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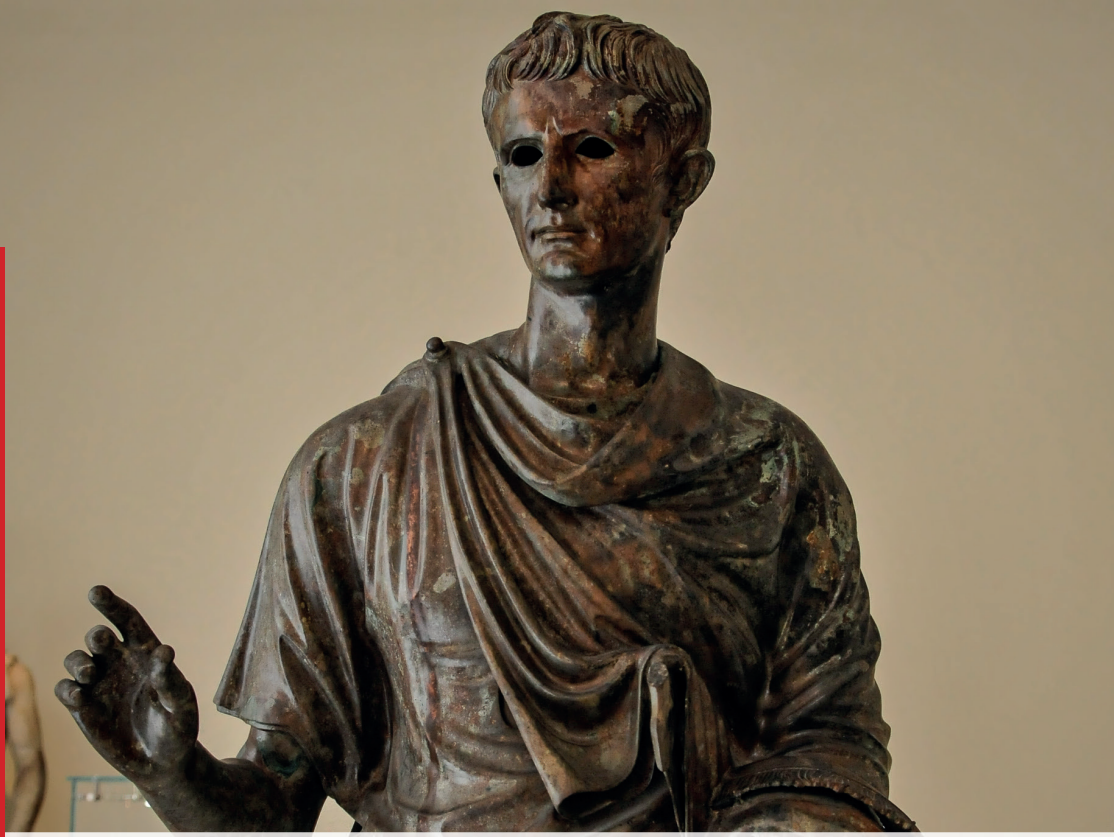
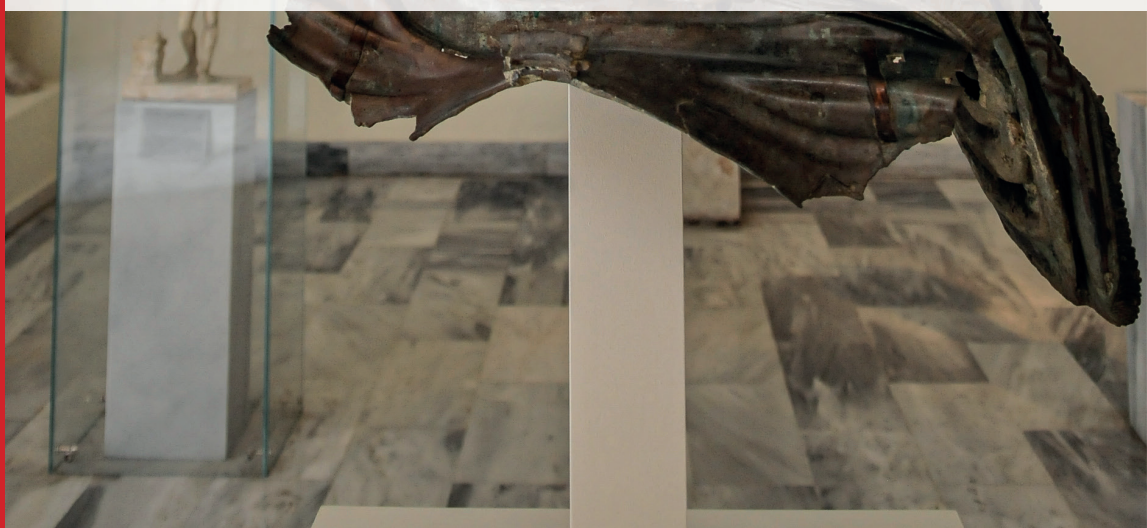


Power in International Criminal Justice

Morten Bergsmo, Mark Klamberg, Kjersti Lohne and Christopher B. Mahony (editors)



E-Offprint:

Barrie Sander, "The Anti-Impunity Mindset", in Morten Bergsmo, Mark Klamberg, Kjersti Lohne and Christopher B. Mahony (editors), *Power in International Criminal Justice*, Torkel Opsahl Academic EPublisher, Brussels, 2020 (ISBNs: 978-82-8348-113-6 (print) and 978-82-8348-114-3 (e-book)). This publication was first published on 9 December 2020.

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Front cover: *Octavian, known as Caesar Augustus (63 BC–AD 14), the first Roman emperor, who enjoys a 2000-year old legacy as one of the most effective leaders in human history. He is a symbol of power. But this famous fragment of a bronze equestrian statue in the National Archaeological Museum of Athens is also a hollow mask. This book is about unmasking power.*

Back cover: *Excerpt from Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report, 30 September 2020. The experts showed courage and incision by challenging power in the International Criminal Court system in their report.*

7

The Anti-Impunity Mindset

Barrie Sander*

7.1. Introduction

Towards the end of the twentieth century, the field of human rights underwent a significant shift in its agenda and priorities in its response to mass atrocity. From the mid-1970s through the late 1980s, human rights groups – particularly those in the United States ('US') and Europe – predominantly directed their advocacy in opposition to State criminalisation of political activity and abuses within domestic criminal justice systems. Their primary tactic was naming and shaming; their principal target was the State.[1] In this period, domestic amnesties became standard political tools – whether 'political amnesties' used by authoritarian regimes for political prisoners as bargaining chips that could be offered to the international community, 'self-amnesties' used by oppressive regimes for their political and military leaders to shield perpetrators from criminal prosecution, or 'blanket amnesties' used in peace negotiations to immunise entire groups of persons unconditionally from criminal prosecution.[2]

* **Barrie Sander** is Assistant Professor of International Justice at Leiden University, Faculty of Governance and Global Affairs. He holds a Ph.D. in International Law (*summa cum laude avec félicitations du jury*) from the Graduate Institute of International and Development Studies (IHEID), Geneva, an LL.M. in Public International Law (*cum laude*) from Leiden University and a Bachelor of Arts, Classics and Law from Jesus College, Cambridge University. He would like to thank Pádraig McAuliffe, Kjersti Lohne, Mattia Pinto, Olivia Nantermoz Benoit-Gonin, and the other editors of this volume for their insightful comments on earlier drafts of this chapter. Any remaining error remains his alone.

1 Karen Engle, "A Genealogy of the Criminal Turn in Human Rights", in Karen Engle, Zinaida Miller, and D.M. Davis (eds.), *Anti-Impunity and the Human Rights Agenda*, Cambridge University Press, 2016, p. 18. On the dangers of referring to 'human rights groups' or 'the human rights movement' as a "singular, monolithic entity", see Paul O'Connell, "Capitalism, Inequality, and Human Rights", in *Law and Political Economy*, 4 June 2018 (available on its web site).

2 Max Pensky, "Amnesty on trial: impunity, accountability, and the norms of international law", in *Ethics & Global Politics*, 2008, vol. 1, no. 1, p. 6.

However, from at least the early 1990s, the field of human rights experienced a "criminal turn",[3] marked by human rights groups increasingly directing their resources towards the promotion of criminal prosecution as an indispensable requirement of securing justice and truth in the aftermath of mass atrocity.[4] Under the banner of 'ending impunity', the primary tactic became the promotion of criminal accountability before domestic and international courts, the principal target became the individual.[5] Nowadays, as Karen Engle has argued, "the correspondence between criminal prosecution and human rights has become so ingrained that expressing opposition to any particular international prosecution is sometimes seen as anti-human rights".[6]

To date, the turn to anti-impunity has primarily been examined as an embrace of criminal prosecution as a necessary antidote to mass violence. Breaking with this trend, this chapter instead examines anti-impunity as a mindset, encompassing a set of assumptions that have permeated justice mechanisms beyond the frame of criminal prosecution.[7] By examining anti-impunity as a mindset, this chapter aims to illuminate its

[3] For a detailed genealogical account of this "criminal turn", see generally, Engle, 2016, p. 15, see above note 1.

