

The Normative Influence of International Criminal Justice: A Symbolic Approach

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September 2024

A thesis submitted to McGill University in partial fulfillment
of the requirements of the degree of
Doctor of Civil Law

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ACKNOWLEDGEMENTS

Many thanks to my supervisor, René Provost, and to my partner, Patricia Hénault, whose support has been essential during these long years. Prof. Provost has by any metric gone over and beyond what would ordinarily be expected of any supervisor in terms of dedication, patience and enthusiasm. I am grateful for the countless lengthy meetings Prof. Provost generously offered me. Patricia has, for her part, remained unconditionally supportive, faithfully undergoing every up and down by my side since the beginning. I view this dedicated support I received as exceptional and am profoundly grateful for it.

I also wish to thank the wonderful group of peers I befriended at McGill. The vibrant, friendly and highly social atmosphere made up by our cohort has forged some of my best memories. I wish to thank Michael Mantle, Marika Samson, Giacomo Marchisio and Stephen Hill for accepting to read and comment parts of this research.

Finally, I wish to thank my parents, Yves Dalpé and Johanne Côté, who inculcated in me the types of affinities and interests having made this research possible. Your curiosity and faithful interest in education and scientific inquiry has made me the researcher I am today.

ABSTRACT

ENGLISH

This dissertation examines the mechanisms through which international criminal justice communicates its normative message to post-conflict societies. Envisaging atrocity prosecutions as a form of modern political ritual, this dissertation first analyses its effects using insights drawn from ritual studies literature. This dissertation next moves to the difficulties frequently hindering this process among non-Western post-conflict societies. To this end, this dissertation describes some of the main patterns governing the reception and frequent rejection of international justice among post-conflict societies adhering to persecutory ideologies and traditional, non-Western conceptions of justice respectively.

FRANÇAIS

Cette thèse analyse les mécanismes qu'utilise la justice pénale internationale pour communiquer son message normatif aux sociétés post-conflit. Dans un premier temps, cette thèse envisage le procès d'atrocité de masse en tant que rituel politique moderne, afin d'en dégager les effets principaux en utilisant la littérature étudiant sur le rituel. Dans un deuxième temps, cette thèse se tourne vers les difficultés minant fréquemment ce processus communicationnel dans les sociétés post-conflit non-occidentales. À cet égard, cette thèse décrit certains des mécanismes gouvernant la réception et le rejet du message normatif de la justice pénale internationale dans les sociétés adhérant à des idéologies persécutrices et à des conceptions traditionnelles non-occidentales de justice respectivement.

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INTRODUCTION

THE INTERNATIONAL CRIMINAL LAW PROJECT AND SYMBOLIC COMMUNICATION THEORY

INTRODUCTION

Beyond impressions of slow, at times very imperfect progress, international legal scholarship to this day has no ready-made, simple and coherent way of describing the effects achieved by international criminal justice. Whether international atrocity prosecutions serve a definite and concrete social purpose, beyond the hopes of those struck by moral sentiment, is a question preserving a part of mystery. With a limited number of case studies published on the subject, international legal scholarship has a history of speculations on the ends sought and the ends met: atrocity justice, according to the literature, is intended to punish offenders, bring justice to victims, voice the international community's outrage, encourage rule of law, establish a record of past violations, mark national history, facilitate national reconciliation, and prevent future atrocities.¹ Whether this field can achieve these objectives has been the object of much debate. Compelling arguments have been depicting international criminal justice as an agent of positive change, inertia or regression; while some point to significant windows of opportunity opened by this movement, others show important limitations inherent to each of its stated objectives.²

¹ For example, see Antonio Cassese, "On the Current Trend towards Criminal Prosecution and Punishment for Breaches of International Humanitarian Law" (1998) 9 EJIL 2; Payam Akhavan, "Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal" (1998) 20:4 Hum R Quart 737; Cherif Bassiouni, "Justice and Peace: The Importance of Choosing Accountability over Realpolitik," (2003) 31 Case W Res J Int'l L 191; Theodor Meron, "From Nuremberg to the Hague" (1995) 149 Mil L Rev 107 at 110-111; Richard Goldstone, "Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals" (1995) 28:3 NYU J Int L & Pol 485; Gerhard Werle, *Principles of International Criminal Law* (Oxford: Oxford University Press, 2014) at 36-39. Many of these objectives can also be found sentencing case law before international criminal tribunals. See, for example, *Prosecutor v. Momir Nikolic*, IT-97-24-T, Trial Sentencing Judgment (31 July 2003) at para. 86 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber); *Prosecutor v. Milomir Stakic*, IT-97-24-T, Trial Judgment (July 31, 2003) at para. 902 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber); *Prosecutor v. Laurent Semanza*, ICTR-97-20-T, Judgment and Sentence (15 Mat 2003) at para 554; *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Judgment (2 September 2008) at paras 2-19 (International Criminal Tribunal for Rwanda, Trial Chamber).

² Immi Tallgren, "The Sensibility and Sense of International Criminal Law" (2002) 13:3 EJIL 561 at 561; Laurel Fletcher and Harvey Weinstein, "Violence and Social Repair: Rethinking the Contribution of Justice

The terms of this debate have thus far tended to follow the concrete and rational format characterizing policy scholarship. Much ink has for instance been spent debating whether or not international criminal justice can prevent future atrocities by altering the costs and benefits of atrocity perpetration. Some argue that genocide plotters typically act in a self-interested manner and therefore tend to be cautious of political legitimacy, while others note the chaotic social climate characterizing atrocities and its likely impact on their ability to think in rational terms.³ Others still debate whether the record of violations produced by mass atrocity prosecutions adequately serve the purposes of national-history making, with some emphasizing the importance of gathering reliable information so as to counter denial, and others arguing that trial records tend to distort history.⁴ Much debate has also revolved on international criminal justice's ability to bring justice to victims, with some arguing that pronouncements of guilt offer victims a sense of closure, and others emphasizing their frequent frustration with the leniency of sentences typically issued.⁵

Amidst these debates on the effects of international criminal justice, a recurrent remark can be found, consistently highlighting the symbolic import and nature of punishment. One may suppose that the difficulty of pointing to positive effects in clear and concrete terms, which do not generate a string of critiques effectively reducing its content to the realm of suppositions, possibly accounts for its popularity. This turn to the symbolic import of international criminal punishment can be traced to the turn of the 2010s, as several authors

to Reconciliation" (2002) 24:3 Hum R Quart 561 at 573; Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice" (2004) 28:3 Int'l Security 5. Later, Kate Cronin Furman, "Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity." (2013) 7:3 Int J Trans Just 434; Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2007) at 149 et seq.

³ With seminal articles published on the subject by authors such as Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" (2001) 95 AMJIL 7 and Tallgren, *ibid*.

⁴ For example, compare Antonio Cassese, "Reflections on International Criminal Justice" (2011) 9:1 J Int Crim Just 271 at 274 and Richard Ashby Wilson, generally, "From Monumental History to Microhistories" in Richard Ashby Wilson, *Writing History in International Criminal Trials* (Cambridge: Cambridge University Press, 2011).

⁵ Contrast Aryeh Neier, "Rethinking Truth, Justice, and Guilt after Bosnia and Rwanda" in Carla Hesse and Robert Post, eds, *Human Rights in Political Transitions: Gettysburg to Bosnia* (New York: Zone, 1999) 39 at 49 and Sarah Kendall and Sara Nouwen, "Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood" (2014) 76:3-4 Law & Contemp Probl 235 at 253-258.

had begun underlining the importance of adopting humble expectations. This literature noted that international criminal justice should not be expected to bring about ambitious social transformations,⁶ coupling this position with a preference for expressivist justifications to the infliction of hard treatment.⁷ According to this view, the effects of international criminal justice are subtle, and may only surface tangibly in the long-term.

This perspective is however made up of incidental remarks, generally formulated amidst schemes of argumentation focusing on related subjects.⁸ These remarks, what is more, do not leave the rational and concrete level of argumentation characterizing the above debate, and do not attempt to engage with the symbolic aspects of international criminal justice in

⁶ Shahram Dana, “The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?” (2014) 30 Penn St J L & Int’l Aff 31 at 49; Stephanos Bibas and William Burke-White, “International Idealism meets Domestic-Criminal-Procedure Realism” (2010) 59:4 Duke L J 637 at 660-63; Saira Mohamed, “Deviance, Aspiration, and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law” (2015) 124:5 Yale L J 1628 at 1666-68; Kai Ambos, *Treatise on International Criminal Law: Volume III: International Criminal Procedure* (Oxford: Oxford University Press, 2016) at 332; Payam Akhavan, “The Rise, and Fall, and Rise, of International Criminal Justice” (2013) 11:3 J Int’l Crim Just 527 at 535; William Burke-White, “Proactive Complementarity The International Criminal Court and National Courts in the Rome System of International Justice” (2008) 49:1 Harv Int’l L J 53 at 59-61; Carsten Stahn, “International Criminal Justice and Reconciliation: Beyond the Retributive v. Restorative Divide” (2015) 36 FICHL Policy Brief Series at 1.

⁷ For example, Drumbl, *supra* note 2 at 173-175; Kai Ambos, *Treatise on International Criminal Law: Volume I* (Oxford University Press, 2016) at 71; David Luban, “After the Honeymoon Reflections on the Current State of International Criminal Justice” (2013) 11:3 J Int Crim Just 505 at 509; Frédéric Megret, “Practices of Stigmatization” (2014) 76:3-4 L & Contemp Probs 287 at 317-18; Carsten Stahn, “Between Faith and Facts: by what Standards Should we Assess International Criminal Justice?” (2012) 25 Leiden J Int’l L 251 at 279-80; Jens Ohlin, *International Criminal Procedure: Towards a Coherent Body of Law* (London: Cameron May: 2009) at 389; Mirjan Damaska, “What is the Point of International Criminal Justice?” (2008) 83:1 Chicago-Kent L Rev 329 at 343; Beth Van Schaack, “Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals” (2008) 97:1 Geo L J 119 at 155-57. According to the expressivist school, punishment is said to translate the otherwise theoretical importance of norms into a lived experience, forcefully demonstrating that the community is willing to go as far as to inflict pain on those who violate fundamental rules. Christopher Bennett, “State Denunciation of Crime.” (2006) 3 Journal of Moral Philosophy 288; Michael Davis, “Punishment as Language: Misleading Analogy for Desert Theorists.” (1991) 10 L & Phil Int’l J 311; Joel Feinberg, “The Expressive Function of Punishment” (1965) 49 The Monist 397 at 398, 400, 402-403.

⁸ Cassese, *supra* note 1 at 9-10; Bassiouni, *supra* note 1 at 191, 192; Damaska, *supra* note 7 at 345; Tom Farer, “Restraining the Barbarians: Can International Criminal Law Help?” (2000) 22:1 Hum R Quart 90 at 91-92; Van Schaack, *supra* note 7 at 155-57; Luban, *supra* note 7 at 505; Robert Sloane, “The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law” (2007) 43:1 Stan J Int’l L 39 at 42; Stahn, *supra* note 7 at 279-80; Jelena Pejic, “Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness” (1998) 29:2 Col Hum R L Rev 291 at 292. Favouring a retributivist-expressivist account of international criminal punishment: Adil Ahmad Haque, “Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law” (2005) 9:1 Buff Crim L Rev 273 at 296-97; Ohlin, *supra* note 7 at 389.

any measure of detail. The social effects achieved by symbolic communication proper – the inner-workings of the communicational process, from message uttered to message received – remain largely unexamined.⁹ The totality of passages forming the symbolic view thus depicts international criminal justice as conveying in its many facets a message for the world to hear, slowly advancing towards a norm of accountability through each of its objectives, from the establishment of a record of violations to national reconciliation, without however engaging seriously with the mechanics of symbolic communication.

Symbolic communication is the object of a rich literature. In a context where legal scholars often point to the importance of communicating the law's message, this literature completes the picture by shedding light on the complex phenomena at play between the symbol of justice as uttered and the message received. Authors associated with symbolic anthropology include Clifford Geertz, Victor Turner, and Mary Douglas, and have laid a conceptual groundwork frequently used by political scientists to explain the effects achieved by highly charged political events.¹⁰ Events such as the kneeling of the German chancellor in the Warsaw Jewish ghetto after the Second World War, Red Army Marches, British coronation ceremonies or the Dreyfus proceedings have been argued to convey a powerful vision of the right and the just as conceived by the political regime in power.¹¹ Symbolic action, following this view, conveys political ideals, identities and sentiments far more efficiently than explicit statements abstractly expounding their merits.¹² Atrocity

⁹ One of the tenets of the expressivist account is its ability to strengthen the norm upheld; punishment according to it is variously to embody the community's outrage and passion for the norms violated, reinforce the norm, "project a norm," "didactically" communicate its importance or "show what conduct will not be tolerated." While punishment's ability to bring about desirable ends such as norm strengthening, and plausibly so, in principle underpins this account, how this form of communication is to operate however tends to be treated as if of secondary importance in this literature. Works on symbolic communication are omitted altogether from it. Diane Marie Amann, "Group Mentality, Expressivism, and Genocide" (2002) 2 Int'l Crim L Rev 93 at 118; Drumbl, *supra* note 2 at 173-175; Ambos, *supra* note 6 at 71-72; David Luban, "Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law" in Samantha Besson and John Tasioulas, eds, *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) 566 at 576; Mohamed, *supra* note 6 at 1670; Cassese, *supra* note 1 at 10.

¹⁰ A survey of this literature is offered below in Sections (II)-(III).

¹¹ E.g., David Kertzer, *Ritual, Politics, and Power* (New Haven: Yale University Press, 1988); Harold Nieburg, *Culture Storm: Politics and the Ritual Order* (New York: St. Martin's Press, 1973); Michael Novak, *Choosing our King: Powerful Symbols in Presidential Politics* (New York: Macmillan, 1974); Michael Walzer, "On the Role of Symbolism in Political Thought" 82 (1967) Pol Sci Quart 191.

¹² Kertzer, *supra* note 11 at 53.

prosecutions, it is submitted, amount to an occurrence of this form of communication, diffusing through the symbol of punishment the law's message in post-conflict societies.

The purpose of this dissertation is to bridge the above chasm between the role attributed to symbolic communication in legal scholarship, the absence of meaningful engagement with this theme, and the existence of a rich body of anthropological scholarship explaining some of the effects obtained through this form of communication. This first, introductory chapter substantiates the assertions made in the preceding paragraphs. It argues that a symbolic reading of international criminal justice completes the otherwise predominantly rationalist view of punishment, by showing how the law's message may obtain its desired normative effect through subjective means. The insight proposed in this chapter distinguishes itself from the literature by suggesting a broader reading of international criminal normativity.¹³ The discussion among jurists frequently mentions the concept of norm projection but does not explore it, as if the imposition of punishment, in the abstract, or through constraint, was to achieve this on its own. Speaking of legal scholars more generally, Nicholas Kasirer talks of *cette hésitation à reconnaître un rôle à l'inconscient dans la confection du droit*.¹⁴

In an attempt to lay out the theoretical structure followed throughout this dissertation, the following begins with a survey of the literature on the role of international criminal justice, before highlighting the redundancy of references to symbolic communication, their centrality, and the thinness of their contents. The following two sections present the basics of symbolic communication theory, before concentrating on a few concepts of particular relevance in the context of international criminal justice. The fifth and sixth sections finally link this discussion to the theme of normativity, and present the structure of this dissertation, its recurring themes and overall argument.

¹³ Contrarily to the predominant view on normativity, which tends to emphasize constraint, this chapter envisages normative communication as operating mainly through moral appeal. Roderick Macdonald and David Sandomierski speak of "the prescriptivist impulse that characterizes most contemporary legal theory" in "Against Nomopolies" (2006) 57 N Ir Leg Quart 610 at 622.

¹⁴ Kasirer's statement can be translated to "This hesitation in recognizing the role played by the unconscious to the confection of law." Nicholas Kasirer, "Le droit robinsonien" in Nicholas Kasirer, ed, *La solitude en droit privé* (Montréal: Éditions Thémis, 2002) 261 at 276.

(I) SYMBOLIC COMMUNICATION IN ICL LITERATURE

From the moment international criminal justice began to develop in the early 1990s, after an institutional hiatus dating back to Nuremberg, issued a voluminous stream of scholarship on the effects of international criminal justice. The present section surveys this literature, stressing its apparent emphasis on, and convergence towards, the importance of communicating the law's message. This literature initially suggested that atrocity prosecutions could achieve the above-stated objectives, quickly giving way to another stream of scholarship debating the feasibility of such aspirations.¹⁵ Many were disappointed with the important limitations plaguing the ICL project: ICTs proved to be slow, costly, selective, to act as a counterincentive to demobilization, to lack domestic legitimacy and to make for a meagre contribution to deterrence among genocidal societies (where a climate of "inverted morality" is often argued to take root).¹⁶ Some two decades after the ratification of the Rome Statute, field studies now demonstrate that the influence of the two *ad hoc* tribunals and the International Criminal Court on post-conflict societies remains difficult to ascertain.¹⁷ Be it in the Former Yugoslavia, Rwanda, Uganda, Kenya, or Sierra

¹⁵ Tallgren, *supra* note 2 at 561; Fletcher and Weinstein, *supra* note 2; Snyder and Vinjamuri, *supra* note 2. Later, Cronin-Furman, *supra* note 2; Drumbl, *supra* note 2 at 149 et seq. For a similar divide in political science, compare Samuel Huntington, *The Third Wave, Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991) at 215 with Bruce Ackerman, *The Future of Liberal Revolution* (New Haven: Yale University Press, 1992).

¹⁶ The concept of "inverted morality," according to Payam Akhavan, is when a group no longer perceives murdering members of a given group as taboo, and rather values it as an act of bravery. See Akhavan, *supra* note 3 at 7, 10. In 2000 Gary Jonathan Bass viewed the "standard liberal arguments in favor of war crimes tribunals" as "far from weak," albeit "not totally convincing neither." Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000) at 304, but 310 ("war crimes trials do not work particularly well. But they have clear potential (...)") to amount to a superior response "to apathy and vengeance."). In 2003 Ralph Zacklin of the U.N. warned that "the verdict is now largely in. The ad hoc tribunals have been too costly, too inefficient and too ineffective" in "The Failings of Ad Hoc International Tribunals" (2004) 2:2 J. Int'l Crim Just 541 at 545. On the costs of international criminal justice, David Wippman, "The Costs of International Justice" (2006) 100:4 AMJIL 861. On the "peace versus justice" debate, Anthony D'Amato, "Peace vs. Accountability in Bosnia" (1994) 88:3 AMJIL 500. On the contentious prospect for deterrence, see Tallgren, *supra* note 2 at 561; Fletcher and Weinstein, *supra* note 2. Echoing this disappointment with respect to the future of international criminal law, Mark Osiel, "The Demise of International Criminal Law" (2014) Humanity Journal Blog.

¹⁷ Jelena Subotic, *Hijacked Justice: Dealing with the Past in the Balkans* (Ithaca: Cornell University Press, 2009); Nicola Palmer, *Courts in Conflict: Interpreting the Layers of Justice in Post-Genocide Rwanda* (Oxford: Oxford University Press, 2015); John Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia: Law, Meaning, and Violence* (Ann Arbor: University

Leone, tangible social transformations resulting from the operation of ICTs have generally been few and slight. While different camps in the polarized debate on international criminal justice hold convincing arguments, many now argue for a humble understanding devoid of ambitious objectives of social engineering.¹⁸

In a context where the concrete contributions made by atrocity prosecutions remain difficult to ascertain, many now point to its symbolic role.¹⁹ Mark Drumbl argues that international criminal punishment “claims as a central goal the crafting of historical narratives, their authentication as truths, and their pedagogical dissemination to the public.”²⁰ Martti Koskeniemi writes that atrocity prosecutions amount to a “final judgment” in national history, allowing for the state to re-establish its capacity to act as a moral agent for the generations to come.²¹ David Luban and Frédéric Mégret view international criminal law as disseminating norms stigmatising political violence.²² Kai Ambos argues that atrocity trials are primarily didactic, concurring, with Carsten Stahn,

of Michigan Press, 2014); Diane Orentlicher, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia* (New York: Open Society Institute, 2008); Lionel Nichols, *The International Criminal Court and the End of Impunity in Kenya* (Heidelberg: Springer, 2015) at 15; Sarah Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: Cambridge University Press, 2013) at 22; Alexander Hinton, *The Justice Façade: Trials of Transition in Cambodia* (Oxford: Oxford University Press, 2018); Phil Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge: Cambridge University Press, 2018); Kamari Clarke, *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback* (Durham: Duke University Press, 2019); Lara Nettelfield, *Courting Democracy in Bosnia and Herzegovina* (Cambridge: Cambridge University Press, 2010); Mark Kersten, *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace* (Oxford: Oxford University Press, 2016).

¹⁸ By the end of the 2000s, a consensus appeared to emerge on the limits of legalism, emphasizing that international criminal justice can only play a modest albeit important role, mostly when paired with other initiatives such as truth commissions, political and economic integration, public education, lustration, ratification of international instruments, and other standardized transitional justice measures. Dana, *supra* note 6 at 49; Bibas and Burke-White, *supra* note 6 at 660-63; Mohamed, *supra* note 6 at 1666-68; Ambos, *supra* note 6 at 332; Akhavan, *supra* note 6 at 535; Burke-White, *supra* note 6 at 59-61; Stahn, *supra* note 6 at 1. For an earlier prediction, Bass, *supra* note 16 at 296.

¹⁹ Cassese, *supra* note 1 at 9-10; Drumbl, *supra* note 2 at 173-175; Diane Amann, “Assessing International Criminal Adjudication of Human Rights Atrocities” (2003) 16 Third World Leg Stud 169 at 175; Bassiouni, *supra* note 1 at 191, 192; Damaska, *supra* note 7 at 345; Farer, *supra* note 8 at 91-92; Van Schaack, *supra* note 7 at 155-57; Luban, *supra* note 7 at 505; Sloane, *supra* note 8 at 42; Mégret, *supra* note 7 at 317-18; Stahn, *supra* note 7 at 279-80; Pejic, *supra* note 8 at 292; Haque, *supra* note 8 at 296-97; Ohlin, *supra* note 7 at 389.

²⁰ Drumbl, *supra* note 2 at 173-175.

²¹ Martti Koskeniemi however views this aspiration (to write collective history) as difficult to achieve at best, in “Between Impunity and Show Trials” (2001) 6:1 Max Planck Yb UN L 1 at 9-10.

²² Luban, *supra* note 7 at 509; Megret, *supra* note 7 at 317-18.

that international criminal punishment reinforces social norms.²³ Robert Solane argues that the expressive account most aptly captures “both the nature of international sentencing and its realistic institutional capacity to make a difference given the [...] constraints that will continue to afflict international criminal tribunals.”²⁴ For Mirjan Damaska the purpose served by international criminal justice is principally didactic, as exposure to its convictions “is apt to contribute to the recognition of basic humanity.”²⁵

Law and the humanities scholarship similarly emphasizes the importance of the law’s message, often viewing punishment as contributing to the transformation of national history.²⁶ Mark Osiel notes that “myths of founding and refounding often center on legal proceedings or the drafting of legal documents,” pointing to the Magna Carta, the trial of Louis XVI or the Declaration of Independence.²⁷ According to Osiel, this end is achieved by staging the trial as a morality play whose symbolic weight, through the effective staging of liberal values, is to exert influence over national myths.²⁸ This spectacle is one of

²³ Ambos, *supra* note 7 at 71; Stahn, *supra* note 7 at 279-80.

²⁴ Sloane, *supra* note 8 at 42.

²⁵ Damaska, *supra* note 7 at 343. Similarly, although under the rubric of retribution, Jens Ohlin, *supra* note 7 at 389; Stressing the state’s role in articulating the values to enshrined in laws, Naomi Roht-Arriaza, *Impunity and Human Rights in International Law and Practice* (Oxford: Oxford University Press, 1995) at 17.

²⁶ Lawrence Douglas, *The Memory of Judgment Making: Law and History in the Trials of the Holocaust* (New Haven: Yale University Press, 2001) at 261; Leora Yedida Bilsky, *Transformative Justice: Israeli Identity on Trial* (Ann Arbor: University of Michigan Press, 2004) at 3, 117; Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick: Transaction Publishers, 1997) at 4, 7, 166; Edward Morgan, “Retributory Theatre” 3:1 (1988) *Am U Int’l L Rev* 1 at 64; Gerry Simpson, “Didactic and Dissident Histories in War Crimes Trials” 60 (1997) *Alb L Rev* 801 at 826; Jonathan Turley, “Transformative Justice and the Ethos of Nuremberg” (2000) 33 *Loy LA L Rev* 655 at 680; Barrie Sander, “Justice as Identity: Unveiling the Mechanics of Legitimation in Domestic Atrocity Trials” (2018) *J Int’l Crim Just* 203 at 203-05; Wilson, *supra* note 4; Shoshana Felman, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (Cambridge: Harvard University Press, 2002) at 4; Yasco Horsman, *Theaters of Justice: Judging, Staging, and Working Through in Arendt, Brecht, and Delbo* (Stanford: Stanford University Press, 2011) at 34, 153; Tom Segev, *The Seventh Million: The Israelis and the Holocaust* (New York: Picador, 2000) at 326; Dominick LaCapra, *Representing the Holocaust: History, Theory, Trauma* (Ithaca: Cornell University Press, 1996) at 12; Henry Rousso, *The Vichy Syndrome: History and Memory in France Since 1944* (Cambridge: Harvard University Press, 2001) at 210; Alain Finkielkraut, *Remembering in Vain: The Klaus Barbie Trial & Crimes Against Humanity* (New York: Columbia University Press, 1992) at xvi, 2. Similarly, albeit in non-historical terms, Ruti Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2002) at 30, 229; Judith Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge: Harvard University Press, 1964) at 145.

²⁷ Osiel, *supra* note 26 at 4, 7 166.

²⁸ This insight was originally suggested in Hannah Arendt’s “Report on the Banality of Evil,” describing the trial of Adolf Eichmann as a failed drama. Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin, 2010) at 9, 287. That the trial was deliberately crafted so as to “reach the hearts of men,” Gideon Hausner, *Justice in Jerusalem* (Jerusalem: Herzl Press, 1978) at 291.

suffering mixed with the sober tone imposed by due process.²⁹ Carlos Nino notes that the “drama of a trial, with the victims and perpetrators under the public light, with accusations and defenses, with witnesses from all social sectors, and with the terrifying prospect of punishment, inevitably attracts great public attention.”³⁰ Some compare this didactic performance to a Greek tragedy.³¹ The moral poignancy of this performance is argued to stem from various sources, including the opposition of the defendant’s immoral behaviour to society’s fundamental values, the re-enactment of traumatic events, or, conversely, the fearful realisation that many if not most could suffer from similar human weaknesses.³² Theatrical catharsis stands as a frequent conclusion: “at the end of evil there must be a moment of reconciliation (...). Some good must come of so much evil.”³³

To be sure, many question the desirability of using the criminal law beyond the strict determination of guilt or innocence, an act perceived to produce poor justice and history at once.³⁴ And this communicative process from courtroom to national consciousness remains uncertain, following unpredictable pathways from one situation to the other.³⁵ Nevertheless, some of the literature argues that this symbolic message can reverberate over

²⁹ Arendt, *supra* note 28 at 6, 277.

³⁰ Carlos Santiago Nino, *Radical Evil on Trial* (New Haven: Yale University Press, 1996) at 131.

³¹ Representing the defendant as a protagonist whose mistakes are demonstrated to cause the suffering of others. The suffering of characters is viewed, in turn, as eliciting compassion, thus reinforcing the spectator’s moral fibre. Antoine Hol, “The Theatre of Justice: On the Educational Meaning of Criminal Trials” in Chrisje Brants, Antoine Hol and Dina Siegel, eds., *Transitional Justice: Images and Memories*, (Burlington: Routledge, 2013) 71 at 73; Shoshana Felman, “Education and Crisis” in Shoshana Felman and Dori Laub, *Testimony: Crises of Witnessing in Literature, Psychoanalysis and Culture* (New York: Routledge, 1992) at 53; Horsman, *supra* note 26 at 34, 153.

³² Respectively, Bilsky, *supra* note 26 at 117; Felman, *supra* note 26 at 4, 126-27; Martha Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge: Cambridge University Press, 2003) at 451.

³³ Lionel Abel, *The Intellectual Follies: A Memoir of the Literary Venture in New York* (New York: Norton, 1984) at 271; Susan Sontag, “Reflections on *The Deputy*” in Eric Bentley, ed, *The Storm over The Deputy: Essays and Articles about Hochhut’s Explosive Drama* (New York: Grove Press, 1964) 109 at 118.

³⁴ Ian Buruma, *The Wages of Guilt: Memories of War in Germany and Japan* (New York: New York Review Books, 2015) at 142; David Cohen, “Beyond Nuremberg: Individual Responsibility for War Crimes” in Robert Post and Carla Hesse, eds, *supra* note 2, 90 at 112.

³⁵ Inés Gonzales and Oscar Landi describe the treatment of human rights violations in Argentina in the 1980s as “a process with a life of its own, the course and results of which escaped the calculations and desires of each of the actors directly involved.” Inés Gonzales and Oscar Landi, “Los derechos en la cultura política,” in Carlos Acuña, ed, *Juicio, Castigo y Memoria: Derechos Humanos y Justicia en la Política Argentina* (Buenos Aires: Nueva Vision, 1995) 41 at 55. See also Jamal Benomar, “Justice after Transitions” in Neil Kritz, ed, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Boulder: US Institute of Peace Press, 1995) 3 at 3-4.

time, proposing explanations to this complex, long-term process. One of the most important factors, according to José Zalaquett, is the amount of power preserved by the group accused of human rights violations: while a downfall in popularity can accentuate political demands for accountability, conversely, the consolidation of power by this very same group risks narrowing the window of opportunities.³⁶ Running parallel to the waning influence of perpetrators is the gradual momentum gained through constant activism by victims and social justice militants. The Argentine case is frequently cited as a paradigmatic example, where popular outrage for crimes long denounced by an engaged civil society eventually lead to wide-ranging accountability initiatives and societal debate.³⁷

Societal debate is another important factor for the symbolic message of international criminal justice to take hold. Atrocity prosecutions, however spectacular, do not easily transform collective memory.³⁸ More than an instantaneous alteration, many understand mass atrocity prosecutions and ensuing societal debates first and foremost as laying the very groundwork for democratic reform. Carlos Nino argues that official state condemnation can counteract totalitarian tendencies by “feeding public discussion and generat[ing] a process of self-examination.”³⁹ Kathryn Sikkink and Ruti Teitel note that this deliberative process, once effectively triggered, tends to broaden across a variety of other discursive sites such as talk shows, popular novels, documentaries, news, TV series, school textbooks, political speeches and electoral debates, memorial sites, museums, grassroots and international human rights advocacy, and victim activism – each

³⁶ José Zalaquett, “Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints” in Kritz, *supra* note 35, 1 at 18.

³⁷ Francesca Lessa, *Memory and Transitional Justice in Argentina and Uruguay: Against Impunity* (Basingstoke: Palgrave Macmillan, 2013) at 9, 49-132. Compare with Audrey Chapman and Hugo van der Merwe, “Reflections on the South African Experience” in Audrey Chapman and Hugo van der Merwe, eds., *Truth and Reconciliation in South Africa: Did the TRC Deliver?* (Philadelphia: University of Pennsylvania Press, 2008) 1 at 322.

³⁸ Osiel, *supra* note 26 at 200.

³⁹ It should be noted that criminal prosecutions only form part of the many legal measures states can use in order to convey an official condemnation of the past. Other means include official apologies, constitutional reform, truth commissions, inquiries and reports, economic sanctions for perpetrators, reparations for victims. Generally, Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998). Nino, *supra* note 30 at 147; David Thelen, “Memory and American History” 75 (1992) J Am Hist at 1117, 1127 and 1119.

retransmitting the law's message to its audience with added cogency.⁴⁰ Through these different channels, according to Yasco Horsman, the voice of victims is constantly reformulated, and can work through some of the traumatic narratives dividing society.⁴¹ Continued deliberation, it is argued, can generate a measure of respect and rapprochement between opposed political views; over generations, and under favorable conditions, more and more may converge towards an emerging majority shocked by the horrors of the past.⁴²

(II) RITUAL AS A CENTRAL, UNEXPLORED INSIGHT IN ICL LITERATURE

While the previous section argued that ICL scholarship frequently underlines the importance of the transmission of its symbolic message, the present section discusses ICL scholarship making explicit references to symbolic communication and ritual theory. Where mass atrocity prosecutions are often characterized as a form of theatrical performance working through traumatic events, others also speak of international criminal law directly as ritual. Payam Akhavan depicts ICL norms as a “sacred moral compass amidst the secular ordering rituals of the contemporary world [..., situating] our normative discourse in the transcendent sphere of ‘unquestionable doctrines.’”⁴³ Koskeniemi speaks of a “cosmopolitan faith” in international norms, depicting mass atrocity prosecutions as enacting a “final judgement on violence in the religious sense.”⁴⁴ Frédéric Mégret speaks of ICL as “practices of stigmatization,” reverting to Durkheim’s symbolic conception of

⁴⁰ Teitel, *supra* note 26 at 49, 220 (speaking of the prosecutions’ operation as a symbol for rule of law and “mediating function,” preserving continuity while instantiating transformative discontinuity); Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: Norton, 2011) at 87-96 (arguing that the newly hegemonic norm condemning human rights violations in Argentinian politics appears to be spreading throughout Latin America according a similar process.).

⁴¹ Horsman, *supra* note 26 at 3; John Borneman, *Settling Accounts: Violence, Justice, and Accountability in Postsocialist Europe* (Princeton: Princeton University Press, 1997) at 6, 25.

⁴² Judith Miller, *One, by One, by One: Facing the Holocaust* (New York: Simon & Schuster, 1990) at 286; Michael Ignatieff, “Articles of Faith” (1996) 25:5 *Index Cens* 110; Bilsky, *supra* note 26 at 11, 250.

⁴³ Payam Akhavan, *Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime* (Cambridge: Cambridge University Press, 2012) at 176.

⁴⁴ Citing Koskeniemi, *supra* note 21 at 10. See also Martti Koskeniemi’s “Between Commitment and Cynicism: Outline for a Theory of International Law as Practice,” in *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (New York: United Nations Press, 1999) 495 at 496 and “Faith, Identity and the Killing of the Innocent: International Lawyers and Nuclear Weapons” 137.

criminal punishment.⁴⁵ Gerry Simpson compares mass atrocity prosecutions to scapegoating, drawing a parallel to René Girard’s mimetic theory.⁴⁶ Ruti Teitel views mass atrocity prosecutions as “enabling a riven country to construct a shared past through collective public ritual.”⁴⁷ Several other statements can be found on this theme in the literature, none of which however leads to substantial engagement with ritual theory.⁴⁸

Frequent allusions to this concept in the literature – in addition to various other symbolic characterizations mentioned above – seem to demonstrate the emergence of a general insight on the importance of the ritual dimension to the ICL project. The above references to ritual and symbolic communication point to a literature encompassing many if not most other symbolic insights discussed in the previous pages. Symbolic communication broadly defined stands as a common denominator to theatrical, performative and psychoanalytic analogies found in the literature, in accounting for the subconscious dimension of mass atrocity prosecutions. In the Durkheimian sense, the sacred dimension of ritual “ultimately refers not to a supernatural entity, but rather to people’s emotionally charged interdependence.”⁴⁹ Thus conceived, ritual can be defined as the symbolic performance of collective emotion through socially standardized behaviour, whose repetition aims at

⁴⁵ Megret *supra* note 7 at 289.

⁴⁶ Simpson, *supra* note 26 at 829.

⁴⁷ Teitel, *supra* note 26 at 49.

⁴⁸ Morgan, *supra* note 32 at 4 (“the ritualized retelling of the tribulations of history”); Turley, *supra* note 26 at 656 (“As high-profile trials became part of the regular diet for news events, citizens became more familiar with the workings and rituals of the legal system.”); Guyora Binder, “Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie” (1989) 98 Yale L.J. 1321 at 1371 (comparing Barbie to a scapegoat and his trial to a ritual ceremony); Osiel, *supra* note 26 at 54 (“No less important to the political efficacy of these proceedings is the way in which they are orchestrated and symbolized”); Edwin Bikundo, *International and Comparative Criminal Justice: International Criminal Law: Using or Abusing Legality?* (London: Routledge, 2016) at 27 (comparing ICC prosecutions to the scapegoating of Africans); Tallgren, *supra* note 2 at 593 (comparing ICL prosecutions to a “funeral of sorrow” for the international community); Borneman, *supra* note 41 at 7 (speaking of the “ritual reaffirmation of the principles of rule of law,” in order for society to avoid “potentially endless cycles of violent retaliations.”); Felman, *supra* note 26 at 58 (comparing popular criminal trials to “rituals of obsession,” the judicial re-enactment of a traumatic past chastising tormenting obsessions); Hilary Charlesworth, “Swimming to Cambodia: Justice and Ritual in Human Rights after Conflict” (2010) 29 Austl Yb Int’l L 1 at 10-14 (speaking of “human rights ritualism”).

⁴⁹ Kertzer, *supra* note 11 at 9, referring to Émile Durkheim, *The Elementary forms of Religious Life*, translated by Joseph Swain (Glencoe: Free Press, 1974) at 37, 41. See also Jack Goody, *Myth, Ritual and the Oral* (Cambridge: Cambridge University Press, 2010) at 20.

inculcating certain moral norms among the population.⁵⁰ In standing as the materialization of action primarily intended for its symbolic, irrational value, ritual encompasses much of this convergence in the literature towards an expressivist understanding of the ICL project.

While frequently pointing to symbolic communication and ritual, international criminal justice scholarship has not engaged seriously with its attendant literature. The superficial treatment afforded to symbolic and ritual theory is partly explained by the architecture of research agendas cutting across this theme. Most legal scholars speaking of ICL's symbolic role on local populations do so under succinct descriptions of the expressivist justification to international criminal punishment in doctrinal works.⁵¹ Those pointing to ICL's symbolic role on international lawyers and international organizations do so from a critical law and society approach in large part responding to international law idealism.⁵² Law and the humanities scholarship follows similar patterns: where references are frequently made to symbolic characterizations such as theatre, performance or psychoanalysis, many primarily intend to do so as a contribution to their respective fields – with a view to understanding how mass atrocity prosecutions inform theatrical, performative or

⁵⁰ Edmund Leach, *Political Systems of Highland Burma* (Boston: Beacon Press, 1966) at 12-13; Roberto Da Matta, "Constraint and License: A Preliminary Study of Two Brazilian National Rituals" in Sally Falk Moore and Barbara Myerhoff, eds., *Secular Ritual* (Amsterdam: Van Gorcum Press, 1977) 244 at 256-57.

⁵¹ See notes 22-27, in accompanying text.

⁵² Here "symbolism" and "ritual" constitute less a promising avenue for research than a rhetorical device highlighting the lack of empirical data supporting the ICL project's objectives. Tallgren, *supra* note 2 at 593; David Koller, "The Faith of the International Lawyer" (2008) 40:4 NYU J Int'l L & Pol at 1019; Koskeniemi, *supra* note 44 at 496; Simpson, *supra* note 26 at 829; Bikundo, *supra* note 48 at 27. More generally, in the domain of international public law, see Jean d'Aspremont, *International Law as a Belief System* (Cambridge: Cambridge University Press, 2017).

psychoanalytic theories, and not the other way around.⁵³ Similar limitations apply to transitional justice,⁵⁴ legal anthropology⁵⁵ and domestic legal scholarship.⁵⁶

An exception to the preceding is the early theoretical insight developed by Carlos Nino, a leading architect in the 1985 Argentine Junta trials.⁵⁷ Nino argued that a reaction of shock was to emerge from the nation's confrontation of the past – from the realization of the

⁵³ Horsman, *supra* note 26 (focusing on the writings of Arendt, Brecht and Delbo); Felman, *supra* note 26 (focusing on literary works discussing trauma and atrocities); Douglas, *supra* note 6 (focusing on film studies); Carrol Clarkson, *Drawing the Line: Toward an Aesthetics of Transitional Justice* (New York: Fordham University Press, 2013) (focusing on artistic representations drawing the line between guilt and innocence in the aftermath of mass atrocity); to a lesser extent, Bilsky, *supra* note 26.

⁵⁴ Existing literature on ritual in this field tends to limit the discussion to transitional justice mechanisms of victim healing, apologies and reconciliation. *E.g.*, Danielle Celermajer, *The Sins of the Nation and the Ritual of Apologies* (Cambridge: Cambridge University Press, 2009); Danielle Celermajer, "The Role of Ritual is Shifting Collective Dispositions" in Christine Bell, ed, *Transitional Justice: Images and Memories* (London: Routledge, 2016) 123; Sverker Finnstrom, "Reconciliation Grown Bitter?: War, Retribution, and Ritual Action in Northern Uganda" in Rosalind Shaw, Lars Waldorf & Pierre Hazan, eds, *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford: Stanford University Press, 2010) 111; Daniel Cuypers, Pilar Orero & Aline Remael, *Public Apology between Ritual and Regret: Symbolic Excuses on False Pretenses or True Reconciliation out of Sincere Regret* (Amsterdam: Rodopi, 2013); Julia Paulson, "Commentary on Memory, Ritual and Apology" in Nicola Palmer, Philip Clark & Danielle Granville, eds., *Critical Perspectives in Transitional Justice* (Portland: Intersentia, 2012) 331.

⁵⁵ Legal anthropology focuses on local traditional justice rituals in non-Western communities without seeking to extrapolate such insights to modern atrocity prosecutions. *E.g.*, Maxine Kamari Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge: Cambridge University Press, 2009); Kristin Doughty, "Law and the Architecture of Social Repair: Gacaca Days in Post-Genocide Rwanda" (2015) 21:2 J Royal Anthr Inst 419; Rosalind Shaw, "Displacing Violence: Making Pentecostal Memory in Postwar Sierra Leone" (2007) 22:1 Cultural Anthropology 66; Prudence Acirokop, "The Potential and Limits of Mato Oput as a Tool for Reconciliation and Justice" in Sharanjeet Parmar, ed, *Children and Transitional Justice: Truth-Telling, Accountability and Reconciliation* (Cambridge: Harvard University Press, 2010) 122.

⁵⁶ While making reference to anthropology, the body of legal scholarship on legal rituals seldom delves into ritual theory, often focusing on commonsensical arguments on the persuasive power of ritualistic facets of trial such as the oath, cross-examination, judicial attire, language and architecture. *E.g.*, Antoine Garapon, *L'âne portant des reliques: essai sur le rituel judiciaire* (Paris: Centurion, 1985) at 59-61, 141-157; Thurman Arnold, *The Symbols of Government* (New Haven: Yale University Press, 1935) at 5-18; Milner Ball, "The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater" (1975) 28:1 Stan L Rev 81; David Tait, "Popular Sovereignty and the Justice Process: Towards a Comparative Methodology for Observing Courtroom Rituals" (2001) 4 Contemp Just Rev 201; Mark Cammack, "Evidence Rules and the Ritual Functions of Trials: Saying Something of Something" 4:1 (1992) Loy LA L Rev 783; Jessie Allen, "A Theory of Adjudication: Law as Magic" (2008) 41:4 Suffolk UL Rev 773; Jenny McEwan, "Ritual, Fairness and Truth: The Adversarial and Inquisitorial Models of Criminal Trial" in Anthony Duff et al., eds., *The Trial on Trial, Vol. 1: "Truth and Due Process"* (Portland: Hart, 2004) 51.

⁵⁷ An erudite legal philosopher, Nino frequently wrote of the events in Durkheimian undertones. See, for example, Carlos Nino "Transition to Democracy, Corporatism and Constitutional Reform in Latin America" (1989) 44 U Miami L Rev 129 at 136 (speaking of the trials as necessary to "inculcate [rule of law] in the collective conscience"); note 36 at 90 (speaking of the "moral consciousness of society."); "The Debate over Constitutional Reform in Latin America" 16 (1994) Fordham Int'l L J 635 at 636-37, 646-49 (viewing social deliberation as laying the groundwork for the consolidation of liberal values in Latin American society).

widespread toleration of behaviour profoundly at odds with fundamental values.⁵⁸ This shared indignation, according to Nino, could unify the nation in common condemnation of the horrors of the past. This was to open the door to public deliberations examining these events and openly questioning some of the mistakes committed.⁵⁹ Following Durkheim's account of punishment, the shock wave created by the prosecution was to culminate in achieving national unity.⁶⁰ Mark Osiel complements this insight by depicting this process of unification through his model of "civil dissensus."⁶¹ Osiel argues that a slow and partial rapprochement begins with the trial's influence over public deliberations, by framing the debate in liberal terms, over the liberal values contravened by the culprits' behaviour. The liberal contours of ensuing discussions, according to Osiel, encourage a form of mutual respect between opposed factions, which "often tends to frown into something more substantive among moderates."⁶² While structured around Durkheim's insight, Nino and Osiel's writings leave the rest of the literature on symbolic communication untouched.⁶³

(III) RITUAL THEORY EXPLORED

Atrocity prosecutions, as an event, arguably amount to the sequencing of symbols with the aim of inculcating a particular message on national history. Where the literature tends to depict the reception of international criminal justice and its symbols as a mysterious process, ritual theory provides a useful framework shedding light on the social consequences achieved through this mode of communication. Particularly relevant here is

⁵⁸ Nino, *supra* note 30 at 147. Making reference to Emile Durkheim, *The Division of Labor in Society*, translated by Steven Lukes (London: Simon and Schuster, 1987) at 102 (arguing that criminal trials "bring together upright consciences and concentrates them" in unison). For further elaboration on this idea, see Kai Erikson, *Wayward Puritans: A Study in the Sociology of Deviance* (Boston: Prentice Hall, 2004) at 13.

⁵⁹ Nino, *supra* note 30 at 147.

⁶⁰ Nino, *supra* note 57 at 636-37; note 36 at 147. Compare with Durkheim's conception of deterrence and the gossip engendered by criminality Durkheim, *supra* note 57 at 98.

⁶¹ Osiel, *supra* note 26 at 44.

⁶² Osiel, *supra* note 26 at 48.

⁶³ Many human rights scholars and activists influenced by Argentina's early transitional justice mechanism now speak of such initiatives in Durkheimian terms. *E.g.*, Zalaquett, *supra* note 36 at 6, 9, 11 (emphasizing the importance of national unity); Teitel, *supra* note 26 at 29, 49-50, 220-24, 229, 230 (depicting transitional justice as a ritual of political passage"). Borneman, draws a short, albeit incisive parallel between atrocity prosecutions and René Girard's theory on scapegoating, arguing that "in most of the new former Bloc states where some retributive justice has been pursued, the potential for violence seems to have been peacefully dampened or diverted." Borneman, *supra* note 41 at 6, 24-25.

the stream of anthropological scholarship called “secular” or “political” rituals, which the present section serves to survey.

Anthropologists initially defined ritual as “culturally standardized, repetitive activity, primarily symbolic in character, aimed at influencing human affairs, and involving the super-natural realm.”⁶⁴ Scholars began using this term to designate other forms of action in the 1960s, stretching its definition from religious activity to sectors as mundane as social etiquette.⁶⁵ While no perfect definition exists, drawing a clear line between the rigid commands of spirituality and the meaninglessness of standardized activity, a middle path proves instructive for the analysis of secular activities. Durkheim proposes such a definition, suggesting that religion, at its origin, represents the veneration of the bonds of interdependence uniting society.⁶⁶ According to this view, ritual can be defined as structured action conveying symbolic sequences arousing emotions connected to social structures.⁶⁷ Similar definitions can be found in modern ritual scholarship, emphasizing the structured expression of shared meaning.⁶⁸ The following pages unpack these concepts.

⁶⁴ Kertzer, *supra* note 11 at 9.

⁶⁵ Catherine Bell, *Ritual: Perspectives and Dimensions* (Oxford: Oxford University Press, 1997) at 39. Critics such as Jack Goody now view this term as largely devoid of meaning due to its overuse. Jack Goody, “Against Ritual” in Falk and Myerhoff, *supra* note 50, 22 at 25.

⁶⁶ While religious membership evolved to become one of the many links uniting society, other streams constituting this general sense of belonging nevertheless remain sacralised according to this view. Veterans Day, British coronations, or controversial popular trials can thus be said to retain a form of religious intensity, energizing the values upheld through shared emotion. Durkheim, *supra* note 49 at 32-37, 41; Jack Goody, *Myth, Ritual and the Oral* (Cambridge: Cambridge University Press, 2010) at 20. Other early works also propose similar views. Numa Fustel de Coulanges, *La cité antique* (Paris: Flammarion, 2009) at 119; Siegfried Nadel, *Nupe Religion* (London: Routledge and Kegan Paul, 1954) at 99.

⁶⁷ Ritual operates following structured, standardized sequences charged with symbolic meaning. Standardized or repetitive action falling short of such symbolization thus stands as an illustration of habit, or custom – not ritual. Barbara Myerhoff, “We Don’t Wrap Herring in a Printed Page” in Moore and Myerhoff, *supra* note 50, 227 at 227; Hilda Kuper, “The Language of Sites in the Politics of Space” 74:3 (1972) *Am Anthropologist* 411 at 420-21.

⁶⁸ Among the most prominent are Jack Goody, “Religion and Ritual: The Definitional Problem” (1961) 12:2 *Brit J Soc* 142 at 159 (“a category of standardized behaviour (custom) in which the relationship between the means and the end is not ‘intrinsic (...)’”); Victor Turner, *The Forest of Symbols: Aspects of Ndembu Ritual* (Ithaca: Cornell University Press, 1967) at 19 (“formal behaviour for occasions not given over to technological routine, having reference to beliefs in mystical beings or powers.”); Robert Bocock, *Ritual in Industrial Society* (London: Allen & Unwin, 1974) at 37 (“ritual is the symbolic use of movement in a social situation to express and articulate meaning”); Stanley Tambiah, “A Performative Approach to Ritual” in *Proceedings of the British Academy, Volume LXV* (Oxford: Oxford University Press, 1979) 113 at 119 (“a culturally constructed system of symbolic communication (...) constituted of patterned and ordered sequences”).

Symbolic expression is said to originate from man's intrinsic need for meaning and intelligibility. In an effort to fight the anxieties created by an infinitely complex world, according to this literature, the mind naturally divides up and categorises, to create boundaries and dichotomies relating the unknown to the familiar.⁶⁹ Experience, it is argued, finds itself transformed into a series of symbols stored for later recognition (*e.g.*, this animal has wings and therefore flies, that animal has fins and therefore swims, this animal has claws and therefore hunts, and so on). This pre-scientific apprehension of the environment reduces the full complexity of existence into simple, intuitive categories.⁷⁰ With its help, the countless stimuli confronting the brain every day is distilled to the most consequential facts.⁷¹ With the passage time, this system of world apprehension passes on from generation to generation, progressively acquiring the sophistication needed to move beyond the more proximate concerns posed by survival.⁷² A shared arborescence emerges apprehending not only one's environment, but also one's place in it – providing answers to age-old existential uncertainties on man's origin, destination and purpose in this world.⁷³

Beyond creating a world in which “the causes are simple and neat and the remedies apparent,” as stated by Murray Edelman, this knowledge is also said to unify those who share it.⁷⁴ This shared knowledge establishes a cognitive world for its community to inhabit, as it were, and nurtures its members to shared meanings.⁷⁵ The articulation of

⁶⁹ Susanne Langer, *Philosophy in a New Key: A Study in the Symbolism of Reason, Rite, and Art* (Cambridge: Harvard University Press, 1954) at 20-42; Charles Peirce, *Philosophical Writings of Peirce* (New York: Dover, 2011) at 60-74; Kenneth Burke, *On Symbols and Society*, in Joseph R. Gusfield, Ed (Chicago: University of Chicago Press, 1989) at 107-13.

⁷⁰ Mary Douglas, *Purity and Danger: An Analysis of Concepts of Pollution and Taboo* (New York: Psychology Press, 2003) at 36; Murray Edelman, *Politics as Symbolic Action: Mass Arousal and Quiescence* (New York: Academic Press, 1974) at 83.

⁷¹ Eugene D'Aquili et al., *The Spectrum of Ritual: A Biogenetic Structural Analysis* (New York: Columbia University Press, 1979) at 43.

⁷² Peter Berger and Thomas Luckmann. *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (New York: Penguin, 1966) at 31-63.

⁷³ Ernst Cassirer, *The Philosophy of Symbolic Forms: Mythical Thought* (New Haven: Yale University Press, 1955) at 38-39; Nieburg, *supra* note 11 at 30.

⁷⁴ Edelman, *supra* note 70 at 83; Sally Falk Moore and Barbara Myerhoff, “Introduction” in Moore and Myerhoff, *supra* note 50, 1 at 17.

⁷⁵ Nancy Munn, “Symbolism in Ritual Context: Aspects of Symbolic Action” in John Honigmann, ed, *Handbook of Social and Cultural Anthropology* (Chicago: Rand McNally, 1973) 589 at 605; Roy Rappaport,

symbols constituting this bond can arouse deep-seated emotions, mediating between the individual and community profound connections to otherworldly conventions.⁷⁶ Through ritual those connections are not only enacted but reified, energizing through performance a sense of purpose and direction developed over centuries.⁷⁷ “The world as lived and the world as imagined,” writes Geertz, thus find themselves “fused under the agency of a single set of symbolic forms,” potentially transforming the irksomeness of moral constraint into “the love of virtue.”⁷⁸ In due course this connection naturally engenders political ramifications, concretely setting the foundations for a society organized according to this shared the sense of life.⁷⁹ Fundamental political and jural institutions, as its cultural offspring, naturally assume important symbolic effects by articulating shared symbols.⁸⁰

A measure of spiritual connection thus remains to most principled political action in modern secular society, for the essence of such endeavours originates in the sanctified bonds uniting society.⁸¹ Political and jural actors defending deeply cherished principles can be said to instigate action of a symbolic character, casting through formalized behaviour sequences amounting to modern, secular ritual.⁸² David Kertzer writes that “political reality is in good part created through symbolic means.”⁸³ He continues, “creating a symbol or, more commonly, identifying oneself with a popular symbol can be a potent means of gaining and keeping power.”⁸⁴ Political witch hunts, official apologies and mass atrocity

Ecology, Meaning and Religion (Berkeley: North Atlantic Books, 1984) at 188; Clifford Geertz, *The Interpretation of Cultures* (New York: Basic Books, 1966) at 145; Durkheim, *supra* note 49 at 262 (“It is by uttering the same cry, pronouncing the same word, or performing the same gesture that (ritual participants) become and feel themselves to be in unison.”).

⁷⁶ Kertzer, *supra* note 11 at 9 at 63; Lisa Schirch, *Ritual and Symbol in Peacebuilding* (Bloomfield: Kumarian Press, 2004) at 100.

⁷⁷ Moore and Myerhoff, *supra* note 74 at 17.

⁷⁸ Geertz, *supra* note 75 at 1, 28-29 at 66. The “Irksomeness of moral constraint being transformed into ‘love of virtue’” is from Turner, *supra* note 68 at 30.

⁷⁹ John McManus, “Ritual and Human Social Cognition” in D’Aquili et al, *supra* note 71 at 227; Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1983) at 14-15.

⁸⁰ Walzer, *supra* note 11 at 194.

⁸¹ Edelman, *supra* note 70 at 83-85; Hugh Duncan, *Communication and the Social Order* (New York: Bedminster Press, 1962) at 245-46.

⁸² Max Lerner, *Ideas from the Ice Age* (New York: Viking, 1941) at 235.

⁸³ Kertzer, *supra* note 11 at 5.

⁸⁴ *Ibid* at 5; Nieburg, *supra* note 11 at 54; Novak, *supra* note 11 at 23; Victor Turner, *Dramas, Fields, and Metaphors: Symbolic Action in Human Society* (Ithaca: Cornell University Press, 1975) at 55.

prosecutions all call upon deep-seated values, implicitly invoking the timelessness of age-old principles deemed essential for the future.⁸⁵ By linking past and present, and by focusing on certain facts while excluding others, such forms of political action effectively channel sentiments towards a particular view, triggering an emotional reaction linking notions of right and wrong to the elements presented.⁸⁶ Erasing as much history from collective memory as they engrave on it, such events provide a powerful communicational vehicle conveying values “in an authenticating and arresting manner.”⁸⁷

In this way, a political actor seeking to generate the public impression that he is the defender of justice and morals is more likely to obtain lasting results by staging a dramatic performance than he is by merely stating it orally.⁸⁸ The ability to influence the public, and to gain political credit for it, to a significant extent stems from the quality of the actor’s interaction with established social structures.⁸⁹ The skilful alignment with popular categories of relevance obtains its desired emotional effect by responding to the population’s innate need for consistency and meaning. Drawing on the works of psychologist Leon Festinger, Lisa Schirch thus notes that people actively seek to maintain their reality by “filtering their experiences with the world in a way that retains only information consistent with their current way of viewing the world.”⁹⁰ Where facts and ideas confirming worldviews already held tend to command receptivity, conversely, experiences contradicting past dispositions tend to trigger defense mechanisms, such as

⁸⁵ Barbara Myerhoff, “A Death in Due Time: A Construction of Self and Culture in Ritual Drama” in John MacAloon, ed, *Rite, Drama, Festival, Spectacle* (Philadelphia: Inst. Study of Human Issues, 1984) at 152.

⁸⁶ Nieburg, *supra* note 11 at 44.

⁸⁷ Moore and Myerhoff, *supra* note 74 at 8; Geertz, *supra* note 75 at 28; Myron Aronoff, *Power and Ritual in the Israel Labor Party* (Assen: Van Gorcum, 1977) at 88; James Young, “Memory and Monument” in Geoffrey Hartman, ed, *Bitburg in Moral and Political Perspective* (Bloomington: Indiana University Press, 1986) 103 at 105.

⁸⁸ Thus “power holders, or aspiring power holders, seek to promulgate the view of the political situation they would like the general population to hold.” Kertzer, *supra* note 11 at 40; generally, Peter Hall, “A Symbolic Interactionist Analysis of Politics” 42 (1972) *Sociological Inquiry* 35.

⁸⁹ The message thus assumes a taken-for-granted character. Peter Berger, *The Sacred Canopy: Elements of a Sociological Theory of Religion* (Garden City: Doubleday, 1967) at 24; Kenneth Burke, *Language as Symbolic Action: Essays on Life, Literature, and Method* (Berkeley: University of California Press, 1966) at 5.

⁹⁰ Schirch, *supra* note 76 at 40, building on Leon Festinger, *A Theory of Cognitive Dissonance* (Stanford: Stanford University Press, 1962) at 133-46.

repression, rationalization, enemy imaging, selective recall and tunnel vision.⁹¹ These natural reactions respond to the anxiety and discomfort engendered by new or unfamiliar ideas, thus enhancing or diminishing the potency of the message uttered.

More than a conservative force inherently serving to guard the structures in place, ritual can also operate as an agent of social change.⁹² Its function in the political realm is perhaps best understood as responding to political demands of all natures, serving as a tool for actors aligning with well-established and emerging views alike.⁹³ Political rituals often embody change in a context of popular disenchantment with traditional models no longer perceived to live up to the expectations. In these situations, the disparities between reality as experienced and imagined can overwhelm cognition with new ideas, relationships and situations.⁹⁴ While the dynamics of cognition normally work to preserve established worldviews, such moments of crisis call for a new conception more consistent with the reality at hand and better aligned with personal interests.⁹⁵ In an attempt to profess the community's longevity in the face of such systemic pressure, political actors are incited to reinvent or reorder the symbols in force.⁹⁶

⁹¹ Gregory Bateson, *Steps to an Ecology of Mind: Collected Essays in Anthropology, Psychiatry, Evolution, and Epistemology* (Chicago: University of Chicago Press, 1972) at 429; Robert Wicklund and Jack Williams Brehm, *Perspectives on Cognitive Dissonance* (Hillsdale: Lawrence Erlbaum Associates, 1976) at 213-21.

⁹² Roy Rappaport, *Pigs for the Ancestors* (Long Gove: Waveland, 1984) at 224-43 (noting that rituals can influence worldviews, identities and relationships when systems come under pressure, highlighting that this social practice is best understood as ensuring the community's longevity.); Lance Bennett, "Myth, Ritual and Political Control" (1980) 30:4 *Journal of Communication* 166 at 168 ("Myths underwrite the status quo in times of stability and they chart the course of change in times of stress.").

⁹³ Turner, *supra* note 84 at 23-59; Victor Turner, "Social Dramas and Stories about Them" (1980) 7:1 *Crit Inq* 141 at 154-55; Richard Schechner, *The Future of Ritual: Writings on Culture and Performance* (New York: Psychology Press, 1993) at 625-28.

⁹⁴ Natalie Houghtby-Haddon, *Changed Imagination, Changed Obedience: Social Change, Social Imagination, and the Bent-Over Woman in the Gospel of Luke* (New York: Wipf and Stock Publishers, 2011) at 9; Jonathan Smith, "The Influence of Symbols on Social Change: A Place on Which to Stand" in Jonathan Smith, ed, *Map Is Not Territory* (Leiden: Brill, 1978) 129 at 128.

⁹⁵ Lisa Schirch, *supra* note 76 at 98, 101 ("Cognitive dissonance is especially powerful in situations where our beliefs conflict with those of socially important others"); Festinger, *supra* note 90 at 11; Mark Snyder and William Swann "When Actions Reflect Attitudes: The Politics of Impression Management" 34:5 (1976) *Journal of Personality and Social Psychology* 1034 at 1041.

⁹⁶ Far from making tabula rasa, these symbolic realignments frequently are the object of the skilful manipulation of vernaculars of authority already in place – achieving their full coercive effect only when feigning continuity with values already deeply held. For two illustrations, see Christel Lane, *The Rites of Rulers* (Cambridge: Cambridge University Press, 1981) at 137-38; Clive Kessler, *Islam and Politics in a*

A wide variety of ritual patterns exists.⁹⁷ While investiture ceremonies transfer the legitimacy of power from a political actor to the next, Veterans Day unites citizen round the symbol of the flag, regional festivals tighten the sense of belonging to local culture, civil disobedience undermines the status quo, national apologies reframe historical consciousness, and atrocity prosecutions degrade once politically influential perpetrators.⁹⁸ From sacrifice to initiation rites, in passing by citizenship ceremonies, each ritual operates a phenomenon of its own. Several academic theories explain such phenomena, sometimes with high levels of theoretical sophistication, such as Turner's social drama, Van Gennep's rite of passage, or Mary Douglas' purity theory.⁹⁹

Ritual thus articulates shared vernaculars of authority, imposes order on the complexity and ambiguity of life, impresses through repeated action a sense of habitus, ultimately arousing emotion and soothing anxieties through the comforting order of structures.¹⁰⁰ Ritual however has its limits. More than entrapping one in a moral universe commanding each and every action, ritual is best understood as operating a limited influence. Individuals remain perfectly free to view the world according to their own values, regardless of the political displays surrounding them.¹⁰¹ While the mystical bond governing one's relation to society typically has a central, all-encompassing role in tribal societies, what is more, one must further note that this mode of cognition now only plays a diminished influence in

Malay State (Ithaca: Cornell University Press, 1992); Rappaport, *supra* note 92 at 224-43; Richard Fox, *Lions of the Punjab: Culture in the Making* (Berkeley: University of California Press, 1985) at 204.

⁹⁷ Munn, *supra* note 75 at 605. In scientific inquiry, Langer, *supra* note 69 at 20 et seq.

⁹⁸ Schirch, *supra* note 76 at 143; Paul Connerton, *How Societies Remember* (Cambridge: Cambridge University Press, 1989) at 41 et seq.; Valentin Rauer, "Symbols in Action: Willy Brandt's Kneefall at the Warsaw Memorial" in Jeffrey Alexander, Bernhard Giesen and Jason Mast, eds., *Social Performance: Symbolic Action, Cultural Pragmatics, and Ritual* (Cambridge: Cambridge University Press, 2006) 257; Aronoff, *supra* note 87 at 88.

⁹⁹ Turner, *supra* note 84 at 23-59; Arnold Van Gennep, *Rites of Passage* (London: Psychology Press, 1960); Douglas, *supra* note 70 at 51-71.

¹⁰⁰ Adam Seligman et al., *Ritual and Its Consequences: An Essay on the Limits of Sincerity* (Oxford; New York: Oxford University Press, 2008) at 27; Bell, *supra* note 65 at 78; Ernst Cassirer, *The Myth of the State* (New Haven: Yale University Press, 1946) at 24; Geertz, *supra* note 75 at 28.

¹⁰¹ Nieburg, *supra* note 11 at 44.

modern societies.¹⁰² The political realm, with its relation to founding myths and ideologies, nevertheless remains an important locus for it.¹⁰³

(IV) RITUAL AESTHETICS AS A GUIDING LOGIC

Moving from the general to the specific, the discussion now turns to symbolic theory. Where ritual is the general communicational vehicle, its symbols feature as the very content, with their adequacy and vividness determining the overall success or failure of ritual communication. This section presents some of the main tenets of symbolic communication. Cognitive psychology shows that information is likely to attract and hold attention when comporting elements of vividness, that is, when emotionally interesting, concrete and imagery-provoking, and proximate in a sensory, temporal or spatial way.¹⁰⁴ Moreover, the likeliness that one cultural construct will be used over another in perceiving one's environment is influenced by the frequency with which this construct is encountered, and the extent to which it is marked by striking, intense or unusual features.¹⁰⁵ Symbols thus have a history of emotional associations, accounting for their strength based on the memories they recall, prior sensations of belonging, and prior representations of identity.¹⁰⁶

Symbols obtain their optimal effect when aptly sequenced in dramatic form. Some compare the dramatic structure of ritual to poetics, viewing the arrangement and rearrangement of

¹⁰² Douglas, *supra* note 70 at 9, 50 ("it involves no special distinction between primitives and moderns: we are all subject to the same rules. But in the primitive culture the rule works with greater force."). Some have gone as far as to assert that industrialised societies no longer need to use rites – as science now explains most of the mysteries faced on a daily basis by the pre-modern man. Bronislaw Malinowski, *Magic, Science and Religion* (Glencoe: Free Press, 1945) at 35; Max Gluckman, "Les rites de passage" in Max Gluckman, ed, *Essays on the Rituals of Social Relations* (Manchester: Manchester University Press, 1962) 1 at 38.

¹⁰³ Lance Bennett, "Myth, Ritual, and Political Control" (1980) 30:4 *Journal of Communication* 166 at 168; Anderson, *supra* note 79 at 14-15; Edelman, *supra* note 70 at 21.

¹⁰⁴ "The death of a single Russian soldier is a tragedy," thus stated Stalin, "while the fact that millions of soldiers die is simply a statistic." Anton Ovseyenko, *The Time of Stalin: Portrait of a Tyranny* (New York: Harper & Row, 1981) at 112. Richard Nisbett and Lee Ross, *Human Inference: Strategies and Shortcomings of Social Judgment* (Englewood Cliffs: Prentice-Hall, 1980) at 43.

¹⁰⁵ Tory Higgins and Gillian King, "Accessibility of Social Constructs: Information-Processing Consequences of Individual and Contextual Variability" in Nancy Cantor and John Kihlstorm, eds., *Personality, Cognition and Social Interaction* (Hillsdale: Erlbaum, 1981) at 71.

¹⁰⁶ Kertzer, *supra* note 11 at 93; Ioan Lewis, "Introduction" in Ioan Lewis, ed, *Symbols and Sentiments* (London: Academic Press, 1977) 1 at 2; Lance Bennett, "Political Sanctification: The Civil Religion and American Politics" (1975) 14 *Social Science Information* 79.

symbols as an artistic exercise.¹⁰⁷ The images and words employed in ritual can merge and conflate cultural constructs so as to enhance the dramatic experience “exaggerating, inverting, re-forming, magnifying, minimizing, dis-coloring, re-coloring, or even deliberately falsifying” ordinary representations, in Victor Turner’s terms.¹⁰⁸ Symbols once at the height of dramatic experience may create a space outside ordinary reality, where ideas and themes which would ordinarily not be engaged with are given prominence.

The creative articulation of known referents creates an intellectual climate of poetic ambiguity, condensing perceptions and emotions normally associated with the symbols conveyed in new and powerful ways.¹⁰⁹ Mary Douglas gives the example of works of art, whose poetic richness often resides in the variety of interpretations available.¹¹⁰ The very strength of this form of communication resides in its capacity to appeal to a wide variety of emotions normally associated with concepts removed one from the other, accumulating under one symbol the forcefulness of its several referents.¹¹¹ The milk tree in Congolese Ndembu society stands as another example in Victor Turner’s writings, conflating under its image sensations linked to concepts as diverse as women’s breasts, motherhood, youth, matriliney, learning, and the unity and persistence of Ndembu society.¹¹² Once effectively displayed, the symbol merges the intensity of the moment with the legitimacy of the

¹⁰⁷ John Galaty, “Ceremony and Society: The Poetics of Maasai Ritual” (1983) 18:2 *Man* 361 at 364; Edward Evans-Pritchard, *Nuer Religion* (Oxford: Oxford University Press, 1956) at 142; Schechner, *supra* note 94 at 625-28; Jean Comaroff, *Body of Power, Spirit of Resistance* (London: University of Chicago Press, 1985) at 95, 100, 103, 118, 197; Gilbert Lewis, *Day of Shining Red: An Essay on Understanding Ritual* (Cambridge, Cambridge University Press, 1980) at 33; Dimitrios Yatromanolakis and Panagiotis Roilos, “Provisionally Structured Ideas on a Heuristically Defined Concept: Toward a Ritual Poetics” in Yatromanolakis, Dimitrios and Panagiotis Roilos, eds, *Greek Ritual Poetics* (Cambridge: Harvard University Press, 2004) 3 at 4; Bruce Kapferer, “Sorcery and the Beautiful” in Angela Hobart and Bruce Kapferer, eds, *Aesthetics in Performance: Formations of Symbolic Construction and Experience* (London: Berghahn Books, 2006) 128 at 129.

¹⁰⁸ Victor Turner, *The Anthropology of Performance*, (New York: PAJ Publications, 1988) at 42; Falk and Myerhoff, *supra* note 74 at 13.

¹⁰⁹ Paul Ricoeur, *Interpretation Theory: Discourse and the Surplus of Meaning* (Fort Worth: The Texas Christian University Press, 1976) at 51 (“what is at stake in metaphorical utterance is the appearance of kinship where ordinary vision does not perceive any relationship.”), 58.

¹¹⁰ Douglas, *supra* note 70 at 49 (citing Empson, although without reference); Anton Ehrenzweig, *The Psycho-Analysis of Artistic Vision and Hearing: An Introduction to a Theory of Unconscious Perception* (New York: Psychology Press, 1999) at 71.

¹¹¹ “Sigmund Freud” in *Encyclopædia Britannica* (London: Encyclopædia Britannica, 2013) at 112.

¹¹² Citing Turner, *supra* note 68 at 28.

structures ritually upheld.¹¹³ The ideas displayed in ritual in other terms come to associate with the emotional intensity achieved with this broad specter of associations.

Some view in the poetic arrangement of symbols and metaphors a form of aesthetic originating from the very contemplation of moral questions treated in ritual.¹¹⁴ Bruce Kapferer reads a common insight to this effect in the works of Lévi-Strauss, Rappaport and Turner.¹¹⁵ These works generally reveal, according to Kapferer, a close connection in ritual between the practical concerns acted upon and the general specter of morality shared by the community.¹¹⁶ In creating a dramatic space apart from the reality of everyday life, and by casting abstract symbols saturated with emotional quality, ritual can be viewed as commanding a form of introspection – a meditation on the “oughtness” of the moment, on the moral solutions fit for the context at hand.¹¹⁷ The symbols conveyed, through their abstract anchoring in the community’s ethical structures, suggest a moral answer while nevertheless avoiding its complete formulation. In the face of crisis, ritual brings the individual into a state of contemplation, to which the moral answer is felt to originate from within. This invitation to observe the appropriate norm in itself constitutes the aesthetic

¹¹³ Turner, *supra* note 68 at 29, citing Edward Sapir, “Symbolism,” in *Encyclopaedia of the Social Sciences* (New York), 14: (1934) 492-495 at 493; Geertz, *supra* note 75 at 112; Ricoeur, *supra* note 109 at 52. On condensation symbols in modern politics, see Doris Graber, *Verbal Behavior and Politics* (Bloomington: University of Illinois Press, 1976); Catherine Helen Palczewski, *Rhetoric in Civic Life* (State College: Strata Publishing, 2012).

¹¹⁴ Jens Kreinath, “Virtuality and Mimesis: Toward an Aesthetics of Ritual Performances as Embodied Forms of Religious Practice” in Bent Hom, Bent Flemming & Karen Vedel, eds, *Religion, Ritual, Theatre* (Frankfurt: Peterlang, 2009) 229 at 230; Ron Williams and James Boyd, “Aesthetics” in Jens Kreinath, Jan Snoek & Michael Stausberg, eds., *Theorizing Rituals Vol.1: Issues, Topics, Approaches, Concepts* (Leiden: Brill, 2006) 113 at 117; Geertz, *supra* note 75 at 127; Kapferer, *supra* note 107 at 154; Douglas, *supra* note 70 at 46-47.

¹¹⁵ Kapferer, *supra* note 107 at 154.

¹¹⁶ Kapferer, *supra* note 107 at 154-55, emphasizing Turner’s analysis of “whiteness” in *Chihamba: The White Spirit - A Ritual Drama of the Ndembu* (Manchester: University of Manchester Press, 1962) at 23-39.

¹¹⁷ See Turner’s notion of “subjunctivity.” Victor Turner, *From Ritual to Theatre: The Seriousness of Human Play* (New York: Performance Art Journal Publications, 1982) at 82; *The Ritual Process: Structure and Anti-Structure* (Ithaca: Cornell University Press, 1969) at vii; Bobby Alexander, *Victor Turner Revisited: Ritual as Social Change* (Atlanta: Scholars Press, 1991) at 39.

dimension in symbolic communication.¹¹⁸ That moral contemplation comports an aesthetic dimension has long been argued by philosophers.¹¹⁹

Ritual's abstracted and non-explicit nature requires the mind to dwell on the precise meaning to retain, and, in doing so, to formulate a discrete interpretation based on one's preferences.¹²⁰ In considering the ritual poetic structure, intuitions naturally direct attention to the symbols interacting most directly with one's personal life-story, personality and background.¹²¹ This phenomenon can be illustrated with the place of the American flag during Veterans Day commemorations. Against the mourning of those deceased to protect the nation, the flag projects the ultimate value held by elements as varied as democracy, rule of law, tolerance, patriotism, militarism and the market economy.¹²² Where the generic message conveyed by the commemoration itself is one of patriotism and celebration of national values, the individual mind remains free to dwell on the components retaining maximal cogency.¹²³ The internal narrative composed through this aesthetic experience mixes emotions felt towards soldierly bravery and the nation's fundamental values.

Ritual aesthetics thus trigger compelling internal narratives on the grandiosity of norms holding society together.¹²⁴ This property creates as many internal narratives as the number

¹¹⁸ Kapferer, *supra* note 107 at 128-160 at 155; Douglas, *supra* note 70 at 46-47. Compare with Durkheim, *supra* note 49 at 126-27 ("there is a poetry inherent in all religion").

¹¹⁹ For instance, Immanuel Kant, *Critique of Aesthetic Judgment*, Translated by Werner Pluhar (Indianapolis: Hackett, 1987) §59, *passim*, §60 and 356; Ted Cohen, "Why Beauty is a Symbol of Morality" in Ted Cohen and Paul Guyer, eds, *Essays in Kant's Aesthetics* (Chicago, University of Chicago Press, 1982) 221 at 238; David Hume, *Essays and Treatises on Several Subjects* (London: Millar, 1758) at 424; Jacqueline Taylor, "Hume on Beauty and Virtue" in Elisabeth Radcliffe, ed, *A Companion to Hume* (Oxford: Blackwell, 2008) 273 at 273-74; Adam Smith, *The Theory of Moral Sentiments* (London: Miller, 1759).

¹²⁰ Burke, *supra* note 89 at 52; Graber, *supra* note 113 at 292; Langer, *supra* note 69 at 58, 181, 198; Turner, *supra* note 68 at 50.

¹²¹ Graber, *supra* note 113 at 291-92; David Kaufer and Kathleen Carley, "Condensation Symbols: Their Variety and Rhetorical Function in Political Discourse" (1993) 26:3 *Philosophy & Rhetoric* 201.

