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The Core Crimes of International Criminal Law

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Abstract

The ‘core’ crimes enumerated in the Rome Statute - the crime of genocide, war crimes, crimes against humanity and aggression - are overwhelmingly assumed to be the most important international crimes. In this chapter, I aim to unsettle this assumption by revealing and problematising the civilisational, political-economic, and aesthetical biases behind designating these crimes as ‘core’. This is done by shedding light on discontinuities in the history of the core crimes, and unsettling the progress narrative from Nuremberg to Rome. More specifically, crimes associated with drug control are placed in conversation with the accepted history of the International Criminal Court (ICC) to exemplify a systematic editing of the dominant narrative of international criminal law.

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Introduction

Art. 5 of the Rome Statute, the treaty establishing the International Criminal Court (ICC), states that the crimes enumerated represent ‘the most serious crimes of concern to the international community as a whole’.¹ These ‘most serious crimes’ in the Rome Statute, namely genocide, war crimes, crimes against humanity and the crime of aggression, are routinely referred to as the ‘core’ crimes of international criminal law.² The Statute itself does not designate these crimes as core crimes; rather the term arose during discussions on subject matter at the Rome Conference,³ was picked up by the literature,⁴ and is now widely accepted. Textbooks, course outlines for teaching, and commentaries regularly simply *state* that the crimes in the Rome Statute are the ‘core crimes’. Not only is the catalogue taken for granted, there is a general assumption of the durability of the list. William Schabas declares that ‘[i]t would seem that the package of atrocity crimes adopted in 1998 will stand the test of time.’⁵

The label ‘core’ is without question used to refer to the perceived elevated status of these crimes. It designates special standing regarding international jurisdiction and it assigns special standing in terms of moral abhorrence – the core crimes are deemed the *worst* crimes. Antonio Cassese describes them as ‘a category comprising the most heinous offences’.⁶ In turn, other crimes are of lesser importance, deemed more aptly prosecuted in domestic jurisdictions and generally inflected with a relativist nature meaning they are, in contrast to truly universal crimes, considered to be culturally specific. Where does this agreement about the prioritisation of these particular crimes over others come from?

In considerations of which crimes to include in the Rome Statute, there were several crimes that were weeded out in order to come to the contemporary understanding of

¹ Art. 5 Rome Statute of the International Criminal Court.

² In December 2017, the Assembly of States Parties to the Statute of the ICC adopted a resolution activating the jurisdiction of the Court over the crime of aggression. Although there have to date been no cases in which the crime is invoked, the crime of aggression is generally mentioned alongside the other crimes as part of a ‘core’ of crimes.

³ The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, the conference at which the final Rome Statute was negotiated and agreed. The Official Records are available at A/CONF.183/13 (Vol.II) (15 June – 17 July 1998).

⁴ William Schabas, ‘Atrocity crimes’ in Schabas (ed) *The Cambridge Companion to International Criminal Law* (CUP 2016) 203.

⁵ *ibid*, 212. A distinction is often made between atrocity crimes (war crimes, crimes against humanity and genocide) and the crime of aggression as a crime against peace. The term ‘atrocity crime’ is said to have been coined by David Scheffer, ‘Genocide and Atrocity Crimes’ (2006) 1 *Genocide Studies and Prevention* 229.

⁶ Antonio Cassese, *International Criminal Law* (OUP 2008, 2nd ed.) 148.

core crimes.⁷ One particular set of offences stand out as illuminating a possible alternative, rejected, path. These are the crimes relating to drug trafficking. It is well-known that the impetus for directing renewed legal and political energies towards the establishment of a permanent international criminal court came in 1989 through a request made to the General Assembly by Trinidad and Tobago.⁸ Trinidad and Tobago's request was made on the grounds that domestic prosecution of drug-related crimes was difficult if not impossible due to various forms of obstruction to domestic prosecutions.⁹ The subsequent resolution by the General Assembly stated the illicit trafficking in narcotic drugs as the primary reason for establishing a permanent international criminal court.¹⁰ However, in 1998, when the final wording of the Rome Statute was negotiated and agreed upon, drug trafficking no longer featured in the list of crimes under the Court's jurisdiction. Since then, the crime has not only been excluded from the venerable list of 'core crimes', it has been relegated to a different discipline altogether. This demotion to a so-called 'treaty crime', and ultimately the banishment to the discipline of transnational criminal law, is to be understood against the background of certain hidden biases of the core crimes.

The chapter begins with an overview of regularly proposed definitions of core crimes and delimitations between core crimes and other crimes. Significant ambiguities and disagreements around the nature of the core crimes and their delimitations are revealed; ambiguities and disagreements which raise questions of the general agreement on the catalogue of core crimes. In the absence of agreement on definitions and criteria, the analysis moves to the historical narrative of the core crimes. Agreement on the catalogue of core crimes is largely placed in the context of an assumed linear narrative from Nuremberg (the trials of key Nazi officials at the International Military Tribunal) to Rome (where the International Criminal Court was established at the Rome Conference). In order to probe this narrative and to unsettle monoliths of history,¹¹ I focus on discontinuities in the accepted history, beginning with the 1989 request to the General Assembly by Trinidad and Tobago as regards drug trafficking crimes. Such disconnecting

⁷ Crimes which were considered as core crimes, right up to the Rome Conference, included crimes of terrorism, and crimes against United Nations and associated personnel. Rome Conference, Official Records, *supra* note 3.

⁸ Letter dated 21 August 1989 from the Permanent Representative of Trinidad and Tobago to the Secretary-General (UN Doc A/44/195)

⁹ Obstructions include threats, bribery, and other forms of influence on police and judges.

¹⁰ United Nations General Assembly, 72nd plenary meeting, A/RES/44/39 (4 December 1989).

¹¹ Michel Foucault, *The Archaeology of Knowledge* (Routledge 2002, first published 1969)

of unquestioned continuities reveals the biases which have informed the catalogue of what are considered core crimes.

In an alternative world of ICL, many global problems could be deemed international crimes: Speculating on derivatives, corruption, or corporate crimes. This chapter does not aim to add to the list of core crimes.¹² Whilst the point is made that crimes around drug trafficking were excluded for ideological reasons, this is not followed by a call for their inclusion. Rather, this chapter aims to uncover the reasoning behind the designation of war crimes, genocide, crimes against humanity and aggression as being 'core'. What we can gain from this line of questioning is a deeper understanding of the moral-legal foundations of international criminal law, and the so-called international community as a whole. By focussing on the historical narrative, i.e. which crimes took precedence at what time, and the inverse of which crimes were 'dropped' or 'weeded out' along the way, we not only understand history but also the present. As we shall see, this requires a de-romanticised approach to the history of international criminal law, and a historical reading which acknowledges that the historical narratives which are repeated and valorised are mostly the stories of victors, of Great Men, and of exploitation and subjugation.

I. Defining Core Crimes

When it comes to defining core crimes, there is a general attitude of 'we all know what they are'.¹³ Although many aspects of the discipline of international criminal law are contested, there is an overwhelming consensus about the core crimes. If, however, a definition is attempted, it is mostly via the distinction between core crimes and treaty crimes or as a special category of international crimes. The following investigates these definitions and delimitations in turn.

¹² For discussions of expanding the jurisdiction of the ICC to include crimes relating to drug trafficking, see: Faiza Patel, 'Crime Without Frontiers: A Proposal for an International Narcotics Court', 22 *NYU Journal of International Law and Politics* (1990) 709, (proposing an international court with exclusive jurisdiction of drug trafficking); Molly McConville, 'A Global War on Drugs: Why the United States should support the Prosecution of Drug Traffickers in the International Criminal Court', 37 *American Criminal Law Review* (2000) 88; Heather L. Kiefer, 'Just say No: The Case Against Expanding the International Criminal Court's Jurisdiction to Include Drug Trafficking' 31 *Loyola of Los Angeles International and Comparative Law Review* (2009) 157.

