Making crimes mean: a normative analysis of the acts that constitute international crimes

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CHAPTER 1. THEORETICAL FRAMEWORK

Having sought to demonstrate how it may be possible to understand many of the criminal acts that constitute international crimes in more multi-dimensional terms than the normative accounts outlined in the introduction to this thesis suggest, this chapter sketches a theoretical framework within which the normative dimensions of these individual acts are examined in this study. This theoretical framework is rooted in a Durkheimian conception of the co-constitutive relationship between criminal law and society. It advances the argument that the normative dimensions of these individual criminal acts are best understood from a constitutive rather than a declarative perspective. The first section of this chapter seeks to bring together this Durkheimian sociological approach to criminal law with elements of the philosophy of criminal law developed at the domestic level, to highlight the particular relevance of understanding the normative dimensions of crimes and criminalisation at the international level in constitutive, politically productive terms.

On this basis, the second section of the chapter goes on to advance a practice-based approach to conceptualising the normative meaning attached to the criminalisation of particular acts of violence in international criminal law, which draws on expressive and discursive approaches to (international criminal) law and the growing concern with the representational facets of international criminal justice. Conceptualising the normative dimensions of the individual criminal acts in this way as a process of construction and meaning making, this section proposes an approach which centralises the narratives and discourses that emerge around particular crimes as central to how they are given normative content, or 'made to mean'[1], in practice. Lastly, the final section of the chapter builds on this theoretical framework to outline the methodological approach which is applied to the analysis of each of the crimes discussed in the following chapters from this theoretical perspective.

1. International criminalisation as constitutive process

In terms of its history, international criminal law has been described as 'essentially reactive'[2] in the sense that its evolution has been driven not through the pursuit of particular policy prescriptions but through responses to particular events. This has meant that the development of international criminal law has not taken place in a 'linear, cohesive, consistent, or logical fashion.'[3] As a category that has in this way

[1] Nesam McMillan, *Imagining the International: Crime, Justice, and the Promise of the Community* (Stanford University Press 2020), 11.
[2] Mark Drumbl, 'Introduction to International Criminal Law by M Cherif Bassiouni', (2005) 99 *American Journal of International Law*, 289.
[3] M. Cherif Bassiouni, *Introduction to International Criminal Law* (Martinus Nijhoff 2014), 28.

'grown out of ad hoc creation and application in response to specific crises'[4], Sarah Nouwen has argued that it may be challenging to identify in the concept of international crime 'an essence that it may never have had.'[5] Recognising the nature of international criminal law, and the crimes that it has codified, as in this way reactive and contingent brings to the fore how international criminal law is inherently 'socially, politically, historically, and legally located and produced.'[6] This conception of international criminal law reflects a central idea in the sociology of crime and deviance; that crime is socially constructed and is constituted through social processes. Such an understanding of crime has some of its historical roots in a Durkheimian conception of the relationship between criminal law and society.

a. Durkheim and the productive politics of criminal law

Durkheim conceived of criminal law as a manifestation of a society's collective consciousness, which he defined in terms of 'the totality of beliefs and sentiments common to the average members of a society.'[7] In Durkheim's view, crime 'disturbs those feelings which in any one type of society are to be found in every healthy consciousness.'[8] A crime therefore consists fundamentally of 'an act contrary to strong, well-defined states of the common consciousness.'[9] Understanding criminal law as emanating in this way from a collective consciousness, Durkheim did not approach crime as an intrinsic quality of a certain category of actions. Instead, he articulated the relationship between crime and the collective consciousness as one where collective sentiment 'far from deriving from the crime, constitutes the crime.'[10] Durkheim for this reason argued that 'we should not say that an act offends the common consciousness because it is criminal, but that it is criminal because it offends that consciousness. We do not condemn it because it is a crime, but it is a crime because we condemn it.'[11]

Durkheim's articulation of the relationship between criminal law and society in these terms has nevertheless been criticised for offering a static and somewhat reified conception of collective consciousness. David Garland argues, for instance, that Durkheim's account overlooks how 'the forms of social relations and moral beliefs that come to dominate in any society are […] the outcome of an ongoing process of

[4] Sarah Nouwen, 'International Criminal Law: Theory All Over the Place' in Anne Orford and Florian Hoffman (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016), 751.
[5] *Ibid.*
[6] McMillan (n 1), 10.
[7] Emile Durkheim, *The Division of Labour in Society* (Palgrave Macmillan 2013), 63.
[8] *Ibid.*, 59.
[9] *Ibid.*, 81.
[10] *Ibid.*, 64.
[11] *Ibid.*

struggle and negotiation.'[12] He suggests that the collective consciousness that is purportedly manifested in criminal law may therefore be better understood in terms of a dominant ideology that has been established by certain social forces.[13] Despite this shortcoming, in highlighting how crime is ascribed its character not by an intrinsic quality to a particular act but through the importance attributed to it by the collective consciousness, Durkheim's account of criminal law is nevertheless valuable for how it exposed the nature of crime and criminalisation as fundamentally 'the outcome of a process of social definition.'[14]

From this perspective, criminologists have therefore argued that 'the category of crime […] has no ontological reality […] crimes and criminals are fictive events and characters in the sense that they have to be constructed before they can exist.'[15] Expanding on the nature of this process, Nils Christie has explained that '[c]rime does not exist. Only acts exist, acts often given different meanings within various social frameworks. […] Our challenge is to follow the destiny of acts through the universe of meanings.'[16] Outlining in this vein how what has come to constitute the category of international crimes has changed over time and how, even at the doctrinal level, the legal definitions of international crimes are recognised as being the products of social and political dynamics at a given point in time,[17] Nesam McMillan has similarly highlighted in the context of international criminal law that '[n]otions of international crime and justice are constructed, contested, and socio-politically negotiated […] the category of international crime, as well as what behaviour is placed in this category is thus a product of socio-political processes of criminalization.'[18]

Recognising in this way that 'acts *are* not, they *become*'[19], this perspective firstly highlights the relevance of asking the question; 'what are the social conditions that encourage or prevent giving the acts the meaning of being crime?'.[20] In other words, recognising how crimes are inherently constructed and socio-politically negotiated foregrounds firstly the question of the process through which the individual criminal acts under international criminal law came to constitute crimes i.e. from what normative environment they emerged and the political and legal processes that contributed to their inclusion as acts constituting international crimes.

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[12] David Garland, *Punishment and Modern Society: A Study in Social Theory* (University of Chicago Press 1990), 51.
[13] *Ibid.*, 53.
[14] Immi Tallgren, 'The Durkheimian Spell of International Criminal Law', (2013) 71(2) *Revue interdisciplinaire d'études juridiques*, 145.
[15] Paddy Hillyard and Steve Tombs, 'Beyond Criminology?' in Paddy Hillyard et al. (eds), *Beyond Criminology: Taking Harm Seriously* (Pluto Press 2004), 11.
[16] Nils Christie, *A Suitable Amount of Crime* (Routledge 2004), 3.
[17] McMillan (n 1), 67.
[18] *Ibid.*, 10.
[19] Christie (n 16), 6.
[20] *Ibid.*, 3.

In addition to highlighting the nature of criminalisation as inherently socially situated, Durkheim's account of the role and function of criminal punishment lays the foundations for conceptualising the socially and politically productive dimensions of criminal law. In identifying the normative substance of criminalisation as constituted by acts that violate the deeply held beliefs of a society's collective consciousness, Durkheim understood punishment as the expression of a collective emotional response to this violation; 'punishment constitutes essentially a reaction of passionate feeling, graduated in intensity, which society exerts through the mediation of an organised body over those of its members who have violated certain rules of conduct.'[21] Questioning more retributive or deterrence-based rationales for the institution of punishment, Durkheim instead identified a social role to this emotional response, describing the real function of punishment as being:

> …to maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigour. If that consciousness were thwarted so categorically, it would necessarily lose some of its power, were an emotional reaction from the community not forthcoming to make good that loss. Thus there would result a relaxation in the bonds of social solidarity. The consciousness must therefore be conspicuously reinforced the moment it meets with opposition. The sole means of doing so is to give voice to the unanimous aversion that the crime continues to evoke, and this by an official act, which can only mean suffering inflicted upon the wrongdoer. Thus, although a necessary outcome of the causes that give rise to it, this suffering is not a gratuitous act of cruelty. It is a sign indicating that the sentiments of the collectivity are still collective, that the communion of minds sharing the same faith remains absolute, and in this way the injury that the crime has inflicted upon society is made good. […] Without this necessary act of satisfaction what is called the moral consciousness could not be preserved. Thus, without being paradoxical, we may state that punishment is above all intended to have its effect upon honest people. Since it serves to heal the wounds inflicted upon the collective sentiments, it can only fulfil this role where such sentiments exist, and in so far as they are active.[22]

In other words, Durkheim understood the infliction of punishment as an expression of a society's condemnation of the violation of its deeply held beliefs, which, in turn, functions to reassert those beliefs and therefore, importantly, to reassert the collective consciousness of which they are part. In this sense, the collective consciousness not only defines what constitutes crime and is the source of the emotional response to it - manifested in the institution of punishment - the collective consciousness is itself 'the

[21] Durkheim (n 7), 74.
[22] *Ibid.*, 83.

beneficiary of the punitive process, being strengthened and reaffirmed by the social response to crime.'[23]

Frédéric Mégret has highlighted how this conception of the function of punishment 'fundamentally shapes the dialectical relation of the criminal law to society in a novel way: The criminal law does not exist because society (pre)exists; rather society exists because criminal law exists.'[24] The Durkheimian understanding of the function of punishment suggests how criminal law is in this way inherently socially and politically productive. The criminalisation, prosecution and punishment of acts that violate a society's collective consciousness not only functions as an expression of the blameworthiness that the society assigns to those acts but also functions as 'a way of constituting the society that assigns this blameworthiness.'[25]

This understanding of the co-constitutive relationship between criminal law and society has particular productive potency at the international level because the existence and nature of a society or community that can be conceived of as 'international' in some way, and how to understand it, is complex and remains a subject of significant debate.[26] In the context of international criminal law, the specific challenges of transposing criminal law theory developed at the domestic level, which takes the state as its centrepiece, to the international level is therefore well-recognised. The distinct international context has given rise to various debates on the justification for punitive power in the absence of a supranational sovereign, on the nature of international criminal jurisdiction, and on the link between crime, citizenship and community for explaining aspects of criminal law in the absence of the structuring framework of a state.[27] A Durkheimian conception of criminal law's constitutive function therefore has particular relevance at the international level precisely because the sovereign of international criminal law and the society which it is understood to represent 'must be actively constituted in legitimation processes that far exceed its