¹²² Schirch, *supra* note 76 at 81; Thomas Eriksen, "Some Questions about Flags" in Thomas Eriksen and Richard Jenkins, eds, *Flag, Nation and Symbolism in Europe and America* (London: Routledge, 2007) 1 at 5.

¹²³ Hans-Robert Jauss, *Pour une esthétique de la réception* (Paris: Gallimard, 1978) at 212-13.

¹²⁴ Douglas, *supra* note 70 at 46-47; Durkheim, *supra* note 49 at 126-27; Kapferer, *supra* note 107 at 155.

of individuals in the audience.¹²⁵ The relative vagueness of symbolic compositions splits the message into a large number of personal internal narratives, naturally tending with its abstract nature towards an arresting interpretation.¹²⁶ Reception theorists such as Hans-Robert Jauss, in the domain of literary studies, explain that interpretations generally diverge according to major cultural differences separating audiences, with certain groups for instance tending toward intellectualisation and others toward emotion.¹²⁷ Audiences sharing similar cultural traits tend to cluster interpretations around a limited number of focal points, creating a small amount of similar yet unique internal narratives.¹²⁸

Some authors note that this ability to split and magnify aesthetic intensity may also direct individuals towards particular actions.¹²⁹ Bruce Kapferer is particularly explicit on this matter, arguing that ritual aesthetics guide individuals in their quest for meaning and orientation. As a deposit of people's imaginative insights into life, Kapferer argues, symbolic communication guides behaviour with its passive influence towards personal conceptions of virtue.¹³⁰ Much of this insight can be traced to earlier philosophical works on moral beauty. Writers such as Kant, Locke and especially Hume present moral aesthetics as guiding individuals towards the realization of personal conceptions of ultimate

¹²⁵ Authors in political anthropology refer to this concept as symbolic "multivocality." Kertzer, *supra* note 11 at 11; Munn, *supra* note 75 at 580; Turner, *supra* note 68 at 50; Bell, *supra* note 65 at 109; James Fernandez, "Symbolic Consensus in a Fang Reformatory Cult" (1965) 67 *Am. Anthr.* at 903-05.

¹²⁶ This ability to navigate the group's numerous subjectivities is what constitutes the very strength of this form of communication. Lewis, *supra* note 107 at 9; Graber, *supra* note 113 at 291.

¹²⁷ Jauss, *supra* note 123 at 212-13; Jacques Leenhardt, Pierre Jozsa and Martine Burgos, *Lire la lecture. Essai de sociologie de la lecture* (Paris: Le Sycomore, 1982) at 51-59; André Petitat, "Transmission et interprétation plurielle des récits" (2008) 22 *Education et sociétés* 57 at 61.

¹²⁸ Graber, *supra* note 113 at 290; William Buchanan and Hadley Cantril, *How Nations See Each Other* (Urbana: University of Illinois Press, 1953) at 12.

¹²⁹ Edward Sapir notes that the effective deployment of symbolism "serves as the springs of effective behavior." Edward Sapir, "Symbolism," in *Encyclopaedia of the Social Sciences* (New York), 14: (1934) 492 at 493. In politics, see Graber, *supra* note 113 at 291; Daniel Katz and Kenneth Braly, "Verbal Stereotypes and Racial Prejudice" in Guy Swanson and Eugene Hartley, eds, *Readings in Social Psychology* (New York: Holt, 1952) 20 at 33. In anthropology, with an emphasis on aesthetics, Victor Turner, *Revelation and Divination in Ndembu Ritual* (Ithaca: Cornell University Press, 1975) at 194; Geertz, *supra* note 75 at 90; Langer, *supra* note 69 at 128. More recently, Kapferer, *supra* note 107 at 130, 155; Angela Hobart and Bruce Kapferer, "Introduction" in Angela Hobart and Bruce Kapferer, eds, *Aesthetics in Performance: Formations of Symbolic Constructions and Experience* (London: Berghahn Books, 2006) 1 at 1.

¹³⁰ Kapferer, *supra* note 107 at 130, 155.

value.¹³¹ While modern scholarship often presents ethics as a matter of norms preventing conflict, these writers view morals as attractive ideals serving as behavioral focal points.¹³²

The symbolic pattern laid out above can be summarized by stating that symbols (1) speak of the right and the just in abstracted fashion; (2) such that individuals and groups may view in it varying internal narratives; (3) in turn enhancing their aesthetic force; (4) thereby compelling individuals and communities towards specific views, dispositions and actions.¹³³ This pattern dovetails Desmond Manderson's writings on law and aesthetics in his book *Songs without Music*, which argues that symbolic power comes from the flexibility of meaning, which allows to speak to the world to which the audience aspires.¹³⁴

(V) RITUAL AESTHETICS AND NORMATIVITY

The preceding, once applied to the realm of international criminal justice, suggests that its influence operates, at the individual level, by compelling to action by the cogency of the symbols conveyed. In an attempt to further ground the discussion at the juridical level, this section links the preceding to the theme of normativity. Once received with the sense of beauty described above, symbolic communication indeed has the capacity to enhance the normative influence of the political principles upheld by it. In the jural and political spheres, symbolic action variously conveys the underlying principles and moral genealogy of the norm upheld, as well as a sense of common identity.¹³⁵ Beyond routinized

¹³¹ Kant, *supra* note 119 at §59, *passim*, §60 and 356; Cohen, *supra* note 119 at 238; "Kant's Aesthetics and Teleology" in *Stanford Encyclopedia of Philosophy* (Stanford: Stanford University Press, 2013); Hume, *supra* note 119 at 424; Jacqueline Taylor, "Hume on Beauty and Virtue" in Elisabeth Radcliffe, ed, *A Companion to Hume* (Oxford: Blackwell, 2008) 273-92 at 273-74; Smith, *supra* note 119 at 23; John Balguy, "Foundation of Moral Goodness" in Lewis Selby-Bigge, ed, *British Moralists, Vol. 2* (Oxford: Oxford University Press, 1897) at 71.

¹³² Julia Annas, *The Morality of Happiness* (Oxford: Oxford University Press, 1993) at 4.

¹³³ Desmond Manderson, *Songs without Music: Aesthetic Dimensions of Law and Justice* (Berkeley: University of California Press, 2000) at 145, 175-76, 200-01.

¹³⁴ The outcome, in his terms, is a visceral one, triggering aesthetic forces "shaking individuals in the depths of their beings." *Ibid* at 201; Robin West, "Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory" (1985) 60 NYU L Rev 145 at 210.

¹³⁵ "The way human beings establish, apprehend and interact with rules around them," according to Roderick Macdonald and David Sandomierski, "depends on their attitude toward the genealogy of these rules." Macdonald and Sandomierski, *supra* note 13 at 624; Durkheim, *supra* note 57 at 102.

technocratic rules governing day to day behaviour, norms touching on the community's fundamental moral commitments can assume a certain mythological quality.

Nicholas Kasirer's analysis of the one-man legal system in Michel Tournier's novel *Vendredi ou les limbes du pacifique* illustrates that fundamental norms tend to evolve through symbolic action.¹³⁶ In this essay, a protagonist loses his sanity after being shipwrecked on a desert island and reverting to a state of nature.¹³⁷ In an attempt to fight his state of inner decay, the protagonist appeals to the laws of his conscience, and initiates a new order by way of ritual, saving himself, as it were, with a new regulated way of life:

“S’habillant formellement pour l’occasion, adoptant une « attitude de respect et de vigilance », Robinson rédige des lois suivant un rituel digne d’un parlementarisme anglais pleinement adapté à l’île. Le moment de l’adoption de la loi se démarque par la solennité – la date de l’acte législatif (le 1000^e jour), la tenue vestimentaire du législateur, le langage de la loi, le rédacteur qui se tient debout [...].”¹³⁸

Kasirer writes that by transposing the works of conscience outward, into the world, the ritual gives this order normative force.¹³⁹ Through ritual the protagonist externalizes the normative order imagined, thereby making visible thoughts and beliefs formerly kept private. By this foundational symbolic act mimicking parliamentary tradition, the protagonist further establishes a normative order commanding from then on an entirely different, “civilized” form of behaviour on the island, forcefully changing his routine from that of the “savage” to that of the colonial administrator.¹⁴⁰ In this instant ritual not only transfers its underlying moral commitment from within to without, and communicates its

¹³⁶ Kasirer, *supra* note 14 at 1; Michel Tournier, *Vendredi ou les limbes du pacifique* (Paris: Gallimard, 1967).

¹³⁷ Kasirer, *supra* note 14 at 8-15.

¹³⁸ *Ibid* at 12, 16, citing Tournier, *supra* note 135 at 82.

¹³⁹ In this extreme example, “la force coercitive provient de l’extérieur du *je*, tout en restant à l’intérieur du *moi*.” *Ibid* at 35.

¹⁴⁰ *Ibid* at 19.

moral genealogy to a public now capable of appreciating it, but also suggests a new course of action.¹⁴¹ From then on, the protagonist administrates and monitors the island.¹⁴²

Stephen Toope and Jutta Brunnée for their part complete the preceding by stressing that, in order to move past their origins, fundamental commitments must develop into established norms.¹⁴³ This process is predicated on the existence, according to Toope and Brunnée, of a strong connection between the symbols invoked, the cultural reality and proximate needs of the audience.¹⁴⁴ A corollary is that commitments must be repeated through time, in order to amass the cultural weight sufficient to sustain themselves.¹⁴⁵ Others after some time may view this as the creation of tradition.¹⁴⁶ In this mature state, the two poles of ritual function with optimal normativity: the aesthetic force of the symbol initially enacted is met with the frequency required to create among its intended public a sense of habit. The norm is routinized, acquiring taken-for-granted character exempting it from the burden of persuasion.¹⁴⁷ In the exceptional circumstance of a prolonged interlocking between the community's needs and the commitment projected, the

¹⁴¹ Similar remarks can be found in legal scholarship on the rituals of judicial procedure. Peter Winn, "Legal Ritual" (1991) 2:2 L & Crit 207 at 208; Jessie Allen, "A Theory of Adjudication: Law as Magic" (2008) 41:4 Suffolk U L Rev 773 at 819; Garapon, *supra* note 56 at 59-61. Others speak of the personal appropriation of justice in the domain of legal interpretation, or the filtering of moral principles upheld in a legal text through one's own worldviews. James Boyd White, *Justice as Translation* (Chicago: Chicago University Press, 1990) at 260; René Provost, "Interpretation in International Law as a Transcultural Process" in Andrea Bianchi, Daniel Peat & Matthew Windsor, eds, *Interpretation in International Law* (Oxford: Oxford University Press, 2015) 290 at 306.

¹⁴² Kasirer, *supra* note 14 at 17-19.

¹⁴³ Stephen Toope and Jutta Brunnée, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010) at 5-9. For a summary, see Stephen Toope and Jutta Brunnée, "Interactional International Law: An Introduction" (2011) 3:2 International Theory 307 at 316. Surviving requires continued persuasiveness. Patrick Glenn, *Legal Traditions of the World* (Cambridge: Cambridge University Press, 2010) at 3.

¹⁴⁴ Roy Rappaport "Veracity, Verity and Verum in Liturgy" (1993) 23:1 Studia Liturgica 35 at 42.

¹⁴⁵ Glenn, *supra* note 143 at 16-17; John Pocock, "Ritual, Language, Power: An Essay on the Apparent Meanings of Ancient Chinese Philosophy" (1964) 16 Political Science 6 at 6. This is what some may call a "tipping point," or "norm cascade" in political science. Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52 Int Org 887.

¹⁴⁶ Glenn, *supra* note 143 at 16-17.

¹⁴⁷ Those who obey it, in other words, do so instinctively, without questioning: according to John Pocock "it no more occurs to this person to act otherwise than it occurs to a dancer to move to a different rhythm than that being played by the orchestra." John Pocock, "Ritual, Language, Power: An Essay on the Apparent Meanings of Ancient Chinese Philosophy" (1964) 16 Political Science 6.

foundational commitment, which initially departed from the status quo, thus becomes the status quo.

Others go so far as to write that “systems of meaning and struggles over belief are transmitted through norms.” Summarizing much of the idea conveyed in the preceding pages, Alison Brysk writes that “political life is one facet of a larger process of social communication that tells us all who we are, what to expect, and when to obey.”¹⁴⁸ This property of normativity must however be distinguished from among the several other facets attributed to it in the literature, which also stress its regulatory, principle-setting and habitual functions.¹⁴⁹ While many do not derive their influence through the type of fundamental moral commitments envisaged above, these facets often combine to different degrees. Depending on the context, individuals may thus comply with a given norm by habit, fear of judgement by peers, sincere personal commitment, or because doing so simply appears practical.¹⁵⁰ The idea here is that even in any given situation involving a change in fundamental political principles, where ideals and identity appear most salient, a mixture of practicality, habit, custom and regulatory considerations necessarily factor among the reasons why individuals and societies endorse certain norms over others.¹⁵¹

(VI) STRUCTURE FOR A PLURALIST ARGUMENT

This completes the theoretical framework proposed for this dissertation. This final section draws on the theoretical framework presented above to lay out the structure followed by this dissertation. It is submitted that international criminal law, as a project, possesses a certain normative appeal, characteristic of progressive movements, which commands

¹⁴⁸ This quote and the preceding are from Alison Brysk, *From Tribal Village to Global Village: Indian Rights and International Relations in Latin America* (Stanford: Stanford University Press, 2000) at 30.

¹⁴⁹ Peter Katzenstein, “Introduction” in Peter Katzenstein, ed, *The Culture of National Security: Norms and Identity in World Politics* (New York: Columbia University Press, 1996) 1; Judith Goldstein and Robert Keohane, *Ideas and Foreign Policy: Beliefs, Institutions, and Policy Change* (Ithaca: Cornell University Press, 1993).

¹⁵⁰ Macdonald and Sandomierski, *supra* note 13.

¹⁵¹ Emphasizing the importance of factors such as feasibility and the prevalence of political traditions and alignments capable of supporting transitions toward liberal normative and political orders, Jack Snyder, *Human Rights for Pragmatists: Social Power in Modern Times* (Princeton: Princeton University Press, 2022).

distinct moods and dispositions, by interacting with its intended public's fundamental commitments.¹⁵² Its normative appeal operates wide-ranging normative effects, both positive and negative, the existence and functioning of which has been the object of little scholarly attention.¹⁵³ The question as to why and how certain groups accept the norm against impunity has not been answered by the literature, and can be deepened using the above perspective.¹⁵⁴ This dissertation is an attempt to do so. In order to do so, each chapter examines a different normative phenomenon using symbolic communication theory.

The first chapter is on the goal of the ICL project, and follows the theory laid out in Robert Cover's article *Nomos and Narrative*, which shows how founding myths arise, evolve and draw their respective communities to action.¹⁵⁵ This chapter transposes this insight onto the reality of international criminal justice, arguing that the ICL project bears a certain moral appeal, driving its proponents to end atrocities. In substantiating this claim, this chapter presents the ICL project as a utopian endeavour committed to the prosecution of authors of mass atrocity, whose aspirations converge towards the realization of an ultimate objective, presented as the global internalization of its ban on mass atrocity.

The second chapter addresses the means through which this goal can be attained, and argues that the ICL project mostly produces its normative effect through the symbolic influence of atrocity prosecutions. Combining Douglas Hay's study of the criminal

¹⁵² Respectively, Herbert Marcuse, *The Aesthetic Dimension* (Boston: Beacon Press, 1979) at 63 ("The idea of beauty appears time and again in progressive movements, as an aspect of the reconstruction of nature and society") and Graber, *supra* note 113 at 291 (noting that political symbols speaking to the listener's most basic values can instigate action).

¹⁵³ That international criminal justice may be perceived as beautiful, and potentially obtain a normative effect by the same token, is briefly acknowledged in the literature, without however forming the object of serious scrutiny. Mark Osiel views mass atrocity prosecutions as potentially "poetic, in the way justice can sometimes be." Jan Klabbers speaks of "falling under the spell of the beauty of bringing an end to the culture of impunity." And Kathryn Sikkink mentions "the vey magnetism of the ideals that gave impetus" to the movement. Respectively, Osiel, *supra* note 26 at 16; Jan Klabbers, "Just Revenge? The Deterrence Argument in ICL" (2001) 12 *Finn Yb Int'l L* 245 at 250; Sikkink, *supra* note 40 at 25; Osiel, *supra* note 26 at 283-92.

¹⁵⁴ To be clear, these ritual patterns do not form an established literature linking anthropological insight to criminal law prosecutions. Ritual scholarship explicitly mentions the theme of criminal prosecutions in a handful of passages but too briefly for an established literature linking the two to exist.

¹⁵⁵ Robert Cover, "The Supreme Court, 1982 Term -- Foreword: Nomos and Narrative" (1983) 97 *H L Rev* 4.

prosecution ceremony in 18th century British society with insights contained in Mary Douglas' classic book *Purity and Danger*, on the incidence of perceptions of purity and impurity on social categories, this chapter highlights the way in which mediatized criminal trials can disseminate the norm against atrocity through powerful symbols of justice.¹⁵⁶ This chapter submits that the intensity of the violence unveiled at trial and the *gravitas* with which such events proceed can leave a vivid and lasting impression. The normative effect generated by this ritual pattern is laid out using the example of Frankfurt Auschwitz trials. 18th century Britain and postwar Germany were selected as case studies illustrating this chapter's argument due to their common anchoring in Western traditions of justice, in addition to their tangibly successful reflection of these ideals in the public's view.

The third chapter focuses on the difficulties encountered in seeking to communicate this message to post-genocidal societies adhering to persecutory ideologies. In order to examine this phenomenon, this chapter follows René Girard's mimetic theory, which depicts mass violence as the culmination of a symbolic structure, articulated around the notion of scapegoating.¹⁵⁷ Girard's theory sheds light on the otherwise puzzling process whereby large groups tolerate and even value the persecution of designated groups. This chapter presents genocide as a phenomenon comprising a moral order of its own, whose tenets compete with the moral order of international criminal justice, and ultimately cause it to be rejected by the population. The objective in this chapter is to illustrate the process through which such societies reject international criminal justice. To do so, this chapter uses the genocide committed against Bosnian Muslims during the breakup of Yugoslavia as an example, first studying the social context and ideologies having surrounded these events, before showing their influence over the reception of atrocity prosecutions before the ICTY. The Yugoslav example was selected to illustrate this chapter's argument due to the abundance of excellent literature on this conflict, as opposed to other conflicts having led to international criminal prosecutions, allowing for a penetrative reading of its ideology.

¹⁵⁶ Douglas Hay, "Property, Authority and the Criminal Law" in Douglas Hay, Paul Lindenbaugh and Edward Thompson, eds, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (Harmondsworth: Penguin Books, 1977) 17; Douglas, *supra* note 70.

¹⁵⁷ René Girard, *Violence and the Sacred* (London: Bloomsbury, 1977).

The fourth chapter explores the difficulty of communicating the law's message to postcolonial and non-Western societies. This chapter uses as its theoretical framework a combination of Gregory Bateson's purposive action theory and Girard's mimetic theory, which together shed light on traditional justice practices operating in parallel to state justice in such societies.¹⁵⁸ This chapter delves into this parallel conception of justice in order to show its friction with the conception of justice proposed by international criminal justice. To do so, this chapter uses *gacaca* traditional justice mechanisms used in post-genocide Rwanda as an example, and shows their alternative moral logic to have featured prominently in the government's rhetoric of opposition against the ICTR. Again, this chapter uses the Rwandan example to illustrate its argument, as opposed to other lesser-known traditional justice practices in other areas, due to the large amount of literature on the subject, allowing for a deeper analysis of the government's anti-ICTR rhetoric.

The last, concluding chapter summarizes the resulting impact of ICL. This chapter invokes Durkheim's writings on criminal punishment, which depict it as ritually excluding delinquents to reinvigorate the social bonds of interdependence violated by crime.¹⁵⁹ This pattern is applied to the ICL project in order to demonstrate its overall effect. The chapter argues that international criminal justice alienates population groups having supported the persecutions while energizing those who condemn them, obtaining its principal effect among the international community and on educated, urban and culturally Westernized population groups. While excluding those who side with perpetrators, international criminal justice in other words unifies an ever-increasing group sympathetic to its cause.

The natural conclusion to the narrative plotted by these chapters is one of pluralism. To view international criminal justice's role in traditional terms as the incapacitation of a handful of would-be mass atrocity perpetrators is to misunderstand its scope and broader societal effects. The rarity, iconic quality, and historical questions judged during these

¹⁵⁸ Gregory Bateson, *Steps to an Ecology of Mind* (New York: Ballantine, 1972) at 426-48.

¹⁵⁹ Durkheim, *supra* note 57 at 198.

events should be the object of social debates, captivating the interest of its different audiences for years to come, be they among victim communities, perpetrator communities, and the international community. International criminal justice in each of these cases should be perceived as relevant in order to progress towards the objective of eradicating impunity. The account formed by the chapters constituting this dissertation is one of a movement in partial contradiction with itself, aiming to influence post-genocidal populations with a normative message too frequently rejected by these populations.

While actors of international criminal justice would agree with these statements, priorities to this day have prevented international criminal justice from earnestly engaging with the sociocultural realities and social phenomena predicating the reception of its normative message. The overall aspiration here is to show that this can no longer be, and that close attention to such themes is necessary. The specific objective of this dissertation however is to describe the symbolic communicative patterns at play in the reception of international criminal justice among post-conflict societies. While operational changes to ICL will be alluded to, this dissertation very much limits itself to describing a problem whose lack of attention, complexity and importance warrant close scrutiny. Meaningful engagement with this problem in other words seems necessary before meaningful solutions can be proposed.

CONCLUSION

In the 1990s, international criminal law quickly emerged as a popular field, attracting a substantial amount of conceptual literature. This scholarship laid out the field's intellectual foundations, striving to give it greater coherence by showing its origin, purpose and legitimacy.¹⁶⁰ Throughout the 2000s, scholarship of this kind continued to accumulate. By the 2010s, international criminal scholarship began to move closer to the concrete effects of ICL, producing a number of field studies during this period.¹⁶¹ The analysis proposed in this dissertation suggests a novel perspective as field studies accumulate. Its perspective

¹⁶⁰ See Section A.

¹⁶¹ See note 18.

promises a deeper understanding of the ICL project's societal impact, adding to the information made available by field studies the interpretative help of symbolic communication theory. The picture proposed is a systemic critique, revealing through the analysis of the movement's goal, means and challenges the importance of a pluralized conception of international criminal justice capable of appealing to all.

CHAPTER 1

A GOAL OF GLOBAL DETERRENCE

INTRODUCTION

A straightforward way to start this systemic critique of the ICL project is to begin with its objective. This chapter is an attempt to answer the question “What is the objective of the ICL project?” by delving into the subjective motivations animating its proponents. One may begin by stating, like Immi Tallgren, that notorious atrocities have indelibly associated the name of their place of perpetration with the stigma of history’s darkest pages.¹ In the wake of such catastrophe, societies have at times sought to retrieve a sense of normalcy using what Mark Osiel terms “justice’s perceived ability to impose meaningful order on some of the most disorderly and unsavory events.”² A longing at times emerged to swing the pendulum the other way, as it were, and stress the bonds linking humanity. For several decades now such reactions have motivated activists to advocate for an international system in which perpetrators are prosecuted instead of being rewarded with power.

Yet why exactly are such prosecutions held, beyond the favorable political climate allowing them to take place? International legal scholarship has poured much ink arguing that international criminal punishment is justified by the expression of outrage in the face of atrocity, the punishment of offenders, bringing justice to victims, promoting rule of law, and preventing future atrocities. Importantly for the purposes of this chapter, discourse on this subject tends to comport what anthropologists term “condensation symbols,” conjuring vivid images capable of arousing strong emotions by appealing to their public’s most basic values.³ Such discourse arguably acts as a source of motivation for the proponents of the

¹ Immi Tallgren, “The Sensibility and Sense of ICL” (2002) 13:3 EJIL 561 at 561.

² Mark Osiel, *Mass Atrocity, Ordinary Evil, and Hannah Arendt: Criminal Consciousness in Argentina’s Dirty War* (New Haven: Yale University Press, 2001) at 2.

³ On condensation symbols, see Victor Turner, *The Forest of Symbols* (Ithaca: Cornell University Press, 1967) at 28-37; Edward Sapir, *Symbolism, in Encyclopaedia of the Social Sciences* (New York: Emerald, 1934) at 492-495; Doris Graber, *Verbal Behavior and Politics* (Champaign: University of Illinois Press,

ICL project. Following a strand of anthropological literature depicting symbolic experience as aesthetic, this chapter proposes to examine the moral appeal of these narratives as represented in mainstream ICL discourse.⁴ By examining these narratives, this chapter argues that the ICL project is characterized by a form of idealism comparable to a secular belief system, whose normative appeal directs its proponents towards the realization of an ultimate objective of social control: the global internalization of its ban on mass atrocity.

Being connected to an ensemble of beliefs, the ICL project can be understood as a utopian project, supported by a global network of jurists, activists, human rights workers, academics and politicians committed to human rights. As in Stephen Hopgood's book *Keepers of the Flame*, on the secular commitment many working for Amnesty International invest into their work, this chapter suggests that the proponents of the ICL project also invest a sense of personal meaning into this project.⁵ This sense of idealism can be found in prosecutors' opening statements, speeches delivered by UN officials, sentencing case law and doctrinal works, which this chapter will examine. In doing so, this chapter distinguishes itself from the literature by focusing on the substance and motivational effect

1976) at 291; Raymond Firth, *Symbols: Public and Private* (New York: Routledge, 1973) at 81; Stanley Tambiah, "A Performative Approach to Ritual" (1979) 113 *Proc Brit Academy* 160 at 164.

⁴ Notoriously, among the anthropological literature, see Victor Turner, *Chihamba : The White Spirit - A Ritual Drama of the Ndembu* (Manchester: Manchester University Press, 1962) at 231; Barbara Babcock, "The Arts and all Things Common: Victor Turner's Literary Anthropology, in" Elinor Shaffer, ed, *Comparative Criticism: Volume 9, Cultural Perceptions and Literary Values* (Cambridge: Cambridge University Press, 1987) 32 at 41; Bruce Kapferer, "Sorcery and the Beautiful" in Angela Hobart and Bruce Kapferer eds., *Aesthetics in Performance: Formations of Symbolic Construction and Experience* (London: Berghahn Books, 2006); Suzanne Langer, *Philosophy in a New Key* (Cambridge: Harvard University Press, 1941) 89.

⁵ Stephen Hopgood, *Keepers of the Flame: Understanding Amnesty International* (Ithaca: Cornell University Press, 2006).

of those justifications.⁶ While the idealistic tone permeating the justifications of ICL is often noted in the literature, nothing has been said on its impact as a social phenomenon.⁷

Of the various works discussing the development of belief systems, Robert Cover's essay *Nomos and Narrative* will be used here precisely for its explicit linkage between the different steps in the development of belief systems and their motivational character.⁸ This chapter follows the structure of Cover's essay, beginning first by a presentation of the essay. While the second section discusses the early origins of the ICL project, the third presents the way in which its aspirations diversified into a plurality of narratives over the course of its history. With the variety of aspirations ascribed to the ICL project presented in some measure of detail, the fourth section highlights the main themes traversing this discourse, using Cover's analytic tools. After having presented the diversity and general themes of mainstream discourse on the justifications of international criminal punishment, the chapter in its fifth and last section uses Cover's analysis to demonstrate how these different strands of discourse converge towards one unified and over-arching aspiration.

(I) COVER'S JURISGENERATIVE THEORY

⁶ Mainstream literature includes Payam Akhavan, "Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal" (1998) 20:4 Hum R Quart 737 at 743-810; Cherif Bassiouni, "Searching for Peace and Achieving Justice: The Need for Accountability" (1996) 59:4 L & Contemp Probs 9; Antonio Cassese, "Reflections on International Criminal Justice" (1998) 61:1 Mod L Rev 1; Shahram Dana, "The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?" (2014) 3 Penn St J L & Int'l Aff 30 47-109; Martti Koskeniemi, "Between Impunity and Show Trials" (2001) 6:1 Max Planck Yb UN L; Mirjan Damaska, "What is the Point of International Criminal Justice?" (2008) 83:1 Chi-Kent L Rev 329.

⁷ As noted in critical literature. *E.g.*, Laurel Fletcher and Harvey Weinstein, "Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation" (2002) 24:3 Hum R Quart 573 at 586-601; Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2007) at 46-123; Tallgren, *supra* note 1 at 590-595; David Koller, "The Faith of the International Lawyer" (2008) 40:4 NYU J Int'l L & Pol 1019 at 1032-49; Sofia Stolk, "The Record on Which History Will Judge us Tomorrow" (2015) Leiden J Int'l L 993.

⁸ Robert Cover, "Supreme Court 1982 Term Foreword: Nomos and Narrative" (1983) 97 Harv L Rev.

Cover's essay draws from Peter Berger's theory on the origins of systems of beliefs, which merits being presented before moving to *Nomos and Narrative*. According to Berger, humans, unlike other animals, do not have a preprogrammed instinct with specialised drives ensuring their survival.⁹ Unlike most species, humans are instead compelled to construct a cultural world of their own, requiring the creation of tools to control their surroundings; these tools may be physical, like the plow and axe, or intellectual, like religion and science. With these tools, humans not only create a world in which to survive, but also providing them with a sense of control, comprehension, and situation in the universe.¹⁰ Through this process, humans thus reduce unsettling questions to comprehensible, accessible patterns.¹¹

Cover adds that these worlds tend to be built on stories, such as myths, legends and folktales.¹² Such accounts are structured around points of interest, such as relationships and adventures, and end with a dramatic closure conveying a moral.¹³ Cover notes that foundational stories often take the form of an epic, in which the world emerges from ambient chaos and impurity. This story Cover calls "jurisgenesis."¹⁴ Be it through the Exodus for the Jews, the beheading of Louis XVI for the French, or the escape from religious persecution in the Old World for American pilgrims, normative worlds rest on a compelling account depicting the community's imagined emergence.¹⁵ Importantly, such

⁹ Peter Berger, *The Sacred Canopy: Elements of a Sociological Theory of Religion* (Garden City: Doubleday, 1967) at 5.

¹⁰ *Ibid* at 25.

¹¹ Echoing the discussion in Section (V) of the preceding chapter, on the tendency to construct a symbolic universe in which the causes of great mysteries are, in the words of Murray Edelman, "simple and neat and the remedies apparent." Murray Edelman, *Politics as Symbolic Action: Mass Arousal and Quiescence* (New York: Academic Press, 2013) at 83.

¹² Cover, *supra* note 8 at 10; Robert Cover, "The Folktales of Justice: Tales of Jurisdiction" (1985) 14 Cap U L Rev 179 at 182; Steven Fraade, "Nomos and Narrative before Nomos and Narrative" (2013) 17 Yale J L & Hum 81 at 81.

¹³ The overwhelming character of existence eventually finds itself dissipated as such stories accumulate and give it direction, evolving from simple traditional affirmations akin to "this is how things are done," in time to become elaborate epics and mythologies. Mishnah, *Aboth* 1:2; Julien Extabé, "The Legal Universe after Robert Cover" (2010) 4:1 Law and Humanities 115 at 121, 123. Berger, *supra* note 9 at 5. Hayden White, "The Value of Narrativity in the Representation of Reality" (1980) 7:1 Crit Inq 5 at 27; Patricia Ewick and Susan Silbey, "Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative" (1985) 29:2 Law & Soc Rev 197 at 198.

¹⁴ Cover, *supra* note 8 at 11; James Gray Pope, "Labor's Constitution of Freedom" (1997) 106 Yale L J 941 at 946-58; Extabé, *supra* note 13 at 121.

¹⁵ "For every constitution there is an epic, for each decalogue a scripture." Cover, *supra* note 8 at 4.

stories typically comport a series of morals and precepts designed to lay the foundations of the normative world's future development. Together these morals and precepts chart a way of life, directing one's existence towards the realisation of a world closer to these values.¹⁶

Cover writes that these stories are the product of a particular influence which he calls "paideic."¹⁷ By constantly creating new myths and meaning, the paideic both adds new stories to the existing corpus, while spurring novel and divergent interpretations to it: "The very 'jurispotence' of [the paideic] vision threatens it. [...] Differences arise immediately about the meaning of creeds, the content of common worship, the identity of those who are brothers and sisters."¹⁸ The risk here is that part of the constituency eventually severs itself from the original community and creates a new normative world, as Christians for example did with respect to Judaism, and Protestants with respect to Christianity.¹⁹ As much as the paideic is essential in creating meaning, a second, "imperial" influence comes as an essential in the exercise of world-maintenance, rescuing meaning as the fecundity of the paideic undermines cohesion. As meaning disintegrates, the imperial rescues its initial strength and momentum by "unleashing upon the fertile but weakly organized jurisgenerative cells an organizing principle" capable of preserving the power of unity.²⁰

¹⁶ A way of life defined by "tension between reality and vision." Cover, *supra* note 8 at 9.

¹⁷ Cover, *supra* note 8 at 12.

¹⁸ Similarly, Nancy Munn, "Symbolism in Ritual Context: Aspects of Symbolic Action" in John Honigmann, ed, *Handbook of Social and Cultural Anthropology* (Chicago: Rand McNally, 1973) 579 at 592; Sally Falk Moore, "Political Meetings and the Simulation of Unanimity: Kilimanjaro 1973" in Sally Falk Moore and Barbara Myerhoff, eds, *Secular Ritual* (Assen: Van Gorcum 1977) 151 at 167. Cover, *supra* note 8 at 12, 15; Françoise Michaut, "Le processus générateur de normes chez Robert Cover et son utilisation par Frank I. Michelman : de la description à la fiction" (2007) 27:3 *Raisons politiques* 59 at 67.

¹⁹ Fraade, *supra* note 12 at 84.

²⁰ If one were to draw the analogy to the common law tradition, the paideic would be innovative judge-made law and the imperial constitutional review. Cover, *supra* note 8 at 16; Michaut, *supra* note 18 at 67; Franklin G. Snyder, "Nomos, Narrative, and Adjudication: Toward a Jurisgenetic Theory of Law" (1999) 40 *William and Mary Law Review* 1623 at 1632. Similarly, see David Kertzer, *Ritual, Politics, and Power* (New Haven: Yale University Press, 1988) at 12.

Cover develops this theory to argue that legal meaning can be created in the absence of state law.²¹ As an illustration of the binding force which normative commitments may exert outside the scope of state law, Cover gives the example of “redemptive communities,” a type of community finding meaning in its attempt to change the world.²² Redemptive communities are characterized by the unredeemed character ascribed to reality, and their adherence to a common vision following which reality is to be brought into closer harmony with certain fundamental moral principles.²³ Cover gives the example of antislavery constitutionalists, who during the Civil War sought to influence the meaning of the constitution so as to annul its protection of slavery.²⁴ As shown below, the ICL project can be envisaged as corresponding to a redemptive community, comporting a “jurisgenesis,” “paideic” and “imperial” influences, and being guided by the fight against impunity.

(II) JURISGENESIS

This section presents mainstream discourse on the history of the ICL project. The numerous proposals for an international criminal court having taken place throughout the history of this movement should be understood against an intention to bring peace through the implementation of international law.²⁵ Some of the most tangible emanations of this initiative can be traced back to the 1899 and 1907 Hague Peace Conferences, where the international community sought to establish a mandatory mechanism for the resolution of

²¹ Legal meaning is viewed as flowing from divinely ordained normative corpus, common ritual, and strong interpersonal obligations – as opposed to state enforcement. Cover, *supra* note 12 at 24; Extabé, *supra* note 13 at 126; Judith Resnik, “Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover” (2005) 17:17 *Y. J. L. & Hum.* 17 at 18; Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998) at 8; Samuel Levine, “Halacha and Aggada: Translating Robert Cover’s Nomos and Narrative” (1998) 24 *Utah L. Rev.* 465 at 470.

²² Cover, *supra* note 12 at 25; Extabé, *supra* note 13 at 131; Nickolai Levin, “The Nomos and Narrative of *Matushita*” (2005) 73 *Fordham L. Rev.* 1627 at 1631.

²³ Cover, *supra* note 8 at 25.

²⁴ Cover, *supra* note 8 at 33.

²⁵ The question of “when history begins” is difficult here, as some trace the origins of the ICL project back to antiquity. Benjamin Ferencz, *Enforcing International Law: A Way to World Peace: A Documentary History and Analysis* (New York: Oceana Publications, 1983) at 1-79; Theodor Meron, *War Crimes Law Comes of Age: Essays* (Oxford: Oxford University Press, 1998) at 1-10. But Cheah Ling and Choong Ling, “Introduction: Historical Origins of International Criminal Law” in Morten Bergsmo and Cheah Ling, eds., *Historical Origins of International Criminal Law: Volume 1* (Oslo: Torkel Opsahl, 2014) 1.

international disputes, to no avail.²⁶ The French foreign minister noted that “the organization of a justice destined to guarantee [the rights of nations] are essential conditions for the establishment and maintenance of peace.”²⁷ This sentiment subsequently gained popularity as the First World War ravaged Europe a few years later.²⁸ With numerous proposals pressing for a supra-national instance, victorious powers established the League of Nations, whose mission was to achieve international peace by implementing the obligation through international law not to resort to war.²⁹

After sustained international pressure, Germany eventually resolved to prosecute a dozen soldiers in relation to violations of the laws of war.³⁰ Despite failing to meet the demands of the international community, which required the prosecution of thousands of individuals including the Kaiser, these events constitute the international community’s first attempt to hold a head of state liable for violations of international law.³¹ After this initiative came the deliberations for the establishment of a Permanent Court of International Justice, which included a proposition to expand the organ’s jurisdiction to international crimes, again to no avail.³² Many stressed that a clearer definition of the offenses was required before this initiative could move forward.³³ This initiative in turn attracted considerable scholarly attention, namely due to the relevance of elaborating definitions.³⁴ Already in his 1922

²⁶ *Proceedings of the 1907 Hague Peace Conference vol. II* (Washington: Carnegie Endowment for International Peace, 1907) at 5; Jacques Dumas, “Sanctions in International Arbitration” (1911) 5 AMJIL 934 at 954.

²⁷ Léon Bourgeois, *Pour la société des nations* (Paris : Bibliothèque-Charpentier, 1910) at 467.

²⁸ One author published a list of over 900 agencies supporting the League of Nations. Otfried Nippold, “Die Gestaltund des Voelkerrechts nach dem Weltkrieg” (1917), reviewed in (1918) 12 AMJIL 689.

²⁹ League of Nations, *Covenant of the League of Nations*, 28 April 1919 [1919] UKTS 4 (Cmd. 153)/ [1920] ATS 1/ [1920] ATS 3.

³⁰ Claud Mullins, *The Leipzig Trials: An Account of The War Criminals' Trials and a Study of German Mentality* (London: Witherby, 1921) at 9; Sheldon Glueck, “German War Trials: Report of Proceedings before the Supreme Court in Leipzig” (1922) 16 AMJIL 628.

³¹ Vittorio Orlando, “On the Aborted Decision to Bring the German Emperor to Trial” (2007) 5 J Int’l Crim Just 1015.

³² Second Resolution Adopted by the Advisory Committee in Lord Phillimore, “An International Criminal Court and the Resolutions of the Committee of Jurists” (1922) 3 Brit YB Int’l L 79 at 80, 84.

³³ United Nations Historical Survey of the Question of International Criminal Jurisdiction, Document: A/CN.4/7/Rev.1 at 10. *Procès verbaux of the proceedings of the Advisory Committee of Jurists, 1920* at 503.

³⁴ During this period also came to life the International Association of Penal Law, heir of the 1889 International Union of Penal Law, and predominant proponent for international criminal justice. Gerard van Hamel, “The International Association of Penal Law” (1925) 15:4 J Am Inst Crim L & Crimin 512.

book *Introduction à l'étude du droit pénal international*, Henri Donnedieu argued that the interests of mankind superseded the “egoistical interests of the sovereign state.”³⁵ The International Law Association, the Inter-Parliamentary Union and the Pan-American Conference soon proposed draft international codes, followed by an aborted proposal by France to establish an international penal court to prosecute terrorists.³⁶

These ideas resurfaced throughout the Second World War, eventually culminating in the establishment of the International Military Tribunal in Nuremberg.³⁷ Prosecutor Jackson’s famous opening statement stated that the purpose of the prosecutions was the advancement of law and justice, putting into words, this time before a court of law, the ideas long envisaged during the first half of the century: “That four great nations, flushed with victory and stung with injury stay the hand of vengeance [...] is one of the most significant tributes that Power has ever paid to Reason.”³⁸ Making reference to the Hague treaties, the Paris and Geneva Pacts and the Versailles precedent, the court reaffirmed that heads of state could be punished individually by the victors in relation to the commission of war crimes, holding that “the law is not static, [...] and] follows the needs of a changing world.”³⁹ The United Nations Charter was adopted a few years later and for its part envisaged as part of its mission “the progressive development of international law and its codification.”⁴⁰

³⁵ Henri Donnedieu de Vabres, “La cour permanente de justice internationale et sa vocation en matière criminelle” (1924) 1:1 *Revue internationale de droit pénal* 91 at 104.

³⁶ “Report of the International Law Association, Stockholm, September 8-13 1924” (1939) 33 *AMJIL* 138; “Inter-Parliamentary Union Proposal for an International Code for the Repression of International Crimes” (1925) in Benjamín Ferencz, *An International Criminal Court, a Step toward World Peace: The Beginning of Wisdom* (New York: Oceana, 1980) at 252; “The Havana Conference code of international penal law listed piracy, slave trade, white slavery and other offences against international law” (1935) 29 *Am. J. Int’l. L.* 643; Kopek Mikliszanski, *Le droit pénal international d’après la législation polonaise* (Paris: Sirey, 1935) at 9.

³⁷ London International Assembly-Reports on Punishment of War Crimes, reprinted in United Nations Historical Survey of the Question of International Criminal Jurisdiction, Document:- A/CN.4/7/Rev.1 appendix 9; Hans Kelsen, *Peace Through Law* (Chapel Hill: University of North Carolina Press, 1944) at 14.

³⁸ Robert Jackson, *The Case Against the Nazi War Criminals* (New York: Knopf, 1946) at 3.

³⁹ Trial of the Major War Crimes before the International Military Tribunal Judgment (Oct. 1, 1946), reprinted in 41 *AMJIL* 172, 217 (1947) at 217-19; Bernard Röling and Christiaan Rüter, *The Tokyo Judgment: The International Military Tribunal for the Far East (I.M.T.F.E.), 29 April 1946-12 November 1948* (Amsterdam: APA-University Press Amsterdam, 1977).

⁴⁰ Article 13(1)(1) U.N. Charter, United Nations, 24 October 1945, 1 UNTS XVI.

The campaign for an international criminal court continued to unfold under this new institution throughout the Cold War. The International Law Commission was mandated to codify international crimes and explore the possibility of establishing an international criminal court, which was postponed time and again due to Cold War tensions.⁴¹ Important atrocity prosecutions were nevertheless held domestically during this period, and large civil society organisations such as Amnesty International and Human Rights Watch carried out substantial groundwork in rising awareness to human rights violations.⁴² The fall of the Berlin wall finally removed the political deadlock in place throughout the Cold War, leading to the establishment of the ICTY and ICTR in response to Yugoslav and Rwandan crises, and to the International Criminal Court by the turn of the millennium.⁴³

These events mark the end of the story accounting for the ICL project's "jurisgenesis." According to Cover, every legal order "conceives of itself in one way or another as emerging out of that which is itself unlawful. [...] We may point to a theophany, a revolution, a migration."⁴⁴ In this case, the history of the ICL project can be seen as the slow progression of an old political stance carried out by a handful of visionaries – men such as Vespasien Pella, Henri Donnedieu de Vabres, René Cassin and Benjamin Ferencz

⁴¹ "International Law Commission Report on the Nuremberg Principles" (1950) 189 Yb ILC. New Conventions were also adopted in Geneva prescribing new humanitarian standards, the enforcement of which could be done before foreign courts. Conventions reprinted in (1953) 47 AMJIL 119. The question however remained alive in academic circles. *E.g.* John Bridge, "The Case for an International Court of Criminal Justice and the Formulation of International Criminal Law" (1964) 18 Int'l & Comp L Quart 1255; Julius Stone and Robert Woetzel, *Towards a Feasible International Criminal Court* (Geneva: World Peace Through Law Institute, 1970); Ferencz, *supra* note 36; Mohammed Cherif Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (Dordrecht: Martinus Nijhoff, 1987).

⁴² Notable are the Greek, Portuguese and Argentinian examples. *Torture in Greece: The First Torturers' Trial 1975* (London: Amnesty International Publications, 1977); Artur Costa, "O Julgamento da PIDE-DGS e o Direito (Transitório) à Memória", in Iva Delgado et al., eds, *De Pinochet a Timor Lorosae: Impunidade e Direito à Memória* (Lisbon: Campo das letras, 2000) 39; Carlos Santiago Nino, *Radical Evil on Trial* (New Haven: Yale University Press, 1996) at 41-107. See also *Attorney General v. Adolf Eichmann*, Criminal Appeal 336/61 (29 May 1962) Supreme Court of Israel.

⁴³ United Nations Mechanism for International Criminal Tribunals, The ICTR in Brief online The International Criminal Tribunal for Rwanda <<http://unictr.unmict.org/en/tribunal>>; United Nations, In Numbers online The International Criminal Tribunal for the former Yugoslavia <<http://www.icty.org/en/in-focus/crimes-sexual-violence/in-numbers>>. On the informal meetings before ICC negotiations in Rome, Cherif Bassiouni, *International Criminal Law: International Enforcement* (Leiden: Brill, 2008) at 131 et seq.

⁴⁴ Mark Osiel similarly notes that foundational myths often translate into legal documents, granting the law's authority to victorious political battles. Mark Osiel, "Ever Again: Legal Remembrance of Administrative Massacre" (1995) 144 U Penn L Rev 463 at 464. Cover, *supra* note 8 at 23; Extabe, *supra* note 13 at 121.

– riding the shockwave caused by major conflicts.⁴⁵ With the establishment of the ICC as its culmination, it is the history of a long fight to move the international system “out of the ambient chaos,” to take Cover’s terms of absolute state sovereignty.⁴⁶ It is the application of basic principles of rule of law onto the international sphere, warranting that subjects of law, no matter how powerful, be held accountable.

(III) THE PAIDEIC FORCE

The paideic force is the creative influence adding new meaning to the jurisgenesis.⁴⁷ While the jurisgenesis represents the original moment of creation uniting all members around an identical vision, the paideic force quickly disrupts this imagined instant of interpretative harmony, tainting the original narrative with a continuous flow of new meaning.⁴⁸ Cover gives the example of the destruction of the temple in the Torah. In the absence of this element so central to the Judaic jurisgenesis, Rabbi Simeon ben Gamaliel added new meaning by proclaiming that “upon three things the world [continues to] exist: upon justice, upon truth, and upon peace.”⁴⁹ The paideic force adds new meaning, opens new interpretations and preserves validity as contexts evolve. Taking the paideic force as its subject, this section presents a number of aspirations further developed after the

⁴⁵ Antonio Cassese compares every advance to the few tiny and seemingly disparate novelties encountered by Columbus towards the end of his “anguished and often hopeless quest for the new world: the shape and colour of the clouds; the wind, no longer impetuous and steadfast; a floating stick; a little branch with its berries still red.” Antonio Cassese, *International Law in a Divided World* (Oxford: Oxford University Press, 1989) at 407.

⁴⁶ Many statements to this effect can be found in the literature. *E.g.*, Cherif Bassiouni, “Justice and Peace: The Importance of Choosing Accountability Over Realpolitik” (2003) 35 Case W. J. Int’l L 191 at 191 (“The pursuit of *realpolitik* may settle the more immediate problems of a conflict, but, as history reveals, its achievements are frequently at the expense of long-term peace, stability, and reconciliation”); Jean Graven, “Conclusion: l’impasse actuelle: comment en sortir?” in Julius Stone and Robert Woetzel, eds, *Towards a Feasible International Criminal Court* (Geneva: World Peace Through Law Institute, 1970) 296 at 301 (“il est impossible de croire que le fait d’avoir bloqué tous les projets en attendant la définition définitive de l’agression ne saurait affecter la validité des principes de Nuremberg.”); Julius Stone, *Visions of World Order: Between State Power and Human Justice* (Baltimore: Johns Hopkins University Press, 1984) at xii (“This refusal rests, over and beyond the arrogance of sovereignty”); Richard Goldstone, *For Humanity: Reflections of a War Crimes Investigator* (New Haven: Yale University Press, 2000) at 120.

⁴⁷ Cover, *supra* note 8 at 14-15.

⁴⁸ Cover, *supra* note 8 at 14.

⁴⁹ Mishnah, *Aboth* 1:18 in Cover, *supra* note 8 at 14.

establishment of the International Criminal Court.⁵⁰ Relying on the same method as in the previous section, this section will attempt to depict each aspiration as found in mainstream discourse, before suggesting through narrative analysis the images and metaphors evoked.

In the past three decades, other international criminal tribunals have been established in Lebanon, East Timor, Sierra Leone, Cambodia, Bosnia, Kosovo and The Hague. Substantial sums have been invested in international prosecutions.⁵¹ The number of prosecutions for human rights violations in the world has increased.⁵² With these new developments, the aspirations of the ICL project changed from the establishment of a permanent organ to the results to be obtained by judicial proceedings.⁵³ The mainstream view is that ICL now has the power to punish those responsible for serious violations of human rights, to prevent their reoccurrence, to secure justice and dignity for victims, to establish a record of past events, and to promote national reconciliation.⁵⁴ Each of these aspirations calls to mind a conception of justice whose moral appeal is discussed below.⁵⁵

⁵⁰ To be sure, many of these aspirations existed before the establishment of the International Criminal Court. The point here is that the rhetoric supporting those which already existed became more developed and sophisticated, and that others did not exist. See note 71.

⁵¹ David Wippman, "The Costs of International Justice" (2006) 100:4 AJIL 861.

⁵² Ellen Lutz and Caitlin Reiger count approximately seventy prosecutions targeting former heads of state or government since 1990 alone. Ellen Lutz and Caitlin Reiger, "Introduction" in Ellen Lutz and Caitlin Reiger, eds, *Prosecuting Heads of State* (Cambridge: Cambridge University Press, 2009) 1 at 1-25; Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (New York: Norton, 2011) at 162-89; Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Philadelphia: University of Pennsylvania Press, 2005).

⁵³ Roht-Arriaza *ibid* at 95 (In contrast to an earlier culture of impunity, in recent years international legal developments were directed at efforts "to reaffirm and expand on duties to investigate, prosecute, and compensate, and to be critical of amnesties that preclude any of these things.").

⁵⁴ These are five of the most common aspirations of the ICL project to be found in the literature and case law. A number of other objectives have also been elaborated, such as rehabilitation, incapacitation, restoration, crystallizing international norms, general affirmative prevention setting standards for fair trials, and ending impunity. Dana, *supra* note 6 at 37.

⁵⁵ This transition does not amount to a clear-cut shift. Some of these ideas already appeared in Nuremberg opening statements and Cold War literature. For example, see Jackson, *supra* note 38 at 21; Ferencz, *supra* note 25 at xi. And the fight against realpolitik remains present in more recent works. Geoffrey Robertson, *Crimes Against Humanity* (New York: The New Press, 1999) at 341; Jackson Nyamuya Maogoto, *War Crimes and Realpolitik: International Justice from World War I to the 21st Century* (Boulder: Rienner, 2004) at 9; Implicitly, Antonio Cassese, "Conclusion: Gathering up the Main Threads" Antonio Cassese, ed., *Realizing Utopia: The Future of International Law* (Oxford: Oxford University Press, 2012) 645 at 649.

(A) Punishing those Responsible for Serious Violations of Human Rights

“As you, [Adolf Eichmann,] supported and carried out a policy of not wanting to share the earth with the Jewish people and the people of a number of other nations, [...] we find that no one, that is, no member of the human race, can be expected to want to share the earth with you. This is the reason, and the only reason, you must hang.”

-Hannah Arendt⁵⁶

Retribution is at least as old as *lex talionis*. The criminal must be punished for his deeds. The word “retribution” is comprised of the Latin roots “re” and “tributio,” which together mean “paying back.”⁵⁷ By breaking the law the offender causes a prejudice to the community and thus contracts a moral debt for which he must pay.⁵⁸ The prejudice is the disruption of moral order and payment is to be rendered in suffering. This transaction, in order to be complete, demands that the offender be inflicted a sanction proportionate to the gravity of the infraction. According to Kant, “the judicial office [...] is called upon by reason to repay, to visit a proportionate evil upon the transgression of moral laws.”⁵⁹ The offender’s moral debt is paid according to a principled system of distributive justice, whereby (a) suffering is delimited by the gravity of the offense and (b) inflicted by the state (c) in an impersonal manner that does not involve pleasure at the suffering of others.⁶⁰ With the law’s unemotional aesthetic permeating the process, retributive justice thus rises above man’s base instinct, convincingly projecting a process society may call justice.⁶¹

⁵⁶ Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin, 2010) at 279.

⁵⁷ John Cottingham, “Varieties of Retribution” (1979) 29 *Philosophical Quarterly* 238 at 238.

⁵⁸ This conventional account of retribution is again to be contrasted with the historical account provided in Chapter 4 Section (I)(A)(1)(i), stating the influence of blood feud in the development of this justification before central judicial systems were established by the first sovereigns of Europe.

⁵⁹ Immanuel Kant, *The Metaphysics of Morals* (Cambridge: Cambridge University Press, 1996) at 553.

⁶⁰ Robert Nozick, *Philosophical Explanations* (Cambridge: Harvard University Press, 1981) at 367; George Fletcher, *Rethinking Criminal Law* (Oxford: Oxford University Press, 2000) at 417.

⁶¹ The criminal’s suffering in proportion to his crime *is* what constitutes justice. Looking away from ends such as the reformation of the offender or the deterrence of future criminal acts, the true retributivist finds complete satisfaction in the production of justice itself, in its right and exact measure. As such it is a “backward-looking theory.” Ted Honderich, *Punishment: The Supposed Justifications Revisited* (Ann Arbor: Pluto, 2005) at 17; Antony Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2003) at 19; Cottingham, *supra* note 57 at 240.

Retributivism is commonly evoked in international criminal sentencing case law.⁶² In a leading judgment, the ICTY notes that in the international context retribution is to be understood as duly expressing the outrage of the international community: a sentence should “make plain that the international community was not ready to tolerate the serious violations of international law brought before this court.”⁶³ Speaking for retributivist international criminal scholars, Jens Ohlin notes that the usual goals of deterrence and rehabilitation are “at best difficult to implement” in the context of mass atrocity, consequently leaving no choice but to concede that the perpetrator deserves to be punished for his conduct – “to do otherwise would be to allow him to escape responsibility for his crimes, resulting in the main enemy of international criminal justice: impunity.”⁶⁴ According to some, retributivism embodies and upholds a sense of common humanity in cases where states fail to do so.⁶⁵ Few scholars however seem to favour retributivism, as the infliction of proportionate punishment appears impossible in this context, considering

⁶² A survey demonstrates a preference for retributive motivations before the *ad hoc* tribunals. Cherif Bassiouni, *Introduction to International Criminal Law* (Leiden: Nijhoff, 2012) at 689. No clear trend has emerged from the ICC’s scarce case law. Carsten Stahn, *The Law and Practice of the International Criminal Court* (Oxford: Oxford University Press, 2015) at 933.

⁶³ *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-A, Judgment (24 March 2000) at 185 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber); *Prosecutor v. Drazen Erdemovic*, IT-96-22-T, Sentencing Judgment (29 November 1996) at para. 65 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber); *Prosecutor v. Zoran Kupreskic*, IT-95-16-T, Judgment (14 Jan 2000) at para. 852 848 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber); *Prosecutor v. Anto Furundzija*, IT-95-17/1, Judgment (10 December 1998) at para 290; *Prosecutor v. Dusko Tadic*, IT-94-1-Tbis-R117, Sentencing Judgment (11 November 1999) at paras 7-9 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber); *Prosecutor v. Dragoljub Kunarac*, IT 96-23/1-A, Judgment (12 June 2002) at para. 385 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber); *Prosecutor v. Clément Kayishema and Obed Ruzindana*, ICTR-95-1-T, Judgment and Sentence (21 May 1999) at para. 2 (International Criminal Tribunal for Rwanda, Trial Chamber); *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Judgment (2 September 2008) at para 2 (International Criminal Tribunal for Rwanda, Trial Chamber).

⁶⁴ Jens Ohlin, *International Criminal Procedure: Towards a Coherent Body of Law* (London: Cameron May: 2009) at 389. See also Alexander Greenawalt, “International Criminal Law for Retributivists” (2014) 35:4 U Penn J Int’l L 969 at 971; Adil Ahmad Haque, “Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law” (2005) 9:1 Buffalo Crim L Rev 273 at 296-97; Jean Galbraith, “The Good Deeds of International Criminal Defendants” (2012) 25:3 Leiden J Int’l L 799 at 810-811; Steven Glickman, “Note: Victims’ Justice: Legitimizing the Sentencing Regime of the International Criminal Court” (2004) 43 Col J Trans L 229 at 247-248.

⁶⁵ Haque, *ibid* at 296-97.

the extreme gravity of the offenses at hand, and that insisting on retribution may very well be misplaced in a social context already characterized by hatred and revenge.⁶⁶

Retributivism evokes a conception of justice marked by perceptions of cleansing. With some of its central tenets featured in the Old Testament, retribution has long represented popular and divine condemnation, emphasizing that something wicked and outrageous would persist if criminal acts were to go unpunished.⁶⁷ According to Pope Pius XII, “justice’ [...has] to maintain the existing equilibrium. And the fulfillment of this demand proclaims the absolute supremacy of good over evil.”⁶⁸ Punishing the ordinary offender is bound to lose much of its meaning so long as genocide plotters can enjoy the spoils of power and wealth as a direct consequence of their crimes. For such crimes moral outrage crosses borders and demands that a calibrated form of punishment be waged in return.

(B) Voicing the International Community’s Outrage in the Face of Mass Atrocity

“The Prosecution will request a very severe sentence. Thomas Lubanga is guilty of enlisting and conscripting children under the age of 15 and using them in hostilities. [...] the Prosecution will request a sentence in the name of each child recruited; in the name of the Ituri community and in the name of citizens concerned from all over the world.”

⁶⁶ Greenawalt, *supra* note 64 at 972; Margaret de Guzman, “Choosing to Prosecute: Expressive Selection at the International Criminal Court” (2012) 33:2 Mich J Int’l L 265 at 302; Koller, *supra* note 7 at 1025. For scholarship in favour of this theory, see Jens Ohlin, “Towards a Unique Theory of International Sentencing” in Goran Sluiter and Sergey Vasiliev, eds., *International Criminal Procedure: Towards a Coherent Body of Law* (Oxford: Oxford University Press, 2009) 381; Haque, *supra* note 64; Andrew Woods, “Moral Judgments and International Crimes: The Disutility of Desert” (2012) 52 Vir J Int’l L 633.

⁶⁷ Johann Klaassen, “Punishment and the Purification of Moral Taint” (1996) 27:2 Journal of Social Philosophy 51 at 54; Herbert Morris, “The Decline of Guilt” in John Deigh, ed, *Ethics and Personality: Essays in Moral Psychology* (Chicago: University of Chicago Press, 1992) 117 at 120; Stanley Cohen, “An Introduction to the Theory, Justifications and Modern Manifestations of Criminal Punishment” (1981) 27 McGill Law Journal 73 at 74; Terance Miethe and Hong Lu, *Punishment: A Comparative Historical Perspective* (Cambridge: Cambridge University Press, 2004) at 16.

⁶⁸ Pope Pius XII, “International Criminal Justice” in Christopher Joyner, ed, *Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference 17-21 September 1998* (Toulouse: Nouvelles études pénales, 1998) 13 at 26.

The expressivist account centers on voicing the importance of norms. Punishment is said to be justified here by its ability to embody society's moral condemnation of the offense, metaphorically translating public thoughts and feelings into action.⁷⁰ Punishment is said to translate the otherwise theoretical importance of norms into a lived and symbolic experience, forcefully demonstrating that the community is willing to go as far as to inflict pain on those who violate its fundamental rules.⁷¹ Punishment is also said to translate the disesteem of society into the value system of the recalcitrant offender such that he may come to see his crime as a mistake.⁷²

This justification is commonly evoked in the international context.⁷³ Sir Hartley Shawcross, the British prosecutor at Nuremberg, envisioned the Nazi trials as a warning to future mass atrocity perpetrators, who would from then on have to face judgement on the

⁶⁹ Press release, *ICC Prosecutor's address on the sentencing of Thomas Lubanga*, ICC-OTP-20120613-PR809, 13 June 2012.

⁷⁰ Joel Feinberg, "The Expressive Function of Punishment" (1965) 49 *The Monist* 397 at 397-98, 400, 402; Christopher Bennett, "State Denunciation of Crime" (2006) 3 *Journal of Moral Philosophy* 288.

⁷¹ Chapter 2 explores the way in which punishment may translate "the otherwise theoretical importance of norms into a lived and symbolic experience," delving into the symbolic communication processes at play during public executions and atrocity prosecutions. Duff, *supra* note 61; Jean Hampton, "The Moral Education Theory of Punishment" (1984) 13:3 *Philos Public Aff* 208 at 217; Herbert Morris, "A Paternalistic Theory of Punishment" (1981) 18 *American Philosophical Quarterly* 63.

⁷² Hampton, *ibid* at 208.

⁷³ In jurisprudence: *Prosecutor v. Momir Nikolic*, IT-97-24-T, Trial Sentencing Judgment (31 July 2003) at para. 86 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber); *Prosecutor v. Milomir Stakic*, IT-97-24-T, Trial Judgment (July 31, 2003) at para. 902 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber); *Prosecutor v. Dario Kordic and Mario Cerkez*, IT-95-14/2-A, Judgment (17 December 2004) at para. 1082 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber); *Prosecutor v. Momcilo Krajisnik*, IT-00-39&40-T, Trial Judgment (27 September 2006) at para. 1135 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber); *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-A, Judgment (24 March 2000) at 185 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber). In the literature: Antonio Cassese, "On the Current Trend towards Criminal Prosecution and Punishment for Breaches of International Humanitarian Law" (1998) 9 *EJIL* 2 at 9-10; Drumbl, *supra* note 7 at 173-175; Diane Marie Amann, "Assessing International Criminal Adjudication of Human Rights Atrocities" (2003) 16 *Third World Legal Studies* 169 at 175; Bassiouni, *supra* note 46 at 192; Damaska, *supra* note 6 at 345; Duff, *supra* note 61 at 589; Tom Farer, "Restraining the Barbarians: Can International Criminal Law Help?" (2000) 22:1 *Human Rights Quarterly* 90 at 91-92; Akhavan, *supra* note 6 at 744; Beth Van Schaack, "Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals" (2008) 97:1 *Geo L J* 119 at 155-57.

basis of the International Law of mankind.⁷⁴ By recurrently underlining that the entire world stands against the atrocity perpetrator, the ICL project, it is hoped, may influence international society more broadly.⁷⁵ The persecution of entire segments of a population is an act the international community is no longer willing to turn a blind eye to. The voicing of the ICL's message should remind that those who violate it cannot be viewed as respectable statesmen. Speaking for many, Mark Drumbl argues that expressivism "transcends retribution and deterrence in claiming as a central goal the crafting of historical narratives, their authentication as truths, and their pedagogical dissemination to the public[.]" thus serving as a "moral operator" capable of conveying a shared abhorrence towards the politics of mass atrocity.⁷⁶

The expressivist account evokes a conception of justice inviting to reflect on justice. One is invited to revisit the importance of the norms infringed, re-exploring the moral architecture of the often-age-old principles defended: bodily integrity, the right to property, freedom of speech, or other such democratic values. Mass atrocities infringe on conceptions of natural law developed during antiquity and later consolidated during the Enlightenment.⁷⁷ Expressivism evokes the importance of responding to atrocities pursuant to the international community's "international conscience," in the words of Diane Orentlicher, when the constant in history has been inaction.⁷⁸

⁷⁴ *Speeches of the Chief Prosecutors at the Close of the Case against the Individual Defendants* (New York: H.M. Stationery Office, 1947) at 63.

⁷⁵ Drumbl, *supra* note 7 at 173-175; Amann, *supra* note 73 at 175; Bassiouni, *supra* note 46 at 192; Kai Ambos, *Treatise on International Criminal Law, Volume 1* (Oxford: Oxford University Press, 2013) at 70-73; Hampton, *supra* note 71; Johannes Andenaes, "The General Preventive Effects of Punishment" (1966) 114:7 University of Pennsylvania Law Review 949 at 955; Damaska, *supra* note 6 at 345; Duff, *supra* note 61 at 589; Woods, *supra* note 66 at 642, 644. But Saira Mohamed, "Deviance, Aspiration, and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law" (2015) 124:5 Y L J 1628 at 1682-1688.

⁷⁶ How this can be done is the subject of chapter 2. Drumbl, *supra* note 7 at 173-175.

⁷⁷ Ziv Bohrer, "International Criminal Law's Millennium of Forgotten History" (2016) 34:2 L Hist Rev 393 at 398.

⁷⁸ Diane Orentlicher, "The Law of Universal Conscience: Genocide and Crimes Against Humanity" (Paper Delivered at the Genocide and Crimes against Humanity: Early Warning and Prevention Conference, *United States Holocaust Museum*, 8-10 December, 1998).

(C) Bringing Justice to Victims

“One of my investigators from Portugal interviewed a girl who was abducted when she was 11-years-old. After 3 days, when the investigator had finished the girl started to cry. [...] But the girl said: ‘I am crying because this is the happiest moment of my life. I have never had anyone pay such attention to what happened to me.’ What we are doing is helping the victims to be less of victims and more of citizens. It is my legal duty to grant such people justice.”

-Luis Moreno-Ocampo⁷⁹

Many argue that prosecutions bring justice to those most directly affected by mass atrocity.⁸⁰ This perspective argues that victims often long for justice in the form of criminal punishment in the aftermath of mass atrocity.⁸¹ The literature states that a balance needs to be restored in favour of victim in order to compensate for the injustices experienced, highlighting that self-worth may be revitalized by condemning perpetrators in the name of

⁷⁹ Felix Osike, “Uganda: ICC Prosecutor Luis Ocampo in His Office at The Hague”, *New Vision* (13 July 2007) B1.

⁸⁰ In case law: *Prosecutor v. Thomas Lubanga*, ICC-01/04-01/06-2904, Decision Establishing the Principles and Procedures to be Applied to Reparations (7 August 2012) at para. 178 (quoting the Trial Chamber in *Prosecutor v. Thomas Lubanga* ICC-01/04-01/06-1-US-Exp-Con, Corrigendum of Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58 (10 February 2006) at para. 150) (International Criminal Court). Victims are seldom mentioned in the *ad hoc* tribunals' case law. See *Prosecutor v. Drazen Erdemovic*, IT-96-22-T, Sentencing Judgment (29 November 1996) at para. 65 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber). In the literature: Julie Mertus, “Only a War Crimes Tribunal: Triumph of the International Community, Pain of the Survivors” in Belinda Cooper, ed, *War Crimes: The Legacy of Nuremberg* (New York: TV Books, 1999) 229 at 235; Aryeh Neier, “Rethinking Truth, Justice, and Guilt after Bosnia and Rwanda” in Carla Hesse and Robert Post, eds, *Human Rights in Political Transitions: Gettysburg to Bosnia* (New York: Zone Books, 1999) 39 at 49; Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (Philadelphia: University of Pennsylvania Press, 2011) at 131; Fletcher and Weinstein, *supra* note 7 at 592-593; Sarah Kendall and Sara Nouwen, “Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood” (2014) 76:3–4 *Law Contemp Probl* 235 at 253-258.

⁸¹ Stephan Parmentier, Marta Valinas and Elmar Weitekamp, “How to Repair the Harm after Violent Conflict in Bosnia? Results of a Population-Based Survey” (2009) 27:1 *Neth Quart Hum R* 27 at 33; Brandon Hamber, *Transforming Societies after Political Violence: Truth, Reconciliation, and Mental Health* (New York: Springer, 2009) at 123; Charles Vicencio, “Restorative justice in South Africa” in Nigel Biggar, ed, *Burying the Past: Making Peace and Doing Justice after Civil Conflict* (Georgetown: Georgetown University Press, 2001) 235 at 244.

the international community.⁸² Such actions can be especially therapeutic in situations where perpetrator groups continue to hold the reins of power and deny accusations of guilt. Testifying is also argued to break victims' silence and transform their shame and humiliation into dignity and strength.⁸³ By re-exploring traumatic events through the lens of the tribunal's authority, it is argued, victims may experience a sense of control and power over events which previously dominated their lives.⁸⁴ It is also argued that victim representation before international tribunals provides victims with the opportunity to influence proceedings and receive compensation.⁸⁵

This aspiration evokes a conception of justice anchored in the ICL project's concrete human impact. The narrative focuses on the strength of catharsis in the aftermath of convictions. The sight of the elated victim gives concrete meaning to what may otherwise be viewed as costly proceedings. The embodiment of extreme suffering as rendered in testimonial form also translates at least in part an injustice difficult to imagine for most.

(D) Promoting National Reconciliation

⁸² John Gehm, "The Function of Forgiveness in the Criminal Justice System" in Gerry Johnstone, ed, *A Restorative Justice Reader: Texts, Sources, Context* (Portland: Willan, 2003) 261 at 284; Howard Zehr, *The Little Book of Restorative Justice*, (Intercourse: Good Books, 2002) at 12.

⁸³ Caroline Fournet, "Mass Atrocity: Theories and Concepts of Accountability – On the Schizophrenia of Accountability" in Ralph Henham and Mark Findlay, eds, *Exploring the Boundaries of International Criminal Justice* (London: Ashgate, 2011) 27 at 44. More generally, regarding the benefits of testifying: Richard Goldstone, "Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals" (1995) 28:3 NYU J Int Law & Pol 485 at 491; Michael Scharf, "The Case for a Permanent International Truth Commission" (1997) 7 Duke Journal of Comparative and International Law 375 at 379; Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2000) at 133-153; Minow, *supra* note 21 at 61-87; Naomi Roth-Arriaza and Margaret Popkin, "Truth as Justice: Investigatory Commissions in Latin America" (1995) 20:1 Law and Social Inquiry 79 at 114.

⁸⁴ This argument is usually drawn from the literature on treatment of trauma survivors, where the recounting of one's personal story is acknowledged as a valuable coping mechanism. Judith Herman, *Trauma and Recovery: The Aftermath of Violence - From Domestic Abuse to Political Terror* (New York: Basic Books, 1997) at 133, 155 and 183; Yael Danieli, "Massive Trauma and the Healing Role of Reparative Justice." (2009) 22:5 J Trauma Stress 351 at 352.

⁸⁵ Article 68 of the Rome Statute; Luke Moffett, "Elaborating Justice for Victims at the International Criminal Court Beyond Rhetoric and The Hague" (2015) 14 J Int'l Crim Just 281 at 287.

“*Convinced* that in the particular circumstances of the former Yugoslavia the establishment of [...] an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would contribute to the restoration and maintenance of peace”

-U.N. Security Council⁸⁶

International criminal justice is also argued to be a prerequisite for the establishment of a lasting peace.⁸⁷ While providing blanket amnesties may resolve short-term threats to security in the aftermath of conflict, it is emphasized that peace achieved by ignoring justice has mostly been short-lived.⁸⁸ A lasting peace, it is argued, must respond to victims’ needs and provide society with a sense of closure.⁸⁹ Prosecutions are said to play an important role in neutralizing conflict entrepreneurs, removing them from positions of influence and discrediting their xenophobic agenda.⁹⁰ Prosecutions may create new

⁸⁶ S.C. Res. 827, ¶ 3 U.N. Doc. S/RES/827 (25 May 1993).

⁸⁷ Resolutions establishing both ad hoc tribunals mention this idea. See note 165. In the case law: *Prosecutor v. Momir Nikolic*, ICTY-97-24-S, Trial Sentencing Judgment (18 December 2003) at para. 233 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber); *Prosecutor v. Darko Mroa*, ICTY-02-59-S, Sentencing Judgment (31 March 2004) at para. 78 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber); *Prosecutor v. Miodrag Jokic*, ICTY-01-42/1-S, Sentencing Judgment (18 March 2004) at para. 76 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber); *Prosecutor v. Clément Kayishema and Obed Ruzindana*, ICTR-95-1-T, Trial Judgment (21 May 1999) at para. 1 (International Criminal Tribunal for Rwanda, Trial Chamber); *Prosecutor v. Laurent Semanza*, ICTR-97-20-T, Judgment and Sentence (15 March 2003) at para 554 (International Criminal Tribunal for Rwanda, Trial Chamber); *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Judgment (2 September 2008) at paras 2-19 (International Criminal Tribunal for Rwanda, Trial Chamber); *Prosecutor v. Jean Kambanda*, ICTR-97-23-S, Judgment and Sentence (4 September 1998) at paras 58-59 (International Criminal Tribunal for Rwanda, Trial Chamber). In the literature: Ferencz, *supra* note 25 at 489; Cassese, *supra* note 6 at 6; Orentlicher, *supra* note 60 at 2250; Michael Scharf and William A Schabas, *Slobodan Milosevic on Trial: A Companion* (New York: Bloomsbury, 2002) at 51-54; Juan Méndez, “National Reconciliation, Transnational Justice, and the International Criminal Court” (2001) 15:1 EJA Ethics Int Aff 25 at 32; Goldstone, *supra* note 83 at 448.

⁸⁸ Fatou Bensouda, “International Justice and Diplomacy” *The New York Times* (19 March 2013). Ban Ki-moon calls a peace without justice “a false peace [...] a truce at gunpoint, without dignity, justice or hope for a better future.” Ban Ki-moon, “Secretary-General’s “An Age of Accountability” address to the Review Conference on the International Criminal Court”, *United Nations Statements* (31 May 2010) online: <http://www.un.org/sg/STATEMENTS/index.asp?nid=4585>

⁸⁹ Bassiouni, *supra* note 46 at 191; Carsten Stahn, “International Criminal Justice and Reconciliation: Beyond the Retributive v. Restorative Divide” (2015) 36 FICHL Policy Brief Series 1 at 1; Goldstone, *supra* note 83 at 448.

⁹⁰ Drumbl, *supra* note 7 at 173-175; Amann, *supra* note 73 at 175; Bassiouni, *supra* note 46 at 192; Ambos, *supra* note 75 at 70-73; Damaska, *supra* note 6 at 345; Farer, *supra* note 73 at 91-92.

national narratives depicting these individuals as tyrants, instead of national heroes, who arrogated power and wealth through widespread misinformation, organized assassinations and the destruction of the societal fabric.⁹¹ Punishment may also have the capacity to prevent collective demonization and dissipate desires of vengeance coming from victim groups.⁹² Doing so is argued to portray the population as having fallen prey to the lies of a manipulating elite.⁹³ By framing its message so as to avoid humiliation on both sides, the law can invite the population to take a step back and reflect on the mistakes having led the country to chaos.

This account of justice evokes a narrative presenting mass atrocity prosecutions as a secular ritual bringing closure to society.⁹⁴ Meaningful order is imposed otherwise troublesome events by authoritatively putting the blame on the hatred having contaminated society. Attention is brought to the hatemongers at the origin of conflict, showing the defendants to “be living symbols of racial hatreds, of terrorism and violence” in Prosecutor Jackson’s words.⁹⁵ This concentration of evil brings closure by clearing the population of its responsibilities and teaching it a lesson, to the effect that “never again” shall the nation allow itself be destroyed by those favoring the unrestrained violation of democratic values.

⁹¹ Akhavan, *supra* note 6 at 767; Goldstone, *supra* note 83; Hannah Arendt, “Truth and Politics”, *The New Yorker* (25 February 1967); Hayner, *supra* note 83 at 20; Minow, *supra* note 21 at 88.

⁹² Richard Goldstone, “Fifty Years After Nuremberg: A New International Criminal Tribunal for Human Rights Criminals” in Albert Jongman, ed, *Contemporary Genocides: Causes, Cases, Consequences* (Leiden: PIOOM, 1996) 215; Michel Feher, “Terms of Reconciliation” in Hesse and Post, *supra* note 80 at 329; Akhavan, *supra* note 6 at 766; Cassesse, *supra* note 45 at 11; Akhavan, *supra* note 6 at 766.

