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Unspectacular Atrocities and the Aesthetics of International Trials

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RANDLE C. DEFALCO. *Invisible Atrocities: The Aesthetic Biases of International Criminal Justice*. Cambridge, UK: Cambridge University Press, 2022.

INTRODUCTION

Randle DeFalco's intriguing new book explores the process through which "slow, banal, bureaucratic, attritive, or otherwise aesthetically unspectacular" forms of violence have fallen outside the purview of international criminal law (ICL) (DeFalco 2022, 4). Notably, the author shares with supporters of the ICL regime the conviction that individual persons should be held responsible for their participation in international crimes and that the embeddedness of those crimes within broader socioeconomic structures of oppression should not serve as an excuse to dismiss them "as nobody's fault and therefore impossible to stop" (DeFalco 2022, 8). Building on that premise, the book seeks to demonstrate to ICL practitioners and human rights advocates that, imperfect as the legal regime might be, there is nothing in ICL *de lege lata* that prevents it from addressing unspectacular forms of violence under the rubric of genocide, crimes against humanity, or war crimes (DeFalco 2022, 101). While many of the book's observations merit further consideration, I focus specifically on its theoretical framework, by situating it within the broader literature on "practice studies," and on its explanatory potential, which appears greater than the author himself recognizes.

AN INTERACTIONAL THEORY OF AESTHETIC BIASES

Invisible Atrocities contributes to a growing body of literature that borrows ideas from "practice studies" in international relations to explore the dynamics behind the everyday (re)production of ICL norms (De Vos 2020; Minkova 2023). Specifically, the book employs Brunnée and Toope's "interactional" theory, according to which international law is generated and maintained "through continuing struggles of social practice" (Brunnée and Toope 2010). From this perspective, international legal rules are neither fixed nor external to social interactions. Rather, following Brunnée and

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Toope, DeFalco observes that "the 'hard work' of international lawmaking is never done but represents a continual, dynamic, nonlinear enterprise" (16). This process of simultaneous contestation and consolidation of legal rules takes place against a set of "shared understandings" about the general scope, content, and aims of a given legal regime (64). But it also leaves room for perceptions, ideologies, and biases to affect the construction of international legal norms.

The unique contribution of *Invisible Atrocities* is to identify one such factor that has become particularly influential in the making of ICL, namely, aesthetic biases. The aesthetic that has dominated the field since the Nuremberg trials is what DeFalco calls the "atrocity aesthetic," namely, the intuition that an international crime is one "which captures our attention and horrifies or appalls us" (61). Based on a review of ICL literature and practice, the author demonstrates that the atrocity aesthetic has become the benchmark for identifying international crimes (chapters 2 and 3), which has led to a neglect of other equally significant but "unspectacular" forms of mass violence, such as the enforcement of famine conditions, extreme forms of corruption, aid interference, and socioeconomic oppression (chapter 4).

Where the Atrocity Aesthetic Fits

The overall theoretical framework of the book and the conclusions made on the basis of it are coherent and insightful. What might have been clarified, further to the theoretical framework (chapter 3), is the *link* between the two branches of theories that are used, namely, practice studies and interactional legal theory on the one hand, and theories of aesthetics, intuition, and perception on the other. *Invisible Atrocities* argues convincingly that the atrocity aesthetic has filled a gap in ICL practice. On this account, ICL has been marked by significant "vagueness and contestation" at both the conceptual and the doctrinal level (83). The atrocity aesthetic has filled that void by providing ICL practitioners and human rights advocates with familiar "reference points" to paradigmatic forms of spectacular horror (67), which they could use to quickly assess whether an instance of mass violence constitutes an international crime or not (75). Yet, it remains less clear whether the atrocity aesthetic has influenced the shared understandings existing in the ICL field as an external force or has itself become a shared understanding that organizes the ICL community from within.

DeFalco seems to favor the former approach, noting that aesthetic considerations "influence the development of shared understandings" in ICL (77), but insists that they themselves remain "extralegal" (17). Indeed, he maintains that there is nothing inherently problematic in the shared understanding that "harm, culpability, and scale" constitute the core components of international crimes. Rather, the problem is identified with the influence of the atrocity aesthetic in giving meaning to those concepts (24–25).

However, at other points, the analysis seems to suggest that the atrocity aesthetic has become more than a mere external influence on ICL practice. DeFalco notes that aesthetics provide "shortcuts" in the process of constructing meanings (67) by enabling a "know it when you see it" approach to identifying international crimes (25, 28, 73). Aesthetics, thus, have the power to "dictat[e] what is knowable and sayable in a given social grouping" (77). It appears as if the atrocity aesthetic operates as a form of what

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Adler and Pouliot call "background knowledge" (Adler and Pouliot 2011, 16). According to this theory, which has also inspired Brunnée and Toope's interactional law model (Brunnée and Toope 2010, 64), background knowledge is crucial for the maintenance of communities of practice, such as the ICL ones, as they help *organize* the differences among their members around specific understandings of reality (Adler and Pouliot 2011, 16). In other words, the atrocity aesthetic seems to organize ICL practice from *within*, by enabling communication in the field.

