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THE ICL COHORT: An Ethnography of International Criminal Justice

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THE ICL COHORT:
An Ethnography of International Criminal Justice

Sarah-Jane Jessica Koulen

A DISSERTATION
PRESENTED TO THE FACULTY OF PRINCETON UNIVERSITY
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Advisers: Professor Carol Greenhouse and Professor John Borneman

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Abstract

In recent decades, a small, tight-knit group of legal experts and diplomats—the ICL cohort—has worked to build a system of international criminal justice. This movement has given rise to the establishment of several ad hoc and hybrid criminal tribunals for international crimes and culminated in the 2002 establishment of the International Criminal Court (ICC), a permanent criminal court charged with addressing “the worst crimes of concern to the international community as a whole,” per its founding document, the Rome Statute. My dissertation focuses on the sociality of international criminal justice, by taking seriously the social ties, orientations, and shared meanings that sustain the field of practice and work to maintain systematicity and coherence against fundamental gaps and contradictions. It shows in particular how the technocratic register of international criminal justice is sustained by an affective register. I bring an ethnographic sensibility to bear on the sites, proceedings, objects and expertise of international criminal justice: in addition to observing trials and speaking with dozens of practitioners, I participated in training sessions, went on capacity-building missions, joined legal teams on trial and attended diplomatic conferences. I demonstrate the ways in which the turn toward international criminal prosecutions has given way to efforts to collect and preserve evidence and document atrocities, and argue that the logic of criminal culpability instrumentalizes data in ways that impede broader approaches to justice. This study therefore challenges legalistic accounts of international law as a solely technocratic field and, at a broader scale, offers a model for the possibility of anthropological engagement with spaces of bureaucratic governance.

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List of Abbreviations

ASP	Assembly of States Parties
CICC	Coalition for the International Criminal Court
ECCC	Extraordinary Chambers in the Courts of Cambodia
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former-Yugoslavia
IRB	Institutional Review Board
LMO	Luis Moreno Ocampo
MICT	Mechanism for International Criminal Tribunals
RAC	Released and Acquitted
R2P	The Responsibility to Protect
TFV	Trust Fund for Victims
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
UN	United Nations
UNSC	United Nations Security Council

Introduction

All Roads Lead to The Hague?

I. February 24, 2022, 5 a.m.¹

All roads lead to The Hague. I began writing this introduction, during what I hoped would be the final stretch of dissertation writing, in March 2022. This was the refrain in my particular social media bubble at the time, with friends and former colleagues working in or related to international criminal justice posting and reposting one picture of what appeared to be a Ukrainian road sign, redacted with paint and tape, so that all directions and all destinations read “The Hague.” One colleague I follow on Twitter re-tweeted the image on March 2, 2022, commenting: “I love this. So much,” ending with an approving “ICC what you did there.”

At the time, President Vladimir Putin

of Russia had just invaded Ukraine, a few days after a fiery February 21 speech during which he essentially disputed Ukrainian statehood.



Figure 1. Mark Kersten @markKersten, 2022, Twitter, March 2, 2022, 16:52 p.m., <https://twitter.com/MarkKersten/status/1499051798866235397?s=20>. Reprinted with permission.

¹ This is the date and time when the Russian invasion of Ukraine began. The 5 AM Coalition is a network of human rights organizations and investigators gathering evidence of war crimes during the Russian armed aggression against Ukraine. See “Ukraine 5 AM Coalition,” Ukraine 5 AM, accessed March 13, 2023, <https://www.5am.in.ua/en>.

Just a few days later, in the early hours of February 24, Russian troops crossed the border into Ukraine from three sides and began an assault on its major, densely populated cities, including the capital Kyiv. The possibility of such an invasion, hotly debated between intelligence officers and diplomatic representatives for years, since at least the invasion of the Donbas in 2014, and then more intensely during the first weeks of 2022 as satellite images of Russia mobilization along Ukrainian borders, became an undeniable reality.

Seven hours behind Kyiv, it was still the evening of Wednesday February 23 in New York City, as the UN Security Council convened for a late-night emergency meeting. Charged with the responsibility to “protect international peace and security” under the UN Charter, the Council convened to explore peaceful resolutions to the dispute. It so happened that Russia was serving a one-month term as president of the Council during February 2022. As such, the Russian Federation’s permanent representative to the UN, Ambassador Vasily Nebenzya, scheduled and chaired the meeting. Around 10:30 p.m., halfway through reading his prepared remarks, the Ambassador picked up his phone lying next to him on the table and read out loud from an incoming message. As I watched the livestream recording shortly after, the Russian ambassador’s words came to me in the tinny, amplified voice of the female Russian-English interpreter:

During this meeting the President of Russia, Putin, spoke with, ah . . . and said, that they’ve made a decision for a special military operation in the Donbas. We don’t know all the details today, but briefly I’d like to inform you. From his statement it says that the occupation of Ukraine is not in our plans. The aim of this special operation is to protect the people who for over 8 years have been suffering genocide, genocide from the Kyiv regime, and for this we will de— aim to demilitarize . . . and degenocide [sic] Ukraine and also support those . . . uhm, uhm, hold accountable those who carried out so many crimes

against civilians, including the ci— including citizens of the Russian Federation. This decision was made in line with Article 51 of the UN Charter and sanction of the Russian Federation and fulfilling the agreement on recognition of the LPR and DPR. We're receiving a lot of information and we will analyze this and we will keep you up to speed with this.

This is how the Russian ambassador announced to his colleagues that a “special military operation” by Russia in Ukraine—the very possibility the emergency session of the Security Council aimed to avert—had begun. Putting down his phone and reshuffling the papers on the desk in front of him, the Ambassador continued, “Now I resume my function as President of the Council . . . and I give the floor to the representative of Ukraine.”

The permanent representative of Ukraine to the UN, Ambassador Sergiy Kyslytsa, slowly reached up to remove his face mask and leant toward the microphone, with a palpable sense of dejection and shock. His fabric face mask is pale blue, what I have come to recognize as “UN blue”: the color of UN “blue helmets,” the same shade as the leather upholstery on the chairs around the circular Security Council desk and the paper binding of the printed copies of the UN Charter, copies of which can be seen strewn around and amongst manila folders and printed documents on tabletops around the room. Ambassador Kyslytsa speaks:

“Well, Distinguished Members of the Security Council, Secretary-General, Under-Secretary . . . before I try to deliver parts of the statement that I came here with tonight . . . most of it is already useless since, ah, [glances at his phone] 10 p.m. New York time.

He picks up a pocket-sized, well-thumbed copy of the UN Charter, holding it in the air as he speaks.

I would like to cite Article 4 of the UN Charter. And it says, “Membership in the United Nations is open to all other peace-loving states which accept the

obligations contained of the present Charter and in the judgement of the organization, are willing and able to carry out these obligations.” . . . Russia is not able to carry out any of the obligations. The ambassador of the Russian Federation three minutes ago confirmed that his President declared a war on my country.

With a voice thick with anger, the Ambassador continues his statement, suggesting that the Russia’s Federation is not a legitimate member of the Security Council and as such, that the Russian delegation ought to relinquish their duties as then-president of the council:

Ambassador Kyslytsa of Ukraine: When I was coming here, an hour or so ago, I was intending to ask the Russian Ambassador to confirm on the record that the Russian troops will not start firing at Ukrainians today and go ahead with the offensive. It became useless . . . forty-eight minutes ago. Because about forty-eight minutes ago, your president declares the war on Ukraine. So now I would like to ask the Ambassador of the Russian Federation to say on the record, that at this very moment, your troops do not shell and bomb Ukrainian cities. That your troops do not move in the territory of Ukraine. You have a smartphone, you can call [Russian Foreign Minister] Lavrov right now. We can make a pause to let you go out and call him. If you are not in a position to give an affirmative answer, the Russian Federation ought to relinquish responsibilities of the president of the Security Council, pass responsibilities on to a legitimate member of the Security Council, a member that is respectful of the charter, and I ask the members of SC to convene an emergency meeting immediately and consider all necessary draft decisions to stop the war. Because it is too late, my dear colleagues, to speak about de-escalation. Too late. The Russian president declared the war, on the record. [Kyslytsa raises his phone, connected to a white

charging cable plugged into an electrical outlet on the desk and points it toward the Russian representative Nebenzya] Should I play the video of your President? Ambassador, shall I do that right now, or you can confirm it? . . . Do not interrupt me please. Thank you.

Ambassador Nebenzya of Russia: Then don't ask me questions when you are speaking. Proceed with your statement.

Ambassador Kyslytsa: Anyway. You declared the war, it is the responsibility of this body to stop the war. So I call on every one of you to do everything possible to stop the war. Or shall I play the video, with your president declaring the war? Thank you very much.

Ambassador Nebenzya: I must say that I thank the representative of Ukraine for his statement and questions I wasn't planning to answer to then. Because I already said all I know at this point. Waking up Minister Lavrov at this time is not something I plan to do. We said the information that we have would be something we'd provide and this isn't called a war, this is called a special military operation in the Donbas. I now give the floor to the special representative of Germany.

The above exchange captures the moment that two emissaries, and their colleagues on the Council, learn that war of the kind the international body and the diplomats gathered around the table that evening are charged with preventing has, in fact, already begun. Immediately after the Russian and Ukrainian representative spoke, the representative of Germany stated, "Mr. President, we meet at the very moment of a military escalation we have not experienced in Europe for over a generation's time."²

² "As Security Council Meets on Ukraine Crisis, Russia Announces Start of 'Special Military Operation,'" *UN News*, February 24, 2022, <https://news.un.org/en/story/2022/02/1112592>.

In those first weeks of the invasion and the war, which at the time of writing is almost a year underway, the conversation revolved around the illegality of this war, and the fundamentally destabilizing effects of this invasion to legal agreements committed to international peace and security. The refrain “All roads lead to The Hague,” then, served as a collective response to what many considered a challenge to the rules-based international order that had been crafted and painstakingly negotiated in the decades since World War II. It was an incantation, a reference to a forum that could—and, it was hoped, would—hold President Putin accountable. “The Hague,” of course, was a shorthand reference to the city that has come to be known—through a concerted lobbying and public relations effort—as the International City of Peace and Justice, housing over two hundred international organizations including the International Court of Justice (ICJ) and the International Criminal Court (ICC). The subtext was that President Putin had initiated a campaign of violence that, in principle, fell squarely into the purview and jurisdiction of the ICC and had thus embarked on a path that should land him, and anyone who participated in the attack and the atrocities that would surely follow, in the docket of the ICC. The picture of the adjusted road sign with all roads leading to The Hague, invoked the possibility and promise of justice, one day. It is this collective faith in a kind of justice rendered through law, and through legal institutions, that is the object of this study. “All roads point to The Hague,” after all, is a bold claim, presenting accountability through international criminal prosecutions as the only and inevitable outcome to the campaign of violence initiated by President Putin with the decision to invade Ukraine in the early hours of February 24, 2022.

In the last days of February and early days of March 2022, the language and principles of international law became mainstream concepts in news reporting. The assemblage of international law groaned into gear. The Security Council, caught off guard by the declaration

of war on Wednesday night, met again on the following Friday to debate a draft resolution deploring, and calling for an end to, the violence. As one of five permanent members of the fifteen-seat Security Council with the ability to do so, Russia used its veto power to ensure that the resolution did not pass. The representative of the United States rejected Russia's use of the veto, proclaiming, "You cannot veto the people of Ukraine. You cannot veto the UN Charter." The Council moved to a procedural vote, which precludes the use of the veto, to call on the General Assembly to convene and issue a decision instead. The General Assembly convened an emergency assembly less than twenty-four hours later, only the eleventh such meeting since 1945, with the previous emergency session having taken place in 1982.³ Delegations from 193 member states descended on New York for the meeting, which ran over two days, resulting in a resolution condemning Russian aggression against Ukraine, calling for an end to hostilities and the immediate withdrawal of troops, and urging a peaceful, diplomatic resolution to the conflict. The representative of the European Union, an observer to the assembly, welcomed the resolution—which the Russian Federation rejected as prejudicial and biased—stating, "This is not just about Ukraine. This is not about Europe. This is about defending an international order based on rules."⁴

During the same period, as the shelling and invasion of Ukraine moved into its fifth day, President Volodymyr Zelensky of Ukraine filed a complaint against Russia with the International Court of Justice (ICJ), the oldest judicial body of the United Nations, to rule on the allegations of genocide in the Donbas under the Convention for the Punishment and Prevention of the Crime of Genocide.⁵ The public hearings commenced within days, despite

³ "Security Council Calls Emergency Special Session of General Assembly on Ukraine Crisis, Adopting Resolution 2623 (2022) by 11 Votes in Favour, 1 Against, 3 Abstentions," United Nations, February 27, 2022, <https://press.un.org/en/2022/sc14809.doc.htm>.

⁴ "General Assembly Overwhelmingly Adopts Resolution Demanding Russian Federation Immediately End Illegal Use of Force in Ukraine, Withdraw All Troops," March 2, 2022, <https://press.un.org/en/2022/ga12407.doc.htm>.

⁵ "Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)," International Court of Justice, March 7, 2022, <https://www.icj-cij.org/public/files/case-related/182/182-20220307-PRE-01-00-EN.pdf>.

Russia's decision not to participate, which was communicated in writing and through its ambassador in the Netherlands. In his opening address, the representative of Ukraine Anton Korynevych stated:

Let us settle our dispute like civilized nations. Lay down your arms and put forward your evidence. Ukraine respects this court and follows its orders, Russia must as well. But if Russia will not return to international law on its own, the court has the power to act. With respect, the court has the responsibility to act.⁶

Korynevych argued that even as Russia seemed to have strayed from or willfully violated key principles of international law, its government knew that international law mattered. Why else, he asked, would Russia try to justify its aggression by claiming that this war was to stop a genocide? States hire international lawyers to represent them at the ICJ. The legal team of Ukraine, including Yale University international law professor Harold Koh, argued that through its actions, Russia had reduced the Genocide Convention, to which both states were parties, to "confetti."⁷ The renowned French international lawyer who had long represented Russia in international proceedings, Alain Pellet, an emeritus professor of law at the University of Paris at Nanterre, resigned from Russia's legal team at the beginning of the invasion. In a public letter of resignation, posted on *EJIL:Talk!*, a well-known international law blog hosted by the European Journal of International Law, he called his previous employer Vladimir Putin's quasi-legal arguments "verbal contortions," writing, "enough is enough. Yesterday I sent my letter of resignation to the competent authorities: lawyers can defend more

⁶ "Russia Reduced Genocide Convention 'to Confetti', Ukraine Tells World Court," UN News, March 7, 2022, <https://news.un.org/en/story/2022/03/1113402>.

⁷ "Russia Reduced Genocide Convention."

or less questionable causes. But it has become impossible to represent in forums dedicated to the application of the law a country that so cynically despises it.”⁸

President Zelensky of Ukraine continued to call on the institutions representing the rules-based international order that he argued was at stake in the days and weeks after the beginning of hostilities, asking for more support from the UN, the North Atlantic Treaty Organization (NATO), and the EU. In early March 2022, the United Nations Human Rights Council voted overwhelmingly for a draft resolution proposed by Ukraine, which called for the withdrawal of Russian troops from the territory of Ukraine and established a commission of inquiry to investigate human rights abuses and violations of humanitarian law.

As the invasion continued, increasing reports of the indiscriminate, and potentially willful, targeting of civilians arose. Humanitarian corridors and evacuation routes did not hold, with an entire family killed trying to evacuate along one such route in the city of Irpin in early March. Schools, apartment buildings, orphanages, and hospitals were destroyed. Was it possible that what was taking place amounted not just to a violation of the principle of non-intervention of international law, but to criminal conduct? Quite possibly, answered the Prosecutor of the International Criminal Court (ICC): “any side that targets, directly targets, civilians or civilian objects is committing a crime under the Rome Statute,” said ICC Prosecutor Karim Khan.⁹ While neither Russia or Ukraine have ratified the Rome Statute, Ukraine has twice issued a declaration voluntarily accepting the jurisdiction of the ICC should the Court wish to exercise it over alleged crimes on its territory from February 2014 onwards. The next step would be for the ICC prosecutor to seek authorization from the ICC judges to open an official investigation, a process that usually takes months. In the situation of Ukraine, however,

⁸ Alain Pellet, “Open Letter to My Russian Friends: Ukraine Is Not Crimea,” *EJIL: Talk!* (blog), March 3, 2022, <https://www.ejiltalk.org/open-letter-to-my-russian-friends-ukraine-is-not-crimea/>.

⁹ Anthony Deutsch and Toby Sterling, “ICC Faces ‘Myriad Challenges’ to Prosecute War Crimes in Ukraine,” *Reuters*, March 4, 2022, sec. World, <https://www.reuters.com/world/icc-faces-myriad-challenges-prosecute-war-crimes-ukraine-2022-03-04/>.

forty-one other states, member states of the Court, referred the case to the Prosecutor, allowing his office to proceed with an investigation immediately. Prosecutor Kahn announced on March 3, 2022, that his office had begun collecting evidence and that a team of lawyers, investigators and operational experts was on its way to Ukraine.¹⁰

Judith Shklar, in 1964's *Legalism*, writes that “there was and is no system of international criminal law, just as there are no international community and no international political institutions to formulate or regularly enforce criminal laws.”¹¹ Shklar's theorizations of legalism as ideology were singularly influential as I began to make sense of my fieldwork and the statements and commitments of my interlocutors. Her analysis forms a refrain throughout this work. I take up her 1964 statement here because it presents the central paradox with which my study is concerned: there is no international community, there is no system of international criminal law . . . *and yet* my interlocutors in the dense social field of international criminal justice are nevertheless involved in a decades-long process of speaking (or dreaming) such a system into existence. In this study, I explore both the tireless efforts to build, animate, reiterate, and *systematize* a system of international law, and the ways in which, in the very same moment, that dreamed-up international legal system vanishes from view, pushed to its own limits, incapable of being consistently applied. I ask, centrally, what animates and sustains these efforts. In the days after the invasion began, references to the fundamental principles of international law abounded, with continuous claims that Russia's act was in breach of the UN Charter: that contract of the new international order and founding document of the United Nations. A central principle of the Charter is the principle of non-intervention in the affairs of

¹⁰ Marlise Simons, “The International Criminal Court Prosecutor Fast-Tracks an Investigation of Possible War Crimes in Ukraine,” *The New York Times*, March 3, 2022, sec. World, <https://www.nytimes.com/2022/03/03/world/europe/war-crimes-russia-ukraine-icc.html>.

¹¹ Judith N. Shklar, *Legalism: An Essay on Law, Morals, and Politics* (Cambridge, MA: Harvard University Press, 1964), 157.

another sovereign state, and the obligation to seek peaceful resolutions to disputes. Ukraine raised the question of whether Russia is a legitimate member of the United Nations, citing its “inability” to uphold these principles and suggesting that there had never been a formal decision to welcome the Russian Federation in its current capacity to replace the United Socialist Soviet Republics (USSR) on the international body. Russia, in turn, used the language and principles of the international legal framework to justify its actions. Following the 1951 Genocide Convention, states are obligated to punish and prevent genocide, a principle Russia has (ab)used to legitimize its invasion of the Donbas. Furthermore, Ambassador Nebenzya argued that the “special military operation” was undertaken in line with Article 51 of the UN Charter, which also provides for the ability to act in self-defense against an armed attack. This argument uses international law against itself, by arguing that an ongoing genocide created an exception to the principle of non-interference and non-intervention and gave rise to an obligation to act in self-defense. The representative of the Ukraine to the International Court of Justice, which would meet shortly after the invasion began, argued that in this manner, Russia sought to use “one pillar of international law to destroy the other.”¹²

Creative interpretations and applications of the UN Charter such as those discussed above were not the only evidence that demonstrated both the fragility and strength of international law. It was painfully clear, at the outset, that even as the invasion of Ukraine by Russia presented *just* the kind of challenge that the international legal order sought to prevent—the waging of an aggressive war and, as the days turned into weeks, mounting evidence of targeted civilian killings—it was also, at the same time, precisely the case that collapses the system (to the extent that one maintains that there is one) in on itself. Even as all roads lead to The Hague, the way there is by no means straightforward.

¹² “The Hague – The International Court of Justice (ICJ) Holds Public Hearings in the Case Ukraine v. Russian Federation,” UN Web TV, March 7, 2022, <https://media.un.org/en/asset/k1s/k1s308hjljg>.

a. The Roadmap: ICC Jurisdiction

I have been teaching interdisciplinary undergraduate courses about international criminal law for the past few years and have noticed how an international criminal court figures in the popular imagination as a solution to all manner of social problems. My students tend to be disappointed when they find out that in fact the ICC, as established, has a very specific purview, known as jurisdiction. Within that jurisdiction, the prosecution of, say, the CEO of a major oil company for climate change before the ICC would not at all be straightforward. If I were a doctrinal international criminal lawyer, I would probably tell them it was impossible. The International Criminal Court, through its founding document the Rome Statute, which was signed in 1998 and entered into force in July 2002, grants the court jurisdiction over war crimes, crimes against humanity, genocide, and the crime of aggression. War crimes relate to crimes constituting grave breaches of the laws of war as set out in the Geneva Conventions of August 12, 1949, including willful killing, torture, intentionally directing attacks at civilians or civilian objects, and attacking or bombarding undefended towns, dwellings or villages without military objective, following article 8 of the Rome Statute. Crimes against humanity are defined in article 7 of the Rome Statute and include widespread and systematic attacks directed against the civilian population, including murder, extermination, enslavement, and forcible deportation. Genocide, following the definition in the Rome Statute, involves acts committed with the “intent to destroy, in whole, or in part, a national, ethnical, racial or religious group.”¹³ As the invasion of Ukraine approaches the one-year mark, observers increasingly suggest there are grounds to believe each of these crimes are being perpetrated by Russian forces on Ukrainian territory, though the claim of genocide is considered particularly contentious.¹⁴ As I

¹³ “Rome Statute of the International Criminal Court,” International Criminal Court, 2021, <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>, article 6.

¹⁴ See, for example, George Wright, “Ukraine War: Is Russia Committing Genocide?,” *BBC News*, April 13, 2022, <https://www.bbc.com/news/world-europe-61017352>; Dominique Soguel, “When Does Atrocity Rise to

will discuss in chapters 4 and 5, what is needed to support these allegations and the logic of criminal justice, which seeks to hold the individuals most responsible individually accountable for grave international crimes, is evidence. This has led to immediate and widespread efforts to document abuses and atrocities, in the hopes that in time, all of this information will amount to useful evidence for criminal prosecutions. Ukrainian prosecutors have also already begun to prosecute these cases on a national level, though their resources are overwhelmed by the scale and scope of cases throughout the country.¹⁵

The jurisdiction of the ICC is further informed by territorial and temporal parameters. In terms of the latter condition, the court has jurisdiction over alleged crimes that took place after 2002, when the Rome Statute entered into force. Territorial jurisdiction is slightly more complicated. For the court to have jurisdiction over conduct happening on a state's territory or committed by a state's nationals, a state must ratify the Rome Statute and become a states party to the treaty. As discussed above, in the case of Russia and Ukraine, neither are states parties to the Rome Statute. However, Ukraine has voluntarily accepted the jurisdiction of the ICC over international crimes committed on its territory since 2014, pledging to "cooperate with the Court without delay or exception" in a September 2015 declaration.¹⁶ This means that the ICC does in theory have jurisdiction over three of the four broad categories of international crime in this conflict—war crimes, crimes against humanity, and genocide—if committed on the territory of Ukraine. Practically speaking, it remains to be seen how or if any Russian

the Level of Genocide?," *Christian Science Monitor*, May 25, 2022, <https://www.csmonitor.com/World/Europe/2022/0525/When-does-atrocity-rise-to-the-level-of-genocide>; Ivana Kottasová, "Leading Experts Accuse Russia of Inciting Genocide in Ukraine and Intending to 'destroy' Ukrainian People," *CNN*, May 27, 2022, <https://www.cnn.com/2022/05/27/europe/russia-ukraine-genocide-warning-intl/index.html>; Peter Dickinson, "Vladimir Putin's Ukrainian Genocide: Nobody Can Claim They Did Not Know," *Atlantic Council* (blog), December 1, 2022, <https://www.atlanticcouncil.org/blogs/ukrainealert/vladimir-putins-ukrainian-genocide-nobody-can-claim-they-did-not-know/>.

¹⁵ Valerie Hopkins, "Investigators of War Crimes in Ukraine Face Formidable Challenges," *The New York Times*, July 3, 2022, sec. World, <https://www.nytimes.com/2022/07/03/world/europe/ukraine-war-crimes-russia.html>.

¹⁶ "Resolution of the Verkhovna Rada of Ukraine," International Criminal Court, September 8, 2015, https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf.

nationals, let alone the senior leadership of the country, will ever be arrested and brought to stand trial in The Hague. As international lawyers engaged in the legal analysis and reasoning that I have conveyed above and began to assess whether the conditions for the Court's jurisdiction had been met, a glaring problem soon emerged. Because of the negotiations and political compromises that underlie the legal possibilities outlined in the Rome Statute, the court does not have jurisdiction over the one crime that seems tailor made to fit the circumstances of Russia's decision to invade Ukraine: the crime of aggression.

b. The Crime of Aggression

While each international crime has its own history, the crime of aggression, in the ICC context, has a distinct trajectory. The protracted history of efforts to secure the ability to prosecute aggression offer evidence of one of this dissertation's central claims: that despite the way that actors both within and outside the world of international criminal law present it, the international legal framework is a system characterized more by political compromise, gaps, and "legal vacuums" than by its comprehensive systematicity. The crime of aggression was first articulated to prosecute the Nazi leadership during the Nuremberg Trials after World War II. Scholars such as Gary Bass have argued that prosecuting German leadership for the crime of aggressive war or crimes against the peace became something of a fixation after the end of the war, particularly for the American lawyers involved, who did not seem centrally concerned with the Holocaust or crimes against humanity in this first trial.¹⁷ Rather, Nuremberg was envisioned as having the enduring legacy of "usher[ing] in a new era where it is in accord with

¹⁷ Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, NJ: Princeton University Press, 2000), 177. Samuel Moyn writes that the crime of aggression, "because it was Robert Jackson's *idée fixe*, utterly dominated Nuremberg after World War II."... "As experts know, the Holocaust was largely omitted from the trial proceedings, due to the priority of the aggression charge and the conspiracy theory through which it was pursued, as well as profound misunderstandings by lawyers and judges about what exactly had occurred in Europe during the war." See Samuel Moyn, "Judith Shklar versus the International Criminal Court," *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 4, no. 3 (2013): 482, 484.

the common sense of mankind that a war of deliberate and unprovoked attack deserves universal condemnation and its authors condign penalties,” in the words of the chief prosecutor, Justice Jackson.¹⁸ In his opening statement before the International Military Tribunal at Nuremberg, Justice Jackson reflected that the tribunal represented an effort to utilize law “against the greatest menace of our times—aggressive war.”¹⁹ While the crime of aggression was not prosecuted in the period between 1945 and 1998, it remained on the table as international lawyers worked in various committees and working groups to develop drafts of an international criminal code. Member states gathered in Rome in 1998 to debate the final text of what would become the Rome Statute could not reach agreement on the definition of aggression and decided to delay this discussion, so as not to hold up the possibility of consensus on the rest of the document. Negotiations in various working groups on the crime of aggression continued until 2009, and during a Review Conference of the Rome Statute in Kampala, Uganda, in 2010, the gathered state representatives voted to insert the agreed upon a definition inserted into the Rome Statute, which became Article 8 *bis*. From 2010 onwards, following an amendment to the Statute signed by 35 member states, the definition of the crime of aggression reads as follows:

For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation, or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.²⁰

¹⁸ Bass, *Stay The Hand of Vengeance*, 177.

¹⁹ Robert H. Jackson, “Second Day, Wednesday, 11/21/1945, Part 04,” in *Trial of the Major War Criminals before the International Military Tribunal*, vol. II. Proceedings: 11/14/1945-11/30/1945. (Nuremberg: IMT, 1947), 98–102, <https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/>.

²⁰ “Rome Statute,” article 8 *bis*.

An “act of aggression” as defined in the Rome Statute includes the use of armed force of a state against the sovereignty, territorial integrity, and political independence of another state, including invasion, attack, occupation, and bombardments.²¹ While this created a definition for the crime, there remained one other aspect to negotiate: how and when would the court be able to exercise its jurisdiction over this crime? For the other crimes in the Rome Statute—war crimes, crimes against humanity and genocide (subject-matter or substantive jurisdiction)—once it is established that the crimes have taken place on the territory of a member state or were likely committed by nationals of a member state (territorial jurisdiction) and had taken place after 2002 (temporal jurisdiction), there are three ways for the Court to assert jurisdiction: the prosecutor begins an investigation on their own initiative and requests authorization from a panel of ICC judges, the UN Security Council refers a situation to the Court, or an ICC member state refers a situation to the Court.

In the period after states had agreed on a definition of the crime of aggression but before it could enter into force, certain states appeared to develop a case of cold feet and began seeking ways to curtail the ways in which the ICC could exercise jurisdiction over the crime. Centrally, it appears that states with large armies, such as France, the UK, and Japan, or those known for their participation in humanitarian intervention, such as Canada, became concerned that the definition of the crime left them exposed to prosecution. The amendment received enough votes from ICC member states to enter into force in December 2017, and the activation of ICC jurisdiction over this crime was placed on the agenda for debate during the annual Assembly of States Parties to be held in New York that year. What followed were days of intense negotiation in the UN headquarters, delegates shuttling from meeting to meeting, and a surprising concession to the demands of, in particular, France and the United Kingdom: the Court’s jurisdiction over the crime of aggression was to be curtailed in two important additional

²¹ “Rome Statute,” article 8 bis.

ways.²² First, the court can only investigate the crime of aggression if both states—the aggressor and the invaded party—are member states of the ICC. And second, these member states needed to have explicitly “opted in” to the amendment by signing it and accepting the Court’s jurisdiction.²³ Eventually, states agreed on both the definition and jurisdictional regime under which the crime could be prosecuted, and the crime of aggression entered into force in July 2018.

Could the delegates have foreseen that, with these last-minute adjustments, they had effectively rendered the ICC powerless to prosecute the crime of aggression just four years later when Russia began a series of actions that seemed to align perfectly with it? Neither Ukraine or Russia are member states of the Rome Statute, and even if the Security Council intervened to refer the situation to the Court, Russia would surely use its veto. Here is another fault line, another compromise, another seam in the international legal framework: the law exists, experts speak it into existence, and yet it fails to capture or hold reality. Additionally, while the preoccupation in early 2022 was with the aggression of Russia against its neighbor, and the ways in which this felt like a make-or-break moment for international law, it is worth remembering that the United States since 2001 has taken unilateral aggressive action through targeted killings in Iraq, Afghanistan, Yemen, and Somalia, arguing self-defense or even humanitarian intervention, where the evidentiary basis for such claims barely existed. Perhaps

²² It is worth noting that while civil society and academic observers have generally been able to observe ASP events with relative ease, during the 2017 ASP, access to the meetings was suddenly restricted. During those meetings, whenever the question of activation of the crime of aggression and jurisdiction was on the agenda, the public gallery would be cleared, with UN Security Guards checking badges for the “right” codes and colors. I remember sitting on the marble floor of the lobby, late into the night, wondering what was going on in the main meeting room and checking Twitter for updates from those more in the know, or simply with the right clearance and access. Noah Weisbord later learned that that state representatives had pressured the organizers of the ASP to limit access to these meetings for civil society and academic observers. See Noah Weisbord, *The Crime of Aggression: The Quest for Justice in an Age of Drones, Cyberattacks, Insurgents, and Autocrats* (Princeton, NJ: Princeton University Press, 2019), 170.

²³ Mark Kersten, “States That Neutered the Crime of Aggression Have a Special Responsibility to Address War Crimes in Ukraine | Justice in Conflict,” *Justice in Conflict* (blog), March 8, 2022, <https://justiceinconflict.org/2022/03/08/states-that-neutered-the-crime-of-aggression-have-a-special-responsibility-to-address-war-crimes-in-ukraine/>.

there is a good reason the very same states, such as the United Kingdom, the United States, and France, who had been centrally involved in developing the crime of aggression and trying the Nazi leadership for such crimes against the peace at Nuremberg, wished in 2018 to limit their own potential exposure to the criminal charge.²⁴ Regardless, by the spring of 2022, lawyers and experts who were working to advance the system of international criminal law were acutely aware of another flaw in the legal design: it was unlikely that the ICC would be able to exercise its jurisdiction over precisely the kind of aggressive conduct international justice sought to prevent. At the conclusion of the Nuremberg trials, Harry Truman had stated that with the successful prosecution of the crime of aggression, “the principles established and the results achieved place International Law on the side of peace as against aggressive war.”²⁵ Yet here, despite such vested faith in its promise and potential, was another gaping hole in the system.

c. A Special Tribunal?

So it happened that, just two weeks into Russia’s 2022 invasion of Ukraine, a group of high-profile international lawyers, policymakers, and academics proposed that what was needed now was a *new* special tribunal, provisionally titled The Special Tribunal for the Punishment of the Crime of Aggression against Ukraine. The group, including well-known international lawyers such as Benjamin Ferencz (who was a prosecutor at Nuremberg) and former UK prime minister and his wife Gordon and Sarah Brown, issued a Combined Statement and Declaration, offering the following rationale for their proposal:

To help beat back President Putin’s heinous attempts to destroy peace in Europe, it is time for us to create such a Special Tribunal. By doing so we act in solidarity with Ukraine and its people, and signal our resolve that the crime of aggression

²⁴ Weisbord, *Crime of Aggression*; Mary Ellen O’Connell, “Russia-Ukraine: Resolving the World’s Most Dangerous Conflict,” *EJIL: Talk!* (blog), January 2, 2022, <https://www.ejiltalk.org/russia-ukraine-resolving-the-worlds-most-dangerous-conflict/>.

²⁵ Bass, *Stay the Hand of Vengeance*, 174.

will not be tolerated, and that we will leave no stone unturned in bringing to an end the terrible events we are now seeing, thereby ensuring that those who have unleashed such horrors are subject to personal accountability under the criminal law, so that justice can be done.

The Special Tribunal should be constituted—on the same principles that guided the allies in 1942—to investigate the acts of violence by Russia in Ukraine and whether they constitute a crime of aggression. Countries should agree to grant jurisdiction arising under national criminal codes and general international law to a dedicated criminal tribunal and confer on such a tribunal jurisdiction to investigate both the perpetrators of the crime of aggression and those who have materially contributed to or shaped the commission of that crime.²⁶

In this statement, the group led by Gordon and Sarah Brown reference the post–World War II Nuremberg tribunal as a touchstone, creating a discursive continuity and invoking a legal precedent for a joint tribunal in the face of state-based aggression in Europe. During an early March 2022 “impromptu on-the-record meeting” hosted by Chatham House in London to launch the call for this Special Tribunal, prominent jurists Phillipe Sands and Dapo Akande iterated on expressions like “the gap must be filled” or “we need to fill the gap” to justify the establishment of a new tribunal to hold those who planned and chose to wage aggressive war individually criminally accountable. The host of the event, as she introduced the speakers, referenced the agreement to establish the Nuremberg Tribunal that took place in London not far from Chatham House and presented this special tribunal as another step in the trajectory of international criminal justice “The path to international criminal justice in difficult and winding, but there always needs to be a first step.” In a particularly arresting contribution, a

²⁶ Gordon Brown et al., “Statement Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression Against Ukraine,” The Office of Gordon and Sarah Brown, March 4, 2022, <https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf>.

harried-looking Dymtro Kuleba, the foreign minister of Ukraine, joining the online event from what seemed to be a laptop perched on his lap in the backseat of a moving car. Expressing his support for the establishment of the new special tribunal, and acknowledging that there was a need to “fill the gap” on the crime of aggression, he stated:

When bombs fall on your cities, when soldiers rape women in the occupied cities . . . it is difficult of course to speak about the efficiency of international law, but this is the only tool of civilization that is available to us to make sure that in the end, eventually, all those who make this war possible will be brought to justice and the Russian Federation as a country that committed an act of aggression will also be held accountable of its deeds.²⁷

Former prime minister Brown ended his remarks on the need for a tribunal by stating, “Those hoping for peace, not only in Ukraine but across Europe, cry out for justice.”²⁸

Bruno Latour in his celebrated ethnography *The Making of Law* characterizes the practice of law as a “darning, knitting . . . a ceaseless, patient, stubborn and pedestrian piece-working: a grey-on-grey that is much more beautiful, and above all much more just, than the bright colors of passion.”²⁹ For Pierre Bourdieu, formalization, formulation, codification, and replication are key to the juridical order and the maintenance of a stable juridical field.³⁰ While both theorists were referring to the practice of law within domestic jurisdictions, this dissertation aims to produce an understanding of the “ceaseless piece working” and “replication” required to sustain the illusion of a stable transnational juridical field. By the spring of 2022, most

²⁷ “A Criminal Tribunal for Aggression in Ukraine,” Chatham House – International Affairs Think Tank, February 20, 2023, <https://www.chathamhouse.org/events/all/research-event/criminal-tribunal-aggression-ukraine>.

²⁸ Gordon Brown, “Remarks by Gordon Brown at Chatham House,” The Office of Gordon and Sarah Brown, March 4, 2022, <https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Remarks-by-Gordon-Brown-at-Chatham-House-4-March-2022.pdf>.

²⁹ Bruno Latour, *The Making of Law: An Ethnography of the Conseil d’Etat*, trans. Marina Brilman and Alain Pottage (Cambridge: Polity Press, 2010), 69.

³⁰ Pierre Bourdieu, “The Force of Law: Toward a Sociology of the Juridical Field,” trans. Richard Terdiman, *The Hastings Law Journal* 38 (1987): 805–53.

international legal scholars and practitioners had realized that the negotiations to limit the ICC's jurisdiction over the crime of aggression constituted, to continue Latour's needlework analogy, a dropped stitch.

By late 2022 and early 2023, the call to establish a mechanism or tribunal that could “deal with” Russian aggression had gained momentum. In September 2022, Andrii Smyrnov, the deputy head of the Office of the President of Ukraine published an op-ed in *TIME* magazine titled “We Need a Special Tribunal to Put Putin and His Regime on Trial.” He wrote, “We ask for this international special tribunal to be created. . . . We very much hope that while Ukraine is fighting day and night for its right to exist, the international legal doctrine will finally work. Or, this world will simply be doomed.”³¹ By November 2022, after weeks of Ukrainian lobbying efforts in Brussels, European Commission President Ursula von der Leyen pledged that the European Union would work toward creating a specialized court to hold Russian leadership accountable.³²

II. The ICL cohort

The efforts outlined above to draft a statute, define crimes, and establish tribunals reflect a commitment to and an enduring faith in legalism—and criminal prosecutions in particular—as a response to the excesses of human atrocity. Recall Ukraine's foreign minister Kuleba, for instance, who within the first few weeks of the conflict, from the backseat of a car in the middle of a warzone, joins a video call and holds up law as the “only tool of civilization” capable of delivering justice and accountability. Or Gordon Brown who positions justice—understood as best accessible through individual criminal prosecutions—as the condition to achieve peace. In

³¹ Andrii Smyrnov, “We Need a Special Tribunal to Put Putin and His Regime on Trial,” *Time*, September 23, 2022, <https://time.com/6216040/putin-war-crimes-tribunals/>.

³² Reuters, “EU Seeks Tribunal to Probe Possible Russian War Crimes in Ukraine,” *Reuters*, November 30, 2022, sec. Europe, <https://www.reuters.com/world/europe/eu-seeks-set-up-russian-war-crimes-tribunal-von-der-leyen-2022-11-30/>.

this dissertation, I examine what I argue has become a hegemony of anti-impunity, and the group of mobile, well-positioned actors who advance this version of criminal justice as the only version of justice and as a natural and neutral historical development—a vanquishing of politics through law. This ethnography originates from a commitment to understanding the sociality that underlies and sustains the work of legalism and the iteration of a system of international criminal justice. As such, it examines the aesthetic, affective and epistemological dimensions that structure this system.

This dissertation proceeds in five chapters. Chapter 1 positions the project in relation to key literatures and reflects on legalism’s investment in and maintenance of its own inscrutability. Chapter 2 then considers the challenges of international criminal justice as a site for anthropological study, focusing on the intricacies of bureaucratic access and permission and the language of categorization and ordering that accompany these intricacies. I argue that the nature of this transnational field requires a polymorphous approach to ethnographic study. The third chapter engages with the deeply affective and aesthetic texture of the spaces in which the ICL cohort convenes and operates. It argues that these affects produce, for members of this cohort, a felt coherence and shared spirit in the project of international criminal law, even as its inconsistencies and limitations are glaring. Chapters 4 and 5 move to a discussion of both the epistemological framework that governs what kinds of information can become evidence and the private actors involved in gathering evidence, embracing the possibilities of technological advancement and valorizing the skills and expertise required. I argue that what is at play in this focus on evidence collection in furtherance of international criminal prosecutions is a permeation of humanitarian logics of care and justice with penal and carceral logics. In the face of a violent conflict, that is, gathering evidence not only offers an illusory promise of justice and accountability, but is also presented and justified as a way to “protect victims.” I conclude that the project of international criminal justice displays a rigid legalism

that works to disavow its own political contingencies and detract attention and investment from other forms of justice or reckoning.

Chapter 1

Legalism against Itself

I came to this research after having spent some years living and working in The Hague. While I was initially working at non-profit organizations involved in humanitarian assistance such as Oxfam,³³ in 2011 I applied for and was hired as a program assistant at The Hague office of the Coalition for the International Criminal Court (CICC).³⁴ I worked at the CICC for around six months, but my time there helped to orient my attention and understanding toward international criminal justice as a densely social, interconnected field. In The Hague, there was no shortage of after-work drinks and social events—from book launches to Halloween parties, panel discussions to champagne receptions. I noticed that I began to recognize and encounter many of the same people, not just at events in The Hague, but also later on, when I had the opportunity to travel to hubs like New York, Geneva, Brussels, and Arusha, Tanzania. Several years later, in June 2017, by then well into my fieldwork, I shared this fascination with and for the social

³³ The Dutch branch of Oxfam is called Oxfam Novib; see “Homepage,” Oxfam Novib, accessed March 13, 2023, <https://www.oxfamnovib.nl/>.