[23] Garland (n 78), 49.
[24] Frédéric Mégret, 'Practices of Stigmatization', (2013) 76 *Law and Contemporary Problems*, 290.
[25] *Ibid.*, 290.
[26] From an international relations perspective see for instance Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (Columbia University Press 2012). For an overview of the normative implications of invocations of international community in the context of international criminal law see Immi Tallgren, 'The Voice of the International: Who is Speaking?', (2015) 13 *Journal of International Criminal Justice*, 135-155.
[27] See for instance Kai Ambos, 'Punishment without a Sovereign? The Ius Puniendi Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law', (2013) 33(2), *Oxford Journal of Legal Studies*, 293-315; Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (Oxford University Press 2010); Darryl Robinson, 'International Criminal Law as Justice', (2013) 11(3) *Journal of International Criminal Justice*, 699-711; Ryan Liss, 'Crimes Against the Sovereign Order: Rethinking International Criminal Justice', 113(4) (2019) *American Journal of International Law*, 732-734.

domestic counterpart.'[28]

In this respect, Immi Tallgren has highlighted how a Durkheimian approach reveals the co-constitutive dynamic between international criminal law and the international community or society for which it is understood to speak. She argues that, in the context of international criminal law, the 'we' of the international community 'continuously reconstitutes itself in expressing its punitive feelings, those shared feelings being part of the conditions of its existence in the first place. If, on the contrary, 'we' remains silent on crime, the collective beliefs and sentiments fade, endangering the existence of an audible 'we'.'[29] International criminal law can be understood, therefore, in these terms as 'the manifestation of an international society's will to exist […] It seeks to affirm fundamental values of an international society in the making through international trials that embody an evolving international "collective consciousness".'[30]

Zooming in, then, on the individual acts criminalised as international crimes, this perspective on the nature of criminal law as both declarative and constitutive of a society's collective consciousness is illuminating for how it underscores the value of 'think[ing] fundamentally backwards'[31] about the normative dimensions of these criminal acts. Rather than asking what principle, interest or value explains or underlies the criminalisation of these acts, the constitutive perspective encourages making the inductive methodological move of asking instead how particular norms, principles or values are constituted through the criminalisation and prosecution of these acts. The particular significance of this approach in the context of international criminal law, in particular for the criminal acts it proscribes, is reinforced by considering the traditional criminal law theory conception of crimes as 'public' wrongs against the absence of a defined community that acts as referent for the 'public' character of international criminal wrongs.

b. Crimes as public wrongs: thinking backwards

Durkheim's sociological approach to criminal law as both animated by and constitutive of the deeply held beliefs that form a society's collective consciousness resonates with the traditional criminal law theory conception of crimes as 'public' wrongs. In his influential theory of domestic criminal law, in which he understands trial and punishment as the forum in which citizens of a shared political community call each other to account for the violation of the public values of that community,

[28] Kjersti Lohne, 'Penal welfarism 'gone global'? Comparing international criminal justice to The Culture of Control, (2021) 23(1) *Punishment and Society*, 12.
[29] Tallgren (n 26), 148.
[30] Mégret (n 24), 292.
[31] *Ibid.*, 290.

Antony Duff explains how crimes are public wrongs 'not in the sense that they harm 'the public' as distinct from any individual victims, but in the sense that they are wrongs that concern 'the public', i.e. all members of the polity, in virtue of their shared membership.'[32] On this account, the 'public' nature of criminal wrongs derives from the fact that, while criminal offences also constitute wrongs to the victims of the offence, criminal wrongs are also wrongs committed against the community, since the offender delegitimises and undermines its system of social and legal norms by violating them.[33]

Offering a normative argument that echoes Durkheim's sociological conception of criminal punishment as contributing to reaffirming the deeply held beliefs of a society that have been violated through crime, Duff argues that wrongs of a 'public' nature require identification and condemnation 'in that for a polity not to condemn them, or not to make efforts to identify and condemn their perpetrators, would be to fail to take seriously both the wrongs as they impact on their victims, and the values to which the polity is supposedly committed.'[34] With respect to the justification and normative contents of criminalisation, Duff's account in this way illustrates how criminalisation is grounded in an understanding of the public nature of the wrongs to be criminalised. He explains that:

> A justification of criminalisation will need to begin by specifying some value(s) that can be claimed to be public, as part of the polity's self-definition; show how the conduct in question violates that value or threatens the goods that it protects; and argue that that violation or threat is such as to require or demand a public condemnation.[35]

On this account, criminalisation therefore ultimately reflects 'what kinds of wrongs should be seen as wrongs against 'us'; […] which values are […] so central to a community's identity and self-understanding, to its conceptions of its members' good, that actions which attack or flout these values are not merely individual matters which the individual victim should pursue for herself, but attacks on the community.'[36] Put simply, criminal wrongs are understood as public wrongs in the sense that they are

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[32] Antony Duff, 'Authority and Responsibility in International Criminal Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010), 595.
[33] Paul McGorrey, 'The Philosophy of Criminalisation: A Review of Duff et al.'s Criminalisation Series' (2018) 12(2) *Criminal Law and Philosophy*, 188; R.A. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart 2007), 143.
[34] Duff (n 32), 143.
[35] *Ibid.*
[36] S.E. Marshall and R.A. Duff, 'Criminalisation and Sharing Wrongs' (1998) 11(1) *Canadian Journal of Law and Jurisprudence*, 21-22.

wrongs that are seen to violate the values that define a community.[37]

When taken in the context of a Durkheimian conception of international criminal law, which, as articulated by Frédéric Mégret, would see international criminal law as 'constitutive of what some traditionally thought it could merely be declarative of'[38], this understanding of crime as specifically and inherently 'public' wrong underscores the particular value of 'thinking fundamentally backwards'[39] about the normative dimensions of the individual acts criminalised as international crimes. Mégret identifies the macro-level relation between international society and criminal justice from a Durkheimian perspective as 'dialectical: [i]nternational society exists only inasmuch as it can react sufficiently strongly, through criminal justice, to what challenges it at its core; and the more it does so, the more it can be said to actually betray that it really exists.'[40] At the more granular level, the normative dimensions of the acts that constitute international crimes can be understood as politically productive in the same way; reacting through criminal justice to the violation of norms that are understood to constitute the core of an international society not only betrays that that society really exists, but also betrays that there are norms that in fact constitute the core of that society, and that these similarly really exist. Understood in these terms, Durkheim's sociology of criminal law taken together with the public understanding of criminal wrongs makes visible 'an informal constitution of ruling morality and outrages, which stand beneath the formal stem of the Rome Statute and inscribe selected outrages as exemplars of "international" solidarity.'[41]

Sinja Graf has offered a conceptualisation of crimes against humanity in precisely these terms, illustrating how understanding criminal law as acting on behalf of a public interest calls into being a corresponding polity to act as its referent. Graf departs from the position that the public nature of criminal law is politically productive because of how it in this way addresses 'society in its entirety and […] endow[s] an authority with the power to speak justice in the name of this political community'.[42] On this view, by prosecuting a wrongdoer because they have violated the values that are understood to define a particular political community, the criminal law and its enforcement also implicitly invokes the existence of that political community[43] and therefore, in the same way, the values that are understood to define it. This act of

[37] Lindsay Farmer, 'Criminal Wrongs in Historical Perspective' in R.A. Duff et al. (eds), *The Boundaries of the Criminal Law* (Oxford University Press 2010), 222.
[38] Mégret (n 24), 292.
[39] *Ibid.*, 290.
[40] *Ibid.*, 291.
[41] Nikolas M. Rajkovic, 'What is a "grave" international crime? The Rome Statute, Durkheim and the sociology of ruling outrages', (2020) 16(1) *Loyola University Chicago International Law Review*, 85.
[42] Sinja Graf, 'To Regain Some Kind of Human Equality: Theorizing the Political Productivity of "Crimes Against Humanity"', (2019) 15(3) *Law, Culture and the Humanities*, 757.
[43] *Ibid.*, 758.

invocation can be understood as politically productive because 'invoking is an act of creation; by calling on a community, that community is, at least partly, constructed.'[44]

Bringing together the nature of international criminal law as unmoored from a clearly defined political community with her analysis of political community as nevertheless the inherent referent of the 'public' nature of criminal wrongs, Sinja Graf therefore argues that 'if we take seriously the connection between criminal law and community "as a whole," the pronouncement of crimes against humanity by legal authorities involves the claim to humanity as a global political community.'[45] Graf's analysis in this way highlights how, while this invocation of humanity does not refer to any empirically identifiable 'global political community', the category of crimes against humanity nonetheless functions, in Durkheimian fashion, as a 'performative claim that calls into existence a global political community by positing an injury to it via the term "crimes against humanity."'[46]

Returning, then, to the question of the normative dimensions of the individual acts criminalised as international crimes, Graf's analysis of crimes against humanity offers two important insights. First, it reveals how the criminalisation of the individual acts that make up the wider categories of international crimes may also be understood to function in a politically productive manner, in terms of how the nature of crimes as 'public' wrongs that violate the defining values of a polity inherently invokes not only the existence of a political community as the referent of criminal law, but also, at a more granular level, the existence therefore of those values that are understood to define that community. In this way, the nature of the individual criminal wrongs that constitute international crimes, in their character as 'public' wrongs, similarly therefore conjure the existence of values that are 'so central to a community's identity and self-understanding, to its conceptions of its members' good, that actions which attack or flout these values are […] attacks on the community.'[47]

Second, Graf's account in this way reinforces the value of the shift in perspective offered by thinking backwards, i.e. thinking constitutively, about the normative dimensions of international criminal acts, rather than approaching them from the explanatory or justificatory perspectives offered by traditional criminal law theory, with their concern with the 'underlying principles'[48] that explain the criminalisation

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[44] Sofia Stolk, *The Opening Statement of the Prosecution in International Criminal Trials: A Solemn Tale of Horror* (Routledge 2021), 9. See also Luigi D.A. Corrias and Geoffrey M. Gordon, 'Judging in the Name of Humanity: International Criminal Tribunals and the Representation of a Global Public', (2015) 13 *Journal of International Criminal Justice*, 97-112.

