty International and Human Rights Watch, which often quite openly advocate for the development of new legal norms relevant to ICL, including advocacy for new international crimes themselves.<sup>95</sup> The ranks of such organizations tend to be filled with international lawyers, or other individuals with specialized training relevant to ICL, lending credibility to their advocacy through affiliation with members of perceived epistemic communities. Such organizations also create informal social networks within which they interact and promote select norms. In addition to interacting with one another, ICL norm entrepreneurs actively engage in

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<sup>94</sup> Academics for example, often fall within this category. While technocratic experts in some regards, academe may themselves openly champion new norms and have had a significant role in shaping the trajectory of ICL. For example, legal scholar Raphael Lemkin relentlessly advocated for the adoption of genocide as an international crime, while Cambridge Professor Hersch Lauterpacht was integral to the normative and legal development of crimes against humanity. For fascinating biographies of Lemkin and Lauterpacht, covering their contributions to ICL, see Phillippe Sands, *East West Street: On the Origins of "Genocide" and "Crimes Against Humanity"* (New York, NY: Knopf, 2016). As a more recent example, a group of legal academics, including members such as M Cherif Bassiouni and Leila Sadat, have advocated for the creation of a crimes against humanity convention for years. See M Cherif Bassiouni, "Crimes Against Humanity: The Need for a Specialized Convention" (1994) 31:3 *Columbia Journal of Transnational Law* 457; M Cherif Bassiouni, "Crimes against Humanity: The Case for a Specialized Convention" (2010) 9:4 *Washington University Global Studies Law Review* 575; Leila Nadya Sadat, ed, *Forging a Convention for Crimes against Humanity* (New York, NY: Cambridge University Press, 2011); Leila Nadya Sadat, "Crimes against Humanity in the Modern Age" (2013) 107:2 *American Journal of International Law* 334.

<sup>95</sup> For example, NGOs and other advocacy groups have championed the development of norms such as the responsibility to protect and greater recognition of sexual and gender based violence within ICL.



public advocacy utilizing sophisticated marketing and social media campaigns to broadly promote their respective agendas, at times with great success.

Aesthetic considerations also influence the decision-making of ICL norm entrepreneurs, albeit in a slightly different way than they shape understandings within epistemic communities. Because norm entrepreneurs are actively engaged in what can only be described as the “marketing” of new norms, they are incentivized to operate according to marketing practices in order to gain attention and increase receptivity to their messaging.<sup>96</sup> Within ICL and associated realms, such as those of human rights, transitional justice, and humanitarian law, the standard method of promoting new norms is to appeal to public sympathy, while combatting compassion fatigue by highlighting the extreme harms associated with the commission of atrocity crimes and large-scale human rights violations.<sup>97</sup> Consequently, there is an incentive for norm entrepreneurs to highlight the most dramatic and horrific aspects of atrocity situations, in order to gain support for new norms presented as combatting such horrors. This incentive leads to the creation and perpetuation of a particular style of representing atrocity crimes, their perpetrators and victims, and the means through which they are committed.

It is, by now, a generally accepted fact that experts and norm entrepreneurs play integral roles in the development of ICL. It is hard to argue that legal experts who have helped draft foundational ICL documents, such as the Genocide Convention or Rome Statute, and who serve as judges and lawyers at ICL institutions such as the ICC, have not had a major hand in developing relevant legal norms. So too have norm entrepreneurs, from individuals such as Raphael Lemkin and Hersch Lauterpacht, to NGOs, such as Human Rights Watch, Amnesty International, or the Coalition for the ICC, also clearly shaped the trajectory of ICL. Such entrepreneurs have shaped ICL by doggedly advocating for new ICL norms, such as universal jurisdiction, greater

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<sup>96</sup> Within the realm of ICL in this regard, see generally Christine Schwöbel, “The Market and Marketing Culture of International Criminal Law” in Christine Schwöbel, ed, *Critical Approaches to International Criminal Law: An Introduction* (Routledge, 2014) 264.

<sup>97</sup> On this standard marketing narrative generally in relation to ICL, see *ibid*; see also Christine Schwöbel-Patel, “Spectacle in International Criminal Law: The Fundraising Image of Victimhood” (2016) 4:2 *London Review of International Law* 247; Sara Kendall, “Donors’ Justice: Recasting International Criminal Accountability” (2011) 24:3 *Leiden Journal of International Law* 585.

recognition of sexual and gender-based crimes or the abuse of children through the adoption of new international crimes. Often, much like other areas of international law, along with states themselves, such experts and activists are viewed as the only actors with the ability to shape the trajectory of ICL. As previously indicated, Brunnée and Toope reject such a narrow understanding of the pathways through which international legal norms are formed and evolve.<sup>98</sup> Interactionalism adopts a quite broad and inclusive view of who and what institutions qualify as actors who contribute to the development of shared understandings relevant to international law, through more diffuse, less purposive processes of social interaction.<sup>99</sup>

This broader view is apt for the realm of ICL, as the language of mass atrocity and international crime is regularly employed outside the realm of traditional ICL fora, such as courts or in foreign relations, to describe a wide variety of situations and actions. The clear majority of such situations will never be subjected to any form of legal adjudication. Indeed, ICL's applicability to real world events is assessed by actors such as scholars, NGOs, journalists, and the like far more often than it is actually determined through legal adjudication. Thus, one ramification of ICL's selectivity is a large role for non-traditional actors to engage with ICL and make arguments concerning its applicability. While a strict legal positivist may view the effect of such actors on the law itself as nil, Brunnée and Toope view such actors, and the communities within which they interact with one another, as participating in the development of shared understandings, and, potentially, of new legal norms.

The ambiguity and malleability of the substance of ICL meanwhile, facilitates the insertion of aesthetic considerations into these norm development processes as well. As actors, ranging from individuals far-removed from locations where potential atrocity crimes are occurring, to local

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<sup>98</sup> See *supra* at 2-6.

<sup>99</sup> For example, Brunnée and Toope argue that in the wake of the terrorist attacks of 9/11 the Bush Administration actively sought to undermine the prohibition on torture under international law. However, Brunnée and Toope also argue that such efforts at undermining this legal norm were met with "vigorous efforts to uphold the rule on the prohibition of torture". Brunnée & Toope, *Legitimacy and Legality*, *supra* note 8 at 102. Brunnée and Toope argue that the actors involved in such efforts were quite diverse, including "international organizations, individual diplomats and politicians, government lawyers, high-ranking military officers, non-governmental organizations, academics, journalists, and the proverbial person in the street protesting against attempts to weaken the prohibition." *Ibid.* Moreover, the "spaces in which these interactions occurred were equally diverse, ranging from UN meetings to domestic legislatures, and courts to national media, to the internet, and more." *Ibid.*

activists and grassroots organizations, form understandings of such situations, the must typically do amidst uncertainty and lack of reliable factual knowledge. For instance, people may come to understand recent events in Darfur through the rubric of ICL, as a “genocide” because they are exposed to various sources of information using that label. The same can be said for various other situations, such as the Rwandan Genocide or Khmer Rouge “killing fields” which have come to be socially understood as emblematic examples of what atrocities are, and are also associated with a catalogue of horrific imagery of suffering, abuse, and violence that are by now, integral aspects of social understandings of such events.

When an individual person, or actors within communities of practice relevant to ICL, interact with the world and one another through the medium of ICL, they do so using a common language and set of normative reference points. This language and these reference points are often deeply aesthetic in nature, as actors interact with one another through the continual referencing of prior atrocities. Moreover, when presented with uncertainty concerning ICL’s applicability, i.e. whether a particular situation is properly viewed as an atrocity or not, the actors who populate communities of practice are especially apt to resort to processes of aesthetic perception, as they typically lack deep knowledge concerning the actual substance of ICL and how this body of law actually operates in practice. Because ICL has so deeply captured the public imagination, and hence, is discussed in many communities of practice and other fora populated by actors with such knowledge gaps, aesthetics are likely to play a disproportionately large role in shaping individual interactions with the world and with one another mediated by ICL.

## Conclusion

Recent research in the field of neuroaesthetics generally and Xenakis and Arnellos’ “interactive affordance” model specifically, provide important insights relevant to interactional legal theory concerning the role of aesthetic perception in shaping social norm development processes. Xenakis and Arnellos thus, describe aesthetic perception as a process of emotional evaluation with “anticipatory features”<sup>100</sup> As such, in situations where individual interactions with the

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<sup>100</sup> Xenakis & Arnellos, *supra* note 36.

world and social interactions between actors occur amidst a high degree of uncertainty and minimal knowledge, the interactive affordance model suggests that actors are more apt to rely on intuitive emotional assessments to forecast how they can most effectively interact with their environment and one another. Such intuitive assessments rely on a catalogue of prior aesthetic experiences in order to resolve uncertainty and act despite a lack of full knowledge.

While politics of visibility affect all legal regimes and social norm development processes to some degree, this chapter has argued that the ambiguity and selectivity of ICL, combined with its factual complexity and politicization, create an environment especially conducive to aesthetic factors shaping shared understandings of mass atrocity and international crime. When conferred with discretionary power amidst uncertainty in terms of both the substance of the law and relevant facts, actors tend to rely more strongly on intuitive processes of aesthetic perception in forecasting whether a specific situation is characterizable involving the perpetration of atrocity crimes. Over time, the cumulation of individual interactions with the world through ICL that are deeply influenced by aesthetic perception ground shared understandings of atrocity crimes in specific constellations of aesthetic characteristics, i.e. a specific aesthetic model. The elements of this “atrocity aesthetic,” and its broader ramifications for ICL itself, are explored in the remainder of this thesis.

## Chapter 2 – The Atrocity Aesthetic: International Crimes as Familiar Spectacles

The previous chapter argued that the ambiguity and selectivity of ICL combine to create an environment in which visibility politics can play a prominent role in the development of shared understandings of atrocity crimes. This chapter seeks to both buttress and build on this argument by identifying *how* aesthetic considerations shape such understandings. It does so by demonstrating that shared understandings of mass atrocity and international crime are grounded in a specific aesthetic model, which I refer to as the “atrocity aesthetic.” According to this model, mass atrocity crimes are expected to manifest themselves as public, visually arresting displays of violence and abuse that are intuitively identifiable as “criminal” in nature. That is, as familiar spectacles of violence and abuse.

This aesthetic understanding of atrocity stems from visibility politics, as it is a product of a high degree of reliance on aesthetic perception in identifying what constitutes an atrocity crime. The normative and doctrinal zones of ambiguity within ICL, factual and political complexity of real-world atrocity situations, and extreme selectivity of ICL, combine to perpetuate this aesthetic understanding of atrocity and international crime, as they create an environment where even highly spectacular atrocities are selectively prosecuted. Such prosecutions confirm the assumption that all atrocities will present themselves as familiar spectacles. International crimes that conform to the atrocity aesthetic are visually arresting, dramatic, and emotionally affective, making them especially amenable to aesthetic perception. Situations that conform to the atrocity aesthetic stand out as highly visible and readily identifiable as mass atrocity crimes. The extreme selectivity of ICL in practice, meanwhile, creates a situation where only a small subset of even the most familiar and spectacular atrocity crimes are ever actually prosecuted, removing pressure to assess ICL’s applicability to situations that fail to conform to the atrocity aesthetic.

To demonstrate that shared understandings of genocide, crimes against humanity, and war crimes, are grounded in an aesthetic model of atrocities as familiar spectacles, this chapter focuses on the ubiquitous usage of the term “atrocity” to describe the general subject matter of ICL. This term is an emotionally affective and descriptively powerful, yet definitionally amorphous and malleable, rhetorical vessel whose meaning, while appearing fixed, is actually quite subjective, as it is contingent on quite personal assessments of what constitutes especially

heinous behavior. The way the term atrocity is rhetorically deployed, including within ICL discourses, evinces a shared understanding of atrocities highly visible and intuitively identifiable phenomena well-suited to being identified via intuitive processes of aesthetic perception, described in the previous chapter. Thus, this chapter concludes that the ubiquitous usage of the language of atrocity to describe the general subject matter of ICL is both a product of, and perpetuates, the visibility politics of international criminal justice. Atrocity does so because the term evokes situations that are aesthetically perceptible, while remaining malleable enough to accommodate new phenomena as social understandings of what constitutes especially heinous or atrocious behavior evolve.

To make this argument, this chapter proceeds in three sections. First, a brief historical overview of the term atrocity, and its current status as the preferred terminology used to refer to the subject matter of ICL is provided. Second, the definitional substance of atrocity as a legal term of art and general concept are explored. This section demonstrates that the term atrocity has no legal meaning and is otherwise definitionally amorphous and malleable, as its meaning is contingent on highly subjective, emotionally grounded moral and ethical assessments of what constitutes especially heinous or reprehensible behavior. Despite this subjectivity and malleability, this section demonstrates that proposed academic definitions of atrocity do, in a broad sense, coalesce around three elements: harm, causation (or culpability), and massiveness (in terms of both the severity and scale of harm inflicted).

The third and final section of this chapter demonstrates that the way the term atrocity is rhetorically deployed within ICL discourses evinces a widely shared understanding that situations involving mass harm causation (i.e. atrocity crimes) will necessarily manifest themselves as easily recognizable spectacles of violence and abuse. Subsequent chapters demonstrate the numerous problematic repercussions that flow from this aesthetically grounded understanding of mass atrocity and international crime, and the visibility politics that underwrite it.

## 1 Atrocity and International Criminal Law

The term atrocity has long been used to describe situations that would currently amount to paradigmatic international crimes. In its earliest manifestations, despite being briefly used as a term of art in Roman law, the term atrocity seems to have been employed primarily as a

descriptor, rather than a legal term of art. Atrocity was first given a legal connotation by the Romans, who used the term within their military law to describe a “subset of offenses, those legally inexcusable despite having been performed under orders.”<sup>101</sup> Despite this early legal usage, atrocity “never became a legal term of art ... with a settled meaning distinct from ordinary Latin [ and] no longer occupies any place within the formal language of international military law.”<sup>102</sup> According to Mark Osiel, the term was supplanted in legal codes by terms such as “manifest illegality” or later, the category of war crimes.<sup>103</sup>

Since these Latin origins in Roman Law, the term atrocity has continued to be used as generic descriptor of particularly egregious instances of large-scale killing and brutality throughout history. Historically, many of the situations this label has been used to describe involve the commission of acts currently understood as paradigmatic international crimes. For example, in a 1919 article entitled *Atrocities in Greek Warfare*, Helen Law draws comparisons between atrocities committed during the Greek wars of antiquity and World War I.<sup>104</sup> Referencing various atrocities committed during these wars, Law singles out the Thracian attack on Mycalessus during the Peloponnesian war as the “most dreadful atrocity committed during that war, for the women and children were not spared, as they ordinarily were. The Thracians, bursting in, sacked the houses and temples and butchered the inhabitants, sparing neither youth nor age but killing all they fell in with, even children and women.”<sup>105</sup> Clearly, the mass killing of civilians by the Thracians, as described by Law, would amount to prototypical war crimes, and perhaps also crimes against humanity, under contemporary ICL.

Atrocity has similarly been used to contemporaneously convey the severity of instances of mass killing and abuse in a wide variety of settings prior to the inception of contemporary ICL. A brief

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<sup>101</sup> Mark J Osiel, “Obeying Orders: Atrocity, Military Discipline, and the Law of War” (1998) 86:5 California Law Review 939 at 951 (internal citations omitted).

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.*

<sup>104</sup> Helen H Law, “Atrocities in Greek Warfare” (1919) 15:3 The Classical Journal 132.

<sup>105</sup> *Ibid* at 139.

list of examples ranges from massacres in colonial India and Congo in the early 19<sup>th</sup> and 20<sup>th</sup> centuries respectively; to the conditions in Siberian gulags in the late 19<sup>th</sup> century; and killings during the Armenian Genocide from 1915-1917. The massacres in India and the Congo involved instances of mass killing, while conditions in Siberian gulags are known to have involved acts of torture and abuse of prisoners that would likely qualify as various crimes against humanity, such as those of torture and inhumane acts if committed now. Meanwhile, the mass killing of Armenians and other members of minority groups in Turkey during World War I is now generally regarded as an early twentieth century example of conduct that is criminalized as genocide today. Despite the fact that when they were committed, ICL, at least as we now know it, did not exist, each of these situations were described as “atrocities” in contemporaneous writing.<sup>106</sup>

These examples demonstrate the evocative power of the term atrocity as a descriptive turn of phrase and its association with acts currently characterizable as international crimes. But the term has also been part of the lexicon of ICL itself since its inception in the wake of World War II. It was used by the Allies in the 1943 Moscow Declaration, formally titled a “Statement on German Atrocities,” and quoted from that document in the 1945 London Agreement, which paved the way for the creation of International Military Tribunal (IMT) at Nuremberg and various other post-WWII courts and tribunals.<sup>107</sup> The IMT judgment itself also repeatedly utilizes the term atrocity, primarily to describe acts of mass killing and abuse committed against Jews and other civilians in Germany and German-occupied territories.<sup>108</sup>

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<sup>106</sup> See e.g. “Atrocities in Congo” (1902) 1:5 *The Journal of Geography* 228; “British Atrocities in India”, *Irish Magazine* (February 1809) 52; “The Sanitary Phase of the Siberian Atrocities” (1890) 135:3476 *The Lancet* 820; Clarence Ussher, “The Armenian Atrocities and the Jihad” (1916) 6:2 *The Muslim World*.

<sup>107</sup> *Statement on German Atrocities*, United States, United Kingdom & Soviet Union, 1 November 1943 [*Moscow Declaration*]; *London Agreement of 8 August 1945*, United States, France, United Kingdom & Soviet Union, 8 August 1945 [*London Agreement*], reprinted in International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal, Germany*, vol I (Nuremberg, Germany, 1947) at 8–9.

<sup>108</sup> See Judgment, International Military Tribunal (1 October 1946), reprinted in International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal, Germany*, vol I (Nuremberg, Germany, 1947) at 175, 251, 270–271, 275, 296, 298, 300, 303, 338 [IMT Judgment].



The term atrocity also appears regularly in judgments issued by the various ad hoc United Nations (UN) courts and tribunals in Rwanda, the former Yugoslavia, Sierra Leone, and Cambodia.<sup>109</sup> Atrocity also appears in the preamble of the Rome Statute of the International Criminal Court (ICC), which references the continuing prevalence of “unimaginable atrocities that deeply shock the conscience of humanity” as one of the reasons why the ICC itself is needed.<sup>110</sup> Indeed, the Statute directly conflates atrocities with international crimes by following this assertion with another, stating “that *such grave crimes* threaten the peace, security and well-being of the world.”<sup>111</sup> The very *raison d'être* of the ICC is thus linked to atrocity punishment and prevention, as the State Parties to the Statute are motivated by a “[d]etermin[ation] to put an end to impunity for the perpetrators of *these crimes* and thus to contribute to the prevention of such crimes”, with the “crimes” in question, again, clearly referencing back to the aforementioned “unimaginable atrocities”.<sup>112</sup>

References to atrocity are also ubiquitous in ICL-related policy documents and scholarship. For example, in 2014, the UN Office on Genocide Prevention and the Responsibility to Protect issued a *Framework of Analysis for Atrocity Crimes* policy document which defines “atrocity crimes” as a term referring “to three legally defined international crimes: genocide, crimes against humanity and war crimes.”<sup>113</sup> Similarly, then-United States (US) President Barack

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<sup>109</sup> See e.g. *Prosecutor v Karemera & Ngirumpatse*, ICTR-98-44-A, Judgement (29 September 2014) paras 333, 353, 698 (International Criminal Tribunal for Rwanda, Appeals Chamber), online: United Nations Mechanism for International Criminal Tribunals <<http://unictr.unmict.org/en/>>; *Prosecutor v Karadžić*, IT-95-5/18-T, Public Redacted Version of Judgement Issued on 24 March 2016 Volume I of IV (24 March 2016) paras 550, 3348, 3519, 4238, 4814, 5825, 6112 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <<http://www.icty.org/>> [*Karadžić*, Trial Judgment]; *Prosecutor v Taylor*, SCSL-03-01-A, Judgement (26 September 2013) paras 275, 305-306, 317-318, 335, 454, 530, 538, 560 (Special Court for Sierra Leone, Appeals Chamber), online: Residual Special Court for Sierra Leone <<http://www.rscsl.org/>>; *Case 002/01*, 002/19-09-2007/ECCC/TC, Case 002/01 Judgement (7 August 2014) paras 856, 958 (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber), online: ECCC <<https://www.eccc.gov.kh/en/>> [*Case 002/01* Trial Judgement].

<sup>110</sup> *Rome Statute*, *supra* note 63, preamble.

<sup>111</sup> *Ibid* (emphasis added).

<sup>112</sup> *Ibid* (emphasis added).

<sup>113</sup> United Nations Office on Genocide Prevention and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes* (2014) at 1.

Obama issued a 2011 presidential study directive on “mass atrocities” with the goal of mainstreaming atrocity prevention into the work of various US government agencies.<sup>114</sup> The rhetoric of atrocity is also the predominant terminology used by scholars to generally reference the subject matter of ICL and the broader purposes of the international criminal justice regime.<sup>115</sup> Indeed, while scholars may sharply disagree concerning whether for example, ICL adequately prevents and/or punishes atrocity, nonetheless the notion that what should be prevented and/or punished are so-called “atrocities” remains subject to near-universal acceptance.<sup>116</sup>

## 2 The Definitional Malleability of Atrocity

Despite the ubiquity of the rhetoric of atrocity in ICL discourse, the term atrocity has never been defined with any specificity as it pertains to ICL, or for that matter international law more generally. Instead, atrocities have, since the inception of ICL, been treated as self-evident phenomena that form the core subject matter with which international criminal justice is concerned. Thus, the term atrocity performs both descriptive and definitional functions, often simultaneously, resulting in circular logic. Atrocities are presented as the general subject matter

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<sup>114</sup> Barack Obama, “Presidential Study Directive on Mass Atrocities” (4 August 2011), online: *White House Office of the Press Secretary* <<https://www.whitehouse.gov/the-press-office/2011/08/04/presidential-study-directive-mass-atrocities>>.

<sup>115</sup> See e.g. Payam Akhavan, “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?” (2001) 95:1 *American Journal of International Law* 7; Drumbl, “Collective Violence and Individual Punishment” *supra* note 6; Kirsten Fisher, *Moral Accountability and International Criminal Law: Holding Agents of Atrocity Accountable to the World* (New York, NY: Routledge, 2013); Mark Osiel, *Making Sense of Mass Atrocity* (Cambridge, UK: Cambridge University Press, 2009); Boas, *supra* note 52; Saira Mohamed, “Deviance, Aspiration, and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law” (2015) 124:5 *Yale Law Journal* 1628; Sheri P Rosenberg, “Audacity of Hope: International Criminal Law, Mass Atrocity Crimes, and Prevention” in Sheri P Rosenberg, Tibi Galis & Alex Zucker, eds, *Reconstructing Atrocity Prevention* (New York: Cambridge University Press, 2015) 151; Hyeran Jo & Beth A Simmons, “Can the International Criminal Court Deter Atrocity?” (2016) 70:3 *International Organization* 443; Tom Buitelaar, “The ICC and the Prevention of Atrocities: Criminological Perspectives” (2016) 17:3 *Human Rights Review* 285.

<sup>116</sup> See e.g. Akhavan, *supra* note 115; Kate Cronin-Furman, “Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity” (2013) 7:3 *International Journal of Transitional Justice* 434; Drumbl, *Atrocity, Punishment and International Law*, *supra* note 52; William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (New York, NY: Oxford University Press, 2012); Nancy Amoury Combs, “Seeking Inconsistency: Advancing Pluralism in International Criminal Sentencing” (2016) 41:1 *Yale Journal of International Law* 1 at 19.

of ICL in a descriptive sense. However, when one asks, well what an atrocity is, the answer provided is likely to refer to the substance of ICL itself. That is, international crimes are described as atrocities, while atrocities are described as international crimes. Yet, as noted in the previous chapter, there exists no clear, widely agreed-upon general definition of what the universal hallmarks of an international crime are.<sup>117</sup> The net result of this definitional merry-go-round is the adoption of a “know it when you see it” approach to identifying atrocities, evidencing an underlying assumption that atrocities need not be defined with much specificity because they manifest themselves as self-evident phenomena.

This tendency to treat atrocity crimes as self-evident phenomena can be traced back to the earliest manifestations of ICL. For example, despite being formally titled a “Statement on German Atrocities,” the Moscow Declaration does very little to describe what atrocities are, or cite specific examples of atrocities the document is meant to refer to, but simply references the existence of evidence of “atrocities, massacres and cold-blooded mass executions” being committed by the Nazis, without any further explanation.<sup>118</sup> The Declaration only provides descriptive examples of apparent atrocities, stating that “Germans who take part in wholesale shooting of Polish officers or in the execution of French, Dutch, Belgian or Norwegian hostages of Cretan peasants, or who have shared in slaughters inflicted on the people of Poland or in territories of the Soviet Union” will be held accountable following the cessation of hostilities.<sup>119</sup> The London Agreement in turn, quotes the Moscow Declaration’s mention of atrocities in its preamble as an integral part of the justification of prosecuting so-called “major war criminals”,

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<sup>117</sup> See *supra* at 13-16.

<sup>118</sup> The Declaration begins by stating that the UK, USSR, and USA “received from many quarters evidence of atrocities, massacres and cold-blooded mass executions ... being perpetrated by Hitlerite forces in many of the countries they have overrun and from which they are now being steadily expelled.” It states that “those German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in the above *atrocities*, massacres, and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein.” *Moscow Declaration, supra* note 107 (emphasis added).

<sup>119</sup> *Ibid.*

without any further explanation of the term's meaning.<sup>120</sup> The rhetoric of atrocity also appears regularly in the IMT judgment and other post-WWII ICL jurisprudence, where it again is deployed as a self-evident descriptor, rather than being defined in any meaningful way.<sup>121</sup>

This early pattern of deploying the rhetoric of atrocity in a manner that assumes the term to be a definitionally self-evident descriptor of the collective horrors associated with the commission of international crimes also manifests itself within the statutes and jurisprudence of the UN ad hoc courts and tribunals, which repeatedly reference, yet never clearly define atrocity.<sup>122</sup> The Rome Statute also refers to “unimaginable atrocities” as the “crimes” the ICC was created to end impunity for, without providing any further definition of what an atrocity itself actually is.<sup>123</sup> Again, the result is that atrocities are treated as self-evident phenomena that collectively, represent the subject matter of the Rome Statute itself when it was drafted, i.e. genocide, crimes against humanity, and war crimes.

In spite of this tendency to treat atrocities as self-evident phenomena, in actuality, the term atrocity is definitionally amorphous and malleable. The ordinary dictionary definition of atrocity also provides little in the way of clarification, as it remains contingent upon highly subjective and malleable notions, such as what constitutes especially heinous behavior or, more circularly, what is meant by the phrase “the quality or state of being atrocious.”<sup>124</sup> The Oxford English dictionary defines the term atrocity as referring to either “[s]avage enormity, horrible or heinous wickedness” or “[a]n atrocious deed; an act of extreme cruelty and heinousness.”

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<sup>120</sup> *Ibid*; *London Agreement*, *supra* note 107 at 8 (preamble in original).

<sup>121</sup> See *supra* note 108.

<sup>122</sup> For examples of such references, see *supra* note 109.

<sup>123</sup> *Rome Statute*, *supra* note 63 at preamble.

<sup>124</sup> *Merriam-Webster Dictionary*, online ed, *sub verbo* “atrocity”, online: *Merriam-Webster Dictionary* <<https://www.merriam-webster.com/>>.

“Atrociousness” meanwhile, is defined as connoting actions that are “extremely wicked, brutal or cruel ... appalling, horrifying [or] utterly revolting: abominable”.<sup>125</sup>

These definitional descriptors are dramatic and emotionally resonant, yet simultaneously vague, as they mainly refer to emotions, feelings, and moral assessments that tend to be intuitively felt, rather than dispassionately assessed. That is, such concepts tend to be understood viscerally, according to deeply held inward feelings, rather than more detached intellectual assessments.<sup>126</sup>

As demonstrated in the previous chapter, such intuitive assessments are conducive to actors relying heavily on processes of aesthetic perception, creating a situation wherein shared understandings of genocide, crimes against humanity, and war crimes become imbued with aesthetic factors.

Examining the way in which the term atrocity is rhetorically deployed within ICL-related discourses provides similarly little in the way of insight into the range of situations this term is meant to refer to. For example, ICL scholar Gideon Boas describes atrocities as situations of “war, to the rupture of society and to systematised murder and persecution.”<sup>127</sup> The term is also regularly used interchangeably with similarly dramatic and emotional, yet vague and malleable conceptual turns of phrase, such as “mass violence,” “gross human rights violations,” or “horrors of the most severe order”.<sup>128</sup> Others use phrases such as “organizational criminality,” “collective

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<sup>125</sup> See *ibid*, *sub verbo* “atrocious” (defining the adjective atrocious alternatively as “extremely wicked, brutal, or cruel: barbaric” ... “appalling, horrifying” or “utterly revolting: abominable”); see also similar formulations in the Oxford English Dictionary, *Oxford English Dictionary*, *supra* note 34, *sub verbo* “atrocious”.

<sup>126</sup> See *Oxford English Dictionary*, *supra* note 34, *sub verbo* “visceral”.

<sup>127</sup> Boas, *supra* note 52 at 1.

<sup>128</sup> See e.g. Mirjan Damaška, “What is the Point of International Criminal Justice?” (2008) 83:1 Chicago-Kent Law Review 329 at 334–335, 342. Damaška argues that international criminal courts are overburdened by an overabundance of objectives, but presents the inquiry generally as one surrounding the question of responses to “massive human rights violations.” *Ibid* at 330. Moreover, in a 2013 speech, then-ICC President Judge Sang-Hyun Song referenced the problematic continued existence of atrocities and stated that “[b]y encouraging national implementation under the principle of complementarity, the Rome Statute helps the global entrenchment of legal and social norms prohibiting mass violence”. Sang-hyun Song, “Keynote Remarks at Human Rights Council Side Event ‘The International Criminal Court after 15 Years: Prospects for the Future’”, (10 September 2013), online: *ICC Website* <[https://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/presidency/statements/Pages/2013-09-10-President-keynote-Geneva.aspx](https://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/presidency/statements/Pages/2013-09-10-President-keynote-Geneva.aspx)>. Similarly, Mark Drumbl, in an influential article, states that “[t]he prevailing paradigm views *mass*

violence” and “system criminality” to refer collectively to genocide, crimes against humanity, and war crimes, in order to highlight the group dynamics of international criminality.<sup>129</sup> Each of these phrases are similar to atrocity in that they evoke graphic imagery of death and suffering, or are suggestive of large-scale, group criminality, yet remain definitionally amorphous. Notions of massiveness, severity, horror, or what characterizes a “gross” human rights violation are, like the dictionary definition of atrocity, inherently subjective and malleable. Terms such as “mass” and “gross” gesture towards largeness in terms of scale, but only in a general sense, and what constitutes “violence” is subject to a protracted, widely divergent definitional debate.<sup>130</sup> Thus, in sum, the manner in which the language of atrocity is rhetorically deployed within ICL discourses suggests that the term does not need to be defined in any way, but is a term that is already subject to a common, intuitive understanding as it related to ICL.

## 2.1 Proposed Definitions of Atrocity

While the term atrocity lacks any legal definition, and is subject to a highly subjective ordinary dictionary definition, a handful of scholars have explored the definitional import of the term. Amongst the limited number of scholars who have directly considered the meaning of the concept of atrocity, David Scheffer, Claudia Card, and Scott Straus, stand out, as exemplars within the fields of law, moral philosophy, and political science respectively.<sup>131</sup> Each of these

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*atrocities* as something greater than the sum of its parts, namely each of its ordinary constituent murders. Under this paradigm, *mass violence* is constructed as something extraordinarily transgressive of universal norms.” Drumbl, “Collective Violence and Individual Punishment” *supra* note 6 at 540 (emphasis added); see also e.g. Jaya Ramji & Beth Van Schaack, eds, *Bringing the Khmer Rouge to Justice: Prosecuting Mass Violence Before the Cambodian Courts*, Criminology Studies 27 (Lewiston, NY: Mellen Press, 2005); Alette Smeulers & Fred Grünfeld, *International Crimes and Other Gross Human Rights Violations* (Boston, MA: Brill Nijhoff, 2011); see also Martha Minow, “Naming Horror: Legal and Political Words for Mass Atrocities” (2007) 2:1 *Genocide Studies & Prevention* 37 at 38.

<sup>129</sup> See e.g. Ohlin, “Organizational Criminality” *supra* note 6; Drumbl, “Collective Violence and Individual Punishment” *supra* note 6; André Nollkaemper, “Systemic Effects of International Responsibility for International Crimes” (2010) 8:1 *Santa Clara Journal of International Law* 313; Julian Ku, “How System Criminality Could Exacerbate the Weaknesses of International Criminal Law” (2010) 8:1 *Santa Clara Journal of International Law* 10; Mark A Drumbl, “Accountability for System Criminality” (2010) 8:1 *Santa Clara Journal of International Law* 373.

<sup>130</sup> For an overview of the many widely ranging approaches to defining violence, see Aisenberg et al, *supra* note 53.

<sup>131</sup> David Scheffer, “Genocide and Atrocity Crimes” (2006) 1:3 *Genocide Studies & Prevention* 229; Claudia Card, *The Atrocity Paradigm: A Theory of Evil* (New York, NY: Oxford University Press, 2002); Scott Straus, “What Is Being Prevented? Genocide, Mass Atrocity, and Conceptual Ambiguity in the Anti-Atrocity Movement” in Sheri P

three proposed atrocity paradigms are outlined in turn, with an eye to identifying common themes.

### 2.1.1 Card: Atrocity as a Paradigm of Evil

Moral philosopher Claudia Card proposes the concept of atrocity as a paradigm of understanding evil as a philosophical subject of inquiry, using the concept of atrocity to chart a middle course between utilitarian and stoic conceptions of what constitutes evil.<sup>132</sup> For Card, there are two core elements of an atrocity: “wrongdoing and harm,” meaning that atrocities are both “perpetrated and suffered” and consequently, there “is no such thing as an atrocity that just happens or an atrocity that hurts no one.”<sup>133</sup> Thus, for Card the core features of evil (or as she uses, the plural, “evils”) are agency, causation and culpability (i.e. wrongdoing and harm). While she presents wrongdoing and harm as the core elements of any atrocity, Card adds another element of scale to her proposed definition by stating that atrocities are situations where wrongdoing and harm occur on a “writ large” scale.<sup>134</sup> Card’s conception of atrocities as evil, evokes the work of Hannah Arendt, who, in *The Human Condition* refers to atrocities, such as those committed by the Nazis during WWII, as “those offenses which, since Kant, we call ‘radical evil’ and about whose nature so little is known, even to us who have been exposed to one of their rare outbursts on the public scene.”<sup>135</sup> While Card herself adopts a rather broad view of relevant harms, her basic definition of atrocities as the combination of wrongdoing and harm writ large remains a helpful starting point for ruminations on the concept of atrocity.<sup>136</sup>

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Rosenberg, Tibi Galis & Alex Zucker, eds, *Reconstructing Atrocity Prevention* (New York: Oxford University Press, 2016) 17.

<sup>132</sup> Card, *supra* note 131 at 4.

<sup>133</sup> Card, *supra* note 131 at 9.

<sup>134</sup> *Ibid.*

<sup>135</sup> Hannah Arendt, *The Human Condition*, 2d ed (Chicago, IL: University of Chicago Press, 1958) at 241. Arendt goes on to state that “[a]ll we know is that we can neither punish nor forgive such offenses and that they therefore transcend the realm of human affairs and the potentialities of human power, both of which they radically destroy wherever they make their appearance.” *Ibid.*

<sup>136</sup> Card mentions such non-traditional atrocity modalities as “the domestic terrorism of prolonged battery, stalking, and child abuse,” capital punishment and “evils done to animals who are raised on factory farms and butchered in

### 2.1.2 Scheffer: Atrocity Crimes and Atrocity Law

While Card uses the concept of atrocity as an entrance point for a philosophical exploration of the nature of evil, legal scholar and former US Ambassador-at-Large for War Crimes Issues, David Scheffer provides a more specific, decidedly legal definition of atrocity. Arguing that there exists a need to shift away from overusing the rhetoric of genocide to refer to all instances of mass crime, Scheffer advocates for a shift in language to the use of the term “atrocity crimes” to generally refer to the types of serious international crimes that have traditionally been prosecuted at internationalized criminal courts and tribunals.<sup>137</sup> Scheffer describes atrocities in terms of their “high-impact” on victims, “severe gravity”, “orchestrated character,” and ability to “shock the conscience of humankind”.<sup>138</sup> This description, like Card’s invocation of evil, evokes a commonly held sentiment famously voiced by Arendt; the notion that international crimes transcend the scope of domestic legal systems because of their sheer scale, which injures not only individual victims, but all of humanity as such.<sup>139</sup> Scheffer views such crimes as being “of such magnitude and destructive character as to be particularly prominent and logically inconsistent with the protection of human rights and the maintenance of international peace and security in an increasingly interdependent and sophisticated global society.”<sup>140</sup> Scheffer also directly references the shocking nature and high visibility of atrocity crimes, describing them as situations “that one would expect the international media and the international community to focus on as meriting an international response holding the lead perpetrators accountable before a

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mass-production slaughterhouses” as examples of “atrocities” as a paradigm of evils. Card is clear however, that she adopts a particularly broad view of what amounts to an atrocity. Card, *supra* note 131 at 8–9.

<sup>137</sup> Scheffer, “Genocide and Atrocity Crimes” *supra* note 131 at 230.

<sup>138</sup> *Ibid* at 238.

<sup>139</sup> In an oft-cited formulation of this idea of international crimes transcending the boundaries of domestic legal jurisdictions, Hannah Arendt, observing the Eichmann trial observed that “[i]nsofar as the victims were Jews, it was right and proper that a Jewish court should sit in judgment; but insofar as the [Holocaust] was a crime against humanity, it needed an international tribunal to do justice to it.” Arendt, “Eichmann in Jerusalem-V” *supra* note 58 at 123.

<sup>140</sup> Scheffer, “Genocide and Atrocity Crimes” *supra* note 131 at 238.



competent court of law”.<sup>141</sup> Ultimately, Scheffer defines “atrocities crimes” as consisting of five elements:

1. The crime must be of significant magnitude, meaning that its commission is widespread or systematic or occurs as part of a large-scale commission of such crimes. The crime must involve a relatively large number of victims (e.g., a fairly significant number of deaths or casualties), or impose other very severe injury upon noncombatant populations (e.g., massive destruction of private property), or subject a large number of combatants or prisoners of war to violations of the laws and customs of war.
2. The crime may occur in time of war, or in time of peace, or in time of violent societal upheaval of some organized character, and may be either international or non-international in character.
3. The crime must be identifiable in conventional international criminal law as the crime of genocide, a violation of the laws and customs of war, the crime of aggression (if and when it is defined so as to give rise to clear individual criminal culpability), the crime of international terrorism, a crime against humanity (the precise definition of which has evolved in the development of the criminal tribunals), or the emerging crime of ethnic cleansing.
4. The crime must have been led, in its execution, by a ruling or otherwise powerful elite in society (including rebel or terrorist leaders) who planned the commission of the crime and were the leading perpetrators of the crime.
5. The law applicable to such crime, while it may impose state responsibility and even remedies against states, is also regarded under customary international law as holding individuals criminally liable for the commission of such crime, thus enabling the prosecution of such individuals before a court duly constituted for such purpose.<sup>142</sup>

Scheffer also views legal responses to atrocity as not being limited to ICL, instead advocating for the acknowledgement of a specific body of “atrocity law” drawn from a composite of ICL, international humanitarian law, international human rights law, and the law of war.<sup>143</sup> Scheffer argues that it is atrocity law, not solely ICL, that modern international criminal tribunals and the ICC apply.<sup>144</sup>

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<sup>141</sup> *Ibid* at 239.

<sup>142</sup> *Ibid* at 238–239.

<sup>143</sup> *Ibid* at 245.

<sup>144</sup> In this vein, Scheffer identifies various international crimes that clearly do not amount to atrocities according to this definition. See *ibid* at 244–246.

At first glance, this definition appears much more substantive and detailed than Card's basic combination of wrongdoing, harm, and scale. Yet, upon close reading, Scheffer's definition merely attaches legal requirements to Card's basic definition of atrocity, by utilizing the label "atrocity crimes." Otherwise, Scheffer's definition closely tracks that of Card, as his requirement of "magnitude" is comparable to Card's "writ large" qualifier. Meanwhile, his requirement that relevant atrocity acts violate law that provides for the criminal prosecution of individuals clearly imports with it (a perhaps more stringent version of) Card's element of "wrongdoing" in the form of individual criminal culpability.

Beyond these similar elements, Scheffer merely limits his definition of atrocity crimes to an apparent subset of atrocities that are addressed by positive ICL. He notes that international crimes may now be committed within any societal context, be it a period of peace, armed conflict, or social upheaval. Scheffer also notes that applicable law, (i.e. ICL) must provide for individual criminal responsibility, and requires involvement of local elites in the commission of such crimes. These requirements also merely reflect the substance of ICL itself, which provides solely for the prosecution of individuals, and the reality that only large-scale groups or other powerful actors are able to actually commit genocide, crimes against humanity, and/or war crimes in most cases.

Despite its specificity however, Scheffer's "atrocity crimes" definition provides only a rough outline of what an "atrocity" itself is. The elements of magnitude and commission by powerful individuals help to further describe the fundamental largeness in terms of the scope, size and structure of genocide, crimes against humanity, and war crimes. The second element, that atrocities must be committed in "time of war, or in time of peace, or in time of violent societal upheaval of some organized character, and may be either international or non-international in character," adds little, if anything, substantively to Scheffer's definition, but merely confirms that international crimes can be committed in the midst of war or peace, or any other state of affairs for that matter.<sup>145</sup> Finally, the third and fifth elements, that atrocity crimes violate ICL

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<sup>145</sup> *Ibid* at 238. It is unclear what state a society may be in other than being at war, at peace, or in violent upheaval. As such, this element appears to merely remind the reader that atrocity crimes can be committed within any social context, but are not limited to periods of war.

and the law provides for individual criminal responsibility respectively, merely reference the elements of specific international crimes/modes of liability and the ICL principle of individual culpability.<sup>146</sup> This definition fails to delve into the complex causal nexuses that can be involved in linking the acts of a perpetrator group sufficiently to both a harm suffered by the victim group and to an individual accused. As such, Scheffer limits his definition of atrocities to forms of mass harm causation involving the commission of cognizable international crimes, but does little to elucidate the common characteristics such crimes share with one another, or to provide examples of non-criminal atrocities, thereby adding little in the way of substance, to discussions concerning the normative features of the subject matter he attempts to affix a label to.

Ultimately, Scheffer describes atrocity crimes in much the same way as Card defines the general concept of atrocity, by focusing on individual culpability (i.e. wrongdoing) and the production of harm on a “writ large” scale (i.e. of a particular “magnitude” in Scheffer’s words). By adding the qualifier “crimes” to that of atrocity, Scheffer however, adds legal limitations to his definition, requiring the commission of acts “prohibited by recognizable ICL”.<sup>147</sup> Thus, both Card and Scheffer arrive at relatively open-ended definitions of atrocities, which can seemingly encompass a broad spectrum of large-scale, culpable harm-causing behaviours. While Scheffer’s definition is more detailed, implicit in these details is the assumption that atrocity crimes will be highly visible, easily recognizable events, i.e. those that “shock” our collective consciences as a species.

### 2.1.3 Scott Straus: Atrocities as Large-Scale, Systematic Violence against Civilians

The most recent attempt to define atrocity is that of political scientist and genocide studies scholar Scott Straus, who asserts that while “mass atrocities and atrocities have no formal, legal

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<sup>146</sup> This is not to disparage the importance of these elements or the general utility of a shift in the language used to discuss ICL to one that revolves around the language of “atrocity”, especially as a replacement for the unfortunate and incoherent use of the language of “genocide” in popular discourses to refer to ICL as a whole. Many important international actors, especially those with an interest of ICL who are not legal practitioners or scholars, benefit from the distinctions drawn by Scheffer, which summarize key developments within ICL that have removed previous, rather arbitrary barriers to international prosecutions, such as the former requirement that crimes against humanity and war crimes could solely be committed during periods of armed conflict legally characterized as international in nature.

<sup>147</sup> Scheffer, “Genocide and Atrocity Crimes” *supra* note 131 at 238.

definition, they usually refer to genocide, [crimes against humanity], war crimes, and ethnic cleansing”, noting the usage of the rhetoric of atrocity within the responsibility to protect (R2P) discursive framework.<sup>148</sup> Pursuant to an assessment of the general characteristics of these legal categories, Straus concludes that the protection of civilian and non-combatant populations from large-scale violence is a prominent, recurring theme common to the law of genocide, crimes against humanity, war crimes, and ethnic cleansing, while the R2P framework references more generally the protection of “populations.”<sup>149</sup> As such, Straus proposes that mass atrocities be defined as instances of “large-scale, systematic violence against civilian populations” as a subject of public policy and scholarly study.<sup>150</sup> Straus’ “large-scale, systematic violence” definition combines elements of scale, organization, violence and civilian victimhood, predicated on an underlying understanding of the term “civilian” as referring to any non-combatant.<sup>151</sup> He summarizes this definition thusly:

The idea of large-scale, systematic implies that the violence is organized, repeated over time and space in a regular fashion, coordinated, widespread, and sustained. Violence includes killing but also includes other forms of deliberate harm being inflicted, such as rape, starvation, and population removal. As conceptualized here, civilians means noncombatants and combatants removed from conflict (e.g., prisoners of war).<sup>152</sup>

Straus views the term atrocity, as he defines it, as superior to other proposed labels, such as “mass killing” because “in contrast to mass atrocity, mass killing is exclusively about killing rather than a range of violence including starvation, attacks on shelter or water supplies, sexual violence, and other forms of violence.”<sup>153</sup> This statement provides an implicit definition of what constitutes “violence” within Straus’ proposed definition, which encompasses forms of harm

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<sup>148</sup> Straus, *supra* note 131 at 23.

<sup>149</sup> *Ibid* at 27.

<sup>150</sup> *Ibid* at 18.

<sup>151</sup> *Ibid* at 27.

<sup>152</sup> *Ibid* at 29.

<sup>153</sup> *Ibid* at 27.

causation beyond the direct physical application of force. Accordingly, Straus views his proposed definition of atrocity as synonymous with the concept of “mass violence” another term commonly used to describe the general subject matter of ICL.<sup>154</sup>

## 2.2 Towards a Basic “Mass Harm Causation” Definition of Atrocity

Despite the significant variation amongst the proposed definitions of atrocity suggested by Card, Scheffer, and Straus, some basic commonalities do exist across all three definitions. On a basic level, Card, Scheffer, and Straus all, reference three key general elements of atrocities: wrongdoing, harm, and scale, albeit using differing terminology. All three proposed definitions refer to intentional, or blameworthy human agency as the driving factor behind atrocities. Card refers to this as “wrongdoing,” Scheffer references individual criminal culpability, and Straus refers to “deliberate harm being inflicted.”<sup>155</sup> All three definitions thus, exclude harms caused primarily by non-human forces, such as those associated with unforeseen natural disasters such as hurricanes, tsunamis, earthquakes, and the like, as well as mere human error and run of the mill negligence, thereby omitting tragic, yet unintentional accidents, such as airplane crashes or the like, which do not involve a sufficient degree of culpable human wrongdoing.<sup>156</sup>

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<sup>154</sup> *Ibid* at 28. This definition also roughly coincides with that used by Bridget Conley-Zilkic & Alex de Waal, who use the term “mass atrocities” to refer to “widespread and systematic violence that results in the deaths of 50,000 or more civilians within a five-year period.” Bridget Conley-Zilkic & Alex de Waal, “Setting the Agenda for Evidence-Based Research on Ending Mass Atrocities” (2014) 16:1 *Journal of Genocide Research* 55 at 57. Like Straus, Conley-Zilkic and de Waal encompass within this definition “both killing as well as instances of the creation of conditions that bring about high levels of dying.” *Ibid* at 57 n 10.