⁹³ Akhavan, *supra* note 6 at 774; Neil Kritz, “Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass violations of Human Rights” (1996) 59:4 *Law and Contemporary Problems* 127 at 132; Tina Rosenberg, *The Haunted Land: Facing Europe’s Ghosts After Communism* (New York: Vintage, 1996); Robert Meister, “Forgiving and Forgetting: Lincoln and the Politics of National Recovery” in Hesse and Post, *supra* note 80 135 at 139; Goldstone, *supra* note 83 at 491; Hayner, *supra* note 83 at 607.

⁹⁴ Immi Tallgren speaks of a “funeral of sorrow.” Tallgren, *supra* note 1 at 593. Mark Osiel views prosecutions as imposing “meaningful order on some of the most disorderly and unsavory events” Osiel, *supra* note 2 at 2. Emmanuel Le Roy Ladurie speaks of “an enormous national psychodrama, psychotherapy on a nationwide scale.” Quoted in Henry Rousso, *The Vichy Syndrome: History and Memory in France since 1944* (Cambridge: Harvard University Press, 1991) at 210. Payam Akhavan argues that the law’s message can “help heal the wounds, exorcise the specters of the past, and build a solid moral foundation for future generations.” Akhavan, *supra* note 6 at 774.

⁹⁵ Jackson, *supra* note 38 at 31.

(E) Establishing a Record of Past Events

“Truth is the cornerstone of the rule of law, and it will point towards individuals, not peoples, as perpetrators of war crimes. And it is only the truth that can cleanse the ethnic and religious hatreds and begin the healing process.”

-Madeline Albright⁹⁶

According to this account, mass atrocity prosecutions may produce a record of violations capable of combatting the distortion of national history ordinarily found in the aftermath of mass atrocities.⁹⁷ The trial record, according to this view, may counter the silence and denial surrounding past atrocities. The law’s impartial and detailed approach may provide a credible account of the events to be condemned, making it more difficult for societies to take refuge in denial by giving legitimacy to otherwise contestable facts.⁹⁸ Some argue that

⁹⁶ *Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting*, U.N. COR, 3217th mtg., at 12, U.N. Doc. S/PV.3217 (25 May 1993).

⁹⁷ In case law: *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-55, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties (31 July 2008) at para. 11 and 16 (International Criminal Court); *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1432, Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008 (11 July 2008) at para. 43 (International Criminal Court); *Prosecutor v. Drazen Erdemovic*, IT-96-22-Tbis, Sentencing Judgment (5 March 1998) at para. 21 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber); *Prosecutor v. Dusko Sikirica et al*, IT-95-8-S, Sentencing Judgement (13 November 2001) at 149 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber); *Prosecutor v. Deronji*, ICTY-02-61-S, Dissenting Opinion of Judge Schomburg (30 March 2004) at para. 6 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber); *Prosecutor v. Georges Ruggiu*, ICTR-97-32-I, Judgement and Sentence (1 June 2000) at para. 72 (International Criminal Tribunal for Rwanda, Trial Chamber). In the literature Ruti Teitel, “Bringing the Messiah Through the Law” in Hesse and Post, *supra* note 80 181 at 181, note 19; Richard Ashby Wilson, “From Monumental History to Microhistories” in Richard Ashby Wilson, ed, *Writing History in International Criminal Trials* (New York: Cambridge University Press, 2011) 112 at 117; Janine Clark, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia* (New York: Routledge, 2014) at 86; Antonio Cassese, “Reflections on International Criminal Justice” (2011) 9:1 J Int Crim Justice 271 at 278; Minow, *supra* note 21 at 50; Michael Ignatieff, *The Warrior’s Honor: Ethnic War and the Modern Conscience* (New York: Henry Holt and Co., 1998) at 183.

⁹⁸ Fletcher and Weinstein, *supra* note 7 at 587; David Crocker, “Reckoning with Past Wrongs: A Normative Framework” (1999) 13:1 Ethics Int Aff 43 at 50; Minow, *supra* note 21 at 50; Ignatieff, *ibid* at 183; Louis Kreisberg, “External Contributions to Post-Mass-Crime Rehabilitation” in Beatrice Pouligny, Simon Chesterman and Albrecht Schnabel, eds, *After Mass Crime. Rebuilding States and Communities* (New York: United Nations University, 2007) 252 at 256.

victims need to know just what they need to forgive in order to find closure.⁹⁹ The record is said to “reduce the range of permissible lies” and to bring consensus on some elementary truths.¹⁰⁰ Others also argue that knowing the truth can alleviate some of the survivors’ suffering caused by not knowing the facts surrounding the loss of relatives.¹⁰¹

The aspiration to establish a record of past violations evokes a narrative picturing the record as a testament to the suffering caused by repression. As lies and manipulation often play an important role in the radicalization of public opinion, as a precursor to atrocities, truth is portrayed as having the power to reveal the full details of the folly having ravaged the country. This narrative depicts the population as metaphorically brought back to reason after having been corrupted by lies and fears. A form of progress is enabled by the record, allowing for the public discussion of questions having previously remained repressed.

(F) Preventing the Recurrence of Mass Atrocities

“I believe that a properly constituted and structured [international criminal court] can make a profound contribution in deterring egregious human rights abuses worldwide.”

-Bill Clinton¹⁰²

⁹⁹ Leo Valladares asks “how can you forgive if you don’t know what you are forgiving or whom you are forgiving David Gonzalez, “Rebel War Comes Back to Haunt Honduran Base”, *New York Times* (8 October 1999) A3. Such events shatter otherwise normal cognitive assumptions regarding the existence and compassion of loved ones. Arthur Neal, *National Trauma and Collective Memory: Major Events in the American Century* (New York: Routledge, 1998) at 201; Minow, *supra* note 21 at 63.

¹⁰⁰ Michael Ignatieff, “Articles of Faith” (1996) 25:5 *Index Cens.* at 114.

¹⁰¹ Marcelo Suarez-Orozco, “The Heritage of Enduring a Dirty War: Psychological Aspects of Terror in Argentina” (1991) 18:4 *The Journal of Psychohistory* 469 at 491; Goldstone, *supra* note 83 at 492.

¹⁰² “Clinton’s Words: The Right Action”, *New York Times* (1 January 2001) A6.

The deterrence account argues that prosecutions have the ability to prevent criminality.¹⁰³ This view maintains that the benefit resulting from punishment – the diminution of criminality – outweighs the individual suffering inflicted on the delinquent, thereby rendering punishment desirable. Deterrence can be divided into two categories: specific and general deterrence. Specific deterrence operates at the individual level, inflicting fright and humiliation by the prospect of punishment.¹⁰⁴ General deterrence operates at the general level, by voicing to all members of society that crime will be punished.¹⁰⁵ General deterrence has an educational function, arguably strengthening the public moral code by repeating society's disapproval of criminality.¹⁰⁶ By a pure matter of habit, fear or respect for authority, citizens are thus induced into respecting the law autonomously.

Once transposed onto the international plane, this perspective argues that high-ranking leaders can be influenced by international criminal justice due to their tendency to engage in delinquency for self-interested reasons.¹⁰⁷ While conflict entrepreneurs defeat their

¹⁰³ Some view this utilitarian function as the very justification for this violent and otherwise potentially troubling measure. Jeremy Bentham, *Principles of Penal Law* (London: Tait, 1843); Duff, *supra* note 61 at 3-19; Herbert Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Oxford University Press, 1982) at 132-147.

¹⁰⁴ Daniel Nagin, "Criminal Deterrence Research at the Outset of the Twenty-First Century" in Michael Tonry, ed, *Crime and Justice: A Review of Research* (Chicago: Chicago University Press, 1998) 1 at 12; Johannes Andenæs, *Punishment and Deterrence* (Ann Arbor: University of Michigan Press, 1974) at 9; James Gibbs, *Crime, Punishment, and Deterrence* (New York: Elsevier, 1975) at 32-49.

¹⁰⁵ Being aware of this message – that the costs of criminality significantly outweigh its benefits – potential offenders are thus expected to refrain from breaking the law. Nigel Walker, "The Efficacy and Morality of Deterrents" (1979) 18 *Crim L Rev* 129 at 138.

¹⁰⁶ Andenæs, *supra* note 104 at 7-8; Harold Grasmick and Donald Green, "Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior" (1980) 71 *J Crim Law Criminol* 325 at 329-32; Charles Tittle, *Sanctions and Social Deviance: The Question of Deterrence* (New York: Praeger, 1980) at 18; Ray Paternoster and Ronet Bachman, "Perceptual Deterrence Theory" in Francis Cullen and Pamela Wilcox, eds, *The Oxford Handbook of Criminological Theory* (New York: Oxford University Press, 2013) 649 at 655-57.

¹⁰⁷ Akhavan, *supra* note 6 at 743-52; Hyeran Jo and Beth A Simmons, "Can the International Criminal Court Deter Atrocity?" (2016) 70:3 *Int Organ J* at 27-28; Jaime Malamud-Goti, *Game Without End: State Terror and the Politics of Justice* (Norman: University of Oklahoma Press, 1996) at 81; Diane Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime" (1991) 100:8 *Yale L J* 2537 at 2539. In the case law: *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Sentence pursuant to Article 76 of the Statute (10 July 2012) at para 16 (International Criminal Court, Trial Chamber I). See also *Prosecutor v. Zejnir Delalic & Others*, IT-96-21 -T, Judgement (16 November 1998) at para. 1234 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber); *Prosecutor v. Anto Furundzija*, IT-95-17/1, Judgement (10 December 1998) at para 290 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber); *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Judgment (2

enemies have historically been rewarded for their deeds, and enjoyed considerable wealth and power as a consequence, the prospect of international criminal punishment may make such behaviour less promising.¹⁰⁸ In this respect, studies have established a correlation between the signaling of signs of activity from the ICC and the reduction of intentional civilian killing in zones of conflict.¹⁰⁹ Punishment, it is argued, also fights the culture of impunity by communicating to high-ranking leaders that mass atrocities cross a certain line, which the international community is now willing to maintain.¹¹⁰ Leaders who envisage crossing this line, it is argued, thus risk tarnishing their image and being shunned from profitable commercial and political relationships on the international plane.¹¹¹

September 2008) at para 2 (International Criminal Tribunal for Rwanda, Trial Chamber); *Prosecutor v. Georges Rutaganda*, ICTR-96-3-T, Judgment (6 December 1999) at para 456 (International Criminal Tribunal for Rwanda, Trial Chamber); *Prosecutor v. Jean Kambanda*, ICTR-97-23-S, Judgement and Sentence (4 September 1998) at para. 26 (International Criminal Tribunal for Rwanda, Trial Chamber). The resolution adopted by the Security Council establishing the ICTY further states that this institution was created “believing that the prosecution of persons” contributes “to ensure that such violations are halted.” S.C. Res. 827, UN DOC S/RES/827 (25 May 1993). In the literature: Theodor Meron, “From Nuremberg to the Hague” (1995) 149 *Mil L Rev* 107 at 110-111; Antonio Cassese, *supra* note 6 at 17; Luis Moreno-Ocampo, “Keynote Address: Integrating the Work of the ICC into Local Justice Initiatives” (2005) 21:4 *American University International Law Review* 497 at 499; Jann Kleffner, “The Impact of Complementarity on National Implementation of Substantive International Criminal Law” (2003) 1:1 *Journal of International Criminal Justice* 86 at 113; Hans-Peter Kaul, “Construction Site for More Justice: The International Criminal Court After Two Years” (2005) 99:2 *AMJIL* 370 at 384.

¹⁰⁸ The mere prospect of having to undergo the tiresome and humiliating process of international criminal prosecution – were it even to result in an acquittal – could make other, less violent avenues more attracting to these individuals. This deterrent effect is argued to be strongest in situations where the ICC has issued an indictment, where human rights organizations are mobilized to advocate for justice, and where leaders perceive themselves as being dependent on the international community’s foreign aid and trade networks. Jo and Simmons, *ibid* at 10; Michael Gilligan, “Is Enforcement Necessary for Effectiveness? A Model of the International Criminal Regime” (2006) 60:4 *International Organization* 936 at 939.

¹⁰⁹ Jo and Simmons, *supra* note 107 at 20; Courtney Hillebrecht, “The Deterrent Effects of the International Criminal Court: Evidence from Libya” (2015) 42:4 *Int’l Interactions* 618 at 628; Hunjoon Kim and Kathryn Sikkink, “Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries” (2010) 54:4 *Int’l Stud Q* 939 at 941.

¹¹⁰ Jo and Simmons, *supra* note 107 at 9. Regarding the fight against the culture of impunity, see Neil Kritz, “War Crime Trials: Who Should Conduct Them—and How?” in Belinda Cooper, ed, *War Crimes: The Legacy of Nuremberg* (New York: TV Books, 1999) 168 at 175; Orentlicher, *supra* note 107 at 2542-44; Ruti Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2002) at 28-30; Akhavan, *supra* note 6 at 748; Cassese, *supra* note 6 at 2.

¹¹¹ It is hoped that, in the long run, prosecutions will condition tomorrow’s despotic leaders into a state of habitual lawfulness. Andrea Birdsall, “Creating a More Just Order: The Ad Hoc International War Crimes Tribunal for the Former Yugoslavia” (2007) 42 *Cooperation and Conflict* 397 at 407; Jo and Simmons, *supra* note 107 at 2; Aryeh Neier and Gary Bass, “War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice.” (1998) 93 *The New York Times Book Review* 103 at 104; Kritz, *supra* note 93 at 128.

The narrative here is one where the law repeatedly impresses its message into the community's consciousness, conditioning the population into conformity. The fright of punishment can be illustrated by the gruesome spectacle of punishment described on the first page of Foucault's *Discipline and Punish*, where a criminal is executed in public after a near-endless program of suffering.¹¹² In the context of atrocity prosecutions this illustrates the horror generated by the prosecution of such unsavory crimes, with the stream of popular demonization associated to international criminals. Beyond the fright of hard treatment thus lurks the specter held by the taboo of international criminal punishment.

(IV) THE IMPERIAL FORCE

The imperial force is the force of coherence. Against the new meaning generated by the paideic force, the imperial force preserves vitality by “unleashing upon the fertile but weakly organized jurisgenerative cells an organizing principle,” capable of preserving the power of unity.¹¹³ It is the thread of original meaning against which its proponents hold on throughout the evolution of the normative world.¹¹⁴ In the context of the ICL project, this insight prevents the various narratives outlined above from leading their proponents into contradictory directions, and stands as the common denominator among the various aesthetic themes presented above. It is the point of convergence to be extracted by weighing each narrative against all others.¹¹⁵ Two aesthetic themes stand out once this is done.

¹¹² “On 2 March 1757 Damiens the regicide [was] to be conveyed in a cart, wearing nothing but a shirt, holding a torch of burning wax weighing two pounds; then, ‘in the said cart, to the Place de Grève, where, on a scaffold that will be erected there, the flesh will be torn from his breasts, arms, thighs and calves with red-hot pincer.” Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage, 1995) at 1.

¹¹³ Cover, *supra* note 8 at 16; Michaut, *supra* note 18 at 67; Snyder, *supra* note 20 at 1632.

¹¹⁴ Cover, *supra* note 8 at 16.

¹¹⁵ Speaking of narrative methodology, Donald Polkinghorne notes that the collection of storied experience provides a basis for understanding new action by means of analogy. New narratives layered upon an existing corpus are tainted by the latter. Similarities with preceding narratives take on greater force, while allowing space for notable differences to stand out: “the understanding of the new action can draw upon previous understandings while being open to the specific and unique elements.” Donald Polkinghorne, “Narrative Configuration in Qualitative Analysis” (1995) 8:1 *International Journal of Qualitative Studies in Education* 5 at 11. Drawing from this idea, Randy Gordon suggests a method for the dissection of narrative corpses: narratives should be measured against one another to determine whether they are congruent, complementary,

One overarching theme is catharsis. The narrative cast by retribution evokes this theme, depicting mass atrocity as a moral taint to be cleansed by the infliction of hard treatment.¹¹⁶ Pope Pius XII notes in the domestic context that “the fulfillment of this demand proclaims the absolute supremacy of good over evil: right triumphs sovereignly over wrong.”¹¹⁷ Expressivism similarly voices the common bond of humanity in the face of man’s destructive impulse, metaphorically bringing light after darkness. Justice can also bring healing, which is to be associated here with the theme of purification on several levels. Its symbolic force condemns perpetrators, chastises the horrors of the past and provides victim populations with catharsis in its literal, purgative sense. The trial record is to show hatemongers acting as national heroes to be tyrants who plunged the country into chaos, thereby figuratively freeing the population from the poisoning grip of radical propaganda. The general deterrent effect of mass atrocity prosecutions is ultimately to fight the evil dangers of impunity – the historic constant having, according to Cassese, given “a nod and a wink to Adolf Hitler to pursue the Holocaust.”¹¹⁸

The second overarching theme is progress. The history of the ICL project emphasises the progress achieved by the development of this norm throughout the century. Ferencz writes that “the organization of mankind moved from the family and the clan to the tribe, the feudal kingdom and the nation-state, yet the use of armed force remains the predominant method for coping with irreconcilable disputes.”¹¹⁹ ICL is depicted as forming part of a march undertaken by international law advocates to emancipate humanity from the violent disorder of a virtually lawless international community dominated by the egoistic

or contradictory. Randy Gordon, *Rehumanizing Law: a Theory of Law and Democracy* (Toronto; University of Toronto Press, 2011) at 46.

¹¹⁶ Klaassen, *supra* note 67 at 52. In the context of ICL, see Arendt, *supra* note 56 at 277; Yosai Rogat, *The Eichmann Trial and the Rule of Law* (New York: Center for the Study of Democratic Institutions, 1961) at 39-40.

¹¹⁷ Pope Pius XII, *supra* note 68 at 26.

¹¹⁸ Cassese, *supra* note 45 at 2. Similarly, see Stolk, *supra* note 7 at 998-99 (“ICL as a saviour coming from a good tradition who intervenes in a chaotic world in order to overcome the past and ensure a better future.”)

¹¹⁹ Ferencz, *supra* note 25 at 6. See also Stolk, *supra* note 7 at 999 (Commenting Prosecutor Jackson’s portrayal of “international law’s firm roots in history and civilization,” and of the IMT as a “logical outcome” of history).

privileges of state sovereignty.¹²⁰ Mass atrocity prosecutions voice that those who violate the rights of man on a systematic basis act at their peril.¹²¹ Condemning atrocity also dissolves latent desires for revenge and other means of violent self-affirmation coming from victim groups, prevents their psychic wounds from festering and paves the way for national reconciliation.¹²² The trial narrative is to cast a shock wave sooner or later altering the population's perception of the events; it will foster a public debate that will help former enemies understand their respective motivations and develop a culture of respect and non-violence. What is more, deterrence underlines that criminality is a form of human behaviour which society is now increasingly able to comprehend and control; by instilling a system of punishment and rewards into the delinquent's environment, it is said that ICL can bring certain would-be tyrants into conformity.

The ideas evoked under both of the above themes converge to some extent. Once read in conjunction with the narrative of jurisgenesis suggested above, they share its foundational commitment to dissolve the culture of impunity. They however differ in the course of action projected. Leaving aside the dream of establishing international criminal tribunals, these themes center on fighting impunity through the issuance of symbolic messages from these very institutions. They further follow a traceable roadmap: through ever-increasing presence and visibility, mass atrocity prosecutions will dissuade would-be perpetrators, heal victims and foster a culture of peace. The very punishment of mass atrocity perpetrators is to serve as an authoritative basis for ongoing conversations, both private and public, that aim to change how former enemies perceive one another. The narrative emphasis shifts from the abstract international relations conception of state sovereignty to the more tangible criminal law conception of individualized human control.¹²³ An excerpt

¹²⁰ See note 90.

¹²¹ Arendt, *supra* note 56 at 279.

¹²² Language used in Cassese, *supra* note 45 at 11; Elizabeth Kiss, "Moral Ambition Within and Beyond Political Constraints: Reflections on Retroactive Justice" in Robert Rotberg and Dennis Thompson, eds, *Truth v. Justice: The Morality of Truth Commissions* (Princeton: Princeton University Press, 2000) 68 at 71-72.

¹²³ A number of commentators have already stated that the objective of the ICL project is general deterrence, without however adding much substantiation to this claim. Cathernie Lu, "The International Criminal Court as an Institution of Moral Regeneration: Problems and Prospects" in Joanna Harrington, Michael Milde & Richard Vernon, eds, *Bringing Power to Justice?: The Prospects of the International Criminal Court*

from a speech delivered by Ban Ki-moon during the Kampala Review Conference aptly summarizes this trajectory:

“The old era of impunity is over. In its place, slowly but surely, we are witnessing the birth of a new Age of Accountability.

It began, many decades ago, with Nuremberg and the Tokyo Tribunals. It gained strength with the international criminal tribunals for Rwanda and the former Yugoslavia, as well as the so-called ‘hybrid’ tribunals in Sierra Leone, Cambodia and Lebanon. Now we have the ICC, permanent, increasingly powerful, casting a long shadow.

There is no going back. In this new age of accountability, those who commit the worst of human crimes will be held responsible. Hear the roster of names for those who have already been called to justice: General Ante Gotovina; Jean-Paul Akayesu, a city mayor; Chea Nuaon and Radovan Karadzic, prominent political leaders; Jean Kambanda, a Prime Minister; Slobodan Milosevic and Charles Taylor, heads of state. Not long ago, this would have been unimaginable.

Let us remember the mothers of Srebrenica, and the orphans of Sierra Leone, the killing fields of Cambodia and Rwanda. So many terrible names, so many haunted places. Long ago, we said: ‘Never again.’”¹²⁴

The vision is a march towards general deterrence. The “New Age of Accountability” referenced is ICL’s ever-more powerful echo throughout world society. Through international criminal prosecutions this message is to influence its different audiences among the world community so as to tighten its grip on perpetrators.

(Montreal: McGill-Queen’s University Press, 2006) 191 at 194; David Wippman, “Atrocities, Deterrence, and the Limits of International Justice” (1999) 23:2 Fordham International Law Journal 473 at 474; Mark Drumbl, “Collective Violence and Individual Punishment: The Criminality of Mass Atrocity” (2004) 99:2 Northwestern University L. Rev 539 at 560; Koskeniemi, *supra* note 6 at 7; Jan Klabbers, “Just Revenge? The Deterrence Argument in International Criminal Law” (2001) 12 Finnish Yearbook of International Law 249 at 251.

¹²⁴ See Ban Ki-moon, *supra* note 88.

(V) REDEMPTION

Cover's notion of redemptive communities is characterized by the unredeemed character reality bears to them.¹²⁵ Be it through Sharia or the conversion of American Indigenous Peoples, their members are motivated by a series of sacred narratives, which compel them to alter their surrounding environment.¹²⁶ The ICL project once taken to its conceptual limit can be said to amount to a redemptive community. The moral appeal held by the narrative corpus described above, it is suggested, guides its proponents towards the realization of a redemptive agenda of global deterrence.¹²⁷ With most of the chapter's argument now laid out, this last section will describe this desired course of action. This will be done using Foucault's notion of *société-observation*, which pushes the notion of general deterrence to the extreme.¹²⁸ Once understood as the natural consequence of conformity as found in all societies to varying degrees, this concept can shed light on the way in which fundamental norms are internalized in social life.¹²⁹

In *Discipline and Punish*, Foucault examined how by the turn of the 18th century, criminal punishment evolved from the brutal spectacle of divine condemnation to become more rational.¹³⁰ Punishment gradually became more frequent, eventually replacing the intensity

¹²⁵ Cover, *supra* note 8 at 34.

¹²⁶ Energy is drawn from the grandiosity of a march towards a distant, elevated world – from the perpetual although never ending rapprochement between reality and vision. Cover, *supra* note 8 at 34; Extabe, *supra* note 13 at 131; Levin, *supra* note 22 at 1635.

¹²⁷ Jonathan Hearn suggests that higher-order narratives “appeal to us according to how they explain, justify, and resonate with our actual experiences. [...] They are] crucial for orienting and guiding behavior.” Jonathan Hearn, “Narrative, Agency, and Mood: On the Social Construction of National History in Scotland” (2002) 44 *Comp Stud Soc’y & Hist* 745 at 750. In his celebrated analysis of the power of religious symbols Clifford Geertz denotes their ability to convey “moods and motivations” in those who believe. Clifford Geertz, *The Interpretation of Cultures* (New York: Basic Books, 1977 at 96-98. Both statements being related to Émile Durkheim's original insight in *Elementary forms of Religious Life* (Oxford: Oxford University Press, 2001) at 237.

¹²⁸ That Foucault denounced this phenomenon is made very clear in his writings. Foucault, *supra* note 112.

¹²⁹ Whether this is the result of some inherent form of coercion extending across all sectors of society is another question. Criticizing this view, Clifford Geertz, “Stir Crazy”, *The New York Review of Books* (26 January 1978).

¹³⁰ In this age of the nation-state and empiricism, a new mode of thought emerges, whereby criminality is envisaged as a form of human behaviour controllable through the novel wisdom of human sciences such as psychiatry and criminology. Foucault, *supra* note 112 at 23.

of sporadic atrocity with the softer but more systematic dissemination of discipline across all sectors of society.¹³¹ The concept of *société-observation* highlights what Foucault views as the penetration of the law's deterrent message in all spheres of social life from this period onwards: as a student, and throughout his life, as a worker, patient or soldier, citizen thus find themselves disciplined by social institutions, such that the schoolboy is observed, punished and rewarded by his master much like the factory worker and his foreman.¹³²

Foucault writes that the delinquent student unable to conform to the rules is transferred to another institution dedicated to his correction, such as a borstal. There the specter of permissible behaviour is narrowed. A heavier dosage of observation, punishment and rewards is observed. Those who fail to rehabilitate are sent to yet another institution administering heavier treatment, such as a hospital. Again, if the delinquent still proves rebellious the last step in this gradation is prison. There the highest form of control is administered.¹³³ The idea is that individuals can be shaped by the sense of normalcy enforced through constant observation.¹³⁴ Foucault likens this phenomenon to society more generally, radically stating that society conditions every member to behave within certain margins of acceptable behaviour, as individuals tend to observe their own behaviour and that of others, in fear of the humiliation associated with marginality and norm deviation.¹³⁵

¹³¹ Michel Foucault, "Disciplinary Power and Subjection" in Steven Lukes, ed, *Power* (New York: NYU Press 2005) 229.

¹³² Foucault gives the example of a 1737 edict establishing a school of drawing at the Gobelins in Paris: "Two hours a day, except on Sundays and feast days, the pupils met in the school. A roll-call was taken, from a list on the wall; the absentees were noted down in a register." He continues, "The factory was explicitly compared with the monastery; the guardian 'will open the gates only on the return of the workers, and after the bell that announces the resumption of work has been rung.'" Foucault, *supra* note 112 at 156 and 145.

¹³³ Foucault, *supra* note 112 at 211.

¹³⁴ Foucault illustrates this reality metaphorically through Jeremy Bentham's concept of the "Panopticon," a form of prison where every cell can be observed covertly from a watchtower. Knowing that his every movement can be monitored, and that his every deviation can be sanctioned, its inmate has no option but to monitor his own behaviour. Others have later referred to this concept as the "habit-creating factor." Andrew Ashworth, *Prevention and the Limits of the Criminal Law* (Cambridge: Cambridge University Press, 2013) at 25; Niels Jareborg, "What Kind of Criminal Law do we Want?" in Annika Snare, ed, *Beware of Punishment: On the Utility and Futility of Criminal Law* (Cambridge: Cambridge University Press, 1995) 14.

¹³⁵ Michel Foucault and Colin Gordon *Power/Knowledge: Selected Interviews and other Writings, 1972-1977* (New York: Pantheon Books, 1980) at 113; David Garland, *Punishment and Modern Society: A Study in Social Theory* (Chicago: University of Chicago Press, 2012) at 137. For a summary, see Philip Smith, *Punishment and Culture* (Chicago, University of Chicago Press, 2008) at 11.

The historical transformation charted in *Discipline and Punish* from occasional exemplary punishment to systematic enforcement can itself be linked to the development of the ICL project. The excerpts taken from Ban Ki-moon's speech confidently denote the increase in spectacular mass atrocity prosecutions before international tribunals in the previous decades. The different narratives on the justifications of international criminal punishment discussed throughout this chapter converge thematically, as noted in the previous section, towards the desire for ICL's ever-greater permeation of societal institutions. Progress and purity are to stem from the fight against state sovereignty, the punishment of offenders, the communication of international society's outrage, the healing of victims' wounds, the production of a record of truth, the facilitation of national reconciliation and the prevention of future atrocities. With the ICC's complementarity mechanism as its center, Ki-moon's new age of accountability is to influence the discourse of influential domestic actors. The normative message of international criminal justice is to leave the exclusive circles at its origin and disseminate into collective consciousness through the various institutions shaping everyday life. A new sense of normalcy is to emerge, in which widespread violence is erased from the collective imagination as a possible means of conflict resolution.

A number of events suggests that this desired course of action is already underway. In her book *The Justice Cascade*, Kathryn Sikkink shows that legal developments such as the obligation to punish human rights violators established by the Inter-American Court of Human Rights created important precedents, which made accountability more prevalent in Latin America and other parts of the world than it has ever been.¹³⁶ Speaking of history, Gary Bass writes that Western states increasingly seem to pay attention to and respect the principled idea that international perpetrators must be prosecuted.¹³⁷ Lutz and Reiger argue that since the 1990s prosecutions targeting heads of state have become more frequent, and that momentum to try such individuals has increased globally.¹³⁸ William Burke White

¹³⁶ Sikkink, *supra* note 52.

¹³⁷ Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2002) at 7

¹³⁸ Lutz and Reiger, *supra* note 52 at 12.

notes that the ICTY has catalyzed domestic atrocity prosecutions, while Lionel Nichols observes that the ICC's intervention in Kenya fostered discussions on rule of law.¹³⁹ Sarah Nouwen writes that catalysing effects manifested themselves in the Ugandan and Sudanese situations via individual norm entrepreneurship and Security Council member action.¹⁴⁰ Hyeran Jo and Beth Simmons more generally demonstrate that state action tends to follow whenever domestic authorities feel in the spotlight in relation to ICC indictments.¹⁴¹

CONCLUSION

This chapter has argued that the aspirations of the ICL project form into a narrative corpus, guiding its proponents towards the global internalization of its ban on mass atrocity. This argument must however be understood with caution. The conceptions of justice described above are mere general propositions, bound to conflict with individual interpretations. Whether such aspirations can be met remains the subject of strong debate in the literature, moreover, leading many to question this idealistic vision of international criminal justice.¹⁴² What is more, punishment cannot be reduced to a single meaning or a single purpose; David Garland rightly warns that punishment “is not susceptible to a logical or formulaic definition because it is a social institution embodying and condensing a range of co-ordinating forces and purposes.”¹⁴³ More than proposing a roadmap for the future with definitive precision, this chapter has principally sought to establish that the appeal held by the above aspirations has a generic effect and direction. Its effect at the personal level is close to what Suzanne Langer adroitly describes in her book *Philosophy in a New Key*:

¹³⁹ William Burke-White, “The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina” (2008) 46 *Columbia Journal of Transnational Law* 279 at 282; Lionel Nichols, *The International Criminal Court and the End of Impunity in Kenya* (Heidelberg: Springer, 2015) at 15.

¹⁴⁰ Sarah Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: CUP, 2013) at 22. See also Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick, N.J.: Transaction Publishers, 1997) (generally viewing attitudinal evolutions attributable to ongoing public debate following prosecutions for Argentina's 1980s' Dirty War);

¹⁴¹ Jo and Simmons, *supra* note 107 at 20.

¹⁴² See note 25.

¹⁴³ Garland, *supra* note 135 at 17.

“Men who follow the sea have often a deep love for that hard life, which no catalogue of its practical virtues can account for. But in their dangerous calling they feel secure; in their comfortless quarters they are at ease. Waters and ships, heaven and storm and harbor, somehow contain the symbols through which they see meaning and sense in the world, a ‘justification,’ as we call it, of trouble [... those vocational sacrifices] show how entirely realistic performances may point beyond themselves, and acquire the value of super-personal acts, like rites. They are the forms of devotion that have replaced genuflection, sacrifices and solemn dances.”¹⁴⁴

¹⁴⁴¹⁴⁴ Susanne Langer, *Philosophy in a New Key: A Study in the Symbolism of Reason, Rite, and Art* (Cambridge: Harvard University Press, 1996) at 235.

CHAPTER 2

A MEANS OF SPECTACULAR PUNISHMENT

INTRODUCTION

The preceding chapter concluded that the ultimate objective of the ICL project is the eradication of mass atrocity through general deterrence. The chapter argued that the proponents of this endeavour derive a certain motivation in expanding the influence of the ICL project throughout as many social sectors as possible. Its ultimate objective was ultimately compared to Foucault's notion of *société-observation*: a situation pushing the concept of general deterrence to the extreme, in which the law's message is instilled into every institution governing the population's day-to-day life. The school setting and workplace are compared in this metaphor to disciplinary sites, dispensing a sense of normalcy through punishment and reward.¹ After prolonged periods of surveillance, Foucault argues, individuals eventually come to adopt the norm dispensed and obey instinctively, so to speak, in the absence of organized discipline. The result is a society conditioned to its norms, observing its own behaviour autonomously. This phenomenon drawn from *Discipline and Punish* was chosen in this chapter to illustrate an ideal state of affairs where, through prolonged exposure to the norm against atrocity, post-conflict society is ultimately made to view such acts of violence as unthinkable and repulsive.

Considering the foregoing, one may wonder how this *société-observation* could be achieved in the type of context in which international criminal justice is ordinarily rendered, where institutional means tend to be limited and the delinquent population substantial. This chapter constitutes an attempt to answer this difficult question by envisaging atrocity prosecutions as a form of ritual whose function in dispensing the norm against atrocity is served by some of the more striking features of the process: the sight of a high-ranking authority figure behind the dock, the shocking scope and viciousness of the violence unveiled, the solemn rigour of the criminal justice process, the fundamental

¹ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage, 1995) at 179.

importance of the norms upheld, or, more generally, the issuing of an official criminal condemnation by the state against a formerly powerful regime. Many such features, in addition to the sporadic nature of atrocity prosecutions and the limited means available to disseminate the message, can be compared to the historical beginnings of criminal justice in pre-industrial Western society. The first portion of *Discipline and Punish* indeed describes criminal punishment in the 18th century as a series of sporadic rituals anchored in the dramatic nature of the violence reproached – as public executions embedded in a series of religious metaphors representing the offender’s awesome descent into hell.

Atrocity prosecutions share with their pre-modern counterpart the ability to convey the law’s message of general deterrence by dramatically conveying its normative message. This form of symbolic communication, while outdated and replaced with the wider array of modern disciplinary institutions making up the modern penal system, provides a helpful model through which to envisage normative dissemination in this context. In the absence of the broad network of penal, police, carceral, and rehabilitative institutions constituting our modern criminal justice system, the pre-industrial model may thus explain a measure of the compliance obtained through the alternative means of spectacular ritual punishment. While less efficient and all-embracing, the pre-modern model is nevertheless associated with certain normative effects in *Discipline and Punish*, arguably by fascinating the population.² In addition to being coherent with some of the principles of symbolic communication presented in the introductory chapter, this insight is further supported by more recent works on the history of criminal justice, which will be presented below.

This chapter focuses on this pre-modern form of normative communication as applicable to the reality of atrocity prosecutions. Using Mary Douglas’ book *Purity and Danger* as its theoretical anchoring, this chapter argues that international criminal justice, when received positively by the population, disseminates its normative message by captivating the

² *Ibid* at 76.

imagination.³ The insight derived from Douglas' book is that this form of communication produces its normative effect by conflating the horrors reproached and the moral grandeur of the norms upheld. This combination, it will be argued, constitutes an intuitive message ultimately generating among its audience a sense of moral commitment. Much in the same way as the aspirations of international criminal justice were said in the previous chapter to guide their proponents towards the realization of their objectives by generating a sense of moral cogency, likewise, this chapter will show that mass atrocity prosecutions as symbolic displays have the potential to push important segments of the population into conformity with this same objective. With repetition, time and under several favourable conditions, as will be shown, the norm against atrocity can settle among increasing segments of the population, ultimately acquiring mainstream adherence and displacing radical ideologies.⁴

ICL literature frequently points to the symbolic role of international criminal justice, but largely refrains from engaging in sustained and detailed discussion of the symbolic effects of international criminal justice.⁵ Research on the influence of atrocity prosecutions on national history making itself tends to mention the subject briefly before dwelling in some measure of detail on the technical difficulties involved in spectacular justice – the arbitrary choice of defendants, porous legal definitions, distortions of history, dangers of a mistrial, the voicing of dissident opinions threatening the dominant narrative, and so on.⁶ The concerns raised are technical and analytical in nature, and, for this reason, arguably address the concerns of jurists and academics more than those of the population.⁷ To speak of the subject in a technical mode of analysis is to evacuate the question of public reception in important respects. This insistence on formal difficulties further tends to portray the didactic insight as potentially founded on the sociological plane, but riddled with legal and ethical difficulties. Contributing to the vague impression of uncertainty surrounding

³ Mary Douglas, *Purity and Danger: An Analysis of Concepts of Pollution and Taboo* (New York: Psychology Press, 2003).

⁴ This chapter mostly explains the processes at play when ICL's message is accepted. It is to be read in conjunction with chapters 3 and 4, which show an altogether different process, when its message is rejected.

⁵ See Introduction Section I.

⁶ For a detailed overview, Gerry Simpson, *Law, War and Crime* (Malden: Polity, 2007) chap.3-4.

⁷ That dramatic political messages tend to be assimilated subjectively more than objectively, David Kertzer, *Ritual, Politics, and Power* (New Haven: Yale University Press, 1988) at 82.

atrocities prosecutions' didactic potential finally is the fact that the many works on historic atrocities prosecutions in the law and the humanities literature tend to follow divergent disciplinary threads and sensibilities, producing relevant albeit somewhat disparate insights ultimately leading to no unified or coherent theory.⁸ One is left to wonder just how, precisely, atrocities prosecutions may come to influence the broader public as desired.⁹

The present chapter constitutes an attempt to answer this question by developing and systematizing existing insights into a coherent whole. In order to do so, this chapter builds on a theory frequently cited in transitional justice scholarship termed the "didactic" function of atrocities prosecutions. This theory postulates that proceedings by their spectacular nature can stimulate wide-ranging public deliberations and ultimately support democratic change. This idea was originally proposed by Judith Shklar in her 1964 book *Legalism* as an insight spanning a few lines, and was notoriously transposed into transitional justice scholarship by Carlos Nino, again in a few lines.¹⁰ The idea was ultimately expounded in the first Part of Mark Osiel's book *Mass Atrocity, Collective Memory and the Law*, the second Part of which focuses on the formal difficulties of didactic

⁸ The range is from the historical, literary and psychoanalytical theories, and broadly focuses on questions other than that of normative diffusion. Richard Ashby Wilson "From Monumental History to Microhistories" in Richard Ashby Wilson, ed, *Writing History in International Criminal Trials* (Cambridge: Cambridge University Press, 2011) 112; Shoshana Felman, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (Cambridge: Harvard University Press, 2002); Yasco Horsman, *Theaters of Justice: Judging, Staging, and Working Through in Arendt, Brecht, and Delbo* (Stanford: Stanford University Press, 2011); Lawrence Douglas, *The Memory of Judgment Making: Law and History in the Trials of the Holocaust* (New Haven: Yale University Press, 2001).

⁹ Authors writing on criminal punishment in pre-modern society, such as Douglas Hay, tend to present it as a "horror spectacle" impressing its message onto the popular imagination; authors writing on modern atrocities prosecutions, such as Hannah Arendt, speak of a "dramatic" or "spectacular" event, this time resorting to theatrical comparison; and authors writing on the history of legal procedure, such as Antoine Garapon, often mention the notion of ritual to evoke the law's influence. While lucid, most of these insights largely remain unexplored suggestions, often written amidst schemes of argumentation directed outside the fields of normativity or symbolic communication. The following pages fill this gap. Douglas Hay, "Property, Authority and the Criminal Law" in Douglas Hay, Edward Thompson and Peter Linebaugh, eds., *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (Harmondsworth: Penguin Books, 1977) 17; Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin Classics, 2010) at 9, 287; Antoine Garapon, *L'âne portant des reliques: essai sur le rituel judiciaire* (Paris: Le Centurion, 1985) at 59-61, 141-157.

¹⁰ Judith Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge: Harvard University Press, 1964) at 73-75, 156, 209-10; Carlos Nino, *Radical Evil on Trial* (New Haven: Yale University Press, 1996) at 147.

justice.¹¹ The didactic theory is frequently cited but appears to have been the object of limited scholarly attention, being confined to a few lines in Shklar and Nino's books and scattered across a few more passages in Osiel's. Importantly, this theory explicitly refers to the symbolic value of punishment, whose functioning rests on ritual theory in many respects, but does not engage with it.

This chapter therefore serves to complete the theory of didactic justice, moving it beyond its present understudied state by discussing it in some measure of detail in light of ritual theory. To do so, the first part of this chapter presents Mary Douglas' pollution theory, which it next applies to the example of 18th century British prosecution ceremonies. Doing so will provide an interpretative framework showing some of the ways in which the justice process conveys its normative message using ritual communication. The second part of this chapter begins by presenting a second symbolic communication theory, Victor Turner's social drama theory, so as to adjust some of the insights formulated in the first part of the chapter to the modern particularities of mass atrocity prosecutions. The chapter next applies this theory and the preceding to the example of the Frankfurt-Auschwitz Trial, again showing some of the ways in which the proceedings conveyed their normative message to and influenced the German public, both during and after the period of the trials.

(I) THE PRE-MODERN RITUAL OF PUNISHMENT

The first part of this chapter will examine the pre-modern ritual of criminal punishment. While discussed without direct reference to international criminal justice, this inquiry will serve to lay out the normative communication mechanism operated by atrocity

¹¹ Osiel sums up (at 24-36) the theory as elaborated by Shklar and Nino in brief, general, but helpful terms, notes the apparent filiation with Durkheim's conception of criminal punishment, but rejects this proposition ultimately to concentrate on an alternative model of "civil dissensus." This model emphasizes that rules of procedure, evidence and professional ethics displayed at trial may come to foster a measure of civility in the ensuing public debates on the country's past (at 36-59). This chapter proposes an alternative interpretation of the deliberative theory originally proposed by Shklar, going back to the roots of the argument, whose inner-workings rest on ritual theory in important respects. This chapter suggests that mass atrocity trials, in contrast with Osiel's argument, do not find their principal social effect in the liberal influence of procedure and evidence rules. Rather the principal effect is the stigmatization of the previous regime and concurrent honouring of fundamental principles of liberal democracy. Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick: Transaction Publishers, 1997).

prosecutions in the absence of elaborate state apparatus. The idea here is to analogize between pre-modern and atrocity proceedings. The first section does so by revealing through the anthropological lens the normative influence operated by symbols of pollution and moral grandeur, which tend to be common in criminal proceedings. The second section examines this communicational pattern using the example of the criminal justice process in pre-modern British society. Together both sections serve to lay out the mechanics of the normative communication process at play in spectacular punishment.

(A) The Pre-Modern Ritual of Punishment and Symbolic Communication Theory

The symbolic communication theory selected for this chapter is drawn from Mary Douglas' book *Purity and Danger*.¹² Several of the ideas presented in this book converge towards what Douglas terms her "pollution theory." This section begins by presenting this theory in isolation from the subject of pre-modern and international criminal punishment, before summarizing those insights most relevant to criminal punishment in its second portion.

(1) Douglas' Pollution Theory

Purity and Danger is considered a classic in the field of anthropology, and was originally written as an attempt to underline the many similarities between tribal and modern society as regards pollution beliefs.¹³ Douglas begins the book by engaging with sociological theory on the formation of cognition. Individuals and cultures, according to Douglas, instinctively construct cognitive worlds intended to provide a certain measure of predictability and intelligibility to their existence.¹⁴ The formation of cognitive worlds begins with the creation of mental categories, in which objects with recognisable shapes are labelled and pigeon-holed to facilitate perception. Their development eventually leads

¹² Douglas, *supra* note 3.

¹³ The book is now criticized from the methodological standpoint, but is nevertheless acknowledged as a strong illustration of established anthropological principles. *E.g.*, Robbie Duchinsky, "The Politics of Purity: When, Actually, is Dirt Matter out of Place?" (2013) 119:1 Thesis Eleven 63 at 67; Jonathan Klawans, "Rethinking Leviticus and Rereading Purity and Danger" (2003) 27:1 AJS Review 89 at 95.

¹⁴ Compare with similar writings on this subject in Cover's *Nomos and Narrative* as laid out in chapter 1 Section (I), and with Section (V) of the introductory chapter. Douglas, *supra* note 3 at 3.

to an overall sense of order and comfort providing its adherents with neatly separated categories, sometimes exaggerating demarcations between one category and the next for the sake of clarity.¹⁵ “In perceiving,” writes Douglas, “we are building, taking cues and rejecting others.”¹⁶ The construction of cognitive worlds is informed by a natural drive for intelligibility, such that perceptual cues matching existing categories are often perceived intuitively, ambiguous ones as if in harmony with others, and discordant ones rejected.¹⁷

The natural coexistence of this drive for order with the normative world providing for this very need instinctively makes discordant cues difficult. The encounter of discordant cues against this reality amounts to an encounter “at the edge” of the known and predictable; it is an unpleasant experience confronting one with the fragility and potentially fictitious nature of one’s established sense of order. Such encounters, according to Douglas, often take the form of perceptions of impurity. According to this argument, disdain and abjection experienced in the face of anomalies correspond less to an authentic risk of disease and uncleanness, than to contradictions unsettling one’s established sense of order: “In chasing dirt, in papering, decorating, tidying,” writes Douglas, “we are essentially re-ordering our environment, making it conform to an idea.”¹⁸ Pollution theory shows this drive for intelligibility to tie elements disturbing one’s sense of order to perceptions of impurity, and often to link those conforming fully to their respective category to perceptions holiness and the sacred.¹⁹ Both extremes are thus shown to function as symbols, preserving the system through complementary signals. While impurity strengthens defiled categories by perceptions of disdain, purity strengthens conform categories by sacredness.

¹⁵ Douglas, *supra* note 3 at 5, 51.

¹⁶ Douglas, *supra* note 3 at 44-45. Compare with Bateson’s writings on this theme, as laid out in Section (V) of the introductory chapter.

¹⁷ Douglas, *supra* note 3 at 44-45; Richard Fardon, *Mary Douglas: An Intellectual Biography* (London: Routledge, 1995) at 87. Summarizing this pattern, Philip Smith, *Punishment and Culture* (Chicago: University of Chicago Press, 2008) at 27-28, 59.

¹⁸ Douglas, *supra* note 3 at 3; Michael Carroll, “Totem and Taboo, Purity and Danger... and Fads and Fashions in the Study of Pollution Rules” 17:2 (1983) *Behavior Sci Research* 271 at 275; Duchinsky, *supra* note 13 at 63.

¹⁹ Duchinsky, *supra* note 27 at 66.

The book's most renowned chapter illustrates this phenomenon using the example of food rules in *Leviticus*.²⁰ Douglas begins her analysis by noting that the word "holiness" in Hebrew means "set apart," and "completeness," before proceeding to show that the concept of holiness in *Leviticus* appears to stem from conformity with existing categories in the Bible.²¹ Where *Genesis* separates the realms of earth, water and firmament, *Leviticus* specifies the characteristics of edible animals: animals that walk on earth and chew the cud are edible while those who creep are unclean, fish that swim in the sea with fins and scales are edible while those who roam the seabed are unclean, and birds that fly in the sky and have two legs are edible while four-footed creatures that fly, such as grasshoppers, are unclean.²² Any class of creature whose mode of locomotion contradicts that set out for its element is thus impure. Creatures that creep or swarm upon the earth are especially so due to their cutting across categories: "Eels and worms inhabit water, though not as fish; reptiles go on dry land, though not as quadrupeds [...]. There is no order in them."²³ The pig is cloven-footed but does not chew the cud, an anomaly commanding repulsion.²⁴

Purity and Danger next turns to the theme of ritual, which is largely considered as the social practice *par excellence* for the diffusion and maintenance of social order. Much of the argument developed on this theme centers on the role of symbols of impurity and defilement in shaping symbolic experience.²⁵ Douglas notes that taboos such as anthropophagy and incest, along with bodily margins such as sperm, blood and excrement tend to be featured in initiation rites, with the effect of imbuing the ceremony with "the special powers of fear and the unknown."²⁶ She likewise notes that sorcerers often embody ambiguous roles, wear attire destined for the opposite sex, and adorn symbols of life and

²⁰ The third book in the Torah and Old Testament.

²¹ That which is holy thus excludes, amongst other things, the mixing of sexual roles, accession to religious office by individuals afflicted by handicap or disease, the crossing of animal breeds, or even the weaving of composite types of fabric. Dietary rules, according to Douglas, "develop the metaphor of holiness" according to the same pattern. Douglas, *supra* note 3 at 65.

²² *Ibid* at 69; Fardon, *supra* note 17 at 90.

²³ Douglas, *supra* note 3 at 70.

²⁴ *Ibid* at xiv, 52, 69. For later comment by Douglas, see "Atonement in Leviticus" (1993) 113 *Jewish Stud Quart* 109 at 112-13; "The Forbidden Animals in Leviticus" (1993) 59 *J Stud Old Testament* 3 at 5-8.

²⁵ Douglas, *supra* note 3 at 148.

²⁶ *Ibid* at 149; Fardon, *supra* note 17 at 93; Klawans, *supra* note 13 at 90.

death.²⁷ “Anomalous elements are usually treated with revulsion,” thus writes Douglas “but sometimes also become sacred sources of the renewal and affirmation of society.”²⁸ She finally explores this insight using Arnold van Gennep’s work on rites of passage, which depicts rituals as serving to highlight transitions from one social category to the next.²⁹ This transition is typically accompanied by fear, as doing so implies a brief moment spent “in the margins,” outside ordinary categories.³⁰ The pubescent initiand, for example, is neither boy nor man and consequently faces the dangers of the unknown and undefinable for this situation outside ordinary structure.³¹ “To be in the margins,” according to Douglas, “is to be in contact with danger, at a source of power.”³²

Many rituals consequently accompany transitions from one category to the next, derive some of their potency from anxieties associated thereto, and often do so through symbolic displays invoking dirt, impurity, disorder, chaos, and other such sensations. Rituals also tend to include a normative dimension, serving to protect social structure by associating discordant elements with perceptions of impurity and concordant elements with perceptions of purity. Pigs, stillborn children or androgynous garment thus inspire vehement reactions in some cultures, while animals conforming to the biblical categories of earth, waters and firmament are considered pure in *Leviticus*. The cognitive influence exerted by purity/impurity symbolism can also create a heightened symbolic space apart from ordinary life, where ordinary meanings are as if suspended, in an interlude between one social category and the next.³³ This sense of an extra-ordinary experience, induced through extra-ordinary symbolism, accompanying the ritual “rebranding” or “re-

²⁷ And unborn children among the Lele carry ill-will due to their ambiguous and marginal state. *Ibid* at 124.

²⁸ *Ibid* at 66; 49.

²⁹ Arnold van Gennep, *The Rites of Passage* (New York: Psychology Press, 1960).

³⁰ Van Gennep illustrates this phenomenon depicting society as a house with rooms and corridors, in which passage from one state to another is dangerous. *Ibid* at 76; Douglas, *supra* note 3 at 119.

³¹ Novices are temporarily treated as outcasts during the marginal period, either living far from society, or sufficiently close for unplanned contacts to take place. In this event, the initiand are sometimes encouraged to commit offenses such as theft and rape. Douglas, *supra* note 3 at 120 referring to Hutton Webster, *Primitive Secret Societies. A Study in Early Politics and Religion* (New York: Macmillan, 1908), Chapter III.

³² Douglas, *supra* note 3 at 120.

³³ Van Gennep, *supra* note 29 at 98.

categorizing” of a given category such as the passage from boyhood to manhood, from celibacy to marital union, from life to death, is central to the argument here.

(2) Towards a Symbolic Communication Model of Pre-Modern Criminal Punishment

These insights can be applied to pre-modern criminal punishment. Criminality, by nature, is the breaking of boundaries of acceptable conduct. The individual deviating from these boundaries can be said to “enter the margins” outside social structure according to this logic. The association between criminality and category-defilement is corroborated by a number of statements in *Purity and Danger*, which for instance highlights that “a man who has spent time ‘inside’ prison is put permanently ‘outside.’”³⁴ Like the bodily margin, between the inner-body and the outer-body, like the initiand, neither boy nor man, or like any other defiling elements mentioned above, the criminal remains within the community but no longer conforms to its established categories of predictable conduct.³⁵ His crime is a discordant cognitive cue as in *Purity and Danger*, a confrontation and threat to the very order of social structure, and for this reason commands a variety of responses oscillating between fear, disgust and rejection.³⁶ The ritual of criminal punishment can thus be understood as the very enactment of this symbolic reality, as symbolically transferring the offender’s status from “within” the community to “without” it in order to protect social structure. While historians of the criminal justice process sometimes note this exclusionary function, no scholarship explicitly studies criminal proceedings from this vantage point.³⁷

³⁴ The strong reaction commanded by crime as an abomination resting outside social structure is also underlined in the forms of delinquent behavior listed in initiation rites, such as stealing, raping, waylaying, anthropophagy and incest. Douglas, *supra* note 3 at 31, 120-21, 166-68, 213.

³⁵ On the rule of law as securing expectations on behavior, in general, Niklas Luhmann, *Trust and Power: Two Works by Niklas Luhmann* (Toronto: Wiley, 1979), and, more specifically, at 34.

³⁶ Douglas, *supra* note 3 at 3. On the link between criminality, filth and danger, Smith, *supra* note 17 at 13, 21; Martha Grace Duncan, *Romantic Outlaws, Beloved Prisons: The Unconscious Meanings of Crime and Punishment* (New York: New York University Press, 1996) at 121.

³⁷ The connection between criminal punishment and social exclusion is established in the sociology of punishment, which tends to be influenced by Durkheim’s writings on punishment. *The Division of Labor in Society* (London: Simon and Schuster, 1997) at 214, 221; Harold Garfinkel, “Conditions of Successful Degradation Ceremonies” (1956) 61:5 *American Journal of Sociology* 420; Kai Erikson, “Notes on the Sociology of Deviance” (1962) 9:3 *Social Problems* 307 at 311. In history and archeology, Louis Gernet, “Sur l’exécution capitale” in Louis Gernet, ed, *Anthropologie de la Grèce antique* (Paris: Masperio, 1968) 303 at 326-27.

The preceding suggests that criminal punishment in its ritual form in fact operates as a rite of passage in the Van Gennepian sense, depicting the offender as “within” the community at the outset of the ceremony, and “without” it at its endpoint.³⁸ A heightened atmosphere should be expected to permeate this transitional moment outside ordinary categories of social structure, as the offender is depicted to belong neither “within” nor “without” the community.³⁹ Where this symbolic space outside ordinary reality tends to be created by displaying category-defiling symbolism, such as bodily margins, sperm or blood, it is suggested that the pre-modern criminal punishment ritual should itself center on the extraordinary or defiling nature of the acts reproached.⁴⁰ Complementing it should also be strong references to the importance and subjective “purity” of the norms upheld.⁴¹ Where *Purity and Danger* shows that elements contradicting social structure tend to be condemned and rejected with a sense of impurity, this same logic should command a form of reverence towards the norm violated. Violations should be shown to be defiling and their attendant norms morally grandiose. This contrast of extremes should ultimately saturate individual cognition with perceptions of extraordinariness characteristic of rites of passage.⁴²

(B) The Ritual of Punishment in 18th Century Britain

This section will now illustrate the above using the example of the criminal justice process in 18th century Britain. This point in history is relevant due to its relative filial proximity to the modern criminal justice process on the one hand, and its palpable dosage of ceremony on the other. This example should help illustrate some of the symbolic dimensions still

³⁸ Van Gennep, *supra* note 29 at 76.

³⁹ Like the initiand who is neither boy nor man. Douglas, *supra* note 3 at 120.

⁴⁰ This form of defilement, one may want to repeat, “is usually treated with revulsion but can also become a sacred source of affirmation for society.” Douglas, *supra* note 3 at 66; 49.

⁴¹ Douglas, *supra* note 3 at 62-63, 65, 144. On the social-structure-upholding function of ritual, Alfred Radcliffe-Brown, *Structure and Function in Primitive Society* (New York: The Free Press, 1965) at 164.

⁴² The ritual may thus be described as (i) the articulation of potent symbolism defying/confirming to social structure; (ii) saturating individual cognition with the impression of a heightened symbolic space apart from ordinary life; (iii) suspending ordinary meanings and allowing for the transition desired between the present social category and the next; (iv) ultimately reinforcing both categories in social structure. Douglas, *supra* note 3 at 93. That criminal proceedings evoke “respect for the law” and “hatred of the criminal,” George Herbert Mead, “The Psychology of Punitive Justice” (1918) *Am J Soc* 577 at 586.

present in contemporary atrocity prosecutions, which may otherwise be concealed by the bureaucratic outlook prevailing in today's criminal justice system. Building on an insight already formulated in legal history scholarship, the following pages will describe the ostensible connection, during this period, between the justice process and popular beliefs.⁴³ The argument developed in this section is that this process successfully conveyed its normative message according to the pattern laid out in *Purity and Danger*, by interacting with conceptions of conformity and defilement in vigor within the population at the time.

(1) The Criminal Justice Process

Criminal justice in 18th century Britain was largely administered by an itinerant court called the Court of Assize, which left the metropolitan area biannually to judge important cases in the country's main cities. The event lasted approximately one week, and was sufficiently popular to disrupt the normal work schedule.⁴⁴ Judges were typically welcomed by an impressive cortege: "they enter the town with bells ringing and trumpets playing," wrote one observer, "preceded by the sheriff's men, to the number of twelve or twenty, in full dress, armed with javelins."⁴⁵ Clergymen subsequently greeted them with a sermon for the occasion, normally emphasizing law's wisdom and the rightfulness of punishment.⁴⁶ The company next moved to the courtroom, where judges read their commissions and, the following morning, called the grand jury, swore them in, and delivered their charge, which often highlighted the virtues of the constitution.⁴⁷ Judges were aristocrats educated in leading institutions, whose learning and eloquence rivaled that of prominent statesmen.⁴⁸

⁴³ Notoriously, Hay, *supra* note 9.

⁴⁴ John Beattie, *Crime and the Courts in England 1660-1800* (Oxford: Oxford University Press, 2003) at 216; Leon Radzinowicz, *A History of the English Criminal Law and its Administration from 1750: Volume 1* (London: Stevens & Sons, 1948) at 192.

⁴⁵ Translation from Charles Cottu, *De l'administration de la justice criminelle en Angleterre et de l'esprit du gouvernement anglais* (Paris: Gosselin, 1822) (work published several decades after its completion) at 43.

⁴⁶ Randall McGowen, "'He Beareth Not the Sword in Vain': Religion and the Criminal Law in Eighteenth-Century England" (1987) 21:2 *Eighteenth-Century Stud* 192 at 192.

⁴⁷ A large number of charges are published in John Adams and Gwen Averley, *A Bibliography of Eighteenth-Century Legal Literature: a Subject and Author Catalogue of Law Treatises and all Law Related Literature Held in the Main Legal Collections in England* (Newcastle: Aveo, 1982) namely at 403–6.

⁴⁸ Richard Cust and Peter Lake, "Sir Richard Grosvenor and the Rhetoric of Magistracy" (1981) 54 *Bull Inst Hist Res* 40; Patrick Collinson, "Magistracy and Ministry: A Suffolk Miniature" in Robert Knox, ed, *Reformation Conformity and Dissent: Essays in Honour of Geoffrey Nuttall* (London: Epworth Press, 1977) 449.

Juries likewise held considerable prestige. Many grand jurors were men of enviable property, who held significant experience in jury service, and were guided by a reputable foreman often himself a former magistrate.⁴⁹ Juries were viewed as the “grand bulwark,” in Blackstone’s phrase, protecting the individual liberties acquired over previous generations.⁵⁰ Judges were sometimes joined on the bench by county magistrates or local aristocrats, and, together with all present, conveyed a general air of sophistication.

Juries first attended a condensed presentation of the evidence, before authorizing a case to proceed on the merits. The defendant’s plea was next entered, and jury members challenged for cause.⁵¹ The trial usually began with the prosecutor’s opening statement, followed by witnesses for the crown, who were in turn examined by the judge. The accused sometimes interrogated witnesses, before pleading their defense.⁵² Judges implicitly abided by a standard of proof beyond a reasonable doubt, and conducted proceedings very closely, actively examining incriminatory and exonerating facts alike.⁵³ Rules of evidence were followed closely and statutes interpreted in a formalistic manner.⁵⁴ Trained counsel appeared increasingly throughout the century, gradually bringing to courtroom behaviour “the coolness and quiet of scientific enquiry” in James Fitzjames’ phrase.⁵⁵ Magistrates conveyed a humane image, with nosegays covering their office and elegant women from affluent houses frequently sitting on their side.⁵⁶ Their warm, paternalistic attitude was frequently noted by journalists, and could be observed during the pronouncement of death sentences.⁵⁷ In this case judges placed a black cloth resembling a veil on their head and

⁴⁹ Cottu, *supra* note 45 at 45 (“les citoyens les plus distingués par leur fortune et la considération dont ils jouissent”), 49 (“Chacun se fait honneur d’être du grand jury.”), 50, 67.

⁵⁰ William Blackstone, *Commentaries on the Laws of England: Volume 4* (London: J. Murray, 1873) at 552.

⁵¹ Beattie, *supra* note 44 at 340.

⁵² John Langbein, “The English Criminal Trial Jury on the Eve of the French Revolution” in Antonio Padoa Schioppa, ed, *The Trial jury in England, France, Germany, 1700-1900* (Berlin: Duncker & Humblot, 1987) 13 at 18; Beattie, *supra* note 44 at 99.

⁵³ Beattie, *supra* note 44 at 99.

⁵⁴ A minor error such as a misspelt Christian name could lead to an acquittal in some cases. Radzinowicz, *supra* note 44 at 25–28, 83–91, 97–103.

⁵⁵ James Fitzjames Stephen, *History of the Criminal Law of England* (Cambridge: Cambridge University Press, 2014) at 429, 432.

⁵⁶ Hay, *supra* note 9 at 33, 51. On the judge, Fitzjames, *ibid* at 435; Cottu, *supra* note 45 at 96.

⁵⁷ Death sentences were a frequent occurrence at the end of proceedings. For example, Michael Foster, *A Report of Some Proceedings on the Commission of Oyer and Terminer and Gaol Delivery for the Trial of the*

solemnly addressed the accused and audience on the fundamental importance and necessity of criminal punishment. Martin Madan emphatically conveys the sense of dramatic tension characterizing this moment in his pamphlet on the benefits of punishment:

“With a countenance of solemn sorrow, adjusting the cap of judgement on his head ... His Lordship then, deeply affected by the melancholy part of his office, which he is now about to fulfill, embraces this golden opportunity to do most exemplary good—He addresses, in the most pathetic terms, the consciences of the trembling criminals ... shows them how just and necessary it is, that there should be laws to remove out of society those, who instead of contributing their honest industry to the public good and welfare, have exerted every art, that the blackest villainy can suggest, to destroy both ... He then vindicates the mercy, as well as the severity of the law, in making such examples, as shall not only protect the innocent from outrage and violence, but also deter others from bringing themselves to the same fatal and ignominious end... He acquaints them with the certainty of speedy death, and consequently with the necessity of speedy repentance—and on this theme he may so deliver himself, as not only to melt the wretches at the bar into contrition, but the whole auditory into the deepest concern—Tears express their feelings—and many of the most thoughtless among them may, for the rest of their lives, be preserved from thinking lightly of the first steps to vice, which they now see will lead them to destruction. The dreadful sentence is now pronounced—every heart shakes with terror—the almost fainting criminals are taken from the bar—the crowd retires— each to his several home, and carries the mournful story to his friends and neighbours;—the day of execution arrives—the wretches are led forth to suffer, and exhibit a spectacle to the beholders, too awful and solemn for description.”⁵⁸

A few months later came the execution, which began with a sermon to the condemned. On this occasion, often before a large public, the prison chaplain presented a number of themes and ideas traditionally associated with punishment. Life was often portrayed as a perennial struggle against vice which, if left unaddressed, ultimately led to a fatal descent into criminality.⁵⁹ The condemned was depicted as representing popular conceptions of vice, as

Rebels in the Year 1746 in the County of Surry and of Other Crown Cases to which are Added Discourses Upon a Few Branches of the Crown Law (Oxford: Clarendon Press, 1962) at 31; Cottu, *supra* note 45 at 96.

⁵⁸A ball also marked the end of Assize week. On this event notables celebrated with the magistrates in a setting so luxurious as to be described by one journalist as a “profusion of magnificence.” The event featured exclusivities such as glass paintings, golden ornaments and a variety of dishes “so grand that fancy itself must have been exhausted in their making.” *Chelmsfordshire Chronicle* (15 March 1765), cited in Peter King, *Crime, Justice, and Discretion in England, 1740-1820* (Oxford: Oxford University Press, 2000) at 335. Excerpt from Martin Madan, *Thoughts on Executive Justice: with Respect to our Criminal Laws, particularly on the Circuits* (London: Dodsley, 1785) at 26–30, quoted in Hay, *supra* note 9 at 31.

⁵⁹ Peter Pinnell, *When the Righteous are in Authority the People Rejoice* (London, 1750) at 1 cited in Randall McGowen, “The Body and Punishment in Eighteenth-Century England” (1987) 59:4 *J Mod Hist* 652 at 659; Henry Downes, *The Necessity and Usefulness of Laws and the Excellency of Our Own* (Northampton: 1708).

the putative culmination of a life of un-piousness, irreverence and debauchery. As such, the ceremony symbolically exposed the criminal's sins before the public, and invited it to reflect on its universal character.⁶⁰ Vice was portrayed as the blended result of personal and collective irresponsibility and carelessness.⁶¹ In assembling before the offender who was to die for his sins, the community was further invited to participate in a form of collective expiation.⁶² The criminal's fate in conjunction with the community's concerted repentance for its misbehaviours exerted a redeeming influence following the example of Christ on the cross, who died for the sins of others.⁶³ Death symbolized the absorption and cleansing of vices of an analogous nature, which the community had equally indulged in.

London executions were highly popular.⁶⁴ The event began outside the prison gates, where a procession escorted the offender outside the city gates. The cortege, headed by the city marshal and a cavalcade of peace-officers, chaotically advanced on the busiest axes of the city, and halted at a number of inns for drink.⁶⁵ Offenders usually took great care to appear in their best clothing, often wearing white wedding attire, reflecting popular conceptions linking public death to marriage, and sometimes sought to display open defiance, carelessness and bravado to the crowd's great amusement.⁶⁶ The crowd greeted the offender in contradictory ways, sometimes with applause and cheers and gifts, and sometimes by hissing and hurling objects.⁶⁷ Once at the gallows, the condemned delivered a farewell speech from the scaffold, consisting of a general account of past sinfulness and

⁶⁰ Curwen Hudleston, *The Advantage of an Impartial Administration of Justice* (London, 1754) at 9-8 cited in McGowen, *ibid* at 658. In the 1600s, Cynthia Herrup, "Law and Morality in Seventeenth-Century England" (1985) 106 *Past Present* 102 at 109.

⁶¹ Robert Eden, *The Connection of Public and Private Happiness* (London, 1743) at 14 cited in McGowen, *ibid* at 659.

⁶² Thomas Alcock, *The Laws not Made for a Righteous Man* (Oxford: Clarendon, 1754) at 26.

⁶³ *Ibid*.

⁶⁴ Gatrell views public hangings as "the biggest, most frequent, and most sensational of all metropolitan gatherings." Vic Gatrell, *The Hanging Tree: Execution and the English People 1770-1868* (Oxford: Oxford University Press, 1994) at 56; James Grant, *Sketches in London* (London: Tegg, 1838) at 290.

⁶⁵ Peter Linebaugh, "The Tyburn Riot against the Surgeons" in Hay, Thompson and Linebaugh, *supra* note 9 at 67; Hay, *supra* note 9 at 67; Gatrell, *supra* note 64 at 33; Simon Devereaux, "Recasting the Theatre of Execution: The Abolition of the Tyburn Ritual" (2009) 202 *Past and Present* 127 at 133.

⁶⁶ Offenders were transported seated on a coffin, and were frequently accompanied by a chaplain seeking last confessions. Henri Misson, *Memoirs and Observations in his Travels over England* (London: Browne, 1719) at 124; Daniel Defoe, *Street Robberies Considered* (London: J. Roberts, 1728) at 52-54; Radzinowicz, *supra* note 44 at 172.

⁶⁷ Some even died from the aggression. Gatrell, *supra* note 64 at 69-70; Radzinowicz, *supra* note 44 at 172.

delinquency, pressing spectators to learn from his mistakes.⁶⁸ One offender named John Marketman for instance spoke of “his disobedience to his parents, how he had spent his youthful days in profanation of the Sabbath and licentious evils of debaucheries beyond expression,” asserting that “the death of Christ was sufficient virtue to wash away his blood-guiltiness.”⁶⁹ Repentance, it was believed, could bring about divine absolution.⁷⁰ For this reason crowds were invited to pray for divine mercy at this moment, where the offender’s eternal fate could suddenly change if imbued with sufficient intensity.⁷¹

The sight of the hangman often elicited reactions of fear and abhorrence from the crowd, which both assigned taboos and healing powers to his office.⁷² The hangman adjusted the cord around the offender’s neck, covered his face, and lashed the horses drawing the cart holding the offender in standing position, thus slipping his feet from under and forcing his body to hang.⁷³ Hanging was a painful death, invented for advertisement value more than celerity. The offender could be left twisting at the end of the rope for twenty minutes. The crowd, despite occasional episodes of irreverence, generally experienced terror. Shrieks were uttered as the drop fell, silence prevailed as the offender choked, and gasps followed his every convulsion.⁷⁴ Adding to the shock and horror of executions were the periodic dissections performed thereafter, which periodically sparked riots to rescue the corpse.⁷⁵ Crowds also stormed the gallows to touch it in hopes of a remedy for tumors and warts.⁷⁶ Reflecting the strong oral tradition of the period further were the many tales, songs and

⁶⁸ McGowen, *supra* note 46 at 204; A century prior, James Sharpe, “Last Dying Speeches: Religion, Ideology and Public Execution in Seventeenth-Century England” (1985) 107:1 Past Present 144.

⁶⁹ *The True Narrative of the Execution of John Marketman, Chyrurgian, of Weslham in Essex, for Committing a Horrible & Bloody Murther* (London: SN, 1680) at 1-3, cited in Sharpe, *supra* note 68 at 144-46.

⁷⁰ Blackstone however specifies that capital punishment did not automatically bring atonement. William Blackstone, *Commentaries on the Laws of England: Volume 1* (London: J. Murray, 1871) at 11.

⁷¹ Gatrell, *supra* note 64 at 70.

⁷² Such was the taboo surrounding this role that most considered his very touch a form of penalty. Pieter Spierenburg, *The Spectacle of Suffering: Executions and the Evolution of Repression from a Preindustrial Metropolis to the European Experience* (Cambridge: Cambridge University Press, 1984) at 16-20, 30.

⁷³ Arthur Griffiths, *The Chronicles of Newgate: Volume 1* (London: Chapman and Hall, 1884) at 88; Horace Bleackley, *Some Distinguished Victims of the Scaffold* (London: Kegan Paul, 1905) at 32.

⁷⁴ King, *supra* note 58 at 350; Gatrell, *supra* note 64 at 89.

⁷⁵ Linebaugh, *supra* note 65 at 73, 115; Steven Wilf, “Imagining Justice: Aesthetics and Public Executions in Late Eighteenth-Century England” (2013) 5:1 Yale J L & Humanities 51 at 62.

⁷⁶ Others believed the corpse cured epilepsy. Radzinowicz, *supra* note 44 at 190; Gatrell, *supra* note 64 at 69.

street performances which followed executions.⁷⁷ Another vehicle relaying the spectacle of execution were print accounts on trials and executions, which became highly popular in the first half of the century.⁷⁸ Another successful publication often displayed illustrations of the offender's crime in ample detail, reflecting popular interest in violence and deviance.⁷⁹ Several other avenues relayed the spectacle of punishment, from children's stories to waxwork expositions, all testifying to the popular interest in executions.⁸⁰

(2) The Criminal Justice Process and Symbolic Communication Theory

While some historians note criminal justice's tangible psychic effect on the population, none explores the mechanics of this symbolic communication process. The following is an attempt to do so, arguing that the justice process symbolically expelled the offender from the community, as a rite of passage ostensibly to reinforcing the norm violated. On one level, the process can be said to have conveyed perceptions of purity in the mundane sense, by emphasizing authority and prestige. One may think here of the ceremony marking the arrival of the judges, the ample presence of notables, the judges' aristocratic manners and

⁷⁷ These productions often expressed a form of popular sympathy towards criminals, noting the dire circumstances leading to criminality. John Holloway, *Later English Broadside Ballads* (London: Taylor & Francis, 2005) at 12-15; Frances Dolan, *Dangerous Familiars: Representations of Domestic Crime in England, 1550-1700* (Ithaca: Cornell University Press, 1994) at 71-76.

⁷⁸ A prominent account was written by the prison chaplain, and typically retold the crimes, trials, confessions, and execution of notorious criminals in a moralizing religious tone. The full title of the broadsheet was *The Ordinary of Newgate, His Account of the Behaviour, Confession, and Dying Words of the Malefactors who were Executed at Tyburn*. Peter Linebaugh, "The Ordinary of Newgate and His Account" in James Cockburn, ed., *Crime in England 1550-1800* (Princeton: Princeton University Press, 1977) 246 at 248; John Langbein, "Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources" (1983) 50:1 U Chic L Rev 1.

⁷⁹ Crudely depicting amputated legs, sawn-off heads, bared female breasts. Gatrell, *supra* note 64 at 70.

⁸⁰ Criminal justice could also fail to impress. Cases proceeded hastily, allowed defendants little defense, on average lasted no more than half an hour, and generally concluded with jury members reaching a verdict within a few minutes. Courtrooms were often populated by dense audiences lacking decorum, and execution processions were characterized by frequent, yelling, drinking, and thieving. One should however bear in mind that the criminal justice process generally did leave its mark on the population's imagination, as several historians of the period note. King, *supra* note 58 at 340; Edward Thompson, *Customs in Common* (New York: Norton, 1993) at 48; McGowen, *supra* note 46 at 203; Spierenburg, *supra* note 72 at 87-88, 99; Hay, *supra* note 9 at 26-40. In Germany, Richard Evans, *Rituals of Retribution: Capital Punishment in Germany, 1600-1987* (Oxford: Oxford University Press, 1996) at 187, 189. In France, Michel B  e, "Le spectacle de l'ex  cution dans la France d'Ancien R  gime" (1983) 38:4 Annales 843 at 843, 849, 852. In Europe more generally, Julius Ruff, *Violence in Early Modern Europe 1500-1800* (Cambridge University Press, 2001) at 104-05, 107-08.

dress, their display of eloquence and intellectual refinement, their office's general endorsement by religious authorities, etc.⁸¹ Another dimension conveying perceptions of authority was the edifying nature of the political ideals upheld, which corresponded to an emerging sense of individualism developed during the enlightenment period: criminal justice protected the rich and the poor alike, such that even aristocrats were seen to hang sporadically. The process also guaranteed independent trial by juries, and offered formal safeguards protecting the rights of the defendant. These rights were in turn insisted upon with a level of rigour corresponding to the fledgling scientific culture of the epoch.⁸²

This perception of grandeur in turn contrasted with the fearsome nature of the crimes evidenced in court, in addition to the terrible fate pronounced for those found guilty of capital offenses. Complementing the experience were frequent perceptions of chaos and horror conveyed throughout the ceremony: the presentation of the offender tied to his coffin during the procession, the hurling of objects at times wounding the offender *en route*, the presence of drink and overall agitation characterizing the execution crowd, the encounter of the hangman on the scaffold, the taboo associated with his office, the sight of the offender mounting the scaffold, the offender's death and convulsions, ensuing dissections and riots, the publications describing the offender's life and crimes in sensational detail, etc. Contrasting this were sporadic perceptions of order and authority: the public sermon preceding the execution ceremony, the figures of authority leading the procession (notably the city marshal and the sheriff), followed by a cavalcade of peace officers, the sermon preceding the moment of hanging, the offenders' prayers and speech, the circulation of publications recounting their confessions in a moralizing tone, etc.

