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WHAT IS A "GRAVE" INTERNATIONAL CRIME? THE ROME STATUTE, DURKHEIM AND THE SOCIOLOGY OF RULING OUTRAGES

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I. Introduction

The modern relationship between criminal law and constitutionalism has had a rich, dynamic, and even symbiotic history. Across a variety of domestic contexts, the academic study and actual practice of criminal law endures perpetual reconstruction through rule of law debates and "constitutional" questions that juggle a bricolage of fundamental norms, rights, procedures and solidary values. What can be referred to broadly as constitutionalism has evolved similarly through societal disputes over the appropriate scope of criminalization, the proper extent of rights and procedural fairness, and the acceptable distribution and proportionality of penal sanctions. Yet, when the adjective "international" is placed in front of "criminal law," or discussions turn to the International Criminal Court (ICC), something curious happens to that rich tradition. Newly anointed international criminal lawyers recuse themselves from discussing the ICC within that same ethos, and even avoid references to the C-word via a lowercase semantics of cosmopolitanism. As a result, a novel discourse has become established that expresses International Criminal Law (ICL) not as the distinct relative of a public law or constitutional tradition, but rather ICL as a new penal orthodoxy of so-called "international criminal justice".[1]

International lawyers explain this seemingly gestalt switch with textbook efficiency and a taxonomical narrative intent on species distinction.[2] Foremost, ICL is asserted to have unique sociological and institutional origins that make it an extraordinary sort of criminal law.[3] Specifically, ICL does not derive from the unitary ideal-type of the state, but alternatively a pluralistic and exceptional international society of states that lacks an express constitutional instrument.[4] That alleged societal and textual distinction is then used to inform a dichotomy between local versus international prospects of criminal law, where the ICC is said

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[1] *See* GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE (Penguin, 2000); Luis Moreno-Ocampo, *The International Criminal Court: Seeking Global Justice* 40 CASE W. RES. J. INT'L L. 215, 215 (2008); *See also* Carsten Stahn, *Between 'Faith" and 'Facts': By What Standards Should We Assess International Criminal Justice?*, 25 Leiden J. INT'L L. 251, 251 (2012).

[2] *See* Kenneth Anderson, *The Rise and Fall of International Criminal Law: Intended and Unintended Consequences*, 20 EUR. J. INT'L L. 331, 331 (2009); Claus Kress, *The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise*, 1 J. INT'L CRIM. JUST. 603, 603 (2003).

[3] *See* Sarah Nouwen & Wouter Werner, *Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity*, 13 J. INT'L CRIM. JUST. 157, 157 (2015).

[4] Frederic Megret, *What Sort of Global Justice is 'International Criminal Justice'?*, 13 J. INT'L CRIM. JUST. 77, 79-81 (2015).

to represent an institutional form that operates in a normative and penal space distinct from public law or constitutionalism.[5] In this way, the term "international" serves an ideological and, not just, a grammar role: it signifies that while ICL, and concretely the ICC, manifest a new jurisdictional ambit it still structurally retains the exceptional sociology of international law that others the prospects of a public law or constitutional ethos.[6]

That mark of exceptionalism is astonishing, I argue, since the ICC has been celebrated within the discipline and profession of International Law as an evolutionary advance for the rule of law in terms of jurisdictional transformation as well as penal and communitarian possibility. The ICC is commonly framed within a historical narrative of evolutionary progress,[7] where the signing of the Rome Statute in 1998 followed by the ICC's subsequent ratification are placed along a trajectory that began with the Geneva and The Hague Conventions, the United Nations Charter, The Nuremburg and Tokyo Tribunals, the Universal Declaration of Human Rights, the Genocide Convention, and the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR).[8] Further still, the growth of international criminal tribunals over the past two decades have been portrayed by leaders, scholars and judges as institutionalizing a "revolutionary"[9] spatial and jurisdictional future for criminal accountability.[10] To use the words of United Nations Secretary-General Kofi Annan at the opening of the Rome Diplomatic Conference to establish the ICC: "We have an opportunity to create an institution that can save lives and serve as a bulwark against evil."[11]

This article casts critical light on that progressive narrative by emphasizing what, I argue, is the liminal crisis that afflicts the operative jurisdiction of the Rome Statute and, importantly, the ICC. By liminal crisis, I refer to the contentious question of operative threshold that the ICC now confronts publicly before a global audience of aggrieved victims, all primed in myriad numbers, locations[12]

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[5] Elies van Sliedregt, *Pluralism in International Criminal Law*, 25 LEIDEN J. INT'L L. 847, 848 (2012) ("The ICC most prominently features as a separate legal system").

[6] *See* Tor Krever, *International Criminal Law: An Ideology Critique*, 26 LEIDEN J. INT'L. L. 701, 701 (2013) (discussing ICL as ideology).

[7] *See* KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS (W. W. Norton, 2011) (showing a narrative example).

[8] Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 11 (1997).

[9] Payam Akhavan, *The Rise, and Fall, and Rise, of International Criminal Justice*, 11 J. INT'L. CRIM. JUST. 527, 527-529 (2013).

[10] Ban Ki-Moon, *With the International Criminal Court, a New Age of Accountability*, WASH. POST, May 29, 2010, at A19.

[11] Press Release, un.org, U.N. Secretary-General Kofi Annan address at inaugural meeting of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Press Release SG/SM/6597/L/2871 (June 15, 1998) https://www.un.org/press/en/1998/19980615.sgsm6597.html.

[12] *See* Carsten Stahn, Justice Civilisatrice? The ICC, post-colonial theory, and faces of 'the local, in Contested Justice: The Politics and Practice of International Criminal Court Interventions (Christian De Vos, Sara Kendall & Carsten Stahn, eds., 2015).

and causes[13] with jurisdictional expectations.[14] On the one hand, the Rome Statute was meant to represent a watershed jurisdictional development for an emergent global legal history, signifying how international society and institutionalism have evolved a global public ethos that combines the rule of law with trans-border solidarity.[15] Yet, on the other hand, this newborn and rhetorical "global public" actually operates within a narrow and privileged catalogue of international outrages and penality, which extends jurisdiction very selectively across a vast depth of culpable international tragedies.[16] As such, ethereal narratives and teleological framing must be put aside, so as to interrogate what are pressing socio-legal questions on the liminal extent of proclaimed (judicial) emancipation: What is the penal threshold of this unique jurisdiction that the ICC is said to legally and institutionally oversee? What is the actual scope of the social "evil" confronted via the doctrinal notion of international crimes? How does that frame our perceptions of who and where are the "saved", and from what kinds of evils? Ultimately, what are the parameters of solidarity that define the horizon of international outrage and penality under the ICC's watch?

At first glance these questions may appear to have only theoretical relevance, but truly they speak to the informal but no less consequential constitution that the Rome Statute actually manifests.[17] Further still, they resonate empirically across growing controversies over, for instance, how the ICC indicts overwhelmingly non-white Africans,[18] and whether the institutionalized sources of chronic starva-

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13 Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution, U.N. Press Release SC/11407 (May 2014); Mark Lowen, Europe, World, BBC, *Greeks seek austerity trial at The Hague,* (Apr. 24, 2012), https://www.bbc.com/news/world-europe-17811153.

14 William Schabas, *The Banality of International Justice*, 11 J. INT'L CRIM. JUST. 545 (2013).

15 *See* Luigi Corrias & Geoffrey Gordon, *Judging in the Name of Humanity: International Criminal Tribunals and the Representation of a Global Public*, 13 J. INT'L CRIM. JUST. 97, 108 (2015) ("International criminal tribunals represent the global public by speaking in its name, that is by saying 'we, humanity. . .'").

16 *See* Immi Tallgren, *The Voice of the International: Who is Speaking?,* 13 J. INT'L CRIM. JUST. 135, 138 (2015) ("The 'ICL we' is, in a way, just one linguistic phantom among others in the alienating landscape where the international crimes become crimes by getting selected out of a multitude of violence by baptizing them with their name and categorizing them as the gravest of all.").