¹³ Kevin Jon Heller, 'What is an International Crime?', Supranational Criminal Law Lecture, Asser Institute (3 March 2015), available at: <https://www.youtube.com/watch?v=GZ3t_tlPsWg>

1. Ambiguities in Distinguishing Core Crimes and Treaty Crimes

A traditional demarcation point between core crimes as opposed to other crimes is the distinction between ‘core crimes’ and ‘treaty crimes’. Neil Boister, who wrote a seminal piece advocating for a wide-spread adoption of the distinction between ICL and Transnational criminal law (TCL), defines transnational crime as ‘conduct that has actual or potential trans-boundary effects of national and international concern’.¹⁴ These are, according to him, to be distinguished from ‘international criminal law *stricto sensu* – the so-called cores crimes’.¹⁵ Treaty crimes, it is suggested, thereby sit on the other side of a disciplinary divide with ICL as concerning core crimes and TCL as concerning treaty crimes. The relevant treaties are also often referred to as ‘suppression conventions’ as they place obligations on states to suppress a certain act in domestic jurisdiction – as opposed to international jurisdiction. On the practical side, then, TCL is built on a web of criminalisation, extradition, and legal and procedural mutual assistance.

Despite these definitional and disciplinary distinctions, ICL and TCL have much in common; both concern criminalised action which is ‘of international concern’ and both are reliant on state assistance for effectiveness. It is debatable whether ICL also necessarily has an ‘actual or potential trans-boundary element’. Suffice to say here that mass atrocity cases mostly have a trans-boundary element, whether it is through the spilling over of violence across borders, or whether it concerns the financing of widespread violence. Regardless of this qualifier, the lines between core crimes and treaty crimes are blurry or even collapse. Indeed, two of the four core crimes are also criminalised in suppression conventions making them also treaty crimes: genocide in the Genocide Convention and war crimes in the Geneva Conventions.¹⁶

The ambiguities of delimitation continue with Antonio Cassese, one of the most eminent international criminal lawyers, according to whom there are two distinguishing factors, namely that core crimes are customary law as opposed to treaty law, and that treaty crimes are routinely committed against states.¹⁷ As regards custom reflected in widespread ratification as an indication of custom, one could point to the 190 state parties to the United Nations Convention against Illicit Traffic in Narcotic Drugs and

¹⁴ Neil Boister, ‘Transnational Criminal Law?’ (2002) *European Journal of International Law* 953-976.

¹⁵ *Ibid* 593.

¹⁶ Art. 5 Genocide Convention obligates the Contracting Parties to ‘undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions ...’.

¹⁷ Cassese, *supra* note 6, 12, 13.

Psychotropic Substances of 1988.¹⁸ Indeed, there have been calls to recognise drug trafficking crimes as customary international law from as early as the 1970s.¹⁹ Similar ambiguities emerge for Cassese's other qualifier, namely that treaty crimes are usually committed *against* states: '[t]hey do not involve states as such or, if they involve state agents, these agents typically act for private gain'.²⁰ But most of the accepted core crimes can, at least in part, be described as having been committed for private gain, whether this is for political or economic power. And, it does not require a significant stretch of the imagination to view cases involving 'warlords' and 'rebel leaders' at the ICC as crimes committed *against* the state. The arrest warrant against Joseph Kony, the trial of Ugandan Dominic Ongwen, the Congolese Germain Katanga, and the recent arrest warrant for Libyan Mahmoud al-Werfalli are cases in point.

Recognising such ambiguities, Roger O'Keefe concludes that the label 'core' is 'both formally meaningless and factually misleading'.²¹ He points out that the adjective 'core' has no legal import, and that there are other crimes which are seemingly more prevalent (he uses corruption and transnational organised crime as examples). O'Keefe states that the label 'core' is

'merely a historically contingent descriptor referable to no more than the twin facts that most of the crimes in question have featured within the respective jurisdictions *ratione materiae* of most of the international criminal courts seen to date and that the four of them are currently the only crimes triable by the International Criminal Court (ICC)'.²²

O'Keefe states elsewhere, somewhat contradictorily, that criminalisation under international law has not been motivated by a perception of the added expressive value of international over municipal law, but rather because otherwise there simply might be

¹⁸ https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&lang=en; The ICJ relied on treaty accession numbers as a method of identifying custom in the *Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, 257-258.

¹⁹ Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 Hague Recueil 1, 64-67 (1978).

²⁰ Cassese, *supra* note 6, 12, 13.

²¹ Roger O'Keefe, *International Criminal Law* (OUP), 63.

²² *Ibid* 63, 64.

no criminalisation at all.²³ The already mentioned ambiguities, even contradictions, around distinction and delimitation indicate that the agreement around the list of core crimes may in fact be masking some important uncertainties about inclusion and exclusion.

2. Ambiguities in Defining Core Crimes as International Crimes

Further ambiguities appear in the classification of core crimes as international crimes, with international crimes being the umbrella 'genre' of core crimes. Some conflate core crimes with international crimes,²⁴ but the more common assumption is that the core crimes are a particular set of international crimes. Even at this seemingly foundational dividing line, there are uncertainties and contradictions among the leading voices of ICL.

Robert Cryer distinguishes between domestic crimes and international crimes by referring to the *locus* of criminal prohibition. International crimes are, according to him, crimes whose locus is the international sphere. Even widely accepted norms such as torture, according to Cryer, do not qualify as international crimes if the treaties which have enshrined them are intended for domestic criminal law (echoing Boister's distinction between ICL and TCL). Cryer uses the example of the Torture Convention, which obliges states to domestically criminalise torture, and the Genocide Convention, which provides for genocide to be an international crime.²⁵ Although a seemingly pithy example, it has its flaws, for the Genocide Convention is, as already mentioned above, a so-called suppression convention. Art 5 imposes obligations on states to domestically criminalise genocide.

Rather than focus on the *locus* of prohibition, Cassese refers to wide-spread ratification of human rights instruments to explain what international crimes are. As mentioned above, he views international customary law as the key distinguishing factor. Cassese references the 1945 UN Charter, the 1948 Universal Declaration of Human Rights, the 1950 European Convention on Human Rights, the two 1966 UN Covenants on Human rights, the 1969 American Convention on Human Rights, the UN Declaration on Friendly Relations of 1970, and the 1981 African Charter on Human and Peoples' Right.

²³ O'Keefe, *supra* note 21, 58.

²⁴ See Boister above (*supra* note 14). Robert Cryer claims that there are 'only four clear examples' of international crimes, and that 'there is very considerable agreement about the relevant norms', Robert Cryer, 'International Criminal Law' in Malcolm Evans, *International Law* (3rd ed. OUP) 753, 754.

²⁵ Cryer, *Ibid.*

Echoing the positivist position, Cassese comments defensively: '[t]he values at issue are not propounded by scholars or thought up by starry-eyed philosophers'.²⁶

Articulating yet a further notion of what constitutes an international crime, Kriangsak Kittichaisaree claims that 'international crimes are those prosecuted before an international criminal tribunal, whether *ad hoc* or permanent.'²⁷ This is an expansive reading of international crimes, and somewhat similar to Cryer's jurisdictional dividing line. However, given that the tribunals have far-reaching, and vastly diverging interpretations of international crimes, this also extends the list of international crimes. The Special Tribunal for Lebanon, for example, has jurisdiction over terrorist crimes under Lebanese law. In terms of the substance of an international crime, Kittichaisaree refers to a definition from the Hostages trial, one of the twelve subsequent Nuremberg trials held by the US Military Tribunal. In *re List and Others*, an international crime is defined as 'a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances.'²⁸ The purported distinguishing factor of 'gravity' does not appear to clarify the search. Indeed, as Meg deGuzman observes, 'the theoretical basis and doctrinal contours of the concept remain uncertain'.²⁹

Heller, in a recent article titled 'What is an international crime?' answers the question he poses by stating that an international crime is an act which is *universally criminal under international law*.³⁰ He therefore combines the international law aspect, which distinguishes an international crime from a domestic crime, and the universality aspect of an international crime, which distinguishes an international from a transnational crime. Heller sub-divides further between the direct criminalisation thesis - criminalisation regardless of domestic criminalisation, with the potential of bypassing domestic law - and the national criminalisation thesis - criminalisation because every state is domestically obligated to criminalise. In his opinion, if positivism is to be taken seriously, ICL must

²⁶ Cassese, *supra* note 6, 11.

