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

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CONCLUSION

This thesis has explored the normative dimensions of the individual acts that constitute international crimes from the perspective of understanding international criminal law as a system of meaning that does not simply reflect a natural, predetermined order, but contributes to constructing the world in its own image. Drawing on a Durkheimian understanding of the relationship between law and society, the thesis has conceptualised the normative dimensions of criminal wrongs as being both declarative and constitutive of a society's collective consciousness. It has built on scholarship that has used this co-constitutive conception of the relationship between law and society to demonstrate how international criminal justice can be understood to function as a mechanism for continuously reaffirming the existence of an international society through the performative expression of its punitive feelings, and has sought to develop this reasoning at the more granular level of the acts criminalised by international criminal law. The thesis has sought in this way to demonstrate how international criminal justice not only performatively reconstitutes the international society on behalf of which it claims to speak but, in casting certain acts as 'public', criminal wrongs, also performatively constitutes a set of norms or values as their referent that are so central to that society's identity and how it defines itself that their violation requires public condemnation.

The thesis has sought to demonstrate how this constitutive conception of criminal wrongs is especially relevant to understanding the normative dimensions of the criminal acts that constitute international crimes because of how international criminal law exists outside of the structuring legal and normative framework of a state. Without an external framework on which to hang the normative meaning of or justification for the criminalisation of these acts, the normative contents of international criminal wrongs must be actively constituted in meaning making processes that exceed those embedded within the state. The aim of the substantive chapters of this thesis has ultimately therefore been to trace these processes of normative meaning making in relation to the criminalisation of attacks on cultural property, pillage, sexual violence and reproductive violence.

In embedding these processes of meaning making within a wider theoretical conception of crimes as both manifesting and constituting a set of fundamental norms or values shared by the society that the criminal justice system is understood to represent, the normative dimensions of these criminal acts have been approached as the products both of processes of social definition as well as of ongoing processes of construction and reconstitution in practice. In adopting this approach, the thesis has deviated to some extent from an exclusively Durkheimian conception of criminal law as the manifestation of a society's collective consciousness in terms of how it has also sought to recognise how a society's moral order, of which criminal law is understood

to be an expression, is not static, unchanging and apolitical, but is instead shaped and instituted by dominant social forces.[1]

The approach adopted in this study, of combining an account of the normative history of a crime with an analysis of the normative implications of its contemporary definition, along with how it has been discursively constructed through practice, has therefore sought to capture a more flexible conception of how criminal law can be understood as both a manifestation and reconstitution of a particular moral order. The analysis has sought to reveal in this sense how the crimes analysed are products of socially, politically and historically situated conditions, and has supplemented Durkheim's more static conception of collective consciousness with recognition of how actors and institutions also contribute to tangibly constructing and shaping their normative meaning through practice.

1. Making crimes mean

The analysis of the crimes of attacks on cultural property, pillage, sexual violence and reproductive violence have substantiated this understanding of the normative dimensions of the criminal acts that constitute international crimes. Each chapter has revealed how these crimes emerged from a particular set of historical and conceptual conditions which led to this conduct emerging as abhorrent. In the cases of attacks on cultural property and pillage, these forms of conduct came to be understood as wrong, and ultimately to be prohibited, during a period in which wider ideas were emerging in Europe about limiting the unnecessary use of force during war. Within this wider normative context, particular veneration had also come to be accorded to art, culture and historic monuments during the Renaissance and Enlightenment, while the commitment to the sanctity of private property emerged as a central pillar of the liberal philosophy that came to dominate in Europe in the 18th century. These ideas formed the wider conceptual conditions in which prohibitions on attacking cultural property and pillage came to be incorporated into early codifications of the laws of war during the late 19th century.

Although often lumped together under the same conceptual umbrella, the analysis of the criminalisation of sexual violence and reproductive violence revealed altogether distinct normative histories. Similar to prohibitions on attacking cultural property and pillage, international prohibitions on sexual violence have long historical roots which can also be traced in part to the emergence of the principle of necessity in regulating the conduct of war. Early prohibitions on rape nevertheless also emerged from a social context in which women constituted the property of male relatives, which therefore manifested in the codification of honour-based conceptions of rape in international

[1] David Garland, *Punishment and Modern Society: A Study in Social Theory* (University of Chicago Press), 53.

humanitarian law that reflected an understanding of the wrong of the act as emanating from the violation of male ownership of female chastity.

The same patriarchal social conditions ensured that an understanding of forms of reproductive violence as wrongful emerged much later in international discourses, which ultimately only began to take place in the 1990s. Prior to the emergence of a human rights discourse on sexual and reproductive health, in which the reproductive sphere was increasingly constructed as one governed by individual rights, a confluence of patriarchal norms positioning the reproductive functions of women as naturally subject to the control of partners, families, or communities, along with the dominance of the population control paradigm in international discourses ensured that acts of reproductive violence were not generally considered wrongful unless they formed part of an attack on the existence of a group. The criminalisation of acts of reproductive violence as war crimes and crimes against humanity in the Rome Statute was in this sense both a reactive response to evidence of acts of forced pregnancy reported to have taken place in the former Yugoslavia but also a product of the relatively-newly emerged and far from settled notion that coercively interfering with an individual's reproductive capacity could be considered wrongful.

The unique historical roots of these crimes reveal how they each emerged as a result of a process of social definition through which a particular set of social, political and historical conditions in the dominant European order rendered the acts in question repugnant and catalysed their prohibition in early codifications on the laws of war or, in the case of acts of reproductive violence, their criminalisation in the Rome Statute. While not yet translated into the not-yet-existing framework of international criminalisation, at their normative roots, each of these criminal acts can be understood in this sense to constitute a manifestation of the discrete temporal, social and moral orders from which they emerged.

Once codified as acts constituting international crimes, the nature of the definitions of these criminal acts provides an additional component to how their normative dimensions can be understood. Examining how the definitions of these crimes invoke certain norms, principles or values through the nature of the conduct that they capture in the abstract has provided part of an answer to the question of what public wrongs are constituted through the criminalisation of these acts. The analysis revealed how, at the definitional level, the crimes of attacking cultural property and pillage invoke a conception of the norms or values protected by the crime that, for the most part, reflect their normative roots. In the case of attacks on cultural property, the dual normative roots of the crime has been reflected in a degree of fluctuation between definitions that invoke a civilian use justification for the criminalisation of these acts, versus other definitions that invoke a more cultural-value oriented conception of the reasons for their criminalisation. In this sense, the nature of the public wrong invoked by the definitions of the crime of attacks on cultural property relates to both the infliction of

civilian suffering by attacking buildings with a civilian character during armed conflict, but also to the wrong of damaging or destroying cultural property because of the separate idea that culture, and its physical embodiments, is valuable in its own right. More straightforwardly, the definitions of pillage codified in different statutes and developed through the case law in general reflect the normative roots of the crime, invoking a public wrong that is rooted in the violation of the rights to property during armed conflict.

The definitions of the crimes of forced pregnancy and enforced sterilization similarly capture the normative environment from which they emerged in terms of how they invoke a public wrong that rests on the violation of a circumscribed individual entitlement to agency and autonomy in one's reproductive life in a specific set of circumstances. This tempered and situation-specific invocation of an individual right to reproductive choice embodies in the definitions of these crimes the tension in the wider social order between the relatively recent emergence of the notion that individuals have a right to reproductive choice versus the ongoing resistance to this normative development in many social and cultural contexts.

By contrast, the definitions of the crimes of rape and sexual violence developed through the case law of the ad hoc tribunals and codified in the Rome Statute are distinct to the other crimes examined in this thesis in terms of how they do not straightforwardly invoke a public wrong that reflects the normative history and roots of the international prohibition of these forms of violence. The definitions of these crimes instead marked a departure from the honour-based conceptions of the wrong of rape from which the prohibition of rape and sexual violence initially emerged, and which subsequently shaped how these norms were codified in international humanitarian law. The definitions of rape and sexual violence developed in international criminal law ultimately construct accounts of the public wrong attached to these crimes that are rooted in, on the one hand, the infliction of physical violence and bodily harm on the victim and, on the other hand, the violation of their individual right to exercise sexual agency and autonomy.

While the substance of the norm against rape in general terms may not have changed substantially from the prohibitions of attacks on honour contained in international humanitarian law, the reasons why acts of sexual violence are considered wrongful have in this sense evolved significantly to reflect the changing social order in which women have been increasingly understood as subjects with an individual right not to experience non-consensual interference with their bodily autonomy or in their sexual lives. In a similar way, the later criminalisation of forms of reproductive violence can be partly understood as a manifestation of the wider social shift away from normalising control over women's reproductive functions towards the emerging notion that women are entitled to exercise agency and autonomy in their reproductive lives. The analysis has in this way revealed how the definitions of the crimes of sexual

violence and reproductive violence codified and developed in international criminal law epitomize a more flexible conception of an international collective consciousness in terms of how these crimes mirror and reconstitute the changing position of women in the dominant social and moral order.