17 Here I concur with Friedrich Kratochwil's thesis that constitutionalism is constituted and contested through varied but no less interacting formal, informal and semantic structures. *See* Friedrich Kratochwil, The Status of Law in World Society: Meditations on the Role and Rule of Law 77-78 (CUP, Cambridge, 2014) ("[T]he rule of law and the constitutional discourse amalgamate different themes and present us with a bricolage of different semantics rather than with an unequivocal and clearly structured program or corpus of rules and principles, sometimes hinted at in discussion on global administrative law, or in debates on the constitutionalization of international law. . . Many laws and documents might have constitutional standing without explicit systematization . . . and even when a clear and systematic exposition of the principles is intended—as in written constitutions—some of the hoariest problems might actually remain outside the constitutional framework.").

18 This racial grievance expressed concisely by Courtney Griffiths QC, who served as chief defense lawyer for the indicted former President of Liberia, Charles Taylor. *See* Mark Kersten, *Is the ICC Racist?*, JUSTICE IN CONFLICT (Feb. 22, 2012), https://justiceinconflict.org/2012/02/22/is-the-icc-racist/ ("If one goes down to the Old Bailey . . . on any given day if you troll around the court, you'll find that roughly ninety percent of all the defendants on trial in that Court are, guess what? Black. . . What we're seeing in terms of international law currently is the replication of that association between criminality and

tion in the Global South must be addressed as a crime against humanity.[19] As such, this article engages the Rome Statute, and its specific gravity threshold, as both a synonym and antonym of penal accountability, by looking critically into the sociological and doctrinal sources that have served to reify a circumscribed catalogue of international crimes, leaving the ICC struggling visibly to live up to its celebrated jurisdiction.

My methodological aim is to show how interdisciplinary research can enhance doctrinal analysis, and, in doing so, bring into conceptual view a submerged constitutional dimension at work within the Rome Statute, which typically escapes the lens of more doctrinal analysis. Specifically, I engage Durkheimian sociology for the purpose of complementing existing doctrinal critiques that have identified a sizable conceptual and policy void within the Rome Statute's seminal "gravity" threshold. This cross-disciplinary move makes visible a politics of ruling outrages that naturalizes, under the cover of doctrinal determinacy, an economy of what grave international crimes are and should be. Thus, the analytical benefit of infusing Durkheimian sociology is the connection this draws between the extralegal and doctrine, highlighting how the former is a silent partner that conventional doctrinal analysis is ill-equipped to grasp on its own.

To unpack my contribution we traverse considerable interdisciplinarity ground, and so my argument works between sociology and doctrinal analysis using the following three steps. First, Emile Durkheim is reintroduced[20] to international lawyers both for the juridical way in which he helped found modern sociology, but also for his deep scrutiny of crime and penal law as the ultimate artifice of any society's "sacred" outrages. In the second step, we bridge Durkheimian insight on sacred outrages and penality with ICL by scrutinizing how the doctrinal notion of grave crimes operates, in effect, as a powerful semantic, symbolic and, ultimately, sacral barrier, which serves to ring a narrow, but increasingly contested, catalogue of international crimes. In the third and final step, we discuss how this symbolic infrastructure has empowered an elite class of international criminal lawyers as managers of the gravity threshold. The key implication being that this creates the appearance of ICL as focused on boutique prosecutions, which minimize scope for wider public access and reflection on whether international crimes remain consistent with present debates on global outrages and solidarity.

black-ness which one sees at the national level not only here in the United Kingdom but in any significant Western country with a black population.").

[19] Gwilym David Blunt, *Is global poverty a crime against humanity?*, 7 INT'L THEORY 539 (2015).

[20] A number of works have related Durkheim's writings to international criminal law and justice. *See generally* Immi Tallgren, *The Durkheimian Spell in International Criminal Law*, 2 REVUE INTERDISCIPLINAIRE D'ETUDES JURIDIQUES 71, 137 (2013); MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW (Transaction Publishers, New Brunswick, 2000); Frederic Megret, *Practices of Stigmatization*, 76 L. CONTEMP. PROBS. 287 (2014); SALIF NIMAGA, EMILE DURKHEIM AND INTERNATIONAL CRIMINAL LAW: A SOCIOLOGICAL EXPOSITION, (2010).

II. A Disciplinary Odyssey: Durkheim, Sociology and Law's Solidarity

Emile Durkheim is recorded as one of the originators of the modern discipline of sociology. Yet, that label effaces the instability from which both he and sociology emerged, and this is worth emphasis owing to the precariousness that now defines our present international circumstances. Quite literally, Durkheim and disciplinary sociology emerged out of Europe's great social upheavals and reorganization in the 19th century, precipitated by the industrialization of what had been centuries-old rural societies and feudal economies. That intense social transformation cultivated a similar upheaval and change across Europe's established academy, which became reflected in the controversy over Durkheim's initial academic posting in 1887 as lecturer in "pedagogy and social science" at the University of Bordeaux. The controversy located in his post title "social science", which apparently emerged as a compromise because his newfound faculty questioned whether sociology was a genuine science of inquiry.[21]

For Durkheim, as exemplified in the title of his inaugural lecture La Solidarite Sociale, the case for sociology became spurred by need for deeper inquiry into the changing bonds of social solidarity in Western Europe and, specifically, the formation of a scientific perspective concerned with interrogating the transformation of the social.[22] The fundamental questions Durkheim defined as the basis of this new and imperative field: "What are the bonds which unite men one with another?"[23] "How. . .does it come about that the individual, whilst becoming more autonomous, depends ever more closely upon society?"[24] The key to answering these questions, Durkheim asserted, was a sociological field that examined the changing character of social morality and solidarity, which specifically took stock of society's moral order and the way it constituted individuals and modern self-consciousness.

In his magisterial work, The Division of Labour in Society, Durkheim then engaged directly with that central issue of what social solidarity is and how sociology, as a new and distinctive social science, could observe and classify it. The paradox Durkheim confronted, however, is that while all manners of solidarity constituted different types of societies, no less "social solidarity is a wholly moral phenomenon which by itself, does not lend itself to exact observation and especially not to measurement."[25] This left a nascent sociology in need of "social facts", and the way out of that conundrum, he asserted, was to "substitute for this internal datum, which escapes us, an external one which symbolizes it, and then study the former through the latter."[26] In other words, as Durkheim exclaimed:

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21 STEVEN LUKES & ANDREW SCULL, DURKHEIM AND THE LAW 54 (Basingstoke, Palgrave MacMillan, 2d ed., 2013).

22 *Id.* at 1.

23 Émile Durkheim, *Introduction a la sociologie de la famille,* ANNALES DE LA FACULTE DES LETTRES DE BORDEAUX, 257 (1888).

24 ÉMILE DURKHEIM, THE DIVISION OF LABOUR IN SOCIETY 7 (Basingstoke, Palgrave MacMillan 2013).

25 *Id.* at 52.