³⁴ The Coalition was founded in 1995, initially as a network of twenty-five non-governmental organizations, who became central to the negotiations and effort to establish a permanent international criminal court and led the civil society input and lobbying efforts during the 1998 Rome Conference that led to the adoption of the Rome Statute and the creation of the ICC. Currently, over 2,500 organizations are members of the CICC. Calling itself “the world’s largest civil society partnership advancing international justice” it is run by two small offices in The Hague and New York, and, as is common for non-governmental organizations in human rights and international justice, a small fulltime staff supported by hundreds of unpaid interns cycling through on short-term contracts. Marlies Glasius has written on the outsized influence global civil society have had and continue to have on the development of international law. As she details, while only a handful of NGOs were present for a General Assembly meeting in 1994 when the International Law Commission’s draft international criminal statute was being discussed, by 1998 this had grown to 800 organizations. This meant that during the final negotiations in Rome, where 236 CICC member organizations sent delegations, civil society presence was far larger, collectively, than any state delegation. Glasius argues that the influence of civil society organization was such that the creation of the court itself can be considered a “global civil society achievement.” This influence has continued from the negotiation stage to the everyday functioning of the court, with extraordinary access to the leadership of the CICC. For example, one of my tasks as program assistant for the CICC was to organize twice-yearly roundtables—known colloquially as “the biannuals”—between civil society and the prosecutor, judges and the registry of the court. See Marlies Glasius, *The International Criminal Court: A Global Civil Society Achievement*, Routledge Advances in International Relations and Global Politics (Abingdon, UK: Routledge, 2006), 27; CICC, “Who We Are,” Coalition for the International Criminal Court, accessed March 12, 2023, <https://www.coalitionfortheicc.org/about/who-we-are>.

life of international criminal justice with an interlocutor, an ambassador who had agreed to meet for a quick cup of coffee in The Hague in between his busy schedule of travel and meetings. Introducing myself and my research, I remarked that I was struck by how small the field seemed, how close-knit, and that I had started bumping into many of the same people, regardless of whether I was at a conference in The Hague or Arusha. I joked that as an anthropologist studying this area of work I ought to make a kinship chart of all the actors in the field and their relationship to one another. He enthusiastically affirmed this: “Oh yes, we all know each other!” With pride, he said, “we are the ICL cohort,” using the shorthand for International Criminal Law.³⁵ His affirmation and introduction of a cohort became central to my understanding that what connected the multiple sites that made up my early fieldwork were conceptual and social ties—different nodes in the network of international criminal law. Through my time at the CICC and in The Hague, I found myself participating in a densely social, connected network of lawyers at the tribunals and courts, legal academics at the universities and law departments, civil society actors at various NGOs and diplomats and state representatives. These actors and their mobility in furtherance of an idea—moving, for example, from teaching positions to advisory roles in government, or from civil society to the International Criminal Court and then on to establish their own projects and “justice startups”—were engaged in the development of international criminal justice.

Several actors in the field referenced the excitement and dynamism of being engaged in extending criminal practice to the international level. Wayne Jordash, a well-known international criminal defense lawyer who has argued before almost every international criminal tribunal to be established in the past twenty years, observed in a 2018 chapter that the proliferation of international adjudicative mechanisms had created “unprecedented

³⁵ Conversation, June 5, 2017. Notes in the possession of the author.

opportunities for advocates to work and argue international law.”³⁶ In the essay (published in an edited volume in celebrating another well-known international legal scholar, William Schabas), Jordash ruminates on the role of “advocates” and their contributions to international affairs, suggesting that “Of late, a new class of advocate has emerged that appears to be carving out a role in the development of international law that must be considered as an essential part of the legal zeitgeist.”³⁷ Continuing his reflection, he argues that the emergence of international adjudicative mechanisms offers a kind of freedom for advocates who argue before them, one that is presumptively distinct from the experience that is available to jurists working domestically. He writes: “In shaping and helping to create the law, although these advocates must act within the rules and practices of their profession and the procedural framework of the arena in which they appear, they are not restrained by the bureaucratic straitjacket of the government lawyer or by the sometimes-pedestrian devotion to methodology of the legal scholar.” Rather, he continues, “they must seek solutions to context and need, and in the right case and court take unabashed steps toward the rule of law and the advancement of human rights and dignity. . . . this creativity and freedom to seek solutions and practical answers . . . provides a considerable source of intellectual and kinetic energy. This energy is what international law requires if it is to survive and serve its normative, regulatory function.”³⁸

The events and receptions I attended during my fieldwork further demonstrated the sociality and camaraderie in the ICL cohort. In early 2018, I was present at a commemorative event celebrating the twentieth anniversary of the Rome Statute and the ICC organized by the Coalition for the International Criminal Court (CICC). Bill Pace, still the network’s convener at that time and the moderator of the day-long event, addressed the over one hundred

³⁶ Wayne Jordash, “The Role of Advocates in Developing International Law,” in *Arcs of Global Justice: Essays in Honour of William A. Schabas*, ed. Margaret M. deGuzman and Diane Marie Amann (New York: Oxford University Press, 2018), 521–36.

³⁶ Jordash, “Role of Advocates.”

³⁷ Jordash, “Role of Advocates.”

³⁸ Jordash, “Role of Advocates.”

individuals gathered in the imposing auditorium of the new wing of the Peace Palace in The Hague. As I listened to his comments, I noted a consistent use of a discursive “we.” He made it clear, as he moderated the event, that he knew the vast majority of speakers, participants, and attendees personally. He did not appear to be reading from any notes or prepared biographies of the speakers; instead, he seemed to be ad-libbing, recalling a fond memory or sharing with the audience an anecdote in relation to each speaker’s career as they took the stage. One of the first to speak was Silvia Fernández de Gurmendi, then President of the ICC, who, as Pace recollected, was present at “the very first organizing meeting of the CICC all those years ago.” Then-Judge Fernández de Gurmendi reflected that this conference was a “remarkable reunion . . . of so many people who worked so hard to make the Court a reality.” Similarly, Carla Ferstman, who has a long tenure in international criminal justice and was then the director of REDRESS, a well-known NGO in the field, reflected in her statement on the “honor and challenge” it had been to be a part of the movement, and expressed recognition and acknowledgement of the “many faces who have been part of the movement since the beginning.” At an earlier event in December 2017—also in The Hague and commemorating the work of another institution in the field, the soon-to-close International Criminal Tribunal for the former-Yugoslavia (ICTY)—Karim A. A. Khan QC, a well-known defence lawyer who would be elected chief Prosecutor of the ICC in 2021, reflected that one important legacy of the ICTY had been to create a “camaraderie, a brotherhood, a sisterhood amongst disparate groups, lawyers, whether they be judges, prosecution, and defence or court staff . . . that worked together in one direction, of trying to make what many thought was an experiment, work.”³⁹

This camaraderie is visible and almost palpable at the various events, conferences, panel discussions, and diplomatic assemblies that constitute the field of international criminal justice:

³⁹ Karim A. A. Khan, ICTY Symposium: Final Reflections on the ICTY, December 18, 2017.

a network of individuals of shared resolve, referencing almost familial ties, committed to the same ideals of global criminal justice and accountability. These anecdotal statements and expressions speak to international criminal justice as a particular social field, and a community of people, who self-identify and take pride in their membership as experts in an emergent field of practice, working together toward a common goal: international justice and, centrally, the logic and praxis of criminal prosecutions as helping to strengthen and enforce the international legal order. I propose that the rules and processes within this social field are shaped and informed by a set of logics that scholars have called the Anti-Impunity Movement.⁴⁰

Anthropologists have been slow to engage with international legal practice and institutions as a social field. For legal scholars who have committed ample attention to studying international law and international legal institutions, the emphasis has been on the development and meticulous analysis of case law and jurisdictional complexities, producing a literature that has become “over dominated by a narrow legalistic lens.”⁴¹ Anthropologist Nigel Eltringham, in his 2019 monograph on the International Criminal Tribunal for Rwanda (ICTR), reflects on the need for (and positions his contribution as furthering) a “thick” analysis of international courts, citing scholars who have lamented a lack of attentiveness and analysis of “the social lives of these institutions.”⁴² This project takes up the dizzying array of acronyms in the field (ICC, ICTR, ICTY, ECCC, MICT, STL, SCSL), each relating to a newly established institution

⁴⁰ Karen Engle, “Anti-Impunity and the Turn to Criminal Law in Human Rights,” *Cornell Law Review* 100 (2015): 1069. On social fields, see Sally Falk Moore, “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study,” *Law & Society Review* 7, no. 4 (1973): 719–46, <https://doi.org/10.2307/3052967>.

⁴¹ Nigel Eltringham, *Genocide Never Sleeps: Living Law at the International Criminal Tribunal for Rwanda*, Cambridge Studies in Law and Society (Cambridge: Cambridge University Press, 2019), 5. See also Kieran McEvoy, “Beyond Legalism: Towards a Thicker Understanding of Transitional Justice,” *Journal of Law and Society* 34, no. 4 (2007): 411–40.

⁴² See Eltringham, *Genocide Never Sleeps*, 6; Jonneke Koomen, “‘Without These Women, the Tribunal Cannot Do Anything’: The Politics of Witness Testimony on Sexual Violence at the International Criminal Tribunal for Rwanda,” *Signs: Journal of Women in Culture and Society* 38, no. 2 (2013): 253–77, <https://doi.org/10.1086/667200>.

(several of which have since closed, or in the case of the MICT, the closure of two institutions and merger into one), trainings, discursive claims, and aesthetic representations as an iterative practice, constitutive of the transnational juridical field of international criminal justice. This is a densely social field requiring anthropological engagement, and this study therefore shines a light on the social and affective attachments that propel this circulation of actors and ideas. In this vein, this project seeks in part to respond to Kamari Clarke's call for a "much needed development of an anthropology of international justice of the twenty-first century."⁴³

In recent decades, international criminal justice has developed into a distinct field of practice and a transnational social field, animated and perpetuated by a small yet transnational network of activists, diplomats, lawyers and academics engaged in the development of key institutions and the articulation and dissemination of expert knowledge. Karen Engle labels the shift in the human rights movement toward an increased reliance on and faith in the promise of international criminal prosecutions the "anti-impunity movement."⁴⁴ The Rome Statute and the establishment of the International Criminal Court ('ICC') are often celebrated as the central achievements of the anti-impunity movement, and a testament to legalism. Three key shifts underline this more general paradigm shift: First, the idea that particular forms of widespread and systematic human rights violations are also international crimes; second, that individual actors must be held individually criminally accountable for this conduct, regardless of rank or political station. Finally, the turn to criminal prosecutions is propelled the conviction that accountability will create the conditions for peace, foster stability in post-conflict situations, and respond to the needs of victims.

⁴³ Kamari Maxine Clarke, *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback* (Durham, NC: Duke University Press, 2019), xxvii.

⁴⁴ See Karen Engle, "Anti-Impunity and the Turn to Criminal Law in Human Rights," *Cornell Law Review* 100 (2015): 1069; Karen Engle, Zinaida Miller, and D. M. Davis, eds., *Anti-Impunity and the Human Rights Agenda* (Cambridge: Cambridge University Press, 2016), in particular chapter 2 by Barrie Sander.

Scholars such as Harvard professor Kathryn Sikkink in her influential 2011 book *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* celebrate the creation of individual criminal accountability for a set of human rights violations termed the most egregious as an overwhelmingly positive development and a signifier of linear global moral progress.⁴⁵ Sikkink credits the work of norm entrepreneurs—or the ICL cohort, as I call this tightly-knit group of legal experts and NGO workers—in responding to social insistence on accountability through individual criminal prosecution and as such, catalyzing a rapid spread of norms and consequently a norm cascade—or *justice cascade*—leading to the establishment of a rising number of judicial institutions. Others, however, point to the ways in which turning to criminal accountability was a distinctly culturally, historically, and politically informed choice that is by no means universally accepted.

Anthropologist Kamari Clarke instead locates the logic of international criminal justice within an “assemblage of possibilities” in which criminal prosecutions of, for example, predominantly African alleged perpetrators as has been the record of the ICC to date, is just one severely limited possibility. Clarke argues that “to suggest that a widespread and enthusiastic acceptance of new justice norms is the primary factor is to miss the significance of the consolidation of technocratic knowledge, affects and emotional regimes in shaping the terms by which [what Clarke calls] affective justice has emerged to constitute international rule of law of law assemblages.”⁴⁶ Clarke troubles the image of Sikkink’s “cascade” as suggestive of a smooth and natural development of new norms across the board, and argues instead that accountability demands are being asymmetrically applied and continuously contested. “They are shaped and guarded by persistent structural inequalities between the Global North and the Global South. As the ICC indictment statistics show . . . prosecutorial justice is practiced

⁴⁵ Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: W. W. Norton, 2011).

⁴⁶ Clarke, *Affective Justice*, 56.

differentially according to geography, with postcolonial regions—characterized by deep underlying economic difficulties and evacuated institutions—deemed more in need of international judicial intervention.”⁴⁷

Karen Engle similarly critiques the wholesale embrace and celebration of increased individual criminal prosecutions as an advance for human rights and argues that the turn to criminal prosecutions in the guise of the “fight against impunity” was by no means an obvious trajectory for either the human rights movement or international law, and proceeds with little deliberation about the aims of criminal law or its pitfalls. How, she asks, have the critiques of penal systems once voiced by human rights advocates come to be forgotten in the embrace of international criminal justice? She uses the example of the well-known human rights organization Amnesty International (AI) to help illustrate her argument. Founded in the 1960s, she points out, *amnesty* was central to the organization’s mission, often running letter-writing campaigns for the release of political prisoners and wary of the use of penal power to silence dissent. Since the 1990s, Amnesty International has become a vocal opponent of amnesties, and over time, a strong supporter of international criminal institutions.⁴⁸ Engle reviews the ways in which human rights organizations have taken up the cause of advocating against “impunity,” explicitly decrying a “culture of impunity” as not only a failure to respond to human rights violations, or a human rights violation in and of itself, but a cultural problem, whereby impunity was narrowly defined as anything that was not criminal prosecution.⁴⁹ She demonstrates that references to the “culture of impunity,” a term rarely used prior to 1991, increased steadily and significantly between 1991 and 2008.⁵⁰ She writes: “Seeing impunity as cultural suggests deeply entrenched attitudes that can only be changed over time. While one

⁴⁷ Clarke, *Affective Justice*, 56.

⁴⁸ Karen Engle, “A Genealogy of the Criminal Turn in Human Rights,” in *Anti-Impunity and the Human Rights Agenda*, ed. Karen Engle, Zinaida Miller, and D. M. Davis (Cambridge: Cambridge University Press, 2016), 15–67.

⁴⁹ Engle, “Genealogy,” 44.

⁵⁰ Engle, “Genealogy,” 20.

could imagine multiple ways to respond to that culture, the stage was being set for individual criminal responsibility to emerge as the primary and even legally necessary response to it.”⁵¹ Engle reflects that the presumptive correspondence between criminal prosecutions and human rights has now become so ingrained that expressing reservations around international prosecutions is sometimes cast as suggesting that one is “anti-human rights.”

Sam Moyn similarly labels “anti-impunity” a striking development in the human rights movement over the last couple of decades. He reflects: “Anti-impunity treats accountability as an overwhelmingly important feature of how conflicts are resolved, and within that preference, goes further to prioritize criminal punishment of perpetrators of mass atrocity crimes. Indeed, though no one calls for ‘ending impunity’ for all crime in domestic affairs . . . that slogan for international affairs has become one of the unique ethical signatures of our time.”⁵² Reviewing the rhetoric of anti-impunity, he explores how advocates will appear to push an anti-impunity agenda whereby criminal justice becomes the sole option in the face of atrocity crime. Like Clarke, he takes issue with Kathryn Sikkink’s model of the rise of the international criminal accountability as a “justice cascade,” concluding that “the truth is that its explosion in our world involved the prioritization of one definition of justice,” potentially at the expense of others. He argues that individual criminal accountability and the quest to end impunity “has come to loom large in the field of human rights” in ways that should be more surprising than they are or are taken up to be in much of the scholarship.⁵³ Taking up anti-impunity in its signature domains—international criminal law and the establishment of the ICC in particular—Moyn argues that “it is clear that in all of these domains, the rhetoric of anti-impunity has become powerful in part through its denial that it is a controversial scheme in need of argumentative justification—

⁵¹ Engle, “Genealogy,” 21.

⁵² Samuel Moyn, “Anti-Impunity as Deflection of Argument,” in *Anti-Impunity and the Human Rights Agenda*, ed. Karen Engle, Zinaida Miller, and D. M. Davis (Cambridge: Cambridge University Press, 2016), 68.

⁵³ Moyn, “Deflection of Argument,” 69.

in spite of the fact that it is historically surprising in its aims, even within the short time horizon of the international human rights movement.”⁵⁴

In influential writings in 2017 and 2019, criminologist Mary Bosworth introduces the term *penal humanitarianism*. Through a study of public policy, governance, and international development programming in the United Kingdom, particularly around systems of migrant detention and the transfer of foreign prisoners back to their countries of origin in the Commonwealth, she identifies a curious conjoining of criminal justice, migration control, and humanitarian goals. Bosworth, crucially, points to the ways in which penal logic, power and expertise have begun to “radiate” well beyond the confines of the nation state. She argues that penal power has become more fluid and expansive, no longer situated in the particularities of a given nation state, but circling the globe, through the work of “practitioners, policy makers and other experts.”⁵⁵ Bosworth identifies not only an elision between penal power and humanitarian goals, but a logic whereby “criminal justice investment appears to have become a humanitarian goal in its own right.”⁵⁶ Polly Pallister-Wilkins expands on this through an analysis of EU border control rhetoric and policy, both of which seek to repackage aggressive border policing and pushbacks on the English Channel and the Mediterranean as a form of humanitarianism that masks the underlying mobility injustice and the political violence of the border.⁵⁷

Criminologist Kjersti Lohne takes up the concept of penal humanitarianism in a 2020 article and applies it to international criminal justice. She points to the ways in which, in this era of penal humanitarianism, the lines between punishment and humanitarianism have become

⁵⁴ Moyn, “Deflection of Argument,” 69.

⁵⁵ Mary Bosworth, “Penal Humanitarianism? Sovereign Power in an Era of Mass Migration,” *New Criminal Law Review* 20, no. 1 (2017): 58–59, <https://doi.org/10.1525/nclr.2017.20.1.39>.

⁵⁶ Mary Bosworth, “Penal Humanitarianism and Sovereign Power,” *Border Criminologies* (blog), March 6, 2019, <https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2019/03/penal>.

⁵⁷ Polly Pallister-Wilkins, *Humanitarian Borders: Unequal Mobility and Saving Lives* (London: Verso Books, 2022).

blurred. For instance, in interviews, her informants were startled by questions around sentencing and punishment at the ICC and insisted that the institution was primarily about administering justice *for* victims. These responses, of course, are shaped by efforts by the ICC, at the urging of a strong civil society lobby, to merge understandings of retributive and restorative justice. The ICC, for instance, through the establishment of a Trust Fund for Victims (TFV) within the institution, allows for participation of victims in the criminal proceedings, and has a mandate to offer material assistance to victims of international crimes, as well as a mandate to implement court-ordered reparations as part of the sentencing. While in practice the results of this work tend to look quite like development initiatives—for instance, it is possible that the TFV may decide to build a school or community center as a form of collective reparations—the legal and penal connection remains central. In other words, there must be a convicted individual found guilty of distinct crimes in a particular location, and there must be a clearly identifiable and verifiable group of victims for the reparations to serve. Seen in this light, Lohne argues, international criminal justice works both to “juridify” and to “depoliticize” complex humanitarian emergencies.⁵⁸ Kamari Clarke has similarly drawn attention to the “tribunalization of African violence.”⁵⁹ In a 2014 opinion piece in the *New York Times* titled “Courts Can’t End Civil Wars,” former president of South Africa Thabo Mbeki and Mahmood Mamdani critique the ways in which criminalization of individual perpetrators has become the preferred response in the wake of extreme violence. What this orientation precludes, they argue, is the prioritization of much needed political reform, and an understanding that political violence is driven by issues and constituencies, not individual, deviant perpetrators.⁶⁰

⁵⁸ Kjersti Lohne, “Penal Humanitarianism beyond the Nation State: An Analysis of International Criminal Justice,” *Theoretical Criminology* 24, no. 2 (October 2018): 156, <https://doi.org/10.1177/1362480618806917>.

⁵⁹ Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa*, Cambridge Studies in Law and Society (Cambridge: Cambridge University Press, 2009), 45.

⁶⁰ Thabo Mbeki and Mahmood Mamdani, “Courts Can’t End Civil Wars,” *The New York Times*, February 5, 2014, sec. Opinion, <https://www.nytimes.com/2014/02/06/opinion/courts-cant-end-civil-wars.html>.

The rise of anti-impunity as hegemonic force as a response to conflict has been supplemented by its entrenchment as an academic discipline. Scholars have pointed to the technocratic vocabularies that appear to accompany increased international institutionalization and bureaucratization and the ways in which the dominant approach to international law, human rights, and rule of law is organized and ordered through a set of problem-solving institutions and instrumentalized legal techniques.⁶¹ Kamari Clarke, for instance, writes, “The expansion of human rights and the rule of law advocacy has involved the development of an analytic community of legal experts whose ‘science’ has been established by the rule of law.”⁶² Mark Goodale calls our attention to human rights as a set of technocratic instrumentalities, dedicated to the protections and maintenance of life.⁶³ My study is indebted to the rich ethnographic and anthropological engagement with the fields of human rights,⁶⁴ development,⁶⁵ and other forms of transnational or international governance and cooperation through technocratic expertise.⁶⁶ A 2020 special section of the journal *Social Anthropology*,

⁶¹ David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton, NJ: Princeton University Press, 2016); Annelise Riles, “Anthropology, Human Rights, and Legal Knowledge: Culture in the Iron Cage,” *American Anthropologist* 108, no. 1 (2006): 59.

⁶² Clarke, *Fictions of Justice*, 65.

⁶³ Mark Goodale, *Dilemmas of Modernity: Bolivian Encounters with Law and Liberalism* (Stanford, CA: Stanford University Press, 2009).

⁶⁴ Sally Engle Merry, *The Seductions of Quantification: Measuring Human Rights, Gender Violence, and Sex Trafficking* (Chicago: The University of Chicago Press, 2016); Sally Engle Merry, “Measuring the World: Indicators, Human Rights, and Global Governance,” *Current Anthropology* 52, no. S3 (2011): S83–95, <https://doi.org/10.1086/657241>; Richard Price, *Rainforest Warriors: Human Rights on Trial* (Philadelphia: University of Pennsylvania Press, 2011); Harri Englund, *Prisoners of Freedom: Human Rights and the African Poor* (Berkeley: University of California Press, 2006); Richard Ashby Wilson and Richard D. Brown, eds., *Humanitarianism and Suffering: The Mobilization of Empathy* (New York: Cambridge University Press, 2009); Jane K. Cowan, Marie-Bénédicte Dembour, and Richard A. Wilson, *Culture and Rights: Anthropological Perspectives* (Cambridge: Cambridge University Press, 2001); Abdullahi An-Na’im, ed., *Cultural Transformation and Human Rights in Africa* (London: Zed Books, 2002); Riles, “Anthropology, Human Rights and Legal Knowledge”; Mark Goodale, “Toward a Critical Anthropology of Human Rights,” *Current Anthropology* 47, no. 3 (2006): 485–511, <https://doi.org/10.1086/503061>; Miia Halme-Tuomisaari and Mark Goodale, “Anthropology & Human Rights – Version 2016,” *Allegra Lab*, March 2016, <https://allegralaboratory.net/anthropology-human-rights-version-2016/>; Annelise Riles, “Infinity Within the Brackets,” *American Ethnologist* 25, no. 3 (2008): 378–98, <https://doi.org/10.1525/ae.1998.25.3.378>; Elif M. Babül, *Bureaucratic Intimacies: Translating Human Rights in Turkey* (Stanford, CA: Stanford University Press, 2017).

⁶⁵ Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton, NJ: Princeton University Press, 1995).

⁶⁶ Stacia E. Zabusky, *Launching Europe: An Ethnography of European Cooperation in Space Science* (Princeton, NJ: Princeton University Press, 1995); Timothy Mitchell, *Rule of Experts: Egypt, Techno-Politics, Modernity* (Berkeley: University of California Press, 2002).

convened by anthropologists Julie Billaud and Jane Cowan, was dedicated to studies exploring international governance processes as an example of “the bureaucratisation of utopia.”⁶⁷

I suggest that while anthropologists have engaged with the larger forces and movements that give rise to structures of governance and conducted functionalist accounts of the effects of such structures in the communities in which they sought to intervene, the discipline has been hesitant to engage ethnographically with the subjectivities, life trajectories, and emotional attachments of professionals who work within the orders of governance that structure our modern world. My own account in this work of my troubled efforts to conduct participant observation in such spaces may go some way toward justifying this hesitancy. This unyieldingness to ethnographic inquiry is also not exclusive to legal institutions. In her study of indigenously owned corporations in New Zealand, Gwendolyn Gordon, a dear friend and brilliant anthropologist who was taken from us far too soon, presents the worlds of finance and business as similarly “slick surfaces . . . once considered too hard, too slick, too self-consciously and self-protectively *polished* [for anthropological scholarship] ever truly to penetrate.” She proposed that we collectively refer to efforts to study such spaces as an “anthropology of the shiny.”⁶⁸ Notable anthropologies of the shiny that have influenced this study, then, are Yael Navarro-Yashin’s ethnography of the affective dimensions of work as a civil servant, Liisa Malkki’s study of the hopes and desires of Finnish Red Cross workers, Elif Babül’s 2017 *Bureaucratic Intimacies*, and (on international criminal justice specifically) Nigel Eltringham’s 2019 study of life at the International Criminal Tribunal for Rwanda.⁶⁹

⁶⁷ Julie Billaud and Jane K. Cowan, “The Bureaucratisation of Utopia: Ethics, Affects and Subjectivities in International Governance Processes,” *Social Anthropology* 28, no. 1 (2020): 6–16, <https://doi.org/10.1111/1469-8676.12750>.

⁶⁸ Gwendolyn Gordon, “Bones, Breath, Body: The Life of an Indigenously Owned New Zealand Corporation,” (PhD diss., Princeton University, 2014), 25, <https://www.proquest.com/docview/1501643991/fulltextPDF/A0A371C8A6AC4D8CPQ/1?accountid=11321>.

⁶⁹ Yael Navarro-Yashin, “Affect in the Civil Service: A Study of a Modern State-System,” *Postcolonial Studies* 9, no. 3 (2006): 281–94, <https://doi.org/10.1080/13688790600824997>; Liisa H. Malkki, *The Need to Help: The Domestic Arts of International Humanitarianism* (Durham, NC: Duke University Press, 2015); Babül, *Bureaucratic Intimacies*; Eltringham, *Genocide Never Sleeps*.

Interestingly, legal scholars themselves are also more frequently taking up the methods of anthropology, such as ethnography and participant observation, to produce “thick description” of legal processes and systems.⁷⁰

The slowness of anthropologists in turning to an ethnographic study of professional life in international bureaucracies may relate both to the patterns and histories in our own discipline, which I will discuss in the next chapter, and to the ways in which these objects or potential sites of study present themselves as inscrutable. During my fieldwork in The Hague, interlocutors regularly assumed I was just passing through, attending a trial before heading “to the field,” presumed to be Africa. As I will discuss in greater detail in the next chapter, while the courtrooms of international criminal justice are generally open to visitors, the offices are clearly not, and workers in the field—bureaucrats—were both surprised and suspicious when I signaled an interest in their experiences and their work. This presentation as a technical, *unpeopled* system of international justice is what Colin Hoag, quoting Donna Haraway, calls the “god-trick” of bureaucracy, “an ethos that figures bureaucracy, like science, as a gaze from nowhere and everywhere all at once.”⁷¹ For instance, one enduring fascination—or vexation, perhaps—underlying this project is that law as an object of study seems to control how, where, and by whom its workings can be properly studied and understood. In short, law as an object of study and a field of practice seems to determine which questions are askable. This is a tension that is identifiable in anthropological engagements with forms of international law, such as human rights activism and international criminal law. Annelise Riles identifies in the space between human rights and anthropology a discursive “interdisciplinarity” animated by a pervasive instrumentalism. Riles calls this the “iron cage” of legal instrumentalism: law’s

⁷⁰ See Anne Orford, “In Praise of Description,” *Leiden Journal of International Law* 25, no. 3 (2012): 609–25, <https://doi.org/10.1017/S0922156512000301>. Another example is Rebecca Sutton’s 2021 book *The Humanitarian Civilian: How the Idea of Distinction Circulates Within and Beyond International Humanitarian Law* (Oxford: Oxford University Press, 2021).

⁷¹ Colin Hoag, “Assembling Partial Perspectives: Thoughts on the Anthropology of Bureaucracy,” *Political and Legal Anthropology Review* 34, no. 1 (2011): 81–94. 4

propensity to absorb everything into its own logic.⁷² A review of the ways in which two legal anthropologists, Richard Ashby Wilson and Kamari Maxine Clarke, have engaged with the complicated relationship between conflict situations on the African continent and the work of the ICC demonstrates this tension.

First, some background is required. As the first permanent international court with jurisdiction to try individuals for the international crimes of genocide, war crimes, and crimes against humanity, and a membership of 123 member states out of 195 countries in the world (as of 2022), one ongoing debate has been around who the prosecutor chooses to prosecute and why. To date, the Office of the Prosecutor (OTP) has criminally indicted forty-six individuals and is detaining eight defendants related to situations under ICC investigation and cases before the court in the Democratic Republic of the Congo, the Central African Republic, Côte d'Ivoire, Sudan, Kenya, Libya, Mali, and Uganda.⁷³ With thirty-three members, African states are the largest regional bloc of member states of the ICC, and were vocal, hopeful early supporters of the establishment of the court, seeing great promise and emancipatory potential in the creation of an international judicial body. Within the ICC's first decade of operations, African states became increasingly disillusioned with and skeptical of the prosecution record of the court, seeing in the predominance of cases against African nationals an uneven, biased application of the law. Rather than ringing in a new world order governed by international institutions and agreements, those disillusioned with the Court saw instead a continuance of an order whereby states in the Global South had their sovereign authority undermined by intervening forces located in "the West" and were evaluated against externally imposed standards and rubrics of "good governance," of which "justice" and "rule of law" have increasingly become indicators. The results of the ICC's office of the prosecution's early charging practice were that Black men

⁷² Annelise Riles, "Anthropology, Human Rights, and Legal Knowledge: Culture in the Iron Cage," *American Anthropologist* 108, no. 1 (2006): 52–65.

⁷³ "Defendants," International Criminal Court, accessed March 14, 2023, <https://www.icc-cpi.int/defendants#Default=%7B%22k%22%3A%22%22%7D>.

from the Global South were overrepresented in the ICC's dockets, facing a team of often predominantly White, Western-educated prosecutors. In 2016, then Information Minister Sheriff Bojang of Gambia, in a televised speech that acutely demonstrated the soured relationship between previously supportive African states and the ICC, exclaimed, "The ICC, despite being called the International Criminal Court, is in fact an International Caucasian Court for the persecution and humiliation of people of color, especially Africans."⁷⁴

Such sentiments became even more pronounced after the ICC prosecutor, following a referral of the United Nations Security Council (UNSC) of the situation in Sudan to the ICC, issued an arrest warrant against President Omar al-Bashir of Sudan in 2009, the first time a sitting head of state had been indicted by an international judicial body. Sudan, like the United States, is not a member state of the ICC and is therefore not subject to its jurisdiction. However, because Sudan is a member of the United Nations, the Security Council's decisions are binding on it. Using its enforcement authority under Chapter VII of the UN Charter, the Security Council in 2005 formally referred the situation in Darfur, Sudan, to the prosecutor of the ICC, thereby extending the court's jurisdiction to the conflict. That this legal contortion was even possible is due to fraught negotiations and a political compromise that gave the Security Council a measure of authority over the ICC. This is how a head of state of a sovereign country not a member of the ICC nevertheless became subject to an ICC arrest warrant.⁷⁵ An analogous outcome for, say, the President of the United States, also not a member of the ICC, would be inconceivable, because in another example of a significant political compromise, the United States, as one of five permanent members of the UN Security Council has the ability to veto any such resolution. These compromises reflect the political dynamics underlying the practice

⁷⁴ Siobhán O'Grady, "Gambia: The ICC Should Be Called the International Caucasian Court," *Foreign Policy*, October 26, 2016, <https://foreignpolicy.com/2016/10/26/gambia-the-icc-should-be-called-the-international-caucasian-court/>.

⁷⁵ Kamari Maxine Clarke and Sarah-Jane Koulen, "The Legal Politics of the Article 16 Decision: The International Criminal Court, the UN Security Council and Ontologies of a Contemporary Compromise," *African Journal of Legal Studies* 7, no. 3 (2014): 297–319, <https://doi.org/10.1163/17087384-12342049>.

of international lawmaking and have become a fault line and a site of discontent even as its supporters proffer the ICC as demonstrative of a coherent international legal order.

For several years between 2009 and 2018, the criticism and severe misgivings around the ICC's work resulted in the African Union voting to pass a series of resolutions vowing to stop cooperating with ICC investigations and the enforcement of arrests.⁷⁶ This "Pan-Africanist pushback" has given rise to renewed discussions in the African Union to establish a new "African Criminal Court" (a criminal chamber added on to the existing African Court of Human and Peoples' Rights) as outlined in the Malabo Protocol and resulted in announcements by three African states in 2016—Burundi, the Gambia, and South Africa—of their decisions to withdraw from the ICC. Ultimately, only Burundi has formally withdrawn from the court.⁷⁷ While diplomatic relations have improved somewhat in recent years, after its 2020 summit the AU passed a resolution criticizing the "double standards applied by the ICC in its selection of cases" and urging member states, and African states in particular to "stand against the increased politicisation of the Court."⁷⁸

Legal anthropologist Richard Ashby Wilson, against this backdrop, engages with the ICC from what one might call an internal epistemic position. His rich work on international criminal prosecutions has explored, through a detailed analysis of trial practices and transcripts, how social scientific knowledge such as ethnographic and qualitative observations of a given

⁷⁶ "Decision On The Meeting Of African States Parties To The Rome Statute Of The International Criminal Court (ICC) Doc. Assembly/AU/13(XIII)," AU Assembly, July 3, 2009, https://au.int/sites/default/files/decisions/9560-assembly_en_1_3_july_2009_auc_thirteenth_ordinary_session_decisions_declarations_message_congratulations_motion_0.pdf.

⁷⁷ "Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi," Pre-Trial Chamber III, International Criminal Court, November 9, 2017, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017_06720.PDF.

⁷⁸ "Decision On The International Criminal Court (ICC) Doc. Assembly/AU/Dec.789(XXXIII)," AU Assembly, February 10, 2020, https://au.int/sites/default/files/decisions/38180-assembly_au_dec_749-795_xxxiii_e.pdf.

social context informs legal actors' decision-making.⁷⁹ In his work on propaganda trials, where international criminal tribunals aimed to prosecute political leaders for speech acts and establish that these acts had instigated widespread atrocity, he explores the different strategies international prosecutors may use to establish causation, and more generally, how international legal institutions apprehend and adjudicate violence.⁸⁰ Wilson's book on historical debates in international criminal trials documented both how historians and historical knowledge entered the court room as witnesses and evidence respectively, and how the trial record and verdict contributed to the development of a historical record.⁸¹ In his work, he has advocated for what he calls a "legal realist" approach, engaging with the structural characteristics of the legal institutions he studies on their own terms, while, on occasion, pointing to the effects of a narrow legalism and the ways in which evidentiary standards and process risk misapprehending the social context within which the crimes at issue took place.⁸² In a piece reflecting on the future of legal anthropology, he encourages fellow legal anthropologists to focus more on problem-solving within the context of legal processes, and to "agonize less about what law is."⁸³

In contrast to Wilson's approaches, I would posit legal anthropologist Kamari Clarke's work on international criminal prosecutions as demonstrating an external epistemic position. Clarke's work on international law demonstrates a refusal to yield to the legal frame and emphasizes instead the conditions of international criminal law's making. For example, in her

⁷⁹ Richard Ashby Wilson, "Through the Lens of International Criminal Law: Comprehending the African Context of Crimes at the International Criminal Court," *Studies in Ethnicity and Nationalism* 11, no. 1 (2011): 106–15, <https://doi.org/10.1111/j.1754-9469.2011.01102.x>.

⁸⁰ Richard Ashby Wilson, "Propaganda on Trial: Structural Fragility and the Epistemology of International Legal Institutions," in *Palaces of Hope: The Anthropology of Global Organizations*, ed. Ronald Niezen and Maria Sapignoli, Cambridge Studies in Law and Society (Cambridge: Cambridge University Press, 2017), 266–93. See also Richard Wilson, *Incitement on Trial: Prosecuting International Speech Crimes*, Cambridge Studies in Law and Society (Cambridge: Cambridge University Press, 2017).

⁸¹ Richard Ashby Wilson, *Writing History in International Criminal Trials* (Cambridge: Cambridge University Press, 2011).

⁸² Wilson, "Propaganda on Trial."

⁸³ Rita Kesselring et al., "The Future of Anthropology of Law," *Emergent Conversation*, PoLAR: Political and Legal Anthropology Review, February 10, 2017, <https://polarjournal.org/2017/02/10/emergent-conversations-part-6/>.

first monograph on international criminal justice, Clarke demonstrated the ways in which the very definition of “international crime” was curtailed through years of negotiation between government actors. The decision to focus the Rome Statute on the “core crimes” of war crimes, genocide, crimes against humanity, and aggression was a legal *as well as* a political one, she argues. For example, in 1989, Trinidad & Tobago and other Caribbean states requested that the International Law Commission ensure that any international criminal court also deal with economic crimes related to the issue of drug trafficking. Current ICJ Judge Patrick Robinson of Jamaica was a state delegate at the time, and has published a detailed account of these lobbying efforts on the part of Caribbean states to include crimes that had a particularly destabilizing effect, such as illicit drug trafficking.⁸⁴ In 1991, Clarke details, the draft code of international crimes listed twelve potential categories of crime: aggression; threat of aggression; intervention; colonial domination and other forms of alien domination; genocide; apartheid; systematic or mass violations of human rights; exceptionally serious war crimes; recruitment, use, financing, and training of mercenaries; international terrorism; illicit traffic in narcotic drugs; and willful and severe damage to the environment.⁸⁵ By 1995, the list of twelve had been reduced to six. Omissions included Trinidad & Tobago’s requested “illicit traffic in narcotic drugs,” colonial domination, apartheid, mercenarism, damage to the environment, and international terrorism.⁸⁶ The justification offered for this reduced list by the special rapporteur was an effort to avoid controversy, work toward a “generally accepted” list of crimes, and avoid a possible “devaluing” of the concept of crimes against the peace and security of mankind by limiting the crimes to “only the most serious.”⁸⁷ Clarke argues that, in

⁸⁴ Patrick Robinson, “The Missing Crimes,” in *The Rome Statute for an International Criminal Court: A Commentary*, ed. Cassese (Oxford: Oxford University Press, 2002), 497–525. See also Patrick Robinson, “The ICC and the Caribbean,” *The Gleaner*, April 11, 2010, sec. In Focus, <https://jamaica-gleaner.com/gleaner/20100411/focus/focus5.html>.

⁸⁵ Clarke, *Fictions of Justice*, 55–59.

⁸⁶ Clarke, *Fictions of Justice*, 55–59.

⁸⁷ Clarke, *Fictions of Justice*, 55–59.

the end, “the crimes classified as the ‘most serious’ were those that involved mass death and widespread killing of such gravity that they were threats to peace and security of the international community. Thus, the crimes that came to occupy the moral and legal concerns of the court were those dealing with explicit forms of mass violence—akin to the forms of violence being perpetrated in sub-Saharan Africa and Latin America at the time.”⁸⁸ In later work, Clarke takes up another process of negotiation related to what would become Article 16 of the Rome Statute, affording powers of referral and deferral of cases from the Security Council to the ICC, as another site of “the political origins of the law and the manner in which foundational inequalities were woven into the very fabric of the Rome Statute.”⁸⁹ This power, afforded to an undemocratic Security Council with only fifteen member states, of which five have a veto power, became a particular flashpoint in the referral of the Darfur case to the ICC, leading to the first international criminal indictment of a sitting head of state, Omar Al-Bashir of Sudan. It is illustrative, in this context, to review in response AU efforts to reinvigorate conversations around establishing an African regional court with international criminal jurisdiction. The crimes included in the Malabo Protocol, the draft code of crimes for the envisioned African criminal court, include a much broader range of fourteen crimes beyond the four “core crimes” in the Rome Statute: mercenarism, corruption, money laundering, piracy, trafficking in drugs, persons, and hazardous waste, the illicit exploitation of natural resources, the crime of unconstitutional change of government, and terrorism. Additionally, the Malabo Protocol provides in Article 46 *A bis* immunity to a serving head of state or government and other senior state officials.⁹⁰ In *Affective Justice* (2019), Clarke follows the emotional, historical, and political entanglements that produced international criminal justice as well as the efforts by the African Union to push back and remake the international juridical framework,

⁸⁸ Clarke, *Fictions of Justice*, 59.

⁸⁹ Clarke and Koulen, “Legal Politics,” 297.

⁹⁰ “Protocol on the Statute of the African Court of Justice and Human Rights,” African Union, July 1, 2008, <https://www.refworld.org/docid/4937f0ac2.html>.

of which the Malabo Protocol is one example. In so doing, she takes seriously the various sites of contestation between the aspirations and desires for global justice as articulated by stakeholders on the African continent and the jurisdiction as established, articulated and exercised by the ICC.

I locate in this review of the difference in epistemic positions taken by Wilson and Clarke an example of the problem outlined by Annelise Riles, that legal knowledge practices appear to demand either participation in the regime (as Wilson models by suggesting constructive, problem-solving avenues for research) or dissent and detraction (of which Clarke has been accused).⁹¹ With this project, through ethnographic and participant observation, I undertake an inside-out approach, positioning myself within the frame of international criminal justice so as to call attention to the ways in which it maintains and outwardly represents itself as a distinct and privileged social field.

In the almost two decades since the establishment of the ICC, international criminal legal scholarship as well as various utterances by actors in ICL institutions have displayed a persistent tendency to separate law from politics, and to elevate the former above the latter. Historian Sam Moyn, for instance, has pointed to the ways in which textbooks of international criminal law seem dedicated to the isolation of law from politics, “stating rules and accumulating doctrines . . . in spite of the strongly improvisational character of the field in which political constraints and possibilities for every move are plain.”⁹² The late Cherif Bassiouni, who was celebrated in several obituaries published after his passing in 2017 as the “godfather” of international criminal justice, described the advancement of international criminal justice as a “historic and still on-going struggle between realpolitik and international

⁹¹ Richard Ashby Wilson, “Affective Justice Symposium: Commentary on Kamari Clarke’s Affective Justice,” *Opinio Juris* (blog), May 28, 2020, <http://opiniojuris.org/2020/05/28/affective-justice-symposium-commentary-on-affective-justice-by-kamari-clarke/>. See also Riles, “Anthropology, Human Rights, and Legal Knowledge.”

⁹² Moyn, “Judith Shklar.”

criminal justice.”⁹³ Successive Chief Prosecutors of the ICC have invoked this binary, stating that they will “not bow to political considerations.”⁹⁴ In a 2014 interview, Prosecutor Fatou Bensouda, who was Prosecutor of the ICC from 2012 to 2021, stated that “political and extraneous considerations” played no role in the decisions of her office.⁹⁵ These rhetorical efforts to insulate law from politics have at times reflected an almost religious zeal. Take, for example, Bensouda’s assertion that the Rome Statute was her “Bible,” and her insistence, during at least two separate briefings to the UN Security Council on the situation in Darfur, that “Justice and accountability for the grave crimes under the Rome Statute must not be sacrificed at the altar of political expediency.”⁹⁶ Earlier, in 2014, her statement was more of an appeal: “For how much longer will legality and accountability be sacrificed at the altar of political expediency? What amount of suffering should Darfur’s victims endure for this Council to act decisively on the situation in Darfur?”⁹⁷ In a 2019 keynote address, Bensouda replaced the phrase “legality and accountability” with “justice for victims” in her remarks: “The dilemma we face is that every situation the ICC is called upon to deal with will always be politically volatile. Many interests may be at stake. However, justice for victims of crimes committed in these situations should never be sacrificed at the altar of political expediency.”⁹⁸

⁹³ M. Cherif Bassiouni, ed., *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text (3 Vols)*, vol. 18, International and Comparative Criminal Law Series (Leiden: Brill, 2005).