<sup>155</sup> Card, *supra* note 131 at 9; Scheffer, “Genocide and Atrocity Crimes” *supra* note 131 at 239; Straus, *supra* note 131 at 29.

<sup>156</sup> While this distinction is often quite clear, significant gray areas in terms of causation do exist. For example, when a government neglects to adequately respond to a natural disaster, exacerbating the suffering and death produced by it, such as occurred in Burma in 2008 in the aftermath of Cyclone Nargis, culpability for harm causation may be attributed to a complex mix of natural and human causes. For an analysis of the Burmese government’s potential criminal responsibility for its failure to respond adequately to Nargis, see Stuart Ford, “Is the Failure to Respond Appropriately to a Natural Disaster a Crime against Humanity? The Responsibility to Protect and Individual Criminal Responsibility in the Aftermath of Cyclone Nargis” (2010) 38:2 *Denver Journal of International Law & Policy* 227.

Second, perhaps the most obvious and least contested element of atrocity is that of human suffering. Card, Scheffer, and Straus all reference the fact that atrocities are not just ethereal phenomena, but have victims, who directly and acutely suffer. As Card pithily puts it “there is no such thing as ... an atrocity that hurts no one”,<sup>157</sup> and Scheffer and Straus both specify that atrocities involve the production of harm amongst civilian or otherwise non-combatant human populations.<sup>158</sup> While Card’s broad philosophical paradigm of atrocity does not parse between categories of victims, she does acknowledge that in a traditional sense, atrocities are understood to have human victims, although she herself does not necessarily prescribe to this view.<sup>159</sup>

Third, some requirement of largeness or severity in terms of scale is common to all proposed definitions of atrocity. Indeed, a certain threshold of seriousness is heavily implied, but not explicitly required, by the ordinary definition of atrocity, which references acts which are “extremely wicked, brutal or cruel ... appalling, horrifying [or] utterly revolting: abominable.”<sup>160</sup> Presumably acts only rise to such a high level of egregiousness when they involve the production of harm on a significant scale. Card, Scheffer, and Straus all explicitly reference scale requirements in their respective definitions. Card notes that atrocities involve wrongdoing and harm “writ large.”<sup>161</sup> Scheffer repeatedly references the scale of atrocity crimes, referring to their “high-impact” on victims, “severe gravity”, “orchestrated character,” and ability

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<sup>157</sup> Card, *supra* note 131 at 9. It is worth noting that Card would include harms suffered by non-human animals, such as “evils done to animals who are raised on factory farms and butchered in mass-production slaughterhouses” and egregious environmental harms as falling within her avowedly expansive definition of atrocity as a model of evil. See *ibid* at 8–9.

<sup>158</sup> Scheffer, “Genocide and Atrocity Crimes” *supra* note 131 at 238; Straus, *supra* note 131 at 29.

<sup>159</sup> Card intentionally leaves open the question of whether situations she views as contemporary evils, such as large-scale factory farming involving the ill-treatment and subsequent mass slaughter of non-human animals, may be considered “atrocities.” Card’s “own list” of evils (i.e. atrocities) “includes evils done to animals who are raised on factory farms and butchered in mass production slaughterhouses.” Card, *supra* note 131 at 8-9.

<sup>160</sup> See *Merriam-Webster Dictionary*, *supra* note 124, *sub verbo* “atrocious” (defining the adjective atrocious alternatively as “extremely wicked, brutal, or cruel: barbaric” ... “appalling, horrifying” or “utterly revolting: abominable”); see also similar formulations in the *Oxford English Dictionary*, *Oxford English Dictionary*, *supra* note 34, *sub verbo* “atrocious”.

<sup>161</sup> Card, *supra* note 131 at 9.

to “shock the conscience of humankind”.<sup>162</sup> Straus similarly explicitly requires a threshold of scale in defining atrocities as “large-scale, systematic violence.”<sup>163</sup> While in many instances, references to scale and gravity tend to equate atrocity with mass killing,<sup>164</sup> one can easily imagine situations of mass harm causation not necessarily involving killing, such as the large-scale commission of sexual violence, or torture, that could rise to a level of severity sufficient to be labeled an atrocity according to Card, Scheffer, and Straus, along with the basic dictionary definition of atrocity. This scale requirement typically serves a dual purpose, referring both the degree of harm suffered by individual victims and to the number of victims affected.<sup>165</sup>

While some scale requirement is included in each definition of atrocity, the threshold where this element is satisfied is near-universally described in qualitative, rather than quantitative terms, as there exists a general unease with formulating a precise combination of severity of harm and number of victims necessary for an situation to be labelled an atrocity.<sup>166</sup> In addition to these three universal elements, other recurring themes include the notions that atrocities involve coordinated action by groups and often involve some degree of complicity or involvement by state or other similarly powerful actors. These qualifiers however, tend to relate back to the three core elements of atrocity, as they describe the kinds of actors who possess sufficient power and influence to cause harm on a massive scale, and the kinds of situations, such as armed conflict or periods of social breakdown, conducive to atrocity commission.

In sum, the term atrocity is oft-used, yet rarely defined. It is a term whose definition is routinely assumed to be intuitive in nature, uncontroversial, and subject to implicit social and legal

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<sup>162</sup> Scheffer, “Genocide and Atrocity Crimes” *supra* note 131 at 238.

<sup>163</sup> Straus, *supra* note 131 at 18.

<sup>164</sup> Conley-Zilkic & de Waal, *supra* note 154 at 57.

<sup>165</sup> This element of massiveness, in terms of severity of harm inflicted and number of victims affect, helps to explain the routine inclusion use of the term “mass atrocity,” in a manner undifferentiated from that of atrocity alone. For an example of such a usage, see e.g. Straus, *supra* note 131 at 17-18.

<sup>166</sup> Efforts to set a specific numeric threshold, such as the approach adopted by Conley-Zilkic & de Waal, requiring 50,000 civilian deaths within a five year period, are clearly efforts to use a numerical placeholder to approximate the threshold of massiveness. See Conley-Zilkic & de Waal, *supra* note 154.

consensus. At times, the rhetoric of atrocity is deployed as a means of collectively referring to the trio of so-called “core” international crimes with which this thesis is concerned: genocide, crimes against humanity, and war crimes. At other times, the term is used to refer to a subset of especially serious situations that ICL was created to address. Most of the time however, such situations are treated, much like the concept of atrocity itself, as highly visible and self-evident phenomena that can be readily identified using a simple “know it when you see it” approach.

In some ways, even this amorphous and malleable concept of atrocity serves a useful function, that of providing a similarly pithy, yet emotionally resonant replacement for the overused term “genocide” to refer to all instances of mass killing and abuse.<sup>167</sup> Beyond serving this particular function however, the rhetorical turn to the language of atrocity does little to help us understand and conceptualize what kinds of situations ICL can (or should) apply to, and what is distinctive about international crimes.<sup>168</sup> Even scholarly efforts to define atrocity with greater specificity remain somewhat vague, coalescing around common themes of wrongdoing, human harm causation, and massiveness in terms of scale and severity of such harms.

Thus, when asked to define atrocity, common elements of harm, wrongdoing, and massiveness in terms of scale, emerge. Other than references to the notion that situations involving harm causation on such a massive scale may “shock” our consciences when we are exposed to them, or otherwise, in the words of Justice LaForest, “assault our eyes,” aesthetic considerations and characteristics play no role in such definitions. Neither Card, nor Scheffer, nor Straus require that situations they believe are properly labelled atrocities must manifest themselves in accordance with any specified aesthetic model. Nonetheless, there seems to exist a widely shared notion that situations involving mass harm causation will, because of their extraordinary scale, manifest themselves in ways that are intuitively identifiable. When we, as human beings, rely on intuitive cognitive processes however, we rely quite heavily the identification of familiar aesthetic

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<sup>167</sup> This is not to suggest that avoiding what David Scheffer refers to as the “g-word” problem, of the disconnect between popular and legal understandings of what constitutes genocide. Indeed, avoiding this problem is the primary motivation behind Scheffer’s advocacy for adopting the language of atrocity to describe serious international criminality. See Scheffer, “Genocide and Atrocity Crimes” *supra* note 131.

<sup>168</sup> This definitional ambiguity has been pointed out by several scholars. See e.g. Minow, “Naming Horror” *supra* note 128 at 39–40; Straus, *supra* note 131; Margaret M deGuzman, “Gravity and the Legitimacy of the International Criminal Court” (2009) 32:5 *Fordham International Law Journal* 1400 at 1400–1402.



patterns of sensory inputs, be they visual, auditory, or tactile in nature. That is, we rely heavily on aesthetic perception. In such circumstances, aesthetic considerations—the way a situation looks to us, the emotions it elicits, and the like—strongly shape the way we perceive, and ultimately understand, such a situation. As such, to extensively employ a rhetorical concept, such as that of atrocity, while sketching out only its rough definitional outlines, is to implicitly assert that such concept has already been socially defined in a way that makes it subject to a common understanding that need not be recited in detail and which can be intuited and interacted with, despite never being clearly defined.

### 3 The Atrocity Aesthetic

Thus far, this chapter has argued that this scenario has played out within the realm of ICL. The remainder of this chapter, returning to interactional legal theory, argues that dominant socially shared understandings of what constitutes an atrocity are grounded in an aesthetic model of large-scale harm causation that is comprised of two key elements: spectacle and familiarity. These elements reflect the prominent, yet mostly unacknowledged role that visibility politics and processes of aesthetic perception play within ICL, especially in the identification and social recognition of mass atrocity and international crime.

As discussed previously, “shared understandings” or “collectively held background knowledge, norms or practices,” constitute the raw material out of which international law is created per interactional legal theory.<sup>169</sup> Within the realm of ICL, there exist various shared understandings that are relevant to the identification and recognition of genocide, crimes against humanity, and war crimes. As demonstrated previously, on one level, there exists a shared understanding that atrocities form the central, if not exclusive, subject matter ICL is concerned with. Moreover, in terms of understandings of what constitutes an atrocity, there also exists a widely shared, if rather rough, basic understanding that atrocities are situations involving severe harm causation on a massive scale.

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<sup>169</sup> Brunnée & Toope, *Legitimacy and Legality*, *supra* note 8 at 64. As noted previously, such understandings are “generated and maintained through social interaction.” *Ibid.*

This basic understanding of ICL as a body of law that criminalizes individual contributions to the production of severe human suffering and/or death on a large-scale is not inherently problematic, as such understanding does roughly approximate the kinds of situations ICL is indeed applicable to, albeit in a highly generalized sense. Yet, this is not the extent of the normative substance of widely shared understandings of mass atrocity and international crime. The way in which the rhetoric of atrocity is deployed within ICL discourses suggests that the term atrocity is not merely used as a placeholder, to refer generally to international crimes. Rather, the definitional vagueness of atrocity and normative and doctrinal vagueness of ICL itself, compounded its highly selective application, have engendered a high degree of reliance on aesthetic perception amongst actors attempting to identifying atrocity crimes and otherwise interacting with the world and one another through the rubric of ICL. Over time, through social interaction amongst these actors within epistemic legal communities, communities of norm entrepreneurs, and more generally within communities of practice relevant to ICL, this reliance on aesthetic perception has grounded shared understandings of atrocity crimes and the means through which they may be committed in a specific aesthetic model. According to this aesthetic model, situations involving atrocity crimes are assumed to manifest themselves as familiar spectacles of violence and abuse.

### 3.1 Shared Understandings of Atrocities

On a basic level, there exists wide agreement that ICL is meant to address situations involving mass harm causation. This understanding, in and of itself, is however, relatively thin in terms of normative content. Yet is roughly accurate in the sense that it does reflect the basic characteristics of genocide, crimes against humanity and war crimes. Each of these main three categories of international crimes contains at least some element requiring harm causation on a quite large scale. The crime of genocide involves acts committed with the intention of destroying at least a “substantial part” of an entire racial, ethnic, national, or religious group.<sup>170</sup> Crimes

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<sup>170</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, United Nations General Assembly, 9 December 1948, UNGA Res 260(III)(A), art 2 [*Genocide Convention*]. Jurisprudence establishes that, regarding efforts to destroy only a “part” of a protected group, such part must be “substantial” in relation to the overall group itself. See e.g. *Prosecutor v Krstić*, IT-98-33-T, Judgement (2 August 2001) at para 634 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <<http://www.icty.org/>> [*Krstić*, Trial Judgement] (Holding that genocide requires “an intent to destroy only part of the group must nevertheless concern a substantial part thereof, either numerically or qualitatively.”).

against humanity can only be committed as part of a “widespread or systematic attack on a civilian population”.<sup>171</sup> Finally, while certain war crimes may be relatively minor in terms of their severity and may be committed against a single victim, and as such clearly would not amount to atrocities in and of themselves, all war crimes must nonetheless be connected (or have a “nexus”) to an armed conflict, which itself is the paradigmatic example of a situation involving mass violence.<sup>172</sup>

On this basic level, the increasing usage of the term atrocity to generally refer to the subject matter of ICL is clearly preferable to a continuation of the overuse of the highly specific label of genocide to refer to all instances of mass harm causation. Atrocity’s intuitive understandability, emotional evocativeness, and definitional flexibility combine to make the term particularly attractive to those seeking an escape route from overly technical, legalistic terminology when referring generally to situations involving mass harm causation. In the transition from a dominant rhetoric of genocide to one of atrocity however, problems of definitional over-specificity attendant to the use of genocide to refer to all international crime have been replaced by problems associated with excessive definitional ambiguity and subjective contingency.

Within discourses of ICL, atrocity situations tend to be characterized as dramatic, highly visible, self-apparent events. Dramatic, highly emotive language permeates ICL discourses and range of superlatives are routinely employed interchangeably with the rhetoric of atrocity and international crime.<sup>173</sup> Typically such rhetoric evokes visually arresting, graphic scenes of death

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<sup>171</sup> See e.g. *Rome Statute*, *supra* note 63, art 7(1) (“For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”).

<sup>172</sup> For example, “[w]ilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial” is a war crime and does not necessarily involve any degree of mass harm causation, as the harm itself may not be especially severe (for example, depriving a prisoner of war accused of a minor crime of a fair trial) and may be committed against a single victim. See *Rome Statute*, *supra* note 63, art 8(2)(vi).

<sup>173</sup> For example, Mark Drumbl describes atrocities as being “characterized as crimes against the world community or, more emotively, as offenses against us all Drumbl, “Collective Violence and Individual Punishment” *supra* note 6 at 540. On the topic of the so-called “core” crimes of ICL, Alexander Greenwalt observes that “[ICL practice from the 1990s onwards] focus on a core trio of ICL offenses: genocide, crimes against humanity, and war crimes.” Alexander KA Greenwalt, “The Pluralism of International Criminal Law” (2011) 86:3 *Indiana Law Journal* 1063 at 1073. Sometimes the crime of aggression is added to this trio. See e.g. Heller, *supra* note 49 at 2.

and destruction.<sup>174</sup> The opening statements of ICL prosecutors for example, tend to present international crimes as epic dramas of breathtaking evil.<sup>175</sup> In the case of *Prosecutor v Sesay et al* at the Special Court for Sierra Leone (SCSL), in his opening statement, lead prosecutor David Crane described the accused as the “evil spawn of [an] unholy union” and “commanders of an army of evil, a corps of destroyers, a brigade of executioners bent on the criminal takeover of Sierra Leone,” claiming further that “the pure evil of the[ relevant] deeds of destruction are so horrific, terrible, and devastating in their scope, words in any language do not describe the offences committed by [Sesay and his co-accused].”<sup>176</sup> While such flair for drama and hyperbole is perhaps, expected and normal within the context of opening statements in criminal trials, such dramatic rhetoric permeates ICL discourses. Scholars, for example, also tend toward the dramatic in characterizing the kinds of situations that are the subject matter of ICL.<sup>177</sup> Even

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<sup>174</sup> Examples of such dramatic turns of phrase include those such as “unimaginable atrocities,” “mass violence,” or “horrors of the worst order”. See *supra* at 37-41.

<sup>175</sup> For example, Sofia Stolk, in observing the prosecution’s opening statement in the *Lubanga* case at the International Criminal Court, notes that the prosecution uses “Explicit accounts and many metaphors help us to imagine what is hard to describe; black pools of blood, cascades of bullets, kids dragging rifles because they are too small to carry the weapons.” Sofia Stolk, “Ntaganda at the ICC – Some Observations from the Public Gallery”, (14 September 2015), online: *Vrije Universiteit Amsterdam School of Law Center for International Criminal Justice* <<https://cicj.org/2015/09/the-opening-of-the-ntaganda-trial-at-the-icc-some-observations-from-the-public-gallery/>>; see also Sofia Stolk, *A Solemn Tale of Horror: The Opening Statement of the Prosecution in International Criminal Trials* (PhD in Transnational Legal Studies, Vrije Universiteit Amsterdam Faculty of Law, 2017) [unpublished, on file with author]; In his opening statement in a case against the most senior former Khmer Rouge leaders still alive at the time, then-Extraordinary Chambers in the Courts of Cambodia Co-Prosecutor Andrew Cayley describes the Khmer Rouge regime as creating a “system of brutality that defies belief to the present day.” *Case 002/01, 002/19-09-2007-ECCC/TC*, Transcript of Trial Proceedings, at 16, lines 5-6 (21 November 2011) (Trial Chamber, Extraordinary Chambers in the Courts of Cambodia), online: ECCC <<https://www.eccc.gov.kh/en>>.

<sup>176</sup> *Prosecutor v Sesay, Kallon, & Gbao*, SCSL—2004-15-PT, The Opening Statement of Prosecutor David M. Crane with Mr. Abdul Tejan-Cole, Trial Attorney, at 4, 14 (5 July 2004) (Special Court for Sierra Leone, Trial Chamber) online: Residual Special Court for Sierra Leone <<http://www.rscsl.org>> [*Sesay et al*, Opening Statement]

<sup>177</sup> For example, David Scheffer, in advocating the adoption of the term “atrocities crimes” as a means of generally referring to the core set of crimes international courts and tribunals are concerned with, describes atrocity crimes as “a basket of particularly heinous crimes” that are collectively executed crimes of such magnitude and destructive character as to be particularly prominent and logically inconsistent with the protection of human rights and the maintenance of international peace and security in an increasingly interdependent and sophisticated global society.” Scheffer, “Genocide and Atrocity Crimes” *supra* note 131 at 238.

international judges routinely resort to dramatic rhetorical flourishes to describe the scale and nature of many international crimes.<sup>178</sup>

Often, such dramatic, emotionally charged rhetoric is accurate. Situations involving the production of severe human suffering and/or death on a massive scale frequently involve the production of horrific spectacles of violence. Such spectacles, such as the large-scale “butchering” of civilians by Thracian soldiers described by Helen Law, are intuitively categorizable as acts punishable through ICL. So too are many other such public, highly visible, and shockingly direct instances of mass killing and abuse such as the Holocaust and Rwandan Genocide, to name but two of many instantly recognizable examples.

These and other paradigmatic examples of mass atrocity crimes operate as implicit aesthetic reference points that combine to ground aesthetic shared understandings of atrocity and international crime. Accordingly, describing a situation as an atrocity, rather than being a means of generally stating that such situation involves harm causation on a massive scale, also has come to be understood as a means of claiming that such situation involves spectacular acts of violence that are self-evidently as “criminal” in nature.<sup>179</sup> Consequently, atrocities, and in turn, international crimes, are understood as consisting of two key aesthetic elements: spectacle and familiarity. Each of these elements, which combine to form what this thesis refers to as the “atrocity aesthetic” are discussed below, followed by some concluding thoughts concerning the potential implications of such understanding.

### 3.1.1 Spectacle

The noun “spectacle” is “derived from the Latin noun *spectaculum*, meaning ‘a show’, ... coming from the verb *spectare* ‘to view’.”<sup>180</sup> Currently, the term spectacle can be defined as

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<sup>178</sup> For example, the judgment of the International Military Tribunal at Nuremberg describes the crimes of the Nazi regime as being of “a scale larger and more shocking than the world has ever had the misfortune to know.” IMT Judgment, *supra* note 108 at 279.

<sup>179</sup> Examples of such paradigmatic atrocities include the Holocaust, Rwandan Genocide, atrocities in the former Yugoslavia during the 1990s, and those committed during the Sierra Leonean civil war.

<sup>180</sup> Schwöbel-Patel, *supra* note 97 at 249.

either a “specially prepared or arranged display of a more or less public nature (esp. one on a large scale), forming an impressive or interesting show or entertainment for those viewing it” or a “person or thing exhibited to, or set before, the public gaze as an object either of curiosity or contempt, or of marvel or admiration.”<sup>181</sup> The adjective “spectacular” is defined as describing a person, place, or thing that is “of the nature of a spectacle or show; striking or imposing as a display” or “[t]hat which appeals to the eye”.<sup>182</sup> Thus, as Christine Schwöbel-Patel helpfully summarizes, the core “idea of spectacle ... concerns the social construction of people and events in order to make a striking impression.”<sup>183</sup>

Atrocity crimes, at least, as they tend to be described dramatically as massive, real-world manifestations of pure evil that “assault our eyes,” are a prime example of spectacles, in that they are events that are highly visible and make a striking impression on those who are exposed to them. Formulated thusly, public fascination with atrocities is a prime example of our individual and social fascination with aesthetic spectacles. The basic notion that we are drawn to spectacular arrangements of sensory inputs is ancient, dating back at least to ancient Greek philosophy.<sup>184</sup> The massive increase in the production of spectacular imagery ushered in by the

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<sup>181</sup> *Oxford English Dictionary*, *supra* note 34, *sub verbo*, “spectacle”.

<sup>182</sup> *Ibid*, *sub verbo* “spectacular”.

<sup>183</sup> Schwöbel-Patel, *supra* note 180 at 249.

<sup>184</sup> For example, in *Poetics*, Aristotle defines tragedy as “an imitation of an important and complete action, possessing a certain degree of magnitude, in ornamented language, having its forms distinct in their respective parts, by the representation of persons acting, and not by narration, effecting through the means of pity and terror, the purgation of such passions.” Aristotle, *The Poetic of Aristotle*, translated by Henry James Pye (London, UK: John Stockton Piccadilly, 1788) at 32–33. Within this definition, Aristotle includes the visual aspects of theatrical production, which he refers to as the “decorations of the theatre” amongst six elements that “must be considered as a principal part of tragedy.” *Ibid* at 34. Aristotle’s six essential elements of tragedy are: “the apparatus of the theatre, the music, the fable, the manners, the language, and the sentiment.” *Ibid* at 36. Often, such “decorations” are described as the element of “spectacle”. See e.g. Leslie Kan, “Spectacle”, online: *The University of Chicago Theories of Media Keyword Glossary* <<http://www.english.hawaii.edu/criticalink/aristotle/terms/spectacle.html>>. However, some scholars quibble with the equivocation of the phrase “decorations of the theater” with the term “spectacle”. See e.g. Aristotle et al, *Aristotle’s Poetics* (Montreal, QC: McGill-Queen’s University Press, 1997). According to Aristotle, we are drawn to the tragic form, including its spectacle, or “ornamented language” by the promise of the pleasurable experience of catharsis, which is the “beneficial transformation of painful emotions through absorbed contemplation of a powerfully moving work of art”. Stephen Halliwell, *Katharsis*, “Katharsis” in Donald M Borchert, ed, *The Encyclopedia of Philosophy*, 2d ed (Detroit, MI: Macmillan Reference USA, 2006) 44.

rapid technological advances of the 20<sup>th</sup> century led to renewed interest in how spectacles shape social life, especially amongst critical scholars. While clearly the fact that humans are drawn to spectacular, or otherwise aesthetically engaging arrangements of sensory inputs and the notion that such attraction may mediate social relations and interactions is not itself, new or a product of the industrial revolution, the sheer volume of spectacular imagery produced did change significantly over the past century. It is this saturation of society with spectacles that engendered a renewed interest in spectacle and visual rhetoric. Amongst the most well-known such studies is Guy Debord's *Society of the Spectacle*, in which he provocatively claims that "[t]he whole life of those societies in which modern conditions of production prevail presents itself as an immense accumulation of spectacles. All that once was directly lived has become mere representation."<sup>185</sup> Such concerns are also present in the work of theorists such as Michel Foucault, who presents the spectacular and ever-present nature of modern surveillance technologies as central facets of their panoptic nature, which he views as central to the automatic functioning of power.<sup>186</sup>

While Debord, Foucault and others have voiced concern regarding how spectacles affect the ordering of contemporary society, comparably scant attention has been paid to the roles spectacles may play in shaping the international legal order. Among the handful of scholars who have considered the role spectacle plays in this arena, the work of Wendy Hesford and Christine Schwöbel-Patel, who use spectacle as an analytic to consider the significance and social construction of the visual in the fields of human rights and ICL respectively, stands out as particularly applicable. Hesford focuses on how what she characterizes as modernist "ocular epistemologies" (i.e. seeing is believing paradigms) shape "discourses of vision and violation

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This attraction to the tragic form has engendered much scholarly debate. See Anthony D Nuttall, *Why Does Tragedy Give Pleasure?* (New York, NY: Oxford University Press, 2001) at 1–28.

<sup>185</sup> Guy Debord, *The Society of the Spectacle*, translated by Donald Nicholson-Smith (New York, NY: Zone Books, 1994) at 7.

<sup>186</sup> Michel Foucault, *Discipline and Punish: The Birth of the Prison*, 2d ed, translated by Alan Sheridan (New York, NY: Vintage Books, 1995). Indeed, Foucault views the modern reality that we are each in a near-constant state of being potentially surveilled by the state, and acutely aware of this reality, as having replaced the social disciplinary roles previous occupied by more direct spectacles of authority and punishment, such as public executions.

within the normative frameworks of a human rights internationalism.”<sup>187</sup> Schwöbel-Patel meanwhile, argues that visual spectacles play a significant role in the social construction of victimhood within the realm of ICL.<sup>188</sup>

While Hesford and Schwöbel-Patel focus most closely on the relationship between spectacle and human subjectivity within the realms of human rights and ICL, much less attention has been paid to the roles spectacle may play in mediating shared normative understandings of the forms that human rights violations and international crimes themselves may take and the means through which they may be committed. Certain other scholars, such as Hilary Charlesworth, in her theorization of public international law as a “discipline of crisis” have gestured towards the roles spectacle and visibility politics may play in shaping international legal discourses relevant to ICL, but only indirectly.<sup>189</sup>

The possibility that spectacle and visibility politics shape understandings of mass atrocity and international crime themselves, has thus far, only been touched on in passing within relevant literatures. Sonja Starr, for example, in discussing potential ICL accountability in relation to large-scale corruption, gestures towards aesthetic considerations by mentioning the romantic tendencies of many ICL scholars, who write against the background of a “thundering and bloody history.”<sup>190</sup> Diana Sankey similarly notes that deprivations of basic human subsistence needs tend to be less visible than other forms of violence within ICL and other transitional justice practices.<sup>191</sup> Finally, Sheri Rosenberg, in calling for a greater acknowledgement of the

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<sup>187</sup> Wendy S Hesford, *Spectacular Rhetorics: Human Rights Visions, Recognitions, Feminisms* (Durham, NC: Duke University Press, 2011) at 7. See also *ibid* at 29, 52. Hesford employs the phrase “human rights spectacle” to “refer to the incorporation of subjects (individuals, communities, nations) through imaging technologies and discourses of vision and violation into the normative frameworks of a human rights internationalism based on United Nations (UN) documents and treaties.” *Ibid* at 7.

<sup>188</sup> Schwöbel-Patel, *supra* note 180.

<sup>189</sup> Hilary Charlesworth, “International Law: A Discipline of Crisis” (2002) 65:3 *Modern Law Review* 377.

<sup>190</sup> Sonja Starr, “Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations” (2007) 101:3 *Northwestern University Law Review* 1257 at 1265–1266.

<sup>191</sup> Diana Sankey, “Towards Recognition of Subsistence Harms: Reassessing Approaches to Socioeconomic Forms of Violence in Transitional Justice” (2014) 8:1 *International Journal of Transitional Justice* 121.



“processorial” nature of mass atrocity and genocide, argues that slow, attritive processes of killing are more difficult to conceptualize as international crimes than killing processes involving the “immediate unleashing of violent death.”<sup>192</sup>

These and other scholars thus, identify what seems to be a common discomfort with conceptualizing forms of harm causation that are unspectacular in nature as atrocity crimes, or even human rights violations, which are comparably less serious. This discomfort suggests that the associations between atrocity as the subject matter of ICL and the production of visual spectacles go beyond mere descriptive flourish, but rather are at the core of shared understandings concerning the ways in which atrocity crimes will manifest themselves. Indeed, the full Webster’s Dictionary definition of spectacle as “something exhibited to view as unusual, notable, or entertaining; especially: an eye-catching or dramatic public display; an object of curiosity or contempt” appears to neatly encapsulate a major facet of shared understandings of atrocity crimes grounded in the notion that atrocities are highly visible, unusual, notable, and even perversely entertaining phenomena that fascinate, simultaneously disgust us as they play out in real time over news and social media outlets.<sup>193</sup>

In this regard, atrocities may be viewed as contemporary, real-world tragedies, that is, spectacular examples of human suffering and wrongdoing that capture our attention and elicit strong emotional responses.<sup>194</sup> It is this notion, of atrocities as tragic, yet visually engrossing public spectacles, that Justice La Forest captures, when stating that “daily assault our eyes whenever we turn on the television” and which permeates the dramatic opening statements of ICL prosecutors and the emotionally charged language used to describe the kinds of situations ICL is applicable to.<sup>195</sup>

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<sup>192</sup> Sheri P Rosenberg, “Genocide Is a Process, Not an Event” (2012) 7:1 *Genocide Studies & Prevention* 16.

<sup>193</sup> *Merriam-Webster Dictionary*, *supra* note 124, *sub verbo* “spectacle”.

<sup>194</sup> In this regard, on the tragic form, see Aristotle, *supra* note 184. For analyses of Aristotle’s poetics, including his definition of tragedy, see Aristotle et al, *supra* note 184; Nuttall, *supra* note 184; Munteanu, *supra* note 34.

<sup>195</sup> *Finta*, *supra* note 4 at 87.

### 3.1.2 Familiarity

Although international crimes are associated with tragic spectacles of human suffering and death, situations involving such spectacles regularly occur that are not socially or legally conceptualized within the rubrics of atrocity or ICL. Earthquakes, tsunamis and other natural disasters are one such example. The squalor and suffering associated with widespread global poverty is another. These and other situations may involve spectacles of human suffering and death tend, yet tend to be viewed as lacking the critical element of human wrongdoing. Consequently, instead of being viewed as “atrocities,” environmental disasters or global poverty are associated with non-human or wholly structural causation. As such, despite the spectacularity of such events, and the fact that some of them are highly visible news events, they are not dominantly viewed as atrocities.

This brings us to the second, perhaps less obvious, element of the atrocity aesthetic, that of “familiarity.” This element refers to the necessity that relevant harm causation methods be self-evidently “criminal” in nature in order to conform to the atrocity aesthetic and hence, be socially conceptualized as an international crime. This element describes the aesthetic characteristics of the subset of spectacles of human misery and death that tend to be understood as falling within the purview of ICL.

The normative origins of this element can be traced back to the peculiarities of ICL’s historical development. Since even before its first concrete manifestation at Nuremberg, ICL has evolved in fits and starts, alternately spurred on the cataclysmic events such as the Armenian Genocide, the Holocaust, and dramatic violence in Rwanda and the former Yugoslavia in the early 1990s, or impeded by Cold War or other political realities. The Rwandan Genocide, Holocaust, and other well-known atrocity events elicited a certain degree of shock and disbelief amongst key global constituencies, spurring new legal developments, such as the introduction of the concepts of crimes against humanity and genocide. Yet, despite being created to address such decidedly extraordinary events, ICL has been constructed mainly through the importation of criminal law

principles from domestic jurisdictions, which have been mixed, often clumsily, with international law.<sup>196</sup>

This process of importation is also partially attributable to the fact that most of the lawyers and judges who populate ICL institutions have been drawn from epistemic communities of domestic criminal lawyers.<sup>197</sup> Given that ICL has developed reactively, straining to adapt to each new situation it is selectively applied to, while being driven by actors with deeply engrained notions of what constitutes a crime drawn from their experiences within domestic legal regimes, the reliance on familiarity in identifying atrocities is unsurprising. The ebb and flow of the substance of ICL has clearly moved in relation to discrete real-world challenges presented by the evolving nature of warfare and technological advances in weaponry and the like.<sup>198</sup> Thus, in a certain sense, ICL is a fundamentally backwards looking discipline, and there exists a concomitant tendency to compare contemporary atrocities with historical one, particularly well-recognized ones such as the Holocaust, or the Rwandan Genocide.

In addition to this tendency to identify contemporary atrocities through aesthetic comparison, there exists a tendency to draw analogies between international crimes and their domestic counterparts, especially in terms of means of commission. This tendency to analogize stems from the fact that forms of harm causation that resemble well-established domestic forms of criminality are easier to conceptualize as being “criminal” in nature, especially for lawyers whose primary expertise lies in domestic criminal law. The tendency towards analogy helps explain the relative ease with which certain new international crimes, for example crimes involving sexual violence, or the abuse of children have been adopted, while other international crimes without clear domestic corollaries, such as the crime of aggression, or the proposed direct

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<sup>196</sup> Mark Drumbl has refers to this process as the construction of ICL on the “borrowed stilts” of domestic criminal law. Drumbl, *Atrocity, Punishment and International Law*, *supra* note 52 at 44.

<sup>197</sup> Drumbl, “Collective Violence and Individual Punishment” *supra* note 6 at 567.

<sup>198</sup> For example, criticisms of the exclusion in the Nuremberg Judgment of any discussion of pre-war atrocities against Jews and others in Nazi Germany, helped lead to a gradual erosion of the armed conflict “nexus” requirement for crimes against humanity applicability, and the prevalence of civil wars, complex insurgencies, and other non-international, or non-traditional armed conflicts has clearly fed into the erosion of the classical distinction between international and non-international armed conflicts in terms of war crimes applicability.

criminalization of large-scale corruption via ICL, have been comparatively unsuccessful in gaining widespread support and recognition, despite routinely involving suffering and death on a comparably large scale to more familiar atrocities.<sup>199</sup> Sexual violence and child abuse are familiar subjects of domestic criminal law regimes, while aggression has no such direct and clear domestic corollary. Large-scale corruption is a more complicated example, yet nonetheless still follows this pattern. Many domestic legal regimes criminalize corrupt acts, often, such crimes are notoriously under-prosecuted. The common thread is that certain forms of mass harm causation involving the production of spectacles of human suffering are intuitively identifiable as “criminal” in nature, while others fail to fit within widely shared notions of what crimes are expected to look like.

## Conclusion

Mark Drumbl describes ICL as a “nascent field constituted essentially in reaction to cataclysmic events” within which “most of the individuals building [ICL] hail from the epistemic community of domestic criminal lawyers.”<sup>200</sup> This chapter has argued that one result of this process of reactive development has been the grounding of notions relating to the forms criminal behavior may take being borrowed from domestic criminal law has been the development of a widely shared aesthetic understanding of atrocities as familiar spectacles of violence and abuse. The spectacular imagery of suffering and death associated with this aesthetic model of atrocity tends to evoke strong emotional responses amongst those exposed to them. While the rhetoric of atrocity that dominates discourses of international criminal justice is grounded in a highly specific aesthetic model, the concept of atrocity itself remains wholly contingent on highly subjective moral assessments and hence, conceptually quite malleable. As such, the language of

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<sup>199</sup> This observation is not meant to suggest in any way that sexual violence and the abuse of children should form part of ICL. For examples of proposed international crimes predicated on grand corruption, see Ndiva Kofele-Kale, “Patrimonicide: The International Economic Crime of Indigenous Spoliation” (1995) 28:1 *Vanderbilt Journal of Transnational Law* 45; Paul D Ocheje, “Refocusing International Law on the Quest for Accountability in Africa: The Case Against the ‘Other’ Impunity” (2002) 15:4 *Leiden Journal of International Law* 749; Chile Eboe-Osuji, “Kleptocracy: A Desired Subject of International Criminal Law that is in Dire Need of Prosecution by Universal Jurisdiction” in Evelyn A Ankumah & Edward K Kwakwa, eds, *African Perspectives on International Criminal Justice* (Accra: Ghana: Africa Legal Aid, 2005) 121; Ben Bloom, “Criminalizing Kleptocracy? The ICC as a Viable Tool in the Fight Against Grand Corruption” (2014) 29:3 *American University International Law Review* 627.

<sup>200</sup> Drumbl, “Collective Violence and Individual Punishment” *supra* note 6 at 567.

atrocities (along with other similar terms, such as “mass violence” or “gross human rights violations”) provides an evocative, emotionally affective, yet free-floating label, which can be affixed to horrific events that capture the public imagination, with very little in the way of hard definitional edges.

Although the notion of familiarity may seem at odds with that of spectacle, they actually operate on concert, mutually supporting one another. Spectacles operate to capture the public imagination through “the social construction of people and events in order to make a striking impression”<sup>201</sup> while familiarity, in terms of the intuitive understandability of relevant harms as “criminal” in nature, operates to help place such events within the rubric of criminal law.

This aestheticized approach to conceptualizing the means or modalities through which international crimes both demonstrates that “visibility politics”—i.e. a politics of acknowledgement and recognition grounded in sensory perceptions and expectations—shape social learning processes within the realm of ICL, and explains the end result of such influence on shared understandings of mass atrocities and international crime. Because ICL remains extremely selective in its application, only a small subset of even the most familiar and spectacular atrocities ever result in individual criminal prosecutions, which in turn avoids questioning of whether all forms of mass harm causation and international crime commission necessarily conform to the atrocity aesthetic.

From an interactional perspective, the notion that international crimes will manifest themselves as familiar spectacles of violence and abuse appears to have developed organically over time and to reflect deeply held underlying assumptions concerning the roles and purposes of ICL. As such, this understanding appears to conform most closely to non-linear social learning theories of norm development, rather than more purposive ones. It also appears to be relatively well-settled, as the notion that international crimes will manifest themselves according to that atrocity aesthetic is rarely even acknowledged, let alone questioned. While this understanding of atrocity crimes has likely played a role in the recent rise of interest in ICL, there is not necessarily anything intrinsically spectacular or familiar about processes of mass harm causation. The remainder of

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<sup>201</sup> Schwöbel-Patel, *supra* note 180 at 249.

this thesis explores the accuracy and broader implications of this dominant understanding of the nature of international criminality.

## Chapter 3 – Beyond the Atrocity Aesthetic: Unspectacular, Unfamiliar International Crimes

As demonstrated in the previous chapter, there exists a widely shared, socially constructed understanding that international crimes will present themselves as highly visible and familiar spectacles of violence and abuse. This “atrocity aesthetic” is grounded in a tendency to rely on aesthetic perception in assessing whether situations appear to involve the commission of genocide, crimes against humanity, and/or war crimes. This tendency is facilitated by the uncertainty injected into such evaluations by the ambiguity and selectivity of ICL, and is reflected in the ubiquitous use of ambiguous, yet emotionally affective rhetoric when generally referring to the subject matter of ICL.

One may well accept these arguments and yet, simply view the atrocity aesthetic as a product of the nature of atrocity itself and the structure of ICL. After all, atrocities, even when broadly defined as situations involving severe harm causation on a massive scale, are extraordinary phenomena and it seems logical to assume that such extraordinariness will manifest itself spectacularly. This assumption has also been largely confirmed by ICL in practice, in the form of prosecutions of international crimes committed amidst the highly visible atrocities of World War II Europe, the Rwandan Genocide, and the Balkan conflicts of the 1990s, to name but a few examples.

If these two assumptions—that atrocities always manifest themselves in spectacular fashion, and that ICL is doctrinally limited to such highly visible situations—hold true, then the preceding analysis has simply identified two prominent aesthetic characteristics of atrocities.<sup>202</sup> This chapter however, argues that the assumption that atrocity crimes will necessarily conform to the atrocity aesthetic is predicated on an overly narrow view of the forms atrocities may take, the means through which they may be committed, and the substance of ICL. As such, I contend that only a subset, albeit a large and highly visible one, of atrocity crimes manifest themselves in accordance with the atrocity aesthetic. Genocide, crimes against humanity, and war crimes can,

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<sup>202</sup> That is, a description of how shared understandings of atrocities as familiar spectacles were constructed as social actors interacted within a broad set of communities of practice in some way relevant to ICL, and over time such understandings were instantiated into the substance of ICL.

and regularly are, also committed through a variety of means that are unspectacular and/or unfamiliar in nature. Moreover, such means, such as the creation or enforcement of famine conditions or large-scale corruption, tend to be socio-economic in nature, and to involve the production of harm attritively over time.

To make this argument, this chapter proceeds in two parts. First, I establish that atrocities are complex social phenomena that regularly involve harm production through a wide variety of means, including many failing to conform to the atrocity aesthetic. Second, I demonstrate that ICL could be applied to a variety of harm causation modalities failing to conform to the atrocity aesthetic. To do so, I analyze the substance and structure of ICL, and thereafter review a growing body of literature identifying areas of ICL applicability to four distinct, yet oft-overlapping unspectacular and/or unfamiliar modalities of harm causation: famine, corruption, aid interference, and socio-economic human rights violations. I demonstrate that these four forms of harm causation all tend to involve the production of harm through means that are socio-economic in nature and unfold attritively over time. Consequently, such forms of harm causation typically do not involve the production of familiar spectacles of violence and abuse, and as such, fail to manifest themselves in accordance with shared understandings of international criminality grounded in the atrocity aesthetic.

As such, this chapter concludes that only a subset, albeit a large and highly visible one, of atrocity crimes conform to the atrocity aesthetic. Various forms of harm causation, especially those that occur over time and/or through socio-economic means, fail to conform to this dominant aesthetic understanding of atrocity and international crime, and hence, tend to be conceptualized as falling outside the purview of ICL through the operation of visibility politics.

## 1 Atrocities as Complex Processes

While within the realm of ICL atrocities tend to be understood as dramatic spectacles, in reality, the mass production of human suffering and death may take a wide variety of forms. This fact is increasingly reflected in scholarly literature on the causal dynamics of atrocity and mass killing. Within such literature, scholars have demonstrated that even paradigmatic atrocity events, such as the Rwandan Genocide, are often in actuality, much longer-term processes that build up



“beneath the threshold of visibility” until exploding spectacularly.<sup>203</sup> Such analyses lends support to “stage” based models of atrocity and genocide proposed by scholars such as Helen Fein and Gregory Stanton, and according to which processes of targeted mass killing proceed in discrete stages, ranging from the “classification,” “symbolization,” and “dehumanization” of victim groups, to processes of “extermination, and denial.”<sup>204</sup> However, as Stanton himself acknowledges, such stages are not “linear” but dynamic, and may overlap, or even vary in terms of order.<sup>205</sup>

Recent research has lent empirical support to this dynamic understanding of mass killing processes. Using population census data, principal component analysis and spatial analysis, Marijke Verpoorten identifies various forms of what she refers to as “hidden violence” in the form of counterinsurgency campaigns and the creation of a refugee crisis that were integral to the production of mass death before, during, and after the 1994 Rwandan Genocide.<sup>206</sup> Similarly, Shelley Burleson and Alberto Giordano, applying historical geographical information systems (GIS) quantitative tools to information contained in a well-known historical manuscript written by Haigazn Kazarian, a first-person observer of the Armenian Genocide, found empirical

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<sup>203</sup> Norbert Finzsch, “War, Violence, and Population: Making the Body Count” (2011) 13:1–2 *Journal of Genocide Research* 187 (book review) at 188 (“The Rwanda genocide is an important example of a long-term process that takes place mostly beneath the threshold of visibility, until it finally explodes in a rampage of violence that appears unfathomable.”).

<sup>204</sup> For example, in a 1979 book, Helen Fein proposes five social stages that she argues were precursors to the Holocaust. Helen Fein, *Accounting for Genocide: Victims—and Survivors—of the Holocaust* (New York, NY: Free Press, 1979). For an overview of early theories of genocide and mass atrocity, see Helen Fein, “Explanations of Genocide” (1990) 38:1 *Current Sociology* 32. Another prominent example of a stage-based theory of genocide is the work of Gregory Stanton. Stanton

first proposed eight stages of genocide: “classification, symbolization, dehumanization, organization, polarization, preparation, extermination, and denial.” Gregory H Stanton, “The 8 Stages of Genocide”, (1998), online: *Genocide Watch* <<http://www.genocidewatch.org/aboutgenocide/8stagesofgenocide.html>>. Stanton has since added two additional stages, those of discrimination and persecution. Gregory H Stanton, “The Ten Stages of Genocide”, (2013), online: *Genocide Watch* <<http://www.genocidewatch.org/genocide/tenstagesofgenocide.html>>.

<sup>205</sup> Stanton, “The Ten Stages of Genocide” *ibid.*

<sup>206</sup> Marijke Verpoorten, “Detecting Hidden Violence: The Spatial Distribution of Excess Mortality in Rwanda” (2012) 31:1 *Political Geography* 44.

evidence that the various stages of genocide and mass killing proposed by Stanton “interact and overlap dynamically” over time during the Armenian Genocide.<sup>207</sup>

The increasingly acknowledged dynamic nature of the various stages and harm causation processes involved in genocides and other mass killing events has facilitated a movement towards understanding such phenomena as complex processes, rather than discrete events necessarily following a predictable, linear model.<sup>208</sup> Consequently, genocide, atrocity, and mass killing, are increasingly described as “dynamic processes” rather than static “events” or “outcomes” in relevant literature.<sup>209</sup> Such process-based approaches tend to view atrocities as dense webs of complex, interactive methods of harm causation that, in the words of Sheri Rosenberg, amount to a “collective cataclysm” of suffering and death.<sup>210</sup>

Critical to the present analysis, many of the methods of bringing about mass suffering and death that are increasingly being recognized as integral to atrocity processes fail to conform to the atrocity aesthetic, as they are decidedly unspectacular and/or unfamiliar in nature. Scholars writing on such forms of harm causation propose a wide range of nomenclature in efforts to

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<sup>207</sup> Shelley Burleson & Alberto Giordano, “Spatiality of the Stages of Genocide: The Armenian Case” (2016) 10:3 *Genocide Studies & Prevention* 39 at 52. Kazarian was a journalist in Constantinople during the Armenian genocide and subsequently British bureaucrat with access to Turkish government documents. See *ibid* at 44–45.

<sup>208</sup> See generally Verpoorten, *supra* note 206; Rosenberg, “Genocide Is a Process” *supra* note 192; Burleson & Giordano, *ibid*.

<sup>209</sup> Sheri Rosenberg argues specifically that processes of genocide and mass killing are better conceptualized as “processes” rather than “events.” Rosenberg, “Genocide Is a Process” *supra* note 192. Various other scholars meanwhile, describe genocide, atrocity, and mass killing in processorial terms. See e.g. Martin Shaw, “From Comparative to International Genocide Studies: The International Production of Genocide in 20th-Century Europe” (2012) 18:4 *European Journal of International Relations* 645 at 658 (referring to “dynamic genocidal processes”); Kjell Anderson, “Colonialism and Cold Genocide: The Case of West Papua” (2015) 9:2 *Genocide Studies & Prevention* 9 (distinguishing between “hot” or immediate forms of genocide and “cold or “slow-motion genocide, where the destruction of the group may occur over generations” through complex processes of domination and subordination of indigenous groups); Peter B Owens, Yang Su & David A Snow, “Social Scientific Inquiry into Genocide and Mass Killing: From Unitary Outcome to Complex Processes” (2013) 39:1 *Annual Review of Sociology* 69; Benjamin Lieberman, “From Definition to Process: The Effects and Roots of Genocide” in Adam Jones, ed, *New Directions in Genocide Research* (New York, NY: Routledge, 2012) 3; Andrew Basso, “Towards a Theory of Displacement Atrocities: The Cherokee Trail of Tears, The Herero Genocide, and The Pontic Greek Genocide” (2016) 10:1 *Genocide Studies and Prevention* 5.