Finally, expanding on this more flexible conception of collective consciousness, the analysis of the discourse in decisions and during the course of proceedings has substantiated the significance of practice for understanding the normative dimensions of these crimes, revealing how the actors and institutions engaged in prosecutions further contribute to constructing and shaping their normative meaning. This is evident in how the normative themes and narratives that emerge in the case law and during the course of proceedings around each of these crimes build on and, to varying extents, differ from the conceptual nature of their definitions, as well as from their normative roots.

For instance, while the different definitions of the crime of attacks on cultural property reflect the dual normative roots of this prohibition, invoking both civilian use and cultural value rationales for the protection of cultural property during armed conflict, the case law and the discourse during proceedings construct an exclusively cultural value justification for its criminalisation. In addition, the analysis of the discourse in decisions and during proceedings has further revealed a significant degree of evolution in the nature of how cultural value has been constructed in practice, reflecting a turn away from a traditional object-centric, internationalist conception towards an account of cultural value that also captures a functionalist, local and people-oriented approach. Illustrating the centrality of practice in developing the normative meaning of crimes, this evolution was particularly pronounced in the *Al Mahdi* case at the ICC, in which, despite the civilian use rationale for the protection of cultural property invoked by the Rome Statute definition of the crime, a multifaceted account of a cultural value justification for its criminalisation was advanced, including a particular emphasis on a functionalist and local account of cultural value that sought to invoke a living connection between people and buildings.

Similarly, while less complex and varied than those constructed around attacks on cultural property, the normative themes and narratives constructed around the crime of pillage go further in the extent to which they depart from the conceptual basis invoked by the definition of the crime. While the early cases at the ICTY reflected relatively limited engagement with the normative dimensions of the criminalisation of pillage beyond appealing to its normative roots in the protection of rights to property under international humanitarian law, the analysis revealed how the cases at the SCSL and the ICC pivoted towards a narrative that centralised the use value of pillaged property in ensuring the subsistence and survival of civilians. This narrative is somewhat at variance with the ownership rights model of the definition applied at these courts and the wrong of the violation of the right to private property during

armed conflict that it invokes. In the same way, the centrality of the principles of reproductive autonomy and choice in the normative narratives constructed around forced pregnancy in the judgments and during the proceedings in the *Ongwen* case deviate from the more circumscribed account of these principles invoked by the definition and drafting history of the crime.

Crimes of rape and sexual violence constitute somewhat of an exception to this pattern. Perhaps due to the fact that the definitions themselves underwent significant transformation through their development in the case law of the ICTY and ICTR and their codification in the Rome Statute, the analysis revealed that the narratives constructed around these crimes in decisions map more closely on to the definition applied in a particular case. Thus, the early ICTY and ICTR case law on rape, which was characterised by an evolving debate over the relevance of the element of consent for the definition of the crime, also directly invoked the associated principle of sexual autonomy. By contrast, the case law of the ICC, where the definition of rape follows a coercive circumstances model, has constructed a normative discourse around crimes of sexual violence that follows the conceptual model of understanding rape as a form of physical violence and aggression that violates bodily integrity.

At the same time, despite the identification of sexual autonomy as a principle protected by the criminalisation of rape in certain decisions of the ICTY and ICTR, the discourse in decisions and during proceedings at each of the courts and tribunals overwhelmingly constructs an account of the individualised harms inflicted by sexual violence that focusses on the physical, on bodily injury and suffering, or on the social harms of shame and stigma. This has resulted in the exclusion of the sexual dimensions of the harms experienced by individuals, despite some limited allusions to harms of this nature during the conduct of proceedings, and has ultimately resulted in the construction of a normative account of crimes of sexual violence in the case law that reproduces elements of an honour-based narrative and elides how they violate and may impact on sexual subjectivity. In this way, the narratives constructed around crimes of sexual violence do not follow the same pattern as the other crimes analysed in the sense that they do not depart from the conceptual nature of their definitions to the same extent. However, similar to the other crimes, the analysis of crimes of sexual violence nevertheless also exposes the process of construction and meaning making that takes place through practice in illustrating the inclusion and exclusion of perspectives involved in how the narratives around these crimes are constructed.

In this respect, by centralising the discourses and narratives constructed in legal decisions and during trial proceedings for understanding how the criminalisation of these acts has been imbued with meaning, the approach in this thesis has demonstrated how the normative meanings of these acts are actively produced, rather than being natural or given. In doing so, this thesis has sought to demonstrate not only what the public wrongs constituted through these individual criminal acts are, but

also, importantly, how they are formed. In this way, this study has sought to expose how the themes and narratives constructed in legal decisions and during proceedings form a central part of how international criminal law performatively invokes and reconstitutes a set of norms and values shared by the international society on whose behalf it claims to speak.

a. Meaning making as continuum

The discursive and narrative expressivist approach adopted in this thesis has in this way also illustrated the value of conceptualising the process of meaning making that takes place through practice in holistic terms. This process is comprehensive of the different dimensions of the legal process in each case as well as the aggregation of meaning that accumulates through sequences of cases and decisions engaging with and building on one another. The diversity of normative themes articulated through the trial process and reflected in the factual, legal and normative narratives contained in decisions, as well as how these have developed and evolved over time, highlights how the process of meaning making that imbues criminal acts with meaning transcends the normative statements offered in any particular judgment.

Instead, the process captured by this approach suggests that the normative meaning making that takes place with respect to these criminal acts can be understood to involve multiple steps in which meaning is generated at different points and on an ongoing basis. This first involves the criminalisation of an act that has come to be identified as wrongful, with the initial normative implications of how it has been defined in legal terms. This is followed subsequently by a process of construction during the trial process which fleshes out the normative meaning of a crime through the testimonies of victims and witnesses and the construction of factual and normative narratives by prosecution and defence. Within these individual trial processes, micro-level processes of meaning making take place in how discrete narratives constructed during proceedings necessarily involve inclusions and exclusions, with individual witnesses and parties to proceedings framing their narrative of events to meet the evidential requirements of the definition of the crime and the requirements of the legal process. The overarching narratives constructed by prosecution and defence during a trial, for instance in opening or closing statements, in turn involve acts of decontextualization and recontextualization, in which certain witness testimonies and other evidence is selected and recounted by parties to proceedings in support of their overall narrative of the case.

This multiplicity of narratives during proceedings is then further decontextualized and recontextualized in the judicial discourse that emerges from the trial, in the decisions required at different stages of proceedings, such as the confirmation of charges decision, the trial, sentencing and appeals judgments and, in some instances,

reparations decisions. In these decisions, the profusion of testimonies recounted during proceedings and the factual and normative narratives constructed by the parties are in turn summarised, may be reinterpreted, and are reframed according to the relevant legal and procedural framework to form the basis of a decision. The nature of these narratives, and therefore the form that this meaning making takes, at times also differs according to the stage of proceedings. The process of adjudication may reflect a perspective that is centred on the perpetrator, sentencing decisions may reflect greater focus on the impact of the perpetrator's crimes, centralising the issues of gravity and the harm inflicted on victims, while reparations practices engage most fully with the nature of the harms experienced by victims, usually offering the most expansive, holistic and victim-centred account of a crime. For instance, while each of the themes identified in the discourse around these crimes are to varying extents woven into each of the different stages of proceedings in each case, the analysis of the crime of pillage revealed how the use value of pillaged property - its role in daily lives and in ensuring the subsistence and survival of civilians - emerged particularly emphatically in the more harm and victim-focussed phases of sentencing and reparations in the *Katanga* and *Ongwen* cases at the ICC.[2]

The analysis of the crime of attacks on cultural property reflects a similar pattern, in which the various dimensions of the cultural value of the city of Dubrovnik and the mausoleums in Timbuktu, and therefore the nature of the particular harms inflicted by the destruction of property of such value, are expounded most fully in the sentencing decision in the *Jokić* case at the ICTY and the *Al Mahdi* case at the ICC respectively.[3] In the *Al Mahdi* case in particular, the reparations order constructed the most comprehensive account of cultural value in how, in addition to the other dimensions of cultural value captured throughout the trial, the Reparations Order also emphasised the emotional dimension of the relationship between people and cultural heritage, extensively citing the testimonies of individual victim applicants that testified to the emotional distress and harm they suffered as a result of the destruction of the mausoleums.[4] In this way, the nature of the stage of proceedings and the different interests at stake are revealed to also contribute to shaping how the legally relevant interest or harm is identified and constructed during proceedings and in the judicial discourse, and how the normative meaning attributed to the crime is therefore constructed.