[4] See, in this regard, the Coalition for the International Criminal Court, established in the mid-1990s by a group of 25 civil society organisations and now comprised of 2,500 civil society organisations in 150 different countries. The official website defines the Coalition as "a movement to end impunity". For a narrative account of the history of the Coalition, see generally Coalition for the International Criminal Court, "Our Story" (available on its web site).

[5] Pensky, 2008, p. 6, see above note 2:

> With the advent of the anti-impunity norm, the overall attitude toward amnesties in the international legal community underwent a remarkable 180 degree shift. Rather than a yearned-for release of innocents from captivity, domestic amnesties for international crimes became the poster child for the most egregious forms of impunity.

[6] Engle, 2016, p. 42, see above note 1. See also, Kieran McEvoy, "Beyond Legalism: Towards a Thicker Understanding of Transitional Justice", in *Journal of Law and Society*, 2007, vol. 34, no. 4, p. 420 ("in some transitional societies human rights concerns become a byword for a retributive notion of justice").

[7] In forging this path, the chapter aims to build on and critically review some of the ideas initially put forward in the excellent edited volume of Karen Engle, Zinaida Miller and Dennis M. Davis. See, in particular, their "Introduction", in *idem*. (eds.), 2016, p. 4, see above note 1 (noting how several chapters in the volume "examine mechanisms for human rights adjudication or transitional justice that appear to operate outside the retributive criminal framework, but nevertheless end up mimicking aspects of it"). For my review of that volume, see Barrie Sander, "The Human Rights Agenda and the Struggle Against Impunity", in *Lawfare*, 6 February 2017 (available on its web site).

power and limits, both within and beyond the field of international criminal justice.

This chapter unfolds in five parts. It begins by defining the anti-impunity mindset through an examination of the human rights field's struggle to end impunity for mass violence (Section 7.2.). The chapter then turns to explore the *reach* of the mindset by examining three entities beyond the field of international criminal justice which, despite their formally non-retributive nature, have ended up embracing the assumptions of the anti-impunity mindset in practice: truth commissions, local justice mechanisms, and civil human rights litigation (Section 7.3.). Next, the chapter illuminates the *power* of the mindset by reviewing some of the principal critiques to which the mindset has been subjected in practice (Section 7.4.). After discussing the mindset's reach and power, the chapter then proceeds to identify its *limits*. Specifically, it is contended that the capacity of the anti-impunity mindset to crowd-out concern for issues of structural violence has sometimes been overstated (Section 7.5.). The chapter concludes with some reflections on critical scholarship concerning the anti-impunity mindset (Section 7.6.).

7.2. The Anti-Impunity Mindset

Since at least the early 1990s, a significant number of human rights groups have waged a struggle to end impunity for gross human rights violations.[8] In this context, impunity – literally the absence of punishment – has come to be equated with an absence of *criminal* prosecution and, where persons are found guilty, *criminal* punishment.[9] As Max Pensky

[8] See above note 4 (referring to the work of the Coalition for the International Criminal Court). See also, Martti Koskenniemi, "Between Impunity to Show Trials", in *Max Planck Yearbook of United Nations Law*, 2002, vol. 6, no. 1, p. 13 ("The effort to end the "culture of impunity" emerges from an interpretation of the past – the Cold War in particular – as an unacceptably political approach to international crises"); and Hani Sayed, "The Regulatory Function of the Turn to Anti-Impunity in the Practice of International Human Rights Law", in *Stanford Journal of International Law*, 2019, vol. 55, no. 1, pp. 3–6 (discussing three different registers under which the turn to anti-impunity could be described, namely changes in the practices of the human rights movement, changes in the background international law framework, or the success of norm entrepreneurs in pushing specific reform proposals past the tipping point to produce a norm cascade).

[9] See similarly, Anette Bringedal Houge and Kjersti Lohne, "End Impunity! Reducing Conflict-Related Sexual Violence to a Problem of Law", in *Law & Society Review*, 2017, vol. 51, no. 4, p. 778 ("we hold the force of the fight impunity-approach to be reflective of […] a strong faith in the ability of law in general – and criminal law in particular – to transform people and societies"); Engle *et al.*, 2016, p. 4, see above note 7 (noting how in general the

has observed, "impunity has been understood virtually entirely […] as a retributive principle of narrowly defined criminal justice".[10] The prioritisation of criminal prosecution and punishment as the preferred policy response to episodes of mass violence is reflected not only in the policy statements of human rights groups, but also the discursive practices of both human rights bodies and international criminal courts.[11] In its *Policy Paper on the Interests of Justice*, for example, the ICC Office of the Prosecutor ('OTP') elaborates a strong presumption in favour of criminal investigation and prosecution when the other relevant statutory criteria set out in Article 53 of the Rome Statute have been satisfied.[12] Embodying the values of the struggle to end impunity, the OTP notes that other transitional justice mechanisms should be seen as "complementary" to the work of the ICC, forming part of "a comprehensive approach" to justice, rather than as alternatives.[13]

The equation of anti-impunity with criminal prosecution and punishment has been driven by a number of claims concerning the potential of law in general – and international criminal law in particular – to posi-

turn to anti-impunity has been viewed "as an embrace of the idea that criminal law is the necessary and preferred response to a particular set of human rights violations and international crimes").

10 Pensky, 2008, pp. 19–20, see above note 2.

11 On the growing tendency of human rights bodies to trigger the application of criminal law and criminal measures within domestic criminal courts, see generally, Alexandra Huneeus, "International Criminal Law By Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts", in *American Journal of International Law*, 2013, vol. 107, no. 1; and Mattia Pinto, "Awakening the Leviathan through Human Rights Law – How Human Rights Bodies Trigger the Application of Criminal Law", in *Utrecht Journal of International and European Law*, 2018, vol. 34, no. 2. On the deployment of anti-impunity rhetoric within the practices of international criminal courts, see generally, Mark Drumbl, "Impunities", in *Washington & Lee Public Legal Studies Research Paper Series*, 2017, Accepted Paper No. 2017-17, pp. 8–18; and Max Pensky, "Impunity: A Philosophical Analysis", in Morten Bergsmo and Emiliano J. Buis (eds.), *Philosophical Foundations of International Criminal Law: Foundational Concepts*, Torkel Opsahl Academic EPublisher, 2019, pp. 246ff. For a discussion of anti-impunity thinking within domestic legislation and criminal courts, see generally, Mattia Pinto, "Sowing a 'Culture of Conviction': What Shall Domestic Criminal Justice Systems Reap from Coercive Human Rights?", LSE Legal Studies Working Paper No. 9/2019, 2019.

12 ICC Office of the Prosecutor, *Policy Paper on the Interests of Justice*, September 2007, p. 3 (http://www.legal-tools.org/doc/bb02e5/).

13 *Ibid*., pp. 7–8.

tively transform individuals and societies.[14] At the individual level, it is claimed that criminal prosecution responds to the needs of victims of mass atrocities, by vindicating their value in the eyes of society, offering a civilised alternative to the desire for revenge, and delivering an authoritative account of what happened during the events in question. At the societal level, it is claimed that criminal prosecution is important for deterring the commission of similar acts in the future. These claims, which pervade the discursive practices of the human rights field, are articulated in particularly clear terms in Amnesty International's *Policy Statement on Impunity* issued in 1991:[15]

> Amnesty International believes that the phenomenon of impunity is one of the main contributing factors to these continuing patterns of [gross human rights] violations. Impunity, literally the exemption from punishment, has serious implications for the proper administration of justice […] Victims, their relatives and the society at large all have a vital interest in knowing the truth about past abuses and in the clarification of unresolved human rights crimes. Similarly, bringing the perpetrators to justice is not only important in respect of the individual case, but also sends a clear message that violations of human rights will not be tolerated and that those who commit such acts will be held fully accountable. When investigations are not pursued and the perpetrators are not

[14] For a detailed exploration of these progress claims, as well as the critiques to which they have been subjected, see generally, Barrie Sander, "International Criminal Justice as Progress: From Faith to Critique", in Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (eds.), *Historical Origins of International Criminal Law: Volume 4*, Torkel Opsahl Academic EPublisher, Brussels, 2015, p. 749 (http://www.legal-tools.org/doc/b7ac0c/).

[15] Amnesty International, "Policy Statement on Impunity", in Neil J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes: Volume I: General Considerations*, US Institute of Peace Press, 1995, p. 219. See similarly, Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. A/49/342, S/1994/1007, 29 August 1994, para. 15 (asserting that the "only civilized alternative to this desire for revenge is to render justice" and that the failure to provide a fair trial would cause "feelings of hatred and resentment seething below the surface […] [to] erupt and lead to renewed violence"); and Carla Del Ponte, "The Dividends of International Criminal Justice", Address at Goldman Sachs, 6 October 2005 ("Of course, the value of satisfying the victims' need for justice cannot be estimated. But what is certain, is that it prevents the feelings of revenge which are strong when injustice prevails").

> held to account, a self-perpetuating cycle of violence is set in motion resulting in continuing violations of human rights cloaked by impunity.