<sup>210</sup> Rosenberg, “Genocide Is a Process” *supra* note 192 at 18.

describe such processes of killing and abuse, referring to them using terms such as “cold” or “slow” genocide, “genocide by attrition,” “nonviolent crimes against humanity,” “subsistence harms,” “displacement atrocities” or “economic violence.”<sup>211</sup> These and other labels are employed in attempts to describe the causal dynamics involved in situations where large-scale suffering and death is brought about through oft-complex sets of contributing causal factors that interact and unfold dynamically over significant spans of time and space.

One alternative model of atrocity and mass killing that has slowly gained traction, and that quite effectively conveys the nature of such harm causation methods, is that of “genocide by attrition,” proposed by Helen Fein in a widely cited 1997 article.<sup>212</sup> Fein defines genocide by attrition as referring to situations wherein “a group is stripped of its human rights, political, civil and economic[,] lead[ing] to deprivation of conditions essential for maintaining health, thereby producing mass death.”<sup>213</sup> Fein argues that processes of killing by attrition typically follow a pattern, whereby the “violation of political and civil rights leads to violation of economic and health rights and life-integrity rights, jeopardizing the life of group members on the basis of their real or perceived membership in the group.”<sup>214</sup> These relatively slow and multifaceted attritive processes are, according to Fein, frequently ignored within genocide studies because “the historiography of genocide often focuses on the numbers directly killed—by execution, gassing, or burning in mass graves” despite the reality that “many victims die from starvation and disease induced by elevated vulnerability following deportation (usually under harsh conditions) and

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<sup>211</sup> Anderson, *supra* note 209; Kiera L Ladner, “Political Genocide: Killing Nations through Legislation and Slow-Moving Poison” in Andrew Woolford, Jeff Benvenuto & Alexander Laban Hinton, eds, *Colonial Genocide in Indigenous North America* (Durham, NC: Duke University Press, 2014) 226; Maung Zarni & Alice Cowley, “The Slow-Burning Genocide of Myanmar’s Rohingya” (2014) 23:3 *Pacific Rim Law & Policy Journal* 683; Helen Fein, “Genocide by Attrition 1939-1993: The Warsaw Ghetto, Cambodia, and Sudan: Links between Human Rights, Health, and Mass Death” (1997) 2:2 *Health and Human Rights* 10; Eamon Aloyo, “Improving Global Accountability: The ICC and Nonviolent Crimes against Humanity” (2013) 2:3 *Global Constitutionalism* 498; Sankey, *supra* note 191; Basso, *supra* note 209; Dustin N Sharp, ed, *Justice and Economic Violence in Transition* (New York, NY: Springer, 2014).

<sup>212</sup> Fein, “Genocide by Attrition” *supra* note 211.

<sup>213</sup> *Ibid* at 10.

<sup>214</sup> *Ibid* at 13.

enforced concentration in overcrowded camps and ghettos.”<sup>215</sup> In terms of real-world examples, Fein argues that conditions in the Warsaw Ghetto (1939-43), Khmer Rouge-era Cambodia (1975-79), and Sudan (1983-93) all exemplify the characteristics of genocide by attrition.<sup>216</sup>

In recent years, scholars have begun to both build on Fein’s theory of genocide by attrition, and to use it as a framework for understanding contemporary atrocity situations. Sheri Rosenberg uses the concept of genocide by attrition as the foundation of her argument that “the social phenomenon of genocide” (i.e. atrocity as defined in this thesis as mass harm causation) is best understood and analyzed “as a process rather than as the outcome of a process.”<sup>217</sup> According to Rosenberg, outdated, “static” approaches to conceptualizing atrocity ignore the reality that atrocities are best understood as a “process, a collective cataclysm, that relies more heavily—than currently appreciated—on indirect methods of destruction for its success.”<sup>218</sup>

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<sup>215</sup> *Ibid* at 12. Fein provides the example of conditions in Jewish ghettos preceding the commencement of Nazi Germany’s mass extermination Final Solution plan. *Ibid* at 14. Stating that:

approximately one of every five Jews in the ghetto (whose population was constantly increasing due to the influx of refugees between 1939 and 1942) had already died by July 1942, before mass deportation. They died from starvation, tuberculosis, typhus, and undetermined causes, impossible to classify with any reliability because the greatest number of dead were dumped on the streets, picked up by wagons, and buried in mass graves after a simple count. The underlying causes of their death were German policies: expulsion of Jews from territory incorporated into the Reich to the General-Government; segregation and concentration in a walled ghetto with extreme overcrowding (68,000 persons per square kilometer); deprivation of its inhabitants of customary livelihoods and subsequent pauperization; enforcement of arduous labor for males; and denial of food, fuel, and medicines.” (internal citations omitted).

Fein also references conditions in Cambodia under the Khmer Rouge (1975-1979) and in the Sudan (1983-1993) as real-world examples of genocide by attrition. *Ibid* at 18–31. It should be noted that although Fein argues that there was “widespread agreement by 1978 that genocide was occurring” in Cambodia under the Khmer Rouge (*Ibid* at 22), this is based on a non-legal definition of genocide generally and the non-legal concept of “autogenocide” specifically. Nonetheless, Fein’s more general argument concerning abuse and killing through attrition modalities remains a vital contribution to understandings of international criminality and mass human rights abuses more generally. It is worth noting that Fein and Sankey both reference conditions in Cambodia under the Khmer Rouge as real-world examples, while Aloyo generally references starvation and famine, citing other specific examples. Cf *ibid* at 18–22; Sankey, *supra* note 191 at 134–136; Aloyo, *supra* note 211 at 499–505.

<sup>216</sup> Fein, “Genocide by Attrition” *supra* note 211 at 14-31.

<sup>217</sup> Rosenberg, “Genocide Is a Process” *supra* note 192 at 17.

<sup>218</sup> *Ibid* at 18. Rosenberg sees the marginalization of attritive processes within genocide studies as due to an “excessive focus on violent deaths” and “preoccupation with the numbers of victims . . . have obscured alternative means of annihilation and have thereby missed the signals of unfolding tragedies.” *Ibid*. According to Rosenberg, this limited understanding of genocide (and more general mass killing processes) “ignores many victims of historical genocides died from slower, ‘indirect,’ and less immediately deadly methods than outright murder.” *Ibid*.

In a subsequent book chapter, Rosenberg and Everita Silina highlight the roles time and space play in facilitating the production of mass death through attritive means.<sup>219</sup> Referring once again to Fein’s concept of genocide by attrition, Rosenberg and Silina highlight the fact that relevant processes of killing through attrition tend to manifest themselves as a “slow process of annihilation that reflects the unfolding phenomenon of mass murder ... rather than the immediate unleashing of violence and death”.<sup>220</sup> They provide the examples of forced displacement, denial of healthcare, denial of food, and sexual violence as means through which genocidal policies may be pursued through attrition and note that understanding genocidal processes in this dynamic way highlights the “interdependence between the series of human rights violations that create conditions of life that bring about physical destruction and eventual mass deaths.”<sup>221</sup>

A host of other approaches to understanding genocide and mass atrocity generally follow Fein and Rosenberg’s broad approach to framing the means through which genocide and atrocity may be committed. For example, Andrew Basso’s “displacement” model of atrocity posits that “processes of forced population displacement and systemic deprivations of vital human needs (i.e., food, water, clothing, shelter, and medical care)” are integral components of broader, structural processes of mass killing beyond immediate and direct physical violence.<sup>222</sup> Diana Sankey makes a similar argument, using the label “subsistence harms,” to refer to what she views as a “discrete type of violence, centred on attacking or showing total disregard for human subsistence.”<sup>223</sup> Eamon Aloyo, meanwhile, refers to a similar set situations, wherein mass harm

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<sup>219</sup> Sheri P Rosenberg & Everita Silina, “Genocide by Attrition: Silent and Efficient” in Joyce Apsel & Ernesto Verdeja, eds, *Genocide Matters: Ongoing Issues and Emerging Perspectives* (New York, NY: Routledge, 2013) 106 at 110 (“Interpreting genocide as a complex process of attrition draws attention to the link between direct and indirect means of annihilation and reveals the interdependence between the series of human rights violations that create conditions of life that bring about physical destruction and eventual mass deaths.”).

<sup>220</sup> *Ibid* at 107. Again, Rosenberg and Silina challenge the accuracy of “linear models” of genocide. *Ibid* at 110.

<sup>221</sup> *Ibid* at 107, 110.

<sup>222</sup> Basso, *supra* note 209 at 6.

<sup>223</sup> Sankey, *supra* note 191. Sankey defines “subsistence harms” as “deprivations of the physical, mental and social needs of human subsistence, perpetrated against individuals or populations in situations of armed conflict or as an act of political repression, where the perpetrator acts with intent or with knowledge of the inevitable consequences of such deprivations.” *Ibid* at 122. Sankey states that her “main aim of this article is to argue for recognition of

is produced over time, through unfamiliar means, as “nonviolent crimes against humanity.”<sup>224</sup> Further examples include terms such as “slow-moving” “slow-burning” or “cold” genocide and atrocity.<sup>225</sup>

The notion that processes of mass killing and abuse are routinely much more causally complex and multifaceted than traditionally conceptualized, involving numerous processes beyond the direct infliction of physical violence by perpetrators against victims, has gained significant traction within scholarly discourses concerning atrocity, genocide, and mass killing. For example, in a recent article reviewing trends in social scientific literature on genocide and mass killing, the authors identify what they characterize as a:

promising recent movement in the literature away from explaining episodes of genocide and mass killing as holistic events and toward the disaggregation and explanation of different causal processes and mechanisms at various levels of analysis that play a role in constituting such episodes [which recognizes that] Genocides are massively complex social phenomena that incorporate many moving parts at all levels of analysis.<sup>226</sup>

The authors further find “encouraging evidence that the social science of genocide and mass killing is moving from initial engagement with genocide as a holistic dependent variable” and toward “analytic disaggregation and engagement with a diversity of contributing dynamics, processes, and outcomes.”<sup>227</sup>

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deprivations of subsistence needs as a distinct form of harm and for the need to address such harms comprehensively within transitional justice. The article introduces the term ‘subsistence harms’ as a way of gathering up and highlighting deprivations of subsistence needs as a discrete type of violence, centred on attacking or showing total disregard for human subsistence.” *Ibid.*

<sup>224</sup> Aloyo, *supra* note 211 at 498 (Arguing that out that “nonviolent harms can be just as morally wrong as violent ones.”). Both Aloyo and Sankey focus on similar sources of harm, such as famine. *Ibid* at 505–506; cf Sankey, *supra* note 191 at 124–127. Aloyo’s analysis is based on an underlying conceptualization of such events as being typified by their nonviolent nature, while Sankey argues that similar or the same events are best conceptualized as a distinctive form of violence that does not require the application of physical force. Aloyo, *supra* note 211; cf Sankey, *supra* note 191 at 122. As such, while both Aloyo and Sankey call for greater engagement with substantially the same set of issues, they disagree as to the underlying conceptualization of the problem. Aloyo calls for greater engagement with nonviolent acts, while Sankey calls for an expanded conceptualization of violence itself.

<sup>225</sup> Ladner, *supra* note 211; Zarni & Cowley, *supra* note 211; Anderson, *supra* note 209.

<sup>226</sup> Owens, Su & Snow, *supra* note 209 at 70.

<sup>227</sup> *Ibid* at 72.

Thus, in sum, there has been a marked movement away from linear, “static” understandings of genocide and other forms of atrocity, and towards more dynamic, process-based ones. Such processorial models of mass killing intentionally fail to differentiate between forms of harm causation based on their visibility or familiarity, but explicitly recognize that situations wherein powerful groups of individuals cause harm on a massive scale tend to be complex social phenomena involving various, interactive processes through which such harms are brought about. Clearly, many such forms of harm causation, particularly those which do not involve the commission of spectacular acts of violence, and/or which unfold attritively over significant expanses of time and space, are apt to manifest themselves in ways that fail to conform to the atrocity aesthetic.

While this reality is by now well-recognized within the academic study of genocide, atrocity, and mass killing generally, it has failed to gain a comparable degree of recognition within legal scholarship and discourse, especially in relation to ICL. Indeed, many scholars who have advocated for broader understandings of the causal modalities through which atrocities may be committed have blamed the narrow scope of ICL and international law more generally for the persistence of outdated, static understandings of genocide and atrocity.<sup>228</sup> The remainder of this chapter demonstrates that the inherent limitations of ICL are not always to blame for this tendency towards oversimplified, static understandings of atrocity, as there is nothing in the substance of ICL that dictates what an international crime must look like. Indeed, as it is currently structured, ICL allows for numerous international crimes to be committed through a virtually unlimited set of means, including those which may fail to conform to the atrocity aesthetic.

## 2 Unspectacular, Unfamiliar Modalities of Mass Harm Causation and International Criminal Law

While there may be a discernable shift in the general study of genocide and mass atrocity away from static, linear models of causation and towards more nuanced ones, a concomitant shift has not, as of yet, occurred within the realm of ICL. Instead, understandings of mass atrocity within

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<sup>228</sup> See e.g. Rosenberg, “Genocide Is a Process” *supra* note 192 at 17, 19.

ICL literature and discourse tend to conform to outdated, relatively simplistic models. As demonstrated previously, such models emphasize the production of harm through modalities of harm causation that are highly visible and easily recognized as “criminal” in nature. Even in situations where it is acknowledged within ICL discourses that atrocities themselves may be more complex than then commonly recognized, the standard assumption is that ICL is simply ill-equipped to delve into such complexities.<sup>229</sup>

At first glance, this seems to be a roughly accurate assessment of the subject matter boundaries of ICL. Attempts to address the complex causal realities of atrocity appear to run afoul of basic liberal criminal law principles grounded in individualized assessments of culpability and harm causation. However, as the remainder of this chapter demonstrates, the notion that ICL simply lacks the ability to address novel forms of harm causation is not true in all cases. Not all forms of harm causation failing to conform to the atrocity aesthetic are purely structural in nature, and even the most paradigmatic atrocities routinely present practical challenges related to causal overdetermination and complex group action.<sup>230</sup> Moreover, nothing in the doctrinal substance of ICL explicitly limits its applicability to mass harms brought about through any specific set of means. To the contrary, ICL contains various crimes and modes of liability that combine to provide for liability for individual contributions to the production of mass harm through a virtually unlimited set of means, making ICL in actuality, relatively well-equipped to address the factual and legal challenges presented by atrocities committed through unorthodox means. Furthermore, a growing cohort of scholars have identified areas of overlap between ICL and a host of subjects that routinely involve mass harm causation, yet typically fail to conform to the

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<sup>229</sup> ICL’s status as an expression of liberal criminal law predicated on binary assessments of guilt and innocence and grounded in individualized culpability, is often cited as one of the main factors contributing to the persistence of outdated, oversimplified understandings of the forms atrocity and human rights violations may take in the first place. See e.g. Nouwen & Werner, *supra* note 1; Engle, *supra* note 1; Lars Waldorf, “Anticipating the Past: Transitional Justice and Socio-Economic Wrongs” (2012) 21:2 *Social & Legal Studies* 171; Zinaida Miller, “Effects of Invisibility: In Search of the ‘Economic’ in Transitional Justice” (2008) 2:3 *International Journal of Transitional Justice* 266; Rosenberg, “Genocide Is a Process” *supra* note 192; Adam Jones, “Genocide and Structural Violence: Charting the Terrain” in Adam Jones, ed, *New Directions in Genocide Research* (New York, NY: Routledge, 2012) 132.

<sup>230</sup> Indeed, causal overdetermination and group perpetration have both been referred to as the leitmotif of international crime. See Stewart, *supra* note 5; Ohlin, “Group Think” *supra* note 6.



atrocities aesthetic, such as famine, corruption, interference with humanitarian aid, and various forms of socio-economic human rights violations.

## 2.1 The Structure and Substance of International Criminal Law

Despite the widespread tendency to assume that contemporary international crimes will be committed through familiar, highly visible means, nothing in the actual substance of ICL limits the array of means through which international crimes may be committed. After all, as observed by Frédéric Mégret, criminal justice itself “is, in the end, nothing more than ... a particular technique, a means to an end rather than an end in itself” and accordingly, no set of transgressions or normative aims are necessarily “presupposed by the very idea of criminal law”.<sup>231</sup> As such, given that the bulk of ICL is, in the words of Roger Clark, “weapons neutral,” an assessment of ICL’s general applicability and subject matter boundaries can only be made through an examination of the substance of the law itself.<sup>232</sup> The following analysis demonstrates that ICL, as currently constructed, includes various crimes and modes of liability that combine to provide numerous pathways for pursuing individual criminal liability for atrocities failing to conform to the atrocity aesthetic.<sup>233</sup>

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<sup>231</sup> Frédéric Mégret, “What Sort of Global Justice is ‘International Criminal Justice’?” (2015) 13:1 *Journal of International Criminal Justice* 77 at 80-81.

<sup>232</sup> See Roger S Clark, “Weapons of Mass Destruction” in Dinah L Shelton, ed, *Encyclopedia of Genocide and Crimes against Humanity* (Detroit, MI: Macmillan Reference, 2005) 1151 at 1151.

<sup>233</sup> While a comprehensive analysis of the boundaries of ICL liability and ICL’s potential applicability to novel forms of atrocity commission goes beyond the scope of this thesis and has already been done elsewhere, both by myself and others, regarding specific, novel means through which mass harm may be caused, such as, *inter alia*, famine, and corruption. See e.g. Randle C DeFalco, “Accounting for Famine at the Extraordinary Chambers in the Courts of Cambodia: The Crimes against Humanity of Extermination, Inhumane Acts and Persecution” (2011) 5:1 *International Journal of Transitional Justice* 142; Randle C DeFalco, “Conceptualizing Famine as a Subject of International Criminal Justice: Towards a Modality-Based Approach” (forthcoming) 38:4 *University of Pennsylvania Journal of International Law*, online: SSRN <<https://ssrn.com/abstract=2788009>>; Ilias Bantekas, “Corruption as an International Crime and Crime against Humanity: An Outline of Supplementary Criminal Justice Policies” (2006) 4:3 *Journal of International Criminal Justice* 466; Starr, *supra* note 190; Bloom, *supra* note 199; Schmid, *Taking Economic, Social and Cultural Rights Seriously*, *supra* note 51.

## 2.1.1 Genocide

The crime of genocide is defined as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.”<sup>234</sup>

Where only a “part” of a protected group is targeted, ICL courts and tribunals have held that at least a “substantial portion” of the overall group population must be targeted for destruction to qualify relevant acts as genocidal.<sup>235</sup> Accordingly, in *Prosecutor v Musema*, the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) held that the crime of genocide consists of three essential elements: (1) commission of one of the enumerated acts; (2) against a recognized protected class, “specifically targeted as such”; and (3) committed with the intent to destroy the protected group in whole or in part (i.e. the *mens rea* of “*dolus specialis*”).<sup>236</sup>

Nothing in the language enumerating the *actus rei* through which genocide may be committed gives any indication that the crime can only be committed through a limited set of means, or that such means must conform to any specific archetype, aesthetic or otherwise. To the contrary, each of the enumerated means through which genocide can be committed, by their plain language, are inclusive in terms of the means through which the destruction of a protected group may be

<sup>234</sup> *Genocide Convention*, *supra* note 170, art II; see also *Rome Statute*, *supra* note 63, art 6.

<sup>235</sup> See e.g. *Prosecutor v Krstić*, Case No. IT-98-33-A, Judgement (19 April 2004) para 8 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), online: ICTY <<http://www.icty.org/>> [*Krstić*, Appeals Judgement]; *Prosecutor v Jelisić*, IT-95-10-T, Judgement (14 December 1999) para 82 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <<http://www.icty.org/>>. This requirement may be numerically or qualitatively satisfied. See *Krstić*, Trial Judgement, *supra* note 170 at para 634 (holding that genocide requires “an intent to destroy only part of the group must nevertheless concern a substantial part thereof, either numerically or qualitatively”). However, “the part targeted must be significant enough to have an impact on the group as a whole.” *Krstić*, Appeals Judgement, *ibid* at para 8.

<sup>236</sup> *Prosecutor v Musema*, ICTR-96-13-A, Judgement and Sentence (27 January 2000) para 154 (International Criminal Tribunal for Rwanda, Appeals Chamber), online: ICTR <<http://www.unict.org/>>.

pursued. In this regard, the *actus rei* of killing members of the group; causing “serious bodily or mental harm” to members of the group; and “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction” stand out in terms of their ability to encompass forms of genocide that occur over time, through attritive, socio-economic, or other unspectacular and/or unfamiliar means.<sup>237</sup>

For example, regarding the genocidal *actus reus* of the deliberate infliction of “conditions of life ... calculated to bring about” the destruction of a protected group, the Preparatory Commission for the ICC interpreted this provision as consisting of five distinct elements:

1. The perpetrator inflicted certain conditions of life upon one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, the national, ethnical, racial or religious group, as such.
4. The conditions of life were calculated to bring about the physical destruction of that group, in whole or in part.
5. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.<sup>238</sup>

These elements, while providing greater clarity, nonetheless continue to provide for a near-unlimited set of means through which relevant “conditions of life” may be produced, so long as the conditions themselves could, alone or as part of a “manifest pattern of similar conduct,” actually destroy a substantial portion of the relevant group.<sup>239</sup>

The ICTR Trial Chamber has adopted a similarly inclusive approach concerning the production of conditions of life calculated to destroy a protected group, holding in *Prosecutor v Akayesu* that Article 2(c) of the Genocide Convention encompasses “methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their

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<sup>237</sup> *Genocide Convention*, *supra* note 170, art 2; *Rome Statute*, *supra* note 63, art 6.

<sup>238</sup> Preparatory Commission for the International Criminal Court, *Report of the Preparatory Commission for the International Criminal Court, Addendum Part II, Finalized Draft Text of the Elements of Crimes*, UN Doc PCNICC/2000/1/Add.2 (2 November 2000) at 7, art 6(c) [*Elements of Crimes*].

<sup>239</sup> *Ibid.*

physical destruction.”<sup>240</sup> In *Prosecutor v Kayishema*, the same Chamber opined that the Genocide Convention “allows for the punishment of the perpetrator for the infliction of substandard conditions of life which, if left to run their course, could bring about the physical destruction of the group”.<sup>241</sup> Examples of specific means through which such conditions of life could be inflicted provided by the Chamber in *Kayishema* include “rape, the starving of a group of people, reducing required medical services below a minimum, and withholding sufficient living accommodation for a reasonable period, provided the above would lead to the destruction of the group in whole or in part.”<sup>242</sup> Thus, the plain language of the Genocide Convention, especially Article 2(c), seems to quite readily accommodate the commission of genocide through means other than those conforming the atrocity aesthetic.

### 2.1.2 Crimes against Humanity

As with genocide, crimes against humanity may be committed through a virtually unlimited set of means, so long as such means satisfy the elements of an individual crime against humanity and form part of a widespread or systematic attack against a civilian population.<sup>243</sup> Lists of specific crimes against humanity vary from jurisdiction to jurisdiction, although the Rome Statute contains a generally inclusive list of contemporary crimes against humanity, including:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

<sup>240</sup> *Prosecutor v Akayesu*, ICTR-96-4-T, Judgement (2 September 1998) at para 505 (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR <<http://www.unict.org/>> [*Akayesu*, Trial Judgement].

<sup>241</sup> *Prosecutor v Kayishema*, ICTR-95-1-T, Judgement (21 May 1999) para 116 (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR <<http://www.unict.org/>>.

<sup>242</sup> *Ibid.*

<sup>243</sup> While this definition varies slightly from jurisdiction to jurisdiction, the requirement of the existence of a widespread or systematic attack against a civilian population is universally required and presumably amounts to customary international law. See generally Sadat, “Crimes against Humanity in the Modern Age” *supra* note 94. As noted previously, the Rome Statute adds the unique requirement that such attack be committed pursuant to a “state or organizational policy.” *Rome Statute*, *supra* note 63, art 7(1). The precise meaning of this requirement remains unclear. On this policy element, and its possible interpretations, see generally Robinson, “A Better Policy” *supra* note 67.

- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the [ICC];
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.<sup>244</sup>

Both the general requirements of crimes against humanity (often referred to as “*chapeau*” elements), and the elements of various individual crimes against humanity provide a degree of coverage over forms of mass harm causation that may fail to conform to the atrocity aesthetic. In terms of *chapeau* elements, the qualifiers “widespread or systematic,” refer to the scale, or highly organized nature of the requisite attack, suggesting that such attack against a civilian population will cover a large area and/or be committed by a large and organized group.

As noted previously, what is less clear is precisely what forms the “attack” itself can take. Whether such attack must necessarily involve the commission of physical acts of violence, remain unclear.<sup>245</sup> There exists a common tendency to assume that such attacks must involve the commission of acts of violence, in a narrow sense of the word.<sup>246</sup> However, as current ICC Judge Chile Eboe-Osuji contends, the:

range of mistreatments recognised as crimes against humanity (such as enslavement, deportation, imprisonment, persecutions, apartheid) do not always

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<sup>244</sup> *Rome Statute*, *supra* note 63, art 7(1).

<sup>245</sup> Schmid, *Taking Economic, Social and Cultural Rights Seriously*, *supra* note 51 at 76, citing Göran Sluiter, “Chapeau Elements” in Leila Nadya Sadat, ed, *Forging a Convention for Crimes against Humanity* (New York, NY: Cambridge University Press, 2011) 102 at 125.

<sup>246</sup> See e.g. Luban, *supra* note 54 at 103 n 69 (Luban argues that if attacks could be committed nonviolently, then “a system of laws prohibiting the use of foreign languages in official documents and traffic signs, if designed to force immigrant groups to learn the native language of a country, could constitute crimes against humanity of the persecution type. Regardless of what one thinks of the wisdom of such language laws, labeling them crimes against humanity is absurd.”); cf Chile Eboe-Osuji, “Crimes against Humanity: Directing Attacks against a Civilian Population” (2006) 2:2 *African Journal of Legal Studies* 118 at 119 (“Typically, an attack would entail violence against the victims. This, however, need not be so in all cases of crimes against humanity.”).

connote the commission of violence against the victims, although they most often do. It is for this reason that the case law has taken a view of ‘attack’ as encompassing ‘any mistreatment’ of the civilian population.”<sup>247</sup>

The case cited by Eboe-Osuji in making this assertion is that of *Prosecutor v Kunarac et al*, wherein the ICTY Appeals Chamber held that “the attack in the context of a crime against humanity is not limited to the use of armed force; it encompasses any mistreatment of the civilian population.”<sup>248</sup>

Disputes over whether the requisite attack for crimes against humanity must be violent or not, moreover, remain highly contingent on underlying notions of what constitutes violence, itself a highly contested term.<sup>249</sup> For example, Evelyne Schmid argues that, despite statements to the contrary in case law, the very “notion of an attack would lose its function to limit the scope of crimes against humanity if it was interpreted to encompass nonviolent measures alone.”<sup>250</sup>

However, Schmid also argues that the term violence should be understood broadly, to encompass “abusive policies that do not directly kill or maim immediately” including various forms of economic, social, and cultural human rights violations.<sup>251</sup> Thus, the disagreement between Schmid, who believes that the requisite attack within the context of crimes against humanity

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<sup>247</sup> Eboe-Osuji, “Crimes against Humanity” *supra* note 246 at 119; see also Ford, *supra* note 156 at 257 (“While the underlying acts that can constitute the attack are often carried out through violence, the attack does not have to be violent and may involve other inhumane mistreatment of the civilian population.”).

<sup>248</sup> *Prosecutor v Kunarac, Kovac & Vukovic*, IT-96-23-A & IT-96-23/1-A, Judgement (12 June 2002) para 86 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), online: ICTY <<http://www.icty.org/>> [*Kunarac et al* Appeal Judgement]. The ICTR Trial Chamber expressed a similar sentiment in *Akayesu*, opining that:

The concept of ‘attack’ may be defined as a unlawful act of the kind enumerated in [the ICTR Statute’s provision on crimes against humanity], like murder, extermination, enslavement, etc. An attack may also be non violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner.

*Akayesu*, Trial Judgment, *supra* note 240 at para 581.

<sup>249</sup> For a discussion of the entrenched definitional debate concerning the meaning of the term violence, see Aisenberg et al, *supra* note 53.

<sup>250</sup> Schmid, *Taking Economic, Social and Cultural Rights Seriously*, *supra* note 51 at 77.

<sup>251</sup> *Ibid.*

must be “violent” in nature, and others, who argue that such attacks may be non-violent, appears to be mostly grounded in differing underlying conceptualizations of what constitutes violence itself, rather than fundamental disagreements on ICL’s applicability. What Judge Eboe-Osuji may consider a “non-violent” attack against a civilian population, Schmid would likely view as merely a form of violence that happens to not involve the direct physical application of force against victims in its commission. Thus, there seems to be a consensus in both jurisprudence and scholarship, that widespread or systematic attacks can take many forms, including those which produce harms attritively over time or through other methods other than those conforming to the atrocity aesthetic.

In terms of individual crimes against humanity, many crimes are defined in such a way as to allow their commission through a wide variety of means. For instance, in terms of crimes against humanity involving killing, the ICC Preparatory Commission views the term “killing” as “interchangeable with the term ‘caused death’” within the context of crimes against humanity.<sup>252</sup> Moreover, various individual crimes against humanity are constructed in a manner evincing the clear aim of maintaining flexibility in terms of means of commission. A prime example is such flexibility is the crime against humanity of extermination. A crime of mass killing, extermination, like genocide, explicitly “includes the intentional infliction of conditions of life, *inter alia*, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.”<sup>253</sup> The Preparatory Commission lists the first element of extermination as requiring that the “perpetrator killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population,” further noting that such “conduct could be committed by different methods of killing, either

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<sup>252</sup> *Elements of Crimes*, *supra* note 238, at 5 n 7.

<sup>253</sup> *Rome Statute*, *supra* note 63, art 7(2)(b). While the quoted definition of extermination is from the Rome Statute, it accords with how the crime has been defined more generally within ICL. For example, the ICTR and ICTY have held that extermination may be committed by “subjecting a number of people to conditions of living that would inevitably lead to death.” *Prosecutor v Ntakirutimana & Ntakirutimana*, ICTR-96-10-A & ICTR-96-17-A, Judgement (13 December 2004) at para 522 (International Criminal Tribunal for Rwanda, Appeals Chamber), online: ICTR <<http://www.unict.org/>>; accord *Prosecutor v Stakić*, IT-97-24-A, Judgement (22 March 2006) at para 259 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), online: ICTY <<http://www.icty.org/>>.

directly or indirectly.”<sup>254</sup> While the enforcement of harsh “conditions of life” must be “calculated” to actually cause mass death, it remains unclear whether the term calculated is meant to imply a subjective intent or merely a “calculated assessment” that the conditions being inflicted will cause mass death.<sup>255</sup> This usage of “calculated” has yet to be clarified, standing as another example of the fact that ICL remains in its formative stages, subject to ambiguity in many key areas.<sup>256</sup> Regardless of the ultimate resolution of this *mens rea* issue, the fact remains that in terms of *actus reus* requirements, the crime against humanity of extermination can clearly be committed through a wide variety of causal modalities, including many which fail to conform to the atrocity aesthetic.

Various other crimes against humanity, such as those of murder, enslavement, deportation or forcible transfer, torture, persecution, apartheid, and other inhuman acts, similarly allow for commission through a near-unlimited set of methods.<sup>257</sup> For example, murder is a crime against humanity when forming part of a widespread or systematic attack against a civilian

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<sup>254</sup> *Elements of Crimes*, *supra* note 238, at 6 and 6 n 8.

<sup>255</sup> Evelyne Schmid for example, asserts that the “verb ‘calculated’ implies that the [alleged means through which mass death is caused, such as] deprivation of access to basic socio-economic rights must have been intended as a mechanism to bring about the destruction of part of a population.” Schmid, *Taking Economic, Social and Cultural Rights Seriously*, *supra* note 51 at 155. However, such an interpretation necessarily renders an accused’s subjective motive for causing mass death a substantive element of the crime, which is quite rare within criminal law generally, due to the difficulty of proving subjective intent and its marginal role in the moral culpability of an accused, who otherwise was fully aware of the nature and consequences of his actions. More often, motive is treated as probative of knowledge or intent if proved, or as an aggravating factor at sentencing, such as is the case for most hate crimes. Furthermore, Schmid does acknowledge that a UN Commission of Inquiry for North Korea stated that in its view the “calculated” element of extermination requires only “the calculated assessment [by the accused] that the infliction of the particular conditions of life will in the ordinary course of events result in mass killing, even though this might not be the perpetrator’s subjective purpose.” *Ibid* at 155 n 418, citing United Nations Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea, *Report of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea*, UN Doc A/HRC/25/CRP.1, 7 February 2014 at 324 n 1558.

<sup>256</sup> See *supra* at 12-20.

<sup>257</sup> See generally, *Rome Statute*, *supra* note 63, art 7(1)-(2); *Elements of Crimes*, *supra* note 238; *Taking Economic, Social and Cultural Rights Seriously*, *supra* note 51 at 74–165; DeFalco, “Conceptualizing Famine” *supra* note 233; Aloyo, *supra* note 211; Clark, *supra* note 232; Ford, *supra* note 156.



population.<sup>258</sup> According to the ICC Preparatory Commission for the ICC, the crime against humanity of murder consists of three elements:

1. The perpetrator killed one or more persons.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. [And]
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.<sup>259</sup>

As referenced previously, the Commission is also of the opinion that within the context of murder in the Rome Statute, the “term ‘killed’ is interchangeable with the term ‘caused death’.”<sup>260</sup> Thus, as with extermination, one can envision a multitude of processes through which a perpetrator, alone or with others, could intentionally cause the death of a victim.

Similarly, the crime against humanity of enslavement occurs when a perpetrator exercises “any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.”<sup>261</sup> The Preparatory Commission views enslavement as encompassing forced labor and human trafficking, which can themselves take many forms.<sup>262</sup>

The crimes of persecution and other inhumane acts also follow a similar pattern of using general language to prohibit acts causing specific harmful outcomes for victims, while seemingly allowing for commission through any number of means. According to the Preparatory Commission, persecution occurs when victims are deprived of a fundamental right because of their “political, racial, national, ethnic, cultural, religious, gender” identity or on “other grounds that are universally recognized as impermissible under international law.”<sup>263</sup> The requisite

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<sup>258</sup> See e.g. *Rome Statute*, *supra* note 63, art 7(1)(a).

<sup>259</sup> *Elements of Crimes*, *supra* note 238, at 9.

<sup>260</sup> *Ibid*, at 9 n 7.

<sup>261</sup> *Ibid*, at 10.

<sup>262</sup> *Ibid*, at 10, n 11.

<sup>263</sup> *Ibid*, at 15.

“fundamental rights” violation is not limited to civil and political human rights violations, but may involve the violation of a variety of economic, social, and cultural rights.<sup>264</sup>

The crime against humanity of other inhumane acts meanwhile, is a residual, catch-all crime that, according to the ICTY Trial Chamber, “was deliberately designed as a residual category, as it was felt to be undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition.”<sup>265</sup>

This intentionally broad crime encompasses the inflict[ion of] great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act ... of a character similar to any other” crime against humanity.<sup>266</sup> According to the Preparatory Commission, the term “character’ refers to the nature and gravity of the act.”<sup>267</sup> Nothing within these requirements, nor those referenced above in relation to the crimes against humanity of extermination, murder, enslavement, or persecution, nor those of various other crimes against humanity, dictate that such crimes must necessarily be committed through any enumerated set of means, let alone means conforming to the atrocity aesthetic.

### 2.1.3 War Crimes

War crimes are serious violations of international humanitarian law entailing individual criminal responsibility.<sup>268</sup> Due to their grounding in the law of war itself, which significantly predates ICL, many war crimes are quite specific in their application.<sup>269</sup> The universal requirement for all

<sup>264</sup> See Schmid, *Taking Economic, Social and Cultural Rights Seriously*, *supra* note 51 at 124–139.

<sup>265</sup> *Prosecutor v Kupreškić*, IT-95-16-T, Judgement (14 January 2000) para 563 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <<http://www.icty.org/>>.

<sup>266</sup> *Elements of Crimes*, *supra* note 238, at 17.

<sup>267</sup> *Ibid* at 17 n 30.

<sup>268</sup> See generally Antonio Cassese, *International Criminal Law*, 2d ed (New York, NY: Oxford University Press, 2008) at 81.

<sup>269</sup> This is because such many war crimes are hence grounded in underlying legal prohibitions on often quite specific prohibitions outlawing specific weapons or forms of warfare.

war crimes is that they must have a “nexus” to an armed conflict.<sup>270</sup> The applicability of war crimes depends on the whether the requisite armed conflict is legally determined to be “international” in character or not.<sup>271</sup> Aside from this requirement that war crimes have a connection to war itself, certain war crimes may involve harms of a gravity much less serious than most forms of crimes against humanity or genocide.<sup>272</sup> This potential lack of seriousness has led many scholars to cite specific war crimes as examples of non-atrocity-based international crimes.<sup>273</sup>

Regardless of whether all war crimes are properly considered within the rubric of atrocity, as with genocide and crimes against humanity, many war crimes provisions allow for commission through a wide variety of means. For example, war crimes derived from Common Article 3 of the 1949 Geneva Conventions, such as “wilful killing;” “torture or inhuman treatment;” “wilfully causing great suffering, or serious injury to body or health;” and “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” all remain silent on the means through which they may be committed, merely referring to particular processes and outcomes that could take innumerable forms.<sup>274</sup> Other war crimes, not directly derived from Common Article 3 are similarly broadly worded. For example,

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<sup>270</sup> For a discussion of this “nexus” requirement, see e.g. Randle C DeFalco, *Justice and Starvation in Cambodia: International Criminal Law and the Khmer Rouge Famine* (LLM Thesis, University of Toronto Faculty of Law, 2013) [unpublished] at 87, online: University of Toronto T-Space <<http://hdl.handle.net/1807/67245>>. See also e.g. *Kunarac et al Appeal Judgement*, *supra* note 248 at para 58.

<sup>271</sup> For example, the Rome Statute contains to separate lists of war crimes, divided into those applicable to international armed conflicts, and a shorter list of those applicable to non-international armed conflicts. *Rome Statute*, *supra* note 63, art 8(2).

<sup>272</sup> For an example, see *supra* note 172.

<sup>273</sup> See e.g. Scheffer, “Genocide and Atrocity Crimes” *supra* note 131 at 244-246.

<sup>274</sup> See *Rome Statute*, *supra* note 63, art 8(2)(a). See also *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (12 August 1949), online: International Committee of the Red Cross <<http://www.icrc.org/eng/>> [*Geneva I*]; *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (12 August 1949), online: International Committee of the Red Cross <<http://www.icrc.org/eng/>> [*Geneva II*]; *Geneva Convention (III) Relative to the Treatment of Prisoners of War* (12 August 1949), online: International Committee of the Red Cross <<http://www.icrc.org/eng/>> [*Geneva III*]; *Geneva Convention (IV) Relative to the Protection of Civilians in Times of War* (12 August 1949), online: International Committee of the Red Cross <<http://www.icrc.org/eng/>> [*Geneva IV*].

the war crimes of “committing outrages upon personal dignity, in particular humiliating and degrading treatment” and “intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions” could both clearly be committed through a wide variety of means.<sup>275</sup>

The coverage of war crimes generally over non-international armed conflicts is much narrower than international armed conflicts. However, even during periods of non-international armed conflict “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;” and “committing outrages upon personal dignity, in particular humiliating and degrading treatment,” remain war crimes.<sup>276</sup> As with genocide and crimes against humanity, again one can easily envision many such forms of abuse that would fail to conform to the atrocity aesthetic, yet amount to such “outrages upon personal dignity” or other war crimes.<sup>277</sup>

#### 2.1.4 Modes of Liability

Establishing that one or more international crimes occurred is but the first step in obtaining a conviction under ICL. Prosecutors must also prove beyond a reasonable doubt that the accused participated in such crime in a manner sufficient to ground individual criminal liability. Because most international crimes are perpetrated collectively, by large groups, rather than by individuals, rare is the case where an accused physically perpetrates the entirety of the crime she is charged with. Indeed, individuals who are amongst those most responsible for the commission of atrocity crimes are often far-removed from the physical perpetration of relevant crimes. To

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<sup>275</sup> *Rome Statute*, *supra* note 63, art 8(2)(b)(xxi), (xxv). For a discussion of Geneva Convention provisions related to the provision of relief supplies during periods of armed conflict, see Randle C DeFalco, “The Right to Food in Gaza: Israel’s Obligations Under International Law” (2009) 35 Rutgers Law Record 11 at 17–21; DeFalco, *Justice and Starvation in Cambodia*, *supra* note 270 at 91–92.

<sup>276</sup> See *Rome Statute*, *supra* note 63, art 8(2)(c)(i)-(ii).

<sup>277</sup> For example, Evelyne Schmid identifies a long list of war crimes that can, and in some cases, have, been committed through violations of economic, social, and cultural human rights. See Evelyne Schmid, “War Crimes Related to Violations of Economic, Social and Cultural Rights” (2011) 71:3 Heidelberg Journal of International Law 523; Schmid, *Taking Economic, Social and Cultural Rights Seriously*, *supra* note 51 at 166–206. Moreover, elsewhere, I have identified various ways through which the creation or perpetuation of famine conditions may amount to war crimes. DeFalco, “Conceptualizing Famine,” *supra* note 233.

account for this phenomenon, ICL has adopted its own specialized modes of liability which provide for various culpable forms of participation in group crimes.

Such modes of liability represent an area of ICL commonly overlooked in assessments of its potential applicability. Because ICL's modes of liability are designed to address individual contributions to crimes covering potentially vast expanses of time and space, and perpetrated by large numbers of individuals working in concert, they have been tailored to be flexible enough to encompass all manner of contributions to group crimes. Two examples of such flexible modes of liability are joint criminal enterprise, a doctrine used extensively by the various ad hoc UN courts and tribunals, and "contribution" liability, laid out in Article 25 of the Rome Statute of the ICC.<sup>278</sup>

Joint criminal enterprise has been utilized by all of the ad hoc tribunals, but has been rejected thus far by the ICC after engendering considerable controversy.<sup>279</sup> This doctrine provides for individual liability when an individual accused joins a criminal enterprise by agreeing to a group plan involving the commission of at least one international crime and thereafter, makes a "significant" contribution to the execution of such plan.<sup>280</sup> Such contribution must be made while the accused possesses knowledge of the criminal nature of the plan and the nature of her

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<sup>278</sup> The doctrine of joint criminal enterprise was first laid out in by the ICTY in the *Tadić* Judgment. *Tadić* Appeal Judgement, *supra* note 70 at paras 185-229 (laying out the elements of joint criminal enterprise for the first time). For an overview of joint criminal enterprise liability, see e.g. Watkins & DeFalco, *supra* note 68. For an overview of the elements of superior and command responsibility, see e.g. *Rome Statute*, *supra* note 63, art 28. For the basic elements of "contribution" liability and other modes of liability at the ICC, see *ibid*, art 25. For analyses of "contribution" liability under Article 25(3)(d) specifically, see DeFalco, "Contextualizing Actus Reus" *supra* note 69; Ambos, "The ICC and Common Purpose" *supra* note 74; Sanikidze, *supra* note 74. For a general analysis of ICL modes of liability, see generally Neha Jain, *Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes* (Portland, OR: Hart Publishing, 2014).

<sup>279</sup> For examples of criticisms of joint criminal enterprise, see Danner & Martinez, *supra* note 68; Ohlin, "Three Conceptual Problems" *supra* note 68; Ohlin, *supra* note 68.

<sup>280</sup> See e.g. *Tadić* Appeal Judgement, *supra* note 70 at para 220; *Prosecutor v Brđanin*, IT-99-36-A, Judgment (3 April 2007) para 371 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), online: ICTY <<http://www.icty.org/>> [*Brđanin*, Appeal Judgment]; *Prosecutor v Kvočka*, IT-98-30/1-T, Judgment (2 November 2001) para 309 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <<http://www.icty.org/>> [*Kvočka*, Trial Judgment] (holding that "[t]he participation in the enterprise must be significant"); for an in-depth overview of the elements of joint criminal enterprise, see Watkins & DeFalco, *supra* note 68 at 232-264.

contribution thereto, or at least is advertently reckless in this regard (this form of recklessness is referred to as the *mens rea* of *dolus eventualis*).<sup>281</sup> Joint criminal enterprises provide a flexible mechanism for addressing the many forms atrocities, and contributions thereto, may take. Criminal enterprises may be large or small, consisting of several members operating exclusively within an individual village, or massive numbers of members spread widely across territories and borders. Joint criminal enterprises may also be nested within one another, with various groups of individuals forming webs of interrelated, but mutually exclusive criminal enterprises.<sup>282</sup>

For example, in the context of the Khmer Rouge regime, in *Case 002/01* the Extraordinary Chamber in the Courts of Cambodia (ECCC)<sup>283</sup> Trial Chamber held that a joint criminal enterprise “to rapidly build and defend the country through a socialist revolution, based on the principles of secrecy, independence-sovereignty, democratic centralism, self-reliance and collectivisation, was firmly established by June 1974 and continued at least until December 1977.”<sup>284</sup> The Chamber found this enterprise to be criminal; although the “common purpose was not in itself necessarily or entirely criminal ... participants implemented the common purpose through [policies] which resulted in and/or involved crimes.”<sup>285</sup> This criminal enterprise involved various members of the Khmer Rouge senior leadership and traversed all of

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<sup>281</sup> *Tadić* Appeal Judgement, *supra* note 70 paras 220, 228. For a discussion of the precise requires of *dolus eventualis*, see Watkins & DeFalco, *supra* note 68 at 249–251.

<sup>282</sup> For example, the ICTY Trial Chamber has held that an “overarching” joint criminal enterprise aimed at “the permanent removal of the Bosnian Muslims and Bosnian Croats from Bosnian Serb claimed territory” existed in the former Yugoslavia during the Tribunal’s temporal jurisdiction along with other smaller criminal enterprises. *Karadžić*, Trial Judgment, *supra* note 109 at para 3505.

<sup>283</sup> The ECCC is a hybrid United Nations-Cambodian tribunal with jurisdiction over senior leaders and others most responsible for the commission of various international and domestic crimes in Cambodia from 1975-1979. For more information on the ECCC, see generally John D Ciorciari & Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (Ann Arbor, MI: University of Michigan Press, 2014).

<sup>284</sup> *Case 002/01* Trial Judgement, *supra* note 109 at para 777. It is worth noting that, because Case 002 was bifurcated into multiple trials, and Case 002/01 concerned only events prior occurring prior to 1977, the Chamber did not issue a holding as to whether this (or other) joint criminal enterprise(s) continued to exist from 1978 onward until the Khmer Rouge were ousted from power in January 1979.

<sup>285</sup> *Ibid*, at para 778.

Cambodia.<sup>286</sup> In other circumstances, such enterprises may be smaller, such as in *ECCC Case 001*, wherein accused Kaing Guek Eav (better known by his revolutionary alias, “Duch”), was accused of participating in a criminal enterprise limited to the operation of a specific prison where detainees were systematically tortured and subsequently executed.<sup>287</sup>

Although the ICC has thus far rejected the doctrine of joint criminal enterprise, it nonetheless provides for individual liability predicated on an accused’s contributions to collective crimes via Article 25 of the Rome Statute, which states:

a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
  - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
  - (ii) Be made in the knowledge of the intention of the group to commit the crime.<sup>288</sup>

Article 25 appears to provide for the broadest liability under subsection (3)(d), as this provision, establishes liability for an accused who contributes “in any other way” than those enumerated elsewhere in Article 25. Subsection (3)(d) however, has yet to be fully clarified, and it remains unclear what the threshold degree of such contribution must be. The ICC Pre-Trial Chamber held in *Prosecutor v Mbarushimana* that an accused’s contribution to the common criminal purpose

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<sup>286</sup> *Ibid*, para 777.

<sup>287</sup> *Case 001*, 001/18-07-2007/ECCC/TC, Judgement (26 July 2010) para 514 (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber), online: <<https://www.eccc.gov.kh/en/>> [*Case 001* Trial Judgement].