²⁷ Kriangsak Kittichaisaree, *International Criminal Law* (OUP) 3. Also expressed by Bruno Simma and Andreas Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 (2) *American Journal of International Law* 302, 308.

²⁸ The *Hostages* Trial, US Military Tribunal at Nuremberg, 19 Feb 1948 (1953) 15 *Ann. Dig.* 632 at 636, cited in *ibid*.

²⁹ Margaret M. deGuzman, 'Gravity and the Legitimacy of the International Criminal Court', (2008-2009) 32 *Fordham International Law Journal* 1400, at 1400-1401.

³⁰ Kevin J. Heller, 'What is an International Crime? (A Revisionist History)', (2017) 58 (2) *Harvard Journal of International Law* 353-420.

accept the national criminalisation thesis. Heller thereby grapples with some of the contradictions of international crimes particularly as regards the natural law and positive law amalgamation,³¹ attempting to emphasise a legal-positivist nature of international crimes. The expected result (positive law) thereby seems rather curiously to drive the enquiry.

The uncertainty as to the question of ‘what is an international crime’ has prompted O’Keefe to comment that ‘[t]he approach one adopts to the concept of an international crime is as much a matter of taste as of law’. ‘We know it when we see it’.³² The disagreement around the distinction between core crimes and treaty crimes and around the definition of international crimes interestingly and peculiarly overwhelmingly sways in favour of agreement when it comes to the catalogue of core crimes. Indeed, the disagreement as to *how* core crimes have become core crimes and *why* is generally brushed aside with a mention of the consensus as to the result. The definitions of the atrocity crimes ‘are the result of a consensus of the 160 States that participated in the 1998 Diplomatic Conference,’ states Schabas.³³ Such reference to formal equality hides the unequal political powers, allegiances, and pressure groups at the Rome Conference. Immi Tallgren consequently describes core crimes and international crimes as ‘linguistic phantoms’.³⁴ Indeed, the question of what is core may, at the end of the day, be semantics. After all, there is no question that the crimes of genocide, war crimes, crimes against humanity and aggression are extremely serious.

But can we allow ourselves to be so dismissive of the justifications for the core crimes because the crimes are serious no matter how we categorise them, and because their criminalisation must be ensured? At the very least, the ambiguous nature of core crimes makes the outer boundaries of ICL blurry: One might wonder where international criminal law ends and transnational criminal law begins. As the designation of ‘core’

³¹ Even the most ardent positivist will find it difficult to adhere to legitimation on the basis of legal authority in the face of the looseness with which the maxim *nullum crimen sine lege* was applied at Nuremberg. The so-called ‘Justice Case’ justified the ignoring of the non-retroactivity maxim, after all, on the basis of ‘the moral sense of mankind’. *United States v. Alstötter et. al.*, ‘The Justice Case’, (1951) 3 TWX 954, at pp. 977-8.

³² O’Keefe, *supra* note 21, 55. Introducing the taxonomy ‘crimes pursuant to international law’ instead of ‘international crimes’.

³³ Schabas, ‘Atrocity Crimes’, *supra* note 4, 210.

³⁴ Immi Tallgren, ‘The Voice of the International: Who is Speaking?’ (2015) 13 *Journal of International Criminal Justice* 138.

evokes a centre of most significant towards a periphery of less significant crimes,³⁵ the list of other non-core international crimes must in some form be shaped by their relation to the privileged crimes.³⁶ Indeed, this type of ‘framing’ is also a means of constructing the world in which we live, not only mirroring it.³⁷ Such a line of enquiry will assist in reflecting on what is institutionalised as morally abhorrent and what is not. If we, as suggested by Gerry Simpson, assume that international criminal tribunals *create* histories, then the prioritising of these crimes is important.³⁸

This leads to the concrete question on when and why a treaty crime such as drug trafficking was disqualified as a ‘core’ crime of ICL? The qualifying question becomes more serious in light of the fact that there is, according to Roger Clark, ‘no obvious characteristic’ that renders treaty crimes singularly inappropriate for international adjudication.³⁹ In the absence of an obvious characteristic, an analysis of the historical narration may provide some answers on which crimes are included and which crimes are excluded from this catalogue, and why.

II. Continuities from Nuremberg to Rome

In the widely accepted historical narrative of ICL, a continuity from Nuremberg to Rome is habitually presented,⁴⁰ which is traced through developments from the IMT to the ICC, via the influences of the ad hoc and hybrid tribunals in the intervening period.⁴¹ For example, in a talk commemorating 60 years since the beginning of the Nuremberg trials, then President of the ICC Philippe Kirsch described the ICC as ‘a direct descendant of

³⁵ Robert Cryer makes no such distinction, for him international crimes and core crimes are the same, *supra* note 25.

³⁶ Tallgren, *supra* note 34.

³⁷ Judith Butler, *Frames of War: When is Life Grievable?* (Verso 2010).

³⁸ Gerry Simpson, ‘Linear Law: The History of International Criminal Law’ in Christine Schwöbel (ed), *Critical Approaches to International Criminal Law. An Introduction* (Routledge 2014) 159-179.

³⁹ Roger S. Clark, ‘Treaty Crimes’ in William A. Schabas (ed) *The Cambridge Companion to International Criminal Law* (CUP 2016) 215.

⁴⁰ The trials in Nuremberg and Tokyo, it should be said, were also retrospectively regarded as the apex of a linear history of attempts to instate individual criminal responsibility in the international sphere. John Dugard described the trials as ‘a natural culmination of the pre-war debate over an international criminal court’, John Dugard, ‘Obstacles in the Way of an International Criminal Court’ (1997) 56 (2) *Cambridge Law Journal* 323.

⁴¹ There are other histories going back further than Nuremberg (for example with the proposal of individual accountability by the ICRC in 1872 or the debates about accountability of the German Kaiser after World War I), but if they begin earlier, then they generally mark the Nuremberg trials as ground breaking for the discipline of ICL.

those trials'.⁴² The coming into force of the Rome Statute in 2002 was accompanied by scholarly work setting out the path 'From Nuremberg to Rome: International Military Tribunals to the International Criminal Court'⁴³, and later works such as 'The Nuremberg Military Tribunals and the Origins of International Criminal Law'.⁴⁴ With the activation of the jurisdiction of the crime of aggression at the Assembly of States Parties in New York in December 2017, the 'legacy of Nuremberg' was once more expressly invoked.⁴⁵ Headlines such as 'From Nuremberg to Manhattan' continue the theme of a pathway.⁴⁶

The IMT in Nuremberg is regarded as the 'origin' of both the ICC and international criminal law in general.⁴⁷ The IMT had jurisdiction over (a) crimes against peace, (b) crimes against humanity, and (c) war crimes. Certainly, the trials in Nuremberg resonated beyond the immediate post-war period. Both in efforts to codify a statute of international crimes and in its implementation through a court, the IMT was a point of reference. The 1948 Convention on Genocide laid down genocide as a discrete crime and envisioned the punishment of the crime of genocide by an international court.⁴⁸ The newly created UN International Law Commission took up the issue of creating a Statute for a permanent court among its first tasks.⁴⁹ The 1949 Geneva Conventions added new categories of war crimes, termed 'grave breaches of the Geneva Conventions'. Between 1948 and 1954, a draft Code of Offences against the Peace and Security of Mankind and the possibility of a body which has jurisdiction over the offences was debated at the UN.⁵⁰ The legacy of Nuremberg does not only radiate to an official institutional history (as propounded by Kirsch in his speech),⁵¹ but also in terms of the customary

⁴² Speech by Philippe Kirsch, President of the International Criminal Court, 'From Nuremberg to The Hague. The Nuremberg Heritage: A Series of Events Commemorating the Beginning of the Nuremberg Trials', 19 November 2005, available at: https://www.icc-cpi.int/NR/rdonlyres/08AB9F8F-53A2-4533-BCE0-887419726332/143894/PK_20051119_En.pdf 9.