According to this perspective, impunity is not merely a failure to criminally prosecute and punish individuals for their participation in the commission of gross human rights violations, but also a major contributing factor to the commission and perpetuation of gross human rights violations.[16]

By emphasising the indispensability and progressive potential of criminal prosecution and punishment in response to mass violence, the struggle to end impunity has come to embody a number of implicit assumptions about how to think about mass violence. Collectively, these assumptions may be understood to form a particular *mindset* amongst their adherents.[17] Specifically, the anti-impunity mindset conceptualises responsibility for mass violence in primarily individualised terms,[18] directs attention towards specific violations rather than structural phenomena,[19] evinces a tendency to prioritise concern for physical violence,[20] and delineates boundaries through binary categorisations, such as guilt and

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16 See also, Houge and Lohne, 2017, pp. 768–78, see above note 9 (examining how "the diagnostic, prognostic and motivational framing of conflict-related sexual violence constructs and reinforces criminal law as its proper response").

17 See, in this regard, Martti Koskenniemi, "Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization", in *Theoretical Inquiries in Law*, 2007, vol. 8, no. 1, p. 9 (describing 'constitutionalism' as "a mindset – a tradition and a sensibility about how to act in a political world").

18 Larry Catá Backer, "The Führer Principle of International Law: Individual Responsibility and Collective Punishment", in *Penn State International Law Review*, 2003, vol. 21, no. 3, p. 525 ("cult of personal responsibility"). Some scholars have referred to anti-impunity's individualism as 'liberal legalist'. See, for example, Laurel E. Fletcher, "From Indifference to Engagement: Bystanders and International Criminal Justice", in *Michigan Journal of International Law*, 2005, vol. 26, no. 4, p. 1031 (defining liberal legalism as "the legal principles and values that privilege individual autonomy, individuate responsibility, and are reflected in the criminal law of common law legal systems"); Mark A. Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press, 2007, p. 5 (adopting Fletcher's definition of liberal legalism but adding that "these values also are shared by civil law legal systems"); and Houge and Lohne, 2017, p. 778, see above note 9 (holding "the force of the fight impunity-approach to be reflective of liberal legalism").

19 See similarly, Tor Krever, "International Criminal Law: An Ideology Critique", in *Leiden Journal of International Law*, 2013, vol. 26, no. 3, p. 722.

20 See similarly, Zinaida Miller, "Anti-Impunity Politics in Post-Genocide Rwanda", in Engle *et al.* (eds.), 2016, pp. 168–71, see above note 1.

innocence, right and wrong, blamers and blamed, and victims and perpetrators.[21]

Although the struggle to end impunity has only become entrenched within the field of human rights over the course of the last 30 years, the mindset and assumptions underpinning the struggle have a longer history. At the international level, anti-impunity thinking is rooted in a double movement: first, the criminalisation of international law, characterised by the tendency to proscribe criminal acts under international law by imposing obligations directly on individuals without the intermediary of the State; and second, the internationalisation of criminal law, characterised by the tendency to prosecute individuals in international criminal courts above the level of the State.

Referred to by Mahmood Mamdani as "the logic of Nuremberg",[22] the anti-impunity mindset finds its clearest expression in the practices of international criminal courts. It is notable, for example, that the mandates of international criminal courts have not only facilitated but also consistently been restricted to the determination of *individual* criminal responsibility.[23] As the International Military Tribunal at Nuremberg famously put it, international crimes are "committed by men, not abstract entities and

[21] See, similarly, Doris Buss, "Performing Legal Order: Some Feminist Thoughts on International Criminal Law", in *International Criminal Law Review*, 2011, vol. 11, no. 3, p. 411; and Stiina Löytömäki, *Law and the Politics of Memory: Confronting the Past*, Routledge, 2014, p. 10.

[22] Mahmood Mamdani, "Beyond Nuremberg: The Historical Significance of Post-apartheid Transition in South Africa", in *Politics & Society*, 2015, vol. 43, no. 1, p. 80. See also, Ryan Liss, "Crimes Against the Sovereign Order: Rethinking International Criminal Justice", in *American Journal of International Law*, 2019, vol. 113, no. 4, p. 757 (discussing the notion of "crimes against the sovereign order", which may be traced back to the late eighteenth century in the form of piracy as an international crime).

[23] See, for example, the references to 'natural persons' in: Statute of The International Criminal Tribunal for the Former Yugoslavia, 25 May 1993, Article 6 (http://www.legal-tools.org/doc/b4f63b/); Statute of the International Tribunal for Rwanda, 8 November 1994, Article 5 (http://www.legal-tools.org/doc/8732d6/); and Rome Statute of the International Criminal Court, 17 July 1998, Article 25(1) (http://www.legal-tools.org/doc/7b9af9/). Article 9 of the Charter of the International Military Tribunal, 8 August 1945 (http://www.legal-tools.org/doc/64ffdd/) provided that a group or organization may be declared to be "a criminal organization". However, this power did not entail the assignation of responsibility as such, but was a mechanism designed to facilitate the determination of the individual criminal responsibility of members of such organisations. The Statute of the Special Court for Sierra Leone, 16 January 2002 (http://www.legal-tools.org/doc/aa0e20/) appeared to leave open the possibility of prosecuting persons other than individuals, though this never eventuated in practice.

only by punishing individuals who commit such crimes can the provisions of international law be enforced".[24] Although efforts have been made in recent years to hold collective entities such as corporations accountable,[25] it remains the case that ever since Nuremberg, a paradigm of individual criminal responsibility has held the field of international criminal justice firmly within its grasp.[26]

Similarly, the legal form of international criminal law has served to focus attention on the *specific* over the general, directing international criminal courts towards particular incidents, individuals and crimes at the expense of examining the structural logics that lurk beneath them.[27] As Zinaida Miller has put it, "[c]riminal courts try individuals, not structures. They pursue particular violations, not a situation of structural violence".[28]

International prosecutors have also tended to prioritise the prosecution of *physical violence* to the relative neglect of economic, social, cultural and environmental violence. In this regard, it is notable that while international criminal law has only ever been able to offer a partial response to these forms of violence, international prosecutors have had at their disposal at least some of the necessary doctrinal tools to orient their charging practices towards a broader range of harms had they so desired.[29] In practice, however, international criminal courts have predomi-

[24] International Military Tribunal, *Göring and others*, Judgment, 1 October 1946, in *Trial of the Major War Criminals before the International Military Tribunal: Volume I*, Nuremberg, 1947, pp. 171 and 223 (emphasis added) (http://www.legal-tools.org/doc/388b07/).

[25] Barrie Sander, "Addressing the Economic Dimensions of Mass Atrocities: International Criminal Law's Business or Blind Spot?", in *Justice in Conflict*, 8 June 2015 (available on its web site).

[26] Kai Ambos, *Treatise on International Criminal Law: Volume I: Foundations and General Part*, Oxford University Press, 2013, p. 103.

[27] Robert Knox, "Marxism, International Law, and Political Strategy", in *Leiden Journal of International Law*, 2009, vol. 22, no. 3, p. 430.

[28] Miller, 2016, p. 169, see above note 20.

[29] See similarly, Ioannis Kalpouzos and Itamar Mann, "Banal Crimes Against Humanity: The Case of Asylum Seekers in Greece", in *Melbourne Journal of International Law*, 2015, vol. 16, no. 1, p. 1; Frédéric Mégret, "What Sort of Global Justice is 'International Criminal Justice'?", in *Journal of International Criminal Justice*, 2015, vol. 13, no. 1, pp. 95–96; and Evelyne Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law*, Cambridge University Press, 2015.

nantly enforced a very narrow set of human rights priorities, neglecting structural injustices rooted in global social-economic inequality.[30]

Finally, the legal form of international criminal law also relies on *binary adversarial categorisations*, which require international criminal courts to "speak" through bright line distinctions.[31] Mark Osiel, for example, has referred to the "bipolar logic of criminal law", which insists on "dividing the world into mutually exclusive categories of people: legally, into guilty and innocent; sociologically, into blamers and blamed".[32] By relying on these binary categorisations, international criminal courts have tended to reduce the complexity of mass atrocities to simplified manageable narratives.[33]

As these observations indicate, the anti-impunity mindset pervades the practices of international criminal courts. Yet, once anti-impunity is characterised as a mindset comprised of a number of assumptions, it is

[30] See similarly, Kalpouzos and Mann, 2015, pp. 1–4, see above note 29 (referring to less visible categories of crimes encompassing "normalised occurrences", "banal acts", and "structural human rights violations rooted in global social-economic inequality"); and Asad G. Kiyani, "International Crime and the Politics of Criminal Theory: Voices and Conduct of Exclusion", in *New York University Journal of International Law and Politics*, 2015, vol. 48, no. 1, pp. 183ff. (noting how international criminal law "continues to enforce a very narrow set of human rights priorities", encompassing "incidences of spectacular, not structural, violence").

[31] Bronwyn Leebaw, *Judging State-Sponsored Violence, Imagining Political Change*, Cambridge University Press, 2011, p. 38 (noting "the epistemology of Western legalism" whose "reliance on adversarial categories functions to reify and intensify conflict").

