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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.

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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.

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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.

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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.

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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

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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.

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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."

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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

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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*.

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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.

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product of the inherent limitations or doctrinal substance of ICL; how it compounds the broader invisibility of these forms of violence and oppression; and, from an interactional theoretical perspective, how this state of affairs undermines the legal legitimacy of ICL.

Ultimately, through this analysis, I conclude that there is a pressing need to question and reassess our assumptions concerning what international crimes are, how they are committed, and how they will manifest themselves. One critical component of such a process of reevaluation would be to more carefully assess the myriad and often banal ways in which power may be wielded to kill, abuse, and oppress, and how ICL might better address both spectacular *and* everyday forms of atrocity violence.

Defining Aesthetics: Sense Perception in Individual and Social Meaning-Making

At this juncture, a note on how the term "aesthetics" is deployed is necessary, given that the term has been defined in many ways, and applied in many disparate contexts. In a broad sense, the term aesthetics is typically used 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."[20] For the purposes of this book, in a general sense, the term aesthetics is understood to refer to both individual and social processes of the perception, production, and response to scenes evoking an intense emotional reaction, in this case a decidedly negative one, of horror, disgust, terror, or the like. More specifically, I am interested in aesthetics both as it may be used to refer to a particular style, model, or set of conventions (as in a cubist, or art deco "aesthetic"), and in relation to individual and social processes of sense perception (often referred to as "aesthetic perception").

In terms of *individual* processes of aesthetic perception, I borrow Ioannis Xenakis and Argyris Arnellos' "interactive affordance" model that situates aesthetic perception as an intuitive process that assists us in interacting with the world despite ever present, yet highly variable degrees of uncertainty. According to this model, for each of us a "particular perception should be considered 'aesthetic' when . . . potential interactions . . . are emotionally evaluated."[21] According to this

[20] Anjan Chatterjee, "Neuroaesthetics: A Coming of Age Story" (2010) 23 *Journal of Cognitive Neuroscience* 53–62: 53.

[21] Ioannis Xenakis and Argyris Arnellos, "Aesthetic Perception and Its Minimal Content: A Naturalistic Perspective" (2014) 5 *Frontiers in Psychology* 1–15: 11.

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definition, "'the aesthetic' is nothing more than a way of interaction [that helps us] to cope with the environment."[22] While we may rely to some degree on aesthetic perception in virtually all of our daily interactions, from the banal to the extraordinary, the primary role aesthetic perception plays in this model is that of allowing us to act despite persistent, yet highly variable, degrees of uncertainty. We thus rely more heavily on the intuitive process of aesthetic perception "in situations that are mainly characterized by high degrees of uncertainty and minimal knowledge."[23]

As is made clear in Chapter 2, for various reasons, ICL represents an environment rife with uncertainty and lack of knowledge. Consequently, actors seeking to identify potential international crimes are apt to heavily rely, knowingly or not, on aesthetic perception to resolve ambiguity and fill in knowledge gaps. In other words, these actors are inclined to look for situations closely resembling widely acknowledged prior examples of international crimes when identifying potential new instances of genocide, crimes against humanity and/or war crimes.

While the interactive affordance model helps us to conceptualize the role aesthetic perception plays in individual notions of what is and is not a potential international crime, the question remains how these individual aestheticized processes of sense-making aggregate to influence socially constructed notions of atrocity, mass violence, international crime, genocide, and the like. To describe the *social* ramifications of the aggregation of individual processes of aesthetic perception as actors interact, and the production of dominant aesthetic forms, conventions, or models, this book borrows Jacques Rancière's concept of aesthetics as the "partition" or "distribution" of that which is "sensible" within a given society or social group, that is, the deeply political process of determining both who can speak and what can be spoken about legibly.[24] This is where various forms of power, both direct and structural, come into play in shaping how we perceive atrocity violence, as Rancière reminds us that not everyone is given an equal voice, nor allowed to speak in and through this distributive process. Rancière's framework is also highly compatible with the social constructivist foundations of interactional legal theory, as it allows for the partitioning of knowability to be understood as an ongoing process through which what is socially and politically sensible

[22] Ibid.
[23] Ibid., 12.
[24] Jacques Rancière, *The Politics of Aesthetics: The Distribution of the Sensible*, trans. Gabriel Rockhill (Continuum, 2013).

