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Introduction

Visible and Invisible Atrocity Crimes

From October 19 to 30, 1943, as the tide of World War II turned in favor of the Allies, representatives of the governments of the United States, United Kingdom, and Soviet Union met in Moscow to consider "measures to shorten the duration of the war against Hitlerite Germany and her Allies in Europe."[1] Following this conference, on November 1, the governments of the three countries issued a joint Protocol, signed the previous evening, concerning various matters relating to the conclusion of the war.[2] Among the documents annexed to the Protocol was a "Declaration of German Atrocities" drafted by Winston Churchill and signed by Churchill, Franklin Roosevelt, and Josef Stalin.[3] Referencing "atrocities, massacres and cold-blooded mass executions," the Declaration states that the United States, United Kingdom, and Soviet Union "solemnly declare and give full warning of their declaration" that at the conclusion of the war "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."[4] The "above atrocities" mentioned are not described with greater specificity in the Declaration, nor the Moscow Protocol more generally. Instead, references are made to evidence of "atrocities, massacres and cold-blooded mass executions," along with "ruthless cruelties," and "monstrous crimes" that had been, and were continuing to be, committed by "Hitlerite forces."[5]

[1] USA–UK–USSR, Moscow Protocol, Moscow, USSR, October 30, 1943, in force November 1, 1943, 1943 For. Rel. (I) 749, para. 1.
[2] Moscow Protocol, Annex 10, "Declaration of German Atrocities."
[3] Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press, 2014), 149.
[4] Moscow Protocol, "Declaration of German Atrocities."
[5] Ibid.

The relative vagueness of the criminal acts alleged in the Declaration was not lost on Churchill. While drafting the text that would become the Declaration, Churchill wrote to Roosevelt and Stalin that while "he was 'not particular about the phraseology,'" his hope was that the general warning of postwar prosecution might "'make some of these villains reluctant to be mixed up in butcheries now they realize they are going to be defeated.'"[6] While focusing on the potential deterrent effect the Declaration might have on the commission of further "butcheries" by the Nazis, neither in his correspondence, nor in the ultimate text of the Declaration, does Churchill specify what crimes the "villains" he refers to might be prosecuted for.[7] Instead, Churchill seems to assume that the "abominable deeds" and "monstrous crimes" referred to are so self-evident in nature that they require no further defining or description.

The stated intention to carry out postwar prosecutions was, of course, followed through on by the Allies, marking the birth of international criminal law (ICL). In the nearly eight decades since Churchill drafted the Declaration, ICL prosecutions have focused primarily on the kinds of highly visible forms of mass violence invoked in the Declaration – new manifestations of the "monstrous crimes" referenced in the Declaration. In describing these "abominable deeds," ICL actors have embraced terms such as atrocity and mass violence. The International Criminal Court's (ICC's) Rome Statute, for instance, refers to "unimaginable atrocities that deeply shock the conscience of humanity" in its preamble when referring to the general subject matter of ICL.[8] This language, the prosecutorial tendencies of ICL in its application, and the ways in which the trio of so-called core international crimes – genocide, crimes against humanity, and war crimes – have been interpreted, combine to suggest that the commission of these crimes inherently involves the production of highly visible spectacles of horrific violence. The "criminal" nature of such horrific spectacles is intuitively recognizable: piles of corpses greeting Allies at liberated concentration camps, rivers full of dead bodies in Rwanda, child soldiers and severed limbs in Sierra Leone, and literal piles of bones and skulls in Cambodia, to name but a handful of examples.

[6] Letter quoted in Bass, *Stay the Hand of Vengeance*, 149.
[7] According to Gary Bass, the wording of the Statement was also left intentionally vague to avoid potential reprisals against Allied prisoners of war. Ibid.
[8] Rome Statute of the International Criminal Court, Rome, July 17, 1998, in force July 1, 2002, 2187 UNTS 3, preamble.

This association between international crime commission and the production of horrific spectacles raises a host of questions concerning the nature, scope, and purposes of ICL. What role do aesthetic considerations play in shaping social and legal understandings of what international crimes are (and are not)? Is there something intrinsic to the substance or nature of ICL itself that demands all crimes involve such spectacles? If not, might certain international crimes be committed through unspectacular means, the criminality of which is not so self-evident? If so, given ICL's extreme selectivity in application, have such crimes been overlooked? What might the broader effects of this potential "invisibilization" of unspectacular forms of mass harms be, including for the legitimacy of ICL itself?