[32] Mark Osiel, *Mass Atrocity, Collective Memory, and the Law*, Transaction Publishers, 1997, p. 159. See similarly, Mark A. Drumbl, "Victims who victimise", in *London Review of International Law*, 2016, vol. 4, no. 2, p. 240 (referring to "the binary reductionism of criminal law's categorism of pure victim and ugly perpetrator").

[33] Carsten Stahn, "Between 'Faith' and 'Facts': By What Standards Should We Assess International Criminal Justice?", in *Leiden Journal of International Law*, 2012, vol. 25, no. 2, p. 273. See similarly, Stiina Löytömäki, "Legalisation of the memory of the Algerian war in France", in *Journal of the History of International Law*, 2005, vol. 7, no. 2, p. 172 (noting that when criminal trials "reduce complex historical phenomena to such binary categories as victim-executioner, innocent-guilty, good-evil, oppressor-oppressed, trials tend to align identities with completely unrealistic and stereotypical classifications"); Buss, 2011, p. 416, see above note 21 (noting that "the criminal trial model, particularly in its Anglo-American adversarial form, reduces all complexity to simplistic binaries of innocent/guilt; good/bad; non-criminal/criminal"); and Richard Ashby Wilson, *Writing History in International Criminal Tribunals*, Cambridge University Press, 2011, p. 9 (noting that "[b]ecause courts follow law's own exceptional principles rather than those of historical inquiry, they can reduce complex histories to a defective legal template, and thereby distort history").

possible to identify the permeation of anti-impunity thinking within justice mechanisms beyond the field of international criminal justice.

7.3. The *Reach* of the Anti-Impunity Mindset

Although anti-impunity thinking is most readily identifiable within the field of international criminal justice, it has also seeped into the operation of other justice mechanisms. Drawing on the recent volume of Karen Engle, Zinaida Miller and D.M. Davis concerning the struggle against impunity,[34] this section discusses three contexts where the assumptions underpinning anti-impunity thinking have been particularly apparent: South Africa's Truth and Reconciliation Commission ('TRC'); Rwanda's *gacaca* process; and US Alien Tort Statute ('ATS') litigation.

7.3.1. South Africa's Truth and Reconciliation Commission

Although truth commissions have often been envisaged as opportunities for broader inquiries into the past than those presented by criminal prosecution, at times their mandates have been interpreted restrictively in ways that mimic attributes of anti-impunity thinking.

Consider, for example, South Africa's TRC, which was established by the Promotion of National Unity and Reconciliation Act of 1995, with a mandate to "provide for the investigation and establishment of as complete a picture as possible of the nature, causes, and extent of gross violations of human rights" committed in South Africa between 1960 and 1994.[35] In practice, however, the TRC interpreted its mandated narrowly in alignment with many of the assumptions of the anti-impunity mindset. In particular, the TRC interpreted the meaning of "gross violations of human rights" as requiring the Commission to focus on "human rights violations committed as *specific* acts, resulting in *severe physical and/or men-*

[34] This section owes an intellectual debt to the volume, several chapters of which examine the three contexts discussed here. See, generally, Engle *et al.* (eds.), 2016, above note 1. For a discussion of anti-impunity thinking within human rights bodies and their growing tendency to invoke human rights to trigger the application of criminal law measures at the domestic level, see Pinto, 2019, above note 11. For a discussion of how the turn to anti-impunity has had a regulatory impact across the governance regimes of international trade and development assistance, see Sayed, 2019, above note 8.

[35] South Africa, Promotion of National Unity and Reconciliation Act, 19 July 1995, Section 3(1)(a) (http://www.legal-tools.org/doc/42cdab/).

tal injury, in the course of past political conflict".[36] To this end, the TRC claimed that while bodily integrity rights fell within its mandate, a broader range of subsistence rights fell beyond it.[37]

The consequences of the TRC's restrictive understanding of its mandate were fivefold.[38] First, the TRC narrated the story of apartheid from the narrow perspective of specific human rights violations rather than the broad perspective of colonialism and capitalism.[39] Second, the TRC individualised the victims, neglecting the collective nature of the oppression that made apartheid distinct.[40] Third, the TRC focused on the violation of bodily integrity rights, despite the vast majority of the South African population suffering economic violence through attacks on their means of livelihood, land and labour.[41] In this regard, although the TRC held institutional hearings, which included consideration of the role of business in apartheid, these were ultimately reduced to providing context and background to its core examination of gross human rights violations.[42] Fourth, the TRC individualised the perpetrators, neglecting that much of the violence in South Africa was a product of the apartheid authorities and the dynamics of the apartheid system.[43] Finally, by relying on the bright line distinction between victims and perpetrators, the TRC devoted minimal attention to the beneficiaries of the apartheid system who fell beyond the victim-perpetrator binary.[44] The result, as Mahmood Mamdani has explained, was to align the TRC with the logic of anti-impunity thinking:[45]

> [T]he TRC set aside the distinctive everyday violence of apartheid, the violence that targeted entire groups and that was central to realizing its political agenda. This is because

[36] TRC, *South Africa Truth and Reconciliation Commission Report: Volume 1*, 1998, para. 55 (emphasis added) (http://www.legal-tools.org/doc/773339/).

[37] *Ibid*., paras. 55–59.

[38] See generally, Robert Meister, *After Evil: A Politics of Human Rights*, Columbia University Press, 2011, chap. 2; and Mamdani, 2015, p. 61, see above note 22.

[39] Zinaida Miller, "Effects of Invisibility: In Search of the 'Economic' in Transitional Justice", in *International Journal of Transitional Justice*, 2008, vol. 2, no. 3, p. 281.

[40] Mamdani, 2015, p. 72, see above note 22.

[41] *Ibid*., pp. 72–73.

[42] *Ibid*., p. 75.

[43] *Ibid*., p. 73.

[44] Leebaw, 2011, p. 139, see above note 31.

[45] Mamdani, 2015, p. 77, see above note 22 (emphasis added).

> the TRC understood *violence as criminal*, not political; as *driven by individual perpetrators*, and not groups of beneficiaries; as *targeting identifiable, individual victims*, and not entire groups. It focused on *violence as excess,* not as norm.

By adopting many of the attributes of the anti-impunity mindset, the TRC ended up focusing on violence that infringed apartheid law, rather than the institutionalised forms of violence – including pass laws and forced removals – that were enabled by it.[46]

7.3.2. Rwanda's *Gacaca* Process

Local justice mechanisms have often been viewed as offering greater restorative, reintegrative and reconciliatory potential than criminal prosecutions. In practice, however, sometimes local justice mechanisms have also become aligned with the assumptions that underpin the anti-impunity mindset.

Consider, for example, the Rwandan *gacaca* process which constituted one of the three transitional justice layers implemented in response to the genocide that occurred in Rwanda in 1994.[47] Faced with considerable financial and logistical challenges in conducting genocide trials before its national courts,[48] the Rwandan government passed Organic Law No. 40/2000 of 26 January 2001,[49] which established a new system for dealing with accused perpetrators, based on the local Rwandan dispute settlement practice known as *gacaca* – literally "justice on the grass" in Kinyarwanda.[50] Due to serious obstacles that confronted the implementation of this law, it was revised and replaced by Organic Law No. 16/2004 of 19 June 2004, which established the organisation, competence and functioning of the *gacaca* courts – which were then charged with prosecuting and trying

[46] *Ibid*., pp. 77–78; Leebaw, 2011, p. 137, see above note 31; and Miller, 2008, p. 277, see above note 39.

[47] The other two layers took the form of the International Criminal Tribunal for Rwanda, established by the Security Council, and trials conducted before domestic courts in Rwanda. See generally, Nicola Palmer, *Courts in Conflict: Interpreting the Layers of Justice in Post-Genocide Rwanda*, Oxford University Press, 2015.

[48] *Ibid*., p. 118. For a discussion of the range of motivations behind the utilization of *gacaca* courts as a response to the Rwandan genocide, see Drumbl, 2007, p. 86, see above note 18.

[49] Rwanda, Organic Law No. 40/2000 of 26 January 2001 Setting Up Gacaca Jurisdictions and Organising Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity Committed Between 1 October 1993 and 31 December 1994, 12 October 2000 (http://www.legal-tools.org/doc/0bdf0f/).

[50] Drumbl, 2007, p. 85, see above note 18.

the accused perpetrators of the crime of genocide and crimes against humanity committed between 1 October 1990 and 31 December 1994.