⁴³ Antonio Cassese, Paolo Gaeta and JRWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), 3 at 18.

⁴⁴ Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (OUP 2011).

⁴⁵ Alex Whiting, 'Crime of Aggression Activated at the ICC: Does it Matter?' *Just Security* (19 December 2017)

⁴⁶ Matt Rhodes, 'The Crime of Aggression: From Rome to Manhattan', December 2017, available at: <https://vimeo.com/244818732>.

⁴⁷ See Heller 2011, *supra* note 44.

⁴⁸ Art. 6 Convention on the Prevention and Punishment of the Crime of Genocide, (9 December 1948), 'or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction'.

⁴⁹ 'The Work of the International Law Commission' (8th ed. UN 2012), available at: http://legal.un.org/avl/ilc/8th_E/Vol_I.pdf.

⁵⁰ Benjamin B. Ferencz, *An International Criminal Court, A Step towards World Peace: A Documentary History and Analysis* (Oceana Publications 1980).

⁵¹ Kirsch 2011, *supra* note 42.

international law created. References to the Nuremberg trials by judges, notably at the ICTY, grounded the work of the Allied tribunal firmly in international criminal law jurisprudence. ‘Courts have consistently cited the NMT [the subsequent US-led Nuremberg trials] judgments and the Law No. 10 when addressing specific crimes against humanity’, observes Heller.⁵²

However, if one lingers awhile on the suggestion from Trinidad and Tobago in 1989 for the establishment of a permanent international criminal court, one is struck by several dischords about this event which jar with the harmonious historical narrative of ICL: There is a dissonance in regard to the subject-matter, namely that the crime of drug trafficking provided the impetus for requests for a permanent court, not one of those crimes later labelled as ‘core’ crimes. The letter to the General Assembly which set out reasons for Trinidad and Tobago’s request made no mention of the legacy of the Nuremberg trials. Moreover, it is unusual that a twin island state in the Caribbean, situated off the coast of Venezuela, would set a path for what would later become a major international institution.

In most accounts of the history of ICL, such an interruption in the natural linear and progressive flow is brushed over as though it were an insignificant blip. But what do we learn if we pay attention to discontinuities? Arguably, the interruptions indicate possible alternative courses for international criminal law. In *The Archeology of Knowledge*, Michel Foucault seeks to demonstrate how the traditional history of ideas places an emphasis on continuities, creating a false sense of coherence. In the desire for unities, totalities, series, and relations, discontinuity was, according to Foucault, ‘the stigma of temporal dislocation that it was the historian’s task to remove from history.’⁵³ The focus on discontinuities does not only reveal a lack of coherence or reveal contingency; it could also reveal a systematic preference or orientation, which privileges some outcomes over others.

III. Discontinuities from Nuremberg to Rome

Apart from Trinidad and Tobago’s request to the General Assembly, I highlight three other discontinuities in the narrative of ICL in general and core crimes in particular.

⁵² Heller 2011, *supra* note 44, 386. Law No. 10 was the occupation government’s legislation to prosecute less significant Nazis.

⁵³ Foucault, *supra* note 11, 9.

These discontinuities relate to Nuremberg and the catalogue of atrocity crimes; discontinuities about the Cold War and its supposed ‘freeze’ of international criminal law activity; and discontinuities about the post-Cold War as a new beginning.

The legacy of Nuremberg is generally considered to lie in the codifying and prosecuting of ‘atrocity’ crime, and therefore of the core crimes; however, it is worth re-emphasising that the ‘centrepiece of the Nuremberg prosecutions was the “crime against peace”.’⁵⁴ Aggressive war, not war crimes, crimes against humanity or genocide, was the criminalised act and so, in the words of David Luban, the ‘decisive legal achievement lay in recognizing the category of *crimes against peace*’.⁵⁵ Although the crime of aggression is now officially part of the jurisdiction of the ICC, albeit in a narrow sense, the public imagination of the core crimes concerns instances of mass organised killing, often on the basis of ethnicity.⁵⁶ Its hugely symbolic position as the point in history which legitimates the international criminal justice project is indeed marked by the short-hand reference of simply ‘Nurmberg’; the trials have become so iconic that they require no further reference other than the city in which they were held.

The apparent linearity from Nuremberg to Rome may also be unsettled by a consideration of Nuremberg’s seeming retrospective ‘judicialisation’. Apart from persistent advocates like Ben Ferencz and Cherif Bassiouni, Nuremberg was in the following decades generally viewed as *sui generis* rather than as the ‘watershed moment in the development of ICL’.⁵⁷ Speaking from the position of a long-standing career in international law, Anthony D’Amato remembers that when he was in law school in the 1960s ‘the faculty, almost without exception, regarded the Nuremberg trials as a political aberration, as not “legal”’.⁵⁸ Writing in 1990, he comments on the changed legal culture: ‘Nuremberg stands for the primacy, albeit in the limited areas of warfare and genocide, of individual rights over the state’s.’⁵⁹ With this, D’Amato is describing the retrospective legitimation of the Nuremberg trials as legal. That which had made Nuremberg an

⁵⁴ William Schabas, ‘Introduction’ to W. Schabas (ed), *Cambridge Companion to International Criminal Law* (CUP 2016) 6.

⁵⁵ David Luban, ‘The Legacy of Nuremberg’ (1986), *Report from the Centre for Philosophy and Public Policy* 9.

⁵⁶ One might speculate here whether this is informed by the jurisdiction of the ICC, which in its first fifteen years has prosecuted so-called atrocity crimes and not the crime of aggression.

⁵⁷ Beth van Schaak and Ron Slye, ‘A Concise History of International Criminal Law’ in van Schaak and Slye (eds), *International criminal law: essentials* (Aspen Publishers 2009) 27.

⁵⁸ Anthony D’Amato, ‘International Law in the Curriculum’, (1990) 2 *Pace Yearbook of International Law*, 83, 89.

⁵⁹ *Ibid.*

‘aberration’, namely individual criminal responsibility, had quite extraordinarily become part of the accepted legal and public discourse.