All of this also takes place against the backdrop of previous decisions that address the same crimes. The normative meaning attributed to a criminal act and the narrative constructed around it in a particular decision is in this sense not static and isolated, but also forms part of an interconnected conversation between sequences of decisions.

[2] See Chapter 3, section 3(b).
[3] See Chapter 2, sections 3 and 4.
[4] See Chapter 2, section 3(d)(iii).

While sometimes implicit, this often also takes place explicitly, such as in the evolving jurisprudence on the definition of rape at the ICTY and ICTR, in which different chambers entered into conversation with one another to offer an evolving normative conception of the crime as an act of bodily violence and aggression versus one that centralised the principle of sexual autonomy.[5] In a similar fashion, in its analysis of the reparation required for the moral harm inflicted by the destruction of the mausoleums in Timbuktu, the Trial Chamber in the *Al Mahdi* case at the ICC drew on some of the object-centric narratives of cultural value that were advanced in decisions addressing the attack on Dubrovnik at the ICTY, which emphasised the authenticity and inherent value of historical buildings.[6] Seen from this perspective, the analysis of these criminal acts has exposed how their normative meanings are not generated in isolation, in a particular judgment or indeed exclusively in judgments, but can be better understood as taking place at different points throughout the different stages of the legal process and in a multiplicity of interconnected cases.

Fundamentally, then, this thesis has demonstrated how the normative dimensions of the individual acts that constitute international crimes can be understood as ongoing processes of construction and meaning making. It has illustrated how certain historical, social and conceptual conditions allowed these acts to emerge as repugnant, while the acts of criminalisation, prosecution and judgment contribute to a constitutive and continuing process of normative meaning making that performatively calls into existence a certain set of internationally-shared norms and values, which figure into the representational work that international criminal justice does in the world. In this respect, adopting an approach that understands the normative dimensions of these acts holistically in terms of an ongoing process of construction and discursive meaning making has revealed a greater degree of diversity to the representational aspects of international criminal justice than is often acknowledged.

b. Diversity of interests

This thesis began by highlighting how an understanding of the nature of the violence captured by international crimes as direct, physical violence and bodily harm that violates corresponding basic security rights to life, physical security and bodily integrity figures centrally in many of the philosophical theorisations of the categories of international crimes, and forms the basis of some foundational critiques of the field. The analysis of the crimes of attacks on cultural property, pillage, crimes of sexual violence and crimes of reproductive violence has nevertheless revealed how the normative dimensions of the acts that constitute international crimes can be understood as more complex than this dominant interpretation on two levels. Firstly,

[5] See discussion in Chapter 4, section 2.

[6] See discussion in Chapter 2, section 3(c).

on a basic level, the nature of the rights, interests or values invoked by the definitions of the criminal acts analysed in this thesis and how they have been interpreted in the case law go far beyond the typical 'attacks on "basic security rights"'[7] conceptualisation of international crimes. In this respect, the analysis has revealed how these acts have been interpreted as protecting the specifically cultural dimensions of cultural property, as protecting both liberal individual rights to private property but also communal or collective rights to property, and as protecting individual rights to sexual and reproductive autonomy, and the right to family.

At a second level, in adopting a narrative expressivist and discursive approach to capture the continuum of meaning making that takes place throughout the legal process, the analysis has also offered an additional layer to how these acts can be normatively conceptualised. Understanding the normative dimensions of the criminal acts that constitute international crimes in these terms reveals not only that they are more normatively diverse than the basic security rights paradigm suggests but that, taken individually, they can also be understood as normatively varied and complex in their own right. This thesis in this way also complicates the notion that the normative dimensions of a criminal act can be boiled down to the protection of a static or immutable right, value or legal good or the prevention of a specific and clear-cut type of harm.

In this respect, the analysis has for instance revealed how the criminalisation of attacks on cultural property has been understood to engage universalist notions of cultural value and the inherent value of a cultural object in its material existence, but also to protect its social meaning, the social and religious practices that surround such property, and its role in the emotions, memories, identities and social fabric of individuals and communities. Similarly, while individual rights to private property as well as community rights to communal property have been invoked to justify the criminalisation of pillage, prosecutions have nevertheless also transcended the property rights paradigm. They have increasingly downplayed the element of ownership and instead centralised the use value of objects in the livelihoods, subsistence and survival of civilians, in addition to at times highlighting the particular cultural role and significance of certain items within a particular community.

The same normative diversity is evident in the analysis of the crimes of sexual violence and reproductive violence. Thus, the criminalisation of sexual violence has been identified as protecting the values of physical and moral integrity, human dignity and sexual autonomy and integrity, while condemnation for the violation of a conjugal order in which sexual violation inflicts shame and stigma on victims, and in some instances, the institution of virginity, is nevertheless also implicitly interwoven into

[7] 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*, 185.

the discourses of decisions and proceedings. The crime of forced pregnancy has similarly been identified to protect an individual right to personal and reproductive autonomy, and the right to family, while the violation of the victims' agency and choice has featured centrally in trial narratives.

Seen from this perspective, the assumption that the acts that constitute international crimes are normatively limited to violations of basic security rights appears reductive both in terms of the nature of the rights that are identified as well as in terms of the utility of conceptualising the normative dimensions of these acts exclusively through the lens of protecting specific and discrete rights, interests or legal goods, or preventing precise and clear-cut harms. Instead, what is revealed is a diverse, dynamic and evolving normative picture in which acts are interpreted from multiple perspectives. Some of these perspectives reflect a normative conception of these criminal acts as rooted in liberal conceptions of individual rights, while others at times reflect some more contextualised, social or communitarian elements in the nature of the rights identified to attach to or the harms identified as having been inflicted by these acts. In this sense, the representational work of international criminal justice in performatively invoking a set of internationally-shared norms and values on behalf of a notional international society can be seen at times to transcend the 'basic security rights' paradigm in the diversity and complexity of how the normative dimensions of these acts are constructed in practice.

c. Foundation building

Understanding the normative dimensions of the acts that constitute international crimes in these terms as an ongoing process of construction and discursive meaning making in practice in this way not only reveals a greater degree of normative diversity to these acts than the basic security rights paradigm suggests, but also underscores the lack of a settled or coherent extrinsic normative framework from which they derive their normative content. In this respect, the analysis of the process of meaning making that surrounds the criminal acts analysed in this thesis resonates with Sarah Nouwen's doubt over the prospect of identifying any normative essence to the category of international crime,[8] and with David Luban's conclusion that 'the atrocities and humiliations that count as crimes against humanity are, in effect, the ones that turn our stomachs, and no principle exists to explain what turns our stomachs.'[9] By demonstrating how each of the criminal acts analysed in this thesis emerged as the product of specific historical, social, and political conditions, and how

[8] 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.

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

their normative meaning is continually shaped and reconstituted in practice, this study in this way ultimately also suggests that no clear unifying foundations can be understood to underlie these acts. At the same time, this approach goes further than Luban's conclusion that no principle exists that explains what turns our stomachs, to suggest that 'what turns our stomachs' is in itself not a settled and unchanging category. Instead, this analysis has demonstrated how 'what turns our stomachs' is contingent on the configuration of a particular social and moral order, which is in turn reflected in and reconstituted by the criminal justice system that emerges from it.

This constitutive understanding of the normative dimensions of the acts that constitute international crimes and, importantly, the unsettled and changeable understanding of their normative foundations that comes with it, is underscored by the somewhat inconsistent and not always coherent character of the process of construction and meaning making that takes place through practice. In particular, the disjunct identified between the normative histories of these crimes and what their definitions conceptually invoke versus the narratives constructed around them in practice reveals a degree of malleability to the nature of their normative meanings. Similarly, some of the values or principles invoked in practice as constituting the normative basis of these crimes, such as moral integrity in relation to crimes of sexual violence, do not in themselves have a clear or transparent meaning, while others, such as human dignity, are so broad as to explain little as to the normative basis of the criminalisation of the particular act in question. Other rights or principles that have a perhaps more precise meaning, such as reproductive autonomy, are nevertheless invoked without explanation of how these criminal acts can be understood in these terms or what their legal or normative basis in international law may be. In a similar way, the human right to private property, while codified in some domestic and regional human rights treaties, is straightforwardly invoked as a basis for the crime of pillage in the case law, despite not enjoying a settled or unambiguous status under international human rights law.