Legal Legitimacy of International Crimes

How could the atrocity aesthetic be consolidated as a shared understanding in the ICL field and yet constitute an "extralegal" factor? The answer is revealed in chapter 7, which turns to the implications of aesthetic biases for the legal legitimacy of international crimes. Here, the author acknowledges that "a shared understanding (i.e. that international crimes will manifest themselves as horrific spectacles) appears to exist which is arguably relatively strong, stable, and widely agreed-on (albeit implicitly)" (235). Nevertheless, DeFalco argues that this understanding remains "extralegal" because it is not only unrequired by the doctrinal substance of ICL (235), but also compromises the legality of the system by unduly restricting its scope (see chapter 7). DeFalco, thus, appears to suggest that while all shared understandings have the power to order sociolegal interactions, not all of those understandings can be considered "legal." The author relies on Lon Fuller's criteria of legality, according to which legal rules need to be general, promulgated, nonretroactive, clear, noncontradictory of one another, possible to follow, and stable, and must exhibit "congruence" between the law and official action (229). As the atrocity bias, which exacerbates the already problematic selectivity of ICL, contradicts many of those criteria, and especially the "congruence" one, he concludes that it cannot be a "legal" shared understanding.

In my reading of it, the atrocity aesthetic, thus, appears to operate *simultaneously* as an internal and an external factor in the ICL field, depending on the theory one employs. From the perspective of general practice studies, the atrocity aesthetic has been internalized as a shared understanding because ICL practitioners and scholars use it intuitively as a benchmark for identifying the scope of legal rules and for marginalizing alternative voices. From the perspective of interactional law theory, the atrocity aesthetic remains external to the field because it contradicts Fuller's requirements of legality. A critical scholar might question the latter approach: the fact that a rule is generally accepted or that it displays congruence between the law and official action does not mean that it is fair or nondiscriminatory.[1] But DeFalco successfully answers such critique by emphasizing that the goal of the book is not to explore whether the ICL system is desirable as such (9). Rather, *Invisible Atrocities* seeks to address those lawyers, academics, and activists who perceive ICL as a legally legitimate project and to explain *on their own terms* why aesthetic biases are problematic and should play no role in the regime. This is an important endeavor because, as I discuss in the next section, the impact of the atrocity aesthetic in the ICL field might be even greater than anticipated in the book.

1. See, for instance, the feminist critique of argumentative rationality (Fraser 1985).

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OTHER ASPECTS OF INTERNATIONAL TRIALS EXPLAINED BY THE ATROCITY AESTHETIC

Invisible Atrocities provides a thorough analysis of the modes through which the atrocity aesthetic operates in ICL theory and practice, including a thought-provoking discussion of the work of the Extraordinary Chambers in the Courts of Cambodia (ECCC) (chapter 5). But while the book focuses on the impact that the atrocity aesthetic has had in terms of narrowing the scope of the concepts of genocide, crimes against humanity, and war crimes to "spectacular" horrors, DeFalco's theory has an even greater explanatory potential, as illustrated by the following two examples.

Why Alternative Voices on Unspectacular Violence Are Marginalized

The first question that the atrocity bias might shed light on is why alternative voices and critical scholars writing about unspectacular forms of mass violence have remained marginalized within the ICL community. As observed by DeFalco, the suggestion that international crimes might be perpetrated through "mundane" means has generally triggered "hostility" in the field. However, for the author, the reasons for the "discomfort" international lawyers and human rights advocates generally feel about such suggestions remain unclear (147). Yet, the answer seems to be in the very concept developed earlier in the book, namely, that of the atrocity aesthetic constituting a consolidated (if extralegal in Fuller's sense) shared understanding among ICL practitioners. By not conforming to the atrocity aesthetic, alternative voices do not speak in the same language as the community of ICL practice. The fact that critical scholars *do not share* with the ICL community the same "background knowledge" or "understandings" of ICL's scope makes it challenging to bridge their differences on substantive issues such as applicability of ICL provisions to unspectacular forms of violence.

This also bears implications for the process of deinstitutionalizing the atrocity aesthetic in ICL. If the latter has become consolidated as a shared understanding among members of the ICL field, this would make the said process significantly more challenging compared to if it had been a mere external influence. Nevertheless, over time the content of shared understandings could be "renegotiated" as an increasing number of scholars and practitioners challenge the established social perceptions (Adler and Pouliot 2011, 17). In that sense, *Invisible Atrocities* makes more than an analytical contribution to the ICL literature—it presents precisely the type of action that facilitates the renegotiation of shared understandings.

Who Are the Perpetrators of Atrocities?