Writing in 1971 in the wake of the Vietnam War, Richard Falk’s account of Nuremberg is similar to d’Amato’s. Falk opens his observations by stating that ‘people are skeptical about the moral stature of international law in the Nuremberg era.’⁶⁰ Falk, an outspoken objector of the Vietnam War, considers questions of war crimes and individual responsibility presented by American involvement. It is notable that Nuremberg is presented in the context of the moral order it was recognised to be at the time (in the 1970s), namely as labeling aggressive war as illegal and as giving rise to individual criminal accountability.⁶¹ We find in Falk’s account an understanding of international crime drawn directly from the Judgment of Nuremberg, which states that the initiation of an aggressive war is the ‘supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.’⁶² This emphasis on aggressive war is quite a different emphasis on international crime to the one we are accustomed to today, which generally foregrounds genocide, war crimes, and crimes against humanity. Particularly interesting for our analysis of discontinuity is that Falk expresses disappointment at the *failure* of Nuremberg to act as precedent. Enumerating the various wars by the victorious powers of the Second World War between 1945 and the early 1970s, Falk laments: ‘The basic international reality, tragic from the perspective of Nuremberg, is that world public opinion, at least as it has crystallized in the setting of the United Nations, neither expects nor insists upon carrying forward the Nuremberg tradition.’⁶³

These reflections suggest that the construction of Nuremberg and developments since have retrospectively been altered to highlight continuities and to erase discontinuities. Recognising that Nuremberg ‘stands as a nostalgic memory in the minds of international criminal lawyers’, Frédéric Mégret invites a view of Nuremberg as contextual and specific rather than part of a narrative of international legal and institutional destiny.⁶⁴ In its specificity, according to Mégret, Nuremberg was a liberal-legal response in the very place

⁶⁰ Richard Falk, ‘Nuremberg: Past, Present, and Future’, (1971) 80 *The Yale Law Journal* 1500.

⁶¹ *Ibid* 1505.

⁶² International Military Tribunal (Nuremberg), Judgment of 1 October 1946, *The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany* 25.

⁶³ Falk, *supra* note 60, 1524.

⁶⁴ Frédéric Mégret, ‘Nuremberg and the Contemporary Commitment to International Criminal Justice’ *Völkerrechtsblog*, 22 February 2017.

where there had been a specific crisis of liberal-legalism.⁶⁵ The specificity of Nuremberg therefore disrupts the universal legal-moralist language about Nuremberg presented today.

Discontinuities can also be found in the Cold War narrative of ICL, described by influential scholars as ‘The Cold War Freeze’,⁶⁶ or ‘The period of stagnation’.⁶⁷ The Cold War period is generally understood, in the words of Kirsch again, as leaving ‘the Nuremberg legacy unfulfilled’⁶⁸. It is seen in the context of an excess of politics and a dearth of law. International relations are described as stagnating during the Cold War and only reinvigorating with the success of the liberal ideology over the socialist ideology with the fall of the Berlin Wall in 1989. In fact, the 1980s were a period of great activity in relation to the conceptualisation and codification of international crimes. Only that the crimes in question related to what we would *today* refer to as transnational crimes but were *then* still international crimes – among them crimes relating to drug control.⁶⁹

While the world’s first international drug control treaty, the International Opium Convention, was passed in the Hague in 1912,⁷⁰ the most influential treaties created with the Assistance of the UN were the 1961 Single Convention on Narcotic Drugs, the 1971 Single Convention on Psychotropic Substances, and the 1988 UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The treaties were responses to the growing demand for cannabis, cocaine and heroin for recreational purposes in the Western world. Higher demand increased the cultivation, manufacture and distribution of cannabis, coca and opium. The Preamble of the 1988 Convention acknowledges illicit trafficking as an ‘international criminal activity’ in the context of international cooperation.⁷¹

In the dominant narrative, the 1990s are regarded as the period of the ‘rebirth’ of international criminal law. In contrast to the dominant narrative of rebirth, the

⁶⁵ Ibid 4.

⁶⁶ Van Schaak and Slye (*supra* note 57) 38.

⁶⁷ Cherif Bassiouni, ‘Revisiting the Architecture of Crimes against Humanity’ in Leila Nadya Sadat (ed), *Forging a Convention for Crimes against Humanity* (CUP 2011) 52.

⁶⁸ Kirsch (*supra* note 42) 4.

⁶⁹ There was activity around conceptualising other international crimes, importantly including The Convention on the Suppression and Punishment of the Crime of Apartheid (1973).

⁷⁰ International Opium Convention, Jan. 23, 1912, 8 L.N.T.S. 188.

⁷¹ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 https://www.unodc.org/pdf/convention_1988_en.pdf

international drug control agenda as part of an international criminal law narrative came to its demise during this time. Needless to say, this coincided with a demise of political and juridical will to pursue treaty crimes more generally as a matter of international legal jurisdiction. It is instructive to follow the course of the crimes involving the illicit traffic in narcotic drugs and psychotropic substances in order to trace how these came to be pushed from the top of the agenda to literally the bottom.

We may recall that in 1989, following Trinidad and Tobago's request to the General Assembly, drug trafficking was considered so important as to propel the establishment of an international criminal court back onto the UN agenda. By 1994, when the International Law Commission presented a Draft Statute for an International Criminal Court, drug trafficking was one among other crimes.⁷² The preparatory consultations on the 1994 Draft Statute reveal that the ILC envisioned international crime and future ICL prosecutions to include a more expansive catalogue, based on what would later be called 'core crimes' and 'treaty crimes'. There was already a distinction, however, between crimes of an international character and crimes under suppression conventions. Although the latter were at this stage to be included in the statute, a clear expressive difference was beginning to emerge. The prohibition of genocide, although also acknowledged by the ILC as technically an act criminalized in a suppression convention, was described as having such 'fundamental significance' as to provide it with exceptional status.⁷³ The 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, on the other hand, was used to exemplify suppression treaties which present a jurisdictional 'problem'.⁷⁴ The ILC's Draft Code of Crimes of 1996 ultimately omits crimes of illicit traffic in narcotic drugs altogether, with an explanatory note that consultation would continue as regards both this crime and the crime of willful and severe damage to the environment.⁷⁵

⁷² Draft Statute for and International Criminal Court with commentaries 1994, Report of the International Law Commission on the work of its forty-sixth session http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1994.pdf.

⁷³ At this stage in the drafting, it was suggested that the new Court should have 'inherent jurisdiction' over the crime, regardless therefore of consent of the relevant state. This was to reflect the idea of the Genocide Convention itself, which attributes inherent jurisdiction to the ICJ. Commentary *Ibid*, 36, 37.

⁷⁴ The 'problem' referred to here concerns the fact that much of the criminalized conduct is not deemed of international concern. Commentary *Ibid*, 37.

⁷⁵ Report of the International Law Commission on the work of its forty-eighth session 6 May-26 July 1996, Official Records of the General Assembly, Fifty-first session, Supplement No. 10. UN Doc. A/51/10. http://legal.un.org/ilc/documentation/english/reports/a_51_10.pdf P. 16

Following the ILC's draft statute, the General Assembly created the Preparatory Committee on the International Criminal Court, which was tasked with resolving some of the more controversial points of the Draft Statute. This Draft Statute was then presented to the delegates assembled in Rome in 1998. At the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, drug trafficking crimes were still on the agenda - just one month before the adoption of the final document. The 6th Meeting, held on Thursday 18 June 1998, proposes crimes involving the illicit traffic in narcotic drugs and psychotropic substances under the Draft Statute.⁷⁶ Bundled together with the highly contentious question on the inclusion of the crime of aggression, and other treaty crimes, very few states spoke in favour of including drug trafficking crimes in the Draft Statute. Delegates justified their objection to including these crimes with mentioning fears of overburdening the fledgling court, the premature nature of these discussions, and that they would prove a distraction to other (more important) crimes. Only the delegates of Trinidad and Tobago, Costa Rica, Thailand, Sri Lanka and Algeria were outspoken in their support of inclusion. They were up against the powerful voices of France, Germany, India, Iran, Russia, Saudi Arabia, and the UK, amongst others.⁷⁷ In the final draft, the crime had subsequently disappeared.