Up until the colonial period, *gacaca* had been a traditional method of dispute settlement among members of the same lineage.[51] When conflicts arose over issues of land, property, marital relations, or inheritance, the parties were brought before informal sessions presided over by the elders (*Inyangamugayo*). After independence, State authorities of Rwanda began to dominate the *gacaca* institution, with local authorities taking on the role of the *Inyangamugayo* and the *gacaca* sessions focusing on minor conflicts concerning unpaid debts, illegal occupations of land, and contested ownership of property. Summarising the central tenets of the *gacaca* process, Charles Ntampaka – a leading expert on Rwandan customary law – has observed how:[52]

> the traditional system of conflict resolution did not include any written rules; remained wary of legal prescriptions that adjudicate and convict; was closely related to the family unit; favoured the role of 'head of the family'; involved forms of collective responsibility; did not promote equality; gave priority to community interests over individual rights; often deemed confessions to be a form of provocation; and drew on the sacred and the religious.
>
> In other words, the aim of *gacaca* sessions was less to adjudicate guilt or apply State law, than to restore social harmony through re-integrating the transgressors into the community.

As conceived for the Rwandan *génocidaires*, however, the *gacaca* process was significantly transformed in alignment with the anti-impunity mindset.[53] The genocide *gacaca* process functioned more like a criminal court with retributive goals, than a communal gathering with restorative aspirations. *Gacaca* sessions were public rather than limited to the affected parties, their functioning and the penalties they could pronounce were legally defined by the State, their judges were elected community members rather than elders, and their competencies were similar to those of

[51] This paragraph draws on Penal Reform International, *Integrated Report on Gacaca Research and Monitoring: Pilot Phase, January 2002 – December 2004*, 2005, p. 8.

[52] Jacques Fierens, "*Gacaca* Courts: Between Fantasy and Reality", in *Journal of International Criminal* Justice, 2005, vol. 3, no. 4, p. 913 (summarising Charles Ntampaka).

[53] This paragraph draws on Penal Reform International, 2005, pp. 9–10, see above note 51; and Drumbl, 2007, pp. 92–94, see above note 18.

ordinary courts, including powers to issue subpoenas and summon witnesses. As Fierens has observed, with the genocide *gacaca* process, tradition was "cloaked in the mantle of a criminal trial, with a strict and written procedure, and leading to a supposedly legal judgment".[54] Moreover, with a maximum sentence of 30 years' imprisonment for murderers and those who committed attacks with the intention to kill but did not succeed, the genocide *gacaca* process was also "jarringly punitive".[55] Although the mandate of the genocide *gacaca* also included objectives such as truth-telling and reconciliation, in practice emphasis was placed on individual accountability and retributive justice.[56]

Examining how the *gacaca* process moved away from its traditional restorative and reconciliatory concern for the interests of victims and the community, and towards a retributive focus on the fate of the accused, Mark Drumbl has identified three sources of pressure that proved pivotal in practice:[57] first, international pressure in the form of criticism from Western governments and civil society groups that were concerned by the lack of due process guarantees in the *gacaca* process; second, pressure from the Rwandan government to utilise the *gacaca* process as a form of social control; and finally, local pressure from victims who were concerned that *gacaca* would be too lenient on perpetrators and minimise the gravity of their crimes. In the end, it was through a combination of these pressures that *gacaca* became aligned with the assumptions of anti-impunity thinking, rather than developing "penological rationales that truly operationalize restoration and reintegration as goals of sanction".[58]

7.3.3. US Alien Tort Statute Litigation

A final illustration of the anti-impunity mindset operating beyond the field of international criminal justice is identifiable within the civil human rights claims brought in the US pursuant to the ATS.

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[54] Fierens, 2005, p. 916, see above note 52. See similarly, Penal Reform International, 2005, p. 9, see above note 51 (describing genocide *gacaca* as "a veritable criminal court, with retributive goals"); Drumbl, 2007, p. 92, see above note 18 (*gacaca* for genocide "is more like a liberal criminal court than what it traditionally is, namely a communal restorative mechanism").

[55] *Ibid*., p. 93. See similarly, Palmer, 2015, pp. 118–119, see above note 47 ("the objectives of the new post-genocide gacaca courts were oriented toward punitive sanctions").

[56] Miller, 2016, p. 158, see above note 20.

[57] Drumbl, 2007, pp. 94–99, see above note 18.

[58] *Ibid*., p. 94.

Enacted in 1798, the ATS provides that federal courts "shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States".[59] Largely dormant for two centuries, the 1980 judgment of the Court of Appeals for the Second Circuit in the *Filártiga* case enabled foreign victims of gross human rights violations to turn to the ATS to pursue civil damages claims in US courts.[60] Following *Filártiga*, there have been three waves of ATS claims.[61] The first wave concerned claims against individuals based on their alleged direct involvement in human rights abuses. The second wave, which commenced in the 1990s, targeted corporations for aiding and abetting in the commission of human rights violations. A final wave concerns claims brought in light of the US Supreme Court's 2013 judgment in the *Kiobel* case, which significantly curtailed the scope of future ATS claims to those that "touch and concern the territory of the United States […] with sufficient force to displace the presumption against extraterritorial application".[62] While narrowing the claims that may be brought under ATS, litigation following *Kiobel* indicated that claims will continue "where the underlying conduct (including manufacture, financing, manage, or developing) occurs in the United States, where the conduct was intended to impact the United States, and where the United States may be harbouring an alleged wrongdoer".[63] Most recently, however, the US Supreme Court's 2018 judgment in the *Jesner* case has curtailed the ambit of future claims even further by concluding that "foreign corporations may not be defendants in suits brought under the ATS".[64]

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59 28 U.S.C. Section 1350.

60 US Court of Appeals for the Second Circuit, *Filártiga v. Peña-Irala* ('*Filártiga* case'), Judgment, 30 June 1980, 630 F.2d 876 (http://www.legal-tools.org/doc/da77e3/).

61 Mark A. Drumbl, "Extracurricular International Criminal Law", in *International Criminal Law Review*, 2016, vol. 16, no. 3, pp. 415–21.

62 US Supreme Court, *Kiobel v. Royal Dutch Petroleum Co.*, Judgment, 17 April 2013, 569 US 108 (2013), p. 1669.

63 Drumbl, 2016, p. 421, see above note 61.

64 US Supreme Court, *Jesner v. Arab Bank, PLC* ('Jesner case'), Judgment, 24 April 2018, 584 U.S. ___ (2018), p. 27. See also, Jesner case, Opinion of Kennedy J. ('Jesner case opinion of Kennedy J.'), p. 23 (stating that "plaintiffs still can sue the individual corporate employees responsible for a violation of international law under the ATS"). For critical discussion of the decision, see generally, Samuel Moyn, "Time to Pivot? Thoughts on Jesner v. Arab Bank", in *Lawfare*, 25 April 2018 (available on its web site); and Chimène Keitner, "ATS, RIP?", in *Lawfare*, 25 April 2018 (available on its web site).

For present purposes, our prime interest is the tendency for ATS litigation to reflect several of the assumptions that underpin the anti-impunity mindset. This tendency has recently been highlighted by Natalie Davidson in her close reading of the landmark *Filártiga* case, which involved a civil claim by two Paraguayan parents against a Paraguayan police officer who had tortured and killed their son in Paraguay.[65] Specifically, Davidson demonstrates how a combination of legal doctrines and the judicial need for legitimacy narrowed the narrative frame of the litigation to focus on the individual torturer at the expense of illuminating the institutionalised use of torture by the Republic of Paraguay.

First, the Court of Appeals for the Second Circuit dismissed the defendant's argument that the claim was barred by the act of State doctrine by disputing "whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterised as an act of state".[66] By this statement, the Court effectively characterised the torture as an individual abuse of the defendant's official position, rather than a routinised practice.[67]

Secondly, the Court of Appeals argued that "for the purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind".[68] Through this imagery, the Court further accentuated the individualised nature of torture, at the expense of revealing the more structural and collective dimensions of the practice.[69] According to Davidson, the Court relied on the doctrine of *hostis humani generis* both to avoid a legal challenge – given that the Re-

65 Natalie R. Davidson, "From Political Repression to Torturer Impunity: The Narrowing of *Filártiga v. Peña-Irala*", in Engle *et al.* (eds.), 2016, p. 255, see above note 1. See also, Natalie R. Davidson, "Shifting the Lens on Alien Tort Statute Litigation: Narrating US Hegemony in *Filártiga* and *Marcos*", in *European Journal of International Law*, 2017, vol. 28, no. 1, p. 147.

66 *Filártiga* case, p. 890, see above note 60.

67 Davidson, 2016, p. 269, see above note 65 ("While the Court could be seen here as making a more normative than descriptive statement (that is torture, though it is done by state officials, should not be recognized as an act of state for purposes of the legal doctrine), the statement actually relies exclusively on the fact that Paraguay officially prohibited torture and did not ratify Peña's acts. As a result, this statement made the torture appear more as an individual abuse of that official's position than an institutionalized practice").

68 *Filártiga* case, p. 890, see above note 60.