26 *Id.*

"Science studies heat through the variations in volume that changes in temperature cause in bodies, electricity through its physical and chemical effects, and force through movement. Why should social solidarity prove any exception?"[27]

Flowing from that analogy, Durkheim set out what sociology's essential indicators should be to help proxy its amorphous but no less consequential "object" of inquiry. He made two pivotal assertions significant for the making of disciplinary sociology, but also of under-examined salience for what is now an institutionalizing field of international criminal law. First, Durkheim held that the "perceptible effects" of social solidarity were symbolized and visible in law, owing to how law came to organize and reflect the moral structures that shaped a common or collective conscience.[28] Yet, Durkheim keenly distinguished between two principal kinds of law, repressive versus restitutive, and it was this former, repressive, type that he claimed spoke most directly to the quality and scope of the moral ordering that created an internal solidarity and thus a societal arrangement.[29] Second, Durkheim's emphasis on repressive law then informed what he claimed was the most direct empirical window onto the existence of a society: punishment as the "straightforward embodiment of [a] society's moral order."[30]

This motif of punishment engaged no less than three of Durkheim's major works (The Division of Labour in Society,[31] Moral Education[32] and The Two Laws of Penal Evolution[33]), and led to an evolutionary account of penal law that examined how pre-modern (mechanical) and modern (organic) forms of solidarity shaped legal performances of punishment. However, what proved the signature of Durkheim's study was his trans-historical conclusion: "Punishment has remained for us what it was for our predecessors. It is still an act of vengeance, since it is an expiation. What we are avenging, and what the criminal is expiating, is the outrage to morality."[34] That bold conclusion later generated profound criticism to the effect that, as David Garland has asserted, Durkheim's theorizing on punishment eventually became relegated to classroom textbooks.[35] The substantial critique being that Durkheim's emphases on moral outrage and vengeance had in fact naturalized and reified a pre-modern, largely religious, and "anthropological" model of punishment, which failed to reflect the detached professionalism, institutional distance and contestable moral order that allegedly typified contemporary penal practices.[36]

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[27] *Id.* at 53.

[28] *Id.* at 52.

[29] *Id.* at 55, 88-89.

[30] DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 25 (UCP, Chicago, 1990).

[31] Durkheim, *supra* note 25.

[32] Émile Durkheim, *Moral Education: A Study in the Theory and Application of the Sociology of Education* (E. K. Wilson and H. Schnurer, trans., Free Press, New York, 1961).

[33] Émile Durkheim, *The Two Laws of Penal Evolution,* 4 L'Annee Sociologique 65 (1901).

[34] *Id.* at 70.

[35] Garland, *supra* note 30, at 26-27.

[36] *Id.*

Yet, dismissing Durkheim vis-à-vis inadequate proportionality and historical immediacy came at the price of forgetting what had in fact been his more generic but no less eminent insight: what connected across different pre-modern and modern societies was how penal law remained to a considerable extent a fundamentally social, constitutive and morally imbued project. In other words, penal law represented, for those within and without, a mirror of the most sacred morals held by an asserted societal grouping at a given time. As such, Durkheim's focus on punishment had underlined a seminal social gap within a timeworn association that has been conceptually made between the notions of crime and justice. Notably, he revealed, what overlapped socially between these two historic concepts was quite crucially the state of social solidarity, and the manner in which penal, or ultimately criminal, law came to mutually reflect and construct collective perceptions of a sacred moral order that acted as the bond of solidarity between individuals.

Projected across the disciplinary boundary between sociology and law, this meant that Durkheim had engaged and advanced much more than just general social theory. He was indeed one of the pioneering and founding disciplinary sociologists, but Durkheim's intervention extended considerably beyond the sociological audience he intended to cultivate. His focus on social solidarity, how that derived from a shared moral order, and the way this ultimately became reflected in penal law, were all social insights that did not simply speak to the constitution of society and the need for sociology but, further still, it spoke to the constitution of law itself in terms of an under-examined moral sociology of legal ordering. Put differently, Durkheim's methodological move of using penal law as proxy to examine social solidarity was an intervention on the social and moral origins of penal law, and the way this influences an evolving state of solidarity across pre-modern, modern, and even post-modern societies.

III. Durkheim's Moral Sociology and the "Sacred" Constitution of Law

However, that rich insight on the deeper social constitution and significance of penal law has historically eluded the register of what public lawyers have traditionally understood as being within the doctrinal rubric of proper legal study. Here, international criminal lawyers, as partial or full descendants of that public law tradition, are in need of confronting that legacy because of the theoretical poverty it has inflicted vis-à-vis grasping law's deeper moral and thus social constitution. The epistemic heritage of that poverty deriving from the dominance of classical legal thought across the 19th and 20th centuries, and how that bunkered the notion of the constitutional within legal formalism. Consequently, the wealth of Durkheim's actual legal intervention has had a largely provincial standing relative to the established canons of not simply conventional legal education but most especially the robust formalism that has defined traditionally the teaching of international law. Notwithstanding that Durkheim built his sociology with law, and incidentally lawyers, as the object or "visible index" of social solidarity. Restated in blunt terms, since Durkheim was not and did not portend to be a lawyer, and his methodological treatment of law could be framed as epiphenome-

nal, this conveniently placed Durkheim outside the fence of requisite formalism that had bounded, in epistemic and identity terms, the late modern canons of disciplinary law and practice.

This metaphor of the fence provides more than a quaint image. Rather, it helps capture what the prolonged and intersecting traditions of legal classicism, formalism and secularism, which later extended into international criminal law, pivotally lost grasp of and bequeath in terms of neglected normative and institutional analysis: the enduring social importance of sacred perception, and the way it permeates through even expressly secular and formalist structures of contemporary law. That gap, however, should be understood less as conscious omission than an artifact of professional and disciplinary consciousness. Where a culture of formalism and secularism informally policed the alleged "extra-legal" and left doctrinal lawyers with an awkward collection of discomfort, incapacity and technical idiom when faced with intimations of the sacred. The most forcible illustration being an ingrained professional instinct that couples the mention of the sacred as something the field of human rights uniquely addresses as a distinct cause of legal action. As such, relegated to the most active of legal imaginations has been the prospect that the sacred could be much more than a novel legal cause of action but, more accurately, a crucial constitutive source that (quietly) stands behind formal institutions and texts of international public law such as the Rome Statute.

We arrive thus at what orthodox legal canon has either directly or indirectly occluded with Durkheim's "extra-legal" placement. In a nutshell, Durkheim's scrutiny of punishment and penal law focused on how submerged moralities have been integral to the mutual constitution of solidarity, law, and "the criminal", and by implication that perspective applied a novel reading of what disciplinary lawyers have long held to be their foundational question of "what is law?" In the alternative, Durkheim asked not what law is, but what informs (penal) law? Yet, that seemingly conceptual question took a more moral and epistemological line of inquiry, which looked not at the history of legal thought but rather the impact of an established moral sociology of the penal. Where punishment was shaped as much by the path dependencies of institutional history as through a common moral circuitry and, especially, the force of an underlying but no less ruling moral order:

In the penal law. . .murder is universally regarded as the greatest of crimes. Yet an economic crisis, a crash on the stock market, even a bankruptcy, can disorganize the body social much more seriously than the isolated case of homicide. . .. But if we compare the degree of danger however real it may be, to the penalty, there is a striking disproportion. All in all, the instances just cited show that an act can be disastrous for society without suffering the slightest repression. . ..Indeed, the only feature common to all crimes is that, saving some apparent exceptions to be examined later, they comprise acts universally condemned by the members of each society. . .that crime disturbs those feelings that in any one type of society are to be found in every healthy consciousness. . ..[37]

[37] Durkheim, *supra* note 25, at 58-59.

Durkheim, the juridical outsider, asserted that the integrity of both society and its laws derived from the magnetic pull of a very specific moral core: the solidary perception of fundamental outrages. A perception, however, that was informed by more than raw imaginations and impulses, but instead shaped through a kind of social matrix that Durkheim pivotally labeled the common or collective consciousness.[38] That noun occupied a profound analytical importance for Durkheim because it emphasized the collective consciousness as an essential "social fact" from which any society and, ultimately, its laws grew. A foundational moral code that defined the scope of what was held out to be collectively unconscionable, and thus by implication gave societal solidarity its broad stickiness as well as the concept of the criminal its normative substance and economy of consequences.

Yet, for Durkheim, there was a further force behind that notion of collective consciousness, but its conception and theme is a difficult one to reconcile with the formalist and secular training of modern lawyers. Effectively, a dualism sits behind Durkheim's notion of collective consciousness, which is not immediately apparent with the concise definition he provides in The Division of Labour in Society. In particular, Durkheim defines the noun with generic openness, or even a bland empirical aggregation, akin to that of a statistical denominator: "The totality of beliefs and sentiments common to the average members of a society. . . ."[39] However, upon closer reading, he further attaches what is the curiously under-theorized but no less seminal dimension of sacredness,[40] which Durkheim emphasized as essential for the integrity and reach of not just penal law but the broader projects of legal and societal ordering.[41] As such, what made collective consciousness an actual phenomenon of profound implication was its attachment to the sacral, which expressly or subversively constituted social and legal "weness" through the bonding effect of essentialized outrages and, by extension, the semantics of "the criminal."