⁸¹ Regarding the lavish ball marking the end of the week, see note 58.

⁸² Think here of James Fitzjames' remark on "the coolness and quiet of scientific enquiry" of courtroom behaviour. Fitzjames, *supra* note 55 at 429. One may hypothesize several ideals appealed to in this process. For one, the commitment expressed at trial to treat participants with care and respect likely appealed to what Durkheim later described as the "sacralised [status of the self] in what can be called the ritual sense of the word," which was increasingly present in early industrial society. As a derivative, trial participants were also depicted as equal citizens in a democracy governed by law. This ideal was supplemented by the rising intellectual rigour applied to the legal process, which in turn likely conveyed a certain commitment to scientific truth freed from the vagaries of aristocratic excess. Émile Durkheim, "L'individualisme et ses intellectuels" (1898) 10:4 *Revue bleue* 7 at 13 (author's translation).

This experience conveyed mixed perceptions of purity and impurity: the purifying vocation of punishment over communal vice as emphasized in execution sermons, the cheering or detestation alternatively expressed by procession crowds upon encountering the offender, the fears of defilement and healing powers attributed to the hangman, the possibility of divine mercy or damnation ultimately reserved to the offender after his death, the popular belief in the healing properties of the offender's body as if purified through punishment, popular interest in publications detailing the gruesome crimes committed by the offender and his pious behaviour on the gallows, and so on. One may argue that the delinquent's deviation from established categories of conduct defiled the community's perceptual repertoire, thereby relegating his person from the realm of the normal to that of the abnormal and dangerous.⁸³ Much like the pig who is cloven-footed but does not chew the cud in *Leviticus*, the offender following his category-defiling behavior was arguably made to enter the realm of abominations, inspiring perceptions of fright and revulsion similar to the dread experienced in the face of supernatural danger in *Purity and Danger*.⁸⁴

The offender and his defiling behavior like other aberrations can be said to have triggered among the community a defensive reaction designed to protect the social or cognitive categories upset by the offense.⁸⁵ His exclusion can be understood as an attempt to negate that which negates meaning, as it were, so as to rid the community from the dangers tied to defilement. This hypothesis is reinforced by archeological findings demonstrating that criminals in pre-modern times were usually interred on barrows or crossroads outside city walls, at the very boundaries of the community.⁸⁶ These spaces represented dangerous

⁸³ In conformity with the insight in *Purity and Danger*, according to which being in the margins (as exemplified here by death and deviance) is to be at a source of power. See note 32.

⁸⁴ Douglas, *supra* note 3 at xiv, 52, 69.

⁸⁵ Fear, revulsion, and detestation form part of a continuum set to negate elements contradicting the established order according to Douglas. See Douglas, *supra* note 3 at 196, 203. This insight is supported by Pascal Bastien, *L'exécution publique à Paris au XVIIIe siècle : Une histoire des rituels judiciaires* (Paris: Champ Vallon, 2006) at 96; Ruff, *supra* note 80 at 106; Mitchell Merback, *The Thief, the Cross and the Wheel: Pain and the Spectacle of Punishment in Medieval and Renaissance Europe* (New York: Reaktion Books, 2001) at 138–39; Evans, *supra* note 80 at 90–101; Bée, *supra* note 80 at 849; Anton Blok, "The Symbolic Vocabulary of Public Executions" in June Starr, ed, *History and Power in the Study of Law: New Directions in Legal Anthropology* (Ithaca: Cornell University Press, 1989) 31 at 38.

⁸⁶ James Davis, "Spectacular Death: Capital Punishment in Medieval English Towns" in Joelle Rollo-Koster, ed, *Death in Medieval Europe* (New York: Routledge, 2016) 130 at 143; Andrew Reynolds, *Anglo-Saxon*

locations haunted by spirits, according to pagan beliefs.⁸⁷ Offenders were also interred near churches with the sick or close to city walls, signifying uncleanness and exclusion.⁸⁸

Douglas writes that rites of passage convey contradictory and ambiguous symbols representing order and disorder, so as to highlight the sense of transition effectuated between one category and the next.⁸⁹ Some Christian writings depicted offenders not as humans but as malevolent animals who had to be killed due to the danger posed to the community.⁹⁰ Contrasting this also was the notion that the offender's pain was a metaphor of the Christ, whose suffering on the cross could cleanse the community from vice, and warrant divine mercy.⁹¹ The object of ignominy and fascination, the offender was arguably made to embody contradictory referents. Like the sorcerer wearing ritual attire for the opposite sex, or the initiand who is neither boy nor man, the metaphor of hanging placed the offender between polar opposites characteristic, in the margins: the gallows symbolized the offender's very "suspension" between heaven and earth, as an eternal outcast, neither within nor without the community, eternally outside social structure.⁹²

Other elements support the rite of passage hypothesis. One may think of the white wedding attire worn by offenders *en route*, which signified status transition, the procession outside city gates, itself journey outside the boundaries of the community, and the elements of inclusion and exclusion respectively emphasized during sermons, condemning vice and

Deviant Burial Customs (Oxford ; New York: Oxford University Press, 2009) at 248; Nicola Whyte, "The After-Life of Barrows: Prehistoric Monuments in the Norfolk Landscape" (2003) 25:1 *Landsc Hist* 5 at 8–9.

⁸⁷ Sarah Semple, "A Fear of the Past: The Place of the Prehistoric Burial Mound in the Ideology of Middle and Later Anglo-Saxon England" (1998) 30:1 *World Archaeol* 109 at 111; Joris Coolen, "Places of Justice and Awe: The Topography of Gibbets and Gallows in Medieval and Early Modern North-Western and Central Europe" (2013) 45:5 *World Archaeol* 762 at 764.

⁸⁸ This notion of exclusion is tied to pagan beliefs in origin but was apparently kept at least in part with the advent of Christianity. Davis, *supra* note 86 at 147; Reynolds, *supra* note 86 at 246.

⁸⁹ On the role of contradictory referents, Douglas, *supra* note 3 at 120.

⁹⁰ This is to be compared with Girard's theory, which, as will be discussed in chapter 3 Section (I), notes the frequent association between deviance and anthropomorphic figures frequently found in classic mythologies. St Thomas Aquinas, *Summa Theologiae*, ed trans by Timothy McDermott (Huston: Texas University Press, 1989) at 389, cited in Katherine Royer, "The Body in Parts: Reading the Execution Ritual in Late Medieval England" (2003) 29:2 *Hist Reflect* 319 at 331.

⁹¹ Esther Cohen, "Symbols of Culpability and the Universal Language of Justice: The Ritual of Public Executions in Late Medieval Europe" (1989) 11 *Hist Eur Ideas* 407 at 408–09; Bée, *supra* note 80 at 849.

⁹² Merback, *supra* note 85 at 141; Reynolds, *supra* note 86 at 248–49; Coolen, *ibid* at 774.

praising justice, which together underlined the notion of transition. With the amplifying effect of crowd sentiment, spectators likely experienced a broad spectrum of emotions such as hatred, anger, disdain, fright, revolt, compassion and admiration, in varying degrees of distinctiveness. This lack of distinctiveness, between damnation and salvation, between vice and purification, between anger and relief, arguably made execution ceremonies an effective vehicle for normative communication. More than mere heightened repetition, these contrary referents complemented one another, saturating the mind with a symbolic display excluding the offender from the community, such that the offender and his behavior were shown to be disgusting and the criminal law grandiose.⁹³ The repetition and high levels of stimulation likely obtained, by way of conditioning, their normative effect.⁹⁴

(II) THE MASS ATROCITY PUNISHMENT RITUAL

Atrocity prosecutions roughly function as a modern manifestation of this old communication method. More than disappearing with the advent of modernity, the strong subconscious bond governing this symbolic communication pattern mostly changed in nature and appearance, fractioning and diminishing its incidence while nevertheless preserving a measure of influence.⁹⁵ Before explicitly drawing the parallel between the above argument and atrocity prosecutions, the following begins with another symbolic communication theory, this time tied to specificities inherent to atrocity prosecutions. The theory is Victor Turner's Social Drama theory, which focuses on the politically transformative effects such proceedings can operate on post-conflict societies.⁹⁶ Turner and Douglas' theories are then applied to the example of the 1963 Frankfurt-Auschwitz trials.

(A) Mass Atrocity Prosecutions and Symbolic Communication Theory

⁹³ On rites of passage and normativity, Douglas, *supra* note 3 at 66.

⁹⁴ On conditioning in pre-modern executions, Wilf, *supra* note 75 at 59–62; Foucault, *supra* note 1 at 78.

⁹⁵ Smith, *supra* note 17 at 58, 15–17.

⁹⁶ Victor Turner, "Social Dramas and Stories about Them" (1980) 7:1 Crit Inq. 141.

This section begins with an overview of Turner's Social Drama theory, before moving to a general depiction of the normative communication process applicable to atrocity prosecutions, uniting insights discussed in both the first and second sections of this chapter.

(1) Turner's Social Drama Theory

An erudite and creative scholar, Victor Turner created his Social Drama theory by amalgamating diverse anthropological and artistic insights, with the intent of explaining some of the principal effects achieved by ritual symbolism in intra-communal conflict.⁹⁷ The first step in Turner's theory is the breaching of a particular norm which speaks to an important facet of collective identity.⁹⁸ The breach is typically perpetrated by an individual seeking to signal the existence of a strong alternative view present among the wider population and, for this reason, generally triggers dramatic responses polarizing society between two opposing camps. The community rapidly finds itself divided between communists, capitalists, Christians, atheists, blacks, whites, hispanophones, anglophones, urbanites, provincials, professionals, working class, or any possible set of social relations related to the initial breach.⁹⁹ Turner cites the Dreyfus affair in France and the Watergate scandal as examples.¹⁰⁰ In order to limit the spread of division, a redressive mechanism is ultimately adopted in the form of a large-scale, public ritual. When displayed successfully, this ritual adequately reinterprets the moral norm at the origin of conflict and allows for the reintegration of the opposing group within society.¹⁰¹ The Watergate procedures for example led to Nixon's resignation, and in turn "reintegrated" a divided public.

This ritual primarily consists of a heightened re-enactment of the events having led to conflict.¹⁰² On a first, more objective level of communication, the ritual narrative recounts

⁹⁷ This theory falls under broader analytical categories of "closure rituals," or "symbolic conflict termination activities." Lewis Coser, *Continuities in the Study of Social Conflict* (New York: Free Press, 1967) at 47.

⁹⁸ Turner, *supra* note 96 at 150.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid* at 150–51; Victor Turner, *Dramas, Fields, and Metaphors: Symbolic Action in Human Society* (Ithaca: Cornell University Press, 1975) at 38, 41.

¹⁰¹ Turner, *ibid* at 55–56; Turner, *supra* note 96 at 151; Victor Turner, *On the Edge of the Bush: Anthropology as Experience* (Tucson: University of Arizona Press, 1985) at 299.

¹⁰² Turner, *supra* note 96 at 151; Ronald Grimes, "Victor Turner's Social Drama and T. S. Eliot's Ritual Drama" (1985) 27:1/2 *Anthropologica* 79 at 79.

the course of events having led to conflict in a certain measure of detail, before measuring this course of events against traditional values.¹⁰³ This would correspond, in the modern context, to the more rigid or mechanical process explicitly governing the presentation of evidence in court and its subsequent evaluation on the merits. This objective level of communication is further complemented by a subjective counterpart. Scandal is underlined, highlighted, detailed in full, and, by the same token contrasted with the moral grandeur of the norms breached.¹⁰⁴ Once effectively displayed, this subjective, emotionally-laden component of the ritual narrative ultimately fuses with its objective counterpart, as it were, merging the intensity of the moment with the legitimacy of the norms upheld.¹⁰⁵ For example, the series of scandals revealed during Watergate, from the proof of espionage to the resignation of the president, were ultimately contrasted during the inquiry with the ethical standards expected of a president.

Turner notes that the heightened atmosphere leading to this particular state partly stems from the articulation of diffuse and agonistic symbols normally susceptible of several interpretations. In tribal society, such symbols typically take the form of monstrous images, sacred objects, ordeals, humiliations, esoteric instructions, ritual clothing, or anonymity, among other things.¹⁰⁶ By their combined vagueness and extraordinariness, these symbols can saturate individual cognition to create the impression of a “moment apart from ordinary life.”¹⁰⁷ This heightened state is in turn enhanced by the reiteration of foundational

¹⁰³ Turner, *supra* note 96 at 156.

¹⁰⁴ Turner, *supra* note 96 at 156; Turner, *supra* note 100 at 298 (quoting Hardy's dictum "If a way to the better there be, it exacts a full look at the worst."), 301; Mathieu Delfem, "A Discussion of Victor Turner's Processual Symbolic Analysis" (1991) 30 *Journal of the Scientific Study of Religion* 1 at 6.

¹⁰⁵ Turner, *supra* note 96 at 55; Victor Turner, *The Forest of Symbols: Aspects of Ndembu Ritual* (Ithaca: Cornell University Press, 1967) at 29, citing Edward Sapir, "Symbolism" in *Encyclopaedia of the Social Sciences: Vol. 14* (New York: MacMillan, 1934) 492 at 493.

¹⁰⁶ These symbolic displays are normally associated with the "liminal" or middle stage in rites of passage. This is the moment where the object of ritual action finds itself fully separated from its previous social category without having entered into the next. It is the "in between," to cite Douglas. Turner, *supra* note 100 at 295, 298; Turner, *supra* note 96 at 55; Van Gennep, *supra* note 29; Douglas *supra* note 3 at 120; Mihai Coman, "Liminality in Media Studies: From Everyday Life to Media Events" in John Graham, ed, *Victor Turner and Contemporary Cultural Performance* (New York: Berghahn, 2008) 94 at 95.

¹⁰⁷ Turner, *supra* note 101 at 295; Turner qualifies modern proceedings as "liminoid" events to designate their diminished symbolic and dramatic substance in comparison with the liminal phase in tribal ritual. Victor Turner, "Variations on a Theme of Liminality" in Sally Falk Moore and Barbara Myerhoff, eds, *Secular Ritual* (Assen: Van Gorcum, 1977) 36 at 43.

principles themselves carrying a vague or generic meaning.¹⁰⁸ Turner argues that individual attachment to principles such as matriliney, birthright, divine will, or rule of law ultimately adds to the experience.¹⁰⁹ Social Drama Theory depicts much of the intensity achieved in this process as directly linked to the number and strength of such associations; the more intimate and affectively-laden the memories aroused by these symbols, the stronger the impact.¹¹⁰ In the Watergate example, one may think of “democracy,” “corruption,” “espionage,” “presidency,” or “honesty,” as concepts the diffuse nature of which allowed to meet personal preferences and memories.

After having achieved this heightened emotional state, the social drama ritual may next move through Van Gennep’s three stages of the rite of passage. Turner views the first stage of the ritual as inducing a heightened mental state set apart from ordinary life.¹¹¹ Here one is made to move away from ordinary judgment and perception, and to open one’s judgement, as it were, to the chain of evocations suggested by ritual symbolism. Following the Watergate example, “democracy,” “corruption,” “espionage,” “presidency” and “honesty” can thus evoke a web of images and perceptions, ultimately forming into a “personal” or “intimate” narrative. The second stage of the rite next engages its participants with its inherent moral dilemma.¹¹² A narrative will normally be articulated around a given scandal calling into question one’s prior adherence to cherished values and institutions, such as the presidency or the Republican Party. A state of moral contemplation is thereby induced, in which one is left to explore alternatives capable of filling the moral gap left by the scandal: “Where historical life itself fails to make cultural sense in terms that formerly held good,” writes Turner, the ritual process “may have the task of *poesis*, that is, of remaking cultural sense, even when it seems to be dismantling entire edifices of

¹⁰⁸ On “root paradigms,” Turner, *supra* note 100 at 154; Turner, *supra* note 96 at 55.

¹⁰⁹ *Ibid*; Delfem *supra* note 104 at 12.

¹¹⁰ Turner, *supra* note 101 at 28; Kertzer, *supra* note 7 at 11.

¹¹¹ Turner, *supra* note 100 at 164, 168; Van Gennep, *supra* note 29; Jeffrey Alexander, “The Social Construction of Moral Universals” in Jeffrey Alexander ed, *Remembering the Holocaust: A Debate* (Oxford: Oxford University Press, 2018) at 38 at 145.

¹¹² Turner, *supra* note 100 at 168.

meaning.”¹¹³ In the third and last stage the ritual ends, leaving one to return to ordinary life, influenced by the values and day to day judgments made salient by the experience.¹¹⁴

The ritual narrative next tends to spark a multitude of stories relaying its message to every sector of society.¹¹⁵ The social drama ritual finds itself reinterpreted by diverse cultural media, such as newspaper, evening news, television series, documentaries, movies, plays, novels, talk shows, and speeches, which adapt and readapt the initial message, condensing its dramatic content according to their audience’s situation.¹¹⁶ “Now we have plays, films, and novels about Watergate,” which are shaped, according to Turner, by the “the Guy Fawkes-like conspiratorial atmosphere of the breach episode, through the tough-minded fiction of the cover-up, with its Deep Throat revelations and combinations of high-minded principle and low-minded political opportunism.”¹¹⁷ This last layer of dramatically condensed meaning further disseminates the ritual message among the population.¹¹⁸

The ritual message, to conclude, is thus naturally recuperated time and again by various media condensing its dramatic content, gradually convincing new segments of the population over the course of time.¹¹⁹ With each encounter, the ritual message in this condensed form again induces all three stages of the rite of passage among the viewer, in

¹¹³ This is what Turner terms the “subjunctive” mood. *Ibid* at 163–65.

¹¹⁴ Turner, *supra* note 96 at 56.

¹¹⁵ Turner, *supra* note 101 at 301; Victor Turner, “Liminality, Kabbalah, and the Media” (1985) 15:3 *Religion* 205 at 211, 217; Grimes, *supra* note 102 at 81.

¹¹⁶ “Life itself becomes a mirror held up to art,” where society performs its “most salient opinions, imageries, tropes, and ideological perspectives.” Turner, *supra* note 101 at 301.

¹¹⁷ This “emplotment,” or “diffusion,” phase thus transposes onto the modern media forum some the more colourful or performative dimensions explicitly found in tribal ritual. Daniel Dayan and Elihu Katz, *Media Events* (Cambridge: Harvard University Press, 1992) at 1–13; Darnell Hunt, *O. J. Simpson Facts and Fictions: News Rituals in the Construction of Reality* (Cambridge: Cambridge University Press, 1999) at 41–44; James Carey, “Political Ritual on Television” in James Curran and Tamar Liebes, eds, *Media, Ritual and Identity* (London: Routledge, 2002) 42 at 43–45. Turner, *supra* note 100 at 154–55.

¹¹⁸ Turner, *supra* note 100 at 154–55.

¹¹⁹ On ritually heightened periods in history, Victor Turner, *The Ritual Process: Structure and Anti-Structure* (Ithaca: Cornell University Press, 1969) at 112; Turner, *supra* note 100 at 99. For a similar insight on the role of media in post-conflict society, Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: W. W. Norton & Company, 2011) at 47, 130.

turn exerting a degree of influence on every occasion.¹²⁰ Over long periods of time spanning decades and sometimes generations, and under favourable conditions such as economic growth, political stability, national unity, political/spiritual leadership, international allegiances, etc, social drama theory states that these multiple cultural reverberation and ramifications may influence public discourse and ultimately integrate an emerging majority under a new post-conflict identity. The authority of the ritual process progressively allows the message to gain ground over alternative stories entertained by the opposing group.

(2) Towards a Symbolic Communication Model of Mass Atrocity Prosecutions

The social drama ritual, to be sure, may also foment dissention and acrimony, and may very well never achieve meaningful reconciliation. That this may be the case for atrocity prosecutions is frequently noted by legal scholars. Where communications literature occasionally notes that “media events” generally divide more than they unite, and that Turner’s thesis seldom appears to stand in modern society, the following pages direct the reader to an exception, perhaps distinguished by the comparatively deeper social tensions and values aroused, and overall popular demand for fundamental political change.¹²¹ More than the automatic instantiation of social peace and unity, as a cursory reading of the theory easily suggests, Turner’s writings are to be understood here to account mainly for the successful unfolding of such events. The following pages, consequently, should not be understood as proposing a formulaic mechanism applicable to all atrocity prosecutions, and should instead be understood as serving to describe, to the extent possible, how the potential held by such events operates, whenever successful. This has been done so far by proposing a normative communication model the terms of which will now be summarized.

Atrocity prosecutions can be viewed as social dramas recapitulating and depicting the terms of intra-communal conflict in relation to traditional values uniting society. When

¹²⁰ Dayan and Katz view such forms of transformative ceremonies as “an illustration of a desired state of affairs.” The ritual message when broadcast by the media is reinforced by rich discursive activity, in turn inviting the public to reflect on the ideals and solutions proposed. Dayan and Katz *supra* note 117 at 167-68.

¹²¹ This is underlined using case studies such as the O.J. Simpson trial in the United States, the Ariele Deri trial in Israel, and the hearings of judges Robert Bork and Clarence Thomas. Among others, Carey, *supra* note 117.

successfully deployed, the ritual message can be transposed onto a number of stories, films and other narrative forms, adding some of the dramatic tension otherwise characteristic of pre-modern ritual communication. The narratives engendered by the atrocity prosecution ritual should articulate themselves creatively and colourfully, according to popular aesthetic preferences, round some of the most striking aspects revealed in the process. Such aspects, it is suggested, should be understood against pollution theory, as both centering on the defiling nature of the acts reproached and the moral grandeur of the norms violated. The contrast should create a heightened atmosphere perceived, at its peak, as extra-ordinary moment outside ordinary life.¹²² This heightened atmosphere, following pollution theory, is the atmosphere described in Van Gennep's works on rites of passage. It is the moment where individual cognition finds itself saturated with emotional and ideological stimulation.¹²³ In this very moment the ordinary bounds of social structure dissipate, to some extent, leaving room for ideological reflection on the merits of the transformation ritually proposed.¹²⁴ With the end of this heightened experience should flow a certain predisposition to accept the transformation proposed, from "dictatorship" to "democracy."

(B) The Ritual of Punishment at the Frankfurt Auschwitz Trial

With this normative communication model presented, this chapter will now move to a case study. The example chosen here is the 1963 Frankfurt Auschwitz trial, which was held in Frankfurt, Germany, in relation to atrocities committed in the Auschwitz concentration camp in occupied Poland. This example was chosen due to the particular influence borne by the facts revealed at trial on popular beliefs and discourse in relation to the Holocaust in the ensuing years and decades. Most Germans had remained unaware of the existence of the Auschwitz camp before the prosecution.¹²⁵ The first sub-section in this case study recounts the event, focusing on those facets most relevant to the symbolic communication

¹²² Douglas, *supra* note 3 at 120.

¹²³ Van Gennep, *supra* note 29 at 76.

¹²⁴ See Turner's definition of "subjunctivity," Turner, *supra* note 110 at 163-65; Turner, *supra* note 115 at 295. Alexander, *supra* note 111 at 39.

¹²⁵ Auschwitz was mentioned in Nuremberg but was largely eclipsed by other concerns. Little interest had existed until then for national introspection. Jeffrey Olick, *The Sins of the Fathers: Germany, Memory, Method* (Chicago: University of Chicago Press, 2016) at 16.

patterns discussed above. In doing so, this sub-section will argue that the event amounted to a rite of passage. The second sub-section aligns this rite of passage with Turner's Social Drama theory and the ensuing democratic transition effectuated in the postwar period.

(1) The Criminal Justice Process

On a December morning in 1963, magistrates, attorneys, defendants and constables gathered with a group of over a hundred journalists in the Frankfurt city hall for the first day of trial.¹²⁶ Most of the twenty defendants were lower-ranking SS men.¹²⁷ The judge "was a sober man, given to intellectual pleasures, [who was] disdainful of judicial fireworks," according to the press."¹²⁸ At his sides were two other judges assisting him, and a six-member jury, surrounded by a large audience variously consisting of school visits, witnesses, victims, activists and journalists. The courtroom generally conveyed a solemn atmosphere according to journalists, despite occasional confrontations.¹²⁹ The accused were charged with the offense of murder, because statutes of limitations prevented the crime against humanity infraction from being used.¹³⁰ A seven-hundred-page long indictment detailed each defendant's alleged misconduct.¹³¹ This document presented the proceedings "as an attempt to master a particularly painful chapter of the nation's historical past by means of criminal law."¹³² Considering that the Nuremberg Trials were perceived as biased in the population's view, these proceedings were to serve as the largest German Nazi trial since the end of the war, spanning 183 trial sessions, indicting over twenty

¹²⁶ Devin Pendas, *The Frankfurt Auschwitz Trial, 1963-1965: Genocide, History, and the Limits of the Law* (Cambridge: Cambridge University Press, 2006) at 5.

¹²⁷ Some were university-educated administrators and healthcare professionals. *Ibid.*

¹²⁸ Martin Vogel, "Vorsitzender: Sie Koennen uns doch nicht einseitig informieren", *Die Welt* (21 March 1964).

¹²⁹ Bernd Naumann, *Auschwitz, a Report on the Proceedings against Robert Karl Ludwig Mulka and Others before the Court at Frankfurt* (New York: Frederick A. Praeger, 1966) at 147.

¹³⁰ Making the German Penal Code the jurisdictional basis for the prosecution. Christiaan Rüter, *Justiz und NS-Verbrechen: Sammlung Deutscher Strafurteile wegen nationalsozialistischer Toetungsverbrechen, 1945-1966 Vol. 14* (Amsterdam: Amsterdam University Press, 1979) at 563.

¹³¹ Pendas, *supra* note 126 at 106.

¹³² *Ibid.*

defendants and interrogating over 350 witnesses.¹³³ The trial, according to the indictment, was “for Germans to punish crimes in their own country according to domestic law.”¹³⁴

Much to the audience’s surprise, most of the defendants in the courtroom looked like ordinary Germans. “Is this the way accomplices to murder really look?” exclaimed one article.¹³⁵ Most defendants took the stand during the first days of trial and testified to their innocence, often underlining the element of luck involved in their decision to join the SS and their subsequent posting to Auschwitz.¹³⁶ The highest-ranking defendant admitted to his knowledge of gassing operations and denounced them emphatically.¹³⁷ Another denounced the lack of infrastructure in his compound, and explained how he had stolen material to build facilities for the children.¹³⁸ Some victims even described defendants as “decent men considering the situation.”¹³⁹ The group was sufficiently successful in depicting itself as ordinary Germans to lead one journalist to exclaim, “thank God I was too young back then!”¹⁴⁰ The guards’ depiction on the whole fell in line with the nation’s self-image of victimization after the war, as having acted under the duress of its superiors.

A group of academics next testified on the functioning of the camp, disclosing to the public for the first time that industrial methods were used to murder over two and a half million Jews.¹⁴¹ The group showed that inmates were asked to line up upon arrival, for guards to

¹³³ Herbert Ostendorf, “Die – widerspruechlichen – Auswirkungen der Nuerberger Prozesse auf die westdeutsche Justiz” in Gerd Hankel and Gerhard Stuby, eds, *Strafgerichte gegen Menschheitsverbrechen: Zum Völkerstrafrecht 50 Jahre nach den Nürnberger Prozessen* (Hamburg: Hamburger Edition, 1995) 73.

¹³⁴ Pendas, *supra* note 126 at 106.

¹³⁵ Ursula von Kardorff, “Durchschnittsmenscen mit Jargon: Beobachtungen beim Auschwit-Prozess”, *Sueddeutsche Zeitung* (6 March 1964). Similarly, Erik Verg, “Wie Konnte ein Deutscher zum Dienst nach Auschwitz kommen?”, *Hamburger Abendblatt* (21 December 1963) A3.

¹³⁶ Others emphasized the structural nature of murder in Auschwitz, stating that death, either by starvation, illness or gassing, could not be reduced to the doings a single individual positively desiring such results. Hermann Langbein, *Der Auschwitz-Prozess: Eine Dokumentation* (Poznań: Neue Kritik, 1995) at 600; Bernd Naumann, “Angeblich wollte keiner als SS-Mann nach Auschwitz”, *Weser Kurier* (21 December 1963).

¹³⁷ This defendant suffered a series of nervous breakdowns and was hospitalized with colic. Others share similar stories. “Nichts gehoert, nichts gemeldet, nichts befohlen”, *Suttgarter Zeitung* (10 January 1964).

¹³⁸ Naumann, *supra* note 129 at 52.

¹³⁹ Rebecca Wittmann, *Beyond Justice: The Auschwitz Trial*, (Cambridge: Harvard University Press, 2005) at 11.

¹⁴⁰ Verg, *supra* note 135 at A3.

¹⁴¹ Modern literature however estimates the number of Auschwitz victims between 1.1 and 1.5 million. Franciszek Piper, “The Number of Victims” in Yisrael Gutman and Michael Berenbaum, eds, *Anatomy of the Aushwitz Death Camp* (Bloomington: Indiana University Press 1994) 61 at 67.

select the able-bodied.¹⁴² Over eighty percent were brought to the gas chamber, where they were told to undress, and followed an arrow pointing to a fictitious shower room.¹⁴³ Zyklon B was next sprayed into this room, murdering its captives in fifteen minutes.¹⁴⁴ Those selected for work were registered at the admissions office, where personnel sheets were emitted and distributed to various departments.¹⁴⁵ Prisoners worked long hours, ate no more than 800 calories daily and slept in insalubrious buildings infested with infectious disease. Most living in these conditions died within three months.¹⁴⁶ Individual cards noted the date of their death, and invented a cause. Letters were then sent to relatives, stating that “despite the best possible medical care, it was not possible to save them.”¹⁴⁷ Adding to the shocking nature of industrial killing, was the account of individual human suffering produced by the large amount of survivor-testimony.¹⁴⁸ One described his incarceration, starvation and torture, pausing on several occasions due to the intensity of emotion.¹⁴⁹ Another took the opportunity to re-enact a scene experienced on numerous occasions.¹⁵⁰ Despite the fact that many were shaken by the sight of their former tormentors and struggled to recall necessary details, the court could nevertheless ascertain a large quantity of legal facts.¹⁵¹

¹⁴² Wittmann, *supra* note 139 at 219; Annette Weinke, “The German-German Rivalry and the Prosecution of Nazi War Criminals during the Cold War: 1958-1965” in Nathan Stoltzfus and Henry Friedlander, eds, *Nazi Crimes and the Law* (New York: Cambridge University Press, 2009) 151 at 164.

¹⁴³ Michael Bazyler and Frank Tuerkheimer, “The Frankfurt Auschwitz Trial: The Germans Trying Germans” in Michael Bazyler and Frank Tuerkheimer, eds, *Forgotten Trials of the Holocaust* (New York: New York University Press, 2014) 227 at 234.

¹⁴⁴ Thousands were murdered in this fashion on a daily basis. Naumann, *supra* note 129 at 43–44.

¹⁴⁵ Karin Orth, “‘SS-Taeter vor Gericht’: Die strafrechtliche Vervolgung der Konzentrationslager-SS nach Kriegsende” in Ingrid Wojak, ed, “*Gerichtstag halten über uns selbst*”: *Geschichte und Wirkung des ersten Frankfurter Auschwitz-Prozesses* (Frankfurt: Campus, 2001) 43 at 45; Bazyler and Tuerkheimer, *supra* note 143 at 247.

¹⁴⁶ Gunther von Lojewski, “Todscherie bis in die Nacht: Ehemaliger Lageraeltester aus Auschwitz sagte aus”, *Westdeutsche Allgemeine* (20 March 1964).

¹⁴⁷ Pendas, *supra* note 126 at 130.

¹⁴⁸ The emotion became so palpable on a number of occasions as to become unbearable for the audience. See, for example, Peter Seidel, “Zuschauer forderten Lynchjustiz an Kaduk”, *Bonner Rundschau* (7 April 1964); Gunther von Lojewski, “Kinder von der SS totgeschlagen”, *Frankfurter Rundschau* (20 March 1964).

¹⁴⁹ Wittmann, *supra* note 139 at 155.

¹⁵⁰ “You fat pig!” he cried, walking back and forth in front of the accused, his thumbs hooked under his vest. Bernd Naumann, “Ja, was meinen sie? Die haetten mich ja direct eingespert”, *Frankfurter Allgemeiner Zeitung* (5 March 1965) cited in Pendas, *supra* note 126 at 162.

¹⁵¹ Some intellectuals viewed this testimony in a positive light, as “having made a little bit of Auschwitz real.” Martin Walser, “Unser Auschwitz” in Martin Walser, ed, *Heimatkunde: Aufsätze und Reden* (Frankfurt am Main: Suhrkamp, 1968) 1 at 10; Hannah Arendt, “Introduction” in Naumann, *supra* note 129 at xxix. But Lawrence Langer, *Admitting the Holocaust* (Oxford: Oxford University Press, 1995) at 89.

A full account of life in Auschwitz indeed struck the imagination as a site of chaos severed from ordinary reality in every sense, made possible only through the conscious participation of many actors. The Red Cross vehicle did not carry sick people but poison gas.¹⁵² Showers did not clean, and injections did not heal. Many sent to the hospital were murdered.¹⁵³ Victims were “transported,” “disinfected,” “moved into the chambers,” “checked off,” “given special treatment” or “interrogated.” Not a single well could be found that was not contaminated. Not a single puddle existed in which anopheles mosquitoes carrying the malaria did not breed.¹⁵⁴ Reflecting this chaotic scene, of an inverted reality was the fact that the press covering the proceedings frequently compared Auschwitz to hell or Dante’s *Inferno*.¹⁵⁵ Some defendants behaved like demons in the literal sense. One played the marksman by shooting prisoners in the neck from a distance for a bet.¹⁵⁶ Another played the sports coach, and forced prisoners to exercise to the point of exhaustion.¹⁵⁷ Another developed a “special blow,” which killed inmates in with single punch.¹⁵⁸ Some played “rabbit hunts,” by murdering prisoners who were slow taking off their hats during roll call.¹⁵⁹ One played the doctor by injecting thousands of prisoners with phenol into their heart.¹⁶⁰ Another designed a torture device suspending prisoners upside down, so as to expose the buttocks regions for beatings leaving them disfigured and sterilized.¹⁶¹ Some swung children into the air and crushed their crania against a wall.¹⁶²

After months of testimony, the trial moved to closing arguments. While emphasizing that the judgement could not possibly accomplish “something like a purification of the entire German people” after the Holocaust, the prosecution stated that by passing sentence

¹⁵² Naumann, *supra* note 129 at 89.

¹⁵³ Some did return, and were even allowed better food to recuperate. Naumann, *supra* note 129 at 70, 97.

¹⁵⁴ The camp location had deliberately been selected for its “thorough unsuitability.” *Ibid* at 97.

¹⁵⁵ Generally, Walser, *supra* note 151.

¹⁵⁶ Some were stripped, soaked and sent outdoors, which froze them to death. Naumann, *supra* note 129 at 89.

¹⁵⁷ Walser, *supra* note 151 at 11.

¹⁵⁸ Max Karl Feiden, “Einer der 21 Angeklagten im Auschwitz Trial ist noch Stolz auf seine neidrige SS-Nummer”, *Ruhr-Nachrichten* (21 December 1963); Gunther von Lojewski, “Boger: In keinem Fall richtig”, *Frankfurter Allgemeine Zeitung* (20 March 1964).

¹⁵⁹ Wittmann, *supra* note 139 at 146, 231; Naumann, *supra* note 129 at 123, 127.

¹⁶⁰ This was initially done to eliminate those infected with disease, but gradually developed into a habit killing over 30 000 inmates. Wittmann, *supra* note 139 at 153.; Naumann, *supra* note 129 at 76, 137, 140.

¹⁶¹ Pendas, *supra* note 126 at 26.

¹⁶² E.g., Gerd Czechatz, “Boger zerschmetterte ein Kind and der Wand”, *Frankfurter Rundschau* (24 April 1964).

“according to today’s principles of the rehabilitated constitutional government, the court could contribute to the inner recovery of the German people.”¹⁶³ Both the prosecution and defense stressed the importance of the rule of law, respectively arguing that the erosion of the rule of law had played an important role in the nation’s descent into authoritarianism, and that evidentiary and procedural rules had to be respected in order to label defendants murderers.¹⁶⁴ In a nine-hundred-page verdict, the court began its judgement by noting the “unprecedented spiritual confusion” having mired the nation during this period, along with the “arsenal of propaganda and intellectual influence” effectuated by the state over an extended period of time.¹⁶⁵ Despite some sympathy for the difficult circumstances having led these events, the court nevertheless found all defendants to have contributed to an “injustice that cries to heaven,” and ultimately convicted them of different offenses.¹⁶⁶

The trial garnered significant public attention. Over 1,400 newspaper articles were published on the proceedings in Germany alone.¹⁶⁷ The event attracted an estimated twenty thousand attendees, a large number of which was drawn from school visits.¹⁶⁸ A popular exhibit on the camp toured the country’s main cities as the proceedings were taking place.¹⁶⁹ Some of the prosecutors also participated in public discussions held in schools and universities during this period.¹⁷⁰ Its leading prosecutor invited artists to the proceedings, with the intent of allowing them to translate to the public “emotions and

¹⁶³ The country remained fundamentally indebted of a rigorous confrontation of the past, according to the prosecution, not only to the rest of the world, but also to itself. This part of the speech was well received by the press according to Wittmann, *supra* note 139 at 198, 204; Pendas, *supra* note 126 at 196, 200.

¹⁶⁴ Wittmann, *ibid* at 193; Pendas, *ibid* at 216.

¹⁶⁵ Friedrich-Martin Balzer and Werner Renz, *Das Urteil im Frankfurter Auschwitz-Prozess, 1963-1965* (Bonn: Pahl-Rugenstein, 2004) at 150, 331.

¹⁶⁶ Most were convicted as aiders and abettors to murder and received light sentences of between three to six years, while those shown to have perpetrated sadistic acts received life in prison. *Ibid* at 136.

¹⁶⁷ Jorgen Wilke et al, *Holocaust und NS- Prozesse. Die Presseberichterstattung in Israel und Deutschland zwischen Aneignung und Abwehr* (Weimar: Boehlau, 1995) at 53; Devin Pendas, “‘I didn’t know what Auschwitz was’: The Frankfurt Auschwitz Trial and the German Press, 1963-1965” (2000) 12:2 Yale J L & Hum 397 at 399.

¹⁶⁸ Gerhard Werle and Thomas Wandres, *Auschwitz vor Gericht: Völkermord und bundesdeutsche Straffjustiz. Mit einer Dokumentation des Auschwitz-Urteils* (Frankfurt: C.H. Beck, 1995) at 42.

¹⁶⁹ Cornelia Brink, *Ikonen der Vernichtung. Oeffentlicher Gebrauch von Fotografien aus nationalsozialistischen Konzentrationslagern nach 1945* (Berlin: Fritz Bauer Institut, 1998).

¹⁷⁰ Wittmann, *supra* note 139 at 206.

realities, which lawyers could not convey through the legal process.”¹⁷¹ One of the better-known works resulting from this initiative is Peter Weiss’ play *The Investigation*, which presented verbatim dialogue to an avid public in over fifteen locations after the trial.¹⁷² Figures such as Jean Améry, Hannah Arendt, Paul Celan, Inge Deutschkron, Horst Krüger, Arthur Miller and Marcel Reich-Ranicki also wrote on the subject in the following years.¹⁷³

(2) The Criminal Justice Process and Symbolic Communication Theory

The literature tends to be critical of the proceedings, noting that the statute of limitations diminished the gravity of the offenses, that its detailed engagement with acts of sadism made the defendants appear like madmen disconnected from the population, and that large segments of society did not engage with its message.¹⁷⁴ These concerns are valid but appear overly severe, echoing a broader tendency, in international criminal justice literature, to view the imperfect reception garnered by a given trial in light of its legal limitations.¹⁷⁵ A broader outlook anchored in symbolic anthropology reveals a perhaps more profound and subtle influence, effectuated by the prosecution’s capacity to spark the public imagination. The following section is an attempt to underline this influence, first using the pre-modern frame of reference developed in *Purity and Danger*, before using Turner’s social drama.

¹⁷¹ Kerstin Steitz, “Juristische und Epische Verfremdung. Fritz Bauers Kritik am Frankfurter Auschwitz-Prozess (1963–1965) und Peter Weiss’ dramatische Prozessbearbeitung Die Ermittlung. Oratorium in 11 Gesängen (1965)” (2017) 40:1 Gsr Ger Stud Rev 79 at 90.

¹⁷² Peter Weiss, *The Investigation: An Oratorio in 11 Cantos*, trans. Alexander Gross (London: Calder, 1966).

¹⁷³ Filmmakers also responded to the invitation, without receiving public attention. Steitz, *supra* note 171 at 90.

¹⁷⁴ The statute of limitations on crimes against humanity imposed an imperfect legal framework, namely by diminishing the total gravity of the infraction denounced (as simple murder), but also by demanding that the defendants’ behaviour be assessed against camp regulation. This resulted in a lengthy expounding of the many scenes of horror perpetrated in Auschwitz by a minority of excess perpetrators, not only normalizing “ordinary” conduct in carrying out a plan as devious as the Final Solution, but also preventing meaningful engagement with broader questions of national responsibility. *E.g.*, Pendas, *supra* note 126 at 248; Wittmann, *supra* note 139 at 6; Irmtrud Wojak, “Im Labyrinth der Schuld” in Wojak, *supra* note 145, 32 at 55; Arendt, *supra* note 151; Walser *supra* note 151 at 7.

¹⁷⁵ *E.g.*, Lawrence Douglas, “The Didactic Trial: Filtering History and Memory into the Courtroom” (2006) 14:4 European Review 513 at 517; Barrie Sander, “Justice as Identity: Unveiling the Mechanics of Legitimation in Domestic Atrocity Trials” (2018) 26 J Int’l Crim Just 203 at 205. Others focus on difficulties faced in the public reception in the short to medium term. Ian Buruma, *The Wages of Guilt: Memories of War in Germany and Japan*, (New York: New York Review Books, 2015) at 198; Tina Rosenberg, *The Haunted Land: Facing Europe’s Ghosts After Communism* (New York: Vintage, 1996) at 309; Jaime Malamud-Goti, *Game Without End: State Terror and the Politics of Justice* (Norman: University of Oklahoma Press, 1996) at 26-27, 184.

(i) The Trial and Pollution Theory

The normative communication pattern at work during the trial can be compared to the criminal justice process in 18th century Britain, having operated by conveying dramatic perceptions situated on the opposing thematic poles of purity and impurity. Perceptions of impurity were present on many levels. First is the image of Auschwitz as a site of industrial killing. The quantity of victims and organizational methods employed evoke a production line whose output is not the assembling of goods but death itself: the railway line, with its incoming “cargo,” the selection of “goods” on the platform, the dispatching and complex matriculation system, the functional vocabulary employed, where one was “transported,” or given “special treatment,” the orderly entrance made into the chamber, the aseptic dispensing of gas, the operation of industrial chimneys for the purpose of cremation, the transformation, ultimately, of all “material” into some other secondary form, from human ashes even to other “by-products” such as gold bullion, textile, clothing, etc. The calm and order with which these operations took place resemble nothing like what the public could imagine as a site of massacre. More than the battlefield, Auschwitz resembled the orderly factory work which many Germans would otherwise have shared.¹⁷⁶

Contrasting this was the sadistic behavior adopted by guards, such as the shootings, starvation, torture and interrogation, “rabbit hunts,” extreme “physical training,” phenol injections, etc, which defiled the solemn stance ordinarily commanded by death with the element of play or pleasure apparently exhibited. Reflecting the abyssal level of delinquency characterizing Auschwitz both on the industrial and individual, face-to-face levels also were the very motives underpinning the guards’ actions. All were employed in Auschwitz, it should be underlined, to carry out the Final Solution. Their actions were the culmination of a paranoiac anti-Semitist ideology versed in a number of variously complex

¹⁷⁶ Some viewed death in the absence of explicit or positive violence as inherently defiling. Others compared Auschwitz to some dystopian culmination of capitalistic industrialism. Respectively, Naumann, *supra* note 129 at 46; Dominick LaCapra, *Representing the Holocaust: History, Theory, Trauma* (Ithaca: Cornell University Press, 1996) at 76.

pseudo-scientific declensions, ranging from the Aryan race to social Darwinism and the perils of genetic intermixing, to name a few. The complete folly which transpired in the carrying out this agenda evokes its fundamentally delusional and egoistic nature. Uneducated and ordinarily powerless men took the opportunity to enact the “doctor,” the “judge,” the “sharpshooter,” the “inventor,” the “hunter” or the “sports coach” in bringing about death. Yet most insisted that they had not joined the SS out of ideological motivation.¹⁷⁷ Considering the privileges ordinarily granted to those working in Auschwitz, and regardless of the merits or sincerity of their affirmation, many were likely viewed as having indulged in mixture of self-interest, wilful blindness and thoughtlessness.¹⁷⁸

Complementing these perceptions of impurity also were perceptions of purity. On the individual level, the judgement explicitly punished every defendant for having thoughtlessly violated natural law for the plain pursuit of self-interest, and allocated markedly harsher sentences to the minority of excess perpetrators. This sanction reflects the pre-modern notion of vice, insofar as orders, spiritual confusion and propaganda evoke numerous other variants of wilful blindness unfortunately characteristic of German society during those years. “Never again should this form of behavior be tolerated, and allow the country to lapse into authoritarian rule,” was a lesson emphasized by the prosecution.¹⁷⁹ Citing the words of the Evangelical Church and West German President Heinrich Lübke as authoritative support, the prosecution in its closing argument went as far as to underline that “it remained the holy duty of the German people to re-establish its lost adherence to the rule of law, in order to facilitate the inner recovery of society.”¹⁸⁰ In spite of its explicit reluctance to engage in ideological flights of lyricism, the final judgement stresses that the question would have been answered within hours in Auschwitz: “therein lies the difference between rule of law in a state of laws and the rule of men as practiced in Auschwitz.”¹⁸¹

¹⁷⁷ Naumann, *supra* note 129 at 16–31.

¹⁷⁸ As noted in Arendt, *supra* note 9 at 293.

¹⁷⁹ Naumann, *supra* note 129 at 204. Wittmann, *supra* note 139 at 219, 226.

¹⁸⁰ Naumann, *ibid* at 193, 195.

¹⁸¹ Naumann, *ibid* at 416.

At the same end of the perceptual spectrum were the many references made to justice and authority throughout the trial. The presiding judge, as mentioned, was described as a “sober man given to intellectual pleasures,” and played this role in every regard; seldom did his temper move from the factual and objective state of mind demanded by the justice process.¹⁸² The 700-page indictment, the 300-page report on the history of the camp, the 350 witnesses interrogated and the 900-page judgement add to this image of intellectual rigor. The judgement itself explicitly distanced the court from grandiloquent historical ambition, noting that the proceedings were to be restricted to the technical meting out of individual guilt.¹⁸³ The application of domestic, instead of international law, in conjunction with the ordered presence in court of a sizable crowd of constables, legal personnel, trial participants, spectators and journalists from across the nation likely conveyed a sense of formal authority. Amidst all the intellectual rigour demanded by rule of law also transpired another, more humane component, completing the picture this time by exhibiting a measure of patience and understanding whenever required by victim testimonies.¹⁸⁴ The paternalism, impartiality, intellectual sophistication and overall ceremonial authority characteristic of the pre-modern criminal justice process were thus equally present.

With the above-described perceptions of purity/impurity also came some of the dramatic intensity associated with the rite of passage. “A psychological dynamic developed,” writes Devin Pendas, “in which Germans were simultaneously repelled and fascinated by the brutality on display.”¹⁸⁵ The trial narrative, while anchored in technocratic language, evoked an unfathomable reality one could only seek to grasp by recourse to the imagination: Auschwitz was an “impossible” place, a “camp located far away, somewhere in Poland,” to quote its commandant in Nuremberg.¹⁸⁶ Many in the press compared it to hell.¹⁸⁷ The picture revealed is one of an upside-down version of reality where showers did

¹⁸² Vogel, *supra* note 128. On legalism, Fitzjames, *supra* note 55 at 429.

¹⁸³ Balzer and Renz, *supra* note 165 at 331.

¹⁸⁴ *Ibid* at 150.

¹⁸⁵ Pendas, *supra* note 126 at 250.

¹⁸⁶ Naumann, *supra* note 129 at 1.

¹⁸⁷ Walser, *supra* note 151.

not clean, injections did not heal and food did not nourish, where one lived to die. The trial's continuous reporting on a place so far removed from ordinary reality likely gave the impression of an extra-ordinary event itself apart from everyday life.¹⁸⁸ Further emphasizing this was the press' focus on the defendants' place as either "within" or "without" the community. Many were struck by the group's ordinary appearance, and overemphasized their humanness, as "responsible, law-abiding war victims, like the rest of society, who feared disobedience in an authoritarian state."¹⁸⁹ Yet this group was also referred to as "monsters," "demons," "devils," "beasts," or "barbarians" by others, again exaggerating their inhumanity. Pendas writes that defendants were often depicted as "non-humans" belonging to some "netherworld" beyond comprehension.¹⁹⁰

Much like the 18th century criminal hanged outside the gates of the community for his vices, the defendants were to be expelled "out of society" (by being sent to prison) for their thoughtlessness and general disregard of natural justice. From an anthropological perspective, the defendants through the defiling behavior disclosed at trial were shown to be disgusting, and to be outsiders, while the norms violated were shown to be pure and authoritative. The upholding of fundamental norms, according to sophisticated and impartial standards, contrasts with the generalized thoughtlessness and carelessness denounced of the defendants. These very "vices," as exemplified in the defendants, were symbolically cleansed much in the same way as the 18th century criminal whose death cleansed communal vice.¹⁹¹ To be clear, this was done by exposing the horrors of crime in what resembled a horror spectacle, in which the terror experienced during the public execution was replaced by the unimaginable suffering detailed over months of testimony.¹⁹² As in the pre-modern ritual, the core of the normative message resided in the

¹⁸⁸ That media events create a sensational moment outside ordinary reality, Dayan and Katz, *supra* note 117.

¹⁸⁹ The *Tagesspiegel* for instance underlined how their motives were neither sadistic nor perverse and rather consisted of an excessive sense of duty. "Der Auschwitz Trial", *Der Tagesspiel* (20 December 1963).

¹⁹⁰ Pendas, *supra* note 126 at 216.

¹⁹¹ As in the march to the scaffold, where criminals were alternatively revered and detested, and of the hanging itself, where the person was loved but his sins hated, Pendas in his overview of the press notes that the group was itself both "adulated" and "detested" by the wider public. Pendas, *supra* note 167 at 221–24.

¹⁹² The terrible agony of the criminal during the execution ritual indeed symbolized his descent into hell, according to Foucault, *supra* note 1 at 2, 46 ("the theatre of hell"). The journalists covering the Frankfurt-Auschwitz trial did not miss the analogy, remarking that the horrors described seemed only to come from hell. Walser, *supra* note 151.

very conflation of purity and impurity symbolism: the exclusion from “within” the community to “without” it, the rite of passage outside ordinary structure excluding the accused forever “in between,” at once as a moral example and defiling element, which was then relayed abundantly by the media to the population.

(ii) The Trial and Social Drama Theory

The preceding has argued that the intensity and plurality of opposing referents connoting purity and impurity likely operated a measure of normative influence, which reinforced the community’s attachment to fundamental principles of rule of law. While similar to the 18th century criminal justice process in its symbolic articulation, this example however lacks two of its key components. For one, the event was less eventful than the marches to the scaffold and did not end with the grand climax of public death. The event also lacked the element of repetition required for the law’s message to impress itself by way of conditioning.¹⁹³ Social Drama theory shows these two elements to have been present to some extent. Counterbalancing the comparative sobriety and lack of repetition of the proceedings, is the chain of dramatic depictions relayed after the fact by journalists, writers and filmmakers, which colourfully repeated the trial’s message in the following years.¹⁹⁴

Turner writes that an initial breach must divide society into two groups on a fundamental question.¹⁹⁵ In this case, the breach can be tied to Germany’s responsibility for the Holocaust, which led one part of society to seek accountability, and another to set the past aside.¹⁹⁶ To the image of the social drama ritual, which dramatically re-enacts the origin of conflict against traditional values, in this case the horrors of Auschwitz were recounted against the liberal values upheld by criminal justice.¹⁹⁷ The effect of the ritual was to

¹⁹³ On conditioning in pre-modern executions, Wilf, *supra* note 75 at 59–62; Foucault, *supra* note 1 at 78.

¹⁹⁴ On France’s recurring waves of “cultural obsessions” over Nazi collaboration throughout the postwar period, Henry Rousso, *Le Syndrome de Vichy de 1944 à nos jours* (Paris: Seuil, 1990).

¹⁹⁵ Turner’s social drama theory begins with a breach, which can be found here in the Holocaust as manifested in Auschwitz. Turner, *supra* note 96 at 150.

¹⁹⁶ On German opinion, generally, Pendas, *supra* note 167.

¹⁹⁷ Turner, *supra* note 100 at 55–56; Turner, *supra* note 96 at 151; Turner, *supra* note 101 at 299.

reintegrate both groups under one and the same identity, which will be shown here to be the identity of the group prepared to confront the nation's past. Turner argues that the ritual produces its effect in modern society through the constant re-enactment of its dramatic message in a variety of media over an extended period of time: "Now we have plays, films, and novels about Watergate," each borrowing from conventional artistic styles for added dramatic ascendancy.¹⁹⁸ As will be shown, a steady narrative did emerge after the trial, which produced many reinterpretations in various cultural productions, ultimately contributing, in the long term, to a societal consensus condemning the Holocaust.

In line with the social drama ritual's emphasis on dramatic reinterpretation of the event, the trial provided ample material for sensationalist mediatic coverage. Among the many headlines on the trial were titles such as "Women thrown Alive into the Fire," "Soup and Street Droppings Stuffed into the Mouths of Inmates" and "Deathly ill Inmates Chewed on by Rats"¹⁹⁹ The press, according to Pendas, further tended to depict the proceedings according to the literary style of realist fiction.²⁰⁰ Dramatization extended to the way the press characterized participants, which was frequently done along conventional attributes tied to the genre of courtroom drama: defendants were depicted as barbaric or honourable, the judge as fair, and lawyers as grandstanding.²⁰¹ Survivor testimony also inspired many artists. A wave of Holocaust fiction arose in the early 1960s, which produced some of the most significant political literature of the period.²⁰² Of importance also was the creation of new literary forms intended to shock the public by revealing truths otherwise absent from high literature or press coverage.²⁰³ One such genre was the documentary drama, which Peter Weiss pioneered with his popular play *The Investigation*. Using a collage of

¹⁹⁸ Turner, *supra* note 100 at 55.

¹⁹⁹ Walser, *supra* note 151 at 11.

²⁰⁰ Pendas, *supra* note 126 at 261. On media sensationalism, Wittmann, *supra* note 139 at 248.

²⁰¹ Pendas, *ibid*.

²⁰² Such as Walser's "The Black Swan," Hochhut's "The Deputy," Kipphardt's "Joel Brand" and Weiss's "The Investigation." Adrei Markovits, "West Germany" in David Wyman and Charles Rosenzweig, eds, *The World Reacts to the Holocaust* (Baltimore: Johns Hopkins University Press, 1996) 391 at 423.

²⁰³ Timothy Scott, *West Germany and the Global Sixties: The Anti-Authoritarian Revolt, 1962-1978* (Cambridge: Cambridge University Press, 2013) at 144.

journalistic reports on testimony from the trial, the play abandoned the proceedings' arid legal tone to focus on the human component, emphasizing the duty to object.²⁰⁴

This ritual message, once dramatized against a variety of aesthetic and moral genres, in turn operated a measure of influence over German society, thereby influencing members of the population to join the breach group. Intellectuals responded to the trial with interest. Over 1,200 articles were published on the trial in 1965 alone.²⁰⁵ Pendas writes that the trial "crystallized a set of public images of Nazism and the Holocaust," which structured public discourse on the subject for a decade.²⁰⁶ One author of the period writes that "no one, I believe, could watch what was going on in the Frankfurt courtroom regularly without being both repulsed and attracted."²⁰⁷ Mirroring the trial's didactic message, influential authors tended to adopt a critical tone of moralism, stressing the importance of renewing with the country's democratic tradition.²⁰⁸ Marcel Atze, one of the many authors invited to the proceedings, views the trial as a "turning point" in the artistic treatment of the Holocaust.²⁰⁹

Again in line with the strengthening of the breach group, the postwar generation reached early adulthood during this period, and was politically socialised in an academic climate largely critical of the nation's past.²¹⁰ Reacting to the silence of older generations, this cohort rejected every potential National-Socialist identity tie, and ultimately chose to

²⁰⁴ The play also featured thousands of representations, and became the object of a television production in both Germanys. Over 400 articles were published on this very work in 1965 only. Mark Wolfgram, "Didactic War Crimes Trials and External Legal Culture: The Cases of the Nuremberg, Frankfurt Auschwitz, and Majdanek trials in West Germany" (2014) 26:3 *Glob Change Peace Secur* 281 at 295.

²⁰⁵ Regina Becker, "Reaktionen der westdeutschen Bevölkerung auf den Auschwitz-Prozess" (2004) 60 *Studienkreis Deutscher Widerstand* at 29; Vivian Liska, "Ich will nur dasitzen und zuhören: Horst Krüger im Auschwitz-Prozess" in Stephan Braese, ed, *Rechenschaften. Juristischer und literarischer Diskurs in der Auseinandersetzung mit den NS-Massenverbrechen* (Göttingen: Wallstein, 2004) 90 at 112.

²⁰⁶ Pendas, *supra* note 126 at 251.

²⁰⁷ Walser, *supra* note 151 at 8.

²⁰⁸ For instance emphasizing the "urgent need to rebuilt legal consciousness" in Germany. Eugen Kogon, "Auschwitz und eine menschliche Zukunft" (1964) 19 *Frankfurter Hefte* 830 at 833; Juergen Baumann, "Wozu noch Auschwitz-Prozesse? Verjaehrung ist Gesetzt" (1964) 9 *Die Politische Meinung* 50 at 63.

²⁰⁹ Marcel Atze, "... an die Front des Auschwitz-Prozesses. Zur zeitgenössischen Rezeption der 'Strafsache gegen Mulka und andere,'" in Irntrud Wojak, ed, *Auschwitz-Prozess 4 Ks 2/63 Frankfurt am Main* (Cologne: Snoeck, 2004) 612 at 637. For an overview of the literature, Steitz, *supra* note 171 at 90.

²¹⁰ That this period shapes political attitudes, Karl Mannheim, "The Sociological Problem of Generations" in Paul Keeskemati, ed, *Karl Mannheim: Essays in the Sociology of Knowledge* (London: Routledge, 1952) 276.

identify with its very opposite: authoritarianism was to be replaced with rule of law, fascism with democracy, capitalism with socialism, anti-Semitism with philo-Semitism, and so on.²¹¹ The trial factored into this transformation. Prosecutors gave lectures during and after the trial.²¹² As one of the chief institutions tasked with the transmission of ideas, the university brought the intellectual discourse sparked by it into the classroom.²¹³ Considerable evidence shows that the Holocaust loomed large in the minds of students.²¹⁴ Bernhard Schlink depicts the trial as “our first concrete exposure [to the Holocaust, given that] for many teachers history ended in 1933, and many families didn’t talk about it.” Another author stresses that “the Auschwitz trial was *the* event for my generation.”²¹⁵ German journalist Hans Kundnani for his part describes student politics as “a defensive movement that aimed [...] to prevent a recurrence of Auschwitz.”²¹⁶

The generation educated in the 1960s progressively integrated society, acquired influential positions, and eventually institutionalised its condemnation of the Holocaust. By the late 1970s, a commemoration culture emerged, which sent countless classroom visits to concentration camps.²¹⁷ Artistic productions blossomed.²¹⁸ Of particular importance was the television miniseries *Holocaust*, which garnered twenty million viewers in Germany, accounting for about half of the country’s adult population.²¹⁹ The series triggered heated

²¹¹ “The ‘national habitus’ that normally connected different generations within a country had, as a result of Nazism, been severely weakened.” Hans Kundnani, *Utopia or Auschwitz: Germany’s 1968 Generation and the Holocaust* (Oxford: Oxford University Press, 2009) at 11–12; This cohort eventually came to identify with the victims of the Holocaust and other oppressed peoples of the third world. Harold Marcuse, “Generational Cohorts and the Shaping of Popular Attitudes towards the Holocaust” in John Roth, ed, *Remembering for the Future: The Holocaust in an Age of Genocide* (New York: Palgrave, 2001) 652 at 656.

²¹² Wittmann, *supra* note 139 at 206.

²¹³ Scott, *supra* note 203 at 95.

²¹⁴ Doerte von Westernhagen, *Die Kinder der Taeter: Das Dritte Reich und die Generation danach* (Munich: DTV, 1987); Sabine Reichel, *What did you Do in the War, Daddy? Growing up German* (New York: Hill and Wang, 1989); Dan Bar On, *Legacy of Silence* (Cambridge: Harvard University Press, 1989).

²¹⁵ Cited in Rosenberg, *supra* note 175 at 312. Recalling “a generation standing accused in the dock,” Michael Geyer and Miriam Hansen, “German-Jewish Memory and National Consciousness” in Geoffrey Hartmann, ed, *Holocaust Remembrance: The Shapes of Memory* (Oxford: Oxford University Press, 1994) 175 at 175.

²¹⁶ Kundnani, *supra* note 211 at 17.

²¹⁷ In 1980, students wrote essays on their own towns under Nazism in a national competition. Klaudia Koonz, “Between Memory and Oblivion: Concentration Camps in German Memory” in John Gillis, ed, *Commemorations: The Politics of National Identity* (Princeton: Princeton University Press, 1996) 258 at 265.

²¹⁸ Influential films and novels such as *Heimat* and *Das schreckliche Maedchen* invited the German public to identify with ordinary individuals of the epoch. Alexander, *supra* note 111 at 38; Buruma, *supra* note 175 at 263–65, on novels, 292–93..

²¹⁹ “‘Holocaust’: Die Vergangenheit kommt zurück”, *Der Spiegel* (29 January 1979).

public discussions in talk shows and the press.²²⁰ Many scholars view this period as a “tipping point,” past which Germany accepted responsibility for the past.²²¹ In line with social drama theory, the change of identity initially called for by intellectuals in the early 60s thus appears to have worked its way into the population’s everyday life, gaining greater significance with every new dramatic production.²²² This change however did not happen on its own, as most Germans had discredited National Socialism after losing the war, had a democratic government put in place by the American occupying power, experienced three decades of unprecedented economic growth, and witnessed other atrocity prosecutions.²²³

Norbert Frei writes that after the trial, “things were not the same,” such that “critical discussion on the subject had ultimately garnered interest.”²²⁴ This opening unfolded in line with Turner’s theory, with each political scandal, subsequent Holocaust trial, popular film or novel recasting in the audience’s mind a dense series of affectively-laden memories building one upon the other with each further commemorative incident.²²⁵ The very weight of the Auschwitz symbol in the form of the industrial extermination camp rose to become *the* defining event: a great source of guilt and taboo viewed as infinite and irreplaceable, with entire subjects such as euthanasia, medical ethics, German-Israeli relations, armed intervention and conscious objection gradually shot through and transformed by it.²²⁶ A

²²⁰ Anton Kaes, “History and Film: Public Memory in the Age of Electronic Dissemination” in Bruce Murray and Christopher Wickham, ed, *Framing the Past: The Historiography of German Cinema and Television* (Carbondale: South Illinois University Press, 1992) 308 at 310.

²²¹ Wulf Kansteiner, *In Pursuit of German Memory: History, Television, and Politics after Auschwitz* (Athens: Ohio University Press, 2006) at 141-42; Wolfram, *supra* note 204 at 273; Marcuse, *supra* note 211 at 656; Alexander, *supra* note 111 at 38, 52-53.

²²² Michal Bodemann, “The Uncanny Clatter: The Holocaust in Germany before its Mass Commemoration” in Dan Michman, ed, *Remembering the Holocaust in Germany, 1945-2000* (New York: Lang, 2002) 43 at 44; Alexander, *supra* note 111 at 38.

²²³ David Conradt, “Changing German Political Culture” in Gabriel Almond and Sidney Verba, eds, *The Civil Culture Revisited: An Analytic Study* (Boston: Little & Brown, 1980) 214 at 215; Jeffrey Herf, *Divided Memory: The Nazi Past in the Two Germanys* (Cambridge: Harvard University Press, 1999) at 201.

²²⁴ Norbert Frei, “Der frankfurter auschwitz process und die deutsch zeitgeschichtsforschung” in *Auschwitz, geschichte, rezeption und wirkung. Jahrbuch 1996 zur geschichte und wirkung des holocaust* (Frankfurt: Fritz Bauer Institut, 1996) 117 at 124.

²²⁵ “One could argue that the developments of the postwar era, and especially of the 1960s and early 1970s in Germany, have furnished successive theatrical stages on which fragments of the events of the past were grasped and continuously re-enacted – an thus recreated.” Bodemann, *supra* note 222 at 44.

²²⁶ Jeffrey Olick Daniel Levy, “Collective Memory and Cultural Constraint: Holocaust Myth and Rationality in German Politics” (1997) 62:6 *Am Sociol Rev* 921 at 927–31.

new redemptive ethos concomitantly emerged, leading many to regard the maintenance of former concentration camps as a sacred duty.²²⁷ “Alas,” writes Habermas, “loyalty to universalist constitutionalist principles, rooted in conviction, could be established in the cultural German nation only after – and by virtue of – Auschwitz.”²²⁸

CONCLUSION

The preceding has argued that the trial narrative was reinterpreted time and again as a source of moral pollution further placing authoritarianism outside social structure, discrediting the National Socialist ethos as tainted and synonymous with the horrors of Auschwitz, and contrasting it to the new and symbolically legitimate ethos of democracy. While the German example remains exceptional, as few other transitions evidence such clear-cut transformations from authoritarianism to democracy, some of the above-discussed patterns do recur in other atrocity prosecutions. The capricious socioeconomic circumstances leading to effective post-conflict transitions aside, atrocity trials have in the past garnered significant public interest elsewhere. Covering South Korean proceedings held in relation to the massacre of student protesters, journalist Sandra Suguwara for instance writes that “the spectacle of the two former rulers before the judge [...] riveted the nation.” Suguwara continues, “South Koreans gathered around television sets in homes, stores and offices to watch the unfolding of a drama that has become a symbol of the political transformation that South Korea has undergone in the past three years”²²⁹ Argentinians, Greeks and Frenchmen likewise assiduously followed domestic proceedings in relation to atrocities hitherto kept outside the sphere of mainstream discourse, discovering as if for the first time the extent of the horrors committed by the former regime, and eventually tying the latter to a political agenda left behind in favor of democracy.

²²⁷ And philosopher Karl Jaspers to end *The Question of German Guilt* by stating that “we have to purge ourselves of whatever guilt each one finds in himself, as far as this is possible [...] by atonement.” Dirk Moses, “Stigma and Sacrifice in the Federal Republic of Germany” (2007) 19:2 Hist Mem 139 at 161. Citation from Karl Jaspers, *The Question of German Guilt* (New York: Fordham University Press, 2009) at 119.

²²⁸ Jürgen Habermas, “Staatsbürgerschaft und nationale Identität” in Jürgen Habermas, ed, *Faktizität und Geltung* (Frankfurt: Suhrkamp, 1992) 632 at 644.

²²⁹ Sandra Suguwara, “South Korean Court Sentences Ex-Rulers to Prison” *Washington Post* (Aug 26 1996) A01.

The revelation of atrocities perpetrated pursuant to an authoritarian political agenda can produce or reinforce a social taint or taboo in relation to this particular agenda. Guillermo O'Donnell for instance notes that individuals having formerly acquiesced to the Argentine military regime tended to view themselves retroactively as dissidents, thus avoiding association with the regime and its moral taint.²³⁰ Similar phenomena occurred in postwar France and Germany, where many denied having glorified Hitler, and claimed to remember assisting the resistance in significant ways.²³¹ In the former Soviet Bloc, the profound corruption and violence associated with communist rule equally appears to have formed a taboo leading new democracies to declare communism "illegal."²³² Illustrative of the moral taint and taboo associated with atrocity prosecutions is the following depiction by one historian of the fate of one convicted Argentine junta general: "today when [he] takes a stroll in the evening, his neighbors cross the street to avoid sharing the sidewalk with him, and this is less a political statement than a reflection of the horror he inspires."²³³

The uncovering of episodes of acute suffering and delinquency formerly believed to have been minimal or inexistent can obtain an electrifying societal effect, sparking a national discussion whose intensity will augment intermittently. Atrocity prosecutions were respectively covered in best-selling Argentine book *The Night of the Pencils* and the most popular film in Greek history, *Z*, along with several other popular artistic productions on the crimes of both countries' junta regimes.²³⁴ After arousing significant public interest, the Argentine trials were however followed by a decade of diminished public interest in accountability, a subject which then returned to prominence by the turn of the

²³⁰ Guillermo O'Donnell, "On the Fruitful Convergence of Hirschman's Exit, Voice, and Loyalty and Shifting Involvements: Reflections from the Recent Argentine Experience" in Alejandro Foxley et al., eds, *Development, Democracy, and the Art of Trespassing: Essays in Honor of Albert O. Hirschman* (Notre Dame: University of Notre Dame Press, 1986) 219 at 264.

²³¹ Alexander Mitscherlich and Margarete Mitscherlich, *The Inability to Mourn* (New York: Grove Press, 1975) at 1-67; Stanley Hoffman, "Foreword" to Henry Rousso, *The Vichy Syndrome* (Cambridge: Harvard University Press, 1994) at vii, vii-viii.

²³² As was the case in The Czech Republic, *Act on the Illegality of the Communist Regime and Resistance to It*, Act No. 198/1993 (Czech Republic, 1993).

²³³ Osiel, *supra* note 11 at 223-224.

²³⁴ Sikkink, *supra* note 119 at 91; Maria Seoane and Hector Nunez, *La Noche de Los Lapices* (Buenos Aires: Sudamericana, 2005).

millennium.²³⁵ Postwar France experienced a similar pattern. Political discourse on the war initially focused on resistance, slowly began incorporating accounts of persecution, concentrated all notion of blame in the person of Maréchal Pétain, and ultimately extended blame to all sectors of society.²³⁶ Henry Rousso's detailed study on the question notes that public discussion on the subject tended to come in waves which peaked, plunged and stagnated with comparable levels of frequency over time, ultimately to attain something of a tipping point, at which most came to recognize the full extent of collaborationism.²³⁷

The preceding also shows scholarly criticism of the didactic function of atrocity prosecutions to be overly severe. Osiel portrays the didactic function as fraught with difficulties and argues that its most important function resides in the public display of rules of procedure and evidence, which can influence the population in framing the public discussion in a civilised and respectful voice.²³⁸ The above argument suggests that this opinion places too little importance in symbols of taboo and moral grandeur, and too much importance in technical rules few outside the profession are likely to be affected by.²³⁹ Devin Pendas and Rebecca Wittmann prefer not to depict the Frankfurt Auschwitz trial as an exceptional achievement, citing the pedestrian nature of the media coverage, fickle levels of public attention and the reduction of international crimes to mere homicide.²⁴⁰ Ian Buruma and Martti Koskeniemi for their part criticize the inaccuracies of trial narrative, while Arendt stresses that didactic ambitions undermine the fairness of the trial, and Segev argues that the vast network of survivor-witness narratives presented at the Eichmann trial

²³⁵ According to an opinion poll, eighty-five percent of the population in 2003 supported the government's initiative to carry out further prosecutions. Respectively, "Derogar la impunidad o juzgarlos en el exterior", *Página12* (July 2013); Francesca Lessa, *Memory and Transitional Justice in Argentina and Uruguay: Against Impunity*. (Basingstoke: Palgrave Macmillan, 2013) at 121.

²³⁶ Alain Finkielkraut, *La mémoire vaine* (Paris: Gallimard, 1992) at 122-29.

²³⁷ Rousso, *supra* note 194 at 147, 180, 234.

²³⁸ Osiel, *supra* note 11 at 23, 31, 38-44.

²³⁹ As transpires from Dianne Orentlicher's study *That Someone Guilty be Punished*, which shows how Bosnian victims tended to give little attention to reasoning of ICTY judgements, and much attention to the types of punishment meted out. Dianne Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (Washington: Open Society Institute, 2010).

²⁴⁰ Without apparently taking into account that symbolic proceedings may have deeper ramifications in the long-term. Pendas, *supra* note 126 at 248; Wittmann, *supra* note 139 at 6. Similarly, Malamud-Goti notes with regret that levels of public discussion on the Argentine Junta proceedings plunged a decade after the proceedings without apparently taking into account that levels of interest may dwindle and peak intermittently (which occurred after his book was published). Malamud-Goti, *supra* note 175 at 184.

was entirely beside the point.²⁴¹ Notwithstanding the fact that atrocity prosecutions violate the expectations of specialists in different areas, such shortcomings can be said to be secondary in the eyes of a public shocked by the gruesome revelation of horrors hitherto denied by the government and kept out of public discourse.

More than a stratagem operated by legal elites instantiating cultural reform mechanically, as if by legal decree, criminal proceedings should however be viewed as the continuation of an evolution. Only with some of the groundwork already in place can a prosecution have its message recuperated and retransmitted by the media. Each link in the communicational chain outlined above plays a unique role, ultimately contributing to the development, in the collective consciousness, of a vast network of taboo and aspiration symbolism in relation to the past. The development of this symbolism, more than the atrocity prosecution itself, constitutes the very core of the transformation. Such symbols develop into an ever-broader network reaching and influencing progressively larger segments of the population in subsequent generations.²⁴² Every influential event, be it judicial, political, religious, or economic, saturates those to follow while being influenced by a number of parallel events occurring on different fronts within the same period, such as the return of the church and its humanistic tradition, the economic miracle and the adoption of capitalism, the outset of the Cold War and the adoption of democracy, etc. All of these events independently contributed, in their own manner, to the development of taboo and aspiration symbolism.

²⁴¹ Buruma, *supra* note 175 at 142; Arendt, *supra* note 9 at 4-5; Tom Segev, *The Seventh Million: The Israelis and the Holocaust* (New York: Hill and Wang, 1993) at 345-66.

²⁴² This network is comparable to a fishing net in structure. In the German example, a series of symbolic events in the immediate aftermath of the war form the nodes of a central ring. One may think of the military defeat, the return of democracy, the return of the Protestant Church, the Nuremberg Trials, and the adoption of the Basic Law. A second ring eventually spread further out into the population, this time including a range of newer nodes – the Cold War divide, the compensations to Israel, the economic miracle, further prosecutions, etc. And so on with the third ring, building on the momentum of its epoch again to bear its imprint on the collective consciousness: the opening of concentration camps to the public, the production of influential Holocaust productions, more prosecutions, political scandals, the historians' debate, and so on. Similarly, Rousso designates Vichy symbolism in postwar France as inherently "composite" – as an amalgam of events and communications spreading like a disease or syndrome. Rousso, *supra* note 194 at 286.

Some will remember the events prosecuted as radically different from any other evil act, as “a unique metaphor of archetypal tragedy” constitutive of radical evil, in Alexander’s terms.²⁴³ Others will focus on the endless repetition of traumatic events as presented in the weeks and months of victim testimony, amounting to an endless stream of human suffering none can fully comprehend.²⁴⁴ And yet others will view the prosecution as unveiling the emptiness of an ungraspable abyss, between the community’s conception of history and the terrible reality experienced by victims. History, following this view, can be changed into a haunting claim putatively possessed by the dead on the living. Mirroring these darker interpretations are its aspirational counterparts, on the possibility of redemption: “Only if somebody has a voice to describe [injustices],” writes Rorty, “does what looked like nature begin to look like culture, what looked like fate begin to look like moral abomination.”²⁴⁵ Underlying the horrors revealed and their numerous interpretations are moral commitments obligating oneself toward a better future. The emotional charge contained by the symbol of atrocity “reacts” against one’s personal lifeworld and incorporates new narratives enhanced in the process. This exchange, between the symbol as iterated and its receiving agent, is what creates the sense of moral cogency capable of private normative influence.

²⁴³ Alexander, *supra* note 111 at 59.

²⁴⁴ Felman, *supra* note 8 at 122.