69 Davidson, 2016, p. 270, see above note 65.

public of Paraguay was protected from suit by sovereign immunity – and to bolster its legitimacy in response to possible criticism that its extension of jurisdiction might be deemed a form of US imperialism.[70]

Through these findings, the Court of Appeals aligned itself with the central tenets of anti-impunity thinking, and "bequeathed to successive ATS cases an interpretation of torture that focused on the *individual* rather than the state, on the *exceptional* rather than the systemic, and on *physical* cruelty rather than economic injustice".[71] Moreover, as Davidson has observed, the *Filártiga* case very much set the tone for ATS claims more generally, with judges in future cases continuing to refer to the Second Circuit's "individualizing and demonizing discourse".[72]

7.4. The *Power* of the Anti-Impunity Mindset

As noted earlier in this chapter, the anti-impunity mindset has typically been accompanied by a faith in the progressive potential of law to render justice for victims and to deter future atrocities. Increasingly, these expectations have been challenged by a critical wave of scholarship, which has probed the underlying assumptions on which the anti-impunity mindset is premised.[73] As Christine Schwöbel-Patel has explained, these critiques have sought to question "who benefits in the existing parameters, who loses through the given legal structures, and why".[74]

By reviewing some of the principal critiques to which anti-impunity thinking has been subjected, this section illuminates the productive power of the anti-impunity mindset,[75] understood as the capacity of the mindset

[70] *Ibid*., p. 275.

[71] *Ibid*., p. 256. See also, Jesner case opinion of Kennedy J., 2018, p. 23, see above note 64 ("If the Court were to hold that foreign corporations have liability for international-law violations, then plaintiffs may well ignore the human perpetrators and concentrate instead on multinational corporate entities").

[72] Davidson, 2016, p. 276, see above note 65. See also, Davidson, 2017, pp. 166–67, see above note 65.

[73] See generally, Sander, 2015, p. 749, see above note 14.

[74] Christine E.J. Schwöbel, "Introduction", in Christine E.J. Schwöbel (ed.), *Critical Approaches to International Criminal Law: An Introduction*, Routledge, 2014, p. 4.

[75] On productive power, see generally, Michel Foucault, *Discipline and Punish: The Birth of a Prison*, Penguin, 1991, p. 194 ("We must cease once and for all to describe the effects of power in negative terms: it "excludes", it "represses", it "censors", it "abstracts", it "masks", it "conceals". In fact, power produces: it produces reality it produces domains of objects and rituals of truth. The individual and knowledge that may be gained of him belong to this production").

together with the institutions through which it is operationalised to offer "a key medium for the making of contestable, thoroughly political distributional choices – for creating winners and losers, prioritizing some voices at the expense of others".[76] To this end, this section examines three critiques in particular: first, the tendency for anti-impunity institutions to underwrite the balance of power between and within States; second, the equation of anti-impunity institutions with a narrow de-contextualised conception of responsibility; and finally, the anti-impunity mindset's occlusion of structural forms of violence.

7.4.1. Underwriting the Balance of Power Between and Within States

A common characteristic of justice modalities underpinned by the anti-impunity mindset has been a tendency to become aligned with the balance of power between and within States.

With respect to international criminal courts, for example, moments of anti-impunity against individuals belonging to particular factions within mass atrocity conflicts have generally been accompanied by moments of impunity for individuals belonging to factions aligned or protected by more powerful actors within the international community.[77] In particular, international prosecutors have either avoided or been prevented from targeting individuals protected by States on whose co-operation they are reliant and/or which are particularly powerful within the international community in general. In this vein, Allied personnel fell beyond the jurisdictional limits of the International Military Tribunal ('IMT') at Nuremberg and the International Military Tribunal for the Far East ('IMTFE') at Tokyo, NATO personnel were subjected to only a half-hearted investigation at the International Criminal Tribunal for the former Yugoslavia ('ICTY'), members of the Rwandan Patriotic Front were not prosecuted at the International Criminal Tribunal for Rwanda ('ICTR'), peacekeepers were not investigated at the Special Court for Sierra Leone ('SCSL'), and the ICC

[76] Ben Golder, "Beyond Redemption? Problematising the Critique of Human Rights in Contemporary International Legal Thought", in *London Review of International Law*, 2014, vol. 2, no. 1, p. 83.

[77] See similarly, Engle *et al.*, 2016, p. 5, above note 7 ("each historical moment of 'anti-impunity' may be more accurately described as one gripped simultaneously by "impunity'"); and Miller, 2016, p. 165, above note 20 ("Anti-impunity all too often brings with it a high degree of impunity").

Prosecutor has tended to de-prioritise prosecutions against members of factions aligned with the interests of the entities responsible for referring situations to her office for investigation.[78]

In the latter regard, the ICC Prosecutor's group-based selectivity, which often takes the form of prioritising cases against non-State armed groups over governmental atrocities within particular situations under investigation, has enabled States to co-opt the ICC, and instrumentalise the vocabulary of international criminal justice to delegitimise and stigmatise their opponents, whilst validating their own monopoly over the legitimate use of force.[79] Adam Branch, for example, has examined the benefits that accrued to the Ugandan government as a result of the ICC Prosecutor's targeted arrested warrants against members of the Lord's Resistance Army ('LRA'). In particular, buoyed by its heightened legitimacy in the international community, the Ugandan government was able to launch military incursions into the eastern regions of the Democratic Republic of the Congo, as well as to obtain assistance from the US military to carry out Operation Lightning Thunder in 2008, in an attempt to capture the LRA commanders.[80] According to Branch, it is even conceivable that the Ugandan government invited the ICC to intervene against the LRA "not to help bring the war to an end but to entrench it and to obtain support for its military campaign".[81] In this way, the ICC's intervention in Uganda serves to illustrate the potential for the ICC to provide a convenient pretext to legitimise military interventions in other States, as well as law enforcement activity against political opponents.[82] In such instances, the ICC becomes embedded within justificatory arguments to legitimise the

78 See generally, Courtney Hillebrecht and Scott Straus, "Who Pursues the Perpetrators? State Cooperation with the ICC", in *Human Rights Quarterly*, 2017, vol. 39, no. 1, p. 162; and Asad Kiyani, "Group-Based Differentiation and Local Repression: The Custom and Curse of Selectivity", in *Journal of International Criminal Justice*, 2016, vol. 14, no. 4, p. 939.

79 See generally, Sarah M.H. Nouwen and Wouter G. Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan", in *European Journal of International Law*, 2010, vol. 21, no. 4, p. 941; and Frédéric Mégret, "Is the ICC Focusing Too Much on Non-State Actors?", in Margaret M. deGuzman and Diane Marie Amann (eds.), *Arcs of Global Justice*, Oxford University Press, 2018, p. 173.

80 Adam Branch, *Displacing Human Rights: War and Intervention in Northern Uganda*, Oxford University Press, 2011, p. 191.

81 *Ibid*., p. 192.

82 *Ibid*., p. 186.

use of force, and the vocabulary of international criminal law facilitates "a neutral and universalist mode of emancipatory intervention".[83]

Similar trends are identifiable within other justice modalities. For instance, the 2004 Organic Law regulating the *gacaca* courts in Rwanda eliminated jurisdiction over war crimes, thereby ensuring that many of the crimes allegedly committed by the Rwandan Patriotic Front were excluded. As Mark Drumbl has observed, "off the table [was] any discussion of human rights abuses by the government, or the reality that, in ousting the genocidal regime, the [RPF] massacred thousands of Hutu civilians".[84]

In addition, in the ATS case of *Filártiga*, the Court of Appeals of the Second Circuit neglected any mention of the economic, military or political support provided by the US that helped maintain a climate of repression during the authoritarian regime of Alfredo Stroessner in Paraguay.[85] Nor is the *Filártiga* case an isolated example. As Natalie Davidson has argued, the omission of US involvement in human rights abuses committed abroad has proven a consistent theme across ATS litigation:[86]

> What has gone unnoticed is the trade-off between legal accountability and historical narratives present in ATS litigation. To admit that transnational human rights claims have implicated the US government is to risk triggering doctrines meant to protect the separation of powers among branches of the US government and to risk alienating the judge or jury. Conversely, to accept a case is to abide by the fiction that there are no foreign policy issues involved.

As these examples indicate, combating impunity for particular factions within a mass atrocity conflict has generally been contingent upon impunity for other factions in accordance with the balance of power between and within States.

7.4.2. A Narrow Conception of Responsibility

Justice mechanisms aligned with the anti-impunity mindset have predominantly – though not exclusively – focused on individualised conceptions

[83] David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism*, Princeton University Press, 2004, p. 23.

[84] Drumbl, 2007, p. 96, see above note 18.

[85] For an overview of US involvement in Paraguay, see generally, Davidson, 2017, pp. 151–54, see above note 65.

[86] *Ibid*., p. 168.

of responsibility. This paradigm of individualism has traditionally been viewed as one of the strengths of the anti-impunity mindset, a mark of progress from purportedly antiquated and primitive notions of collective responsibility that preceded them.[87] For instance, in his role as President of the ICTY, Antonio Cassese famously declared that past experience had demonstrated that "clinging to feelings of 'collective responsibility' easily degenerates into resentment, hatred and frustration and inevitably leads to further violence and new crimes".[88] Indeed, the recognition of individual criminal responsibility at Nuremberg may even be viewed as a riposte to the perceived failings of collective responsibility in the Versailles settlement that followed the First World War.[89]

At the same time, the equation of anti-impunity with a narrow individualised form of justice has risked masking the collective dimensions of mass atrocities behind the depoliticised veil of the individuals under examination.[90] According to Frédéric Mégret, for example, anti-impunity thinking within the field of international criminal justice "may occasionally let states and society off the hook too easily and even delay a necessary realization of collective faults".[91] In particular, the failings of international organisations, international peacekeeping forces, international financial institutions, foreign governments and bystanders have often fallen beyond the webs of relevancy within justice mechanisms whose attention has been fastened on individualised conceptions of responsibility.