[45] Graf (n 42), 759.

[46] *Ibid.*, 760.

[47] Marshall and Duff (n 36), 21-22.

[48] David Luban, 'A Theory of Crimes Against Humanity', (2004) 29(1) *Yale Journal of International Law*, 101.

of particular acts or the 'real underlying rationale for an offence.'[49] The particular relevance of this shift in perspective in the context of international criminal law can be further illustrated by considering the nature of domestic theories of criminalisation and how they function in the domestic context.

c. Domestic theories of criminalisation: form without international content

In broad terms, the two basic theories of criminalisation at the domestic level are the Anglo-American harm principle and the continental law concept of the protection of legal goods (*Rechtsgüter*). These theories have been developed to address the legitimate scope of criminalisation and therefore the limits on the state's power to criminalize conduct.[50] Both the harm principle and the theory of legal goods are in this way conceptually embedded within the framework of the state. This has implications for how their normative contents are determined.

In general terms, the theory of legal goods understands criminalisation as justified by the 'violation of or threat to a good, which the state is to guarantee equally to everyone and which is attributable to the human will.'[51] While approaches to identifying legal goods vary, in order to function as a tool for assessing the legitimacy of particular criminal offences, approaches to legal goods that go beyond a descriptive account of the legally protected interests reflected in existing criminal offences require an independent normative existence against which the criminal law can be evaluated.[52] Where to locate the independent values that provide the normative content of the concept of legal goods is nevertheless contested. Some conceptions of legal goods identify the content of the goods to be protected outside of the framework of the criminal law yet remaining with the broader system of positive law. For instance, Claus Roxin argues that in order for the concept of legal goods to function as a constraint on the state's power to criminalise conduct, its content must be found in constitutional principles.[53] Other approaches derive the content of legal goods from

[49] Kai Ambos, 'The Overall Function of International Criminal Law: Striking the Right Balance Between the Rechtsgut and the Harm Principles', (2015) 9(2) *Criminal Law and Philosophy*, 323.
[50] For an overview see Nina Peršak, *Criminalising Harmful Conduct: The Harm Principle, its Limits and Continental Counterparts* (Springer 2007).
[51] Johann Michael Franz Birnbaum as cited in Peršak (n 50), 107.
[52] Carl Constanin Lauterwein, *The Limits of Criminal Law: A Comparative Analysis of Approaches to Legal Theorizing* (Routledge 2010), 9**.** See for instance Bernd Schünemann, 'The System of Criminal Wrongs: The Concept of Legal Goods and Victim-based Jurisprudence as a Bridge between the General and Special Parts of the Criminal Code', (2004) 7(2) *Buffalo Criminal Law Review*, 553; see also Peršak (n 50), 107.
[53] Claus Roxin, *Strafrecht Allgemeiner Teil Band I: Grundlagen. Der Aufbau der Verbrechenslehre* (Beck 1997), 15.

the concept of rights, frequently constitutional rights.[54] In attempting to give autonomous substance to the concept of legal goods, these approaches in this way refer for the substance of the legal goods protected through criminal law to the contents of other areas of a state's legal framework.[55]

A further variation on the evaluative conception of legal goods locates their contents outside of the legal system. This conception of legal goods makes appeals to ethical or value-based foundations to provide the contents of the legal goods to be protected by criminal offences. These types of approaches place more emphasis on the normative nature of the concept of legal goods, as opposed to its legal nature.[56] In terms of substantive content, these conceptions of legal goods have typically referred back to liberal theories of social contract, defining legal goods along the lines of the 'conditions or chosen ends, which are useful either to the individual and his free development within the context of an overall social system based on this objective, or to the function of this system itself.'[57]

Beyond the broad contractualist criteria of legal goods as those preconditions fundamental for social life and individual development, this conception provides limited guidance as to what these preconditions can be considered to be, and therefore of which legal goods ultimately warrant protection.[58] In this way, a theory of legal goods does not ultimately provide 'substantive (normative) criteria to decide which goods or interests should be protected by criminal law and which should not.'[59] Rather, the theory of legal goods provides the conceptual framework through which the pre-determined values, understood to provide the preconditions for coexistence in a given society, are then protected through criminalisation.[60] In this way, in both its positivist and more normative forms, the theory of legal goods relies on its embeddedness within the legal or other normative structure of a state or defined political community for its substantive content.

In a similar manner, the harm principle, which provides the principal justification for criminalisation in Anglo-American legal systems, is intended to function as a check on the scope of the state's power to criminalise conduct. The harm principle originates

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[54] Otto Lagodny, 'The Case of Substantial Criminal Law before the Bars of Constitutional Law – An Overview from the Perspective of the German Legal Order', (1999) 7(3) *European Journal of Crime, Criminal Law and Criminal Justice*, 283.
[55] Peršak (n 50), 108.
[56] *Ibid.*, 110-111.
[57] Claus Roxin as cited in Markus Dirk Dubber, 'Theories of Crime and Punishment in German Criminal Law', (2005) 53(3) *American Journal of Comparative Law*, 685.
[58] Santiago Mir Puig, 'Legal Goods Protected by the Law and Legal Goods Protected by the Criminal Law as Limits to the State's Power to Criminalize Conduct', (2008) 11(3) *New Criminal Law Review: An International and Interdisciplinary Journal*, 414.
[59] Ambos (n 49), 306.
[60] *Ibid.*

in the liberal political theory of John Stuart Mill, who argued that state intervention with the autonomy of individuals requires strict justification:

> That principle, that the sole end for which mankind is warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others.[61]

In broad terms, the harm principle is therefore a more consequentialist theory of criminalisation than the theory of legal goods, requiring that 'conduct should be criminalized only if it is harmful.'[62] While inherently rooted in liberal theory, in relying on a more naturalistic or tangible understanding of the effects of the conduct to be criminalised, the harm principle is less obviously dependent on an external legal or normative framework to supply its substantive content than the theory of legal goods. At the same time, the harm principle has been subject to similar critiques to that of the theory of legal goods for failing to provide an evaluative limit on the scope of criminal liability. In this respect, some scholars have argued that the harm principle is insufficiently limiting because 'nearly any result that anyone has ever wanted to prevent could be construed as harmful.'[63]

The most influential account of the harm principle has been advanced by Joel Feinberg who, in seeking to develop this limiting function, defined harm as a 'thwarting, setting back, or defeating of an interest' through wrongful conduct.[64] In this respect, Feinberg offered an account of harm as being a necessary, but not a sufficient condition for criminalisation, rejecting the notion that the harm principle can be understood in simple, determinate, or empirical terms.[65] Instead, he argued that:

> harm is a very complex concept with hidden normative dimensions, and that partly because of this, the harm principle cannot be applied in a plausible way in large ranges of circumstance without supplementary criteria (or 'mediating maxims'), some of which are provided by independent moral principles.[66]

The necessity of appealing to independent moral principles to develop a functional notion of harm is in this way revealing of how, similar to the notion of legal goods,

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[61] John Stuart Mill, 'On Liberty' in Joel Feinberg and Jules Coleman (eds), *Philosophy of Law* (Thomson Wadsworth 2008), 251.
[62] Hamish Stewart, 'The Limits of the Harm Principle', (2010) 4(1) *Criminal Law and Philosophy*, 18.
[63] Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press 2008), 71.
[64] Joel Feinberg, *Harm to Others* (Oxford University Press 1984), 33.
[65] *Ibid.*, 214.
[66] *Ibid.*

some of the normative substance of the harm principle must be derived extrinsically. For instance, in his discussion of the relative importance of different harms for the purpose of determining the scope of criminalisation, Feinberg identifies three relevant characteristics for weighing the importance of different harms. One of the characteristics he identifies is the 'inherent moral quality' of the interest that is set back through wrongful conduct.[67]

Highlighting how Feinberg's definition of harm as the setting back of an interest relies in this way on an understanding of certain 'inherent moral qualities' to that interest, Bernard Harcourt has raised the question of what those inherent qualities can be considered to be, arguing that the harm principle itself cannot provide an answer to this question.[68] In this respect, Harcourt argues that 'we inevitably must look beyond the harm principle. […] We must access larger debates in ethics, law and politics – debates about power, autonomy, identity, human flourishing, equality, freedom and other interests and values that give meaning to the claim that an identifiable harm matters.'[69] For this reason, and in a similar manner to scholarly debates on the contents of legal goods, critics have stressed the 'essential indeterminacy of the concept of harm, and its potential to be under or overinclusive'[70], with the result that the literature on the harm principle also reflects 'an intense struggle for the meaning of harm.'[71] This ultimately leads back to the sociological reality that the harm principle necessarily also relies on some kind of social agreement about what constitutes harm in order to construct a system of criminal law on this basis.[72]

Taken together, the theory of legal goods and the harm principle in this way illustrate how domestic theories of criminalisation inherently and necessarily require an external normative structure from which to derive their substance, whether through reliance on the legal framework within or the political theory of a state to supply them with normative content, or through the simple fact that criminal law necessarily emerges from and therefore embodies in legal form a socially situated conception of harm in a given societal context. As Nina Peršak explains; 'every type of criminalisation requires an underlying public moral theory, since it is connected to the values and morality of society.'[73] In this sense, as theories developed in the domestic

[67] Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (Oxford University Press 1984), 217.
[68] Bernard Harcourt, 'The Collapse of the Harm Principle', (1999) 90 *Journal of Criminal Law and Criminology*, 183.
[69] *Ibid.*
[70] Farmer (n 37), 215.
[71] Harcourt (n 68), 129.
[72] Ed Gibney and Tanya Wyatt, 'Rebuilding the Harm Principle: Using an Evolutionary Perspective to Provide a New Foundation for Justice', (2020) 9(3) *International Journal for Crime, Justice and Social Democracy,* 102.
[73] Peršak (n 50), 1.

context to determine the legitimate scope of the state's power to criminalise conduct, extracting the harm principle or the theory of legal goods from the structure of the state or a coherent social framework that gives them their substance arguably leaves them empty of normative content.