In addition, the fact that the normative narratives constructed around some crimes differ not only from what their definitions conceptually invoke, but also between courts and cases, further exposes this normative malleability and the lack of a settled, clear or universal normative meaning attributed to them even within the internal practices of international criminal law. This is demonstrated for instance in the shift from emphasising rights to property in relation to pillage at the ICTY compared to the emphatically humanitarian focus of the narratives constructed around this crime at the ICC and SCSL. It is also evident in the evolution in the conception of cultural value that is constructed around the crime of attacking cultural property between the ICTY and the *Al Mahdi* case at the ICC, as well as in the abandonment at the ICC of the early language on sexual autonomy that emerged from the ICTY and the ICTR. These discursive shifts reveal how the actors involved in the processes of prosecution and

judgment have a degree of leeway in terms of how they go about explaining or justifying the criminalisation of these acts.

Taken as a whole, the nature of these processes of meaning making, which reflect a not always coherent and somewhat ad hoc and unsystematic exposition of the normative dimensions of these criminal acts, underscore how their normative foundations are not fixed, static or immutable, existing extrinsically to the framework of international criminal law, but are better understood as being constituted internally through practice. In this respect, despite not always being necessary for the purposes of the legal reasoning in a particular decision, the attempts to justify or explain the criminalisation of an act in normative terms, evidenced by statements like those describing the crime of attacking cultural property as representing 'a violation of values especially protected by the international community'[10] or describing the crime of forced pregnancy as 'grounded in the woman's right to personal and reproductive autonomy'[11], seems to reflect an impulse to construct normative foundations to the criminalisation of these acts that do not pre-exist these statements.

This constructive role of practice in relation to the substance of the law itself is well-recognised and relatively uncontroversial. In particular with respect to the decisions of the ad hoc tribunals, for instance, which operated with limited jurisprudence and vague statutes, judges are widely understood to have been required to address significant gaps and ambiguities in the law. As a result, these judgments are often seen to have represented a balancing act between the judicial function of delivering a verdict and the role of judges as developers of international criminal law.[12] Judges have in this respect been described as having 'resorted to expansive legal interpretations trying to fill the gap left open by a Swiss cheese corpus of international law.'[13] The approach adopted in this thesis reveals how the processes of meaning making that take place with respect to the normative dimensions of the acts that constitute international crimes can be understood in similar terms. In the absence of an extrinsic normative framework through which to justify or explain the criminalisation of particular acts of violence at the international level, the processes of meaning making that take place through practice, whether through decisions themselves or through the discourses that emerge during proceedings, can ultimately be understood to function as a means through which the field builds its own normative foundations.

[10] *Prosecutor v. Miodrag Jokić*, IT-01-42/1-S, ICTY, Sentencing Judgment, 18 March 2004, para 46.
[11] *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, ICC, Trial Judgment, 4 February 2021, para 2717 [hereafter Ongwen Trial Judgment].
[12] Rosa Aloisi and James Meernik, *Judgment Day: Judicial Decision Making at the International Criminal Tribunals* (Cambridge University Press 2017), 11.
[13] *Ibid.*

Recognising in this way how the normative foundations of these acts are malleable and built internally through practice is not a purely theoretical matter, relating only to how these acts can be understood in normative or representational terms, but also carries certain legal implications. In a similar way to some of the legality concerns raised with respect to the more expansive interpretations that characterised in particular the case law of the ad hoc tribunals, which have been criticised for how they 'took a toll on the right of individual defendants to a sufficiently foreseeable, accessible, and specific penal law'[14], exposing how the normative foundations of these acts are constructed and transformed through practice may also raise questions for procedural fairness and the principle of legality. In particular, the shifting and malleable nature of the normative foundations of these acts may impact on the foreseeability of the law, the principle of strict construction and the consistency and predictability of sentencing.

In this respect, revealing some of the changes that have taken place in how the normative dimensions of the crimes of attacks on cultural property, pillage, sexual violence and reproductive violence are constructed in practice has also exposed instances where these normative shifts are linked to or manifest through changes in how the legal elements of a crime have been interpreted. For example, in *Kordić and Čerkez* at the ICTY, the Trial and Appeals chambers arrived at differing conclusions as to the scope of the offence of destruction or wilful damage to institutions dedicated to religion or education based ultimately on different interpretations of cultural value.[15] Based on its analysis of the rules governing the protection of cultural property during armed conflict, the Trial Chamber included educational institutions within the scope of the offence on the grounds that they 'are undoubtedly immovable property of great importance to the cultural heritage of peoples in that they are without exception centres of learning, arts, and sciences, with their valuable collections of books and works of arts and science.'[16]

Adopting a more hierarchical and internationalist interpretation of cultural value, the Appeals Chamber by contrast rejected the notion that educational institutions could be considered of great importance to the cultural heritage of peoples on the basis that cultural or spiritual heritage is limited to 'objects whose value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of a people.'[17] It went on to stress that the adjective 'cultural' used in Article 53 of Additional Protocol I 'applies to historic

[14] Sergey Vasiliev, 'The making of international criminal law' in Catherine Brölmann and Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar 2016), 393.
[15] See Chapter 2, section 3(a).
[16] *Prosecutor v. Dario Kordić and Mario Čerkez*, IT-95-14/2-T, ICTY, Trial Judgment, 26 February 2001, para 360.
[17] *Prosecutor v. Dario Kordić and Mario Čerkez*, IT-95-14/2-A, ICTY, Appeal Judgment, 17 December 2004, para 91-92.

monuments and works of art and cannot be construed as applying to all institutions dedicated to education such as schools.'[18] In this way, the Trial and Appeals chambers' disagreement over whether the scope of the offence captured educational institutions hinged upon the difference in their approaches to the nature of cultural value. Thus, how these chambers interpreted the normative dimensions of this crime, in other words, how they understood what can be considered culturally valuable and therefore to be correctly protected by the offence, ultimately shaped their conclusions as to its legal scope.

While in this instance the Appeals Chamber in *Kordić and Čerkez* ultimately favoured a more restrictive interpretation of the crime, in other instances, shifts in how the normative dimensions of a crime are constructed have had the opposite effect. The interpretation of the term 'attack' in the Rome Statute's language of 'intentionally directing attacks against' cultural property in the *Al Mahdi* case represents a particularly contentious example of where this has taken place.[19] Expanding the traditional interpretation of attack as an act of violence against an adversary that takes place during the conduct of hostilities, the Trial Chamber in *Al Mahdi* determined that:

> [T]he element of 'direct[ing] an attack' encompasses any acts of violence against protected objects and will not make a distinction as to whether it was carried out in the conduct of hostilities or after the object had fallen under the control of an armed group. […] This reflects the special status of religious, cultural, historical and similar objects […] international humanitarian law protects cultural objects as such from crimes committed both in battle and out of it.[20]

This more expansive interpretation of attack has nevertheless been criticised by some commentators in relation to the factual circumstances in the *Al Mahdi* case, who have suggested that 'the term "attack" is not the word that would be used to describe the demolition or destruction of structures, using implements that are not weapons or military in nature, and where armed adversaries are not to be found within hundreds of kilometres.'[21] In this decision, the normative conception of the crime applied by the Chamber in this way again proved pivotal for shaping its legal interpretation. The Chamber used its understanding of the crime as centring on the cultural value of the protected property, stressing its 'special status' as distinct from the protections accorded to civilian objects in general and in contrast to the more civilian use rationale

[18] *Ibid.*, para 92.
[19] See Chapter 2, section 2(b).
[20] *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, ICC, Judgment and Sentence, 27 September 2016, para 15 [hereafter Al Mahdi Judgment and Sentence].
[21] William Schabas, 'Al Mahdi Has Been Convicted of a Crime He Did Not Commit', (2017) 49 *Case Western Reserve Journal of International Law*, 78.

invoked by the definition of the crime in the Rome Statute,[22] to ultimately broaden the nature of the conduct captured by the offence to the extent that some commentators have questioned whether this interpretation violated the principle of strict construction in the Rome Statute.[23]

Similar developments were revealed by the analysis of the element of ownership in the definition of the crime of pillage, which has been interpreted in increasingly expansive terms in the case law of the ICC and the SCSL.[24] Various decisions have interpreted the elements of intending to deprive an owner of property without their consent in broad terms, at times brushing aside the factual questions of ownership and consent,[25] and at others developing somewhat nebulous interpretations of the element of ownership, such as the assertion by the Trial Chamber in *Ntaganda* that it would consider 'the person who had the property under him or her as the 'owner'.'[26] The underlying normative transformation from the individual ownership rights model reflected in the ICC definition of pillage to the emphatically use value narrative constructed around it, and evidenced in the wider analysis of the crime, has in this way resulted, in a similar way to the expansion of the term attack in relation to attacks on cultural property, in a widening and loosening of the legal elements of the crime, which may similarly implicate the principles of foreseeability and strict construction.