These are the questions at the heart of this book, which explores the roles aesthetics play in shaping how we conceptualize what international crimes are, and imagine how they might be committed. The significance of the normative associations between international crime and an aesthetics of spectacle remains understudied. This book attempts to rectify this oversight. It does so by examining the role aesthetic considerations play in the social construction of shared social and legal understandings of international crime and ICL. Attending to both individual and social processes of aesthetic perception and meaning-making to account for the complex ways in which they feed into one another, I argue that, within the realm of ICL, the net result of these processes has been, among other things, the construction, embedding, and reproduction over time of an assumption that real-world instances of genocide, crimes against humanity, and/or war crimes will necessarily conform to a particular aesthetic model of atrocities as highly visible, intuitively recognizable spectacles of horrific violence. I demonstrate that aesthetic considerations continue to play a significant role in shaping what forms of harm causation are viewed as potentially grounding ICL accountability. This reliance on the spectacular stems from the grounding of widely shared understandings of international crime in what I refer to as a dominant "atrocity aesthetic" model of international crime commission. Emerging from longstanding, widely shared understandings of mass violence, "atrocity," and international crime, this dominant, if largely unacknowledged, aesthetic model undergirds predominant understandings of genocide, crimes against humanity, and war crimes, as manifesting themselves exclusively through the commission of gruesome, horrific acts of violence and abuse.

These horrifically spectacular acts conform to preconceived notions of not only violence, but also harm, by resembling prior canonical atrocity crimes and thus resist innovation or broader understandings. Consequently, less aesthetically familiar processes of mass harm causation – those that are slow, banal, bureaucratic, attritive, or otherwise aesthetically unspectacular and unfamiliar in nature – tend to be assumed to fall outside the purview of ICL. These unspectacular forms of harm causation are consequently characterized as either not severe enough to warrant being characterized as international crimes, or as wholly forms of "structural violence" inherently situated outside the reach of criminal law generally, and ICL specifically. As this book, and the work of a growing cohort of scholars demonstrates, this characterization, however, is not always accurate. International crimes can be, and regularly are, committed through a wide variety of means, ranging from the spectacular to the banal, even mundane.

Moreover, the current myopic focus on familiar, spectacular forms of violence and harm causation within ICL helps obscure the reality that virtually all atrocities, including those conforming to the atrocity aesthetic, are complex social phenomena, involving the culpable production of overlapping, mutually reinforcing forms of harm causation by groups of actors working in unison. Even within broader atrocity situations conforming to the atrocity aesthetic, ICL's narrow focus on spectacular forms of killing and abuse may obscure other, comparably important harms. For example, as discussed in more detail in Chapter 5, the Khmer Rouge regime abused, killed, and traumatized Cambodians not only through the commission of extreme forms of physical violence, but also by placing victims in terrible living conditions where they were systematically overworked, underfed, denied access to basic health care, and forbidden from engaging in coping behaviors, such as foraging for food or cultivating subsistence gardens. In many cases, including that of Cambodia, such unspectacular, everyday forms of harm causation can involve suffering and death of a scale and magnitude comparable to even the most large-scale international crimes committed through traditional, spectacularly violent means. Less spectacular does not necessarily mean less serious or less harmful. Moreover, these relatively unspectacular forms of killing and abuse may be quite direct in terms of harms caused and the culpability of those involved, as I argue appears to be the case in the Cambodian context, where the regime's leaders continued to demand the rigid implementation of their mass death-producing policies even as the civilian population starved and died by the thousands.

More generally, there now exists a significant and growing literature identifying various novel and largely overlooked means of international crime commission, ranging from the enforcement of famine conditions, to sustained socioeconomic oppression. One common thread tying many otherwise disparate forms of routinely overlooked or ignored atrocity commission processes analyzed within this literature is a failure to conform to the atrocity aesthetic. I suggest that this shared tendency toward aesthetic unfamiliarity plays a significant, and largely overlooked role in the continued backgrounding of these harm causation processes within international criminal justice. In turn, the culpability of those responsible is obscured and the status of victim denied for those affected.