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(in this case as an "atrocity" or "international crime") is determined that is continual and perpetual.

These twin frameworks of individual and social sense-making processes as shaped by aesthetic factors, resulting over time in the construction of dominant aesthetic models, allow us to see how certain ways of conceptualizing international crimes and associated harms predominate over others. Many individuals may, and probably do, conceptualize various unspectacular, everyday forms of violence and abuse as crimes. For example, in interacting with rural Cambodian survivors of the Khmer Rouge regime, I was routinely asked whether the Extraordinary Chambers in the Courts of Cambodia (ECCC)[25] would prosecute those tried before it for "starving" them, or forcing them to live in terrible conditions separated from their loved ones. For at least these individuals, none of whom had any legal training to my knowledge, the distinction between traditional forms of (direct, physical) atrocity violence and other forms of abuse and oppression they suffered was nonexistent, or at least not significant. Indeed, it was these extended experiences of deprivation and suffering that were repeatedly highlighted by survivors, even as the Court itself focused predominantly on more traditional forms of atrocity (beatings, torture, executions, etc.) in its adjudication of the regime's crimes.

It is this dynamic, whereby that which is knowable ("sensible") is "partitioned," that I employ Rancière's concept of aesthetics as the "partition of the sensible" to describe. I view the processes through which such partition occurs as being multifaceted, deeply intertwined with power relations, and importantly, both the product of intentional and nonpurposive norm development processes. The net result of this partitioning process is that, through power dynamics and sociopolitical processes of dictating what is knowable, sayable, and understandable, in terms of what forms mass violence and abuse may take, what international crimes are, how they manifest themselves, who commits them, how they are committed, and who is victimized is established and maintained over time.

Thus, this book is interested both in the role intuitive processes of sense perception play in shaping how we interact with the world and, in doing so, identify abstract phenomena such as international crimes or

[25] 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 to 1979. On the ECCC generally, see John D. Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (University of Michigan Press, 2014).

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atrocity violence, and also in how, over time, such individualized experiences feed into the construction and maintenance of dominant social understandings. In the case of ICL, I argue that a variety of factors, prime among them being the aesthetic spectacularity and self-evident nature of many (yet not all) atrocity crimes, combined with the continuing ambiguity of ICL normatively and doctrinally, and extreme selectivity in application, have combined to render certain potential international crimes non-"sensible" as such, at least to key actors.

It is this dynamic, tied up as it is in power and notions of what harms entail sufficient culpability and are of sufficient gravity to warrant being branded "international crimes" developed primarily by elites and technocrats, rather than those subject to oppression, precarity, and violence, that has resulted in the current myopic focus on horrific spectacle when conceptualizing international crime as a category of phenomena. To return to the example of Cambodia, an elite group of mostly international experts and later a mix of international and Cambodian legal professionals and investigators were able to prescribe and prioritize what actions amounted to international crimes during the Khmer Rouge era and determine how to prioritize among them. From the outset, what was sayable and knowable as a crime was largely preordained, not only by applicable law but also by deep-seated assumptions concerning the nature of causality, the feasibility of evidence collection and required proofs, and the relative severity and importance of various harms. Through this process, potentially novel instantiations of international crimes committed by the regime, in the form of the cumulative effects of sustained deprivation, overwork, and generalized mistreatment, were cordoned off and relegated to the background, as either unexplored potential crimes, or more often, by being framed as collateral causes or consequences of more aesthetically familiar, and hence more "real" in a legal sense, forms of atrocity violence.