²⁴⁵ Richard Rorty, “Feminism and Pragmatism” in Marianne Janack, ed, *Radical Philosophy* (Philadelphia, Pennsylvania State University Press, 2010) at 233. See also Walter Benjamin, *Illuminations: Essays and Reflections* (New York: Schocken, 1969) at 256.

CHAPTER 3

A PROBLEM OF CONFLICTING WORLDVIEWS: THE PERSECUTORY CONCEPTION OF JUSTICE

INTRODUCTION

One may wish to recapitulate the argument presented in previous chapters. According to Cover, law can be seen as a “bridge, leading to an idealised world.”¹ The first chapter argued that the ICL project represents an ideal to its proponents, in the form of a world freed from atrocity. The second chapter argued that this ideal can be advanced, or “bridged,” in Cover’s terms, through spectacular prosecutions. While the first chapter examined the ideal embodied by the ICL project, the second showed how justice may lead to this idealised world. The discussion in this chapter now moves to another theme addressed in Cover’s writings, namely the difficulties encountered in the transition towards this idealised world. In *Folktales of Justice*, Cover returns to his bridge metaphor, adding that “constraints must exist in its engineering.”² The ICL project is riddled with such difficulties. This dissertation has so far covered the positive side of this communicative exercise, by describing the normative appeal of ICL and its ability to move societies to action. The perspective will now shift in the opposite, and focus on instances where the exercise fails.

The remainder of this dissertation will address this subject by focusing on the cultural gap separating international criminal justice from post-conflict societies. Whereas the legal process in 19th century Britain conveyed the law’s message using society’s time-honoured traditions of justice, and the Frankfurt-Auschwitz trial revived established German traditions of democratic rule of law, the same cannot be said of international criminal proceedings, which tend to operate at a remove from post-conflict societies. The cultural gap separating ICTs from the local population is twofold; not only do most populations

¹ Robert Cover, “The Supreme Court, 1982 Term Foreword: Nomos and Narrative” (1983) 97 Harv L Rev 4 at 9, 27, 47–48.

² Robert Cover, “Folktales of Justice: Tales of Jurisdiction” (1985) 14 Capital U L Rev 179 at 191.

affected by mass atrocities live in non-Western countries, and therefore enjoy varying levels of familiarity with Western legal traditions, but entire groups may continue to adhere to persecutory ideologies influencing their conception of morality and justice. International criminal tribunals tend to lack the cultural and political authority required to confront populations with their crimes. In order to shed light on the process through which its message fails to be accepted, this chapter will focus on conceptions of justice stemming from persecutory ideologies and their influence on the popular reception of the law's message. Doing so should contribute to the thin body of literature on the reception of ICL, first and foremost by filling a conspicuous gap on the adverse effects of international criminal justice in post-conflict societies.³ Behind the much-discussed objectives presented in chapter 1 indeed exists a broader social mechanism through which post-conflict societies reject international justice and further entrench themselves in illiberal mythologies. The existence and functioning of this mechanism both remain to be seriously studied.

This chapter will do so by engaging with some of the social particularities inhering to mass atrocities, the sociopolitical aspects of which easily tend to be misunderstood. Goldhagen's bestselling *Hitler's Willing Executioners* is easily understood as explaining the Holocaust through the fundamental preparedness of an entire nation to engage in persecutions, while Horowitz's *Taking Lives* shows a modern industrial process almost with a life of its own, and Arendt's *Eichmann in Jerusalem* portrays a defendant so ordinary as to be like many other bureaucrats.⁴ Scholars and journalists variously define atrocities as an aggression planned for strategic gain, an autonomous phenomenon operating without the majority's knowledge, the deed of militarised subcultures, the result of widespread propaganda, a clash of primordial hatreds, and the like.⁵ The extent to which the population ratified the persecutions politically is often downplayed or exaggerated. Atrocities are often characterized in the media as a cataclysm beyond comprehension, using expressions such

³ Much of the model presented in chapter 1, on the objectives of international justice, appears to have been kept within the confines of an *a priori* mode of reasoning, itself almost impervious to the malleability of notions of morality across cultures and contexts.

⁴ Daniel Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* (New York: Vintage, 1997); Irving Horowitz, *Taking Lives: Genocide and State Power* (New York: Routledge, 1991); Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin 2010).

⁵ See Section (I)(A) below.

as “the crime of all crimes,” the “g-word” for genocide, or biblical metaphors describing its perpetration as “scenes from hell,” again furthering this aura of incomprehensibility.

An impression of inscrutability similarly transpires from ICL literature on international tribunals and post-conflict societies, which tends to preserve a certain distance from the persecutory process and its ideology. The reception of international criminal justice tends to be subsumed under the topic of legitimacy, and to be addressed through legalistic factors such as (i) the process by which international tribunals are created, (ii) their location, (iii) staff composition, (iv) institutional structure, (v) laws and procedures used at trial, (vi) outreach mechanisms, and so on.⁶ This simple and objectified approach overlooks the subjective complexity of the process at hand. The same critique applies to the literature on the relationship between the *ad hoc* tribunals and the local population, which is mainly constituted of field studies without theoretical scope.⁷ In a context characterised by the prevalence of nationalist ideology, deeper engagement with these mythologies reveals the existence of a certain logic influencing the reception of international criminal justice.

More than senseless insolence best left ignored, the narratives produced by artists and politicians in the form of hate speech and hyper-nationalistic mythology prove to be useful cultural artefacts, depicting the “cause” espoused by the perpetrator group. This chapter will argue that this “cause” tends to structure the reception of international criminal justice in important ways. The chapter proceeds first by presenting the persecutory societal phenomenon surrounding it using René Girard’s mimetic theory as a conceptual framework. The following section illustrates this concept using the historic example of Vichy collaborationism. The chapter next uses these concepts to propose a framework

⁶ Stuart Ford, “A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms” (2012) 45 Vand J Trans L 405 at 408; Laura Dickinson, “The Promise of Hybrid Courts” (2003) 97 AMJIL 295 at 301-03, 306; Antonio Cassese, “The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice” (2012) 25 Leiden J Int’l L 488 at 493.

⁷ Diane Orentlicher, *Shrinking the Space for Denial: the Impact of the ICTY in Serbia* (New York: Open Society Institute, 2008); Lara Nettelfield, *Courting Democracy in Bosnia and Herzegovina* (Cambridge: Cambridge University Press, 2010); Eric Gordy, *Guilt, Responsibility, and Denial: The Past at Stake in Post-Milošević Serbia* (Philadelphia: University of Pennsylvania Press, 2013).

explaining the reception of international justice, and finally tests this framework against the example of the ICTY in Serbian society, which did not accept the tribunal's message.

(I) THE PERSECUTORY CONCEPTION OF JUSTICE

This chapter begins by presenting a generic conception of a persecutory "cause" frequently found among societies engaged in mass atrocities. The title of this section refers to the "persecutory" context in the broad sense, referring to widespread and ideologically-motivated violence against a given group. The broad nature of the analysis here of course suffers the defects of anything generic, in that the following framework risks applying more directly to some cases than others. Strong ideological motivations are central to the analysis here, and of course do not factor equally in every instance.⁸ This section begins by presenting this framework conceptually, before turning to a historical example illustrating this insight more concretely. The conceptual framework is presented using Girard's mimetic theory, which was selected for its theoretical grounding in ritual and mythology. The historical example used to illustrate this framework is the French participation in the Holocaust, which was chosen for the abundance of literature on its ideology.

(A) The Persecutory Conception of Justice and Symbolic Communication Theory

The theory discussed in this section touches on genocide studies literature, which recurrently insists on the eminently diverse nature of mass atrocities.⁹ Illustrating the diversity of types of victims, perpetrators, motives, methods and consequences, Roger Smith for example classifies genocide into five categories, namely "retributive," "institutional," "utilitarian," "monopolistic," and "ideological."¹⁰ This literature

⁸ The more central the ideological component, the stronger the connection to other cases will be. On the varying import of ideology on genocide perpetration, see, for instance, Frank Chalk and Kurt Jonasson, *Genocide: Analyses and Case Studies* (New Haven, Yale University Press, 1990) at 29-32.

⁹ Helen Fein for instance stresses that assuming that genocide follows a mechanical script is bound to be misleading. Helen Fein, *Genocide: A Sociological Perspective* (London: Sage, 1993) at 56.

¹⁰ Chalk and Jonasson similarly classify motivations between "fear," "retribution," "material advantage," "colonial domination," "national political consolidation," and "ethnic purification." Chalk and Jonasson, *supra* note 8 at 35. Distinguishing between "pragmatic" and "transcendental" genocide, Petrus Du Preez,

nevertheless acknowledges that episodes of mass violence share similarities, such as rapid political transformations, a pre-existing civil war, the demonization of the victim group, their association with delusional conspiracies, the use of euphemism to refer to extermination, or grandiloquent national aspirations.¹¹ Using Girard's theory, this section will focus on a type of interpretation categorized as "scapegoating" in this literature.¹²

(1) Girard's Mimetic Theory

According to Girard's mimetic theory, mythologies often describe rivalries opposing two heroes fighting over a prestigious object such as a crown, a fort, a hand, a title.¹³ The hand of Helen of Troy can be given as an example. Girard writes that over time rivals tend to lose interest in its initial object, and to become more and more interested plainly in defeating one another.¹⁴ Girard observes that mythologies often take this phenomenon to the extreme, showing rivals to become so absorbed by the desire to defeat one another, as to act similarly. Rivals are not only depicted as reciprocating every aggression in kind, but as undoing every obstacle hindering the attainment of their objective.¹⁵ Importantly, of the different kinds of obstacles encountered, rivals will frequently come to a point where even the most basic of moral norms are violated. For their inability to respect moral standards, mythologies thus tend to depict them as gradually metamorphosing into beasts, which once

Genocide: The Psychology of Mass Murder (London: Bowerdean, 1994) at 67; Michael Freeman, "The Theory and Prevention of Genocide" (1991) 6:2 *Holocaust and Genocide Studies* 185 at 189. Roger Smith, "State Power and Genocide Intent: On the Uses of Genocide in the Twentieth Century" in Levon Chorbajian and George Shirinian, eds, *Studies in Comparative Genocide* (Basingstoke: Macmillan, 1998) 1 at 4.

¹¹ Alexander Hinton, "Why did the Nazis kill? Anthropology, Genocide and the Goldhagen Controversy" (1998) 14:5 *Anthropology Today* 9; Neil Kritz, "The Rule of Law in the Post-Conflict Phase: Building a Stable Peace" in Chester Crocker, Fen Hampson & Pamela Aall, eds, *Managing Global Chaos: Sources of and Responses to International Conflict* (Washington: United States Institute of Peace Press, 1996) 593 at 591; Barbara Harff, "The Etiology of Genocide" in Michael Dobkowski and Isador Wallimann, eds, *Genocide in the Modern Age: Studies of Mass Death* (New York: Greenwood, 1987) 41 at 47.

¹² Genocide scholarship frequently notes that perpetrators "sacrifice" or "scapegoat" the victim group, using these words in their usual sense, without reference to scapegoating theory. *E.g.*, Ervin Staub, *The Roots of Evil: The Origins of Genocide and Other Group Violence*, (Cambridge: Cambridge University Press, 1992) at 48–49; Jacques Semelin, *Purify and Destroy* (New York: Columbia University Press, 2009) at 90; Leo Kuper, *Genocide* (New Haven: Yale University Press, 1981) at 44–52; Zygmunt Bauman, *Modernity and The Holocaust* (New York: Polity, 1989) at 113.

¹³ René Girard, *Violence and the Sacred* (London: Bloomsbury, 1977) at 79, 171.

¹⁴ *Ibid* at 171. René Girard, *Le Bouc émissaire* (Paris: Grasset 1982) at 197, 198.

¹⁵ Girard, *supra* note 13 at 179–180.

fully removed from their human form ultimately find themselves prepared to murder one another.¹⁶ What Girard notes is that at the last hour rivals sometimes avoid mutual annihilation, by finding a scapegoat whose death releases them from the grip of rivalry.¹⁷

Girard argues that mythologies further tend to show the existence of a similar pattern at the societal level. In this case a catastrophe such as a war, a plague or a drought has wreaked such havoc on a community, as to have reduced its inhabitants to a state of bare survival. Where relations were previously positive, mythologies show material scarcity to have spoiled the social climate, and forced all to compete against all over basic goods.¹⁸ The amicable bond which formerly governed material exchanges is shown gradually to subside to hostility, and hostility to accumulate to the point of poisoning political relations.¹⁹ Soon entire population segments begin to blame one another for their difficulties.²⁰ A pattern of rivalry begins to emerge on the social plane, through which rival factions begin competing for domination. As hatred mounts, citizen entangle themselves in a circle of reciprocations so vicious, as to make all other considerations come to loose significance.²¹ Revered traditions progressively erode as citizen lose regard for basic moral norms, and society gradually transforms into a monstrous whole.²² After having lost all appearance of morality and humanity, the citizenry eventually finds itself prepared to descend into mutual annihilation, and ultimately avoids confrontation with a scapegoat.²³

Girard argues that the perceptual process leading the population to discharge its animosity on the scapegoat is riddled with distortions. According to Girard, the citizenry remains oblivious to the causes of conflict, and especially its responsibility in relation thereto.²⁴ Considering that fighting between rivals would entail substantial costs, most citizen in fact

¹⁶ Girard, *supra* note 13 at 79 and note 22 at 179-80.

¹⁷ Girard, *supra* note 14 at 12.

¹⁸ Girard, *supra* note 14 at 23.

¹⁹ *Ibid.*

²⁰ *Ibid* at 194.

²¹ Girard, *supra* note 13 at 335.

²² René Girard, Jean-Michel Oghourlian and Guy Lefort, *Things Hidden since the Foundation of the World* (Stanford: Stanford University Press, 1987) at 21.

²³ *Ibid* at 38.

²⁴ Girard, *supra* note 13 at 24; James Williams, *The Girard Reader* (New York: Crossroad Herder, 1996) at 7.

share an interest in projecting blame onto some weaker third party. What most readily choose to notice is that society's customs and traditions, which enshrine its moral norms, appear to have undergone a process of erosion.²⁵ Soon, society obsessively blames a small group of putative culprits, whose identity belongs within the community but does not conform to one particular social category. One may think of minorities, nationalised foreigners or artists.²⁶ This formal difference is increasingly depicted as excessively defiling, and perceived as if contributing to the disappearance of traditions.²⁷ Seeing in this group a reflection of the loss of traditions and morals having brought society into state of chaos, the citizenry ultimately releases its aggressivity on it, decimating it.²⁸ When the material difficulties having initially caused conflict are no longer in place, the act of scapegoating defuses tensions, and allows normal life to resume in the community.

To kill the scapegoat, according to Girard, is to obtain catharsis. In its original Greek sense the word refers to a rite of purification following which a human victim, a *katharma*, is paraded ceremonially in the streets before his execution, putatively absorbing noxious influences within the community.²⁹ The new social equilibrium established by the act of scapegoating in turn engenders a series of mythologies retelling the history of the conflict according to the same delusions having led to conflict.³⁰ Just as rivals evidenced little insight into their responsibility for having brought about conflict, believing their every action to have been justified, mythologies portray society as having freed itself from a dangerous enemy.³¹ To inject a sense of common honour necessary to lubricate social relations between former rivals, mythologies both present the conflict as a triumphant victory for all members of society, and erase all traces of violence. The base and gruesome massacre of the victim group ultimately finds itself transformed into a story where the scapegoat fantastically disappeared of its own, without society's immediate involvement.

²⁵ Girard, *supra* note 13 at 54.

²⁶ *Ibid* at 29.

²⁷ Girard, *supra* note 13 at 24, 61 note 10.

²⁸ *Ibid* at 25; Paisley Livingston, *Rene Girard and the Psychology of Mimesis* (Baltimore: Johns Hopkins University Press, 1992) at 11.

²⁹ In its medical sense the word designates a poison capable of acting as a cure. Girard, *supra* note 13 at 327-28.

³⁰ *Ibid* at 105.

³¹ *Ibid* at 6-7.

(2) Towards a Symbolic Communication Model for Genocidal Persecution

The preceding can be separated into a number of milestones leading to persecutions. The first is the initial cataclysm, which depletes the community's supply of material resources and eventually degrades the quality of interpersonal relations. The pleasant state of positive reciprocity normally governing social relations transforms into one of acrimony. These difficulties eventually translate onto the political plane to bring about the second milestone, in the form of a political deadlock. Political difficulties produce such an exacerbated state of antagonism, that members of opposing factions begin to derogate to fundamental moral norms in their mutual relations. Society comes to perceive that its institutions and customs are no longer functioning, in what begins to appear as a state of chaos. The following milestone consists in the progressive transference of social acrimony onto a weak victim group, whose distinctive identity traits are believed to violate society's traditions and customs. In this context, the victim group's putative contribution to the erosion of traditions becomes the object of obsessive discussion, through which anxieties may be safely released, and formidable delusions produced depicting the victim group as beasts. The next milestone is its physical elimination. In a final act of perceptual distortion, finally, scapegoating mythologies settle which depict the victim group as a form of beast which, through society's heroic deeds, perished without violence and disappeared mysteriously.

With this pattern recapitulated, one may argue that a parallel exists with the pre-modern punishment ritual laid out in the previous chapter, especially as regards the perpetration of violence. On one level, the nature of the recriminations levied against the scapegoat and the offender is the same, as both tend to be accused of undermining society's fundamental norms. The scapegoating ritual, with its expulsion of the scapegoat, tends to share with the pre-modern ritual of punishment the general structure of a symbolic process of social expulsion. Girard's example of the *katharma* ritual is a case in point. One may remember that the offender was indeed paraded ceremonially through the streets, and believed to cleanse the community from the noxious influence of vice. Like the scapegoat, which for

its contradiction of social categories neither belongs fully “within” nor “without” the community, one may also remember how the offender was also depicted as belonging to the margins. Notably, his death occurred at a crossroads, in suspension in between heaven and earth, and his interment took place between the cemetery and city walls. Finally, while the scapegoat tends to be killed using methods conducive to denial, which often portray the scapegoat as disappearing of its own, the offender would be killed using a series of indirect techniques: a despised hangman would whip a horse, which would pull a plank from under the offender’s feet, allowing his body to fall and strangulate itself with own weight.

(B) The Persecutory Conception of Justice and Vichy Anti-Semitism

The discussion will now move to an example illustrating the above framework. Using the example of French collaboration during the Holocaust, this section will first illustrate Girard’s framework using the above-described series of milestones. This section will next argue that the order of persecution followed a symbolic structure similar to the pre-modern ritual of punishment presented in chapter 2, endowing it with an aura of legitimacy necessary for large segments of society to participate in a variety of sectors. In order to do so, the following section begins with a historical overview of modern anti-Semitism in France, which will subsequently be applied to the scapegoating process outlined above.

(1) The Holocaust under Vichy

France has a long history of anti-Semitism, which Édouard Drummont’s bestseller *La France juive* abruptly revived at the turn of the 19th century.³² The book, like other antisemitic literature, capitalized on the hardships engendered by the great transformations of this historical epoch. One may think in this respect of the steady migration from the agrarian world to industrial centers and spiritual decline. The traditional rural lifestyle was

³² Édouard Drummont, *La France juive* (Paris: Flammarion, 1886).

partly replaced by the expansion of *laissez-faire* capitalism, with its sudden upticks and downturns in economic growth and often difficult working conditions. In this period many lost the social ties having traditionally connected individuals to their community, land and traditions.³³ According to anti-Semitic literature, the appetite for lucre associated with Judaism – this incessant quest for profit strongly denounced by Christianity – appeared to have been perversely rewarded. For a landed élite outweighed by the power of capital, and for those struggling in the working masses, anti-Semitism offered a compelling account.³⁴

Anti-Semitism resurged after the 1930 economic crisis, as a constant flow of Jewish foreigners entered the country in a desperate attempt to escape Nazi persecution in Germany. In response to popular demands, the government enacted a series of draconian measures in 1930 to regulate the entry of foreigners.³⁵ The following year, the same government established a series of camps to respond to the refugee crisis engendered by the massive flow of foreigners fleeing the Spanish Civil War. In a strange reversal of circumstances, Spaniard refugees soon repatriated only to be replaced by stateless Jews swept up in police operations.³⁶ Conditions in camps led thousands to their deaths even before the deportations had commenced and the occupant taken interest in the matter.³⁷ After the armistice, the new Vichy government adopted anti-Semitic legislation which excluded Jews from sectors such as politics, civil service, the judiciary, national defense, education and the media even before Germany exerted any pressure to do so.³⁸ Vichy further developed an elaborate identity card system to identify Jews so as to send those deemed superfluous to the national economy to concentration camps, and extended to the unoccupied zone the occupants' measures stripping Jews of their property.³⁹ Under a

³³ Robert Byrnes, *Antisemitism in Modern France* (New York: Howard Fertig, 1969) at 9; Carlton Hayes, *A Generation of Materialism, 1871-1900* (New York: Praeger, 1941) at 103.

³⁴ On Dreyfusard and Anti-Dreyfusard positions, Stephen Wilson, *Ideology and Experience: Antisemitism in France at the Time of the Dreyfus Affair* (Toronto: Fairleigh Dickinson, 1982) at 169 et seq.

³⁵ "Le statut des commerçants étrangers", *Le temps* (15 April 1939).

³⁶ Pierre Pierrard, *Juifs et catholiques français* (Paris: Fayard, 1970) at 316.

³⁷ Donald Lowrie, *The Hunted Children* (New York: Norton, 1963) at 152; Gilbert Badia, "Camps répressifs ou camps de concentration?" in Gilbert Badia et al, eds, *Les barbelés de l'exil: études sur l'émigration allemande et autrichienne: 1938-1940* (Grenoble: Presse Universitaire de Grenoble, 1979) 289 at 296; Suzan Zuccotti, *The Holocaust, the French, and the Jews* (New York: Basic Books, 1993) at 72-77.

³⁸ *Loi portant statut des juifs*, 18 October 1940 J.O.

³⁹ Joseph Billig, *Le Commissariat général aux questions juives, Volume 1* (Paris: Centre, 1955) at 44-46.

complex legal cover, Jewish property was thus liquidated in a massive effort involving both public and private sectors, during which business transactions professionals transferred some 40,000 Jewish businesses to a trusteeship destined for French nationals.⁴⁰

State organs involved in anti-Semitic measures were largely staffed with the same personnel as before the war and generally worked diligently. Most directly involved were the clergy, army, prefectures, ministries, railway service, police and courts, which in one way or another participated to the camp system.⁴¹ To be sure, resistance did take place in various sectors, with many advocating in favour of democracy and tolerance. A laudable network of resistance was organised, many of whom risked their lives to help Jewish refugees. Yet in a context where German authorities remained understaffed, French society provided the necessary means to bring the deportations to their daunting heights.⁴² Vichy not only implemented anti-Semitic legislation before the German occupant in an attempt to safeguard national autonomy, but appeared so readily prepared to do so as to lead Von Ribbentrop to inform Hitler in 1940 that “there was great interest in France for a solution to the Jewish problem.”⁴³ Popular complaints on deportations concerned how they were handled more than the fact that they were occurring.⁴⁴

(2) The Holocaust under Vichy and the Scapegoating Milestones

With the extent of societal involvement in anti-Semitic persecution presented, the discussion will now turn to the above-discussed milestones leading to scapegoating. The first milestone is the initial cataclysm, and in the present case can be located in the armistice accord. This event exacerbated the material pressures already brought about by the war, requisitioning no less than 58% of the nation’s annual budget, in addition to large quantities

⁴⁰ Philippe Verheyde, *Les Mauvais Comptes de Vichy* (Paris: Perrin, 1999) at 98.

⁴¹ Byrnes, *supra* note 33 at 142.

⁴² Robert Paxton and Michael Marrus, *Vichy France and the Jews* (New York: Basic Books, 1981) at 317.

⁴³ Vallat similarly claimed during his trial that anti-Semitic measures reflected popular wishes. *Le procès de Xavier Vallat présenté par ses amis* (Paris: Conquistador, 1948) at 58-77; Memorandum from von Ribbentrop, Paris, 9 December 1938, DGFP, No. 372, 481-82.

⁴⁴ François Delpech, “La persécution des juifs et l’amitié chrétienne” in Xavier de Montclos et al, ed, *Églises et chrétiens dans la Deuxième guerre mondiale : La région Rhone-Alpes* (Lyon: Presses universitaires de Lyon, 1978) 143 at 168.

of skilled labor and agricultural produce.⁴⁵ The next milestone is the division of society between two rival camps. In this case France had been in a state of political deadlock at least since the late 1930s.⁴⁶ In line with this milestone, which tends to bring about the erosion of traditions, many claimed that institutions having allowed the nation to rise to prominence in the past were endangered by modern life; unusual attention was given in public discourse to matters such as the declining birthrate, alcoholism, the abandonment of religion or the waning influence of the national army.⁴⁷ Sociologist Yves Chalas writes that Maréchal Pétain thus depicted France as in a state of illness: “The country needed a therapist,” went one of his allocutions. “Economic crises, political upheavals and constant conflicts [...] were the symptoms of a profound spiritual evil and moral decadence.”⁴⁸

In line with the following milestone, according to which societal anxieties tend to be displaced onto a weak victim group, Jews eventually found themselves subject to a host of accusations. According to increasingly popular anti-Semitic views, this group was associated with cosmopolitanism and urban life, and putatively shared some fundamental guilt in relation to benefits reaped by playing the rules of the economic system too competitively.⁴⁹ Jews further resembled ordinary Frenchmen, but bore minor distinctions which, in line with mimetic theory, putatively made them highly dangerous. Their ears, lips and nose were the object of obsessive comment, suggesting the reflection of a perverted mindset.⁵⁰ Anti-Semitic literature depicted them as jackals, pigs, spiders and octopuses,

⁴⁵ Alan Milward, “French Labour and the German Economy, 1942-45: An Essay on the Nature of the Fascist New Order” (1970) 23 *Econ Hist Rev* 336 at 342; Karl Brandt, *Management of Agriculture and Food in the German-Occupied and Other Areas of Fortress Europe* (Stanford: Stanford University Press, 1953) at 21.

⁴⁶ On the division of society by February 1936, Robert Brasillach, *Notre avant-guerre* (Paris: Plon, 1955) at 151-55; Lucien Rebatet, *Les décombres* (Paris: Denoel, 1942) at 29-33; Robert Paxton, *Vichy France: Old Guard and New Order, 1940-1944* (New York: Knopf, 1972) at 246.

⁴⁷ Julian Jackson, *France: The Dark Years, 1940-1944* (Oxford: Oxford University Press, 2001) at 98-102; Claude Langlois, “Le Régime de Vichy et le clergé d’après les ‘semaines religieuses’ des diocèses de la zone libre” (1972) 22 *Revue française de science politique* 750 at 757.

⁴⁸ Author’s translation, Yves Chalas, *Vichy et l’imaginaire totalitaire* (Grenoble: Actes Sud, 1985) at 45.

⁴⁹ Georges Virebeau, *Les juifs et leurs crimes* (Paris: Office de propagande nationale, 1938) at 54; Hugues Lelorain, *L’antisémitisme est-il digne du Chrétien et du Français?* (Paris: Office de propagande nationale, 1939) at 11.

⁵⁰ The closer the resemblance to the ordinary Frenchman, the more dangerous, and hence the particular fear entertained by many of the half-Jew. “La question juive est facile à résoudre, mais il faut le vouloir!” *Le matin* (13-14 March 1934).

circumcised perverts, homosexuals and hermaphrodites.⁵¹ In accordance with the attributes of rivals and scapegoats in mimetic theory, Jews were thus depicted as so riddled by vice as to have come to assume a beastly appearance. While mimetic theory shows rivals progressively transforming into beasts as they abandon fundamental notions of morality, the same type of distortions applied to the victim group, inciting their persecution.

In 1942, at a time when the country was among the worst-fed in occupied Europe, the influx of Jewish refugees into the unoccupied zone began to cause serious unrest, leaving the population to view Jews as responsible for their predicament: Jews were accused of black-market operations, diverting foodstuffs, fomenting popular revolt, as well as of a generic form of fundamental guilt related to a host of different matters.⁵² According to anti-Semites, Jews not only readily avowed their own guilt when spoken to, but had caused every sort of treachery since the very beginning of Western civilisation.⁵³ Academics in fields as diverse as history, economy and biology began to study the question of Jewish guilt, which had become so ominous as to lead the judicial system to refuse to grant Jews the presumption of innocence.⁵⁴ After the scapegoat's putative guilt had become manifest, German authorities next undertook to deport Jewish refugees in 1942, bringing an appalling 75,000 to death camps.⁵⁵ During what became the worst massacre in modern French history, the population remained silent.⁵⁶ When a number of modest acts could have obstructed these operations, the population was so profoundly absorbed by material needs as to perceive Jews not as fellow humans in need of protection but as a source of revenue to be plundered, or as posing a logistical problem to be resolved with minimal resources.⁵⁷

⁵¹ Laurent Vigier, *Les juifs à travers Léon Blum* (Paris: Baudinière, 1938) at 98. Robert Boissel, *Le réveil du peuple* (1 May 1936); Francis Myrtane, *Le bonnet jaune* (March 1939); Louis Ferdinand Céline, *L'École des cadavres* (Paris: Denoel, 1938) at 215.

⁵² Prefects repeatedly reported violence perpetrated against Jews, popular views that Jews should be the object of stronger discrimination, and numerous robberies. Paxton and Marrus, *supra* note 42 at 182.

⁵³ Beginning with the death of Jesus Christ. "Les juifs ne changent pas", *Revue internationale des sociétés secrètes* (15 October 1932).

⁵⁴ Richard Weisberg, *Vichy Law and the Holocaust in France* (New York: New York University Press, 1996) at 76; Pascal Ory, "L'université française face à la persécution anti-Sémite" in Georges Wellers, André Kaspi and Serge Klarsfeld, eds, *La France et la question juive 1940- 1944* (Paris: Messinger, 1981) 4 at 9-11

⁵⁵ Serge Klarsfeld, *Le mémorial de la déportation des juifs de France* (Paris: Fils et filles déportés juifs de France, 1978) no pagination.

⁵⁶ Paxton and Marrus, *supra* note 42 at 331; 345 for the striking absence of interference.

⁵⁷ Billig, *supra* note 39, Vol 1 at 146 and Vol 3 at 237-38, 287-304.

In line with the need to resolve the societal division characterizing the above-mentioned political deadlock milestone, the Vichy regime tended to stress the importance of national unity. To this effect, numerous ceremonies conveyed the heightened atmosphere characterising political rituals. One may note the mass rallies, army parades, village fairs and special church services celebrating patriotic values, in addition to the host of athletic contests, artisan expositions, nationalist songs and youth camps inculcating the new national identity.⁵⁸ A religious revival further occurred, which combined political events with religious observance.⁵⁹ In line with the notion of scapegoating mythologies, which tend to foster denial, the regime further disseminated anti-Semitic views in every cultural sector using brochures, posters, cinema, radio programmes, detective stories, romances, and adventure novels, in which Jews played pernicious parts.⁶⁰ After this ideological upheaval, society eventually recovered a functioning political and economic state, helped by three decades of steady economic growth after the war. In line with mimetic theory, this new political order was finally accompanied by three decades of denial. While Pétain had been popular at the outset of the war, de Gaulle gained near-unanimous support by its end, with many retroactively viewing themselves as *résistants*.⁶¹

(3) The Holocaust under Vichy and the Scapegoating Ceremonial Order

This sub-section will turn to the ritual aspects evidenced in the scapegoating process presented above. One must begin with the symbolic status given to the Jew. Mimetic theory states that victims generally resemble the population, and that minor differences tend to become the source of obsessive comment noting their noxious character.⁶² Jews resembled the rest of society, but putatively transgressed social structure by their minor differences. Like the criminal who transgresses social categories but remains “within” the community,

⁵⁸ Général Alfred Niessel, “Les Compagnons de France”, *Revue des deux mondes* (15 October 1941); Jan Guéhenno, *Journal des années noires* (Paris: Gallimard, 1947) 17 July 1942.

⁵⁹ Delpech, *supra* note 44 at 163.

⁶⁰ Paxton and Marrus, *supra* note 42 at 298.

⁶¹ Generally, Henry Rousso, *Le Syndrome de Vichy de 1944 à nos jours* (Paris: Seuil, 1990) at 185; Simone Weil, *Une vie* (Paris: Stock, 2007) at 112.

⁶² Girard, *supra* note 13 at 29.

as described in chapter 2, the Jew was arguably given a liminal status, as a character “on the margins” of social structure. Jews were called *métèques*, from the Ancient Greek *metoikos*, designating citizen having changed residence and thereby obtained a status between stranger and citizen.⁶³ Jews were depicted as Bolshevik insurrectionists and unscrupulous lords of high finance, dirty ghetto dwellers and opulent élites, boorish foreigners and effeminate bourgeois, mediocre and grandiose at once.⁶⁴ Like the criminal, they were attributed dichotomous characteristics and quasi supra-natural powers.

Jews were destined to a fate similar to the criminal in the pre-modern setting, who after having being labelled as such through judicial means was escorted beyond the limits of the community, past the city gates, to hang at a crossroads, symbolically suspended “in between” heaven and earth. Elaborate identification methods were developed during the occupation to identify Jews, doing away with the ambiguity characterising their marginal status.⁶⁵ Once so “unmasked,” Jews were arguably shown not to be undifferentiated community members but dangerous outsiders.⁶⁶ Like the criminal in the pre-modern setting, Jews were next escorted outside communal limits, into concentration camps where further risks of defilement were contained. Like the crossroads where criminals were hanged, these camps further tended to be located in abandoned wartime facilities in remote locations where Jews were confined but porously so, officially “out” of society but somehow allowed to remain “in” France, in a place of impermanent residence.⁶⁷ “Out” of society but not yet completely so, Jews were to be deported to some distant and mysterious land, to the image of this state of “in between.”⁶⁸ Vichy considered locations such as

⁶³ Delpech, *supra* note 44 at 158.

⁶⁴ Ralph Schor, *L'Antisémitisme en France pendant les Années Trente* (Paris: Complexe, 1992) at 72.

⁶⁵ Pierre Piazza, “Système d’enregistrement d’identité, numéro d’identification et ‘carte d’identité de Français’ durant le Régime de Vichy” (2017) 11 *Revue d’Histoire de la justice, des crimes et des peines* 33.

⁶⁶ That half-Jews were particularly feared, see Schor, *supra* note 64 at 66.

⁶⁷ On camps dating back to 1914-18 and circulation in and out, Zuccotti, *supra* note 37 at 23 and 34.

⁶⁸ Jews were thought to be Orientals originating from some mysterious and historically distant nation, a noxious mixture of all races effectively coming from “nowhere.” Every destination contemplated by Vichy reflected this belief in one way or the other. Pierre Birnbaum, *Un Mythe politique, “la République juive” : De Léon Blum à Pierre Mendès France* (Paris: Fayard, 1988) Chapter IV.

Madagascar and Patagonia, and ultimately collaborated in massive deportations to Auschwitz, in trains officially bound to an “unknown destination.”⁶⁹

Jews not only disappeared to some mysteriously liminal location, but did so in a manner coherent with scapegoating. Having been singled out for their association with money, which constituted the source of desires having brought chaos to French society, Jews were dispossessed of their property and sent to concentration camps to work in forced labor units. A reflection of the degeneration gradually experienced by rivals in the course of rivalry, who transform into anthropomorphic figures once consumed by desire, Jews were not only compared to animals but treated as such. Many camps had no bedsheets, no utensils, minimal hygiene and medical care, leaving the population exposed to wind, cold heat and overcrowding.⁷⁰ Children in one camp were fed a soup causing diarrhea, forcing them to remain naked amid an ambient odor of excrement, wearing nothing but dog tags bearing their names, as clothing was being washed.⁷¹ Deportees were similarly loaded onto overcrowded cattle cars with nothing but soiled hay on which to urinate and defecate.⁷²

In allocutions, Pétain spoke of the “sacrifices” necessary for the people’s redemption, an allusion to Christian symbolism perhaps more literal than may have been understood.⁷³ France allowed a large number of Jews to enter its territory but proved reluctant to let them escape. The state issued few visas, made adoption procedures nearly impossible – even when American agencies extended offers – and scolded Italian forces having allowed them to cross the border.⁷⁴ Roundup operations similarly exhibited a tendency to confine the population by encircling and limiting movement, which police operations did by sealing

⁶⁹ Such was the official answer were citizen to inquire. Lucien Steinberg, *Les autorités allemandes en France occupée: inventaire commentée des documents conservés au CDJC* (Paris: Centre de documentation juive contemporaine, 1966) at 135.

⁷⁰ Zuccotti, *supra* note 37 at 72-77.

⁷¹ Georges Wellers, *De Drancy à Auschwitz* (Paris: Centre, 1946) at 56-57.

⁷² Ludvine Broch, *Ordinary Workers, Vichy and the Holocaust: French Railwaymen and the Second World War* (Cambridge: Cambridge University Press, 2016) at 236.

⁷³ “Dans un vibrant discours, Mgr Gerlier engage tous les Français à s’unir autour du Maréchal”, *Journal des débats* (28 December 1940); Langlois, *supra* note 47 at 757.

⁷⁴ Leon Poliakov and Jacques Sabelle, *Jews under the Italian Occupation* (Paris: Centre, 1955) at 25-26.

off entire arrondissements in a cordon.⁷⁵ Pétain made biblical references to sacrifice, and the events somehow conform to a biblical example cited in Girard's works, in which Jesus chastises evil spirits having haunted a community. In this example, spirits relocate into a flock of pigs which jumps off a cliff into the ocean, ostensibly to perish naturally, out of sight.⁷⁶ By branding Jews as outcasts to be feared instead of helped, and by turning its back on what should have been recognised as a humanitarian emergency, society can be said to have brought about conditions conducive to their autonomous elimination. Similarly, like the criminal killed indirectly by a rope pulled by horses whipped by a masked hangman loathed by the public, Jews were further starved in concentration camps, and handed to a loathed German occupant who deported them to distant lands.⁷⁷ The persecutions followed methods sufficiently indirect for the public to remain wilfully blind to its consequences.

(4) The Scapegoating Ceremonial Order and the Justice Process

After having drawn the connection between the Holocaust in France and the scapegoating process, this chapter will examine how the scapegoating process conformed to the symbolic structure of the criminal justice process as laid out in the preceding chapter. On a primary level, the exclusion of the victim group shared similarities with the deterrent account of justice. Jews were widely believed to be a menace. Stripped of their possessions, in quotas of no more than two to three percent in every profession, or interned in concentration camps, they were no longer able putatively to afflict society with foreign ideologies, or to exploit it through capitalist machinations.⁷⁸ What is more, by impoverishing them, anti-Semitic measures strangely created a climate in which the impression of attending to the

⁷⁵ Tragically famous was the *Vel d'Hiv* roundup in Paris, where 28,000 Jews were kept in an auditorium of 15,000 seats for five days. "Note of Heinrichson" in Henri Monneray, ed, *La persécution des juifs en France et dans les autres pays de l'ouest représentés par la France à Nuremberg* (Paris: Centre, 1947) 152 at 153-54.

⁷⁶ This is the example of Gerasnene demoniac. That scapegoats are often pushed off a cliff, Girard, *supra* note 13 chap xiii. On the tendency to depict atrocities as "natural" occurrences in genocidal societies, Stanley Cohen, *States of Denial* (London: Polity, 2000) at 109.

⁷⁷ Heydrich similarly stated in an early Nazi meeting on the Jewish question that "the Final Solution was to be carried out in huge labor columns whose hardships would accomplish the natural decline of the majority, and with some special treatment for the tenacious hard core which would survive this natural selection." Reprinted in Raul Hilberg, *Documents of Destruction* (Chicago: University of Chicago Press, 1971) at 89.

⁷⁸ Charles Sowerwine, *France since 1870* (London: Palgrave, 2018) at 185.

needs of others came about, in a distorted variant of the Christian tradition of charitable justice. Concentration camps were termed *centres d'hébergement* as if “services” were dispensed there, and charitable institutions were established with thieved Jewish funds.⁷⁹ In line with the retributive account of justice, some publications further went as far as to justify anti-Jewish legal measures in terms of moral purification, in relation to some putative fundamental sin.⁸⁰ On another level, anti-Semitism also promised national unity by liberating the country from the divisive forces of modernity.⁸¹ In their own distorted way, the persecutions thus tended to embody a set of normative ideals such as retribution and expressivism, which mirrored those usually proposed for criminal justice.

These ideals likely interpenetrated the exclusionary aspect of the persecutions. Like the criminal in Chapter 2, Jewish victims were brought before a judge who, in the context of legal proceedings, examined the facts presented before him, scrutinized procedural formalities and attempted to establish whether or not the accused corresponded to some defiling legal category meriting social exclusion.⁸² To conclude that the accused was a Jew symbolically amounted to a finding of guilt, which transferred this person from “within” the community to “without” it. Like the criminal, the Jew officially recognised as such was next taken to the functional equivalent of detention facilities, in a concentration camp.

A process equally had to be respected, following which victims were made to suffer only after having been expelled in accordance with the laws of the state, and brought outside the community, to its limits, in the liminal location of disused refugee camps.⁸³ There Jews were to be treated like animals – by being exposed to the elements, beatings,

⁷⁹ Paxton and Marrus, *supra* note 42 at 200.

⁸⁰ Jacques Duquesne, *Les catholiques français sous l'occupation* (Paris: Grasset, 1966) at 252; Laurent Joly, *L'État contre les juifs* (Paris: Grasset, 2018) at 139.

⁸¹ Drumont contrasted the anomy of modern rationalist society to the romantic past of chivalric, rural noble Christians living in the harmony of agricultural society. Emmanuel Beau de Loménie, *Édouard Drumont ou l'anticapitalisme national* (Paris: Peauvert, 1968) at 12; Janine Bourdin, “Des intellectuels à la recherche d'un style de vie: l'École de cadres d'Uriage” (1959) 9:4 *Revue Française de Science Politique* 1029 at 1030, 1042.

⁸² *Loi portant statut des juifs*, 18 October 1940 J.O.

⁸³ Particularly striking was the disdain expressed by the French population, including anti-Semites, at the sight of overt violence outside the formal structure. Paxton and Marrus, *supra* note 42 at 276.

malnourishment, overcrowding, filth and illness.⁸⁴ Jews were not only associated with livestock, but also made to vanish by some mysterious and indirect method, to an “unknown destination,” where suffering receded from the perceptual sphere. Similar distortions took place during the pre-modern justice process, during which criminals could not only be viewed as animals but killed by a hangman using indirect methods (whipping a horse, which pulled a rope dropping the plank from underneath the criminal’s feet, allowing yet another rope to choke him) leaving them in some irregular spatial state of suspension. The method chosen for the infliction of death was distant and indirect, perceptually extricating violence from the hands of the population, almost as if social structure enforced itself autonomously.

In sum, every step along this symbolic pattern of social exclusion produced its distortions, so as to normalize the process and ease popular conscience: the case made by intellectuals that anti-Semitism was a “cause,” which served the aims of justice in some plausible sense, its subsequent ratification in state law, the technical examination during formal proceedings of procedural formalities, the communal exclusion following judicial condemnations, the infliction of suffering “out of sight” in secluded facilities, the blurring of reality by depicting these facilities as refugee camps, and the further distortion of reality by killing indirectly. From writers to academics to policemen, judges, parliamentarians, financiers, railway workers and occupants, the persecutory process formed an arc of delusions across social sectors so varied and numerous, as to command an appearance of normalcy. This arc was in turn conveniently based on the familiar, plausibly legitimate custom of judicial social exclusion in the broad sense. The argument here is that the procedure having opened the floodgates of violence was of a symbolically judicial nature, transferring the victim group from “within” society to “without” it, pursuant to established procedure, in relation to the enforcement of normative considerations shared by most.

⁸⁴ Zuccotti, *supra* note 37 at 72-77.

(II) THE PERSECUTORY CONCEPTION OF JUSTICE IN FRICTION WITH INTERNATIONAL JUSTICE

The preceding partly reconciles a variety of perspectives commonly entertained in genocide scholarship, between the doings of a handful of calculating elites, whose propaganda cunningly manipulates a naïve populace, those of opportunistic bureaucrats, and those of a barbarous mass, ready to kill should the need arise. Mimetic theory unites these contradictory representations in a process through which entire layers of society collaborate, in a series of collective delusions camouflaging the extent of the violence and suffering. In keeping with this theme, the discussion will now move to the reception of international justice in post-genocidal societies, where persecutory conceptions of justice tend to define public perceptions of international justice. This will be done first by returning to mimetic theory, so as to lay out a conceptual basis for this discussion, before turning to the Serbian case for concrete illustration.

(A) The Reception of International Justice and Symbolic Communication Theory

In keeping the general theme traversing this dissertation, the present section will envisage atrocity prosecutions through the lens of symbolic communication theory. The premise here is that in order to understand how international justice is received, one must delve into the set of beliefs, values and ideals present among genocidal societies. As stated in the cursory intrusion into failed ritual theory in the introduction, ritual can be said to fail, from the experiential perspective, according to the audience's expectations. The proposition here is that international justice is perceived to fail through the lens of the persecutory conception of justice. It is suggested that a certain order or process exists, in the rejection of international justice, which can be derived from the above-described exclusionary process. The following pages present this proposition by returning to some elements of mimetic theory, before proposing a symbolic model for the rejection of international justice. The following shows mimetic theory not only to explain how persecutions emerge,

but also how the truth about them tends to be suppressed through further exclusionary violence.

(1) Girard's Mimetic Theory and the Contestation of International Justice

Some elements left out of the above presentation of mimetic theory must be returned to in order to understand how persecutory societies react to international justice. Girard presents a mechanism governing the type of reaction of popular scandal caused by the revelation of episodes of persecution in the aftermath of scapegoating. In order aptly to draw the parallel with international criminal justice, which regularly unveils the perpetration of atrocities, the following must take a few steps back and go to the root of Girard's notion of scandal.

One may begin by noting that Girard views the advent of modernity as having eroded traditional religious worldviews, which, for much of history, have provided societies and their inhabitants with unquestionably fixed and definite identities.⁸⁵ Girard explains that this transformation has led to the development, in modern culture, of individual identities essentially replicating the experience of spiritual ascension in secular terms. To avoid the dreadful experience of "being nothing a world without meaning," individuals have increasingly devised for themselves a set of aspirations derived from the achievements of other great men.⁸⁶ Saints and deities were in other words replaced by personal idols, whose extraordinary attributes elevate great men above the realm of the profane, closer to what has traditionally been considered sacred. As much as imitating one's personal idols and achieving similar feats can provide a sense of triumph and spiritual elevation,⁸⁷ so can this pattern backfire whenever one fails to meet one's aspirations. In this case, greatness gives way to existential dread, causing one to seek obsessively to meet this frustrated ambition.⁸⁸

⁸⁵ René Girard, *Deceit, Desire, and the Novel* (Baltimore: Johns Hopkins University Press, 1965) at 65.

⁸⁶ Girard gives the example of Don Quixote, who aspired to become a knight like his hero. Girard, *ibid* at 1.

⁸⁷ See Girard's writings on the notion of *kudros*. Girard, *supra* note 14 at 171-72.

⁸⁸ Girard, *supra* note 13 at 41.

Girard adds that this pattern applies to rivals, who, by displaying extraordinary aptitudes in the course of their conflict, may come to perceive in one another a measure of greatness.⁸⁹ In this case, the rival who wins a contest dotting their rivalry experiences transcendence, while the loser experiences existential dread. Rivals who suffer defeat may further attempt to alleviate the state of torment inflicted by their inability to meet their aspirations by diminishing the other's prestige, often by denouncing moral breaches witnessed in the course of their rivalry.⁹⁰ If aired successfully, these allegations will in turn be returned and exchanged, in line with the mimetic aspect of conflict. This should give rise to a cycle of recriminations depicting the rivals' respective breaches as representative of some generalized societal tendency, towards the loss of moral standards and societal prestige.⁹¹ Through their recriminations, in other words, rivals may successfully project their own sense of existential dread onto the public sphere, using the medium of moral breaches to make society believe that it, like them, has been robbed of its greatness. These recriminations may in turn rally members of the public behind the putative causes presented by the rivals, exacerbate tensions between both groups, and ultimately lead to scapegoating.

Girard's argument is that scapegoating settles the rivalry but creates mythologies reproducing the same perceptual distortions having led to conflict in the first place, by placing all blame on the scapegoat in such a way as to replenish the collective prestige dismantled by conflict.⁹² Mythologies create a new collective identity endowing society with a renewed sense of greatness, based on a story heavily distorting the series of events in question to achieve this end. Society thus tends to be depicted as having heroically united to vanquish some monstrous menace, and to remain unquestionably united on the basis of this extraordinary feat. Importantly for our purposes, whoever questions this falsified historical account, by unveiling the persecutions at its origin, immediately triggers the same reaction of existential dread as the defeated rival.⁹³ Like the individual unable to attain his

⁸⁹ Girard, *ibid* at 89.

⁹⁰ René Girard, *Des choses cachées depuis la fondation du monde* (Paris: Grasset, 1978) at 449.

⁹¹ *Ibid* at 331.

⁹² Girard, *supra* note 13 at 15.

⁹³ "This will always lead to an attempt to stifle this knowledge by violence; there will be an unsuccessful attempt to close the human community in on itself." Girard, *supra* note 13 at 128.

objective, or the rival undone by his opponent, society automatically reacts as if existentially threatened, and scapegoats this person to preserve its mythologies.⁹⁴ In line with the logic of scapegoating, the act of scapegoating delegitimizes the victim's statement, replenishes the mythologies' social prestige, and preserves societal unity and cohesion.

(2) A Symbolic Communication Model for the Contestation of International Justice

International criminal justice by design must reveal the occurrence of persecutions denied by post-conflict societies.⁹⁵ It is submitted that by contradicting the post-genocidal mythologies, which necessarily deny these atrocities, international justice is likely to cause societal outrage.⁹⁶ To protect its newfound sense of honour, society is likely to react as defeated rivals, by depicting international justice as a rival. This should first be done by attacking its prestige and authority, decrying that it is "partial," that it has "no legal foundation," "no jurisdiction" and the like. Such is the logic of rivalry, in which every blow is to be returned by imitation.⁹⁷ Each indictment, prosecution and conviction, every step taken by international justice is thus likely to be experienced as a blow to society's honor, which should find itself drawn to retaliate on every count. In time, society should gradually become so obsessed with its weak rival, as to come to view it through the same perceptual distortions as a scapegoat.⁹⁸ Like it, international justice should be seen as constituting a societal threat, set to disintegrate the nation culturally, to be outdone at all costs.⁹⁹ The process should finally climax in aggression being released on individuals associated with international justice, in yet another act of scapegoating.

⁹⁴ This is what happens to Jesus and John the Baptist in the Bible, the two examples in Girard's writings. Girard, *supra* note 13 at 198, 215, 216. Girard, *supra* note 13 at 207 ("Chaque fois qu'ils se sentent menacés de discorde, ils (...re-favorisent) la résolution sacrificielle qui les remettra d'accord aux dépens de la victime.")

⁹⁵ Girard, *supra* note 90 at 449 ("Le scandale, (est aussi) dans le message de non-violence, de sollicitude.")

⁹⁶ Girard, *supra* note 13 at 288, 296, 307 (That judgement in the judicial sense causes scandal, noting that "Satan" in Hebrew means "accuser," that "persecuting" and "martyr" in Latin mean "prosecuting," and "testimony").

⁹⁷ René Girard, "Scandal and Dance: Salome in the Gospel of Mark" (1984) 15:2 New Lit Hist 311 at 317.

⁹⁸ Girard, *supra* note 13 at 33 ("la responsabilité des victimes subit le même grossissement fantastique").

⁹⁹ It should come to represent a form of vice inherently similar to that viewed in the scapegoat, some terrifying continuity of the longings and desires that menaced the cultural fabric before peace and stability settled (typically through notions such as cosmopolitanism, individualism, atheism, or any of the cultural embodiments of "modernity.") On the incidence of modernity, Girard, *supra* note 90 at 77.

(B) The Serbian Persecutory Conception of Justice in Friction with International Justice

With the conceptual framework for the reception of international justice now laid out, these ideas will find concrete illustration in the following pages, which will discuss the persecution of Bosnian Muslims during the breakup of Yugoslavia and the reception of international justice in Serbia in relation to those offences. Both subjects will be discussed under the same general heading so as to underline the ideological continuity between the unfolding of the persecutions on the one hand, and the popular rejection of international justice on the other.¹⁰⁰ Serbia was selected here due to the abundance of persecutory ideology having permeated this conflict, in addition to its cultural proximity to Western civilization, such that frictions in the reception of justice cannot be consigned to the incommensurability of legal traditions. Some three decades after the ICTY's inception, historical insight further seems both possible and warranted. Finally, it must be noted that the following section in essence replicates the argument laid out in the above Vichy example, which appears necessary in order to further substantiate the otherwise subjective framework made up by mimetic theory. It is further suggested that the reception of international justice is in significant ways defined and influenced by this societal reality, and consequently requires detailed engagement in order to be adequately understood.

(1) The Serbian Persecutory Conception of Justice and the Persecutions

One may remember from the first section of this chapter on mimetic theory that the scapegoating process is usually understood by the population to free society from some particular conception of vice held to endanger its social fabric. Like the greed and

¹⁰⁰ The literature tends to acknowledge the existence of symbolic and mythological influences without engaging with this insight in detail. Works have also been published on Serbian national mythologies, mostly discussing their substance doctrinally, without actively seeking to draw the connection to the manner in which the persecutions unfolded. Michael Ignatieff, *The Warrior's Honor: Ethnic War and the Modern Conscience* (New York: Henry Holt and Co., 1998) at 34-72; John Allcock, *Explaining Yugoslavia* (New York: Columbia University Press, 2000) at 411; Ivan Colovic, *The Politics of Symbol in Serbia* (London: Hurst, 2002); Branimir Anzulovic, *Heavenly Serbia: From Myth to Genocide* (New York: New York University Press, 1999); Michael Sells, *The Bridge Betrayed* (Berkeley: University of California Press, 1996).

individualism commonly found to undermine the social fabric in the Vichy example, Serbian nationalist discourse can be said to have associated the disappearance of national traditions to a particular conception of vice. The following argues that this justified the perpetration of violence in significant ways, by forming the basis of a corresponding conception of justice, itself anchored in the punishment of groups deemed guilty of vice. This will be shown by presenting this conception against its sociocultural context using the above-discussed milestones leading to scapegoating.

(i) The Nationalist Conception of Vice and the Leadup to Scapegoating

One should note that Serbia has long been split between the Ottoman and Austro-Hungarian empires, serving as a military buffer zone between both powers.¹⁰¹ As modern ideas of science and commerce began to circulate and transform Western Europe during the 19th century, both empires maintained this region as a remote and partial war zone separating their boundaries, significantly undermining national economic development and political autonomy.¹⁰² As an indirect reaction to this predicament, a trope of nationalist literature concomitantly emerged, which tended to depict as a form of vice the individual act of yielding to the temptation of avoiding the hardships of traditional agrarian life by serving imperial powers.¹⁰³ Another theme in this literature centered on the assimilation of nationals into the distinct liberal culture made up by the strong presence of foreign imperial officials and merchants in cities.¹⁰⁴ This was interpreted as a form of betrayal favoring individual and imperial interests at the expense of the nation.¹⁰⁵ This literature conversely glorified those who sacrificed dearly to defend national autonomy, as notoriously illustrated in its rendition of Serbia's defeat before the first Ottoman conqueror. In this case the king's vassals defected his ranks to join forces with the enemy in return for benefits, and the king sacrificed his life to defend the nation.¹⁰⁶ These conceptions of nationalist vice

¹⁰¹ Gunther Rothenberg, *The Military Border in Croatia, 1740-1881* (Chicago: University of Chicago Press, 1966) at 16.

¹⁰² Allcock, *supra* note 100 at 31, 214–215.

¹⁰³ Charles Jelavich, *South Slav Nationalism and Yugoslavia before 1914* (Columbus: Ohio State University Press, 1990) at 57.

¹⁰⁴ Michael Palaret, *The Balkan Economies, 1800-1914* (Cambridge: Cambridge University Press, 1997) at 166.

¹⁰⁵ Anzulovic, *supra* note 100 at 38.

¹⁰⁶ *Ibid.*

and virtue would eventually return towards the end of the 20th century, forming the basis of an ideological nodus influencing the very order and nature of the persecutions perpetrated against Bosnian Muslims during the breakup of Yugoslavia.

As in the above Vichy example, however, the nationalist conception of vice operated its influence on the persecutions from within the framework of mimetic theory, and therefore warrants that the milestones leading to scapegoating first be presented. The first milestone is the initial cataclysm, and is to be found in this case in the difficulties presented by the oil crisis of the 1980s, the death of Tito and the end of communist rule, which together brought the country's economic and political systems to a state of near-collapse.¹⁰⁷ The second milestone is the development of rivalries, which rapidly crystallised both at the national and federal levels around contrasting responses to these difficulties.¹⁰⁸ Domestic political tensions rose between a privileged class of urban professionals in favor of liberalisation and a majority population of unskilled workers in favor of economic centralism.¹⁰⁹ At the federal level, republics with a history of Austro-Hungarian rule, which had been exposed more directly to modern industrial methods a century earlier, were similarly in favor of liberal political and economic reforms while regions with a history of Ottoman rule favored centralist economic measures.¹¹⁰ These tensions played out particularly acutely between Serbia and Croatia, which having been ruled by different empires, became rivals in the Girardian sense. Serbian nationalist sensibilities were set ablaze as the Croatian president refused to acknowledge the full extent of Serb persecutions during the Second World War.¹¹¹ The incident triggered a verbal war, where reciprocation escalated into armed aggression as anti-Serbian resentment prompted Serb minorities living in the republic to arm and Croats in turn to purchase weapons.¹¹² Serbia next initiated the conflict by deploying troops purportedly to defend ethnic Serbs.

¹⁰⁷ Sabrina Ramet, *The Three Yugoslavias* (Bloomington: Indiana University Press, 2006) at 283.

¹⁰⁸ Karen Dawisha and Bruce Parrott, *Politics, Power and the Struggle for Democracy in South-East Europe* (Cambridge: Cambridge University Press, 1997) at 150, 208; Milokjo Drulovic, *Self-Management on Trial* (Nottingham: Spokesman Books, 1978) at 94-9.

¹⁰⁹ Allcock, *supra* note 100 at 204, 282.

¹¹⁰ Ramet, *supra* note 107 at 375, 427.

¹¹¹ In detail, Stevan Pavlowitch, *Hitler's New Disorder* (New York: Columbia University Press, 2008).

¹¹² Ramet, *supra* note 107 at 368-69, 374.

In line with the third milestone, as in the Vichy example, national discourse also began deploring the erosion of traditions, emphasizing such themes as the decline of the national birthrate, the disappearance of traditional collective farming households, the empowerment of women, the suppression of religious education, the abandonment of the national script, the precarious state of national boundaries, and so on.¹¹³ Half of the rural population had migrated to the city in search of employment in the last three decades.¹¹⁴ Radical nationalists deplored a putative state of cultural degeneration: the problem was ethnically mixed marriages, the coexistence of cultures, religions and races, comfort, democracy, and cosmopolitanism, while those who cherished these values were “renegades, traitors, destroyers of Serbdom, new converts, Turks, all kinds of weeds and scum, punished and unpunished criminal types.”¹¹⁵ As in the Vichy example, urbanites were depicted along liminal lines, emphasizing deviousness to the point of criminality, and contrasted with the putative purity of the Serbian countryside.¹¹⁶ Like Pétain some fifty years earlier, nationalist discourse began speaking of a sacrifice or transition, which the nation was to effectuate “in order to overcome its fatal sickness, to be reborn by pulling up the poisonous weed from out of its corn.”¹¹⁷ The media began emphasizing national unity, as religion and national tradition rapidly gained popularity.¹¹⁸ Amidst this climate of spiritual renewal and nationalistic fervor, Milosevic presented himself as the leader who would unite the nation, rid it of usurpers and achieve the developments necessary to overcome its predicament.¹¹⁹

(ii) Vice Purged through Scapegoating

¹¹³ Norman Cigar, *Genocide in Bosnia: The Policy of “Ethnic Cleansing”* (College Station: Texas A&M University Press, 1995) at 75–77.

¹¹⁴ Harold Lydall, *Yugoslav Socialism in Theory and Practice* (Oxford: Clarendon, 1984) at 160.

¹¹⁵ Streten Vujovic, *Gred u senci rata* (Belgrade: Institut za sociologiju, 1996) at 89–90, cited in Colovic, *supra* note 100 at 132, 147.

¹¹⁶ Sells, *supra* note 100 at 50.

¹¹⁷ Citing Nedeljkovic, in Colovic, *supra* note 100 at 147.

¹¹⁸ While a new genre of neo-folkloric music gained prominence, which conveyed sentimental nostalgia for the rural way of life, relics also began appearing as the press increasingly reported groups of children experiencing religious visions. Allcock, *supra* note 100 at 360; Gerlad Markle and Frances McCrea, “Medjugorje and the Crisis in Yugoslavia” in William Dwatos, ed, *Politics and Religion in Central and Eastern Europe* (London: Praeger, 1994) 187 at 200.

¹¹⁹ Allcock, *supra* note 100 at 407.

The fourth milestone is the selection and discharging of acrimony on a weak scapegoat posing no real threat. In line with this milestone, Serbian fighting on Croat territory quickly halted as Milosevic realized that Croats had managed to arm significantly.¹²⁰ The conflict no longer being asymmetrical, both belligerents suddenly shared an interest in avoiding a bloody and protracted siege on their territories and turned their attention to Bosnia, whose territory both invaded in a war of conquest justified on mirroring ideological grounds.¹²¹ To frame the matter according to mimetic theory, rivals realized that further escalation entailed mutual annihilation and chose to concentrate their energies on a scapegoat. The largely unarmed Bosnian Muslim population corresponded to the Girardian scapegoat in important respects, posing no serious threat and sharing a similar language and ancestral stock with its aggressors. Nationalist discourse in both republics depicted them as a menace to Christian religion, which Serbs and Croats both shared, positing some putative conspiracy to assimilate them by means of a higher birthrate.¹²² Much of this population was originally made up of Slavic Christians having converted to Islam under Ottoman rule, which according to the nationalist conception of vice amounted to a form of treason.¹²³ Bosnian Muslims were labelled as “perverts,” “pigs,” “filth,” “beasts,” “parasites,” “criminals,” and the like.¹²⁴ They were “criminals” who for their resemblance to fellow Slavic Christians were particularly dangerous.¹²⁵ They were “fundamentalist terrorists” and “fascists,” embodying the combined menace of Oriental and Western domination.¹²⁶

As shown in the Vichy example, the way in which the ensuing persecutions unfolded again exhibited a certain propensity to treat the victim group as animals. In striking similarity

¹²⁰ Laura Silber and Allan Little, *Yugoslavia: Death of a Nation* (New York: Penguin, 1997) at 207.

¹²¹ Ramet, *supra* note 107 at 368–69.

¹²² Cigar, *supra* note 113 at 25, 28, 70.

¹²³ Ivo Andric, *The Development of Spiritual Life in Bosnia under the Influence of Turkish Rule* (Durham: Duke University Press, 1990) at 16; generally, Leonard Cohen, “Bosnia's 'Tribal Gods': The Role of Religion in Nationalist Politics” in Paul Mojzes, ed, *Religion and the War in Bosnia* (Atlanta: Scholars’ Press, 1998) 73.

¹²⁴ Ivan Ivekovic, “Modern Authoritarian Ethnocracy” in Carl-Ulrik Scherup, ed, *Scramble for the Balkans: Nationalism, Globalisation and the Political Economy of Reconstruction* (London: Macmillan, 1999) 55 at 62.

¹²⁵ Colovic, *supra* note 100 at 147; Cigar, *supra* note 113 at 68.

¹²⁶ Robert Donia, “From Creativity to Conflict: Semantic Innovation in the Bosnian Serb National Movement of the 1990s,” in Predrag Dojcinovic, ed, *Propaganda and International Criminal Law* (London: Routledge, 2019) 159 at 173–74.

with the Vichy example, victims were often deported in cattle cars.¹²⁷ Transportation conditions were inhumane due to frequent overcrowding and lack of ventilation, which left many to strip off their clothes due to excessive heat. Camp conditions equally resembled those of livestock. Victims were chronically deprived of clothing, hygiene, food, shelter and medical care.¹²⁸ Many were left to sleep on the floor amid their own excretions, with only hay or ferns as mattresses.¹²⁹ Some were forced to eat their excretions.¹³⁰ One camp in particular constituted of an open pit, in which inmates stood both feet in the mud.¹³¹ In another, victims were kept in metal cages stacked four high. A common execution method consisted in the slitting of throats, a technique customarily reserved to pigs.¹³² Victims were sometimes designated in camp jargon as “meat” to be sold, and their cadavers brought to an animal feed plant.¹³³ Reflecting the phantasmagoric overtones which characterized camp persecutions finally is the fact that perpetrators tended to call their victims *zrtva*, which translates to “sacrifice.”¹³⁴

Be it in the camp environment or in cities, the chief *modus operandi* consisted in confining the victim population within a given perimeter and withholding material resources to such an extent as to cause death on a massive scale. The siege of Sarajevo illustrates this, where heavy artillery ringing the surrounding hills confined the population within the city, causing most to perish from starvation and disease.¹³⁵ An intent to destroy institutions associated with urban cosmopolitan culture further transpired, as illustrated by the shelling of the city market traditionally associated with its historic development.¹³⁶ This, in addition to the targeting of cultural elites in Muslim villages, suggests an intent to persecute the very culture despised in nationalist literature. The persecutions also corresponded to some

¹²⁷ Roy Gutman, *A Witness to Genocide* (New York: MacMillan, 1993) at 36, 37, 42. Comparing the treatment of Jews during the Holocaust and Bosnian Muslims to that of cattle, Richard Rorty, “Human Rights, Rationality and Sentimentality” in Stephen Shute and Susan Hurely, eds, *On Human Rights* (New York: Basic Books, 1994) 111 at 113.

¹²⁸ Gutman *ibid* at 47, 48; Cigar, *supra* note 113 at 27–28.

¹²⁹ Sells, *supra* note 100 at 75; Gutman, *supra* note 127 at 54.

¹³⁰ Gutman, *supra* note 127 at 54.

¹³¹ *Ibid* at 28, 34, 44–45.

¹³² Allcock, *supra* note 100 at 382, 398.

¹³³ Gutman, *supra* note 127 at 46, 47, 87; Allcock, *supra* note 100 at 86.

¹³⁴ Allcock, *supra* note 100 at 398, 407.

¹³⁵ Population declined from 500 000 to 300 000. Ramet, *supra* note 107 at 431; Cigar, *supra* note 113 at 56.

¹³⁶ That mortar fire targeted temples, libraries and museums. Ramet, *supra* note 107 at 311, 431.

of the main spatial characteristics of scapegoating. Be it in the taking of Muslim villages, the siege of Sarajevo or the camp environment, victims tended to be massed and encircled.¹³⁷ The pushing of victims into canyons, the sniper attacks, the mortar fire and exposure to the elements also involved a degree of psychological distance between killer and victim.¹³⁸ This persecutory order coincided with the Girardian fiction according to which victims vanished autonomously. Camp guards reportedly claimed that detainees died “of natural causes” or simply “disappeared,” while Karadzic for his part stated that Muslims had “destroyed the Sarajevo market themselves.”¹³⁹

(iii) Scapegoating and the Pre-Modern Ritual of Justice

The nationalist conception of vice rose to prominence due to a combination of events in the 1980s. Among these were the conflagration of the Yugoslav union, the end of communist rule in Europe and the sudden material precarity engendered by the oil shocks late into the decade. To many in the population, these events signified an upcoming transition out of the communist geopolitical sphere of influence, which during Tito’s rule had had the effect of sheltering Serbia from its former imperial rulers. As nationalists tended to favor national autonomy and limited Russian cultural influence, which shared with Serbian culture a similar language, ancestral stock and religion, a number of factors appeared to reopen the country to Western and Islamic influence.¹⁴⁰ Nationalists feared that Muslim populations living in Bosnia and Kosovo threatened Serbian control over parts of the region by means of a higher birthrate, and viewed the preference for Western-style modes of government among national elites and other Yugoslav republics as further exposing the country to foreign influence.¹⁴¹ The country in other terms risked finding itself culturally wedged between Western and Muslim interests, as it had during its history of

¹³⁷ In rural Muslim agglomerations, heavy forces created a cordon around villages, before allowing militia to enter and engage in ethnic cleansing. The theme of encirclement also transpired in the deportation process, during which many were confined in large and overcrowded buildings, such as sports stadiums, in a manner reminiscent of the Vel’ d’Hiv roundup under Vichy. Cigar, *supra* note 113 at 55.

¹³⁸ Linking fanatical beatings and denial, Cohen, *supra* note 76 at 53.

¹³⁹ Patrick Quinn, “Serbs, Croats Press into Bosnia”, *Washington Times* (5 July 1993) at A9; Peter Maass, “UN Officials Denounce Bosnian Serb Barrage”, *Washington Post* (14 April 1994) at A23.

¹⁴⁰ Tim Judah, *The Serbs* (New Haven: Yale University Press, 1997) at 227.

¹⁴¹ Cigar, *supra* note 113 at 68.

Habsburg and Ottoman domination.¹⁴² In a context of transition in which the nation's neighbors and urban population appeared to favour allegiances to foreign powers, the loss and preservation of cultural points of reference thus became particularly sensitive.

In this particular context, any further contribution to the dissolution of national customs became tantamount to a form of deviance, triggering perceptions of defilement and impurity.¹⁴³ Much in the same way as executions were believed to cleanse the crowd of the vice symbolized by the convict during the pre-modern ritual of punishment, so could the persecution of Bosnian Muslims be said to have embodied the cleansing of the population's own putative guilt, in relation to the loss of traditional Serbian culture.¹⁴⁴ Such would appear to have been the anthropological meaning of "cleansing" in the Serb policy of "ethnic cleansing." By corresponding to the social exclusion pattern associated with criminal justice, what is more, the persecutions were further able to appear as legitimate to the eyes of the perpetrator population, in such a way as to mask the full depth and extent of their barbarity. Two criminal justice traditions were followed in this regard, one centered on the judicial process and the other on blood feud, both of which obtained this same result.

That the persecutions corresponded to a judicial process akin to the pre-modern ritual of punishment is suggested by a series of procedural particularities which appeared to serve little to no tangible strategic interest. Upon Serbian conquest of a Muslim enclave, victims were for instance taken to the police station for interrogations, where they were accused of terrorist activities, jailed, and assigned legal representation.¹⁴⁵ Some were further incited to incriminate fellow victims, as if to prove some penchant for betrayal, before being denied rewards promised for cooperation. Those who were incriminated were punished like the rest.¹⁴⁶ Many were also sent to concentration camps for further interrogation in anticipation of some future trial, where they were sometimes beaten by policemen and interrogated by a judge, as if in some inquisitive process, and received a guilty verdict after

¹⁴² See Section (II)(B)(1)(ii).

¹⁴³ As shown by liminal depictions of Bosnian Muslims in nationalist discourse. *Ibid.*

¹⁴⁴ Chapter 2 Section I(B)(1).

¹⁴⁵ Gutman, *supra* note 127 at 48.

¹⁴⁶ *Ibid.*

dying.¹⁴⁷ Finally, many were only allowed to leave villages after having obtained a host of different permits, as if in some legalistic process regulating the deportations.¹⁴⁸

This suggests a certain judicial and bureaucratic process prior to the victim's departure from "within" the community to "without" it. As in the Vichy example, only after the completion of legal formalities were victims expelled from their places of residence to concentration camps, where most of the killing occurred. While many were killed immediately after their village was conquered, the vast majority perished only once this exclusionary process completed.¹⁴⁹ That these formalities had the effect of opening the floodgates of violence – as argued in the Vichy example – is suggested by the fact that victims wounded outside concentration camp limits were sometimes brought to the hospital.¹⁵⁰ This right was denied to camp inmates, who, following the exclusionary process, had by then been transferred outside the bounds of the community.¹⁵¹ Once in the prison-like environment of the camp, victims had in other terms lost the basic rights accorded to ordinary citizen. As in the Vichy example, the violence further appears to have dissimilated itself behind the cognitive blind spots made up by some of the judicial process's main characteristics: a notion of vice was expounded, a culprit formally identified and removed from society, using set forms and practices, and punished via indirect means.

The pre-modern execution ritual was argued in chapter 2 to consist of a rite of passage, effectuating a transition from one social category to the next, in a heightened symbolic process conveying perceptions of "in betweenness."¹⁵² The persecutions would appear to have conformed to this aspect of the pre-modern punishment ritual in some respects, in such a way as to further mask the violence. Like the convict alternatively praised and detested by the crowd, and killed at a crossroads by hanging "between heaven and earth," before being ultimately interred between the church cemetery and city walls, Bosnian

¹⁴⁷ Gutman, *supra* note 127 at 56, 119, 111.

¹⁴⁸ Judah, *supra* note 140 at 242.

¹⁴⁹ Allcock, *supra* note 100 at 398.

¹⁵⁰ Gutman, *supra* note 127 at 96.

¹⁵¹ *Ibid.*

¹⁵² See Chapter 2 Section (II)(A)(1).

Muslims tended to be depicted as belonging neither fully “within” nor “without” society in nationalist discourse, in addition to being ultimately sent to perish in concentration camps located in disused industrial sites, on the margins of society.¹⁵³ Much in the same way as the convict during the pre-modern ritual of punishment was said to lie neither “within” nor “without” society, but “in between” both categories, so could Bosnian Muslims be perceived as “like” other ordinary members of the community, while remaining firmly different. Indeed, this group had not only lived in the same country as Serbs under the Yugoslav federation, implying a history of cooperation sufficiently substantial as to induce mutual familiarity, but also shared with Serbian culture a similar language and ancestral stock.¹⁵⁴ The difference ostensibly separating Bosnian Muslims from Serbs was religion.

As argued in chapter 2, the aspect of liminality characterizing rites of passage further tends to be constituted of a form of paradoxical symbolism, whose particularity lies in its emphasis on opposing and often contradictory referents. This aspect of the rite of passage transpired in the way Bosnian Muslims were depicted in nationalist discourse; this group was not only viewed as neither “within” nor “without” society, but also as privileged urbanites historically favored by the legacy of Ottoman rule in the region, and as impoverished citizen of an underdeveloped and oriental country.¹⁵⁵ They were said to be dangerous terrorists and fundamentalist warriors, while having for the most part amounted to a largely unarmed and defenceless group of civilians.¹⁵⁶ Such symbolism equally saturated the camp environment, which, by its location in disaffected industrial sites on the margins of society, appears to have evoked themes connected to the end of communist industrial life. To a population of unskilled manual workers, these were the sites from which much of the steady employment and material sustenance ensured by the communist regime had both flowed and ceased to flow. The treatment reserved to Bosnian Muslims appeared to reflect this paradox by offering captives material sustenance and starving them

¹⁵³ Branko Colanovic, *Development of the Underdeveloped Areas in Yugoslavia* (Belgrade: Medjunarodna Politika, 1966) at 19; Gutman, *supra* note 127 at 46, 47, 87; Allcock, *supra* note 100 at 86.

¹⁵⁴ As stated in the above sub-section.

¹⁵⁵ Colovic, *supra* note 100 at 147; Cigar, *supra* note 113 at 68.

¹⁵⁶ *Ibid.*

to death.¹⁵⁷ That a certain confusion occurred between the killing and the succoring of inmates is suggested by the fact that camps were euphemistically called “centers,” that some soldiers bore Red Cross emblems, and that some officials held the title of “director of refugees,” as if in the spirit of protecting vulnerable internally displaced nationals.¹⁵⁸

(iv) Scapegoating and Blood Feud

By their articulation around an exclusionary process accompanied by paradoxical symbolism, the persecutions can thus be said to have triggered a heightened mental state outside ordinary social structure, the effect of which was to suspend ordinary meanings and judgements, in such a way as to mask and legitimate acts of aggression that would otherwise have been considered defiling.¹⁵⁹ With the argument formulated in relation to the pre-modern ritual of punishment, the scope and extent of the above-postulated “dissimulative” properties must now be modulated in light of the parallel influence of a second, this time non-judicial, tradition of criminal justice. In a culture where rule of law never enjoyed the same monopoly over conceptions of justice as in Western Europe, and where persecutions in part embodied a return to national traditions, a second tradition of justice indeed appears to have played a cognate role, through the meting out of personal vengeance pursuant to the regional custom of blood feud.¹⁶⁰ This time the betrayal postulated in the nationalist conception of vice appears to have been tantamount to a national affront which, according to this custom, was to be sublimated by vengeance.¹⁶¹

¹⁵⁷ See Section (II)(B)(1)(ii).