This illustrates, therefore, the particular relevance of adopting a constitutive approach to the normative dimensions of the individual acts criminalised as international crimes. Precisely in the way that the invocation of political community through criminal law has particular potency at the international level because it performatively calls into being the existence of an international political community, so the invocation of particular acts as crimes conjures the existence of particular normative principles that attach to them, however these are understood, where there is no clearly defined external social or legal referent to supply their normative content.

In other words, to return to the discussion of the politically productive character of criminal law, the nature of international crimes as public wrongs not only invokes the existence of an international community or society as a referent of the 'public' nature of the wrong, it also calls into existence those norms or values that are so central to the identity and self-understanding of that society that they constitute public wrongs in this way, and therefore warrant criminal protection. This shift in perspective from the domestic criminal law theory approach of seeking to identify substantive principles that provide the legitimate parameters of the state's power to criminalise illuminates the relevance of examining instead how the acts criminalised under international criminal law, in the absence of such an extrinsic framework to supply their normative content, are in this way politically productive and constitutive of the norms or values that they invoke through their criminalisation and prosecution.

2. International criminal law as discursive project

This ultimately leads to matters of practice and representation. In order to examine the nature of the norms, principles or values that are in this way constituted through the international criminalisation and prosecution of particular acts of violence, it is necessary to pay attention to how this process of constitution takes place. As noted previously, a limitation of Durkheim's conception of the relationship between criminal law and society is its static, structural conception of the collective consciousness, which is treated as an inherent, apolitical and ahistorical property of a homologous society, with the result that the Durkheimian conception of criminal law is 'blind to how moral orders are established temporally and spatially rather than just given'.[74] This critique of Durkheimian theory is evidently particularly relevant in the context of international criminal law, as a product of and operating as it does within

[74] Rajkovic (n 41), 74-75.

an unequal and Western-dominated international order.[75]

As one way of addressing this shortcoming, Frédéric Mégret has emphasised the importance of supplementing a Durkheimian conception of international criminal law with attention to its practices. Highlighting how Durkheim's static conception of the collective consciousness evades the issue of 'the power that lies behind and constitutes the criminal-justice system, often treating it as one that has a sort of abstract will of its own, with the "collective consciousness" as the linchpin of a quasi-religious system'[76], Mégret underscores the necessity of examining the practices of the actual actors and institutions of international criminal justice in shaping and producing those norms or values that are understood to emanate from the 'collective consciousness'. Practices in this context can be understood as 'recurrent and meaningful work activities—social or material—that are performed in a regularized fashion and which have a bearing, whether large or small, on a social phenomenon.'[77] Sociological theories of practice emphasise in this respect how individuals give meaning to the practices in which they are engaged by bringing their interests, preferences and values to the activities that constitute that practice, which in turn mediate the production of a particular social phenomenon.[78] From a legal perspective, the everday life of law in the activities of its practitioners is in this sense central for understanding how law as a social phenomenon is produced.

This view also ties in with some of the sociologically-oriented scholarship on international courts as social actors,[79] which highlights how 'courts often perform broader functions than just applying general norms or creating individual norms:

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[75] See for instance Antony Anghie and B.S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts', (2003) 2(1) *Chinese Journal of International Law*, 77-103; Wolfgang Kaleck, *Double Standards: International Criminal Law and the West* (Torkel Opsahl Academic EPublisher 2015); Asad G. Kiyani, 'International Crime and the Politics of Criminal Theory: Voices and Conduct of Exclusion', (2015) 48(1) *New York University Journal of International Law and Politics*, 129-208.

[76] Mégret (n 24), 293.

[77] Jens Meierhenrich, 'The Practice of International Law: A Theoretical Analysis', (2014) 76(3-4) *Law and Contemporary Problems*, 19.

[78] *Ibid.*, 20-21.

[79] See for example Mikael Rask Madsen, 'The Sociology of International Law: An Introduction' in Richard Nobles and David Schiff (eds), *Law Society and Community: Socio-Legal Essays in Honour of Roger Cotterell* (Routledge 2014), 241-253; Mikkel Jarle Christensen, 'The emerging sociology of international criminal courts: Between global restructurings and scientific innovations', (2015) 63(6) *Current Sociology*, 825-849; Vera Willems, 'International Courts and Tribunals and Their Linguistic Practices: A Communities of Practice Approach', (2017) 30 *International Journal for the Semiotics of Law*, 181-199; Nicole De Silva, 'International Courts' Socialization Strategies for Actual and Perceived Performance' in Theresa Squatrito et al. (eds), *The Performance of International Courts and Tribunals* (Cambridge University Press 2018), 288-321; Kjersti Lohne, 'Towards a Sociology of International Criminal Justice' in Morten Bergsmo et al. (eds), *Power in International Criminal Justice* (Torkel Opsahl Academic EPublisher 2020), 47-78; Moshe Hirsch, 'Introduction: Sociological Perspectives on International Tribunals', (2020) 34(2) *Temple International & Comparative Law Journal*, 193-201.

courts also present general images of community goals, identities, principles, ways of life, etc.'[80] In this respect, the sociological recognition that 'only individuals – not institutions and laws – have intentions'[81] centralises the practices of the actors involved in the international criminal process, such as states, prosecution, defence, judges and victims' representatives, in shaping these broader functions. On this view, the practices of these actors 'become key to understanding the development of these […] institutions and laws.'[82]

While Mégret outlines a number of perspectives from which the role of practice can in this way be incorporated into a constitutive understanding of the relationship between international criminal law and society, Nesam McMillan has highlighted in particular the centrality of discourse and representation for understanding how international criminal law concretely functions as a process of 'socio-legal construction, with powerful effects.'[83] She explains that:

> [I]deas of international crime and justice are vivid and emotive as well as productive, figuring and enacting the spaces and subjectivities of which they speak. These discourses and representations of internationalized crime and justice are thus ethically significant, as they do not simply reflect the consolidation or existence of an already existing global community or common humanity with established norms and values. Rather, it is in and through representations and discourses of international criminal justice that such global subjectivities and modes of global responsibility and interconnection are productively imagined.[84]

Understanding international criminal justice in this way as a 'process of meaning making'[85], McMillan emphasises the importance of examining how notions of crime and justice are 'given content in practice.'[86] In general terms, the notion of 'meaning' can be understood to refer to 'the contested social and cultural processes by which situations are defined, individuals and groups are categorized, and human consequences are understood. […] an ongoing, everyday process of sense-making, symbolic communication, and contested understanding.'[87] Meaning making can be understood in these terms as a foundational process in human culture through which situations and actions are categorised and defined by drawing patterns of relations on

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[80] Wouter G. Werner, 'Speech Act Theory and the Concept of Sovereignty: A Critique of the Descriptivistic and the Normativistic Fallacy', (2001) 14 *The Hague Yearbook of International Law*, 73-84.
[81] Lohne (n 79), 54.
[82] *Ibid.*
[83] McMillan (n 1), 125.
[84] *Ibid.*, 22.
[85] *Ibid.*, 11.
[86] *Ibid.*, 5.
[87] Jeff Ferrell, 'Cultural Criminology and the Politics of Meaning', (2013) 21(3) *Critical Criminology*, 258.

the basis of which people decide how to interpret and respond to different situations.[88] The practices of international criminal justice in this sense function as processes of discursive meaning making in how they contribute to structuring processes of categorisation which 'give meaning, sense and order to the world thus influencing how phenomena are experienced as reality.'[89]

From this perspective, examining the normative dimensions of the acts that constitute international crimes requires attention not only to the normative environment from which they emerged and to what their legal definitions invoke, but also to the meanings generated by the discourses that are constructed around them through the practices of trial and punishment. Sociological approaches to international criminal justice have in this respect demonstrated how 'international criminal justice is 'brought into being' by analysing the 'products' of courts, such as documents, discourses, and other legal artefacts as empirical data rather than as legal statements.'[90] This brings to the fore the significance of the discourses and language that emerge through judicial practices as a central dimension of the 'process of meaning making'[91] involved in constituting the normative dimensions of the individual acts criminalised as international crimes. As Immi Tallgren has argued, international criminal law 'is a universe constructed in language, not predetermined by some necessary, natural order.'[92] Frédéric Mégret has similarly explained that 'the practices of international criminal justice are, fundamentally, logorrheic and hortatory, and involve the constant attempt to characterize situations and persons through the appropriate use of words.'[93]

This dimension of international criminal justice features centrally in expressivist approaches to international criminal law, which focus on the socially communicative features of law from a number of disciplinary and normative perspectives. Expressive theories of law can further enrich an understanding of international criminal justice as a process of meaning making in how they centralise in particular the performative, rhetorical and discursive features of law and the process of trial and punishment.

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[88] Jay L. Lemke, *Textual Politics: Discourse and Social Dynamics* (Taylor and Francis 2005), 141-142; Reiner Keller and Adele E. Clarke, 'Situating SKAD in interpretive inquiry' in Reiner Keller, Anna-Katharina Hornidge and Wolf J. Schünemann (eds), *The Sociology of Knowledge Approach to Discourse Investigating the Politics of Knowledge and Meaning-making* (Routledge 2018), 48.

[89] Hella von Unger, Penelope Scott and Dennis Odukoya, 'Using SKAD to analyse classification practices in public health: methodological reflections on the research process' in Reiner Keller, Anna-Katharina Hornidge and Wolf J. Schünemann (eds), *The Sociology of Knowledge Approach to Discourse Investigating the Politics of Knowledge and Meaning-making* (Routledge 2018), 172.

[90] Lohne (n 79), 64.

[91] McMillan (n 1), 11.

[92] Tallgren (n 26), 138.