⁹⁴ Clarke and Koulen, “Legal Politics.”

⁹⁵ Mercy Eze, “Interview with Fatou Bensouda,” *New African*, January 28, 2014, <https://newafricanmagazine.com/4193/>.

⁹⁶ Fatou Bensouda, “Statement of ICC Prosecutor Fatou Bensouda to the United Nations Security Council on the Situation in Darfur, Sudan Pursuant to UNSCR 1593 (2005),” International Criminal Court, 099 2016, <https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-united-nations-security-council-situation-darfur-sudan>. See also Kamari Maxine Clarke, “Affective Justice: The Racialized Imaginaries of International Justice,” *PoLAR: Political and Legal Anthropology Review* 42, no. 2 (2019): 244–67, <https://doi.org/10.1111/plar.12307>.

⁹⁷ “Justice for Darfur’s Victims Mired in Political Expediency – ICC Prosecutor,” UN News, June 17, 2014, <https://news.un.org/en/story/2014/06/471072>.

⁹⁸ Fatou Bensouda, “Prosecutor Says ICC Is Fair, Independent and Impartial,” *Journalists for Justice* (blog), September 30, 2019, <https://jfjustice.net/prosecutor-says-icc-is-fair-independent-and-impartial/>. With the swearing in of a new Prosecutor in 2021, the discourse of legality and accountability as understood through the logic of international criminal justice as commensurate with justice for victims continues, though the current Prosecutor Karim Khan has been noticeably more measured. In December 2022, he announced that his office was closing an investigation, for the first time since the office began work in 2003. The OTP would not be pursuing further charges against any other individuals in addition to the two already indicted in relation to the situation in the Central African Republic. Given the limited resources of his office against the scale of

These statements by central actors in the field of international criminal justice, in which “politics” and “law” are positioned as distinct entities and whereby legal actors go to great lengths to disavow the political aspects of their decisions, align with political theorist Judith Shklar’s 1964 theorization (and critique) of legalism. While Shklar acknowledged that in legal theory “the divorce of law from politics” is widely accepted as a practical measure “designed to prevent arbitrariness,” she critiqued the extent to which, ideologically, legalism extended this separation:

ideologically, legalism does not stop there. Politics is regarded not only as something apart from law, but as inferior to law. Law aims at justice, while politics looks only to expediency. The former is neutral and objective, the latter the uncontrolled child of competing interests and ideologies. Justice is thus not only the policy of legalism, it is treated as a policy superior to and unlike any other.⁹⁹

Law aims at justice, while politics looks only to expediency. Against the background of Shklar’s theorization of ideological legalism, ICC Prosecutor Bensouda’s plea to the Security Council fifty years later—“justice for victims of crimes should never be sacrificed at the altar of political expediency”—reads very much like an expression of ideological legalism on the international stage. Indeed, for Sam Moyn, Shklar, despite not having lived to see the establishment of the first international criminal court, is “the rare thinker to offer a serious account of international criminal justice as a deeply and inescapably political enterprise.”¹⁰⁰ Moyn finds in Shklar’s *Legalism* an “underappreciated classic” that “stands out as the single

criminality assessed by the ICC, he stated, “I am not willing to continue to overpromise and underdeliver for survivors and the families of victims. To achieve meaningful results, we must be robust in our analysis of how resources can be most effectively deployed to deliver the greatest impact for those affected by crimes falling within our jurisdiction globally.” Karim A. A. Khan, “The Prosecutor of the International Criminal Court, Karim A.A. Khan KC, Announces Conclusion of the Investigation Phase in the Situation in the Central African Republic,” International Criminal Court, December 16, 2022, <https://www.icc-cpi.int/news/prosecutor-international-criminal-court-karim-aa-khan-kc-announces-conclusion-investigation-0>.

⁹⁹ Shklar, *Legalism*, 111; my emphasis.

¹⁰⁰ Moyn, “Judith Shklar,” 473.

most significant reckoning with the politics of international criminal justice ever written. Returning to its account fifty years ago could serve to develop an intellectual perspective sorely needed today.”¹⁰¹

Judith Shklar defined legalism as “the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by legal rules.”¹⁰² As a social and historical phenomenon, Shklar noted, legalism cannot simply be defined, but as a morality “must be seen in its various concrete manifestations.”¹⁰³ For Shklar, legalism’s “most nearly complete expression is in the great legal systems of the European world. . . . it has also served as the political ideology of those who cherish these systems of law and, above all, those who are directly involved in their maintenance—the legal profession, both bench and bar.”¹⁰⁴ Shklar identified, in legal theory and among lawyers and philosophers, an “urge to draw a clear line between law and non-law,” a procedure that “has served to isolate law completely from the social context within which it exists. Law is endowed with its own ‘science,’ and its own values, which are all treated as a single ‘block’ sealed off from general social history, from general social theory, from politics, and from morality.”¹⁰⁵ Throughout the book, Shklar aims to clarify the workings of legalism as an ideological manifestation:

To say that it is an ideology is to criticize only those of its traditional adherents who, in their determination to preserve law from politics, fail to recognize that they too have made a choice among political values. In itself this would hardly be a new accusation, nor a very important one. What does matter is again the intellectual consequences of this denial, and the attendant belief that law is not

¹⁰¹ Moyn, “Judith Shklar,” 473.

¹⁰² Shklar, *Legalism*, 1.

¹⁰³ Shklar, *Legalism*, 1.

¹⁰⁴ Shklar, *Legalism*, 2.

¹⁰⁵ Shklar, *Legalism*, 2.

only separate from political life but that it is a mode of social action superior to mere politics. . . It is the rigidity of legalistic categories of thought, especially in appraising the relationships of law to the political environment within which it functions that is so deleterious.¹⁰⁶

Shklar's central critique of legalism was its inflexibility and narrowness. She pressed for the necessary acceptance that law itself is a form of political action, a choice among others, and lamented that anyone who dared assert that that legal justice is itself a policy "must expect to meet certain outraged accusations."¹⁰⁷ She wrote, presciently, that "there is no situation in which these ideological habits of legalism are more openly confronted by competing policies than in the course of political trials."¹⁰⁸ It is for this reason that she dedicated a large portion of *Legalism* to an analysis of the transcripts of the Nuremburg trials. In calling the post-WWII prosecution of the Nazi leadership a political trial, Shklar was careful to explain that in her view, "there is politics and politics." In other words, building on the central premise that legal action is "both the expression of and a participant in" politics, the more salient question then becomes: what kind of politics can law maintain? In Shklar's words, "It is the quality of the politics pursued in them that distinguishes one political trial from another." While legal theorists eschew the political trial because of the possibility of political persecution or the repression of political dissent, Shklar argued that there are occasions when trials may serve liberal ends, constitutional politics, and a "decent legal system." She concluded, albeit with some ambivalence, that the "Trial of the Major War Criminals by the International Military Tribunal at Nuremberg probably had that effect."¹⁰⁹ But while Shklar accepted that in the post-WWII context the decision to pursue criminal prosecutions as a policy choice may well have been constructive from a legalistic perspective—the decision to prosecute Nazi leadership for

¹⁰⁶ Shklar, *Legalism*, 9.

¹⁰⁷ Shklar, *Legalism*, 143.

¹⁰⁸ Shklar, *Legalism*, 143.

¹⁰⁹ Shklar, *Legalism*, 145.

the crime of aggression and crimes against humanity expressed and reinforced legalistic principles on an international stage, and offered a “legalistic way to cope with violence, vengeance, disorder and even the future of German politics.”¹¹⁰—the problem, for Shklar, was that adherents of “the policy of justice” rarely take satisfaction in considering justice a policy choice among and in accordance with others:

In its exclusiveness justice as a policy tends to ignore all other political ends and the very social circumstances which condition its effect and even its possibility. Formal justice depends for its social impact upon the total political environment in which juridical actions occur, and its functions cannot be understood in isolation. Yet isolation from politics is its first ideological demand.¹¹¹

In her trademark acerbic style, Shklar concluded: “As such, the Trial was a tribute to both the intellectual limitations and to the real political value which legalism has in practice, even it if refuses to recognize this clearly.”¹¹² This inability of lawyers to recognize themselves and their labor as expressions of a political value was a central frustration for Shklar, and, what she called the “great paradox” of legalism:

The great paradox revealed here is that legalism as an ideology is too inflexible to recognize the enormous potentialities of legalism as a creative policy but exhausts itself in intoning traditional pieties and principles which are incapable of realization. This is, of course, the perennial character of ideologies.¹¹³

While, in her estimation, as demonstrated through a discussion of the Nuremberg tribunal, there can certainly be a need for a pragmatic, creative application of legalism, legalism as ideology is simultaneously too inflexible to admit its utility and potentiality in specific contexts and

¹¹⁰ Shklar, *Legalism*, 147.

¹¹¹ Shklar, *Legalism*, 147.

¹¹² Shklar, *Legalism*, 147.

¹¹³ Shklar, *Legalism*, 112.

situations. For Shklar, the post-WWII moment was one in which legalism fulfilled an immediate and distinct function, which, she wrote, “is both the most ancient and the most compelling purpose of all criminal justice. It replaced private, uncontrolled vengeance with a measured process of fixing guilt in each case and taking the power to punish out of the hands of those directly injured. This alone would suffice to show its enormous social value as an expression of legalistic politics.”¹¹⁴ While one can certainly disagree with the reasons for which Shklar saw the Nuremberg trials as a necessary political choice, as Samuel Moyn does, her point that it was a choice among others is crucial.¹¹⁵ This aligns with her argument that law ought to be seen “in terms of degrees of legalism in the politics of complex social orders.”¹¹⁶ Law and politics, then, are not divorced entities, but work together; as such, the central, enduring question must be *which* political values are served here?¹¹⁷ As I argue throughout this dissertation, the logic of international criminal law focuses on atrocious acts by individual actors, justifying its prosecutions as a kind of care for victims of such harms, without being willing or able, due to fundamental constraints on what qualifies as admissible evidence in a courtroom, to engage with deep-seated patterns of harm and inequity in our world. In other words, what emerges is a form of penal humanitarianism that privileges carceral logic in efforts toward justice and redress.

¹¹⁴ Shklar, *Legalism*, 158.

¹¹⁵ See Moyn, “Judith Shklar,” 48. He writes:

Yet there is actually very little reason to believe that generalized vengeance was a threat (or option) after World War II—certainly for the most grievously injured group, which was in no position to exact it. The victors considered unleashing extrajudicial revenge themselves, simply killing those they caught, and it was a near thing that they didn’t in all cases. But given the superficiality of Nuremberg’s attempt to reckon with the past, postwar history better proves that vengeance need not follow from inaction than that only trying the perpetrators forestalls blood. And in any case it is well known that—as post-World War II history also proves—a binary choice between trials and vengeance is false, given a continuum of available political techniques. Shklar herself admitted as much: “If the only two alternatives had been a trial or uninhibited redress by the injured, nothing more need be said in favor of a trial. These two were not, however, the only possibilities” (159).

Had Shklar defended trials mainly as the lesser evil, her argument would have lacked theoretical interest by her own lights, since “the political advantages of a trial that replaces the anarchic cycle of vengeance need hardly be belabored; they have been well-known since the days of Aeschylus” (159).

¹¹⁶ Shklar, *Legalism*, 149.

¹¹⁷ Shklar, *Legalism*, 156, 169.

In Shklar's estimation, in 1945 one could argue for a variety of reasons that the Nuremberg trials were politically necessary and yielded possible future advantages. But it is precisely this weighing of arguments, an exploration of necessity and function, that legalism—and by extension, I argue, international criminal justice—dismisses. Shklar wrote: "From the point of view of traditional legal ideology, [these arguments] are therefore not just inadequate—they are totally misguided. They prove only that expediency, and not justice, was served, and, these two being irreconcilable, they show what a farce the Trial was from beginning to end."¹¹⁸ ICC Prosecutor Bensouda's entreaties to the Security Council between 2014 and 2016, in which she cast criminal justice for victims and legal accountability as sacrificial lambs slaughtered at "the altar of political expediency," are a striking example of ideological legalism at work at the international level, over five decades after *Legalism* was published. While Shklar never witnessed the establishment of the International Criminal Court, she was presciently skeptical of any endeavor to create, or pretend that there existed, an international *system* of justice. Indeed, she found that the hostility to politics was particularly prominent among scholars of international law.¹¹⁹ After all, after the Nuremberg and Tokyo tribunals, it would be another fifty years until the establishment of the notably ad hoc UN tribunals for the former Yugoslavia and Rwanda, and even with the establishment of a permanent international criminal court in 2003, there is much that remains improvisational and ad hoc about its work. Shklar wrote, "On the international level of politics a single-minded pursuit of a policy of criminal justice has even graver defects. Since, for justice, law must either be 'there' or 'not there,' it becomes necessary to pretend that a legal system analogous to a well-established domestic order exists." Reflecting again on the archive of Nuremberg, she argued: "History had to be tortured throughout in order to reduce events to proportions similar

¹¹⁸ Shklar, *Legalism*, 160.

¹¹⁹ Bronwyn Leebaw, *Judging State-Sponsored Violence, Imagining Political Change* (Cambridge: Cambridge University Press, 2011), 38.

to those of a model criminal trial within a municipal system. The future was not altogether ignored, but it was seen, characteristically, as the future of law only.”¹²⁰

It is perhaps the best example of international criminal justice’s inability to acknowledge and scrutinize itself as ideology that scholars in the field have by and large displayed little awareness of or interest in the relevance of Judith Shklar’s writings on legalism and her critiques of the utility of pursuing criminal justice on the international level. Those who have engaged with her work as part of a scholarly engagement with the politics of international criminal justice can be counted on one hand, and include, notably, legal scholar Gary Bass (a student of Shklar’s), historian Samuel Moyn, and political scientist Bronwyn Leebaw. While Samuel Moyn, in a 2013 essay, disagreed with several of Shklar’s assertions around the necessity and utility of the Nuremberg trials, he concluded more generally of her work that if one followed Shklar’s skepticism and the analytical framework proposed in *Legalism*, “they must lead to considerable doubts about the current forms of international criminal law. [Shklar] may, indeed, stand as their foremost critic.”¹²¹

Bronwyn Leebaw, in her 2011 book *Judging State-Sponsored Violence, Imagining Political Change*, undertakes a close reading of Shklar’s *Legalism*. She theorizes that the contemporary moment is one of “human rights legalism.”¹²² For Leebaw, human rights legalism insists not only upon legality in general but “on the centrality of *criminal* law in the aftermath of atrocities and political violence.”¹²³ Leebaw argues that this particular strain of legalism has had a powerfully limiting effect on the broader field of transitional justice, whereby processes such as amnesties, lustration campaigns, or, for example, Rwanda’s decision to use quasi-traditional *gacaca* courts to aide in the processing of complaints against

¹²⁰ Shklar, *Legalism*, 147.

¹²¹ Moyn, “Judith Shklar.”

¹²² Leebaw, *Judging State-Sponsored Violence*, 6.

¹²³ Leebaw, *Judging State-Sponsored Violence*, 7.

over 100,000 alleged genocidaires, have come to be invalidated and rejected.¹²⁴ In her discussion of Shklar's *Legalism*, Leebaw argues that Shklar was particularly critical of what she saw as a growing faith in the power of international law to overcome political conflict altogether: "The idea that all international problems will dissolve with the establishment of an international court," wrote Shklar, "is an invitation to political indolence. It allows one to make no alterations in domestic political action and thought . . . to try no new approaches and yet appear to be working for peace."¹²⁵

Leebaw argues that Shklar presented two visions of legalism, with different implications. Nuremberg, for Shklar, so Leebaw argues, was an example of creative, practical legalism, justifiable and valuable in the face of political collapse in post-war Germany. Shklar contrasted creative legalism that can serve strategic ends with ideological legalism, a "rigid and messianic conception of international law." Leebaw argues that creative human rights legalism, which insists on a central or even leading place for criminal law in post-war responses and a "duty to prosecute," relies both on the creative application of legalism and on the ahistorical, apolitical conception of international law that is associated with ideological legalism, resulting in a conflicting set of aspirations for international criminal trials.¹²⁶ For Leebaw, human rights legalism and its emphasis on prosecutions as justice overly relies on adversarial categories that function to reify and intensify conflict, is of limited utility as a framework for analyzing the causes of systematic atrocity and political violence (considering it is largely a function of the absence of law, i.e., lawlessness), and promotes a "narrow vision

¹²⁴ See "Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts" (Human Rights Watch, May 31, 2011), <https://www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts>; "Côte d'Ivoire: No Amnesty for Serious Crimes of 2010–11 Crisis," Amnesty International, August 7, 2018, <https://www.amnesty.org/en/latest/news/2018/08/cote-ivoire-no-amnesty-for-serious-crimes-of-crisis/>.

¹²⁵ Shklar, *Legalism*, 134. See also Leebaw, *Judging State-Sponsored Violence*, 38.

¹²⁶ Leebaw, *Judging State-Sponsored Violence*, 34.

of justice that amounts to what is largely a symbolic assertion of law in response to only the most extreme forms of physical violence.”¹²⁷

This dissertation explores the development of international criminal law unmoored from the structure of the nation state as a form of human rights legalism that is propelled forward and animated by a community of experts. I am interested in the ways in which international criminal justice experts insist on the systematicity of the field even in the face of clear limitations and gaps—insisting, for example that President Putin be “brought to justice” for the invasion of Ukraine even as there is no existing international tribunal with jurisdiction to try the crime of aggression as perpetrated by Russia—and in their efforts to constantly make and remake the field (as exemplified by the proposal to establish a new mechanism that will have jurisdiction to sanction Russian aggression). While Judith Shklar’s *Legalism* goes some way toward defining and characterizing the steadfast nature of the faith in law, and Leebaw convincingly identifies human rights legalism as containing elements both of Shklar’s creative legalism and ideological legalism, this project seeks to contribute to an understanding of the social dynamics that sustain and animate such faith, day in, day out. I sought to explore the lived experience of creating and inhabiting international criminal jurisdiction. Recall the advocates Wayne Jordash evoked in his chapter referenced above, and the sense of freedom and “kinetic energy” they experience while “working international law.”¹²⁸ At play in Jordash’s argument is precisely the dialectic between Shklar’s ideological legalism (“rules and practices of their profession”; the rule of law; international law’s regulatory function) and creative legalism (“unabashed steps towards the advancement of human rights”; “solutions and practical answers”) that Leebaw argues is central to the “human rights legalism” of the twenty-first century. The following chapters emerge from several years of participant observation with the

¹²⁷ Leebaw, *Judging State-Sponsored Violence*, 56.

¹²⁸ Jordash, “Role of Advocates.”

actors who belong to the self-described ICL Cohort. Through long-term immersion in the field and personal engagement with professionals, I sought to take seriously the social, emotive, epistemological, and material structure of the field of international criminal justice.

Chapter 2

Opaque Transparency: Anthropology Meets International Criminal Law

I. Introduction

My fieldwork took place between 2016 and 2019. I began what I then hoped would be an extended period of participant observation at key sites of international justice during the summer of 2016 with a six-week stay in Arusha, Tanzania. I arrived a few months after the closure of the International Criminal Tribunal for Rwanda (ICTR). Established by the UN as a response to the atrocities of the Rwandan genocide in 1995, and always intended to be a temporary institution, the Tribunal had ceremoniously handed its responsibilities over to the newly established UN Mechanism for International Criminal Tribunals (MICT) and domestic Rwandan authorities in December 2015. The MICT is one institution with an office in Arusha and an office in The Hague with a shared Prosecutor, President, and Registrar (collectively referred to as The Principals) who travel back and forth between Arusha and The Hague, and regularly to New York City to report to the United Nations on their work. The Hague offices serve as a residual mechanism to the International Tribunal for the former Yugoslavia, which closed in December 2017. I arrived in Arusha eager to learn from the remaining staff about their experience of these processes, their memories of the twenty-one-year tenure of the ICTR, and their perspective on their new positions within the MICT. Yet my attempt to study ethnographically the work of the MICT in Arusha was disorienting, and it foreshadowed the methodological challenges that would come to characterize my fieldwork.

The MICT offices in Arusha were in a large, open-plan conference center. By the time I arrived, trials had ended, and the majority of international staff had left. The building had an abandoned air, with a skeleton staff of around seventy of the former hundreds remaining, and

abandoned offices with tangles of wires on the floors where computers and monitors had been disconnected. The participant observation I hoped to undertake and had read so much about in my anthropology classes looked more like this: endless unanswered emails, and days spent perched in the only two public spaces in the building, the library and the cafeteria. I eventually managed to schedule a few appointments with archivists and through informal connections made on weekend hikes and drinks at Via Via, a popular outdoor bar within walking distance of the MICT's offices, was put in touch with the assistant to the Registrar. While I had tried to contact the Registry for months before this visit with no reply, my hope was that being there in person now meant I could begin to discuss formal research permission and plan for an extended period of participant observation. For the next couple of weeks, the assistant to the chief legal officer and I would send emails back and forth: she sent a draft terms of reference with the request that I complete it, she asked me for a full list of all employees I wanted to meet with, I responded that I was hoping to get a broad sense of the daily work at the organization, but that I did not have a full list of employees, she requested a full list of questions I intended to ask, I sent over draft questions by way of example and tried to explain that I would not be conducting interviews but rather unstructured, free-flowing conversations, geared toward an understanding of daily work. Sometimes there would be ten-day silences between emails, after which I checked in asking about the status of the terms of reference (TOR). This ongoing correspondence around a TOR also meant that the people I had been able to meet with previously for informal conversations over lunch and coffee began to pull back, postponing further meetings until the TOR had been completed and signed, and I received formal permission to conduct research.

In this chapter, I discuss the ways in which my early fieldwork revealed much about the nature of international criminal law as a network of bureaucratic institutions and the investment of actors within these institutions to maintain the systematicity the field, even as gaps and

tensions and public secrets abounded. The efforts to regulate knowledge and what is knowable manifested in what I call opaque transparency in this project: a nominal commitment to transparency that in practice functioned to obfuscate more than it clarified and created a deflection quality limiting the possibility of engagement and scrutiny of these public institutions. Combined with the transnational nature of the ICL cohort, I adopted a polymorphous approach, across multiple sites, methods, and sources. Ultimately, the issues raised in this chapter speak to larger questions of how the method with anthropology can engage international criminal law and other transnational bureaucratic fields.

II. The Released and Acquitted: Gaps in the System

One particular issue that caught my attention during those early first weeks in Arusha had to do with the position of a group of men known as the “released and acquitted” (as previously mentioned, acronyms abound in this field—staff of the tribunal call them the RAC). This was a sticky issue for the MICT. These were individuals, all men, who either had been found guilty by the ICTR and completed their sentences or had been acquitted and released from the UN detention center in Arusha. While both categories meant they were technically free, they could not return to Rwanda, fearing persecution and retaliation for their (perceived) roles in the genocide. Indeed, their acquittals were often met with outrage, and at times led to public unrest and rioting in the streets of Kigali.¹²⁹ ICTR judges have acknowledged that the former accused legitimately fear a return to Rwanda and should not be returned, and various international observers share their concerns, citing persecution, revenge, or further prosecution as real possibilities.¹³⁰ The ICTR statute, however, does not offer specific provisions on the relocation

¹²⁹ Caroline Buisman and Kate Gibson, “Acquitted by Law, Prosecuted by Propaganda,” *Justice in Conflict* (blog), March 31, 2014, <https://justiceinconflict.org/2014/03/31/acquitted-by-law-prosecuted-by-propaganda/>.

¹³⁰ Kevin Jon Heller, “What Happens to the Acquitted?,” *Leiden Journal of International Law* 21, no. 3 (2008): 663–80, <https://doi.org/10.1017/S0922156508005232>; Benoît Henry, “The Acquitted Accused, A Forgotten Party of the ICTR,” *New England Journal of Comparative and International Law* 12 (2005): 81–88.

of former defendants, which leads to the troubling conclusion that acquittals were somehow not foreseen or deemed worthy of attention when the tribunal was established. Such an oversight raises interesting questions about the ways in which the development of international criminal law has been somewhat weighted toward the investigation, arrest, and prosecution side of things, rather than the dynamics of punishment, rehabilitation, and eventual release, or the possibility of compensation and support for those wrongfully detained or acquitted.¹³¹ Even as proponents celebrate the emergence of a “system” of international criminal justice, it is clear that it remains incomplete, and does not take all stakeholders into account.

Of the ninety-three individuals indicted by the ICTR between 1995 and 2015, fourteen were found not guilty and acquitted. Of the sixty-two who were sentenced, increasing numbers are currently being released, having served at least two-thirds of their sentences. Currently, eleven individuals remain in the safe house—free, but with nowhere to go.¹³² These Rwandan nationals in the safe house in Rwanda are essentially stuck in a legal vacuum between international criminal law, international human rights law, and international refugee law. The absence of a specific legal provision means that UN member states are under no legal obligation to assist in the relocation of acquitted and released individuals, although member states are bound to cooperate with the ICTR, now the MICT. Tanzania, as a condition of its “host state agreement” with the UN, has stipulated that no former defendants or witnesses before the Tribunal would subsequently be eligible for asylum in Tanzania. Other “third” states have generally not been forthcoming in granting asylum to these men, though in specific, discretionary cases a small number have been permitted to join their families who had already been granted asylum in countries like Switzerland, Italy, Belgium, France, Canada, Denmark,

¹³¹ Beth S. Lyons, “Litigating for Compensation for the Acquitted,” *IntLawGrrls* (blog), November 21, 2015, <https://ilg2.org/2015/11/21/litigating-compensation-for-the-acquitted/>.

¹³² Colleen Rohan to António Guterres, “Re: ICTR Acquitted Persons and Persons Released after Serving Their Sentences,” March 22, 2018, https://docs.wixstatic.com/ugd/ce12e8_09ab3309eafb4067942d8b8fcd715d0.pdf.

and the United Kingdom.¹³³ The former registrar of the ICTR, Everard O'Donnell, has stated that “no proper provision was made for acquittal at the beginning of the setting up of the Tribunal. That much is a fact, and it’s one we’ve struggled with in the registry ever since. There was no budget for dealing with acquitted persons.”¹³⁴ In the absence of a specific provision, UN member states are under no legal obligation to assist with the relocation of acquitted and released individuals and have been reluctant to do so. One reason is that the International Refugee Convention offers an easy out: article 1F excludes “any person with respect to whom there are serious reasons to believe” they have committed an international crime. This excludes those convicted from the protective category of refugee. Moreover, given the differences in standards between “beyond a reasonable doubt” for the criminal trial and “serious reasons to believe” for the refugee application, it is possible that even those acquitted would not qualify for refugee status—which is a problem for the men who continue to reside in the safe house in Arusha, and one that has not yet been resolved by the ICC.

The position of the RAC, perpetually suspended in the web of international law (following Talal Asad), reflects a type of responsible violence that is tolerated as a response to the violence of the 1994 genocide, deemed irresponsible, an affront to the “essence of humanity” and the international community.¹³⁵ Take the pseudonymized case of Mr. X for instance, in his sixties at the time of writing, who was arrested in 1997. A former government official in Rwanda during the genocide, X was charged with organizing, preparing, and instigating the genocide. His trial began in September 2000. He was acquitted in 2004, and the acquittal was confirmed on appeal in February 2006. He was subsequently released from custody at the UN Detention Facility in Arusha and has been living in the safe house ever since.

¹³³ Rohan to Guterres.

¹³⁴ “International Criminal Tribunal for Rwanda: Model or Counter Model for International Criminal Justice? The Perspectives of the Stakeholders,” International Symposium, Session 4, Geneva, July 10, 2009, 12.

¹³⁵ Talal Asad, “Reflections on Violence, Law, and Humanitarianism,” *Critical Inquiry* 41, no. 2 (2015): 390–427, <https://doi.org/10.1086/679081>.

He spends his days applying for asylum, filing requests for assistance from UNHCR, visiting the legal library at what remains of the institution that arrested him, and working out on one of the two home trainers on the veranda of the safe house. He has a temporary ID card from the UN, a small monthly cash allowance, and access to medical care, and may request a car and driver for transportation to such medical appointments when available from the UN fleet of white Land Cruisers. He cannot cross international borders and has no access to banking services in his name. He has not been able to rejoin his family. His life has been entangled within this legal “system” for nineteen years and counting—and he was found guilty of no crime.¹³⁶ At the time of writing, six individuals, after a series of lengthy and complex negotiations and further proceedings, were successfully relocated to third countries and united with their families after being granted asylum. Eight of the fourteen acquitted men are currently still looking for states willing to grant them asylum, and they have since been joined in the safe house by three convicted individuals who have completed their sentences. Similarly citing fear of persecution or further prosecution upon a return to Rwanda, these individuals are released back into the custody of the UN in Arusha after having served their sentences in prisons around the world. At the time of writing, eleven individuals reside in the safe house.

The situation of the RAC was a tricky issue for the MICT, charged with dealing with the residual work of the ICTR. The position of these men illustrates another gap in the system of international criminal justice and presents an enduring headache for the staff of the MICT. In April 2016, the men in the safe house published a joint letter in an online newspaper, calling for attention to their plight and the need for a solution.¹³⁷ It seemed that during the creation of the Tribunal, with its focus on prosecutions and convictions, little thought had been afforded

¹³⁶ Center for International Criminal Justice, “Acquitted,” When Justice Is Done, April 21, 2014, <https://web.archive.org/web/20180830211411/http://www.whenjusticeisdone.org/index.php/acquittedd>.

¹³⁷ Ruhumuza Mbonyumutwa, “ICTR Acquitted Persons Seriously Concerned over Living Conditions,” *Jambo News*, May 12, 2016, <https://www.jambonews.net/en/actualites/20160512-ictr-acquitted-persons-seriously-concerned-over-living-conditions/>

to what would happen to those who were acquitted, or those who completed their sentences and required resettlement. It seemed as if the responsibility and care of the Tribunal over the lives of those who encountered its carceral frame had simply not been thought through. Senior leadership of the court was negotiating with governments, working towards case-by-case solutions—which they continue to find, allowing an individual to rejoin their families and go on with their lives after months and years of waiting. But such an admission would lay bare uncomfortable truths about international criminal tribunals: that they had been established following a political decision in the UN Security Council, and that really, they were figuring out the details and intricacies as they went along. Judith Shklar could have predicted this. She may have theorized that the ICTR and the ICTY were forms of creative legalism, a pragmatic, ad hoc solution from the international community, a need to do *something* after standing idly by in the face of brutal acts of genocide and mass killing. The utterances of key members of the ICL cohort such as Prosecutor Bensouda in relation to the permanent ICC, however, reflect a rigid ideological legalism, whereby any admission of political compromise or negotiation taints the maintained purity, objectivity, and systematicity of the law. The negotiations through diplomatic channels to find states willing to accept members of the RAC, then, were a sensitive issue. The unwillingness of MICT officials in Arusha to speak to this issue—a matter of public record—made this clear.¹³⁸

III. Public Secrets and Opaque Transparency

I came to see that in Arusha, Tanzania, the location and the appearance of the safe house operated as a public secret.¹³⁹ One day, on one of our many drives around Arusha, I asked

¹³⁸ Olufemi Elias, “Remarks by Olufemi Elias, Registrar Mechanism for International Criminal Tribunals,” UNMICT, May 17, 2017, <https://www.irmct.org/sites/default/files/statements-and-speeches/170517-remarks-by-olufemi-elias-registrar-en.pdf>.

¹³⁹ Michael Taussig, *Defacement: Public Secrecy and the Labor of the Negative* (Stanford, CA: Stanford University Press, 1999).

Benson, the taxi driver whom I would catch rides with most days, if he knew anything about this house and if he had ever seen it. “Of course,” he said, making the gesture I’d come to understand as his way of saying “sure, no problem, easy,” like when I asked him if he knew where I could go to exchange money or buy a mosquito net. He went on to describe the exact location of the safe house, using landmarks—that sign, this tower, that roundabout—that were slowly becoming familiar to me after a few weeks in the small city. By contrast, an MICT official whom I had contacted to request a meeting responded promptly that while he was happy to speak with me about international justice issues, he would *not* be in a position to discuss the position of the released and acquitted “due to institutional considerations.” I duly stayed away from this topic during our conversation, but after about an hour of free-flowing conversation, feeling like we had established some rapport, I confessed that I had been surprised by his message. After all, the fact that a number of released and acquitted remained in Arusha under the responsibility of the tribunal was a matter of public record: officials of the tribunal had appealed to states to assist in the relocation of this group through public addresses, as well as the regular progress reports to the UN Security Council and the General Assembly, all of which are available online. Journalists have written about the issue, and some have even visited the safe house on the invitation of those acquitted and released who live there. In April 2016, the eight acquitted men who then resided in the safe house wrote a letter expressing concern and dismay about their situation to the Registrar of the MICT and had circulated it widely to several news agencies. I knew that I had gone too far, however, when he frowned, pushed his chair back from the table and said, “I am hesitant to speak on this issue . . . there is a need not to publicize. . . It is a sensitive matter.” I apologized and sought to change the topic, but soon afterward, we finished our coffees and parted ways.

This was an early ethnographic encounter with a quality in these institutional legal spaces that, inspired by Annelise Riles’ writing on the dual transparency and opacity of legal

language, I have taken to calling *opaque transparency*.¹⁴⁰ Here was the spokesperson of an institution dedicated to transparency, committed to producing a visible and accessible legacy and public record, telling me that he would not speak about a public issue. I later wrote to another official, asking him to outline what the policy was for media and research requests in relation to the released and acquitted. His assistant responded promptly:

The individuals in question are free and have the right to meet with and talk to researchers. The MICT, however, requires that these meetings/conversations take place outside of the safe house and that details of its location, layout or residents are not made public. In addition, no confidential information shall be disclosed. I would therefore kindly request you to sign the form enclosed and return it to me before your meeting.

The form required me to receive prior written consent from the individuals in the safe house that I wished to speak with. I was struck by how all of this was presented as perfectly possible, even as I came to find, after several weeks in Arusha, that it was highly unlikely that such a meeting could be arranged.

Opaque transparency became the way in which I made sense of the enduring disorientation of attempting ethnographic observation within the sites of international criminal justice. The constant work of the bureaucracy to categorize and thereby organize what is knowable was a feature of this. For instance, I learnt in Arusha that there is an obscure space between “public” and “confidential,” within which reside terms such as “non-public” and “otherwise sensitive.” The utility of these terms for bureaucrats representing the institution and the destabilizing quality of them for an aspiring institutional ethnographer became particularly pronounced during conversations to finalize a formal terms of reference with the MICT, which

¹⁴⁰ Annelise Riles, “Infinity Within the Brackets,” *American Ethnologist* 25, no. 3 (2008): 378–98, <https://doi.org/10.1525/ae.1998.25.3.378>.

I hoped would regularize my presence at the MICT and allow me to do research and interview staff who were willing.

I departed Arusha with a signed terms of reference that summer. Printed on official letterhead of the overarching institution with branches in both Arusha and The Hague, and signed by the Registrar, the administrative head of both branches, it was both exciting and terrifying. It stipulated that I had been approved to conduct qualitative research consisting of surveys and interviews. The terms stated that “no information shall be disclosed that has been designated as confidential or otherwise sensitive. Sarah-Jane Koulen shall not disclose any non-public information in connection with the Project.” The final paragraph was the kicker: “In the event Sarah-Jane Koulen fails to incorporate a requested modification or agreed alternative modification, any and all materials gained by Sarah-Jane Koulen from the MICT for the purpose of this Project shall immediately become the property of the MICT and shall be immediately surrendered to the MICT. All permissions granted to Sarah-Jane Koulen hereunder to publish and/or produce any such materials shall be null and void.” When I asked for formal clarification, over email, on the category of “non-public,” which struck me as vague and amorphous, I was told to simply interpret that as another way of saying “confidential.” But when, in conversation, I asked another official about this, she shrugged and said, “Well, you know. There is confidential information and then there’s non-public stuff, related to the inner workings of the organization.” These notions of public, non-public, and confidential, the unclear space between these categories, the restriction of access, knowledge, and space, and those who maintained these restrictions—all of these features would form a pattern in my fieldwork.

I signed the TOR in August 2016, somewhat nervously, thinking that at the very least trying to stick to these terms would prove an interesting ethnographic experience in and of

itself.¹⁴¹ When I began fieldwork in earnest, in January 2017, I assumed this document would be a way in, given that there was now a signed agreement in place outlining the research project. I contacted the office of the registry of the MICT in The Hague in January, and eventually secured a meeting in early March 2017. I met with two legal officers. One of them I had met in Arusha the summer before. I had heard a lot about her. She was one of those people with social clout. Other staff looked up to her, wanted to be near her. She decided who to include for drinks after work, and who to exclude—so I was told by a staffer who was never invited. This particular legal officer had always evaded my meeting requests in Arusha citing travel or other commitments and seemed rather suspicious of me and my research. In Arusha, people who had seemed happy to speak with me initially suddenly stopped, and I later learned that an email had been circulated with instructions not to speak with me until the terms of reference was complete. I always suspected she had been involved, so I was somewhat dismayed to see her pop up in The Hague. She explained that she had been seconded to The Hague, where life was not as exciting as in Arusha, but that there was important work to be done here.

The three of us met for about an hour in a meeting room. I started the meeting by explaining the terms of reference. I showed them the appendixes to the original agreement, my consent forms, and draft interview questions, and provided them with the contact details for Princeton's Institutional Review Board, all things that I had also submitted six months prior. I refreshed their memories on how we had come to these terms, referencing dates of emails, and indicated that they had been signed off on by their boss. They told me they had a new boss now, and that he would have to review the agreement again. They asked again about my

¹⁴¹ I should have been terrified. In April 2008, the ICTY indicted a French journalist who formerly worked as a spokesperson for the court. Based on accusations that she had published confidential information, she was held in contempt of court and fined 7,000 euros. In late 2011, the ICTY declared the fine unpaid and converted it to a seven-day prison sentence, issuing a warrant for her arrest. The following March, while reporting on a sentencing trial taking place at the court, she was arrested outside the ICTY and spent the following days in detention. See Florence Hartmann, "Handcuffs at The Hague: How I Was Arrested by a War Crimes Tribunal—For My Journalism," *The Intercept*, April 19, 2016, <https://theintercept.com/2016/04/19/how-i-was-arrested-by-a-war-crimes-tribunal-for-my-journalism/>.

research objectives and what I hoped to learn. I explained that while I understood that there were confidentiality concerns at a court of law, my research interests did not involve details of case files or witness identities. Rather, I was interested in the experience of being a member of staff, what it was like to be a legal expert in this new field of law. I was interested in the career trajectories, the long hours of daily work, and what the social world of international criminal justice was like. The word “social” did not go over well. One scoffed that it sounded like I was interested in “personal gossip,” while the other exclaimed that there was no way I would be allowed to air their “dirty laundry.” I stammered that of course I was not writing a gossip column (even as I thought to myself that the gossip *would* be illuminating) but an ethnography, to provide an anthropological account of what the work of international criminal law-making was like. I explained that no identifying information would be disclosed, that the project was not about individuals, but about the collective. I offered the example of the Director of the World Bank, who had invited anthropologists to study the internal workings of the organization. None of this seemed to help. We ended the meeting agreeing that I would follow up with (yet another) research outline and draft interview questions. I left the room, sweating and shaky, feeling attacked, and somewhat dirty and ashamed. Early the next morning, I followed up, thanked them both for the meeting, and sent over the requested material. A week passed. Then one month, then two. I followed up by phone, and email, and never heard back. I saw both of these women regularly at public events over the course of my fieldwork and would always smile, say hello, ask how they were, and inquire after the status of my request. Each would refer to the other as the appropriate person to contact, or mumble something about “internal considerations” and rush off. Even though I had an agreement on paper, signed by both parties, actually enacting it proved impossible.

I soon found that the International Criminal Court, also in The Hague, was going to be even less accessible than the MICT. Even though I showed up to conferences, hearings, and other public events, and knew many of the people I wrote personally, my requests for meetings largely went unanswered. I applied to internships and heard nothing. At a conference celebrating the twentieth anniversary of the Court, one panel discussed how the court had felt let down by academia, with speakers complaining that these external observers never really understood how things worked in practice, and by and large were too critical. The sense seemed to be that academics used the work of the Court to further their own careers, and that criticizing the Court had become a rather fashionable and easy way to do so. This was a sentiment that I encountered often, the idea that those who worked in international law and academics were, or at least ought to be, partners—weren't both projects fundamentally about gathering and interpreting information? Weren't we on the same side? Weren't we all about understanding the world better, and making it a better place? They felt let down by critical scholars—those who engaged in a critique of their work but offered no solutions.

In The Hague in particular, interlocutors would often present their work at places like the ICC or the MICT as bureaucratic and nondescript. During my fieldwork, I was told often, as we stood in the lobbies of the courts or offices with staff rushing around in suits, that I was in the wrong place, that the real work did not happen here but elsewhere. One official told me that I should go to “the field,” and many who heard that I was an anthropologist told me that while it was great that I was stopping by The Hague, I should really work with “local communities” and “affected populations,” often gesturing south, in the general direction of “Africa.” The knowledge I gained there would also be helpful for improving the functioning of the Court, it was said. When I, in turn, gestured to the full rooms, the conferences, the reception we were attending, the wine glasses we were holding and said, “But look! This is the community I’m interested in!” I received blank stares. I was told that there was nothing distinct

about the office building in which we were gathered, that nothing interesting was happening here.¹⁴² At other times, I would realize that what I considered to be safe, introductory, getting-to-know-you questions were in fact, far too invasive. Over lunch one afternoon with a junior legal officer of the ICTY, who had agreed to speak with me because she was a social scientist as well as a lawyer and seemed sympathetic to my struggles to secure research permission, I asked her whether the court, which was due to close in a few months but whose core tasks would continue in a smaller administrative form, would stay in the same building, or whether a move would be necessary. She said that if I continued to ask these kinds of controversial questions, she could imagine that I would not be permitted to do research.

IV. Where is the Transnational?

During these preliminary and early stages of fieldwork, I struggled to articulate where my field site was. During my second year of graduate studies at Princeton's Anthropology program, a fellow graduate student in the program called me "*such a F..... European anthropologist.*" This was in response to my suggestion, during a free evening while attending the annual AAA conference in Washington, DC, that we go to a bar a little further down the block, because I had remembered from the previous evening that the bar we were about to enter (and the one my fellow grad student seemed to prefer) had smelled bad and had been chilly and deserted. Coursework and conference attendance with other graduate students are an important part of being socialized and professionalized as a cultural anthropologist, and this comment from one of my peers (very much not a compliment) as we debated which bar to spend our evening at made a set of important, yet often unspoken understandings clear to me.

¹⁴² Colin Hoag, in a review of anthropological engagements with bureaucracy, references Hannah Arendt, who saw bureaucracy as "the rule by nobody" and following Donna Haraway, the production of universality as the "god trick of bureaucracies, the illusion of even, unmediated, and rational vision . . . an ethos that figures bureaucracy, like science, as a gaze from nowhere and everywhere at once." Colin Hoag, "Assembling Partial Perspectives: Thoughts on the Anthropology of Bureaucracy," *Political and Legal Anthropology Review* 34, no. 1 (2011): 82.