Perhaps the most well-recognised example of where the normative conception of a crime has produced legal effects in shaping the nature of its definition is the evolution of the definition of rape in the case law of the ad hoc tribunals.[27] Following the adoption of different definitions of rape in the early case law of the ad hoc tribunals, in *Kunarac*, the Trial Chamber straightforwardly based its inclusion of the element of consent in its definition of the crime on its identification of sexual autonomy as 'the basic principle which is truly common'[28] to the crime of rape in national jurisdictions. The evolving definition of rape in the case law of the ad hoc tribunals, which, as demonstrated in the analysis, reflected and was partly driven by different conceptions of the nature of the wrong attached to this crime as an act of physical violence and aggression or as a violation of sexual autonomy,[29] has nevertheless been problematised for failing to adhere to the principle of legality. Roelof Haveman has, for instance, highlighted how the three definitions of rape developed in the case law during this period 'were only determined when the verdicts were given after the

[22] See discussion in Chapter 2, section 2(b).
[23] Schabas (n 21), 77.
[24] See Chapter 3, section 3(c).
[25] See Chapter 3, section 3(c).
[26] *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, ICC, Trial Judgment, 8 July 2019, para 1034.
[27] See Chapter 4, section 2(b)-(d).
[28] *Prosecutor v. Dragoljub Kunarac et al*., IT-96-23-T & IT-96-23/1-T, ICTY, Trial Judgment, 22 February 2001, para 457 [hereafter Kunarac Trial Judgment].
[29] See Chapter 4, section 2.

statements of evidence were recorded. This result[ed] in the suspect being highly curtailed of the possibility to defend himself.'[30]

Differing normative conceptions of a crime have also figured into some chambers' reasoning on the question of gravity for the purposes of establishing jurisdiction and for sentencing, in particular in relation to attacks on cultural property. In this respect, the varying approaches to cultural value identified in the narratives of different cases have ultimately produced different legal outcomes by shaping the analysis of the gravity of a crime. In *Hadžihasanović and Kubura* at the ICTY, the Trial Chamber determined that vandalism to the interior of a monastery was of sufficient gravity to constitute the offence of damage or destruction to institutions dedicated to religion, and to therefore fall within the court's jurisdiction, on the basis that 'special attention is paid to certain property, namely religious buildings, owing to their spiritual value. […] The Chamber considers that the seriousness of the crime of destruction of or damage to institutions dedicated to religion must […] take much greater account of the spiritual value of the damaged or destroyed property than the material extent of the damage or destruction.'[31] In this way, the Chamber's particular intangible understanding of the value of religious property, and therefore of that which is normatively protected by the crime, proved operative in its conclusion that it could exercise jurisdiction over the act of vandalism in this case.

Similarly illustrating how differing conceptions of the normative dimensions of a crime can shape the analysis of its gravity, and can in this way affect legal outcomes, in sentencing, the Trial Chamber in *Al Mahdi* identified a higher degree of gravity to the destruction of the mausoleums in Timbuktu based in particular on an internationalist conception of cultural value. The Chamber explained that 'all the sites but one […] were UNESCO World Heritage sites and, as such, their attack appears to be of particular gravity as their destruction does not only affect the direct victims of the crimes, namely the faithful inhabitants of Timbuktu, but also people throughout Mali and the international community.'[32] In this way, the internationalist dimensions of the Chamber's approach to the issue of cultural value, and therefore to how this crime was constructed in normative terms, also fed into the reasoning on Al Mahdi's sentence. Each of these examples ultimately demonstrate how recognising that the normative foundations of these acts are not rooted in a static and unchanging extrinsic framework, but are instead constructed and transformed internally through an ongoing process of meaning making in practice is not free of consequence in legal

[30] Roelof Haveman, 'Rape and Fair Trial in Supranational Criminal Law', (2002) 9(3) *Maastricht Journal of European and Comparative Law*, 264. See similarly Jessica Lynn Corsi, 'An Argument for Strict Legality in International Criminal Law', (2018) 49(4) *Georgetown Journal of International Law*, 1321-1381.

[31] *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, IT-01-47-T, ICTY, Trial Judgment, 15 March 2006, para 63. For discussion see Chapter 2, section 3(a).

[32] Al Mahdi Judgment and Sentence (n 20), para 80. For discussion see Chapter 2, section 3(b).

terms, but can also shape outcomes in ways that may ultimately implicate aspects of procedural fairness and the principle of legality.

2. International criminal wrong as flexible and dynamic

Taken together, understanding the normative dimensions of the acts that constitute international crimes in terms of a process of meaning making that takes place throughout the different stages of a continuum of cases, through which the field constructs its normative foundations internally through practice and produces a diversity of normative themes and interests in the process, ultimately points towards a more flexible and dynamic conception of wrong in international criminal law than is captured by the harm-based theories of criminalisation or theories of legal goods discussed at the beginning of this thesis. By revealing how the normative meanings of these criminal acts are constantly being discursively produced, re-constituted and transformed in practice, this thesis has illustrated how their normative dimensions are not given, settled or unchanging, and offers instead an account of wrongs in international criminal law as socially constructed, dynamic and pluralistic.

a. Legal and normative pluralism

The character of these wrongs as socially constructed and pluralistic is ultimately inherent to the nature of international criminal law in particular, but also to criminal law more generally. The normative pluralism that emerges in the nature of the harms, values or interests identified in the analysis of each of the crimes in this thesis, the way that they transform over time and the pluralism that characterises how they are articulated, in directly normative terms as relevant harms or protected rights, values or interests, or more implicitly, through the legal, factual and normative narratives that are constructed in the discourse, can be understood as a product of the inherently pluralistic character of international criminal law. Pluralism in international criminal law has been described as 'impossible to deny, prevent, or halt.'[33] International criminal law's pluralist character is variously identified in the 'irreducibly pluralistic environment'[34] in which it operates, in the plethora of its enforcement institutions, the diversity of substantive and procedural rules they apply, and the multiplicity of approaches and interpretations reflected in the body of case law that results from this institutional, jurisdictional and situational variety.[35]

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[33] Elies van Sliedregt, 'International Criminal Law and Legal Pluralism' in Paul Schiff Berman (ed), *The Oxford Handbook of Global Legal Pluralism* (Oxford University Press 2020), 576.

[34] Alexander K.A. Greenawalt, 'The Pluralism of International Criminal Law', (2011) 86(3) *Indiana Law Journal*, 1068.

[35] Elies van Sliedregt and Sergey Vasiliev, 'Pluralism: A New Framework for International Criminal Justice' in Elies van Sliedregt and Sergey Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford University Press 2014), 4-6, 14.

At a more foundational level, pluralism has also been understood to characterize 'the building blocks that constitute the normative structure'[36] of international criminal law, which reflect diverging values, rationales and normative identities. This emerges partly from the legal-cultural diversity of the domestic criminal law traditions from which international criminal law draws, but also from the diversity of the normative, methodological, and ideological foundations of the field.[37] In this respect, international criminal law has been described as reconciling 'at least three dimensions: the 'universalist' aspirations of public international law, the 'humanist' dimensions of human rights law and the legality and fairness-oriented foundations of criminal law.'[38] Elies van Sliedregt and Sergey Vasiliev explain how the 'conflicting premises, ambitions, and aspirations at the heart'[39] of international criminal law partly originate in this way from the plurality of the legal fields from which it draws its normative contents. In terms of substantive law, they therefore highlight how, for instance, the general international law dimensions of international criminal law pull in a state-centred direction, its criminal law dimensions centralise principles of strict legality, while its humanitarian and human rights law dimensions may tend to favour more progressive victim-centred or humanitarian interpretations.[40]

In this respect, the analysis of the normative dimensions of the criminal acts examined in this thesis reveals how they often reflect and reconstitute the legally pluralist character of the field as a whole, in how the wrongs invoked frequently draw explicitly on international criminal law's legally pluralist roots in different bodies of law. For instance, pillage was initially framed in the case law of the ICTY as normatively rooted in international humanitarian law's rules 'aimed at protecting property rights in times of armed conflict.'[41] The Trial Chamber in *Kunarac* at the ICTY conducted a review of domestic criminal law on rape to inform its conclusion that the relevant principle to be protected by this crime is sexual autonomy.[42] At the ICC, the Trial Chamber in *Ongwen* referred to the Convention on the Elimination of All Forms of Discrimination Against Women in its interpretation of the crime of forced pregnancy as being grounded in the right to family,[43] while it relied on the decisions of the African Commission on Human and Peoples' Rights and the Inter-American Court of Human Rights to inform its conclusion that the right to property encompasses both individual and communal property with respect to the crime of