What has been under discussed not simply within sociological circles, but even less so among most lawyers, is how Durkheim's resuscitation of the sacred provides a disruptive and fundamental challenge to the formalist conception of socio-legal ordering that has bound to date international legal thought. Law draws authority not merely from the doctrinal articulation of rules and norms but also, informally, from different kinds of sacral appearances intended to project a ruling morality. Durkheim's emphasis on the sacred, and more accurately the role of sacredness, appears initially to swim radically against the secular ethos of not merely modern law but especially enlightenment thought. That is until one discerns how Durkheim's emphasis on sacredness is actually about the continued importance not of religion per se but religiosity, such that, as he underlined, modern law has always relied on trappings of the transcendental and, by implication, sacredness.[42] As Durkheim explained, this quantum of the sacral was what ulti-

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[38] *Id.* at 64.

[39] *Id.* at 63.

[40] Garland, *supra* note 30, at 55.

[41] Durkheim, *supra* note 25, at 77.

[42] Garland, *supra* note 30, at 54-55.

mately distinguished the impact of the penal not just in terms of what made alleged crimes resonate socially as "the criminal", but further because it ignited the outrages that fused a diverse mass of individuals into a social collectivity of higher moral purposefulness:

When we demand the repression of crime it is not because we are seeking a personal vengeance, but rather vengeance for something sacred which we vaguely feel is more or less outside or above us. . . This is why penal law is not only of essentially religious origin, but continues always to bear a certain stamp of religiosity. This is because the acts that it punishes always appear as attacks upon something which is transcendent, whether this is a being or a concept. . .. Such a representation is assuredly an illusion. In one sense it is indeed ourselves that we are avenging, and ourselves to whom we afford satisfaction, since it is within us, and within us alone, that are to be found the feelings that have been offended. But this illusion is necessary. Since these sentiments, because of their collective origin, their universality, their permanence over time, and their intrinsic necessity, are exceptionally strong, they stand radically apart from the rest of our consciousness. . .they dominate us, they possess, so to speak, something superhuman about them.[43]

However, Durkheim's argument on the role and relevance of sacredness was, to a considerable extent, undermined by the reified way he came to conceptualize the sacred.[44] In particular, his theorizing of both sacredness and collective consciousness invoked a largely apolitical and ahistorical construal of these pivotal "social facts." The effect of which was illustratable in Durkheim's incomplete distinction between religiosity and religion, where he emphasized sacred norms as occupying an essential core that both constituted collective consciousness and correspondingly the criminal. Yet, that closed and deductive character he assigned to sacred norms produced in effect a causal theory that did not account for or elaborate the possibilities of historical production. Durkheim drew little attention to the importance of understanding what brought about sacred perception in the actual making of a fundamental moral order and, ultimately, the alleged higher purpose that distinguished penal law. In this way, his treatment of sacred norms as given social variables had a sizable methodological as well as theoretical implication, it depicted the sacred as an inherent property of homologous society rather than a historical artifact of evolving social relations and moralities.

Thus, Durkheim's theorizing on sacredness was trans-historical in its analytical ambition but largely ahistorical when it came to conceptualization and method, and this attracted criticism. Indeed, the identification of sacredness and collective consciousness underscored the importance of an underlying and fundamental moral framework that maintained, in the face of social differences and clashing interests, a deeper level of shared sentiments and solidarity. Flowing from that framework, acts that became designated as criminal, and projected socially through penal law, could then be understood as the signifiers of what was a sacred class and constitution of moral values. Yet, Durkheim's reified construal

[43] Durkheim, *supra* note 25, at 77-78.

[44] Garland, *supra* note 30, at 55-56.

of "social facts" left his resuscitation of sacredness having neglected, as David Garland has notably criticized, that: "Social relations and moral beliefs that come to dominate in any society are. . .the outcome of an ongoing process of struggle and negotiation. They are not a given characteristic of a particular social type, nor are they the inevitable product of functional evolution."[45]

In this light, the crucial gap that emerges within Durkheim's approach was his failure to distinguish between the semantic or symbolic endurance of sacredness relative to the taxonomy or even genealogy of what sacredness meant across varied societal arrangements over time. This implied that sacredness and collective consciousness did matter for moral and legal ordering in the symbolic way Durkheim emphasized, but without the isomorphic meaning he had conceptually and socially presumed. As such, the distinct absence of historicity made Durkheim's conceptualization blind to how moral orders are established temporally and spatially rather than just given. This by virtue of how sacred values evolve from social forces that each advance alternate ruling moralities and, crucially, differing schemes of sacred outrage which trigger need for law's penal repression.

IV. Sacredness and Sacral Outrages: What Makes the Gravity of International Crimes?

This brings us to the point of overlap where Durkheim's extra-legal inquiry into sacredness assumes significance for ICL as it encounters, after the ICC's judicial establishment, social friction and controversy over the relevant scope of grave international crimes. Frictions and controversies increasingly expressed through critiques that range from the narrowness of the international criminal catalogue, to the need for greater expansion in interpreting that existing catalogue, or to, demographically, the striking racial profile that has emerged with the few ICC prosecutions that materialize. Yet, a key feature of that burgeoning contestation has been both formal institutional crisis and normative and moral contestation over who and what draws the outrage of international penalization. By implication, the nature of that politics, while ultimately legal and penal in consequence, is an inherent social struggle over collective (global) indignations that inform the doctrinal register of international crime. A politics and struggle enacted over the performance of the ICC but, deeper still, at the constitutive level that Durkheim identified seminally as ruling outrages and what is deemed to shock an international collective consciousness.

However, before I proceed, it is important to preface briefly how the application of Durkheim's work to ICL and the ICC is quite literally a novel one, both in historical and sociological terms. Foremost, Durkheim and his sociological work on crime actually preceded, by several decades, the normative and institutional emergence of ICL. As such, his theorizing did not address the notion of international crime in any concrete sense. In addition, Durkheim's study of criminal law focused largely on nation-state societies as opposed to expressly international

[45] *Id.* at 51.

society. Notwithstanding multiple references in The Division of Labour in Society where Durkheim mentions "international law,"[46] "international relations,"[47] as well as prospects for international or European consciousness.[48] Yet, what should not go forgotten is that Durkheim's work, while being a product of his specific time and reigning truths on the nature of society, no less engaged trans-historical change and evolution involving different types of societal and, correspondingly, penal arrangements. Durkheim's aim was very much to grasp what he saw as a key historical continuity or commonality located in the sacred norms and constitution that animated penal orders. A trans-historical observation of profound relevance applicable even to the novel species of international criminal ordering that he never lived to study specifically.

With this outlook, Durkheim's emphasis on the sacred constitution of penal and societal ordering sharpens focus on how a ruling morality similarly influences the constitution of international criminal law, which in turn governs the scope of imaginable outrages the ICC becomes institutionally capable of conceiving, seeing and acting upon. What might emerge as surprising for international lawyers is that the doctrinal and formalist bounds of disciplinary training have obscured the extent to which ICL is predicated politically on a ruling morality but also, more pivotally, a latent structure of religiosity. Where, using the Durkheimian lens, it becomes possible to interrogate how the formal indexing of "grave" international crimes produces sacral appearance in international penal ordering, which then conditions the parameters of international consciousness and, ultimately, the proper essence of international solidarity that becomes enforced through ICL.