First, my colleague's comment seemed to reflect a familiar pattern in cultural anthropology, one that Akhil Gupta and James Ferguson in their 1997 volume *Anthropological Locations* call a "hierarchy of purity of field sites." Reflecting on the construction of the field through the anthropologist's practice of fieldwork, they identify a tendency to radically separate "the field" from "home":

The very distinction between "field" and "home" leads directly to what we call a *hierarchy of purity* of field sites. After all, if "the field" is most appropriately a place that is "not home," then some places will necessarily be *more* "not home" than others, and hence more appropriate, more "fieldlike." All ethnographic research is thus done "in the field," but some "fields" are more equal than others—specifically, those that are understood to be distant, exotic, and strange. Here the parallel is striking with the older conception of anthropology as a field science, in which some sites offered better approximations of "the natural state" than others and were therefore preferred. Although anthropologists no longer think in terms of natural or undisturbed states, it remains evident that what many would deny in theory continues to be true in practice: some places are much more "anthropological" than others (e.g., Africa more than Europe, southern Europe more than northern Europe, villages more than cities) according to the degree of Otherness from an archetypal anthropological "home."¹⁴³

I understood my colleague's exasperated tone, coupled with the expletive, as producing a separation between our field sites. She had just returned from fieldwork—not in Europe—and had had a particularly difficult time. She was equating my perceived intolerance for

¹⁴³ Akhil Gupta and James Ferguson, "Discipline and Practice: 'The Field' as Site, Method, and Location in Anthropology," in *Anthropological Locations: Boundaries and Grounds of a Field Science*, ed. Akhil Gupta and James Ferguson (Berkeley: University of California Press, 1997), 13.

discomfort—the smell of sewage in the bar—with an inclination toward a field site that, following Gupta and Ferguson, would be more “home.”

Second, and more importantly, I gleaned from this exchange that my project and I had been slotted into the category of European anthropologist. (A complicating aspect here is that I also largely grew up in the Netherlands; as such, the descriptors “European” and “anthropologist” are technically not incorrect.) My early presentations on this research project at conferences and in my graduate program where I discussed exchanges and findings from research trips to The Hague at times prompted the response, “So, you’re a Europeanist?” Similarly, I heard friends and more senior colleagues describe themselves as Africanists or Americanists. These labels obviously have very little explanatory power—they do not tell us much about any anthropologist’s sense of project, or the central concepts at play in their research. And yet these categories perform important, pragmatic social functions in ordering and locating one’s work in relation to others. This organizing of work into continental areas reflects a cardinal anthropological commitment to place, situatedness, locality. Stacia Zabusky, describing her 1995 *Launching Europe*, an ethnographic account of European cooperation in the realm of space science, recounts the challenge of “constructing” a field site to satisfy grant administrators and a dissertation committee. She reflects that “the implicit rules of the discipline of anthropology mandated that I be an ethnographer, one known primarily by my geographic area and published and hired in terms of it.”¹⁴⁴ And yet her field and interlocutors refused to stay put, to be localized in the manner that anthropological convention implicitly seemed to demand. Her interests, like mine in this project, are best described as transnational processes, always in motion, rarely fixed or apprehensible from one geographically defined place. Where scientific cooperation and European integration commanded Zabusky’s

¹⁴⁴ Stacia E. Zabusky, “Ethnography in/of Transnational Processes: Following Gyres in the Worlds of Big Science and European Integration,” in *Ethnography in Unstable Places: Everyday Lives in Contexts of Dramatic Political Change*, ed. Carol J. Greenhouse, Elizabeth Mertz, and Kay B. Warren (Durham, NC: Duke University Press, 2002), 121.

ethnographic gaze, my early sense of project was piqued by the sheer mobility of the legal experts I came to know. I did not understand my project as necessarily European. My colleague's comment on the sidewalk in DC, as we figured out which bar to visit that evening, prompted the realization that I needed to do a better job of articulating my field site. Where is the transnational? What kinds of processes, institutions, and social networks connect New York to The Hague to Arusha, or Phnom Penh to Freetown?

Writing in 1991, Arjun Appadurai and others identified the tension between cultural anthropology's methods for studying small-scale societies and the reality of an ever-globalizing and increasingly mobile world.

As groups migrate, regroup in new locations, reconstruct their histories, and reconfigure their ethnic "projects," the *ethno* in ethnography takes on a slippery, nonlocalized quality, to which the descriptive practices of anthropology will have to respond. The landscapes of group identity—the ethnoscares—around the world are no longer familiar anthropological objects, insofar as groups are no longer tightly territorialized, spatially bounded, historically self-conscious, or culturally homogeneous. . . . The task of ethnography now becomes the unraveling of a conundrum: what is the nature of locality, as a lived experience, in a globalized, deterritorialized world?¹⁴⁵

Akhil Gupta and James Ferguson take up "the field" and "fieldwork" in *Anthropological Locations* because both concepts are central to socialization and professionalization in anthropology graduate training, yet often remain beyond scrutiny as constructs in and of themselves. The "field," they argue, operates as a largely taken for granted space: once one

¹⁴⁵ Arjun Appadurai, "Global Ethnoscares: Notes and Queries for a Transnational Anthropology," in *Recapturing Anthropology: Working in the Present*, ed. Richard G. Fox (Santa Fe, NM: School of American Research Press, 1991), 191–96.

gets “there,” the work of observing begins; once one gets back, the writing begins. The off-the-cuff comment by my colleague during my socialization into graduate training in anthropology prompted me to make explicit that the field I was interested in was actually an *idea*, advanced and made real by actors who were dispersed and distinctly mobile while deeply socially connected. But how does one study an idea?

V. Polymorphous Engagement

After Arusha, The Hague—known as the International City of Peace and Justice—seemed a good place to start. During my first few months in The Hague, I felt like I was stumbling around blindly, literally hitting thick, impenetrable walls of silence, or putting my foot into controversies and misunderstandings. I kept attending hearings, events, conferences, and receptions, and also began showing up to publicly announced “private” events or high-level meetings. Increasingly, as I failed to secure the kind of daily, regular institutional access I thought I needed, I became attuned to the ways in which the field extended beyond the walls of the individual institutions. Despite having begun to conceptualize my field site as a transnational project or idea, I had inadvertently remained committed to the idea of institutional fieldwork—one place, one set of offices to visit. Despite this early fixation on “institutional access,” there was so much else going on in The Hague. There were workshops, conferences, training sessions, tours, summer schools, receptions, dinners, public hearings—not to mention a large online community, with various websites, blogs, Twitter feeds, and Facebook groups. One particular Facebook group, which is open only to women engaged in international criminal law, and their regular drinks and get-togethers offered a sense of community, a way to get a feel for the things that were on people’s minds. Additionally, due to various pressures and dwindling employment opportunities at the courts and tribunals, international criminal justice experts were increasingly establishing their own consultancy groups or pursuing freelance

opportunities. My fieldwork—described below—took on a nebulous, mobile, and transnational character that reflected the nature of the network of actors in which I was interested.

During my time in the Netherlands, I observed ongoing trials before the International Criminal Court and the MICT, and attended dozens of events: panel discussions, receptions, book launches, commemorations. Many were held at the premises of the ICC or the MICT, but others took place at Leiden University's The Hague campus, in conference rooms of research institutes dedicated to international law such as the TMC Asser Instituut and the Peace Palace, which houses the International Court of Justice and is a central landmark in The Hague. I attended social events such as the *Movies that Matter* Film Festival hosted annually by Amnesty International in The Hague, with screenings and discussions of films related to human rights and international justice, as well as dozens of informal coffees, house parties, and afterwork drinks with interlocutors. In the United States, I spent time in the Brooklyn-based studio of an artist who had become an "artist in residence" at one of the largest NGO networks involved in international criminal justice and who was working to develop a travelling exhibit with portraits, photographs and audio installations of defendants, practitioners, and victims in international criminal proceedings. I attended the annual Assembly of States Parties, the meeting of state representatives who are party to the Rome Statute, which determines the budget and other business for the ICC in the year to come, for four consecutive years. As I discuss in chapter 2, the ASP—scheduled every year in early December, alternating between The Hague and New York—is the social highlight of the year, bringing various actors in the field of international criminal justice together at either the UN headquarters or the largest convention center in The Hague, the World Forum.

During my second year of conducting fieldwork, I divided my time between two internships—one with a defense team on an ongoing trial before the MICT in The Hague, which allowed me several months of observing the day-to-day reality of practicing international

criminal law, and the other with a former ICTY prosecutor who left the Tribunal to launch her own organization, committed to partnering with and offering technical support to “local” practitioners, drawing on her twenty-plus years of experience as a prosecuting attorney to advance international criminal cases through domestic courts in countries where international crimes have taken place. In the fall of 2018, I travelled with her, the organization’s co-director, and the international law program officer from UN Women, to Kosovo, where I was able to gain insight into the ways in which international criminal lawyers are undertaking efforts to advise and lend technical assistance to domestic prosecutors who may not have experience with the complexity of international criminal cases. This attention to the ways in which technical expertise is being exported from the hubs of international criminal justice led me back to The Hague, where I spent several more weeks attending trainings and observing workshops at a training institute dedicated to providing training in the investigation of war crimes, crimes against humanity, and genocide, a key site for the circulation of expertise related to international criminal investigations.

By the end of my fieldwork, challenges around evidence and evidentiary standards—issues at the heart of chapters 3 and 4—had become a common motif in my conversations with interlocutors. In 2019, ICC judges acquitted and ordered the release of former Côte d’Ivoire President Laurent Gbagbo and youth militia leader Charles Blé Goudé, who had been on trial for alleged crimes against humanity against political opponents in the aftermath of the election in 2010. I happened to be observing trials at the ICC that morning. The judge’s oral ruling was so terse that the public viewers, myself included, had barely cleared security and shuffled into the public gallery to find a seat when a loud cheer erupted from Gbagbo’s relatives and supporters and the crowd began to move back out of the gallery, spilling out across the lobby and through glass doors outside into the wintery sunshine that day, giving rise to what can only be described as a boisterous, euphoric block party outside of the ICC’s premises. The judges,

halfway through the trial, had deemed the prosecution's evidence insufficient, agreed with the defense that it did not support the charges and that the defendant in fact had "no case to answer." It took the presiding judge under five minutes to read a summary of the bench's decision and acquit Laurent Gbagbo of all charges. While the former Ivorian president's supporters who had travelled to The Hague to watch the proceedings celebrated and danced outside the court building, legal commentators and ICL experts began drafting solemn op-eds and blogposts. The Court was approaching its twenty-year anniversary and concerns abounded around the low rate of convictions relative to the tremendous cost of the Court, leading to doubts about the Prosecutor's ability to investigate and collect the kind of evidence that would secure a conviction.¹⁴⁶ Another acquittal, these commentators argued, was a serious blow to the ICC.¹⁴⁷ In addition, images of the brutal conflict in Syria were dominating headlines at the time, and while legal scholars concluded that "virtually every international crime that forms part of the international penal code has been committed in and around Syria," the possibility of ICC jurisdiction and prosecution of crimes was precluded by Russia's ability to veto any such decisions in the UN Security Council.¹⁴⁸ The inability of the lauded first permanent International Criminal Court to assert jurisdiction over the crimes taking place in Syria, against Syrian nationals, posed what legal scholar Beth Van Schaack described as "an acute—some might say existential—challenge to the international community's commitment to justice and

¹⁴⁶ Earlier in this trial, the judges had scolded the prosecutor for relying too heavily on "anonymous hearsay from NGO reports, UN reports and press articles." See "ICC Wants More Evidence before Charging Gbagbo," *Nation*, July 3, 2020, sec. Africa, <https://nation.africa/kenya/news/africa/icc-wants-more-evidence-before-charging-gbagbo-866870>. See also Yvonne McDermott, "Gbagbo's Acquittal Isn't Bad for the ICC. But Problems around Evidence Remain," *The Conversation*, January 24, 2019, <http://theconversation.com/gbagbos-acquittal-isnt-bad-for-the-icc-but-problems-around-evidence-remain-110364>.

¹⁴⁷ Luke Moffett, "Why Gbagbo Acquittal Is a Bigger Blow for the ICC than the Bemba Decision," *The Conversation*, January 15, 2019, <http://theconversation.com/why-gbagbo-acquittal-is-a-bigger-blow-for-the-icc-than-the-bemba-decision-109913>.

¹⁴⁸ Beth Van Schaack and Ronald C. Slye, *International Criminal Law: Intersections and Contradictions*, Concepts and Insights Series (St Paul, MN: Foundation Press, 2021).

accountability.”¹⁴⁹ Frustrated with the lack of intervention despite the public record of atrocity and criminality, a variety of international actors began the work of collecting and compiling material that could be used as evidence once an appropriate judicial forum became available. Accordingly, one of my final “sites” was at the headquarters of a group of private war crimes investigators and the repository of evidence they had begun compiling—without a mandate from a state or multilateral institution.

As this account of the varying and parallel sites of my fieldworks shows, my research method involved a form of what cultural anthropologist Hugh Gusterson has called “polymorphous engagement.” In a 1997 article revisiting Laura Nader’s 1974 call for a “critical repatriated anthropology” that would study the powerful elites in banks, law firms and regulatory bodies, Gusterson reflects on the challenges of access and methodology that are inherent to the approach anthropologists have come to call “studying up.” He suggests that anthropologists may have to abandon the central method of participant observation in favor of polymorphous forms of engagement: interacting with informants across a number of dispersed sites as well as virtually, enlisting research methods that blur the boundaries between anthropology, sociology, and “even journalism,” and collecting data from a disparate array of sources.¹⁵⁰

The following chapters reflect this multi-year polymorphous engagement with the actors, objects, and institutions of international criminal justice.

¹⁴⁹ Beth Van Schaack, “Introduction: Syria’s Challenge to the Promise of International Justice,” in *Imagining Justice for Syria*, ed. Beth Van Schaack et al. (New York: Oxford University Press, 2020), 1, <https://doi.org/10.1093/oso/9780190055967.003.0001>.

¹⁵⁰ Hugh Gusterson, “Studying Up Revisited,” *Political and Legal Anthropology Review* 20, no. 1 (1997): 114–19.

Chapter 3

A Fabric of Common Experience

I. Introduction: The Spirit of Rome and the Affective Turn

“A considerable source of intellectual and kinetic energy.”¹⁵¹ As raised in the Introduction, this is how defense lawyer Wayne Jordash characterized the experience of working in the field of international criminal justice in a recent article. In part, this notion of “kinetic energy” can be read as referring to the kind of fulfilment and pleasure one derives from knowing and executing one’s profession well and the related social status and esteem that is accumulated by professionals.¹⁵² Similarly, David Kennedy identifies in the exercise of expertise an alluring “intellectual mastery over some of the most pressing social concerns of our time,”¹⁵³ while Samuel Moyn argues that a career in international law and international humanitarianism offers “the sort of meaningful life that comes from fulfilling clearly moral tasks consistent with mainstream respectability.”¹⁵⁴ This invocation of kinetic energy, however, also denotes a particular force or energy that circulates within the field of practice and that is both created and experienced collectively by those who participate in it.

This lawyer is not the first to have identified or given voice to a particular energy felt while engaged in the work of international justice. In 1998, the mayor of Rome and the official host of the Rome Conference—the diplomatic conference where the Rome Statute was finalized and adopted in the early hours of July 18, 1998—complimented the delegates and

¹⁵¹ Wayne Jordash, “The Role of Advocates in Developing International Law,” in *Arcs of Global Justice: Essays in Honour of William A. Schabas*, ed. Margaret M. deGuzman and Diane Marie Amann (New York: Oxford University Press, 2018), 521–36.

¹⁵² Max Weber, *Essays in Sociology*, ed. C. Wright Mills, trans. H. H. Gerth (New York: Oxford University Press, 1946).

¹⁵³ David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton, NJ: Princeton University Press, 2016).

¹⁵⁴ Samuel Moyn, “Anti-Impunity as Deflection of Argument,” in *Anti-Impunity and the Human Rights Agenda*, ed. Karen Engle, Zinaida Miller, and D. M. Davis (Cambridge: Cambridge University Press, 2016), 77.

expressed his gratitude and pride in the work they had done. He mused that the signing of the Statute had been inspired by the “spirit of Rome,” “the emotion and the awareness transmitted by the stones and the universal history of this city.”¹⁵⁵ Two decades later, at the December 2017 Assembly of States Parties at the United Nations headquarters in Manhattan, several delegates spoke of a need to recapture the “spirit of Rome,” referring to the momentum leading up to the 1998 diplomatic convention in Rome and the creation of the ICC. The concern was that this spirit was waning and needed to be recaptured or reinvigorated somehow. Over coffee in what is known as the Vienna Café in the basement of the UN building, an NGO representative told me that there was a shared concern among the various NGOs in the field around ways to ensure that youth around the world would carry the mantle and continue to engage with this “spirit” in the future.

I propose in this chapter that the spirit of Rome does not work just as an externalized public relations effort, leading to the raising of bright blue flags in The Hague bearing the imperative “Justice Matters” on International Criminal Justice Day in July, or Twitter campaigns aiming to make the hashtag #justicematters go viral. Rather, it serves simultaneously as a personal touchstone and a reservoir of professional faith for those who work in the field every day, creating affective ties to the collective effort of “fighting impunity.”¹⁵⁶

The mayor of Rome’s 1998 invocation of “the emotion and awareness transmitted by the stones” is a distinctly *affective* statement. Sara Ahmed, in her work on affect and emotion, introduces the concept of an “affective economy.” In these economies, affect circulates to create a “sticky” coherence with the potential to produce, bind together, and sustain a

¹⁵⁵ UN, “Secretary-General says establishment of International Criminal Court is major step in march towards universal human rights, rule of law,” United Nations Digital Library (UN Dept. of Public Information, July 20, 1998), <https://digitallibrary.un.org/record/257656..>

¹⁵⁶ David S. Koller, “The Faith of the International Criminal Lawyer,” *NYU Journal of International Law and Politics* 40, no. 4 (2008): 1019–69.

collective. For Ahmed, the ways in which affect moves between bodies and objects generate collective attachments and align communities.¹⁵⁷ Kamari Clarke analyses the affective terms through which international criminal justice as a mode of governance is articulated, and how its legitimacy is constructed through particular affective strategies and aesthetic manifestations. She uses this theorization of the emotive and affective life of law and law-making to examine the structures of feelings that inform and shape the pushback by the African Union against ICC investigations and intervention on the continent. For Clarke, affective appeals, and the packages of encapsulated meaning that underlie them, are central both to the mobilization of campaigns for an international rule of law and the fight against impunity, and to those campaigns rejecting the legitimacy of the ICC.¹⁵⁸ Thinking through affect in relation to international criminal justice, I argue here, can produce insights into the structure of the social field of international justice, into its claims to operate on a purely rational, objective, and technical level, and into how the illusion of systematicity and the ideology of human rights legalism sustains itself.¹⁵⁹ Affective sensibilities around justice, a series of meanings that are *felt* rather than known, create internal logic, the allure of rationality and cultivate adherence to “best practices,” established techniques, and normalized meanings. One such normalized meaning is the discursive equivocation of “justice” with “criminal justice,” or the way in which the “fight against impunity” has become both a rallying cry as well as the dominant policy response to conflict and violence.¹⁶⁰ This chapter points to the aesthetic and affective repetition that makes up part of the fabric of common experience for the ICL cohort, and which in turn

¹⁵⁷ Sara Ahmed, “Affective Economies,” *Social Text* 22, no. 2 (2004): 117–39.

¹⁵⁸ Kamari Maxine Clarke, *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback* (Durham, NC: Duke University Press, 2019).

¹⁵⁹ For another study of affect in legal practice, see Jonas Bens, *The Sentimental Court: The Affective Life of International Criminal Justice* (Cambridge: Cambridge University Press, 2022).

¹⁶⁰ Elizabeth Cullen Dunn, “The Chaos of Humanitarian Aid: Adhocracy in the Republic of Georgia,” *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 3, no. 1 (2012): 1–23, <https://doi.org/10.1353/hum.2012.0005>. See also Anette Houge and Kjersti Lohne, “End Impunity! Reducing Conflict-Related Sexual Violence to a Problem of Law: End Impunity!,” *Law & Society Review* 51, no. 4 (2017): 755–89, <https://doi.org/10.1111/lasr.12294>.

allows for the collective enunciation and mobilization around distinct objects (the victim, the perpetrator, humanity) and objectives (justice, rule of law, transparency) within the social field of international justice. I propose that this repetition plays an important role in upholding and sustaining the consistent claims to legitimacy, systematicity, rationality, and objectivity of the field of international criminal justice. In other words, it is the affective register that sustains and animates the practice of technocratic international criminal legalism.

I develop the argument in this chapter through a discussion of the distinct objects that I encountered during my fieldwork with the ICL cohort: badges, a prosthetic limb on a table during a reception, an art exhibit, and the architecture and design of the various buildings that make up important sites in the transnational network of international criminal justice. Others who have taken the materiality of international justice spaces seriously have suggested that what is at play is a communication of humanitarian values (Lohne), or a branding practice to market and promote international criminal justice (Schwöbel-Patel). I suggest additionally that aesthetic experience produces a crucial coherence for the practitioners of international criminal justice themselves, serving to hold an ever-emergent, piecemeal project together, across time and place, creating a deeply affective fabric of common experience and professional and personal touchstones for the ICL cohort.

II. Badges: Social Ordering

The ASP (Assembly of States Parties) takes place every year in December, alternating between the headquarters of the United Nations in New York City and a large commercial convention center known as The World Forum in The Hague. With a capacity of 5,000 people, the World Forum's website boasts of its experience in 'Hosting the World!' The convention center is in the middle of what is known as the international zone of The Hague and sits along a flag-lined avenue right across from the building that formerly housed the International Criminal Tribunal

for the former Yugoslavia (ICTY), now the Residual Mechanism (MICT), and next to Europol's offices. The Assembly is the legislative and management oversight body of the ICC and each member state to the Court has one vote. Issues to come before the Assembly relate to the approval of the operating budget of the Court, judicial elections, as well as elections for the position of Prosecutor and Deputy-Prosecutor of the Court.¹⁶¹ Additionally, several civil society organizations, non-member state representatives, and representatives of international organizations may receive accreditation to observe or participate in the assembly. The ASP is a crucial space of governance that determines the leadership and shapes the policy of the Court's main organs. It is also an intensely social space, where relationships are nurtured and collaborations form. In a 2019 chapter, Marieke de Hoon and Kjersti Lohne reflect on the ASP as an annual diplomatic ritual where the ICC and the field of international criminal justice more broadly "are legally but also socially constituted, that is, brought into a particular type of being through a set of actors, practices and modes of social organization."¹⁶² Separately, Kjersti Lohne has argued that ASP meetings serve to build a constituency for international criminal justice through the invocation of cosmopolitan imagery and references the "transportable materialities" often on display at the ASP. For instance, there were years where delegates could purchase t-shirts and coffee mugs emblazoned with the Preamble of the Rome Statute—perhaps to aid in a recapturing of the spirit of Rome.¹⁶³ During most iterations of the Assembly, photo exhibits are on display in the main entrance hall or lobby of the convention center, and endless amounts of posters, brochures, flyers, buttons, and tote bags are available. For anyone

¹⁶¹ "ICC - Assembly of States Parties," International Criminal Court, accessed March 12, 2023, <https://asp.icc-cpi.int/assembly>.

¹⁶² Marieke de Hoon and Kjersti Lohne, "'All the World's a Stage': Constituting International Justice at the ICC's Assembly of States Parties Meeting," in *Backstage Practices of Transnational Law*, ed. Lianne J. M. Boer and Sofia Stolk (New York: Routledge, 2021), 66, <https://doi.org/10.4324/9780429023583-5>.

¹⁶³ Kjersti Lohne, *Advocates of Humanity: Human Rights NGOs in International Criminal Justice*, Clarendon Studies in Criminology (New York: Oxford University Press, 2019), 62.

working in or adjacent to international criminal justice, the weeklong ASP is the professional and social event of the year.

“Are you going to ASP this year?” becomes the question to start many a conversation in international justice circles come September when it is time to make travel arrangements and book accommodation. While for academic audiences this may sound familiar, akin to any scholarly conference, the ASP requires not just registration, but accreditation by the secretariat of the ASP to attend the meetings. Once accredited, one is issued a photo ID badge that provides access to the physical buildings in which the meetings are held and also determines which specific sessions and side events one has access to. The following section briefly describes the ASP accreditation process before moving on to a discussion of the workings and social function of the badges. I propose that these badges themselves are an important material object that communicate meaning and produce a social ordering in the field of international criminal justice.

Generally, there are two avenues for (groups of) individuals who are not part of a state delegation to participate in the meetings. Non-governmental organizations that have previously been recognized by the United Nations under a process and designation called “ECOSOC consultative status” as administered by the UN Economic and Social Council and “whose activities are relevant to the activities of the Court” can register directly with the secretariat of the ASP for accreditation.¹⁶⁴ The second avenue is to register under the umbrella of the Coalition for the International Criminal Court (CICC). The Coalition was founded in 1995, initially as a network of twenty-five non-governmental organizations, who became central to the negotiations and effort to establish a permanent international criminal court and led the

¹⁶⁴ See CICC, “Guidelines for ASP Accreditation,” Coalition for the International Criminal Court, accessed March 12, 2022, https://www.coalitionfortheicc.org/sites/default/files/cicc_documents/ASP%202019%20Accreditation%20Guidelines%20%28Final%29.pdf; “Rules of Procedure of the Assembly of States Parties,” International Criminal Court, accessed March 12, 2022, https://legal.un.org/icc/asp/1stsession/report/english/part_ii_c_e.pdf, Rule 73, Rules of Procedure and Evidence, 329–30.

civil society input and lobbying efforts during the 1998 Rome Conference that led to the adoption of the Rome Statute and the creation of the ICC. Currently, over 2,500 organizations are members of the CICC. Calling itself “the world’s largest civil society partnership advancing international justice,” it is run by two small offices in The Hague and New York and an army of unpaid, short-term interns.¹⁶⁵ Each of these processes for accreditation requires that individuals are formally affiliated to a registered, recognized non-governmental organization. While there are specific guidelines for press accreditation, there is no official avenue for individual accreditation as, say, a researcher or an anthropology graduate student. This was formalized in a 2019 CICC document outlining the guidelines for accreditation, which stated that individuals seeking accreditation must work for a recognized non-profit entity with a mission concerning “justice and accountability.” Additionally, the CICC developed a questionnaire to be completed as part of the process of accreditation. Questions related to the central activities of the organization, asking how the organization’s work related to justice and accountability and requiring that five “key outcomes” of the organization’s work on justice and accountability be listed.¹⁶⁶ Still, over the course of my fieldwork, I attended ASP meetings annually in both The Hague and New York from 2013 to 2018. In earlier years, I was able to be accredited quite easily as part of the CICC delegation. This was likely because I worked there for a few months prior to starting graduate school, and was friendly with some of the staff, and usually a phone call or quick email would suffice to be added to the list. Sometimes I would agree to share in some of the labor of documenting the events, sharing summaries of meetings I had attended or photographs I had taken. This was more a gesture of goodwill than a formal condition. It is important to note here that, while my intention in attending the meetings was simply to be in the room, to get a sense of the conversations happening and the

¹⁶⁵ CICC, “Who We Are,” Coalition for the International Criminal Court, accessed March 12, 2023, <https://www.coalitionfortheicc.org/about/who-we-are>.

¹⁶⁶ CICC, “Guidelines for ASP Accreditation.”

decisions being made, this approach also meant that I effectively became a member of the CICC delegation, added to their numbers, and was visible and discernible as such to anyone who glanced at my badge. There is a lot of badge glancing at these events. For the first two or three years, it seemed I was added to the list because I had been in attendance in a prior year. Gradually, as indicated by the guidelines and questionnaire mentioned above, the process of CICC accreditation appeared to become more formalized and it became more difficult to be formally accredited through the CICC. My contacts at the CICC had either left the organization or began forwarding my messages to a designated “accreditation contact person” who would in turn direct me to the official form and questionnaire to complete. I was a graduate student, and universities did not appear to be recognized as non-profits with a mission toward advancing justice and accountability by the CICC. The 2019 CICC guidelines on accreditation were updated to include the following exclusions:

- **Previous ASP accreditation will not translate into a right to receive accreditation for future ASP sessions.** This rule applies to those who might have been previously accredited on the basis of their association/employment with a CICC member organization or their association with an organization possessing UN ECOSOC status, or on an ad hoc basis.
- The requests of students’ participation for the purpose of exposure to the meetings will be rejected.¹⁶⁷

My usual approaches to accreditation had effectively been foreclosed. In following years, I was invited to join the delegation of the Public International Law and Policy Group (PILPG) as an “affiliated expert.” PILPG is an international *pro bono* law firm that provides

¹⁶⁷ CICC, “Guidelines for ASP Accreditation.”

free legal assistance to parties involved in peace negotiations, the drafting of post-conflict constitutions and war crimes prosecution/transitional justice. Several of the founders and lawyers at this firm are also law professors with law school or university affiliations. As such, PILPG is positioned both as a non-profit organization advancing global justice “outcomes” for the purposes of ASP accreditation, and as an academic network of scholars interested in studying international criminal justice. I met several PILPG affiliates at conferences or at universities during part-time teaching engagements in the Netherlands while I was conducting fieldwork and completing graduate school, and as such was able to request inclusion in their delegation.

This section has reflected on the process of accreditation at length because it sheds light on the ways in which the social field of international criminal justice is produced and conditioned through meanings communicated through particular objects. It is with these objects that the rest of this chapter is centrally concerned.

The ID badges, in iconic UN blue, are part of the materiality of key sites of international criminal justice

such as the ASP and become part of the structured sociality and meanings that circulate at as well as produce these sites. As one can probably tell from the slight smile on my face in the picture printed on my 2017 badge above (Figure 2), I was pleased, and perhaps somewhat relieved, to have been issued a badge. This piece of laminated cardboard attached to a lanyard facilitated my access, which was essential for my research and efforts to be a participant observer, but also meant that for the time being, until the rules were adjusted again, I was “in,” along with many of those whom I had come to see as key interlocutors, colleagues, and friends over the years of following the goings on in international criminal justice. Yet as became more



Figure 2. Photograph by the author, December 2017.

and more apparent to me during subsequent iterations of the ASP, even being “in,” with badge in hand, was structured in particular ways. As I wandered past the meeting halls and went from plenary meeting to side event to coffee corner, past art exhibits and back to plenary meeting, I found that there were still spaces I was barred from entering. Certain meetings were designated as being for state delegations only, for example. This particular type of conditioned and conditional social inclusion was particularly pronounced during the 2017 Assembly of States Parties. During this session, which was being held at UN Headquarters, certain elements of the plenary meeting were in fact, not plenary. During this particular session, the crime of aggression, on which a definition had finally been reached during the Review Session in Kampala in 2010, was due to be activated, having reached the required number of state ratifications. This meant that the ICC’s jurisdiction over individuals accused of acts of aggression and aggressive war, as imagined by the drafters and negotiators of the Rome Statute, could soon become a reality. However, a few months before the Assembly, a coalition of militarily powerful states such as Canada, Colombia, France, Japan, Norway, and the United Kingdom submitted a legal opinion to the Austrian diplomat who had been charged by the secretariat of the ASP with facilitating the upcoming activation decision. The intricacies and ramifications of that legal opinion are beyond the scope of the current chapter. In fact, the text of this opinion is not part of the public record. Suffice it to say that the opinion itself was considered an attempt by this coalition of states to narrow the scope of the law and to significantly limit ICC jurisdiction over the crime of aggression with effects that would be felt keenly after Russia’s act of aggression against Ukraine in early 2022, and it was considered a departure from previously held positions on which consensus had been achieved seven years prior.¹⁶⁸ This meant that at the upcoming ASP, activation was not going to be a rubber-stamp

¹⁶⁸ “Resolution RC/Res.6,” International Criminal Court, June 11, 2010, https://asp.icc-cpi.int/sites/asp/files/asp_docs/Resolutions/RC-Res.6-ENG.pdf.

issue on the agenda but would instead be subject to renewed debate. In a nutshell, the 2017 ASP was going to become a particularly contentious edition, and observers have suggested that delegates of states leading the effort to reopen the scope and possible activation of the crime of aggression thus wanted to ensure that access and accreditation to meetings would be limited to ICC member states. Certainly, accreditation was particularly strict that year. Any representatives of non-ICC member states, civil society, and any academics who had found their way into the Assembly, were excluded from meetings where the question of activation of the crime of aggression was being debated.¹⁶⁹ This particular focus on who could hear or read what resulted in interesting moments during the weeklong meeting, where some of us present would be asked to leave the plenary meeting, only to be gestured back into the hall once the meeting had turned to another issue on the agenda. This is where the ID badges came in. Printed on these badges were particular letters in particular colors, which helped the UN security guards on the premises ascertain who could sit where in the General Assembly Hall, and which sections of the gallery should be asked to leave at any given time. I spent several hours of that ASP sitting on the cool marble floor of the lobby to the UN secretariat building, sometimes late into the night, scrolling through Twitter for any updates from the debate taking place behind closed doors, just a few yards from where I was sitting. In this way, the badge, its color, and the intricate system of letters and numbering became part of the material terrain of the ASP and played an important role in the social ordering of access and information, adding another dimension to the sense of “opaque transparency” I introduced in the previous chapter.

¹⁶⁹ Noah Weisbord, *The Crime of Aggression: The Quest for Justice in an Age of Drones, Cyberattacks, Insurgents, and Autocrats* (Princeton, NJ: Princeton University Press, 2019), 171.

III. Appendage: Representations of African Calamity

At the ASP, the days are filled with large plenary meetings and debates, as well as a dizzying amount of concurrent “side events”: informal breakfast gatherings, book launches with catered lunches, documentary film screenings and art exhibits, panel discussions, debates, and receptions. These are spaces for lobbying, where stakeholders can draw attention to issues that are not on the plenary meeting agenda but that are, in their view, deserving of attention. Often, side events are used by civil society organizations to draw attention to their work over the past year or launch a new initiative. Many of these events are co-sponsored by the embassies of member states in either The Hague or New York, who in so doing are lending a stamp of approval and providing logistical and financial support: translation services, catering, or making a meeting space available. In what follows, I focus on one particular event: a December 2017 reception held one evening on Day 3 of the Assembly,¹⁷⁰ featuring the work of the Trust Fund for Victims in the Democratic Republic of Congo and Uganda, co-sponsored by the Board of Directors of the Trust Fund for Victims and the Netherlands. The permanent representation of the Netherlands to the UN offered use of its conference room just a few blocks away from First Avenue, where meetings had been ongoing in the UN’s General Assembly Hall.

¹⁷⁰ The Coalition for the International Criminal Court (CICC) releases daily schedules, lists of events and summaries on its website while the ASP is in session. See: CICC, “ASP 2017: Day Three,” Coalition for the International Criminal Court, December 6, 2017, <https://www.coalitionfortheicc.org/asp-2017-day-three>.

At the event, I encountered the table of objects pictured below (Figure 3):

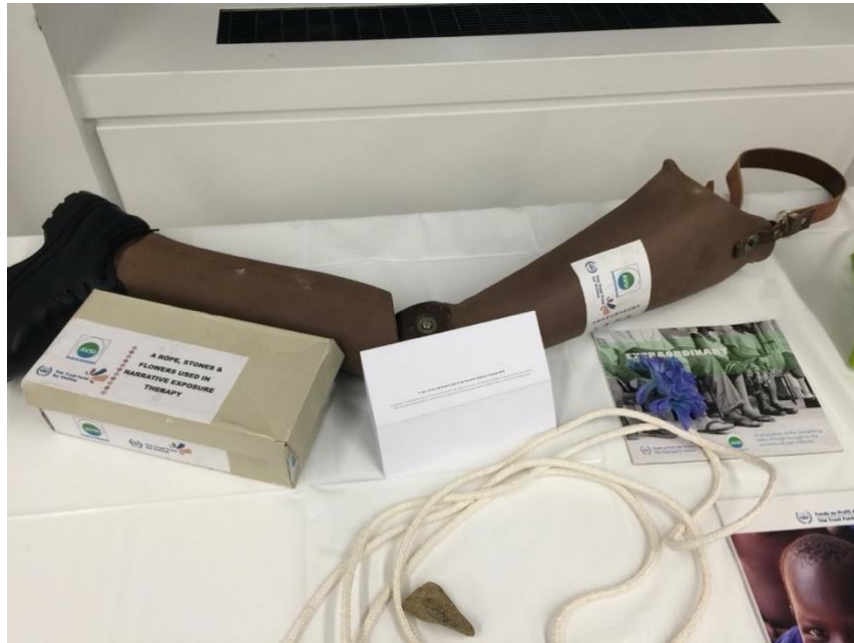


Figure 3. Photograph by the author, December 2017.

Pictured in the image above, from left to right: a shoebox bearing the logo of the International Criminal Court's Trust Fund for Victims (TFV), and the logo of Association of Volunteers in International Service (ASVI), a partner organization of the TFV. The label on the shoebox reads, "A rope, stones & flowers used in Narrative Exposure Therapy (NET)." The white cardboard sign in the middle of the image explains the three elements used in NET: "a symbolic representation of the client's life; good events are represented in flowers and painful ones are stones." The sign further explains that "this exercise is being used by Association of Volunteers in International Service (ASVI) in their trauma counselling group." On the table are a white woven piece of rope, a small, jagged rock, and a blue artificial flower; presumably these are arranged along the rope to represent a chronological narrative of the good and painful events of an individual participating in Narrative Exposure Therapy. On the table are two brochures, and not pictured in the picture above,¹⁷¹ to the far right, a certificate that reads "CVT

¹⁷¹ Additional images of the table and objects are in the possession of the author.

– Makerere University Trauma Counseling Certificate, granted jointly by the University of Makerere’s School of Psychology Department, the Center for Victims of Torture and the ICC’s Trust Fund for Victims.” The two brochures on the table are a French translation of the 2016 Annual Report of the Trust Fund for Victims and a smaller square pamphlet titled “Extraordinary: A photostory of the compelling tales of hope brought to the survivors of war violence,” again bearing the logo of the Trust Fund for Victims and its partner organization ASVI.

The Trust Fund for Victims is an organ of the International Criminal Court. Considered a key innovative feature of the permanent international criminal court, the Fund is charged with responding to the harm suffered by victims of crimes under the jurisdiction of the ICC, in accordance with article 79 of the Rome Statute.¹⁷² Within a criminal tribunal focused on retributive justice, the Fund represents a restorative element in line with international human rights treaties establishing that victims of human rights violations have a right to a remedy and a right to reparation.¹⁷³ The TFV aspires to “deliver reparative value to victims.”¹⁷⁴ The activities of the fund are broadly distributed across two main areas of work: reparations and general assistance. Reparations are directly linked to guilty verdicts in the judicial proceedings of the ICC: when a defendant is found guilty, they are also found liable for the harm suffered

¹⁷² See the following section:

Article 79 Trust Fund

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.
2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.
3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

“Rome Statute of the International Criminal Court,” International Criminal Court, 2021, <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

¹⁷³ UN General Assembly, “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,” OHCHR, December 16, 2005, <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation>.

¹⁷⁴ Trust Fund for Victims, “TFV Board: Closure for Victims Is the True Measure of International Justice,” International Criminal Court, November 29, 2016, <https://www.icc-cpi.int/news/tfv-board-closure-victims-true-measure-international-justice>.

by victims who have registered with the court and have been recognized to have suffered harm by the actions of the accused. As such, the TFV is charged with distributing court-ordered reparations as well as assessing the most appropriate form of reparations. Incidentally, early decisions and practice suggest that court-ordered reparations after a guilty verdict are unlikely to take the form of individual lump sum payments to recognized victims of the crime, but will be collective and symbolic in nature.¹⁷⁵ Activities under the Trust Fund’s general assistance mandate can take place as proceedings are ongoing and are geared toward providing general support to communities affected by the kinds of violence within countries in which particular events or situations are subject to ongoing investigation by the Office of the Prosecutor.

The Association of Volunteers in International Service (AVSI) is what is called an implementing partner of the TFV: essentially a subcontractor selected through a competitive bidding and procurement process. These implementing partners receive grants from the TFV, which is in turn funded through grants from ICC States Parties, as well as any fines and forfeitures leveled against convicted persons.

For ten years, from 2008 to 2018, AVSI worked in the Acholi and Lango sub-regions of northern Uganda to conduct outreach activities to identify victims with physical rehabilitation needs resulting from conflict. According to the 2016 annual report of the TFV, AVSI through its Gulu Regional Orthopedic Workshop (GROW) provided “selected beneficiaries . . . with a range of medical care services including prosthetic limbs for amputees, orthotic devices such as crutches, calipers, splints etc.”¹⁷⁶ Over a ten-year period, ASVI received €925,363 from the “common basket” of TFV funds in support of these activities. The 2016 report also reports that another implementing partner, Amuria District Development

¹⁷⁵ Marina Lostal, “The Ntaganda Reparations Order: A Marked Step towards a Victim-Centred Reparations Legal Framework at the ICC,” *EJIL: Talk!* (blog), May 24, 2021, <https://www.ejiltalk.org/the-ntaganda-reparations-order-a-marked-step-towards-a-victim-centred-reparations-legal-framework-at-the-icc/>.

¹⁷⁶ Trust Fund for Victims, “Annual Report 2016,” Trust Fund for Victims, accessed March 12, 2023, <https://www.trustfundforvictims.org/sites/default/files/reports/TFV%20Annual%20Report%202016.pdf>, 65.

Agency (ADDA), received €160,000, provided by Finland, a large donor of the TFV, to provide “physical and psychological rehabilitation for victim survivors, with a special focus on girls and women subjected to sexual crimes; undertake victim mobilisation and identification, counselling, reconstructive and corrective surgery, recuperative/restorative surgery, orthopaedic surgical services and prosthetic devices for victims of deformity.”¹⁷⁷

At the top end of the table, effectively framing the other, smaller items on display, is a brown full prosthetic leg, with a sturdy leather strap and buckle for fastening at the top and a black leather lace up shoe attached to the foot. As with the other items on the table, this prosthetic limb bears a label displaying the logos of the TFV and ASVI.

I encountered this table with the array of arrangement of items displayed near a window of a conference room of the nineteenth floor of a high-rise Manhattan office building, where the offices of the Permanent Representative of the Kingdom to the Netherlands to the UN are located. It was December 2017, and midtown Manhattan was bustling with the arrival of hundreds of delegations from states and civil society organizations, gathered to attend ASP.