[36] *Ibid.*, 29.
[37] *Ibid.*, 29-34.
[38] Carsten Stahn and Larissa van den Herik, 'Fragmentation', Diversification and '3D' Legal Pluralism: International Criminal Law as the Jack-in-the-Box?' in Carsten Stahn and Larissa van den Herik (eds), *The Diversification and Fragmentation of International Criminal Law* (Brill Nijhoff 2012), 23-24.
[39] van Sliedregt and Vasiliev (n 35), 32.
[40] *Ibid.*, 32-33. See also Vasiliev (n 14), 375.
[41] *Prosecutor v. Zdravko Mucić et al.*, IT-96-21-T, ICTY, Trial Judgment, 16 November 1998,
[42] Kunarac Trial Judgment (n 27), para 457.
[43] Ongwen Trial Judgment (n 11), para 2717.

pillage.[44] These examples make explicit how a pluralistic conception of the wrong that attaches to the criminal acts that constitute international crimes partly emerges from and in turn reconstitutes the field's legally pluralist structural foundations.

The analysis also reveals how the foundational pluralism of values, rationales and normative identities that characterise international criminal law manifests in the diverse nature of how wrongs are articulated. The normative dimensions of the acts analysed have been varyingly articulated in terms of rights, such as a right to private property, a right to reproductive autonomy or a right to family,[45] in terms of protected interests, such as the protection of cultural property or individual sexual autonomy,[46] or in terms of harms, such as those of shame and stigma experienced by victims of sexual violence and the harm to the conjugal order of their communities, the harm to the social fabric of communities inflicted by the destruction of cultural property, or the harm to civilians' ability to survive inflicted by the pillaging of their property.[47]

The nature of these narratives also illustrates some of the interplay between the normative dimensions of the acts that constitute international crimes and the wider crime categories within which they are embedded, in terms of how some narratives have been shaped by the context of armed conflict or other form of large-scale violence in which an act took place. This is evident, for instance, in the emphasis on the subsistence and survival of civilians in relation to the war crime of pillage or in the centrality of the injury to a community's conjugal order through the sexual violation of its members in the case of the war crime and crime against humanity of sexual violence. In other instances, a more stand-alone normative conception of a criminal act is offered that is less reliant on the context required by the category of crime to which it belongs, such as when the normative conception of an act is articulated in terms of the protection of a right or interest.

These diverse ways of constructing the normative dimensions of these acts ultimately capture some of the pluralist normative identities of the field, reflecting influences from domestic criminal law theory, such as in the identification of particular protected interests, as well as a pull towards more victim-oriented and humanitarian considerations in the increasingly comprehensive and nuanced nature of the harms that are articulated during proceedings and in judgment, sentencing and, in particular, reparation. The analysis of the crimes of attacks on cultural property, pillage, sexual violence and reproductive violence has in this way exposed how the meaning making processes through which the normative foundations of these acts are constructed through practice in turn reproduce the field's structural pluralism at a

[44] *Ibid.*, para 2766.

[45] See Chapter 3, section 2; Chapter 2, section 3(a); Chapter 4, section 2(d) and section 3(a)(ii).

[46] See Chapter 2, section 3(a); Chapter 4, section 2(d).

[47] See Chapter 4, section 3(b)(iii); Chapter 2, section 3(d)(ii); Chapter 3, sections 3(b) and 4(a).

normative level, producing a correspondingly pluralistic account of the wrongs that attach to these acts.

b. Criminal wrong as socially and politically situated

At the same time, the nature of the flexible and dynamic wrongs that emerge through the process of being continually discursively produced, re-constituted and transformed in practice, while partly reflecting the legally pluralist structures of international criminal law as a field, may also relate at a more fundamental level to the inherently socially constructed nature of the concept of 'wrong' in criminal law more generally. The wider theoretical framework adopted in this research, drawing on a Durkheimian understanding of criminal wrongs as both declarative and constitutive of a society's collective consciousness, foregrounded in the first instance how criminal wrongs are products of processes of social definition. The analysis of the crimes nevertheless also sought to move beyond Durkheim's static and homologous conception of collective consciousness by tracing some of the specific historical, social and political conditions in which these acts came to be understood as wrong in a Western-dominated international order as well as how their normative meanings are constructed and transformed in practice in an ongoing process of meaning making that both reflects and reconstitutes wider changes in this dominant social and moral order.

This co-constitutive relationship between changes in the dominant order and the nature of how wrongs are identified and constructed in international criminal law is best illustrated by the analysis of the crimes of sexual and reproductive violence. From its honour-based prohibition in international humanitarian law to its construction in international criminal law in terms of individual physical integrity and bodily and sexual autonomy, but not more fully in terms of sexual subjectivity, the nature of how the wrong attached to sexual violence is conceptualised has transformed alongside the changes in the position of women in the wider social and moral order. Similarly mapping on to these tectonic social shifts in gender roles and relations, the criminalisation of acts of reproductive violence took place in the context of a turn away from the population control paradigm in international discourses, towards a more individual rights-based understanding of the reproductive sphere, with the invocation of a woman's right to reproductive autonomy in the *Ongwen* case reflecting an emphatic consolidation of this shift.

While perhaps less evidently mapping on to such profound social changes, the analysis of the crimes of attacking cultural property and pillage nevertheless reflect a similar dynamic. The practice around the crime of attacks on cultural property has evolved in a way that reflects wider developments in the field of heritage studies towards a more local, community-oriented and intangible understanding of cultural

value.[48] Similarly, the practice on pillage has moved away from its historical roots in an emphatically-liberal individualist protection for property rights during armed conflict to reflect the more humanitarian and victim-oriented concern with subsistence and survival characteristic of the rise of the human security paradigm in the international order.[49]

The analysis of the normative dimensions of each of these crimes can in this sense be understood as paradigmatic of a conception of criminal wrong that is socially constructed and politically situated. In the domestic context, Lindsay Farmer exposes the inherently constructed and contingent nature of the concept of 'wrong' and its relationship to criminal law through a useful illustrative discussion of the distinction between the categories of *malum in se* and *malum prohibitum*.[50] In his analysis of this distinction, Farmer highlights how the notion of *malum in se*, with its invocation of inherent wrong independent of law, implies a conception of wrongfulness that is 'obvious', as opposed to crimes *mala prohibita*, which are crimes that are only wrong because they are prohibited by law. Farmer illustrates in this way how the notion of *mala in se* implies a category of 'core' or 'paradigmatic' crimes by virtue of the idea that their wrongfulness is more readily identified than those of *mala prohibita* crimes, which instead constitute the periphery of criminal law.[51] Approaching the notion of criminal wrong from a historical perspective, Farmer uses this notion of 'core' or 'paradigmatic' crimes to highlight how in reality:

> [T]he core is in fact always changing, either because crimes which were regarded as central or paradigmatic are no longer treated as such (eg treason, blasphemy) or because central features of 'core' crimes change in ways which shift the meaning and social significance of the crime. […] [T]he content of the idea of non-trivial harm or wrong is going to be highly dependent on the temporally contingent social meaning of certain actions.[52]

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[48] For an overview of these developments see Angela M. Labrador and Neil Asher Silberman 'Introduction: Public Heritage as Social Practice' in Angela M. Labrador and Neil Asher Silberman (eds), *The Oxford Handbook of Public Heritage Theory and Practice* (Oxford University Press 2018), 1-18.

[49] For an overview of the shift in the international order during the post-Cold War period from privileging state security to human security see Ruti G. Teitel, *Humanity's Law* (Oxford University Press 2012).

[50] Lindsay Farmer, 'Criminal Wrongs in Historical Perspective' in R.A. Duff et al. (eds), *The Boundaries of the Criminal Law* (Oxford University Press 2010), 220. For other examples of literature addressing criminal wrong in similar terms see Richard L. Gray, 'Eliminating the (Absurd) Distinction Between Malum In Se and Malum Prohibitum Crimes', (1995) 73(3) *Washington University Law Quarterly*, 1369-1398; David Brown, 'Criminalisation and Normative Theory', (2013) 25(2) *Current Issues in Criminal Justice*, 605-625.

[51] Farmer (n 50), 218.

[52] *Ibid.*, 220.