Yet, my scrutiny of sacredness is not about claiming international crimes are ultimately creatures of religiosity, with international criminal lawyers lacking the consciousness to grasp this. This would miss entirely a more subtle but key observation. The objective here is to emphasize how legal formalization in ICL has the effect of constraining, politically and socially, an evolving and reflexive register of international solidarity and, importantly, penality.[49] This constraining effect drawing force not merely from the accepted substance and procedures of international law-making, but also an under-acknowledged symbolic power exercised via a ruling dichotomy between grave and non-grave killing. Where the former class is stratified normatively and protected institutionally as "grave" international outrages. The informal consequence being a quiet association between international crimes and sacral appearances, which becomes a problem if international lawyers do not register that effect and over-rely on its strength to sustain social and political purchase in ICL, the Rome Statute and the ICC. Consequently, this may produce a wide gap between institutional versus social imagi-

[46] Durkheim, *supra* note 25, at 95.

[47] *Id.* at 173.

[48] *Id.* at 219.

[49] On the discursive power of formalization and standardization, *see* Thomas Skouteris, *The Force of a Doctrine: Art. 38 of the PCIJ Statute and the Sources of International Law, in* EVENTS: THE FORCE OF INT'L L., 69, 69-80 (Fleur Johns et al. eds., 2011).

nations of "international crimes", which gradually corrode support in ICL as a genuine rule of law project acting on evolving perceptions of outrage.[50]

The trajectory just described is more than a hypothetical proposition, because the ICC is increasingly confronted by an expanding parade of mass human tragedies where it has—what lawyers call—no jurisdiction or authority to act. These (invisible) tragedies range from regularized human starvation, mass infanticide, human trafficking,[51] to the excesses of the so-called war on terror (e.g. drone killings and proxy aggressions),[52] naming only a few. The cause of that incapacity is often and conventionally framed in the usual terms of inadequate jurisdiction, finite resources, or doctrinal constraints. Most overlook, however, the deeper moral and conceptual politics that have structured deficient agency into this doctrinal and institutional regime. In particular, the formalization of grave international crimes under the Rome Statute has silently created an underclass of global outrages that publicly manifest severe collective harm and detriment, but which are framed as conceptually and thus doctrinally misfit for outrage under ICL's penality.

For many, an apparent solution resides in either amending the doctrinal law, i.e. the Rome Statute, through further treatification or reworking the canons of interpretation. However, both prospects remain distant feats not simply due to the positivism of state consent, but because, crucially, they must reconfigure what Durkheim emphasized as ruling outrages that govern the social ambit of international solidarity and penality. This is where Durkheim's emphasis on the sacral is novel for how international criminal lawyers come to appreciate productive power in relation to the Rome Statute, as well as ICL more generally.[53] The principal gain being how the notion of sacral outrages unsettles an under-examined presumption across international law: the secular exclusion of religiosity from institutional rule. To refer to Wittgenstein's metaphor,[54] my exploring the sacral sheds light on a "scaffolding" that gently disciplines perceived international outrages and, by implication, the ICC's jurisdictional horizon on what international crime is and should be.

By scaffolding, I direct our attention at two symbolic effects that play a key role in sanctifying a narrow penal economy and monopoly brand of "international criminal justice". First, the Rome Statute is a symbolic text and object used to bound select killings deemed as exclusively "grave". This effect flowing not simply from the application of doctrinal and technical logic, but relying as well

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50 *See* Frédéric Mégret, *In whose name? The ICC and the search for constituency, in* CONTESTED JUSTICE: THE POLITICS AND PRACTICE OF INT'L CRIM. CT. INTERVENTIONS 1, 23-45 (Christian De Vos et al. eds., 2015).

51 *See* Janie A. Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law,* 108 AM. J. INT'L L. 609 (2014).

52 *See* Steve Niva, *Disappearing Violence: JSOC and the Pentagon's New Cartography of Networked Warfare*, 44 SECURITY DIALOGUE 185 (2013).

53 For a rich explanation of typologies of power, *see* Michael Barnett & Raymond Duvall, *Power in International Politics*, 59 INT'L ORG 39, 40 (2005).

54 Ludwig Wittgenstein, *On Certainty*, §211 (G.E.M. Andscombe and G.H. von Wight eds., Harper & Row, 1972) (1969).

on the symbolic and "high" standing of the Rome Statute as an inter-state treaty that uniquely defines the exemplars of grave outrage.[55] Second, by enumerating what outrages are recognized by international law as grave, this creates, informally, a sacral class of (international) crimes. Put together, these symbolic effects become mutually reinforcing and powerful, because they iconize the boundaries and properties of proper international solidarity and outrage. This makes the task of critiquing or amending the catalogue of grave crimes not just a difficult doctrinal enterprise, but also an uphill political and sociological endeavor because one must overcome the reigning symbolic infrastructure that protects this established economy and code of grave crimes. In other words, the Rome Statute should also be appreciated as a disciplining text in a more Foucauldian sense: it is a powerful artifice of symbolic power because it frames an alleged natural order of international crimes.[56]

Admittedly, what I have asserted offers a disruptive prospect for a good number of doctrinal international lawyers. The Durkheimian lens brings subtle religiosity and productive power into view, which pressures a key background assumption that international law's formalization provides a doctrinal space autonomous from grassroots political and social contestation. However, that mapping underplays how certain international institutions, like the Rome Statute and ICL, are more vulnerable to feedback loops from immediate political controversies, as recently shown in the case of protests from the African Union.[57] This suggests why symbolic power and sacral appearance become important for the Rome Statute because it imposes a normative topography over political debates, where the metaphorical high-ground of "grave" crimes influence the register of solidarity and what seemingly merits international penality. Yet, the peril with such a topography is the moral, normative and political numbness it risks toward the world beyond elite international criminal lawyers and their hardened institutional logics. The specter of that detachment perhaps taking hold, for example, with respect to whether ICC prosecutions, intentionally or structurally, produce institutional racism within the framework of the Rome Statute.[58]

No less, this introduction of Durkheim, symbolic power and sacral appearance relative to grave crimes will likely generate pushback from doctrinal orthodoxy in a dual sense. Where, first, my highlighting a dimension of the sacral within the

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[55] For more on the power of formal style and the transcendental object, *see* P.J. Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627, 1628 (1990-91).

[56] *See* Michel Foucault, *The Subject and Power*, *in* POWER: ESSENTIAL WORKS OF MICHEL FOUCAULT, 326-348 (J.D. Faubion ed., R. Hurley et al. trans., Vol. 3, 2000).

[57] *See* Adam Branch, *Dominic Ongwen on Trial: The ICC's African Dilemmas*, 11 INT'L J. TRANSITIONAL JUST. 30, 30-49 (2017); *see also* Max du Plessis & Guénael Mettraux, *South Africa's Failed Withdrawal from the Rome Statute*, 15 J. INT'L CRIM. JUST. 2, 361-370 (2017).

[58] For interrogation of the notion of institutional racism, *see* Colin Wight, *The Agent-Structure Problem and Institutional Racism*, 51 POL. STUD. 70 (2003). On the under-confronted roots of racism and white privilege within international criminal law, *see* Makua Mutua, *From Nuremberg to the Rwanda Tribunal: Justice or Retribution?* 6 BUFF. HUM. RTS. L. REV. 77, 79-80 (2000) ("[N]uremberg can be seen as an orchestrated and highly manipulated forum intended primarily to impress on the Nazi leadership who the victors were and to discredit them as individuals as well as their particular brand of the philosophy of racial supremacy. The irony of Nuremberg, and the White men who created it was that their states either practiced as official policy or condoned their own versions of racial mythologies. . .").

Rome Statute may be framed as overly "meta" or "postmodern" and, second, ignores how international criminal lawyers have already responded via their applications and readings of the Rome Statute. In nutshell, the sociological and political concerns I raise amount to a tempest in teapot? To that effect, it becomes important to take head on what, I argue, are the limits of purely doctrinal thinking and remedies: where the asserted interpretive and procedural safeguards put in place are believed to convincingly address the perennial problem of what is and should be the operative field of international penality. In the critique that follows, my analysis draws from the seminal insights of Margaret M. DeGuzman on indeterminacy within doctrinal practice[59] regarding which kinds of killings enter the space of grave crimes and thus receive the formal outrage of ICL.