What, then, is a brown prosthetic leg doing on a table during an evening reception with drinks and hors d’oeuvres in midtown Manhattan? What does it signify? This one object, transported from the TFV’s offices in The Hague, for many who are familiar with the field, taps into an affective register. It evokes images of the kind of violence the ICC is meant to prosecute and deter. The horrific and brutal spectacle of amputations, with their capacity to inflict terror on a civilian population, has become a common phenomenon in the conflicts that come within the purview of international criminal courts and tribunals, established to prosecute the worst crimes of concern to the international community as a whole, per the Rome Statute’s preamble. For instance, former president of Liberia Charles Taylor, the first former head of

¹⁷⁷ Trust Fund for Victims, “Annual Report 2016,” Annex II.

state to stand trial before a UN-mandated tribunal, was ultimately found guilty of supporting the brutal insurgency of the Revolutionary United Front (RUF) during the decade-long civil war in neighboring Sierra Leone. The RUF, in particular, though certainly not the only faction to employ such techniques, was infamous for its campaign of terror against civilians, whereby mutilations and amputations of limbs, ears, lips, and noses became horrific trademarks. Reports on the numbers of impaired range from 2,000 to 27,000, though it is important to note that, as cultural anthropologist Marianne Ferme argues, these kinds of numerical “truths” should be critically analyzed rather than taken for granted, “especially when estimates can range from two- to four-digit figures, as do those of amputations in Sierra Leone—disfigured bodies will for decades serve as a reminder of the atrocities committed during the conflict.”¹⁷⁸ This particular type of spectacular, catastrophic violence figures prominently in the popular imagination of the kinds of atrocities with which international criminal justice concerns itself.¹⁷⁹ Broadcast on the news or in searing photographic exposés, for many international audiences this became the first time they had heard of the country Sierra Leone, let alone the fighting that raged for over eleven years. For a global news media eager for a human element and uplifting note for their reporting, the various amputee organizations or amputee soccer

¹⁷⁸ George Packer, “The Children of Freetown,” *The New Yorker*, January 5, 2003, <https://www.newyorker.com/magazine/2003/01/13/the-children-of-freetown>; IRIN News, “Amputees Still Waiting for Reparations Almost 10 Years On,” *The New Humanitarian*, October 24, 2011, <https://www.thenewhumanitarian.org/report/94037/sierra-leone-amputees-still-waiting-reparations-almost-10-years>; Maria Berghs, *War and Embodied Memory: Becoming Disabled in Sierra Leone* (Farnham, Surrey: Ashgate, 2012). See also Marianne Ferme’s searing critique:

If the order of numerality is to remain a central feature of quickly written humanitarian accounts of crisis, this must be discussed and analyzed, rather than taken for granted, especially when estimates can range from two-to four-digit figures, as do those of amputations in Sierra Leone. The magnitude of this range is such that it not only raises questions about the political use of numbers, statistical samples, and comparisons, but also asks those who take humanitarianism seriously – if not for its underlying conceptual apparatuses and premises, then as a strategic political engagement – to always questions which figures are selected.

Mariane C. Ferme, *Out of War: Violence, Trauma, and the Political Imagination in Sierra Leone* (Oakland: University of California Press, 2018), 101.

¹⁷⁹ Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa*, Cambridge Studies in Law and Society (Cambridge: Cambridge University Press, 2009). See also Ferme, *Out of War*, 99: “The horrific and spectacular instances of harm take precedence over other kinds of harms inflicted on the population, because they are more accessible to and commensurate with, the international community.”

teams became powerful symbols of resilience and recovery from mass trauma. A 2012 UN News story and short video clip alongside after Charles Taylor's conviction brings these elements together in an exemplary fashion, under the headline: "Amputees from Sierra Leone's war applaud sentence for Charles Taylor":

Amputees got together in the capital of Freetown to watch in a cinema as the former Liberian leader received his sentence from the UN backed Special Court for Sierra Leone at the Hague.

Tens of thousands of people were killed, mutilated, raped, robbed and displaced in Sierra Leone during the decade long war.

Jabati Mambu was a teenager when he had his right hand hacked off by a machete during the war. Now he is president of the Amputee Football Team and spoke with Julie Walker about Charles Taylor's sentence.¹⁸⁰

A 2003 *New Yorker* story details how these images galvanized a Greek-American prosthetist into involving himself in an "African calamity," beginning a multi-year effort to bring children who had suffered violent, traumatic amputations to the United States—Staten Island, to be specific—fit them with prostheses, and then return them to Sierra Leone, neglecting, incidentally, to account for the fact that a prosthesis must constantly be adjusted and that children will require new prostheses as their bodies grow.¹⁸¹ Marianne Ferme reflects on how coverage of the catastrophe in Sierra Leone became preoccupied with the "figure of mutilated, decapitated and violated bodies in both image and writing," whereby amputees emerged as the canonical image of incommensurable suffering."¹⁸² Anthropologist Maria Berghs, who has written extensively on post-war disability in Sierra Leone, reflects on the differences between local and international coverage of the phenomenon:

¹⁸⁰ UN News, "Amputees from Sierra Leone's War Applaud Sentence for Charles Taylor," United Nations, May 30, 2012, <https://news.un.org/en/audio/2012/05/573602>.

¹⁸¹ Packer, "Children of Freetown."

¹⁸² Ferme, *Out of War*, 100.

In both global and local discourses in the media, the image of the amputee (man, woman, child) became symbolic of the atrocities and trauma of the war. Global media discourses on the war reported on the mindless violence and barbarism of young rebels wielding machetes indiscriminately on a local population. In contrast, local discourses on amputation understood amputation was used by all factions as a highly symbolic and rational strategy to enforce loyalty to either side of the fighting in Sierra Leone.¹⁸³

Berghs has also analyzed the ways that once the transitional justice process was underway in Sierra Leone, through a combination of a Truth and Reconciliation Commission and the Special Court for Sierra Leone to prosecute those bearing the greatest responsibility, victimhood became linked to physical impairment, and an amputated limb became visual evidence of a medicalized “truth,” proof of having been appropriately classified as “victim.”¹⁸⁴ The final report of the Sierra Leone TRC, in a separate 40-page appendix to the 1500-page report titled “Appendix 5: Amputations in the Sierra Leone Conflict,” lists in painstaking detail the kinds of amputations perpetrated (“arms, ears, legs, fingers . . .”) and the instruments of amputation used (“machetes, widely referred to as cutlasses in Sierra Leone, axes and knives.”) and discusses and assesses at length possible reasons why intentional amputations emerged as a distinctive strategy during the conflict. Ultimately, the report concludes that amputation is a complex phenomenon, shaped by a range of factors such as the socio-political situation, the availability and ubiquity of certain kinds of weapons, historical factors, substance abuse, and

¹⁸³ Maria Berghs, “Disability as Embodied Memory? A Question of Identity for the Amputees of Sierra Leone,” *Wagadu: A Journal of Transnational, Women’s and Gender Studies* 4 (2007): 78–92.

¹⁸⁴ The Special Court for Sierra Leone was known as a hybrid criminal court, jointly established between the United Nations and the government of Sierra Leone, its judges and officials were a mixture of international staff and Sierra Leoneans, and the court was based in Freetown between an international tribunal and a domestic court. See Kristina Perrin, “Book Review: War and Embodied Memory: Becoming Disabled in Sierra Leone by Maria Berghs,” *LSE Review of Books* (blog), April 3, 2013, <https://blogs.lse.ac.uk/lsereviewofbooks/2013/04/03/book-review-war-and-embodied-memory-becoming-disabled-in-sierra-leone/>.

the particular make-up of Sierra Leonean society, but that “the factors driving amputation in Sierra Leone, reflect those found in other countries around the world.”¹⁸⁵

The comparative reflection that the TRC’s study on amputation ends with speaks to a central tension in legal humanitarianism. At play is at once a notion of incommensurability—images of violence and harm that are considered so egregious that they produce outrage and calls for accountability—and a notion of commensurability across different, heterogeneous states, contexts and circumstances, in what Ferme points to as the “antinomy at the heart of what is called the humanitarian project of democratic accountability.”¹⁸⁶ And so the violence in Sierra Leone is rendered *like* the violence in Kosovo, like the violence in Rwanda, like the violence in Uganda, like that in the Central African Republic, like that in the Democratic Republic of Congo, and through the project of penal humanitarianism all these forms of violence and harm can be appropriately addressed (and redressed) through the three broad categories of crime recognized by contemporary international criminal law—genocide, war crimes, and crimes against humanity—via the expertise of international criminal lawyers. Elena Baylis, in a 2008 article exploring the knowledge practices of what she terms “tribunal-hopping post-conflict junkies” identifies a form of “analogical knowledge” whereby these young professionals, who choose to travel from post-conflict setting to post-conflict setting for employ at the various transitional justice institutions or non-governmental organizations, carry with them expertise developed and lessons learnt in previous settings, identifying what they believe to be common patterns and features, and making sense of a new situation through an analogical lens, rather than a lens focused on the distinctive and particular.¹⁸⁷ The central

¹⁸⁵ Artemis Christodoulou, “Appendix 5: Amputations in the Sierra Leone Conflict,” Sierra Leone Truth and Reconciliation Commission, October 4, 2004, https://www.sierraleonetrctc.org/index.php/view-the-final-report/download-table-of-contents/appendices/item/appendix-5-amputations-in-the-sierra-leone-conflict?category_id=15, 19.

¹⁸⁶ Ferme, *Out of War*, 99. See also: Elizabeth A. Povinelli, “Radical Worlds: The Anthropology of Incommensurability and Inconceivability,” *Annual Review of Anthropology* 30 (2001): 319–34.

¹⁸⁷ Elena Baylis, “Tribunal-Hopping with the Post-Conflict Justice Junkies,” *Oregon Review of International Law* 10, no. 2 (2008): 377.

tension of course, is that international criminal justice promises to bring justice to victims of *these kinds* of harms, but can never do so in all instances, nor does it address the structural factors and systemic inequities that underlie such cycles of violence.

The dark brown prosthetic limb on the table at a reception for the Trust Fund for Victims taps into a deep reservoir of shared understandings and references to atrocity, violence, justice, racialized African victims, and repair that structure the field of international criminal justice. Seen in this way, the victim was rendered present in part and absent as a whole, at that reception in Manhattan on a Tuesday evening in December 2017. Kamari Clarke argues that the figure of the victim works to legitimize the mandate of the ICC and offers a moral platform for the work of international criminal justice. But, she writes, “this very process of legitimation serves to dissolve the victim’s corporeality, leaving a residue—akin to a specter or ghost—something that is not physically ‘real’ but that haunts the proleptic possibility of justice because its history—as lived in the present—is so powerfully horrific.”¹⁸⁸ We might understand the presence of the prosthetic limb at that midtown reception, then, as the spectral victim, both present and absent, serving to remind the various experts gathered there—ambassadors, lawyers and legal scholars, NGO workers and board members of the TFV—of the purpose and proper recipient of their work, and the object to be repaired.

Recall that in addition to the prosthesis there were two brochures on the table. One was the 2017 annual report of the TFV. In his foreword to the report, the director of the Fund reaffirms the TFV’s ambition to “create and to deliver reparative value to victims” and lists the number of victims fitted with prostheses or orthotics as a key indicator of this value and strategic goal. In 2017, the results reported were 228 recipients across the Democratic Republic

¹⁸⁸ Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa*, Cambridge Studies in Law and Society (Cambridge: Cambridge University Press, 2009), 94.

of Congo and Uganda.¹⁸⁹ Here, we might dwell on the phrasing “create and deliver reparative value” as well as the role of indicators and numbers as key measures of humanitarian care. Legal scholar Christine Schwöbel-Patel has argued that global justice is increasingly being *marketized*, which she defines as the receding of social values in favor of market values, or the inflection of social values with market values. Indeed, the phrasing in the TFFV’s 2017 annual report demonstrates a curious collapsing or equating of understandings around social repair after mass conflict or repair for harm suffered with an understanding of value that can be created and delivered through the exchange and circulation of commodities.¹⁹⁰ Coupled with the second brochure on the table, “Extraordinary,” which carries a picture of only the legs and feet of presumed recipients of prostheses on the cover and bears the subtitle “a photostory of the compelling tales of hope brought to the survivors of war violence,” we begin to see how prostheses operate here as deliverables for victim-survivors who must be *brought hope* and receive reparative value from international criminal justice as a technical field of practice. Schwöbel-Patel takes up the circulation of images within the field of global justice as key evidence of the marketisation of the field, whereby such images work as a form of publicity and communication with the public and are a central vehicle for the branding and marketization of global justice.

While Schwöbel-Patel’s theorizations here are illuminating, and the role of images will be addressed in greater detail later in this chapter, I am interested in returning to the objects and texts displayed on the table at the evening reception. The event at which these items were displayed—the prosthetic limb, the therapy kit, the two brochures and a certificate in trauma

¹⁸⁹ Trust Fund for Victims, “Annual Report 2016.” See also Sally Engle Merry, *The Seductions of Quantification: Measuring Human Rights, Gender Violence, and Sex Trafficking*. Chicago: The University of Chicago Press, 2016.

¹⁹⁰ Christine Schwöbel-Patel, *Marketing Global Justice: The Political Economy of International Criminal Law*, Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2021), 96–126. Schwöbel-Patel revisits Karl Marx’s theorization of value, under which all commodities have a use value and an exchange value.

counselling—was not an event geared at the general public, or passersby with a cursory interest in international criminal law. Rather, this display was part of the highly regulated, structured space of the annual ASP. Scheduling and the reservation of rooms and locations begins months in advance. Given that the offices of the TFV are in The Hague, and the partners that implement their prosthetic support programs are based in Uganda and the Democratic Republic of the Congo, some thought and effort would have been required to ensure that an exemplary prosthesis arrived in midtown Manhattan. Nearly everyone in attendance that evening had received formal accreditation, and as such had demonstrated a connection to an entity working to advance international criminal justice. The audience was predominantly made up of experts and practitioners, many of whom would likely be included in the self-referential ICL cohort. Certainly, there is an element of branding or marketing at play. The logo of the TFV adheres to each of the items on the table, and the glossy, printed annual report justifies the Fund's expenditures and enumerates its accomplishments in 2017. Yet the point I wish to make here is that those who were present that evening would have already known this, or at least would have had access to this information. Perhaps some of the guests that evening were potential donors and funders, in which case it would be helpful for those representing the Trust Fund to have easy access to a prosthesis, a photo brochure, or the annual report, to impress upon the donor the effectiveness and professionalism of their work. I propose that the table and the objects on display that evening played another role as well, working on an affective register to remind experts in the ICL cohort of the value of their work and as such, constantly melding an affective attachment to the core belief system underpinning the field of international criminal justice as a social field of practice.

The central pillars of this belief system are not far removed from Makau Mutua's characterization of the grand narrative of the human rights corpus, one that is increasingly informed by the logic of criminal accountability for those who violate certain human rights

principles. Mutua locates within human rights discourse a powerful three-dimensional compound metaphor, which he calls the savage-victim-savior (SVS) metaphor.¹⁹¹ For Mutua, “savagery” here is applied to any cultural deviation from human rights, and it is inflicted upon a victim. In this arrangement, the victim is often rendered powerless and helpless, having had her “dignity and worth” violated.¹⁹² Sara Kendall and Sarah Nouwen describe the discursive invocation of an abstracted, de-personified, almost deity-like “Victim” as the *telos* of international criminal justice, while Karen Engle has critiqued the ways the victim appears as both “central and marginal, featured and featureless.”¹⁹³ Kamari Clarke, who has commented on the “spectral, stylized, fictionalized and idealized figure” of the victim in international criminal law discourse has reflected on the ways in which the victim requires as its counterpart the “spectacle of the warlord”; in her critique, both figures are key to providing the moral legitimacy of the work of international criminal justice.¹⁹⁴ The third figure, completing Mutua’s tripartite metaphor, is the “savior”: he who does the work of civilizing and safeguarding against tyranny, providing redemption, and, crucially, providing a set of diagnostic therapies and remedies. Recall the subtitle of the glossy brochure produced by the TFV: “hope brought to the survivors of wartime violence.” Wartime violence here is the savage, while the survivors are passive recipients to whom the agent (though somewhat hidden through the use of the passive voice) brings hope.

For Mutua, the savior is itself a metaphor for a set of values: “culturally based norms and practices that inhere in liberal thought and philosophy.”¹⁹⁵ During my research amongst members of the ICL cohort, at no point was I reminded more starkly of this metaphor (which

¹⁹¹ Makau W. Mutua, “Savages, Victims, and Saviors: The Metaphor of Human Rights,” *Harvard International Law Journal*, 42, no. 1 (2001): 201–45.

¹⁹² Mutua, “Savages,” 203.

¹⁹³ Karen Engle, Zinaida Miller, and D. M. Davis, “Introduction,” in *Anti-Impunity and the Human Rights Agenda*, ed. Karen Engle, Zinaida Miller, and D. M. Davis (Cambridge: Cambridge University Press, 2016), 10.

¹⁹⁴ Kamari Maxine Clarke, “The Rule of Law Through Its Economies of Appearances: The Making of the African Warlord,” *Indiana Journal of Global Legal Studies* 18, no. 1 (2011): 7–40, <https://doi.org/10.1353/gls.2011.0008>.

¹⁹⁵ Mutua, “Savages,” 203.

Mutua introduced in 2001) than when I was introduced to the work of a Brooklyn-based visual artist and CICC artist in residence, who between 2015 and 2017 produced an art installation on international justice titled “Weights and Measures,” consisting of three elements: large-scale oil paintings of defendants, photographs of justice practitioners, and audio installations featuring witnesses and victims.

IV. Exhibit: “Justice is Blind”

In March 2016, I received an email invitation from the American Bar Association’s Center for Human Rights inviting recipients to a “private viewing” of an exhibit featuring “portraits of defendants as they stood trial before international tribunals and the ICC for war crimes and crimes against humanity.” The subject line caught my attention: “Invitation to Private Showing and Reception – Art & International Justice – March 1st.” According to the message, recipients were invited to an exclusive preview of what was a larger artistic project on international criminal justice. Fascinated by the explicit linkage between art and international law as well as the allure of a *private* invitation to a *private* viewing (even though presumably, hundreds subscribe to this mailing list), I RSVP-ed. A week later, I find myself walking along Madison Avenue on Manhattan’s Upper East Side, in search of the art gallery. I eventually enter a little doorway off the street and give my name to the intern working the door, checking names off of a spreadsheet clipped to a clipboard. I make my way inside, up two sets of steep stairs. With every step, the smell of warm, soft French cheeses and open bottles of wine becomes stronger and the familiar murmur of after-work small talk louder. Coats drape the stair railing and leather briefcases line the hall. I leave my coat and bag in the hallway and step into the warmly lit, bustling room. It is a typical gallery space: white walls, high ceilings, polished parquet floors; a little bar—the source of the powerful wine and cheese aroma—is set up in one corner. Groups

of people mill around the white-walled room, talking, sipping wine from plastic cups and examining the large portraits on the walls.

Shifting my gaze, the first thing I see is a larger-than-life portrait of Thomas Lubanga Dyilo.¹⁹⁶ His hands are clasped, his gaze level. It is an enormous oil painting, so detailed that it almost looks like a photograph, red veins and a slight tinge of yellow in the whites of his eyes. Turning to take in the rest of the room, I see that the walls are lined with more oil paintings of familiar faces. At least, they are familiar to me, an anthropologist studying the development of international criminal justice, and as such, somewhat at home in the field myself. Moving further along the gallery, past the first portrait of Thomas Lubanga, I come face to face with a large portrait of Radovan Karadžić.¹⁹⁷ There is Jean-Pierre Bemba Gombo.¹⁹⁸ Here is a portrait of “Comrade Duch,” the first defendant before the Extraordinary Chambers in the Courts of Cambodia.¹⁹⁹ On the far side of the room is a portrait of Bosco Ntaganda.²⁰⁰ I see a portrait of

¹⁹⁶ Thomas Lubanga Dyilo was the first defendant before the ICC. He was President of the Union des Patriotes Congolais and Commander-in-Chief of the Forces Patriotiques pour la Liberation du Congo. He was found guilty on 14 March 2012 of the war crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities in the Democratic Republic of the Congo. He was sentenced to 14 years of imprisonment. See www.icc-cpi.int/drc/lubanga.

¹⁹⁷ Radovan Karadžić was a founding member of the Serbian Democratic Party of Bosnia and Herzegovina and was President of the party from July 1990 to July 1996. He was president of the *Republika Srpska* until July 1996. He was sentenced to 40 years of imprisonment on 24 March 2016 for genocide, crimes against humanity and war crimes by the ICTY. At the time of writing, the case was under appeal at the MICT. See www.unmict.org/en/cases/mict-13-55.

¹⁹⁸ Jean-Pierre Bemba Gombo was found guilty on 21 March 2016 of two counts of crimes against humanity (murder and rape) and three counts of war crimes (murder, rape and pillaging), committed in the Central African Republic between October 2002 and March 2003. He was sentenced on 21 June 2016, to 18 years of imprisonment. See <https://www.icc-cpi.int/car/bemba>.

¹⁹⁹ Kaing Guek Eav, alias Comrade Duch, the former Chairman of the Khmer Rouge S-21 Security Center in Phnom Penh, was the first defendant in the first case (Case 001) before the Extraordinary Chambers in the Courts of Cambodia. On 26 July 2010, Duch was convicted of crimes against humanity and grave breaches of the 1949 Geneva Conventions. He was sentenced to 35 years of imprisonment, which on appeal was amended to life imprisonment. See <https://www.eccc.gov.kh/en/case/topic/90>.

²⁰⁰ Bosco Ntaganda, alleged Deputy Chief of Staff and commander of operations of the Forces Patriotiques pour la Libération du Congo is on trial before the ICC for 13 counts of war crimes and 5 counts of crimes against humanity allegedly committed in 2002–2003 in the Ituri district of the DRC. See [https://www.icc-cpi.int/drc/ntaganda](http://www.icc-cpi.int/drc/ntaganda).

William Samoei Ruto (also the current vice-president of Kenya).²⁰¹ There is Charles Taylor.²⁰² Joshua Sang.²⁰³ Many of the portraits carry subtitles: “Warlord”; “Terminator”; “Nationalist”; “Defiance”; “The Butcher”; “Simba”; “Child Soldier to Commander.” Scattered around the gallery are folders with brief “biographies,” listing the criminal charges brought against the individuals depicted, their dates of indictment or arrest, the current stage of legal proceedings, and a sentence or two on their occupation before their actions became the object of international criminal proceedings, likely the work of a group of research assistants and interns from one of New York’s law schools put to the task of copying and pasting this information from court websites.

Later that spring, I visited the artist at his bright studio near the Brooklyn Naval Yard. Over glasses of water, and his hyperactive dog tearing around, he explained how his project and engagement with international criminal law came about. As an artist, his previous work engaged with themes around social justice, civic discourse, and race relations in the United States. During a trip to The Hague and a visit to the ICC where the Court’s first defendant Thomas Lubanga Dyilo was on trial, he produced the first large portrait of Dyilo described above, from an official press photograph taken during his sentencing. This was his first work to engage with justice outside of the US context. Several months later, the artist connected with Bill Pace in 2014, the convenor of

²⁰¹ William Samoei Ruto is the Vice President of Kenya and was formerly an MP and the Minister of Higher Education, Science and Technology. He was charged by the Prosecutor of the ICC with three counts of crimes against humanity (murder, deportation or forcible transfer of population, and persecution) allegedly committed during the 2007–2008 post-election violence in Kenya. The case against him was terminated on 5 April 2016. See <https://www.icc-cpi.int/kenya/rutosang>.

²⁰² Charles Ghankay Taylor is the former President of Liberia and was indicted by the Special Court for Sierra Leone in March 2003. He was found guilty on 11 counts on the modes of liability of planning of crimes and for aiding and abetting of crimes committed by rebel forces in Sierra Leone. He was sentenced to 50 years of prison. See <http://www.rscsl.org/Taylor.html>.

²⁰³ Joshua Arap Sang is a former Kenyan radio broadcaster. In December 2006, Sang allegedly established a network with the aim of committing crimes against supporters of the Party of National Unity during the period of post-election violence in Kenya in December 2007. He was charged by the Prosecutor of the ICC with being criminally responsible as an indirect co-perpetrator for the crimes against humanity of murder, deportation or forcible transfer of population, and persecution. On 5 April 2016, the Trial Chamber terminated the case, deciding that the charges were to be vacated and the accused discharged, explaining that the Prosecution failed to present sufficient evidence.

the CICC, and pitched the idea of an “arts initiative,” in collaboration with the CICC, where he would be an artist in residence. This became the Coalition Arts Initiative to End Impunity.²⁰⁴

The Initiative, according to the various press releases and blog posts introducing it at the time, aimed to “harness the power of art to enrich understandings of international justice and invigorate the dialogue between human rights, arts communities and the general public. Its goal is to deepen awareness of the work of the ICC and the Coalition’s members around the world.”²⁰⁵ In a video on the artist’s page on Indiegogo—a crowd-funding platform—a senior CICC representative explains, “To get the international community to adopt the laws and institutions needed to rid the world from the scourges of war, we needed to have the arts community committed.” The programme director of the CICC reflects, “What we could not say in our reports, we might be able to say it through paintings . . . that’s how I understood how the Arts Initiative would help us.”²⁰⁶

For roughly a year, from April 2014 to March 2015, the artist worked “in residence” at the CICC in the hopes of creating an “ongoing space for the arts to engage with the international law community.”²⁰⁷ When I visit him in his bright Brooklyn studio a few weeks after the exhibit, he explains that the portraits of defendants are just one part of what will be a three-part exhibition. Once complete, the full exhibit will consist of oil paintings of defendants, photographs of justice practitioners accompanied by quotes, and an audio installation of victim testimony. These three sections encapsulate perfectly the three core discursive pillars of the anti-impunity movement: individual perpetrators, those experts who work to develop and

²⁰⁴ The CICC is one of the most vocal and visible advocacy networks in support of international criminal justice and a “fair, independent and effective International Criminal Court.”

²⁰⁵ CICC, “Coalition Launches Arts Initiative to Enrich Dialogue on Global Justice |,” *Global Justice* (blog), April 8, 2014, <https://ciccglobajustice.wordpress.com/2014/04/08/coalition-launches-arts-initiative-to-enrich-dialogue-on-global-justice/>.

²⁰⁶ Bradley McCallum, “To End Impunity,” Indiegogo, November 1, 2014, https://www.indiegogo.com/projects/to-end-impunity#.

²⁰⁷ Personal communication, 25 January 2018 (on file with the author).

advance the field, and “the victims,” on whose behalf the system of international criminal justice claims to work.²⁰⁸

The artist used pictures of the defendants on the stand, usually available through Reuters or the Associated Press, and then, with a team of studio assistants, produced oil-based realistic renderings of the image on large canvases. As he explained it to me, the crafting of realistic renderings of these defendants, using the age-old technique of oil paint brushed onto canvas, aims to facilitate a subjective interpretation on the part of the viewer, a reading of these men’s—all of the completed paintings I saw were of men—faces through an engagement with the texture of the paint and the expression in their eyes. The choice to display the portraits as diptychs, where one is the full color, realistic rendering and beside it is a black and white, photonegative inversion of the original, was explained to me by the artist as a device to offer the viewer a sense of having gained access to the individual’s interiority. He explained that the team settled on this form after feeling dissatisfied with the effects of the initial realistic, full color oil paintings. Having spent hours scrutinizing the faces, painstakingly recreating their features and expressions in oil paint brushed onto linen, the result was, the artist reflected, “an absence of criticality . . . their subjectivity came through, a sense of humanity.”²⁰⁹ Similarly, his long-term studio assistant reflected that through his work on the paintings he began to notice that “they are just human beings. Same as me, or same as other people. Two eyes, one nose, one mouth.”²¹⁰ The photonegative version, then, served to complicate the sense of empathy that a viewer might have in approaching portraits of another human, forestalling them from perceiving the subjects as being just a human being, same as them. The team thus began to

²⁰⁸ See, for instance, Karen Engle, Zinaida Miller, and D. M. Davis, eds., *Anti-Impunity and the Human Rights Agenda* (Cambridge: Cambridge University Press, 2016); Sara Kendall and Sarah Nouwen, “Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood,” *Law and Contemporary Problems* 76, no. 2–3 (2013): 235–62, <https://doi.org/10.2139/ssrn.2313094>.

²⁰⁹ Conversation with the author, May 2016.

²¹⁰ McCallum, “To End Impunity.”

experiment with purposefully unfinished portraits that, as the artist explained to me, “in their rough imperfection looked appropriately scarred.” Through a process of trial and error, they eventually settled on the concept of photonegative inversions, which, paired with the full color, realistic oil paintings, aimed to produce a compelling effect: “Something was happening here that complicated the relationship between interiority and exteriority, where the photonegative inversions appeared to reveal an interiority, to make visible what was previously hidden.”²¹¹ The artist described these pairings as a way to capture the facial expressions of individuals as they stand trial, while at the same time offering an attempt to approach or interpret the inner character of the accused. He explained: “I am creating large scale painted portraits of powerful men at a point when their *impunity has ended*. We are drawn into the power of their gaze, their humanity, while also being challenged to consider the structures of international justice and the experiences of victims and witnesses. . . With this work, art will provide a catalyst for civic discourse.”²¹²

After beginning the Coalition Arts Initiative to End Impunity, the artist’s first paintings were all ICC defendants, which given the Court’s early case selection and caseload, resulted in a studio full of portraits of Black men—all nationals of African states. In the project’s crowdfunding video, a CICC spokesperson asserts, “In this room we have individuals from all over the world. You have people from Cambodia, you have people from Europe, you have people from Africa who have committed crimes. Justice is universal. Justice is blind.”²¹³ The artist told me that the final exhibit, in an apparent effort toward diversity, would include portraits of defendants before the ICTY and the Extraordinary Chambers in the Courts of Cambodia.

²¹¹ Personal communication, May 2016 (on file with the author).

²¹² CICC, “Coalition Artist-in-Residence to Debut Art Projects,” *Global Justice* (blog), November 19, 2014, <https://ciccgloaljustice.wordpress.com/2014/11/19/coalition-artist-in-residence-to-debut-art-projects/> (emphasis added).

²¹³ McCallum, “To End Impunity.”

In November 2016, roughly six months after I visited his studio and a year after we met, the artist and his team attended the annual session of the Assembly of States Parties to the ICC in The Hague, sponsored by the Wayamo Foundation.²¹⁴ Under the auspices of one of the ASP's side events that year, called "Through the Looking Glass: Imagining the Future of International Criminal Justice," the artist had been invited to display a preview of the exhibit. Accordingly, a selection of portraits was crated and shipped across the Atlantic. On an evening in late November 2016, one wall of The Hague Marriott hotel's ballroom displayed five or six large portraits of mostly Black and brown, all male, defendants. Some were ICC defendants, while others, such as Charles Taylor and former Chadian president Hissène Habré, had been prosecuted by other international and so-called hybrid courts, such as the Special Court for Sierra Leone and the Extraordinary African Chambers in the Senegalese courts.

Just weeks prior to this Assembly, in October 2016, The Gambia, South Africa, and Burundi had announced that they were withdrawing from the Rome Statute and the ICC. These announcements were the result of years of increasing acrimony and tensions between the African Union and the ICC over a perceived disproportionate charging practice against Africans and unprecedented criminal charges against sitting African Heads of State. The then-Minister of Information of The Gambia, Sheriff Bojang, had just called the ICC, on national television, the "International Caucasian Court for the persecution and humiliation of people of color, especially Africans."²¹⁵ This charged political context and the need to assuage the tension loomed large during the 2016 Assembly session. Seen in this light, the choice to bring these larger-than-life portraits of the accused to the Assembly and display them during the event

²¹⁴ "Home," Wayamo Foundation, accessed March 12, 2023, <https://www.wayamo.com/>.

²¹⁵ Siobhán O'Grady, "Gambia: The ICC Should Be Called the International Caucasian Court," *Foreign Policy*, October 26, 2016, <https://foreignpolicy.com/2016/10/26/gambia-the-icc-should-be-called-the-international-caucasian-court/>.

seemed odd to me, at least, if not spectacularly tone deaf. When Kenyan newspaper *The Daily Nation* ran a story on the portraits, titled “William Ruto portrait on sale in New York,”²¹⁶ a furious Twitter user responded across three separate tweets: “Mr. William must stop using other pple’s [*sic*] images to create wealth without informed consent ... PERIOD!”, “This is wrong! If he was creating awareness, why sell it?”, and “This is wrong! using Africans to make money in the name of International Justice???”²¹⁷ Another Twitter user commented wryly, “Cashing in on the miseries of Africa.”²¹⁸

When the artist introduced his project that evening in The Hague, he explained that he had aimed “to express visually the core principles of international criminal justice” and “explore how we can look at humanity in all its complexity . . . broaden awareness and take this exhibit to audiences that may only get the sound bite.”²¹⁹ From my perspective in the audience, while some participants commented on the portraits with some irritation and found them galling in light of the tensions and accusations of bias facing the ICC, for many others the artwork seemed utterly commonplace, an unremarkable rendering of the work of international criminal justice. Indeed, the lobbies and hallways of the annual Assembly’s venue, whether at the United Nations headquarters in New York or the World Forum in The Hague, often contain photo exhibits or display cases of objects in relation to international justice, positioned as seeming reminders to the passing hordes of diplomats, NGO workers, lawyers, and interns of the importance of the collective endeavor; recall the 2017 encounter with the prosthetic strap-on limb. During another ASP, I spent some time studying a display case containing possessions of victims of Syria’s ongoing conflict: a pair of sneakers in a child’s size and a tattered and abandoned backpack. These objects made an affective reference to the

²¹⁶ Kevin J. Kelley, “William Ruto Portrait on Sale in New York,” *Nation*, July 2, 2020, <https://nation.africa/kenya/news/william-ruto-portrait-on-sale-in-new-york-1064822>.

²¹⁷ *Daily Nation*, on Twitter, February 2015, <https://twitter.com/dailynation/status/562077971771424768>.

²¹⁸ *Daily Nation*, on Twitter, February 2015, <https://twitter.com/dailynation/status/561969824134213633>.

²¹⁹ Personal communication, 26 November 2016 (on file with the author).

kind of violence the ICC sought to address—disregarding the reality that the ICC does not have jurisdiction over the conflict in Syria because the country is not a signatory of the Rome Statute.

At the 2016 ASP, where the artist had presented his portraits, drinks were served afterward. The panel discussion followed by drinks, usually coupled with the launch of a publication or report or the unveiling of a building,²²⁰ some artwork²²¹ or a tapestry,²²² is a common and important social practice in this field. The event in November 2016 in The Hague unfolded much like any other, with speeches similar to the ones all those months ago at the art gallery in Manhattan, employing familiar phrases: the “importance of justice,” “the fight against impunity” and “the need for accountability.” Afterward, participants congregated at the bar to socialize, catch up, network and perhaps negotiate a pending resolution or budget proposal.

The art exhibit at issue here, even as it espouses a commitment to critical debate and dialogue, simultaneously accepts and replicates the modes of representation that are central to international criminal justice discourse. The predominantly brown and Black faces—a result of the ICC’s early charging practice —on the wall of the Marriott hotel in The Hague and in the art gallery in Manhattan, painted in an attempt to “unveil their psyche” and “probe their internal subjective landscapes,” displayed with subtitles such as “Defiant”, “Opportunist” and “Terminator”, echo a colonial history that saw people of color, particularly Africans, portrayed, objectified, marked, labelled, and commodified for the consumption of Western publics. A further, particularly tenacious pattern at play in the portrayal of these defendants is the persistent individualization of guilt. In this narrative, conflicts are caused by a few violent

²²⁰ “Official Opening of the ICC Permanent Premises on 19 April 2016,” International Criminal Court, April 8, 2016, <https://www.icc-cpi.int/news/official-opening-icc-permanent-premises-19-april-2016>.

²²¹ “Liechtenstein Foreign Affairs Minister Unveils Artwork Donation to International Criminal Court,” International Criminal Court, November 16, 2016, <https://www.icc-cpi.int/news/liechtenstein-foreign-affairs-minister-unveils-artwork-donation-international-criminal-court>.

²²² “Gender Justice Legacy Wall,” Women’s Initiatives for Gender Justice, accessed March 12, 2023, <https://4genderjustice.org/gender-justice-legacy-wall/>.

individuals: those who belong up on the wall. Capturing and holding them criminally accountable becomes *the* solution to complex, layered, and often decades-long societal conflicts driven by generations of deprivation, resource extraction, and other conditions of precarity. The practice of portraying “Defiant,” “Opportunistic” “Warlords” also rather complicates the presumption of innocence, already a difficult dictum to maintain in international criminal law, given the severe, widespread, and often highly publicized nature of the crimes.²²³

A second part of the exhibit, featuring audio recordings of victim testimony, replicates and reinforces the disembodied and depersonified figure of the Victim.²²⁴ The recordings were testimony of violent attacks, catastrophic injury and loss: these were not full life stories but rather methodical recountings of the singular events that had brought them into the purview or jurisdiction of the Court. In the case of the prosthetic limb propped on a table amidst stacks of brochures and flyers at the event described above, “The Victim” was similarly disembodied, and represented solely through an appendage that served to symbolize patterns of violence that had become part of the trial record. The third and final element of the exhibit was to feature photographs of “justice practitioners” or, following Mutua’s metaphor, the saviors. When I met the artist and first learnt about his project, this third element of the work had not yet been completed. The artist planned to approach and invite the practitioners to sit for professional photographic portraits during various international conferences, receptions, and the Assembly

²²³ Indeed, some of the those portrayed in the exhibit are no longer defendants, yet their paintings remain. The charges against Callixte Mbarushimana were not confirmed, those against Ruto and Sang were vacated, and Milošević died before the completion of his trial.

²²⁴ For instance, Karen Engle argues that the role and place of the victim within the imagination of the anti-impunity movement is ambivalent. “The victim is both central and marginal, featured and featureless, a necessary representative of a horrific past and a feared brake on future transformation”; see Engle, Miller, and Davis, “Introduction,” 11. Kamari Clarke has argued that ‘the victim’ permeates international criminal justice discourse as a ‘spectral’, stylized, fictionalized and idealized figure; see Clarke, “Rule of Law.” For Sarah Nouwen, ‘the victims’ “cabined into one monolithic category [...] are not concrete persons of flesh, blood and water, with individual names and individual opinions, but a deity-like abstraction that is disembodied, depersonified and depoliticized”; Sarah M. H. Nouwen, “Justifying Justice,” in *The Cambridge Companion to International Law*, ed. James Crawford and Martti Koskeniemi, Cambridge Companions to Law (Cambridge: Cambridge University Press, 2012), 340.

of States Parties. Their portraits would be displayed alongside short quotes and excerpts from personal interviews. These practitioners, lawyers, diplomats, and civil society actors, largely well-educated and well-off global elites, would be represented in their own words and on their own terms, a courtesy notably not provided to the defendants portrayed.

The exhibit described above, of which the portraits of defendants were one part, was compelling. I was moved by the striking and beautifully rendered images and the dedication of the artist to his work. Yet I also recognized familiar tropes and dominant and pervasive modes of representation at play in the exhibit, just as they circulate in the larger field of international criminal justice. Even as the actors involved in the art initiative express a desire to stimulate critical debate, the images replicate key discursive arrangements and patterns of meaning. Warlord. Victim. Justice Practitioner. Rather than unsettle or problematize them, spaces such as the Assembly of States Parties, the reception at the diplomatic mission, or the art gallery on Manhattan's Upper East Side become veritable echo chambers, constantly amplifying a set of normalized, and almost ritualized, meanings. "Justice matters." "The fight against impunity." It is this tenacious repetition and affirmation of a central message that Christine Schwöbel-Patel calls the "marketing culture" of international criminal law, where, she argues, symbolism has displaced content. I argue that the repetition and affirmation here also work in an effort to sustain and animate the faith in human rights legalism and the fight against impunity.

V. Architecture: "Making Iconic"

In a 1947 *New Yorker* piece, Lewis Mumford, an American historian and writer, wrote a scathing review of the proposed design of the UN Secretariat building. He argued that the building "should proclaim with a single voice that a new world order, dedicated to peace and justice, is rising on this site." For Mumford, the building housing the UN Headquarters ought to make a powerful aesthetic impression and convey meaning as a symbol, and he argued that the architects should have "set their most imaginative members to work on the problem of

symbolism . . . the problem of public relations for the new world order.”²²⁵ The team charged with the responsibility of overseeing the design process for the new permanent premises of the ICC—which was completed in 2016, nestled in the dunes of Scheveningen—appeared to recognize the symbolic role for the building. In early 2008, the Netherlands, as the host State of the ICC, launched an architectural design competition in an effort to find a design that would ‘symbolize the goals of the Court.’²²⁶ The CICC, participating as an official observer to the competition, further suggested that

the new ICC premises must be an icon in a truly potent sense; it mustn’t simply exist, it must engage. It should embody cultural and social meaning, placing us in the historical and cultural context of this new system of international justice and reflecting the importance of the International Criminal Court—an authority to help end impunity, powerful and inspiring in its actions, yet welcoming and sensitive to those involved in its proceedings. The winning design must be a strong and understandable concept that speaks not only to the governments and international civil servants of the ICC, but also to the public and to victims, giving a clear message of the processes taking place at the Court and conveying its meaning and purpose: to ensure that the perpetrators of the gravest crimes do not go unpunished. It is in this participation that a true iconization can take place, as the viewer is forced to confront its related history.²²⁷

The design brief, created by Court officials and sent to contest participants, stipulated that the building was to convey seven essential institutional values: “Justice,” “Human Dignity,”

²²⁵ Lewis Mumford, “The Sky Line,” *The New Yorker*, November 7, 1947, <https://www.newyorker.com/magazine/1947/11/15/the-sky-line-5>. For a more extensive discussion on Mumford’s views and his thoughts on symbolism in relation to the UN headquarters, see Stephen Hopgood, *The Endtimes of Human Rights* (Ithaca, NY: Cornell University Press, 2013).

²²⁶ Rijksoverheid, “ICC Design Competition Opened,” February 5, 2008.

²²⁷ Coalition for the International Criminal Court, ‘Building – ICC Premises’, <https://www.coalitionfortheicc.org/building-icc-premises>

“Openness,” “Credibility,” “Safety,” “Icon” and “Global.”²²⁸ An ICC report on its permanent premises argued that the Court’s building should symbolize its mission, reflect the universal vocation of the Court, and represent the entire international community.²²⁹ The video of the winning design has a solemn voice-over, which explains that “the building should have the courage to be an ambassador for the credibility of the ICC.”²³⁰ The architects explain that with their design, they sought to convey eminence and authority and communicate trust, hope and faith in justice, and fairness. The result is a gleaming greyish-white set of cubic towers, covered in stainless steel and glass cladding with a vertical garden running up the main tower abloom with flowers and plants from all member states of the ICC, and design elements involving flowing water. The architects hoped to construct the “essence of democratic architecture”: an informal, accessible structure with a small footprint, present merely as a “backdrop for communication.”²³¹ While the Court is open to the public and most trial proceedings can be watched from a public gallery (in line with the accessibility the architects and developers wished to convey), in practice visitors must present identification documents to the security guards in UN uniform, explain the purpose of that day’s visit, and pass through metal detectors—a sensory encounter with the opaque transparency I raised in the previous chapter.

Once inside the building, but before continuing past the second layer of security required to access the public gallery of the courtrooms, there is plenty to see. Once the ICC moved to its newly constructed building and opened its doors in 2016, there have been regular visits by diplomatic missions wishing to gift artwork to the Court. In March 2017, for instance, a delegation from Belgium unveiled a series of framed reliefs in copper and bronze, titled “Wall

²²⁸ Coalition for the International Criminal Court, ‘Building – ICC Premises’, <https://www.coalitionfortheicc.org/building-icc-premises>

²²⁹ “Report on the Future Permanent Premises of the International Criminal Court: Project Presentation,” International Criminal Court, October 18, 2005, https://asp.icc-cpi.int/sites/asp/files/asp_docs/library/asp/ICC-ASP-4-22_English.pdf. See also Hopgood, *Endtimes*, 87.

²³⁰ IntlCriminalCourt, “The Permanent Premises of ICC by Schmidt Hammer Lassen Architects,” YouTube, December 7, 2010, <https://www.youtube.com/watch?v=Uu6oZZQ8vzU>.