[93] Mégret (n 24), 300.

a. Expressive theories of international criminal law

Theories of expressivism capture a number of ideas that have their roots in different disciplinary and normative perspectives. In general terms, expressive theories locate the value of law in its ability to convey social meaning, in addition to its ability to control behaviour directly.[94] Such theories are based on the fundamental assumption that 'actions are expressive; they carry meanings.'[95] Reflecting its sociological foundations in Durkheimian sociology, from an expressivist perspective law is understood to carry meaning in that it reflects and communicates the norms and values of the society in which it exists.[96] Expressive theories of law vary in the way that they conceptualise the expressive function. The dominant approach has focussed on the concrete sociological effect of law on social norms.[97] These types of expressive theories focus on questions relating to the circumstances in which law is likely to produce social effects, such as issues relating to the law's perceived legitimacy as a factor in contributing to its ability to motivate behaviour, or consider how law can be employed as a tool for actively seeking to change values or morals among the public.[98]

Expressive theories of law have enjoyed particular prominence in the field of criminal law. Drawing on Durkheim's sociological conception of the relationship between criminal law and society, theories of criminal law that centralise its communicative or expressive function focus on its capacity to articulate societal censure for behaviour that violates a society's norms. Often identified as central to the communicative capacity of criminal law is the social function of punishment, whose purpose is not only to impose hardship on the criminal because this is what they deserve, or in order to deter future crimes, but serves as a 'device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself or of those 'in whose name' the punishment is inflicted. Punishment, in short, has a symbolic significance largely missing from other kinds of penalties.'[99] This symbolic significance to punishment has been conceptualised from a variety of perspectives. Some approaches have centralised the messages sent to different actors within the criminal process, with, for instance, the perpetrator or victims of crimes understood as the primary targets of expressive messaging, while others have focused instead on the norm-affirming role of the

[94] Cass R Sunstein, 'On the Expressive Function of Law', (1996) 144 *University of Pennsylvania Law Review*, 2024.
[95] *Ibid.*, 2021.
[96] Carsten Stahn, *Justice As Message: Expressivist Foundations of International Criminal Justice* (Oxford University Press 2020), 26.
[97] Sunstein (n 94), 2025-2026.
[98] Richard McAdams, *The Expressive Powers of Law: Theories and Limits*, (Harvard University Press 2015), 3-4.
[99] Joel Feinberg, 'The Expressive Function of Punishment' in Joel Feinberg (ed), *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton University Press 1970), 98.

message sent by punishment to the wider public.[100] Understood in these terms, the target audience of punishment at the international level includes 'not only the current and potential perpetrators of international crimes and the current and potential victims of international crimes, but any other person in the world community.'[101]

Expressive theories of and justifications for criminalisation and punishment have found particularly fertile ground in the field of international criminal justice.[102] Barrie Sander has identified an 'expressive turn'[103] in the scholarship on international criminal law, arising partly in response to the perceived failings of more common retributive and deterrence-based justifications for criminal law at an international level, while at the same time responding to some of the unique features of international criminal justice, which are understood as being particularly well-suited to expressive justification.[104] In this respect, the international stature and purported global audience of international criminal trials have been seen to lend them particular expressive value; international trials have been described as having 'a better chance of becoming the kinds of 'popular trials' that define a debate, remind us of the content and value of law, or serve as intergenerational 'signposts' in history.'[105]

While early expressive approaches to international criminal law focussed on the social

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[100] Stahn (n 96), 19.
[101] *Ibid*., 180.
[102] See for instance Diane Marie Amann, 'Group Mentality, Expressivism, and Genocide', (2002) 2(2) *International Criminal Law Review*, 93-143; Mark Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press 2007); Robert D Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law', (2007) 43(1) *Stanford Journal of International Law*, 39-94; Margaret deGuzman, 'An Expressive Rationale for the Thematic Prosecution of Sex Crimes' in Morten Bergsmo (ed), *Thematic Prosecution of International Sex Crimes* (Torkel Opsahl Academic EPublisher 2012), 13-44; Margaret deGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court', (2012) 33(2) *Michigan Journal of International Law*, 265-320; Maria Elander, 'The Victim's Address: Expressivism and the Victim at the Extraordinary Chambers in the Courts of Cambodia, (2013) 7 *International Journal of Transitional Justice*, 95-115; Saira Mohamed, 'Deviance, Aspiration and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law', (2015) 124(5) *Yale Law Journal*, 1628-1689; Tim Meijers and Marlies Glasius, 'Trials as Messages of Justice: What Should Be Expected of the International Criminal Court?', (2016) 30(4) *Ethics and International Affairs*, 429-447; Barrie Sander, 'The Expressive Limits of International Criminal Justice: Victim Trauma and Local Culture in the Iron Cage of the Law', (2019) 19(6) *International Criminal Law Review*, 1014-1045; Barrie Sander, 'The expressive turn of international criminal justice: A field in search of meaning', (2019) 32 *Leiden Journal of International Law*, 851-872; Stahn (n 96).
[103] Sander 'The expressive turn' (n 102), 852.
[104] Amann (n 102), 115-116; Drumbl (n 102), 61; Mark Drumbl, 'The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law', (2007) 75(5-6) *George Washington Law Review*, 1195; David Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010); deGuzman (n 102), 33-34.
[105] Drumbl (n 102), 175.

function of the institution of punishment, the scholarship in this area has developed to reflect a wider concern with 'the symbolic and aesthetic meanings generated by the broader range of social practices that comprise and surround international criminal proceedings.'[106] For instance, a study of the language employed in judgments at international criminal tribunals has revealed how judges often seek to move beyond simply making legal determinations, to reach out past the legal community and address broader audiences in moral or philosophical terms, reflecting their understanding of their role 'in the larger scope of the international judicial community and international relations.'[107]

Similarly, the performative dimensions of international criminal trials have been identified as contributing to their communicative function; trials are seen to be able to 'educate the public through the spectacle of theatre – there is, after all, pedagogical value to performance and communicative value to dramaturgy.'[108] The legal process itself, with the presentation of evidence by prosecution and defence, and its adjudication by a judge, is further seen to establish the facts of a crime as incontrovertible. By doing so, the legal process is understood to support a process of truth-telling, narrating history, and developing shared understandings of the origin and consequences of collective violence.[109] In these ways, the expressive functions of trials are seen to contribute to a much broader didactic process, which goes beyond the adjudication of guilt to address history and memory.[110] In general terms, then, expressive approaches to international criminal justice centralise its perceived ability to communicate, 'to share and declare – an ideal and aspiration'[111] and conceive of trial and punishment 'primarily as a normative, didactic endeavour.'[112]

Various limitations to and critiques of expressive theories of and justifications for international criminal justice have nevertheless been identified. In normative terms, critics have for instance highlighted how wider norm-expression oriented justifications for punishment run the risk of instrumentalising the defendant by 'using the accused as an object in a didactic exercise rather than respecting autonomy and fairness.'[113] Similarly, the expressive function of punishment has been problematised for how it serves and empowers primarily the speaker or communicator, raising

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[106] Sander 'The expressive turn' (n 102), 852.
[107] Rosa Aloisi and James Meernik, *Judgment Day: Judicial Decision Making at the International Criminal Tribunals* (Cambridge University Press 2017), 198.
[108] Drumbl (n 102), 175.
[109] Drumbl (n 102), 174-175.
[110] Lawrence Douglas, *The Memory of Judgment* (Yale University Press 2001).
[111] Anette Bringedal Houge, 'Narrative expressivism: A criminological approach to the expressive function of international criminal justice', (2019) 19(3) *Criminology and Criminal Justice*, 281.
[112] *Ibid.*
[113] Darryl Robinson, 'The Identity Crisis of International Criminal Law', (2008) 21 *Leiden Journal of International Law*, 931. See also Stahn (n 96), 81-82.

questions as to the legitimacy and validity of the perspective that is being expressed as universal by international criminal justice.[114]

From a more empirical perspective, the assumption that trials are necessarily articulating coherent and unified messages, rather than varied and conflicting narratives advanced by different parties to proceedings, has also been problematised,[115] while the complexity of conceptualising who the 'audiences' of international criminal trials may be and whether they are receptive to the messages that trials articulate has also been highlighted.[116] Similarly, limited empirical evidence exists to support the notion that anything resembling communication, in the sense of an audience or recipient who is 'an active participant in the process [and] will receive and respond to the communication'[117], is taking place between international criminal institutions and their purported audiences.[118] The wider truth and history-telling role of international criminal courts and tribunals has similarly been problematized in terms of how the legal process structures and shapes the nature of the truth that is constructed, which 'streamlines causality, draws individuals out of collectives and categorizes both them, the acts, victims and contexts.'[119]

Within this body of more critical scholarship on expressivism in the context of international criminal law, Barrie Sander has identified a strand that is concerned in particular with 'the illumination of the expressive limits of international criminal courts [in terms of] the configurations of power that underpin the messages and narratives constructed within such courts in different institutional contexts.'[120] These more critical approaches to the idea of an expressive function to international criminal law not only question the normative desirability of justifying punishment in these terms or the limits of expressivism in empirical terms, but also engage more fundamentally with the productive power of international criminal justice and the 'dynamics of power that underpin the messages and narratives that are constructed within such courts in practice.'[121]

Of particular relevance from the perspective of examining how practices of international criminal justice construct the normative meaning of the individual acts criminalised as international crimes is Anette Bringedal Houge's theorisation of a

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[114] Stahn (n 96), 78-80.
[115] Marlies Glasius, 'It Sends a Message': Liberian Opinion Leaders' Responses to the Trial of Charles Taylor', (2015) 13(3) *Journal of International Criminal Justice*, 423.
[116] Meijers and Glasius (n 102), 433, 443; Glasius (n 115), 423.
[117] Antony Duff, *Punishment, Communication and Community* (Oxford University Press 2003), 79.
[118] See for instance Glasius (n 115), 419-447.
[119] Houge (n 111), 283. See also Barrie Sander, *Doing Justice to History: Confronting the Past in International Criminal Courts* (Oxford University Press 2021).
[120] Sander 'The expressive turn' (n 102), 853.
[121] *Ibid.*, 863-864.

narrative approach to expressivism. Houge conceives of expressivism not in normative terms, as a justification for international criminal justice, but rather from the perspective of knowledge production – in terms of how international criminal legal processes contribute to the juridification of extra-legal knowledge in a way that feeds into and shapes wider societal understandings of violence.[122] Broadening the focus of expressive approaches to international criminal law from the concern with the communicative function of punishment, Houge instead centralises the narrative dimensions of international criminal law and criminal proceedings to capture 'all the acts and perspectives of the different actors that get voiced throughout proceedings on the international stage that the court provides.'[123]