V. The Semantics of Gravity and the Specter of Boutique Prosecutions

At first glance, conjoining the terms gravity and indeterminacy might seem odd semantics for characterizing what many would expect is the most legally concrete aspect of the ICL and the Rome Statute: the distinct seriousness of an international crime. After all, the narrative of this institutional field asserts that the accepted universality of international crimes provides the basis from which international law is authorized to administer criminal justice over and above national jurisdictions.[60] What is more, listed crimes are professed to be so empirically grave they intuitively seize international solidarity and, as such, warrant the intervention of international criminal adjudication. This narrative and jurisdictional structure is reflected clearly in the Rome Statute's preamble where the ICC is said to focus on "the most serious crimes of concern to the international community as a whole," which are qualified further as "unimaginable atrocities" that "deeply shock the conscience of humanity."[61] Pursuant to Article 17 of the Statute, jurisdiction is emphasized as only concerned with "the most serious crimes" and prohibiting the ICC from taking on crimes "not of sufficient gravity."[62]

Yet, does this black-on-white doctrine obscure a deeper conceptual and historical tension when it comes to the practice of empirically discriminating what are the "most serious" and "shocking" deaths across international society? Here, again, the rise of social media, and its influence on political discourse today, has resulted in an unprecedented visibility given to an array of culpable and shocking tragedies: e.g. systematic and mass starvation in habitual parts of the globe, the regularized deaths of millions of children each year across the same countries, or the newly systematized pattern of mass drownings of non-European migrants in

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[59] Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 FORDHAM INT'L L. J. 1400, 1400-1401 (2008) ("The concept of gravity or seriousness resides at the epicenter of the legal regime of the International Criminal Court. . . Yet despite the acknowledged centrality of gravity to international criminal law, there is virtually no discussion in academic or judicial sources of theoretical basis and doctrinal contours of this concept. . .").

[60] Kevin Jon Heller, *What is an International Crime? (A Revisionist History)*, 58 HARV. INT'L L. J. 353, 354 (2017).

[61] *Rome Statute of the International Criminal Court, preamble, 2187 U.N.T.S. 90 (July 17, 1998)*, https://www.icc-cpi.int/resourcelibrary/official-journal/rome-statute.aspx. [hereinafter ROME STATUTE]

[62] *Id.*

the Mediterranean.[63] Yet, these instances stand little chance of accessing the Rome Statute and the ICC.[64] How so?

The doctrinal lawyer simply points to the established and venerated catalogue of the Rome Statute: genocide, crimes against humanity, war crimes and—more recently—aggression.[65] This same lawyer will also acknowledge, in an empathetic tone, that the four-crime catalogue curates a narrow horizon of international outrages and penal prosecutions. A catalogue that reflects a positivist core of international criminal law, and the way state practice and opinio juris define international penalization. As Kevin Jon Heller has emphasized, nearly 150 states have adopted legislation authorizing "their courts to exercise universal jurisdiction over war crimes, crimes against humanity, genocide or aggression."[66] Nevertheless, there is a risk of over-emphasizing this positivist legacy, and undermining a richer history of contingencies in the development of international solidarity, opinio juris and penalization now embodied by the Rome Statute. A concern reflected in Sara Kendall's observation that "much international criminal law scholarship has a positivist focus on decisions and judgments while sidestepping and underlying critical engagement: understood here as the examination of underlying presuppositions and animating forces."[67]

As such, a doctrinal and positivist approach toward the development of the Rome catalogue, while resonating with an internal legal logic, still overlooks the history and force of normative production and contestation. Referring back to Durkheim's insight, a positivistic approach relies on an established legal method to reify, and iconize, a privileged list of international outrages and grave crimes. Yet, in terms of social narratives directed beyond lawyers, this provides a necessary but insufficient justification when one considers that the ICC must face a global audience with myriads of actual and possible victims seeking "international criminal justice."

My emphasis on socially sustainable narratives is of real legal concern and relevance,[68] because the positivist history and practice of the Rome Statute is littered with normative contingencies. For starters, it is important to recall how the drafting history of the Rome Statute, at key points, gave serious consideration

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[63] *See* T. Basaran, *The saved and the drowned: Governing indifference in the name of security*, 46 SECURITY DIALOGUE 205, 205 (2015) ("The duty to render assistance at sea appears to be a well-established humanitarian norm; nonetheless, in 2011 alone more than 1500 people drowned in the Mediterranean. Witnesses recount that many could have been rescued if fellow seafarers had not ignored their pleas for help.").

[64] *See* James Boyle, *Ideals and Things: International Legal Scholarship and the Prison-house of Language*, 26 HARV. INT'L L.J. 327, 331-32 (1985) ("[O]ne would have to ignore the central insight that 'social constructs', such as law, do not have some pre-existing shape prior to human intervention. The idea of finding the essence or the real sources of law distracts us from the reality that, in a very important sense, it is being created by our categories and definitions rather than being described by them.").

[65] *See* deGuzman, *supra* note 59, at 1401.

[66] *See* Heller, *supra* note 60, at 357.

[67] Sara Kendall, *A Critique of International Criminal Court Practice*, *in* CRITICAL APPROACHES TO INTERNATIONAL CRIMINAL LAW: AN INTRODUCTION 53, 56-57 (Christine Schwöbel ed., Routledge 2014).

[68] Ronald R. Krebs & Patrick Thaddeus Jackson, *Twisting Tongues and Twisting Arms: The Power of Political Rhetoric*, 13 EUROPEAN J. INT'L REL. 39, 42 (2007).

to longer lists of grave crimes. Notably, the 1991 Draft Code listed not four but twelve crimes: aggression, threat of aggression, intervention, colonial domination and other forms of alien domination, genocide, apartheid, systematic or mass violations of human rights, exceptionally serious war crimes, recruitment, use, financing and training of mercenaries, international terrorism, illicit traffic in narcotic drugs, and willful and severe damage to the environment.[69]

Or, turning to the everyday practice and controversy, the ICC's Office of the Prosecutor (OTP) publicly declines jurisdiction over thousands cases involving some kind of culpable death.[70] This selective in-take,[71] both with respect to the very small number as well as inconsistent kinds of cases, has made the Rome Statute and the ICC vulnerable to an accusation that its brand of ICL is based on a boutique ethos in the pursuit of international criminal prosecutions. For instance, in 2006, the OTP declined proprio mutu jurisdiction over evidence of British war crimes in Iraq on the basis of relatively low numbers of deaths suffered;[72] notwithstanding that later the ICC scrutinized cases involving North Korea, Honduras and Guinea all with similarly lower numbers of deceased.[73]

Consequently, my notion of boutique prosecutions is jolting for institutional sensibilities because the ICC defends prosecution and jurisdictional decisions with reference to a doctrinal threshold of "seriousness" and "gravity." These gatekeeping terms mobilizing semantic determinacy and a vivid geophysical metaphor. Yet, when one looks more closely at when and how the terms "serious" and "gravity" arose in recent decades of international legal deliberation and legislating, what is most striking is the extent to which these gatekeeping terms have exhibited conceptual contestation and operational plasticity on the potential range of international penality.

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69 International Law Commission, Summary of the Work of the International Law Commission: Draft code of crimes against the peace and security of mankind (Part II), http://legal.un.org/ilc/summaries/7_4.shtml (Accessed 26 Sept. 2018).

70 *See* The Office of the Prosecutor, ICC, *Report on Preliminary Examination Activities 2013*, Nov. 2013, https://www.icc-cpi.int/OTP%20Reports/otp-report-2013.aspx (Between 1 November 2012 and October 2013, the OTP "received 597 communications relating to article 15 of the Rome Statute of which 503 were manifestly outside the Court's jurisdiction; 21 warranted further analysis; 41 were linked to a situation already under analysis; and 32 were linked to an investigation or prosecution. The Office has received a total of 10,352 article 15 communications since July 2002.").