On this basis, Farmer concludes by calling for 'a richer account not only of what count as legal wrongs but of how these legal wrongs are linked to social, political, and legal order.'[53]

While understanding criminal law as in this way 'explicable largely as the result of exercises of political power at particular points in history'[54] is common in more sociologically or criminologically oriented scholarship on domestic criminal law, the 'context-free and abstract arguments of some [criminal law] philosophy'[55], which have informed many of the theorisations of international crimes offered in the scholarship to date,[56] have tended not to address this more socially and politically-informed dimension of what constitutes a wrong and its relationship to criminal law.[57]

The absence of the political from the discussion on the nature of the forms of violence that constitute international crimes is arguably somewhat characteristic of international criminal law and much of the rhetoric that surrounds it. This rhetoric often reflects a heavily natural law flavour in the vocabulary of 'atrocities that deeply shock the conscience of humanity' and the commonplace notion that 'the nature of the acts which international criminal law has traditionally dealt with […] tend to reflect […] the minimum content of natural law, exist[ing] at a liminal point in criminal law.'[58] In a similar way, while not always made explicit, a strong undercurrent of understanding the core international crimes as reflecting some form of *mala in se*, as intrinsically bad, evil or morally wrong, capturing conduct that could be considered 'so evil that not prosecuting it was viewed as wrongful'[59], shaped the field at its inception and often continues to animate how international crimes are conceptualised.[60]

This general tendency is also reflected in how the nature of the acts that constitute international crimes are commonly understood as resting on a set of given and self-evident, or in Farmer's words 'obvious'[61], wrongs, which characterises the popular discourse around the field as well as the spectrum of harm-based and protected legal

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[53] *Ibid.*, 237.

[54] Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press 2009), 2.

[55] Brown (n 50), 619.

[56] For an overview see Introduction, section 1.

[57] Farmer (n 50), 216-217.

[58] Robert Cryer and Albert Nell, 'The philosophy of international criminal law' in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar 2020), 207.

[59] Patrick Keenan, 'Doctrinal Innovation in International Criminal Law: Harms, Victims, and the Evolution of the Law', (2020) 42(2) *University of Pennsylvania Journal of International Law*, 433.

[60] Corsi (n 30), 1367. See also Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press 2019), 19-22; William A. Schabas, 'International crimes' in David Armstrong (ed), *Routledge Handbook of International Law* (Routledge 2009), 272-274.

[61] Farmer (n 50), 218.

goods or interests theories of international crimes discussed in the introduction to this thesis.[62] This in turn produces a discourse around international crimes that elides the relationship between criminal wrong and the wider social, political and moral order which constitutes international criminal law and is constituted by it, and which emerges particularly clearly in the analysis of the crimes of sexual and reproductive violence in this study, but is also reflected in those of attacks on cultural property and pillage.

The analysis of the crimes in this thesis in this way underscores the relevance to international criminal law of a socially constructed and contingent conception of wrong, which recognises the relationship between transformations in social and political relations and how 'particular moral concepts of wrong themselves change over time.'[63] Understanding the normative dimensions of the criminal acts that constitute international crimes in the terms proposed by this thesis, as an ongoing, flexible and dynamic process of meaning making that constitutes and is constituted by a pluralistic and socially constructed conception of wrong goes some way towards exposing this relationship. This, in turn, contributes in a small way to exposing some of the foundational politics of international crimes, which are often masked by the enduring strength of a naturalistic understanding of the wrongs that make up their constituent parts.

c. Legitimation

In understanding the nature of criminal wrong in international criminal law as socially constructed and dynamic, it is important to recall the co-constitutive relationship between criminal law and society outlined at the beginning of this thesis, in which criminal law is understood to be both 'generated by and productive of social order.'[64] In this respect, the constructed and contingent character of criminal wrong can be understood to operate in two directions; transformations in the dominant social and political order create the conditions in which certain acts come to be understood as wrongful and therefore to be criminalised, at the same time as the institutions and

[62] For instance, Larry May describes the normative contents of crimes against humanity as limited to 'basic rights to security and subsistence', David Luban describes them as acts that violate 'basic moral decency' while for Massimo Renzo they are acts that violate 'basic human rights.' Kai Ambos refers to rights to life, human dignity and physical integrity as legal goods protected by the crimes against humanity, war crimes and genocide, while the wider philosophical literature on war crimes has overwhelmingly focussed on acts involving violence to life and person. See Introduction, section 1. Larry May, *Crimes Against Humanity: A Normative Account* (2005 Cambridge University Press), 21; David Luban, 'A Theory of Crimes Against Humanity', (2004) 29(1) *Yale Journal of International Law*, 119; Massimo Renzo, 'Crimes Against Humanity and the Limits of International Law', (2012) 31(4) *Law and Philosophy*, 453; 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*, 66.
[63] Farmer (n 50), 237. See also Gray (n 50), 1369-1398.
[64] Farmer (n 50), 237.

practices of criminal justice also play a role in reasserting and reconstituting what is seen as wrongful and how these wrongs are understood.

In reflecting on the latter aspect of how criminal wrongs are constituted and reshaped through practice, which the analysis of the criminal acts in this thesis has exposed, it is worth returning to Frédéric Mégret's call for supplementing a Durkheimian conception of international criminal law with attention to the practices of the actors and institutions of international criminal justice as a means of uncovering some of 'the power that lies behind and constitutes the criminal-justice system.'[65] In this respect, Mégret's emphasis on the practices of these actors highlights how the themes and narratives that emerge through practice and constitute the process of meaning making that imbues the criminal acts analysed in this thesis with their normative meaning are partly a product of the agency of the actors and institutions engaged in the system of criminal justice. In other words, the normative discourses that emerge in practice and construct a particular account of the wrong attaching to a criminal act are not transcendent, emerging from nowhere, but are instead the product of the conscious or unconscious choices of the individuals and actors involved in these cases. As noted by Kjersti Lohne, since 'only individuals – not institutions and laws – have intentions, the actors inhabiting those institutions and prescribing those laws become key to understanding the developments of these very same institutions and laws.'[66]

Understanding the nature of the processes of meaning making and the construction of normative foundations that take place through practice as in this way a product of the agency of the actors involved in the justice system raises the question of their motivations and the power they exercise in pursuing particular narratives. While the motivations and reasoning of particular actors in constructing certain narratives was beyond the scope of this research, and may not even or always be a product of conscious reflection, taken as a whole, the nature of some of the themes and narratives identified in this research are nevertheless suggestive of a certain self-interested dynamic that may reflect a concern with legitimating the charges in a particular case in normative terms.

In particular, digging into the fine grain of the normative themes and narratives that have emerged through the case law and during proceedings reveals a tendency to rhetorically invoke harm or injury to the human person, usually in the form of invoking the life, physical security and bodily integrity paradigm, in terms of how the harms inflicted by and the wrongs underlying these criminal acts have been constructed. This is particularly the case with respect to the crimes against property

[65] Frédéric Mégret, 'Practices of Stigmatization', (2013) 76 *Law and Contemporary Problems*, 293. For discussion see Chapter 1, section 2.

[66] 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), 54.

of attacking cultural property and pillage, that do not directly involve injury to the human person in these terms.

While the normative discourse around attacks on cultural property is varied, constructing a multifaceted account of the nature of what can be understood to be valuable about cultural property, in the *Al Mahdi* case at the ICC, in which this crime was the sole charge, the functionalist, people-oriented approach featured heavily, in particular in the narrative constructed by the OTP. The OTP's narrative during proceedings appeared in this respect to seek to personify the destroyed mausoleums, casting them as living entities through invoking a profound connection between the buildings and a 'persons' deepest inner self'[67] and 'the very core of their being.'[68] Seeking in this way to situate the crime of attacks on cultural property within the wider normative universe of international criminal law, the OTP explained that the common denominator that unites international crimes relates to how they 'inflict irreparable damage to the human person in his or her body, mind, soul and identity'[69], going on to describe the crime of attacking cultural property as one that 'affects the soul and spirit of a people.'[70]

The OTP made explicit this justificatory aspect of its reasoning in therefore arguing that 'such an attack […] falls into the category of crimes that destroy the roots of an entire people and profoundly and irremediably affects its social practices and structures. This is precisely why such acts constitute a crime under Article 8(2)(iv) of the Rome Statute.'[71] The precise nature of how the OTP constructed the cultural value of the mausoleums in the *Al Mahdi* case, as being a living part of the people themselves, appears in this way to have functioned to legitimise pursuing a case involving a sole charge of the destruction of a building by discursively elevating it in gravity it to one that ultimately can be understood to have inflicted damage to the human person.