While the obfuscation of the criminality of certain unfamiliar forms of international crime commission is undoubtedly multicausal and tied up in politics and power relations, I nonetheless suggest that aesthetically unfamiliar forms of mass harm causation represent a distinctive *lacuna* in ICL. Aside from the usual manipulation of ICL to suit the preferences of powerful states and actors, as well as ICL's inherent inability to address wholly structural forms of violence and injustice, I suggest that aesthetic sensibilities and biases play a meaningful role in whether (and how) certain international crimes are recognized and branded as such. The net result is the narrowing of ICL from its potential, broad-based applicability, encompassing virtually any process through which individuals culpably participate in the infliction of large-scale harms on others, to focusing narrowly on familiar, spectacular processes of harm causation, the criminality of which is intuitively recognizable. Because this normative association between international crime and the production of horrific spectacle is itself unacknowledged, and fails to accurately reflect the actual boundaries of ICL, *de lege lata*, I frame this phenomenon as a distinctly aesthetic bias that, along with other factors, narrows the scope of ICL by rendering certain international crimes socially and legally invisible.

Spectacular and Invisible Atrocities: Why It Matters

This book grew out of a longstanding interest in studying intersections between ICL and novel, heretofore unprosecuted forms of mass killing, abuse, and oppression. As I researched this topic, I began to find that many scholars have considered ICL's potential applicability to forms of harm causation that are unlikely to immediately come to mind when one thinks of international crimes. Comparatively scant attention has been

paid to the question of why these forms of harm causation not only go, like so many other potential atrocity crimes, unprosecuted, but also tend not even to be recognized as potentially grounding ICL liability in the first place.

While a small, but growing cohort of scholars have by now identified various heretofore ignored modalities of international crime commission, the question of why has remained a secondary one, with the primary assessment being a largely doctrinal one, of whether and how ICL might address previously ignored forms of atrocity. When opining as to why such potential forms of international crime commission have been largely overlooked, authors have tended to frame this practice gap as a political or structural choice. While, as with all aspects of ICL and international law more generally, politics and power dynamics play a major role in shaping what is and is not criminalized and who is and is not prosecuted, this book argues that one significant, and largely overlooked factor underwriting ICL's exclusionary tendencies is aesthetic in nature. That is, dominant understandings of international crime seem to be grounded in a particular aesthetic model of horrific spectacle. This aesthetic commitment leads us to associate atrocity and international crime with spectacular harms and rarely, if ever, to associate unspectacular suffering with atrocity or prosecution, even if occurring on a massive scale. Indeed, this commitment is often evident in pushback against the notion that ICL might be applied to novel, unspectacular forms of violence and harm causation.[9]

One salutary approach to understanding and explaining the dynamic whereby we recognize certain forms of atrocity violence quite easily, yet struggle to see others, is to excavate the aesthetic from the doctrinal, and in doing so demonstrate that the classification of international crimes and the inclusion/exclusion of specific acts, situations, places, people, and so on, are deeply influenced by aesthetic sensibilities relating to notions of atrocity and international crime, rather than produced strictly by legal considerations. While I conduct such an analysis in Chapters 4 and 5, this process does not reveal the deepest aspects and implications of the atrocity aesthetic. This is because such an analysis suggests that

[9] Hence, for example, what Evelyne Schmid refers to as the "legal impossibility argument" regarding the potential applicability of ICL to harms brought about through economic, social, and cultural human rights violations may be also partially grounded in an (unacknowledged) general feeling that such harms are inherently not "criminal" in nature. See Evelyne Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* (Cambridge University Press, 2015), 22–40.

a simple reformist approach, one that encourages institutions such as the ICC to seek out new forms of international crime commission to investigate and prosecute, would likely be met with pushback and allegations "expanding" ICL improperly. One person's "expansion" of ICL doctrine may be merely the "application" of existing laws to new facts for another. Consequently, a reformist agenda might turn out to be a lot harder to follow than we think precisely because of how deep-seated, unquestioned, and foundational the atrocity aesthetic is when it comes to processes of recognizing potential international crimes.

As this book shows through its use of interactional legal theory, individual and social processes of constructing ideas are complex and intertwined, making it not only hard to reconceptualize what forms international crimes may take, but also to recognize the ways ICL shapes understandings of atrocious behavior in the world. It is this process, of "seeing" as a form of social recognition, that I am primarily interested in, as what we choose to see as an international crime has serious consequences beyond the realm of international criminal justice. Given that ICL's influence has grown to the point that international *criminal* justice has come to be routinely conflated with the much broader concept of *global* justice,[10] global justice resources are funneled first and foremost to acknowledged sites of atrocity. This funneling makes sense if one views international crimes as the worst forms of global injustice and believes that resources ought to be distributed by giving priority to the worst injustices.