¹⁵⁸ Gutman *supra* note 127 at 37, 47, 121-22.

¹⁵⁹ Chapter 2 Section (II)(A)(1).

¹⁶⁰ At its simplest, blood feud demands that murder be avenged with murder; an insult, if sufficiently severe, could also command homicidal retaliation, such that killing often corresponded to the culmination of a certain escalation between rivals. A complex set of rules further endowed the act with a normative dimension distinguishing it from manslaughter. The rival who failed to retaliate was considered “trampled underfoot,” and lost his reputation. Feuds also implicated the broader clan and its honour, and could be passed on from one generation to the next. Christopher Boehm, *Blood Revenge: The Anthropology of Feuding in Montenegro and other Tribal Societies* (Lawrence: University of Kansas Press, 1984) at 57–58, 66, 93; Edith Durham, *Some Tribal Origins: Laws and Customs of the Balkans* (London: Allen & Unwin, 1928) at 162.

¹⁶¹ Some of the worst episodes of violence were explicitly justified as vengeance for Muslim aggression on Christian villages. A massive offensive was launched immediately after Bosnia declared independence, as if in retaliation for the loss inflicted to the dwindling and Serb-dominated Yugoslav federation. Chuck Sudetic, *Blood and Vengeance: One Family's Story of the War* (Boston: Norton, 1998) at 164.

While Milosevic spoke of national vengeance in a notorious speech delivered on the occasion of the 600th anniversary of Serbian defeat before the Ottomans in Kosovo, nationalist media explicitly couched certain publications in the idiom of blood compensation: Bosnian Muslims putatively possessed “the blood of subjugators,” or “had their hands covered with the blood of their ancestors,” suggesting some fictional attribution of responsibility for historic imperial oppression.¹⁶² Slogans and songs showcased in nationalist rallies similarly stated that Serbs “had been bloodied” or “longed to drink Turkish blood,” again pointing to some fictional debt to be compensated in blood.¹⁶³ Blood compensation was also emphasized during the persecutions. While women were often made to release blood through forced intercourse during the rash of sexual aggressions having plagued the conflict, compensation tended to be operated among male inmates through direct beatings, which in the camp environment often continued until a given amount of blood had been released.¹⁶⁴ A variant to the common throat slitting execution method consisted in the positioning of victims in such a way as to allow blood to flow into the historically significant River Sava, thereby metaphorically operating compensation to the benefit of the Serbian nation.¹⁶⁵ That the loss of Serbian blood was considered an affront

¹⁶² Milorad Ekemecic, “Profiles of Societies in the Second Half of the Nineteenth Century,” in Milorad Ekemecic, ed, *History of Yugoslavia* (New York: McGraw-Hill, 1974) 366 at 372; Kemal Kurspahic, *Prime Time Crime: Balkan Media in War and Peace* (Washington: United States Institute of Peace Press, 2003) at 34-36; Miroslav Stefanovic, untitled, *Belgrade TV News* (15 November 1992); Cigar, *supra* note 113 at 71, 29.

¹⁶³ Muharem Duric and Mirko Caric, “Kako srpski nacionalisti odmanzu srpkom,” *Politika* (17 September 1988); Ievrem Brkovic, “Susteca sutnja,” *Danas* (7 February 1989), cited respectively in Cigar, *supra* note 113.

¹⁶³ Blood revenge likewise comports a group dimension, in that one’s vengeance also bears influence on the reputation of the entire clan. Boehm, *supra* note 160 at 47. Anzulovic, *supra* note 122 at 47-49.

¹⁶⁴ Some gruesomely sang at a nationalist rally, “in the glade in the little forest, a Serb is f***ing a Muslim woman; the Muslim woman is covered with blood, the Serb was her first man ever.” Intercourse outside the bounds of marriage traditionally constitutes one of the most common causes of blood feud, and the manner in which the widespread rash of sexual aggressions took place throughout the conflict tended to emphasize fantasies of deflowering and extramarital intimacy. Unfaithful wives further risked having their noses cut according to the blood feud tradition, and some victims in concentration camps were found dead with their noses cut. This can be explained by the fact that nationalists both viewed conversions to Islam and the higher Muslim birthrate as an attack threatening the survival of Serbia. Milki Tadic, “Ratne prijetnje us amanet vlasti,” *Monitor* (11 February 1994), cited in Cigar, *supra* note 113 at 8; Boehm, *supra* note 160 at 80; Gutman, *supra* note 127 at 51.

¹⁶⁵ In another camp, lethal torture was inflicted in a building called the “red house” and nonlethal torture in one called the “white house,” mirroring the colors of innocence and guilt in the blood feud tradition; Boehm, *supra* note 160 at 52, 60; Gutman, *supra* note 127 at 51, 88, 90, 96-09.

is exemplified by the case of a victim brought to the hospital for a blood transfusion and aggressed by staff and patients because the transfusion involved the loss of Serb blood.¹⁶⁶

This is in line with the blood feud custom, which demands that lost blood be compensated with blood from the aggressor or his clan. Several instances of violence further conformed to the corollary custom of raiding.¹⁶⁷ The element of ambush, looting and killing carried out in this way appears to have corresponded to an old form of popular justice, as raiders by their deeds were traditionally considered heroes and champions of justice.¹⁶⁸ That such deeds as blood compensation and raiding corresponded to popular conceptions of justice is incidentally supported by the fact that pagan beliefs in the area were historically integrated into religion to make the Supreme Being into someone to be feared. Contrarily to traditional Christian belief, God was angered by misconduct, and would punish in furious retaliation rather than constructive punishment, and this at any time.¹⁶⁹ A work of nationalist literature would later claim, in line with this perspective, that cities destroyed during the war had “merely been subject to divine punishment, [...] because of the unhealthy, cosmopolitan, over-tolerant life in them.”¹⁷⁰ These beliefs can finally be said to have contributed to the above-presented pattern of violence dissimulation and legitimization, due to the elements of spiritual justice and rejuvenation associated with them, which tend to ground denial, in addition to their customary distinction from manslaughter.¹⁷¹

(2) The Serbian Persecutory Conception of Justice and International Justice

¹⁶⁶ Gutman, *supra* note 127 at 51, 96, 98–99.

¹⁶⁷ Buses were repeatedly robbed and assaulted *en route* to concentration camps. Militiamen brandished knives and rifles in the air as if in the spirit of raiding Boehm, *supra* note 160 at 57; Gutman, *supra* note 127 at 122, 120.

¹⁶⁸ The tradition was glorified in some of the most important works of Serbian nationalist literature. One such poem titled *The Mountain Wreath*, which praised the massacre of Muslims, was published in twenty editions between 1847 and 1913, to become the most widely read literary work in Serbia. Anzulovic, *supra* note 100 at 52. On its deep cultural influence, Milovan Diljas, *Land without Justice* (London: Harcourt, 1958) at 130.

¹⁶⁹ Praise of revenge can also be gathered from traditional folklore: Anzulovic, *supra* note 100 at 50.

¹⁷⁰ Another would for instance write that Sarajavo “was an unnatural creation, which had collapsed by itself from malice and hatred.” Colovic, *supra* note 100 at 25.

¹⁷¹ Boehm, *supra* note 160 at 67, 54 (“Blood feud means a kind of spiritual fulfilment”); Durham, *supra* note 160 at 162 (“When a man takes vengeance, then he is happy; then it seems to him he has been born again”).

With the persecutory sense of justice presented in the previous section, this section now turns to the reception of international justice. As will be shown, international justice and Serbian nationalist discourse proposed conflicting narratives of justice in relation to the persecutions, which inevitably entered into friction and ultimately engendered popular discontent. In a post-conflict transition where nationalist elites by and large remained in power, international justice, as will be shown, unfortunately stood little chance of displacing widely held popular beliefs. More than a fundamental development whose veracity supported nationwide scrutiny as in the German example, the law's message, as will be shown, confronted mythologies and caused further denial. In line with mimetic theory, which states that whoever reveals the persecutory nature of the scapegoating mythologies is bound to cause scandal, the following argues that the ICTY ushered a wave of indignation having united conservative nationalists and cosmopolitan liberals in shared condemnation.¹⁷² This process is broken into four stages: (i) an initial reaction of rivalry opposing the nation to the ICTY; (ii) the emergence of a shared, popular sense of threat regarding it; setting the stage for (iii) more persecutory violence; thus (iv) furthering denial; again (v) by conforming to pre-modern conceptions of justice in the broad sense.

(i) International Justice as a National Rival

In the nationalist political imaginary, Serbia had become the “youngest and freshest nation in Europe” as a result of the war, while remaining the eldest bearer of ancient Christian tradition.¹⁷³ Serbs had further perished to ensure the country's renewal, for the sins of others: “the sacrificial blood of fallen heroes nourishe[d] the body of Serbia, the native soil, as those who died preserve the germs of national renewal.”¹⁷⁴ Like Christ, this had been a martyr's death, for the higher principle of national survival.¹⁷⁵ “No longer,” after this moment of collective effervescence, “would Serbians indulge in the sin of obeying foreign masters,” this discourse went.¹⁷⁶ Society would no longer be divided between those who

¹⁷² Katarina Ristic, *Imaginary Trials* (Leipzig: Leipziger Universitätsverlag, 2014) at 217.

¹⁷³ *Ibid* at 8, 89–92.

¹⁷⁴ As described in Colovic's summary of the state of nationalist discourse. Colovic, *supra* note 100 at 8.

¹⁷⁵ This is the principle of “heavenly Serbia.” *Ibid* at 8, 11.

¹⁷⁶ The face paint, the Rambo sweatbands, the ski masks, the bizarre haircuts, and the uniforms adorned by paramilitary units suggest the ceremonial nature of the persecutions. Allcock, *supra* note 100 at 398, 407.

adhered to national culture and those who did not. Accompanying these perceptions further was a narrative of denial which emphasized that Serbs really were the ones to have sacrificed to achieve this end, and that Bosnian Muslims vanished without harm.¹⁷⁷ Such was the nature of the scapegoating mythologies on which Serbian society was to reestablish itself. With the contours of these mythologies briefly laid out, this sub-section now turns to the reception of international justice. In line with mimetic theory, which states that those who reveal the persecutory nature of the mythologies are perceived as rivals, this sub-section argues that a pattern of rivalry tended to characterize popular depictions of it.

Press coverage of the ICTY frequently reported that defendants were “winning,” or that the tribunal was “a game,” in which Serbia could hope to deduct a few points from its NATO opponents.¹⁷⁸ Prosecutor Del Ponte was likewise treated as a rival for her role as chief representative and quickly attracted resentment from the public.¹⁷⁹ The press tended to depict her exchanges with national politicians as clashes between the leaders of two rival groups, one representing the national population and the other the West.¹⁸⁰ During their first meeting, President Kostunica launched an attack against the ICTY and sparked such a heated argument as to cause the Prosecutor to leave the meeting abruptly.¹⁸¹ As if angered by the tinge of rivalry defining her relations with Serbia, Prosecutor Del Ponte herself tended to respond to national politicians with an abrasive style, and openly voiced her own exasperation with their lack of cooperation.¹⁸² The Prosecutor was also said to have exclaimed that she admired the brilliant manner in which Milosevic had conducted his defense.¹⁸³ Going further along the theme of admiration ordinarily characterising the rivalrous relationship, nationalist intellectuals often expressed admiration towards Western

¹⁷⁷ As if naturally. “Ethnic cleansing is a natural phenomenon and not a war crime,” for instance claimed Plavsic. “If six million Serbs are meant to die on the battlefield, there will remain another six to enjoy the fruits of their fight.” Cited in Admir Mulaosmanovic, “Islam and Muslims in Greater Serbian Ideology: The Origins of an Antagonism and the Misuse of the Past” (2018) 39:3 J Muslim Minority Affairs 300 at 309.

¹⁷⁸ *Ibid* at 190–92..

¹⁷⁹ Victor Peskin, *International Justice in Rwanda and the Balkans* (Cambridge: Cambridge University Press, 2008) at 29, 73.

¹⁸⁰ *Ibid*.

¹⁸¹ Zeljko Cvijanovic, “Hague Tribunal Prosecutor Carla Del Ponte Storms out of Meeting with President Kostunica”, *Institute for War and Peace Reporting* (24 January 2001).

¹⁸² Norman Cigar, *Vojislav Kostunica and Serbia's Future* (London: Saqi Books, 2001) at 29.

¹⁸³ *Ibid* at 29; Vecernji List, “Del Ponte: Divila same se misevicevoj odbrani” (29 July 2006) *Vreme*, in Ristic, *supra* note 172 at 217.

legal traditions.¹⁸⁴ Legalism also coloured public discourse on the past, initiating passionate public discussions on the legality of particular events during the war.¹⁸⁵ In parallel, public discourse also dwelled on the several important legal weaknesses plaguing the tribunal.¹⁸⁶

Public discourse not only depicted the tribunal as failing to uphold the very principles that should have made it honourable in the eyes of the public, but also reproduced the same crimes and accusations levied against the nation. Media variously depicted the tribunal as the “propagandist” creation of military enemies “with imperialistic interests” in the conquest of Serbia, “an act of aggression,” a “joint criminal enterprise,” a “genocide,” a place where “feuding” enemies sacrificed Serbs.¹⁸⁷ As if in an attempt to retaliate for the tribunal’s decontextualized assessment of the situation, the media reporting on war crimes prosecutions itself tended to decontextualize the proceedings.¹⁸⁸ Some publications mimicked the courtroom process, cross-examining some of the witnesses in a vacuum, and systematically skewing the facts to the advantage of defendants.¹⁸⁹ Domestic war crimes tribunals were also created, which minimized the gravity of the crimes.¹⁹⁰ A mock trial and documentary movie were staged in response to the ICTY’s notorious “Scorpions” video showing Serbian extrajudicial killings.¹⁹¹ Domestic trials blamed Bosnian Muslims and formed the basis of extradition requests from Western jurisdictions.¹⁹² A domestic truth and reconciliation commission produced no results while a documentation center

¹⁸⁴ Colovic, *supra* note 100 at 41, 43; Marlene Spoerria and Annette Freyberg, “From Prosecution to Persecution: Perceptions of the ICTY in Serbian Domestic Politics” (2008) 11 J Int’l Rel & Dev 350 at 363.

¹⁸⁵ Miklos Biro, “Public opinion in Serbia on ICTY” (2018) 10 *Primenjena psihologija* 463 at 465.

¹⁸⁶ Such as the lack of jurisdictional basis, absence of separation between prosecution and judge, poor definition of the burden of proof, formal absence of an independent appeal body, failure to protect against multiple convictions for the same offence and the presumption that confessions were made freely and voluntarily. Kosta Cavoski, *The Hague against Justice* (Belgrade: Center for Serbian Studies, 1996).

¹⁸⁷ Amer D’Ihana, *Media and National Ideologies: Analysis and Reporting on War Crime Trials in the former Yugoslavia* (Sarajevo: Mediacentar, 2011) at 257; Marlise Simons, “Lessons from a ‘Textbook’ War Crimes Trial”, *NY Times* (19 September 2004); Aleksandar Jokic, “Genocidalism” (2004) 8 J. of Ethics 251 at 254.

¹⁸⁸ Lara Nettelfield, *Srebrenica in the Aftermath of Genocide* (Cambridge: Cambridge U. Press, 2013) at 259.

¹⁸⁹ Ristic, *supra* note 172 at 192.

¹⁹⁰ Bodgan Ivanisevic, “Against the Current: War Crimes Prosecutions in Serbia” (2007) 23 Center for Transitional Justice at 4; *Report on War Crimes Trials in Serbia* (Belgrade: Humanitarian Law Center, 2019).

¹⁹¹ Gordy, *supra* note 7 at 134, 137.

¹⁹² Damien McElroy, “Extradition of Former Bosnian President Ejup Ganic Thrown Out”, *The Telegraph* (27 July 2010); “Austria Won’t Send Bosnia General to Serbia”, *Reuters* (7 March 2011); Nermina Durmic, “International Officials Condemn Bogus Ruling of Serb Court”, *Associated Press* (13 December 1998).

systematically contradicted ICTY findings.¹⁹³ Srebrenica commemorations prompted alternative commemorations for Serbian victims in surrounding villages.¹⁹⁴ In line with Girard's theory, which states that rivals tend to imitate one another, Serbia very much responded to international scrutiny by mimicking important aspects of international justice.

(ii) International Justice as a Threat to National Unity

While national discourse tended to depict the war as having consolidated Serbian national unity and culture, another theme characterizing mediatic depictions of the tribunal was its perceived capacity to threaten these crucial achievements. Cooperation with the tribunal proved to be highly divisive, such that public discourse on the subject tended to reproduce the same pattern of rivalry in domestic politics, along prewar political divisions between urban economic elites and rural traditionalists. Standing firmly in favor of cooperation with the ICTY was the prime minister, who enjoyed support from liberal institutions such as large businesses, technocratic elites and civil society. Firmly opposing cooperation on the other hand was the country's president, who in turn enjoyed support from conservative institutions such as the army, the church and former communist elites.¹⁹⁵ While progressive media tended to side with the prime minister and sought to report the tribunal's work in an objective manner, conservative media for its part tended to side with the president and covered the subject in rigged television debates.¹⁹⁶ One should note that the scope of disagreement between both sides of this old political fault line had narrowed substantially during the war, such that the prime minister and president shared similar objectives for the country, and differed mainly on the question of cooperation.¹⁹⁷

¹⁹³ Jelena Subotic, *Hijacked Justice: Dealing with the Past in the Balkans* (Ithaca: Cornell University Press, 2009) at 53–55; Darko Trifunovic, "Report about Case Srebrenica" (Banja Luka: Documentation Center of Republic of Srpska for War Crimes Research and the Bureau of Government of RS for Relation with ICTY, 2002).

¹⁹⁴ In Bratunac, Gordy, *supra* note 7 at 105, 136.

¹⁹⁵ Peskin, *supra* note 179 at 65. Subotic, *supra* note 193 at 70–71.

¹⁹⁶ Biro, *supra* note 185 at 8.

¹⁹⁷ Obrad Kesic, "An Airplane with Eighteen Pilots: Serbia after Milosevic" in Sabrina Ramet and Vjeran Pavlakovic, eds, *Politics and Society under Milosevic and after* (New York: University of Washington Press, 2005) 95 at 107.

Conservative media tended to depict the prime minister's decision to cooperate in exchange for foreign economic assistance as a form of treason.¹⁹⁸ The extradition of indictees to The Hague further was seen to align with the country's history of imperial domination, by allowing foreign powers again to dictate the nation's faith in return for economic benefit.¹⁹⁹ In line with the nationalist conception of vice, the prime minister and those who worked to help the ICTY were putatively guilty of the traditional offence of undermining national interests in favor of foreign powers. Cooperation became the subject of such a high level of anxiety among the conservative camp, as to cause those in favor of it to be perceived as dividing society, by collaborating with its enemy.²⁰⁰ So acute were perceptions of imminent danger, that cooperation became the object of several protests among the national population and armed forces, which regularly blocked major highways with armored vehicles.²⁰¹ And so densely tinged with nationalist conceptions of vice and virtue were those reactions, as to cause one senior government official to commit suicide in overt protest, and tens of thousands of supporters to crowd the streets of Belgrade on 25 September, chanting "kill yourself, Slobodan, and save Serbia!"²⁰² According to national mythologies, sacrifice of life to defend the nation indeed amounted to a heroic act.

(iii) A Necessary Return to Scapegoating

In line with the following step in Girard's theory, social division eventually gave rise to widespread perceptions of threat, and eventually led to scapegoating of the persons associated with it. Like other victims of persecutory violence studied in this chapter, the tribunal was depicted along liminal lines in public discourse. The prosecution was said to use "Muslim war tricks," "participate in the war" and seek to "exterminate Serbs"

¹⁹⁸ That Del Ponte regularly identified him as "the tribunal's interlocutor" gave the impression of collaborating with the enemy. Subotic, *supra* note 193 at 46; Sabrina Ramet, *Civic and Uncivic Values: Serbia in the Post-Milosevic Era* (Belgrade: Central European University Press, 2011) at 173.

¹⁹⁹ Humanitarian Law Center *supra* note 190 at 14. "Suicide Attempt is 'Warning to International Community'", *Agence France Presse* (12 April 2002); Peskin, *supra* note 179 at 71.

²⁰⁰ That ICTY and cooperation with it momentarily became the population's chief political concern, Mirko Klarin, "The Impact of the ICTY Trial on Public Opinion in the former Yugoslavia" (2009) 7 J Int'l Crim Just 90 at 89; Spoerria and Freyberg, *supra* note 184 at 361.

²⁰¹ Peskin, *supra* note 179 at 75–77.

²⁰² Spoerria and Freyberg, *supra* note 184 at 361; Untitled, *Star Tribune* (25 September 2000).

culturally. The tribunal was depicted as a “disease,” a lethal mixture of “New World Order fascism” and “Islamic fundamentalism,” while Prosecutor Del Ponte herself was depicted as “the new Gestapo,” a “bloodsucker.”²⁰³ The language of threat and scandal originally attributed to the tribunal for its overt confrontation of the scapegoating mythologies eventually expanded its scope, and began targeting Serbian nationals associated with its operations. Like Bosnian Muslims before them, NGO workers were “fascists,” “criminals,” “perverts,” “transvestites” and “animals,” Serbians who looked like fellow nationals but subversively served foreign empires.²⁰⁴ This type of discourse likewise began to target the prime minister, who was similarly accused of collaborating with the tribunal. Like others supporting the tribunal, his person became increasingly associated with it, symbolically accumulating much of the hatred and loathing towards it. One article troublingly read,

“Somewhere in Bosnia, there is a fire pit. On it once, long ago, there was a fire, above which, once, long ago, there was a grill. On that grill was an ox. Which they ate [meaning the sacrificial slaughter of victims as animals.]. Once, long ago. People say there is a legend that the spirit of that ox often appears at that place and gazes towards Sarajevo, to catch a glimpse from of at least one of the people [the prime minister] who then, once long ago, ate from that grill. People swear that that they can now hear the spirit of the eaten ox as it lows from the highlands.”²⁰⁵

The prime minister and NGO workers supporting the tribunal had “eaten from the sacrificial animal,” in the nationalist imaginary, before treacherously working to undermine the fragile unity achieved through sacrifice. They were traitors without respect for the blood poured for the Serbian nation.²⁰⁶ As had been the case for Bosnian Muslims, these accusations were couched in the logic of revenge, as a form of offense demanding reciprocation.²⁰⁷ In 2003, the prime minister was assassinated by a group named the “Anti-

²⁰³ Iavor Rangelov, “International Law and Local Ideology in Serbia” (2004) 16:3 Peace Rev 331 at 331; Katarina Ristic, “The Media Negotiations of War Criminals and their Memoirs: The Emergence of the ‘ICTY Celebrity’” (2018) 28:4 Int’l Crim Just Rev 391 at 396; Gordy, *supra* note 7 at 147.

²⁰⁴ That pacifists “help the evil forces and by the same token to humanity, and they are champions of treason and defeat, they are the mythical personifications [...] demons of enslavement and tyranny. The basis for such a practice is cowardly egoism.” Cigar, *supra* note 113 at 32. Citing parliamentarians, Humanitarian Law Center, *supra* note 190 at 18, 16-17, 30; “The Writing on the Wall: Serbian Human Rights Defenders at Risk” Amnesty International (29 November, 2005) at 1-2, 8.

²⁰⁵ Vojislav Zanetic, “Hagalnica”, *NIN* (14 June 2001), cited in Gordy, *supra* note 7 at 89.

²⁰⁶ *Ibid* at 69, 71.

²⁰⁷ Humanitarian Law Center, *supra* note 190 at 9; Gordy, *supra* note 7 at 78.

Hague Patriots,” after having been associated by the press with organised crime for some time.²⁰⁸ As if already made into some form of criminal to be punished for his treacherous cooperation with the tribunal, the prime minister was even said to have died “by his own doings” by the nationalist bishop presiding over his funeral.²⁰⁹ Others in the press stated more explicitly that he was “killed by Slobodan Milosevic and Carla Del Ponte,” implying a form of revenge for his treacherous extradition of the country’s former leader at the behest of Western enemies.²¹⁰ As would be the case after a blood feud killing, the murderers involved in the assassination were depicted in public discourse as heroes.²¹¹

(iv) Scapegoating, Denial and Justice

As one would expect after scapegoating, political unity appeared to ensue. “Almost everyone regarded [Prime Minister] Dindic as a divisive figure, but in death he seemed to unite the country,” wrote one journalist.²¹² Conservatives won a sweeping majority during the following election, and the party having received the largest number of votes was headed by an ICTY defendant.²¹³ The idea of a unified government also began to germinate. Both political camps issued a “Declaration of Political Reconciliation” a few years later, promising to “overcome conflicts from the past free of resentments from or denials of the past, without accusing or exonerating people for their affiliation.”²¹⁴ A social consensus appears to have crystallized after the assassination of the prime minister, which condemned the ICTY across the political spectrum.²¹⁵ Cooperation appeared to take on a new meaning among the population, which broadly endorsed the government’s portrayal of defendants as national martyrs.²¹⁶ A flurry of books written by ICTY defendants and a

²⁰⁸ Unsigned, “Serbian court convicts 12 in PM assassination”, *Associated Press* (23 May 2007); Eric Gordy, “Serbia after Djindic: War Crimes, Organized Crime, and Trust in Public Institutions” (2004) *Problems of Post-Communism* 10 at 13.

²⁰⁹ Unsigned, “Rana posred srca naroda”, *Vecernje* (15 March 2003), cited in Gordy, *supra* note 7 at 80.

²¹⁰ Stojan Cerovic, “Posle Dindica”, *Vreme* (20 March 2003), cited in Gordy, *supra* note 7 at 81.

²¹¹ Ramet, *supra* note 198 at 171-72.

²¹² Misha Glenny, “The Death of Dindic”, *New York Review of Books* (17 July 2003) at 34.

²¹³ Rangelov, *supra* note 203 at 333.

²¹⁴ Peskin, *supra* note 179 at 83; Gordy, *supra* note 7 at 75, 94.

²¹⁵ Thus liberal media joined forces with conservatives and increasingly published articles criticizing the ICTY. Spoerri and Freyberg, *supra* note 184 at 358; Ristic, *supra* note 203 at 193.

²¹⁶ Steven Woehrel, “Conditions on U.S. Aid to Serbia,” CRS Report for Congress at 3, cited in Orentlicher, *supra* note 7 at 30 note 135; Rod Nordland, “Pensions for Patriots”, *Newsweek* (25 June 2005).

variety of cultural productions further crystallised Serbia's alternative account of the war.²¹⁷ The inverse the Frankfurt Auschwitz trial, a normative message would seem to have emerged, which rejected the tribunal's findings across cultural media as varied as television, radio, theatre, school books and political discourse.²¹⁸

The preceding has argued that the prime minister and NGO workers were vilified for their support of the ICTY and ultimately persecuted following the same structure as scapegoating. In line with mimetic theory, which states that those who denounce scapegoating mythologies are bound to face widespread anger, it was argued that the violence dispensed ultimately ushered new mythologies which served to nullify the tribunal's message and reinforce denial. One may further argue that these delusions were allowed to settle because the violence was structured around a symbolic justice process in the broad sense. As would be the case for delinquents, the tribunal and those who associated with it were indeed perceived as offenders, who for their denial of national identity could legitimately be punished. The violence not only followed disproportionate perceptions of risk, intermittently making the tribunal the country's main security consideration, but punished those held guilty of the nationalist conception of vice following methods consonant with the blood feud tradition, and in such a way as to exonerate the authors of that violence and make them into national heroes.²¹⁹ Following traditional conceptions of justice, the government designed its policy of "voluntary surrenders" in conformity with national mythologies, and called for indictees to cooperate with the ICTY in the spirit of sacrifice.²²⁰ By staging the martyr archetype in public ceremonies, the government

²¹⁷ Over a hundred books have been written by some twenty ICTY defendants, some of which are highly popular. Susanne Karstedt, "I Would Prefer to Be Famous': Comparative Perspectives on the Re-entry of War Criminals Sentenced at Nuremberg and The Hague" (2018) 28:4 Int'l Crim Just Rev 372.

²¹⁸ Ana Omaljev, *Divided we Stand: Discourses on Identity in "First" and "Other" Serbia* (Stuttgart: Ibidem Verlag, 2016) at 200 (one nationalist thus writes, "We will no longer sit and quietly observe how [NGOs are attempting to take over]. We will fight in the newspapers, we will fight on web sites, we will fight in public debates, we will fight in books, we will fight in theatres, we will fight in galleries").

²¹⁹ The population intermittently viewed the ICTY as its main security concern. Klarin, *supra* note 200 at 89.

²²⁰ With the participation of the Serbian Orthodox Church, the president staged departure ceremonies praising those who surrendered voluntarily as patriots and national heroes. Sells, *supra* note 100 at 85; Subotic, *supra* note 193 at 49. In line with this perspective, some indictees went so far as to commit suicide. According to Peskin, Milosevic contributed to his death by failing to take his medication. Peskin, *supra* note 179 at 85.

managed to cast the ICTY as the real offender, against whom national identity was to be defined. This strategy largely worked, and effectively blocked the ICTY' message.²²¹

The end of the Milosevic regime brought with it a sense of political transition during which denial appeared milder. According to polling agencies, much of the public during this period deemed Milosevic guilty of having led the country into chaos, and, for this reason, believed that punishment should be meted out against the country's former leaders.²²² Commenting on this period, one Serbian scholar wrote that "everyone has, at once, become anti-Milosevic, and millions of citizens in twenty-four hours, changed their favorite color uniforms [...]." ²²³ Before the tribunal attracted widespread public attention, survey results suggested that the population partly recognised the importance of Serb atrocities.²²⁴ Yet this tendency changed as the tribunal attracted national attention. Surveys indicate that the number of citizen willing to concede knowledge of the most dramatic events of the war diminished during its operation.²²⁵ School textbooks to this day remain evasive and biased, leaving the younger generation uninformed and uninterested in this portion of national history.²²⁶ The prevailing account on the past continues to portray Serbia as the primary victim of the war, and to confer the 1999 NATO bombing place of choice. Six of the twenty-two ICTY accused have re-entered politics in various capacities while one scholar views the tribunal as one of the most negatively valued concepts in the country.²²⁷

²²¹ "The more the Serbian government stepped up its extraditions," thus writes Subotic, "the less public debate there was about war crimes." Subotic, *supra* note 193 at 51-52. Rangelov, *supra* note 203 at 331 ("Its indictments continue to galvanize nationalist sentiment."). Jovana Mihajlovic, "Homecomings from The Hague: Media Coverage of ICTY Defendants after Trial and Punishment" (2018) 28:4 Int'l Crim Just Rev 406 at 416.

²²² Gordy, *supra* note 7 at 22.

²²³ Another wrote that "critical thought at last began to appear [with respect to the former regime] in the population." Stjepan Gredelj, "Najviše grandjana Dindić u i Kostunici", *B92* (30 May 2001); Petar Lukovic, "Vojislav Fernandel", *Feral Tribune* (14 October 2000). Articles respectively cited in *ibid* at 22, 93.

²²⁴ For instance naming the shelling of the Markale Market, the siege of Sarajevo and the massacre in Srebrenica as "the first three events that come to mind in relation to the war in Bosnia." SMMRI 2001 at 22, cited in Gordy, *supra* note 7 at 24.

²²⁵ Christopher Lamont, *International Criminal Justice and the Politics of Compliance* (Farnham: Ashgate, 2010) at 22.

²²⁶ Dubravka Stojanovic, "Slow Burning: History Textbooks in Serbia, 1993-2008" in Augusta Dimou, ed, *Transition and the Politics of History Education in Southeastern Europe* (Goettingen: V&R Unipress, 2009) 191.

²²⁷ Respectively, Karstedt, *supra* note 217 at 383; Ristic, *supra* note 203 at 193.

CONCLUSION

The preceding has shown that the ICTY's message was ultimately understood as a confirmation of the persecutory ideology. In having done so, the analysis refuted two arguments commonly made on the subject in legal scholarship: one to the effect that the ICTY should have undermined radical nationalist defendants politically, and the other to the effect that the tribunal should have reduced the scope of denial.²²⁸ It no longer seems premature, some two decades and a half after the fact, to claim that many of the positive effects initially posited as consequences of the ICTY's work largely failed to materialise. Another central argument, on which the preceding argument rests, was that the perpetration of atrocity often corresponds with mimetic theory. With the argument now laid out, it is important to stress that this theory cannot be applied mechanically to every occurrence of persecutory violence, with each of its constitutive elements unfolding automatically one after the other. The theory, rather, suggests a series of factors and symptoms to be adapted to the specifics of each case. The risk in carrying out this type of analysis is to overstretch its broad, malleable concepts into perceiving "mimetism," "rivalry," "liminal depiction" and any of its constitutive categories, where there is only ordinary conflict.

A cursory comparison between our case studies and other instances of persecution however suggests the recurrence of these concepts. Both the Vichy and Balkans examples featured severe economic crisis, social polarization, fears of cultural degeneration, the identification of a weak and privileged victim group, and the glorification of folklore and national unity. Other examples can be found. The persecutions of the Third Reich took place after the economic crisis of 1930 had exasperated social tensions between Catholics and Protestants, and between bourgeois and working class, to the point creating a state of political deadlock.²²⁹ Hitler sought to remedy the prevailing sense of social dislocation by

²²⁸ Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" (2001) 95 Am. J. Int'l L. 7 at 10; Orentlicher *supra* note 7.

²²⁹ Deepening the sense of dislocation were threats of secession from territories on the Eastern, Western and Northern borders (the threat of Polish separatism, rumors of reunification in Alsace, and a Danish minority presenting similar concerns respectively). Thomas Kühne, "Political Culture and Democratization" in James Retallack, ed, *The Short Oxford History of Germany* (Oxford: Oxford University Press, 2008) 174 at 176-78. Ferdinand Tönnies, *Gemeinschaft Und Gesellschaft* (Berlin: Kessinger, 2010) at 13.

emphasizing notions of national unity (*Volksgemeinschaft*).²³⁰ In Argentina, the persecutions of the junta government occurred after a drastic devaluation of the currency had worsened tensions to the point of near revolt between the urban economic elite and the rural population.²³¹ Before the Armenian Genocide, the Ottoman Empire had effectively collapsed, and left the victim group, as Christians, to represent the Russian enemy.²³² In Rwanda, a drastic currency devaluation occurred before the genocide, and media such as *Radio des Mille Collines* fostered Hutu unity, when none had truly existed before, amidst the prevalent climate of political antagonism along the North-South divide.²³³

An overarching commonality across these cases is the drastic erosion of tradition and social solidarity. This has often been the consequence of a speedy modernisation process having left entire population groups behind, and opened the country to drastic economic upturns and downturns.²³⁴ Similarities can likewise be noted in the manner in which these persecutions unfolded. In both of our case studies, victims were expelled from the community following a loose judicial process, and executed using “autonomous” elimination methods.²³⁵ During WWII, persecutions were accompanied by legal decrees and procedures expelling Jews from German society. Nazis allegedly selected Auschwitz as its main execution camp for its arid climate and remote geographical location.²³⁶ Like the French Jews sent to vanish “to an unknown destination” in the faraway locale of Auschwitz, many victims of the Armenian genocide were made to disappear, literally by

²³⁰ National Socialism was characterized by the obsessive sowing of comradeship, with the creation of a panoply of institutions devoted to the idea, from youth camps to labor service units. Cornelia Schmitz, *Vokabular des Nationalsozialismus* (Berlin: Walter de Gruyter, 1998) at 343–45.

²³¹ That a notion existed that the “organic” nature of Argentine society had to be restored, Carlos Santiago Nino, *Radical Evil on Trial* (New Haven: Yale University Press, 1996) at 43, 45.

²³² Robert Melson, *Revolution and Genocide* (Chicago: University of Chicago Press, 1992) at 79–80.

²³³ Gérard Prunier, *Rwanda: le Génocide* (Paris: Dagorno, 1998) at 113.

²³⁴ In prewar Japan, for example, a series of economic downturns had halted the rapid industrialisation process having swept the country out of feudalism in only a matter of decades, creating a sense of chaos and polarization leaving room for the army to take power. George Allen, *A Short Economic History of Modern Japan* (London: Allen, 1946) at 90–144.

²³⁵ Both featured pillaging, legalised persecution, deportation (in cattle cars), animalistic treatment, internment in concentration camps, and death by exposure to the elements, amongst other things.

²³⁶ Which facilitated autonomous death by exposure to the elements. Direct elimination methods were quickly abandoned, what is more, due to the heavy moral strain exacted on troops. See, amongst other things, *Law for the Safeguard of German Blood and German Honor*, translated and reprinted in Jeremy Noakes and Geoffrey Pridham, *Documents on Nazism* (New York: Viking, 1974) at 463–67; Daniel Goldhagen, *Hitler's Willing Executioners* (New York: Vintage, 1997) at 111.

walking across to the desert, to an unknown and undisclosed location.²³⁷ In Argentina, victims were thrown off helicopters midair into the Rio Grande, to vanish “autonomously” in the sea.²³⁸ Japanese WWII persecutions equally included death marches and camp-induced famine deaths.²³⁹ These methods emphasised the “natural” and “autonomous” disappearance of the victim group after the staging of a generic legal process.²⁴⁰

Many such patterns have already been identified in the genocide studies literature, albeit in a variety of distinct works scattered between different sub-fields. Some insights can be found in the literature noting the existence of a certain link between violence and scapegoating.²⁴¹ Others touch upon it in the literature on hate speech and genocidal ideology and propaganda, for instance noting that victim groups tend to be compared with vermin and beasts, and dehumanized.²⁴² Works in the history of genocide note the recurring patterns of economic difficulties, rapid social transformations, and political polarization, in addition to the recurring methods, both distant and intimate, through which violence tends to be perpetrated.²⁴³ It is generally understood that victim groups tend to be essentialized, and that perpetrator groups often seek a grand return of sorts, to some imagined golden age of tradition.²⁴⁴ Yet these works tend to consider these ideas along with a variety of other, more concrete and material factors, which are explained in ways quite different from mimetic theory.²⁴⁵ While the literature provides ample material for the

²³⁷ Payam Akhavan, *Reducing Genocide to Law* (Cambridge: Cambridge University Press, 2012) at 1.

²³⁸ Where pigs fall from a cliff and crash into the sea. Calvin Sims, “Argentine Tells of Dumping ‘Dirty War’ Captives into Sea”, *New York Times* (13 March 1995).

²³⁹ Baron Edward Russell of Liverpool, *The Knights of Bushido* (London: Skyhorse, 2008) at 43-70.

²⁴⁰ Similarly, Roger Smith writes that “the use of a low level of technology to destroy victims is done by choice in the twentieth century. Cambodia did have bullets; peasants armed with ritual knives were not the most efficient means of destruction in Indonesia. Rather, the technology chosen was a mirror of the purposes of the perpetrators, and the culture of the particular society. Smith, *supra* note 10 at 12; Fein, *supra* note 9.

²⁴¹ E.g., Staub, *supra* note 12; Chalk and Jonasson, *supra* note 8; Kuper, *supra* note 12.

²⁴² In works and approaches either such as Schor’s, *supra* note 64, or Alison Des Forges’, “The Ideology of Genocide” (1995) 23:2 Issue: J of Opinion 44.

²⁴³ E.g., Ben Kiernan, *Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur* (New Haven: Yale University Press, 2007); Smith, *supra* note 10 at 12.

²⁴⁴ Gregory Stanton, “The Eight Stages of Genocide,” *Briefing paper presented at the US State Department* (1996), Genocide Watch, <http://www.genocidewatch.org/genocide/8stagesofgenocide.html>.

²⁴⁵ Indeed, genocide studies literature often bears the empirical perspective required to produce knowledge facilitating its prevention, which would appear to have precluded the development of an established, detailed and theoretically grounded literature investigating its deeper symbolic and subconscious aspects. Compare this chapter’s analysis of attrition and Fein, *supra* note 9.

type of symbolic analysis carried out in this chapter, it refrains from engaging with it, perhaps due to disciplinary methodological preferences.

Several parallels have been drawn in this chapter between scapegoating and pre-modern criminal justice processes, suggesting how the former may borrow from the latter in communicating its normative message to the public. Both processes convey their message using the essential purity/impurity dichotomy presented in the second chapter. Like criminals depicted along liminal themes for their defiling behavior, scapegoating victims were shown to be perceived both as primitive animals, and as dangerous elites threatening society with their connections and intellect. Chapter 2 also noted that pre-modern punishment cleansed the community from the moral pollution produced by the delinquent's crime, but also from any similar form of behaviour within the community. Both case studies in this chapter have shown that a similar conception of vice was attributed to each victim group, and that persecutions were partly understood to cleanse this vice from society. While Vichy persecutions targeted the greed and exacerbated individualism believed to undermine the social fabric, Serbians tied their persecutions to a fight against the abandonment of national culture and interests. Both the scapegoating and pre-modern punishment process finally circulated their message using a broad variety of media, culminating in experience directing the audience's attention away from suffering, and closer to the reification of a persecutory conception of justice.²⁴⁶

Like the scapegoating process, atrocity prosecutions equally tend to produce denial in some respects. Both constitute the enactment of a series of narratives written long ago by intellectuals having relentlessly lobbied for their mainstream acceptance, "out of a period of chaos," when delinquents continued to wage appalling deeds without consequence. Out of this period of chaos, these narratives suggested a certain notion of vice which punishment should counteract. One may remember, for instance, that the Frankfurt Auschwitz trial was understood by many to counteract the tendency, which the German

²⁴⁶ Once so articulated the ritual, as writes Goodin, "foreclose[s] debate on all questions which given an alternative construction might well be live political ones." Robert Goodin, "Rites of Rulers" (1978) 29:3 *Brit J Sociology* 281 at 287. Similarly, Eric Hoffer, *The True Believer* (New York: Harper, 2010) at 80.

population may have had, to disregard the rule of law.²⁴⁷ While the persecutory process targets the period of crisis having preceded the persecutions, and deflects attention from the period of crisis constituted by the persecutions, the mass atrocity prosecution does the opposite, and targets the period of crisis constituted by the persecutions and deflects attention from the period of crisis having preceded them. Little attention was given during the Frankfurt Auschwitz trial, for example, to the dire socioeconomic situation having preceded the Holocaust.²⁴⁸ Much of the psychological complexity behind the persecutions at Auschwitz was reduced by the media to incomprehensible evil.²⁴⁹ The numerous references to “hell” made by journalists in modern cultural productions on atrocities such as “Shake Hands with the Devil” and “A Problem from Hell” suggest a continued tendency to overlook and deny the human reality behind such acts of extreme violence.²⁵⁰

Contrarily to what some ICL scholarship appears to imply, only a limited portion of the blame can be attributed to the cynical manipulations of cunning elites.²⁵¹ This approach tends to condense blame on the leaders in a disproportionate manner, which many are tempted to interpret as explaining far too much. Doing so may be understood, from the internationalist perspective, as serving the functional objective of allowing many to forget that they may themselves have supported the persecutions, by displacing blame on those facing punishment. Years after the Frankfurt Auschwitz trial, entire segments of the postwar German population were reported to have ceased to deny the persecutions, only to

²⁴⁷ Norbert Frei, “der Frankfurter Auschwitz Prozess und die Deutsche Zeitgeschichtsforschung,” in Fritz Bauer Inst. ed, *Auschwitz, Geschichte, Rezeption und Wirkung*. (Frankfurt: Campus, 1996) at 124; Jerry Muller, *The Other God that Failed: Hans Freyer and the Deradicalization of German Conservatism* (Princeton: Princeton University Press, 1987) at 383

²⁴⁸ No matter how detailed, the legacy of the ICTs is likely to be memorialised similarly, placing the appalling crimes of Srebrenica and Kigali at the forefront of its history. The drastic inflation rates and national currency devaluations having preceded both persecutions play no significant role in it.

²⁴⁹ That ICL by nature tends to mask the broader causes having led to conflict, *e.g.*, Mark Kersten, *Justice in Conflict* (Oxford: Oxford University Press, 2016) at 75, 78; Tor Krever, “International Criminal Law: An Ideology Critique” (2013) 16 *Leiden J Int’l L* 701 at 722; Mark Osiel, *Making Sense of Mass Atrocity* (Cambridge: Cambridge University Press, 2009) at 2-3. In domestic criminal law, Robert Cover, “Violence and the Word” (1986) 95 *Yale L J* 1601 at 1604.

²⁵⁰ Romeo Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda*, (Toronto: Vintage Canada, 2004); Samantha Power, *A Problem from Hell: America and the Age of Genocide* New York: (Basic Books, 2002).

²⁵¹ Akhavan, *supra* note 228 at 10, 11, 17; Antonio Cassese, “Reflections on International Criminal Justice” (1998) 61:1 *Mod. L. Rev.* at 9.

wish to “turn the page,” in a weakened form of denial.²⁵² Yet few post-conflict societies have a government whose radical elements have been purged, a tradition of democracy to revive, and a strong economic potential. When insecurity remains part of daily experience, the frame of personal suffering having led to the persecutions retains its significance. Regardless of the public debate engendered in France at the turn of the 20th century, the lessons of the Dreyfus Affair did not prevent the resurgence of anti-Semitism after the 1930 crisis. Populations cannot be expected to engage with the past without the type of political stability and economic development necessary to eradicate these difficulties.²⁵³

One may conclude, in relation to the failed reception process documented in this chapter, by noting that “the harder you hit a nail on the head,” as Lunacharsky wrote, “the deeper it goes into the wood.”²⁵⁴ This comment initially made in relation to Napoleon’s failed historic battle against the Church would seem applicable to international justice in perpetrator societies where criminal governments remain in power. Atrocity trials can only be expected to contribute to a desired return to liberal traditions which, as seen in the German example, already has an impetus of its own. When there are no democratic traditions to go back to, when poverty, humiliation and insecurity remain, atrocity prosecutions should be understood to risk backfiring, and ultimately solidify denial and illiberal political mythologies at the expense of the norm against atrocity.²⁵⁵ Post-genocidal societies appear to need the very stability which atrocity prosecutions precisely tend to upset, in order to engage with the law’s message.²⁵⁶ Here the ICTY appears to have upset the fragile political equilibrium established in Serbia after the war: with Milosevic’s initial loss of popularity, the population’s desire to join the EU, and the election of a liberally-

²⁵² Cited in Michael Iganitief, “Articles of Faith” (1996) 5 Index on Censorship 110 at 112.

²⁵³ Similarly, Sonia Cardenas, *Conflict and Compliance: State Responses to International Human Rights Pressure* (Philadelphia: University of Pennsylvania Press, 2006) at 30, 76-79; Robert Meister, *After Evil* (New York: Columbia University Press, 2010) at 2.

²⁵⁴ Cited in Bernard Pares, “Religion in Russia” (1943) 21:4 Foreign Affairs 635 at 639.

²⁵⁵ This is what important books on the normative influence of mass atrocity prosecutions such as Sikkink’s *The Justice Cascade* and Osiel’s *Mass Atrocity, Collective Memory and the Law* seem to overlook. (New York: W. W. Norton & Company, 2011); (New Brunswick: Transaction, 1997).

²⁵⁶ In other situations before the ICC such as in Sudan and Kenya. Sarah Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan*, (Cambridge, 2013) at 270; Juan Branco, *L’ordre et le monde* (Paris: Fayard, 2016) at 112.

minded leader, the country appeared to have been in the process of realising precisely this type of transformation, which the ICTY undermined.

CHAPTER 4

A PROBLEM OF CONFLICTING WORLDVIEWS: AUTOCHTHONOUS CONCEPTIONS OF JUSTICE

INTRODUCTION

As an overview of the ICL project, this dissertation has first argued that the objective of the ICL project is to disseminate the norm against atrocity on a global scale. The second chapter has argued that this can be done via spectacular punishment, using a communicative structure similar to the pre-modern ritual of criminal punishment. The discussion next moved to difficulties preventing the attainment of this objective. The last chapter has argued that a chasm exists between the conception of justice conveyed by international justice and that adhered to by perpetrator populations. The present chapter continues the discussion by focusing on similar difficulties occurring in post-conflict societies adhering to non-Western conceptions of justice.

Non-Western conceptions of justice tend to be characterized by their emphasis truth-seeking and reconciliation, as well as by their anchoring in local cultural referents.¹ They often operate in parallel to the official justice system, roughly as the functional equivalent of the small claims or first instance courts, in communities accustomed to both traditional and modern justice.² In some cases they nearly comprise the community's entire legal universe.³ The reduced costs, limited logistical requirements and popular familiarity with traditional justice processes account for their frequent use in post-conflict situations, where

¹ Jaya Ramji, "Designing Bespoke Transitional Justice: A Pluralist Process Approach" (2010) 32:1 Mich J Int'l L 1 at 54; Rosalind Shaw and Lars Waldorf, "Introduction: Localizing Transitional Justice" in Rosalind Shaw et al, eds, *Localizing Transitional Justice* (Stanford: Stanford University Press, 2010) 3 at 5; Padraig McAuliffe, "Romanticization vs Integration? Indigenous Justice in Rule of Law Reconstruction and Transitional Justice Discourse" (2013) 5 Göttingen J Int'l L 41 at 51.

² E.g., Laura Nader, *Harmony Ideology: Justice and Control in a Zapotec Village* (Stanford: Stanford University Press, 1990).

³ Shaw and Waldorf, *supra* note 1 at 3, 15.

the sheer magnitude of crimes would overwhelm even the most elaborate judicial systems.⁴ One newspaper article briefly describes one such practice in Northern Uganda:

“They had raped and pillaged. One after the other, they stuck their bare right feet in a freshly cracked egg. The egg symbolized innocent life, and by dabbing themselves in it the killers are restoring themselves to the way they used to be. Next, the former fighters brushed against the branch of a pobo tree, which symbolically cleansed them. By stepping over a pole, they were welcomed back into the community, having been forgiven for their wrongs.”⁵

While long treated as subordinate to state justice, traditional justice has now entered a period of renewal.⁶ This change is tied to a broader trend, in postcolonial national politics, towards the revitalization of indigenous traditions and the contestation or reappropriation of colonial cultural heritage.⁷ Having witnessed the degradation of traditional culture as a consequence of Western imperialism, many postcolonial states seek to reverse this state of affairs, in the hopes of eventually reaching a balance between tradition and modernity.⁸

Another factor explaining the embrace of indigenous customs and rejection of colonial heritage has to do with the type of social context in which persecutory violence typically takes place. As argued in chapter 3, persecutions tend to afflict societies deeply concerned with the loss of tradition.⁹ Considering the twin difficulties posed by the persecutory and postcolonial societal contexts, the reception of international criminal justice seems likely to cause the same phenomenon of popular rejection and opposition presented in the preceding chapter. This chapter examines this reaction and shows how the postcolonial context emboldens it by focusing on international justice’s foreign character.¹⁰ Much in the

⁴ McAuliffe, *supra* note 1 at 51.

⁵ Marc Lacey, “Atrocity Victims in Uganda Choose to Forgive”, *New York Times* (18 April 2005).

⁶ Adam Kochanski, “The ‘Local Turn’ in Transitional Justice” (2020) 22:1 Int’l Stud Rev 26 at 30, 37; Bonny Ibaoh, *Human Rights in Africa* (Cambridge: Cambridge University Press, 2018) at 116-17.

⁷ David Birmingham, *The Decolonisation of Africa* (Athens: Ohio University Press, 1995) at 114; Kamari Clarke, *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback* (Durham: Duke University Press, 2019) at 173; Makau Mutua, *Human Rights: A Political and Cultural Critique* (Philadelphia: University of Pennsylvania Press, 2011) at 88-89, 90.

⁸ Birmingham, *supra* note 7 at 12; Ibaoh, *supra*, note 6 at 50.

⁹ On this theme, in general, Ben Kiernan, *Blood and Soil* (New Haven: Yale University Press, 2007).

¹⁰ Such reactions of concerted national opposition appear to have taken place to varying degrees in several states, such as Rwanda, Uganda, Kenya, Sudan and South Africa, inevitably impacting the dissemination of the norm against atrocity. Sarah Nouwen, *Complementarity in the Line of Fire* (Cambridge: Cambridge

same way as scapegoating mythologies call for the return to national traditions and the rejection of foreign cultural influence, blaming the latter for all matters of conflict and division, so do traditional justice mechanisms further a similar worldview: these mechanisms uphold traditional values such as in-group solidarity, honour, honesty, reciprocity, and piousness, which themselves tend to be juxtaposed, in oppositional rhetoric, against the greed, individualism, social atomization, cosmopolitanism and atheism associated with modern Western culture. By its embodiment of modern Western values and customs, international criminal justice unwittingly finds itself entangled in this type of rhetoric, as the putative vehicle of modern culture and its discontents.

Examining the rejection of international criminal justice through the persecutory and postcolonial vantage point complements the literature in multiple respects. While several strands of the literature mention the subject, none deals with it directly. The most notorious branch of the literature touching on the reception of international justice consists of quantitative studies, whose reliance on statistical methods leaves out important subjective considerations.¹¹ The literature on traditional justice and international law for its part focuses on a different perspective, depicting whether and where traditional practices fit within the international legal framework.¹² Often siding with other critical literature,¹³ the literature on the neocolonial backlash against the ICC has not delved into the broader

University Press, 2013) at 270; Lionel Nichols, *The International Criminal Court and the End of impunity in Kenya* (London: Springer, 2015) at 104; Juan Branco, *L'ordre et le monde* (Paris: Fayard, 2016) at 112.

¹¹ Phuong Pham et al, *Forgotten Voices: A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda* (Berkeley: University of California Human Rights Center, 2005); Phuong Pham et al, *So We Will Never Forget: A Population-Based Survey on Attitudes About Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia* (Berkeley: University of California Human Rights Center, 2009).

¹² Tim Kelsall, *Culture under Cross-Examination* (Cambridge: Cambridge University Press, 2009); Tim Allen, "Ritual (Ab)use? Problems With Traditional Justice in Northern Uganda" in Nicholas Waddell and Phil Clark, eds, *Courting Conflict? Justice, Peace and the ICC in Africa* (London: Royal African Society, 2008) 47; Lars Waldorf, "Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice" (2006) 79 Temple L Rev 1.

¹³ The overall picture, when it comes to understanding this literature's take on the effects of international justice on the population, is mostly made up of propositions produced by the proponents of international justice, and hedged about by limitations from their critics. Immi Tallgren, "The Sensibility and Sense of International Criminal Law" (2002) 13:3 EJIL 561; Laurel Fletcher and Harvey Weinstein, "Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation" (2002) 24:3 Human Rights Quarterly 573.

pattern of societal opposition within which this rhetoric is imbricated.¹⁴ The lack of scholarly interest in the rejection of international criminal justice as a societal phenomenon is to be contrasted with the opposite phenomenon. Deeper and comparatively notorious research documents important social patterns at play when populations welcome international norms and integrate them into local practice. One may think of the “didactic justice,” “norm cascade” and “vernacularization” models, for example, which omit the whole array of societal processes carried out in reaction to, and with the express object of insulating the population from, international justice.¹⁵ The consequences of these processes are not only misunderstood but significant, as international justice not only fails to achieve progress towards its stated objective, but undermines it by consolidating against it a sense of resentment and intolerance. The fact that international criminal tribunals have tended to face significant difficulties in attempting to communicate the law’s message goes to show that the present state of the literature mostly accounts for part of the picture.

This chapter proceeds as follows. Its first section presents Gregory Bateson’s purposive reasoning theory, which sheds light on an important distinction between modern and pre-modern social institutions. This section further adds elements from mimetic theory to propose a theoretical framework that will be applied, in the following section, to the example of traditional justice practices in East Timor. Together, these two first sections should serve to present an interpretative framework through which to understand traditional conceptions of justice as found in a variety of autochthonous cultures in postcolonial states in the world. With this framework presented, the remainder of this chapter will focus on

¹⁴ Clarke, *supra* note 7; Carsten Stahn, “Justice Civilisatrice? The ICC, Post-Colonial Theory, and Faces of the ‘Local’” in Christian De Vos, Sara Kendall & Carsten Stahn, eds, *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge: Cambridge University Press, 2015) 1; Gino Naldi, “The International Criminal Court and the AU: A Problematic Relationship” in Charles Jalloh and Ilias Bantekas, eds, *The International Criminal Court and Africa* (Oxford: Oxford University, 2017) 111.

¹⁵ Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change” (1998) 52:4 *Int’l Org* 887 and Sally Engle Merry, “Legal Vernacularization and Transnational Culture: The Ka Ho’okolokolonui Kanaka Maoli, Hawai’i 1993” in Richard Wilson, ed, *Human Rights, Culture and Context: Anthropological Perspectives* (London: Pluto, 1997) 28. These models have been followed in international relations and anthropology. *E.g.*, Ellen Lutz and Caitlin Reiger, *Prosecuting Heads of State* (Cambridge: Cambridge University Press, 2009); Naomi Roht, *The Pinochet Effect* (Philadelphia: University of Pennsylvania Press, 2005); Richard Wilson, *The Politics of Truth and Reconciliation in South Africa* (Cambridge: Cambridge University Press, 2001). For Osiel’s thoughtful elaboration of the law’s didactic potential, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick: Transaction Publishers, 1997).

the incidence of these conceptions of justice on the reception of international justice. This will be done by taking post-conflict Rwandese society as an example. The third section thus presents the *gacaca* traditional justice mechanisms used to deal with post-genocide justice, while the fourth section illustrates how the traditional conception of justice, as embodied by these practices, ultimately transpired in the government's rejection of international justice.

(I) AUTOCHTHONOUS CONCEPTIONS OF JUSTICE

The following section presents the chapter's theoretical framework. This framework draws from Gregory Bateson's theory of purposive reasoning and René Girard's mimetic theory.¹⁶ This framework will serve to underline some of the main characteristics of traditional justice processes in use in many autochthonous cultures around the world. The objective here is to present autochthonous conceptions of justice as federated by general principles, which will later be shown to come into friction with international justice. One must note however that the wide geographical scope implied by the task runs the risk of any generic claim, and must consequently reduce the rich diversity of autochthonous legal traditions. The result will be an imperfect approximation, whose main tenets tend to recur from one situation to the next. This section begins by presenting the chapter's theoretical framework in the abstract, before moving on, its second half, to illustrate these ideas against the example of a traditional justice mechanism in post-conflict East Timor.

(A) Autochthonous Conceptions of Justice and Symbolic Communication Theory

In an attempt to chart some of the main differences between modern and pre-modern criminal justice, this sub-section presents an amalgam of ideas drawn from Gregory Bateson's and René Girard's writings, which together highlight two important dimensions of traditional justice: (i) the spiritual, or supra-natural dimension; and (ii) the relational, or

¹⁶ Gregory Bateson, *Steps to an Ecology of Mind* (New York: Ballantine, 1972) at 426-48; René Girard, *Violence and the Sacred* (London: Bloomsbury, 1977).

interpersonal dimension. Bateson and Girard's writings were selected here for their shared engagement with pre-modern thought processes from a relational vantage point.¹⁷

(1) Bateson's Purposive Action Theory, Mimetic Theory and Traditional Justice

Bateson's theory of purposive reasoning refers to the opposite of what he views as "non-purposive" or "ecological" reasoning and focuses on the common tendency in the sciences and modern thought to tie knowledge to concrete ends.¹⁸ This approach, according to Bateson, consists in extricating a few relevant elements from the broader system in which they operate, and in examining them in causal relationship one upon the other.¹⁹ According to Bateson, the purposive nature of this endeavour, that is, its essential connection with its objective, undesirably skews the observer's perception of reality. Of the many effects produced by the interactions between the elements selected, only those deemed directly relevant to the initial objective are considered.²⁰ The objective in other terms imposes itself as guiding principle of sorts, making other effects irrelevant. Inevitably, this approach fails to capture effects on the broader system. This eventually allows for disruptions to settle within it which, if left unchecked, concretely risk undermining it.²¹ An example could be the steam engine, invented for the purpose of hauling coal out of mines, and long conceived of in isolation from the subsidiary and catastrophic degradation of atmospheric conditions.

Purposive reasoning has played an important role in two transformations distinguishing modern from pre-modern criminal justice. One originated during the period of the Enlightenment, as a new scientific approach applied purposive reasoning to rationalise

¹⁷ This, more than other classics such as Malinowski's *Crime and Custom in Savage Society*, or Lévi-Strauss' *The Savage Mind*, proves most relevant for the present enquiry. Bronislaw Malinowski, *Crime and Custom in Savage Society* (London: Harcourt, 1926); Claude Lévi-Strauss, *The Savage Mind* (Chicago: University of Chicago Press, 1962). Bateson's writings were also selected due to their emphasis on the difficulties engendered by the abandonment of relational and ecological habits of thought in modern culture.

¹⁸ Bateson, *supra* note 16 at 426-48.

¹⁹ *Ibid* at 434, 445.

²⁰ *Ibid* at 440; Phillip Guddemi, "Conscious Purpose in 2010: Bateson's Prescient Warning" (2011) 28 *Syst Research & Behav Sci* 465 at 467.

²¹ Bateson, *supra* note 16 at 446.

punishment and reduce the infliction of harm.²² To this end, this transformation replaced the types of supernatural considerations traditionally invested in ordeals and inquisitive torture with increasingly technical rules of procedure and evidence, supplemented by elaborate deterrence and rehabilitation techniques.²³ Another transformation occurred a few centuries earlier, after the Roman Empire's collapse, when the first sovereigns began establishing a centralised system of criminal punishment. Some of the first laws enacted to fill the legal vacuum reproduced the customary system of private vengeance applied among barbarian populations, in an attempt to limit the extent of permissible violence.²⁴ Early rulers acted purposively by interceding to punish the aggressor in the name of the state, thus rupturing the cycle of reprisals between victim and aggressor, and contributing to state building by consolidating its monopoly of violence.

Envisaged in light of Girard's mimetic theory, the relational dimension of justice refers to the element of reciprocity governing the relationship between victim and aggressor, commanding the reciprocation of aggression.²⁵ For its part, the spiritual dimension of justice corresponds to the perception of transcendent morality associated with mimetic reciprocation.²⁶ Alternatively, conflict can also be envisaged non-purposively, and therefore ecologically, as made up of disruptions among a community's constitutive systems. Conflict accordingly (i) halts alliances guaranteeing the circulation of goods and services between belligerents; (ii) undermines social norms preventing aggression; (iii) develops an alternative moral influence among belligerents; and (iv) undermines the community's decision-making abilities. Given that these disruptions have the propensity to aggravate one another, potentially bringing the community to the brink of collapse, a non-purposive justice process would focus on recalibrating these imbalances, making plain

²² Michel Foucault, *Discipline and Punish* (New York: Vintage, 1995).

²³ Richard Fenn, *Liturgies and Trials* (New York: Pilgrim, 1982) at 40.

²⁴ Katherine Drew, *The Laws of the Salian Franks* (Philadelphia: University of Philadelphia Press, 1991) at 50-52; Raymond Verdier, "Histoire du monopole étatique de la vengeance en Occident" in Raymond Verdier, ed, *Vengeance: Le face-à-face victime/agresseur* (Paris: Autrement, 2004) 145 at 146.

²⁵ Girard, *supra* note 16 at 7.

²⁶ Associating "spiritual fulfilment" and "public sentiment" with feuding, respectively, Christopher Boehm, *Blood Revenge: The Anthropology of Feuding in Montenegro and other Tribal Societies* (Lawrence: University of Kansas Press, 1984) at 67, 54; Alfred Radcliffe-Brown, *Structure and Function in Primitive Society* (New York: Free Press, 1952) at 215. In mimetic theory, Girard, *supra* note 16 at 327.

the webs of relationships – economic, political, or religious – on which conflict and community depend.²⁷ A conflict resolution ritual addressing the relational and spiritual dimensions according to mimetic theory would finally need to transmute, by way of scapegoating, the bond of negative reciprocity into one of positive reciprocity – allowing former rivals to continue pursuing their endeavours in mutually beneficial terms.²⁸

(2) Towards a Symbolic Communication Model for Autochthonous Criminal Justice

The preceding ideas, once integrated, first point to a disruption in the web of relationships constituting the community. The emergence of rivalry in this context sets about a disruption of this web of interactions, first between rivals, and eventually between rival groups, which if left unchecked eventually comes to affect the community's economic, political, normative and spiritual systems. To avoid further destruction, a ritual must be organized, in which the community invests its political and spiritual energies. On one level, this ritual aims to address the acrimony accumulated between rivals by exacting some form of sacred punishment, to be meted out on a scapegoat, so as to cleanse rivals of the taboos associated with deviance, and restore their standing as fellow citizen. On another level, the ritual encourages former rivals to engage in mutually beneficial endeavours. This should be done by making plain that the sense of transcendence pursued during the rivalry is now to be attained through beneficial and associative behaviours, aimed at restoring a state of balance and harmony among the community's different constitutive systems, be they relational, economic, political, normative or spiritual. In order to guard this state of harmony, the ritual should finally repress memories of the rivals' former misdeeds.

²⁷ On the danger of protracted feuding, Evans-Pritchard notes that "either the [...feud is] settled, the unity of the tribe being maintained thereby, or they remain so long unsettled [...] that the tribe tends to split." Edward Evans-Pritchard, "The Nuer of Southern Sudan" in Meyer Fortes and Edward Evans-Pritchard, eds, *African Political Systems* (Oxford: Oxford University Press, 1940) 272 at 279. Paul Bohannan states that conflict, according to the Tiv, "spoils the [community]," and that justice conversely "repairs" it, thereby enhancing health and the fertility of crops and women. Paul Bohannan, *Justice and Judgement among the Tiv* (Oxford: Oxford University Press, 1957) at 3.

²⁸ Girard, *supra* note 16 at 26, 82, 133.

(B) Autochthonous Conceptions of Justice in East Timorese Post-Conflict Justice Rituals

The following pages illustrate these ideas using the example of a traditional justice process in East Timor called *nahe biti*, which roughly translates as “stretching the mat.”²⁹ The first half of the section presents the ritual, while the second focuses on its cultural meaning, drawing the link with the above framework. This example was chosen for its similarity with Rwandese *gacaca* rituals studied below, in addition to its location outside the African continent, on which much of the literature on the subject tends to focus, thereby supporting the generalizability of the argument across different autochthonous cultures.

(1) The Traditional Conception of Justice in East Timor’s *Nahe Biti* Ritual

East Timorese colonial history is characterized by the significant political and cultural autonomy afforded to the island’s many autochthonous groups during this period, a consequence of which has been the preservation of traditional customs.³⁰ After colonial authorities departed in 1975, Indonesia took control of the island and sparked a protracted independence struggle culminating in the 2000 unilateral declaration of independence. This engendered a series of catastrophic repressions by the Indonesian state, involving retaliatory killings and near-total destruction of national infrastructure.³¹ These events left the new state unable to govern itself, prompting the UN to intervene by establishing a series of transitional justice initiatives after Indonesia’s departure.³² While a hybrid tribunal was created which did not have jurisdiction over high-ranking Indonesian defendants,

²⁹ Sophie Close, “Indigenous East-Timorese Practices of Building and Sustaining Peace” in Heather Devere, Te Maihāroa & John Synott, eds, *Peacebuilding and the Rights of Indigenous Peoples* (New York: Springer, 2017) 131 at 136.

³⁰ Ivo Carneiro de Sousa, “The Portuguese Colonization and the Problem of the East Timorese Nationalism” (2001) 8 *Lustopie* 183 at 184. Tanja Hohe and Rod Nixon, *Reconciling Justice “Traditional” Law and State Judiciary in East Timor* (Washington: United States Institute of Peace, 2003) at 26; Rod Nixon, *Justice and Governance in East Timor* (London: Routledge, 2012) at 172.

³¹ Joseph Nevins, *A Not-So-Distant Horror: Mass Violence in East Timor* (Ithaca: Cornell University Press, 2005) at 5; Geoffrey Robinson, *East Timor 1999: Crimes against Humanity* (New York: United Nations Press, 2003) at 20-21.

³² David Cohen and Leigh-Ashley Lipscomb, “When More May be Less: Transitional Justice in East Timor” in Rosemary Nagy, Jon Elster & Melissa S. Williams, eds, *Transitional Justice* (New York: New York University Press, 2012) 257.

commentators note that the initiative having had the strongest impact on the population was the truth and reconciliation commission, which combined visits throughout the country with traditional justice rituals reintegrating former combatants.³³ For its rough correspondence to conceptions of justice already held by the population, in terms of truth-telling and reconciliation, the commission was integrated with such traditional processes. These rituals attracted broad participation and yielded high levels of satisfaction,³⁴ but only dealt with minor crimes, leaving out murders – which have traditionally been dealt with judicially.³⁵

The body of customs governing these rituals is called *lisan*, and rests on the authority of the spirits of the dead.³⁶ According to East Timorese cosmology, the dead have the duty to ensure the flourishing of life and harmony in anticipation of their eventual return in the form of new life.³⁷ Moral infractions upset these spirits, who may retaliate by sending their descendants misfortunes such as droughts or illness.³⁸ In their personal interest and that of the community, which is equally affected by spiritual misfortunes, disputants thus convene to discuss and reconcile, ultimately to re-establish the spiritual equilibrium disrupted by conflict by way of a ritual called *nahe biti*.³⁹ The complainant begins the process by

³³ Lia Kent, *The Dynamics of Transitional Justice: International Models and Local Realities in East Timor* (New York: Taylor & Francis, 2012) at 88; Nevins, *supra* note 31 at 168.

³⁴ Attracting 40 000 villagers and reintegrating over 1,400 perpetrators in a population of one million. Surveys show a 90% level of satisfaction. James DeShaw, *Peacebuilding and transitional justice in East Timor* (Boulder: First Forum, 2009) at 180; Chris Lundry, “The Success of Tradition: Lisan and the Reintegration of East Timorese Militia Members” in Richard Friman, ed, *Challenges and Paths to Global Justice* (London: Palgrave, 2007) 43 at 52.

³⁵ Amy Senier, “Traditional Justice as Transitional Justice: A Comparative Case Study of Rwanda and East Timor” (2008) 23 *Praxis: The Fletcher Journal of Human Security* 67 at 78; Hohe and Nixon, *supra* note 30 at 57; Kent, *supra* note 33 at 94.

³⁶ Piers Pigou, *The Community Reconciliation Process of the Commission for Reception, Truth & Reconciliation* (New York: UNDP Timor Leste, 2004) at 26, 29–30; David Mearns, *Looking Both Ways: Models for Justice in East Timor* (Melbourne: Australian Legal Resources International, 2002) at 31 [hereinafter “Looking both Ways”]; David Mearns, *Chega! The Report of the Commission for Reception, Truth & Reconciliation Timor-Leste* (Dili: CAVR, 2005) at 5.

³⁷ Elizabeth Traube, *Cosmology and Social Life: Ritual Exchange among the Mambai of East Timor* (Chicago: University of Chicago Press, 1986) at 22; Franciscus van Wouden, *Types of Social Structure in Eastern Indonesia* (The Hague: Martinus Nijhof, 1968) at 2-3.

³⁸ Jose Trinidad and Bryant Castro, *Rethinking Timorese Identity as a Peacebuilding Strategy* (Dili: The EU Rapid Reaction Programme, 2007) at 16.

³⁹ The ritual is considered the first in a series of steps to be undertaken towards reconciliation. Dionisio Babo-Soares, “Nahe biti: The philosophy and process of grassroots reconciliation (and justice) in East Timor” (2004) 5:1 *Asian-Pac J Anthropol* 15 at 15–16, 21, 27. Pigou, *supra* note 36 at 27.

approaching the hamlet leader, who summons the accused, traditional leaders and ritual experts.⁴⁰ The event is usually inaugurated with a ceremony inviting ancestral spirits, following which a traditionally woven mat is unfolded for the occasion.⁴¹ Acting as a mediator, the leader lets the victim speak, to describe his or her grievances and assert a willingness to resolve the conflict through compromise. The process requires that the entire history of the conflict, which may go back generations, be recited to acknowledge the initial event having engendered it.⁴² The offender then speaks and admits his wrongdoing, expresses a desire to reconcile with victim and community, and his willingness to submit to the decision of the leaders.⁴³

Many view this last part of the process as particularly important, as admissions of wrongdoing often entail significant shaming, and incites the offender to show remorse for his misbehavior.⁴⁴ To countervail the reputational costs associated with crime, wrongdoers and their families often seek a compensatory agreement with the help of traditional leaders. In this case leaders formulate a recommendation based on the severity of the offence, either for the exchange of goods, monetary payment or community service.⁴⁵ In return for the gift, the victim's family will in turn contribute modest items.⁴⁶ The exchange is often concluded by a communal meal on the occasion of which a pig is slaughtered.⁴⁷ A final step of *nahe biti* sometimes involves a symbolic cleansing ceremony, one manifestation of which takes the form of a blood oath during which victim and perpetrator drink each other's blood and promise never to quarrel again.⁴⁸ When reconciliation cannot be achieved,

⁴⁰ Lundry, *supra* note 34 at 49.

⁴¹ *Ibid*; Kyoko Cross, *Harmonizing Local with Global Justice: Emergence of a Hybrid Institutional Mechanism for Reconciliation in East Timor* (Kyoto: Afrasian Centre Peace & Development Studies, 2009) at 14.

⁴² Andrew McWilliam, "Meto Disputes and Peacebuilding: Cultural Notes on Conflict and its Resolution in West Timor" (2007) 8:1 Asia Pacific J Anthr 75 at 77; Nixon, *supra* note 30 at 175.

⁴³ Lundry, *supra* note 34 at 49.

⁴⁴ Elizabeth Traube, "Unpaid Wages: Local Narratives and the Imagination of the Nation" (2007) 8:1 Asia Pacific J Anthr 9 at 19; Cross, *supra* note 41 at 14; Kent, *supra* note 33 at 142.

⁴⁵ Alexander Loch and Vanessa Prueller, "Dealing with Conflicts after the Conflict: European and Indigenous Approaches to Conflict Transformation in East Timor" (2011) 28:3 Conflict Res Quart 315 at 322.

⁴⁶ Nixon, *supra* note 30 at 175; Traube, *supra* note 44 at 12.

⁴⁷ Lundry, *supra* note 34 at 49.

⁴⁸ Babo-Soares, *supra* note 39 at 20, 28.

traditional justice tends to exact a form of punishment more violent than imprisonment.⁴⁹ With these steps completed, spiritual balance is considered restored. Interpersonal reconciliation is only considered to have been initiated however, and must be continually built upon in the long term through constant efforts, to ensure sound cooperation.

(2) *Nahe Biti* and Symbolic Communication Theory

With the ritual process explained, the discussion will now interpret some of its cultural meaning in light of the theoretical framework laid out above, first by analysing the relational and spiritual dimensions, before focusing on the notion of purposive reasoning. *Nahe biti* addresses the relational dimension of justice on several levels. The ritual first serves to mend broken relationships through reconciliation. The mat on which the ritual unfolds traditionally symbolizes the reconciliation process, with its constitutive threads representing the parties' divergent opinions being woven into one and the same fabric.⁵⁰ Like threads in the mat, according to this perspective, opinions must be handled with care, so as to avoid leaving gaps, which would weaken the weavings.⁵¹ The mat symbolism may also be seen in a Girardian light, in that unchecked disagreements, like holes in the weavings, risk stretching into further conflict which may eventually tear the community apart. *Nahe biti* by design underscores the initial event having sparked conflict, its spread to the parties' respective families, and its disturbance of the broader community.⁵² This reflects the contagious nature of mimetic conflict. The need to halt the spread of negative exchanges may in effect appear as a concrete necessity in this context, where the custom of private vengeance has not yet fully vanished, and where conflict is traditionally passed down to subsequent generations, ultimately to affect the broader community.⁵³

⁴⁹ Tanja Hohe, "Justice without Judiciary in East Timor" (2003) 3:3 Conflict, Security & Dev 335 at 342.

⁵⁰ Compare with Gluckman's emphasis on compromise, in attempting to find a judicial outcome that will prevent the breaking of relationships, *The Judicial Process among the Barotse of Northern Rhodesia* (Glencoe: The Free Press, 1955) at 20-21. Babo-Soares, *supra* note 39 at 24.