71 *See* Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 265, 271 (2012) (deGuzman refers specifically to a "selectivity threat" facing the ICC: "No aspect of the ICC's work has been more controversial to date than its decisions about which situations and cases to prosecute. Every selection decision the Court makes is scrutinized, and many have given rise to strong criticisms. Such expressions of disapproval have come from each of the ICC's primary evaluative audiences—states, NGOs, communities most affected by the ICC's work, academics, and the global community generally."); *See also* William Schabas, *Victor's Justice: Selecting 'Situations' at the International Criminal Court*, 43 J. MARSHALL L. REV. 535, 535-36 (2010).

72 William Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT'L CRIM. JUST. 731, 742-43 (2008).

73 Margaret M. deGuzman, *How Serious Are International Crimes? The Gravity Problem in International Criminal Law*, 51 COLUM. J. TRANSNAT'L L. 18, 42-43 (2012), http://jtl.columbia.edu/wp-content/uploads/sites/4/2014/05/51ColumJTransnatlL18_How-Serious-are-International-Crimes-The-Gravity-Problem-in-International-Criminal-Law.pdf.

What I refer to specifically derives from the under-scrutinized conceptual evolution of the notion of international crime, and how it is historically, legally and politically misleading to characterize the four-crime catalogue as representing an immutable "core." The basis of that inference flowing from how different stages of institutionalization have evolved the doctrinal scope of international crime, which is traceable across the jurisgenerative legacies of the International Military Tribunal at Nuremburg (IMT), the ICTY, the ICTR, and the International Law Commission (ILC). With each of these institutions separately and cumulatively transforming the meaning and ambit of international crime within little over 40 years of international drafting, institutionalization and adjudication.

It is a sequence of transformation that begins with the IMT, and its inaugural conceptualization for international crime based both on the "war nexus" concept and the horrific exemplar of Nazi aggression and Holocaust.[74] Together, these dual features projected a threshold where an international crime needed to occur in a context of international conflict and, further, manifest features of large-scale, systematic and state-directed slaughter. The later rise of the ad hoc tribunals, the ICTY and the ICTR, in the early 1990s reinforced but also profoundly mutated that founding conceptualization and methodology.[75] On the one hand, both ad hoc tribunals consolidated the jurisdictional ambit of ICL by capping the outrages of international crime to the finite doctrinal categories of war crimes, crimes against humanity and genocide. On the other hand, the ICTY, in its renown Tadic case, came to historically dissolve this once essential "war nexus" via the court's watershed assertion that international crimes could actually become recognized outside conventional international conflicts.[76]

Pivotally, it was the ILC, and not the IMT, the ICTY or the ICTR, that came to establish the doctrinal terms gravity and seriousness,[77] where in the 1983 the ILC first proposed and articulated a doctrinal threshold for international crimes using the exact gatekeeping terms of "serious" and "gravity."[78] These two notions then became central semantics and terms for the ensuing ILC negotiations and drafts during the 1990s, which eventually produced the Rome Statute and the institutional birth of the ICC. Yet, when one studies the process of those ILC negotia-

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[74] Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT'L L. 787, 791 (1998).

[75] The later ICTR Statute especially, since Article 3 of that Statute made the watershed change that the charge of crime against humanity only involves "widespread or systematic attack against any civilian population." *See* S.C. Res. 955, ¶ 3 (Nov. 8, 1994).

[76] *Prosecutor v. Tadic*, Case No. IT-94-1, ¶¶ 128-37 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

[77] *See generally Report of the International Law Commission on the Work of Its Thirty-Fifth Session*, 2 Y.B. INT'L L. COMM'N 1, 13-14, U.N. Doc. A/CN.4/SER.A/1983/Add.1 (Part 2) (1983), http://legal.un.org/docs/?path=. ./ilc/publications/yearbooks/english/ilc_1983_v2_p2.pdf&lang=EFSRA. (reported it "unanimously agreed" that the Draft Code should include "the most serious of the most serious offences.").

[78] *See* Doudou Thiam, *First Report on the Draft Code of Offences Against Peace and Security of Mankind*, 2 Y.B. INT'L L. COMM'N 137, 137-143 (1983). ("It may be that the authors of the Charter of the Nuremberg were struck not so much by the political content of the crimes with which they were concerned as by their gravity, their atrociousness, their scale and their effects on the international community.").

tions, it becomes clear that semantic agreement did not produce a universal understanding on conceptualization and operationalization.[79] In particular, preparatory consultations on the 1994 Draft Statute reveal how the ILC envisioned international crime and future ICL prosecutions to reflect potentially a more expansive catalogue based on not simply so-called "core crimes" of the international humanitarian law e.g. genocide, crimes against humanity and war crimes, but also treaty crimes reaching into a broader map of systematic human rights violations.[80] Regardless, at the Rome Conference in 1998, state delegations rejected summarily the ILC's more expansive "treaty crimes" proposal on the grounds that expansion beyond the "four core crimes" might encompass subjects "insufficiently serious" that "trivialize" the ICC's work.[81]

These differing "core" versus "expansive" approaches on the proper catalogue of international crimes resulted in the terms "serious" and "gravity" being left, ultimately, undefined in the Rome Statute,[82] and further still, under-specified in ensuing prosecutorial policy-making and judicial decisions. That void justified publicly on the grounds that both core and expansive approaches were given some doctrinal purchase within the text of the Rome Statute, while at the same time granting space and time for prosecutorial practices to define, across ensuing jurisprudence, the appropriate jurisdictional balance.[83] However, the examples have been plentiful on the extent to which the OTP[84] and especially the ICC[85] have struggled to evolve doctrinal and empirical metrics on the ex ante operation of the gravity threshold. That critical observation being visible in post-Statute policy-making efforts by the OTP,[86] and most remarkably in the abstraction ex-

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79 *See Report of the International Law Commission on the Work of Its Thirty-Sixth Session*, 2 Y.B. INT'L L. COMM'N 1, at 17, U.N. Doc. A/CN.4/SER.A/1984/Add.1 (Part 2) (1984), http://legal.un.org/docs/?path=. /ilc/publications/yearbooks/english/ilc_1984_v2_p2.pdf&lang=EFSRA. (The Commission advanced the following determination when some its members pressed for specific *ex ante* criteria on gravity: "The seriousness of an act was judged sometimes according to the motive, sometimes according to the end pursued, sometimes according to the particular nature of the offense the horror and reprobation it arouses, sometime according to the physical extent of the disaster caused. . .").

80 *Id.*

81 *See* deGuzman, *supra* note 59, at 1421.

82 *See* ROME STATUTE, *supra* note 61.

83 *See* deGuzman, *supra* note 73, at 36.

84 *See* The Office of the Prosecutor, ICC, *Annex to the "Paper on Some Policy Issues Before the Office of the Prosecutor": Referrals and Communications*, https://www.icc-cpi.int/NR/rdonlyres/278614ED-A8CA-4835-B91D DB7FA7639E02/143706/policy_annex_final_210404.pdf. (The OTP simply asserts that it has a wide discretion.)

85 *See generally* Prosecutor v. Katanga, ICC-01/04-01, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga (Nov. 3, 2009); Prosecutor v. Ntaganda Dyilo, ICC-01/04-169, Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58 (July 13, 2006).