<sup>288</sup> *Rome Statute*, *supra* note 63, art 25.

must be “significant” which is the same *actus reus* threshold required under current joint criminal enterprise jurisprudence.<sup>289</sup> This holding however, was *obiter dicta*, as a majority of the Chamber found that the prosecution failed to adduce sufficient evidence that the relevant group, the Democratic Forces for the Liberation of Rwanda (FDLR) operating in the Democratic Republic of the Congo, constituted a common criminal purpose at all and that regardless of whether this was true, Mbarushimana himself “did not provide any contribution to the commission” of the crimes alleged to have been committed by the FDLR.<sup>290</sup>

Although the prosecution appealed the decision, the Appeals Chamber did not need to address the question of the minimum degree of contribution legally required under Article 25(3)(d) and declined to express its opinion on the matter.<sup>291</sup> However, Appeals Chamber Judge Silvia Fernández de Gurmendi appended a separate opinion advocating for the adoption of a “normative and causal links” test to determine whether the acts of an accused legally qualify as a “contribution” to a group crime under Article 25(3)(d).<sup>292</sup> How Judge Fernández de Gurmendi’s proposed normative and causal links test would materially differ from the significant act test remains unclear, as does the precise legal characterization of the threshold *actus reus* requirement for contribution liability at the ICC at this time.<sup>293</sup> Regardless of the ultimate determination made by the ICC Appeals Chamber concerning how to legally characterize the

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<sup>289</sup> *Prosecutor v Mbarushimana*, ICC-01/04-01/10, Decision on Confirmation of Charges (16 December 2011) at para 285 (International Criminal Court, Pre-Trial Chamber I) online: <<https://www.icc-cpi.int/>>. For similar holdings concerning the threshold *actus reus* required for joint criminal enterprise liability to attach, see *Brđanin*, Appeal Judgment, *supra* note 280 at para 371; *Kvočka*, Trial Judgment, *supra* note 280 at para 309.

<sup>290</sup> *Mbarushimana*, *ibid* at paras 291-292.

<sup>291</sup> *Prosecutor v Mbarushimana*, ICC-01/04-01/10 OA4, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011 entitled ‘Decision on the Confirmation of Charges’ (30 May 2012) at paras 64-69 (International Criminal Court, Appeals Chamber) online: <<https://www.icc-cpi.int/>>.

<sup>292</sup> *Prosecutor v Mbarushimana*, ICC-01/04-01/10 OA4, Separate Opinion of Judge Silvia Fernández de Gurmendi (30 May 2012) (International Criminal Court, Appeals Chamber) online: <<https://www.icc-cpi.int/>>.

<sup>293</sup> For analyses of *Mbarushimana* and the lack of clarity in terms of Article 25(3)(d) of the Rome Statute, see DeFalco, “Contextualizing Actus Reus” *supra* note 69; Ambos, “The ICC and Common Purpose” *supra* note 74; Sanikidze, *supra* note 74.



minimum threshold of contribution to ground liability under Article 25(3)(d), it is unlikely that specific limitations will be put on the forms such contributions may take.<sup>294</sup>

Thus, while the ICC has rejected the doctrine of joint criminal enterprise, under Article 25, the ICC Office of the Prosecutor may still prove an accused's culpability through their participation in a group that has a common criminal purpose. Joint criminal enterprise jurisprudence at the ICTY and ECCC meanwhile demonstrate that groups forming a common criminal purpose or criminal enterprise may be relatively small and tight-knit, or vast organizations spanning entire countries or even spilling across borders.<sup>295</sup> Especially large and powerful criminal groups are able to kill and abuse victims through means unavailable to ordinary, domestic criminal organizations, or even smaller criminal enterprises which commit international crimes. Significant contributions to massive criminal organizations may also take many forms, ranging from familiar forms of direct violence, such as hands-on killing, to bureaucratic functions. Indeed, in many cases, the contributions of those who physically perpetrate even the most horrific crimes, such as those perpetrated in concentration camps during the Holocaust, may be relatively insignificant in comparison to the seemingly much more banal, bureaucratic contributions of others. This seeming paradox is personified in the culpability of Adolph Eichmann, the quintessential bureaucrat who oversaw the systematic murder of millions of victims.<sup>296</sup>

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<sup>294</sup> For example, in a situation where a group causes mass death through means deviating from the atrocity aesthetic, such as by diverting resources away from a population in severe need, an accused may be considered liable for contributing to such deprivation in a wide variety of ways, ranging from direct misappropriation of such resources, or by actively preventing the victim population from accessing such resources. Whether such contributions are "significant" or have sufficient "normative and causal links" to relevant harms will fluctuate depending on the overall size of the perpetrator group and the nature of his or her contribution.

<sup>295</sup> For example, the ICTY found that an "overarching" criminal enterprise with the common purpose of expelling non-Serbs from designated territories by any means necessary existed in the former Yugoslavia during the 1990s and the ECCC found that a common criminal purpose existed amongst members of the Khmer Rouge leadership in Case 002/01 encompassing the entirety of Cambodia's territory and society. See *Karadžić*, Trial Judgment, *supra* note 109 at para 3505; *Case 002/01* Trial Judgement, *supra* note 109 at paras 777-778.

<sup>296</sup> On Eichmann's role in the Holocaust and its bureaucratic nature, see *Attorney General v Eichmann*, Criminal Case No 40/61, Judgment (11 December 1961) (District Court of Jerusalem), online: TMC Asser Institute International Crimes Database <<http://www.internationalcrimesdatabase.org/Case/192/Eichmann/>> [*Eichmann* Trial Judgment]; see also Arendt, "Eichmann in Jerusalem-V" *supra* note 58.

Of course, the ICC is not limited to prosecuting individuals for their contributions to group crimes exclusively via Article 25(3)(d). Indeed, as noted above, the ICC Office of the Prosecutor has mainly relied on alternative modes of liability in its prosecutions to date. Article 25 also provides for liability for crimes committed by an “individual, jointly with another or through another person, regardless of whether that other person is criminally responsible”<sup>297</sup> and the Rome Statute contains other modes of liability, such as ordering, instigating, and incitement to commit genocide, designed to account for the collective nature of atrocity commission.<sup>298</sup>

Article 28 of the Rome Statute, for instance, provides for liability via command and superior responsibility, ICL-specific doctrines used to hold military and civilian authority figures responsible for failing to prevent or punish crimes of their subordinates. Command responsibility provides for the liability of military commanders who fail to prevent or punish international crimes committed by subordinates under his or her “effective command and control.”<sup>299</sup> Superior responsibility, meanwhile, provides corollary liability for non-military authority figures for the crimes of subordinates over whom they wield “effective authority and control” and attaches liability when such authority figure “fail[s] to take all necessary and reasonable measures within his or her power to prevent or repress” the commission of relevant crimes, or “to submit the matter to the competent authorities for investigation and prosecution.”<sup>300</sup>

The flexibility and potential reach of joint criminal enterprise, contribution liability, command and superior responsibility, and various other ICL modes of liability, has engendered significant controversy.<sup>301</sup> Nevertheless, the basic need to account for individual contributions to group

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<sup>297</sup> *Rome Statute*, *supra* note 63, art 25(3)(a).

<sup>298</sup> See generally *ibid*, art 25. For a more detailed analysis of ICL modes of liability, see Jain, *supra* note 278.

<sup>299</sup> *Rome Statute*, *supra* note 63, art 28(a).

<sup>300</sup> *Ibid*, art 28(b).

<sup>301</sup> For a sampling of critiques of ICL modes of liability, see e.g. Danner & Martinez, *supra* note 68; Ohlin, “Three Conceptual Problems” *supra* note 68; Jens David Ohlin, “Joint Criminal Confusion” (2009) 12:3 *New Criminal Law Review* 406. Jens Ohlin has explored the collective-individual tension inherent in ICL, offering approaches that attempt to better balance the complex relationships between individual culpability and collective perpetration. See Ohlin, “Group Think” *supra* note 6; Jens David Ohlin, “The One or the Many” (2015) 9:2 *Criminal Law & Philosophy* 285.

atrocities is accepted by even some of the most strident critics of ICL's current modes of liability.<sup>302</sup> Controversy aside, the upshot of these specialized ICL modes of liability for the present inquiry is that they are designed to address the group nature of international crimes and as such, provide means through which individuals may be held responsible for their contributions to collectively perpetrated crimes.<sup>303</sup> Thus, while clearly not without their flaws, such modalities do provide opportunities to capture the complex nuances of international criminality. Yet, despite this doctrinal flexibility and capaciousness, ICL continues to be dominantly viewed as a body of law concerned narrowly with spectacular outbreaks of violence.

## 2.2 Four Examples of Unspectacular, Unfamiliar Means of Atrocity Crime Commission

The foregoing analysis has demonstrated that atrocities themselves are complex processes of mass killing and abuse, ICL is not normatively or doctrinally limited to any enumerated subset of such processes, and in fact, contains provisions providing it with the ability to address a seemingly wide variety of forms of harm causation. The remainder of this chapter identifies and discusses four examples of mass harm causation modalities that both tend to not conform to the atrocity aesthetic and yet, through which well-established international crimes may be committed: famine causation; large-scale corruption; humanitarian aid interference; and economic, social, and cultural rights violations. Each of these phenomena as they may serve as

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<sup>302</sup> For example, Jens Ohlin has rather strongly critiqued joint criminal enterprise. See Ohlin, "Three Conceptual Problems" *supra* note 68. Yet, Ohlin nonetheless argues elsewhere that "[i]f we insist on individual blameworthiness to the point of ignoring the reality of collective conduct, then we have enforced a fallacious fidelity to the principle of culpability that is blind to the reality of human collaboration." Ohlin, "Organizational Criminality" *supra* note 6 at 117. To a significant degree, ICL may be merely caught in a perpetual dilemma, between accounting for the fundamentally collective causal realities attendant to processes of atrocity, and the strictures of liberal criminal law traditions grounded in the myth of the fully free-willed individual moral agent.

<sup>303</sup> While the general summarization of ICL modes of liability as providing for individual penal responsibility predicated on each accused's contribution to a collectively perpetrated crime represents somewhat of an overgeneralization, a detailed analysis of all ICL modes of liability predicated on collective perpetration, and critiques thereof, is outside the scope of the present analysis. For further information on such modes of liability, see generally Jain, *supra* note 278. For a discussion of the collective nature of the vast majority of international crimes and the implications of this reality for the imputation of individual responsibility, see e.g. Ohlin, "Organizational Criminality" *supra* note 6.

harm causation methods through which atrocity crimes may be committed are addressed in turn, followed by some concluding observations.

## 2.2.1 Famine

Famine is the perhaps most-studied form of non-traditional potential means of atrocity commission, and for good reason. Famine<sup>304</sup> and starvation<sup>305</sup> have been fully preventable for well over a century, yet during this time some of the worst famines in human history occurred.<sup>306</sup> This seeming paradox has led famine scholars to increasingly theorize famine as a largely predictable product of human actions, rather than as an unpredictable natural disaster.<sup>307</sup> Yet,

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<sup>304</sup> There are many different understandings of the term famine. I use the term famine to refer to instances where lack of access to food amongst an affected population results in a significant increase in mortality rates. For an overview of the dynamics of famine and various definitions, see generally Cormac Ó Gráda, *Famine: A Short History* (Princeton, NJ: Princeton University Press, 2009); Stephen Devereux, ed, *The New Famines: Why Famines Persist in an Era of Globalization* (New York, NY: Routledge, 2006).

<sup>305</sup> Whereas the term famine refers to large-scale suffering from lack of food, the term starvation refers to individual victim suffering from a complete lack of nutrition, eventually leading to death if unaddressed. See e.g. Ó Gráda, *supra* note 304; Devereux, *supra* note 304. Amartya Sen, “Ingredients of Famine Analysis: Availability and Entitlements” (1981) 96:3 *The Quarterly Journal of Economics* 433 at 434 (Observing that “starvation is a matter of some people not having enough food to eat, and not a matter of there being not enough food to eat.”).

<sup>306</sup> Until the late twentieth century, two schools of thought of conceptualizing famines prevailed. One school, based on the writings of Thomas Malthus, viewed famines as products of insufficient aggregate food supplies within an affected area and thus viewed population levels, natural disasters, such as droughts and floods, and technological limitations as the main challenges in famine prevention efforts. Virtually all of the main technological problems, related to communications and the production, storage, preservation and transportation of food were solved during the industrial revolution and the dawn of the twentieth century. Nonetheless, throughout the twentieth century numerous catastrophic famines occurred. This persistence of famine conditions led scholars to shift away from the classical Malthusian approach to understanding famines and towards a variety of other non-Malthusian approaches that all focused on factors other than aggregate food production and population levels. While these approaches vary significantly, they generally view famine as an avoidable catastrophe that is in no way a “natural” or inevitable event. See generally Sen, *supra* note 305; Ó Gráda, *supra* note 304; Devereux, *supra* note 304.

<sup>307</sup> To be sure, there remains a significant amount of disagreement amongst famine studies scholars concerning the root causes of famine and how they interact with natural conditions, especially within the realm of situations of food insecurity not rising to the level of a famine emergency. For the purposes of the current inquiry it is sufficient however, to note that there is general agreement amongst famine experts that famines should not be understood as unforeseeable or so-called “natural” disasters, but flow predictably from human activities. For overviews of current famine scholarship, see generally Devereux, *supra* note 304; Ó Gráda, *supra* note 304. Amartya Sen’s oft-referenced “entitlements” approach to famine dynamics is a particularly useful lens through which to examine famine as a subject of legal regimes, as the approach concentrates on the “ability of different sections of the population to establish command over food using the entitlement relations operation in that society depending on its legal, economic, political, and social characteristics.” Sen, *supra* note 305 at 459; see also Alex de Waal, “A Re-assessment of Entitlement Theory in the Light of the Recent Famines in Africa” (1990) 21:3 *Development and Change* 469. De Waal argues that “entitlements themselves form only part of a larger account of famine. Some aspects of a revised account include coping strategies of famine-affected people, social disruption, and violence. In

ICL does not explicitly address famine causation in any meaningful way. While intentionally using starvation of civilians as a method of warfare is a well-established war crime,<sup>308</sup> the specialized nature of war crimes, being limited to periods of armed conflict, along with the required intentional instrumentalization of starvation, render this crime inapplicable to many famine scenarios. Still, in a broader sense, ICL does provide some coverage over aspects of famine causation and from time to time, famine issues have emerged at the periphery of ICL practice. For example, famine and starvation were addressed, albeit in a limited fashion, in the Judgment of the IMT, wherein defendants such as Hermann Göring, Hans Frank and Walther Funk, were convicted of war crimes and crimes against humanity partially for their roles in, *inter alia*, the economic exploitation of occupied territories, which in turn resulted in famine and starvation, particularly in occupied Poland.<sup>309</sup> The IMT found that:

agricultural products, raw materials needed by German factories, machine tools, transportation equipment, other finished products, and even foreign securities and holdings of foreign exchange were all requisitioned and sent to Germany. These resources were requisitioned in a manner out of all proportion to the economic

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this account, less severe famine is not theoretically distinct from acute poverty, and severe famine is distinct largely because of the severity of social collapse”. *Ibid* at 469. De Waal’s critique of Sen’s entitlement theory only serves to further underscore the existence of linkages between law, criminal justice and famine.

<sup>308</sup> For one formulation of this crime, see e.g. *Rome Statute*, *supra* note 63, art 8(2)(b)(xxv).

<sup>309</sup> IMT Judgment, *supra* note 108. The IMT found that “agricultural products, raw materials needed by German factories, machine tools, transportation equipment, other finished products, and even foreign securities and holdings of foreign exchange were all requisitioned and sent to Germany. These resources were requisitioned in a manner out of all proportion to the economic resources of those countries, and resulted in famine, inflation, and an active black market.” *Ibid* at 458. The IMT judgment, however, failed to clearly elucidate precisely how the enforcement of famine conditions on a civilian population interacted with the elements of specific crimes against humanity as for example, the IMT simply found Frank guilty of various crimes against humanity based on his contribution to a variety of methods of abuse and killing utilized by the Nazi Party against Jews and Poles without connecting specific harms to specific crimes against humanity. *Ibid* at 497–499. The *Eichmann* Judgment also discussed starvation conditions as part of the overall Final Solution plan of the Nazis. *Eichmann* Trial Judgment, *supra* note 296. Recent international prosecutions have largely limited analysis of famine/starvation situations to conditions in prisons. See e.g. *Prosecutor v Krnojelac*, IT-97-25-T, Judgement (15 March 2002) para 499 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <<http://www.icty.org/>> [*Krnojelac*, Trial Judgement]. Krnojelac was found liable under the doctrine of superior responsibility for the war crime of cruel treatment as a breach of Common Article 3 of the Geneva Conventions for the living conditions enforced on non-Serb detainees at the Kazneno-Popravni Dom (“KP Dom”) prison where he served as warden. A major aspect of the living conditions that contributed to their rising to the level of cruel treatment as a war crime was the provision of “starvation rations” to non-Serb prisoners. *Ibid*, paras 439-443. Famine conditions were also addressed to some degree, by the IMT. See IMT Judgment, *supra* note 108 at 279–282, 296–301, 304–310.

resources of those countries, and resulted in famine, inflation, and an active black market.<sup>310</sup>

The IMT judgment, however, failed to clearly elucidate precisely how the enforcement of famine conditions on a civilian population interacted with the elements of specific crimes against humanity. For example, the IMT simply found Hans Frank guilty of various crimes against humanity based on his contribution to a variety of methods of abuse and killing utilized by the Nazi Party against Jews and Poles without connecting specific harms to specific crimes against humanity.<sup>311</sup>

A similar analysis led Raphael Lemkin to conclude, in a previously unpublished letter written sometime around 1953, that the Ukrainian *Holodomor* (“extermination by hunger”) famine of 1932-1933,<sup>312</sup> formed a key part of a larger, genocidal “Russification” plan carried out by the Soviet Union in an effort to destroy the Ukrainian national identity.<sup>313</sup> Moreover, the judgment against Adolph Eichmann in Jerusalem also discussed starvation conditions as part of the overall Final Solution plan of the Nazis.<sup>314</sup>

Yet, despite these early engagements with famine as a subject matter of ICL, since the field of ICL stagnated during the Cold War, the notion that the causation of famine and starvation could

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<sup>310</sup> IMT Judgment, *supra* note 108 at 240.

<sup>311</sup> *Ibid* at 296–301.

<sup>312</sup> For a historical account of this famine, see Robert Conquest, *The Harvest of Sorrow: Soviet Collectivization and the Terror-Famine*, reprint ed (New York, NY: Oxford University Press, 1987). A published undergraduate student note argues that this famine is properly conceptualized as involving the commission of both crimes against humanity and genocide, see Renate Stark, “Holodomor, Famine in Ukraine 1932-1933: A Crime against Humanity or Genocide?” (2010) 10:1 *Irish Journal of Applied Social Studies* 2. See also David Marcus, “Famine Crimes in International Law” (2003) 97:2 *American Journal of International Law* 245 at 252–255.

<sup>313</sup> Roman Serbyn & Raphael Lemkin, “Lemkin on Genocide of Nations” (2009) 7:1 *Journal of International Criminal Justice* 123 at 128 (Lemkin’s unpublished essay argued that the “third prong of the Soviet plan” to destroy the Ukrainian nation “was aimed at the farmers, the large mass of independent peasants who are the repository of the tradition, folklore and music, the national language and literature, the national spirit, of Ukraine. The weapon used against this body is perhaps the most terrible of all— starvation. Between 1932 and 1933, 5,000,000 Ukrainians starved to death”. In his analysis, Lemkin describes starvation as a “weapon” wielded by the Soviet Union against Ukrainian peasant farmers, whom Lemkin described as the “repository of the tradition, folklore and music, the national language and literature, the national spirit, of Ukraine.”).

<sup>314</sup> District Court of Jerusalem, *supra* note 299.

form the *actus reus* of certain forms of genocide, crimes against humanity, or war crimes also remained largely undeveloped. As ICL became more codified and viewed as more scrupulously “legal” in nature during the 1990s, prosecutions have largely limited analysis of famine and starvation situations to the more familiar realm of prison and concentration camp conditions.<sup>315</sup>

The issue was taken up again in 2003 by David Marcus, who argues that extant ICL at the time provided only “patch-work” coverage of what he defined as “faminogenic” (i.e. famine-causing) behaviour, in the form of certain crimes against humanity.<sup>316</sup> Marcus called for the codification of new crimes in a famine-specific convention designed to expand ICL liability for faminogenic acts.<sup>317</sup> To date, there has been no appreciable movement towards the adoption of famine-specific international crimes.

Other scholars, myself included, have since also argued that certain famines have involved the commission of established international crimes.<sup>318</sup> Certain of these scholars have approached the

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<sup>315</sup> See e.g. *Krnjelac*, Trial Judgement, *supra* note 309 at para 499; see also Diana Kearney, “Food Deprivations as Crimes against Humanity” (2013) 46:1 NYU Journal of International Law and Politics 207 at 256-257.

<sup>316</sup> Marcus, *supra* note 312 at 247 (Concluding that “[ICL] already criminalizes certain faminogenic conduct, but the legal doctrine that penalizes this behavior resembles the ‘patch-work coverage’ that typifies the customary law of crimes against humanity.”).

<sup>317</sup> *Ibid.* Jlateh Vincent Jappah and Danielle Taana Smith similarly advocate for the codification of “politically induced famine” as a crime against humanity and use the term “state sponsored famine” to “reflect the conceptualization of famine as not merely nature-induced but also as a willfully orchestrated state policy.” Jlateh Vincent Jappah & Danielle Taana Smith, “State Sponsored Famine: Conceptualizing Politically Induced Famine as a Crime against Humanity” (2012) 4:1 Journal of International & Global Studies 17 at 17. Rhoda Howard-Hassmann echoes calls for the codification of new ICL provisions made by Marcus, Jappah and Smith, and similarly proposes the term “state-induced famine” be used in order to “clarify that faminogenesis is often a state activity.” Rhoda E Howard-Hassmann, “State-Induced Famine and Penal Starvation in North Korea” (2012) 7:2-3 Genocide Studies & Prevention 147 at 147; Rhoda E Howard-Hassmann, “Mugabe’s Zimbabwe, 2000-2009: Massive Human Rights Violations and the Failure to Protect” (2010) 32:4 Human Rights Quarterly 898 at 908-909. Howard-Hassmann argues specifically that the “criminal activities that caused malnourishment in Zimbabwe in the 2000s, and might well have caused an actual famine had not the world community stepped in to distribute food, suggest the need for revisions of international law to name this type of crime, pass laws against it, and mandate punishments for it.

<sup>318</sup> Jenny Edkins, “The Criminalization of Mass Starvations: From Natural Disaster to Crime against Humanity” in Stephen Devereux, ed, *The New Famines: Why Famines Persist in an Era of Globalization* (New York, NY: Routledge, 2007) 50 (arguing that the attendant shift in the vocabulary used to discuss famine would bring famine more in line with current understandings of its dynamics by removing the outmoded language of natural disaster that currently predominates popular discourses); see also DeFalco, “Accounting for Famine” *supra* note 233; DeFalco, “Conceptualizing Famine” *supra* note 233.

issue from the perspective of the human right to food,<sup>319</sup> or as part of a larger critique of the scope of transitional justice efforts.<sup>320</sup> Along with these general analyses, scholars have also argued that specific real-world famines should be conceptualized as involving international criminality. Eamon Aloyo, in an article advocating for the prosecution of what he refers to as “nonviolent crimes against humanity” provides the examples of prior famines in the Ukraine, China, Ethiopia and Zimbabwe as examples of the types of famine situations he argues merit such prosecutorial efforts.<sup>321</sup> Sigrun Skogly and others similarly argue that famine conditions in Darfur may rise to the level of the crimes against humanity of other inhumane acts in relation to acts of affirmatively blocking food aid.<sup>322</sup> Several authors, including myself, argue that the

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<sup>319</sup> For example, Larissa van den Herik contends that especially severe violations of the right to food resulting in mass famine and starvation, can potentially satisfy the *actus rei* requirements of genocide and/or the crime against humanity of extermination. Larissa van den Herik, “Economic, Social, and Cultural Rights-International Criminal Law’s Blind Spot?” in Eibe H Riedel, Gilles Giacca & Christophe Golay, eds, *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (New York, NY: Oxford University Press, 2014) 343 at 351 (Concluding that, at the ICC, “mass starvation in a famine could be captured [under ICL] but only if proven that there was a certain deliberateness involved” and noting that the ICC Office of the Prosecutor has included famine issues in its filings related to the situation in Darfur.). Van den Herik generally concludes that although there is “ample opportunity” to include socio-economic and cultural concerns in ICL practice, that the role of ICL in addressing economic, social and cultural rights violations is “rather marginal”, though “not necessarily redundant or inconsequential.” *Ibid* at 366.

<sup>320</sup> See e.g. Amanda Cahill-Ripley, “Foregrounding Socio-Economic Rights in Transitional Justice: Realising Justice for Violations of Economic and Social Rights” (2014) 32:2 *Netherlands Quarterly of Human Rights* 183 at 197–201 (Arguing that ICL practice should pay greater attention to socio-economic rights violations, noting as examples the blocking of food aid in Sudan and famine in Zimbabwe and stating that “[i]t is clear that systematic and large scale abuse of such rights can meet the threshold required to constitute a crime against humanity, war crimes or even genocide.”); Sankey, *supra* note 191 at 132-136. Sankey states that ICL provides some coverage over famine and starvation conditions currently, but argues that this coverage is insufficient because it fails to comprehensively address what she terms “subsistence harms” which includes famine suffering. *Ibid*.

<sup>321</sup> Aloyo, *supra* note 211 at 505-506.

<sup>322</sup> Sigrun I Skogly, “Crimes Against Humanity-Revisited: Is There a Role for Economic and Social Rights?” (2001) 5:1 *International Journal of Human Rights* 58 at 68–71 (concluding at page 71, that regarding the right to food “one could relatively easily establish that when a government or other organisation deliberately and intentionally blocks food aid from reaching people in immediate danger of starvation, this would be an act that would [qualify as a crime against humanity under] the ICC Statute.”). Despite his reservations concerning the practical implications of doing so, Alex de Waal also argues that famine conditions in Darfur should be conceptualized as crimes against humanity. Alex de Waal, “Reflections on the Difficulties of Defining Darfur’s Crisis as Genocide” (2007) 20 *Harvard Human Rights Journal* 25 at 30 (Advocating for the merging of scholarship on Sudan’s civil wars and humanitarian crises and genocide studies and concluding that one implication of such a merger would be, “given the importance of the destruction of livelihoods and obstruction of relief to the Darfur genocide determination, ... a sharper conceptualization of the creation of famine as a crime against humanity.”). De Waal does have reservations concerning the potential practical implications of the international criminalization of famine/starvation. See Alex De Waal, “On Famine Crimes and Tragedies” (2008) 372:9649 *Lancet* 1538.



Khmer Rouge era famine in Cambodia merits ICL scrutiny.<sup>323</sup> Grace Kang and others have made similar arguments in regards to recurring famine conditions in North Korea in recent decades.<sup>324</sup> Conditions in Zimbabwe from 2000-2009<sup>325</sup> and Somalia over the past decade<sup>326</sup> have also been cited as examples of famine situations involving apparent atrocity crimes.

## 2.2.2 Large-Scale Corruption

Large-scale corruption is another issue that has been proposed as a worthy subject of ICL.<sup>327</sup> As with famine-based ICL scholarship, there exists a divide between scholars who see the current lack of accountability for harms flowing from large-scale corruption as a problem of a lack of suitable law versus a problem of enforcement of existing provisions of ICL. Also, as with

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<sup>323</sup> See e.g. J Solomon Bashi, “Prosecuting Starvation in the Extraordinary Chambers in the Courts of Cambodia” (2011) 29:1 Wisconsin International Law Journal 34 (arguing that the ECCC has a “duty” to prosecute the “crime” of “starvation” in the form of crimes against humanity, but remaining skeptical as to the ultimate likelihood that convictions would result). I have similarly argued that if the ECCC is to provide a fulsome accounting of the crimes of the Khmer Rouge in Cambodia, it is imperative that the Court address the issue of famine, and proposed the combination of the crimes against humanity of extermination, persecution and other inhumane acts as a framework for doing so. Unlike Bashi, I view convictions as a likely outcome, if aggressively pursued by the prosecution. See DeFalco, “Accounting for Famine” *supra* note 233 at 144, 158.

<sup>324</sup> Grace M Kang, “A Case for the Prosecution of Kim Jong II for Crimes against Humanity, Genocide, and War Crimes” (2006) 38:1 Columbia Human Rights Law Review 51 at 67 (“The charge of extermination as a crime against humanity for [North Korea’s] policies that have led to mass starvation, for example, would mark new ground for a crime that has occurred repeatedly and will undoubtedly appear again on the international stage.”) citing Marcus, *supra* note 312; see also generally Howard-Hassmann, “State-Induced Famine” *supra* note 317.

<sup>325</sup> Howard-Hassmann, “Mugabe’s Zimbabwe” *supra* note 317 at 906-909.

<sup>326</sup> Jens David Ohlin, “Somalia Famine ‘Crime against Humanity’?”, (12 August 2011), online: *CNN* <<http://www.cnn.com/2011/OPINION/08/12/ohlin.somalia.crimes/index.html>>; Matt Bryden, “Somalia’s Famine is Not Just a Catastrophe, It’s a Crime”, (October 2011), online: *Enough Project* <<http://enoughproject.org/publications/somalia%E2%80%99s-famine-not-just-catastrophe-it%E2%80%99s-crime>>. While these analyses are brief, they do suggest that ICL accountability may be appropriate. For reports on conditions in Somalia during this period, see Wairagala Wakabi, “Health and humanitarian situation worsens in Somalia” (2007) 370:9594 *Lancet* 1201; Gerald Martone & Maureen Shawn Kennedy, “Scenes from Somalia” (2012) 112:12 *American Journal of Nursing* 38.

<sup>327</sup> It should be noted that part of the arguments for the international criminalization of corruption-related issues is based on sources of law outside of ICL itself, such as the United States’ 1977 Corrupt Foreign Practices Act (CFPA), the Organisation for Economic Cooperation and Development’s (OECD) 1990 non-binding Recommendation on Bribery in International Business Transactions and 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. While these steps are significant within the realm of international anti-corruption law, a fulsome analysis of their efficacy and criminal aspects is outside the scope of the current inquiry, which is limited to ICL. For an overview of these alternative international efforts to suppress corruption, see e.g. Bantekas, *supra* note 233 at 468–474.

famine, new issue-specific international crimes, using labels such as “patrimonicide,” “indigenous spoliation” and “political corruption,” have been proposed as methods of explicitly bringing corruption within the purview of ICL.<sup>328</sup> There also exists a general scholarly consensus that corruption is best addressed within the rubric of crimes against humanity.<sup>329</sup>

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<sup>328</sup> See e.g. Kofele-Kale, “Patrimonicide” *supra* note 199 at 57–58. Kofele-Kale argues that “word ‘patrimonicide’ seems appropriate for this new international economic crime [because t]he word comes from combining the Latin words ‘patrimonium,’ meaning ‘[t]he estate or property belonging by ancient right to an institution, corporation, or class; especially the ancient estate or endowment of a church or religious body,’ and ‘cide,’ meaning killing. This term is fitting because indigenous spoliation is the destruction of the sum total of a state’s endowment, the laying waste of the wealth and resources belonging by right to her citizens, and the denial of their heritage.” *Ibid* at 58 (internal citation omitted). Although Kofele-Kale argues that patrimonicide and the related phenomenon of “indigenous spoliation,” should be criminalized, he offers no analysis of whether extant ICL at the time could be used to address these twin phenomena. See *ibid* at 117. Kofele-Kale concludes that “international community ought to take the same position with respect to acts of indigenous spoliation. The spoliator, like the pirate and slave trader before him, should be regarded as *hostis humani generis*, an enemy of mankind.” *Ibid* (internal citations omitted). Elsewhere, Kofele-Kale has argued that “brazen” large-scale thefts from public treasuries “should not even be called corruption, at least as the term is used in treaty law.” Ndiva Kofele-Kale, “The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime Under International Law” (2000) 34:1 International Lawyer 149 at 174. See also Brian C Harms, “Holding Public Officials Accountable in the International Realm: A New Multi-Layered Strategy to Combat Corruption” (2000) 33:1 Cornell International Law Journal 159. Harms appears to call for codification of a new corruption-specific crime against humanity, but does not explicitly state as much. He argues that if “persecution of citizens by misappropriating the resources and wealth of a country can fit within the definition of ‘crimes against humanity,’ then corruption falls within the jurisdiction of the [ICC].” *Ibid*. This language suggests that Harms may believe that corruption-related activities could amount to the crime against humanity of persecution, however, the general thrust of Harms’ argument appears to call for codification, in line with Kofele-Kale. See Harms, *ibid* at 202–209 (Concluding at 209 that the codification of a treaty “criminalizing indigenous despoliation” would be a positive step forward in the global struggle against corruption.). Paul Ocheje also builds on the work of Kofele-Kale, calling for the creation of a new international crime of “political corruption.” Ocheje, *supra* note 199 at 776. Ocheje links what he perceives to be the total lack of coverage within ICL over large-scale corruption as symptomatic of the larger prioritization of civil and political rights over social and economic rights within international law generally. See *ibid* at 779 (“The expansion of the ICC’s jurisdiction to cover political corruption, especially the looting of public funds, will underscore the dangerous implication of this conduct for international peace and security, and eliminate the needless dichotomy which is currently being drawn between civil/political rights on the one hand and social/economic rights on the other.”). Chile Eboe-Osuji, currently a Trial Judge at the ICC, has also added his voice to those arguing that the Rome Statute should be amended to include corruption as a stand-alone crime against humanity. Eboe-Osuji, “Kleptocracy” *supra* note 199. Not all scholars however, view codification as a feasible, or necessary step towards the prosecution of large-scale corrupt acts as international crimes. See e.g. Bloom, *supra* note 199 at 668 (Concluding that the “existing ICC framework already provides a working foundation to prosecute egregious cases of grand corruption.”); Starr, *supra* note 190.

<sup>329</sup> Kofele-Kale, “The Right to a Corruption-Free Society” *supra* note 328 at 173–174. Kofele-Kale identifies what he argues is an emerging norm of customary international law of treating large-scale corruption as criminal in nature, but fails to clearly elucidate whether existing ICL provisions at the time could be used to prosecute specific acts associated with large-scale corruption, instead averring only generally to the *chapeau* requirements for crimes against humanity. *Ibid*. Subsequently, within the context of discussing enforcement issues, Kofele-Kale makes it clear that he advocates for the creation of a new corruption-specific international crime, stating that “problems associated with criminalizing domestic behavior at the international level might lead some to question why the fight against corruption is not being handled at the national level. This concern goes to the question of enforcement. If in

Meanwhile, some commentators address the issue of corruption by theorizing the lack of ICL accountability as a manifestation of a bias in favor of the prosecution of violations of civil and political human rights over economic, social, and cultural rights violations.<sup>330</sup> Sonya Starr argues that ICL is not commonly viewed as capable of addressing “entrenched, longer-term abuses” such as large-scale corruption.<sup>331</sup> While acknowledging that ICL cannot and should not address all forms of petty corruption, Starr argues that “large-scale ransacking of treasuries” causing “extreme poverty and decimated government services, resulting in widespread deaths” may implicate the crime against humanity of other inhumane acts.<sup>332</sup> This sentiment is shared by Ilias Bantekas, who similarly argues that certain corruption scenarios should be prosecuted as crimes against humanity, including that of extermination.<sup>333</sup> Bantekas links corrupt practices to resulting harms and argues that corrupt acts should be understood as a means through which crimes against humanity can be committed, particularly where such acts “culminate[] in famine, disease and lack of medical care that leads to death.”<sup>334</sup>

Issues related to corruption, kleptocratic governance and despoliation and their relation to ICL, have also been taken up within transitional justice scholarship. Again, much of this scholarship forms part of a larger critique concerning the marginalization of economic, social and cultural human rights violations within prevailing transitional justice practices.<sup>335</sup> This scholarship

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fact corruption is given the status of an international crime will there be an effective enforcement of the law against violators or potential violators?” *Ibid* at 174.

<sup>330</sup> Ocheje, *supra* note 199 at 778 (Contending that the “lack of regard for the complementarity of human rights casts an unseemly blight on the otherwise impressive progress of human civilization exemplified by the establishment of the ICC.”).

<sup>331</sup> Starr, *supra* note 190 at 1257.

<sup>332</sup> *Ibid* at 1259.

<sup>333</sup> Bantekas provides the example of a situation wherein a “corrupted government forcibly displace[s] a local community without measures for their subsequent welfare” rendering “access to food and medicine for the civilian population for the next 10 years almost impossible.” Bantekas, *supra* note 233 at 474.

<sup>334</sup> Bantekas, *supra* note 233 at 484. Unlike Starr however, Bantekas focuses primarily on the crime against humanity of extermination in his legal analysis. Bantekas, *supra* note 233 at 474–475; cf Starr, *supra* note 190 at 1259.

<sup>335</sup> For example, Ruben Carranza argues that the “prevailing assumption” within transitional justice is that the discipline is meant to “engage mainly, if not exclusively, with civil and political rights violations that involve either physical integrity or personal freedom, and not with violations of economic and social rights, including such crimes

highlights the centrality of socio-economic rights issues to the lives of those most affected by gross human rights violations and often views this importance as incongruous with the current dearth of attention paid to these issues within prevailing paradigms of international justice-seeking.<sup>336</sup> Often, the turn to ICL as the primary mechanism through which transitional justice is

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as large-scale corruption and despoliation.” Ruben Carranza, “Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?” (2008) 2:3 *International Journal of Transitional Justice* 310. Carranza further argues that transitional justice, as a field, “compartmentalizes the unresolved legacies faced by transitioning societies, particularly in developing countries. It constructs one compartment for human rights violations and another for economic crimes and corruption. Economic crimes thus are treated as if they do not constitute rights violations in themselves. Not only does this compartmentalization oversimplify the relationship between those unredressed legacies but it also does not reflect the reality of the societies that seek to address them.” *Ibid* at 314–315. In a similar vein, see Evelyne Schmid & Aoife Nolan, “‘Do No Harm’? Exploring the Scope of Economic and Social Rights in Transitional Justice” (2014) 8:3 *International Journal of Transitional Justice* 362; Louise Arbour, “Economic and Social Justice for Societies in Transition” (2007) 40:1 *NYU Journal of International Law & Politics* 1.

<sup>336</sup> For example, Dustin Sharp argues that despite a recent groundswell of support for the creation of transitional justice mechanisms in post-conflict societies, the proper role of transitional justice in addressing “economic violence” is “far less certain.” Dustin Sharp, “Addressing Economic Violence in Times of Transition: Toward a Positive-Peace Paradigm for Transitional Justice” (2011) 35:3 *Fordham International Law Journal* 780 at 792. Sharp defines “economic violence” as encompassing “violations of economic and social rights, corruption, and plunder of natural resources.” *Ibid*. Sharp further observes that “historically, economic violence and economic justice have sat at the periphery of transitional justice work” and to the extent that these concerns have been addressed within transitional justice practice, they have “been treated as little more than useful context in which to understand the perpetration of physical violence.” *Ibid*. The concept of “positive peace” used by Sharp is drawn from the work of Johan Galtung. *Ibid* at 782 n 10, citing Johan Galtung, “Violence, Peace and Peace Research” (1969) 6:3 *Journal of Peace Research* 167. According to Galtung, the term “positive peace” refers to the absence of both direct and indirect violence, including various forms of “structural violence” such as poverty, hunger, and other forms of social injustice. In contrast, the term “negative peace” refers solely to the absence of direct physical violence. *Ibid*. Sharp defines economic violence relationally to physical violence as follows:

The terms ‘physical violence’ and ‘economic violence’ are used as shorthand to refer to a range of phenomena [in Sharp’s article]. ‘Physical violence’ refers to murder, rape, torture, disappearances, and other classic violations of civil and political rights. In contrast, ‘economic violence’ refers to violations of economic and social rights, corruption, and plunder of natural resources. While the violence that characterizes ‘physical violence’ is often direct, ‘economic violence’ is typically more indirect. Both terms are clearly oversimplifications. For example, not all violations of civil and political rights involve direct physical violence, and many violations of economic and social rights—hunger and starvation, for example—are arguably a form of physical violence. While most of the ‘physical violence’ discussed in this Article constitutes a violation of civil and political rights under international law, the concept of ‘economic violence’ includes, but is broader than, violations of economic and social rights under international law. Sharp, “Addressing Economic Violence” *supra* note 336 at 785.

While Sharp does not go so far as to argue that transitional justice be merged with longer-term development projects, he advocates movement towards a more peace positive conceptualization of transitional justice, involving a “nuanced, contextualized, and balanced approach to a wider range of justice issues faced by societies in transition.” *Ibid* at 784. Other scholars, such as Zinaida Miller have echoed the arguments of Carranza and Sharp concerning the need to foreground economic and social issues that are often intimately

pursued is blamed as a driving force behind the neglect of corruption, reflecting the dominant social perception that ICL simply is not meant to address socio-economic issues.

### 2.2.3 Aid Interference

As with both famine and corruption, a small, but lively scholarly discourse has emerged concerning potential intersections between ICL and the interference with, or outright denial of humanitarian aid during periods of acute need.<sup>337</sup> As with starvation, there is a war crime that explicitly predicated on protecting humanitarian aid workers and infrastructure.<sup>338</sup> As is also the case with famine, the specificity of this crime and war crimes in general, render its utility limited. Outside of the context of direct attacks on aid workers and infrastructure, which must be committed during recognized periods of armed conflict, ICL coverage becomes much murkier regarding actions that deny, delay or redirect aid.

Part of the challenge in protecting the flow of humanitarian aid through ICL is one of definition, as aid interference can take many different forms, ranging from flat-out denial, to more subtle methods, such as misappropriation or redirection. For example, Christa Rottensteiner defines the denial of humanitarian assistance as “a situation where, as a result of the intentional Behaviour of certain persons, humanitarian assistance does not reach its intended beneficiaries.”<sup>339</sup> The results of such actions however, remain predictable, involving the deterioration of living conditions, leading to the spread of famine, disease and in turn, death and like other scholars such as Sonja Starr within the context of corruption, Rottensteiner connects acts that block or redirect aid with

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associated with corruption, within transitional justice efforts. Miller, *supra* note 229. See also e.g. Cahill-Ripley, *supra* note 320.

<sup>337</sup> “Humanitarian aid” can be a very broad term, encompassing both emergency life-saving undertakings and longer-term development projects. Within this thesis, the term is used to refer solely to the former category of aid, where urgent action is needed to avert imminent large-scale suffering and/or excess deaths. For a discussion of the wide variety of forms that humanitarian aid may take, see Josh Scheinert, “Refusal to Save Lives: A Perspective from International Criminal Law” (2013) 13:3 International Criminal Law Review 627 at 629–630.

<sup>338</sup> It is a war crime to intentionally direct attacks against personnel, installations, material, units or vehicles involved in humanitarian assistance efforts during both international and non-international armed conflicts. See e.g. *Rome Statute*, *supra* note 63, arts 8(2)(b)(iii), 8(2)(e)(iii).

<sup>339</sup> Christa Rottensteiner, “The Denial of Humanitarian Assistance as a Crime under International Law” (1999) 81:835 International Review of the Red Cross 555 at 559.

their eventual outcomes, including the spread of disease and extreme poverty.<sup>340</sup> This pattern, of aid interference followed by the spread of hunger, disease and the like has played out in real-world situations, such as the aftermath of Cyclone Nargis in Burma,<sup>341</sup> South Africa's refusal to accept prenatal HIV/AIDS drugs,<sup>342</sup> and the Mugabe government's restrictions on and manipulation of aid to Zimbabwe in the 2000s.<sup>343</sup>

Due to the narrow specificity of the war crime of directing attacks against humanitarian targets and the often widespread or systematic nature of mass harm causing aid interference, scholars have focused predominantly on crimes against humanity as a potential entry point for the pursuit of ICL accountability predicated on interference with aid. For example, Stuart Ford has argued that certain acts by the Burmese junta government during the immediate aftermath of Cyclone Nargis, including the outright rejection of aid offers, diversion of aid from its intended beneficiaries and the forcible eviction of civilians from aid camps may have amounted to crimes against humanity.<sup>344</sup> Although he refrains from forecasting the ultimate guilt of junta leaders, Ford does conclude that available evidence “gives rise to a reasonable belief that the underlying criminal acts of a crime against humanity, including murder, extermination and inhumane acts, were occurring” in Burma in the aftermath of Nargis' landfall.<sup>345</sup>

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<sup>340</sup> See generally *ibid*; cf Starr, *supra* note 190.

<sup>341</sup> See generally Ford, *supra* note 156; Scheinert, *supra* note 337; J Benton Heath, “Disasters, Relief, and Neglect: The Duty to Accept Humanitarian Assistance and the Work of the International Law Commission” (2010) 43:2 NYU Journal of International Law & Policy 419.

<sup>342</sup> Scheinert, *supra* note 337.

<sup>343</sup> Howard-Hassmann, “Mugabe's Zimbabwe” *supra* note 317 (Arguing that the Mugabe government committed the crime against humanity of other inhumane acts during the 2000s in Zimbabwe by inducing famine conditions through, *inter alia*, blocking and manipulating humanitarian assistance efforts, by refusing to accept certain sources of aid and manipulating the delivery of aid in order to prevent it from being distributed in areas perceived to be political opposition strongholds.); see also John D Kraemer, Dhruvajyoti Bhattacharya & Lawrence O Gostin, “Blocking Humanitarian Assistance: A Crime against Humanity?” (2008) 372:9645 Lancet 1203 (Arguing that acts that block humanitarian aid, including those actions by Mugabe where he “cut off international assistance, apparently to manipulate an election but leaving millions without food aid or medical care” often rise to the level of crimes against humanity generally and should be understood as such.).

<sup>344</sup> Ford, *supra* note 156.

<sup>345</sup> *Ibid* at 255. Ford consequently concludes that it appears that the crimes against humanity of murder, extermination and other inhumane acts appear to have occurred in aftermath of Cyclone Nargis in Burma. *Ibid* at 261. This conclusion is based on interpretations of crimes against humanity that Ford persuasively argues fall “well

Other scholars have made similar arguments in relation to both post-Nargis Burma and other locations, such as South Africa, but unlike Ford, have focused their analyses exclusively on the crime against humanity of other inhumane acts.<sup>346</sup> Eric Reeves makes similar arguments in relation to conditions in the Sudan over the past two decades, during which time he argues that the Sudanese government, under the leadership of President Omar al-Bashir has “deliberately and systematically denied, obstructed, destroyed, or attacked humanitarian facilities and personnel.”<sup>347</sup> Reeves outlines the various ways in which the government interfered or

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within” prevailing ICL jurisprudence. *Ibid* at 274. Ford concludes that as a result, crimes against humanity could be “seamlessly applied to a government's failure to respond appropriately to a natural disaster.” *Ibid*.