In the final marginalisation, quite literally, of the crime, one finds it in Annex I of the Final Act, alongside other treaty crimes, in which it is *recognised* 'that the international trafficking of illicit drugs is a very serious crime, sometimes destabilizing the political and social and economic order in States'. *Regret* is expressed that 'no generally acceptable definition of the crimes of terrorism and drug crimes could be agreed upon for the inclusion, within the jurisdiction of the Court,' And finally, it is *affirmed* that the Statute provides a mechanism for review.⁷⁸ And in this way, the crimes were shelved. As Kiefer noted:

'There is some measure of irony in this result: the impetus for the movement to create the ICC was the desire to create an

⁷⁶ Official Records (*supra* note 3) 171.

⁷⁷ *Ibid*, Part 2. Jurisdiction, Admissibility and Applicable Law, p.171-179.

⁷⁸ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15-July 17, 1998, *Final Act*, Annex I (E), U.N. Doc. A/CONF.183/10 (July 17, 1998).

http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v1_e.pdf

international court to try drug traffickers, and yet, the result of the movement, the Rome Statute, deprived the Court of jurisdiction over drug trafficking offenses.⁷⁹

In the end, Trinidad and Tobago abstained from voting to adopt the Rome Statute. In the contemporary narrative, the success of the negotiations of Rome are celebrated. An evocative moment in such celebration is the film footage of the signing, showing delegates embracing, clapping rhythmically.⁸⁰ In this narrative of success, the new and residual discontentment of some delegates is edited out.

Certainly, in regard to recognising drug trafficking as an international crime, there are relevant questions which arise: Whether and how evidence could be obtained; whether cooperation among states and enforcement agencies would be a problem; whether individual criminal accountability really would deter continued trafficking; whether there would be sufficient resources; which countries to focus on; not to forget the question whether criminalization is indeed the correct policy. However, these are questions which apply to all current core crimes, and any future additions. Notably, the crime which was deemed important enough to revive a legal and political process committed to an international criminal court, should, in less than a decade, be excluded from the list of international crimes altogether.

Not only was the post-Cold War political and juridical landscape a time of demise of treaty crimes, the 'newness' narrative can also be disrupted with a view to *continuities*. Whilst ideological barriers between the Permanent Five of the Security Council had seemingly been overcome in the 1990s, the turn to universalism and institutionalism was based on the old norms of international law. The negotiations leading up to Rome are to be understood in an international legal and political context which deepened and consolidated economic liberalisation. In addition, the US's position as global hegemon, a path already paved during the Cold War, was to solidify in the 1990s. Against this background, the 1990s provided a renewed legal and moral authority to post-World War II trial and reconstruction efforts. Continuity and solidifying of old power-configurations is evidenced in what Richard Falk already foresaw in the 1970: that the crime of

⁷⁹ Kiefer (*supra* note 12) 165.

⁸⁰ See the International Criminal Court – Institutional Video (2014), at <https://www.youtube.com/watch?v=1K4Y8iqLzxQ&t=118s>

aggression should remain unfulfilled due to the hypocrisy of Nuremberg; that the powerful states are not themselves subjected to the liberal-legal order which they played such a key role in constructing.

When commenting on the exclusion of some and inclusion of other crimes, Roger S. Clark observes that '[s]ometimes international drafting partakes of the random'.⁸¹ However, the historical analysis above has shown that inclusions and exclusions are not random. Instead of highlighting alternative linear paths, say an ICC of economic crimes, the discontinuities highlight contradictions. And yet despite these contradictions, a particular path was more likely to be taken than others, not in a random way, but in a predictable way.⁸² These blips in the narrative reveal what Susan Marks has termed 'false contingency' of the historical narrative of the core crimes.⁸³ The concept of false contingency tells us that the course of events is neither entirely fixed nor entirely open. But there are certain *orienting* factors in how change is shaped, which must be placed in the context of present circumstances, given and inherited.⁸⁴ The following section illuminates these orienting factors further.

III. Biases of the Core Crimes

Although often deemed as 'naturally' the most serious international crimes, the previous sections have revealed that the core crimes have been, in fact, been privileged in their status vis-à-vis other serious crimes. I identify three interrelated factors at play in the designation of genocide, war crimes, crimes against humanity and the crime of aggression as the four 'core' crimes – at the exclusion of other contenders for this status.

1. *Civilisation Bias*

First, although a concept which is now 'mostly considered an embarrassing relic of a long-gone era',⁸⁵ the crimes include a civilisation bias. Despite formal equality of states under international law, a distinct North-South division continues to be displayed in terms of those who benefit from international institutions and norms. Historically, this

⁸¹ Clark (*supra* note 39).

⁸² As regards predictability of change, see Marks's notion of 'false contingency': Susan Marks, 'False Contingency' (2009), 62 (1) *Current Legal Problems* 1-21.

⁸³ I thereby depart from Foucault and place history within its material setting. *Ibid.*

⁸⁴ Marks references here Karl Marx, 'The Eighteenth Brumaire of Louis Bonaparte' in T Carver (ed) *Marx: Later Political Writings* (CUP 1996) 32.

⁸⁵ Ntina Tzouvala, 'Civilisation' in Jean d'Aspremont and Sahib Singh (eds.), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar 2018).

inequality became institutionalised and normalised during the colonisation of much of the Latin Americas, Africa, and Asia by European colonial powers. Colonisation not only meant the loss of land rights and many other rights, it also meant labour and land exploitation for the enrichment of the colonial powers. It is well known that much of the justification for these impositions and exploitations were performed in the name of a ‘civilising mission’. International law played an organising, legitimising and juridifying role.⁸⁶ Despite the events of de-colonisation and despite the relative decline of the concept of ‘civilisation’, many of these impositions and exploitations remained firmly in place. Hegemony through violence was replaced through softer means in the form of trade deals, the putting into place of a racialized elite, and through debt and aid dependencies imposed and legitimated by international financial institutions.⁸⁷ In the Gramscian sense, this type of hegemony is imposed not through violence but through consent.⁸⁸ Such consent may be evidenced through the signing of multilateral or bilateral agreements which ultimately reify inequality. The idea of a divide between the uncivilised, the civilising, and the civilised as a stagist progression has, as recently argued by Ntina Tzouvala, been replaced by notions of development and progress.⁸⁹ Crucially, becoming civilised is constructed as attainable, according to an understanding of the future overcoming the past.

The linearity of the progress narrative has already been mentioned above, but it is in this context of civilisation where its ideological purpose becomes evident. The progress narrative of ICL states that Europe has a ‘dark history’, one which it learned from as well as overcame. The 1930s as the darkest decade of all saw a gruesome World War, racial hatred leading to genocide, the zenith of fascism, as well as the Great Depression.⁹⁰ In ICL’s narrative, the light of justice won over the darkness of barbarism. Nuremberg’s story from host city for Nazi rallies to host city for the trials could not be more apt. In

⁸⁶ The Mandate System of the League of Nations most explicitly performed the ‘civilising mission’. See Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005) 115f.

⁸⁷ Among the wealth of literature, see on Gramsci and international relations, Robert W. Cox, ‘Gramsci, Hegemony, and International relations: An Essay in Method’ 12 (2) *Millenium* (1983) 162-175. On hegemony as a concept in international law see Robert Knox, ‘Hegemony’ in Jean d’Aspremont and Sahib Singh (eds.), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar 2018).

⁸⁸ Antonio Gramsci, (Quentin Hoare, Geoffrey Nowell-Smith, ed., trans.) *Selections from the Prison Notebooks* (Lawrence & Wishart 2005, first published 1971)

⁸⁹ Tzouvala, *supra* note 85, drawing on the distinction between vocabulary and grammar of international law set out in Martti Kosenniemi, *From Apology to Utopia* (CUP 2005). See also Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of of Universality* (CUP 2011).