²³¹ IntlCriminalCourt, “Permanent Premises.”

of Shame,” described by the artist and the Belgian ambassador as “drawing attention to the global problem of child soldiers.” The press release notes that the Court has additionally received donations of artwork from the Governments of Japan, Korea, Liechtenstein, Senegal, Slovenia and Tunisia, “representing their cultural heritage as well as reflecting the mandate of the Court.”²³² According to the press release, these donations will adorn the walls and hallways in the new premises of the ICC, in addition to the exhibit in the hallway, “Justice Matters,” which “uses intimate portraits and videos to explore how justice is crucial to survivors of the world’s most heinous crimes, and how it matters to the world as we strive together to achieve lasting peace.”²³³ The ICC headquarters is not the only building in the ICL world that conveys its mission via artwork: in the courtyard to the newly built edifice housing the MICT’s Arusha branch, a “single, prominent tree” serves to (according to yet another voice-over) “symbolize justice in many parts of Africa.”²³⁴ According to the Registrar, or chief administrator, of the Mechanism, the complex “tangibly embodies the legacy of the [ICTR] and the steadfast resolve of the international community to bring those individuals still at large to account.”²³⁵

The statements and language around the design process and competition, the elements in the winning design, and the collected artwork all appear to reflect a felt need to produce, through the design and building of the ICC, an iconic symbol, not just for victims, but also for those international civil servants who work there. Anne Stoler urges us to think about such affective arrangements not just as embellishment, but as part and parcel of the very substance of governing projects.²³⁶ Seen in this light, then, the buildings and materialities of the field

²³² “Belgium Delegation and ICC President Unveil Artwork Donation to International Criminal Court,” International Criminal Court, March 2, 2017, <https://www.icc-cpi.int/news/belgium-delegation-and-icc-president-unveil-artwork-donation-international-criminal-court>.

²³³ “Visit Us,” International Criminal Court, accessed March 12, 2023, <https://www.icc-cpi.int/visit>.

²³⁴ “Construction of the Arusha Facility,” United Nations International Residual Mechanism for Criminal Tribunals, accessed March 12, 2023, <https://www.irmct.org/specials/arusha-facility/index.html>.

²³⁵ “Ground-Breaking at Lakilaki Marks Start of Construction of the New Arusha Premises,” United Nations International Residual Mechanism for Criminal Tribunals, February 27, 2015, <https://www.irmct.org/en/news/ground-breaking-lakilaki-marks-start-construction-new-arusha-premises>.

²³⁶ Ann Laura Stoler, *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense* (Princeton, NJ: Princeton University Press, 2009), 60.

serve not just as a public relations effort, but also and perhaps more potently as a keenly felt, internal, “private” relations effort, working to sustain the collective effort, energy, and sense of shared undertaking of those who make up the ICL cohort.

VI. Conclusion: “The Spirit of the Thing”²³⁷

This chapter has explored both the effects and the *affects* of the architectural designs and art and photo exhibitions that play a role in animating the social field of international criminal justice. Various interlocutors in the field speak of the collective spirit and energy that is felt in the field: a spirit that, I argue, also animates and works to bolster the coherence and legitimacy of the field of international criminal justice. For Stephen Hopgood, the “architecture of humanism,” the human rights film festivals, receptions—and, I offer, art exhibits—work to nurture a shared effervescence, which Durkheim understood as essential to religious feeling.²³⁸ Annelise Riles argues that the very repetition and careful placement of words and phrases in international treaties takes on an aesthetic quality, creating a reality and providing a form within which collectivities are harnessed.²³⁹ These artefacts and aesthetic arrangements serve not only to promote the mission of global justice, but also to harness the collective of global actors—

²³⁷ *Warrior Without Weapons* is a memoir written by Marcel Junod, a young Swiss doctor, of his time working for the International Committee of the Red Cross in Abyssinia (Ethiopia), Spain, Poland, Germany and Japan between 1935 and 1945. After his recruitment in October 1935, Junod spent time at the headquarters in Geneva, poring over the texts of the Geneva Conventions, hoping to acquaint himself with the history and principles of the organization he was so recently summoned to join and lend his medical expertise to. His fellow delegate to Abyssinia was quick to dissuade him from his reading: “Books are all very well, but when you’re on the spot, thousands of miles from Geneva, all on your own, you’ll have to fall back on your imagination. There are the official Red Cross texts, of course, but, above all, there’s the *spirit* of the thing” (p. 16). On the eve of their departure, Marcel reflects:

The farewells of my friends on that evening at Cornavin Station and a certain anxiety aroused by such words as ‘volleys’, ‘bombardments’ and ‘ambushes’ almost made me feel that I was going off to war myself. I did not realize then that the war would continue for me long after the conquest of Abyssinia by the Italians, and that it would take me to Spain, Germany, England, Poland, Greece and to the Far East – including Hiroshima. A strange kind of soldier whose only arms were two conventions. Two conventions and something else besides ... ‘The spirit of the thing’ as Brown had put it.

Marcel Junod, *Warrior Without Weapons* (London: Jonathan Cape, 1951), 17.

²³⁸ Hopgood, *Endtimes*, 2013.

²³⁹ Annelise Riles, “Infinity Within the Brackets,” *American Ethnologist* 25, no. 3 (2008): 378–98, <https://doi.org/10.1525/ae.1998.25.3.378>.

the ICL cohort—working together to create and sustain an international legal system against formidable odds. Taking seriously the aesthetic arrangements that circulate and the affects produced in the meeting rooms, offices, and social spaces where members of the ICL cohort congregate offers an additional lens to understand the shift in meanings and knowledge practices that make possible and sustain the anti-impunity movement. As an audience member at a panel discussion at a think tank in The Hague where speakers had been exploring the effects of documentary films put it in strikingly simple and powerful terms: “These images don’t work on our brain, they work on our stomach.” It is the work of this visceral register that this chapter has sought to point to as a key domain through which the ICL cohort furthers its mission and sustains itself, in nostalgia for the sense of momentum and enthusiasm that characterized the spirit of Rome.

Chapter 4

Documentation, Evidence and Techno-Optimism: Mediated Legal Humanitarianism

I. Introduction

“The world is watching. Photographic and video evidence is mounting, and you will be held to account for your actions. We will not let atrocities slide.”²⁴⁰ These were the words of Linda Thomas-Greenfield, US Ambassador to the United Nations, in a rebuke to her Russian colleague during a Security Council meeting in mid-March 2022. The Russian invasion of Ukraine was almost three weeks underway and had also been deemed a war of information, given President Putin’s near total control of Russian state media and President Zelensky’s updates and appeals on social media platforms such as Instagram. With citizens able to capture the devastation on smartphones or other mobile devices as it occurred, images and videos circulated heavily on the internet, across social media platforms and encrypted messaging services such as WhatsApp, Telegram, and Signal. Intelligence services, engaged civilians, and international lawyers were endlessly scrutinizing, verifying, and attributing scenes of destruction to one party or another. Previously, it had been the Syrian civil war that was called the “YouTube conflict,” with floods of harrowing digital footage uploaded by citizens whenever an internet connection allowed. One commentator, reflecting on the volume of information coming out of the escalating conflicts in Syria and Libya remarked, “The amount of video coming out was overwhelming. . . There have been more minutes of video from Syria than there have been minutes of real time.”²⁴¹ In 2016, Google launched a new application

²⁴⁰ UN Security Council, “Threats to International Peace and Security - Security Council, 8991st Meeting | UN Web TV,” UN Web TV, March 11, 2022, <https://media.un.org/en/asset/k16/k16nsx50dm>.

²⁴¹ Andy Greenberg, “Google’s New YouTube Analysis App Crowdsources War Reporting,” *Wired*, April 20, 2016, <https://www.wired.com/2016/04/googles-youtube-montage-crowdsources-war-reporting/>. See also Armin Rosen, “Erasing History: YouTube’s Deletion Of Syria War Videos Concerns Human Rights Groups,” *Fast*

called Montage that was designed specifically to help “excavate, map, tag and sort” YouTube footage from conflict zones and protests. According to the new application’s product manager, “it’s especially useful in conflict scenarios where it’s hard to get journalists boots on the ground . . . [while the situations are] dangerous and chaotic . . . there’s still enough connectivity that people are uploading massive amounts of video to the internet. That’s the sweet spot. The data just needs to be curated.”²⁴²

If the logic of criminal accountability and penal power have come to dominant policy frameworks from peace and security to international development and humanitarian intervention, as I argue it has, then what matters above all else is the curation of data as evidence. Evidence, as in Ambassador Thomas-Greenfield’s statement above, becomes a vehicle through which the international community promises future accountability for “those most responsible” as a response to current and ongoing atrocities. This chapter accordingly focuses on the work of gathering data and translating that data into evidence, showing how this work is shaped by international criminal law’s epistemological commitments, and how the centrality of evidence mediates legal humanitarianism.

Ambassador Thomas-Greenfield’s words were uttered in the Security Council, the same organ that historically has launched peacekeeping missions of UN “blue helmets” to separate warring parties and protect civilians under the banner of humanitarian intervention. In the case of Ukraine, as in Syria, the possibility of intervention, or “boots on the ground,” had little support politically. Any resolutions even suggesting intervention were vetoed by permanent members like China and Russia, and Western states that had previously, at least discursively, embraced the principle of “Responsibility to Protect” had seemingly lost their appetite for military intervention, citing the possibility of escalation and shifting to language

Company, March 7, 2018, <https://www.fastcompany.com/40540411/erasing-history-youtubes-deletion-of-syria-war-videos-concerns-human-rights-groups> (quoting Justin Kosslyn).

²⁴² Greenberg, “Google’s New YouTube Analysis App.”

that promised a future justice: “*You will be held to account.*” With this shift in framing, the Responsibility to Protect becomes the Responsibility to Prosecute, whereby the implicit promise is an ex post facto judicial reckoning at some stage in the future, made more likely by the collection of the kinds of information that may make useful evidence for a criminal trial.

I argue in this chapter that, with this turn to the “responsibility to prosecute” or the “fight against impunity,” the humanitarian imperative and its attendant interventionary logics are mediated through documentation and evidence collection efforts. Focusing on documentation avoids the complications of direct military intervention, and though it does not prevent harm or suffering in the moment, it offers the promise of justice, someday. The intention here is not to argue that documentation and evidence collection—to understand what happened, reckon with the past, and reflect on the shape and form of accountability—is inherently problematic or flawed. Eyal Weizman, the founder of Forensic Architecture, a group of academics and interdisciplinary researchers who use publicly available material and techniques of architectural modeling in aid of human rights investigations, argues that forensics and the making public of evidence is about the struggle for, or return to, a common ground, a necessary “precondition for any political initiative or struggle to take place.”²⁴³ This point is well taken. At issue in this chapter, however, is a concern with how the powerful logic of the “fight against impunity” instrumentalizes data and represents it for the singular purpose of holding “those most responsible” criminally accountable and in so doing, impairs collective and more capacious understandings of justice. Two quotes from organizations in the field of international criminal justice below elucidate this dynamic. Here is how the Institute for International Criminal Investigations (IICI), one of the principal training institutes in international criminal investigations, articulates its objectives on its website:

²⁴³ Eyal Weizman, “Open Verification,” *e-flux*, June 2019, <https://www.e-flux.com/architecture/becoming-digital/248062/open-verification/>.

Our particular goal is modest, but indispensable: while we cannot change the political climate, we can train investigators to the highest standards, so that when the day of reckoning finally comes for the worst humanity has to offer, as it almost always does, the best of what humanity has to offer will be ready.

Raymond McGrath, IICI President²⁴⁴

An organization called Justice Rapid Response offers a similar rationale in their mission statement:

Unless we secure evidence to hold perpetrators accountable, we will not be able to bring justice to victims, their families, and their communities. Bringing justice is essential to breaking the cycle of atrocity-laced violence in countries whose populations have too long suffered under this burden. This, in turn, can be the spark that generates a real chance for lasting peace for these societies.²⁴⁵

Justice Rapid Response is an organization that maintains a roster of specialized justice experts including psychosocial experts, forensic pathologists, prosecutors, and investigators who are “rapidly deployable” to any country that requests assistance with investigations of war crimes, genocide, crimes against humanity, and serious human rights violations. As I argue throughout this dissertation, “justice” here has become synonymous with criminal prosecutions and the end of impunity. Evidence, in this framework, per the JRR statement above, is essential to holding perpetrators accountable, and its collection almost a moral duty. In this chapter I discuss how donor funding streams directed towards evidence collection and documentation efforts have replaced earlier discourses of “boots on the ground” military humanitarian intervention, best represented by the narrative of the Responsibility to Protect (R2P). I argue

²⁴⁴ IICI, “Homepage,” Institute for International Criminal Investigations, accessed March 9, 2023, <https://iici.global/>.

²⁴⁵ JRR, “Making Justice Possible,” accessed March 9, 2023, <https://www.justicerapidresponse.org/what-we-do/making-justice-possible/>.

that a focus on accountability *ex post facto*, or rather an emphasis on the Responsibility to Prosecute has instead taken hold.²⁴⁶ Following this logic, the collection of evidence is not solely a technical, legal endeavor but is made to extend to broadly humanitarian objectives, bringing justice to victims, breaking the cycle of violence, and creating the conditions for lasting peace, as per the excerpt JRR’s promotional materials above.

In what follows, I first provide a brief historical background of the R2P discourse in relation to the turn toward international criminal prosecutions and the fight against impunity. The chapter then turns to a discussion of the ways in which technological advancements have provided a range of opportunities for an assemblage of international criminal justice experts, journalists, and curious, engaged citizens alike to collectively engage in the collection and analysis of information and the curation of evidence. In an age of increased interconnectivity and an overload of information, technological advancements have been enthusiastically embraced by stakeholders and practitioners of criminal justice practitioners for their potential to aid in the efficient identification and curation of information as evidence. I offer a discussion of three tech-driven evidence projects to demonstrate this: a smartphone app developed to allow users in conflict situations to upload images and videos that may constitute evidence, a hackathon harnessing the skills of computer scientists in the service of international criminal law, and an AI human rights lawyer. I propose that what emerges from this combination of technological innovation and the imperative to collect evidence in the name of the fight against impunity is a form of *mediated legal humanitarianism*, where concerned citizens and activists huddle behind their laptops seeking to distill and extract “facts” from the endless streams of YouTube videos and Twitter posts detailing violence from citizens with smartphones under

²⁴⁶ Diane F. Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,” *The Yale Law Journal* 100, no. 8 (1991): 2537–2615, <https://doi.org/10.2307/796903>; “‘Settling Accounts’ Revisited: Reconciling Global Norms with Local Agency,” *International Journal of Transitional Justice* 1, no. 1 (2007): 13, 18, 21, <https://doi.org/10.1093/ijtj/ijm010>.

siege thousands of miles away. These facts—if severe enough—may end up in news reports, blog posts, databases, or archives, perhaps a criminal trial or two, years and decades after the victims have been buried and their screams have died down. Not only does this version of mediated humanitarianism do little to help acute suffering or address the deep-rooted and complex structures that produce cycles of conflict; the networks of such justice startups, many of which rely on funding from donors, produce a discourse whereby the focus and the celebration lie on those individuals who came up with the idea to collect evidence and document crimes from afar. Mark Duffield identifies a similar pattern in humanitarian work, whereby “politically safe, logood, glitzy and smart” innovation and adaptation create a focus on the adaptive “design” of a particular project, distracting and detracting from the need for any real change or reorganization of political and societal priorities.²⁴⁷ These new domains of evidence and the increased role of individuals pursuing evidence and assembling documents outside the purview of governmental or multilateral institutions trouble understandings of justice as a public good²⁴⁸ and draw our attention to the ways in which the ever emergent field of international criminal justice may afford considerable and alluring individual rewards and recognition for those at the forefront of the field, a dynamic that Michelle Burgis-Kasthala calls “entrepreneurial justice,” whereby individual actors identify a gap or weakness in the existing public international criminal justice fora and set out on their own to create a new, private organization or initiative to address this gap. Beth van Schaack, legal scholar and the current US Ambassador At Large for War Crimes, is enthusiastic about developments such as the private evidence collectors I will discuss in the next chapter, in part, because these “justice entrepreneurs” (as she calls them) are finding innovative paths around obstacles to justice, “reflecting this idea that the quest for justice is inexorable”; through their individual enterprise

²⁴⁷ Mark Duffield, “Post-Humanitarianism: Governing Precarity through Adaptive Design,” *Journal of Humanitarian Affairs* 1, no. 1 (2019): 16, <https://doi.org/10.7227/JHA.003>.

²⁴⁸ Laura Dickinson, “Public Law Values in a Privatized World,” *Yale Journal of International Law* 31 (January 2, 2006): 383.

and expertise, she sees them as producing a “new architecture, bridging the public and the private, that is contributing to a more robust and coordinated system of international justice.”²⁴⁹ Finally, I turn to the epistemological framework at play in the training of “best practices” in evidence collection for international criminal prosecutions.

This chapter and the next explore the network of actors who act with unprecedented autonomy in a largely private or privatized capacity, with the support of funding streams earmarked for justice and accountability, to collect and verify information that may serve as evidence in national or international criminal proceedings at a later stage. While Chapter 4 offers a more detailed description of the opportunities these developments offer for networks of international criminal justice experts and discusses the ethos of one group of private international criminal investigators, this chapter engages with the circulating logics and understandings that structure expertise around evidentiary standards, and thus work to instrumentalize information, imagery, and personal accounts of harm, loss, and grief into the framework of the criminal trial, in service of the fight against impunity.

II. The Responsibility to Protect and the Responsibility to Punish

I argue throughout this dissertation that the vexed principles of humanitarian, military intervention enshrined in the Responsibility to Protect doctrine have shifted to a logic of ex post facto, criminal accountability, and the embrace of a Responsibility to Punish. With this shift, the collection of evidence and a promise of future accountability are presented as the preconditions for all manner of long-term humanitarian outcomes: bringing justice to victims, breaking cycles of violence. In this section, I provide a history of R2P so as to bring into focus the mediated legal humanitarianism that is at the center of this chapter.

²⁴⁹ Beth Van Schaack, *Imagining Justice for Syria*, ed. Michael N. Schmitt et al., The Lieber Studies Series (New York: Oxford University Press, 2020).

In May 2021, the UN General Assembly voted to include an item on “the Responsibility to Protect” on the Assembly’s annual agenda, a new item amongst over 100 recurring items. The Responsibility to Protect, shortened to R2P, is a concept that has been part of international legal discourse since its development in the early 2000s. It was developed by the specially established Independent Commission on Intervention and State Sovereignty and articulated in their 2005 report. They sought to offer a solution to the dilemma that then UN-Secretary General Kofi Annan laid out in his 2000 Millennium Report, looking ahead to the role of the United Nations in the twenty-first century. In a section titled “Addressing the dilemma of intervention,” Annan wrote:

In my address to the General Assembly last September, I called on Member States to unite in the pursuit of more effective policies to stop organized mass murder and egregious violations of human rights. Although I emphasized that intervention embraced a wide continuum of responses, from diplomacy to armed action, it was the latter option that generated most controversy in the debate that followed.

Some critics were concerned that the concept of “humanitarian intervention” could become a cover for gratuitous interference in the internal affairs of sovereign states. Others felt that it might encourage secessionist movements deliberately to provoke governments into committing gross violations of human rights in order to trigger external interventions that would aid their cause. Still others noted that there is little consistency in the practice of intervention, owing to its inherent difficulties and costs as well as perceived national interests—except that weak states are for more likely to be subjected to it than strong ones. . .

We confront a real dilemma. Few would disagree that both the defence of humanity and the defence of sovereignty are principles that must be supported. Alas, that does not tell us which principle should prevail when they are in conflict.

Humanitarian intervention is a sensitive issue, fraught with political difficulty and not susceptible to easy answers. But surely no legal principle—not even sovereignty—can ever shield crimes against humanity. Where such crimes occur and peaceful attempts to halt them have been exhausted, the Security Council has a moral duty to act on behalf of the international community. The fact that we cannot protect people everywhere is no reason for doing nothing when we can. Armed intervention must always remain the option of last resort, but in the face of mass murder it is an option that cannot be relinquished.²⁵⁰

The Commission on Intervention and State Sovereignty charged with responding to the dilemma presented by Annan consisted of twelve political dignitaries, professors, public intellectuals—one woman and eleven men—including Australia's former foreign minister and president emeritus of International Crisis Group Gareth Evans, the late Algerian diplomat Mohamed Sahnoun, former head of Canada's Liberal Party and the director of the Carr Center for Human Rights at Harvard's Kennedy School Michael Ignatieff, former president of the Philippines Fidel Ramos, and Cyril Ramaphosa, who would go on become president of South Africa. The Commission followed Annan's reasoning and left armed intervention for humanitarian ends on the table. Their 2005 report, titled *Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, sought to respond to the

²⁵⁰ Kofi A. Annan, "*We the Peoples*": *The Role of the United Nations in the 21st Century* (New York: United Nations, 2000), <https://digitallibrary.un.org/record/413745?ln=en>, 47–48.

challenge leveled by Secretary-General Annan five years prior. In broad strokes, Responsibility to Protect refers to the idea that military intervention to prevent large-scale loss of life and ethnic cleansing is justified, as a last resort, when states fail in their most basic duty to protect their own populations. The Commission came to this conclusion through the articulation of three principles or “pillars”: First, every state has a responsibility to protect its populations from four mass atrocity crimes: genocide, war crimes, crimes against humanity and ethnic cleansing; second, the wider international community has the responsibility to encourage and assist individual states in meeting that responsibility; and third, if a state is manifestly failing to protect its populations, the international community must be prepared to take appropriate collective action, in a timely decisive manner, in accordance with the UN Charter. In effect, R2P offers a framework for military intervention for humanitarian ends that circumvents a cardinal principal in public international law: the principle of non-intervention in the domestic affairs of sovereign states. Four broad categories of mass atrocity crimes become the exception that justifies a departure from the rule—and the shift in wording from an earlier, more muscular “right to intervene” (one that the United States and its “coalition of the willing” tried vociferously to defend after invading Iraq in 2003 without Security Council approval); “responsibility” suggests that in these cases, there is an unshirkable humanitarian imperative to act.²⁵¹ Legal scholar Elizabeth O’Shea characterizes this shift as a move from a framing emphasizing legality to one offering legitimacy for such interventions.²⁵²

Since 2000, R2P has been repeatedly invoked in UN discourse and resolutions but has been applied in practice just once. In March 2011, after Muammar Gaddafi’s brutal crackdown

²⁵¹ For more on the state of exception in international law, see Kamari Maxine Clarke and Sarah-Jane Koulen, “The Legal Politics of the Article 16 Decision: The International Criminal Court, the UN Security Council and Ontologies of a Contemporary Compromise”, *African Journal of Legal Studies* 7 (2014) pp. 297-319.

²⁵² Elizabeth O’Shea, “Responsibility to Protect (R2P) in Libya: Ghosts of the Past Haunting the Future,” *International Human Rights Law Review* 1, no. 1 (2012): 173–90, <https://doi.org/10.1163/22131035-00101010.0>

on anti-government protests and threats to “cleanse Libya house by house”, the UN Security Council passed resolution 1973/2011 authorizing the use of “all necessary measures” to protect civilian life in Libya—including the use of military force, or “humanitarian intervention.” This resolution gave rise to a NATO-led intervention in Benghazi, Libya. Gareth Evans, in a 2018 tribute obituary for his co-chair on the Commission, Mohamed Sahnoun, lauds R2P as “conceptually ground-breaking” and reflective of a “genuine North-South consensus on how to respond to mass atrocity crimes where none had previously existed.”²⁵³ Yet, even as he concludes that R2P had achieved “overwhelmingly unquestioned acceptance now in principle,” he acknowledges that “R2P has struggled to gain any traction at all in response to the catastrophes in Syria, Yemen and Myanmar in particular.”²⁵⁴

The aim of this chapter is not to discuss the changing nature of humanitarian intervention in the past twenty years, or to defend the merit of R2P; in fact, I would suggest that the term is an oxymoron both in theory and in practice, and there are good reasons to be wary of military intervention on humanitarian grounds. We can conclude, however, that in the past decade, the political will to engage in armed interventions despite the widespread commission of atrocity crimes has been noticeably absent. The interventions of the '90s and early '00s were by and large expensive, protracted, and politically disastrous, most importantly, they themselves produced humanitarian disasters and widespread loss of life. Additionally, the geopolitical reality of situations such as Syria, Yemen, Myanmar, and Ukraine that have captured headlines in recent years with reports of massive loss of life and illegal attacks on civilian populations has meant that even if support could be garnered for intervention, any proposal would likely be vetoed in the Security Council by one of the P-5 members. For

²⁵³ Gareth Evans, “A Tribute to Mohamed Sahnoun, 1931–2018,” Global Centre for the Responsibility to Protect, January 30, 2019, <https://www.globalr2p.org/publications/a-tribute-to-mohamed-sahnoun-1931-2018/>.

²⁵⁴ Evans, “Tribute.”

example, a UN draft resolution proposing to refer the situation in Syria to the ICC for investigation produced a rare, double veto by both China and Russia in 2014.²⁵⁵

For various reasons, then, of which this chapter by necessity offers only a few, Western, liberal governments, while still espousing a commitment to human rights, have lost their “interventionary nerve.”²⁵⁶ The rise of populist governments has fostered increased polarization and distancing, as exemplified by the Muslim ban and the crackdown on legal immigration and asylum by the Trump administration, Brexit in the United Kingdom, and the European Union’s cynical and brutal closure of ports and borders, allowing thousands to drown in the Mediterranean Sea rather than offer refuge. In this contemporary moment, even as the language of human rights and global justice circulates with momentum and zealous energy within certain political elites, international human security arrangements—the right to asylum, for instance—are under pressure and losing popular support. International criminal justice, seen in this context, offers a tidy and affordable channel for residual humanitarian commitments. On the one hand, the political fallout of military presence on another nation’s territory is avoided, while on the other, through the collection of evidence, commitments to rule of law, accountability and underexamined claims of criminal law’s potential to offer redress for victims, and societal repair fulfil cosmopolitan demands of solidarity for victims of violent conflict.

This chapter therefore brings into focus the substantive affinity between R2P, called an idea “whose time never comes,”²⁵⁷ and the rise of international criminal justice—and particularly the efforts to collect evidence—as another form of humanitarian intervention, the

²⁵⁵ “SC Draft Res. 348,” Security Council Report, May 22, 2014, <https://www.securitycouncilreport.org/un-documents/document/s2014348.php>.

²⁵⁶ Duffield, “Post-Humanitarianism,” 7.

²⁵⁷ Catherine Renshaw, “R2P: An Idea Whose Time Never Comes,” *The Interpreter* (blog), June 21, 2021, <https://www.lowyinstitute.org/the-interpreter/r2p-idea-whose-time-never-comes>.

main parameters of which were articulated roughly around the same time as R2P.²⁵⁸ Similar logics around exceptions to sovereignty and the need for intervention by the international community animate the Responsibility to Prosecute.²⁵⁹ For example, with the adoption of the Rome Statute, in theory, sovereign heads of state can be faced with criminal indictments by an international court, and though the role of investigations and prosecutions remain primarily with states and the ICC is envisioned as a complementary judicial authority in theory, in practice it has issued indictments even against individuals and heads of state from countries that are not member states. An additional shift in the language of international criminal justice around the establishment of the ICC, one that brings its humanitarian logics into focus, emphasizes the role of retributive justice *for victims*. The ICC provides for the participation of victims as witnesses during trial and seeks to provide support services and reparations to community of victims, a development that legal scholar Sara Kendall calls international criminal justice's restorative turn. It is through this restorative turn in an inherently retributive system, Kendall argues, that international criminal justice brings itself into conversation with other forms of humanitarianism, seeking to alleviate conflict-related suffering and stake rights claims on behalf of victims, producing a "legal humanitarianism." This framework, Kendall

²⁵⁸ Sara Kendall, "Beyond the Restorative Turn: The Limits of Legal Humanitarianism," in *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, ed. Carsten Stahn, Christian De Vos, and Sara Kendall (Cambridge: Cambridge University Press, 2015), 352–76, <https://doi.org/10.1017/CBO9781139924528.017>.

²⁵⁹ Throughout this chapter, I refer to the Responsibility to Prosecute to connect it to the defunct doctrine of Responsibility to Protect. In doing so, I echo law professor Diane Orentlicher's argument around a "Duty to Prosecute." In her 1991 article "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," Orentlicher argues that customary international law places a requirement on states to investigate and punish certain human rights crimes, particularly those relating to physical integrity. In her 2007 article "'Settling Accounts' Revisited," she laments the ways in which her earlier article inadvertently cast her as a supporter of "a rigid and universally applicable duty to prosecute all human rights violations." Still, in her later writing, she remains convinced of the legal correctness of condemning amnesties for international crimes. She identifies "powerful affirmation of a global norm in support of criminal accountability for atrocious crimes" and "maintains support for the broad trend in international law supporting criminal accountability for those who bear principal responsibility for atrocious crimes." See Diane F. Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," *The Yale Law Journal* 100, no. 8 (1991): 2537–2615, <https://doi.org/10.2307/796903>; "'Settling Accounts' Revisited: Reconciling Global Norms with Local Agency," *International Journal of Transitional Justice* 1, no. 1 (2007): 13, 18, 21, <https://doi.org/10.1093/ijtj/ijm010>.

argues, “routes its governance objectives through humanitarian logics, yet it is limited by the framework of law, which provides jurisdictional constraints that other humanitarian forms do not encounter to the same degree.”²⁶⁰ In what follows, I build on Kendall’s argument, with particular attention to penal humanitarianism’s focus on and methods of evidence-gathering and the embrace of technological innovation in relation to evidence collection.

III. Techno-Optimism and the Rise of the Justice Startup

This increased attention to evidence has had to reckon with new techniques and technologies of information exchange and capture. At the same time, this shift has also given rise to new constellations of experts and expertise, with the ability to render legible grainy satellite imagery, video clips, and pictures on Facebook, Instagram, TikTok, Twitter, and messaging platforms like Telegram. Documentation of human rights abuses and the collecting of accounts to establish patterns is a well-established practice of non-profit organizations working in the field of human rights. With the spread of new tools and technologies, it is becoming increasingly easy for survivors in conflict zones to directly upload first-person accounts, imagery, and footage for the world to see, and for a range of public *and* private actors to engage with and analyze this material from the comfort of their desk chairs. All that is required is an internet connection and some familiarity with the increasing range of tools and software for helping process large volumes of information.

While the next chapter engages with one form of what Michelle Burgis-Kasthala has termed “entrepreneurial justice”—a private group of international criminal investigators, many of whom started their careers and training as interns at the ICTY, setting up an evidence collection practice on their own initiative without institutional or governmental oversight—this chapter focuses on the epistemological structures that shape evidence collection, the ongoing

²⁶⁰ Kendall, “Beyond the Restorative Turn,” 353.

technological innovation with regards to evidence collection and verification and the new forms of expertise that emerge in response to these shifting practices.

The sheer volume of information and imagery available on social media is having a profound effect on the practices of international criminal law. In August 2017, for example, ICC judges approved the chief prosecutor's request to issue an arrest warrant for Mahmoud Mustafa Busayf Al-Werfalli, a commander of the Al-Saiqa Brigade which allegedly was taking part in Operation Dignity at the time, a coalition effort to fight terrorist groups in Benghazi.²⁶¹ Based on information gathered entirely from open sources, the Office of the Prosecutor was able to convince the judges of Pre-Trial Chamber I that there were reasonable grounds to believe that Al-Werfalli had personally committed, or ordered as a superior to others, seven separate instances of extra-judicial executions, in or around Benghazi, Libya, between June 3, 2016 and July 17, 2017, in which a total of thirty-three people were killed, and that he should be charged with murder as a war crime. This was the first time an international criminal arrest warrant had relied entirely on open-source material drawn from social media platforms. In fact, the evidence against Commander Al-Werfalli consists of seven videos posted on Facebook and other social media by the brigade's own Media Centre.²⁶² Given that the last video was posted on July 17, 2017, and the Prosecutor appealed to the judges to issue an arrest warrant on August 1, 2017, there were less than two weeks between the event, the ICC investigators receiving and verifying the video, and the decision to indict, and exactly one month between the last video and the issuance of an international arrest warrant. This is extraordinarily fast for international criminal investigations—most take months if not years. The Al-Werfalli arrest warrant describes what is depicted in each video in detail, the date the video was posted, and in some

²⁶¹ Emma Irving, "And So It Begins... Social Media Evidence In An ICC Arrest Warrant," *Opinio Juris* (blog), August 17, 2017, <http://opiniojuris.org/2017/08/17/and-so-it-begins-social-media-evidence-in-an-icc-arrest-warrant/>.

²⁶² "Warrant of Arrest," International Criminal Court, August 15, 2017, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017_05031.PDF.

cases where the video was uploaded—information that would have been gleaned from the original video file’s metadata if available, or verified through geolocation, a process by which any visual clues or landmarks (trees, buildings, power lines, road markings, etc.) from an image or video recording are cross-referenced to determine an event’s location. For instance, a description of the first incident in paragraph 12 of the warrant for Al-Werfalli’s arrest reads:

Mr Al-Werfalli, wearing camouflage trousers and carrying a weapon, is seen in a video footage to stand near a hooded, unidentified person, who is moving around an open dirt area with his arms in the air. Mr Al-Werfalli is heard saying “Put your hands up! Put your hands up! Put your hands up!”. After that, he shoots the hooded person with his left hand a number of times and the person falls on the ground. Mr Al-Werfalli approaches the body, shoots again the body on the ground for a number of times and states “You have been misled by he who did you harm. You have been misled by Satan”. The video depicting this incident was posted on Facebook on 3 June 2016.²⁶³

The Al-Werfalli indictment demonstrates the value of open-source material—in this case, video uploaded to Facebook—for international criminal prosecutions. But governments and multilateral institutions have been comparatively slow to develop the tools and expertise that would allow them to use and verify this material. Rather, the field has been shaped by a relatively small group of individuals who love the internet and spend endless hours behind screens, logged in and online, exploring all that it has to offer.²⁶⁴ Legalism and technoptimism meet in this “justice start-up” market, with those involved expressing excitement for

²⁶³ “Warrant of Arrest,” International Criminal Court, August 15, 2017, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017_05031.PDF.

²⁶⁴ There is an element of fun or play in this world of open-source sleuthing. In the next chapter, I discuss Anja Reiss’s 2017 documentary *The Truth Detectives*, which follows groups of citizen investigators collecting material in support of accountability efforts for human rights violations. In recent years, she’s been involved in pitching a game version to various game developers which resulted in funding and ultimately, a new video game titled *The Truth Detectives: A Very Serious Game* which trains the player to become an open-source investigator prepared to join activist networks like Amnesty International or Bellingcat. See “SwissGames Showcase 2023,” SWISSGAMES, accessed March 9, 2023, <https://swissgames.ch/swissgames-showcase-2023/>.

the quality of evidence that technological mediation offers over, for instance, eyewitness testimony, and the “distance and purity” that the use of technologically mediated data as evidence seems to promise.²⁶⁵

Bellingcat: Truth in a Post-Truth World

One example is Eliot Higgins, who started as a blogger working from home while taking care of his young daughter after having been laid off from his job. He now runs Bellingcat, a collective of researchers, investigators, and citizen journalists spread out across twenty countries who have investigated and pieced together publicly available information on anything from the downing of Malaysian Airlines Flight 17 over Ukraine in 2014 to the transport and sales of the nerve agent Sarin, used in chemical attacks against civilians in Syria. Higgins, a quiet, self-deprecating Brit, who by his own account had few friends except for his wife and baby daughter and previously spent hours behind his computer, now travels the world giving TED Talks and press briefings and running sold-out workshops teaching the skills of open-source investigation.²⁶⁶ In 2019, Bellingcat was the subject of the final film of New York’s Human Rights Watch documentary film festival, *Bellingcat: Truth in a Post-Truth World*. One of Higgins’s partners at Bellingcat, the Dutch Christiaan Triebert, was headhunted by the *New York Times* to join their visual investigations unit. That unit, similarly, using open-source investigations and digital sleuthing, has gone on to win four Pulitzer Prizes for their work reconstructing and verifying events through the use of publicly available information.

Higgins combined his tendency to fixate and research a topic obsessively with the near endless information available online on social media platforms such as Facebook, YouTube and Instagram coupled with the reference and verification possibilities of Google Earth, Google

²⁶⁵ Kamari Maxine Clarke and Sara Kendall, “‘The Beauty...Is That It Speaks for Itself’: Geospatial Materials as Evidentiary Matters,” *Law Text Culture* 23 (2019): 91–118, <https://doi.org/10.3316/agispt.20201009037908>.

²⁶⁶ Patrick Radden Keefe, “Rocket Man,” *The New Yorker*, November 17, 2013, <https://www.newyorker.com/magazine/2013/11/25/rocket-man-2>.

Maps, and Street View. He has become a leading figure in the field of open-source investigations. In 2012, from his living room in Leicester, working while his daughter played, Higgins began poring over the video and photographic footage that was being uploaded to the internet from the war in Syria. Since he does not speak Arabic, he focused on visual material and weaponry, endlessly scrutinizing armaments and shell casings, posing a question to the crowd on Twitter whenever he encountered something he did not recognize or markings he could not decipher. Within months, he had become a self-taught munitions expert, and his blog *Brown Moses* a leading source on the progression of the war, attracting a quarter of a million page-views a month from Human Rights Watch and Amnesty International researchers, leading journalists, weapons experts, and activists.²⁶⁷ When suspicions arose that the Syrian regime was targeting civilian populations with chemical weapons and cluster bombs—both of which are illegal under international humanitarian law—Higgins’s work was cited in an influential Human Rights Watch report finding that “Syrian government forces were almost certainly responsible for the August 21 attacks, and that a weapons-grade nerve agent was delivered during the attack using specially designed rocket delivery systems.”²⁶⁸

Higgins went on to establish Bellingcat in 2014. Initially crowdfunded through a Kickstarter campaign, the organization now receives grants from private organizations—though not governments. Higgins wanted to create an online space to bring together fellow self-made open-source experts, writers, and activists, and to offer how-to guides on the latest tools and technologies to aid others in becoming citizen open-source investigators.²⁶⁹ In recent years, Bellingcat researchers and affiliates have been involved in breaking multiple cases and investigations before the mainstream media or official law enforcement. In addition to their

²⁶⁷ Keefe, “Rocket Man.”

²⁶⁸ Human Rights Watch, “Attacks on Ghouta,” Human Rights Watch, September 10, 2013, <https://www.hrw.org/report/2013/09/10/attacks-ghouta/analysis-alleged-use-chemical-weapons-syria>.

²⁶⁹ Eliot Higgins, “What Is Bellingcat,” *Brown Moses Blog* (blog), July 15, 2014, <http://brown-moses.blogspot.com/2014/07/what-is-bellingcat.html>.

work on chemical weapons attacks in Syria, the group ascribed responsibility for the downing of the commercial Malaysian Airlines flight MH-17—which was shot down over Ukraine in July 2014, killing all 298 civilians on board—to specific individuals in the Russian Army and identified the assassins in the attempted murder of Sergei Skripal and his daughter Yulia in London in 2019. In each of these cases, Bellingcat reached and published their conclusions on their website far earlier than official authorities reached the same verdicts. In the case of the MH17 investigation, for instance, Bellingcat publicly concluded that the Russian military had been involved years before the Joint Investigation Team (JIT), the official international police team, did so. The JIT issued arrest warrants for four individuals in June 2019. But in a press conference and report released immediately after the official JIT press conference, based on their investigations, Bellingcat named another eight suspects based on their investigations, alleging that they “had a role in organizing or facilitating the transport” of the Buk missile launcher that ultimately downed the passenger plane.²⁷⁰

In the past decade, Bellingcat has evolved from “a group of dedicated nerds armed with nothing more than an internet connection and a talent for creative Googling” and a desire to speak truth to power, i.e. mice “belling” the cat, to a funded business, with eleven fulltime paid staff and a network of volunteers, preparing to open offices in The Hague and New York City.²⁷¹ In recent publications, interviews, and social media posts, Bellingcat and their collaborators have made apparent their aims to support justice and accountability efforts with open source investigations. For example, members of the group, including Higgins, have been invited to join the ICC’s Technology Advisory Board to help the Court understand how they

²⁷⁰ Yuri Zoria, “JIT Charges Four Suspects over Downing MH17, Bellingcat Identifies Eight More,” *Euromaidan Press*, June 20, 2019, <https://euromaidanpress.com/2019/06/20/jit-charges-four-suspects-over-downing-mh17-bellingcat-identifies-eight-more/>; Bellingcat Investigation Team, ““A Birdie Is Flying Towards You”: Identifying the Separatists Linked to the Downing of MH17,” Bellingcat, June 19, 2019, <https://www.bellingcat.com/news/uk-and-europe/2019/06/19/identifying-the-separatists-linked-to-the-downing-of-mh17/>.

²⁷¹ Owen Matthews, “How Bellingcat Outfoxes the World’s Spy Agencies,” *The Spectator*, October 18, 2018, <https://thespectator.com/topic/bellingcat-outfoxes-spy-agencies/>.

can use open-source investigations in their investigations and prosecutions. According to Bellingcat’s website, they have become “part of a network of like-minded organizations and individuals from a range of disciplines who have been working to answer the many questions [that have] been raised about how to archive open-source material for the purposes of accountability.”²⁷² In 2022, the newly elected Prosecutor of the ICC, former defence counsel Karim Kahn, issued a press release announcing his intention to “ensure that our Office [of the Prosecutor] draws on industry-leading technological architecture as part of its investigative work. Conflicts and international crises now generate audio, visual and documentary records on a massive scale. The commission of international crimes leaves a significant digital footprint.”²⁷³ Keith Hiatt, Director of the Human Rights and Technology Program at UC Berkeley School of Law, similarly reflects on how, given the “messy” and “difficulty and dangerous” business of war crimes investigations, “international human rights courts have expressed hope that new information technologies might bring about better, cheaper and safer prosecutions.”²⁷⁴

eyeWitness to Atrocity

In 2010, the International Bar Association began developing its eyeWitness to Atrocities app, a smartphone application that, per its website, “allows courageous citizens and human rights defenders to capture verifiable footage related to international atrocity crimes.” eyeWitness to Atrocities’ mission statement reads as follows: “eyeWitness seeks to bring to justice individuals who commit atrocities by providing human rights defenders, journalists and

²⁷² “About,” Bellingcat, accessed March 9, 2023, <https://www.bellingcat.com/about/>.

²⁷³ Karim A. A. Khan, “Statement of ICC Prosecutor, Karim A.A. Khan QC: Contributions and Support from States Parties Will Accelerate Action across Our Investigations,” International Criminal Court, March 28, 2022, <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-contributions-and-support-states-parties-will>.

²⁷⁴ Keith Hiatt, “Open Source Evidence on Trial,” *The Yale Law Journal*, Emerging Technologies in Investigations, 125 (March 3, 2016), <https://www.yalelawjournal.org/forum/open-source-evidence-on-trial>.

ordinary citizens with a mobile app to capture much needed verifiable video and photos of these abuses. eyewitness then becomes an ongoing advocate for the footage to promote accountability for those who commit the worst international crimes.” The website offers tabs labelled “find out how to get justice here!” and a compellingly simple invitation to download the app, “capture evidence” and “get justice”.²⁷⁵

The project’s website speaks directly to the work of mediation that this user-generated material is required to do. They write: “Currently, a number of challenges distance the work of these [human rights] defenders from the needs of investigators. As a result, valuable opportunities to use footage of the worst international crimes to obtain justice are lost. eyeWitness aims to bridge the gap between the documenters of grave human rights violations and the requirements for justice mechanisms to use this information, by providing an innovative system that addresses existing pitfalls.”²⁷⁶ In a 2015 interview with *The Guardian*, board members and project directors for the app explained that it had been set up to avoid the evidentiary challenges associated with authenticating mobile phone footage and to ensure that user-generated material meets the admissibility requirements of evidence.²⁷⁷ For instance, each image or video captured through the application is saved with its metadata, which can help investigators months or even years later ascertain when and where the image was captured and whether it has been altered in any way. Additionally, they explain, everything received through the application is stored on eyeWitness’s servers, which ensures for later investigators and prosecutors who wish to admit this material as evidence into a criminal trial that there is a chain of custody from the instant the material was captured until it is used as evidence. This second pillar of their “award-

²⁷⁵ On the pitfalls of expecting technology to unequivocally fix problems, see Evgeny Morozov, *To Save Everything, Click Here: The Folly of Technological Solutionism* (New York: PublicAffairs, 2013).