<sup>346</sup> For example, Josh Scheinert argues that the South African government’s refusal to accept prenatal HIV/AIDS drugs and the behavior of the Burmese junta leadership in the aftermath of Cyclone Nargis should be conceptualized as crimes against humanity. Scheinert, *supra* note 337. Scheinert defines humanitarian aid as “aid that on an objective standard stands to mitigate critical threats to the physical life of an individual or group.” *Ibid* at 630. Scheinert broadly agrees with Ford that the challenge of bringing such scenarios within the purview of ICL is “more conceptual than actual” and argues that the lack of attention to date is due to the fact that the relevant circumstances “bear little or no resemblance to what one associates with ICL.” *Ibid* at 629. Scheinert departs from Ford’s analysis however, by concluding that solely the crime against humanity of other inhumane acts is applicable to the South African and Burmese scenarios and that other crimes against humanity could not be pursued in relation to the aftermath of Cyclone Nargis. *Ibid* at 629, 663. Scheinert concludes that “the most cogent arguments can be put forward when positing that rejection of humanitarian aid qualifies as the [crime against humanity] of other inhumane acts.” See also *Ibid* at 663. “It must also be noted that although this article has been unable to fit the cases surveyed into other forms of [crimes against humanity], namely murder, extermination, and persecution, if facts permit the missing elements to be met in others instances, the rejection of humanitarian aid may also take other forms of [crimes against humanity].” This disagreement turns largely on the authors’ varying interpretations of fine line *mens rea* distinctions between motive, intent and knowledge within the Rome Statute and in ICL more generally. See Scheinert, *supra* note 337 at 652–653 (“What makes an accusation of the [crimes against humanity] of extermination unwise in these case studies is the assertion that infliction of conditions of life was calculated to bring about a group’s destruction” as “it is the contention of this article that barring explicit evidence, one should be weary of making an assertion that, notwithstanding the crime’s engagement with the concept of humanitarian aid, an individual was denied such food and medicine in order to destroy part of a population. The facts do not support such a contention. There is no evidence whatsoever to indicate that Mbeki and the military junta rejected their respective offers of humanitarian aid because they sought the destruction of the affected segments of their populations. As such, it is unnecessary to examine whether Mbeki and the military junta possessed the requisite *mens rea* to commit the underlying act of extermination.”); but cf Ford, *supra* note 156 at 241–242, 246–247 (Concluding at 246-247 that “[t]he discussion of murder as a crime against humanity has already established that there was reason to believe that people were dying as a result of the acts or omissions of the Myanmar government and that those acts or omissions were intentional. The only additional element necessary for there to be extermination is that the deaths occurred on a massive scale.”). Eamon Aloyo also mentions the aftermath of Cyclone Nargis in Burma as one example of a situation likely involving the commission of nonviolent crimes against humanity and argues that the ICC Office of the Prosecutor should investigate key junta leaders for contributing to “actions that anyone could have predicted would lead to avoidable severe harms.” Aloyo, *supra* note 211 at 506. Like Scheinert, Aloyo argues solely for the prosecution of the crime against humanity of other inhumane acts.

<sup>347</sup> Eric Reeves, “Humanitarian Obstruction as a Crime Against Humanity: The Example of Sudan” (2011) 54:3 *African Studies Review* 165 at 172.

manipulated aid efforts during this period<sup>348</sup> and argues that its military operations and denial of humanitarian assistance have moved in “perfect concert in a campaign of destruction that clearly targeted ethnic groups, although the two parts of the war were rarely connected as mutually reinforcing crimes against humanity.”<sup>349</sup>

Rhoda Howard-Hassmann makes similar arguments concerning the potential ICL culpability of President Robert Mugabe in relation to aid manipulation in Zimbabwe from 2000-2009.<sup>350</sup> More specifically, Howard-Hassmann notes that in the midst of a burgeoning famine, while the world “called on Mugabe to allow humanitarian agencies access to all of Zimbabwe, he continued to block distribution of food to those who he thought supported the opposition.”<sup>351</sup> It is these and other similar policies enacted and enforced by Mugabe and his inner circle, which Howard-Hassmann argues satisfies the *actus reus* requirement for the crime against humanity of other inhumane acts.<sup>352</sup>

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<sup>348</sup> *Ibid* at 169, summarizing as follows:

The means of obstruction include the denial of visas and travel permits for humanitarian personnel; denial of humanitarian access to key areas for reasons unrelated to security; the halting of essential humanitarian supplies in Port Sudan; the gratuitous and incompetent testing of medical supplies; refusal to accept food deliveries on spurious grounds; the limiting of the transport capacity from Port Sudan and Khartoum to Darfur; contrived insecurity to prevent the movement of humanitarian personnel; arrests of humanitarian personnel as well as beatings and other threats; confiscation of humanitarian assets; and most dramatically, the expulsion from Darfur of thirteen international NGOs and humanitarian organizations, including two national sections of Doctors Without Borders/Médecins Sans Frontières (MSF) in March 2009.

<sup>349</sup> *Ibid* at 170. Although Reeves fails to go into specifics regarding how acts by Sudanese leaders that have interfered with the delivery of much-needed humanitarian aid can and/or should be legally characterized as crimes against humanity. Nonetheless, Reeves concludes by arguing that given the “reality of these massive crimes” and “the gradual international acceptance of this ruthless cabal of men concerned only with maintaining their monopoly on wealth and power suggests just how far we remain from the ideal of international justice.” *Ibid* at 173.

<sup>350</sup> Howard-Hassmann, “Mugabe’s Zimbabwe” *supra* note 317 at 898.

<sup>351</sup> *Ibid* at 902.

<sup>352</sup> *Ibid* at 909.



## 2.2.4 Economic, Social, and Cultural Human Rights Violations

Scholars have also organized critiques of the boundaries of ICL practice by examining such questions through the lens of economic, social and, cultural, human rights.<sup>353</sup> Although certain ICL provisions explicitly reference economic and social rights issues, such as the right to food and the right to healthcare, the notion that, in terms of human rights violations, ICL solely overlaps with violations of certain civil and political rights, persists.<sup>354</sup> This assumption is powerfully challenged by Evelyne Schmid in her recent book on the relationship between economic, social, and cultural rights and ICL.<sup>355</sup> In the book, Schmid concludes that “many types of abusive conduct depriving people of their rights to health, water, education, participation in cultural life, food or other [economic, social and cultural rights] are properly considered to be within the ambit of ICL.”<sup>356</sup> Other scholars have reached similar conclusions, and a general consensus is discernable from the literature that there are significant areas of legal overlap between particularly egregious forms of economic, social and cultural rights violations and extant ICL.<sup>357</sup>

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<sup>353</sup> Van den Herik, “Economic, Social, and Cultural Rights” *supra* note 319; Schmid, *Taking Economic, Social and Cultural Rights Seriously*, *supra* note 51. This body of scholarship is closely related to the much broader ongoing debate concerning the justiciability of economic, social and cultural rights within human rights law itself. A discussion of the justiciability of economic, social and cultural rights generally is outside the scope of this thesis. For a discussion of this issue and its relation to transitional justice work, see e.g. Arbour, *supra* note 335 at 10–14; Schmid & Nolan, *supra* note 335.

<sup>354</sup> See e.g. *Rome Statute*, *supra* note 63, art 7(2)(b) (defining the crime against humanity of extermination as “include[ing] the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population”) (emphasis added). For an in-depth critique of this lack of engagement, see Schmid, *Taking Economic, Social and Cultural Rights Seriously*, *supra* note 51.

<sup>355</sup> Schmid, *Taking Economic, Social and Cultural Rights Seriously*, *supra* note 51.

<sup>356</sup> *Ibid* at 312.

<sup>357</sup> For example, Evelyne Schmid identifies a “considerable area of overlap” between certain economic, social and cultural rights violations and the elements of certain war crimes, concluding that although “how abuses should be prioritised in a post-conflict context is a difficult question”, there are “no legal reasons to conclude *a priori* that [economic, social and cultural rights] violations should not or cannot be addressed by attempts to deal with a legacy of war crimes.” Schmid, “War Crimes” *supra* note 277 at 540–541. Schmid makes similar arguments more generally in relation to economic, social and cultural rights violations and ICL. See Schmid, *Taking Economic, Social and Cultural Rights Seriously*, *supra* note 51 at 311–336. Similarly, Sigrun Skogly argues that certain situations involving economic, social and cultural rights violations, such as “deliberate starvation” or forced evictions, could qualify as crimes against humanity. Skogly, *supra* note 321. Skogly specifically mentions interference with food aid in the Sudan and forced evictions in Kosovo as examples of the types of acts that could be both conceptualized as involving mass economic, social and cultural rights violations and the commission of international crimes. *Ibid* at

Within actual ICL practice however, economic, social and cultural rights violations and socio-economic questions more generally, tend to be addressed solely as they relate, as causes or consequences of, more traditional atrocity crimes involving civil and political rights violations.<sup>358</sup> This process of foregrounding civil and political rights and backgrounding economic and social ones has also been critiqued by a number transitional justice and ICL experts, such as Louise Arbour.<sup>359</sup> Many such scholars view this tendency to foreground civil

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59. Like many other scholars, Skogly identifies the crime against humanity of other inhumane acts as the most suitable ICL entry point. *Ibid* at 70 (concluding that the crime against humanity of other inhumane acts is the “relevant provision” of the Rome Statute concerning potential prosecutions of violations of economic, social and cultural rights). Skogly does later reference the crime against humanity of rape or other sexual offences as an example of a provision that could come into play in relation to the right to health. *Ibid* at 72. Skogly subsequently states that in determining what economic, social and cultural rights violations may rise to the level of a crime against humanity, “the important issue is the outcome, and the establishment of whether acts amount to ‘other inhumane acts of similar character intentionally causing great suffering or serious injury to body or to mental or physical health’”. *Ibid* at 73. Skogly concludes that limiting crimes against humanity to physical integrity rights is an “arbitrary limitation that should be challenged.” *Ibid* at 74. Larissa van den Herik adopts a similar approach to Skogly, arguing that there is “ample opportunity to include socio-economic and cultural concerns in mainstream criminal justice modalities.” Van den Herik, “Economic, Social, and Cultural Rights” *supra* note 319 at 365. Van den Herik highlights the crimes against humanity of persecution and other inhumane acts as suitable entry points for doing so, thus generally agreeing with Skogly concerning the importance of other inhumane acts, but going beyond this single-crime approach. *Ibid* at 352 (“In particular the broad crime definitions of persecution and other inhumane acts as crimes against humanity offered some leeway to import socio-economic human rights notions.”). For van den Herik, the proper role of ICL in addressing economic, social and cultural rights violations is “rather marginal, but not necessarily redundant or inconsequential” in that international prosecutions can help increase the visibility of such violations and thereby “reduce the overall blind spot on socio-economic abuses” by fostering a “more encompassing conflict discourse.” *Ibid* at 366.

<sup>358</sup> For example, at Nuremberg, the IMT considered not only the Final Plan to exterminate all Jews from Europe as involving various international crimes, but also held that the conditions in places such as the Warsaw Ghetto, prior to the commencement of the Nazi Final Plan, resulting in famine, spread of disease, overcrowding and excess deaths, to involve international criminal acts by certain Nazi figures. See generally IMT Judgment, *supra* note 108; see also Fein, “Genocide by Attrition” *supra* note 211; Rosenberg, “Genocide Is a Process” *supra* note 192. Meanwhile, Mark Drumbl has observed that “[b]y and large, the reach of international criminal law is limited to serious violations of core civil and political rights. Therefore, notwithstanding certain exceptions where violations of social, economic, and environmental rights have become implicated, the focus of judicialization efforts remains limited to core civil and political rights.” Mark A Drumbl, “Accountability for Property Crimes and Environmental War Crimes: Prosecution, Litigation, and Development” (2009) International Center for Transitional Justice, online: <<http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1202&context=wluofac>> at 4. Drumbl further states that while there is “much to celebrate in the enforcement of international criminal law; there also is much to critique and improve upon. Part of the improvement project involves recognizing that criminal prosecutions and civil litigation concerning violations of core civil and political rights offer only a *partial print of justice*. Ever since the divide effected in international human rights law in the 1960s, economic, social, cultural, and environmental rights have mixed quite uneasily with third-party criminal or civil enforcement strategies.” *Ibid*. (emphasis in original).

<sup>359</sup> See e.g. Arbour, *supra* note 335; Cahill-Ripley, *supra* note 320.

and political rights within ICL as reflective of the broader systemic prioritization of civil and political rights within human rights and global justice discourses.<sup>360</sup>

## Conclusion

Atrocities—situations involving the culpable production of mass suffering and death—are complex phenomena that involve numerous actors at various levels and unfold dynamically over significant expanses of time and space. Such phenomena can, and regularly do, involve a wide variety of processes of harm production that cumulatively produce suffering and death on a large scale. Many such processes, particularly those such as the creation of famine, corruption, aid interference, or the cumulative effect of various economic, social, and cultural rights violations, produce harm attritively over time through the manipulation of socio-economic conditions. These and other processes of harm causation may, depending on the circumstances, amount to the commission of genocide, various crimes against humanity and/or war crimes. Despite this fact, these and other similar forms of harm causation tend to be conceptualized as being outside the purview of ICL.

This exclusion can be both explained by, and serve as evidence of, the fact that visibility politics play a major role in shaping shared understandings of atrocity and international crime. Harms brought about attritively through complex, socio-economic means tend not to produce spectacles of violence and abuse. Nor do such means resemble familiar, domestic forms of crime and criminality, as individuals and domestic criminal organizations tend to lack the necessary power and influence to directly cause serious harm through such means.

Consequently, rather than being viewed as integral aspects of atrocity processes, harms produced through unorthodox means such as famine or socio-economic oppression, tend to be conceptualized as non-criminal in nature. Such means tend to be viewed as tragic, yet non-

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<sup>360</sup> See e.g. Arbour, *supra* note 335 at 4-9; see also Benjamin Authers & Hilary Charlesworth, “The Crisis and the Quotidian in International Human Rights Law” (2013) 44 *Netherlands Yearbook of International Law* 19 (arguing that failure to engage with everyday structural socio-economic injustices impoverishes international human rights law). However, cf Kenneth Roth, “Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization” (2004) 26:1 *Human Rights Quarterly* 63 (arguing that the process of “naming and shaming” that is central to current human rights work renders it more difficult to achieve results in relation to economic, social and cultural rights violations, which typically arise from complex relationships and thus lack individuals who can be named and shamed).

criminal phenomena, rather than pathways through which atrocity crimes can, and regularly are, committed. Corruption is viewed as potentially criminal, but as a form of theft, or political misappropriation, rather than a means through which vulnerable populations may be actively denied access to resources necessary to maintain their basic, day-to-day subsistence. Similarly, economic, social, and cultural human rights violations are viewed as less serious, less justiciable, and hence, somehow less “legal” than civil and political rights violations. The visibility politics of ICL continually operate in the background, unacknowledged and obscured by the selectivity and general politicization of ICL itself, to maintain these assumptions.

## Chapter 4 – Unspectacular, Unfamiliar Atrocities: Cambodia and Beyond

### Introduction

Thus far, this thesis has argued that ICL represents an environment conducive to the operation of visibility politics, and that such politics in turn, shape social learning processes and norm development in relation to understandings of atrocity as the subject matter of ICL. These visibility politics have contributed to the creation and maintenance of a widely shared understanding of atrocity crimes grounded in a particular aesthetic model of atrocities as familiar spectacles of violence and abuse. In the previous chapter, I sought to demonstrate that this atrocity aesthetic misrepresents both the complex empirical realities of atrocity situations, and ICL's ability to account for such complexity.

This chapter seeks to ground and give greater clarity to these arguments by providing examples of real world atrocity processes that have likely involved the commission of genocide, crimes against humanity or war crimes, yet have failed to conform to the atrocity aesthetic. I provide one in-depth case study, followed by briefer overviews of examples of a host of other such situations. I first provide a relatively detailed overview of how the Khmer Rouge regime, from April 1975 to January 1979, brought about mass suffering and death through various means, many of which failed to conform to the atrocity aesthetic. I then discuss the work of the ECCC thus far, which I argue, has focused its energies disproportionately on atrocities committed through familiar, spectacular means. I argue that this narrow focus demonstrates how visibility politics within the realm of ICL operate to mischaracterize suffering and death attributable to unfamiliar and/or unspectacular causes such as famine, overwork, and denial of medical care, by presenting them as causes or collateral consequences of atrocity crimes, rather than means through which such crimes may themselves be committed. I then buttress this argument by providing a host of additional examples of real world situations, both historical and contemporary, involving unfamiliar and/or unspectacular atrocity processes and demonstrating how such situations fit awkwardly within prevailing shared understandings of the subject matter of ICL.

# 1 Khmer Rouge-era Cambodia

## 1.1 Processes of Atrocity and Mass Killing under the Khmer Rouge

On April 17, 1975, following a bitter five-year civil war, the Khmer Rouge swept into power in Cambodia.<sup>361</sup> The regime proceeded to set about radically altering the structure of Cambodian society, brutalizing the civilian population in the process. This brutality took many forms, ranging from familiar manifestations of atrocity, such as mass imprisonment, torture, and executions, to an array of oppressive policies that combined to produce mass trauma and death over time.<sup>362</sup> These policies dictated each aspect of the daily lives of civilians and were backed up by the ever-present threat of extreme physical violence. When the regime was ultimately ousted by invading Vietnamese forces in January 1979, somewhere between 1.2 and 2.8 million Cambodians had perished over a period spanning approximately three years and eight months.<sup>363</sup>

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<sup>361</sup> For a basic overview of this history, see Khamboly Dy, *A History of Democratic Kampuchea 1975 -1979* (Phnom Penh: Documentation Center of Cambodia, 2007).

<sup>362</sup> The term “trauma” is subject to a wide array of understandings, ranging from physical traumas, to psychological traumas. The severity of harm being referred to also varies widely. Throughout this thesis, “trauma” is used to refer solely to experiences involving suffering that rising to the level of being “inhumane” according to international criminal law, by involving “great suffering, or serious injury to body or to mental or physical health.” See generally *Prosecutor v Lukić & Lukić*, 98-32/1-T, Judgement (20 July 2009) para 960 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <<http://www.icty.org/>> (stating that to rise to the level of an inhumane act under international criminal law, an “act or omission must have caused serious mental or physical suffering or injury or constituted a serious attack on human dignity.”). For historical overviews of the Khmer Rouge period, see e.g. David Chandler, *A History of Cambodia*, 4th ed (Boulder, CO: Westview Press, 2008); Elizabeth Becker, *When the War was Over: Cambodia and the Khmer Rouge Revolution* (New York, NY: Public Affairs, 1998); Ben Kiernan, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-79*, 3d ed (New Haven, CT: Yale University Press, 2008). Elsewhere, I have argued that the famine Cambodians endured during the Khmer Rouge period was a direct result of these policies, and appears to have involved the commission of crimes against humanity by senior Khmer Rouge leaders. See DeFalco, *Justice and Starvation in Cambodia*, *supra* note 270; DeFalco, “Accounting for Famine” *supra* note 233.

<sup>363</sup> The aggregate death toll (or in technical terms, the aggregate number of “excess” deaths) of the Khmer Rouge era is subject to a wide range of estimates, attributable to a dearth of reliable statistical figures and exacerbated by strong political and ideological forces at work. In 2009, demographers appointed by the Co-Investigating Judges at the ECCC surveyed available death toll estimates and concluded the “most likely” death toll to be between 1.747 and 2.2 million victims. Ewa Tabeau & Kheam They, *Khmer Rouge Victims in Cambodia, April 1975 - January 1979: A Critical Assessment of Major Estimates* (Office of the Co-Investigating Judges, Extraordinary Chambers in the Courts of Cambodia, 2009) at 70. More recently, Patrick Heuveline, using computer simulations estimated that there is a 95 percent certainty that the death toll fell somewhere between 1.2 and 2.8 million, with a nearly 70 percent chance that the death toll was between 1.5 and 2.25 million victims. Patrick Heuveline, “The Boundaries of

Roughly half of this massive death toll can be attributed to the regime's oppressive social and economic policies.<sup>364</sup> These deaths were caused, for the most part, attritively over time, through some mix of famine, disease, denial of basic medical care, and overwork.<sup>365</sup>

These basic facts—of endemic trauma and death, brought about through a mix of shocking violence, and the enforcement of extremely harsh living conditions, encapsulate the Khmer Rouge experience in Cambodia. When one delves into this history beyond the surface, to determine with more precision how the Khmer Rouge brought about such devastation, and who might be responsible, morally or legally, the mutually reinforcing nature of the various modalities of oppression and harm causation enforced on the civilian population by the regime become even more apparent. During the reign of the Khmer Rouge, policy edicts emanated from the regime's "Party Center," made up of its Standing and Central Committees, themselves dominated by Pol Pot and a select group of close confidants and advisors.<sup>366</sup> These top Khmer Rouge leaders engaged in violent internal purges of party ranks repeatedly throughout their relatively short time in power.<sup>367</sup> Any Khmer Rouge official whose loyalty to the Party Center came to be questioned, or whose local power was derived from loyalties independent of the Party

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Genocide: Quantifying the Uncertainty of the Death Toll during the Pol Pot Regime in Cambodia (1975–79)" (2015) 69:2 Population Studies 201.

<sup>364</sup> See Tabeau & They, *supra* note 363 at 70. Heuveline similarly estimates that there is a 95 percent likelihood that 728,000 to 1.455 deaths were caused through the commission of violence, narrowly defined. Heuveline, *supra* note 363 at 214. Based on his estimate of 1.2 to 2.8 million aggregate deaths in the same likelihood range, this would result in a non-violent death toll of between 472,000 and 1.345 million victims. Heuveline refers to "policies of population displacement, forced labor, and restricting the availability of food and medicines" as "non-violent" sources of mortality under the Khmer Rouge. *Ibid* at 202.

<sup>365</sup> Heuveline, *supra* note 363 at 202. For more information on these causes of death see generally James A Tyner & Stian Rice, "To Live and Let Die: Food, Famine, and Administrative Violence in Democratic Kampuchea, 1975–1979" (2015) 48 Political Geography 1; James A Tyner, "Dead Labor, Landscapes, and Mass Graves: Administrative Violence during the Cambodian Genocide" (2014) 52 Geoforum 70.

<sup>366</sup> The term "Party Center" is used by Ben Kiernan to refer "members of the Standing Committee of the Central Committee with national responsibility, not specifically responsible for a regional area such as one of the Zones of the country." Kiernan, *supra* note 362 at 93 n 7. For the purposes of the present inquiry, the term is used to generally refer to the highest echelons of the Khmer Rouge leadership apparatus. For an overview of the Khmer Rouge command and communication structures, see *Case 002/01 Trial Judgement*, *supra* note 109 at paras 199-302.

<sup>367</sup> For detailed analyses of the Khmer Rouge's internal purges, see Kiernan, *supra* note 362 at 59–96, 313–356, 368–376 and 411–427; see also DeFalco, *Justice and Starvation in Cambodia*, *supra* note 270 at 52–62; Alexander Laban Hinton, *Why Did They Kill? Cambodia in the Shadow of Genocide* (Berkeley, CA: University of California Press, 2005) at 96–169.

Center's patronage network, was subject to increased suspicion and a prime candidate to be purged.<sup>368</sup> Against this backdrop of suspicion and the ever-present threat of execution, the Party Center set about to radically overhaul Cambodian society on a remarkably aggressive timetable, despite taking over a nation devastated by five years of civil war.<sup>369</sup>

The policy edicts of the Party Center created nationwide living conditions that soon began to produce mass suffering and death. The regime first closed Cambodia's borders and expelled all foreigners and foreign organizations, resulting in an immediate cessation of all humanitarian aid work in the country.<sup>370</sup> The government also forcibly evacuated Cambodia's cities, most notably the capital, Phnom Penh, dispersing the civilian population throughout the countryside according to where the Party Center deemed human labor to be in short supply.<sup>371</sup> The conditions of these transfers were harsh. Most evacuees had to travel vast distances on foot and without proper provisions, resulting in food shortages and diseases weakening the population and causing many deaths along the way.<sup>372</sup>

On arrival at their assigned destination, evacuees were put to hard, forced labor, primarily in rice fields or at construction sites, where bridges, dams and other infrastructure projects were built

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<sup>368</sup> The Khmer Rouge itself was an amalgamation of various revolutionary movements, and many mid- and senior-level Khmer Rouge officials and military leaders had preexisting loyalty and patronage networks outside of their status within the Khmer Rouge movement itself. These leaders, such as Ros Nhim and Sao Phim, tended to be the targets of internal purges during the Khmer Rouge period. For an overview of such purges, see generally Kiernan, *supra* note 362. For an analysis of Cambodian patronage networks and the role they played in mass killing, including internal purges, under the Khmer Rouge, see Hinton, *Why Did They Kill?* *supra* note 367 at 96–169.

<sup>369</sup> For an overview of the Khmer Rouge's plans to overhaul Cambodian society, see generally, DeFalco, *Justice and Starvation in Cambodia*, *supra* note 270 at 27–45.

<sup>370</sup> For an overview of the expulsion of all foreigners from Cambodia after the Khmer Rouge seized power, see generally Kiernan, *supra* note 362 at 39–44.

<sup>371</sup> For example, in 1976, 500,000 to 800,000 Cambodian civilians were sent to the country's Northwest Zone, where the Party Center deemed that additional labor forces were needed to achieve rice production quotas, which were especially high in the area. The areas these evacuees were sent to utterly lacked the capacity to house and feed them, creating especially high mortality rates. For an account of this forced relocation and its consequences, see generally *ibid* at 216–250.

<sup>372</sup> For an overview of the evacuation of Phnom Penh, *Case 002/01 Trial Judgement*, *supra* note 109 at paras 459–500.



with near-exclusive reliance on human labor, rather than modern machinery.<sup>373</sup> Most areas that received evacuees did not have the necessary housing, sanitation, medical, or food production infrastructure in place to support the new arrivals. Consequently, many new arrivals lived in makeshift housing or slept out in the open and diseases spread essentially unchecked.<sup>374</sup>

According to the Party Center's policy of "independence self-mastery" Cambodian society was to be overhauled without significant foreign aid, save for that from a short list of allied countries, primarily China.<sup>375</sup> The revolution was to maintain this defiant independence by "standing" (i.e. relying) on rice production to sustain the civilian population, provision the military, and as the primary source of national income through export.<sup>376</sup> In essence, rice replaced money as the currency of the regime, which had also immediately banned markets upon taking power, and ended the use of currency shortly thereafter. Indeed, the very notion of private property was abolished and everything within Cambodia, from natural resources, to personal possessions, became the property of the regime, known in the countryside only collectively as the ominous and faceless Revolutionary Organization (*Angkar Padevat*).<sup>377</sup>

This ban encompassed ownership of medicine or cooking provisions, the cultivation of private subsistence gardens, and cooking or eating privately outside of the communal dining halls. Even foraging amongst Cambodia's then-abundant wild food sources was forbidden as a vestige of forbidden "privatism".<sup>378</sup> Consequently, the civilian population was forcibly made completely reliant on the Khmer Rouge regime itself for food, shelter, medical care and other basic

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<sup>373</sup> See generally DeFalco, *Justice and Starvation in Cambodia*, *supra* note 270 at 27–43.

<sup>374</sup> For example, see Kiernan's discussion of the mass forced evacuation of civilians to Northwestern Cambodia under the Khmer Rouge. Kiernan, *supra* note 362 at 216–250.

<sup>375</sup> For a discussion of the Khmer Rouge concept of independence self-mastery, see DeFalco, *Justice and Starvation in Cambodia*, *supra* note 270 at 32-39.

<sup>376</sup> For a discussion of the Khmer Rouge regime's plan to "stand" on agriculture, see *ibid* at 35-40.

<sup>377</sup> See generally *ibid*; Kiernan, *supra* note 362 at 58 et seq.

<sup>378</sup> For information on the Khmer Rouge's ideology surrounding collectivism and their aversion to what they perceived as vestiges of "privatism" see generally, Hinton, *Why Did They Kill?* *supra* note 367 at 126–169; Kosal Path & Angeliki Kanavou, "Converts, Not Ideologues? The Khmer Rouge Practice of Thought Reform in Cambodia, 1975–1978" (2015) 20:3 *Journal of Political Ideologies* 304.

provisions, as it was literally a crime, punishable by death, to take independent action to sustain oneself or loved ones.

The policy of independence self-mastery also drove additional policy edicts that had disastrous human consequences. The country's already weak medical care sector was replaced by makeshift "hospitals" where untrained, often illiterate, teenage party members practiced a form of healthcare that amounted to little more than human experimentation.<sup>379</sup> The "medicine" administered in these hospitals was in reality, typically an unsanitary concoction of coconut juice and various plant extracts, injected randomly into victims already suffering from severe health issues and diseases such as malaria and dysentery, compounded by endemic famine.<sup>380</sup>

The rice production envisioned by the Party Center that would support the population and military while simultaneously funding the overhaul of Cambodia's infrastructure required nearly tripling the country's rice yield, from one, to three tons per hectare.<sup>381</sup> The phrase "three tons per hectare" became a party mantra, repeatedly referenced in party propaganda, mentioned at party meetings and adopted as a party slogan for local officials to disseminate amongst the masses.<sup>382</sup> This scaling up of rice production was manifestly impossible, and production goals were not met with any regularity anywhere in Cambodia while the Khmer Rouge held power. And yet, the Party Center viewed any failures to achieve these ludicrous production targets as products of subversion, sabotage, or laziness, rather than the manifest impossibility of doing so.<sup>383</sup> This is where the Party Center's paranoia and propensity for extreme violence came into play as a means of reinforcing the devastation being wrought by their radical policies. Patterns of mass

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<sup>379</sup> Laura Vilim, "'Keeping Them Alive, One Gets Nothing; Killing Them, One Loses Nothing': Prosecuting Khmer Rouge Medical Practices as Crimes against Humanity", (2010), online: *DC-Cam* <[http://d.dccam.org/Abouts/Intern/Interns\\_2004\\_2011.htm](http://d.dccam.org/Abouts/Intern/Interns_2004_2011.htm)>.

<sup>380</sup> For analyses of Khmer Rouge medical practices, see generally *ibid*; DeFalco, *Justice and Starvation in Cambodia*, *supra* note 270 at 50–52.

<sup>381</sup> See DeFalco, *Justice and Starvation in Cambodia*, *supra* note 270 at 36–37.

<sup>382</sup> See *ibid* at 35–39.

<sup>383</sup> For an overview of how the Khmer Rouge leadership shifted blame for its deeply flawed policies, see *ibid* at 52–72.

internal purges of the ranks of the Khmer Rouge tended to occur in areas where local officials enjoyed some degree of autonomous support, such as along Cambodia's eastern border, and/or where officials complained about the impossibility of achieving the Party Center's rice production demands and other mandates, such as in the country's northwestern areas bordering Thailand.<sup>384</sup>

The degree of suffering wrought by the Khmer Rouge regime through its oppressive policies cannot be conveyed by a mere recitation of the estimated number of victims who ultimately died of starvation, overwork, or wholly preventable and/or treatable diseases. Enduring the kinds of slow processes of attrition and starvation inflicted by the Khmer Rouge regime on the civilian population under its control produces extreme suffering and life-altering physical and mental traumas, amongst both those who ultimately die and survivors alike. In this way, the ravages of hunger, overwork and lack of medical care, along with the ever-present threat of violence, represent a uniquely universal experience amongst all Cambodian civilians who lived under Pol Pot's Khmer Rouge regime.<sup>385</sup> Those who survived the Khmer Rouge era, even those who managed to avoid being physically beaten or tortured, were left deeply traumatized, and untreated post-traumatic stress disorder (PTSD) and other mental health problems continue to plague survivor populations, and their descendants to this day.<sup>386</sup>

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<sup>384</sup> For a discussion of how such purges were used by the Party Center to both enforce its socio-economic policies and shift blame for the inevitable shortcomings of such policies to hidden "enemies" of the revolution, see *ibid* at 52–61. For analyses of the Khmer Rouge's internal purges, see David Chandler, *Voices from S-21: Terror and History in Pol Pot's Secret Prison* (Berkeley and Los Angeles, CA: University of California Press, 1999); Hinton, *Why Did They Kill?* *supra* note 367; Kiernan, *supra* note 362.

<sup>385</sup> Conditions did vary throughout Cambodia under the Khmer Rouge, but famine, forced labor, forced communal eating, denial of basic medical care and other sources of suffering were ubiquitous throughout the country to some extent, as they were the mostly products of national policy edicts issued by the Khmer Rouge central leadership. For an overview of how various Khmer Rouge policies produced mass death in Cambodia, see DeFalco, *Justice and Starvation in Cambodia*, *supra* note 270; Tyner & Rice, *supra* note 365; Tyner, *supra* note 365.

<sup>386</sup> See Youk Chhang, Beth Van Schaack & Daryn Reicherter, eds, *Cambodia's Hidden Scars: Trauma Psychology in the Wake of the Khmer Rouge* (Phnom Penh: Documentation Center of Cambodia, 2011). Recent research has found evidence that elderly Cambodians, virtually all of whom lived through the Khmer Rouge era, experience especially high rates of disability as they age. Experiences of prior trauma are likely a contributing factor to this increased disability rate. See Zachary Zimmer, "Disability and Active Life Expectancy Among Older Cambodians" (2006) 2:2 *Asian Population Studies* 133. A survey conducted by the United State National Institute of Health found post-traumatic stress disorder (PTSD) to be "epidemic" amongst Cambodian immigrants in Long Beach, California, most of whom were in Cambodia during the Khmer Rouge period. United States Institute of Mental Health, "PTSD, Depression Epidemic Among Cambodian Immigrants", (2 August 2005), online: *US National Institute of Mental*

Just as the scale of suffering and death in Cambodia under the Khmer Rouge cannot be reduced to a recitation of an estimated death toll, neither can the modalities through which such suffering and death were produced be neatly disaggregated into a discrete set of causal categories. Any attempt to do so risks ignoring the fact that the regime produced mass trauma and death through a complex set of mutually reinforcing processes that unfolded dynamically over significant spans of time and space to decimate the population under its control. Local Khmer Rouge officials were routinely forced to choose between critiquing the impossible production demands of the Party Center, and overworking and underfeeding the civilian workforce, to remit enough rice or other goods to the regime to avoid potentially deadly suspicion. Some such officials apparently did complain that the production targets dictated by the Party Center were impossible to achieve and were purged, along with their entire family and all of their subordinates and their families.<sup>387</sup> Others worked the civilian population under their control past the brink of overwork and starvation, while obsessively stockpiling rice to assuage the ever-suspicious *Angkar*. When production shortfalls inevitably occurred, local Khmer Rouge officials were further incentivized to blame such shortfalls on subversive networks attempting to undermine the revolution, further fueling the paranoia and violence of the Party Center.<sup>388</sup>

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*Health* <<http://www.nimh.nih.gov/news/science-news/2005/ptsd-depression-epidemic-among-cambodian-immigrants.shtml>>. There is also evidence that PTSD and trauma has intergenerational effects. See e.g. Cécile Rousseau, Aline Drapeau & Robert Platt, “Family Trauma and its Association with Emotional and Behavioral Problems and Social Adjustment in Adolescent Cambodian Refugees” (1999) 23:12 *Child Abuse & Neglect* 1263; Greg Mellen, “PTSD from Cambodia’s Killing Fields Affects Kids Who Were Never There”, (22 April 2012), online: *Long Beach Press Telegram* <<http://www.presstelegram.com/article/ZZ/20120422/NEWS/120429216>>; Richard F Mollica et al, “The Enduring Mental Health Impact of Mass Violence: A Community Comparison Study of Cambodian Civilians Living in Cambodia and Thailand” (2014) 60:1 *International Journal of Social Psychiatry* 6; Nigel P Field, Sophear Muong & Vannavuth Sochanvimean, “Parental Styles in the Intergenerational Transmission of Trauma Stemming from the Khmer Rouge Regime in Cambodia” (2013) 83:4 *American Journal of Orthopsychiatry* 483.

<sup>387</sup> See Kiernan, *supra* note 362 at 59–96, 313–356, 368–376 and 411–427. See also generally DeFalco, *Justice and Starvation in Cambodia*, *supra* note 270 at 52–62; Hinton, *Why Did They Kill?* *supra* note 367 at 96–169. For an analysis of S-21 prison, where purged high level party officials were sent to be tortured into confessing to concocted subversive activities, see Chandler, *Voices from S-21*, *supra* note 384. For examples of specific Khmer Rouge officials who apparently complained about the regime’s extreme policies and associated living condition repercussions, and were shortly thereafter purged, such as Mok Heng, Hou Yuon, Chin Suon, Hu Nim, Koy Thuon, Chum Narith, and Nhim Ros, and Sao Phim, see DeFalco, *Justice and Starvation in Cambodia*, *supra* note 270 at 52–62.

<sup>388</sup> See generally DeFalco, *Justice and Starvation in Cambodia*, *supra* note 270 at 52–62. For example, after assuming control of the North Zone of Cambodia in April of 1976 after the Zone’s previous leader had been purged, newly installed Zone Secretary Ke Pauk sent a telegram to the Party Center which reported on “the enemy, the

Civilians, meanwhile, were placed in an even worse predicament. If they assiduously followed the regime's commands by working ceaselessly and not seeking to procure sufficient food, rest, or medicine, this still did not guarantee they would not be arrested or executed, and they were very likely to waste away and die from a mix of disease, starvation, and overwork. If they complained about rations or living conditions, they were likely to be executed.<sup>389</sup> If they clandestinely sought out additional food or medicine through illicit trade, foraging, or by stealing crops, civilians again, risked imprisonment, torture, and execution. Thus, all paths led inexorably to deprivation and a greatly increased likelihood of death, with the choices along the way mostly affecting only the immediate cause of such suffering or death.

Amidst these Orwellian circumstances, causes of trauma and death were both cumulative and overdetermined in nature, rendering efforts to neatly categorize harms according to a single, discrete cause (execution, overwork, famine, disease, torture, denial of medical care, etc.) an exercise in elision and oversimplification. Execution victims may have been killed only because they stole food in an effort to avoid starving to death. Victims of disease often died of relatively minor illnesses whose deleterious effects were exacerbated by overwork, starvation and denial of medical care.

## 1.2 Shared Understandings of Atrocity Processes in Cambodia and their Legal Implications

In their totality, the socio-economic policies of the Khmer Rouge Party Center directly traumatized virtually every civilian living in Cambodia from 1975-1979, and most likely killed between 472,000 and 1.345 million victims.<sup>390</sup> Despite this staggering toll, whether at the high

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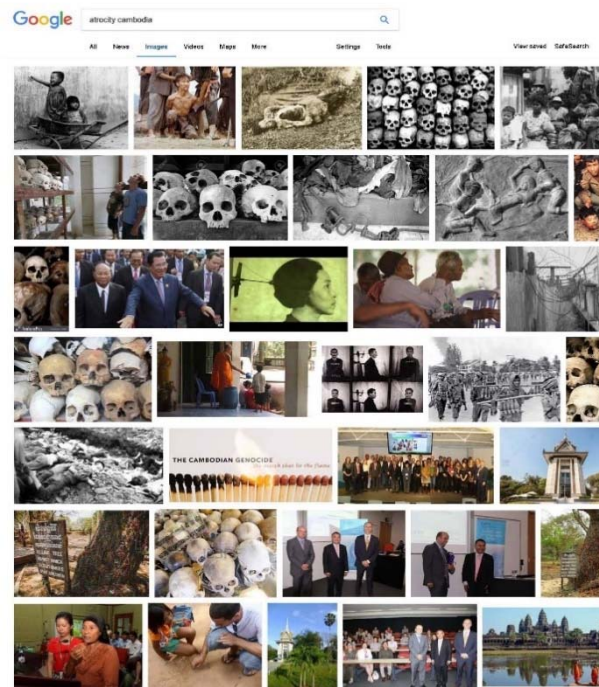
masses, and cultivation in the northern zone” and stated that “[t]he enemy says that the revolution is too strict. They oppose the idea of cooperatives and the construction of new dikes. They also complain about starvation.” To combat these “enemies”, Ke Pauk informed the Center that he “advised regions to investigate the above-mentioned enemy activities closely. We have already arrested the former cooperative chiefs. In addition to these actions, the enemy has a hidden network, which we are investigating. We will take appropriate measures to deal with this.” *Ibid* at 57, quoting “Telegram 94”, *Searching for the Truth: Magazine of the Documentation Center of Cambodia* (2d Quarter 2003) 11.

<sup>389</sup> For an overview of how the Party Center shifted the blame for its ill-conceived and impossible to achieve policy edicts, see DeFalco, *Justice and Starvation in Cambodia*, *supra* note 270 at 52–62.

<sup>390</sup> See *supra* note 364.

or low end of estimates, standard narratives of atrocity and mass killing in Khmer Rouge-era Cambodia tend to foreground the spectacularly horrific, aesthetically familiar forms of violence and abuse committed by the regime in the form of mass executions, violent internal purges, mass imprisonment, and the endemic use of torture. In the process, harms caused by the Party Center’s socio-economic policy edicts are implicitly presented as either non-criminal collateral consequences flowing from more traditional atrocities, or as somehow less serious or central to the criminality of the Khmer Rouge regime.

A simple Google image search of terms such as “Cambodia” and “atrocities” or “genocide” returns page after page of graphic, often quite visceral, images of violence and its aftermath. The images that are returned primarily depict Khmer Rouge guerillas wielding weaponry, piles of human bones and skulls, and images of sullen detainees who were photographed prior to their execution.



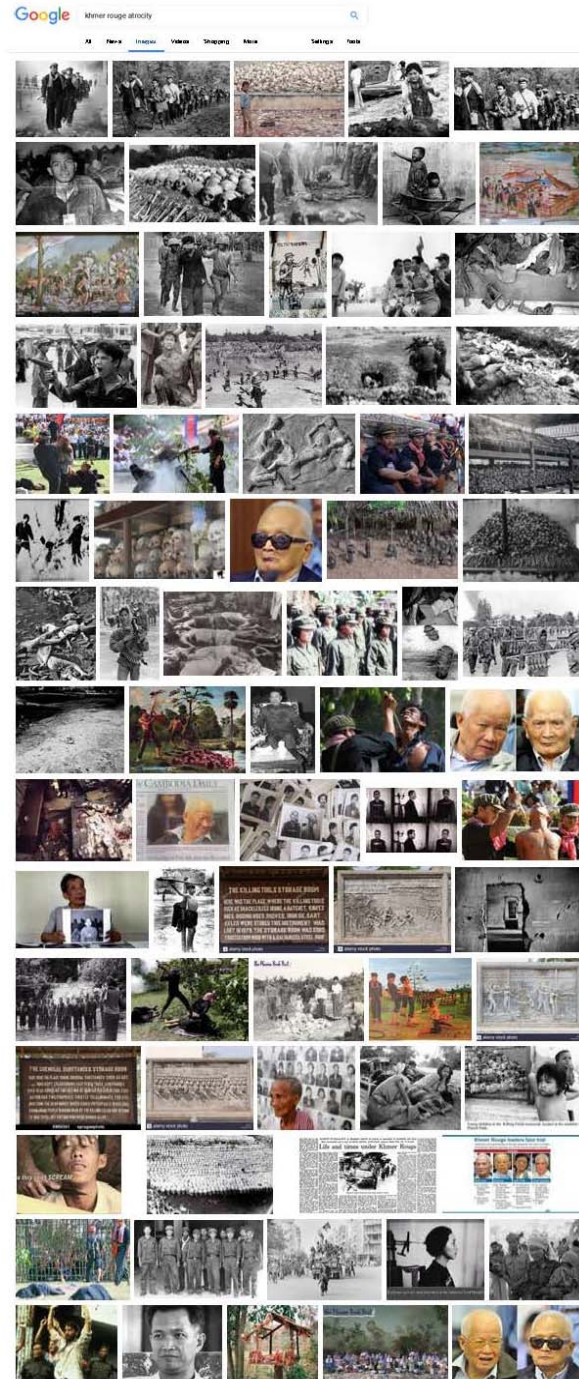
Results from Google Image search using terms “atrocities” and “Cambodia”<sup>391</sup>

<sup>391</sup> Search performed by author May 24, 2017 (6:45pm EST). Identifiable images include a scene from the film *The Killing Fields*, images of S-21 prisoners, and collections of skulls and human bones.



Results from Google Image search using terms “Cambodia” and “genocide”<sup>392</sup>

<sup>392</sup> Search performed by author May 24, 2017 (7:00pm EST). Again, iconic imagery of violence, death, S-21 prisoners and piles of bones and skulls figure prominently.



Results from Google Image search using terms “Khmer Rouge” and “atrocity”<sup>393</sup>

<sup>393</sup> Search performed by author May 24, 2017 (7:05pm EST). Again, iconic imagery of violence, death, S-21 prisoners and piles of bones and skulls figure prominently. Also visible are images depicting events at the ECCC.



Such spectacular violence also leaves behind visceral physical reminders of its horror in Cambodia in the form of thousands of mass graves, and so-called “dark” tourism sites of former prisons, execution sites, and the like.<sup>394</sup>



Tourists at a Buddhist stupa filled with the skulls of victims executed by the Khmer Rouge at *Choeung Ek*, a field on the outskirts of Phnom Penh, Cambodia (Photo: David Longstreath, Associated Press)<sup>395</sup>

The graphic imagery and lasting evidence from the Khmer Rouge regime in Cambodia play directly into the visibility politics that underwrite shared understandings of this and other histories of atrocity and genocide. Along these lines, Valerie Hartouni traces the increasing role of aesthetic representation in understandings of atrocity crimes to the graphic imagery that emerged at the close of World War II of the Holocaust. These shocking images, of bodies piled in heaps and gaunt, ghost-like concentration camp internees, helped create the impetus for the creation of ICL itself and later played a central evidentiary role in the trial of Adolph Eichmann in Jerusalem.<sup>396</sup> This imagery has, according to Hartouni, helped produce a current situation

<sup>394</sup> The two most prominent examples of such tourist sites include S-21 *Tuol Sleng* prison, the *Choeung Ek* killing field and mass grave site. However, many other similar, yet less well-known sites exist or are in development. Examples include Pol Pot’s cremation and grave site and the former residence of Khmer Rouge commander Ta Mok.

<sup>395</sup> Photo appears in Denis D Gray, “Atrocity or Theme Park?”, (15 August 2006), online: *MSNBC* <<http://www.nbcnews.com/id/14363744/ns/travel/t/atrocity-or-theme-park/>>.

<sup>396</sup> Valerie Hartouni, *Visualizing Atrocity: Arendt, Evil, and the Optics of Thoughtlessness* (New York, NY: New York University Press, 2012). For example, Hartouni argues that “Atrocity images from the [WWII] period, especially the now iconic images of the liberation of the concentration camps, contribute to and reinforce viscerally what these scholars assert as a matter of fact – that the Holocaust is at the limit of knowledge and feeling.” *Ibid* at 13.

where Nazi atrocities are treated as “both a benchmark and an aberration” in understanding atrocity and totalitarian violence.<sup>397</sup> This imagery has given rise to what Hartouni describes as a set of “myths” concerning the nature of mass atrocity and genocide that “are inextricably tied to and reinforced viscerally by the atrocity imagery that emerged with the liberation of the concentration camps at the war’s end.”<sup>398</sup> Such imagery, according to Hartouni, grounds a “visual rhetoric that now circumscribes the moral and political fields and powerfully assists in contemporary mythmaking about how we know genocide and what counts as such.”<sup>399</sup> This grounding of understandings of atrocity in an expectation of visceral aesthetic representation is summed up nicely by Susan Sontag, as a state of affairs within which “the very notion of atrocity, of war crime, is associated with the expectation of photographic evidence. Such evidence is, usually, of something posthumous; the remains, as it were—the mounds of skulls in Pol Pot’s Cambodia, the mass graves in Guatemala and El Salvador, Bosnia and Kosovo.”<sup>400</sup>

Meanwhile, other physical reminders of the suffering and death of the Khmer Rouge regime either present themselves much more ambiguously, or are marked by a complete lack of presence. For example, I have visited various sites of forced labor, such as Trapeang Thma dam in Northwestern Cambodia (present day Banteay Meanchey province), where suffering was intense and death rates quite high during the Khmer Rouge regime. Such sites are often oddly quiet, beautiful and peaceful, as suffering and death here is marked solely by the existence of mounds of earth and sluice gates, which were dug out and constructed painstakingly by hand and at the cost of thousands of lives.

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<sup>397</sup> *Ibid* at 10.

<sup>398</sup> *Ibid* at 21.

<sup>399</sup> *Ibid* at 22.

<sup>400</sup> Susan Sontag, *Regarding the Pain of Others* (New York, NY: Picador, 2003) at 83.