As many commentators have warned, this seemingly ever-increasing fascination with atrocity and ICL may or may not be a net positive development in terms of prospects of actually improving global justice and the lives of the world's most vulnerable populations.[11] I share these concerns, and would add that the degree to which ICL draws attention

[10] For discussions of the ways in which ICL has begun to monopolize global justice and human rights discourses, see Sarah M. H. Nouwen and Wouter G. Werner, "Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity" (2015) 13 *Journal of International Criminal Justice* 157–176; Karen Engle, "Anti-Impunity and the Turn to Criminal Law in Human Rights" (2015) 100 *Cornell Law Review* 1069–1128. Along these lines Christine Schwöbel-Patel demonstrates how the branding of ICL has actively coopted the language of global justice. Christine Schwöbel-Patel, *Marketing Global Justice: The Political Economy of International Criminal Law* (Cambridge University Press, 2021).

[11] See, for example, 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, and Carsten Stahn, eds., *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015), 272–301; Engle, "Anti-Impunity."

away from certain pressing global justice issues, for example, the perpetuation and expansion of radical global wealth inequality, can only be compounded when we fail to see certain international crimes. Through this process, harms that are in actuality products of culpable, agentic actions are conceptually transformed into non-agentic structural injustices, which are then excused as inevitable or at least too complex to do anything about. Thus, direct violence becomes structural violence, which is then dismissed as nobody's fault and therefore impossible to stop.

Even when we may be able to see unspectacular atrocities as potentially implicating ICL, a similar dynamic operates to downgrade the perceived seriousness of such crimes. Given what scholars such as Margaret deGuzman have already demonstrated in terms of the amorphousness and malleability of "gravity" as a basis for assessing the relative seriousness of even the most paradigmatic international crimes,[12] we may easily fall into the trap of simplistically equivocating the most aesthetically horrific forms of violence with the most serious international crimes. Who makes up the "we" in this regard is also troubling, as assessments of what is and is not an international crime viewed as being authoritative are overwhelmingly made by elite technocrats (lawyers, judges, investigators, etc.) clustered in the Global North.[13] Thus, what is recognized as an international crime, and what are viewed as the most serious of these crimes warranting the bulk of our time and energy, may turn largely on what forms of harm causation distant elites in the Global North are most revulsed by, exposing ICL to further allegations of engaging in "distant" justice or falling prey to racist and/or neocolonial notions of where atrocities occur, who commits them, and who is victimized.[14]

[12] Margaret M. deGuzman, "Gravity and the Legitimacy of the International Criminal Court" (2009) 32 *Fordham International Law Journal* 1400–1465.

[13] On the question of who and what institutions make up the "we" so often invoked in mainstream ICL discourses, see Immi Tallgren, "Who are 'We' in International Criminal Law? On Critics and Membership," in Christine Schwöbel-Patel, ed., *Critical Approaches to International Criminal Law: An Introduction* (Routledge, 2014), 71–95. On the representational practices of ICL and the constituencies it seeks to speak on behalf of, see Sara Kendall and Sarah Nouwen, "Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood" (2014) 76 *Law and Contemporary Problems* 235–262; Frédéric Mégret, "In Whose Name? The ICC and the Search for Constituency," in Carsten Stahn, Sarah Kendall, and Christian M. de Vos, eds., *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015), 23–45.

[14] See, for example, Phil Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge University Press, 2018); Sofia Stolk, "A Sophisticated Beast? On the Construction of an 'Ideal' Perpetrator in the Opening

Considering the distributional role ICL plays in labeling the "worst" global injustices,[15] adherence to the atrocity aesthetic risks rewarding powerful actors willing to kill and oppress creatively and through novel means, by removing them from the intense glare of what Larissa van den Herik describes as the "spotlight" effect of ICL.[16] Individuals accused of planning or participating in atrocity crimes may be branded, socially, if not legally, as *hostis humani generis* ("enemies of all humankind"), limiting their freedom of movement and ability to participate in various political arenas and organizations.[17] Peacebuilding, foreign aid, and transitional justice activities also tend to be funneled toward acknowledged sites of atrocity. Conversely, denial that atrocities were committed against members of a particular victim group often correlates with their continuing oppression, highlighting the importance of whether dominant historical narratives are couched in the language of atrocity and international crime.