⁵¹ Babo-Soares *ibid.*

⁵² McWilliam, *supra* note 42 at 77; Senier, *supra* note 35 at 70.

⁵³ East Timorese "are not the same as the people of Java, [where] if you step on one of them he will apologize. If you step on one of us, you will be punched." Manuel Carrascalao, "The role of the Military and Police in East Timor's Democracy" (Dili: Proceedings of the National Democratic Institute Forum, 14 march 2002)

Other parallels may be drawn with mimetic theory. Like Girardian rivals who become possessed by malevolent spirits and progressively lose their human nature through prolonged exposure to conflict, and ultimately transform into beasts, East Timorese folklore similarly depicts wrongdoers as possessed by spirits who progressively consume their souls, and transform them into animals.⁵⁴ *Nahe biti* entails the performance of an animal sacrifice, as in the scapegoating ritual, following which denial is made to settle by forbidding participants ever to mention the conflict again.⁵⁵ To the image of mimetic symbolism, finally, the blood oath concluding *nahe biti* is equally understood to unite belligerents symbolically as brothers, as rival twins would through the spilling of blood.⁵⁶

With this apparent knowledge of crime's propensity to lock perpetrator and victim in a rivalrous deadlock spreading outwards to their respective families, the key to *nahe biti* would appear to rest in its ability to break the pattern of negative exchanges, ultimately to substitute it with one of positive exchanges.⁵⁷ The gifts customarily exchanged in this ritual indeed tend to address the element of pride or personal honour, which Girard views as the source of conflict in mimetic theory. The items exchanged usually represent different dimensions of the experience of conflict, such as shame, grief and jealousy, whose material reality the perpetrator symbolically acknowledges by his gift.⁵⁸ Gift-giving can thus be seen as a precedent ritually halting negative exchanges.⁵⁹ The particular goods offered further symbolise the terms of a certain relationship of material dependency to develop between both families.⁶⁰ The strength of the ritual rests in its ability to induce former rivals into a

18 at 30. On the spread of conflict, McWilliam, *supra* note 42 at 77; Lia Kent, "Interrogating the "Gap" Between Law and justice: East Timor's Serious Crimes Process" (2012) 34:4 Hum R Quart 1021 at 1036.

⁵⁴ Nixon, *supra* note 30 at 171.

⁵⁵ Loch and Prueller, *supra* note 45 at 322; Babo-Soares, *supra* note 39 at 21–22.

⁵⁶ Babo-Soares, *supra* note 39 at 20.

⁵⁷ *Ibid* at 21–22.

⁵⁸ Aisling Swaine, *Traditional Justice and Gender Based Violence* (Washington: International Rescue Society, 2003) at 20–1; Nixon, *supra* note 30 at 169; Mearns, "Looking both Ways" *supra* note 35 at 43.

⁵⁹ Babo-Soares, *supra* note 39 at 22; David Hicks, *Tetum Ghosts and Kin* (Long Grove: Waveland, 1976) at 82; Traube, *supra* note 44 at 12; Kelly Silva, "Reciprocity, Recognition and Suffering: Political Mobilizers in Independent East Timor" (2008) 5:2 Vibrant 156 at 159.

⁶⁰ On exchanges and the development of relationships, Traube, *supra* note 44 at 13; Laura Grenfell, "Legal Pluralism and the Rule of Law in Timor Leste" (2006) 19:2 Leiden J Int'l L 305 at 316; Hohe, *supra* note 49 at 339.

relationship of mutual care where each positive transaction in the context of this dependency leads to rapprochement. As with the scapegoating ritual, *nahe biti* thus has the power to transmute acrimonious relationships into positive harmony, through the use of authoritative cultural symbols capable of supporting this inversion. The element of dialogue and compromise must finally be understood to mirror this same function, triggering, as suggested in James Gibbs' study of traditional justice mechanisms in Liberia, a "psychotherapeutic" release of the tensions and acrimony.⁶¹

As regards the spiritual dimension, the East Timorese believe that the world must be the object of constant effort to maintain harmony. This belief can be described using a traditional metaphor, which depicts the past as the roots of a tree, the present as its trunk, and the future as its canopy.⁶² Being located in the past, among the tree's fictional roots, ancestors and traditions are thus said to ensure the community's spiritual and material subsistence, providing vitality as roots would to the trunk and canopy.⁶³ It is believed that ancestral traditions must be honoured for this life-giving process to be maintained, and that its energy, once harnessed, is to be redistributed within the community in the form of gifts and other positive exchanges, in order to be consumed.⁶⁴ Criminal offenses are held to disrupt this order, diminishing the extent to which the community may receive this energy, in turn exposing it and the perpetrator to ancestral retribution in the form of illness and accidents.⁶⁵ This perspective endows *nahe biti* with further meaning, granting its ritual exchange the capacity to remedy this state of affairs through positive exchanges.

⁶¹ "The act of talking seems to relieve some of the aggression [...]." James Gibbs, "The Kpelle Moot: A Therapeutic Model for the Informal Settlement of Disputes" (1963) 33:1 Africa 1 at 6.

⁶² Babo-Soares, *supra* note 39 at 22; Hohe and Nixon, *supra* note 30 at 18.

⁶³ Hohe, *supra* note 49 at 340.

⁶⁴ Jose Trindade, "Matak-Malirin, Tempu Rai-Diak no Halirik: Expressions of what Timorese Longed-for, Fought-for and Died-for" (Paper delivered for the 4th Timor-Leste Studies Association Conference, Liceu Campus, Universidade Nasional Timor-Leste, 12 June 2013), [unpublished]. This is equally in line with Malinowski's observations on a similar matter, as well as with Marcel Mauss' concept of *hau*. Bronislaw Malinowski, *Argonauts of the Western Pacific* (London: Dutton, 1923) at 179; Marcel Mauss, *Essai sur le don* (Paris: Presses universitaires de France, 2007) at 11.

⁶⁵ Babo-Soares, *supra* note 39 at 22; Trindade and Castro, *supra* note 38 at 16.

Crime was traditionally viewed as a form of moral taint to be expiated through ritualized methods of hard treatment similar to the pre-modern ritual of punishment before the advent of colonial rule.⁶⁶ Like the perpetrator escorted outside the city gates to have his crimes read before a hostile crowd comprising several important authority figures, *nahe biti* includes a lengthy discussion of the offender's crimes before respected authorities, namely the traditional law specialist, ritual leader, warriors, local priest, village chief, hamlet chief and family elders.⁶⁷ As was explicitly the case in the pre-modern ritual, the perpetrator could be ostracized and punished through hard treatment by the community, which remained free during this period to punish the perpetrator as desired.⁶⁸ The latter could be mutilated in particular ways, which physically symbolized social stigma, while some were made to walk across the village with clothing upside down, which symbolised the social disorder caused by crime.⁶⁹ While largely extinguished by the state's monopoly on violence, these practices nevertheless evoke a period when the perpetrator was momentarily considered as an outcast, at once "in" and "out" of society, as shown in chapter 2.

There are several links to Bateson's notion of purposive action. The essence of the ritual is to restore some form of communal harmony whose disruption is held, according to local beliefs, to entail supranatural punishment.⁷⁰ The community is understood to depend on this state of harmony in order to maintain its vitality, much in the same way as a tree depends on its roots.⁷¹ The metaphor of the mat, whose threads must be sewn together for fear of a rupture in the social fabric, again underscores the importance of the system of relationships constituting the community.⁷² The ritual in its substance reflects a non-purposive approach by undoing some of the imbalances caused by conflict on several levels: the relational imbalance is halted by the intervention of the spirits, and so are its material consequences addressed by the exchange of gifts and compensations. The

⁶⁶ Noting the "expiation of sins," Nixon, *supra* note 30 at 166; Hohe and Nixon, *supra* note 30 at 18–21.

⁶⁷ Hohe, *supra* note 49 at 344.

⁶⁸ Senior, *supra* note 35 at 70; Hohe and Nixon, *supra* note 30 at 22.

⁶⁹ Hohe and Nixon, *supra* note 30 at 22.

⁷⁰ Traube, *supra* note 44 at 22.

⁷¹ Babo-Soares, *supra* note 39 at 22; Hohe and Nixon, *supra* note 30 at 18.

⁷² On the mat metaphor, Babo-Soares, *supra* note 39 at 24.

importance of communal norms is equally reasserted through the public stigma attached to their violation and the amends to be made to appease ancestral spirits. The multilayered nature of the ritual can finally be said to make for a compelling experience, mixing matters as different as mediation, spirituality, negotiation, feasting, compensation, peer-pressure, physical punishment, and the forging of new alliances, not only between individual rivals but also among their respective families, before the eyes of the community.

(II) AUTOCHTHONOUS CONCEPTIONS OF JUSTICE IN FRICTION WITH INTERNATIONAL JUSTICE

With the autochthonous conceptions of justice briefly presented, the second part of this chapter will use these concepts to depict how Non-Western post-genocidal societies react to international justice. The argument will rely on failed ritual theory, proposing that the local population should expect international justice to follow a logic similar to that of traditional justice.⁷³ While many in the population are sufficiently familiar with state justice to view international justice as legitimate on the same grounds, and many will likely be content to hear that perpetrators are finally punished, many will also be in agreement with official rhetoric deploring that international justice fails truly to amount to justice due to its inability to meet the same objectives. To be clear, the phenomenon studied below is the very societal reaction, as fomented by state authorities, to international justice's perceived violations of traditional notions of justice. More than the actual satisfaction or dissatisfaction of victims participating in international proceedings, the following will focus on official renditions of the clash between local and international justice. These ideas will be discussed first by suggesting a symbolic communication framework in relation to it, which will next be illustrated using Rwanda's *gacaca* tribunals.

(A) The Reception of International Justice and Symbolic Communication Theory

⁷³ Ronald Grimes, *Ritual Criticism* (Columbia: University of South Carolina Press, 1990) at 199-233; Ute Husken, "Ritual Dynamics and Ritual Failure" in Ute Husken, ed, *When Rituals Go Wrong: Mistakes, Failure and the Dynamics of Ritual* (Leiden: Brill, 2007) 337 at 339, 347.

The following pages propose a symbolic communication framework for the reception of international justice, in the precise context where post-genocidal regimes continue to control much of the information received by the population on the subject. This framework will posit that post-genocidal societies possess a series of needs which correspond to those ordinarily responded to by traditional justice mechanisms at the communal level. This leap from the communal to societal can be achieved by envisaging genocide as a radical manifestation of the same mimetic pattern of behaviour responsible for the minor interpersonal conflicts studied above.⁷⁴ The following merely focuses on another portion of the spectrum of mimetic conflict. This part begins by presenting a series of theoretical concepts drawn from mimetic theory, before summarizing them in a second part.

(1) Purposive Action, Mimetic Theory and the Rejection of International Justice

The preceding has suggested that traditional justice mechanisms tend to resolve conflicts by recalibrating systems at the personal, familial and communal levels, whose respective dysfunctions contribute to conflict. A series of steps was shown to do so by setting positive precedents among each: spirits are summoned to remind rivals that their true obligation as believers is to halt the exchange of aggression, the normative breaches committed during the conflict are acknowledged, gifts exchanged and alliances formed, etc. Participants were finally shown to engage in a ritual sacrifice followed by a feast, whose overall effect was to induce a state of denial regarding their respective aggressions, thus laying a stable foundation for a productive relationship to develop in the future.⁷⁵ This may be compared with mimetic theory, which points to a cataclysm having disrupted the distribution of resources, wrought conflict among citizen when good relations formerly prevailed, spread rivalry to the point of causing a political deadlock, and allowed acrimony to accumulate, to the point of allowing the violation of fundamental norms.⁷⁶ To achieve these transformations, *nahe biti* and scapegoating both emphasize the restoration of the normative system in force and the concomitant punishment and expulsion of those

⁷⁴ That mimetic theory applies to interpersonal and communal conflict, Chapter 3 Sections (I)(A) and (II)(A).

⁷⁵ Babo-Soares, *supra* note 39 at 21-22.

⁷⁶ René Girard, *Le Bouc émissaire* (Paris: Grasset 1982) at 23.

influences deemed responsible for its perceived degradation. In *nahe biti* as in scapegoating, belligerents were indeed believed to transform into beasts, as if possessed by malevolent spirits, which were then chastised by a ritual culminating in animal sacrifice.⁷⁷

While the restoration of communal norms contributed to the creation of a common ground for future cooperation, the condemnation of a weak third party associated with the degradation of communal norms and customs discharged and effaced memories of mutual hatred and aggression. A dichotomy can be said to appear, opposing the chaos associated with the neglect of traditions to the harmony and vitality to be retrieved by their observance.⁷⁸ To be sure, the resulting peace must be underpinned by fears of social disintegration were the group's new mythological foundation to prove inoperative. To undermine these new and tentative foundations inevitably risks unleashing the barrage of anxieties otherwise contained by it, setting forth the same pattern of scandal and scapegoating presented in the Serbian example.⁷⁹ Such is the fate, it is submitted, reserved to international justice, which by investigating crimes committed on both sides is bound to reveal the occurrence of crimes otherwise denied by former belligerents.

For this negative precedent in the community's normative and relational systems, international justice should consequently be perceived as embodying the functional opposite of the non-purposive frame of mind necessitated by post-genocidal societies. While traditional justice processes such as *nahe biti* address the relational dimension through various means, including mediation, compensation, punishment and scapegoating, international justice should be perceived as addressing it by comparatively lenient prison sentences. In a context where post-genocidal societies tend to call for a return to traditional identities, international justice should further be depicted as representing the very form of foreign influence having disrupted the community's normative system and brought society into a state of disorder. In contrast to traditional justice mechanisms, which tend to

⁷⁷ Section (I)(B)(2).

⁷⁸ That ancestral spirits must punish those who violate communal customs in order to preserve its vitality for the moment of their return, Babo-Soares, *supra* note 39 at 22; Hohe and Nixon, *supra* note 30 at 18.

⁷⁹ See Chapter 3 Section (II)(B)(4)-(6); Girard, *supra* note 76 at 198, 215, 216.

emphasise values such as in-group cohesion, solidarity, reciprocity and respect for tradition, international justice, for its association with modern culture, will likely be perceived as variously embodying individualism, secularism, materialism, globalism, etc.⁸⁰ Its message will tend to be perceived as a foreign body which for its confrontation of traditions must be rejected in order for the community to recover the imagined state of balance inhering to its relational, normative, economic, spiritual and political systems.

(2) Towards a Symbolic Communication Model for the Reception of International Justice

The preceding can be summarized by stating that post-genocidal societies tend to return to a state of peace by addressing roughly the same systemic imbalances as traditional justice. By playing on the former rivals' sense of honour in such a way as to transmute the pattern of negative reciprocity into one of positive reciprocity, both processes can be said to halt the root imbalance in the community's relational system, itself having afflicted the economic, political, normative and spiritual systems of the community. Yet in this process of recovering harmony among society's different constitutive systems, former rivals have little insight into their own responsibility for the degradation of communal life, and are mostly cognizant of the loss of customs, norms and institutions having contributed to conflict. For its confrontation of the state of denial affecting former opponents, international justice should for its part tend to spark a wave of scandal leading to its rejection. While following the same the pattern of scapegoating as in the Serbian example, this phenomenon of popular rejection should stress the systemic imbalances addressed by the scapegoating mythologies. Post-genocidal societies thus tend to move out of conflict, and reject international justice, following the ecological structure laid out above.

(B) Autochthonous Conceptions of Justice in Friction with International Justice in Rwanda

⁸⁰ On values of group cohesion and harmony in traditional justice, among others, Nader, *supra* note 2 at 243, 291 et seq; Martin Chanock, *Law, Culture and Social Order* (Cambridge: Cambridge University Press, 1985) at 6; Patrick Glenn, *Legal Traditions of the World* (Cambridge: Cambridge University Press, 2001) at 67.

The preceding will find concrete illustration in the following section, on the reception of international justice in Rwanda. The following presents the traditional conception of justice underpinning *gacaca* and the rejection of international justice in unison. These subjects will be discussed under the same general heading in order to underline the continuity between the local conception of justice and the reception of international justice. The Rwandese case was chosen here both for its location on the African continent, where most ICL situations now originate, as well as for its political configuration: the Rwandan regime both harbours anti-imperialist sentiment and denies its involvement in the perpetration of atrocities. Other situations where such factors are absent do not fit this model.

(1) The Traditional Conception of Justice in Rwanda's *Gacaca* Ritual

Like many other postcolonial societies, Rwanda remains host to a number of traditional justice mechanisms, which to this day continue to subsist alongside the official legal system. *Gacaca* is one such mechanism, and became notorious following its institutionalisation in the aftermath of the genocide, in an effort to prosecute hundreds of thousands of low-level perpetrators. This sub-section begins the discussion by presenting the traditional version of the process, before moving to its neo-traditional variant as implemented after the genocide, ultimately analysing both processes in light of the above theoretical framework. Doing so should lay the basis for the argument to follow in subsequent section, to the effect that the perceived erosion of traditions, as a result of contact with Western culture, influenced national depictions of international criminal justice. It should be emphasized, before beginning the argument, that the following discussion presents *gacaca* as institutionalized by the Kagame regime, in order to show the friction between national and international conceptions of justice. To this end, this section must ironically stress traditional ideals of harmony and reciprocity found in *gacaca*, when this practice was in reality instrumentalized by the regime in an attempt to coerce the country into unity.⁸¹ The following describes, but certainly rejects, this official narrative.

⁸¹ As overwhelmingly shown by the literature on *gacaca*. For a recent example, Jens Meierhenrich, *The Violence of Law: The Formation and Deformation of Gacaca Courts in Rwanda* (Cambridge: Cambridge University Press, 2024) at 7-8. In greater detail, notes 121-126.

(i) Conceptions of Justice underpinning Traditional *Gacaca*

Gacaca was performed in traditional Rwandese society long before the government instituted its neo-traditional variant after the genocide. Given the degree of distinctiveness characterizing the neo-traditional variant, any study of national conceptions requires that the original version be presented first, together with the set of beliefs around which it is articulated. One should begin by noting that traditional *gacaca* is situated within a broader cosmology stressing the importance of group harmony.⁸² This cosmology can be likened to ecological conceptions of society expounded by Arthur Hocart, where group members tend to be envisaged as in a state of interdependence, much in the same way as natural species in a common ecosystem.⁸³ Among the many natural occurrences illustrating this principle, is the case of species requiring sunlight, some of which will grow tall and in turn provide humidity to other species living under their canopy. This worldview is reflected in a series of rules and injunctions in traditional Rwandese society.⁸⁴ Traditional cosmology also depicts society as animated by a flow of energies, which citizens circulate amongst themselves through mutual interaction. This view is for instance reflected in the following passage, drawn from Danielle de Lame's works, on sacred kingship liturgy in Rwanda:

“[The liturgy] emphasizes the fertilizing effect of the king's traveling between his residences, and of the cycles of reigns, the circulation of taxes and persons. The royal observances and ritual family practices were emanations of a circulatory patterning of the universe including the heavens, the earth and humans [...]. In the body as in the old kingdom, [these] must circulate in adequate amounts. A balance is achieved through strictly regulated exchanges with the environment, governed by rules whose transgression may cause diseases. [... Impurity and witchcraft equally come from] that which defies the social rules of circulation.”⁸⁵

⁸² Charles Ntampaka, *Introduction aux systèmes juridiques africains* (Namur: Presses universitaires de Namur, 2005) at 34.

⁸³ Expounding the ecological conception of society in tribal culture, Arthur Hocart, *Kings and Councillors: An Essay in the Comparative Anatomy of Human Society* (Chicago: University of Chicago Press, 1970).

⁸⁴ OHCHR, *Gacaca: Le droit coutumier au Rwanda: Rapport final de la première phase d'enquête sur le terrain* (1996) LIB/AFR/RWA/24 Annex 6 at 2 and Annex 3 at 7; Michel Darnaud, “La problématique marginaliste, l'idéologie et le devenir Rwandais” (1977) 2:1 Afr Dev 89 at 98-99.

⁸⁵ Danielle de Lame, *A Hill among a Thousand: Transformations and Ruptures in Rural Rwanda* (Madison: University of Wisconsin Press, 2005) at 331–32.

It is believed that criminal offences by their defiling nature upset ancestral spirits, who are tasked with relaying this vital energy to their descendants, and thus diminish the amount of vital force distributed to victims and their family.⁸⁶ Criminal offences amount to an affront to familial honour, according to this perspective, and have to be reciprocated on the perpetrator or his family in order to assuage ancestral wrath and ultimately resume the flow of vital energy. It is understood that those who fail to mete out vengeance expose themselves and their families to supernatural risks associated with the anger of ancestral spirits and the scarcity of vital force.⁸⁷ By reciprocating the aggression, victims however risk angering the perpetrator's ancestral spirits and, according to the same logic, risk sparking a blood feud between both families.⁸⁸ To halt the endless reciprocation of aggressions and its destructive consequences, the community could intervene by organising a ceremonial mediation process called *gacaca*.

The *gacaca* process began by convening every male on a patch of grass. The hearing was normally presided by elders, who for their age were deemed closer to ancestors.⁸⁹ The event commenced with an account of the conflict covering all incidents reproached on both sides.⁹⁰ Parties could express themselves freely, and were given the liberty to bring a wide range of facts to the decider's attention.⁹¹ Proof mainly consisted of oral testimony, and could be complemented by ordeals, which invoked the authority of spirits.⁹² The process was generally designed in such a way as to make the truth come to the fore so forcefully as to prompt the parties into apologizing. To this end, elders could use the authority of the audience, whose integration within the closely-knit web of relations within community was believed to make the facts of the conflict common knowledge.⁹³ Just as central to *gacaca*

⁸⁶ Charles Ntampaka, "Le gacaca rwandais, une justice répressive participative" (2001) 6 *Revue de droit pénal et de criminologie* 14 at 25; Placide Tempels, *La philosophie bantoue* (Elisabethville: Loviana, 1945) at 27, 54.

⁸⁷ Ntampaka, *ibid* at 25.

⁸⁸ *Ibid* at 21; OHCHR, *supra* note 83 at 16 ("Il naissait entre les familles un état de rancune.").

⁸⁹ Paul Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation* (Oxford: Oxford University Press, 2012) at 32.

⁹⁰ Filip Reyntjens, "Le gacaca ou la justice du gazon au Rwanda" (1990) 40 *Polit Afr* 31 at 33.

⁹¹ For a colourful illustration, Guy Menga, *La Palabre stérile* (Yaoundé: Éditions CLE, 1968) at 94.

⁹² Paul Verdickt, *Introduction au droit écrit et coutumier* (Butare: Université nationale du Rwanda, 1979), namely at 18, 108 et seq.

⁹³ OHCHR, *supra* note 83 at 8-9 (That *gacaca* by its very name signified this form of test).

further was the elder's ability to mediate the process, which required that proceedings and their conclusions unfold in such a way as to avoid humiliating participants.⁹⁴ In ideal circumstances, the process led the defendant to confess, express remorse and request forgiveness, which the other party in turn accepted. Doing so was believed to lift parties from the nefarious spiritual influence having brought them into a cycle of aggressions.⁹⁵

Judgements at times decreed physical punishment, when deemed necessary to achieve reconciliation.⁹⁶ Punishment however tended to consist of damages owed collectively by one family to the other in the form of banana beer jugs.⁹⁷ Families often paid these damages immediately upon the deliverance of judgement, and thereupon took the occasion to drink together in the spirit of reconciliation.⁹⁸ A ritual feast was often organised thereafter, which was intended to lift the state of acrimony between both families.⁹⁹ On this day elders often carried out purificatory rituals by sacrificing livestock, which was believed to cleanse participants from the impurities of conflict and appease spirits.¹⁰⁰ A wedding could further be arranged, which created an alliance between both families. The event could ultimately be memorialised by planting a tree, or creating a tale, which honoured the spirit of the victims deceased during the conflict, and deterred similar behavior in the future.¹⁰¹

(ii) Conceptions of Justice underpinning Neo-Traditional Gacaca

⁹⁴ Arthur Molenaar, *Gacaca: Grassroots Justice after Genocide* (Leiden: African Studies Centre, 2005) at 14.

⁹⁵ *Ibid* at 14 ; Charles Ntampaka, "La conception des relations entre les vivants et les morts dans le Rwanda ancien" (2001) 225 *Dialogue* 3 at 13; OHCHR, *supra* note 83 at 18.

⁹⁶ OHCHR, *supra* note 83 at 14.

⁹⁷ Alice Karekezi, "Juridictions gacaca: Lutte contre l'impunité et promotion de la réconciliation" in Eugene Ntaganda, ed, *Les juridictions gacaca et les processus de réconciliation* (Butare : Université nationale du Rwanda, 2001) 9 at 32.

⁹⁸ Nicodème Ruhashyankiko, *Le droit coutumier rwandais et africain* (Butare: Université nationale du Rwanda, 1977) at 73.

⁹⁹ OHCHR, *supra* note 83 at 16.

¹⁰⁰ Charles Ntampaka, "Le retour à la tradition dans le jugement du génocide rwandais : le gacaca, justice participative" (2002) 48:4 *Bulletin des Séances de l'Académie royale scientifique d'outre-mer* 419 at 430.

¹⁰¹ Françoise Digneffe and Jacques Fierens, "Introduction" in Françoise Digneffe and Jacques Fierens, eds, *Justice et gacaca: l'expérience rwandaise et le génocide* (Namur: Presses Universitaires de Namur, 2003) 1 at 17.

The Rwandan government implemented the neo-traditional version of *gacaca* with a view to restoring communal relations and bringing to justice the many who were incarcerated during the genocide and awaited trial.¹⁰² Ideologically, the government also envisaged this initiative as a response to the perceived loss of traditions having resulted from exposure to modern Western culture. In a country where much of the population had abandoned traditional life and embraced modern life, *gacaca* was intended to palliate to the perceived disorder having resulted from the general flouting of traditional injunctions demanding harmony and cooperation.¹⁰³ Much in the same way as beliefs emphasizing social harmony were shown above to depict individuals as exchanging energy when in a state of cooperation, so did traditional beliefs tend to associate greed, competition and obstruction of resources with impurity and witchcraft.¹⁰⁴ A seeming cause and effect relationship between the abandonment of traditional values and the state of chaos having engulfed the country existed in popular beliefs, to the effect that the massive flouting of traditional norms should have exposed society to catastrophes. Some authors explicitly suggest a link between the disappearance of traditional values and the perpetration of the genocide, noting that both were characterised by the selfish pursuit of material and political interests.¹⁰⁵ Noting similar views within the government, Phil Clark thus writes that

“The government blames [Western] outsiders for creating divisions in Rwandese society which turned Rwandese tradition on its head and propagated what Patrick Mazimpaka, then presidential envoy to the Great Lakes, calls ‘anti-values’ in Rwandese society that require ‘counter-values.’”¹⁰⁶

¹⁰² Republic of Rwanda, *Loi organique no. 8196 du 30/8/96 sur l’organisation des poursuites des infractions constitutives du crime de génocide ou de crimes contre l’humanité, commises à partir de 1er octobre 1990*, Official Gazette of the Republic of Rwanda, 1 September 1996.

¹⁰³ Charles Ntampaka, “Droit et croyances populaires dans la société rwandaise traditionnelle” (1999) 211 Dialogue 3 at 12; Darnaud, *supra* note 83 at 89; OHCHR, *Gacaca: Le droit coutumier au Rwanda: Rapport de la deuxième première phase d’enquête sur le terrain* (1996) LIB/AFR/RWA/24 at 7.

¹⁰⁴ De Lame, *supra* note 84 at 331; Maurice d’Hertefeldt, *Les anciens royaumes de la zone interlacustre médiévale* (Paris: Arthaud, 1962) at 80; Marcel Pauwels, *Imana et le culte des mânes au Ruanda* (Bruxelles: Académie royale des Sciences, des Lettres et des Beaux-Arts de Belgique, 1958) at 78.

¹⁰⁵ E.g. OHCHR, *supra* note 83 annex 3 at 7, 8, 37; Aloisea Inyumba, “Report on the Consultative Meetings Held at Grassroots Level by the Unity and Reconciliation Commission Executive Secretary” in *Report on the National Summit of Unity and Reconciliation* (Kigali: National Unity and Reconciliation Commission, 2000) at 41; Jean Rutayisira, *A Guide to Civic Education: Life Skills for Rwandese Primary Schools* (Kigali: Ministry of Education, 2004) at 34, cited in Kristin Doughty, *Remediation in Rwanda: Grassroots Legal Forums* (Philadelphia: University of Pennsylvania Press, 2016) at 108.

¹⁰⁶ This is also reflected in OHCHR, *supra* note 102, Annex 3 at 7-8. Phil Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda* (Cambridge: Cambridge University Press, 2010) at 135.

Against this ideological background, *gacaca* ordinarily commenced by convening over a hundred adult individuals on a patch of grass on a fixed day of the week during which work was suspended.¹⁰⁷ Witnesses, victims and defendants were called to the bar, before the court proceeded to hearing the arguments presented on both sides.¹⁰⁸ Trials were conducted in such a way as to foster open-ended conversations with the audience, and included broader considerations such as the parties' familial history, social position and economic circumstances.¹⁰⁹ In dramatized performances, each party could seek to play on the public's sympathies.¹¹⁰ The effectiveness of the process depended on the judge's mediating abilities, in guiding the parties towards mutual understanding and forgiveness.¹¹¹ The process culminated with a confession – indicating the method, place, persons and damages involved in the offence – followed by an apology whose acceptance reduced the sentence.¹¹² The deciders next withdrew, reached a decision and read their judgement.¹¹³ While a day ordinarily sufficed to complete several cases, some stretched over weeks.¹¹⁴

Convictions for violent offences normally led to prison sentences of up to thirty years, which could be halved at the judges' discretion and transmuted into community work.¹¹⁵ Such work was to be carried out in a *travaux d'intérêts généraux* camp managed by the government, and focused on infrastructural necessities such as road-building, ground

¹⁰⁷ Article 18, *Organic Law No. 33/2001 of 2001 Modifying and Completing Organic Law No. 40/2000 of 26 January 2001 Setting Up "Gacaca Jurisdictions" and Organising Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity, Committed Between October 1, 1990 and December 31, 1994* [hereinafter "Gacaca Law"]; Seth Kaplan, "Case Study: Rwanda's Gacaca Courts" in Seth Kaplan, ed, *Human Rights in Thick and Thin Societies* (Cambridge: Cambridge University Press, 2018) 162 at 165; Doughty, *supra* note 104 at 96.

¹⁰⁸ Article 64, *Gacaca Law*, *ibid*.

¹⁰⁹ Doughty, *supra* note 104 at 103–04, 106–07, 123.

¹¹⁰ Muriel Paradelle and Hélène Dumont, "L'emprunt à la culture, un atout dans le jugement du crime de génocide ? Étude de cas à partir des juridictions traditionnelles gacaca saisies du génocide des Tutsis du Rwanda" (2006) 39: 2 *Criminologie* 91 at 100, 125; Doughty, *ibid*; Bornkamm, *supra* note 88 at 66.

¹¹¹ Bornkamm, *ibid*; Kaplan, *supra* note 106 at 96.

¹¹² Bert Ingelaere, "The Gacaca Courts in Rwanda" in Luc Huyse and Mark Slater eds, *Traditional Justice and Reconciliation after Violent Conflict* (Stockholm: IDEA, 2008) 12 at 39.

¹¹³ Phil Clark, "Gacaca's Legacy: Interview with Steve Terrill", *The Independent* (29 May 2012).

¹¹⁴ Nicola Palmer, *Courts in Conflict: Interpreting the Layers of Justice in Post-genocide Rwanda* (Oxford: Oxford University Press, 2015) at 128; Timothy Longman, "Justice at the Grassroots? Gacaca Trials in Rwanda" in Naomi Roth-Arriaza and Javier Mariezcurrena, eds, *Transition Justice in the Twenty-First Century: Beyond Truth versus Justice* (Cambridge: Cambridge University Press, 2006) 206 at 215.

¹¹⁵ Ntampaka, *supra* note 99 at 443; Doughty, *supra* note 104 at 100–01.

clearing, brickmaking and house reconstruction.¹¹⁶ Convictions for property crimes sentenced defendants to compensations executable through payments in cash or by returning the stolen goods to survivors. Compensation could be carried out by performing services linked to the victim's needs, such as rebuilding houses, replanting gardens or contributing to farm work.¹¹⁷ Victims were further eligible to compensations from the *Fonds national d'assistance*, which centered on those most in need, such as orphans, widows and handicapped, and provided benefits such as education, health services, housing and income-generating programs.¹¹⁸ The information gathered was finally sent to the government's Gacaca Documentation Centre, which constituted a record of the genocide.

One scholar notes that many spontaneously performed traditional practices akin to *gacaca*, in which after a ritual sharing of drink symbolising reconciliation victim and perpetrator expressed their willingness to live together.¹¹⁹ An important variant consisted in Christian *gacaca*, which invited participants to share their sins before inviting victim to pardon those willing to confess.¹²⁰ While nongovernmental practices tended to be popular, the same cannot be said of official *gacaca*, which was fraught with significant weaknesses.¹²¹ Most salient was the failure to achieve reconciliation in many if not most cases, often worsening communal relations by sparking further acrimony.¹²² Participants often lied strategically, confessed without sincerity, hid evidence, bribed judges, and banded with others to strengthen their case.¹²³ One in every four judges was also found to have taken part in the

¹¹⁶ Clark, *supra* note 105 at 79.

¹¹⁷ *Ibid* at 254.

¹¹⁸ Heidy Hombouts, *Victim Organisations and the Politics of Reparation* (New York: Intersentia, 2004) at 375 et seq; Venant Sinsebyimfura, "Le Fonds d'Assistance" in Avocats sans frontières and Ministère de la justice du Rwanda, eds, *Séminaire sur la réparation* (Kigali: Avocats sans frontières, 2000) 1 at 28 et seq.

¹¹⁹ Ntampaka, *supra* note 85 at 18. See also Kristin Doughty, "Grassroots Law in Context" in René Provost, ed, *Culture in the Domains of Law* (Cambridge: Cambridge University Press, 2017) 266 at 268 et seq.

¹²⁰ Philippe Denis, "Christian Gacaca and Official Gacaca in Post-Genocide Rwanda" (2019) 32:1 J Stud Rel 1 at 3; Clark, *supra* note 105 at 66–67; Emmanuel Ndiruwonsanga, *The Shortcomings of Capitalism and Communism in Light of John Paul II*, MA thesis (Halifax: Atlantic School of Theology, 2013) at 99.

¹²¹ Denis *ibid* at 3; Clark, *supra* note 105 at 66–67.

¹²² Timothy Longman, *Memory and Justice in Post-Genocide Rwanda* (Cambridge: Cambridge University Press, 2017) at 323; Susane Buckley, "Remembering to Forget: Chosen Amnesia as a Strategy for Local Coexistence in Post-Genocide Rwanda" (2006) 76:2 Africa 131 at 139.

¹²³ Phil Clark, *How Rwanda Judged its Genocide* (London: Africa Research Institute, 2012) at 6; Ingelaere, *supra* note 111 at 54; Waldorf, *supra* note 12 at 70; Jean Hazfield, *A Time for Machetes: The Rwandese Genocide – The Killers Speak* (London: Serpent's Tail, 2008) at 148–55.

genocide.¹²⁴ The process was finally plagued by lack of participation, manifested in the audience's frequent silence during hearings.¹²⁵ Nevertheless, some also view this criticism as overly harsh, considering the sheer number of cases and daunting objective of rebuilding trust in a society riven by division. Many sessions unfolded in a peaceful spirit conducive to reconciliation, and led to positive outcomes in spite of the oft bellicose atmosphere.¹²⁶

(iii) Gacaca and Symbolic Communication Theory

With traditional and neo-traditional *gacaca* presented, the discussion will now examine both in light of the theoretical framework presented earlier. One may begin by noting the importance played by honour in traditional *gacaca*, which was intended to lift its participants from the vicious circle of perceived attacks on familial honour engendered by vengeance.¹²⁷ The process first touched on the participants' honour by emphasizing the parties' respective accounts of the conflict, which often entailed detailed descriptions of the personal considerations having motivated and subjectively legitimised vengeance.¹²⁸ As the culmination of a series of small steps taken to recognise one another's honour, the confession stage amounted to the most important step in this regard, precisely by allowing for a reversal of the parties' negative relationship. The confession broke with the perpetrator's denial of the victim and her dignity, implicitly recognising the wickedness of the pattern through which the victim was made to suffer.¹²⁹ If aired with sufficient forcefulness, the confession in turn prompted the extension of forgiveness, which implied the restoration of the perpetrator's dignity. Further supporting the perpetrator's recognition

¹²⁴ Pietro Sullo, *Beyond Genocide: Transitional Justice and Gacaca Courts in Rwanda* (Heidelberg: Asser, 2018) at 173-177.

¹²⁵ Avocats sans frontières, *Monitoring of the Gacaca Courts, Judgement Phase, Analytical Report, March–September 2005* (Brussels: Avocats sans frontières, 2005) at 10–14; Phil Clark, "The Rules (and Politics) of Engagement: The Gacaca Courts and Post-Genocide Justice, Healing and Reconciliation in Rwanda" in Phil Clark and Zachary Kaufman, eds, *After Genocide* (New York: Columbia University Press, 2009) 297 at 317-19.

¹²⁶ Mark Drumbl, "Punishment Post-Genocide: From Guilt to Shame to Civis in Rwanda" (2000) 75 NYU L Rev 1221 at 1264-65; Salomé van Billoen, *Les juridictions gacaca au Rwanda* (Brussels: Bruylant, 2011) at 126; Clark, *supra* note 105 at 158, 213, 233.

¹²⁷ OHCHR, *supra* note 83 at 16.

¹²⁸ Benoit Atangana, "Actualité de la palabre?" (1966) 324:6 Études 460 at 462; Molenaar, *supra* note 93 at 14.

¹²⁹ On the ritual structure to this effect, OHCHR, *supra* note 83 Annex 3 at 3.

of the victim's honour, finally, were the compensations to be offered and the gifts and ritual drinking concluding the process, which symbolized a reversal of negative reciprocity.¹³⁰

The emphasis on positive reciprocity also extended to related spiritual beliefs. In Rwanda as in East Timor, lineages were traditionally conceived of through the metaphor of a tree, following which roots represented the family's ancestors, the trunk its elders, and the branches and leaves its children and grandchildren.¹³¹ Ancestors were believed to provide families with the energy required to ensure its subsistence, as roots would for a tree, and to stop doing so when a crime was committed.¹³² The king, what is more, was equally believed to do the same with respect to society as a whole.¹³³ This redistributive process was made possible by the observance of customs, which had the effect of locking the kingdom's diverse groupings into one interdependent network.¹³⁴ In a complex system of exchanges and obligations, political and familial units of every sort were believed to further this circulation of resources and energy down to every group.¹³⁵ Much in the same way as conflict and delinquency risked undermining the customs safeguarding this system of positive reciprocity, and exposing the community to defilement and ancestral punishment, so did the process of acculturation tied to the progressive dominance of modern Western culture over society.¹³⁶ Popular discourse tended to liken the chaos having engulfed the country to explanations thematically consistent with this view, as a consequence of the

¹³⁰ Molenaar, *supra* note 93 at 14; OHCHR, *supra* note 83 Annex 3 at 1.

¹³¹ Ntampaka, *supra* note 99 at 427.

¹³² Pierre Bettez, *Ramera: A Community in Eastern Rwanda* (Paris: Mouton, 1966) at 146; OHCHR *supra* note 83 at 16, Annex 1 at 9.

¹³³ Danielle de Lame, "Idéologies d'ici et là : des rwandaises et une anthropologue" in Danielle Jonckers, Renée Carré & Marie-Claude Dupré, eds, *Femmes plurielles: Les représentations des femmes : discours, normes et conduites* (Paris: Maison des sciences de l'homme, 1999) 37 at 42; Ntampaka, *supra* note 99 at 427.

¹³⁴ This was true of the institution of the family as much as of politics, where a complex body of customs made each group owe to others as much as others were made to owe others. Alexis Kagame, *Les organisations socio familiales dans le Rwanda ancien* (Tervuren: Musée royal d'Afrique Centrale, 1954) at 72; Richard Kandt, *Caput Nili* (Berlin: Reimer, 1905), cited in Gérard Prunier, *The Rwanda Crisis* (London: Hurst, 1995) at 11.

¹³⁵ A common way in which energy was retransmitted consisted in the exchange of gifts, such as banana beer. De Lame, *supra* note 84 at 332–34; Jean-Pierre Chrétien, "Échanges et hiérarchies dans les royaumes des Grands Lacs de l'Est africain" (1974) 29: 6 *Annales Économies, Sociétés, Civilisations* 1327 at 1329; Vincent Mulago, "L'union vitale bantu ou le principe de cohésion de la communauté chez les Bashi, les Banyarwanda et les Barundi" (1956) 20 *Ann. Lateranensi* 263 at 267.

¹³⁶ Grégoire Kayibanda, "Sauver notre culture, pour sauver notre âme" (1971) 26 *Dialogue* 1 at 3–4.

social *malaise* stemming from the abandonment of traditions.¹³⁷ Charles Ntampaka thus writes that “some events in traditional society such as the massacre of women and children tended to be viewed as punishment for the violation of ancestral prohibitions.”¹³⁸

Neo-traditional *Gacaca* can be said to have served as a response to this phenomenon, as one of several initiatives intended to reshape national mythologies by replenishing the stock of national customs. One group of government-employed scholars thus writes, “[i]n this Rwanda emptied of values, recourse to traditional culture should lay the basis for a new mechanism capable of contributing to social cohesion.”¹³⁹ The process not only addressed the relational aspect of punishment by reconnecting formerly antagonized population groups through dialogue and mediation, but also formed part of a wider process aimed at formulating a new identity for its participants. While triggered by immediate necessities, neo-traditional *gacaca* also possessed strong ideological overtones.¹⁴⁰ Arthur Molenaar notes that as *gacaca*’s launch date approached, “excitement began to rise in government circles, and the belief in it began to attain nearly religious proportions.”¹⁴¹ The spiritual dimension of punishment thus rested in this belief, in its ability to strike an alliance between Hutu and Tutsi, all in the name of some lost traditional sense of unity and harmony. Government-friendly commentators variously attributed to this initiative the ability to “recover a culture of solidarity,” “create a meeting place to revive communal life,” or “work toward the restoration of social equilibrium.”¹⁴²

¹³⁷ De Lame, *supra* note 84 at 253, 255; OHCHR, *supra* note 83 annex 3 at 8, 37; Inyumba, *supra* note 104 at 41.

¹³⁸ Author’s translation. Ntampaka, *supra* note 102 at 13. Similarly, Maurice d’Hertefelt, “Mythes et ideologies dans le Rwanda ancien et contemporain” in Jan Vansina, Raymond Mauny & Louis-Vincent Thomas, eds, *The Historian in Tropical Africa* (Oxford: Clarendon, 1964) 219 at 228.

¹³⁹ OHCHR, *supra* note 83, Annex 3 at 7-8. Author’s translation.

¹⁴⁰ Clark, *supra* note 105 at 256, 135.

¹⁴¹ Molenaar, *supra* note 93 at 67, 69.

¹⁴² Gasana Nsabiya, “Confronting Conflict and Poverty through Trauma Healing: Integrating Peace-Building and Development Processes in Rwanda” in Clark and Kaufman, *supra* note 124 at 152; Simon Gasibirege, “Perceptions à propos de la loi gacaca au Rwanda : Résultats d’une étude multiméthode” (Baltimore: Johns Hopkins Centre for Communications, 2001) at 34; Karekezi, *supra* note 96 at 34; Clark, *supra* note 105 at 256, 135.

In line with mimetic theory, the process can be said to have contributed to the creation of national mythologies according to which guilt for the genocide was to be displaced on certain groups in order to allow for reconciliation. *Gacaca* can be said to have been part of a process through which punishment both tended to confront *and* produce denial, by reintegrating returnees while deflecting guilt upon those held responsible of grave offences.¹⁴³ Many in the audience failed to recall the events or displaced all blame on external parties, in line with governmental propaganda, while perpetrators tended to confess only to minor crimes such as physical presence during the killings, and often claimed absence from key incidents, which they attributed to individuals then dead or disappeared.¹⁴⁴ This collective displacement of guilt finally concurred with the government's official narrative, which tended to condense guilt upon the shoulders of external parties and the higher echelons of the *génocidaire* government, while minimizing the extent to which the population had sincerely adhered to extremist positions.¹⁴⁵ Susanne Buckley thus concludes that "a strategy of scapegoating appeared actively to be working," the consequence of which was to render "ordinary Rwandans collectively innocent."¹⁴⁶

The element of political ideology traversing neo-traditional *gacaca* would thus appear to have been coherent with spiritual beliefs already present in traditional society regarding the circulation of vital force and ancestral spirits. In line with it, the ideal to be attained was an imagined return to a mythologized past, through which society's factions would be brought into harmony and prosperity. The bulk of common perpetrators were to be reintegrated into the fundamental historical unicity putatively compromised by colonists and their pawns.¹⁴⁷ This return to unicity was also exhibited spatially. Detainees were

¹⁴³ Molenaar, *supra* note 93 at 146 and 39; Palmer, *supra* note 113 at 130; Clark, *supra* note 105 at 322–23.

¹⁴⁴ Bert Ingelaere, "Do We Understand Life after Genocide? Center and Periphery in the Construction of Knowledge in Postgenocide Rwanda" (2010) 53:1 *Afr Stud Rev* 41 at 53; Buckley, *supra* note 121 at 134.

¹⁴⁵ Patrick Mazimpaka, "Reconciliation and Democratization Processes after Genocide" in Patrick Mazimpaka, ed, *Reconciliation and Democratization* (Kigali: National Unity and Reconciliation Commission, 2003) 1 at 22; Clark, *supra* note 105 at 106.

¹⁴⁶ Buckley, *supra* note 121 at 140. Similarly, Alison Des Forges, "Legal Responses to Genocide in Rwanda" in Eric Stover and Harvey Weinstein, eds, *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, illustrated edition ed (Cambridge: Cambridge University Press, 2004) 49 at 54; Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Princeton: Princeton University Press, 2001) at 231; Nigel Eltringham, *Accounting for Horror* (London: Pluto, 2004) at 67.

¹⁴⁷ Clark, *supra* note 105 at 135; OHCHR, *supra* note 83 Annex 3 at 4.

released from prison into working camps, where they were exposed to governmental propaganda, and often returned to live on the margins of their communities, in anticipation of their hearing.¹⁴⁸ The reverse of the criminal's escorting outside the city gates to the gallows, this voyage from the prison to the working camps, the margins of the community and *gacaca* evokes a symbolic transition through decreased points of liminality, from "without" the community, ever closer to "within" its center. Like the execution crowd escorting the condemned outside city gates, communities tended to behave with confused excitement as detainees returned, alternatively cheering them and attacking them.¹⁴⁹

(2) Traditional Conceptions of Justice in Friction with International Justice

With the traditional conception of justice presented, the discussion will now show how these notions influenced the reception of international justice. This section will argue that for its prosecution of atrocities denied by the regime, international justice engendered a public reaction of scandal, the substance of which reflected fundamental notions of traditional justice. This will be done by showing how the reception of international justice was influenced by the relational dimension, before moving to its spiritual counterpart.

(i) The Relational Dimension of Justice

Gacaca was shown in the preceding sub-section to play an important role in the country's intended cultural transformation, arguably serving to reintegrate former Hutu and Tutsi rivals under one and the same national identity. According to Molenaar, those who criticized its ability to do so were "dismissed as foreigners, who are afraid that it would beat the justice system."¹⁵⁰ This type of antagonistic reaction is not unlike that documented in the Serbian example, in reaction to the ICTY's confrontation of scapegoating mythologies. As in chapter 3, the international community can be said to have been antagonized as a rival, for its confrontation of the regime's vision of traditional unity. This

¹⁴⁸ Clark, *supra* note 105 at 332; In general, Chi Mgbako, "Ingando Solidarity Camps: Reconciliation and Political Indoctrination in Post-Genocide Rwanda" (2005) 18 Harv Hum Rts J 201.

¹⁴⁹ Clark, *ibid* at 150.

¹⁵⁰ Molenaar, *supra* note 93 at 70.

appears to have been the case when international non-governmental organization criticized *gacaca* for its violation of international standards, causing frustration in many government circles.¹⁵¹ A sense of scandal further appears to have permeated the government's relationship with the ICTR from the start, caused by its failure to conform to its agenda.

In line with the relational dimension, which places the victim at the center of proceedings, Rwanda behaved as a victim state unhappily pushed aside from the international response to the genocide. The regime deplored that the ICTR had been established outside Rwanda, that its chief prosecutor mostly worked from Europe, and that the tribunal had the ability to dispossess its judiciary from ongoing cases.¹⁵² A notorious scholar depicted the tribunal as reflecting Rwanda's "position in international relations, as a country at the bottom of the hierarchy of poor and strategically insignificant subjects of international law."¹⁵³ In line with the relational dimension, the government further resented the mild sentences, narrow temporal jurisdiction, the absence of the death penalty, and international prison terms in comfortable facilities.¹⁵⁴ Rwanda finally deplored that international funds were allocated almost exclusively to U.N. staff, further consolidating the international community's failure to restore national honour, in the spirit of the relational dimension of justice, through sufficient economic compensations and punishment. "The government regarded the UN's decision to keep its resources to itself as an insult," writes Philip Gourevitch.¹⁵⁵

¹⁵¹ Responding to international criticism, President Kagame for instance claimed that *gacaca* would amount to "an important contribution to the advancement of international law." Muturi Githae, "Gacaca Courts Undertaking to Hasten Trials", *The New Times* (12 October 2004).

¹⁵² Richard Goldstone, *For Humanity: Reflections of a War Crimes Investigator* (New Haven: Yale University Press, 2000) at 111-12; Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (Cambridge: Cambridge University Press, 2008) at 166, 211.

¹⁵³ Jean-Marie Katamali, "The Challenge of Linking International Criminal Justice and National Reconciliation: The Case of the ICTR" (2003) 16:1 *Leiden J Int'l L* 115 at 119.

¹⁵⁴ Peskin, *supra* note 151 at 162; José Alvarez, "Crimes of States/Crimes of Hate: Lessons from Rwanda" (1999) 24 *Yale J. Int'l L.* at 409; Virginia Morris and Michael Scharf, *The International Criminal Tribunal for Rwanda. Vol. 2* (Irvington: Transnational, 1998) at 296-310.

¹⁵⁵ Philip Gourevitch, *We Wish to Inform you that Tomorrow we Will be Killed with our Families*: (New York: Picador, 1998) at 252-53. Similarly, regarding NGOs, Johan Pottier, *Re-Imagining Rwanda* (Cambridge: Cambridge University Press, 2002) at 159.

This critique equally circulated among national media and victim organizations, which were closely controlled by the government.¹⁵⁶ According to victim associations, victims were displeased with the ICTR's failure to meet expectations ordinarily addressed by traditional justice.¹⁵⁷ The tribunal firstly had its quality as an impartial decider compromised by the international community failure to prevent the genocide.¹⁵⁸ Whereas *gacaca* judges are traditionally selected for their wisdom and capacity to mediate conflict, the U.N. was depicted as one of the parties that should have stood trial.¹⁵⁹ Further supplementing these apprehensions was the distant and impersonal way in which the tribunal operated. Contrarily to *gacaca*, which operates within the community, and under which complaints are presented to local authorities whom victims know personally, the ICTR was not only situated outside national borders, in Tanzania, but its Kigali offices were guarded and inaccessible. Further supporting this sense of distance was the fact that once within its offices victims could only speak to foreigners using interpreters.¹⁶⁰

The government criticized ICTR procedure on similar grounds. Contrarily to *gacaca*, where the individual victim is given a central role, the ICTR focused almost entirely on the accused, whose actions and fundamental rights were meticulously inspected over extensive periods of time. In a context where Rwandans were accustomed to cases being heard over a day or two and decided soon thereafter, the tribunal's burdensome procedure was perceived as expressing a certain preference for the accused.¹⁶¹ The methods of interrogation further ran counter to the relational dimension of justice, which *gacaca* tended to accommodate by giving parties ample room to air their personal views, perspectives and frustrations. By contrast, witnesses were only allowed to answer the

¹⁵⁶ Peskin, *supra* note 151 at 168.

¹⁵⁷ Anecdotally noting that among the few victims interviewed in an independent study on the matter, several reflected official criticisms of the ICTR, Longman, *supra* note 121 at 282.

¹⁵⁸ *Survivors and Post-Genocide Justice in Rwanda: Their Experiences, Perspectives and Hopes* (Kigali: Redress and African Rights, 2008) at 55.

¹⁵⁹ Kaplan, *supra* note 106 at 96.

¹⁶⁰ Alison Des Forges, *Leave none to Tell the Story* (New York: Human Rights Watch, 1999) at 508; Longman, *supra* note 121 at 282.

¹⁶¹ Jason Strain, and Elisabeth Keyes, "Accountability in the Aftermath of Rwanda's Genocide" in Jane Stromseth, ed, *Accountability for Atrocities* (Ardsley: Transnational, 2003) 87 at 107; Jennie Burnet, "Whose Genocide? Whose Truth? Representations of Victim and Perpetrator in Rwanda" in Alexander Hinton and Kevin O'Neill, eds, *Genocide: Truth, Memory and Reconciliation* (Durham: Duke University Press, 2009) 80.

specific questions asked in the context of interrogations, thereby severing them from the liberative potential of testimony.¹⁶² The personal account of one's relationship with the perpetrator, the enumeration of moral faults reproached within this context, all in accordance with one's own perspective on the matter, which together form the bulk of personal frustrations to be assuaged by the relational dimension of justice, were for the most part irrelevant for under ICTR procedure. Adding to these frustrations finally was the fact that indictees were allowed to make confessions in the absence of victims, which violated the most important step of the *gacaca* process by denying them the right to look into the eyes of the accused during confessions to appraise their remorse and sincerity.¹⁶³

Another of the government's criticisms focused on the attribution of resources. One important way in which *gacaca* addressed the relational dimension of justice was through the allocation of material compensations, which the ICTR statute did not provide for. "The prevalent viewpoint in Rwanda," wrote one observer, "was that the victims' right to compensations should have been part of the definition of justice."¹⁶⁴ It was similarly deplored that the tribunal had given defendants unjust material advantages by granting them access to legal aid.¹⁶⁵ This inadequacy was consequently said to amount to the tribunal's failure, in the government's view, to recognize the significant material and emotional difficulties which victims continued to face.¹⁶⁶ The sentences issued by the tribunal were also criticized for their leniency and lack of proportionality with the harsher punishments ordinarily meted out for serious crimes under domestic law.¹⁶⁷ Considering that survivors often continued to live in precarious conditions where food and physical

¹⁶² Alana Tiemessen, "After Arusha: Gacaca Justice in Post Genocide Rwanda" (2004) 8:1 Afr Stud Quart 57 at 68.

¹⁶⁴ Kingsley Moghalu, *Rwanda's Genocide: The Politics of Global Justice* (New York: Palgrave, 2005) at 187. Similarly, Gerald Gahima, *Transitional Justice in Rwanda: Accountability for Atrocity* (London: Routledge, 2012) at 114; Longman, *supra* note 121 at 289.

¹⁶⁵ Redress and African Rights, *supra* note 157 at 57.

¹⁶⁶ On the fee-splitting scandal in which part of the legal aid funds were given to defendants, Betsy Pisik, "Frustration in Rwanda", *Washington Times* (29 July 2002); Timothy Longman, Phuong Pham and Harvey Weinstein, "Connecting Justice to Human Experience: Attitudes toward Accountability and Reconciliation in Rwanda" in Stover and Weinstein, *supra* note 145 at 221-22.

¹⁶⁷ "More than one Third of Genocide Survivors are Impoverished", *Hirondelle* (13 January 2009).

security were not guaranteed, the detention conditions offered to convicts were viewed as an unfair advantage, again taken to illustrate the U.N.'s lack of concern for victims.¹⁶⁸

(ii) The Spiritual Dimension of Justice

As regards the spiritual dimension, the ICTR contradicted the political agenda underpinning *gacaca* – which was expected, as part of a series of initiatives to this end, to contribute to the restoration of society's different constitutive systems. The government developed several other purportedly local, participatory and traditional institutions such as *abunzi* mediation committees, *ubusabane* community festivals, *ubudehe* development schemes, *itorero* schools and *ingando* camps, among others.¹⁶⁹ The government also showcased its vision of national identity in a broad variety of media, from theatre to music performances, football games, student associations, speeches and commemorations.¹⁷⁰ In concomitance with this were initiatives emphasizing the relational dimension, as evidenced by the abolition of the Hutu/Tutsi distinction, its criminalisation under capital punishment and the government's rebranding as "government of unity."¹⁷¹ A variety of projects bearing neo-traditional names were created which stressed economic matters, for instance demanding that the population spare a certain funds, complete primary school, and move into model suburban villages.¹⁷² In a manner coherent with beliefs surrounding the notion of vital force and the circulation of energies through harmonious relationships, by "working together," the different segments of society were expected gradually to overcome their differences, through the reconstruction of a new, prosperous and inclusive nation.

Some of the government's initiatives relayed this message with a ceremonial character verging upon the religious. Andrea Purdekova for instance notes that hundreds of

¹⁶⁸ That the tribunal failed to give sufficient importance to victims, "U.N. Tribunal Registrar Leaves Kigali Amid New Standoff", *Hirondelle* (27 January 2002); Mary Kimani, "Genocide Survivor Groups Suspend Co-operation with ICTR", *Internews* (28 January 2002). Des Forges, *supra* note 159 at 508-09.

¹⁶⁹ Andrea Purdekova, *Making Ubumwe: Power, State and Camps in Rwanda's Unity-Building Project* (New York: Berghahn Books, 2018) at 6.

¹⁷⁰ Molenaar, *supra* note 93 at 49.

¹⁷¹ Molenaar, *supra* note 93 at 49.

¹⁷² Other such initiatives included *irondo*, *ubudehe* and *umurenge*. Purdekova *supra* note 168 at 112, 254.

thousands of citizens passed through a country-wide “nationalist camping” indoctrination programme during which a ceremony inducted all participants into the new Rwandan political identity amidst drumming, dancing, ululations, whistling and symbolic gestures imitating the horns and milking of Tutsi cattle.¹⁷³ While most of the government’s initiatives did not bear an explicitly religious dimension, many were nevertheless embedded in traditional popular beliefs and neo-traditional mythologies, the contradiction of which was tantamount to sacrilege. Just as Western culture was shown above to be depicted in national history as having disrupted the bond of unity and harmony having putatively held Rwanda together as a nation before the arrival of the colonists, so was the tribunal perceived as another example of divisive Western cultural influence. The government’s view of history tended to depict Rwandans as having lived in harmony prior to the arrival of the colonists, who institutionalised and significantly amplified the Hutu/Tutsi distinction, in turn sparking a political conflict having led the country to episodes of inter-communal violence culminating in the 1994 genocide. This is for instance illustrated in the following RPF song, quoted from Alison Des Forges’ report *Leave none to Tell the Story*:

“It is the white man who caused all that, children of Rwanda. He did it in order to find a secret way to pillage us. When they arrived, we were living side by side in harmony. They invented different origins for us, children of Rwanda. So, children of Rwanda, we are called upon to fight for Rwanda.”¹⁷⁴

Colonists were said to have implanted a malignant political tradition commonly termed “divisionism,” following which Tutsi were made to rule at the expense of Hutu throughout the colonial period, and the Hutu at the expense of the Tutsi afterwards. The two regimes having followed Belgian rule during the Cold War were said to have been installed by the latter, as their docile and corrupt pawns, and to have ruled again following its divisionist political tradition. Having implanted a tradition having led to genocide, the colonizers and their successive regimes were allotted most of the blame.¹⁷⁵ The international community is said to have played a similar role in the years leading up to the 1994 genocide, by

¹⁷³ Purdekova *ibid*, at 141, 273, 283 288-89.

¹⁷⁴ Des Forges, *supra* note 159 at 693.

¹⁷⁵ Molenaar, *supra* note 93 at 61-62; Eltringham, *supra* note 145 at 171; Gourevitch, *supra* note 154 at 308.

interfering with the political system in 1990 to require greater openness to democracy, ushering a wave of polarization that would derail into genocide.¹⁷⁶ Like the Belgians in the years following national independence, the West then proceeded to willingly ignore, and thereby implicitly allow, the perpetration of genocide in 1994.¹⁷⁷

Much in the same way as Westerners were delegitimized as outsiders responsible for the destruction of the country's cultural institutions and attendant political polarization, so were tribunal staff depicted as foreigners and outsiders posing a similar threat. The government generally tended to treat the ICTR as a criminal institution by accusing it of "divisionism" and negationist genocidal ideology.¹⁷⁸ The tribunal, NGOs and international media diffusing its work found themselves accused of "spreading poison," having "participated in the genocide," and forming part of some "formidable campaign," orchestrated by the international community against Rwanda.¹⁷⁹ Evoking this preoccupation for instance was the initial insistence on controlling the selection of ICTR officials, "in order to ensure that the states having supported the regime responsible for the genocide would not gain control over it."¹⁸⁰ This perception of an international conspiracy between the *génocidaire*, its former colonial master and the international community would ironically be supported by a series of government-funded publications noting the presence of Hutu *génocidaire* on ICTR payroll.¹⁸¹ While traditional conceptions of justice emphasized communal harmony, which itself stretched out further into the political domain, demanding the constant flow of resources and alliances across the nation, in ever stronger interdependency, the tribunal by threatening to prosecute atrocities committed by

¹⁷⁶ Mamdani, *supra* note 145 at 153.

¹⁷⁷ Further solidifying the government's distrust, Western countries then deployed their armed forces at the outset of the conflict with the exclusive mandate of rescuing its own citizenry, thereby leaving the Tutsi population into the hands of their murderers. Western forces would only return after most of the killing had been carried out, to carry out a humanitarian mission that would secure a safety route for much of the Hutu Power leadership and militia to escape into Zaire. Prunier, *supra* note 133 at 229-68; Alain Destexhe, *Rwanda and Genocide in the Twentieth Century* (New York: New York University Press, 1994) at 48-55; Pottier, *supra* note 154 at 156.

¹⁷⁸ Peskin, *supra* note 151 at 218.

¹⁷⁹ Pottier, *supra* note 154 at 164.

¹⁸⁰ Gahima, *supra* note 163 at 86.

¹⁸¹ E.g., "UN Tribunal Investigating 12 on its Payroll" *Integrated Regional Information Networks* (29 June, 2006).

President Kagame's forces represented just the opposite, as a poisonous form of cultural influence threatening to push the country back into a state of national disintegration.¹⁸²

The tribunal would appear to have been consigned to the category of external actors to be blamed for the country's ills, just as *gacaca* and other institutions diffusing the government's new political ideology sought to reintegrate, mask and displace onto foreigners the population's guilt in relation to the genocide. The tribunal, like any object of scapegoating, can be said to have embodied both in form and substance the very transgression of the traditions to be returned to on a societal basis. The tribunal corresponded with popular views on formal justice according to which, in the words of Charles Natampaka, "the obligation to judge according to the law can lead to hostilities namely between the families of the accused and the victim, in addition to jeopardizing communal peace," for its incapacity to adjust its rulings to important contextual factors.¹⁸³ In substantive terms, the tribunal by design corresponded to the very diffusion of Western culture having putatively led the country into a state of social disintegration and cultural anomie. In the name of values emphasizing the subsumption of the individual within the group, and the group within the nation, the tribunal was thus to be rejected following the pattern of scapegoating outlined above.¹⁸⁴ Doing so can be said to have formed part of a series of punitive enactments, symbolically freeing society from an ill largely similar to the nationalist conception of vice outlined in chapter 3, namely the abandonment of national traditions.

(3) The Post-Genocidal Order in Friction with International Justice

After having drawn the link between the regime's reaction to international justice and traditional conceptions of justice, the discussion will now move to the pattern of overt confrontation having led the regime officially to reject international justice. While the

¹⁸² Peskin, *supra* note 151 at 232.

¹⁸³ Author's translation. Ntampaka, *supra* note 99 at 446.

¹⁸⁴ Makau Mutua likewise writes that human rights require "the reconstruction of states [...], to reflect the values and structures of liberal market democracies" in *supra*, Mutua note 7 at 41. The subsumption of the individual under the group and the state is underlined in the African Charter of Human and Peoples' Rights, whose "primary concern has been with the eradication of colonialism" according to Rose M D'Sa, "Human and Peoples' Rights: Distinctive Features of the African Charter" (1985) 29:1 J Afr L 72 at 74.

traditional conception of justice was used above to interpret the arguments having subjectively legitimated the rejection of international justice, the following pages will chart the most important events throughout the Rwandan government's relationship with the tribunal. This will be done first by recounting this series of events in light of mimetic theory, before showing, as was done in the preceding chapter, that such events corresponded to the rejection of international justice and its normative message.

(i) Initial Confrontations with International Justice

A series of incidents occurred between the Rwandan government and the ICTR, which together evidence the rivalrous nature of the relationship assigned by the former to the latter. The first such incident occurred as the government requested international assistance to apprehend exiled perpetrators and, eventually, to hold the international community accountable its failure to prevent genocide.¹⁸⁵ The U.N. responded by proposing to establish an international tribunal that turned out to be so far from the government's demands, as to lead Rwanda to cast the only dissenting vote to the Security Council resolution establishing it.¹⁸⁶ One source of dissatisfaction was the perceived replication of colonial patterns such as the primacy over domestic laws, carrying out of prosecutions outside national borders, and employment of Westerners.¹⁸⁷ Another centered on the sense of dispossession, confronting the government's desire for autonomy rather directly by seemingly "dismissing in advance any trials which Rwanda might hold as beneath international standards."¹⁸⁸ This, together with the decision not to hold trials for the failure to prevent the genocide, encouraged a rhetoric ostensibly inverting the type of criticism historically received from colonial powers: the government deplored that the ICTR was mismanaged, lacked basic infrastructures, and was staffed by incompetent personnel.¹⁸⁹

¹⁸⁵ Peskin, *supra* note 151 at 158.

¹⁸⁶ The Situation Concerning Rwanda, UN Doc. S/PV.3453, 14-16 (Nov. 8, 1994) (statement by Mr. Bakuramutsa).

¹⁸⁷ Katamali, *supra* note 152 at 119.

¹⁸⁸ William Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press, 2006) at 11; Gahima, *supra* note 163 at 97.

¹⁸⁹ Karl Paschke, Under-Secretary-General for Internal Oversight Services, *Rep. of the Office of Internal Oversight Services on the Audit and Investigation of the International Criminal Tribunal for Rwanda, Annex to the Report of the Secretary-General on the Activities of the Office of Internal Oversight Services*, 17, U.N.

Rivalry became tangible as the government began to search for major criminals. On two occasions, the ICTR enraged the government by seizing cases on which Rwandan authorities had already made significant progress. In this regard, Prosecutor Goldstone stated “that he would have preferred closing down the tribunal then to defer a major criminal.”¹⁹⁰ Frustrations also ensued as the tribunal, in breach of the government’s ideological account of the events, declared one high-ranking defendant innocent. The government responded by staging largescale protests denouncing the ruling.¹⁹¹ The government equally deplored that ICTR indictees had worked as employees under fictitious identities, which was interpreted as confirming the ICTR’s hostility towards the Tutsi.¹⁹² A similar incident reinforced this perspective, as judges laughed during the interrogation of a rape victim, causing a significant media backlash.¹⁹³ The country’s two largest victim associations retaliated by withholding cooperation.¹⁹⁴ In the spirit of rivalry, one newspaper for instance portrayed this conflict as a “David and Goliath struggle.”¹⁹⁵

(ii) The Scapegoating of International Justice

In March 2000, a newspaper article announced that the U.N. had in its possession documents proving that forces under the government’s control had shot down the former president’s plane and sparked the killings.¹⁹⁶ A French judge followed suit, claiming to possess sufficient evidence to request an international arrest warrant against president

Doc. A/51/789 (Feb. 6, 1997); ICTR, Second Annual Report, UN Doc. A52/582-s/1997/868 (NYC: UN, 1997) paras 4-6.

¹⁹⁰ The defendants were Bagosora and Karamira. Peskin, *supra* note 151 at 173-74.

¹⁹¹ After which the decision was reversed on appeal. *Jean-Bosco Barayagwiza v. the Prosecutor*, ICTR-97-19-AR72, Appeals Chamber Decision, (November 3, 1999) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber).

¹⁹² “Statement of Rwandan Minister of Justice,” Minutes of 4429th meeting of the Security Council, UN Doc. S/PV.442 (27 November 2001) at 19.

¹⁹³ The laughter having in reality been caused by the defense lawyer’s behavior during the interrogation “UN Judges Laugh at Rape Victim!”, *The Monitor* (3 December 2004).

¹⁹⁴ Mary Kimani, “Genocide Survivor Groups Suspend Co-operation with ICTR”, *Internews* (28 January 2002).

¹⁹⁵ “Ibuka, ICTR Lock Horns”, *The New Times* (18 February 2002).

¹⁹⁶ Steven Edwards, “‘Explosive’ Leak on Rwanda Genocide”, *National Post* (1 March 2000).

Kagame.¹⁹⁷ Tensions peaked as the Security Council required that the scope of the ICTR's activities be expanded to cover crimes committed by the government.¹⁹⁸ Its third prosecutor, Carla Del Ponte, addressed this matter by formally opening an investigation, causing the government to react with indignation.¹⁹⁹ Not only did the government need a positive image to preserve its fragile political hold over the country, but nearly half its budget depended on donor money, itself tributary to the maintenance of a positive outside façade.²⁰⁰ While the considerations invoked to oppose the investigations on their face appeared pragmatic, a general sense of outrage permeated governmental rhetoric, which stemmed from the confrontation of scapegoating mythologies exculpating the government.

The government retaliated by opposing the French investigation and preventing witnesses from travelling to the ICTR, prompting Prosecutor Del Ponte to respond by actively criticizing Rwanda for its non-compliance in a standoff that, according to Victor Peskin, would "mark the beginning of an escalating confrontation with the Kigali government."²⁰¹ In line with Girard's writings, which state that contradictions to the scapegoating mythologies cause scandal, resentment suddenly became widespread, and tended to concentrate on the person of the chief prosecutor.²⁰² For their contradiction of the scapegoating mythologies, members of civil society and human rights organizations associated with international justice and human rights were equally targeted by inflammatory speeches accusing them of divisionism.²⁰³ In a reversal of the situation, Kagame claimed that the Westerners having established the refugee camps in Zaire having

¹⁹⁷ Katrin Bennhold, "French Judge Seeking to Bring Rwandan President before UN Tribunal", *International Herald Tribune* (21 November 2006).

¹⁹⁸ RPF forces committed massacres while invading Rwanda and chasing forces on the Zairian border. Pottier, *supra* note 154 at 164. On the Gersony Report, Prunier, *supra* note 133 at 360.

¹⁹⁹ "Del Ponte Addresses Alleged RPF Massacres with Kagame", *The New Humanitarian* (14 December 2000).

²⁰⁰ One of its most pressing objectives was the consolidation of social peace, which remained central as *génocidaire* returnees continued to destabilize one region after the other. Purdekova, *supra* note 168 at 328.

²⁰⁰ Purdekova, *supra* note 168 at 189. Purdekova, *supra* note 168 at 189, 328.

²⁰¹ The flow of witnesses eventually resumed however. Chris McGreal, "Witness Boycott Brings Rwandan Genocide Trials to a Halt", *The Guardian* (29 July 2002); Peskin, *supra* note 151 at 203.

²⁰² One official for instance described Prosecutor Del Ponte as "deeply immersed in the ethnic arithmetics and negationist theories of 'equal guilt.'" UN Prosecutor Rallies UK Support to Investigate Rwandan Army", *Hirondelle News* (29 November 2002).

²⁰³ Longman, *supra* note 121 at 55, 139.

allowed the *génocidaire* to regroup and survive should themselves stand accused.²⁰⁴ For her willingness to cooperate with the *génocidaire* to obtain information on RPF crimes, Prosecutor Del Ponte became an enemy of the nation herself. The government called for her punishment, and, in the words of an ICTR prosecutor, “treated her like a criminal.”²⁰⁵

This is the language of mimetic rivalry: the government not only returned the tribunal’s accusations, but depicted it and its representatives along liminal lines.²⁰⁶ For the putative infraction of having contradicted the scapegoating mythologies, international justice was branded as a criminal to be expelled from the community. The government organised several important demonstrations before ICTR offices in Kigali.²⁰⁷ Protesters during one such event were said to have chanted “go home Del Ponte, you are nothing worse than *génocidaire*!”²⁰⁸ The radio equally broadcasted the slogan “Rwanda under Attack,” and played various songs by popular artists, which condemned Western countries having abetted the arrest of RPF defendants in Europe.²⁰⁹ Reacting to the French investigation, Kigali eventually broke off diplomatic relations with France and expelled its ambassador.²¹⁰ The government similarly expelled 38 foreign NGOs and human rights organisations.²¹¹ Several Rwandan prosecutors and judges critical of the government’s human rights violations were imprisoned on genocide charges, reflecting notions of criminal expulsion ordinarily associated with scapegoating.²¹² The ICTR suddenly found itself in the midst of a reaction ostracizing those who sought to confront these crimes.

²⁰⁴ Gourevitch, *supra* note 154 at 340.

²⁰⁵ “Rwanda calls upon the international community and the UNSC in particular to hold her accountable for her deliberate conduct, which clearly bears grave consequences.” News Release by the Government of Rwanda, November 21, 2002, cited in Moghalu, *supra* note 163 at 141; Peskin, *supra* note 151 at 178.

²⁰⁶ The concept of liminality is explained in Chapter 2 Section (II)(A)(1).

²⁰⁷ E.g. “Rwanda: Genocide Survivors Protest against ICTR Prosecutor”, *Integrated Regional Information Network* (26 May 1997); “Genocide Survivors Demonstrate against ICTR Chief”, *All Africa* (28 June 2002).

²⁰⁸ Victor Peskin, “Rwandan Ghosts”, *Legal Affairs* (Sept/Oct 2002) at 22.

²⁰⁹ In relation to the arrest of a high-ranking RPF officer in Germany. Purdekova, *supra* note 168 at 195.

²¹⁰ Peskin, *supra* note 151 at 229-30.

²¹¹ Alex de Waal, *Famine Crimes* (London: African Rights and the International African Institute, 1997) at 202.

²¹² Longman, *supra* note 121 at 122, 203.

A notorious victim of these reactions of expulsion and ostracization was Prosecutor Del Ponte. Particularly incendiary, in the government's view, was the fact that she had consented to deferring investigations into RPF crimes to the national judiciary before disavowing her promise after consultations with tribunal personnel.²¹³ The government did not renew her visa, thus expelling her like other human rights representatives.²¹⁴ Rwanda also waged an international lobbying campaign to have her removed from office, resulting in her expulsion from the international scene. These efforts concurred with a newfound sense of fatigue regarding international criminal tribunals.²¹⁵ In a surprising turn of events, the Security Council did not renew her contract and replaced her with another prosecutor who would never touch the question of RPF crimes.²¹⁶ "The timing of the decision," writes Peskin, "at the height of the Rwanda-Del Ponte conflict, leaves it open to the charge that it sacrificed her to forestall RPF indictments."²¹⁷ This series of events would appear to have been coherent with Girard's writings in a general sense, by accusing and effectively excluding the person responsible for the confrontation of the scapegoating mythologies.

(iii) The Consolidation of Denial

As in the Serbian case, in conjunction with its efforts to expel tribunal representatives following the scapegoating order, the government further defused the tribunal's message by mimicking the international community's human rights practices. The government established a national human rights commission, a truth and reconciliation commission and adopted a new progressive constitution which together contributed to authenticating its version of the events.²¹⁸ Rwanda also prosecuted a handful of RPF militia in trials that

²¹³ Moghalu, *supra* note 163 at 145.

²¹⁴ Peskin, *supra* note 151 at 178.

²¹⁵ Marlise Simons, "Rwanda is Said to Seek New Prosecutor for War Crimes Court", *New York Times* (28 July 2003); Jess Bravin, "U.S. Seeks Timetable to Close UN War-Crimes Tribunal", *Wall Street Journal* (1-3 March 2002).

²¹⁶ John Hooper, "I was Sacked as Rwanda Genocide Prosecutor for Challenging President, says Del Ponte", *The Guardian* (12 September 2003).