Trapeang Thma Dam, December 2013  
(Source: Documentation Center of Cambodia)<sup>401</sup>

The difficulty of visualizing the Trapeang Thma dam as a site of atrocity reflects the difficulty of conceptualizing suffering brought about through deprivation of access to basic subsistence needs. While other, more familiar atrocities closely resemble domestic forms of criminality, albeit on a larger scale, atrocities committed through socio-economic or other attritive means, such as those in Cambodia, are harder to conceptualize as international crimes. Such unfamiliar atrocities lack discrete, identifiable moments of direct harm causation that are intuitively identifiable as criminal in nature. Many other atrocities, including many of those committed by the Khmer Rouge regime itself, are conversely, highly visible and easily recognizable. Thus, harms in Cambodia brought about through the Khmer Rouge Party Center's extreme socio-economic

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<sup>401</sup> Photo appears in Dalin Lorn, *A Trip to Trapeang Thma Dam in Banteay Meanchey Province, December 20-22, 2013* (Documentation Center of Cambodia, 2013). The author was present during this trip. The dam itself is multiple kilometers long and approximately three meters wide, broad enough for a car to drive along it. DC-Cam is an independent research institution dedicated to documenting and pursuing justice for abuses committed during the Khmer Rouge period in Cambodia. For more information on DC-Cam, see Documentation Center of Cambodia, "History and Description of DC-Cam", online: *DC-Cam* <<http://www.dccam.org/Abouts/History/Histories.htm>>.

policy edicts remain at the periphery of shared understandings of the atrocities of this dark period of Cambodian history.

### 1.2.1 Visibility Politics and Legal Accountability in Cambodia

The subtle foregrounding of forms of harm causation conforming to the atrocity aesthetic in social understandings of the Khmer Rouge experience in Cambodia is also reflected in the operations of the ECCC to date, in terms of both its prioritization of cases, suspects, and charges, and assessments of relative culpability between suspects. The ECCC was created, following protracted negotiations between the Cambodian government and United Nations, with a mandate to prosecute former Khmer Rouge “senior leaders” and other individuals considered “most responsible” for the crimes of the Khmer Rouge era.<sup>402</sup> Thus far, the Court, which began operations in 2006, has disproportionately focused on familiar, physically violent crimes. The Court’s first judgment related solely to crimes related to the operation of a specific prison, torture and execution center.<sup>403</sup> Meanwhile, the case against the two most senior former Khmer Rouge leaders still alive, Nuon Chea and Khieu Samphan (referred to as “Case 002”), has been bifurcated into a series of trials, with the first such trial focusing exclusively on allegations related to the events immediately following the Khmer Rouge’s seizure of power in 1975, most notably the forced evacuation of Phnom Penh and summary executions of individuals associated with the previous regime.<sup>404</sup>

While the second Case 002 trial is currently underway and this trial will address living and working conditions, it does so only in relation to a handful of specific locations, rather than addressing such issues from a nationwide perspective.<sup>405</sup> The ECCC has also announced that

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<sup>402</sup> ECCC Agreement, *supra* note 80.

<sup>403</sup> *Case 001* Trial Judgement, *supra* note 287.

<sup>404</sup> See *Case 002/01* Trial Judgement, *supra* note 109.

<sup>405</sup> See Extraordinary Chambers in the Courts of Cambodia, “Case 002”, online: *Extraordinary Chambers in the Courts of Cambodia* <<http://www.eccc.gov.kh/en/>>.

there will be no further trials in Case 002.<sup>406</sup> Thus, over a decade into the operation of the Court, questions relating to the Khmer Rouge leaders' criminal culpability for subjecting the civilian population under their control to horrific living conditions remain unclear and largely unaddressed. While the suffering attendant to such living conditions has been acknowledged by the ECCC in passing, such conditions tend to mostly be presented as a collateral consequence of the regime's penchant for violence.

In addition to the ECCC's prioritization of charges to pursue, the difference between perceptions of convicted accused Duch in Case 001 and suspect Im Chaem in Case 004 provides a concrete example of how visibility politics may influence assessments of gravity and culpability within ICL. Case 001 solely concerned the operations of *Tuol Sleng* prison in Phnom Penh, code-named "S-21," and its nearby mass execution site, *Choeung Ek*. The case against Im Chaem meanwhile, concerned the operations of Phnom Trayoung prison, which was larger, yet less infamous than S-21, as well as living and working conditions at worksites and in cooperative villages in Northwestern Cambodia. Even though the allegations against Im Chaem appear to have involved harms of at the very least, a comparable seriousness to those addressed in Case 001, the ECCC's Co-Investigating Judges recently dismissed the case against her, finding that she did not qualify as a "most responsible" individual, despite the fact that Duch does. The different views of these cases, and the respective culpabilities of Duch and Im Chaem for Khmer Rouge era atrocities are deeply embedded in visibility politics.

S-21 prison is located in what were the outskirts of Phnom Penh during the Khmer Rouge regime. This prison was discovered by invading Vietnamese soldiers and several journalists accompanying them in January 1979 amidst the chaos of the Khmer Rouge's hasty retreat into the jungles of Cambodia's Northwestern regions. The prison operated as the nerve center of the Khmer Rouge state security apparatus. As an institution, the primary role of S-21 was the manufacture of evidence validating the paranoia and suspicion of the Khmer Rouge Party Center. Under the supervision of Duch, guards at S-21 systematically tortured detainees until they

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<sup>406</sup> Extraordinary Chambers in the Courts of Cambodia, "Trial Chamber Reduces Scope of Case 002", (17 February 2017), online: *Extraordinary Chambers in the Courts of Cambodia* <<https://www.eccc.gov.kh/en/articles/trial-chamber-reduces-scope-case-002>>.

“confessed” to pre-determined anti-revolutionary acts. This Orwellian house of horror has become symbolic of the broader horrors of the Khmer Rouge regime itself, as it, along with *Choeng Ek*, the site where at least 12,272 of its prisoners were executed and placed in mass graves, is now a museum and major tourist attraction.<sup>407</sup>

The horrors of S-21 have been well documented, especially visually, and their visceral nature has been central to the institution’s central place in the history of the Khmer Rouge period. Duch and his subordinates abandoned S-21 shortly before the Vietnamese military entered Phnom Penh. The group of people who discovered S-21 were drawn to the site by the smell of bloated corpses. The journalists in the party had both still and video-cameras, and were able to visually document what they found, which were torture implements and the mutilated bodies of several final victims, some of them still chained to the metal bed frames where they had been tortured to death.<sup>408</sup> They also found a significant portion of Duch’s notes, which he had kept fastidiously, and had not had time to fully destroy before fleeing. These notes carefully documented a highly organized system of torture and execution, which historian David Chandler has described as a “total institution.”<sup>409</sup>

A large body of graphic evidence of the horrific violence perpetrated at S-21 has been preserved and displayed at the prison site itself and elsewhere, as testaments to the cruelty of the Khmer Rouge regime. Along with the photographs and video footage shot by the journalists who happened upon S-21 in 1979, there exists a large body of iconic photographs of S-21 prisoners. This haunting gallery of victims exists because a photograph was taken of each prisoner when they entered S-21. Each prisoner is wearing the same black pajamas, with a number pinned to them. These photographs evoke iconic Holocaust imagery of concentration camp inmates in

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<sup>407</sup> The ECCC Trial Chamber found that “[d]ue to the inaccuracy of the existing record, the Chamber finds that it is not possible to quantify the precise number of the detainees who died and were executed. On the basis of the Revised S-21 Prisoner List, the Chamber quantifies this number to be no fewer than 12,272 detainees.” *Case 001 Trial Judgement*, *supra* note 287, para 340.

<sup>408</sup> This footage may be viewed at the Documentation Center of Cambodia’s public information room at 66 Preah Sihanouk Boulevard, Phnom Penh, Cambodia, upon request.

<sup>409</sup> See Chandler, *Voices from S-21*, *supra* note 384.

striped pajamas and the numerical branding of such victims with tattoos. Exhibits of these photographs still stand at S-21 and have also been displayed abroad, including at the Royal Ontario Museum in 2013.<sup>410</sup>



Exhibition of prisoner photographs, *Tuol Sleng Genocide Museum (S-21)*  
(Source: *Tuol Sleng Genocide Museum website*)<sup>411</sup>

<sup>410</sup> Royal Ontario Museum, “Observance and Memorial: Photographs from S-21, Cambodia”, online: *Royal Ontario Museum* <<http://www.rom.on.ca/en/exhibitions-galleries/exhibitions/past-exhibitions/observance-and-memorial-photographs-from-s-21>>.

<sup>411</sup> Tuol Sleng Genocide Museum, “Exhibitions”, online: *Tuol Sleng Genocide Museum* <<http://www.tuolslenggenocidemuseum.com/exhibitions.html>>.



“Observance and Memorial” Exhibition, Royal Ontario Museum (2013)  
(Source: Royal Ontario Museum website)<sup>412</sup>

Conditions in S-21 and specific torture practices are also graphically depicted in paintings by Bou Meng and Vann Nath, two of the handful of victims imprisoned at S-21 who survived.<sup>413</sup>



A Painting by Vann Nath depicting his experience at S-21  
(Source: Pasos Peace Museum website)<sup>414</sup>

<sup>412</sup> Royals Ontario Museum, *supra* note 410.

<sup>413</sup> Both men survived because they were artists, as they were assigned tasks utilizing their artistic skills.

<sup>414</sup> Pasos Peace Museum “Vann Nath”, online: *Pasos Peace Museum* <<http://pasospeacemuseum.org/vann-nath/>>.



*Choeng Ek*, an otherwise empty field several kilometers outside of Phnom Penh where S-21 prisoners were regularly executed en masse in front of pre-dug pits, is also a tourist destination. Visitors to the site are first confronted by a multi-story Buddhist stupa, encased in glass and containing neatly arranged stacks of human skulls of victims killed at the site. Informational plaques point out a tree where babies were executed by having their heads smashed, and note the fragments of clothing and bits of bone from execution victims one can identify being slowly churned out of the earth in many places.

As sites of highly visible, visceral violence, S-21 and *Choeng Ek* are paradigmatic atrocity sites and are integral points of reference underlying social understandings of the Khmer Rouge experience in Cambodia, as well part of the main focus of legal proceedings at the ECCC. Yet, although at least 12,272 people were mistreated and executed at S-21 and *Choeng Ek*,<sup>415</sup> this prison was, despite the horrific crimes perpetrated at it, but one aspect of Cambodia's experiences of atrocity under the Khmer Rouge, as it was one of an estimated nationwide network of 196 "security" centers (i.e. prisons) established during the Khmer Rouge regime identified by the Documentation Center of Cambodia (DC-Cam).<sup>416</sup> Some of these prisons were smaller, while others far larger, than S-21 in terms of both total numbers of prisoners and execution victims.<sup>417</sup> The sole factor that made S-21 unique was that it received all high-value prisoners whom were to be tortured into confessing to pre-specified anti-revolutionary acts.<sup>418</sup> Likewise, *Choeng Ek* was not the sole, or largest mass execution site created during the reign of the Khmer Rouge in Cambodia. As of 2005, DC-Cam had identified over 19,000 mass grave sites created between 1975 and 1979.<sup>419</sup> While some of these grave sites contain the remains of as few as four individuals who died during the Khmer Rouge era, DC-Cam has identified and

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<sup>415</sup> *Case 001 Trial Judgement*, *supra* note 287, para 340. The true number is likely well over 20,000 victims.

<sup>416</sup> See Pong-Rasy Pheng, *DK Prison* (Phnom Penh: Documentation Center of Cambodia, 2008).

<sup>417</sup> See generally Pheng, *supra* note 405; see also Documentation Center of Cambodia, *List of Democratic Kampuchea Burial* (Phnom Penh: Documentation Center of Cambodia, 2005).

<sup>418</sup> See generally Chandler, *Voices from S-21*, *supra* note 384.

<sup>419</sup> Documentation Center of Cambodia, *List*, *supra* note 417.

mapped numerous mass graves containing at least as many victims, and in some cases, many more, than those killed at *Choeng Ek*.<sup>420</sup>

More importantly, as discussed previously, executions and direct physical violence at prisons and execution sites form only one aspect of the complex web of processes through which the Khmer Rouge brutalized and killed. Approximately half of the regime's victims died from causes other than executions and other forms of such direct violence.<sup>421</sup> While forced labor, overwork, and famine are quite often mentioned as aspects of the "Cambodian Genocide," the graphic imagery from S-21 and *Choeng Ek*, photos of mutilated bodies, piles of skulls, and the like, have become the dominant imagery used to represent the horrors of the Khmer Rouge era. Images of emaciated civilian workers, and photos of forced manual labor are often depicted as well, but such imagery, and in turn, relevant processes of mass harm causation, tend to be treated as collateral consequences of Khmer Rouge regime's penchant for shocking violence, rather than as integral aspects therein.

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<sup>420</sup> *Ibid.*

<sup>421</sup> See e.g. Tabeau & They, *supra* note 363.



Civilian laborers packaging rice into jute sacks during the Khmer Rouge period  
(Source: Documentation Center of Cambodia)

Acts such as those depicted in the above photo, appear banal at first glance. While one may understand that the photo depicts forced labor, this discrete act of packaging rice fails to convey to the viewer the complex realities of resource allocation under the Khmer Rouge. This rice, despite being the product of civilian labor, was viewed as being the exclusive property of the revolution, to be doled out, or exported, according solely to the needs of the revolution itself, as they were perceived by the Party Center.<sup>422</sup> Even rare photographs depicting actual forced labor during the Khmer Rouge period do not directly convey the extreme suffering and mass death resulting from the cumulative effect of overwork, denial of access to sufficient food, denial of medical care, and poor sanitation practices.

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<sup>422</sup> On this subject, see generally DeFalco, *Justice and Starvation in Cambodia*, *supra* note 270 at 27–46.



Forced labor at a dam construction site in Cambodia, 1976<sup>423</sup>  
(Source: Documentation Center of Cambodia)

The horrific straightforwardness and wealth of evidence in relation to crimes at S-21, along with the fact that Duch was already in the custody of the Cambodia Government when the ECCC was created, combined to make him the sole accused in the Court's first ever case. Duch, who rather candidly admitted his role as commandant of S-21, but for the most part, denied any legal

<sup>423</sup> The photograph depicts forced labor at the 1<sup>st</sup> January Dam worksite. Alleged crimes committed in relation to this specific worksite are being addressed to some degree by the ECCC in Case 002/02. See "1st January Dam Worksite", online: *Extraordinary Chambers in the Courts of Cambodia* <<https://www.eccc.gov.kh/en/crime-sites/1st-january-dam-worksite>>.

responsibility for the crimes committed at the prison, and was convicted of various international crimes by the ECCC Trial Chamber, and such convictions were upheld on appeal.<sup>424</sup>

Case 001 and the spectacular violence it focused on, can be contrasted with the experience in relation to former ECCC Case 004 suspect Im Chaem, who recently had the charges against her dropped by the ECCC's Co-Investigating Judges.<sup>425</sup> As noted above, because the ECCC was designed to pursue only limited prosecutions, language seemingly restricting the Court's personal jurisdiction to former Khmer Rouge "senior leaders" and other individuals considered "most responsible" for relevant crimes, was inserted into the foundational legal documents of the Court.<sup>426</sup> The term "most responsible" is widely believed to have been inserted specifically with Duch in mind, as he was clearly not a senior leader within the Khmer Rouge hierarchy, solely holding authority within the confines of S-21.<sup>427</sup> Both the Trial and Supreme Court Chambers of the ECCC eventually held that Duch qualifies as "most responsible" despite defense arguments to the contrary.<sup>428</sup>

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<sup>424</sup> See *Case 001* Trial Judgement, *supra* note 287; *Case 001*, 001/18-07-2007-ECCC/SC, Appeal Judgement (3 February 2012) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber), online: <<https://www.eccc.gov.kh/en/>> [*Case 001* Appeals Judgement].

<sup>425</sup> See Extraordinary Chambers in the Courts of Cambodia, "Co-Investigating Judges Dismiss Case against Im Chaem" (22 February 2017), online: *Extraordinary Chambers in the Courts of Cambodia* <<https://www.eccc.gov.kh/en/articles/co-investigating-judges-dismiss-case-against-im-chaem>>. The ECCC utilizes civil law criminal procedure, according to which the prosecution initiates a case by forwarding an introductory submission to investigative judges, who then take carriage of the investigation, ultimately issuing a closing order which determines if a suspect will be sent to trial and if so, for what specific charges. For more information on the law applicable to the ECCC, see generally Ciorciari & Heindel, *supra* note 283.

<sup>426</sup> See ECCC Agreement, *supra* note 80, art 1.

<sup>427</sup> For summaries and analyses of the negotiations leading to the creation of the ECCC, see Ciorciari & Heindel, *supra* note 283 at 14–40; Steve Heder, "A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia" (1 August 2011), online: *Cambodia Tribunal Monitor* <<http://www.cambodiatribunal.org/>>; David Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton, NJ: Princeton University Press, 2012) at 341–406.

<sup>428</sup> See *Case 001* Appeals Judgement, *supra* note 424, paras 22, 62-79. It is worth noting that both Chambers viewed assessments of who qualifies as a senior leader or most responsible individual as falling within the discretion of the Co-Prosecutors and Co-Investigating Judges, bounded by a good-faith test. For a discussion of these findings, see DeFalco, "Cases 003 and 004 at the Khmer Rouge Tribunal" *supra* note 81 at 47–50.

While this holding, that the ECCC Co-Prosecutors and Co-Investigating Judges did not err in considering Duch a “most responsible” individual, is quite understandable, the Co-Investigating Judges recently concluded that Im Chaem is *not* a most responsible individual.<sup>429</sup> While the Co-Investigating Judges have yet to release the full reasons for this conclusion, and may never be forced to divulge this information publicly due to the ECCC’s civil law procedures, their conclusion is highly questionable in light of their previous determination that Duch may be considered amongst those most responsible. There exists compelling evidence that Im Chaem was both more senior, and at least as responsible as Duch for atrocity crimes, if not moreso. Within the Khmer Rouge hierarchy Im Chaem held real, if localized, authority after being placed in charge of Preah Net Preah district in Banteay Meanchey province during a 1977 internal purge of the area.<sup>430</sup>

While Duch was intimately involved in the systematic execution of at least 12,272 victims,<sup>431</sup> Im Chaem appears to have held real decision-making authority over prisons, worksites, and cooperatives where far more people were executed or died from a combination of disease, famine, overwork, lack of sanitation, and the denial of medical care.<sup>432</sup> For example, in a 2011 interview, Thip Samphatt, a survivor of the Khmer Rouge period now living in a village near Preah Net Preah district, told DC-Cam interviewers that in August 1978 he was arrested and sent

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<sup>429</sup> See “Co-Investigating Judges Dismiss Case against Im Chaem”, *supra* note 425.

<sup>430</sup> See generally, DeFalco “Cases 003 and 004 at the Khmer Rouge Tribunal” *supra* note 81 at 56. Im Chaem freely admits that she was placed in charge of Preah Net Preah and that she associated with Ta Mok, a notorious Khmer Rouge figure, often referred to as “the butcher” due to the brutality of his methods. See Julia Wallace, “The Bucolic Life of a Cambodian Grandmother Accused of Mass Killings”, (24 February 2017), online: *New York Times* <<https://www.nytimes.com/2017/02/24/world/asia/cambodia-khmer-rouge-im-chaem.html>>. Ta Mok was captured by Cambodian government forces in 1999 and died in pretrial detention in 2006.

<sup>431</sup> *Case 001* Trial Judgement, *supra* note 287, para 340.

<sup>432</sup> Preah Net Preah is located in Banteay Meanchey province in Northwestern Cambodia, where living conditions were especially harsh during the Khmer Rouge regime and death rates from famine and other associated causes were especially high. Im Chaem is alleged to have held authority over Phnom Trayoung prison, where an estimated 40,000 victims were killed. See Wallace, *supra* note 430. Journalist Douglas Gillison meanwhile, estimates that the case against Im Chaem concerns approximately 50,000 deaths, and the suffering of many other victims who survived. Douglas Gillison, “Crime Scenes of the Khmer”, (27 February 2012), online: *The Investigative Fund* <[http://www.theinvestigativefund.org/investigations/international/1614/crime\\_scenes\\_of\\_the\\_khmer](http://www.theinvestigativefund.org/investigations/international/1614/crime_scenes_of_the_khmer)>.

to Phnom Trayoung prison.<sup>433</sup> After being arrested, Samphatt was shown a letter by the prison chief, named Souen, “stamped and signed by *Yeay* [grandmother] Im Chaem” alleging that Samphatt and two other men he had been arrested with had “betrayed the revolution and therefore had to give their blood to the revolution” (i.e. be executed).<sup>434</sup> Samphatt was only spared because Souen was fond of him and thus sent Samphatt to a labor camp instead of having him executed. Many others were not so fortunate, as Samphatt himself witnessed the mass execution of approximately ninety fellow prisoners.<sup>435</sup>

What Im Chaem’s alleged crimes seemingly lack is the spectacle and familiarity of those Duch participated in while in charge of S-21. Im Chaem is alleged to have enforced horrible conditions at worksites and in cooperatives, and to have held authority over one of the nearly two hundred prisons in Cambodia other than S-21, one where more victims were killed than at S-21 itself. This prison, Phnom Trayoung, has not become part of the iconography of atrocity in Cambodia, and is located in a rural area in Cambodia’s Northwest, rather than Cambodia’s capital city. Because she held actual regional authority, Im Chaem was not intimately involved in the day to day activities of Phnom Trayoung, where approximately 40,000 prisoners were allegedly executed during the Khmer Rouge regime.<sup>436</sup> While this lack of day to day oversight may seem to decrease Im Chaem’s culpability, in another sense her role can be interpreted as heightening her responsibility for the killings and mistreatment that occurred under her authority. Unlike Duch, Im Chaem held actual decision-making power within Preah Net Preah. Duch was under standing orders to execute every prisoner that entered S-21. If he did not do so, he would have been executed himself, evidenced by the fact that S-21 personnel regularly became inmates themselves at S-21, destined for execution at *Choeung Ek*. Im Chaem however, enjoyed a degree of latitude in interpreting and enforcing the regime’s plans and orders.

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<sup>433</sup> Interview summarized in, Dany Long, “Promoting Accountability Project Interviews with El Pheap, Youk Neam, Bin Nann, Rin Kheng and Thip Samphatt: Field Trip Note” (September 2011), online: *DC-Cam* <<http://www.dccam.org/Archives/>>.

<sup>434</sup> *Ibid*,

<sup>435</sup> *Ibid*.

<sup>436</sup> See Wallace, *supra* note 430.

Many factors, most of them decidedly non-legal in nature, likely went into the ECCC Co-Investigating Judges' decision to declare Im Chaem as not amongst those "most responsible" for the crimes of the Khmer Rouge era. The Cambodian government has long been vocally opposed to Cases 003 and 004 and the Court has operated amidst a continual funding crisis.<sup>437</sup> However, regardless of the actual motivations underlying the Co-Investigating Judges' dismissal of the case against Im Chaem, visibility politics are central to their very ability to ground their decision in a legal assessment of relative culpability. Duch's role as the regime's specialist torturer and his day-to-day presence at and authority over S-21, render his culpability quite apparent in relation to the crimes committed at the prison and nearby at *Choeung Ek*. And yet, unlike Im Chaem, Duch had extremely little, if any, power to change the ultimate outcome for victims sent to S-21.

Im Chaem meanwhile, is alleged to have had the power to order execution *or* release of prisoners at Phnom Trayoung, and to dictate living and working conditions in Preah Net Preah and worksites such as Trapeang Thma dam, at least to some degree. She did so however, in a manner that only worsened conditions in Preah Net Preah after her arrival. While the decision of the Co-Investigating Judges to drop the case against her means we may never know the full extent of Im Chaem's authority and culpability, research conducted by DC-Cam and other organizations suggests that there exists strong evidence corroborating the allegations against her.<sup>438</sup>

The ECCC's heavy focus on familiar atrocity crimes thus far, and the seemingly widespread agreement that Duch had to be prosecuted before the ECCC, while the prosecution of Im Chaem and the other suspects in Cases 003 and 004 is optional, may be seen as being facilitated visibility politics. While also clearly products of practice concerns, such as the availability of

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<sup>437</sup> Kuch Naren, "Hun Sen Warns of Civil War if ECCC Goes Beyond 'Limit'" (27 February 2015), online: *The Cambodia Daily* <<https://www.cambodiadaily.com/news/hun-sen-warns-of-civil-war-if-eccc-goes-beyond-limit-78757/>>.

<sup>438</sup> While in residence as a researcher and subsequently, employee of DC-Cam, the author has reviewed many reports and eyewitness accounts pertaining to events in Preah Net Preah during the Khmer Rouge regime. Many such pieces of information strongly implicated Im Chaem. For example, one survivor who was imprisoned in Phnom Trayoung claims to have been shown his own death warrant, signed personally by Im Chaem. See Long, *supra* note 433. For her part, while Im Chaem refuses to accept any criminal responsibility, she freely admits that she was placed in charge of Preah Net Preah in 1977. see also Wallace, *supra* note 430.



evidence, age of the accused and ease of prosecution, along with political compromises, and financial limitations, shared understandings of have shaped how the Khmer Rouge period history and the crimes that occurred during it, are conceptualized. The highly visible, oft-graphic nature of the horrific crimes committed at S-21 and *Choeung Ek* in the form of photographs and paintings, and bones and clothing fragments, helped to make the prosecution of these crimes at the ECCC seem essential. The same can be said for crimes attendant to the forced evacuation of Phnom Penh in April 1975, an event that was extensively documented with photographic evidence depicting young Khmer Rouge guerrillas brandishing weapons while issuing orders to civilians. To a lesser extent, internal purges, mass executions, and the creation of a nationwide network of prisons have also been seen as essential subjects to address, even if symbolically.

Conversely, perhaps the largest source of suffering and death under the Khmer Rouge, the slow physical and mental deterioration of the civilian population as they were overworked, underfed, and denied medical care, has been viewed as a subject too complicated, too large, or too structural in nature, to be addressed head-on. Yet, such explanations do not fully explain this preoccupation with familiar forms of atrocity. As I argue elsewhere, causation and culpability for such unfamiliar atrocity processes, including in the Khmer Rouge context, may be more direct than for acts of direct violence in certain circumstances.<sup>439</sup> For example, the Khmer Rouge Party Center dictated quite specific socio-economic policies for the entire country, triggering and perpetuating mass death through starvation and ill-treatment, yet in many cases deferred local security policies, including decisions concerning whom to arrest and execute, to local Khmer Rouge officials. Thus, simplicity, directness and ease of prosecution cannot fully explain the backgrounding of unfamiliar atrocity processes within ICL. Instead, such arguments provide cover for visibility politics within ICL, and indeed, the availability of such arguments is one reason why such politics are so pernicious.

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<sup>439</sup> See DeFalco, *Justice and Starvation in Cambodia*, *supra* note 270; DeFalco, “Accounting for Famine” *supra* note 233.

## 2 Beyond Cambodia

While the Khmer Rouge period in Cambodia provides a rather extreme example, the production of mass trauma and death through a broad set of interactive, mutually reinforcing processes, is in no way unique to this context. History is replete with examples of situations where various overlapping forms of oppression and abuse combine to produce suffering and death on a massive scale. How atrocity, both as a broad social concept, and as a term used to refer to the general subject matter of ICL, is understood affects how such histories are understood, especially concerning the assignment of culpability and responsibility. Familiar atrocity processes involving direct acts of physical violence tend to be remembered and memorialized as unequivocally wrongful, or deplorable acts. In contrast, unfamiliar processes of mass killing and abuse are more likely to be overlooked, misremembered, or downgraded in terms of their seriousness, by being discussed in less condemnatory terms or being treated as regrettable mistakes or unforeseen consequences of “real” atrocities.

Historical narratives concerning indigenous populations in places such as Canada, the United States, and Australia are prime examples of these processes of elision and downgrading the full reality of the atrocities suffered by such populations being facilitated by visibility politics. All three of these populations have been killed, oppressed, and otherwise abused, through multifaceted processes involving a mix of direct violence, displacement, socio-economic oppression, and forced cultural assimilation.<sup>440</sup> These processes were both far-reaching, and localized. A localized and discrete example of the role of unfamiliar atrocity processes deployed against indigenous populations was the mass displacement of Native American Cherokees from their traditional lands from 1838 to 1839, an event that has come to be known as the Trail of

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<sup>440</sup> See e.g. Patrick Wolfe, “Settler Colonialism and the Elimination of the Native” (2006) 8:4 *Journal of Genocide Research* 387; Damien Short, “Australia: A Continuing Genocide?” (2010) 12:1–2 *Journal of Genocide Research* 45; Andrew Woolford & Jeff Benvenuto, “Canada and Colonial Genocide” (2015) 17:4 *Journal of Genocide Research* 373; Ladner, *supra* note 211; Basso, *supra* note 209; Alexander Laban Hinton, “Colonial Genocide in Indigenous North America” in Andrew Woolford, Jeff Benvenuto & Alexander Laban Hinton, eds, *Colonial Genocide in Indigenous North America: A View from Critical Genocide Studies* (Durham: Duke University Press, 2014) 325; Anderson, *supra* note 209.

Tears.<sup>441</sup> During this period, at least 16,000 members of the Cherokee nation were forcibly displaced to areas in Oklahoma. The transfer was conducted without sufficient resources causing thousands of deaths along the way. Those who survived meanwhile arrived in Oklahoma during the winter without sufficient provisions or food, causing thousands of additional deaths. In all, between 4,000 and 8,000 of the 16,000 Cherokees forcibly removed from their territory were killed.<sup>442</sup>

Another example of this dichotomy between familiar and unfamiliar processes of atrocity are the events that took place in present-day Namibia from 1904 to 1908, when German colonial forces put down an uprising by the Herero and Nama people in what was then German South West Africa.<sup>443</sup> This uprising followed years of colonial oppression and violence. Herero forces were decisively defeated by German military forces at the 1904 Battle of Waterburg.<sup>444</sup>

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<sup>441</sup> Basso, *supra* note 209.

<sup>442</sup> *Ibid* at 22.

<sup>443</sup> See Basso, *supra* note 209; Aaron Akinyemi, “The Forgotten Genocide”, (31 January 2010), online: *The Guardian* <<https://www.theguardian.com/commentisfree/2010/jan/31/genocide-namibia>>.

<sup>444</sup> Akinyemi, *ibid*.



Image depicting the Battle of Waterburg  
(Source: The Guardian)<sup>445</sup>

After defeating the Herero and Nama militarily, German forces displaced the remaining Herero and Nama populations into the Namib and Kalahari deserts. The victorious Germans then guarded the borders of the desert to prevent the Herero and Nama from escaping. The Germans also guarded water-wells and poisoned the wells they left unguarded.<sup>446</sup> The net result was that of “the 50,000 or 60,000” Herero and Nama “displaced to the desert, by 1908 only 3,000 escaped to neighbouring countries safely.”<sup>447</sup> The massacre of Herero and Nama fighters by the German military may be visually represented in a manner conforming to the atrocity aesthetic, involving the depiction of direct killing en masse, as demonstrated in the above image of the battle of Waterburg. This battle however, may have been a traditional military engagement, and hence, may not have involved the commission of what we now know as international crimes. Imagery of Herero and Nama victims of intentional acts of persecution and mass killing that would currently constitute genocide and various crimes against humanity, tend to be much more

<sup>445</sup> Jason Burke & Philip Oltermann, “Germany Moves to Atone for ‘Forgotten Genocide’ in Namibia”, (25 December 2016), online: *The Guardian* <<https://www.theguardian.com/world/2016/dec/25/germany-moves-to-atone-for-forgotten-genocide-in-namibia>>.

<sup>446</sup> Basso, *supra* note 209 at 23.

<sup>447</sup> *Ibid.* An additional 17,000 Herero prisoners were sent to labor camps where approximately 6,000 of them died.  
*Ibid.*

visually ambivalent. The authors of such atrocities, and the manner through which they were committed are not easily reduced to visual representation and are notably absent in surviving images of emaciated Herero victims ravaged by lack of food, water, and shelter.



Emaciated Herero and Nama civilians (circa 1905-1908)  
(Source: PBS)<sup>448</sup>

Andrew Basso presents these genocides of the Cherokee during the Trail of Tears and Herero and Nama people by German military, along with similar oppression and mass killing of Pontic Greeks in the Ottoman Empire from 1916 to 1918 and 1919 to 1923, as examples of what he refers to as “displacement” atrocities.<sup>449</sup>

Meanwhile, under Stalin, as part of the Soviet Union’s “Russification” plan, millions of people in Ukraine died of hunger and famine-related diseases during the 1932-1933 *Holodomor* (“extermination by hunger”) famine, leading many to label this an atrocity crime.<sup>450</sup>

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<sup>448</sup> PBS, “Understanding Genocides: Our Age of Suffering”, online: *PBS* <<http://www.pbs.org/wnet/worse-than-war/stories-essays/understanding-genocides/our-age-of-suffering/27/>>.

<sup>449</sup> Basso, *supra* note 209.

<sup>450</sup> See generally Conquest, *supra* note 312; Marcus, *supra* note 312 at 252–255; Nicolas Werth, “Keynote Address for the Holodomor Conference, Harvard Ukrainian Research Institute, 17—18 November 2008” (2008) 30:1 *Harvard Ukrainian Studies* xxix; Serbyn & Lemkin, *supra* note 313; Rebekah Moore, “A Crime Against Humanity

Nonetheless, the *Holodomor* is amongst the least prominent atrocities of the twentieth century. Even the Holocaust, often viewed as the prototypical mass atrocity event, involved harms brought about through economic oppression, forced confinement, and other processes, along with massacres and mass executions.<sup>451</sup> In the case of the Holocaust, many of these processes of atrocity, even ones which were socio-economic in nature, were made highly visible by the practices of the Nazi regime, in the form of the construction of ghettos, and the marking of Jewish businesses and bodies themselves with the yellow star.

While these historical examples all took place over seventy years ago, and the Khmer Rouge period ended nearly four decades ago, many other, more recent examples exist of apparent atrocities committed through unspectacular and/or unfamiliar means. These atrocities have followed a similar pattern of have relevant harm causation processes simplified and conceptually flattened to conform to the atrocity aesthetic. For example, over multiple decades the Burmese government has allegedly engaged in the systematic social and economic oppression of various ethnic minority groups, especially Rohingya Muslims, producing large-scale suffering and greatly increased mortality rates.<sup>452</sup> Only recently, since Rohingyas and members of other minority groups have been subjected to violent attacks, and have increasingly taken to the sea in efforts to escape persecution, have the plight of these groups become widely discussed using the rhetoric of ICL.<sup>453</sup> Also in Burma, as referenced above, several scholars argue that the

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Arguably Without Parallel in European History’: Genocide and the ‘Politics’ of Victimhood in Western Narratives of the Ukrainian Holodomor” (2012) 58:3 Australian Journal of Politics & History 367.

<sup>451</sup> For example, Helen Fein observes that:

[w]hile the historiography of genocide often focuses on the numbers directly killed-by execution, gassing, or burning in mass graves outside cities and villages and in extermination camps, many victims die from starvation and disease induced by elevated vulnerability following deportation (usually under harsh conditions) and enforced concentration in overcrowded camps and ghettos. This is true even in genocide characterized by industrial killing in camps, like the Holocaust, where an estimated 700,000 Jews or 13.7 percent of the total number of those who perished, did so from hunger and diseases attributable to starvation and poor living conditions in ghettos.

Fein, “Genocide by Attrition” *supra* note 211 at 12.

<sup>452</sup> See e.g. Akm Ahsan Ullah, “Rohingya Refugees to Bangladesh: Historical Exclusions and Contemporary Marginalization” (2011) 9:2 Journal of Immigrant & Refugee Studies 139; Zarni & Cowley, *supra* note 211.

<sup>453</sup> See e.g. David Mathieson, “Perilous Plight: Burma’s Rohingya Take to the Seas” (26 May 2009), online: *Human Rights Watch* <<https://www.hrw.org/report/2009/05/26/perilous-plight/burmas-rohingya-take-seas>>; Matthew Smith, “‘All you can do is Pray’: Crimes against Humanity and Ethnic Cleansing of Rohingya Muslims in

government's actions of refusing to accept and properly distribute humanitarian aid following Cyclone Nargis amounted to the commission of crimes against humanity.<sup>454</sup>

North Korea is another location where intermittent acts of violence have been interspersed amidst long-term social and economic oppression which has produced mass death and suffering through a host of relatively banal means.<sup>455</sup> Grace Kang argues that, as of 2007, high level members of the North Korean dictatorship appeared to have committed the crime against humanity of extermination by enforcing famine conditions on the civilian population under their control.<sup>456</sup> Conducting a similar analysis in a 2012 article, Rhoda Howard-Hassmann concludes that members of the North Korean dictatorship appear to have “merely” committed the crime against humanity of other inhumane acts by enforcing famine conditions.<sup>457</sup> 2014 report by a UN commission of inquiry found that in North Korea “international crimes appear to be intrinsic to the fabric of the state” and that Kim Jong-Un and other high-level North Korean officials appear to have committed crimes against humanity repeatedly against “starving civilian populations.”<sup>458</sup>

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Burma's Arakan State” (22 April 2013), online: *Human Rights Watch* <<https://www.hrw.org/report/2013/04/22/all-you-can-do-pray/crimes-against-humanity-and-ethnic-cleansing-rohingya-muslims>>; UN Human Rights Council, “Situation of Human Rights of Rohingya Muslims and other Minorities in Myanmar” UN Doc A/HRC/32/18 (20 June 2016) [advance unedited version], online *UN Refworld* <<http://www.refworld.org/docid/5768f0e94.html>>; Azeem Ibrahim, *The Rohingyas: Inside Myanmar's Hidden Genocide* (London, UK: Hurst, 2016).

<sup>454</sup> See e.g. Ford, *supra* note 156; Aloyo, *supra* note 211; Scheinert, *supra* note 337; see also *supra* at 104-110.

<sup>455</sup> For an overview of this famine, see Rhoda E Howard-Hassmann, *State Food Crimes* (Cambridge, UK: Cambridge University Press, 2016) at 61–71; see also Kang, *supra* note 324; Howard-Hassmann, “State-Induced Famine” *supra* note 317; Marzuki Darusman, “End of Mission Statement to Japan of the Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of Korea”, (22 January 2016), online: *United Nations Office of the High Commissioner for Human Rights* <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16981&LangID=E>>.

<sup>456</sup> Kang, *supra* note 324 at 85.

<sup>457</sup> Howard-Hassmann, “State-Induced Famine” *supra* note 317 at 158.

<sup>458</sup> United Nations Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, “Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea,” UN Doc A/HRC/25/CRP.1 (7 February 2014) paras 1162, 1164, online: *United Nations Office of the High Commissioner for Human Rights* <<http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/ReportoftheCommissionofInquiryDPRK.aspx>>.

In the context of Zimbabwe meanwhile, Howard-Hassmann argues that systemic oppression by the Mugabe government from 2000-2009 involved the commission of crimes against humanity.<sup>459</sup> Howard-Hassmann argues that, while Mugabe's land redistribution policies were ostensibly aimed at combatting the legacies of colonialism, in practice, land and resources were redistributed along partisan lines, primarily to Mugabe's political allies.<sup>460</sup> The result of these and other policies, enforced by violence, was mass suffering and death amidst a precipitous rise in the HIV/AIDS infection rate and famine conditions.<sup>461</sup> Howard-Hassmann and Eamon Aloyo both argue that this situation involved the commission of the crime against humanity of other inhumane acts by Mugabe and other high-level government figures.<sup>462</sup>

In Nigeria, from 1998 to 2007, Peter Odili, then-Governor of Nigeria's Rivers State, allegedly engaged in corruption and election-fixing, misappropriating huge sums of money in bribes, kickbacks and misappropriation of public funds, resulting in poverty, increased morality rates and widespread suffering.<sup>463</sup> Ben Bloom argues that available evidence indicates that during this period, Odili and others committed the crime against humanity of other inhumane acts by engaging in these and other acts of grand corruption which directly caused widespread inhumane conditions.<sup>464</sup>

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<sup>459</sup> Howard-Hassmann, "Mugabe's Zimbabwe" *supra* note 317. To a large degree this sentiment is shared by Eamon Aloyo, see Aloyo, *supra* note 211 at 505-506. For another perspective, see Kraemer, Bhattacharya & Gostin, *supra* note 343.

<sup>460</sup> Howard-Hassmann, "Mugabe's Zimbabwe" *supra* note 317 at 899-906.

<sup>461</sup> For an overview of these conditions and their causation, see Howard-Hassmann, *State Food Crimes*, *supra* note 455 at 78-91.

<sup>462</sup> Howard-Hassmann, "Mugabe's Zimbabwe" *supra* note 317 at 906-909; Aloyo, *supra* note 211 at 505-506.

<sup>463</sup> See Bloom, *supra* note 199 at 640-648, 659-665.

<sup>464</sup> *Ibid* at 659-667.



In Somalia, famine, exacerbated by actions restricting food aid deliveries and other living condition issues resulted in approximately 260,000 deaths from 2010-2012.<sup>465</sup> The Al-Shabaab militant group has been accused of committing crimes against humanity through their role in producing and thereafter enforcing famine conditions in areas under their control by killing foreign aid workers, confiscating food aid, and preventing civilians from fleeing famine-plagued areas.<sup>466</sup> More recently, journalist Alex Perry has accused the Somali government and their US military advisors of the war crime of intentionally using starvation of civilians as a method of warfare by impeding humanitarian food relief efforts destined for areas controlled by the Al-Shabaab militant group in 2011.<sup>467</sup>

In Sudan, as referenced previously, socio-economic oppression and the imposition of terrible living conditions marked by famine and the spread of disease have been central aspects of the alleged genocidal campaign waged by Sudanese President Omar al-Bashir and his allies in both Darfur and the Nuba Mountains.<sup>468</sup> Within the context of the Darfur region, such processes of harm causation have been presented as international crimes by the ICC Office of the Prosecutor (OTP). The OTP alleges that between September 2003 and January 2005 in the Darfur region of Sudan certain ethnic groups were systematically attacked as part of a genocidal plan carried out by al-Bashir and others. More specifically, the OTP further alleges that an integral part of this

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<sup>465</sup> See BBC News, “Somalia Famine ‘Killed 260,000 People’” (2 May 2013), online: *BBC News* <<http://www.bbc.com/news/world-africa-22380352>>; Martone & Kennedy, *supra* note 326.

<sup>466</sup> See e.g. Andrew Jillions, “The (in)Justice of Famine: Is al-Shabaab guilty of a Crime Against Humanity?” (15 August 2011), online: *Justice in Conflict* <<http://justiceinconflict.org/2011/08/15/the-injustice-of-famine-is-al-shabaab-guilty-of-a-crime-against-humanity/>>; Ohlin, “Somalia Famine”, *supra* note 326; Bryden, *supra* note 326; Human Rights Watch, “Somalia: End War Crimes to Help Tackle Famine” (14 August 2011), online: *Human Rights Watch* <<https://www.hrw.org/news/2011/08/14/somalia-end-war-crimes-help-tackle-famine>>.

<sup>467</sup> CBC, “Somalia 2011 Famine was a U.S.-Created War Crime, says Journalist Alex Perry” (18 January 2016), online: *CBC* <<http://www.cbc.ca/radio/thecurrent/the-current-for-january-18-2016-1.3408273/somalia-2011-famine-was-a-u-s-created-war-crime-says-journalist-alex-perry-1.3408302>>.

<sup>468</sup> See e.g. Fein, “Genocide by Attrition” *supra* note 211; de Waal, “Reflections” *supra* note 321; Edkins, *supra* note 318; *Situation in Darfur, Sudan*, ICC-02/05-157-AnxA, Annex A: Public Redacted Version of Prosecution's Application under Article 58 filed on 14 July 2008 (14 July 2008) (International Criminal Court, Pre-Trial Chamber I), online: *International Criminal Court* <<https://www.icc-cpi.int/pages/record.aspx?uri=559998>> [*Situation in Darfur*, Annex A of Prosecution's Application]; Samuel Totten, *Genocide by Attrition: The Nuba Mountains of Sudan* (New Brunswick, NJ: Transaction Publishers, 2012); Reeves, *supra* note 347.

genocidal plan was the use of “[m]ethods of destruction other than direct killings” against targeted groups, including “destruction of their means of survival in their homeland; systematic displacement from their homes into inhospitable terrain where some died as a result of thirst, starvation and disease; usurpation of the land and denial and hindering of medical and other humanitarian assistance needed to sustain life in [internally displaced persons] camps.”<sup>469</sup> These indirect methods of killing were than direct violence, as the OTP estimates that 83,000 out of 118,142 total civilian victims (roughly 70%) died from indirect causes, including injury, starvation, lack of water, or poor living conditions in refugee camps.<sup>470</sup> Samuel Totten argues that similar tactics were used by the Sudanese government as part of a genocidal campaign waged against minority groups in Sudan’s Nuba Mountains in the late 1980s and early 1990s.<sup>471</sup>

While al-Bashir and his alleged co-perpetrators have managed to avoid arrest through deft political manoeuvring, they have also been able to decrease international scrutiny of their ongoing efforts to gain control over Darfur by reducing their reliance on direct, armed attacks in the area. In December 2016, the UN Secretary General Ban Ki-moon reported to the UN Security Council that “no major armed conflict [occurred] in Darfur” during the preceding months, linking this development to an overall marginal improvement in living conditions.<sup>472</sup> The Secretary General however, also observed that there still exists a pressing need to address the “root causes” of violence in Darfur.<sup>473</sup> Meanwhile, only later in his report, under the heading of the “humanitarian situation” in Darfur, does the Secretary General mention that 97,000 new verified internally displaced persons were documented over the same time period, and that “[h]umanitarian actors also continued to face bureaucratic impediments in the form of delays and

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<sup>469</sup> *Situation in Darfur*, Annex A of Prosecution’s Application, *supra* note 468 at para 172.

<sup>470</sup> *Ibid* at para 111. While the figures provided by the ICC Office of the Prosecutor remain allegations and not necessarily proven facts, they are illustrative of the basic fact that many human beings died in Darfur during the relevant period and that a large proportion of such deaths were not immediately caused by the application of direct physical violence against victims.

<sup>471</sup> Totten, *supra* note 468.

<sup>472</sup> United Nations Security Council, “Report of the Secretary-General on the African Union-United Nations Hybrid Operation in Darfur,” UN Doc S/2016/1109 (23 December 2016) at para 2.

<sup>473</sup> *Ibid*.

rejections of intra-state travel permits, in particular for areas in which internally displaced persons affected by [recent armed conflict] reportedly settled.<sup>474</sup> Thus, while al-Bashir and his co-indictees have continued to cause mass suffering and death in Darfur, their decreasing reliance on the direct commission of acts of violence has helped them to conceptually move atrocity and genocide in Darfur towards becoming a past event, rather than an ongoing process.

The production of mass suffering and death through this wide variety of unspectacular, unfamiliar means is not likely to cease any time soon. In 2016, Secretary-General Ban Ki-moon accused the Syrian government, rebel forces, and Islamic State militants, all of committing the war crime of using starvation as a weapon within the context of ongoing food crises in Madaya and other parts of Syria.<sup>475</sup> In early 2017 meanwhile, the UN Food and Agriculture Organization officially declared that areas of South Sudan are experiencing “man-made” famine conditions.<sup>476</sup>

These situations, from Cambodia to South Sudan, demonstrate the complex, causally multifaceted nature of atrocities. While many of these situations have been socially conceptualized as atrocities, and some of them, such as Khmer Rouge era Cambodia, North Korea, and events in the Darfur region of Sudan, have even been labeled international crimes. Yet, even when broader situations are placed within the rubrics of atrocity and ICL, there exists a tendency to connect unfamiliar atrocity processes with more familiar ones. Accordingly, starvation and the spread of disease in Cambodia are linked to the Khmer Rouge’s violent tendencies and the presence of overseers at work sites. In Darfur, the seemingly calculated expulsion of members of certain ethnic groups into the desert, is linked to violent attacks on villages, the expropriation of livestock and poisoning of drinking wells. In North Korea, state policies enforcing famine conditions on the civilian population are viewed in tandem with the

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<sup>474</sup> *Ibid* at paras 24-25, 29.

<sup>475</sup> United Nations Web Services Section, “Full Transcript of Secretary-General’s press encounter following briefing to the General Assembly on his Priorities for 2016”, (14 January 2016), online: *United Nations Web Services Section* <<http://www.un.org/sg/offthecuff/index.asp?nid=4316>>.