In a similar fashion, in marked contrast to the ownership rights model of the definition of the crime, the narratives constructed around charges of pillage at the SCSL and the ICC have been emphatic in their emphasis on the implications of the loss of property for the life and physical security of victims in impoverished communities 'where victims lived on a subsistence basis.'[72] Pillaged property has been described as

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[67] *Prosecutor v. Ahmad al-Faqi al-Mahdi*, ICC-01/12-01/15, ICC, Transcript 23 August 2016, 90 [hereafter Al Mahdi Transcript Date].
[68] Al Mahdi Transcript 24 August 2016 (n 67), 7.
[69] Al Mahdi Transcript 1 March 2016 (n 67), 12.
[70] *Ibid.*
[71] *Ibid.*, 13.
[72] *Prosecutor v. Issa Hassan Sesay et al. (RUF Case)*, SCSL-04-15-T, SCSL, Sentencing Judgment, 8 April 2009, para 172-176.

'essential to [the civilian population's] survival'[73], with victims left 'without basic necessities'[74] and having 'suffered a great deal as a result of the attackers having stolen the food […] many people suffered from intense hunger.'[75] These types of descriptions that explain the nature of the harm inflicted by pillage on victims, in these instances in terms of the threat to their subsistence and survival, are nevertheless absent when pillaged items have not fit as easily into the normative framework of threats to survival and subsistence, such as in the numerous instances where charges have also included the theft of items such as televisions, radios or watches.[76] The normative narrative constructed around the crime of pillage in these cases ultimately remains silent on the nature of the harm inflicted by the loss of items of this nature or the wrong that can be understood to underlie the charges for pillaging these types of property.

Similar to the nature of the narrative constructed around cultural value in the *Al Mahdi* case, this implies that the form taken by the normative narrative constructed around charges of pillage may have been, in part, driven by a justificatory impulse on the part of the actors involved in these cases since, where it is possible to discursively situate the act within the paradigm of basic security rights, the OTP and the chambers in these cases rely on this framework to normatively justify the prosecution of acts that, in themselves, do not involve direct harm or injury to the human person in these terms. By contrast, in the absence of such a clear link to the basic security rights paradigm, the normative dimensions of these acts are left unaddressed. The elevating of crimes against property to those involving harm to the human person that characterises the OTP's discourse in the *Al Mahdi* case and the decisions on pillage at the ICC and SCSL may in this way suggest that the nature of how actors explain and justify certain charges, in other words, what normative narratives they choose to construct about particular criminal acts, may be driven, at least in part, by an impulse to legitimate their pursuit of charges in a particular case.

Although not involving crimes against property, the analysis of the treatment of forced pregnancy in the *Ongwen* case at the ICC also supports this reasoning. In contrast to the narratives around crimes against property that seek to centralise harm

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[73] *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, ICC, Judgment pursuant to article 74 of the Statute, 7 March 2014, para 1665.

[74] *Prosecutor v. Jean-Pierre Bemba Gombo,* ICC-01/05-01/08, ICC, Judgment pursuant to Article 76 of the Statute, 21 June 2016, para 51-53.

[75] *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, ICC, Sentence 6 May 2021, para 201.

[76] See *Prosecutor v. Jean-Pierre Bemba Gombo,* ICC-01/05-01/08, ICC, Judgment pursuant to Article 74 of the Statute 21 March 2016, para 502, 509, 547, 646; *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, ICC, Trial Judgment, 8 July 2019, para 514, 1035, 1042; *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, ICC, Sentencing Judgment, 7 November 2019, para 139; *Prosecutor v. Alex Tamba Brima et al. (AFRC Case)*, SCSL-04-16-T, SCSL, Trial Judgment, 20 June 2007, para 1426; SCSL, *Prosecutor v. Moinina Fofana and Allieu Kondewa (CDF Case)*, SCSL-04-14-T, SCSL, Trial Judgment, 2 August 2007, para 460; *Prosecutor v. Issa Hassan Sesay et al. (RUF Case)*, SCSL-04-15-T, SCSL, Trial Judgment, 2 March 2009, para 1535, 1594; *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, SCSL, Trial Judgment, 18 May 2012, para 1939.

to the human person, the OTP and the Trial Chamber made little mention of the significant physical demands of pregnancy and the profound violation of bodily integrity inherent in being forced to carry a pregnancy to term without having chosen to do so. Instead, the narrative constructed around this crime by both the OTP and the Trial Chamber relied almost exclusively on a principled account of the wrong of the crime as rooted in a right to reproductive autonomy and choice. The physical nature of the harms inflicted on victims of these acts have so far gone almost unremarked in the narratives constructed in this case.[77] This may be because pregnancy and motherhood are represented almost universally in the dominant social order as positive 'life affirming experiences – as the greatest achievements of a woman's life.'[78] It is possible that the physical demands of pregnancy may therefore be difficult to conceive of as injuries or harms when nevertheless experienced by an individual without their choice. Since the reasoning of the actors involved in trials in choosing to construct certain narratives did not form part of this research, it is difficult to assess why this more abstract and principled normative meaning was attributed to the crime in this case. It is also important to note that, of all four crimes analysed, to date, only one case, which at time of writing is under appeal, has involved charges for crimes of reproductive violence, with the result that the meaning making processes around these crimes remain in their early stages.

At the same time, it may still be possible to speculate that this principled emphasis on reproductive autonomy and choice similarly formed part of a process of legitimation on the part of the OTP and the Trial Chamber involved in this case. The emphasis on reproductive autonomy and choice in both the OTP's narrative of the case and the invocation of this principle by the Trial Chamber can perhaps partly be interpreted as a response to the consistent calls among civil society and some states for greater gender-sensitivity in international criminal law.[79] The significance of being the first case to involve charges for forced pregnancy may in this sense have encouraged the actors involved in this case to construct a normative narrative that reflects the increasing gender-sensitivity of some quarters of the dominant social and moral order and, in doing so, to legitimate their progressive credentials on such issues. In this sense, the two aspects to understanding how criminal wrongs are socially constructed - as both the product of how notions of wrong are constructed and change in wider society, but also as a product of the role that institutions and practices of criminal justice in turn play in reasserting, transforming and reconstituting how wrongs are understood - are evidently not divorced from one another. Rather, the wider social and moral order not only provides the social context from which wrongs emerge but

[77] At time of writing the case is under appeal.

[78] Rosemary Grey, 'Reproductive Crimes in International Criminal Law' in Indira Rosenthal, Valerie Oosterveld and Susana SáCouto (eds), *Gender & International Criminal Law* (Oxford University Press, forthcoming), 33.

[79] For an overview see Louise Chappell, *The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy* (Oxford University Press 2016).

may also feed back into how actors involved in cases construct justificatory narratives that they believe may resonate with and be perceived as legitimate more widely.

While the reasons behind the construction of particular normative narratives by the actors engaged in the practice of international criminal justice was not ultimately the focus of this research, reflecting in this way on the nature of some of the narratives revealed through the analysis contained in this thesis nevertheless suggests that there may be a degree of self-justification at play on the part of the actors engaged in their construction, in which certain narratives are pursued as a means of legitimating the choices in a particular case. This points towards an element of inward-looking self-interest in shaping how the foundational normative aspects of these acts are constructed. In other words, if the normative foundations of these criminal acts can be understood, as proposed by this thesis, as being constructed internally through an ongoing process of meaning making in practice, the particular interests of the actors engaged in this process may contribute to shaping the outcomes of what these foundations end up being.

Although the nature of the research conducted for this thesis does not allow for more expansive or definitive conclusions to be drawn in this respect, reflecting on the interests at play in the process of meaning making that takes place in practice exposes some of the implications of understanding the normative dimensions of the criminal acts that constitute international crimes in these terms. This raises questions for further reflection as to the power exercised by the actors that shape how wrong is constructed in international criminal law and, in doing so, may not only shape the legal outcomes in a particular case, but also contribute to shaping the nature of the internationally shared norms and values that are performatively invoked through international criminal justice.

Ultimately, this thesis has not sought to take a normative position on the nature of the norms or values called into existence through the international criminalisation and prosecution of attacks on cultural property, pillage, sexual violence and reproductive violence. The more modest aim in conducting this analysis was instead to expose what some of these norms and values may be, and the nature of the processes through which they come to be. The thesis has in this respect offered a more granular but also a more socially and politically situated understanding of the normative dimensions of the acts that constitute international crimes, which reveals a more complex, dynamic and diverse normative picture than is captured by their typical characterisation as violations of basic security rights in some form. In doing so, this thesis has ultimately sought to lay some of the groundwork to enable a more particularised and transparent conversation about some of the representational work that international criminal justice does in the world.