²¹⁷ Peskin, *supra* note 151 at 178.

²¹⁸ While the human rights commission maintained a low public profile, the truth and reconciliation commission loomed large, and promoted the government's account of history. The constitution promoted democracy and the rights of women, and allowed for the creation of a host of civil society organizations controlled by the government. Purdekova, *supra* note 168 at 211; Paul Nantulya, Karin Alexander, Didace Kanyugu, et al., *Evaluation and Impact Assessment of the National Unity and Reconciliation Commission*

systematically minimized the gravity of their crimes.²¹⁹ The vast majority of the country's efforts at delivering justice targeted the Hutu *génocidaire*. "The government's efforts at delivering justice," concludes Rwanda scholar Timothy Longman, "have been less concerned with making known the truth about what has happened, than promoting a particular version of the past that serves the interests of those in power."²²⁰

As in the Serbian example, the government after the end of the conflict had also showed promising prospects for the development of democracy, namely by filling half of its cabinet with "moderate Hutu" politicians, including the president.²²¹ RPF leaders however became intolerant of political opposition in the ensuing years.²²² The government expelled most Hutu from its cabinet, replaced the president with Paul Kagame, and banned the main opposition party on grounds of "divisionism."²²³ Like the ICTY, one may suggest that the ICTR may have had a disruptive influence over national politics. The situation since then is characterized by denial. History lessons have been removed from the national curriculum.²²⁴ The youth take part in indoctrination camps and student clubs at the primary school, high school and university levels where they are taught the government's version of history.²²⁵ Mass graves of RPF victims largely remain ignored.²²⁶ Part of the blame is deflected to the West, which as a colonizer and idle bystanders is said to have abetted the genocide.²²⁷ Scholars and NGO reports repeatedly note the population's generalized lack of information on the ICTR, and suggest a chronic underreporting on the subject during its

(NURC) (Kigali: Institute for Justice and Reconciliation, November 2005); Longman, *supra* note 121 at 163-64, 172.

²¹⁹ Des Forges *supra* note 159 at 733; *Rwanda, World Report 1998*, (New York: Human Rights Watch, 1997) at 23-27.

²²⁰ Longman, *supra* note 121 at 125.

²²¹ André Guichaoua, *Les crises politiques au Burundi et au Rwanda : 1993-1994* (Lille: Université des Sciences et Technologies de Lille, 1995) at 759-61. Also, Prunier, *supra* note 133 at 268-73, 295-305.

²²² Joseph Sebarenzi, *God Sleeps in Rwanda* (New York: Atria, 2008) at 141.

²²³ Longman, *supra* note 121 at 153-54, 164.

²²⁴ Susanne Buckley, "Nation, Narration, Unification? The Politics of History Teaching after the Rwandan Genocide" (2009) 11:1 J. Gen. Research at 31.

²²⁵ Purdekova, *supra* note 168 at 212.

²²⁶ Faustin Rutembessa, "Le discours sur le peuplement comme instrument de manipulation identitaire" in Faustin Rutembessa et al, eds, *Peuplement du Rwanda : Enjeux et perspectives* (Butare : Université nationale du Rwanda, 2002) 77 at 83.

²²⁷ Longman, *supra* note 121 at 238; Buckley, *supra* note 121 at 140.

years of activity.²²⁸ “On the whole,” concludes Timothy Longman, “my research provides little evidence that the ICTR has had a significant impact in Rwanda.”²²⁹

CONCLUSION

The object of this chapter has been to garner from traditional conflict resolution processes a certain guiding logic, through which the national opposition to international justice could be envisaged. While conflict resolution necessarily varies across cultures, a generic outline has been proposed, based on the similarities observed in our two case studies: be it under traditional *gacaca* or *nahe biti*, a cultural context was shown to exist, in which offenses could be avenged in kind, cause a blood feud, and eventually lead to resolution processes led by elders, partly to mediate, partly to interpret the will of ancestral spirits. The history of the conflict was recounted, parties heard, valuables exchanged, and a feast and ritual purification carried out. Similar mechanisms exist in many other countries, including in Uganda and Cambodia, where international criminal justice has also made itself present.²³⁰

Most traditional practices are however situated somewhere between tradition and modernity, while others rest on an adversarial logic and others emphasize separation.²³¹ What is more, traditional justice mostly gained prominence recently, in the context of post-conflict transitions where states were overwhelmed by the demands of mass justice and

²²⁸ A 2002 survey of over 2000 Rwandans found that 87% were either “not well informed” or “not informed at all” about the tribunal. Eric Stover and Harvey Weinstein, “Conclusion: A Common Objective, a Universe of Alternatives,” in Stover and Weinstein, *supra* note 145 at 334. Similarly, Des Forges, *supra* note 159 at 742. That this is even the case among lawyers and judges, Katamali, *supra* note 152 at 120.

²²⁹ Longman, *supra* note 121 at 285.

²³⁰ In Africa, Martin Chanock, *supra* note 80 at 6. In Canada, Ross, *supra* note 54 at 25. In Cambodia, Ian Harris, “‘Onslaught on Beings’: A Theravada Buddhist Perspective on Accountability for Crimes Committed in the Democratic Kampuchea Period” in Raya Ramji and Beth Van Schaak, eds, *Bringing the Khmer Rouge to Justice* (Lewiston: Mellen, 2005) 76 at 81, 85. In China, Liwen Zhang, “Harmony and Justice” (2015) 10:4 *Frontiers Philosophy of China* 553 at 533. In the world, Graham Kemp and Douglas Fry, eds, *Keeping the Peace: Conflict Resolution and Peaceful Societies around the World* (London: Routledge, 2004); Roger Mac Guinty, “Indigenous Peace-Making Versus the Liberal Peace” (2008) 43:2 *Coop & Conflict* 139 at 149.

²³¹ Ann Chowning, “Disputing in Two West New Britain Societies: Similarities and Differences” in Arnold Epstein Ed, *Contention and Dispute: Aspects of Law and Social Control in Melanesia* (Canberra: Australian National University Press, 1974) 150 at 152-53; Laura Nader, “Choices in Legal Procedure: Shia Moslem and Mexican Zapotec” (1965) 167 *American Anthropologist* 394.

tended to instrumentalize traditional practices.²³² This led to the reinvention of forgotten traditions and their implementation in ways that often violated due process and human rights.²³³ Importantly, state law generally tends to preserve legitimacy as regards the prosecution of grave offences.²³⁴ The contest between local and international conceptions of justice suggested in this chapter may thus be overdrawn, considering that court proceedings mostly constitute the ordinary response to grave offenses, and that traditional justice mechanisms are often implemented in new and exceptional ways to accommodate post-conflict necessities.²³⁵

This being said, commentators note that local justice mechanisms often do enjoy popular legitimacy, especially when practiced organically, without formal state intervention.²³⁶ Moreover, the fact that court proceedings may be deemed as the conventional response to grave offenses in such communities should not be taken to imply automatic authority.²³⁷ More than the natural reflection of local conceptions of justice, Western-style prosecutions have often been imposed for prolonged periods of time throughout the colonial period, to the point of replacing original customs dealing with grave offences. Speaking of legal traditions in Africa, Patrick Glenn thus notes that local elites very much inhabit a “*pays légal*, distinct and distant from the mass of people.”²³⁸ With the tradition having organically

²³² Holly Porter, “Justice and Rape on the Periphery: The Supremacy of Social Harmony in the Space between Local Solutions and Judicial Systems in Uganda (2012) 6:1 J East Afr Stud 81 at 89; Mac Guinty, *supra* note 229 at 155; McAuliffe, *supra* note 1 at 51.

²³³ Francis Deng, “Customary Law in the Cross Fire of Sudan’s War of Identities” in Deborah Isser, ed, *Customary Justice and the Rule of Law in War-Torn Societies* (Washington: US Institute for Peace, 2010) 285 at 316; Waldorf, *supra* note 12 at 6, 40 et seq.; Marc Galanter, “Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law” (1981) 19 J. Leg Plur & Unofficial L 1 at 25.

²³⁴ In East Timor, Pigou, *supra* note 36 at 34. In Liberia, Stephen Lubkeman, Deborah Isser and Philip Banks, “Unintended Consequences: Constraint of Customary Justice in Post-Conflict Liberia” in Isser, *supra* note 232 at 219. In Uganda, Allen, *supra* note 12 at 85.

²³⁵ Warning not to adhere to a naively optimistic view of local justice, Alexander Betts, “Should Approaches to Post-Conflict Justice and Reconciliation be Determined Globally, Nationally or Locally?” (2005) 7:4 Eu J Dev Res 735 at 735; Kiernan McEvoy, “Letting Go of Legalism: Developing a ‘Thicker’ Version of Transitional Justice” in Kiernan McEvoy and Lorna McGregor, eds, *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (London: Hart, 2008) 15 at 30.

²³⁶ Ramji, *supra* note 1 at 54; McAuliffe, *supra* note 1 at 51-52.

²³⁷ Noting deep distrust towards state institutions, Porter *supra* note 231 at 87 (in Northern Uganda). Perceiving state courts as corrupt, Pham et al, *supra* note 13 at 33-34 (in Cambodia); Ramji, *supra* note 1 at 57-58 (in East Timor). That state justice can be “alien and alienating,” Paul Gready, “Reconceptualising Transitional Justice: Embedded and Distanced Justice” (2005) 5 Confl Sec & Dev 3 at 9.

²³⁸ Glenn, *supra* note 80 at 86.

emerged from local culture now displaced, prosecutions may be viewed as “normal” or “conventional” while failing to command substantial or meaningful authority in society as a whole. Claude Welch thus notes that “the majority of people in Africa have had unpleasant, confusing contact with the legal system.” Noting the corruption plaguing many national judiciaries, Welch further notes that the “enforcement of values little known in communities, through procedures and personnel distant from popular understanding, has serious limitations.”²³⁹

This argument applies to atrocity prosecutions. While many victims appreciate that justice be rendered on their behalf, and many desire that high-ranking perpetrators be brought to justice, examples suggest that the population often fails to find sincere interest and satisfaction in international criminal proceedings.²⁴⁰ International criminal justice thus garnered low visibility and public interest in East Timor, and followed a process described by James Deshaw as extraneous to the culture and customs of the population.²⁴¹ Similar difficulties occurred in Cambodia, where the objectives pursued by international criminal justice failed to reflect popular preferences.²⁴² One survey carried out in the Democratic Republic of Congo equally shows little knowledge and interest in international criminal justice, and a preference for local justice mechanisms carried out in parallel.²⁴³ Anecdotal evidence further suggests a preference for local justice in Uganda.²⁴⁴ The Special Court for Sierra Leone is similarly criticized as “a court perceived as a curiosity and an anomaly with

²³⁹ Claude Welch Jr., *Protecting Human Rights in Africa* (Philadelphia: University of Pennsylvania Press, 1995) at 198.

²⁴⁰ Phil Clark writes that “studies tend to argue that large segments of affected communities support the idea of prosecutions for high-level atrocity suspects, including through the ICC.” Yet these studies also reveal that a very small portion of their respective samples had either heard of the ICC before taking the survey, or understood what international criminal tribunals concretely do. Phil Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge: Cambridge University Press, 2018) at 101; Phuong Pham et al, *supra* note 11 at 32; Phuong Pham et al, *supra* note 11 at 44; Dianne Orentlicher, *That Someone Guilty be Punished: The Impact of the ICTY in Bosnia* (Wash: Open Society Institute, 2010).

²⁴¹ Similarly, Ramji, *supra* note 1 at 33; Pigou *supra* note 36 at 30-36; Deshaw, *supra* note 34 at 156, 163.

²⁴² Phuong Pham et al, *supra* note 11 at 27, 32-33.

²⁴³ Patrick Vinck et al, *Living with Fear: A Population-Based Survey on Attitudes About Peace, Justice, and Social Reconstruction in Eastern DRC* (Berkeley: University of California Human Rights Center, 2008) at 47.

²⁴⁴ Kelsall, *supra* note 12 at 135, 137.

little impact on citizens.”²⁴⁵ These shortcomings are also linked to the fact that many in post-conflict societies live in a state of acute material precarity, requiring the fulfillment of basic needs before the question of high-level responsibility may come to be perceived as relevant. “By and large,” writes Sally Engle Merry, “the ideas of human rights have little resonance at the grass roots.”²⁴⁶

This chapter suggested that traditional justice may live up to popular conceptions of justice precisely by fulfilling a series of emotional, material and communal needs, through the articulation of locally authoritative religious and customary norms. A combination would appear to be expected, in order for traditional justice to be perceived as justice, between the remediation of immediate needs and the appropriate invocation of religious and political notions of justice sincerely anchored in tradition.²⁴⁷ International criminal justice unfortunately can neither truly respond to the needs commonly addressed by local justice mechanisms, nor invoke the repertoire of ideals and beliefs inscribed in tradition. On the subject of traditions and beliefs, Phil Clark’s study of *gacaca* rightly stresses that international justice literature too frequently fails to acknowledge the importance of sincerely held religious convictions, in bringing about justice and reconciliation.²⁴⁸ Another frequently overlooked aspect of traditional justice mechanisms, is their ability to address the population’s needs by reordering the very nature of the relationships having led to conflict.²⁴⁹ This allows the resumption of ordinary productive activities both individually and communally, contributing to the alleviation of pressing material needs.

The needs to respond to in order to generate a sense of justice in the traditional sense would seem to be more than material, and to involve a mixture of personal, communal and moral considerations, which local justice mechanisms tend to address in a united and somewhat

²⁴⁵ Tom Perriello and Marieke Wierda, *The Special Court for Sierra Leone Under Scrutiny* (London: International Center for Transitional Justice, 2006) at 2.

²⁴⁶ Sally Engle Merry, *Human Rights and Gender Violence* (Chicago: University of Chicago Press, 2006) at 164.

²⁴⁷ McAuliffe, *supra* note 1 at 51; Porter, *supra* note 231 at 87.

²⁴⁸ Clark, *supra* note 21 at 341.

²⁴⁹ In traditional justice mechanisms elsewhere, Mac Guinty, *supra* note 229 at 148; Shaw, “Introduction” in Shaw and Waldorf, *supra* note 3, 1 at 21; Nader, *supra* note 2 at 243, 312.

undifferentiated manner. Such mechanisms often address them by halting the exchange of aggression between former rivals and establishing a new relationship of mutual dependence and support, from which future projects may grow. Some *Nahe biti* participants were for instance made to erect a house of worship in the name of common ancestors, while *gacaca* participants were made to rebuild destroyed houses.²⁵⁰ Such projects further the bond of mutual trust, dependency and social integration between former rivals, which will ultimately contribute to addressing their immediate needs. At the societal level, the Rwandan government similarly sought to reconcile and unify its citizenry by involving it in the realization of ambitious projects of national reconstruction.²⁵¹ A similar example in peacebuilding literature is the important role played by the restoration of strong commercial ties between France and Germany after WWII.²⁵² The very experience of overcoming difficulties, and of improving one another's material situation through shared projects, appears to contribute in important respects to the resolution of hostilities.

While local justice mechanisms open the door to this reconciliatory path, international criminal justice only addresses the question of high-level individual punishment in isolation. Serious difficulties occur when little can be done to bridge this gulf, and especially when international criminal justice becomes the object of a forceful national rhetoric of opposition. In Batesonian terms, international criminal justice's purposive focus on rule of law, by operating in isolation from the needs characterizing post-genocidal societies, tends to spark "disruptions," in the form of broad-ranging political opposition. While traditional justice tends to address such needs as the restoration of honour, unity and cultural integration, international criminal justice by contrast tends to come into friction with these needs by threatening to reveal humiliating atrocities following the foreign and cosmopolitan idiom of international law. One must bear in mind here that the post-genocidal context is marked by a deep crisis of traditions and social polarization, whose perceived aggravation by international criminal justice is likely to spark outrage. Whenever

²⁵⁰ Hohe and Nixon, *supra* note 30 at 26; Molenaar, *supra* note 93 at 31.

²⁵¹ Generally, Purdekova, *supra* note 168.

²⁵² William Long and Peter Brecke, *War and Reconciliation: Reason and Emotion in Conflict Resolution* (Cambridge: MIT Press, 2003) namely at 13, 112.

understood to contravene society's need to achieve unity through the reworking of national myth and tradition, international criminal justice is likely to be perceived as a threat.

CONCLUSION

POSITIVE EFFECTS IN AND BEYOND THE WEST

INTRODUCTION

This dissertation has explored some of the communicational difficulties preventing international criminal justice from disseminating the norm against atrocity in post-conflict societies. To recapitulate, the first chapter has argued that the objective of the ICL project is to disseminate the norm against atrocity on a global scale, while the second has shown how this message could be communicated. It was argued that this could be done by following the symbolic structure of pre-modern punishment, using society's own vernaculars of justice. The criminal justice process in 18th century Britain and Frankfurt Auschwitz trials were chosen for this reason, as examples of ceremonies expressing their community's normative symbolism. The following chapters purposefully focused on situations in which a mismatch existed between the conceptions of justice expressed by international justice and those adhered to by a significant proportion of the population. Chapter 3 focused on post-genocidal societies, in which a distinct conception of morality exists, and showed how this conception of justice structures the reception of international justice. Chapter 4 focused on a similar mismatch, using the example of Chthonic conceptions of justice. With those chapters in mind, one might be tempted to conclude, like Makau Mutua does for human rights more generally, that the ICL project:

“will ultimately fail because it is perceived as an alien ideology which does not deeply resonate in the cultural fabrics of non-Western states. [...It] must be moored in the cultures of all peoples.”¹

Another excerpt reflecting this dissertation's argument can be found in Ellen Lutz's *Prosecuting Heads of State*. “The most important lesson learned” from one high-profile case, notes Lutz, is that justice “must be as accessible as possible to those who suffered most” and lead “to national acknowledgment of the wrongs that occurred and societal

¹ Makau Mutua, “Savages, Victims and Saviors: The Metaphor of Human Rights” (2001) 42:1 Harv Int'l L J 201 at 208.

involvement in righting them.”² While often noted in passing, such remarks point to a subject deserving closer attention. In spite of the abundance of scholarship stating that international justice is intended to prevent future crimes, the reality “on the ground” continues to lack attention.³ As Beth Simmons notes with respect to international human rights law, the few case studies on the influence of ICL norms constitute “intensive case studies on individual countries [which] have been invaluable in generating insights into specific crucial episodes, but [...] leave open the question about the influence of legal commitments on practices more broadly.”⁴ The cultural basis and political ramifications of opposition movements to international criminal justice also remain largely understudied.

In an attempt to add caveats to the argument elaborated by this dissertation, the present conclusion will show how atrocity prosecutions can generate a measure of normative influence both within and outside Western society. The following begins with human rights professionals and international criminal tribunals, before discussing the reception of atrocity justice in Western democracies. The discussion next points to positive results in perpetrator regimes. The last section presents historical patterns associated with the long-term development of human rights. The discussion throughout follows a theoretical insight derived from Durkheim’s writings on punishment and collective solidarity, and argues that atrocity prosecutions vitalize group identity.⁵ This discussion leads to the conclusion that atrocity justice impacts democratic societies the most and undemocratic societies the least. While ending with potential operational changes for ICL, this chapter, as is the case for this dissertation more generally, is first and foremost intended as a description of the main communicative patterns at play among the different groups and actors identified with ICL.

² Ellen Lutz and Caitlin Reiger, “Foreword” in Ellen Lutz and Caitlin Reiger, eds, *Prosecuting Heads of State* (Cambridge: Cambridge University Press, 2009) at xx.

³ Noting that such questions often tend to be “sidelined as ‘sociology’ or ‘theory’” by international legal scholars, Gerry Simpson, *Law, War and Crime: War Crimes, Trials and the Reinvention of International Law* (London: Polity, 2007) at 135.

⁴ Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge: Cambridge University Press, 2009) at 11.

⁵ Émile Durkheim, *The Elementary forms of Religious Life* (Glencoe: Free Press, 1974) at 37, 41; Émile Durkheim, *The Division of Labor in Society* (London: Simon & Schuster, 1987) at 81, 102; Roger Cotterrell, “Constructing the Juristic Durkheim?” (2004) 10 *Durkheimian Studies* 56.

The following complements the literature by providing an overview of the effects of international criminal justice on its main audiences, thus bringing together strands of the literature normally examined in isolation. The literature on the normative influence of atrocity justice is made up of a patchwork of studies discussing specific parts of the subject from varied disciplines and perspectives without meaningfully citing or building on one another. The result is a voluminous literature from legal, criminological, political science, history, literature, psychoanalytic and anthropological scholarship, discussing parts of the phenomenon as diverse as deterrence, historic trials, cultural trauma, national reconciliation, country-specific politics and the development of the human rights movement.⁶ The insular nature of this literature appears to have precluded efforts at presenting the phenomenon of normative diffusion in full, by considering its many strands.⁷ Further complicating the matter is a pattern aptly described by Simmons in relation to human rights literature more generally, where “attempts to answer [similar questions] have – in the absence of much systematic evidence – been based on naïve faith or cynical skepticism.” With “supporters of each approach adducing a set of anecdotes to lend credence to their claims,” writes Simmons, “broader patterns [...] remain elusive.”⁸

I. THE INTERNATIONAL COMMUNITY

The following discusses the normative influence of atrocity prosecutions on the international community. Its first sub-section argues that international criminal justice has strengthened the identity of international criminal lawyers and activists, while the second notes a similar phenomenon among international institutions. To cite Stephen Turner’s writings on Durkheim, international criminal justice created, among these groups,

⁶ Eric Stover and Harvey Weinstein, “Introduction” in Eric Stover and Harvey Weinstein Eds, *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge: Cambridge University Press, 2010) 1 at 4. In international human rights, Sonia Cardenas, *Conflict and Compliance: State Responses to International Human Rights Pressure* (Philadelphia: University of Pennsylvania Press, 2006) at 1.

⁷ As remarked by Mark Kersten of the truth versus justice debate, most arguments “for” and “against” the dissemination of international criminal justice and human rights norms in reality do not contradict one another, and mostly add to and complement the discussion in ways mostly ignored due to disciplinary allegiances. Mark Kersten, *Justice in Conflict: The Effects of the International Criminal Court’s Interventions on Ending Wars and Building Peace* (Oxford: Oxford University Press, 2016) at 30, 108.

⁸ Simmons, *supra* note 4 at 4, 11. Similarly, Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick: Transaction, 1997) at 295.

“emotionalized collective states in which actors are attracted by ideals and lifted beyond themselves, [...which] transform or create social structures and interpersonal bonds.”⁹

(A) International Justice Professionals

Professionals working in ICTs and NGOs supporting their work form a group whose identity in several ways corresponds to the hero archetype. Literary scholarship describes this archetype as invested in a perpetual struggle to establish a new political order, and, in so doing, as deriving fame from their willingness to sacrifice everything to this end.¹⁰ In line with this description, international criminal justice scholar Sofia Stolk writes that opening statements before international criminal tribunals often present international justice as effectuating a transition from chaos to peace “follow[ing] an almost messianic logic.”¹¹ According to Stolk, the American opening statement at Nuremberg for instance “manoeuvred between a modest and a heroic role for international criminal trials, [...] in overcoming the past and changing the course of history.”¹² Further conforming to the theme of the hero is the fact that this profession is characterized by the sacrifices required to practice it. Young professionals in international criminal justice and human rights often undertake costly unpaid internships leading to uncertain career prospects, while senior professionals face high trauma rates caused by exposure to victim suffering.¹³ Some note how exposure to acute suffering produces a deep sense of meaning for many such professionals.¹⁴ Corresponding to the hero’s ascension to fame, finally, is the fact that

⁹ Stephen Turner, “Introduction: Reconnecting the Sociologist to the Moralist” in Stephen Turner, ed, Emile Durkheim: Sociologist and Moralist (New York: Routledge, 1993) 1 at 19.

¹⁰ Summarizing this literature, Bernhard Giesen, *Triumph and Trauma* (Boulder: Routledge, 2004) at 18, 24.

¹¹ Sofia Stolk, “‘The Record on Which History Will Judge Us Tomorrow:’ Auto-History in the Opening Statements of International Criminal Trials” (2015) 28 *Leiden J. Int’l. L.* at 998-99, 1002, 1005-6. That John Parker and his contemporaries in Nuremberg viewed their objective as the laying of a basis for a new postwar order ruled by law and not politics, John Parker, “The Nuremberg Trial” (1946) 30 *J Am Judicature Soc’y* 109 at 115; Telford Taylor, *The Anatomy of the Nuremberg Trials* (Boston: Little & Brown, 1993) at 226.

¹² Stolk, *supra* note 11 at 998.

¹³ Parisa Zangeneh, “Internships in International Criminal Justice Institutions”, *Opinio Juris* (31 July 2020) online: *Opinio Juris* <<http://opiniojuris.org>>; Sarah Knuckey, Margaret Satterthwaite and Adam Brown, “Trauma, Depression, and Burnout in the Human Rights Field: Identifying Barriers and Pathways to Resilient Advocacy” (2018) 49:3 *Col Hum R L Rev* 267.

¹⁴ Stephen Hopgood, *Keepers of the Flame: Understanding Amnesty International* (Ithaca: Cornell University Press, 2006) at 37, 41, 44; Payam Akhavan, *In Search of a Better World: A Human Rights Odyssey* (Toronto: House of Anansi Press, 2017) at 54, 117.

several among group have acquired reputational benefits as a result of their work, receiving prestigious appointments in universities, international bodies or domestic judiciatures.¹⁵

Some commentators note that the operation of international criminal justice and human rights is influenced by this longing for personal meaning. Stephen Hopgood thus writes, in very critical terms, that “international justice is only about victims in a secondary sense [...and] is mostly entirely about *itself*.”¹⁶ Others note that this group has grown in numbers as a result of the development of international criminal justice. For one, Nigel Eltringham contends that one of the chief realizations of the ICTR has been the creation of a sizeable new professional class.¹⁷ More positively, other authors in the domain of international relations write that the rise of international accountability norms and institutions has fostered the development of an influential professional class now playing a key role in inducing state compliance.¹⁸ International criminal lawyer David Koller concludes that “the most fundamental way in which international law has an effect on identity creation, is by contributing to building the community which identifies the need to respond to crimes.”¹⁹ As described in the first chapter, international criminal justice arguably stimulates among this group a deep personal commitment to furthering its objectives.

¹⁵ Immi Tallgren, “Stardust of Justice? Celebrity in and by International Law” (Paper delivered at the Law and Society Annual Conference, Toronto, 8 June 2018), [unpublished]. Providing examples in the domain of human rights, see Kathryn Sikkink, *The Justice Cascade* (New York: Norton, 2011) at 91-95. Testament to the public interest and sense of meaning associated with this work finally is the fact that many have written books on their lives as international criminal jurists. Richard Goldstone, *For Humanity* (New Haven: Yale University Press, 2000); Chuck Sudetic and Carla Del Ponte, *La caccia: Io e i criminali di guerra*, (Milan: Feltrinelli, 2008); Louise Arbour, *War Crimes and the Culture of Peace* (Toronto: University of Toronto Press, 2002); Philippe Sands, *East West Street: On the Origins of Genocide and Crimes Against Humanity* (London: Vintage, 2017); Akhavan, *supra* note 14; Carlos Nino, *Radical Evil on Trial* (New Haven: Yale University Press, 1996).

¹⁶ Stephen Hopgood, *The Endtimes of Human Rights* (Ithaca: Cornell University Press, 2015) at 29, 42. Similarly, Mutua, *supra* note 1 at 204; David Kennedy, “Spring Break” (1985) 63 Tex. L. Rev. 1377, reprinted in David Kennedy, *The Dark Sides of Virtue – Reassessing International Humanitarianism* (Princeton: Princeton University Press, 2005) at 37-85.

¹⁷ Nigel Eltringham, “A Legacy Deferred? The International Criminal Tribunal for Rwanda at 20 Years”, *E-International Relations* (29 April 2014) online: E-International Relations <<http://e-ir.info>>.

¹⁸ Margaret Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998); Mark Osiel, *supra* note 8 at 235-36.

¹⁹ David Koller, “The Faith of the International Lawyer” (2008) 40:4 NYU J Int’l L& Pol 1019 at 1057.

(B) International Criminal Justice Institutions

A similar argument can be made with respect to international criminal justice institutions, whose identity and number developed after the end of the Cold War, as atrocity prosecutions became more commonplace. Several European and Latin American countries returned to democracy after periods of military rule during this period and undertook wide-ranging domestic accountability initiatives, eventually giving birth to a small but influential professional class.²⁰ The funds and expertise pertaining to this area continued to expand as the ICTY and ICTR were established in the 1990s, running alongside a global increase of domestic human rights prosecutions.²¹ Accompanying these changes was the creation of the ICC and several other mixed tribunals.²² Together with important developments in international human rights and humanitarian law, these factors contributed to the expansion of the body of ICL institutions, best practices and applicable law, which before the 1990s had remained embryonic.²³ As international criminal prosecutions and tribunals left the realm of idealistic aspirations to become an emerging reality, so did the possibility of further developments become evermore realistic. International criminal justice in other terms facilitated its own institutional development by making the international community more readily prepared to respond to atrocities. Like many who studied the ICTR, Victor Peskin writes that ICTs “are fundamentally oriented toward delivering justice for the global community and establishing precedents for the further extension of international law.”²⁴

A tendency towards institutional growth also appears to have influenced international criminal tribunals, suggesting that atrocity prosecutions lead to the expansion of their supporting institutions. During its first years, the ICC for instance seemed to favor cases likely to preserve good relations with major powers, arguably protecting its institutional

²⁰ Keck and Sikkink, *supra* note 18; Mark Osiel, *supra* note 8 at 235-36.

²¹ Lutz and Reiger, “Introduction” in Lutz and Reiger, *supra* note 2 at 12, 30-31, 61.

²² Victor Peskin, *International Justice in Rwanda and the Balkans* (Cambridge: Cambridge University Press, 2008) at 164, 235-39.

²³ Heather Smith, *Insincere Commitments: Human Rights Treaties, Abusive States, and Citizen Activism* (Georgetown: Georgetown University Press, 2012) at 1.

²⁴ Peskin, *supra* note 22 at 132.

future.²⁵ The ICC further supported domestic proceedings where international trials were likely to upset major powers, and discouraged domestic proceedings in the presence of state cooperation making international prosecutions more easily feasible.²⁶ Several authors claim that international tribunals have favored their institutional development at the expense of their domestic impact. Phil Clark thus criticizes the ICC's general lack of on-site presence and overall lack of consideration of domestic accountability initiatives.²⁷ In a similar vein, Mark Drumbl writes that "the main beneficiary of the ICTR's work arguably has been the international community – whether in terms of assuaging guilt or developing international criminal law – and not Rwandans."²⁸ Similar criticism can also be found in relation to other international criminal tribunals.²⁹ Like human rights professionals, ICTs arguably shaped international criminal justice in such a way as to serve their objectives and further their development. In line with Durkheim's insight, several authors note that these tribunals mainly influenced the international community, making atrocity accountability "increasingly internalized as part of the 'fabric of emerging international society.'"³⁰

II. THE WEST

The preceding has argued that atrocity justice has consolidated the international community's human rights professional group and institutional apparatus, and ultimately strengthened the norm against atrocity within international circles first and foremost. With

²⁵ Kersten, *supra* note 7 at 163-64.

²⁶ Sarah Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: Cambridge University Press, 2013) at 13-14.

²⁷ Phil Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge: Cambridge University Press, 2018) at 294-95, 298-300; Padraig McAuliffe, "From Watchdog to Workhouse: Explaining the Emergence of the ICC's Burden-Sharing Policy as an Example of Creeping Cosmopolitanism" (2014) 13 Chinese J Int'l L 233.

²⁸ Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2007) at 132. Similarly, in general, Nicola Palmer, *Courts in Conflict: Interpreting the Layers of Justice in Post-genocide Rwanda* (Oxford: Oxford University Press, 2015). Sara Kendall and Sarah Nouwen's study of ICTR legacy materials suggests that the ICTR prioritized its institutional development over its national impact. Sara Kendall and Sarah Nouwen, "Speaking of Legacy: Toward an Ethos of Modesty at the International Criminal Tribunal for Rwanda" (2016) 110 AMJIL 212 at 216.

²⁹ Abul Cole, "A Big Man in a Cell: Charles Taylor and the SCSL" in Lutz and Reiger, *supra* note 2 at 215; Refik Hodzik, "Accepting a Difficult Truth: ICTY is not our Court", *Balkan Insight* (2 March 2013); Nerida Chazal, *The International Criminal Court and Global Social Control* (London: Routledge, 2018) at 99.

³⁰ Harold Koh, "Why Do Nations Obey International Law?" (1997) 106 Yale LJ 2599 at 2655; Theodor Meron, "Answering for War Crimes: Lessons from the Balkans" (1997) 76 Foreign Affairs 2 at 7.

the effects of international criminal justice on the international community presented, the discussion will now move to the second group culturally closest to the international criminal justice institutions, namely populations living in Western countries. The following section discusses the history of atrocity prosecutions after the Second World War, both before domestic and international tribunals. It will be argued that both types of prosecutions strengthened the norm against atrocity and helped make it a central, identity-defining value in Western countries.

(A) Domestic Prosecutions and the Norm against Atrocity

Several important domestic atrocity prosecutions have taken place between the end of the Second World War and the Fall of the Berlin Wall. One may think of the thousands of collaborator prosecutions after the Second World War, or of the streak of major Holocaust-related prosecutions during the 1970s and 1980s.³¹ Other examples include the Greek, Portuguese and Argentinian Junta trials.³² Some “captured the public imagination” according to Mark Osiel.³³ Describing the Argentinian trials, Carina Perelli writes that “all the media gave ample coverage to an event discussed in squares and cafes by poor and rich alike.”³⁴ Another author depicted France’s Papon Trial as a “mass-mediated event of an unprecedented scale.”³⁵ Other domestic trials have been described as “an enormous national psychodrama,” a “spectacle [that] riveted the nation,” or as having “deeply affected the moral consciousness of the people.”³⁶ On the whole, such prosecutions

³¹ Fritz Weinschenk, “Nazis before German Courts: The West German War Crimes Trials” (1976) 10:3 Int’l Lawyer 515; Neil Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Vol II* (New York: US Institute of Peace Press, 1995) at 83 et seq; Ruti Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2002) at 39.

³² Osiel, *supra* note 8 at 207; Malamud-Goti, *Game Without End: State Terror and the Politics of Justice* (Norman: University of Oklahoma Press., 1996) at 26; Sikkink *supra* note 15 at 33, 46.

³³ Osiel, *supra* note 8 at 2.

³⁴ Nancy Wood, “Memory on Trial in Contemporary France: The Case of Maurice Papon” (1999) 11:1 Hist & Memory 41 at 41-42.

³⁵ Carina Perelli, “Memoria de Sangre: Fear, Hope, and Disenchantment in Argentina” in Jonathan Boyarin, ed, *Remapping Memory* (Minneapolis: University of Minnesota Press, 1994) 39 at 49-50; On the media coverage of the Touvier trial, Leila Wexler, “Reflections on the Trial of Vichy Collaborator Paul Touvier for Crimes Against Humanity in France” (1995) 20 L & Soc Inq 191 at 191.

³⁶ Respectively, Emmanuel Roy Ladurie, “The Trial of Vichy France”, *The Economist* (12 February 1983) at 55; Sandra Suguwara, “South Korean Court Sentences Ex-Rulers to Prison, Death”, *Washington Post* (26 August 1996) A01; Carlos Nino, *Radical Evil on Trial* (New Haven: Yale University Press, 1996) at 90.

contributed to important societal transformations.³⁷ By unveiling the horrors of the past, these events helped discredit the former regime and its authoritarian style, and strengthened the regime in power and its democratic style.³⁸ By way of repetition, these events contributed to normalizing atrocity justice, especially where they were most mediatized.³⁹

Each took place in the aftermath of significant military defeats, as popular opinion called for the punishment of national leaders.⁴⁰ Kathryn Sikkink thus writes that Portuguese and Greek protest crowds chanted slogans “harken[ing] back to ancient cries of ‘Death to the King!’ [...] suggesting] some kind of ritual cleansing of the body politic through the sacrifice of the leader.”⁴¹ Studies suggest that public discourse in the ensuing years tended to blame former national leaders while absolving the general population.⁴² Writing on the legacy of the Holocaust, Judith Miller states that “in every country, every culture [...] irrespective of national character or political ideology [...] self-deception has usually triumphed over self-revelation.”⁴³ Only decades later, after significant periods of stagnation and setbacks, did subsequent generational cohorts partly recognise the broader societal involvement having facilitated such crimes.⁴⁴ These changes took place after much discussion about the past had taken place in fora as diverse as truth commissions,

³⁷ In Germany, Ian Buruma, *The Wages of Guilt: Memories of War in Germany and Japan* (London: Vintage, 1995) at 149; Hannah Arendt, “Introduction” in Bernd Naumann, *Auschwitz: A report on the Proceedings against Robert Ludwig Mulka and others before the Court at Frankfurt* (New York: Praeger, 1966) at xi; Aleksander Lasik, “Postwar Prosecution of the Auschwitz SS” in Yisrael Gutman and Michael Berenbaum, eds, *Anatomy of the Auschwitz Death Camp* (Bloomington: Indiana University Press, 1994) 588 at 588-89.

³⁸ In Germany, Giesen, *supra* note 10 at 32, 123-25. In France, Henry Rousso, *Le Syndrome de Vichy de 1944 à nos jours* (Paris: Seuil, 1990) at 43, 46. In Argentina, Alison Brysk, *The Politics of Human Rights in Argentina: Protest, Change, and Democratization* (Stanford: Stanford University Press, 1994) at 73. In general, Juan Linz and Alfred Stepan, *The Breakdown of Democratic Regimes: Crisis, Breakdown and Reequilibration. An Introduction* (Baltimore: Johns Hopkins University Press, 1978) at 45-46.

³⁹ On the regional influence of prosecutions, Sikkink, *supra* note 15 at 87; Cardenas, *supra* note 6 at 113.

⁴⁰ Noting the incidence of the German defeat during the Second World War, the Greek defeat in Cyprus, the Portuguese defeat in its African colonies, and of the Argentinians in the Falklands, Osiel, *supra* note 8 at 207; Malamud-Goti, *supra* note 32 at 26; Sikkink, *supra* note 15 at 33, 46.

⁴¹ Sikkink, *supra* note 15 at 33.

⁴² Alexander Mitscherlich and Margarete Mitscherlich, *The Inability to Mourn* (New York: Grove Press, 1975) at 20-21; Giesen, *supra* note 10 at 123, 125, 130, 132; Malamud Gotti, *supra* note 32 at 112.

⁴³ Judith Miller, *One, by One, by One: Facing the Holocaust* (New York: Simon & Schuster, 1990) at 279; Herbert Hirsch, *Genocide and the Politics of Memory* (Chapel Hill: North Carolina Press, 1995) at 28.

⁴⁴ Osiel, *supra* note 8 at 205-206; Malamud-Goti, *supra* note 32 at 147 and 97; Rousso, *supra* note 38 at 147.

parliamentary inquiries, town meetings, museums and memorials, sponsored scholarly inquiries, popular artistic productions, speeches and talk shows.⁴⁵

These trials arguably conveyed their message by concentrating guilt in the defendant, thereby sheltering society at a time when sincere engagement with the past would have been unfeasible.⁴⁶ By reducing its intellectual content to amplified perceptions of evil and virtue, the law's message arguably opened the door for long-term societal debate, gradually making this subject sufficiently uncontroversial to appear in best-selling movies, television series and novels.⁴⁷ While chapter 3 has shown that persecutory violence mobilizes society against a victim group, these proceedings can be said to have mobilized society against atrocity-perpetrating regimes. This is suggested by the radical change in status accorded to victims and resistance members, who became society's heroes and martyrs.⁴⁸ The process further allowed society to acknowledge the past, first by dissociating from and blaming its leaders, and, as subsequent generational cohorts came of age, doing the same with their parents' age group. "The act of accusing," thus writes François Tricaud, "magically exonerates the accusing party by establishing between it and the accused a sort vector, by which all moral purity finds itself at one extremity and all impurity at the other."⁴⁹ Further suggesting that this communicational process is one of scapegoating, finally, is the following observation, by Nicolas Meienberg, on Swiss pro-Nazi prosecutions after the Second World War: "given the extent of popular anger [... there existed] a need to find scapegoats."⁵⁰

⁴⁵ Richard Bosworth, *Explaining Auschwitz and Hiroshima: History Writing and the Second World War 1945-1990* (New York: Psychology Press, 1993) at 159-60; Naomi Roth-Arriaza and Margaret Popkin, "Truth as Justice: Investigatory Commissions in Latin America" (1995) 20:1 Law and Social Inquiry 79 at 79-80; Rousso, *supra* note 38 at 286.

⁴⁶ While authors decry that such proceedings often demonize defendants and mask the causes of violence, these characteristics arguably corresponded to the mental gymnastics required to initiate societal engagement with the past. See Mahmood Mamdani, *Saviors and Survivors – Darfur, Politics and the War on Terror* (London: Verso, 2009) at 273; Juan Branco, *L'ordre et le monde* (Paris: Fayard, 2016) at 225; Frédéric Mégret, "The Politics of International Criminal Justice" (2002) 13:5 EJIL 1261 at 1272-74; David Forsythe, "International Criminal Courts: A Political View" (1997) Neth Q Hum R 5 at 9.

⁴⁷ As argued in chapter 2, artists and the public arguably felt secure exploring these themes knowing that they had officially been condemned by the state. More broadly, Hannah Arendt, *On Violence* (New York: Harcourt, 1970) at 55; Michael Ignatieff, "Articles of Faith" (1996) 25:5 Index Cens. at 117.

⁴⁸ Osiel, *supra* note 8 at 151.

⁴⁹ Author's translation of François Tricaud, *L'accusation : recherche sur les figures de l'agression éthique* (Paris: Dalloz, 1977) at 27.

⁵⁰ Nicolas Meienberg, *Reportages en Suisse : L'exécution du traître à la patrie* (Geneva: Zoé, 1976) at 53.

(B) International Prosecutions and the Norm against Atrocity

International prosecutions have had a similar, yet reduced influence over Western society, furthering a collective identity opposed to the horrors of defeated national rivals, in favor of international norms against atrocity. The first and most influential international prosecutions were the Nuremberg trials, in the aftermath of the military defeat of a fearsome military rival. Reflecting popular interest in this event was the widespread media coverage, which boasted heroic headlines such as “a cause for pride,” “a magna carta,” or “a shining landmark in the moral development of mankind and for peace.”⁵¹ Importantly, the trial revealed the horrors of the Holocaust to a largely unknowing Western public.⁵² The subject broadly defined continued, years later, to exert cultural influence as best-selling artistic works such as Ann Frank’s *Diary* and the *Holocaust* miniseries were produced.⁵³ Authors note that Nuremberg’s moral lessons – from the dangers of authoritarianism to conscientious objection and human rights – were progressively expanded to related political themes.⁵⁴ Thus, Cover writes that “millions of Americans took the Nuremberg principles as their guide for conduct in opposing the Vietnam conflict.”⁵⁵ Noting a transformation during the Cold War, Levy and Sznajder thus write that “self-criticism based on the Holocaust, which before [...] could be dismissed as unique to the

⁵¹ On the popularity of the trials, John Kennedy, *Profiles in Courage* (New York: Harper, 1956) at 216. One observer went as far as to claim that these trials broke the record of the largest group of journalists ever gathered in the same place. Janet Flanner, “Letter from Nuremberg” *New Yorker* (16 March 1946). The headlines are respectively in *Brooklyn Eagle* (8 October 1946); *New York Times* (29 September 1946); *Los Angeles Times* (2 October 1946); *Washington Evening Star* (17 October 1946).

⁵² Theodor Klefisch, “Thoughts about the Purport and Effect of the Nuremberg Judgment” in Wilbourne Benton and Georg Grimm, eds, *Nuremberg: German Views of the War Trials* (Dallas: Southern Methodist University Press, 1956) 209 at 211-17; William Bosch, *Judgment on Nuremberg: American Attitudes toward the Major German War-Crimes Trials* (Chapel Hill: University of North Carolina Press, 1970) at 233; Avaishai Margalit and Gabriel Motzkin, “The Uniqueness of the Holocaust” (1996) 25 *Phil and Pub Affairs* 65 at 67.

⁵³ Jeffrey Shandler, *While America Watches: Televising the Holocaust* (Oxford: Oxford University Press, 1999) at 155-78.

⁵⁴ Daniel Levy and Natan Sznajder, *The Holocaust and Memory in the Global Age* (Philadelphia: Temple University Press, 2006) at 113-14.

⁵⁵ Robert Cover, “The Folktales of Justice” (1985) 14 *Capital University Law Review* at 199.

German case, has now become the norm.”⁵⁶ Finally, the notion of human rights, initially conceived as matter of foreign policy, gradually became central in domestic politics.⁵⁷

In a similar vein, the taboo of persecutory crimes continued to accentuate after the end of the Cold War. News coverage of the Yugoslav conflict replicated the archetypal figure of the emaciated concentration camp internees and called for the application of the “Nuremberg precedent.”⁵⁸ One of the main reasons behind international intervention in the Balkans, according to one observer, was that these images “conjured up memories of the Holocaust.”⁵⁹ Hinting at perceptions of rivalry, Rorty states that “we [...] feel about the Serbian torturers and rapists as they feel about their Muslim victims: they are more like animals than like us.”⁶⁰ American Senator Bob Dole, when speaking on the imposition of an arms embargo in the region, stressed that “this [was] not just a vote about Bosnia. It’s a vote about America. It’s a vote about what we stand for, our humanity and principles.”⁶¹ Ensuring peace and justice in the region had, in line with Durkheim’s insight, acquired a nearly patriotic value. The Rwanda crisis similarly added resonance to the genocide label. American media brought the Darfur genocide to attention during the tenth anniversary of the Rwandan genocide.⁶² The same year, the House and the Senate passed resolutions to affirm that genocide was occurring, marking the first time in history a legislative branch did so as the violence unfolded.⁶³ International prosecutions consequently became a reality as the norm against atrocity took root in Western society. While no comprehensive

⁵⁶ Levy and Sznajder, *supra* note 54 at 196.

⁵⁷ Cynthia Soohoo, Catherine Albisa and Martha Davis, *Bringing Human Rights Home* (Irvine: Greenwood, 2008).

⁵⁸ “The Story of this Shocking Image from a Camp Continues 25 Years Later”, *Time* (22 November 2017); Eric Bourne, “Opinion: the Nuremberg Precedent”, *Christian Science Monitor* (9 October 1992); Ina Waddell, “A Force to Reckon with: How and why an International Court would Help”, *Vancouver Sun* (10 October 1992); Arlen Specter, “Get on with War Crimes Trials”, *Washington Post* (9 November 1993).

⁵⁹ Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000) at 281.

⁶⁰ Richard Rorty, “Human Rights, Rationality and Sentimentality” in Richard Rorty, ed, *Truth and Progress: Philosophical Papers* (Cambridge: Cambridge University Press, 1998) 111 at 167.

⁶¹ Cited Samantha Power, *A Problem from Hell* (New York: Basic Books, 2013) at 429.

⁶² Samantha Power, “Remember Rwanda but Take Action in Sudan”, *New York Times* (6 April 2004); Richard Williamson, “Stop Genocide in Sudan”, *Chicago Sun Times* (11 April 2004); Khadir Ahmed, “Another Side to the Sudan Story”, *Washington Post* (11 March 2004).

⁶³ “Powell Calls Sudan Killings Genocide”, *CNN* (9 September 2004); Rebecca Hamilton, *Fighting for Darfur: Public Action and the Struggle to Stop Genocide* (New York: St. Martin’s, 2011) at 45, 47.

information exists on their news coverage, it is suggested that prosecutions concerning rival and strategically insignificant states are generally received positively.

III. NON-WESTERN STATES

The preceding section depicted atrocity prosecutions as part of a trend in Western countries, through which consensus in favor of the norm against atrocity progressively increased. Where this consensus initially defined postwar regimes against the atrocities committed by their National Socialist rival, distant atrocities posing no substantive threat to the West were eventually perceived following a similar frame of reference. That this trend mostly occurred in Western states however suggests another difficulty. The following section examines if and to which extent this pattern applies in other societies, beginning at the elite level with post-conflict regimes, and continuing, at the popular level, with victim groups.

(A) Post-Conflict Regimes

Undemocratic regimes also disseminate the norm against atrocity by uniting their constituents in condemnation of the horrors committed by their rivals. Thanks to their role in many independence struggles, international norms, including human rights, often enjoy a measure of political salience among post-colonial elites.⁶⁴ Leaders often respond to international scrutiny in the idiom of international justice, depicting themselves as embattled in a heroic struggle against imperial forces.⁶⁵ Writing on the Pinochet regime, Sonia Cardenas for instance states that “international pressure [served as] an explicit call for national identity and unity, a means of confronting the unjust accusations of international actors who were conspiring with [domestic enemies].”⁶⁶ In anticipation of

⁶⁴ Roland Burke, *Decolonization and the Evolution of International Human Rights* (Philadelphia: University of Pennsylvania Press, 2010); Onkemetse Tshosa, *National Law and International Human Rights Law: Cases of Botswana, Namibia and Zimbabwe* (Burlington: Ashgate 2001) at 110, 172; Kamari Clarke, *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback* (Durham: Duke University Press, 2019) at 78.

⁶⁵ Frédéric Mégret, “Cour pénale internationale et néocolonialisme : au-delà des évidences” (2014) 45:1 *Études internationales* 27 at 29-30; Clarke, *ibid.*

⁶⁶ Cardenas, *supra* note 6 at 87.

criticism, Argentine General Jorge Videla similarly described his coup as opening a new historical cycle in which “respect for human rights is not only borne out by rule of law and international declarations [but also] the result of our profound belief in the preeminent dignity of man.”⁶⁷ Kenyan leader and ICC indictee Uhuru Kenyatta, according to Snyder, likewise “gained popularity by decrying the imperialism of the court and used this platform to unite with his political rival.”⁶⁸ Whether sincere or not, the Durkheimian framework uniting the population against perceived perpetrators remains at play.

What is more, post-conflict regimes increasingly prosecute their political opponents.⁶⁹ Defeated regimes for instance faced human rights prosecutions in Ethiopia, Cambodia and Nicaragua.⁷⁰ Prosecutions in Greece, Portugal and Argentina occurred in the context of a long tradition of political trials.⁷¹ Atrocity prosecutions in Senegal, Sierra Leone, and Rwanda have targeted regime opponents.⁷² Virtually all state cooperation before the ICC has targeted regime opponents.⁷³ While most domestic prosecutions and ICC cooperation have thus far been motivated by one-sided political justice, such initiatives were nevertheless anchored in international human rights norms. Undemocratic regimes thus use human rights to define themselves against their rivals “above,” among international society and “below,” among weaker political rivals.⁷⁴ Much in the same way as Girard notes that

⁶⁷ Speech by Jorge Videla: “A Time for Fundamental Reorganization of the Nation, 1976,” reprinted in Brian Loveman and Thomas Davies Jr, eds, *The Politics of Antipolitics* (Lincoln: University of Nebraska Press, 1978) 177 at 178-80.

⁶⁸ Jack Snyder, *Human Rights for Pragmatists: Social Power in Modern Times* (Princeton: Princeton University Press, 2022) at 101.

⁶⁹ Lutz and Reigger, *supra* note 2; Claude Welch Jr., *Protecting Human Rights in Africa* (Philadelphia: University of Pennsylvania Press, 1995) at 21-22.

⁷⁰ Julie Mayfield, “The Prosecution of War Crimes and Respect for Human Rights: Ethiopia’s Balancing Act - Notes and Comments” (1995) 9:2 *Emory Int’l L Rev* 553; Evan Gottesman, *Cambodia after the Khmer Rouge: Inside the Politics of Nation Building* (New Haven: Yale University Press, 2003) at 4, 63; “7000 will face trial in Nicaragua”, *New York Times* (10 December 1979).

⁷¹ Sikkink, *supra* note 15 at 53 and 69.

⁷² Thomas Hammarberg, “How the Khmer Rouge Tribunal was Agreed” *Magazine of the Documentation Center of Cambodia* (2001); Alexander Hinton, *The Justice Façade: Trials of Transition in Cambodia* (Oxford: Oxford University Press, 2018) at 44, 47; José Alvarez, “Crimes of States/Crimes of Hate: Lessons from Rwanda” (1999) 24 *Yale J Int’l L* 365 at 410-12; Lutz and Reigger, *supra* note 2 at 37-38, 210.

⁷³ Hillebrecht and Scott Straus, “Who Pursues the Perpetrators? State Cooperation with the ICC” (2017) 39:1 *Hum R Quart* 162; Oumar Ba, *States of Justice: The Politics of the International Criminal Court* (Cambridge: Cambridge University Press, 2020); Nouwen, *supra* note 26 at 117, 237, 372.

⁷⁴ Hinton, *supra* note 72 at 47; Welch, *supra* note 69 at 215; Bonny Ibaoh, *Human Rights in Africa* (Cambridge: Cambridge University Press, 2018) at 179-82, 198.

rivals tend to be “assimilated by” the object of their rivalry, being drawn into the same behaviours by their pursuit of the same objective, so are post-conflict regimes often locked into a dynamic, through which human rights increasingly determine the terms of the debate. Human rights scrutiny, especially from important players, in turn leads to human rights initiatives.⁷⁵ Writing on Sudan and Uganda, Nouwen thus notes that “domestic courts specialising in international crimes proliferated,” leading to the establishment of “mini ICCs mimicking the court.”⁷⁶ Cardenas writes that international pressure in Chile and Argentina “led to monitoring, which facilitated subsequent international pressure, and to strengthening the domestic political opposition, which also made further international pressure possible and was significant for later democratization.”⁷⁷ Transnational pressure may lead to concessions which are initially minor but gradually become significant.⁷⁸

(B) Post-Conflict Societies

Despite frequent disappointments with international criminal justice, victims are often satisfied that some form of official sanction be imposed against their former tormentors.⁷⁹

⁷⁵ Such was the case in Bahrain and Myanmar, leading to the establishment of a Commission and a Court of Inquiry mirroring international standards. Pinochet similarly established a Secretariat for Detainees facetiously depicted as a humanitarian organization. Argentina placed a few high-profile but politically marginalized officers in preventive detention to fend off international pressure to extradite officers to Spain. Kate Cronin-Furman, *Hypocrisy and Human Rights: Resisting Accountability for Mass Atrocities* (Ithaca New York: Cornell University Press, 2022) at 90; Sikkink, *supra* note 15 at 78; Cardenas, *supra* note 6 at 57.

⁷⁶ Steps have also been taken by the AU to provide the ACJHR with criminal jurisdiction by “replicating [...] the structure and logic of the crimes [...] in the Rome Statute,” according to Kamari Clarke. Clarke, *supra* note 64 at 194 et seq. and 206 et seq. That ICC activity in Kenya coincided with “the most sustained period of legal reforms in the country’s history,” Lionel Nichols, *The International Criminal Court and the End of Impunity in Kenya* (Heidelberg: Springer, 2015) at 183. Nouwen, *supra* note 26 at 10, 254.

⁷⁷ Cardenas, *supra* note 6 at 99. See also Kathryn Sikkink, “Human Rights, Principled Issue-Networks, and Sovereignty in Latin America” (1993) 47:3 Int Org 411 at 426.

⁷⁸ According to Risse and Sikkink, strategic concessions eventually entrap states in a series of precedents which, when political opposition is organized and tolerated, form the basis of further demands. “Eventually,” writes Cardenas, “as human rights norms become institutionalized and routinized, compliance can become consistent.” Thomas Risse and Kathryn Sikkink, “The Socialization of International Human Rights Norms into Domestic Practice: Introduction” in Thomas Risse, Steve Ropp and Kathryn Sikkink, eds, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press 1999) 1 at 27; Cardenas, *supra* note 6 at 20-21; Emilie Hafner-Burton and Kiyoteru Tsutsui, “Human Rights in a Globalizing World: The Paradox of Empty Promises” (2005) 110 Am J Soc 1373.

⁷⁹ *So We Will Never Forget: A Population-Based Survey on Attitudes About Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia* (Berkeley: University of California Human Rights Center, 2009) at 39-40; Diane Orentlicher *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (New York: Open Society, 2010) at 178.

Many overcome the cultural differences separating them from the judicial proceedings by reinterpreting the law's message against local beliefs and values. Merry terms this phenomenon "vernacularization," giving the example of a group of rural Hong Kongese having effectively reframed their legal status as victims against traditional notions of family obligations.⁸⁰ Alexander Hinton's study in Cambodia similarly shows that ECCC victim witnesses interpreted the proceedings against traditional beliefs. In spite of cultural differences, many were satisfied with the tribunal's contribution to restoring the dignity of the dead.⁸¹ Finally, studies on court outreach and human rights training suggest that such activities often yield positive results when vernacularized by legitimate local actors.⁸²

Human rights accountability initiatives can also mobilize victims into an influential political group.⁸³ Writing on human rights activism in the last years of the USSR, Daniel Thomas argues that groups of diverse origins "coalesced into well-organized human rights and opposition groups, focused on [human rights] norms," eventually to become "more politically catalytic [in some republics] than any produced in three decades of Communist rule."⁸⁴ A similar pattern is documented among widowed victim activists in Argentina and Bosnia, which Sikkink and Nettelfield respectively show to have been unified by a common language and cause against their persecutors.⁸⁵ Such victim groups may potentially influence the rest of society, as has been the case in a number of Western democracies. In post-Holocaust France and Germany, in the United States and in post-

⁸⁰ Sally Merry, *Human Rights and Gender Violence* (Chicago: University of Chicago Press, 2006) at 103-34.

⁸¹ Hinton, *supra* note 72 at 103, 180, 207-08, 244.

⁸² "After this workshop," one participant states, "I changed my mind. Human rights are not alien, but something that exists [...] in our religion and culture." Afghanistan Independent Human Rights Commission, "Annual Report, January 1-December 31, 2009" at 25. On outreach, Orentlicher, *supra* note 79 at 82; Jessica Lincoln, *Transitional Justice, Peace and Accountability: Outreach and the Role of International Courts after Conflict* (New York: Routledge, 2017).

⁸³ Arguing that social movements create a common identity, more generally, Sidney Tarrow, *The New Transnational Activism* (Cambridge: Cambridge University Press, 2005).

⁸⁴ Joshua Rubenstein writes that "nationalists in different republics, religious believers, Zionists, and Moscow dissidents, could use a common vocabulary and recognize their common antagonist." Joshua Rubenstein, *Soviet Dissidents: Their Struggle for Human Rights* (Boston: Beacon, 1980) at 228. Daniel Thomas, *The Helsinki Effect: International Norms, Human Rights, and the Demise of Communism* (Princeton: Princeton University Press, 2001) at 122, 162-63, 172, 176-77.

⁸⁵ Kathryn Sikkink, "From Pariah State to Global Protagonist: Argentina and the Struggle for International Human Rights" (2008) 50:1 *Latin American Politics and Society* 1; Lara Nettelfield, *Courting Democracy in Bosnia and Herzegovina* (Cambridge: Cambridge University Press, 2010) at 101.

Junta Argentina, the eventual adequation between victim activism and popular sentiment gave this group particular salience, favoring the development of a national identity fundamentally defined against their former tormentors.⁸⁶ Taking the French example, Mark Osiel thus writes that “victims and résistants bec[a]me saints and martyrs and celebrities at once.”⁸⁷ Similar patterns may occur outside the West. In survivor countries such as Israel, Armenia and Rwanda, victim activism for instance coincided with popular opinion and resulted in a multitude of governmental initiatives including atrocity prosecutions.⁸⁸ In Durkheimian terms, this fostered a collective identity stressing victimhood and resistance.

IV. THE FUTURE

The preceding has argued that human rights professionals, regime leaders and victim groups reinterpret atrocity justice in such a way as to further a heroic collective identity, defined in opposition to tyranny and formally presented as in favor of international human rights norms. This last section moves the discussion to the future of atrocity justice. While periods of stagnation and setbacks inevitably await, the following argues that the driving forces having favored the development of international human rights and criminal law however seem unlikely to vanish. This section presents arguments to this effect before cautioning that this process is however largely limited to industrialized democracies.

(A) The Long-Term Expansion of Human Rights in History

Several works on the evolution of morals describe a long-term trend in favor of the diffusion of equality norms favoring human rights.⁸⁹ Singer’s *The Expanding Circle* shows

⁸⁶ Jeffrey Alexander, “Toward a Theory of Cultural Trauma” in Jeffrey Alexander et al, eds, *Cultural Trauma and Collective Identity* (Berkeley: University of California Press, 2004) 1; Rousso, *supra* note 38 at 28-30, 59; Alison Brysk, *The Politics of Human Rights in Argentina* (Stanford: Stanford University Press, 1994) at 73.

⁸⁷ Osiel, *supra* note 8 at 151.

⁸⁸ Leora Bilsky, *Transformative Justice: Israeli Identity on Trial* (Ann Arbor: University of Michigan Press, 2004); Razmik Panossian, *The Armenians: From Kings and Priests to Merchants and Commissars* (New York: Columbia University Press, 2006) at 12; Palmer, *supra* note 28.

⁸⁹ Classics on this theme include Henry Maine, *Ancient Law: Its Connection to The History of Early Society* (London: Lector House, 2020); Edward Westermarck, *Ethical Relativity* (New York: Harcourt, 1932); Norbert Elias, *The Civilizing Process: Sociogenetic and Psychogenetic Investigations* (Oxford: Wiley, 2000).

that groups entitled to fair and equal treatment have expanded in time to include identities increasingly remote from the majority.⁹⁰ After having recognized the logical inconsistency of denying to one in-group member what others within it should be entitled to, Singer argues, societies have increasingly applied this reasoning to other groups.⁹¹ Lynn Hunt's *Inventing Human Rights* illustrates this insight with the 18th century example of the granting of equal rights to Catholics and Protestants in France. Noting that this rapidly led other marginalized groups to obtain similar protections, Hunt stresses the key role played by logical consistency in debates leading to these changes.⁹² Pinker's *Better Angels of our Nature* summarizes several strands of scholarship showing the emergence of similar transformations.⁹³ According to this scholarship, the rise of rational thought favored the extension of impartiality reasoning to groups until then considered outsiders, having made increasingly untenable the incoherence of considering some groups equal but not others. Others, from Westermarck to Elias, stress the rise of empathy.⁹⁴ One may argue that atrocity justice furthers this process, operating on the basis of equality norms playing on our need for consistency, and on the basis of emotions by revealing atrocity knowledge.

Examples show that knowledge of atrocity, in the form of scenes of horror, can move audiences out of adversarial allegiances.⁹⁵ One author stresses how Soviet and American leaders were impacted by the detailed description of human suffering contained in NGO reports on the USSR, helping move East-West negotiations out of the Cold War status quo.⁹⁶ Another author notes that the decisive moment having moved the U.N. General Assembly out of its complacent stance towards South African apartheid took place just

⁹⁰ Peter Singer, *The Expanding Circle: Ethics, Evolution, and Moral Progress* (Princeton: Princeton University Press, 1981). On the increasing consideration of others, Elias, *ibid.* Noting rising empathy, Peter Spierenburg, *The Spectacle of Suffering: Executions and the Evolution of Repression: From a Preindustrial metropolis to the European Experience* (Cambridge: Cambridge University Press, 1984) at 185; Westermarck, *supra* note 89, ch 7.

⁹¹ Singer, *supra* note 90 at 99-100, 118.

⁹² Lynn Hunt, *Inventing Human Rights: A History* (New York: Norton, 2007) at 147.

⁹³ Steven Pinker, *The Better Angels of Our Nature: Why Violence Has Declined* (New York: Penguin, 2012).

⁹⁴ Elias, *supra* note 89; Spierenburg, *supra* note 90 at 185; Westermarck, *supra* note 89, ch 7.

⁹⁵ Henry Dunant's notorious 1859 encounter with scenes of suffering on the Solferino battlefield constitutes an early example, in which the clash between the reality and the embellished narratives of heroism ordinarily attached to war encouraged Dunant to found the Red Cross. Another example is the unprecedented apparition of literary works by soldiers expressing empathy for their adversaries. Pinker, *supra* note 93 at 443.

⁹⁶ Thomas, *supra* note 84 at 128-30, 226-38.

after the bloody Sharpeville killings, whose widespread reporting triggered worldwide outrage.⁹⁷ Another example is the impact of televised reporting of the Tet Offensive on American popular support for the Viet Nam War, which plummeted after scenes of horror appeared on screen.⁹⁸ One may argue that by unveiling atrocity knowledge and normalizing its diffusion, atrocity justice contributes, in indirect and longitudinal fashion, to preventing wars and persecutions.⁹⁹ Indeed, the diffusion of knowledge of atrocity has, according to some, been associated with a reduction of the patriotic appeal traditionally invested in war and a better understanding of persecutions.¹⁰⁰ When little was known about persecutions a century ago,¹⁰¹ authors argue that a host of best-selling artistic and educational works now makes it more difficult for its ideology and distortions to take hold of entire societies.¹⁰²

(B) Specificities of the Historical Process

In order to produce consistent results, however, human rights pressure requires the free circulation of information, ideally amid a large network of independent judges, journalists, civil society activists and opposition politicians.¹⁰³ Another factor conducive to a human rights culture is the existence of an established political tradition and structure effectively

⁹⁷ Audie Klotz, *Norms in International Relations: The Struggle against Apartheid* (Ithaca: Cornell University Press, 1995) at 44-45.

⁹⁸ Edward Herman and Noam Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (New York: Knopf Doubleday Publishing Group, 2002) at 328.

⁹⁹ Speaking of a “negative epiphany” against war, upon seeing images of atrocities, Susan Sontag, *On Photography* (New York: Anchor, 1989) at 19. Noting an instinctive curiosity in relation thereto, Georges Bataille, “Concerning the Accounts Given by the Residents of Hiroshima” in Cathy Caruth, ed., *Trauma: Explorations in Memory* (Baltimore, John Hopkins University Press, 1995) 221 at 232.

¹⁰⁰ Giesen, *supra* note 10 at 123, 125, 130, 132; Levy and Sznajder, *supra* note 54 at 196; Michael Cunningham, “Saying Sorry: The Politics of Apology” (1999) 70:3 Pol Quart 285.

¹⁰¹ While the historical constant has been that news of atrocity perpetration never reached mass audiences, the cultural sensibilities and technological devices at our disposal have now fundamentally changed this Simmons, *supra* note 4 at 28-34, 54; Hamilton, *supra* note 63 at 205; Randle DeFalco, *Invisible Atrocities: The Aesthetic Biases of International Criminal Justice* (Cambridge: Cambridge University Press, 2022) at 43.

¹⁰² René Girard, *Violence and the Sacred* (London: Bloomsbury, 1977) at 25; René Girard, Jean-Michel Oughourlian and Guy Lefort, *Things Hidden since the Foundation of the World* (Stanford: Stanford University Press, 1987) at 128.

¹⁰³ Kathryn Sikkink, *Evidence for Hope: Making Human Rights Work in the 21st Century* (Princeton: Princeton University Press, 2019) at 116; Cronin, *supra* note 75 at 15; Beth Simmons, “International Law and State Behavior: Commitment and Compliance in International Monetary Affairs” (2000) 94:4 Am Pol Sci Rev 819; Bass, *supra* note 59 at 280.

available as an alternative to the regime in place.¹⁰⁴ Another factor is the disappearance of economic and geopolitical threats having legitimizing repression.¹⁰⁵ Several authors consequently conclude, like Emilie Hafner-Burton, that human rights work best in countries where they are least needed, and work least where they are most needed.¹⁰⁶ Considering that the vast majority of states having democratized after human rights accountability initiatives already enjoyed a democratic cultural heritage, one may wonder to which extent atrocity justice can disseminate the norm against atrocity in countries that have never been democratic.¹⁰⁷ Where the state closely controls the flow of information, the type of human rights backlash depicted in this dissertation unfortunately risks worsening the situation.¹⁰⁸

CONCLUSION

With its argument laid out, this chapter now ends with a criticism of the legalistic approach through which international criminal justice has predominantly been envisaged to date. More broadly, Mark Goodale speaks of the “the still-dominant approach to human rights of those scholars and activists who view any problems, let alone structural crises, to lie outside the international human rights system itself.”¹⁰⁹ Symptoms of this approach within ICTs include a lack of interest in outreach, a reluctance to hold *in situ* hearings, a lack of personnel with specialized country knowledge and a reluctance to recognize traditional

¹⁰⁴ Snyder, *supra* note 68 at 84-85.

¹⁰⁵ Cardenas, *supra* note 6 at 30, 76, 120. In the Soviet Union, Thomas, *supra* note 84 at 223.

¹⁰⁶ Christian Davenport, “Human Rights and the Democratic Proposition” (1999) 43 J Confl Res 92; Rhoda Howard and Jack Donnelly, “Human Dignity, Human Rights, and Political Regimes” (1983) 80:3 Am Pol Sci Rev 801; Emilie Hafner-Burton, “Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most” (2007) 44:4 J Peace Research 407; Simmons, *supra* note 4 at 65-66.

¹⁰⁷ E.g., Germany, Greece, Portugal, Poland, Czechoslovakia, Argentina and Chile. That ICTs have mostly helped human rights activists obtain strategic concessions and incited states to tackle specific forms of human rights violations under scrutiny, Jay Goodlife, Darren Hawkins, Christine Horne and Daniel Nielson, “Dependence Networks and the International Criminal Court” (2012) 56:1 Int Stud Quart 131; Geoff Dancy and Florencia Montal, “Unintended Positive Complementarity: Why International Criminal Court Investigations Increase Domestic Human Rights Prosecutions” (Paper delivered to the American Society of International Law Research Forum, Chicago, 6 November, 2014), [unpublished].

¹⁰⁸ Risse and Sikkink, *supra* note 78 at 23.

¹⁰⁹ Mark Goodale, *Reinventing Human Rights* (Stanford: Stanford University Press, 2022) at 6.

justice as a legitimate alternative.¹¹⁰ Reflecting a preference for stronger international institutions, Louise Arbour initially viewed the ICC's complementarity principle, which gives primacy to domestic jurisdictions, as "an absolute recipe for disaster," while Antonio Cassese found it questionable.¹¹¹ While understandable, such preferences often reflect an unproductively distrustful attitude towards domestic justice.¹¹² "Too often," writes Alexander Hinton, "national courts are viewed as political and as delivering a lesser form of justice even though they are potentially much more effective in terms of being attuned to the local context."¹¹³

Legalistic preferences thus contributed to the creation of what transitional justice scholars increasingly term an "experience-distant" form of justice, existing "from a degree of abstraction that facilitates legalistic, technocratic and depoliticized enactments of transitional justice."¹¹⁴ Yet the objective of international criminal justice is to influence post-conflict regimes and societies. At the outset of his tenure, Prosecutor Moreno-Ocampo himself stressed the importance of "maximizing the impact of [atrocities] trials, because the real duty is to investigate and prosecute in order to contribute to the prevention of future crimes."¹¹⁵ To expect compliance in a vacuum, without coupling legalistic demands with serious engagement with the sociocultural context, risks resulting in superficial effects

¹¹⁰ Clark, *supra* note 27 at 303; Jim Freedman, *A Conviction in Question: The First Trial at the International Criminal Court* (Toronto: University of Toronto Press, 2017) at 105; Lionel Barber, "Lunch with the FT: Sang-Hyun Song", *Financial Times* (13 March 2015).

¹¹¹ Sandra Raponi and Jennifer Llewellyn, "The Protection of Human Rights through International Criminal Law: A Conversation with Madame Justice Louise Arbour, Chief Prosecutor for the International Criminal Tribunals for the Former Yugoslavia and Rwanda" (1999) 57:1 *University of Toronto Faculty of Law Review* 90 at 96-97; Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003) at 355.

¹¹² In many cases, ICTs or human rights NGOs have actively opposed domestic initiatives. NGOs insisted that Gaddafi's son be tried in The Hague, in spite of Libyan authorities' willingness (and ability) to try him in Tripoli, Kersten, *supra* note 7 at 147. Deploring a similar pattern in ICL scholarship written by practitioners, Clark, *supra* note 27 at 305. Nouwen, *supra* note 26 at 354.

¹¹³ Hinton, *supra* note 72 at 46.

¹¹⁴ Hinton, *supra* note 72 at 22; Kiernan McEvoy, "Letting Go of Legalism: Developing a 'Thicker' Version of Transitional Justice" in Kiernan McEvoy and Lorna McGregor, eds, *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (London: Hart, 2008) 15; Rosemary Nagy, "Transitional Justice as Global Project: Critical Reflections" (2008) 29 *Third World Quart* 275 at 277.

¹¹⁵ Luis Moreno-Ocampo, "Keynote Address: Integrating the Work of the ICC into Local Justice Initiatives" (2005) 21:4 *Am U Int'l L Rev* 497 at 497.

likely to wane in the short term.¹¹⁶ Just as important as the observance of legalistic standards, for the future of international criminal justice, should be the observance of basic sociopolitical standards intended to ensure that its message stand a reasonable chance of influencing the population positively. In his recent critique of human rights, Goodale rightly states that international institutions and activists applying international norms can no longer afford to evoke a sense of local dispossession with such frequency and imperial indifference, and must instead seek to create a sense of repossession in the Global South.¹¹⁷

For this reason, national ownership of accountability initiatives should be understood as a precondition for the objectives of international criminal justice to be realized, at least in a portion of the cases before international criminal tribunals. Without national ownership, international criminal justice largely loses the opportunity to exert a meaningful influence. International criminal tribunals should further attempt to make themselves visible on the ground. One may think of an approach where proceedings likely to garner public attention are held in the capital or center of the afflicted region.¹¹⁸ Particularly important, as shown throughout this dissertation, are the methods through which information on the trial is redistributed to the population. One may doubt the desirability of holding proceedings likely to be seldom reported on, in univocally negative terms, by a tightly government-controlled press. Success should be measured by the trial's ability to inspire a string of mediatic and artistic productions, which arguably amounts to the most influential means through which its message can reach the population. The architects behind several influential domestic prosecutions have taken steps to ensure this, inviting renown artists,

¹¹⁶ Showing examples in the domain of democratization, Harri Englund, *Prisoners of Freedom* (Berkeley: University of California Press, 2006).

¹¹⁷ Goodale, *supra* note 109 at 163.

¹¹⁸ ICC personnel has taken steps in this direction in the RDC, Kenya and Northern Uganda situations, unfortunately to no avail. Rule 100 of the ICC Rules of Procedure and Evidence allows the Court 'to sit in a State other than the host State' if this change of the place of proceedings is considered to be 'in the interests of justice.' 6 See Rule 100 (1). One example is Finland's prosecution of Rwandan genocide suspect François Bazaramba. BBC, "Finnish Genocide Trial in Rwanda", (16 September 2009).

televising proceedings, following set genre conventions and selecting victim witnesses from all social strata.¹¹⁹

Finally, one may consider that a series of sociopolitical factors, including regime endorsement, should ideally be present beyond a minimal threshold for this message realistically to circulate. Local contexts may be studied in such a way as to determine which situations are likely to be improved by international criminal justice. In every situation, an influential constituency should be identified, which would be in a position to receive and recirculate the law's message domestically. Where this proves impossible, and no meaningful flow of information can realistically take place, it should be understood that international criminal justice is likely to worsen the situation. This recommendation closely aligns with Hafner-Burton's conclusion, on international human rights institutions, to the effect that "greater triage and localization will require an even sharper turn away from global legalism."¹²⁰ The objective, now that international criminal justice no longer is in its infancy, should be to move past its institutional development, and ensure its effective deployment. While undemocratic regimes should still be investigated and condemned, more time and energy should be spent on situations where positive results can be expected.

¹¹⁹ Kerstin Steitz, "Juristische und Epische Verfremdung. Fritz Bauers Kritik am Frankfurter Auschwitz-Prozess (1963–1965) und Peter Weiss' dramatische Prozessbearbeitung Die Ermittlung. Oratorium in 11 Gesängen (1965)" (2017) 40:1 Gsr Ger Stud Rev 79 at 90; Tom Segev, *The Seventh Million: The Israelis and the Holocaust* (New York: Hill and Wang, 1993) at 336, 338; Osiel, *supra* note 8 at 37, 85, 107, 284-89.

¹¹⁹ Osiel, *supra* note 8 at 37.

¹²⁰ Emilie Hafner-Burton, *Making Human Rights a Reality* (Princeton: Princeton University Press, 2013) at 194.

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