²⁷⁶ eyeWitness to Atrocities, “Our Work,” accessed March 9, 2023, <https://www.eyewitness.global/our-work.html>.

²⁷⁷ Owen Bowcott, “EyeWitness to Atrocities: The App Aimed at Bringing War Criminals to Justice,” *The Guardian*, June 7, 2015, sec. Technology, <https://www.theguardian.com/technology/2015/jun/08/eyewitness-to-atrocities-the-app-aimed-at-bringing-war-criminals-to-justice>.



Figure 4 Flowchart from eyeWitness project materials. Reprinted with permission.

winning technology is key to allowing photos and video to be used as evidence in court.”²⁷⁸ Finally, all material received through the app is “processed for justice”—a process of review by lawyers who tag and catalog the visual evidence to meet the requirements of investigators.²⁷⁹

The Hague Hackathon for Good

The techno-optimism in the field of international criminal justice extends beyond the launch of various apps. In 2018, the Municipality of The Hague invited talented hackers and computer scientists to “hack for Peace, Justice and Security. Use your skills to help organizations such as NATO, the International Criminal Court and the Red Cross to solve real world problems. Work with teams to understand interesting data sets and build solutions for global challenges.”²⁸⁰ Mass violence and human rights violations became an interesting data set to tinker with on state-of-the art computers in The Hague, and the hackers were competing for

²⁷⁸ eyeWitness to Atrocities, “Our Work.”

²⁷⁹ eyeWitness to Atrocities, “Our Work.”

²⁸⁰ Hackathon for Good, The Hague, <https://dinosaur-salamander-drd3.squarespace.com/hackathon-for-good-2018> See also: <https://www.hackathonforgood.org/hackathons/the-hague-1>

€17,500 in prize money. In 2018, the ICC’s Office of the Prosecutor challenged participating hackers to find a way to automate the process of entity and relationship extraction, the manual process by which investigators scrutinized reports and witness testimony to identify actors within a particular area under investigation and the manners in which they interacted with each other. The envisaged outcome of the challenge was a “proof of concept/working prototype of an application mining entities and relationships from txt/html/doc(x) documents and outputting them into a graphical database format—such as a .json file or a .csv file featuring a list of edges and nodes of the graph.”²⁸¹

The Virtual Human Rights Lawyer

In 2019, a global pro bono law firm headquartered in Washington, DC, that provides free legal assistance to parties involved in peace negotiations, the drafting of post-conflict constitutions, war crimes prosecutions and efforts towards transitional justice launched its latest project: the Virtual Human Rights Lawyer. Still in its pilot phase with a prototype having rolled out in Namibia, the project aims to offer a web-based platform using chatbot technology that will allow individuals who believe they have experienced a violation of their human rights to explore whether and how they can bring their complaint before a human rights mechanism. After downloading the necessary Telegram app, an encrypted messaging service that offers users an option to create secret chats and exchange messages that self-destruct after a set time limit, users can initiate conversation with the Virtual Human Rights Lawyer chatbot. According to the project description, the chatbot will guide users through a series of questions, using “simple, empathetic language to engage with users and understand what happened to them.” The pre-programmed yet empathetic questions are designed to extract answers to assess

²⁸¹ “International Criminal Court 2018,” Hackathon for Peace, Justice and Security, January 7, 2020, <https://web.archive.org/web/20200107080535/https://www.hackathonforgood.org/v1-icc-2018>.

whether the user has indeed experienced a violation, identify said violation, and establish whether any national, regional or international human rights mechanisms exist to hear their claim. The overarching aim of the project is to “provide users with legal information that will empower them to seek justice and redress.”²⁸² “What happened to you” becomes input, data entered into a machine pre-programmed to be empathetic, with the appropriate output being a determination of whether there has been a violation of a right, and in the age of international criminal justice whether said violation also meets the definition of an international crime.

The networks of initiatives or projects pairing technology with legal expertise, many of which rely on funding from donors, produce a discourse whereby the focus and the celebration lie on those who come up with the idea, or the hack, potentially making the collection of evidence easier or the effort to document crimes more efficient. Humanitarian care or solidarity is mediated through a series of platforms, and the responsibility to provide information or engage in the language of legal humanitarianism lies with the individual user, as in the case of the Virtual Human Rights Lawyer or eyeWitness for Atrocity app. All the while the discourse of justice and accountability as imagined through a criminal trial here, promises far more than it can reasonably achieve; a handful of cases will go to trial, likely at some geographical and temporal distance from where the harm took place, with very little material improvement to the lives of those affected and possibly increased risk of harm, all under the guise of justice. The principle that governs here is the utility of information packaged as evidence in compliance with the standards required by a criminal trial, as I will discuss in greater detail in the next section.

²⁸² “Home page,” Virtual Human Rights Lawyer, accessed March 9, 2020, <http://virtualhumanrightslawyer.strikingly.com/> See also: <https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2019/11/14/creating-a-virtual-human-rights-lawyer-week-vhrl-conference>

IV. From Information to Evidence

As an analyst for the ICTY put it during an interview in The Hague, “information is *not* evidence.” International criminal law’s focus on establishing the individual culpability of those ‘most responsible’ means that the kind of information or documentation that counts as valuable evidence are not general human rights reports or even eyewitness testimony but specific evidence that links a powerful individual to a pattern of crime. In other words, the point is not to establish that terrible things happened, but that an individual intended for those things to happen, through committing, ordering, soliciting, inducing, planning, or facilitating these acts. The Rome Statute of the ICC—the closest thing there is to an international criminal code, as of this writing—gives the Court jurisdiction over war crimes, “particularly when committed as part of a plan or policy or as part of a large-scale commission of such crimes.” Article 8 defines war crimes in a way that consistently emphasis that the constitutive acts—e.g., killing, torture, depriving prisoners of war of the right to a fair trial, directing attacks against civilian objects or religious buildings, or the enlistment and conscription of child soldiers—must be done “willfully” or “intentionally.”²⁸³

If a prosecutor seeks to charge an individual with the war crime of “intentionally directing an attack against civilian objects which are not or not military objectives,” they will need evidence establishing that an attack took place on the territory of a state that has accepted the jurisdiction of the Court (states parties) or that a national of such a state was involved in or affected by the attack (territorial jurisdiction). They will also need to prove that the event took place after July 1, 2002, when the Rome Statute went into effect (temporal jurisdiction). In addition, they will need evidence to demonstrate that the singular attack was part of a plan or

²⁸³ “Rome Statute of the International Criminal Court,” International Criminal Court, 2021, 5–10, <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

policy, or that such attacks were part of a large-scale commission of such crimes at the same time, in the same area. They will need to assemble evidence that the conduct constituted a “grave breach” of the Geneva Conventions. And specific evidence will be needed to establish that this was or had been a civilian object (a dwelling, office, playground, hospital) *at the time of the attack* and that no military activity had been taking place there. Finally, and centrally, the prosecutor will need to establish that an individual knew, could have known, or should have known all of the above, and while knowing this, committed, ordered, aided, facilitated, or failed to prevent the attack.

One particular challenge amid this stringent set of limitations on what counts as the right kind of evidence concerns the need to demonstrate a substantive connection between the defendant and the actions on the ground that the defendant allegedly brought about, contributed to or failed to prevent. The general wisdom and practice in the field of international criminal prosecutions has been that prosecutors should focus on prosecuting “those most responsible” for international crimes. This is where linkage evidence becomes all important. An event or series of events must be “linked” to similar events in the same time frame and general location, such as a country or region, to establish evidence of a plan, policy or systematicity. These events must then be linked to an alleged perpetrator or set of perpetrators active in that area, and linkage evidence should moreover help investigators and prosecutors travel as far as possible “up” an organizational structure or chain of command, from the alleged groups of perpetrators to the leadership or those in a position to give orders and issue commands. Morten Bergsmo and William Wiley, an international lawyer and international criminal investigator, both with years of experience, conclude matter-of-factly in a 2008 manual on criminal investigations that the practice of prosecuting “those most responsible” “means that the Court is likely to concern itself with persons whom the evidence suggests have perpetrated crimes at some distance from the physical conduct giving rise to investigations and prosecutions.

International criminal jurisdictions should generally speaking concentrate their limited resources on persons with higher-level responsibility. Lower-level functionaries should be left to national courts.”²⁸⁴

While international criminal law as a field is centrally concerned with individual responsibility and accountability for international crimes (personal jurisdiction or *ratione personae*), the language of focusing on those *most* responsible is in fact, nowhere to be found in the founding documents of the ICC, though practitioners suggest that this has become a basic principle or standard of the field. While international criminal tribunals since the Nuremberg Tribunal have been centrally concerned with unravelling structures of leadership to identify, in the language of the Nuremberg Charter, “major War Criminals,”²⁸⁵ international law professor Charles Jalloh argues that the specific language of “those most responsible” first arose in the founding documents and mandate of the Special Court for Sierra Leone (SCSL) and was unique

²⁸⁴ Morten Bergsmo and William H. Wiley, “Human Rights Professionals and the Criminal Investigation and Prosecution of Core International Crimes – Peace Research Institute Oslo,” in *Manual on Human Rights Monitoring: An Introduction for Human Rights Field Officers*, ed. Siri Skåre, Ingvild Burkey, and Hege Mørk (Oslo: Norwegian Centre for Human Rights, 2008), 1–28,

[https://www.casematrixnetwork.org/fileadmin/documents/M. Bergsmo and W.H. Wiley Human Rights Professionals and Criminal Investigation NCHR Manual 10 pp. 1-29.pdf](https://www.casematrixnetwork.org/fileadmin/documents/M._Bergsmo_and_W.H._Wiley_Human_Rights_Professionals_and_Criminal_Investigation_NCHR_Manual_10_pp._1-29.pdf).

²⁸⁵ In his opening statement before the International Military Tribunal at Nuremberg, the US prosecutor Justice Jackson argued:

The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched... The case as presented by the United States will be concerned with the brains and authority back of all the crimes. These defendants were men of a station and rank which does not soil its own hands with blood. They were men who knew how to use lesser folk as tools. We want to reach the planners and designers, the inciters and leaders without whose evil architecture the world would not have been for so long scourged with the violence and lawlessness, and wracked with the agonies and convulsions, of this terrible war. . . . None of these men before you acted in minor parts. Each of them was entrusted with broad discretion and exercised great power. Their responsibility is correspondingly great and may not be shifted to that fictional being, “the State,” which cannot be produced for trial, cannot testify, and cannot be sentenced. . . . the idea that a state, any more than a corporation, commits crimes, is a fiction. Crimes always are committed only by persons. While it is quite proper to employ the fiction of responsibility of a state or corporation for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity.

See Robert H. Jackson, “Second Day, Wednesday, 11/21/1945, Part 04,” in *Trial of the Major War Criminals before the International Military Tribunal*, vol. II. Proceedings: 11/14/1945-11/30/1945. (Nuremberg: IMT, 1947), 98–102, <https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/>. See also “Charter of the International Military Tribunal,” United Nations, March 15, 1951, https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.2_Charter%20of%20IMT%201945.pdf.

and largely undefined at the time. The SCSL was established in 2000, following a Security Council resolution. In that resolution, citing deep concern at the international crimes committed against the people of Sierra Leone and UN personnel and the prevailing situation of impunity for such crimes, the Council requested that the Secretary General of the United Nations negotiate with the government of Sierra Leone to establish a special court to prosecute such crimes. It recommended that the subject matter jurisdiction of the court should relate to crimes against humanity, war crimes, and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone. Because of this ability to prosecute both international crimes and crimes within the domestic legal framework of Sierra Leone, this tribunal became known as one of the hybrid tribunals.²⁸⁶ The Security Council further recommended that the court should have “personal jurisdiction over persons *who bear the greatest responsibility*” for these crimes (my emphasis).²⁸⁷ Charles Jalloh argues that, while this statement may well have been intended as a pragmatic and budget-conscious limitation of the scope of the Special Court’s work (which would be financed through donations by states), as a conceptual threshold and limitation it has subsequently been widely embraced in international criminal law circles and has become “the informal gold standard for the framing of *ratione personae* jurisdiction in contemporary international criminal tribunals.”²⁸⁸ Indeed, while not explicitly bound to do so by the Rome Statute, the Prosecutor of the ICC has indicated in various policy documents that his office follows the standard of “most responsible” in building its cases. For instance, in its 2019–2021 Strategic Plan, the Office of the Prosecutor notes that it has secured convictions through a

²⁸⁶ United Nations and the Rule of Law, *International and Hybrid Criminal Courts and Tribunals*, <https://www.un.org/ruleoflaw/thematic-areas/international-law-courts-tribunals/international-hybrid-criminal-courts-tribunals/>.

²⁸⁷ United Nations Security Council Resolution 1315, (Aug. 14, 2000) <https://digitallibrary.un.org/record/420605>.

²⁸⁸ Charles Jalloh, “Prosecuting Those Bearing the Largest Responsibility: The Lessons of the Special Court for Sierra Leone,” *Marquette Law Review* 96, no. 3 (2013): 107, 110.

“building upwards strategy,” focusing on the most responsible perpetrators, and reaffirms its aim and decision as a matter of policy to prosecute “the most responsible following the evidence that it can obtain from its independent investigations.”²⁸⁹ I dwell on this issue of “most responsible” at length because it informs the emphasis on linkage evidence and the task of understanding individual ranges of influence that shapes the work of justice startups. As will be discussed in the next chapter, one of the first tasks that the private international criminal investigation group FORUM embarked upon was to analyze the evidence it had seized and produce a brief explaining the leadership and command structure of “The Regime,” pointing to key leadership positions and the names of individuals who held positions of influence.

In March 2022, a *Washington Post* headline asked, “How to turn a tweet into viable evidence of a war crime.”²⁹⁰ How, indeed? Or to put it another way, what distinguishes a random piece of data from valuable evidence in aid of criminal prosecutions? As was explained to me often by investigators and lawyers during the course of my research, often with a sense of exasperation, human rights documentation collected in haphazard ways, such as shaky smartphone footage, images and even the well-meaning interviews and testimony, is of limited use in an international criminal trial. Such imagery and testimony may serve to document widespread pattern, or—to return to the example above of war crimes—large-scale commission. But investigators gathering evidence with a view to an international criminal trial call this “crime base” evidence. While this material can establish a record of crimes that may amount in scale, gravity, and systematicity to the international crimes of genocide, war crimes, and crimes against humanity, this does not connect an individual to a crime. What matters

²⁸⁹ Office of the Prosecutor, “Strategic Plan 2019–2021,” International Criminal Court, July 17, 2019, <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20190726-strategic-plan-eng.pdf>.

²⁹⁰ Philip Bump, “How to Turn a Tweet into Viable Evidence of a War Crime,” *The Washington Post*, March 10, 2022, <https://www.washingtonpost.com/politics/2022/03/10/how-turn-tweet-into-viable-evidence-war-crime/>.

above all else, then, in the logic of international criminal justice is linkage evidence, the all-important if ever elusive “smoking gun,” the direct order, the signed and stamped decree, establishing an irrefutable connection between criminal outcomes or events (*actus reus*) and individual, criminal intent (*mens rea*), synthesized in the Latin dictum *actus reus non facit reum nisi mens sit rea* (the act is not culpable unless the mind is guilty).

Historically and materially, there is a strong relationship between the fields of human rights and the establishment of international criminal bodies. International crimes can be human rights violations, and human rights violations can amount to international crimes. Many human rights organizations and advocates became strong advocates of the formulation of international criminal law and the establishment of criminal tribunals²⁹¹ and many human rights workers have gone on to work for or support the work of the ICC and vice versa. But while the logics, principles, and methods animating these fields of practice may be adjacent or complementary, they differ in important ways. Human rights organizations, such as Human Rights Watch and Amnesty International tend to collect a wide range of testimony and individual accounts to establish a record based on which they can monitor either worsening or improving conditions. These records also inform their advocacy towards a state or structure of governance. Often, human rights monitors will use pseudonyms or protect the identity of those who share their stories, using the principle of “do no harm.” It is also possible that one group of victims may be interviewed by dozens of different human rights investigators over a period, all writing their own reports.

UN discourse tends to blur the lines between the fields of work and their distinct approaches. For instance, the independent international commission of inquiry set up to

²⁹¹ Heidi Nichols Haddad, “After the Norm Cascade: NGO Mission Expansion and the Coalition for the International Criminal Court.” *Global governance* 19, no. 2 (2013): 187–206. See also: William Pace, “The Relationship Between the International Criminal Court and Non-governmental Organizations,” in Herman von Hebel, Johan G. Lammers, and Jolien Schukking, eds., *Reflections on the International Criminal Court* (The Hague: T. M. C. Asser, 1999)

investigate human rights violations in Ukraine by the UN Human Rights Council, has the following mandate:

to, among other things, investigate *all alleged violations and abuses of human rights* and violations of international humanitarian law, *and related crimes*, in the context of the Russian Federation's aggression against Ukraine, and to establish the facts, circumstances, and root causes of any such violations and abuses; *to make recommendations, in particular on accountability measures, all with a view to ending impunity and ensuring accountability, including, as appropriate, individual criminal responsibility, and access to justice for victims*; to provide the Human Rights Council, at its fifty-first session, with an oral update, to be followed by an interactive dialogue, and a comprehensive written report at its fifty-second session, to be followed by an interactive dialogue, and to submit a report to the General Assembly at its seventy-seventh session (my emphasis)²⁹²

The UN Human Rights Council is charged with “promoting and protecting” human rights, and in executing that duty for Ukraine as referenced above, takes up accountability measures including individual criminal responsibility as an instrument in this work of promoting and protecting human rights in Ukraine. It is also worth noting the refrain of “access to justice for victims” here. Even as international criminal accountability is seen here as a device or tool for furthering human rights, those who work in these fields tend to argue that they are distinct fields. Bergsmo and Wiley, in the 2008 manual on investigations referenced above, write that there are “significant differences between the professional culture of human rights monitors and criminal investigators,” arguing that these are “two disciplines” that approach human rights

²⁹² UN Human Rights Council, “Situation of Human Rights in Ukraine Stemming from the Russian Aggression,” United Nations Digital Library (UN, March 4, 2022), <https://digitallibrary.un.org/record/3963815>.

violations in a “distinct manner.”²⁹³

One concrete result of this difference in approach is that human rights monitors tend to be driven by the “human”: accounts of victims and survivors, which cumulatively are taken to create a narrative, often made available as a report and open-source document that anonymizes the names of individuals. International criminal investigations, by contrast, are driven, first and foremost, by the requirements of law. As Bergsmo and Wiley’s manual entry demonstrates, international criminal investigators often do not speak to or ask to interview individual victims and survivors until later in their investigation, and these individual accounts of harm tend to be of limited use as evidence. While cumulatively, individual testimony may help to support evidence of a crime base, i.e., establishing that events that may reflect criminal conduct took place, and even that there was a pattern of such conduct, which may speak to scale, and may be suggestive of “plan” or “policy” (returning to the war crimes example above), Bergsmo and Wiley assert that in their experience, on the whole, such crime-based witnesses “do not advance the linkage component of an investigation beyond a limited point.”²⁹⁴ Witness testimony does not tend to produce the evidentiary requirements international criminal investigators seek to fulfil in their law-driven investigations. If their testimony is too similar, they may have colluded, or been improperly prepared and unduly influenced. If too disparate, their stories do not help to establish pattern, scale, policy, or plan. Likewise, warn Bergsmo and Wiley, “informants must be handled with caution in light of their unknown loyalties and, in some cases, [may be] unsavoury characters.”²⁹⁵ Generally, they conclude, it is best for criminal investigators to hear from witnesses later into the investigation, and to use the details of this testimony, particularly from informants who may have been affiliated to one of the parties being investigated, to lead them to more reliable forms of documentary evidence, which could

²⁹³ Bergsmo and Wiley, “Human Rights Professionals,” 3.

²⁹⁴ Bergsmo and Wiley, 12.

²⁹⁵ Bergsmo and Wiley, 12.

be used for cross-reference. In other words, if, hypothetically speaking, investigators following Bergsmo and Wiley's manual were to interview you about a traumatic and deeply painful event, they would not or could not let themselves be led by your story and what you feel called to share in that moment. Rather, they would ask you specific questions: *in what types of vehicles did the alleged perpetrators arrive? What were they wearing? What kinds of markings, symbols, colors did you see? And what kinds of weapons were they carrying?*

This logic and its prioritization of (often seemingly banal) empirical details can come into painful conflict with how people from outside the ICL cohort understand the function of testimony and their own understandings of what happened to them. During my fieldwork in The Hague, I worked for several weeks as an intern with a defence team before the Mechanism for International Criminal Tribunals (MICT), the residual mechanism dealing with the caseload for the International Criminal Tribunal for the former-Yugoslavia (ICTY). The case being heard was the case against Jovica Stanišić and Franko Simatović, who were being tried for crimes allegedly committed in the course of their work for the State Security Service of the Republic of Serbia during the series of conflicts which gave rise to the dissolution of the former-Yugoslavia from 1991 to 2001. Simatović was a senior employee while Stanišić was the head of this agency, akin to the US Secret Service. They were arrested in 2003 and acquitted of all charges in 2013. After the Prosecutor appealed the verdict, the judges, in a much-maligned 2015 decision, ordered a complete retrial. They were eventually found guilty in 2021, after two trials spanning seventeen years of the aiding and abetting of murder as a war crime and the crimes of murder deportation, forcible transfer, and persecution as crimes against humanity and sentenced to prison terms of twelve years each, a decision that was appealed by both the prosecution and the defense in September 2021.

One day during the retrial in early 2018 it was my turn to fulfil the coveted role of “coder” in the courtroom. This meant that you entered the courtroom with the defense attorneys

and sat behind the courtroom computer to highlight key words and phrases that had been identified as of importance to the case (and the defence's argument) as they appeared on the official court transcript of the day's proceedings. After years of trial, there were thousands of such phrases with associated color codes, and as an intern on the case (interns generally joined the team for three to six months) it was impossible to know them all by heart. The atmosphere was muted during court days, when the team would move from the rented offices in a run-of-the-mill shared office building in the city center of The Hague to the office space on the premises of the tribunal shared with other defense teams. It was January in The Hague, so the days were short and gray. Every computer, desk, and chair in the shared office was at least twenty years old; some chairs had the duct-tape repairs to prove it. By that point, in 2017, the underfunded tribunal had most certainly seen better days, and this was particularly visible in the facilities for the defence, which had not been a priority in the establishment and organizational structure of the Tribunal.²⁹⁶ But there were other reasons for the bleak mood as we entered the courtroom that day. Just a few months prior, in November 2017, Slobodan Praljak, as the judge read out his guilty verdict and 20-year sentence, had stood up and cried "I am not a war criminal!" before raising his hand, throwing back his head and drinking from a small glass vial that later turned out to have contained a lethal dose of potassium cyanide dissolved in water. Authorities have never been able to establish how he procured the substance while in detention. He died at the HMC Westeinde hospital in The Hague shortly later.

A few months later, in early 2018, we all shuffled down the very same hallway into the very same courtroom, past a UN security guard who checked our pockets and the few items allowed inside and took our assigned seats. I felt nervous and ill at ease that day, which was my permanent state of being during the few months I worked on the team. This condition did

²⁹⁶ Charles C. Jalloh and Amy DiBella, "Equality of Arms in International Criminal Law: Continuing Challenges," in *The Ashgate Research Companion to International Criminal Law-Critical Perspectives*, ed. William A. Schabas, Yvonne McDermott, and Niamh Hayes (New York: Routledge, 2013), 251–88.

not improve after being told in no uncertain terms by the legal adviser and coordinator of the interns as we filed into the courtroom that the black blouse and black dress pants that I was wearing that day were completely inappropriate. Next time, I was told, I was to wear a suit. That day, the trial chamber was due to hear from a witness. She was (by now) an elderly woman who had lost her son and husband during the war in the early '90s. Over the almost two decades and two trials since, she had been called to testify several times. The judges and lawyers thanked her profusely for her willingness to travel to The Hague and appear in court again. It was clear that she seemed familiar with the courtroom and the proceedings, though I also remember that she appeared tired, had recently been unwell and indicated her distress that day at being asked, yet again, to recount the deaths of her husband and son. During one line of questioning, the defense counsel asked her if she could remember what the men who dragged her son and husband out of the shelter in which the family had been hiding, lined them up against the wall with the other men and boys and executed them, had been wearing. By that time, the ICTY and MICT had completed so many trials that it had been well-established and documented across the jurisprudence that the various fighting factions could be identified through certain colors, markings, or types of clothing (e.g., the Red Berets) Continuing his cross-examination, the attorney asked whether they were wearing balaclavas. The witness misheard him and exclaimed, incredulously, “‘Baklava’?! No. There was no pastry.” There were no smiles, let alone laughter, in the courtroom. The defense attorney quickly rephrased the question.

In this chapter, I have discussed the epistemological framework that determines what kind of information is salient to international criminal investigations. The effort to hold individuals accountable for international crimes has changed the landscape of human rights documentations, whereby the information that is most valuable is the kind that can be used to

conceptually link a crime to an individual perpetrator. The recognition of the value of this kind of evidence for securing convictions at international courts has resulted in an enthusiastic embrace of the potential for technological developments and applications to assist investigators with the collection, storing and processing of this evidence. Legalism and techno-optimism meet here, with justice startups promising the potential of the kind of objective, unsullied, evidence that will secure convictions at trial.

Chapter 5

The Truth Detectives: The New Private Frontiers of International Criminal Justice²⁹⁷

I. The Savivors

It is, by now, a commonplace in international legal scholarship to identify the paradigm shift ushered in with the logic of criminal prosecutions: a focus on individual criminal accountability. In this chapter, I identify a parallel consequence of the rise of international criminal law. I argue that for experienced members of the ICL cohort, “being expert” in the ever-emerging field of international criminal justice also provides alluring opportunities for individual enterprise, freedom, and innovation. For instance, his appointment as the first prosecutor of the ICC launched the Argentine prosecutor Luis Moreno-Ocampo onto the international stage. He invited three separate documentary film crews to profile him and his work during his tenure. In one such film, *The Court* (2013), the American actress Angelina Jolie is seen in meetings with the prosecution team; in the closing credits, she is pictured addressing then Prosecutor Ocampo directly, imploring, “We need *you* now, Mr. Prosecutor, more than ever.”²⁹⁸ A year prior to the release of this documentary, a non-profit group named Invisible Children produced Kony2012, an early viral video on YouTube. With over 120 million views, the group hoped to raise public pressure and ensure the arrest of Joseph Kony, the leader

²⁹⁷ The title for this chapter is borrowed from Anja Reiss’s 2017 documentary *Truth Detectives*, which was doing the rounds at various human rights festivals in Western Europe during my fieldwork in 2018. The documentary follows groups of independent, largely self-appointed activists and citizens who take upon themselves the tasks of documenting violence in real-time, poring over satellite imagery, or trawling through the virtually endless material available through social media posts or video material on YouTube. The documentary tracks private truth-finding efforts working to document human rights abuses and collect potential evidence for criminal trials, such as a group in Ukraine who used social media to keep track of the brutal government crackdown against political dissidents, a Colombian network of scientists trekking through the dense foliage of Columbian forests to find human remains of those disappeared, and a network of tech-savvy, video game aficionados who began scouring social media in the hopes of identifying who was responsible for the downing of Malaysia Airlines Flight 17 in 2014, which had departed from Amsterdam, the Netherlands, and was shot down over eastern Ukraine while on its way to Kuala Lumpur. Many of the individuals featured would go on to gain more formalized positions in growing organizations like Bellingcat, discussed in the previous chapter.

²⁹⁸ *The Court* (Filmperspektive GmbH, C-Films in coproduction with SWR, 2013).

of the militia group The Lord's Resistance Army, which had been waging an insurgency in Northern Uganda since the 1980s and against whom the ICC had issued an arrest warrant for crimes against humanity in 2005. In hindsight, the campaign by Invisible Children—founded by three American college students who had travelled to Northern Uganda with a camera—reflects the central logics of penal humanitarianism in concentrated form: the video exhorted viewers to rally around the arrest of Joseph Kony, end the war, and save lives. In a 2017 leak, Prosecutor Luis Moreno Ocampo's emails became public. The cache of messages and documents obtained and analyzed by a European network of investigative journalists offer striking insight into the behind-the-scenes networking between the kinetic elites of international justice. The messages show that Ocampo regularly turned for advice on some of the most sensitive policy decisions during his time in office to an informal grouping of celebrity advisors, including billionaire philanthropists, Jolie, and George Clooney. Clooney, incidentally, entered the world of penal humanitarianism in 2010, when he used the earnings from his Nespresso commercials to purchase and keep a satellite trained over Sudan—a sovereign nation—so that he could keep an eye on President Omar Al-Bashir, also accused of war crimes and under ICC indictment.²⁹⁹

In a 2012 e-mail exchange between the director of Invisible Children, Prosecutor Moreno Ocampo and Angelina Jolie, Ocampo wrote, “She [Jolie] has the idea to invite kony for dinner and then arrest him.” “She is the one,” he continued. “She knows, she loves to arrest kony. she is ready. probably brad [Pitt] will go also.”

Jolie responded, “Brad is being supportive. Let's discuss logistics. Much love xxx.”³⁰⁰

²⁹⁹ See Kia Makarechi, “George Clooney Spends Nespresso Paycheck On Spy Satellite To Keep Tabs On Omar Al-Bashir | HuffPost Entertainment,” *Huffington Post*, July 31, 2013, https://www.huffpost.com/entry/george-clooney-nespresso-spy-satellite_n_3681937; Malka Older, “Satellite Surveillance Can Trace Atrocities but Not Stop Them,” *Foreign Policy*, January 21, 2020, <https://foreignpolicy.com/2020/01/21/sudan-clooney-satellite-surveillance-can-trace-atrocities-but-not-stop-them/>.

³⁰⁰ See Katherine Gillespie, “Angelina Jolie Nearly Agreed to Lure and Capture Kony,” *Vice*, October 8, 2017, <https://www.vice.com/en/article/d3y9kk/angelina-jolie-backed-out-of-a-plan-to-seduce-and-capture-kony>; Stephanie Maupas, “Secrets of the ICC: Jolie, Clooney and the World-Fixer Psychosis,” *The Black Sea*, October 9, 2017, <https://theblacksea.eu/stories/secrets-of-the-international-criminal-court-jolie-clooney-and-the-world-fixer-psychosis/>; Hanneke Chin A Fo, “Op Schurkenjacht in Afrika Met Angelina Jolie,” *NRC*, October 6, 2017, <https://www.nrc.nl/nieuws/2017/10/06/op-schurkenjacht-in-afrika-met-angelina-jolie-13367654-a1576314>.

While this honeytrap plot involving the actress, the prosecutor, the alleged warlord, and Brad never appears to have come to fruition—and indeed, may have just been a bit of banter between friends—it does reveal the kinds of imaginaries of perpetrator versus heroic self that animate the field of penal humanitarianism. One publication after the Ocampo email leaks diagnosed Ocampo’s cohort of celebrity friends and college students with “World Fixer Psychosis,” while critical legal scholars such as Makau Mutua would likely identify an instance of the “savior”: one of three figures in Mutua’s tripartite “savage-victim-savior” metaphor, which he argues animates the field of human rights (and which I, in this project, extend to international criminal justice).³⁰¹ In what follows, I provide a more detailed analysis of these imaginaries of the self and adventurous contribution through expertise, via an account of war crimes investigator Ted and his organization FORUM.

II. Introduction

The establishment and then closure of international criminal tribunals established in the 90s such as the ICTY and ICTR has produced a generation of international criminal justice experts and investigators who both forged and became expert in the field of international criminal justice. They may have been able to work for a time at the hybrid tribunals established in Sierra Leone (SCSL) and Cambodia (ECCC) but are now vying for a radically shrinking pool of permanent positions at the ICC, the only permanent international criminal court. Mikkel Karl Christensen, identifying this trend, estimates that in its most expansive state in the late 2000s, the field of international criminal justice employed over 4000 staff.³⁰² With the closure of the ad hoc and hybrid tribunals, the ICC remains as the main, permanent, employer in the field

³⁰¹ Makau Mutua, “Savages, Victims, and Saviors: The Metaphor of Human Rights,” *Harvard International Law Journal* 42, no. 1 (2001): 201–45.

³⁰² Mikkel Christensen, “From Symbolic Surge to Closing Courts: The Transformation of International Criminal Justice and Its Professional Practices,” *International Journal of Law, Crime and Justice* 43 (2015): 609–25.

with only 900 staff positions and a constrained budget as donor states are increasingly underwhelmed by the Court's track record, and themselves struggle to meet their financial obligations post- Covid 19.³⁰³ Increasingly, these highly specialized international criminal justice experts are taking their expertise elsewhere – with several establishing their own organizations, 'justice start-ups' or consultancy groups, or joining rosters to be deployed on international missions to support national prosecutors seeking to investigate complex international criminal cases.³⁰⁴ Consequently, the method, logic and expertise of international criminal justice is circulating far beyond the institutional confines or capacity of the ICC.

This chapter engages with what Michelle Burgis-Kasthala has termed "entrepreneurial justice": it centers on a private group of international criminal investigators, many of whom started their careers and training as interns at the ICTY, who set up an evidence collection practice on their own initiative, without institutional or governmental oversight.³⁰⁵ Where the preceding chapter discussed the legal frameworks that determine what can and cannot be evidence, this chapter addresses a related but distinct issue. I argue that, increasingly, these expert practitioners of entrepreneurial justice are applying penal logics in a manner not just separated from the state but separated from multilateral organizations, leading to a global constellation of privately founded (albeit often publicly funded) initiatives focused on evidence collection. Recall Wayne Jordash, the lawyer who has argued before almost every international criminal tribunal to be established in the past twenty years, whose 2018 essay was referenced in previous chapters. I joined his team for a brief period in 2017 to learn more about defence

³⁰³ Janet Anderson, 'The ICC in Times of Budget Crunch', *Justiceinfo.net*, December 13, 2021, <https://www.justiceinfo.net/en/85475-icc-times-budget-crunch.html>.

³⁰⁴ See Burgis-Kasthala, *Entrepreneurial Justice*.

³⁰⁵ On "entrepreneurial justice," see Michelle Burgis-Kasthala, "Researching Secret Spaces: A Reflexive Account on Negotiating Risk and Academic Integrity," *Leiden Journal of International Law* 33, no. 2 (2020): 269–87, <https://doi.org/10.1017/S0922156519000748>; Paul McKeigue, "'Entrepreneurial Justice' Operations Related to the Syrian Conflict: Role of The Commission for International Justice and Accountability and Other Businesses Controlled by William Wiley," Working Group on Syria, Propaganda and Media, March 25, 2021, <https://syriapropagandamedia.org/entrepreneurial-justice-operations-related-to-the-syrian-conflict-role-of-the-commission-for-international-justice-and-accountability-and-other-businesses-controlled-by-william-wile>.

work in international criminal justice. Jordash observes that the rise of international criminal law has created “unprecedented opportunities for advocates to work and argue international law.”³⁰⁶ In the essay, he argues that the growth of the field offers a kind of freedom. He writes: “In shaping and helping to create the law . . . [advocates] are not restrained by the bureaucratic straitjacket of the government lawyer or by the sometimes-pedestrian devotion to methodology of the legal scholar.” For Jordash, this opportunity beyond the ‘straitjacket’ of domestic law is a source of intellectual and kinetic energy. He encourages advocates to become “legal entrepreneurs,” reflecting in a later passage that “with the growth of international law and means for settling disputes, advocacy services are increasingly in demand and international advocates have become a dynamic and roaming legal force.”³⁰⁷ In 2013, Jordash founded his own international legal consultancy firm alongside a non-profit foundation “specializing in international humanitarian, criminal and human rights law to address and alleviate acute humanitarian need.”³⁰⁸ Since the invasion of Ukraine in early 2022, his organization’s “Mobile Justice Teams” have been assisting the Office of the Prosecutor General of Ukraine by providing crime scene evidence collection and analysis.

In this chapter, I show how the imperative of “humanitarianism” and the embrace of criminal prosecutions have worked to make possible and to legitimate a range of initiatives and interventions by private, non-state actors in realms that in the nation-state system are considered the purview of public actors, such as the investigation of criminal conduct and the collection of evidence. Through organizations such as FORUM, which I will discuss in detail in this chapter, private actors are involved in the exercise of penal power beyond the nation state, entangled in humanitarian logics, through the medium of “evidence” as an expression of

³⁰⁶ Wayne Jordash, “The Role of Advocates in Developing International Law,” in *Arcs of Global Justice: Essays in Honour of William A. Schabas*, ed. Margaret M. deGuzman and Diane Marie Amann (New York: Oxford University Press, 2018), 523.

³⁰⁷ Jordash, “Role of Advocates,” 525, 535.

³⁰⁸ Global Rights Compliance, “Homepage,” Global Rights Compliance Foundation, accessed March 2, 2023, <https://globalrightscpliance.com/home-foundation/>.

said humanitarian care. The director of FORUM stated in a 2017 media interview with a Dutch newspaper that “in essence, we do everything a national prosecutor would do.”³⁰⁹ What does it mean for a network of private actors to take on the role of a national prosecutor? I follow in this chapter Mary Bosworth’s and Kjersti Lohne’s theorizations of penal humanitarianism, previously discussed in the introduction: Bosworth identifies an extension of the penal state radiating beyond the confines of the nation,³¹⁰ and Lohne identifies within international criminal justice a complete delinking between penal power and the nation state, maintained by appeals to humanitarian reason.³¹¹ I follow Bosworth and Lohne’s analysis here, and identify in this roaming network of expert criminal investigators a further decoupling of penal logics from nation states and multilateral institutions and entrenchment of penal humanitarianism. I argue that the group of private war crimes investigators I engage with here find in their experience and training in criminal justice—coupled with circulating and developing discourses around the “responsibility to prosecute,” penal humanitarianism, and the reality of an ever-incomplete system of international law—an alluring set of conditions for individual enterprise. Through a discussion of FORUM’s practices and ethos as represented by the director in various speeches and interviews, I demonstrate how international criminal justice startups reproduce many of the conditions of precarity and unequally distributed risk that have elsewhere been identified in contemporary neoliberal iterations of the gig economy. Additionally, in my discussion of Ted, the director of FORUM, I engage with his frequent invocation and disavowal of his company’s “cowboy” image, suggesting that the image is a

³⁰⁹ Arjen van der Ziel, “De oorlogsonderzoekers in Syrië liggen nu zelf onder de loep,” *Trouw*, May 22, 2020, <https://www.trouw.nl/buitenland/de-oorlogsonderzoekers-in-syrie-liggen-nu-zelf-onder-de-loep~bebc6f05/>.

³¹⁰ Mary Bosworth, “Penal Humanitarianism? Sovereign Power in an Era of Mass Migration,” *New Criminal Law Review* 20, no. 1 (2017): 39–65.

³¹¹ Kjersti Lohne, “Penal Humanitarianism beyond the Nation State: An Analysis of International Criminal Justice,” *Theoretical Criminology* 24, no. 2 (October 2018): 145–62, <https://doi.org/10.1177/1362480618806917..>

salient metaphor that lays bare broader tensions in the field of international criminal justice around tropes of whiteness, masculinity, objectivity and the white-savior industrial complex.³¹²

III. The Rise of FORUM

In a city in Western Europe, in a climate-controlled room in a nondescript, rented office building with balconies overlooking a busy thoroughfare and sidewalks lined with little lunch cafés and coffee shops, sit over one million pages of intelligence and government documents that have been smuggled out of a war-torn region by a network of international criminal investigators. The effort to collect and assemble these boxes and boxes of paper (each page has also been scanned and digitally backed up) began in 2012, when a small group of well-connected international criminal investigators decided they had had enough of the bureaucracy, politics, and red tape at the International Criminal Court (ICC) and were going to strike out on their own. The group of skilled investigators, lawyers, and forensic experts rallied around a set of ideas: first, a conflict was raging with clear human rights violations and atrocities while the UN was at a political standstill and no form of intervention was forthcoming; second, they possessed the necessary skill set to collect evidence; and third, they could commence the purely “operational” task of collecting and smuggling evidence across borders immediately, rather than having to wait for the slow work of international diplomacy and consensus-building. They decided to begin to collect and hold whatever information they found under secure circumstances and begin analyzing patterns of crime and command structure, until or if ever there was an opportunity for the material to be admitted into evidence before a national court or international tribunal. The evidence repository, somewhere in Western Europe, is theirs. In

³¹² Teju Cole coined this phrase in 2012 after watching the documentary *Kony2012*, arguing that these kinds of initiatives are more about satisfying the need of white, western audiences and actors to “do something” or “do good” without any specific, contextual knowledge of the place in which they seek to intervene. See Teju Cole, “The White-Savior Industrial Complex,” *The Atlantic*, March 12, 2012, <https://www.theatlantic.com/international/archive/2012/03/the-white-savior-industrial-complex/254843/>.

this chapter, I call this organization FORUM, and offer a detailed description of their work, based on my conversations with the director and other staff members during a weeklong visit to their headquarters, a series of public talks and presentations by the director that I attended, and additional media reporting.³¹³

Ted, a war-crimes investigator and well-connected former army officer with a long career in the field of international criminal law, is the director. After his long tenure with several of the international criminal tribunals, he left to set up his own international consultancy, of which FORUM eventually became a spin-off. His consultancy group offered an array of bespoke services in the fields of rule of law and security-sector reform in what were called ‘conflict and high security environments’: investigations, the collection and extraction of information, trainings and risk assessments to international clients including governments, UN agencies, private security companies (PSCs), risk management firms, as well as mining, oil, and gas companies. It was through these, as he says, commercial interests in Iraq and throughout the Middle East that he became aware of the specific brutality of the conflict that was tearing through the region, as well as the apparent inability or unwillingness of the international community to intervene. While, a UN-mandated commission of inquiry was eventually established to collect testimony and information from afar, over Skype or other video-link platforms in 2011, the problem as Ted and his partners saw it was that this information would not be useful for criminal prosecutions. The UN commission, following a fact-finding model, offered its sources complete anonymity, meaning that if and when indictments and trials rolled around, the testimony would be either immediately declared inadmissible or relegated to hearsay because the anonymous source would not be available for cross-examination under oath.

³¹³ To protect the anonymity of the organization, and particularly its field workers who risk their lives to collect and smuggle documents out of a war zone, I refer to the organization as FORUM, and will not discuss the specific locations or sites of conflict in which they gather evidence. All names used are pseudonyms.