Consider, for example, the role of bystanders within mass atrocities. Mass atrocities are often committed in environments where large numbers of individuals acquiesce in the violence around them, some even benefitting materially from its commission, without necessarily having blood on

87 André Nollkaemper, "Introduction", in André Nollkaemper and Harmen van der Wilt (eds.), *System Criminality in International Law*, Cambridge University Press, 2009, p. 9.

88 Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. A/49/342, 29 August 1994, para. 16 (http://www.legal-tools.org/doc/cacdb7/).

89 Gerry Simpson, "Men and abstract entities: individual responsibility and collective guilt in international criminal law", in Nollkaemper and van der Wilt (eds.), 2009, see above note 87, p. 80.

90 George P. Fletcher, "The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt", in *Yale Law Journal*, 2002, vol. 111, no. 7, p. 1514.

91 Frédéric Mégret, "International criminal justice: A critical research agenda", in Schwöbel (ed.), 2014, p. 29, see above note 74.

their hands.[92] As Jelena Subotić has explained, senior leaders have often built their policies on "a societal receptivity to violent claims that were broadly accepted, normalized, and routinized in society and gave criminal policies a patina of legitimacy".[93] In such contexts, doing nothing may in fact constitute doing something, the inaction of large numbers of individuals serving as a form of silent condonation of the atrocities unfolding around them.[94]

Yet, despite the significance of bystander passivity in enabling the formation of a climate of societal permissibility for the commission of international crimes, it has tended to fall beyond the purview of anti-impunity frameworks, either because of its legal remoteness to standards of personal culpability applied by international criminal courts, or as a result of reliance placed on binary victim-perpetrator categorisations within other transitional justice modalities.[95] By overlooking bystanders, anti-impunity initiatives have not only failed to differentiate the range of roles that bystanders have played within mass atrocity situations, but also risked serving as "an alibi for the population at large to relieve itself from responsibility".[96]

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92 Larry May, *Genocide: A Normative Account*, Cambridge University Press, 2010, p. 260.

93 Jelena Subotić, "Expanding the scope of post-conflict justice: Individual, state and societal responsibility for mass atrocity", in *Journal of Peace Research*, 2011, vol. 48, no. 2, p. 160.

94 Laurel E. Fletcher, "Facing Up to the Past: Bystanders and Transitional Justice", in *Harvard Human Rights Journal*, 2007, vol. 20, p. 47. See also, Iris Marion Young, *Responsibility for Justice*, Oxford University Press, 2011, p. 87 (noting how by engaging in a mass self-deception that the atrocities unfolding around them are acceptable, bystanders evacuate "any space of popular organization and critical accountability, leaving isolated and ineffectual the few of their fellow members who were inclined to think and criticize").

95 See, for example, Fletcher, 2005, see above note 18 (examining the depiction of bystanders within international criminal courts); and Mamdani, 2015, p. 77, see above note 22 ("Because South Africa's TRC focused on perpetrators and kept out of sight the beneficiaries of mass violations of rights – such as pass laws and forced expulsions – it allowed the vast majority of white South Africans to go away thinking that they had little to do with these atrocities").

96 Koskenniemi, 2002, p. 14, see above note 8. See similarly, Osiel, 1997, p. 157, see above note 32 ("Since only a few will ever be prosecuted, the many who collaborated in myriad ways are discouraged from any serious self-examination"); Fletcher, 2005, p. 1080, see above note 18 ("By individualizing guilt, trials offer the opportunity for complicit bystanders to deny or evade their role in mass violence"); and Devin O. Pendas, *The Frankfurt Auschwitz Trial, 1963-1965: Genocide, History, and the Limits of the Law*, Cambridge University Press, 2006, pp. 294 and 304 (noting how the Frankfurt Auschwitz Trial "provided an alibi for those disinclined to examine their own histories" and that "[b]ecause the

7.4.3. Occluding Structural Violence

In his landmark paper on violence and peace, Johan Galtung referred to structural violence as social injustices such as entrenched poverty, unequal economic opportunities and systematic social deprivation that occur without "a clear subject-action-object relation".[97] In such situations, violence is "built into the structure and shows up as unequal power and consequently as unequal life chances".[98]

Structural violence can take many forms.[99] Frances Stewart, for example, has identified four categories of structural violence: political participation; economic assets; incomes and employment; and social aspects.[100] The existence of these forms of structural violence can generate grievances within society that fuel exploitative violence. As Rami Mani has explained, while the precise causal relation between structural violence and mass atrocity situations is disputed, "often, although by no means always, underlying or proximate causes of conflicts appear to centre on contentions about distributive justice: unequal access to, distribution of, and opportunities for political power and socio-economic resources".[101]

In practice, it is often the nature of structural violence that determines the likelihood of violent conflict, with horizontal inequalities – namely, those aligned with groups along cultural, religious, geographical

understanding of the defendants as individual agents disguised the way in which the vast majority of Germany society, that is, Germans as an organized collectivity, were implicated in that same process of genocide, they could quite plausibly insist that they did not know of their own involvement") (emphasis in original).

97 Johan Galtung, "Violence, Peace, and Peace Research", in *Journal of Peace Research*, 1969, vol. 6, no. 3, p. 171.

98 *Ibid*., p. 171.

99 There has been a tendency in transitional justice literature to limit discussions of structural causes of mass violence to economic factors to the exclusion of political factors. In fact, structural violence encompasses both economic *and* political harms. For further discussion, see generally, Evelyne Schmid and Aoife Nolan, "'Do No Harm'? Exploring the Scope of Economic and Social Rights in Transitional Justice", in *International Journal of Transitional Justice*, 2014, vol. 8, no. 3, pp. 371–74.

100 Frances Stewart, "The Root Causes of Conflicts: Some Conclusions", in *QEH Working Paper Series*, 1998, Working Paper Number 16, pp. 12–14.

101 Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War*, Polity Press, 2002, p. 127.

or class lines – more likely to lead to the onset of direct violence.[102] When inequalities are defined along group lines, they may be instrumentalised by leaders to generate a sense of group identity, which in turn can lead to the mobilisation of group members through appeals to underlying grievances about real or perceived forms of structural violence.[103]

Despite its perceived explanatory value, justice mechanisms underpinned by the anti-impunity mindset have generally devoted little attention to the context of structural violence where mass atrocities have occurred, either excluding or marginalising the influence of factors as diverse as land distribution, extreme poverty, demographics, systemic discrimination, political instability, social marginalisation, environmental degradation, and widespread economic injustice, many of which may be brought about by the normal operation of the global economy.[104] As Vasuki Nesiah has put it, "moments of *anti-impunity* against perpetrators of international crimes are also moments of *impunity* for injustices committed by systemic inequality".[105]

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[102] See, for example, Paul Gready and Simon Robins, "From Transitional to Transformative Justice: A New Agenda for Practice", in *International Journal of Transitional Justice*, 2014, vol. 8, no. 3, p. 347; and Frances Stewart, "Root causes of violent conflict in developing countries", in *British Medical Journal*, 2002, vol. 324, no. 7333, p. 343.

[103] Mani, 2002, p. 128, see above note 101.

[104] See similarly, Ruti Teitel, "Bringing the Messiah Through the Law", in Carla Hesse and Robert Post (eds.), *Human Rights in Political Transitions: Gettysburg to Bosnia*, Zone Books, 1999, p. 185; Immi Tallgren, "The Sensibility and Sense of International Criminal Law", in *European Journal of International Law*, 2002, vol. 13, pp. 593–595; Philip Allott, *The Health of Nations: Society and Law Beyond the State*, Cambridge University Press, 2002, pp. 37 and 67; Rosemary Nagy, "Transitional Justice as Global Project: Critical Reflections", in *Third World Quarterly*, 2008, vol. 29, no. 2, pp. 276, 279, and 284–86; Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa*, Cambridge University Press, 2009, pp. 46–48, 53–55 and 237; Branch, 2011, p. 213, see above note 80; Leebaw, 2011, p. 181, see above note 31; Mégret, 2014, p. 30, see above note 91.