Theoretical Framework: Interactional Legal Theory

To demonstrate the influential role aesthetics play in shaping dominant notions of what international crimes are, this book utilizes an interactional legal theory framework of social and legal norm development. Developed by Jutta Brunnée and Stephen Toope, interactional theory is a practice-based model of lawmaking, legitimacy, and legality at the international level, built on a merger of social constructivist international relations scholarship and Lon Fuller's work on the "internal morality" of

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law.[26] Social constructivists "focus attention upon the role that culture, ideas, institutions, discourse and social norms play in shaping identity and influencing behaviour."[27] Brunnée and Toope merge this approach to social norm development with legal theory, especially Fuller's well-known theory of legality, itself often used as a rule of law assessment tool. They do so by adapting Fuller's eight "criteria of legality" to the international level, where they contend a broad spectrum of actors, ranging from individuals to states, continually make, and refine (or unmake) international law as they interact with one another.[28]

Interactional legal theory views international law as consisting of a web of widely shared, socially constructed normative understandings that have been instantiated into law in substantial compliance with Fuller's eight criteria of legality, and thereafter sustained by practices of legality.[29] Fuller's legality criteria are:

1. generality;
2. promulgation;
3. nonretroactivity;
4. clarity;
5. noncontradiction;
6. possible to follow;
7. constancy (or stability); and
8. congruence between the law and official action.[30]

Fuller famously argued that only when rules substantially satisfy these characteristics can they properly be labeled "law."[31] Thus, for Fuller, rules purporting to be law that substantially depart from these criteria fail to exhibit the necessary basic characteristics of law, and hence represent some extra-legal form of rulemaking or exercise of power. Aside from

[26] Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, 2010); Lon L. Fuller, *The Morality of Law* (Yale University Press, 1969).

[27] Jutta Brunnée and Stephen J. Toope, "Constructivism and International Law," in Jeffrey L. Dunoff and Mark A. Pollack, eds., *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge University Press, 2012), 119–145.

[28] See Jutta Brunnée and Stephen J. Toope, "Interactional International Law: An Introduction" (2011) 3 *International Theory* 307–318: 309.

[29] See generally Brunnée and Toope, *Legitimacy and Legality in International Law*.

[30] Brunnée and Toope, "Interactional International Law," 310.

[31] See Fuller, *Morality of Law*. This legitimation as true "law" is, in turn, key for Brunnée and Toope because for them "true" (i.e., interactional) law attracts a special "sense of commitment among those to whom law is addressed." Ibid., 308; see also Brunnée and Toope, *Legitimacy and Legality in International Law*, 52–55.

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mere issues of proper labeling, Fuller as well as Brunnée and Toope claim that only norms and rules properly labeled as "law" by substantially conforming to Fuller's eight criteria attract the unique value-added status of legality, that of habitual obeyance, which Fuller refers to as "fidelity" and Brunnée and Toope refer to as legal "obligation."[32] That is, only when rules and norms are instantiated into law in substantial accordance with Fuller's 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, and can hence be accurately labeled as international "law" from the perspective of interactional legal theory.[33]

Whether a norm or rule is or is not properly labelable as "law," however, is not a binary yes or no assessment. Fuller himself claimed that each of his eight legality criteria may, both cumulatively and individually, be satisfied in degrees.[34] Accordingly, legality *exists* in degrees according to both Fuller, and Brunnée and Toope.[35] This view of legality as a continuum of degrees, along with their requirement of law being sustained through robust practices of legality, 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 criteria of legality, and are supported by robust practices of legality, therefore, dictates the degree to which Brunnée and Toope would characterize such norms as "interactional" international law. Thus, in the words of Brunnée and Toope, the "hard work" of international lawmaking is never done but represents a continual, dynamic, nonlinear enterprise.[36]

Interactional legal theory provides the overarching methodological framework through which norm development, lawmaking, and legal legitimacy are conceptualized in this book. As a social constructivist, practice-based theory, interactionalism is particularly useful as a methodological framework for exploring the normative epistemological forces underlying the current international criminal justice

[32] Brunnée and Toope, *Legitimacy and Legality in International Law*, 27.
[33] Ibid., 350–355.
[34] Fuller, *Morality of Law*.
[35] Fuller referred to this dynamic as law's ability to "half-exist." Ibid., 122–123; accord Brunnée and Toope, *Legitimacy and Legality in International Law*, 22–23.
[36] Brunnée and Toope, *Legitimacy and Legality in International Law*, 6–19, 72.