In this respect, she understands legal decisions as well as the arguments of the different parties to proceedings, the testimonies of witnesses and the statements of defendants as narratives that form part of a discursive battle over how crimes are explained, understood and responded to.[124] From this perspective, Houge highlights how legal processes and decisions do not construct an objective or complete account of the events and acts to which they are applied, but instead offer a narrative that is necessarily filtered through the constraints and possibilities of the legal framework.[125] Criminal proceedings and the practices that surround them are in this sense understood as 'a process of inclusion and exclusion of different voices and […] the leveraging and silencing of some stories over others.'[126] Houge's approach in this way shifts the focus of legal expressivism from punishment towards stories, processes and description, to reveal how international criminal legal frameworks and processes function to promote 'a particular structuring of thought'[127] in relation to the violence to which they are applied. Taken as a whole, then, Houge describes a narrative expressivist approach to international criminal justice as one that:

> emphasizes its *stories*, not its truths, its *understandings*, not its punishments, its descriptions and explanations, not its normative evaluation and judgment. That is, [narrative expressivism] looks at how laws generate and enable, constrain and silence, knowledge about complex collective violence.'[128]

Importantly, Houge emphasizes how in this way international legal frameworks and processes operate as a form of discursive power, in how they produce juridified understandings of the events to which they are applied, which, in turn, feed into and

[122] Houge (n 111), 288.
[123] *Ibid.*, 282.
[124] *Ibid.*
[125] *Ibid.*, 283.
[126] *Ibid.*
[127] *Ibid.*, 277.
[128] *Ibid.*, 284. Emphasis in the original.

shape wider social and political discourses.[129] This dimension of international criminal justice has similarly been described by others as having representational power because of how it can 'affect collective representations and memories […] and thereby […] impress on a global public a particular understanding of mass violence as a form of criminal violence.'[130] As noted by Nesam McMillan, international criminal legal frameworks and processes in this way 'produce meaning themselves, shaping which events of harm come to external attention, which are seen to be important, and who and what they are seen to affect and implicate.'[131] Houge's conception of narrative expressivism in this way identifies the narrative functions of international criminal legal frameworks and processes as a central dimension of how they function as 'knowledge producers beyond the development of legal doctrine.'[132]

b. Law as discourse and narrative

In highlighting the discursive power of the narratives constructed by international criminal justice in this way, Houge's approach draws on a theoretical understanding of law as a discourse as well as on scholarship on the relationship between language, narrative and law. With its roots in social constructivism, the fundamental theoretical assumption that is central to a conception of law as a discourse is that language, or any system of meaning, does not simply reflect the world as it is, but functions to constitute social life. In this sense, discourses 'build objects, worlds, minds and social relations. It doesn't just reflect them.'[133] As some discourses gain prominence and become increasingly widely shared, they become in this way a part of social reality.[134] In its more poststructuralist form, discourse is therefore understood to be intrinsically linked to questions of power in the social world.[135] By constructing reality in a certain way, a discourse does not 'simply represent the world but signifies, constitutes and constructs social identities, (power) relations between people and systems of knowledge.'[136]

While this understanding of discourse is not limited to the role of language in the

[129] *Ibid.*, 285.
[130] Joachim J. Savelsberg, 'The Representational Power of International Criminal Courts' in Morten Bergsmo et al. (eds), *Power in International Criminal Justice* (Torkel Opsahl Academic EPublisher 2020), 287.
[131] McMillan (n 1), 14.
[132] Houge (n 111), 285.
[133] Margaret Wetherell, 'Themes in Discourse Research: The Case of Diana' in Margaret Wetherell et al. (eds), *Discourse Theory and Practice: A Reader* (Sage Publications 2002), 16.
[134] *Ibid.*
[135] Adele E. Clarke, *Situational Analysis: Grounded Theory After the Postmodern Turn* (SAGE Publications 2005), 149.
[136] Johanna Niemi-Kiesiläinen, Päivi Honkatukia and Minna Ruuskanen, 'Legal Texts as Discourses' in Åsa Gunnarsson, Eva-Maria Svensson (eds), *Exploiting the Limits of Law: Swedish Feminism and the Challenge to Pessimism* (Routledge 2007), 82.

constitution of social reality, but is intended to capture a wider range of social practices, language nevertheless plays a central role in understanding how discourses define and produce objects of knowledge in how it governs how 'a topic can be meaningfully talked about and reasoned about. [It] 'rules in' certain ways of talking about a topic, defining an acceptable and intelligible way to talk, write, or conduct oneself [and] 'rules out', limits and restricts other ways of talking, of conducting ourselves in relation to the topic or constructing knowledge about it.'[137]

As a linguistic and symbolic discourse that determines how particular forms of violence can be named and imagined, international criminal law can in this sense be understood as 'a perfect reflection of discursive power floating within society while constructing particular subjects and identities, and shaping the very society it claims to act on behalf of.'[138] From this perspective, the discursive practices of international criminal legal proceedings in relation to the acts of violence criminalised as international crimes function as a site in which the normative meaning of these crimes and the acts of violence to which they are applied, are actually produced. Examining the normative dimensions of these criminal acts from a discursive perspective does not, for this reason, require consideration of the truth or falsity of the discourse or narrative constructed around the events in question. Instead, of primary importance is 'the process of construction itself, how 'truths' emerge, how social realities and identities are built and the consequences of these.'[139]

In this respect, Houge's conception of narrative expressivism brings to the fore how narrative plays a central role in this process of construction. Narrative has increasingly come to be understood as 'a basic part of legal discourse and legal interpretation'[140] which 'pervade[s] all law and, in a sense, constitute[s] law.'[141] In the context of international law, Anne Saab has highlighted the centrality of narrative and storytelling for an understanding of the work that international law does in the world, arguing that 'law, including international law, is not only a set of rules and principles, but also a way of engaging with and perceiving the world – that is, a force in telling stories and constituting the reality to which it subsequently responds.'[142]

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[137] Stuart Hall, 'The Work of Representation' in Stuart Hall (ed), *Representation: Cultural Representations and Signifying Practices* (SAGE Publications 2003), 44.
[138] Gözde Turan, 'Responsibility to prosecute' in an age of global governmentality: The international criminal court', (2016) 51 *Cooperation and Conflict*, 21.
[139] Wetherell (n 133), 16.
[140] Greta Olson, 'On Narrating and Troping the Law: The Conjoined Use of Narrative and Metaphor in Legal Discourse' in Michael Hanne and Robert Weisberg (ed), *Narrative and Metaphor in the Law* (Cambridge University Press 2018), 19.
[141] Paul Gewirtz, 'Narrative and Rhetoric in the Law' in Peter Brooks and Paul Gewirtz (eds), *Law's Stories: Narrative and Rhetoric in the Law* (Yale University Press 1996), 3.
[142] Anne Saab, *Narratives of Hunger in International law: Feeding the World in Times of Climate Change* (Cambridge University Press 2019), 33-34.

Houge defines narrative broadly as 'a story that orders experience, renders experience meaningful or tentatively explains acts and events, always for a particular audience.'[143] As a particular representation of reality, a particular telling or ordering of acts and events, narratives are understood as central to the social construction of reality; 'rather than referring to "reality," [narratives] may in fact create or constitute it, as when "fiction" creates a "world" of its own.'[144] For this reason, narratives are inherently value-laden:

> [Narratives] tell one story to the detriment of others by silencing voices, setting characters aside, and – most importantly – by providing the authority of what is natural, what goes without saying. Over time, narratives are internalized and their authority and explanatory force are taken for granted.[145]

In this sense, the legal, factual and normative narratives that are constructed during international criminal proceedings are best understood as 'reflections of particular discursive formations that determine what counts as the truth.'[146] Conceptualising the narratives constructed during international criminal proceedings in these terms is not to suggest that they are in some way fictions, or inaccurate representations of reality, but seeks instead to capture how, through the processes of construction, inclusion and exclusion inherent in narrativising events through legal processes, international criminal justice functions as 'a representational project as much as a practical endeavour.'[147]

Understanding the representational dimensions of the practice of international criminal justice in these terms also highlights how the 'process of meaning making'[148] that takes place with respect to the acts that constitute international crimes can also be understood as continuous and ongoing, taking place through the profusion of narratives that emerge throughout the continuum of the legal process and each new case and decision. In this respect, in addition to the processes of construction, inclusion and exclusion inherent in representing events in the form of discrete factual and legal narratives, Jan Blommaert has highlighted the role of processes of decontextualization and recontextualization in how legal frameworks and procedures function discursively as meaning making practices.[149] Blommaert offers the concept of

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[143] Houge (n 111), 279.
[144] Jerome Bruner, 'The Narrative Construction of Reality', (1991) 18(1) *Critical Inquiry*, 13.
[145] Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford University Press 2016), 295.
[146] Carine M. Mardorossian, 'Toward a new feminist theory of rape', (2002) 27 *Signs*, 766.
[147] McMillan (n 1), 22.
[148] *Ibid.*, 11.
[149] Jan Blommaert, *Discourse: A Critical Introduction* (Cambridge University Press 2005), 62-76; Susan Ehrlich, 'Text trajectories, legal discourse and gendered inequalities', (2012) 3(1) *Applied Linguistics Review*, 47-73.

text trajectory to capture how texts and discourses undergo transformations in meaning when they move around and are recontextualised in different interpretive spaces.[150] In the context of legal proceedings, Blommaert reveals in this way how narratives of events are not constructed 'in one act of communication; [they are] constructed through a sequence of re-entextualisations, involving far-reaching reinterpretations of the story, summarising and rewording practices, and the reframing of a story in a legal and procedural framework.'[151] For instance, in the context of criminal proceedings, trial testimony is often transplanted into other communicative events within the legal process; it can be recounted in the closing statements of lawyers, discussed by juries, or cited in the decisions of judges.[152] Susan Ehrlich and Tanya Romaniuk explain that the transplantation of a text or discourse into a different context in this way can have 'transformative effects: once a stretch of talk is 'lifted out of its interactional setting', segmented, and turned into a 'text' […] it may bring something from its earlier context, but may also take on different meanings as it is 'recentred' (i.e. recontextualised) in a new context.'[153]

The notion of text trajectories in this respect captures the idea that 'meaning-making practices are never exhausted after one speech event; rather they occur over a series of interconnected speech events and often involve far-reaching re-interpretations of that initial communicative event.'[154] Drawing also on the notion of text trajectories, the 'process of meaning making'[155] surrounding the criminal acts analysed in this thesis is therefore conceptualised as a continuum of discursive and narrative construction through which the normative meaning attributed to criminal acts are continually reconstituted through different dimensions of the legal process and through numerous decisions engaging with each other.