When not jetting around the world speaking at conferences or meeting with diplomats in a tailored three-piece suit, buying rounds of drinks, Ted is to be found behind his desk, responding to emails and overseeing operations, with breaks for a Cuban cigarillo on the balcony of his office building. On these slow office days—which were the rare times I was able to speak with him, either face to face or over Skype—he wears t-shirts and the kind of high-tech, moisture-wicking trousers in various shades of khaki or army-fatigue green common amongst hikers, backpackers, and as I came to realize, international war crimes investigators. Somewhere in his mid- to late-fifties (he speaks often, and wistfully, of wanting to retire) he has the kind of muscular, broad-shouldered physique that, I will come to read in one of the many effusive profiles on him in the media, is maintained by regularly bench-pressing 350-pound weights.³¹⁴ He has a sardonic, wry manner, is infuriated by the bureaucracy and ‘red-tape’ of the international criminal tribunals and courts for which he works, and often expresses a preference for the operational, ‘field-based’ work of international criminal investigations in places like Rwanda or the Democratic Republic of the Congo, rather than the highly regulated office-based work in Geneva, Brussels and The Hague.

Ted has friends all over the world. He speaks at an almost dizzying pace of phone calls with London-based government officials, drinks in Istanbul with diplomats, lunch meetings in Brussels with ambassadors. He says that it was during one of these lunches that the idea to collect and extract evidence from the conflict and preserve it in a central, safe hub was first pitched. Just a few months later—things happen quickly when you have friends in high places—Ted and his team were contracted as external consultants to do a first round of trainings in the region. Their aim was to begin to get the young men “running around with smart phones,” as Ted described it—shooting shaky footage as their neighborhoods were destroyed, friends

³¹⁴ Ben Taub, “The Assad Files,” *The New Yorker*, April 18, 2016, <https://www.newyorker.com/magazine/2016/04/18/bashar-al-assads-war-crimes-exposed>.

and family murdered, and gunfire and shelling took place all around them—to think more strategically, in the language of forensic expertise and criminal evidence. Instead of running around documenting destruction, they should be trained to photograph and measure artillery craters, assess angles of impact, collect shell fragments, attempt to triangulate and calculate launching points, identify the types of weapons used. Above all, they were to focus on collecting documents generated by the government, ideally with a stamp or signature, “the king or queen of evidence in international criminal prosecutions”: linkage evidence that, as discussed in the previous chapter, would help to demonstrate a chain of command and point to those “most responsible.”

Eventually, though it is not at all clear when this happened or if the commercial entity is adequately separated from the non-profit, Ted says that his vested commercial interests and consultancy gigs in the region morphed into a non-profit organization.³¹⁵ The non-profit FORUM was initially funded by the United Kingdom and the United States, and after a slow process of convincing other donors, is now funded by the EU, other European countries, and George Soros’s Open Society Foundation. A joke with which Ted will regularly begin the various talks and presentations I observed is to feign surprise at finding himself, of all people, heading an NGO. He clearly does not think he is the type to do so. As will become clear, he does not think very highly of other non-profits and NGOs, international organizations, or the public sector writ large, and frequently espouses the benefits of the “lean and mean” private sector model his organization follows.

FORUM aims to collect, organize, analyze and preserve evidence of international

³¹⁵ In March 2020 the European Union’s anti-fraud office accused FORUM of widespread violations “including submission of false documents, irregular invoicing and profiteering” and recommended that national prosecutors in the UK, Belgium and the Netherlands investigate and try to recover almost €1.5 million in ‘Rule of Law’ funds; see European Anti-Fraud Office, “OLAF Unravels Fraud among Partners in Rule of Law Project in Syria,” OLAF: European Anti-Fraud Office, March 24, 2020, https://anti-fraud.ec.europa.eu/system/files/2021-07/pr_24032020_olaf_rule_of_law_project_syria_en.pdf. In May 2020, a Belgian Court found the organization guilty of fraud and ordered it to repay almost €400,000 in public funds. FORUM has appealed this decision.

crimes in situations where the international community is unwilling or unable to act. Practically speaking, this means that FORUM works across borders, with no permission from the governments of these states (though with the endorsement of the state donors mentioned above), to train and retain a network of regionally based field team members trained in criminal investigation standards. These young men and women are paid the equivalent of \$800 per month to collect and smuggle documents out of the country and to FORUM's evidence repository. This smuggling has taken place in all manner of ways: suitcases stuffed with paper in the back of a delivery truck that made it through a checkpoint without scrutiny; a thumb drive of pictures inserted into a sock, rubbing against the ankle of a young man desperate to leave the country; a sheaf of documents taped tightly to a bare chest under layers of t-shirts and sweaters. Field-based team members scour locations that have been abandoned as the active fighting subsided or moved on, such as abandoned military, security, and police facilities and offices, and unmanned checkpoints. Though the focus seems to be on paper, hard-copy, original official government material, team members have also collected physical evidence or material handed to them by witnesses or "persons with knowledge," as well as material in electronic formats: scans, material transmitted directly from a source, material recovered from an electronic storage device, or electronic files obtained from open-source platforms, such as YouTube, Facebook, and Twitter.

FORUM now holds a trove of valuable evidence in a repository, the location of which, similar to the safehouse in Arusha, is one of the ICL cohort's public secrets. The repository currently holds over one million documents. Once evidence is received by FORUM at its repository and headquarters, it is assigned an evidence management number, scanned and backed up to the password-protected evidence management system (EMS), a database that tracks every transaction on a document, such as viewing, editing, and downloading. This serves to establish a chain of custody, should the evidence ever be admitted into evidence before a

court. All evidence in the possession of FORUM is inspected, authenticated, and translated upon arrival at headquarters. The headquarters are staffed by experts in international criminal law, former investigators, many of whom have established careers at the tribunals and courts, analysts, translators and about ten to twenty full-time unpaid interns. The practice of authentication consists of considering the circumstances of document collection, including the location and the source, cross-referenced with other records and documents in the archive as well as historical events “and circumstances known to FORUM analysts”, following a report on their method that a judge asked FORUM to introduce alongside their evidence at a later trial. Finally, analysts consider the “intrinsic characteristics of the document.” According to this report, “[analysts] have years of experience reviewing the collection. . . these analysts rely on their own intricate knowledge of the expected and normal form of documents, seals, signatures, notations and content routinely used by the [relevant] government, permitting them to verify the form and contents of the documents.”

After years of waiting patiently in climate-controlled repositories, FORUM’s evidence is gradually making its way into the hands of national police forces, attorney generals, prosecutors and national courts through civil as well as criminal proceedings around the world. As part of my research, I spent several hours speaking with the designated war crimes unit of the Dutch National Police. They expressed that they had come to find the database of evidence useful, and regularly submitted requests for information to FORUM. In addition, the UN has since established its own evidence repository, to which FORUM says it has made available a copy of its evidence archive. As Ted later tells me during a conversation, the services of FORUM are in high demand by national police forces in the Schengen zone, who are facing the complicated task of figuring out, who amongst the large flows of migrants that made their way to Europe during the “migrant crisis” years between 2014 and 2017 qualify as victims and refugees and who might instead have played active roles in the conflicts and are thus potential

criminal suspects.³¹⁶ In countries that experienced a high influx of refugees, individuals being held in detention facilities awaiting the results of their requests for asylum, were coming forward and reporting crimes that had taken place elsewhere in the context of a civil war—the murder of a loved one, the destruction of their homes, arbitrary arrest and torture by state authorities of the country they had just fled—to police authorities in their new countries of residence, at times identifying newly arrived asylum seekers housed in the very same detention center or encountered on a street corner as possible suspects. There is also a long-standing though not often used international legal principle of universal jurisdiction for crimes of such gravity that they “shock the conscience of humanity,” broadly classified under the three main categories of war crimes, crimes against humanity, and genocide. In theory, under what is considered customary international law, states have a duty to investigate and prosecute such crimes regardless of where they took place. In practice, though there are few exceptions, such as the famous attempt by a Spanish judge to extradite and prosecute former Chilean President Augusto Pinochet in 1998, states have usually reserved the application of universal jurisdiction to cases where there is a “link” to their territory, such as the presence of either an accused or a victim reporting the crime. National police forces have rapidly had to adjust, establishing dedicated international crimes units or war crimes units, who have come to rely on FORUM’s databases for information. Ted remarked in a presentation that FORUM was working with “thirteen different western states, principally national war crimes units”; on their website, FORUM states that its cooperation with domestic law enforcement agencies “has begun to bear fruit.” In 2019, Germany became the first state to bring criminal charges against senior foreign government officials based largely on evidence made available to the prosecutor by FORUM, whose staff proudly tweeted about this moment the day the indictment was made public.

³¹⁶ A key component of international refugee law, derived from Article 1F of the Refugee Convention, is that individuals whom there are serious reasons to consider as having committed an international crime must be excluded from the protective status of “refugee.”

IV. Beyond Bureaucratic Domination

In the fall of 2017, I attended a conference held in a striking gallery in Italy. I am not sure why the conference was in Italy, given that the large majority of speakers seemed to be coming from the Netherlands—many of us were on the same low-budget carrier flight from Schiphol Airport in Amsterdam—other than that a September weekend in Italy offered conversations lubricated by strong espresso, quick breaks for gelato in the late fall sunshine, excellent wine, meals of roast lamb, fresh pastas, and pizzas in the evenings, lodgings in a plush, ornate hotel, and lunch breaks and evenings spent collectively admiring frescoes and other architectural highlights. Ted’s panel was scheduled for the first day of the conference, presenting the work of FORUM as a “new frontier in international criminal justice” and a model for private initiatives that can move the field of practice “beyond bureaucratic domination.” Today is a three-piece suit day, with a thick wad of cash in a silver-colored money clip in one pocket. I will notice this when he jumps up to buy round after round of drinks at the bar that evening. As he speaks, legs wide, hands lightly holding both sides of the lectern, not reading from notes or a prepared paper but calmly and confidently holding the audience’s gaze, his left foot gradually moves from the floor to the bottom of the lectern and then the chair beside him, so that he’s standing with one leg propped up, as he addresses us. His is a commanding presence, and I briefly wonder if he’s asserting his own domination, as he offers his own organizational model as the way forward in international criminal justice.

He begins to speak:³¹⁷

As the head of what has become a very large foundation, I travel endlessly and
I speak an awful lot, but it’s behind closed doors to government people,

³¹⁷ This section is drawn from the author’s notes and from a video recording of the conference proceedings.

operational people, policy people, sometimes political people, and it's a rare treat for me to attend . . . what is largely . . . a scholarly conference. I'm not a scholar, I'm not a social scientist in particular, I'm a long-time practitioner in this field of international criminal justice. . . I do hold a Ph.D. but I was in fact still an infantry officer when I did this when I was young, so that sort of negated any proper development of a scholarly mind, I suspect. So, uhm, I think what I'll do today is set out for those who don't know it terribly well or have never heard of it what FORUM is, what it does, what it's designed to do, our overall strategic goal, and I'll leave it to those with a more scholarly bent to join what is becoming—uh, join some other scholars in fact, who've spent some time in our headquarters, as you see fit, in trying to fit FORUM in these broader trends in this field of law.

He continues his presentation with a discussion of how FORUM came into existence through a series of conversations with friends and colleagues, and how over the years, he developed this idea of private-public partnerships in international criminal justice to fill what he considered a gap in capacity. Ultimately, through “some small commercial interests” that he had in a region that was experiencing full-scale civil war, he came back to the idea of non-profit work. He realized that there was as yet no investigative or judiciary structure in place with jurisdiction over this particular conflict, and through conversations with friends and colleagues he thought that he could “set something up that would start building cases to some degree” in the interim, and that these case files could ultimately be made available to national prosecutors or a formal, international adjudicative mechanism, if one was ever established with jurisdiction over this particular conflict. The principal objective of FORUM, he explains, is to “fill the investigative gap in the midst of an ongoing conflict, when there is no international body, for whatever reason, capable of doing so.” Over the past few years, his organization has

grown from an idea to an outfit employing 150 personnel; currently, he explains, they are planning to extend their investigative focus to other locales and conflict situations.

Continuing his presentation, Ted explains that the overall strategic objective of FORUM is about changing the way in which international criminal investigations are done. In his view, his organization is a *tool* that aims to fill a gap in the field of practice, rather than a substitute for formal public prosecution services or judicial authorities. He sets out four principal reasons why his model works. First, he emphasizes his group's ability to take physical risks, in ways that "public institutions, other than the armed forces, simply can't." He pauses, and in a more reflective tone, muses:

People that know me, or actually, people that don't know me very well . . . I'm sometimes characterized as a cowboy. That's certainly not the case but I have a high physical risk tolerance. And that . . . I have built the organization around that. Because if you don't have that, you will not have any advantage over the public institutions. Not that it's a competition, but we're trying to, again, do what the public institutions can't do, to make those public institutions better, more efficient, faster, cheaper and so forth. So, the result of that high physical risk tolerance . . . is that our people in the field do get hurt. The majority of our staff are locally retained, we spend a great deal of money, we're talking millions, training, mentoring them, developing them, they're led from headquarters. Everything is analytically driven, in the context of the legal framework, which is international criminal and humanitarian law, unless of course we're doing specific work for a domestic legal authority, then we adjust to their rules of domestic evidence, admissibility issues and so forth. But we've had, we've had a number of people hurt over the past six years. Sometimes in the course of their duties with FORUM and sometimes by virtue of being in a

high-intensity conflict zone.

In his regular invocation and then disavowal of the image of the “cowboy,” particularly paired with the language of “frontier,” Ted seemingly attempts to toe the line between the ‘do good NGO worker’ and the distinct brand of ruthlessness, independence and efficiency he espouses. Despite his references to his own tolerance for risk, it is important to recall that Ted and the experts in his employ at FORUM are in reality displacing the daily risk of gathering material amid ongoing fighting and bombardments onto local investigators.

Several of FORUM’s field workers have been severely injured, captured and tortured, or even killed. One such investigator, speaking to a newspaper under a pseudonym, acknowledges that his work and long absences had caused significant stress and fear for his family, but that he still believed in the cause of justice, and hoped, one day, to see a court try the senior leadership of his country and hold them accountable for the crimes they committed. In his address, Ted argues that related to the issue of physical risk is the issue of reputational risk, whereby the leadership of FORUM, “first and foremost myself,” have to keep an eye on the reputation of FORUM “if the idea is to persist.” And yet, he argues, his team is prepared to take certain reputational risks that public institutions would or could not, such as entreating with individuals from various sides of a conflict or even those widely seen as the aggressors, in an effort to get inside information. He states that this is the case because his staff, as opposed to those who work in the public institutions, are not primarily concerned with their own professional reputations and career prospects. His team, he explains, are not worried about these things. Rather, they are primarily loyal to FORUM and do what needs to be done. Ted offers his staff’s ability to overcome personal considerations as a second principal reason why his model, the FORUM model, works.

The third reason Ted offers, is that he is able to attract “very good people.” He receives a great many unsolicited CVs from highly trained staff currently employed by the public

institutions, because, he explains, FORUM has a reputation for getting things done. He also points to the flexibility he affords himself as director when it comes to hiring and firing: “Everyone’s a contractor. There’s no benefits or pension plans or any of that nonsense.” These details—“nonsense,” according to Ted—are his staff’s own responsibility, who are essentially all independent contractors who can be cut loose at a moment’s notice. It is perhaps a consequence of the doing away with “nonsense” provisions such as maternity leave that I saw very few female senior staff at FORUM, with one notable exception. FORUM’s head of communications is female, and she suggested she was hired to help tone down the “cowboy” image FORUM had acquired.

Setting up a clear contrast to international public institutions such as the ICC, which in recent years has been criticized for not being demographically diverse enough in their hiring practices, he espouses another benefit of FORUM’s flexibility: “We’re not bound by demographic considerations, that we have too many Canadians, Aussies, Americans, Brits, this is not, ah— paradoxically, we’re not bound by that but have ended up staffed like that.” Here, while presumably wishing to demonstrate that his organization ended up with a much more diverse staff than the ICC, he gets himself into a bit of trouble: “I’m Canadian, one of my deputies is uhm . . . American, actually the other deputy’s a Brit, ah haha, but originally from Bosnia, so . . .” Shifting gears quickly, away from the (lack of) diversity in his organization, he goes on to emphasize that he hires based on skill and aptitude:

So, uhm, its, its, quite representative. . . it’s based on need and skill set, that’s the determining factor. Principally what we’re looking for is prior experience and especially with the younger staff, language skills. In the field, we’re looking for an aptitude to develop as a collector or investigator [and an ability to] set aside personal political convictions and focus in particular on the needs of the organization.

During his speech Ted, takes care to emphasize what, in his view, distinguishes his organization (or model, as he often calls it) from others. FORUM is an NGO, he says, pausing to remark wryly that he “never in a million years, given his personal and political background” thought he’d run an NGO”: “I think it fair to say that we differ from most or any other human rights NGO in that there is real discipline in FORUM.” The audience audibly chuckles here. Speaking in the conference room in the autumn sunshine, Ted espouses the importance of discipline in his staff and organization, and the necessity of complete allegiance to FORUM’s objectives. He summarizes:

So . . . discipline, flexible hiring and removal options are very, very, very key, and having the courage—it’s rare in our institutions—but having the courage to get rid of people. This is another fundamental problem . . . the public institutions are utterly filled with dead wood people who are a complete and utter waste of space, they have no business being there, they shouldn’t have been hired in the first place.

I’ve heard him say this before, at different presentations or in conversations, his voice thick with scorn for the people who are “dead wood,” and a palpable irritation with the bureaucracy and procedures that make it more difficult to “dismiss someone” at public institutions such as the ICC. Later on, I would meet a woman, a senior international lawyer like Ted, who sold her home and moved countries for a job with an organization that sounded similar to FORUM, only to be dismissed, cut loose without a salary, mere months later. In his speech, Ted reflects that while there is no “thought police” at FORUM, “people are expected to buy into the objectives of the organization.” He argues that he expects his people to “work hard and work well” and “seek to constantly develop themselves professionally.” Most importantly, he states, “when we don’t see that kind of development, they’re gone. There’s no staff council, there’s

no appeal, you can try to sue us, but we have a general counsel and the contracts are so tightly done that you're just wasting your money. So, there is a certain ruthless streak."

This "somewhat ruthless streak" is what Ted identifies as central to his organization's contribution to justice. During my time conducting interviews and observing the daily work at FORUM, I was struck by the ways in which discipline and disciplining were considered the two main reasons why this organization's model works. The organization attracts experts with long careers in law enforcement, intelligence, and the military, who claim to know what they're doing, and consider it a benefit to be able to do this work with minimal oversight and low overhead costs. One individual I interviewed at the organization's headquarters had been a career intelligence officer who, as he told me, had plenty of experience developing assets and running covert operations. I found myself wondering whether he'd ever "eliminated an asset." When I ask him on whose mandate FORUM is going into sovereign states and extracting evidence, he appears to wink at me in response, saying dryly, "Sometimes it's quite useful not to have a mandate."

Despite this flexibility, Ted is careful to maintain that there are "checks on my power, and that of my deputy directors. Those checks...obviously there's a quality control element, but there's real checks from the donors themselves, uhm, there's a lot more checks on my authority than there ever was, say, on Luis Moreno Ocampo's authority." This last remark—which prompts more chuckling from the audience—refers to the infamous first prosecutor of the ICC discussed at the beginning of the chapter, who for the first nine years of the court's existence was responsible for selecting the situations to investigate and deciding which prosecutions would be opened. The Argentine lawyer and former public prosecutor Luis Moreno Ocampo, or LMO as he is often referred to within the international criminal justice scene with a complicated mixture of both fondness and ridicule, was the public face of the court for its first nine years of existence.

Ted's reference to LMO here does two things. First, it is a way of demonstrating insider knowledge of the social field of international criminal justice and its rumors and scandals. Second, Ted's invocation of him during his speech strikes me as suggesting that while his approach and the FORUM may be unorthodox, the field of international criminal justice is full of divisive, unorthodox figures charting their own course, and that Ted, by this measure, is not as bad as they come. For instance, as the first prosecutor, LMO had been involved in setting up the Office of the Prosecutor and its internal processes and policies, and an ongoing issue during his tenure concerned whether and how to create an oversight mechanism for the first permanent international criminal prosecutor's office. LMO famously resisted efforts towards oversight, citing the necessity of prosecutorial discretion and independence.³¹⁸ During his time in office and beyond, an allegation of sexual harassment and misconduct was made against him, though an internal panel concluded the allegations were manifestly unfounded,³¹⁹ he drew scrutiny and legal proceedings due to summary dismissal of staff who disagreed with him or tried to report aforementioned alleged sexual misconduct,³²⁰ and demonstrated a lack of diplomacy and political tone-deafness that antagonized many—particularly, perhaps unsurprisingly, senior officials and presidents his office was investigating.³²¹ He seemed, inappropriately to some, to revel in the adulation and instant celebrity his position offered. The worst blow to his reputation came during the 2017 email leak. Analysis of the 40,000

³¹⁸ The ICC's Internal Oversight Mechanism—with a mandate to oversee and investigate the conduct of all ICC staff and elected officials was established in 2009, after a decision by the Assembly of States Parties of the ICC, and entered into force in 2017—more than a decade after the ICC began its work.

³¹⁹ See Christian Palme, "Complaint against ICC Prosecutor Luis Moreno-Ocampo Concerning Serious Misconduct," Inner City Press, October 20, 2006, <https://www.innercitypress.com/ocampocomplaint.pdf>; "The ICC at 10," *Harvard Political Review* (blog), September 3, 2012, <https://harvardpolitics.com/the-icc-at-10/>.

³²⁰ ILO Administrative Tribunal, "Judgment No. 2757," International Labour Organization, July 14, 2008, https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=2757&p_language_code=EN.

³²¹ James Verini, "The Prosecutor and the President - The New York Times," *The New York Times Magazine*, June 22, 2016, <https://www.nytimes.com/2016/06/26/magazine/international-criminal-court-moreno-ocampo-the-prosecutor-and-the-president.html?smid=tw-share&r=0>; Mark Kersten, "A Brutally Honest Confrontation with the ICC's Past: Thoughts on 'The Prosecutor and the President,'" *Justice in Conflict* (blog), June 23, 2016, <https://justiceinconflict.org/2016/06/23/a-brutally-honest-confrontation-with-the-iccs-past-thoughts-on-the-prosecutor-and-the-president/>.

documents from the ICC that became public—internal memos, contracts, and emails (including the correspondence with Angelina Jolie)—led to a series of revelations on the inner workings of the ICC’s Office of Prosecutor while LMO was in charge. In addition to the rumors and murmurs that surrounded LMO while he was in office, these documents pointed to serious financial misconduct, abuse of power, and regular sharing of confidential, sensitive information with a self-selected advisory cabinet of celebrity confidants.³²² While Ted is happy to countenance certain aspects of his cowboy image—his high tolerance for risk, his independence, his tough, swashbuckling brand of masculinity—he is nevertheless careful to modulate this perception: he may be a maverick, but he is more serious than LMO.

Ultimately, Ted summarizes the benefits of the elements he set out previously (flexible hiring capability, risk tolerance, sufficient funding) as creating the crucial advantages of FORUM over other institutions in the field: speed and cost. Allowing himself a little reflection, he looks up from the lectern and tells us that “building international criminal cases is not rocket science.” In an echo of the widespread veneration for the kind of evidence collected by the Allied Forces after the Second World War and at the disposal of the Nuremberg prosecutors, he says, “They knew how to build criminal cases in 1945. They were done properly: document-based, insider-witness based, focused on linkage not crime-base.” He accuses the UN tribunals of the ’90s of producing “utter rubbish” in their first years: “all crime-base, no linkage, guys sitting in pre-trial custody while the lawyers finally take responsibility for the case and actually build a linkage case which justifies that the guy is in custody pending and during trial. How nobody thought to look back and see how it had been done before . . . is something of a mystery to me.” Turning back to the text of his presentation, he reiterates that criminal cases can be

³²² Not only did he consult Angelina Jolie regarding a possible plot to arrest Joseph Kony with which this chapter opens, but a few months after this, in April 2012 sent her a confidential memo on his office’s determination that it could or would not investigate possible international crimes in Palestine, asking for her advice on “how to present this to normal people.” See Maupas, “Secrets of the ICC.”

built relatively quickly and to a very high quality, and that that is what FORUM demonstrates, with a relatively small staff of 150 people and a modest budget of \$7 million USD annually. Again creating a contrast between FORUM's model and the more cumbersome organizational structure of organizations like the ICC, he tells us that only 8 percent of FORUM's budget is spent on overhead and administration, and that it would be less if not for "the requirements that the donors place on us in terms of financial reporting, which is fairly simple but there's all sorts of crap you have to do, people have to have time sheets and I don't know what else . . . procurement rules for every time we buy a package of pens." Again, gesturing to his impatience with this aspect of running an organization, he explains that he generally stays away from this side of things, but that in his view it should be perfectly possible to lower the overhead costs from 8 percent to 4 percent. He makes another comparison between FORUM and the ICC, explaining that when he left in 2005, there were only ten investigators out in the field out of a staff of four hundred, and that it was "quickly becoming an inverse pyramid," an organization that was top-heavy with bureaucrats, procedures, and rules, with very few people actively engaged in investigation, prosecution, and adjudication, which he believes to be the integral functions of the institution. At this point, Ted brings his speech to a close:

So, to wrap up, because I'm at time here, just to reiterate. FORUM's a tool, yeah, it's not a replacement for the public institutions. Public institutions could do what FORUM does. They should do what FORUM does ideally, but I just don't see that happening. I hope that FORUM ultimately inspires other civil society organizations to replicate, what I call, for use of a better word, the FORUM model, because I do believe this is the future. The consent of the donors if you will for international criminal justice is being withdrawn . . . I think this point was made this morning, it's being withdrawn due to debacles such as LMO's emails, uhm, other outrageous nonsense that's gone on over the

years, but first and foremost it's gone on because the prosecutorial investigative process is too slow and too expensive relative to output. I don't think that personally it's a good way to measure international criminal justice, but that's how the states that are looking at it, and states that are not projecting force, the Canadians, the Germans, the Scandinavians, states that are not fearful of being caught up, or having their nationals caught up in international criminal justice processes. And with that, I'll stop.

[Applause]

FORUM's model, as celebrated by Ted, is an example of a widespread pattern of outsourcing public goods to private actors, promising high returns on investment, while removing from view the ways in which increased flexibility for some is tied to increased precarity for others, as is the case between Ted and his investigators and staff who work on temporary contracts. Moreover, the private initiative to secure evidence on the territory of a sovereign nation without a mandate lay bare the singular instrumentalizing logic of international criminal justice: what is needed at all costs is evidence to sustain a conviction beyond a reasonable doubt.

V. Public Goods/Private Initiatives

The work of FORUM represents a new development in the field of rule of law and international criminal evidence, whereby evidence becomes the vector through which humanitarian care and intervention is facilitated, and states and international organizations outsource the work of evidence collection to private organizations and groups of individuals. I conclude by suggesting that the rise of such organizations and groups shapes not only the economic structure of the ICL cohort (with the increasing role of lean and mean, low-overhead justice start-ups) but FORUM also ultimately contributes to and reflects the further entrenchment of penal

humanitarianism and the shrinking possibility of other forms of solidarity and care.

An appendix to 2016 written testimony by FORUM’s deputy director to US Congress’s Commission on Security and Cooperation in Europe (Helsinki Commission) demonstrates that FORUM received over \$22 million in support between 2013 and 2018 from the United Kingdom’s Foreign and Commonwealth Office, the European Union, the governments of Canada, Denmark, Norway, Germany and Switzerland, and IREX (International Research and Exchanges Board), a “global development and education organization,” per its website.³²³ With this funding in place, FORUM has been increasingly able to bring its evidence to courtrooms around the world. It appears that national jurisdictions are not only increasingly willing to use this privately collected evidence in either domestic civil proceedings or criminal proceedings under the logic of universal jurisdiction but have come to rely on and cooperate with private investigators. In 2019, an unprecedented civil suit in the United States resulted in an award of \$302.5 million in punitive damages from a national regime embroiled in a yearlong deadly conflict to the family of a journalist who had been killed while covering the ongoing conflict. While it is unlikely that this award will ever be collected, this trial was one of the first times that evidence collected, and evidence briefs prepared by FORUM investigators and analysts was heard in court. In a heavily redacted expert report that was admitted into evidence (Figure 1), one of FORUM’s senior investigators, a former British military officer, detailed his organization’s approach. In more recent years, evidence from FORUM has been used in the criminal trials of three additional defendants in Germany in 2021 and 2022. FORUM’s investigators are summoned to provide expert testimony. While this means that their approach to the collection of evidence and questions around appropriate storage and chain of custody are increasingly becoming part of the public record, or at least available for scrutiny by judges,

³²³ “Who We Are,” IREX, accessed March 5, 2023, <https://www.irex.org/who-we-are>.

much remains unclear.³²⁴ To date, according to their website, FORUM “is cooperating with 15 ongoing investigations and provides support to 36 law enforcement agencies from 13 countries.”³²⁵



Figure 5. A screenshot of one page of the expert report

Ted makes clear, when he speaks about his organization, that they are only doing this work because in his experience the “public institutions”—the catch-all phrase he uses to refer to national jurisdictions, the UN system, and international courts and tribunals—cannot do it.

³²⁴ Syria Justice & Accountability Centre, “Inside the Raslan Trial #18: The Czech and a Journalist: ‘The Corpse’s Head Knocked against Each Step,’” Syria Justice & Accountability Centre, February 25, 2021, <https://syriaaccountability.org/inside-the-raslan-trial-the-czech-and-a-journalist-the-corpses-head-knocked-against-each-step/>.

³²⁵ Commission for International Justice and Accountability, “Koblenz Court Issues Verdict in Eyad A. Case,” Commission for International Justice and Accountability, February 24, 2021, <https://cijaonline.org/news/2021/2/24/koblenz-court-issues-verdict-in-eyad-a-case>.

He usually describes FORUM in terms of a service, a model, or a product that is then made available for use by clients, e.g., a court, police force, or prosecutor. During one of our first conversations, I expressed confusion to him, asking whether FORUM was being paid for these services and if evidence-collection had become a for-profit, commercial activity. He responded that FORUM is a non-profit foundation funded by states and the EU—though it is unclear how his commercial activities relate to the non-profit side of things. In a 2019 presentation, he stated: “It’s not a matter of private is better than public, in fact, the public authorities are necessary, but private actors extend the reach of the public authorities into places where the public sector for reasons of physical risk and obviously political and diplomatic reasons, can’t go.”

FORUM’s focus is on justice and accountability, and the humanitarian impetus here, which tends to shift in and out of view, is not to save lives, end the conflict, or achieve a peaceful resolution. In fact, as the conflict in which FORUM first became involved in collecting evidence grinds on, most international authorities have stopped even trying to count the dead or wounded. Rather, the focus here becomes on securing evidence—not to produce a full, detailed historical record of what has happened in the region for the past decade, but to gather evidence of the type that will allow a future tribunal to parse and assign guilt to a small group of powerful individuals. FORUM makes very clear that they are not interested in providing a full historical account and speak dismissively of the work of human rights organizations and commissions of inquiry who “crawl over each other trying to speak to victims.” Their interest is not in documenting harm and experiences of violence laterally, but in securing a cache of original, stamped and signed documents to prove vertical command responsibility, so that individualized intent and criminal responsibility of “those most responsible” can be weighed, ascribed, and punished by a judicial authority. The underlying understanding of justice here is not only strikingly legalistic, but preoccupied with

criminalization and criminalistics, where the more specialized, trained, and disciplined the forensic scientists, the better the evidence, and the better the result, i.e., the rule of law.

The FORUM model raises a host of questions. At play is a displacement of collective understandings of the public good to the domain of private enterprise, with minimal oversight. Underlying this logic is a distinctly legalistic understanding of the nature and function of truth regarding social harms. As the previous chapter demonstrates, criminal justice is not necessarily interested in full, detailed, layered accounts but rather linkage evidence. The violence at issue is the violence recognized in the “core” international atrocity crimes: genocide, war crimes, and crimes against humanity, which must be verifiable and attributable, or linkable through evidence, to a specific actor or group of actors acting with criminal intent. In the logic of penal humanitarianism, evidence works to mediate humanitarian solidarity. Private evidence collection initiatives such as FORUM both mirror and extend even further the key tenets of penal humanitarianism as present in international criminal justice: the dominant narrative is one of future criminal responsibility as the avenue toward delivering justice for past harms, with evidence as the crucial vector through which to establish criminal responsibility across distance (between a heinous act and a commander several miles away) and time (between the original act and a possible, future trial). Not only does the dominance of criminal logics severely limit imaginations of what other forms justice might take, but the promise of criminal accountability—someday, somewhere, mediated through evidence—risks displacing and foreclosing other expressions of humanitarian, or simply, inter-human care and solidarity.

Conclusion

What Sort of Politics?

As I write this conclusion, the Russian invasion of Ukraine, which had just begun when I drafted the introduction to this dissertation, is one year underway. With spring approaching, Ukrainians took to social media in defiance, celebrating the end of a bleak winter. Across the world, early predictions that the conflict would be brutal but short have made way for renewed commitments to support Ukraine's resistance and an understanding that this conflict will be long, with no discernible end or off-ramp. The logics of penal humanitarianism and the fight against impunity have also sprung into action. By mid-December 2022, the Prosecutor General of Ukraine had already registered over 50,000 war crimes cases, and even prosecuted and secured convictions in a handful of war crimes cases.³²⁶ The Chief Prosecutor of the ICC, in turn, has sent forty-two experts to Ukraine—the largest investigative presence in the history of the Court—to investigate war crimes and ensure that evidence is collected “in a manner that strengthens its admissibility in future proceedings.” Speaking to the media while visiting a mass grave in the town of Bucha near Kyiv, the Prosecutor called Ukraine “a crime scene,” thanked other countries such as the Netherlands and France for similarly deploying forensic experts, and stated: “Now, more than ever we need to show the law in action.”³²⁷

Various groups of loosely coordinated civil society and private investigators are also hurtling ahead, gathering photos, testimony, and open-source material on the internet in an effort to document war crimes. In the fall of 2022, the International Bar Association announced

³²⁶ Milica Stojanovic, “As War Grinds On in Ukraine, Investigators Doggedly Track Crimes,” *Balkan Insight*, December 30, 2022, <https://balkaninsight.com/2022/12/30/as-war-grinds-on-in-ukraine-investigators-doggedly-track-crimes/>.

³²⁷ Al Jazeera and News Agencies, “ICC Sends 42-Member Team to Probe Alleged War Crimes in Ukraine,” *Al Jazeera*, May 17, 2022, <https://www.aljazeera.com/news/2022/5/17/icc-sends-largest-ever-investigative-team-to-war-torn-ukraine>.

that citizens on the ground had used the eyeWitness to Atrocities app to capture and upload 20,000 “verifiable items” as potential evidence for trials.³²⁸ FORUM’s director, Ted, has been a frequent commentator in the media, espousing the importance of linkage evidence and the need to take a “cold, pragmatic approach to this stuff, rooted in the requirements of the law.”³²⁹ Phillippe Sands, a law professor, reflects that in no other conflict has there been such a concerted push to lay the groundwork for potential war crimes trials from the start, an effort to create what Ukrainian prosecutor general Iryna Vendikтова has called “a judicial front” in the war.³³⁰ But with so many different actors working to collect evidence, concerns are being voiced that these actors may be working at cross-purposes and duplicating efforts.³³¹ For instance, victims and witnesses are being interviewed multiple times, unclear as to how the various investigators differ from one another or where their testimonies will go. In addition, multiple testimonies from the same person will invariably display small inconsistencies, leading to credibility challenges in the courtroom down the line.

Where these courtrooms will be remains unclear. The prosecutor general of Ukraine has taken the lead, but domestic prosecutions of all registered cases will already take decades, and the war is far from over. The initiative raised early in the conflict to establish a separate tribunal to prosecute heads of state such as President Putin for the crime of aggression is gaining

³²⁸ “EyeWitness to Atrocities App Surpasses Collection of 20,000 Verifiable Items of Potential Human Rights Violations in Ukraine, and Group Submits Evidence to UN COI,” International Bar Association, October 4, 2022, <https://www.ibanet.org/eyeWitness-to-atrocities-app-surpasses-collection-of-20000-verifiable-items-of-potential-human-rights-violations-in-Ukraine-and-group-submits-evidence-to-UN-COI>; Anya Neistat, “Victims of War Crimes in Ukraine Have an Unprecedented Chance to Seek Justice,” *The Observer*, July 24, 2022, sec. Opinion, <https://www.theguardian.com/commentisfree/2022/jul/24/war-crimes-ukraine-investigations-justice>.

³²⁹ Noah Robertson, “Ukraine War Crimes: The Chase Is on in a Conflict Rich with Evidence - CSMonitor.Com,” *The Christian Science Monitor*, March 31, 2022, <https://www.csmonitor.com/World/2022/0331/How-war-crimes-investigators-do-their-jobs-in-evidence-rich-Ukraine>.

³³⁰ Loveday Morris, “An ‘Unprecedented’ Effort to Document War Crimes in Ukraine. But What Chance of Justice?,” *The Washington Post*, May 28, 2022, <https://www.washingtonpost.com/world/2022/05/28/ukraine-war-crimes-investigations/>.

³³¹ Morris, “‘Unprecedented’ Effort.” See also: Ukraine: UN expert urges all war crimes investigators work closely with national authorities, United Nations Office of the High Commissioner for Human Rights, 16 May 2022, <https://www.ohchr.org/en/press-releases/2022/05/ukraine-un-expert-urges-all-war-crimes-investigators-work-closely-national>

traction. The European Union passed a non-binding resolution in January 2023, calling on the bloc to “work in close cooperation with Ukraine to seek and build political support in the U.N. General Assembly and other international forums . . . for creating the special tribunal for the crime of aggression against Ukraine.”³³² In February, EU states launched a joint database for the preservation, storage, and analysis of evidence, and in early March, EU member states entered into an agreement to set up the International Centre for the Prosecution of the Crime of Aggression in The Hague.³³³ During the 2022 ASP, Karim Khan, the current prosecutor of the ICC, had opposed the plan to establish a separate tribunal, arguing that EU officials had misunderstood the law, that fragmentation should be avoided and that efforts should instead be geared towards consolidation. Despite the ICC not having jurisdiction over the crime of aggression, his office intends to move forward with the prosecution of high-ranking figures for crimes against humanity, war crimes, and even genocide. In fact, just days before this dissertation went to print, ICC judges granted the Prosecution’s request to issue two arrest warrants against President Vladimir Putin and his Commissioner for Children’s Rights, Maria Alekseyevna Lvova-Belova.³³⁴ Other states are independently exploring prosecutions within their own justice systems under the principle of universal jurisdiction for international crimes.

Ukraine is the latest location for the logic of penal humanitarianism to play out. Alongside the weapons deliveries to support the Ukrainian war effort and the deliveries of

³³² See “Ukraine War: MEPs Push for Special Tribunal to Punish Russian Crimes,” News | European Parliament, January 19, 2023, <https://www.europarl.europa.eu/news/en/press-room/20230113IPR66653/ukraine-war-meps-push-for-special-tribunal-to-punish-russian-crimes>; Mike Corder, “‘People’s Court’ Tries Vladimir Putin for War in Ukraine,” *AP News*, February 20, 2023, <https://apnews.com/article/putin-international-criminal-court-netherlands-crime-bb0a20256019057da42e887542676c7b>.

³³³ “Accountability for Russian International War Crimes in Ukraine: President von Der Leyen and Commissioner Reynders at ‘United for Justice’ Conference,” European Commission, March 6, 2023, https://neighbourhood-enlargement.ec.europa.eu/news/accountability-russian-international-war-crimes-ukraine-president-von-der-leyen-and-commissioner-2023-03-06_en.

³³⁴ “Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova,” International Criminal Court, March 17, 2023, <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>.

heaters, blankets, medicine, food, and water to citizens hunkering down, a full-scale, multi-level effort to collect evidence is underway. Even as many acknowledge the unlikelihood of Putin himself ending up in a courtroom, discursive commitments to the need to record the conflict and amass evidence with a view toward accountability circulate in newspaper reports and conference halls around the world. Additionally, we can identify both in EU initiatives to establish a new tribunal *and* in Prosecutor Khan's insistence that the ICC has jurisdiction efforts to present international criminal justice as a coherent system and an enduring faith in legalism.

In this dissertation, I have argued that the ICL cohort functions as a complex and affective social field that works to present a global, rational, purely legalistic system of international law and ultimately to privilege the penal logic of anti-impunity over other logics of reckoning and to suffuse humanitarianism with this penal logic. I have sought to draw attention to the ways in which the affective register sustains the technocratic register of law. Such expressions of sentiment, following Stoler, ought not to be relegated or dismissed as mere embellishment; rather, they should be considered central to the very substance of governing projects, such as international criminal justice.³³⁵ In the discourse around Ukraine, law—and in particular, criminal prosecutions—is presented as the only correct, inevitable response. *All Roads Lead to The Hague*. Moreover, law is assigned a privileged position as an actor in its own right. Take, for example, Prosecutor Karim Khan's statement regarding the deployment of a team of investigators to Ukraine: "Now more than ever we need to show the law in action."³³⁶ "The law" in his invocation is the Rome Statute and the body of international criminal law—itsself an outcome of political negotiations and compromise that gave rise to the

³³⁵ Ann Laura Stoler, *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense* (Princeton, NJ: Princeton University Press, 2009), 60.

³³⁶ "ICC Prosecutor Karim A.A. Khan QC Announces Deployment of Forensics and Investigative Team to Ukraine, Welcomes Strong Cooperation with the Government of the Netherlands," International Criminal Court, May 17, 2022, <https://www.icc-cpi.int/news/icc-prosecutor-karim-aa-khan-qc-announces-deployment-forensics-and-investigative-team-ukraine>.

recognition of four categories of crime, privileged penal understandings of individual criminal responsibility, and seeks to hold accountable through criminal punishment “those most responsible.” Judith Shklar reminds us that such intonation of principles and commitments that are incapable of realization is precisely how legalism as ideology works. Instead, she argued, legalism is more appropriately conceived as just one creative, pragmatic, and political choice among others, that *may* fulfil distinct functions in political orders. Of central importance, for Shklar, was not a rigid representation of law as above or distinct from politics, but an acceptance of law as itself serving a political function and reflective of a set of choices. For Shklar, the salient question was not “Is law political?” (to which her response would be in the affirmative) but “What sort of politics can law maintain and reflect?”³³⁷

In this study, I have approached this question through an anthropological engagement with the ICL cohort, key actors in the anti-impunity movement. What sort of politics, then, can anti-impunity maintain and reflect? Through the logic of individual accountability and the push toward evidence collection, I argue that anti-impunity privileges penal logics and detracts from other understandings of justice or reckoning. The kinds of violence for which the ICL cohort seeks justice are violent, shocking physical atrocities. But no matter how much evidence is collected and how many new tribunals are established, invariably only a handful of individuals will be convicted. It is unlikely that a President Assad or President Putin will end up in prison, just as it is unlikely that the architects of US offshore detention and torture facilities will serve time. The pursuit of criminal justice on an international level may fulfil the needs and desires of some: the need for one particular kind of justice, the desire for vengeance, perhaps the need for a medical intervention, or merely the desire for stimulating employment opportunities. For many more, though, the results are less fulfilling. Recall Shklar, who saw in “the idea that all

³³⁷ Judith N. Shklar, *Legalism: An Essay on Law, Morals, and Politics* (Cambridge, MA: Harvard University Press, 1964), 144.

international problems will dissolve with the establishment of an international court . . . an invitation to political indolence. It allows one to make no alterations in domestic political action and thought, to change no attitudes, to try no new approaches and yet appear to be working for peace.”³³⁸ For many outside of the ICL cohort, the pursuit of international criminal justice will change nothing while detracting attention from the ongoing cycles of exploitation and deep inequity that characterize our world.

³³⁸ Shklar, *Legalism*, 134.

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