86 The OTP's latest statement on the gravity threshold still only provides a menu of potential criteria and does not articulate an actual liminal policy. *See* The Office of the Prosecutor, ICC, *Draft Policy Paper on Case Selection and Prioritisation* (Feb. 29, 2016), https://www.icc-cpi.int/iccdocs/otp/29.02.16_Draft_Policy-Paper-on-Case-Selection-and-Prioritisation_ENG.pdf. (37. The scale of the crimes may be assessed in light of, inter alia, the number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families, and their geographical or temporal spread (high intensity of the crimes over a brief period or low intensity of crimes over an extended period)).

hibited by the ICC's own appellate chamber. As Judge Pikis revealed with elaborate haziness in the Lubango case:

Which cases are unworthy of consideration of the International Criminal Court? The answer is cases insignificant in themselves; where the criminality on the part of the culprit is wholly marginal; borderline cases. A crime is insignificant in itself if, notwithstanding the fact that it satisfies the formalities of the law, i.e. the insignia of the crimes, bound up with the mens rea and the actus reus, the acts constituting the crimes acts wholly peripheral to the objects of the law in criminalizing the conduct. Both, the inception and the consequences of the crimes must be negligible. In those circumstances the Court need not concern itself with the crime nor will it assume jurisdiction for the trial of such an offence. . . Any other construction of Article 17(1)(d) of the Statute would neutralize its avowed objects and purposes and to a large extent empty it of content. The subject-matter must be minimal, so much so that it can be ignored by the Court.[87]

Accordingly, what actually constitutes sufficient seriousness garners slight specificity from doctrinal formula or policy, and instead appears rooted in other informal and extra-legal comprehensions that international criminal lawyers have been disinclined to interrogate thus far. With the symbolic power and formal semantics of the Rome Statute obfuscating how the legal threshold for gravity is, to a considerable extent, void of jurisdictional certainty. In operational terms this means that while doctrinal law demarcates a boundary for international criminal jurisdiction through a semantics of gravity (i.e. Statute terms, OTP criteria and policy statements, ICC cases), in reality the substance of what gravity means is more encrypted by doctrine and positivism than settled normatively or socially.

This brings us back to Durkheim's earlier emphasis on how penal law is ultimately tied to ruling outrages that represent a particular collective consciousness. In the specific context of international crime, such ruling outrages gain a distinct institutional and symbolic platform via their canonization in the Rome Statute. This platform venerating select types of culpable deaths as grave crimes over othered types of culpable tragedies, which become subaltern and non-grave misfortunes. The positivist narrative relied upon by international criminal lawyers anaesthetizing this bit of doctrinal and social violence, aided conceptually by the rhetorical frame of "core crimes". The implication, sociologically and politically, is the four-crime catalogue might also represent an economy of culpable death, encoded by the legal semantics and grammar of "grave" international outrages and crimes.

It is via this powerful mix of legal formalism, symbolic power and social performance that the Rome Statute comes to discipline the possibilities of international outrages and criminalization; where the positivist tradition of international law stunts capacities to evolve a broader and more resonant social discourse on outrages that shape international penalization. The implications now being the focus of the concluding section that follows.

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[87] Prosecutor v. Lubango Dyilo, Case No. ICC-01/04, Decision on the Prosecutor's Application for Warrants of Arrest, ¶¶ 38-39 (July 13, 2006) (See Article 58, Separate and Partly Dissenting Opinion of Judge Georghios M. Pikis).

VI. Conclusion: Ruling Outrages and the Penal Economy of Grave Crimes

This loops our discussion back to where the paper departed vis-à-vis an absent constitutionalism within ICL relative to domestic criminal counterparts. However, using Durkheim's insight we can challenge that seeming void, and even dichotomy between constitutional discourse and ICL. Durkheim's sociology making visible an informal constitution of ruling morality and outrages, which stand beneath the formal stem of the Rome Statute and inscribe selected outrages as exemplars of "international" solidarity.

This brings to fore the question of how does that ruling morality work to privilege certain deaths as international outrages, versus not? Further, what role does ICL play via the Rome Statute in that moral and criminal ordering of international outrages? Or, more tangibly, how does ICL come to distinguish gravity between, for example, thousands killed systematically through military slaughter versus regularized mass starvation and malnourishment? How much work does doctrinal and positivist law actually perform with respect to such empirical determinations of gravity? What does this all reveal about an informal constitution of international criminal law?

My excavation of Durkheim has produced two key insights that address these questions, but in a manner where ICL is not taken to be a sui generis doctrinal or penal species of "international criminal justice". Instead, ICL is engaged as a socio-legal project with constitutional dimensions that international lawyers can ill-afford to discount. First and foremost, a Durkheimian reading sharpens focus on what has been the largely ignored relationship between solidarity and international penal law, with such unfamiliarity stemming from how formalization engenders a technical ethos that focuses on applying the Rome Statute as settled law. What Durkheim highlights usefully for international lawyers is how international crimes and penality are immersed in far more than just doctrinal law and application. The Rome Statute is also an asset of symbolic, and even sacral, power because its text venerates what are the "grave" outrages of the reigning international order. This means, in effect, that the Rome Statute is a powerful tool of symbolic exclusion because its status as the doctrinal catalogue dulls scrutiny into an underlying penal economy of sanctioned (e.g. systematized starvation) versus non-sanctioned (e.g. military atrocities) deaths. In other words, this symbolic force of the Statute dampens prospects for ongoing reflection and revision on what are "grave" international outrages.

Second, flowing from this emphasis on ruling morality, Durkheim's further focus on a "collective consciousness" helps problematize a managerial ethos that is visible publicly in the operation of the Rome Statute. An elite lawyer class applies and operates the workings of the Rome Statute, which produces a distinct public space governed by the technical tools and protocols of the international criminal lawyer. Yet, the rule of that lawyer class has remained largely under-

examined,[88] because the symbolic force of the Rome Statute, and its four-crime catalogue, projects an intrinsic and naturalized order of what international crime is and should be. All the while, the Statute's symbolic height disciplines the bounds of imagined collective consciousness on what counts as a true international (criminal) outrage.[89]

In conclusion, the Rome Statute is more than a doctrinal text or convention of international law. Sociologically, its catalogue is a symbolic marker that borders what grave deaths are worthy of international outrage and jurisdiction. Put another way, the Statute is bounded by more than its legal list of crimes but, further, by a symbolism that blunts liminal inquiry into the subject that crucially defines its jurisdiction: the gravity of killing that offends international consciousness. This brings into question what Durkheim flagged as the essential social and subjective core of penal law: how a solidary "we" informs and ignites what alleged crimes define the highest moral outrage and purpose of international penal law. In the case of the Rome Statute and the ICC, the heavy extent to which that international "we" has become managed by doctrinal legalism and sacral symbolism influences the potential depth of solidarity enacted through the workings of international crime and punishment. This perhaps sheds light on social violence committed when the possibility of constitutional discourse is dismissed as incompatible with the idiom, grammar and legalism of ICL.

We become confronted thus by a perplexing implication, which derives from frequent assertions that "international criminal justice" is an exceptional doctrinal species. Foremost, this exceptionalism has undermined the full gaze of legal, political and, ultimately, constitutional scrutiny, resulting in structural outcomes that are unsustainable for the ICC in the longer term. Notably as: the Global North versus Global South experiencing very uneven levels of international criminal investigation and actual prosecutions; or, the so-called fight against impunity generating stark racial demographics vis-à-vis who in actual practice faces criminal accountability.

Put another way, the Rome Statute and the ICC have constructed, whether intended or not, an altar of grave international crimes, which imposes its hierarchy of killing over multiple kinds of outrageous deaths the world over. The gravity threshold being a doctrinal device that seeks to control access to what is and should be a grave (international) crime. Yet, Durkheim reminds us of the close social relationship between all penal law and ruling outrages, and this imparts to international criminal lawyers the importance of staying attentive to that evolving sociology and politics of international outrages. Should my altar metaphor prove apt, this suggests the presumed exceptionalism of "international criminal justice" from ordinary social and constitutional considerations may in fact produce an occupational hazard.

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[88] *See* Immi Tallgren, *Who Are 'We' in International Criminal Law? On Critics and Membership*, *in* CRITICAL APPROACHES TO INTERNATIONAL CRIMINAL LAW: AN INTRODUCTION 71 (Christine Schwöbel ed., Routledge 2014).

[89] On imagination and states of national (collective) consciousness, *see* Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism* (Verso, 1991).