Given these concerns, my motivation for engaging in this line of inquiry is less to advocate for the abolishment, continuation, or expansion of international criminal justice as a global project. Rather, given my ambivalence about the legitimacy and usefulness of ICL and its current institutions, my ambition is to contribute to a more nuanced understanding of what this body of law actually does and does not do, and perhaps more importantly, what it can and should do if it is to continue existing. Along these lines, I am of the view that, if ICL is going to continue to exist and attract the attention it does, this body of law should at least be used to highlight the gravity and culpability of a broader array of forms of violence, abuse, and oppression than it currently does. While we must remain vigilant to the risks of uncritically equating the criminal law prosecution of individuals with "doing justice," especially given the fact

Statements of International Criminal Trials" (2018) 29 *European Journal of International Law* 677–701; Randle C. DeFalco and Frédéric Mégret, "The Invisibility of Race at the ICC: Lessons from the US Criminal Justice System" (2019) 7 *London Review of International Law* 55–87; Clarke, "'We Ask for Justice You Give Us Law'"; Christine Schwöbel-Patel, "Spectacle in International Criminal Law: The Fundraising Image of Victimhood" (2016) 4 *London Review of International Law* 247–274.

[15] Frédéric Mégret, "Practices of Stigmatization" (2013) 76 *Law and Contemporary Problems* 287–318; Nikolas M. Rajkovic, "What Is a 'Grave' International Crime? The Rome Statute, Durkheim and the Sociology of Ruling Outrages" (2020) 16 *Loyola University Chicago International Law Review* 65–86.

[16] Larissa van den Herik, "International Criminal Law as a Spotlight and Black Holes as Constituents of Legacy" (2016) 110 *AJIL Unbound* 209–213.

[17] On the more general neoliberal branding culture of ICL, see Schwöbel-Patel, *Marketing Global Justice*.

that criminal prosecutions and mass incarceration have done so much *in*justice – indeed in certain circumstances may themselves arguably be atrocity processes – I tentatively agree with Itamar Mann's assertion that "as long as we have prisons, let them be filled with those who have committed the worst of crimes."[18] Hence, I think it is imperative to carefully explore the outer boundaries of ICL and to point out that, while powerful actors may be able to better disguise the criminality of their actions by producing harms through seemingly banal, bureaucratic means, they remain culpable, and we may condemn their actions as "atrocious," just as we condemn other forms of violence committed through more familiar means.

Thus, even if one arrives at the conclusion that the kinds of reforms necessary to render ICL a worthwhile endeavor are so radical as to justify jettisoning the entire project of international criminal justice, it remains important to consider what ICL does do, while it continues to exist and operate. Of particular importance are the ways in which ICL shapes narratives, influences resource allocation, and selectively condemns certain forms of mass violence and abuse, while ignoring others. Consequently, in researching ICL's treatment of less obvious forms of large-scale harm causation, I remain primarily interested in the role(s) ICL plays in reflecting and (re)constructing socio-legal understandings of what mass violence and atrocity themselves are, as opposed to opining whether the international criminal justice project is worthwhile, or advocating for specific doctrinal interpretations.[19]

While undoubtedly various factors, especially politics and power (both direct and structural), continue to play important roles in dictating the substance and reach of ICL, I nonetheless suggest that power relations are both enabled, and subtly shaped by, aesthetic biases, especially when it comes to the identification of potential international crimes. Thus, in sum, this book demonstrates how aesthetically unfamiliar forms of mass harm causation – those that are slow, attritive, banal, and hence generally unspectacular in nature – have been relegated to the margins of international criminal justice; why this backgrounding is not always the

[18] Itamar Mann, "Border Violence as Crime" (2021) 42 *University of Pennsylvania Journal of International Law* 675–736, 723.

[19] That said, in terms of doctrinal interpretation, while I recognize the inherent limitations of ICL in terms of the forms of violence and oppression it can address given its foundational exclusive focus on individual culpability, I am of the view that ICL doctrine should be interpreted in a way that, as far as possible, encompasses all of the many ways in which individuals may culpably participate in large-scale harm causation.