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regime and for identifying how such forces influence the substance and practice of ICL itself. First, interactional theory, particularly its notion of "shared understandings," provides a helpful model for describing how the widely shared assumptions of social actors may influence the formation, interpretation, and evolution of ICL. As such, interactional legal theory helps to describe and articulate how widely shared assumptions concerning the means through which international crimes may be committed may help drive legal practices, and eventually even change the law. Through such processes, as Brunnée and Toope have argued, "power relations and even violence can be hidden or justified by new norms, including new legal norms."[37] Interactionalism thus helps elucidate how excessive reliance on intuitive processes of aesthetic perception in identifying atrocities may contribute to the social and legal invisibility of aesthetically unfamiliar international crimes. It also helps us to see the power dynamics underlying such invisibility.

Second, interactionalism also provides a method of analysis for differentiating between shared normative understandings that have, versus 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 aesthetic considerations and associated politics of recognition *affect* the practice of ICL while remaining outside of the law, as opposed to having been instantiated into ICL itself. It is one thing for assumptions concerning the means through which international crimes may be committed to gradually shape the evolution of the doctrinal substance of ICL to focus narrowly and exclusively on such means. It is another thing for such assumptions to shape legal practices while themselves remaining extralegal and unacknowledged, as I argue is often the case when it comes to hidden forms of atrocity violence.

Regardless of the legal status of the normative assumptions underlying ICL's aesthetic biases, interactionalism provides a useful tool for assessing the broader ramifications of such biases for the legal legitimacy of ICL by facilitating an analysis of how aesthetic assumptions concerning the nature of international crime commission operate to encourage congruence or deviation from Fuller's criteria of legality in practice. I argue that, in the case of ICL, deep-seated expectations that international crimes will always and necessarily announce themselves in spectacular, self-evident

[37] Brunnée and Toope, "Constructivism and International Law," 137.

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fashion continue to undergird widely shared normative understandings concerning the means through which international crimes may be committed and forms they may take. Critically, such expectations, despite their virtual ubiquity, have not in any meaningful way been instantiated into the actual doctrinal substance of ICL itself, which remains largely means-neutral and unspecific when it comes to the forms commission may take. Despite not being instantiated into ICL, such aestheticized understandings continue to influence legal practices associated with ICL, pushing spectacular crimes to the foreground and unspectacular ones to the background. Such influence undermines the generality and clarity of ICL in practice and widens the gap between ICL's potential applicability and its actual practice. Consequently, from an interactional perspective, I argue that the grounding of shared understandings of atrocity and international crime in an aesthetics of horrific spectacle undermines the legal legitimacy of ICL.

Chapter Overview

Chapter 2 explores shared understandings of the subject matter and purposes of ICL. I argue that the tendency to collectively describe genocide, crimes against humanity, and war crimes as crimes of "atrocity" or "mass violence" is indicative of an implicit aesthetic framing of these crimes as horrific spectacles. I make this argument in two parts. First, I identify atrocity as the general subject matter ICL is dominantly viewed as being tasked with addressing and compare various proposed definitions of atrocity. While these proposed definitions coalesce around a basic framing of atrocities as instances of large-scale culpable harm causation, in the second part, I argue that the deployment of the rhetoric of atrocity and mass violence also brings with it a set of aesthetic presumptions and sensibilities.

I do so by demonstrating how, as both a general concept and the presumed core subject matter of ICL, the concept of atrocity is grounded in an aesthetics of horrific spectacle. I then demonstrate how this dominant "atrocity aesthetic" model has both aided in garnering support for ICL and subtly shaped shared understandings of international crime. This chapter demonstrates that the association between atrocity (and later "atrocity crimes") and an aesthetics of horrific spectacle is both deep-seated and longstanding and has helped to uncritically embed the notion that all international crimes will manifest themselves as highly

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visible, intuitively recognizable harms in the social and legal imaginaries of international law and international criminal justice.