The second aspect of ICL practice that the atrocity aesthetic throws new light onto is the choice of modes of liability or, in other words, the legal doctrines the prosecutor relies on to establish a *link* between the accused and the crimes. DeFalco correctly observes that some modes of liability are "tailored to be flexible enough to encompass a diverse array of contributions to group crimes," including forms of mundane or "unspectacular" violence

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(123). He focuses on the "joint criminal enterprise" (JCE) doctrine and Article 25(3)(d) of the statute of the International Criminal Court (ICC). Both doctrines enable the imputation of liability for a crime committed by a group acting with a criminal purpose to the persons who have contributed to the group effort. As the purpose of this chapter is to show that "nothing in the actual substance of ICL limits the array of means through which most international crimes may be committed" (110), the analysis concludes with the finding that the broad scope of modes of liability, such as JCE and Article 25(3)(d) of the ICC Statute, enables them "to capture the complex nuances of international crime commission" (129). However, two observations merit further consideration: first, that JCE has increasingly fallen out of popularity in ICL and, second, that Article 25(3)(d) has not been used as widely at the ICC as some other modes of liability have. Borrowing insights from sociological institutionalism (Barnett and Finnemore 1999), I have previously tried to explain the selection of modes of liability at the ICC with the propensity of legal institutions to develop "pathologies," or in other words, to habitually follow ineffective rules (Minkova 2022). However, *Invisible Atrocities* provides new and important insights into this problem by elucidating the role of the atrocity bias in such practices.

Specifically, the atrocity aesthetic, as conceptualized by DeFalco, seems to have influenced the image of the perpetrator of international crimes. As the author notes, international crimes result from "culpable human behaviour" (52). But while that proposition is broad enough to capture various forms of participation in international crimes (24–25), the image of the perpetrator of international crimes has been narrowed down to those persons whom Werle and Burghardt call "armchair killers" (Werle and Burghardt 2011) and Van der Wilt calls "spiders in the web" (Van der Wilt 2009)—namely, the leadership figures that orchestrate the commission of atrocities from above. These images are part of the atrocity aesthetic DeFalco identifies, as they rest on references to the way in which atrocities had been organized during the Holocaust (Van der Wilt 2009, 311–12), as well as to well-known trials, such as that against Adolf Eichmann (Werle and Burghardt 2011, 86).

This aesthetic seems to have contributed to the gradual decline of JCE's popularity. In particular, JCE has been subject to vigorous criticism within the ICL community for being so broad and flexible that is fails to distinguish between the contributions of those persons who, by orchestrating the crimes, bear greatest responsibility, and the contributions of the *mere* accessories to the crimes (Farhang 2010, 140). DeFalco's theory could also shed light on the fact that Article 25(3)(d) still has not gained the same attention in ICC jurisprudence as have the modes of liability that conform to the "armchair killers" aesthetic. ICC chambers have generally relied on German criminal law theories, designed specifically with the conduct of perpetrators like Eichmann in mind, to establish forms of principal liability.[2] Just like DeFalco observes that the atrocity aesthetic has distorted the concept of international crimes, so it has been suggested that those theories have produced a flawed image of the perpetrator of international crimes as an omnipresent and unrealistically powerful person who exercises unquestioned "control" over the commission of atrocities.[3]

2. For commentary, see Weigend 2011.

3. Prosecutor v. Ntaganda, ICC- 01/04-02/06-2666-Anx5, Annex 5: Partly Concurring Opinion of Judge Chile Eboe-Osuji, ¶ 93 (Appeals Chamber, Mar. 30, 2021), https://www.icc-cpi.int/RelatedRecords/CR2021_03022.PDF.

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Some ICC judges have recently argued that Article 25(3)(d) liability, with its greater flexibility, allows for a "common sense description and appreciation of the role of an individual" in organized forms of criminality.[4] Nevertheless, it remains unclear whether Article 25(3)(d) will become the most widely used mode of liability in the Court's jurisprudence. As *Invisible Atrocities* suggests, the answer to that question depends in part on combating the atrocity bias in ICL and, specifically, the intuition that the most blameworthy acts are always manifested in the form of armchair criminality.

CONCLUSION

While the past two decades have witnessed the proliferation of critical studies of ICL, the attempts to establish a bridge between the critique of the legal regime and the ICL community of practice have remained scarce. *Invisible Atrocity* makes a unique contribution in that regard as it develops an argument that most critical scholars would agree with—that ICL has failed to address mundane or unspectacular violence—and yet shows that this outcome is not the inevitable result of the way in which the legal regime has been structured. The book is, thus, not only a must-read for both the critics and the advocates of ICL, but also an example of a new approach to international criminal justice scholarship.

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4. Prosecutor v. Ntaganda, ICC-01/04-02/06-2666-Anx2, Annex 2: Separate Opinion of Judge Howard Morrison on Mr Ntaganda's Appeal, ¶ 40 (Appeals Chamber, Mar. 30, 2021), https://www.icc-cpi.int/RelatedRecords/CR2021_03021.PDF.

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