<sup>476</sup> Food and Agriculture Organization of the United Nations, “Famine Hits Parts of South Sudan”, (20 February 2017), online: *Food and Agriculture Organization of the United Nations* <<http://www.fao.org/news/story/en/item/471251/icode/>>. For an analysis of this famine and its causes, see Siobhán O’Grady, “South Sudan’s Man-Made Famine”, (27 February 2017), online: *Foreign Policy* <<http://foreignpolicy.com/2017/02/27/south-sudans-man-made-famine/>>.

regime's practice of executing perceived traitors and preventing emigration through violence. When these links are absent (or themselves, largely invisible), such as was the case for decades in Burma, or the Nuba mountains, where victims were oppressed and killed primarily through attritive means, until such situations boil over into scenes of shocking violence, they tend occupy a position at the periphery of ICL, or treated as non-criminal problems to be addressed through human rights law, transitional justice, or development-based approaches. Thus, within the realm of ICL, visibility politics incentivize the commission of atrocities through means that do not conform to the atrocity aesthetic, as such means tend to be cost-effective and help avoid public scrutiny.<sup>477</sup>

## Conclusion

The events in Cambodia under the Khmer Rouge and elsewhere discussed in this chapter demonstrate that atrocities are complex social phenomena that may take many different forms and involve many different causal mechanisms in terms of the production of mass suffering and death. Such processes can, and regularly do, involve means of harm causation, such as the creation or enforcement of famine conditions, corrupt acts causing enormous damage to groups of people, or interference with humanitarian aid, that fail to conform to dominant aesthetic understandings of atrocity despite at times, falling within boundaries of extant ICL. As such, each of these situations fail to fit neatly within dominant understandings of the subject matter of ICL. This awkwardness of fit is evidenced by a common tendency to either view relevant harms as being situated outside the rubric of ICL, or to connect them to more familiar atrocity crimes, as either their root causes, or collateral consequences. This backgrounding process cannot be attributed wholly to ICL's general selectivity or assessments of relative degrees of gravity and individual culpability. In many cases, particularly visible atrocity crimes, ones documented by visceral, shocking evidence, are prioritized over less visible ones despite involving fewer victims and potentially less direct individual culpability amongst potential suspects. This prioritization

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<sup>477</sup> For example, Basso provides four reasons why the commission of atrocity through displacement may be selected as the "optimal mode of destruction" by actors with genocidal intentions, including: "cost-effectiveness . . . , the ability to lessen psychological strains on individual perpetrators, the pervasive social disruption among victim groups, and veiling the public." Basso, *supra* note 209 at 11. For a similar argument see generally Rosenberg & Silina, *supra* note 219.

appears to be a product of visibility politics and the tendency to rely on processes of aesthetic perception in identifying and understanding atrocity situations, as outlined previously in chapter one of this thesis. These politics operate within the broad zones of discretion afforded to ICL actors and institutions by the extreme selectivity of ICL itself.

## Chapter 5 – The Costs of Invisibility

### Introduction

Thus far, this thesis has argued that aesthetic considerations have shaped shared understandings of what constitutes genocide, crimes against humanity, and war crimes, resulting in the social and legal backgrounding of atrocities committed through unspectacular, less obvious means. One may very well accept this assertion, yet view the effects of these visibility politics as relatively inconsequential in terms of their role in contributing to the shortcomings of ICL, or their material effects. Given the rarity of ICL prosecutions, pointing out even more instances where the perpetration of atrocity crimes goes unpunished may be dismissed as merely adding to the veritable mountain of unprosecuted international crimes. This chapter seeks to unsettle this presumption by demonstrating that the way visibility politics currently operate undermine the aims of ICL itself, and produce negative outcomes beyond ICL.

Although they may not themselves be immediately apparent, the visibility politics of ICL produce a host of problematic repercussions. Because they effect both legal and broader social understandings of the nature of atrocity perpetration, the repercussions of such politics go far beyond missed prosecutorial opportunities. Indeed, the failure to prosecute international crimes committed through means failing to conform to the atrocity aesthetic represents perhaps one of the *least* significant outcomes of ICL’s visibility politics. Far more important are the effects of such politics on the retributive, utilitarian, and expressive functions of ICL itself, and the implications they have for historical memory, transitional justice and peacebuilding, and human rights.

### 1 Visibility Politics and the Aims of International Criminal Law

ICL is not underlaid by any clearly elucidated set of normative commitments, but, like most legal regimes, rests on a complex jumble of goals and justifications ascribed to it. The variation of these goals and justifications is especially broad in ICL, including aims related to “retribution,

deterrence, rehabilitation, truth-telling, incapacitation, expressivism, and reconciliation.”<sup>478</sup> One consequence of this loading up of expectations on ICL is that the stated purposes of ICL vacillate, swinging between retributive, consequentialist, and other proposed criminal law justifications.<sup>479</sup> As the foregoing analysis demonstrates, regardless of one’s viewpoint concerning what the proper purposes of ICL are however, such purposes are undermined through the operation of visibility politics.

## 1.1 Retributivist Repercussions

Retributivist theories of criminal punishment are premised on the notion that there exists a moral imperative to punish those who commit crimes, irrespective of whether such punishment serves any broader social purpose.<sup>480</sup> The extreme harm associated with the commission of atrocity crimes are often invoked as creating a deep retributive moral imperative for criminal punishment, thus justifying ICL.<sup>481</sup> This sentiment is reflected in the Rome Statute’s preambular reference to the fact that during the twentieth century “millions of children, women and men have been

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<sup>478</sup> Drumbl, “Accountability for System Criminality” *supra* note 129 at 380. For an overview of proposed justifications for ICL, see Combs, *supra* note 116 at 3–5. For an overview of ICL’s lack of any clearly elucidate set of normative commitments, see *supra* at 13-16.

<sup>479</sup> The preamble of the Rome Statute embodies this vacillation, repeatedly referencing the gravity of international crimes and seeming moral imperative to punish those responsible through battling impunity, while also explicitly stating the utilitarian goals of deterrence and the maintenance of international peace and security. See *Rome Statute*, *supra* note 63, preamble. Moreover, the increasing reliance on positioning victims as one of the beneficiaries of ICL has gestured towards alternative justice models, such as restorative ones, albeit primarily in a hortatory, rather than substantive manner. On ICL’s gesturing towards restorative justice, see Kamari Maxine Clarke, “‘We Ask for Justice You Give Us Law’: The Rule of Law, Economic Markets and the Reconfiguration of Victimhood” in Christian De Vos, Sara Kendall & Carsten Stahn, eds, *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge, UK: Cambridge University Press, 2015) 272.

<sup>480</sup> This characterization is, of course, a rather simplistic one, as there exist various permutations of retributive theories of criminal punishment. For more information on retributivism and its contemporary permutations, see generally Mark D White, ed, *Retributivism: Essays on Theory and Policy* (New York, NY: Oxford University Press, 2011). For a discussion of retributive theory in relation to atrocity crimes, see Drumbl, “Collective Violence and Individual Punishment” *supra* note 6 at 577-588.

<sup>481</sup> For example, in the second sentence of his famous opening statement at Nuremberg, Justice Jackson highlights the gravity of the crimes at issue, stating that “[t]he wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated.” Robert Jackson, “Robert H Jackson: Opening Statement Nuremberg Trials, 1945”, (21 November 1945), online: *PBS* <[http://www.pbs.org/wnet/supremecourt/personality/sources\\_document12.html](http://www.pbs.org/wnet/supremecourt/personality/sources_document12.html)>.

victims of unimaginable atrocities that deeply shock the conscience of humanity.”<sup>482</sup> This retributivist bent is however, also complicated by these same extreme harms, as such crimes may be viewed as being of a seriousness that transcends the boundaries of retributive justice. After all, it seems impossible to mete out a punishment via criminal law that is appropriate and “just” against individuals implicated in abusing and murdering hundreds, thousands, or even hundreds of thousands of victims.<sup>483</sup> This paradox, of the strong moral argument for retributivist criminal justice following atrocities, yet the impossibility of adequate punishment, has long been a point of difficulty for ICL theorists. For example, on one hand, Hannah Arendt argues that the “radical evil” of atrocities demanded their direct criminalization under international law.<sup>484</sup> In correspondence with Karl Jaspers however, she also observes that such crimes may, because of their scale, “explode the limits” of the law and criminal retribution.<sup>485</sup>

Visibility politics undermine the retributive aims of ICL, by inserting morally (and legally) irrelevant factors into assessments of the gravity of international crimes and individual blameworthiness. They do so by inserting aesthetic considerations, of shock, spectacle, and visceral horror, into assessments of what constitutes an international crime, and in ranking the relative seriousness of situations conceptualized as international crimes. As with many other aspects of the visibility politics of ICL, at first glance, this emphasis on shock and gravity appears natural, even wholly appropriate. Assessing the moral wrongfulness of an atrocity crime according to the shocking displays of violence and suffering it produces conforms to our moral intuitions and resonates with the emotional reactions atrocities elicit amongst those exposed to them. Such reactionary emotional assessments however, improperly insert such intuitive, emotional responses into assessments of gravity and wrongfulness.

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<sup>482</sup> *Rome Statute*, *supra* note 63, preamble. For a rather extreme version of such a focus on gravity, see *Sesay et al*, Opening Statement, *supra* note 176 (Prosecutor David Crane alleging that “the pure evil of the[ relevant] deeds of destruction are so horrific, terrible, and devastating in their scope, words in any language do not describe the offences”).

<sup>483</sup> On this subject, see Drumbl, “Collective Violence and Individual Punishment” *supra* note 6 at 577-588.

<sup>484</sup> See Arendt, *The Human Condition*, *supra* note 135 at 241.

<sup>485</sup> Hannah Arendt & Karl Jaspers, *Hannah Arendt/Karl Jaspers: Correspondence, 1926-1969*, Lotte Kohler & Hans Saner, eds, Robert Kimber & Rita Kimber, trans (New York, NY: Harcourt Brace Jovanovich, 1992) at 54.



Visibility and familiarity however, are irrelevant factors in assessing the degree to which an individual who participates in atrocity commission deserves to be punished. While one may plausibly argue that exposure to graphic atrocity imagery produces some negative societal outcome or harms certain social interests, such abstract harms pale in comparison to the very concrete traumas experienced by actual victims of atrocity crimes.<sup>486</sup> However, aesthetically grounded assessments of shock, spectacle, and familiarity, do appear to factor into social and legal assessments of the gravity of international crimes and the degree to which those responsible are morally deserving of punishment.

As discussed previously, while on one level it may feel intuitively appropriate to prioritize the prosecution of an individual such as Duch over on such as Im Chaem, given the centrality of S-21 to the legacy of the Khmer Rouge period, such a decision actually undermines the retributive legitimacy of the ECCC. Retributivist theories focus on the harms caused by a perpetrator and his degree of causal responsibility for such harms in determining his moral and legal blameworthiness. Unless we are to place those exposed to atrocity into the category of victim, a move I consider wholly improper, this assessment process has no place for aesthetic considerations. From a retributive perspective, the means involved in the production of harm, are wholly inconsequential, aside from variations in the degree of suffering they produce. For example, in terms of both causation and moral blameworthiness, it is irrelevant if a perpetrator commits murder by shooting a victim in the head with a gun, versus locking them in a room and allowing them to die from exposure or the like. Indeed, in the latter case, because the victim suffers more than the victim immediately killed by a gunshot to the head, if anything, those who participate in slow, unspectacular or less obvious processes of killing are perhaps more culpable than those who participate in violent, direct ones. Thus, the insertion of visibility politics into socio-legal assessments of what constitutes an international crime, and the culpability of those

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<sup>486</sup> That is, unless one is willing to view the production of spectacles of violence and exposing the broader global community thereto, as part of assessments of the wrongfulness involved in atrocity perpetration. I am not willing to do so, as this implies that those exposed to the reality that atrocities are regularly committed through news-media as pseudo-“victims,” as they are the ones who suffer such harms. I am quite uncomfortable with including the discomfort we may all feel when exposed to unsettling, often graphic imagery of atrocity, as an aspect of the harm of atrocity, as I am of the opinion that such minor psychological discomfort should not be compared, even implicitly, to the very direct and extremely serious traumas suffered by direct victims of atrocity and those who have intimate personal or familial relationships with such victims.

potentially responsible within the sphere of ICL impair retributive justifications for ICL punishment.

## 1.2 Consequentialism and Deterrence Slippage

Visibility politics also negatively affect the potential utilitarian purposes served by ICL. The main utilitarian purpose ascribed to ICL, or for that matter criminal justice in general, is that of deterrence.<sup>487</sup> This purpose, like retributivism, is central to standard justifications invoked by advocates of ICL. The notion that the prosecution of prior atrocity crimes may help deter the commission of future atrocities is evident in both Justice Jackson's statement that "civilization cannot tolerate [the atrocity of WWII] being ignored, because it cannot survive their being repeated" in his famous opening address at Nuremberg, and the preambular language in the Rome Statute, which explicitly links the fight against impunity for international crimes with their prevention.<sup>488</sup>

The degree to which ICL produces any deterrent effect is unclear, and any deterrent effect it serves is certainly not direct or substantial.<sup>489</sup> Regardless of the ultimate degree to which ICL

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<sup>487</sup> For a discussion of deterrence-based consequentialist justifications proposed for ICL. See Drumbl, "Collective Violence and Individual Punishment" *supra* note 6 at 588-592.

<sup>488</sup> Jackson, *supra* note 463. One of the lines of the Rome Statute's preamble lists as one of the goals of the state parties to the ICC, a "[d]etermin[ation] to put an end to impunity for the perpetrators of [international] crimes and thus to contribute to the prevention of such crimes." *Rome Statute*, *supra* note 63, preamble.

<sup>489</sup> There is an ongoing debate concerning whether ICL prosecutions produce any deterrent effect and if so, to what degree. For general assessments of the question of deterrence in ICL, see David Wippman, "Atrocities, Deterrence, and the Limits of International Justice" (1999) 23:2 *Fordham International Law Journal* 473; Akhavan, *supra* note 115. For a criminological assessments of the ICC's potential deterrent effect, see Buitelaar, *supra* note 115 at 285. (Concluding that "although the ICC can constructively contribute to a normative shift toward accountability and a change in international rules of legitimacy, its prospects for the direct and meaningful deterrence of future atrocities are slim."); Cronin-Furman, *supra* note 116. Cronin-Furman argues that because mass atrocity commission tends to be motivated by varying "logics" that this changes the dynamic of deterrence within ICL and that "given the comparative lack of certainty and severity of sanction represented by the [ICC's] prosecutions, as well as the selection of perpetrators with powerful incentives to offend, current prosecutorial policy is not well-targeted at producing a deterrent effect." *Ibid* at 434. For the argument that ICL prosecutions do not deter, and indeed, may even encourage atrocity commission in certain circumstances, see Julian Ku & Jide Nzelibe, "Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?" (2006) 84:4 *Washington University Law Review* 777; Ku, *supra* note 129. However, cf. Jo & Simmons, *supra* note 115. (finding empirical evidence that prosecutions at the ICC do produce a limited degree of deterrence for government actors, along with rebel groups that seek legitimacy). More generally, Kathryn Sikkink and Hunjoo Kim contends that empirical evidence suggests that "human rights prosecutions" including ICL prosecutions, do produce broad, if limited, normative deterrent effects.

produces a deterrent effect, now, or at some point in the future, such effect is and will continue to be diminished, or in some cases extinguished altogether through the operation of visibility politics. The types of powerful, collective actors who perpetrate atrocity crimes often have the capacity to commit crimes not only on a fundamentally larger scale than domestic criminal actors, but also through a wider array of means.<sup>490</sup> That is, such actors may choose to dominate or oppress a segment of the civilian population through either spectacular and familiar means, such as mass executions, the creation of concentration camps, or the like, or through alternative, less visible and familiar means, such as socio-economic oppression, the enforcement of famine conditions, or the like, which may produce equally disastrous results, yet fail to conform to the atrocity aesthetic.

Precisely because such alternative forms of harm causation are unlikely to be broadly conceptualized as atrocities falling within the purview of ICL, a risk of deterrence “slippage” is created. The term slippage is used to convey that any initial deterrent effect produced by ICL, in the form of those contemplating the commission of atrocity crimes being more hesitant to proceed for fear of being prosecuted, may simply choose alternative means that achieve the same harmful results, through alternative means. Indeed, such choices may be made in the sincere, yet erroneous, belief that relevant harm-producing actions will not even violate ICL, but merely run afoul of legal interests perceived as less serious, such as international human rights law. Although ignorance of the law is never considered a full excuse for violations of criminal law, including under ICL, if this misperception of the substance and applicability of ICL reflects broader social understandings of atrocity and international crime grounded in aesthetic considerations, such beliefs may become self-authenticating.

One can look to any variety of situations and see this slippage effect in action. Given the choice, it is clearly preferable for actors not to be implicated, social or legally, in the commission of

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See Hunjoon Kim & Kathryn Sikkink, “Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries” (2010) 54:4 *International Studies Quarterly* 939; Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (New York, NY: WW Norton & Co, 2011).

<sup>490</sup> On the inherently collective nature of atrocity perpetration, see e.g. Ohlin, “Organizational Criminality” *supra* note 6; Drumbl, “Collective Violence and Individual Punishment” *supra* note 6; André Nollkaemper & Harmen van der Wilt, eds, *System Criminality in International Law* (Cambridge, UK: Cambridge University Press, 2009); Ku, *supra* note 129.

atrocities independent of whether or not ICL performs any straight-line deterrent effect. Socially branding a situation using labels associated with ICL, as atrocities or genocide, creates an environment of relative political urgency in relation to harms and suffering socially placed within alternative normative or legal frameworks, such as human rights. Powerful actors may produce massive suffering and excess death for long periods of time while have relevant actions conceptually located outside the realms of atrocity and ICL.

For example, in Burma, the former junta oppressed Rohingya Muslims and other minority groups for decades.<sup>491</sup> Much of this oppression was effectuated through socio-economic, and other attritive means.<sup>492</sup> While the junta was regularly accused of human rights violations in relation to their persecution of Burmese Rohingya populations during this period, the plight of the Rohingya was not dominantly conceptualized within the rubric of atrocity.

In recent years however, the Burmese government, despite moving towards a more democratic system, has allegedly tolerated and even participated in violent attacks by the Buddhist majority against Rohingya populations. These attacks, and the spectacle of Rohingya victims fleeing Burma on overcrowded boats in increasing numbers, have led to an increased tendency to use the language of atrocity and ICL in describing the plight of the Rohingya population and the potential culpability of members of the Burmese government.<sup>493</sup> While this recent spate of violent attacks is of course, reprehensible, the victimization of members of the Rohingya population and other minority groups in Burma on an equally serious scale, and similarly involving the apparent commission of well-established international crimes, is nothing new, dating back to Burma gaining independence in 1948, or at least the military junta's seizure of power in 1962.<sup>494</sup> Scholars, such as Azeem Ibrahim, Maung Zarni and Alice Cowley, who have

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<sup>491</sup> See generally Ullah, *supra* note 452; Zarni & Cowley, *supra* note 211; Ibrahim, *supra* note 453.

<sup>492</sup> Zarni & Cowley, *supra* note 211.

<sup>493</sup> See e.g. Mathieson, *supra* note 453; Smith, *supra* note 453; UN Human Rights Council, "Situation of Human Rights", *supra* note 453.

<sup>494</sup> Ibrahim, *supra* note 453 at 1-10. Zarni and Cowley meanwhile, argue that Rohingya Muslims "have been subject to a state-sponsored process of destruction" since 1978. Zarni & Cowley, *supra* note 211 at 683.

attempted to draw much broader temporal boundaries around the continuing atrocities being committed against the Rohingya population, highlight its unfamiliarity with regard to dominant understandings of atrocity and international crime, by describing the situation as a “hidden” or “slow-burning” genocide.<sup>495</sup>

Similar processes of obscuring, or downgrading the severity of mass harm causation processes failing to conform to the atrocity aesthetic, thereby removing them from the assumed purview of ICL, can also be observed elsewhere. For example, it is more difficult to conceptualize corrupt acts in Nigeria’s Rivers State, the South African government’s refusal to accept prenatal HIV/AIDS medicine, or socio-economic policies of the Khmer Rouge regime, as atrocities worthy of ICL scrutiny, despite the fact that all three situations may well have involved both enormous harms and the commission of well-established international crimes.<sup>496</sup> While currently, the risk of visibility politics undermining deterrence within the realm of ICL is limited by ICL’s high degree of selectivity and the lack of conclusive empirical evidence that ICL actually produces any deterrent effect, moving forward, when and if ICL becomes a more normal and routine legal regime, deterrence slippage may become a more significant problem.

### 1.3 The Expressive Role of International Criminal Law

As previously indicated, traditional criminal law justifications of retribution and deterrence fit awkwardly when applied to ICL.<sup>497</sup> The harms involved in many international crimes, routinely involving killing on a massive scale that may transcend the limits of notions of retributive moral desert. Moreover, the often relatively light sentences imposed by ICL institutions, and the idiosyncratic sentencing practice of such institutions further disrupt traditional retributive

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<sup>495</sup> Ibrahim, *supra* note 453; Zarni & Cowley, *supra* note 211.

<sup>496</sup> See generally Bloom, *supra* note 199; Scheinert, *supra* note 337; DeFalco, “Accounting for Famine” *supra* note 233; DeFalco, *Justice and Starvation in Cambodia*, *supra* note 270.

<sup>497</sup> On the general limitations of the usefulness of drawing theoretical analogies to justifications for domestic criminal law regimes and punishment, see Robert D Sloane, “The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law” (2007) 43:1 *Stanford Journal of International Law* 39 at 39–42.

rationales for criminal punishment.<sup>498</sup> The widespread skepticism of ICL's deterrent effect, meanwhile, makes traditional utilitarian justifications, particularly those grounded in general deterrence, ring somewhat hollow.<sup>499</sup>

These limitations have likely contributed to an increasing embrace of expressive theories of punishment within the realm of ICL.<sup>500</sup> Expressivism is grounded in the notion that one of the central aims of criminal law should be the promotion of certain normative values through criminal sanction.<sup>501</sup> As such, expressivism views the role of criminal prosecutions and punishment as communicative in nature, expressing a society's opprobrium to certain behaviors by stigmatizing and punishing those who commit them through criminal law.<sup>502</sup>

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<sup>498</sup> On the inconsistency within ICL sentencing, see generally Drumbl, "Collective Violence and Individual Punishment" *supra* note 6; Margaret M deGuzman, "Harsh Justice for International Crimes?" (2014) 39:1 Yale Journal of International Law 1; Joseph W Doherty & Richard H Steinberg, "Punishment and Policy in International Criminal Sentencing: An Empirical Study" (2016) 110:1 American Journal of International Law 49; Barbora Hola & Hollie Nyseth Brehm, "Punishing Genocide: A Comparative Empirical Analysis of Sentencing Laws and Practices at the International Criminal Tribunal for Rwanda (ICTR), Rwandan Domestic Courts, and Gacaca Courts" (2016) 10:3 Genocide Studies and Prevention 59. For an argument that sentencing consistency ought not to be viewed as desirable, see Combs, *supra* note 116.

<sup>499</sup> For scholarship on the role of ICL in deterring international crimes, see *supra* note 489.

<sup>500</sup> For examples of explicit expressive proposals, see Diane Marie Amann, "Group Mentality, Expressivism, and Genocide" (2002) 2:2 International Criminal Law Review 93; Sloane, *supra* note 497; deGuzman, "Choosing to Prosecute" *supra* note 52; Mohamed, *supra* note 115. Other justifications provided are often grounded in some form of expressivism, such as norm projection or didactic functions. For example, Mirjan Damaška locates the "primacy" of the didactic function of ICL. Damaška, *supra* note 128. Frédéric Mégret, meanwhile, argues, albeit indirectly, that expressivism is central to the actual function of ICL, claiming that ICL is a form of distributive justice, which assigns stigma selectively to certain forms of behavior. Mégret, "Practices of Stigmatization" *supra* note 56.

<sup>501</sup> See e.g. Diane Marie Amann, "Message as Medium in Sierra Leone" (2001) 7:2 ILSA Journal of International & Comparative Law 237 at 238 ("Expressive theories look not so much at whether a law deters or whether a law punishes, but at the message we get from a law. The message understood, rather than the message intended, is critical. Expressivism tells us that a harmful message in itself causes harm; therefore, when we evaluate whether an action done was good or bad, we should look at the message that the action was understood to convey.") citing Dan M Kahan, "The Secret Ambition of Deterrence" (1999) 113:2 Harvard Law Review 413; Elizabeth S Anderson & Richard H Pildes, "Expressive Theories of Law: A General Restatement" (2000) 148:5 University of Pennsylvania Law Review 1503.

<sup>502</sup> Joel Feinberg characterizes expressive justifications for criminal law as grounded in the fact that "[p]unishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, either on the part of the punishing authority himself or of those 'in whose name' the punishment is inflicted. Punishment, in short, has a *symbolic significance* largely missing from other kinds of penalties." Joel Feinberg, "The Expressive Function of Punishment" (1965) 49:3 The Monist 397 at 400 (emphasis in original). See also Drumbl, "Collective Violence and Individual Punishment" *supra* note 6 at 592-595.

The attractiveness of such theories of punishment within ICL is easily grasped, as ICL can be viewed according to expressivist theories as a vehicle for propagating social opprobrium to the commission of atrocities and the impunity of those responsible therefor. While in a general sense, the propagation of social opprobrium to the commission of atrocities is a worthwhile endeavor, the selectivity of ICL both generally, and specifically flowing from its visibility politics, operates to warp such messaging. As Frédéric Mégret points out, the operation of ICL, including its selectivity, has significant distributive justice ramifications.<sup>503</sup> Mégret also argues that it is stigma, “both an expression of the inherent moral blameworthiness assigned to the perpetrators of certain heinous acts and a way of constituting the society that assigns this blameworthiness” that is distributed via ICL.<sup>504</sup> Thus, one may view the operation of ICL as one which selectively assigns extreme stigma to certain types of harm causing behaviors.<sup>505</sup>

Visibility politics operate to shape the normative values expressed through ICL, problematically suggesting in the process that mass killing and abuse brought about through means that do not conform to the atrocity aesthetic are less worthy of stigma than those which do conform thereto.

The flipside of stigmatization meanwhile, is toleration, and the current tendency to broadly conceptualize unspectacular, less obvious forms of harm causation as being situated outside the purview of ICL problematically suggests that such forms of harm causation, regardless of their scale or severity, are tolerable. This toleration implicates ICL in the much broader global tendency to prioritize the experiences and lives of certain individuals and communities over others and marginalize social, distributive and economic questions of justice.<sup>506</sup>

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<sup>503</sup> Mégret, “What Sort of Global Justice” *supra* note 231.

<sup>504</sup> Mégret, “Practices of Stigmatization” *supra* note 56 at 290.

<sup>505</sup> In a general sense, international crimes are viewed as more serious than other forms of injustice, such as human rights violations.

<sup>506</sup> For example, Mégret notes that international criminal justice “largely ignores questions of economic justice that are otherwise so prominent in the work of global justice scholars Mégret, “What Sort of Global Justice” *supra* note 231 at 81.

The victims of manifestations of genocide, crimes against humanity, and war crimes failing to conform to the atrocity aesthetic tend to be drawn from already vulnerable and marginalized populations. These populations are largely clustered in the Global South, and lack sufficient social, legal, and political entitlements to gain security in terms of both their subsistence needs and physical surroundings. Such populations, and in particular, the sources of their suffering, are often already obscured from popular sightlines.<sup>507</sup> By expressing the sentiment that everyday forms of oppression that fail to shock us do not merit ICL's attention, visibility politics subtly help condone the current global stratification in terms of the importance of human lives.<sup>508</sup>

## 2 Broader Repercussions: Historical Memory, Transitional Justice, Peacebuilding and Human Rights

For better or worse, ICL casts a rather wide shadow, exerting a great deal of influence over historical narratives and practices in related fields such as human rights, transitional justice, and peacebuilding. Consequently, visibility politics not only undermine the value of the retributive, consequentialist, and expressive functions of ICL, but may also produce broader problematic repercussions outside the realm of ICL itself. Such repercussions flow directly from how atrocity crimes are presented within ICL, as whether a specific situation is viewed as an atrocity often has a significant role in dictating the content of dominant historical discourses, and the allocation of resources to human rights, transitional justice, and peacebuilding projects. Such projects are overwhelmingly pursued in the aftermath of the commission of recognized atrocity crimes. Human rights meanwhile, are also increasingly viewed through the lens of ICL.<sup>509</sup> One consequence of this emphasis on ICL, is that the repercussions of the visibility politics of ICL

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<sup>507</sup> In this vein, on the socially constructed visibility of different bodies and their experiences, see generally Monica J Casper & Lisa Jean Moore, *Missing Bodies: The Politics of Visibility* (New York, NY: NYU Press, 2009) at 10–14.

<sup>508</sup> In the words of Judith Butler, these forces may contribute to the determination of “bodies that matter.” Butler famously uses this turn of phrase within an entirely different context, that of gender identity politics. Judith Butler, *Bodies that Matter: On the Discursive Limits of “Sex”*, Routledge classics (New York, NY: Routledge, 2011). Despite focusing on a completely different subject matter, Butler’s insight that legal and other “regulatory [social] schemas are not timeless structures, but historically revisable criteria of intelligibility which produce and vanquish bodies that matter.” *Ibid* at xxii. On global stratification in terms of the ways in which the world’s people are unequal, see generally Casper & Moore, *supra* note 507 at 3.

<sup>509</sup> See Engle, *supra* note 1.



are not strictly limited to ICL itself, but seep into these related disciplines which ground their understandings of atrocity and human rights violations in the normative structure of ICL.

The remainder of this chapter explores the role of ICL's visibility politics in narrating histories of oppression and abuse, and perpetuating the backgrounding of questions of structural and socio-economic justice within the related disciplines of human rights, transitional justice, and peacebuilding. This analysis demonstrates that visibility politics, in the form of social preferences for spectacle and familiarity, are not unique to ICL, but operate in a similar fashion within these related disciplines. Moreover, because ICL has become the primary normative environment within which concepts such as atrocity are social constructed, I argue that the visibility politics of ICL play a significant role in perpetuating the blindness to structural and socio-economic questions of justice and development within human rights, transitional justice, and peacebuilding.

## 2.1 Historical Memory

Shared understandings of atrocity grounded in notions of what constitutes genocide, crimes against humanity, and war crimes may have significant ramifications for historical memory and narrative. One of the main objectives commonly ascribed to ICL is the establishment of an accurate historical record of periods of atrocity.<sup>510</sup> Actually producing an accurate, integrated truth of what occurred during the tumult and chaos of atrocity is a quite difficult, if not impossible task.<sup>511</sup> Moreover, the form of criminal adjudication, and the sole purpose of a criminal trial, the determination of the guilt or innocence of the accused, are arguably ill-suited to the production of broad historical narratives.<sup>512</sup>

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<sup>510</sup> See generally Marina Aksenova, "Symbolism as a Constraint on International Criminal Law" (2017) 30:2 *Leiden Journal of International Law* 475 at 494.

<sup>511</sup> On the "pluralism" of truths in relation to histories of atrocity, see Mark A Drumbl, "The Curious Criminality of Mass Atrocity: Diverse Actors, Multiple Truths, and Plural Responses" in Elies van Sliedregt & Sergey Vasiliev, eds, *Pluralism in International Criminal Law* (New York, NY: Oxford University Press, 2014) 68.

<sup>512</sup> For critiques of ICL's suitability for truth-telling and the production of accurate historical narratives, see *ibid*; Martti Koskenniemi, "Between Impunity and Show Trials" (2002) 6:1 *Max Planck Yearbook of United Nations Law* 1; Richard Ashby Wilson, "Judging History: The Historical Record of the International Criminal Tribunal for the former Yugoslavia" (2005) 27:3 *Human Rights Quarterly* 908; Aksenova, *supra* note 510 at 494. However, some

Regardless of whether or not ICL is actually any good at producing accurate historical narratives of atrocities, social and legal understandings of what constitutes genocide and atrocity play a major role in whether and how histories of large-scale injustice and abuse are remembered and historically documented. As demonstrated previously in this thesis, a correlation exists between forgotten or hidden histories of mass killing and abuse, and forms of harm causation that do not conform to the atrocity aesthetic.<sup>513</sup> For example, histories of atrocities, including acts that would now legally constitute genocide, such as those committed against Herero and Nama victims in present-day Namibia between 1904 and 1908 by confining them to unlivable desert areas, or along the Cherokee trail of tears from 1838 to 1839, may be misconstrued as mere violations of human rights, or otherwise downgraded in seriousness.

According to this flawed logic, specific acts, such as the poisoning of wells in Namibia and the use of violence to prevent starving and dehydrated Herero and Nama victims from escaping the desert, may amount to atrocities, but the broader, holistic set of processes involved in killing and abusing such victims may be inaccurately viewed as non-criminal in nature. For example, there exists a common misconception that some non-legal qualifier, such as “political” or “cultural” needs to be added to the concept of genocide for the systematic destruction of Aboriginal populations in North America and elsewhere to be properly labelled as genocides.<sup>514</sup> Such discourses affect how such situations are remembered and memorialized.

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scholars argue that the structure of ICL prosecutions allows for them to contribute meaningfully to the establishment of accurate historical records. See e.g. Ruti G Teitel, *Transitional Justice* (New York, NY: Oxford University Press, 2000) at 69–118.

<sup>513</sup> See *supra* at 140-150.

<sup>514</sup> See e.g. Ladner, *supra* note 211; Hinton, “Colonial Genocide”, *supra* note 440. For a broader overview of the debate in Canada surrounding usage of the term “cultural genocide” in relation to treatment of Aboriginal populations, see Joseph Brean, “‘Cultural Genocide’ of Canada’s Indigenous Peoples is a ‘Mourning Label,’ Former War Crimes Prosecutor Says”, (15 January 2016), online: *National Post* <<http://news.nationalpost.com/news/canada/cultural-genocide-of-canadas-indigenous-people-is-a-mourning-label-former-war-crimes-prosecutor-says>>. For a discussion of the US context in this regard, see Chris Mato Nunpa, “Historical Amnesia: The ‘Hidden Genocide’ and Destruction of Indigenous Peoples in the United States” in Alexander Laban Hinton, Thomas LaPointe & Douglas Irvin-Erickson, eds, *Hidden Genocides: Knowledge, Power, Memory* (New Brunswick, NJ: Rutgers University Press, 2014) 96.

Historical nomenclature is also not limited solely to abstract debate and practices of memorialization, but often has significant continuing social and political implications. This importance also extends to how victim groups are labelled, as researchers have found a correlation between the failure to acknowledge prior atrocities and the continuing oppression of relevant victim groups.<sup>515</sup> As an example, one need not look any further than the situation in Turkey, where Armenian, Assyrian and other populations continue to be marginalized, and the government has long denied that these groups were victims of genocide.<sup>516</sup>

## 2.2 Transitional Justice and Peacebuilding

Whether a historical narrative is broadly understood as involving acts of atrocity also has repercussions for activities related to human rights, transitional justice and peacebuilding.<sup>517</sup> Each of these fields has been influenced by ICL because atrocity crimes are viewed as the most serious human rights transgressions possible. Consequently, once a country or region becomes a widely acknowledge atrocity site, new sources of funding and resources become available to civil society actors and social justice activists located there, creating material incentives for

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<sup>515</sup> See e.g. Armillei, Marczak & Diamadis, *supra* note 3 (noting a correlation between a lack of acknowledgement of the fact that atrocities were committed against Romani populations during the Holocaust and Assyrian populations in Turkey during the Armenian Genocide, and the continuing persecution of these groups).

<sup>516</sup> On this subject, see generally Burlison & Giordano, *supra* note 207.

<sup>517</sup> The term “transitional justice” does not have a universally agreed-upon definition, but in a general sense, “refers to the ways countries emerging from periods of conflict and repression address large scale or systematic human rights violations so numerous and so serious that the normal justice system will not be able to provide an adequate response.” International Center for Transitional Justice, “Transitional Justice Factsheet” (2009), online: *International Center for Transitional Justice* <<https://www.ictj.org/about/transitional-justice>>. Another influential definition views transitional justice as “the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.” Ruti G Teitel, “Transitional Justice Genealogy” (2003) 16 *Harvard Human Rights Journal* 69 at 69. For the purposes of this thesis, the term transitional justice is used to generally refer to any and all efforts to pursue justice in the wake of large-scale oppression or harm causation. The term “peacebuilding” meanwhile:

first emerged in 1970s through the work of Johan Galtung who called for the creation of peacebuilding structures to promote sustainable peace by addressing the ‘root causes’ of violent conflict and supporting indigenous capacities for peace management and conflict resolution. Since then, the term Peacebuilding has covered a multidimensional exercise and tasks ranging from the disarming of warring factions to the rebuilding of political, economic, judicial and civil society institutions.

United Nations Peacebuilding Support Office, “Peacebuilding and the United Nations”, online: *United Nations Peacebuilding Support Office* <<http://www.un.org/en/peacebuilding/pbso/pbun.shtml>>.

actors seeking to engage with local histories of oppression and injustice to frame such histories within the rubric of atrocity.<sup>518</sup>

For example, the US Agency for International Development (USAID) Bureau for Democracy, Conflict, and Humanitarian Assistance recently announced that \$16 million of funding would be distributed to support “activities that mitigate conflict and promote reconciliation by bringing together individuals of different ethnic, religious, or political backgrounds from areas of civil conflict and war.”<sup>519</sup> While the USAID call for applications states that “[p]rograms that provide opportunities for adversaries to address issues, reconcile differences, promote greater understanding and mutual trust, and work on common goals with regard to potential, ongoing, or recent conflict will receive consideration for funding,” only organizations working in a pre-selected group of eleven “post-conflict” countries are permitted to even submit applications.<sup>520</sup> Each of these countries are well-established sites of recent, highly visible periods of violent conflict.

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<sup>518</sup> For example, preliminary empirical research suggests that ICL projects tend to attract far more funding than other transitional justice mechanisms, such as truth commissions. See William Muck & Eric Wiebelhaus-Brahm, “External Transitional Justice Funding: Introducing a New Dataset” (2016) 11:2 *Journal of Peacebuilding & Development* 66. The fact that forms of harm causation that tend not to be conceptualized as atrocity crimes, such as socio-economic ones, tend to be marginalized within the literature and practice of transitional justice also lends support to the general conclusion that there exists a material incentive for actors seeking funding for transitional justice projects to frame the past harms they seek to address as atrocities. On the backgrounding of forms of harm causation failing to conform to the atrocity aesthetic within the realm of transitional justice, see e.g. Arbour, *supra* note 335; Miller, *supra* note 229; Carranza, *supra* note 335; Ismael Muvingi, “Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies” (2009) 3:2 *International Journal of Transitional Justice* 163; Sharp, “Addressing Economic Violence” *supra* note 336; Cahill-Ripley, *supra* note 320; Sharp, *Justice and Economic Violence*, *supra* note 211. For a critique of the ramifications flowing from the fact that virtually all transitional justice projects are externally funded, see Ismael Muvingi, “Donor-Driven Transitional Justice and Peacebuilding” (2016) 11:1 *Journal of Peacebuilding & Development* 10. For a similar critique within the field of ICL, see Kendall, *supra* note 97.

<sup>519</sup> *Notice of Funding Opportunity: Request for Applications Number RFA-OAA-17-000011* (USAID, 2017) (on file with author).

<sup>520</sup> *Ibid* at 5. Eligible countries include: Bangladesh, Bosnia-Herzegovina, Central African Republic, Colombia, Democratic Republic of Congo, Georgia, Liberia, Indonesia, Nigeria, Peru, South Africa and Thailand.

The visibility politics of ICL not only influence *where* transitional justice and peacebuilding are pursued, but also *how* they are pursued, and what forms of harms causation are prioritized. In this vein, Zinaida Miller argues:

Transitional justice as both literature and practice offers more than just a set of neutral instruments for the achievement of the goals of justice, truth and reconciliation. It also serves to narrate conflict and peace, voice and silence, tolerable structural violence and intolerable physical atrocity. Ultimately, transitional justice is a definitional project, explaining who has been silenced by delineating who may now speak.<sup>521</sup>

As Miller points out, one consequence of this narrative role of transitional justice is that, “[d]espite its claims to exposure, revelation and memorialization, the project of transitional justice may simultaneously perpetuate invisibility and silence” especially in relation to economic questions of inequality and structural violence.<sup>522</sup>

Miller’s usage of visibility as an organizing theme reflects the similar role visibility politics play within the broader field of transitional justice and within the realm of ICL. Indeed, such politics appear to operate symbiotically within these two fields, mutually reinforcing the incorrect notion that direct physical violence is the sole means through which mass harm may culpably be brought about.<sup>523</sup>

Recently, there has been a movement towards broader, more holistic approaches to transitional justice. Pdraig McAuliffe describes this shift as a “transformative turn” which he links with the liberation of transitional justice from its “legalist beginnings”.<sup>524</sup> Thus, according to McAuliffe

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<sup>521</sup> Miller, *supra* note 229 at 266–267.

<sup>522</sup> *Ibid* at 267. On the general meaning of the term “structural violence” see Galtung, *supra* note 336. On the meaning of structural violence within the realm of transitional justice, see generally Krista Thomason, “Transitional Justice as Structural Justice” in Claudio Corradetti, Nir Eisikovits & Jack Volpe Rotondi, eds, *Theorizing Transitional Justice* (Burlington, VT: Ashgate, 2015) 71.

<sup>523</sup> On the incorrectness of this assumption that socio-economic issues are inherently structural in terms of their causal dynamics and thus, less direct than other forms of harm causation and rights violations, see Schmid & Nolan, *supra* note 335.

<sup>524</sup> See e.g. Pdraig McAuliffe, *Transformative Transitional Justice and the Malleability of Post-Conflict States* (Northampton, MA: Edward Elgar, 2017) at 2–3.

and numerous other scholars, transitional justice's overly narrow focus stems at least partially from its grounding in legal mechanisms, the most notable of which is ICL.<sup>525</sup> I agree with the general assertion made by McAuliffe and others that legal mechanisms, especially those grounded in criminal law, such as ICL, offer but one of a wide variety of approaches to justice-seeking in the aftermath of social upheaval and pervasive injustice. However, what I have sought to demonstrate through the foregoing analysis is that visibility politics exacerbate the degree to which transitional justice's close associations with ICL blind it to certain forms of harm causation. Moreover, visibility politics may also operate to remove certain situations from the realms of transitional justice and peacebuilding altogether, obscuring the presence of systemic oppression, killing, that manifest themselves non-spectacularly.

## 2.3 Human Rights

The field of human rights experiences a similar set of material and normative repercussions stemming from ICL's visibility politics to those of transitional justice and peacebuilding. As ICL has become increasingly prominent, human rights has undergone what Karen Engle describes as a "turn to criminal law" in recent decades.<sup>526</sup> Although she acknowledges that for the most part, the linking of human rights with ICL has been viewed as a positive development for the global protection of human rights, Engle has deep concerns that such linking plays into a broader, US-

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<sup>525</sup> *Ibid*; see also e.g. Cahill-Ripley, *supra* note 320 at 189 ("It is evident that violations of economic and social rights have been ignored or sidelined within transitional justice as they are not viewed as a legitimate concern for prosecutorial justice or are deemed too difficult an issue for criminal accountability."); Rosemary Nagy, "Transitional Justice as Global Project: Critical Reflections" (2008) 29:2 *Third World Quarterly* 275 at 276. ("Although there is no single definition of transitional justice, I suggest that predominant views construct human rights violations fairly narrowly to the exclusion of structural and gender-based violence. There is a privileging of legal responses which are at times detrimentally abstracted from lived realities.")

<sup>526</sup> Engle, *supra* note 1 at 1070. For an overview of how this turn occurred, see *ibid* at 1073–1079. For an analysis of the role that the emergence of the field of transitional justice played in the shift in human rights away from "naming and shaming" practices and towards an emphasis on accountability, see Paige Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice" (2009) 31:2 *Human Rights Quarterly* 321. Human Rights Watch, for example, "considers international justice—accountability for genocide, war crimes, and crimes against humanity—to be an essential element of building respect for human rights." Human Rights Watch, "International Justice", (31 March 2015), online: *Human Rights Watch* <<http://www.hrw.org/topic/international-justice>>.

led global exportation of a particular economic ideology: neoliberalism.<sup>527</sup> As with the concerns voiced by transitional justice scholars, Engle and other human rights scholars are wary that by linking ICL and human rights, the visibility and recognition of socio-economic and structural human rights violations will be impaired.<sup>528</sup>

Thus, as ICL is increasingly integrated with human rights, normatively and legally, the tendency for ICL's visibility politics to background socio-economic and other unspectacular, less obvious forms of mass harm causation connects with the longstanding debate within human rights concerning the legality and justiciability of economic, social, and cultural rights. Human rights lawyers and activists have worked against the perceived division between civil and politics, and economic, social, and cultural rights for decades.<sup>529</sup> Visibility politics are often tied quite closely to this artificial divide. For example, Wendy Hesford argues that what she terms the "human rights spectacle" shapes "discourses of vision and violation" within the internationalist human rights movement.<sup>530</sup> Other scholars, such as Hilary Charlesworth and Benjamin Authers, make similar arguments, also alluding to visibility politics in arguing that the label "crisis," a term that is, like atrocity, definitionally capacious, ambiguous, and constructed, gives "power" to human rights law.<sup>531</sup> Charlesworth and Authers argue that one effect of this preoccupation with crisis is that "the absence of crisis language can make some human rights violations appear quotidian, a part of everyday life and less urgent to redress than crisis-generated rights. Economic, social, and cultural rights, for example, are only infrequently depicted as the subjects of legal crisis."<sup>532</sup> A

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<sup>527</sup> Engle, *supra* note 1 at 1123.

<sup>528</sup> *Ibid* at 1112–1127.

<sup>529</sup> For an overview of this schism in human rights, see Sharp, *Justice and Economic Violence*, *supra* note 211 at 38–40.

<sup>530</sup> Hesford, *supra* note 187 at 7.

<sup>531</sup> Authers & Charlesworth, *supra* note 360 at 2.

<sup>532</sup> *Ibid*.

host of other scholars have made similar arguments concerning the prioritization and perceived legality of economic, social, and cultural human rights in relation to civil and political rights.<sup>533</sup>

These permutations of visibility politics, while distinct from those this thesis argues operate within ICL, are nonetheless, to some degree, perpetuated by ICL's visibility politics. The same preference for spectacle and familiarity that underwrites the atrocity aesthetic, helps to background questions of socio-economic justice within transitional justice and peacebuilding, and economic, social, and cultural rights violations within human rights law. Indeed, Evelyne Schmid draws a direct connection between the failure to take economic, social, and cultural rights issues seriously within ICL and their continued backgrounding in human rights law and discourse more generally.<sup>534</sup> Larissa van den Herik meanwhile, characterizes economic, social, and cultural rights issues as a "blind spot" within ICL.<sup>535</sup> Schmid, van den Herik and others have identified areas of overlap between economic, social and cultural rights violations and the commission of international crimes.<sup>536</sup>

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<sup>533</sup> See e.g. Shedrack C Agbakwa, "A Path Least Taken: Economic and Social Rights and the Prospects of Conflict Prevention and Peacebuilding in Africa" (2003) 47:1 *Journal of African Law* 38; Arbour, *supra* note 335; Susan Marks, "Human Rights and Root Causes" (2011) 74:1 *The Modern Law Review* 57; Philip Alston, "Phantom Rights: The Systemic Marginalization of Economic and Social Rights", (4 August 2016), online: *Open Democracy* <<https://www.opendemocracy.net/openglobalrights/philip-alston/phantom-rights-systemic-marginalization-of-economic-and-social-rights>>. For a more general overview of economic, social, and cultural human rights, see Gilles Giacca, Christophe Golay & Eibe H Riedel, eds, *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges* (New York, NY: Oxford University Press, 2014).

<sup>534</sup> Schmid, *Taking Economic, Social and Cultural Rights Seriously*, *supra* note 51.

<sup>535</sup> Van den Herik, "Economic, Social, and Cultural Rights" *supra* note 319.