Chapter 3 considers why shared understandings of international crime appear to remain so deeply intertwined within the atrocity aesthetic, even as this normative linkage itself remains largely unacknowledged. Combining insights from social constructivist models of norm development and research on the role aesthetic perception plays in individual and social processes of identification and recognition, I theorize ICL as an especially ideal environment for aesthetic considerations to play a significant yet unacknowledged role in shaping shared understandings of what international crimes are over time. I do so by framing individual and social processes of meaning-making and norm development as relying more heavily on intuitive processes of aesthetic perception when occurring within a context of uncertainty and lack of knowledge. Defining individual processes of aesthetic perception as emotional, intuitive evaluative processes that are "aesthetic" in nature in that they involve assessments of "rightness" grounded in sensory experience, I argue that, through a persistent "know it when you see it" approach to identifying potential international crimes, understandings of atrocity and international crime have remained embedded in an aesthetics of horrific spectacle.

Chapter 4 assesses the degree to which the atrocity aesthetic accurately captures the full array of forms that genocide, crimes against humanity, and war crimes may actually take. This chapter argues that the current dominant atrocity aesthetic oversimplifies the highly complex nature of many processes of mass killing and abuse and misrepresents the boundaries of ICL in relation to such processes. The atrocity aesthetic fails to capture the complexity of mass harm causation processes, which are social phenomena that unfold dynamically over large expanses of time and space through a host of overlapping, mutually reinforcing means. Many such means, particularly those which are slow, attritive, and/or socioeconomic in nature, fail to conform to the atrocity aesthetic and, hence, tend not to be conceptualized as potential international crimes. While this exclusion from international criminal justice of unspectacular forms of violence is often presumed to be wholly attributable to limitations in the doctrinal substance of ICL or the intrinsic limitations of criminal law more generally, this chapter demonstrates that this is not always the case. It does so by identifying areas of apparent overlap between ICL and a variety of aesthetically unfamiliar modalities of

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atrocity commission, ranging from the enforcement of famine conditions to socioeconomic oppression.

Chapter 5 grounds the preceding analysis by providing examples of real-world situations involving the likely commission of genocide, crimes against humanity, and/or war crimes through means failing to conform to the atrocity aesthetic identified. Such situations have, predictably, been relegated to the margins of international criminal justice or been viewed as altogether beyond the purview of ICL. Examples discussed include the enforcement of famine conditions and everyday violence in Khmer Rouge-era Cambodia, the starvation of civilians in occupied Poland and other Axis-controlled territories during World War II, the slow, multifaceted genocidal processes experienced by Indigenous populations in North America and elsewhere, colonial-era atrocities attendant to wealth and resource extraction, and the longstanding persecution of minority groups in various locations ranging from the United States to Myanmar. Such examples demonstrate that a host of atrocity commission processes failing to conform to the atrocity aesthetic may violate ICL, *de lege lata*, yet continue to be dominantly viewed as structurally excluded from the purview of ICL.

Chapter 6 explores some of the broader implications of ICL's aesthetic biases. It does so by framing ICL as operating as a spotlight, one that highlights the wrongfulness and impact of certain forms of violence while obscuring the severity, wrongfulness, and criminality of other forms of violence. As such, ICL's aesthetic biases arguably not only impair the efficacy of international criminal justice as a bulwark against atrocity commission, but also entail negative consequences for historical memory, the distribution of human rights, transitional justice and peacebuilding resources, and help facilitate the ongoing oppression of groups who remain under-acknowledged as victims of past atrocity crimes and/or whose ongoing victimization fails to conform to the atrocity aesthetic. Moreover, ICL's aesthetic selectivity also arguably undermines the retributive, utilitarian, and expressive credentials of international criminal justice as a global project. In terms of retributive goals, ICL's aesthetic selectivity problematically inserts arguably 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, aesthetic selectivity creates a risk that any deterrent effect ICL may have, presently or in the future, may be undermined by allowing powerful actors to enjoy impunity so long as they commit international crimes