For the purposes of examining the individual acts that constitute international crimes from a normative perspective, a discursive and narrative expressivist approach in this way provides a means of complementing and operationalising the wider Durkheimian conception of the constitutive function of criminal law in relation to the norms or values invoked by the criminalisation of particular acts of violence. Such an approach brings to the fore not only the significance of the socially and politically situated roots of the criminalisation of certain acts of violence, and the normative dimensions of their legal definitions with the values or principles these conceptually invoke, but also the significance of how such crimes are constructed discursively in

[150] Blommaert (n 149), 46.
[151] *Ibid.*, 63.
[152] Ehrlich (n 149), 49.
[153] Susan Ehrlich and Tanya Romaniuk, 'Text Trajectories and Gendered Inequalities in Institutions' in Jo Angouri and Judith Baxter (eds), *The Routledge Handbook of Language, Gender, and Sexuality* (Routledge 2021), 355.
[154] Ehrlich (n 149), 69.
[155] McMillan (n 1), 11.

the factual and normative narratives forwarded about them both in judgments and during the course of criminal proceedings. Combining a Durkheimian conception of the constitutive function of criminal law with an analysis of the discourses that emerge through the practices of international criminal justice in this way seeks to capture how courts and legal practices 'do not just reflect common conscience, but also help to shape it. They become the agent of and substitute for values.'[156] The discourses that emerge through decisions, trial proceedings and other legal practices therefore provide one way of examining how the practices of international criminal justice produce and invoke these values. The narrative expressivist approach in this way provides a framework for examining how the practices of international criminal justice function concretely as a 'process of meaning making'[157] with respect to the normative dimensions of the individual acts of violence criminalised as international crimes and for conceptualising the productive effects of this process.

3. Methodological approach

The methodological approach applied to the analysis of the crimes discussed in the rest of this thesis draws on the theoretical framework outlined in this chapter. Through the different aspects of the analysis, this methodological approach seeks to capture the elements of how crimes and their normative dimensions are historically, socially and politically situated, can be understood as constitutive of certain normative principles in what their legal definitions invoke at an abstract, conceptual level, and are further discursively constructed through the processes of meaning making that take place during prosecution and judgment.

a. Selection of crimes

The four crimes analysed in each of the following chapters are those of attacking cultural property, pillage, crimes of sexual violence and crimes of reproductive violence. These four crimes have been selected for analysis because they fall outside or appear more normatively complex or multi-dimensional than the generalised life, physical security and bodily integrity framework that is relied upon in much of the scholarship on international crimes outlined in the introduction to this thesis. In this respect, two of the crimes constitute crimes against property while the other two are crimes that have emerged in the more recent history of international law, attach to less well-established international norms and capture forms of conduct that remain, to varying degrees, normatively contentious at an international level. In this sense, posing the question of 'what might be the normative basis of the criminalisation of this act?' in relation to the crimes selected would be likely to elicit a more complex

[156] Marlies Glasius, 'Do International Criminal Courts Require Democratic Legitimacy?', (2012) 23(1) *European Journal of International Law*, 56.
[157] McMillan (n 1), 11.

response than might be the case for other crimes such as murder or torture, which fit more straightforwardly into the basic security rights paradigm previously discussed. These crimes have therefore been selected on the assumption that they are likely to reflect more richly the process of normative meaning making outlined in the theoretical framework proposed in this chapter.

Evidently, numerous other individual acts criminalised as international crimes could also fit these criteria. In addition to the limited scope of this study, which precludes an exhaustive investigation into all of the forms of violence criminalised as international crimes and required that a limited number be selected, it was necessary to select crimes for which there was sufficient material for analysis. For the purposes of this theoretical framework, this required the selection of crimes which have formed part of the charges in at least one case at an international tribunal in order to be able to analyse its treatment in decisions as well as the discourse that emerges around the crime during the course of proceedings. In other words, it was necessary to select crimes where some level of normative meaning making has taken place in practice. This therefore also ruled out crimes that meet some of the criteria outlined above but that have not been charged or prosecuted at an international tribunal to date such as, for instance, persecution on grounds of gender or apartheid.

Lastly, two crimes against property and two gender-related crimes were selected on the grounds that their normative dimensions have been understood as significant in some way; they have elicited a degree of normative controversy and/or have enjoyed celebration in normative terms. In this respect, some of the philosophical scholarship on international criminal law has reflected an uneasiness with the inclusion of crimes against property within the normative universe of 'the most serious crimes of concern to the international community as a whole'[158] that international criminal law claims to represent.[159] This uneasiness similarly manifested in the domestic and international response to the *Al Mahdi* case at the ICC, which involved a sole charge of intentionally directing attacks against religious and historic buildings. Various responses to this case questioned the normative legitimacy of focussing on this charge, with a Malian media source stating, for instance, that 'there are more important things than monuments. The human person is sacred and inviolable. Crimes of blood must come before crimes against monuments.'[160] The art critic for *The Guardian* newspaper notoriously also argued that:

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[158] Preamble to the Rome Statute of the International Criminal Court, 18 July 2002 [hereafter Rome Statute].

[159] See for instance Larry May, *War Crimes and Just War* (Cambridge University Press 2007), 20; Kirsten Fisher, *Moral Accountability and International Criminal Law – Holding Agents of Atrocity Accountable to the World,* (Routledge 2013), 41-42.

[160] Original: 'mais il ya plus important que les monuments. La personne humaine est sacrée et inviolable. Les crimes de sang doivent passer avant les crimes sur les monuments.' - Maliweb, 'Détention d'un Malien à la CPI: De la poudre aux yeux?'', 2 October 2015 [available at

> The most precious work of art in the world is still worth less than a single human life. War crime as a category must be kept distinct. It needs to be highly specific. The destruction of art is vile and offensive to many – but it is not mass murder and we should not pretend it is the same, nor that it belongs in the same court. There is potential for absurdity and moral confusion if artistic vandalism becomes a matter for The Hague. […] Culture can be renewed, remade, reinvented. Human life cannot. The organised torture and murder of human beings is what war crime should always, and unmistakably, mean. So while we mourn the loss of art or cultural artefacts, we need to keep a moral perspective in which the true crimes of war can be seen for what they are, and eradicated from the world.[161]

The codification of crimes of sexual and reproductive violence under international law was, by contrast, celebrated precisely in normative terms, being understood to reflect a significant development in wider international attitudes to violence against women.[162] The normative dimensions of the criminalisation of forms of sexual violence, in particular, have nevertheless also been contested. Feminist scholarship has, for instance, questioned the dominant normative conception of such crimes primarily as violations of bodily integrity for how this overlooks the autonomy or discrimination harms attached to such acts, and for how this constructs women's bodies and sexualities as violable and submissive.[163] While the criminalisation of forms of reproductive violence has enjoyed less scholarly analysis, the normative dimensions of these crimes were some of the most heavily contested during the

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https://www.maliweb.net/societe/justice/detention-dun-malien-a-la-cpi-de-la-poudre-aux-yeux-1179012.html - accessed 11 February 2022]. See similarly Info Matin, 'Sans Tabou: CPI, à quand le tour des assassins et autres agresseurs?', 3 March 2016 [available at https://info-matin.ml/sans-tabou-cpi-a-quand-le-tour-des-assassins-et-autres-agresseurs/ - accessed 11 February 2022].

[161] The Guardian, 'Destroying priceless art is vile and offensive – but it is not a war crime', 22 August 2016 [available at https://www.theguardian.com/artanddesign/jonathanjonesblog/2016/aug/22/ahmad-al-mahdi-war-crimes-the-hague-destroying-mausoleums-timbuktu#comment-81652909 – accessed 11 February 2022].

[162] Karen Engle, *The Grip of Sexual Violence in Conflict: Feminist Interventions in International Law* (Stanford University Press 2020), 44-47.

[163] See for instance Chiseche Salome Mibenge, *Sex and International Tribunals: The Erasure of Gender from the War Narrative* (University of Pennsylvania Press, 2013); Fionnuala Ni Aoláin, 'The Gender Politics of Fact-Finding in the Context of the Women, Peace and Security Agenda', University of Ulster Transitional Justice Institute Research Paper No. 14-08 (2014), 1-3; Vasuki Nesiah, 'Missionary Zeal for a Secular Mission: Bringing Gender to Transitional Justice and Redemption to Feminism' in Sari Kouvo and Zoe Pearson (eds), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?* (Oxford: Hart, 2014), 143; Kiran Grewal, 'International Criminal Law as a Site for Enhancing Women's Rights? Challenges, Possibilities, Strategies', (2015) 23(2) *Feminist Legal Studies*, 157-158; Engle (n 162), 151.

drafting of the Rome Statute[164] while matters related to reproduction, in particular female reproductive choice, remain highly controversial internationally.[165]

Taken together, the normative contestation and debate that surrounds each of these four crimes for this reason makes for particularly fertile ground for examining how the practices of international criminal law seek to explain or justify their criminalisation and prosecution, and in this way engage with and construct their normative dimensions.

b. Methodology

The analysis of each crime will consist of four steps that reflect the theoretical framework outlined in this chapter. These steps consist of an account of the crime's historical-normative roots, a conceptual analysis of its legal definition, followed by a discourse analysis of the normative themes articulated in the case law and the narratives that emerge around the crime during the course of proceedings. While the project of international criminal justice is broader than the activities of international criminal courts and tribunals, and includes domestic trials for international crimes and universal jurisdiction cases, this research focusses on the decisions and transcripts of proceedings of international courts and tribunals. This focus is due partly to the methodological constraint of selecting a feasible number of cases for which to examine decisions and transcripts, but is also due to the project's approach to examining the normative dimensions of the acts that constitute international crimes from the perspective of asking how certain internationally shared norms, principles or values are performatively invoked through their criminalisation and prosecution.