<sup>536</sup> See Schmid, *Taking Economic, Social and Cultural Rights Seriously*, *supra* note 51 at 316; van den Herik, "Economic, Social, and Cultural Rights" *supra* note 319; Skogly, *supra* note 321. Prominent ICL scholars Carsten Stahn and Robert Cryer, along with van den Herik, agree with Schmid's general argument that international crimes may be committed through methods that also amount to economic, social, and cultural rights violations. See *European Journal of International Law*, "Book Discussion: Taking Economic, Social and Cultural Rights Seriously in International Criminal Law" (16 March 2016), online: *EJIL Talk!*: *Blog of the European Journal of International Law* <<http://www.ejiltalk.org/book-discussion-taking-economic-social-and-cultural-rights-seriously-in-international-criminal-law-a-response-to-cryer-stahn-and-van-den-herik/>>.



## Conclusion

This chapter has argued that the visibility politics of ICL and the aesthetic considerations they insert into the recognition of genocide, crimes against humanity, and war crimes, have repercussions that go far beyond a general failure to prosecute international crimes failing to conform to the atrocity aesthetic. Rather, the failure to acknowledge the criminality of such means of mass harm causation undermine the retributive, utilitarian, and expressive functions of punishment via ICL, distorts historical memory, and contributes to the backgrounding of socio-economic justice issues that plagues transitional justice, peacebuilding and human rights.

Visibility politics undermine the retributive goals of ICL by inserting morally irrelevant aesthetic considerations into assessments of gravity and individual culpability. Such politics also create a risk of undermining any deterrent effect ICL may have, now or in the future, by allowing powerful actors to commit atrocities with impunity so long as they utilize means that are unspectacular or otherwise less obvious. In terms of the expressive value of ICL, visibility politics problematically implicate ICL in the tendency to present certain harms, which tend to be suffered disproportionately by already marginalized populations clustered in the Global South, as tolerable.

Meanwhile, the ICL's visibility politics similarly contribute to the backgrounding of socio-economic and structural rights and justice issues within the realms of transitional justice, peacebuilding, and human rights, by subtly diverting attention and resources away from forms of harm causation failing to conform to the atrocity aesthetic. Such politics also implicate ICL in the perpetuation of the myth that economic, social, and cultural human rights violations are necessarily less serious and less worthy of redress than civil and political rights violations.

## Chapter 6 - Legality and Legitimacy Implications: An Interactional Legal Theory Perspective

The previous chapter explored the repercussions of ICL's visibility politics in terms of their effect on the aims of ICL and the way they impact historical memory, transitional justice, peacebuilding, and human rights. This chapter, returning to interactional legal theory, considers how such politics affect the legal legitimacy of ICL itself. Such considerations are important for two reasons. First, the need to jealously guard ICL's legal legitimacy is often presented as a reason why the outer boundaries of ICL should not be explored in relation to novel forms of harm causation such as famine or corruption, that fail to conform to the atrocity aesthetic. Second, such assessments help to frame what is at stake when it comes to ICL's visibility politics, as this chapter argues that the tendency to focus myopically on familiar, spectacular crimes undermines the very legality of ICL through the insertion of extra-legal aesthetic considerations into processes of identifying, investigating, and prosecuting international crimes. More specifically, this chapter argues that the insertion of such aesthetic considerations impairs ICL's adherence in practice to Fuller's eight criteria of legality that are central facets of interactional legal theory.

### 1 Legality and Legitimacy: An Interactional Perspective

Interactional legal theory is a relatively recent social constructivist account of lawmaking, legal legitimacy, and compliance at the international level.<sup>537</sup> According to this theory, the distinguishing feature of international *law* that differentiates it from "other types of social ordering is not form, but adherence to specific criteria of legality."<sup>538</sup> Thus, per interactionalism, "[w]hen norm creation meets these criteria and is matched with norm application that also satisfies the legality requirements" actors are then "able to pursue their purposes and organize their interactions through law."<sup>539</sup>

<sup>537</sup> See *supra* at 2-6; see also generally Brunnée & Toope, *Legitimacy and Legality*, *supra* note 8.

<sup>538</sup> Brunnée & Toope, *Legitimacy and Legality*, *supra* note 8 at 6.

<sup>539</sup> *Ibid* at 6-7.

Within this context, Brunnée and Toope view legal legitimacy as something that, rather than being inherent in a particular form, or fixed at an identifiable moment in time, instead fluctuates dynamically. Legal legitimacy is either maintained, through robust practices of legality, evolves, through recalibration of shared understandings and their instantiation into to the law, or erodes, through a lack of support. Moreover, according to interactionalism, legal legitimacy is not merely an ephemeral goal that is pursued for wholly abstract reasons, but an evolving status that engenders habitual adherence, or in the words of Fuller, “fidelity”.<sup>540</sup> As such, interactional legal theory seeks to peer into the inner workings of what Martti Koskenniemi refers to as the “mystery” of legal obligation.<sup>541</sup>

Shared understandings that ground social norms are merely the raw material necessary for interactional international lawmaking. For a rule or norm to become part of international law per interactionalism, it must be instantiated into law in substantial accordance with eight criteria of legality. Once again, these criteria are:

1. generality;
2. promulgation;
3. non-retroactivity;
4. clarity;
5. non-contradiction;
6. possible to follow;
7. constancy (or stability); and
8. congruence between the law and official action.<sup>542</sup>

The atrocity aesthetic, while continuing to shape both social and legal understandings of atrocity and international crime, has itself not been instantiated into the substance of ICL and actually impairs the broader legal legitimacy of ICL itself.

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<sup>540</sup> *Ibid* at 7.

<sup>541</sup> Martti Koskenniemi, “The Mystery of Legal Obligation” (2011) 3:2 *International Theory* 319.

<sup>542</sup> Brunnée & Toope, “Interactional International Law” *supra* note 9 at 310. As mentioned previously, these criteria are drawn from Lon Fuller’s work on the internal morality of law. See Fuller, *The Morality of Law*, *supra* note 11.

## 2 Interactional Legal Legitimacy Implications of the Visibility Politics of International Criminal Law

Visibility politics affect lawmaking and legal legitimacy vis-à-vis ICL in various ways. As I argue in chapter one, ICL represents a favorable environment for aesthetic considerations to shape social learning processes because of ICL's multiple levels of ambiguity and selectivity.<sup>543</sup> Ambiguity renders assessments of ICL's applicability to a specific situation less clear, while selectivity confers a great deal of discretion on ICL actors. In response to this lack of clarity and discretion, ICL actors are apt to rely more heavily on aesthetic perceptive processes in identifying instances of international criminality. Such lack of clarity is exacerbated by the fraught political environments amidst which international crimes occur, lack of access to complete, accurate information due to such politicization and the social chaos and lack of security associated with the commission of genocide, crimes against humanity, and war crimes. Investigators and other ICL actors must therefore make preliminary assessments of ICL's applicability based on flawed information and according to oft-unclear legal provisions. Because many international crimes manifest themselves in a highly visible, instantly recognizable manner, the general concept of atrocity becomes conflated with this subset of crimes. ICL's highly selective practice then affirms the expectations underlying the atrocity aesthetic, creating a self-affirming feedback cycle.

This cycle has implications throughout interactional lawmaking processes. First, because visibility politics shape social learning processes within the realm of ICL, they influence the development of widely shared understandings concerning what the subject matter of ICL is, and what forms international crimes may take. Rather than developing a set of general, widely agreed upon criteria concerning what the basic elements of an international crime are, shared understandings of atrocity and international crime have coalesced around a particular aesthetic model. As chapter three of this thesis demonstrates, this aesthetically grounded understanding of atrocity oversimplifies the complex causal realities of actual processes of mass killing and abuse

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<sup>543</sup> See *supra* at 2-30.

in the real world, and is not actually grounded in the substance of ICL itself.<sup>544</sup> In the remainder of this chapter, I argue that shared understandings of the subject matter of ICL grounded in the atrocity aesthetic, actually undermine the legal legitimacy of ICL, by impairing various criteria of legality.

## 2.1 Generality

The legality criterion of generality requires that legal norms be “general, prohibiting, requiring, or permitting certain conduct.”<sup>545</sup> This requirement is grounded in the notion that law must be evenhanded and cannot descend into hyper-specificity requiring constant explanation.<sup>546</sup> As previously discussed, ICL’s multiple levels of selectivity undermine its generality in practice. It is one thing to say that anyone who participates in an atrocity crime could theoretically be held responsible and thus, ICL is general in its application.<sup>547</sup> However, practically speaking, there are broad swaths of the globe where impunity for atrocity is the rule, rather than the exception. This state of affairs impairs ICL’s generality, as it remains abundantly clear that certain individuals enjoy functional immunity from the reach of ICL.<sup>548</sup>

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<sup>544</sup> See *supra* 74-110.

<sup>545</sup> Brunnée & Toope, “Interactional International Law” *supra* note 9 at 310.

<sup>546</sup> In this regard, Fuller observes that “[i]f we observe that the power of law normally expresses itself in the application of general rules, we can think of no better explanation of this than to say that the supreme legal power can hardly afford to post a subordinate at every street corner to tell people what to do.” Fuller, *The Morality of Law*, *supra* note 11 at 147.

<sup>547</sup> Theoretically, even if an international crime occurs in a state that does not have provide for domestic criminal liability for international crimes and which is not a state party to the ICC, such crime could be prosecuted through either the UN Security Council referring the situation to the ICC, or a domestic court invoking universal jurisdiction. However, in practice, these processes are exceptionally rare occurrences.

<sup>548</sup> For example, despite abundant evidence that the US military engaged in systematic torture in Guantanamo Bay and elsewhere in prosecuting the “War on Terror,” there has never been any serious suggestion that senior Bush administration officials will ever be held accountable for such atrocities. For an overview of the implications of the war on terror for the legal prohibition on torture under international law, see Brunnée & Toope, *Legitimacy and Legality*, *supra* note 8 at 220-270. Similarly, despite abundant evidence that under the direction of Henry Kissinger, the US Nixon administration committed various crimes against humanity and war crimes by carpet bombing Cambodia indiscriminately from 1970-1975, yet the pursuit of ICL against Kissinger or other relevant individuals has never been serious contemplated. For an overview of the bombing, and an analysis of its incredible indiscriminate manner, see Taylor Owen & Ben Kiernan, “Bombs over Cambodia”, *The Walrus* (October 2006) 62.

ICL's generality is further impaired by the lack of clear rules concerning how prosecuting authorities will select which situations, suspects, and crimes to investigate and prosecute. Prosecutors at the ICC and other ICL institutions, despite being reliant on other authorities, states and institutions to assist them to investigate crimes, arrest suspects, and fund their work, nonetheless wield a great deal of discretionary power. The bounds of such discretion are especially broad at the ICC, which is the first court with general jurisdiction over ICL violations, but the exercise of prosecutorial discretion has also created controversy at the ICTY, ICTR and ECCC.<sup>549</sup> At the ECCC for example, the question of how many suspects would be prosecuted has been a source of considerable controversy since the Court's inception.<sup>550</sup> In the Rwandan context meanwhile, although the government pledged full accountability, this pledge created its own set of selectivity problems, as over 120,000 suspects languished in pre-trial detention for years awaiting trial.<sup>551</sup> Meanwhile the Rwandan government blocked the ICTR from investigating alleged atrocities committed by Rwandan Patriotic Front forces who were under the command of current Rwandan President Paul Kagame when they entered Rwanda and brought an end to the genocide in 1994.<sup>552</sup>

Thus far, this discretion has not been bounded by any comprehensive set of legal principles, but has only been subjected to broad and highly subjective tests of good faith and comparative assessments of gravity.<sup>553</sup> The exercise of this discretion has been predictably fraught with political pressure, influence and subjected to a great deal of critique. Thus, even within their sphere of influence, it remains impossible for international prosecutors to apply ICL in a truly

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<sup>549</sup> For an overview of the limited personal jurisdiction regimes of the ICC, ICTY, SCSL, and ECCC, and resulting selectivity guidelines developed at each institution, see generally, DeFalco, "Cases 003 and 004 at the Khmer Rouge Tribunal" *supra* note 81 at 46–55. At the ICC, the Office of the Prosecutor has issued periodic public guidelines outlining its internal policies in selecting situations to investigate. See ICC Office of the Prosecutor, "Policy Paper on Case Selection and Prioritisation" (15 September 2016), online: *International Criminal Court* <<https://www.icc-cpi.int/legalAidConsultations?name=policy-paper-on-case-selection-and-prioritisation>>.

<sup>550</sup> See *supra* at 127-140.

<sup>551</sup> Powers, *supra* note 85.

<sup>552</sup> Larissa van den Herik, "International Criminal Law as a Spotlight and Black Holes as Constituents of Legacy" (2016) 110 AJIL Unbound 209.

<sup>553</sup> See generally DeFalco "Cases 003 and 004 at the Khmer Rouge Tribunal" *supra* note 81.

even-handed manner, as there are no guidelines they can follow which dictate whom they should prosecute and in what order.

While the general selectivity of ICL undermines its generality in practice, the injection of visibility politics into such selection processes further impairs the generality of ICL. They do so by inserting a set of unacknowledged aesthetic considerations into already contentious processes of ICL case selection. Thus, while doctrinally, ICL is applicable to all situations involving the commission of genocide, crimes against humanity, war crimes, and other recognized international crimes, visibility politics limit ICL's applicability to a subset of such crimes that conforms to the atrocity aesthetic in practice. The net result is that visibility politics exacerbate the degree to which the general selectivity of ICL impairs the legality criteria of generality in the practice of ICL. For example, visibility politics appear to have assisted the ECCC Co-Investigating Judges in placing a legal gloss on the decision to dismiss the case against Im Chaem by obscuring the seriousness of such allegations in relation to the crimes former S-21 prison commander Duch was convicted of in Case 001.<sup>554</sup>

## 2.2 Promulgation

A second legality requirement affected by ICL's visibility politics is that of promulgation, which requires that laws be "accessible to the public, enabling actors to know what the law requires."<sup>555</sup> Unlike domestic jurisdictions, processes of legal promulgation at the international level are not straightforward, as there is no state presumed to be the lawgiver, but a horizontal authority structure made of primarily of sovereign states. While international law is becoming increasingly codified in the form of various treaties, conventions, and the like, customary rules of international law, general principles of law, and so-called "soft-law" norms remain important.<sup>556</sup>

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<sup>554</sup> For a more fulsome discussion of the role of visibility politics in the decision to dismiss the case against Im Chaem, see *supra* at 127-140

<sup>555</sup> Brunnée & Toope, "Interactional International Law" *supra* note 9 at 310.

<sup>556</sup> On these and other acknowledged sources of international law, see Brunnée & Toope, *Legitimacy and Legality*, *supra* note 8 at 47.

The doctrinal substance of ICL reflects these various sources of international law. While each of the various hybrid or international courts and tribunals, ranging from Nuremberg to the ICC have been created through treaties or other codified processes, much of the substance of ICL has been developed incrementally over time through common law adjudication. This continues to be true even with increasing codification of ICL in instruments such as the Rome Statute. As there now exists a wealth of published sources, including the abundance case law of the various ICL courts and tribunals that have been created over the years, containing the various rules and norms that make up ICL, the law in this area has been set forth publicly, hence generally adhering to the criterion of promulgation.

To some degree however, visibility politics undermine the degree to which ICL is promulgated. They do so because they ground a widely shared, yet implicit, understanding of the forms atrocity crimes may take. Because this understanding is implicit, it remains not only unacknowledged, but is also not promulgated as it has not been instantiated into the substance of ICL itself. This lack of acknowledgement underscores the uniqueness, from an interactional legal theory perspective, of the atrocity aesthetic and visibility politics that underwrite it. In this scenario, a shared understanding appears to exist which is arguably, relatively strong, stable, and widely shared. This understanding is central to the functioning of ICL, as it concerns the very subject matter this body of international law is meant to address and thus, shapes numerous practices of legality related to ICL. And yet, such understanding, despite its seeming ubiquity, remains wholly extralegal in that it reflects an assumption that does not necessarily reflect the actual substance of ICL. As such, the current myopic focus within ICL practice on international crimes committed through familiar and spectacular means, has not been communicated to the public in any legal sense, impairing the interactional legality criterion of promulgation in the process.

### 2.3 Non-Retroactivity

The third criterion of legality undermined by ICL's visibility politics is that of non-retroactivity, which requires legal norms to be wholly "prospective, enabling citizens to take the law into



account in their decision making”.<sup>557</sup> This requirement is grounded in the idea of fair notice, and tends to be strongly enforced in criminal law regimes, where the stakes are especially high for actors subjected to the law, involving their physical liberty.<sup>558</sup> In the realm of ICL specifically, this requirement is expressed through the maxim *nullum crimen sine lege* (“no crime without law”).<sup>559</sup> In ICL jurisprudence, relying on decisions of the European Court of Human Rights, in order to survive a *nullum crimen* challenge raised by the defense, the challenged provision must have existed under ICL at the time of the alleged offense, in a form sufficiently clear and accessible to the accused to allow her to understand that she was violating it.<sup>560</sup> In terms of existence of the legal provision being challenged, the law must simply be found to have existed at the time the accused is alleged to have violated it.<sup>561</sup> Determining the existence of the law

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<sup>557</sup> Brunnée & Toope, “Interactional International Law” *supra* note 9 at 310.

<sup>558</sup> For a discussion of the notion of fair warning and its implications for ICL, see Robinson, “A Cosmopolitan Liberal Account”, *supra* note 78.

<sup>559</sup> The phrase *nullum crimen sine lege* is used interchangeably with the term “legality” as means of referring to the prohibition on retroactive criminalization within the realm of ICL. To avoid confusion, this thesis exclusively uses the terminology of *nullum crimen sine lege*. For an overview of the requirements of the doctrine of legality under ICL, see Cassese, *supra* note 268 at 36–38; Beth Van Schaack, “The Principle of Legality in International Criminal Law” (2009) 103 Proceedings of the Annual Meeting (American Society of International Law) 101; Watkins & DeFalco, *supra* note 68 at 200–203.

<sup>560</sup> *Prosecutor v Vasiljević*, IT-98-32-T, Judgment (29 November 2002) para 198 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: ICTY <<http://www.icty.org/>> [*Vasiljević*, Trial Chamber Judgment] (stating that the offense must be defined “with sufficient clarity for it to have been foreseeable and accessible, taking into account the specificity of customary international law.”); see also *Prosecutor v Milutinović*, IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction - Joint Criminal Enterprise (21 May 2003) para 21 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) online: ICTY <<http://www.icty.org/>> [*Milutinović*, JCE Decision]. The twin inquiries of specificity and accessibility are sometimes grouped as subsets of the requirement that the law was defined with sufficient “clarity” at the relevant time. See *Case of Streletz, Kessler and Krenz v Germany*, 34044/96, 35532/97 & 44801/98, Judgement (22 March 2001) para 91 (European Court of Human Rights, Grand Chamber), online: *International Criminal Court Legal Tools* <<http://www.legal-tools.org/doc/7058a0/>> [*Streletz et al*, Judgement] (Stating that to assess the principle of *nullum crimen sine lege*, the proper assessment is “whether, at the time when they were committed, the [relevant] acts constituted offences defined with sufficient accessibility and foreseeability under international law.”); see also Watkins & DeFalco, *supra* note 68 at 199–205. Thus, the principle of *nullum crimen* under ICL protects not only the legality criteria of non-retroactivity, but also those of promulgation and clarity in requiring accessibility, clarity, and foreseeability.

<sup>561</sup> See generally Watkins & DeFalco, *supra* note 68 at 202; see also *Prosecutor v Norman*, SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) (31 May 2004) para 8 (Special Court for Sierra Leone, Appeals Chamber) online: Residual Special Court for Sierra Leone <<http://www.rscsl.org/>> (holding that the question to be answered in response to a defense argument that the law did

requires turning to the standard sources of international law, as laid out in Article 38 of the Statute of the International Court of Justice.<sup>562</sup> The challenged provision of ICL must also be shown by the prosecution to have “existed at the relevant time ... in a form specific enough to make liability foreseeable to the accused when acting.”<sup>563</sup> The law’s applicability to the accused’s actions must also have been foreseeable at the time of the alleged offense, and be promulgated in a form accessible to the accused in particular.<sup>564</sup>

While the current formulation of the principle of non-retroactivity provides a reasonable amount of protection against the retroactive application of ICL, the principle of non-retroactivity was a source of a great deal of controversy at early ICL institutions, such as the IMT and International Military Tribunal for the Far East (IMTFE). These institutions were quite loose in their adherence to the principle against retroactive criminalization.<sup>565</sup> The IMT for example, famously held that “the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice” going on to state:

To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the Government of Germany, the defendants, or at least some of them must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs

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not exist is whether the relevant provision of ICL “was recognized as a crime entailing individual criminal responsibility under customary international law at the time of the acts alleged in the indictment against the accused.”).

<sup>562</sup> See generally *Streletz et al*, Judgement, *supra* note 560; *Vasiljević*, Trial Chamber Judgment, *supra* note 560 at para 198.

<sup>563</sup> *Watkins & DeFalco*, *supra* note 68 at 203 (internal citations omitted).

<sup>564</sup> See generally *ibid* at 202-204. For a judicial discussion of these factors, see *Milutinović*, JCE Decision, *supra* note 560 at paras 40-42.

<sup>565</sup> For an overview of the legality principle at the IMT and other early ICL institutions see generally Beth Van Schaack, “Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals” (2008) 97:1 *Georgetown Law Journal* 119 at 125–133.

of invasion and aggression. On this view of the case alone, it would appear that the maxim [*nullum crimen sine lege*] has no application to the present facts.<sup>566</sup>

This passage encapsulates the IMT's relatively fast and loose approach to the principle of non-retroactivity. At the time of the IMT judgment, ICL was, of course, far from fully formed, and entirely new concepts, such as that of crimes against humanity, were constructed and applied simultaneously by the IMT.<sup>567</sup>

Over time, as the doctrinal substance of ICL has become increasingly codified and elucidated in a massive body of jurisprudence, criticisms of ICL grounded in *nullum crimen sine lege* arguments have become less common and less incisive. The non-retroactivity principle however, remains central to debates concerning whether ICL can and should be applied to novel forms of harm causation, especially those not conforming to the atrocity aesthetic, such as famine and socio-economic rights abuses.<sup>568</sup> Such concerns tend to be deeply grounded in a rather formalistic strain of legal positivism, as many advocates call for codification of new, issue-specific ICL which directly criminalizes certain types of harm causing behavior such as corrupt practices or famine causation.<sup>569</sup>

Thus, certain interpretations of the principle of *nullum crimen sine lege* might be seen as a true legal barrier to the prosecution of atrocity crimes committed through novel, unspectacular and/or unfamiliar means. In this way, arguments against the application of ICL to novel forms of mass harm causation are at times, couched in the protection of the systemic legality of ICL by preventing its retroactive application. The argument that ICL may run afoul of the *nullum crimen sine lege* principle, while generally true in relation to certain vague areas of the law, has not

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<sup>566</sup> IMT Judgment, *supra* note 108 at 219.

<sup>567</sup> See generally Van Schaack, *supra* note 565 at 125–133.

<sup>568</sup> See e.g. Bashi, *supra* note 323 at 39–40. (expressing concern that the defense of *nullum crimen sine lege* could block certain attempts to prosecute Khmer Rouge officials for war crimes predicated on their roles in causing famine). For critiques of these arguments, see e.g. Schmid, *Taking Economic, Social and Cultural Rights Seriously*, *supra* note 51 at 71–73; DeFalco, “Conceptualizing Famine” *supra* note 233 at 53–54.

<sup>569</sup> For examples of such calls for codification, see Marcus, *supra* note 312 (advocating for the creation of new famine-specific crimes which criminalize famine causing (“faminogenic”) behavior); Kofele-Kale, “The Right to a Corruption-Free Society” *supra* note 328; Kofele-Kale, “Patrimonicide” *supra* note 199.

special applicability in relation to discussions concerning extant ICL's applicability to novel factual scenarios. This is because the argument that declining to pursue ICL accountability for novel forms of harm causation safeguards the legality of ICL confuses potential *means of committing crimes* with *crimes themselves*. The principle of non-retroactivity operates solely in relation to the *law* and not in relation to whether there exist analogous examples of successful ICL prosecutions based on substantially the same *method* of commission.<sup>570</sup>

While it is true that non-retroactivity is a foundational principle of both Fuller's internal morality of law and basic liberal criminal law theory, it is a principle grounded in concept of fair warning and not a ban on the application of the law to new facts.<sup>571</sup> From an interactional legal theory perspective, while ICL's previously fast and loose fidelity to the principle of non-retroactivity may have impaired ICL's legality, the pursuit of ICL accountability beyond harms conforming to the atrocity aesthetic would not impair the legality of ICL in any general sense. That is, so long as the actual legal provisions used were well-established when the relevant events took place and the accused had fair warning that ICL prohibited their actions.

It is worth noting however, that this conclusion may be in the process of being eroded by the visibility politics of ICL. This is because, while the provisions of ICL themselves that may apply to a situation involving the commission of atrocities through unfamiliar means are by now, relatively clear and quite accessible, as such modalities of harm causation continue to be systemically backgrounded within ICL practice, it may become less foreseeable that these forms of mass killing and abuse may violate ICL. This demonstrates the self-confirming nature of ICL's visibility politics, as they become increasingly viewed as an inherent part of ICL itself.

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<sup>570</sup> For an illustration of this distinction in practice at the international level, see e.g. *Milutinović*, JCE Decision, *supra* note 560 at para 38 (discussing the requirements of specificity and foreseeability at the international level and concluding that the doctrine of legality prevents a court from "creating new law or interpreting existing law beyond the reasonable limits of acceptable clarification.").

<sup>571</sup> At the international level, the concept of fair warning is manifested in the twin requirements of "accessibility" and "foreseeability" at the heart of the doctrine of *nullum crimen sine lege*. See Watkins & DeFalco, *supra* note 68 at 200–203.

## 2.4 Clarity

The third criterion of legality undermined by ICL's visibility politics is the requirement that the law be clear for actors to be able to "understand what is permitted, prohibited, or required by law."<sup>572</sup> ICL continues to suffer from a lack of a clear normative substructure and contains isolated zones of legal ambiguity, as referenced previously in this thesis.<sup>573</sup> From a bird's eye perspective, when limited to genocide, crimes against humanity, and war crimes, along with its specialized modes of liability, ICL can be seen as broadly criminalizing large-scale harm causation, particularly in relation to abuses committed against civilians and other noncombatants. The increasingly large body of ICL jurisprudence and its codification in international legal instruments such as the Genocide Convention, Geneva Conventions, various ad hoc tribunal treaties and statutes, and the Rome Statute, has clearly contributed to the increasing clarity of ICL in a general sense.<sup>574</sup>

While it is true that ICL has progressed towards greater adherence to the legality criterion of clarity, once again, from an interactional legal theory perspective, such adherence appears to be both overstated in a general sense, and undermined in practice through the operation of visibility politics. The various zones of ambiguity identified previously in chapter one of this thesis render the edges of ICL liability hazy and unclear.<sup>575</sup> Moreover, in terms of visibility politics, the insertion of extralegal, aesthetic considerations into assessments of what situations involve the commission of atrocity crimes, impairs the clarity of ICL by operating as an invisible layer of selectivity. This additional selectivity, and its invisibility, undermine the clarity of ICL by rendering it more difficult to assess how the law might actually be applied to a given situation.

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<sup>572</sup> Brunnée & Toope, "Interactional International Law" *supra* note 9 at 310.

<sup>573</sup> See *supra* at 12-25.

<sup>574</sup> Indeed, ICL is now at times referred to as a mature legal system. For an example of such a sentiment, see e.g. Van Schaack, *supra* note 565 at 189 (Stating that "[a]lthough codification will never be complete, the rate of change is slowing significantly. As a maturing system of law, most of the next phase of the evolution of ICL will happen at the outer edges of doctrine, where the implications of new ideas are perhaps less dramatic. As a result, there will be less and less space for judges to build upon the ICL edifice.).

<sup>575</sup> See *supra* at 13-20.

## 2.5 Stability

The fourth criterion of legality undermined by ICL's visibility politics is that of stability, which requires that the demands of the law "must remain relatively constant."<sup>576</sup> While visibility politics do not directly impair the stability of ICL, they do, to a degree, affect the stability of the law in a broad sense by contributing to the rift between the law as drafted and as applied. As ICL has reemerged from its Cold War dormancy; when and where it will be applied has come to be contingent mostly on political factors and power. Visibility politics affect politics and power to some degree, as such politics shape social attitudes towards when impunity for those participating in atrocity crimes may be tolerable versus when accountability is viewed as an absolute imperative. For example, the graphic stories and imagery that emerged from Rwanda and the Balkans during the 1990s clearly played a major role in creating the necessary political climate for the ICTR and ICTY to be created. The same can be said of the graphic images of victims missing limbs in Sierra Leone and the social furor around the issue of "blood diamonds" and their role in fueling the Sierra Leonean civil war. The film, *The Killing Fields* and the graphic evidence of atrocity on display in Cambodia at sites such as S-21 and *Choeung Ek* clearly helped fuel the creation of the ECCC. At the ICC, indictments of Omar al-Bashir and others in the Sudan, followed global protests concerning the Darfuri genocide and the search for Joseph Kony intensified after the "Kony 2012" campaign went viral on social media.

This contingency unsettles the stability of ICL because it makes the law's evolution unpredictable and subject to extralegal considerations that themselves are unacknowledged. New norms may emerge rather rapidly when social opprobrium to a shocking practice or event is properly leveraged, as was the case concerning the rapid development of ICL in relation to child soldiers, and to sexual and gender based crimes in recent years. Alternatively, the law's applicability may be left unsettled in relation to forms of mass harm causation that fail to gain social traction, thereby undermining the stability of ICL.

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<sup>576</sup> Brunnée & Toope, "Interactional International Law" *supra* note 9 at 310.

## 2.6 Congruence between the Law and Official Action

Fifth and finally, ICL consistently fails to conform to the criterion of legality requiring “congruence between legal norms and the actions of officials operating under the law.”<sup>577</sup> The congruence requirement is grounded not only in standard notions of the rule of law, but also Fuller’s understanding of reciprocity between lawgivers and those governed by laws.<sup>578</sup> This notion of reciprocity, as interpreted by Brunnée and Toope, “means that law givers must be able to expect that citizens will ‘accept as law and generally observe’ the promulgated body of rules.”<sup>579</sup> Thus, this notion of reciprocity does not require that the law be perfectly followed at all times, but rather that officials, holding positions of authority vis-à-vis a body of law, behave as if the law actually influences their actions. For example, in the realm of criminal law, the principle of congruence would not require that law criminalizing murder deters all would-be murderers perfectly, but rather that officials who shape the law or are empowered by it (police, lawyers, judges, legislators, etc.) behave as if they are also bound by the law. Thus, according to a Fullerian view of legality, a private citizen who commits a murder, yet somehow evades capture, does not necessarily undermine the legality of the criminal law regime which he has managed to evade. Conversely, if a police officer commits a murder and behaves as if the law regarding murder simply does not apply to him, or that he is somehow exempt because of his official position in relation to the criminal law, this has the effect of impairing the legality of a given criminal law regime’s prohibition on murder.<sup>580</sup> As Brunnée and Toope note, this notion of reciprocity maps well onto the horizontal authority structure of international law.<sup>581</sup>

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<sup>577</sup> *Ibid.*

<sup>578</sup> See generally Fuller, *The Morality of Law*, *supra* note 11; Brunnée & Toope, “Interactional International Law” *supra* note 9 at 311.

<sup>579</sup> Brunnée & Toope, “Interactional International Law” *supra* note 9 at 311, quoting Lon L Fuller, “Human Interaction and the Law” in Kenneth I Winston, ed, *The Principles of Social Order: Selected Essays of Lon L Fuller*, rev’d ed (Portland, OR: Hart Publishing, 2001) 211 at 235.

<sup>580</sup> This also explains the pernicious rule of law ramifications of the recent spate of police killings of unarmed black men in the United States that have not been treated as homicides despite manifestly violating relevant criminal laws concerning culpable forms of killing.

<sup>581</sup> Brunnée & Toope, “Interactional International Law” *supra* note 9 at 311.

ICL of course, struggles mightily with enforcement and selectivity problems. Thus, in a quite general sense, legal practices within the realm of ICL fail regularly to conform to the legality criterion of congruence. Despite ICL's explicitly universalist aspirations and self-proclaimed applicability, in a practical sense ICL is narrowly applicable to select pockets of time and space within which the proper combination of jurisdictional competence, sufficient desire, and sufficient resources to actually pursue accountability converge. These pockets have proven consistently to exist only in exceptional circumstances, with impunity for atrocity crimes being the general rule to which accountability represents a rare exception. Of course, various political and social forces shape the selective application of ICL. Each of these forces which narrow ICL's practical applicability may be seen as undermining ICL's adherence to the interactional legality principle of congruence. I have argued however, that visibility politics also represent one such normative force, one which operates to shape and constrain where and how ICL is applied by influencing shared understandings of what kinds of situations ICL may address. As such, visibility politics operate to further widen the chasm between ICL, as it is meant to apply, and ICL as it is actually applied.

The legality criterion of congruence between the law and official action also serves to highlight the constantly evolving nature of international legality, and the role of legal practices in maintaining or undermining such legal legitimacy. Because Brunnée and Toope view norm development and international lawmaking as dynamic, perpetual processes, legal practices within international legal regimes such as ICL largely determine the ebb and flow of their legal legitimacy from an interactional perspective. This insight highlights the fact that visibility politics continue to impair the legality of ICL, by affecting relevant the behavior of relevant legal actors, ranging from individuals to states, as they interact with one another through the rubric of ICL. Thus, each of the various criteria of legality this chapter has argued are impaired through the operation of visibility politics within the realm of ICL, continue to be impaired so long as such politics themselves remain unacknowledged and hence, unaccounted for.

## Conclusion

The visibility politics of ICL represent a novel case study for interactional legal theory, involving a situation where unacknowledged aesthetic considerations shape shared understandings of the subject matter ICL, yet have in no way been instantiated into the substance of ICL itself. This



situation highlights the importance, and dangers, of non-linear social learning processes in the development of shared understandings and law at the international level. Through social interaction, ICL actors appear to have generated a widely shared understanding of what kinds of situations ICL applies to and inserted such understanding into the vocabulary and rhetoric of ICL without articulating the normative content of such understandings, or indeed, even necessarily being aware of what they were doing. While this insight helps confirm the central role that social interaction and non-linear, non-purposive social learning processes play in shaping the normative contours of international law, it also highlights the potentially troubling legal ramifications of such processes. Shared understandings that are developed through such processes, though they may be more inclusive in terms of the number of actors involved, may shape deeper social understandings of relevant law and influence relevant legal practices without ever actually being themselves acknowledged, let alone instantiated into the substance of the relevant international legal regime.

This dynamic is exemplified by the operation of visibility politics within ICL and the resultant grounding of shared understandings of international crime being grounded in a particular aesthetic model of atrocities as familiar spectacles of violence. This chapter has argued that from an interactional legal theory perspective, the failure of ICL to engage with unfamiliar or unspectacular forms of mass harm causation, rather than protecting the legal sanctity of ICL, actually works to impair ICL's legality by undermining various criteria of legality. This argument is not meant to be interpreted as denying ICL any claim to legal legitimacy, as Fuller, Brunnée and Toope all view legality as a phenomenon that exists in degrees along a spectrum, rather than being a binary assessment.<sup>582</sup>

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<sup>582</sup> Fuller asserts that contrary to others, he is of the view that law can “half exist” or exist in degrees of imperfection. He notes that for all other fields of inquiry, the “normal expectation would be of some performance falling between zero and a theoretical perfection” but that somehow law is thought of in different terms, finding it “truly astounding to what an extent there runs through modern legal thinking in legal philosophy the assumption that law is like a piece of inert matter—it is there or not there.” Fuller, *The Morality of Law*, *supra* note 11 at 122-123. Fuller makes a parallel argument in relation to entire legal regimes, stating that “both rules of law and legal systems can and do half exist. This condition results when the purposive effort necessary to bring them into full being has been, as it were, only half successful.” *Ibid* at 122. Fuller leaves “uncertain the precise point at which a legal system can be said to have come into being. I see no reason to pretend to see black and white where reality presents itself in shades of gray. Certainly, there is little point in imposing on the situation some definitional fiat, by saying, for

This chapter has instead argued that when one assesses the legality of ICL as a system from the perspective of interactional legal theory, ICL's selectivity and zones of continuing ambiguity stand out immediately as major impediments to ICL achieving a high degree of legality. As observed in chapter one of this thesis, ICL is selective on multiple fronts.<sup>583</sup> ICL purports to apply to everyone, everywhere, yet its institutions, such as the ICC, have limited territorial jurisdictional reaches.<sup>584</sup> From the perspective of interactional theory, such *lacunae* operate not only to undermine ICL's enforcement, but to impair its legitimacy as a legal system, by undermining its generality of application.

ICL's lack of generality, clarity, and congruence between the law and official action, are often dismissed as enforcement problems, rather than issues affecting the very legitimacy and legality of ICL itself. From the practice-based perspective of interactional legal theory however, these shortcomings cannot be so neatly separated from assessments of ICL's legal legitimacy. Because the selectivity and ambiguity of ICL significantly impair at least three of Fuller's criteria of legality, ICL cannot be viewed as a mature or perfected system of international law from an interactional perspective. To be sure, this conclusion does not deny ICL any claim to legal legitimacy. While I am hesitant to conclude that ICL is minimally legitimate system of international law, a final determination of this essentially subjective assessment is not essential at this juncture. Rather, this chapter has simply demonstrated that visibility politics operate to exacerbate the legality shortcomings associated with ICL's selectivity and ambiguity by operating as additional, unacknowledged sources of selective application, contributing to ICL's ambiguity by further obscuring ICL's normative aims and doctrinal boundaries.

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example, that we shall consider law to exist only where there are courts." *Ibid* at 131. See also Brunnée & Toope, *Legitimacy and Legality*, *supra* note 8 at 22-23.

<sup>583</sup> See *supra* at 20-25.

<sup>584</sup> Each of the ad hoc UN Tribunals and the ICC have temporal limitations on their jurisdiction, further undermining their abilities to apply ICL generally. Obviously political realities, resource limitations, and the like also functionally limit the jurisdictional reach of ICL institutions. The doctrine of universal jurisdiction may be viewed as theoretically remedying this disconnect between ICL's stated global applicability, and its jurisdictionally limited reach. This doctrine however, never engendered a significant number of ICL prosecutions in domestic courts and has fallen largely into disuse. Thus, absent the extraordinary steps of the UN Security Council conferring ad hoc jurisdiction to the ICC over a situation otherwise out of the Court's jurisdictional purview, or a domestic court invoking universal jurisdiction, international crimes regularly occur in jurisdictional lacunae within the current international criminal justice regime.

## Conclusion: (Re)Conceptualizing Atrocity Crimes

Reporting on the 1963 trial of Adolph Eichmann in Jerusalem, Hannah Arendt famously coined the phrase “the banality of evil” to describe what she perceived to be Eichmann’s fundamental ordinariness as a human being, despite having been a central figure in the Holocaust.<sup>585</sup> This observation, which has been repeated to the point of cliché, was quite controversial when Arendt first made it, despite the fact that she nonetheless supported the prosecution (and execution) of Eichmann. More recently, scholars such as Mark Drumbl, have similarly begun to follow in Arendt’s footsteps by critically examining some of the foundational assumptions upon which ICL rests in light of the complex, “messy” nature of atrocities and the processes through which they are committed.<sup>586</sup>

In this thesis, I have explored another aspect of the banality of atrocity as described by Arendt and the “messiness” of atrocity described by Drumbl. Rather than focusing on the characteristics of the actors involved in the commission of such atrocities, be they as victims, perpetrators, or bystanders, in this thesis I have focused on the banality and messiness of atrocities processes themselves in terms of the forms they may take. I have done so through the lens of Jutta Brunnée and Stephen Toope’s interactional theory of international lawmaking and legality. Utilizing this social constructivist theory of international law, I have argued that the norm development processes involved in the social construction of widely shared understandings of atrocity have been deeply influenced by visibility politics, i.e. a politics of vision and recognition grounded in aesthetic considerations, resulting in the grounding of such understandings in a particular aesthetic model of atrocity. This model, which combines aesthetic elements of spectacle and familiarity, fails to account for the fact that atrocities may be committed through decidedly banal,

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<sup>585</sup> Arendt, *supra* note 133.

<sup>586</sup> Drumbl, for example, questions the sharp line that is commonly assumed to separate victims and perpetrators of atrocity crimes, and the ability to arrive at a singular, objective “truth” of events as complex and messy as those involving the commission of atrocity crimes. See Mark A Drumbl, “Victims who Victimise” (2016) 4:2 London Review of International Law 217. Drumbl refers specifically to the collapse of the perpetrator/victim divide embodied in the figure of the *Kapo*. *Kapos* were concentration camp internees appointed by the Nazis to fulfill various functions within the camps themselves. *Ibid* at 220. See also Drumbl, “The Curious Criminality of Mass Atrocity”, *supra* note 511 at 101 (“Mass atrocities are never unitary. They are, rather, metastasized—and often messy—agglomerations of many local tragedies, small-scale decisions, and parochial horrors.”).

bureaucratic means. Consequently, social and legal understandings of atrocity grounded in this aesthetic model fail to encompass the full reality of atrocity processes in all their complexity.

Chapter one argues that ICL represents an environment especially conducive to actors operating within it relying heavily on aesthetic perception and that, from a social constructivist perspective, such reliance is likely to deeply influence norm development processes through which shared social understandings created. Relying on insights from both social constructivism and neuroaesthetic research, I argue that the normative and doctrinal ambiguity of ICL and its selectivity, combined with the complex and politically contentious nature of situations involving the commission of atrocity crimes (i.e. genocide, crimes against humanity, and war crimes), create environments of uncertainty and lack of knowledge. Actors within such environments are apt to rely heavily on cognitive processes of aesthetic perception when interacting with both the world and one another through the rubric of ICL. Social constructivism demonstrates how, over time, through such interactions, social learning occurs and thereby shared understandings are developed. The high degree of reliance on aesthetic perception amongst actors identifying and interacting with atrocity situations thus, imbues resultant shared understandings of atrocity crimes with aesthetic considerations.

Chapter two argues that the net effect of this heavy reliance on aesthetic processes of perception within the realm of ICL has been the embedding of shared understandings of atrocity crimes in a particular aesthetic model of atrocities as familiar spectacles of violence and abuse. This model flows from the operation of visibility politics because atrocity crimes conforming to this model are both highly visible and easily recognizable in terms of their “criminal” nature. I demonstrate the existence of this model through an examination of how the term atrocity itself is rhetorically deployed within social and legal discourses relevant to ICL. In doing so, I contend that ubiquitous use of the language of atrocity, despite the term’s definitional ambiguity and malleability, demonstrates how the term operates as a free-floating label that may be affixed to situations we intuit as especially shocking or heinous, and hence, meriting ICL prosecutions. Over time, through social interaction, the term atrocity has hence, come to be understood largely aesthetically, as a term referring to situations involving the production of spectacles of violence and abuse that conform to preconceived notions concerning the nature of crime and criminality.

Chapter three argues that this aesthetic model captures only a subset of the means through which atrocity crimes may actually be committed and in doing so, tends to encourage overly simplistic, ultimately inaccurate understandings of both atrocity as a social phenomenon, and the substance of ICL. To make this argument, I rely on both recent research demonstrating the complexity and heterogeneity of atrocity processes, close readings of the doctrinal substance of ICL itself, and scholarship demonstrating ICL's applicability to various forms of harm causation failing to conform to the atrocity aesthetic. Through this analysis, I demonstrate that mass harm causation processes take many different forms, many of which may be decidedly unspectacular and unfamiliar in nature, and may also involve the commission of well-established international crimes.

In order to demonstrate the real-world implications of the visibility politics of ICL, in chapter four, I demonstrate how such politics, and the aestheticized understandings of atrocity they engender, operate to socially and legally obscure certain forms of mass harm causation. To do so, I provide various examples of real-world situations involving the commission of atrocity crimes through means failing to conform to the atrocity aesthetic and discuss how such characteristics affect how such situations are viewed as potential subjects of ICL. This analysis reveals that such forms of harm causation, regardless of their scale and the apparent culpability of those responsible, tend to be systematically backgrounded within ICL discourse and practice, demonstrating the effects of visibility politics of ICL in action.

Chapter five explores the repercussions of the backgrounding of certain forms of mass harm causation within ICL identified in chapter four. In doing so, I argue that the social and legal invisibility of certain atrocity processes perpetuated by ICL's visibility politics produces a variety of negative consequences, both within and beyond ICL itself. First, visibility politics undermine the retributive, utilitarian, and expressive aims underlying ICL itself by inserting morally irrelevant, aesthetic factors into assessments of culpability. I also argue that the failure to address atrocity crimes failing to conform to the atrocity aesthetic undermines any deterrent effect ICL may have, now or in the future, and undermines ICL's expressive value by ignoring a subset of crimes committed against especially vulnerable populations, while focusing disproportionately on the discomfort of Western audiences in being exposed to graphic depictions of suffering and death. Second, I also argue that the failure to label certain forms of harm causation atrocity crimes warps historical memory and negatively impacts the global

distribution of human rights, transitional justice, and peacebuilding resources, by artificially removing certain historical narratives from the rubric of atrocity and thereby implicitly downgrading the seriousness of the harms involved and the culpability of those responsible.

Chapter six, returning to interactional theory, argues that visibility politics undermine the legal legitimacy of ICL itself, by impairing various interactional criteria of legality, including those of generality, promulgation, clarity, stability, and, most importantly, congruence between the law and official action. These criteria are impaired because the aesthetic considerations that are embedded in social and legal understandings of atrocity crimes, regardless of their appropriateness from a normative standpoint, have not been recognized by the legal actors they influence, let alone instantiated into the substance of ICL in any way. Because such understandings have not been instantiated into the law, yet affect its practice quite significantly, they render ICL overly specific, inject norms into legal practices that have not been promulgated in any way, render the law unclear by making its application contingent on unacknowledged factors, and destabilize the law. Most importantly, visibility politics exacerbate the negative legality consequences stemming from ICL's highly selective application, by widening the chasm between the commission of international crimes and the practice of ICL.

Ultimately, the fact that visibility politics deeply influence how we understand atrocities and the means through which they may be committed challenge some of the foundational assumptions underlying ICL as a global project. While scholars such as Arendt and Drumbl have identified the limitations of legal processes—particularly criminal ones—in accounting for the scale and complexities presented by mass atrocities, in this thesis I have argued that their general insight, that atrocity crimes can, and do, depart radically from ordinary criminality, is equally applicable to the *means* through which such crimes are committed. Thus, somewhat paradoxically, I have argued that it is precisely *because* international crimes are extraordinary that they may be committed through processes that may, at first glance, appear decidedly ordinary, even banal in nature, and hence non-criminal.

Consequently, just as the figure of the perpetrator of atrocity has been complicated by Arendt, and the suitability of ICL as a response to the moral, legal, and ethical “murkiness” of atrocity situations has been complicated by Drumbl, I believe there exists a pressing need to critically reexamine and complicate social and legal understandings concerning the forms atrocities may

take and the means through which they may be committed. That is, there exists a need to step back and re-conceptualize the very notion of what an atrocity is with a more critical eye, while remaining open to the possibility that atrocity crimes may manifest themselves in extraordinary ways that may depart radically from our intuitive understandings of them. In doing so, we may discover that, just as Eichmann's seemingly ordinary, highly bureaucratic nature defied stereotypical notions of mass murderers as human manifestations of Kantian radical evil, so too may the oft-bureaucratic nature of processes of mass killing and abuse themselves defy stereotypes of atrocities as instantly recognizable, highly visible spectacles of evildoing. Doing so may undermine the comfort of ICL's seeming moral clarity,<sup>587</sup> and exacerbate the degree to which certain atrocity crimes, in the words of Arendt, "explode the limits of the law."<sup>588</sup> Nonetheless, only by acknowledging the true, complex, and often messy nature of atrocity situations, and grappling with the implications of such complexity and messiness, can we formulate more suitable and effective methods of addressing and repressing atrocity, both within and beyond the confines of ICL.

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<sup>587</sup> On ICL as a source of comfort, see Christine EJ Schwöbel, "The Comfort of International Criminal Law" (2013) 24:2 Law & Critique 169.

<sup>588</sup> Arendt & Jaspers, *supra* note 485 at 54.

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