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through unspectacular 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 all undermined by the continued message emanating from ICL that, so long as violence, oppression, and persecution do not shock our aesthetic sensibilities, they remain relatively tolerable from the perspective of international criminal justice, regardless of their potential scale and severity. Thus, as a global project, international criminal justice risks expressing the troubling norm that only when atrocities aesthetically manifest themselves in ways that offend the sensibilities of key constituencies clustered in the Global North, by confronting them with horrific spectacles of violence in faraway places, are they deemed worthy of recognition as international crimes and all that comes with such recognition. This state of affairs problematically renders those exposed to the horrors of atrocity violence as a kind of collateral class of quasi victims of international crimes. It also may play into tropes of the "savage" Global South, where atrocities seemingly exclusively occur, and the "civilized" Global North, where atrocities seemingly do not occur and where "justice" emanates from.[38] Pursuant to this deeply problematic narrative, racialized men in the Global South become the sole visible authors of an extreme, exoticized form of violent criminality. Meanwhile, the more banal, everyday forms of violence that disproportionately, though not solely, affect the lives of residents of the Global South, often along racial and gendered lines, is further relegated to the periphery of global justice concerns.

In addition to these problematic ramifications in terms of the traditional criminal law justifications for ICL, the aesthetic selectivity of international criminal justice also negatively affects historical memory and the distribution of global justice resources and aid. Histories of oppression and atrocity may be misremembered, and the culpability of those responsible obscured, by shifting the tenor of the language used in discussing such histories from that of criminal law, implying direct human causation and culpability, to more ambiguous language, such as the causally neutral language of "disaster," "tragedy," or "mistake." In terms of material repercussions, given ICL's highly influential position within the architecture of global justice, blind spots in ICL affect the

[38] Makau Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights" (2001) 42 *Harvard International Law Journal* 201–245.

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distribution of material resources earmarked as contributions to human rights, transitional justice, and peacebuilding. The tendency to not see aesthetically unfamiliar atrocities thus may prevent civil society actors and social justice activists from accessing certain resources and sources of funding if they are in a location where mass harms have been caused through means failing to conform to the atrocity aesthetic. Moreover, how historical narratives are framed also often have continuing material ramifications and may help to perpetuate the continuing oppression of groups who have experienced atrocities in the past. By masking the intentional, oft-criminal roots of violence that has, over time, become increasingly structural in nature, such structural forms of oppression and violence become easier to dismiss the importance of or deny the existence of altogether. Moreover, in postcolonial contexts, former colonial nations are more able to conceptually transform capital accumulated through long histories of atrocity commission into wealth acquired through means other than those involving the commission of atrocity crimes. Thus, the aesthetic selectivity of ICL may be seen as part of a broader obfuscation of the directness of the relationship between the current global distribution of wealth and capital and the role of atrocity commission in the initial capture and accumulation of such wealth.

Chapter 7, returning to interactional legal theory, considers the legal legitimacy ramifications of ICL's aesthetic biases. Using interactional legal theory's models of legality and legitimacy, I argue that the aesthetic biases identified in this book operating within international criminal justice undermine ICL's legal legitimacy. In doing so, I argue that such biases 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 aesthetic biases distort practices of legality associated with ICL, jeopardizing the gains ICL has made toward legal legitimacy in terms of the instantiation of relevant legal norms.

Conclusion

The overarching argument advanced in this book is that there exists a dominant, longstanding assumption that international crimes will adhere to a specific, easily recognizable aesthetic model. This model combines elements of familiarity (visceral, intuitive recognizability) and spectacle (large-scale public acts of violence). Crucially, this model captures only a subset, albeit a large and highly visible one, of the many ways

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in which genocide, crimes against humanity, and war crimes may 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 genocide, crimes against humanity, and war 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 violent spectacles. 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 large-scale, collective endeavors perpetrated by powerful actors. Thus, just as Hannah Arendt famously described the potential "banality" of those who participate in, or even lead, 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 seemingly ordinary, even banal means. Only by recognizing this reality can the role ICL can and should play in addressing atrocity violence be properly considered.

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