⁹⁰ This theme is maintained in Zara Steiner, *The Triumph of the Dark: European International History 1933-1939* (OUP 2011).

this story, barbarism lives on in other parts of the world, which must follow the European example to overcome darkness. This narrative, which sits alongside the very real concentration of ICC trials in Africa, maintains a North-South divide in ICL. It is a reproduction of colonial logic. The designation of the main characters of ICL, as victims, perpetrators and legal representatives, sits comfortably within the civilisation bias: Perpetrators are deemed savages or warlords, their victims as entirely innocent (and lacking the agency), and the legal representatives are the muscular legal humanitarians of the light.⁹¹ The racialisation of both perpetrators and victims is reminiscent of the simplistic notions of backwardness and savagery associated with the uncivilised in the 19th century.

The relationship between drugs and the criminal justice system is, in contrast, arguably more complex. To begin with, the line between the licit and the illicit market are often blurry.⁹² Moreover, issues relating to the criminalisation of dealing in drugs, of using drugs, crimes committed under the influence of drugs, turf wars of drug gangs, acquisitive crime by dependent users, are all complex matters. Clearly drug crimes are committed both in the Global North and the Global South. Whilst large-scale cultivation mainly occurs in the Global South, distribution and consumption occurs across the world. The opioid crisis in the US, for example, is well-documented, with overdoses being the leading cause of death for Americans under 50 years old.⁹³ If drug trafficking were to be recognised as a crime by the ICC, international crime would, with some important qualifications, be – quite literally - back on the Western map. Linked to this is the fact that the prosecution of drug-related crimes tends to force structural problems to the surface. The close connection between drugs and poverty and unemployment and social exclusion necessitate investigations of inequality through institutions, law, and processes.

That is not to say that a civilizational bias does not exist as regards drug crimes. Arguably, the isolation and confinement of drug crimes to particular spaces and groups

⁹¹ For a critical analysis of the image of victims of international crime, see Christine Schwöbel-Patel, 'Spectacle in International Criminal Law: The Fundraising Image of Victimhood' (2016) 4(2) *London Review of International Law* 247-274. For a discussion on the complexities of victimhood, see Mark Drumbl, 'Victims who victimise', (2016) 4(2) *London Review of International Law* 217-246 and Erica Bouris, *Complex Political Victims* (Kumarian Press 2007).

⁹² Victims of drug use are often those who has mis-used licit drugs.

⁹³ 'Provisional Drug Overdose Death Counts', National Center for Health Statistics, available at: <<https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm>>.

recreates a civilizational narrative. Certain drugs, such as crack, are considered to be consumed by the less civilised (often black or racialised communities) whilst cocaine, for example, is socially and legally constructed as a vice or excess by its wealthier users.⁹⁴ So whilst drug use is to be found in all classes (one might think of the drugs scandal of the UK House of Lords, for example), criminalisation overwhelmingly affects racialised, lower class and poor communities. The racialised and gendered stereotypes of drug dealers in the popular imaginary (sparked by punitive criminal policies which target specific individuals), also arguably recreates a civilizational narrative of barbarism.⁹⁵ However, here too contradictions appear, for example, as regards the broad-brush criminalisation of distribution and the selective legalisation of consumption. Overall, the complicated and contradictory nature of drug-related crimes and criminalisation sit uneasily with the ICL progress narrative and would unsettle the moralistic higher ground attained by Western countries in regards to core crimes.

2. *Political-Economic Bias*

It will already have become clear that the civilisation bias outlined above is closely linked to a political-economic bias. A political-economic bias is given if there are material benefits to be gained through deeming certain crimes as ‘core’ vis-à-vis others. For example, this might be the case if there is a correlation between those who fund the project of international criminal justice and those who benefit from it. This correlation can also be described as upholding the *status quo* and the global hierarchies and inequalities which come with it.

Despite the proclaimed dedication to fighting drug trafficking, the 1988 Convention as the *status quo* of transnational crime tends to benefit the interests of powerful states while creating burdens for weaker states. Inequalities are sustained and created in several ways: First, the Convention includes provisions to either extradite or try offenders (*aut dedere aut judicare*), benefiting those states who have the resources to make the choice. Prosecuting drug barons, who can afford impressive legal defences, and keeping bribery and influencing at bay is a greater burden for those who have empty state coffers, where gathering evidence is expensive and salaries are low. Poorer states not only lack resources

⁹⁴ Cocaine is the same drug as crack cocaine, but more expensive and pure. Many thanks to Randle DeFalco for pointing me in the direction of this necessary qualifications, particularly for the US context.

⁹⁵ In the US context, the ‘enemy’ of the war on drugs was constructed as coming from South America. See Curtis Marez, *Drug Wars: The Political Economy of Narcotics* (University of Minnesota Press, 2004) 4.

for complex trials, they are generally less active in requesting extraditions.⁹⁶ A further means of protecting powerful interests is in the Convention placing those involved in cultivation, production, and trade of narcotic drugs and psychotropic substances outside the law, i.e. the ‘small fry’ as opposed to the ‘big fish’ of the drug trade. This provides a means of impunity for those entangled in affairs of the state. Indeed, the economics of drug criminality tends to uphold income disparities. Naturally, there is much money to be made from drug trafficking and, it does not really need spelling out, addicts are the best customers, searching out the commodity regardless of criminalisation. Drug trafficking in these terms is a form of exploitation, particularly of those already living in poverty, and its prosecution is inconsistent, with many voicing concerns over the racialized form of criminality relating to drug crimes.⁹⁷ Interested in such economics of drug criminality, Foucault observed how in the 1960s the policies of controlling and dismantling the refining networks and controlling and dismantling the distribution networks increased the unit price, favouring and strengthening the monopoly or oligopoly of some big drug sellers, traffickers, and big drug refining and distribution networks.⁹⁸ Arguably, this is an extreme case of monopoly capitalism, where those owning the biggest means of production are shielded by impunity and small-scale competitors are criminalised. Indeed, it merits emphasising that the global drug market is far more lucrative *because of* its illicit nature. The impunity of the rich and the criminalisation of the poor in the context of a global exploitative economy around desirable resources arguably finds parallels in the structures of debt imposed on countries in the Global South in order to forcefully implement interests of the Global North. Not to speak of using combatting drug trafficking as a justification for military intervention, as was the case with the US invasion in Panama in 1989.

During the drafting negotiations of the nascent Rome Statute, Dugard already notes that the principle reason for exclusion of the treaty crimes from the Draft Code were not those officially voiced (that they did not qualify as customary international law, and that they would overburden and trivialise the court), but rather the main reason for resistance ‘is that powerful states prefer the present arrangement under the treaties’.⁹⁹ Generally, the

⁹⁶ Boister, 1998, (*supra* note 14), 36.

⁹⁷ Frédéric Mégret and Randle DeFalco, ‘The Invisibility of Race at the ICC: Lessons from the US Criminal Justice System’ (forthcoming, draft on file with the author).

⁹⁸ Michel Foucault, (Graham Burchell, Arnold Davidson, ed., trans.) *The Birth of Biopolitics, Lectures at the Collège de France, 1978-1979* (Palgrave 2008) 257, 258.

⁹⁹ Dugard, (*supra* note 40) 334.

states which are the largest financial contributors to the international criminal justice project have a greater interest in the punishment of ‘war-lords’ than they do in the punishment of those pulling the strings of the illicit drug trade (‘drug lords’ or financiers of money laundering, ‘Wall-Street-lords’). Whilst the criminalisation of war-lords tends to localise conflict, the money flows of drug-lords and financiers tends to expose global capital flows which benefit the richer states. Those benefiting from chains of exploitation unquestionably attempt to maintain the *status quo*.¹⁰⁰

We see then in the civilizational bias and in the political-economic bias moments of complicity, where international law is serving the interests of some over others. Rather than being overt moments of discrimination or domination, international law provides legitimacy in the name of humanitarianism. Much of the enablement and hiding of complicity occurs, as I argue in the following section, through a politics of distraction.