In this respect, the practices of international criminal courts and tribunals, as compared to their domestic counterparts, can be understood to more straightforwardly involve a performative invocation of internationally shared norms or values due to international courts' claim to speak on behalf of a notional international community, as distinct from the domestic political communities on whose behalf domestic courts claim to act as representative.[166] From this perspective, trials at international courts and tribunals, by virtue of being internationalised, may send different signals about what they are doing and who they claim to represent than

[164] Michael Cottier and Sabine Mzee, 'Article 8(e) War crime of forced pregnancy', in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (2016 Beck/Hart), 499.

[165] Lucía Berro Pizzarossa, 'Here to Stay: The Evolution of Sexual and Reproductive Health and Rights in International Human Rights Law', (2018) 7(3) *Laws*, 13-14.

[166] Harmen van der Wilt, 'On Regional Criminal Courts as Representatives of Political Communities: The Special Case of the African Criminal Court' in Kevin Jon Heller et al. (eds), *The Oxford Handbook of International Criminal Law* (Oxford University Press 2020), 194.

those that take place in domestic jurisdictions.[167] For this reason, while the nature of the political community invoked by domestic courts when prosecuting international crimes may not always be straightforward or bounded by the domestic political community in which a court is embedded, this thesis focusses on the practices of international courts and tribunals as the clearest starting point for examining how the processes of criminalising and prosecuting the acts that constitute international crimes performatively invoke a set of norms and values shared by an international community on whose behalf these institutions claim to speak.

In addition, while this thesis focusses on the normative dimensions of the acts that constitute international crimes due to the tendency in the scholarship to conceptualise them in generalised terms, it is important to note that it is not possible to entirely separate the normative dimensions of the acts that constitute international crimes from the wider crime categories to which they belong. The normative dimensions of these acts, in terms of their historical roots, their contemporary definitions and how they are constructed discursively in practice, will necessarily have been shaped in part by the context required by the category of crime in which they are embedded, be that a situation of armed conflict, a widespread or systematic attack against a civilian population or a situation involving the destruction of a national, ethnic, racial or religious group. In this sense, while this thesis focusses on the normative dimensions of the acts that constitute international crimes independent of the wider categories of international crimes, what is ultimately being examined is how these acts have been attributed with normative meaning within these contexts.

Taken together, the theoretical orientation of the different dimensions of this methodological approach is primarily inductive and intended to be descriptive, rather than normative. It seeks to capture the processes of normative meaning making that take place through the criminalisation and prosecution of the crimes under discussion. It is concerned in this sense with how the crimes are 'actually made to mean'[168], and the possible effects of this process of construction and representation, rather than seeking to advance a normative argument about how crimes should be conceptualised or treated in practice.

i. Historical-normative roots

Responding to the theoretical recognition that, as products of processes of social definition, crimes are inherently historically, socially and politically situated, this section of the analysis examines the historical-normative roots of the crimes in question. This includes both a straightforward account of the historical development

[167] Frédéric Mégret, 'In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice', (2005) 38(3) *Cornell International Law Journal*, 743.
[168] McMillan (n 1), 11.

of the legal norms which provide the basis for their contemporary criminalisation as well as consideration of the wider social, political and normative environment that gave rise to these norms. This section of the analysis draws on the existing scholarship on the historical roots of these crimes as well as the wider historical literature relating to the practices that subsequently came to constitute acts criminalised under international criminal law. In relying on existing scholarship on the historical origins of these crimes, this analysis reflects the dominant linear historical narratives contained in these accounts. While recognising that this approach is limited in how it may omit a more plural account of the historical roots of these norms and their contestability,[169] it is ultimately beyond the scope of this project to undertake a more critical historical analysis of the origins of these crimes. Instead, the aim is to offer a general overview of the normative roots of these crimes as captured in the development of the legal norms that historically underpin them and how these were justified or normatively conceptualised at the time in order to expose some of the social, historical and conceptual conditions from which they emerged.

ii. Legal definitions

Departing from the theoretical position outlined in this chapter that crimes conceived as public wrongs inherently invoke a set of publicly shared norms, principles or values as their referent, this section examines the normative dimensions of the contemporary legal definitions of these crimes from a conceptual perspective, considering the nature of the principles or values invoked by the definitions of these crimes. This conceptual analysis considers both the drafting history of the crime, where this is normatively illuminating, as well as taking into account the nature and form of the conduct that the legal definition can be understood to capture. The focus of this analysis is not, therefore, on the nature of the legal interpretation, understood as the determination or the construction of the content of the law,[170] that has produced these definitions, but is instead on developing a descriptive account of their normative implications. In other words, this analysis provides an abstract account of the normative implications of what the definition of a crime includes or excludes in terms of conduct and the implications of this in terms of what norms or values, understood in general terms, it can therefore be understood to invoke. The definitions discussed are those included in the statutes of the international criminal tribunals, including the ICC's Elements of Crimes, and any definitions or elements of crimes further developed in the case law.

[169] For an overview of debates emerging from the 'historical turn' in international law scholarship see Jean d'Aspremont, 'Critical histories of international law and the repression of disciplinary imagination', (2019) 7(1) *London Review of International Law*, 89-115.

[170] For discussion of different approaches to the nature of legal interpretation see Gleider I. Hernández, 'Interpretation' in Jörg Kammerhofer and Jean D'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (Cambridge University Press 2014), 317-348.

iii. Normative themes in the case law

Reflecting the narrative expressivist conception of the significance of the discourses constructed in legal decisions and more widely through the practices of international criminal justice, the next two sections turn to a more discursive account of the normative character of the crimes as constructed in the case law and during the course of proceedings, in order to examine the nature of the meaning making processes that take place in practice. It is important to note that the meaning making processes that construct the normative dimensions of these criminal acts may not be confined to practices internal to international criminal legal processes, but may also be shaped and informed by the practices of other actors involved in the international criminal justice system, such as states, civil society, the media or actors involved in domestic accountability efforts. The methodology applied in this thesis cannot therefore claim to capture the entirety of the meaning making processes that may shape the normative meanings of the acts that constitute international crimes. Instead, the thesis focusses on judicial decisions and the transcripts of proceedings as a starting point for examining how practices internal to the legal process contribute to constructing, but are nevertheless not exclusive of, the normative meanings of these acts.

This section of each chapter therefore conducts a discourse analysis of the case law concerning the selected crimes at each of the international criminal tribunals. Importantly, and distinct from the previous section's conceptual analysis of the definitions of the crimes in legal terms, the analysis of the normative themes in the case law focuses on the nature of the language used in decisions to describe and interpret these crimes in both normative and factual terms. This analysis therefore captures both explicit normative statements that engage directly with the normative dimensions of a crime and articulate a chamber's understanding of it in normative terms, as well as the normative implications of broader legal findings that relate to the crime and wider normative themes reflected in the factual narratives constructed around them.

This section of each chapter is based on a discourse analysis of all trial and appeals judgments for cases involving the selected crimes at the ICTY, ICTR, ECCC, SCSL and ICC. In addition, Confirmation of Charges, Sentencing and Reparations decisions from ICC cases, where available, and Sentencing decisions from ICTY and SCSL cases, where relevant, were also analysed on the grounds that they often contain substantial additional discussion of the normative dimensions of crimes. Taken together for each of the crimes, a total of 240 decisions were analysed. These are listed in Appendix I. In order to facilitate identification of the relevant sections of the decisions under analysis, they were searched for key words and coded using the qualitative analysis software ATLAS.ti. The list of key words used to search the decisions and identify relevant sections is included in Appendix II. This methodology of using key words to search the decisions for relevant text was not intended to be exhaustive, and some relevant

sections may not have been identified if they did not contain any of these key words. However, the key words were intended to be sufficiently comprehensive to identify the vast majority of the relevant sections of the decisions, and often captured significantly more than was relevant to the analysis. This suggests that the majority of relevant sections were identified through the use of key word searches. The identified sections of the decisions were then read and coded according to the normative themes they reflected. Codes were identified both inductively and deductively, with some being informed by existing literature on the crimes and case law, while others emerged through the process of conducting the discourse analysis. Finally, the selected sections of text were organised according to the code they had been allocated and were re-read to identify particularly representative or illustrative examples, which then formed the basis of the discussion contained in the chapter.

iv. Narratives during proceedings

Capturing narrative expressivism's concern with the discourse that emerges through the practices and performative dimensions of international criminal trials, in addition to that which is contained in the decisions themselves, the final section of each of the chapters consists of a discourse analysis of the transcripts of the same trials, the decisions of which were analysed in the previous section. The discourse analysis of the trial transcripts was intended to capture the wider variety of narratives about these crimes that may have been forwarded by different parties to proceedings, prior to being condensed into, included in or excluded from a judgment or decision.

The transcripts of the trials analysed are listed in Appendix III. With the exception of the analysis of crimes of sexual violence, all transcripts of all trials included in Appendix I were analysed. Due to the high number of cases involving charges for sexual violence, an exhaustive analysis of the transcripts of all trials involving such charges at the international criminal tribunals was not possible. The transcripts of those trials that featured charges of sexual violence most prominently, according to the previous analysis of the case law, were therefore selected and analysed for this chapter. The transcripts of the trials analysed for the chapter on crimes of sexual violence are listed in Appendix IV. In total, for all of the crimes, 19,157 trial transcripts were analysed. It is important to note the nature of publicly-available trial transcripts as a record of those sections of trial proceedings that have been conducted in open session. Some relevant sections of proceedings entered closed session, in particular those involving testimony of sexual and reproductive violence, meaning that the record of these sections of proceedings was not available for analysis. However, sufficient data from each trial was identified to ensure that an overview of the themes and narratives contained in them was captured.

A similar methodology to that outlined in the previous section was applied for the discourse analysis of the trial transcripts. Key words were again selected and searched for in order to identify those sections of transcripts where the crimes were likely to have been discussed during proceedings. These are listed in Appendix II. Identification of the relevant sections of proceedings where the crimes were discussed will similarly not have been exhaustive and some relevant sections may have been overlooked if the key words searched for did not appear. However, similar to the results of the key word searches of the decisions, significantly more text was identified by the key word search than was relevant to the analysis, which suggests that the majority of relevant sections were captured using this method. The sections of the transcripts identified using the key word search were then read and coded according to the narratives or themes they reflected. Codes were again identified both inductively and deductively. Coded sections of text were subsequently organised according to theme or narrative and again re-analysed to identify illustrative or representative examples which formed the basis of the discussion contained in the chapter.