3. *Aesthetical Bias*

The politics of distraction is performed through an aesthetical bias. By focusing on direct physical violence, with its casualties and gore and seemingly clear distinctions between victims and perpetrators, the ICC, and other tribunals, are arguably arresting the attention with physical violence and diverting it away from structural inequalities.¹⁰¹ Considering the aesthetics of the core crimes is a means to question the way in which such crimes are perceived. An enquiry into aesthetics and law foregrounds questions on constructions of law’s space, law’s language, law’s signs, and law’s images. Aesthetics is therefore not simply about beauty or about what we see; rather aesthetics is to be understood as the ‘formalisation’ of experience.¹⁰² In other words, aesthetics concerns the frame for common sense; with common sense denoting the social relation between sense/experience and meaning.¹⁰³ A crucial question in thinking about experiences which formalise our common sense pertains to the *dominant* aesthetic: What is the usual, (stereo)typical, habitual way of experiencing core crimes in international criminal law?¹⁰⁴

¹⁰⁰ Susan George, *How the Other Half Dies. The Real Reasons for World Hunger* (Rowman & Littlefield).

¹⁰¹ On the condition of international law as a discipline of crisis, see for example, Hilary Charlesworth (2002) 65 *Modern Law Review* 377-392.

¹⁰² Jacques Rancière, (Gabriel Rockhill, ed.) *The Politics of Aesthetics* (Bloomsbury 2013)

¹⁰³ *Ibid.*

¹⁰⁴ These questions are dealt with in depth in Christine Schwöbel-Patel and Robert Knox (eds), *The Aesthetics and Counter-Aesthetics of International Justice* (forthcoming 2019).

The core crimes in their predominant understanding privilege a certain type of spectacular crime; in O’Keefe’s words ‘we know it when we see it’.¹⁰⁵ Certainly the public perception of core crimes is informed by gruesome events etched into the mind’s eye and evoked by place names such as Auschwitz, Srebrenica, Rwanda. This public perception cannot simply be attributed to a sensationalist media but is regularly invoked and reinforced by international criminal tribunals. One might think of the ICC’s construction of perpetrators as ‘war-lords’ and brutal leaders as exemplifying the distancing which takes place through visual and discursive techniques. The racialised, hyper-masculine, and violent portrayal of perpetrators of international crimes shifts the imagination of atrocity towards physical violence and away from other forms of violence such as the white-collar-crime of drug money laundering, or structural violence such as poverty, which is perpetuated in drug economies.

The distraction afforded by the spectacle of violent crime means impunity for what Rob Nixon has termed ‘slow violence’. With this, he means ‘disasters that are slow moving and long in the making, disasters that are anonymous and that star nobody, disasters that are attritional and of indifferent interest to the sensation-driven technologies of our image-world’.¹⁰⁶ Although the ICC’s Al-Mahdi case, which concerned cultural heritage crimes, and the Office of the Prosecutor’s stated intent to pursue land-grabbing and environmental crimes may see a loosening of this grip on physical violence, there remains a distinct privileging of ‘fast’, spectacular and physical violence crimes. Such prioritising is evident in the Trial Chamber’s own words, stating that property crimes ‘are generally of lesser gravity than crimes against persons.’¹⁰⁷

Much of the legitimisation of the 1993 establishment of the ICTY, for example, was aesthetically positioned with reference to the 1945-1946 Nuremberg trials. The circulation in the Western media of images of Bosnian Serb ‘concentration camps’ put ethnic cleansing and mass atrocity back on the agenda. What one might call the ‘legitimation aesthetics’ for the tribunal echoed memories of Nuremberg in numerous ways: The photographs of ethnic cleansing and mass graves were black and white (although colour photography had long been dominant), and the rhetoric was one which explicitly referred to the International Military Tribunal.

¹⁰⁵ O’Keefe, (*supra* note 21) 55.

¹⁰⁶ Robert Nixon, *Slow Violence and the Environmentalism of the Poor* (HUP 2011) 3.

¹⁰⁷ *The Prosecutor v Ahmad al Faqi Al Mahdi*, 27 September 2016, ICC-01/12-01/15, para 77.

The illicit drug trade, in contrast, neither visually produces the kind of victims which immediately evoke compassion (and therefore donors), nor does it allow the simple exercise of categorisation of victim and perpetrator. Addicts tend to be both victims and perpetrators, as do dealers. Those involved in the cultivation of drugs are often both perpetrators in the supply-chain as well as victims of it too, at the very least in the exploitation of their labour. As mentioned above, the criminalisation of drug trafficking is exceedingly complex. And yet the complexity serves the interests of those in power as it enables the blurriness of accountability, the laundering of drug money, and a penal system which hides the complicity of the state and its elites.

The distraction of spectacle not only suits the powers who might be vulnerable to the criminalisation of ‘slow violence’; it also suits the interests of the international criminal justice project itself. If we understand the ICC as placed within its own market, what I call ‘the global justice sector’, we find that simple and violent messages trump complex stories of complicity and entanglement.¹⁰⁸ There are, in other words, competing understandings of global justice all of which claim universality or at the very least supremacy over other meanings. This competition is not simply one of morals, of the supremacy of intellectual thought; it is a material competition. For with the competition for the meaning of global justice comes the competition for prestige, institutions, donations, students, activists, officials, policy-makers, book deals. Of note here is that the disciplinary distinction between international criminal law and transnational criminal law, advocated by the most well-known contemporary scholar of transnational criminal law. Boister’s article, published in the year of the coming into force of the Rome Statute, seemingly performs a particular politics of expertise, setting out clear distinctions between competing global justice actors.¹⁰⁹

The civilizational bias, the political-economic bias, and the aesthetic bias are interconnected and mutually reinforcing. Tropes and images of racialization, barbarism, backwardness, and economic marginalisation in the global order have organising effects on which crimes are considered as ‘core’. Such biases also have material-distributive effects, ultimately benefiting economically powerful states and individuals over others.

¹⁰⁸ Christine Schwöbel, ‘The Comfort of International Criminal Law’ (2013) 24(2) *Law and Critique* 169-191

¹⁰⁹ Boister, (*supra* note 14).

Conclusion

The core crimes of international criminal law capture some of the greatest concerns about human misconduct. And yet, ambiguities around the definition and delimitation of the core crimes of international criminal law raise questions regarding the seeming overwhelming agreement on the catalogue of core crimes. With a focus on discontinuities, I have sought to highlight that the catalogue of core crimes is not necessarily based on an inherent quality in the crimes themselves but rather is to be understood as part of international law's linear progress narrative. Indeed, the catalogue of core crimes is far more contested than this linear progress narrative would have us believe. The retrospective legitimation of this path and the systematic editing of discontinuities and ruptures therefore reveals important biases. Following the story of drug trafficking as international to transnational crime reveals both discontinuities as well as continuities which unsettle the habitual historical narrative from Nuremberg to Rome. The crime of genocide, war crimes, crimes against humanity, and aggression are then inhabited by three interconnected biases. The civilizational bias, the political-economic bias, and the aesthetical bias all play a critical role in retaining rather than disrupting given power structures, sustaining and stabilising hegemony.

Such currents of stabilisation on the one hand and destabilisation on the other offer a wider view onto similar trends within the international criminal justice system as a whole. While seemingly stable, there are increasingly destabilising currents. The more the ICC is revealed as playing a contributing role in global economic inequality, either knowingly or unknowingly, the more destabilising currents are likely to arise. Such destabilisation may take place on various fronts; it may involve a demand for investigating economic crimes, it may concern the unwavering questioning of selectivity, or it may be a more radical questioning of the utility of the system itself. It is clear that the core crimes of ICL lie at the heart of the broader international criminal justice project and must therefore be questioned, if not destabilised.