[105] Vasuki Nesiah, "Doing History with Impunity", in Engle *et al.* (eds.), 2016, p. 96, see above note 1 (emphasis added). See similarly, Frédéric Mégret, "Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project", in *Finnish Yearbook of International Law*, 2001, vol. 12, p. 204 (observing how international criminal courts have been at permanent risk of grossly underestimating "such trivialities as the world's billion poor, 800 million hungry, 2.4 billion without sanitation, or 90 million children without basic education"); and Miller, 2016. p. 169, see above note 20 ("The cumulative effect of ratcheting up attention and funding for high-level prosecutions is to enforce a hierarchy of harms in which the spectacular violence pursued in international courtrooms is dubbed the

By focusing on individual perpetrators, together with the immediate collective contexts within which they operated, anti-impunity institutions have risked depicting such individuals in uniform terms as the *causes* of mass violence, while neglecting to recognise how they are also the *symptoms* of more widely dispersed structures.[106] Beyond diverting attention away from conditions of structural violence, some scholars have argued, in stronger terms, that anti-impunity institutions have also contributed to their perpetuation. Karen Engle, Zinaida Miller and D.M. Davis, for example, have argued that "anti-impunity discourse is often seen not only to displace attention from inequality but also *to produce it*, in part by operating as a pillar of neoliberal global governance".[107] In a similar vein, Nesiah has claimed that "anti-impunity projects may have *legitimized* the dominant global order in the name of liberal political ethics and therefore *helped entrench* impunity […] for atrocities such as exploitative terms of international trade which enable and condition socio-economic abuses".[108]

most serious while the horrific indignities and suffering of daily life in a poor country or conflict zone are naturalized as largely inescapable and unchangeable").

106 See similarly, Paul Kirby, "Refusing to be a Man?: Men's Responsibility for War Rape and the Problem of Social Structures in Feminist and Gender Theory", in *Men and Masculinities*, 2012, vol. 16, no. 1, p. 109; and Elizabeth Dauphinee, "War Crimes and the Ruin of Law", in *Millennium: Journal of International Studies*, 2008, vol. 37, no. 1, p. 55.

107 Engle *et al.*, 2016, p. 8, see above note 7.

108 Nesiah, 2016, p. 113, see above note 105. See also, Mark A. Drumbl, "Pluralizing International Criminal Justice", in *Michigan Law Review*, 2005, vol. 103, p. 1313 ("The ICTR's judicial reductionism *absolves* the role of international agencies, transnational economic processes, the foreign policies of influential states, and colonial policies, each of which exacerbated ethnic conflict by creating an environment conducive to violence in Rwanda") (emphasis added); David S. Koller, "The Faith of the International Criminal Lawyer", in *New York University Journal of International Law and Politics*, 2008, vol. 40, p. 1067 ("international criminal law may ignore many of the structural factors which contribute to the perpetration of massive atrocities […] [and] *hinder* the structural revolution necessary to bring the cosmopolitan community into effect") (emphasis added); Zinaida Miller, "Effects of Invisibility: In Search of the 'Economic' in Transitional Justice", in *International Journal of Transitional Justice*, 2008, vol. 2, p. 288 ("By ignoring the deeper roots of conflict, the relationship of inequality to reconciliation and the injustice of maldistribution, transitional justice mechanisms *may actively contribute* to new outbreaks of violence"); Joe Hoover, "Moral Practices: Assigning Responsibility in the International Criminal Court", *Law and Contemporary Problems*, 2013, vol. 76, p. 280 ("by focusing on the acts of individuals the ICC […] happens to *excuse* systemic causes and the influences of outside institutions and states") (emphasis added); Grietje Baars, "Making ICL History: On the Need to Move Beyond Pre-Fab Critiques of ICL", in Schwöbel (ed.), 2014, p. 209, see above note 74 (arguing that international criminal law establishes "specific explanations of conflicts that *exempt/exonerate* the economic/capitalism") (emphasis added); Christopher

According to this perspective, seemingly neutral anti-impunity institutions may inadvertently operate ideologically to validate and build consensus in the existing international social order.[109]

7.5. The *Limits* of the Anti-Impunity Mindset

By revealing the alignment of anti-impunity institutions with the balance of power between and within States, as well as their reliance on narrow conceptions of responsibility and their occlusion of structural violence, critical scholarship has helped illuminate the productive and representational power of the anti-impunity mindset. At times, however, the capacity of the anti-impunity mindset to divert attention from specific agendas as well as its complicity in particular injustices seems overstated.

In particular, while few would disagree that structural injustices have generally fallen beyond the purview of anti-impunity frameworks, less clear is the extent to which this silence has been complicit in a more general neglect of such issues during periods of transition.[110] The anti-

Gevers, "International Criminal Law and Individualism: An African Perspective", in Schwöbel (ed.), 2014, see above note 74, p. 233 (arguing that the individualism of international criminal law "misrepresents, and possibly even *sublimates*, the role of structural forces" and "*exculpates* – as a matter of both legal and historical record – these other drivers of conflict") (emphasis added); and Davidson, 2017, see above note 65, p. 168 ("By ignoring and […] *absolving* the USA of responsibility, these cases have not only addressed human rights abuses in a superficial manner, but they have further *legitimated* the conditions under which the abuses have been perpetrated") (emphasis added).

109 Tor Krever, "Unveiling (and Veiling) Politics in International Criminal Trials", in Christine E.J. Schwöbel (ed.), *Critical Approaches to International Criminal Law: An Introduction*, Routledge, 2014, p. 128 ("the international criminal trial […] may serve to *naturalize and legitimize* historically specific social relations and structural sources of crime. […] [T]hey contribute to the way in which people come to accept the existing order of things. As such, even the seemingly neutral, legalistic trial may operate politically, in the sense of politics encompassing broadly the processes, multifaceted and varied, by which social orders and conditions of power are sustained or challenged") (emphasis added); and Josh Bowsher, "'Omnus et Singulatim': Establishing the Relationship Between Transitional Justice and Neoliberalism", in *Law and Critique*, 2018, vol. 29, no. 1, pp. 85 and 98 ("Transitional justice, I conclude, does the necessary work of bringing conflictual, traumatized societies back together following periods of deep division, conflict and mistrust, whilst doing so on terms that do not threaten but instead prefigure the individualising demands made upon subjects at the sites of neoliberal transition […] At its very worst, this becomes more than a prefigurative gesture, and transitional justice forms explicit connections between past human rights abuses and the necessity of neoliberalisation").

110 See also, the parallel debate in the field of human rights concerning the relationship between human rights and neoliberalism. See, in particular, Susan Marks, "Four Human Rights Myths", in *LSE Law, Society and Economy Working Papers*, 2012, Working Paper

impunity mindset undoubtedly arrests attention through its seductive legalism,[111] as well as a dominant aesthetic that privileges the spectacle of physical violence over the complexity of structural injustices.[112] The anti-impunity mindset also captures attention by offering a simple and highly communicable frame for understanding mass atrocities.[113] As Keck and Sikkink have observed, "problems whose causes can be assigned to the deliberate (intentional) actions of identifiable individuals are amenable to advocacy network strategies in ways that problems whose causes are irredeemably structural are not".[114] Nonetheless, to focus on the distracting qualities of the anti-impunity mindset is to neglect other factors that have arguably proven more instrumental in marginalising issues of structural injustice during periods of transition.

Pádraig McAuliffe, for example, has identified a range of international and domestic political and economic configurations that have undermined efforts to address structural violence in practice.[115] Peace agreements, for instance, have typically been negotiated by "military and political elites who benefit from the existing order and whose existing ad-

No. 10/2012, p. 9 (arguing that Naomi Klein's work identifies the emergence of the human rights movement to be "part of the context for the consolidation of neo-liberalism itself"); Samuel Moyn, "A Powerless Companion: Human Rights in the Age of Neoliberalism", in *Law and Contemporary Problems*, 2014, vol. 77, no. 4, p. 169 (arguing that human rights have constituted "a powerless companion to neoliberalism"); and Tiphaine Dickson, "On the Poverty, Rise, and Demise of International Criminal Law", in *Portland State University: Dissertations and Thesis Paper*, 2016, no. 2707, p. 119 (arguing that the human rights movement "was reckless, if not more, but it was also opportunistic in marginalizing socio-economic rights"). See also, Daniel McLouglin, "Post-Marxism and the Politics of Human Rights: Lefort, Badiou, Agamben, Rancière", in *Law and Critique*, 2016, vol. 27, no. 3, p. 303.

111 On seductive legalism, see generally McEvoy, 2007, pp. 416–17, see above note 6 (noting how the "seductive qualities of legalistic analysis lend themselves particularly well to transitional contexts […] [including] values and working practices such as justice, objectivity, certainty, uniformity, universality, rationality, and so on").

112 On aesthetic bias, see generally Christine Schwöbel-Patel, "The Core Crimes of International Criminal Law", in Kevin Jon Heller, Frédéric Mégret, Sarah Nouwen, Jens David Ohlin, and Darryl Robinson (eds.), *The Oxford Handbook of International Criminal Law*, Oxford University Press, 2020.

113 See generally, Houge and Lohne, 2017, see above note 9.

114 Margaret E. Keck and Kathryn Sikkink, *Activism Beyond Borders: Advocacy Networks in International Politics*, Cornell University Press, 1998, p. 27, cited in Houge and Lohne, 2017, p. 781, see above note 9.

115 See generally, Pádraig McAuliffe, *Transformative Transitional Justice and the Malleability of Post-Conflict States*, Edward Elgar, 2017.

vantages are increased by the opportunities created by marketisation and privatisation".[116] The consequent marginalisation of structural violence in peace negotiations is reflected by the fact that only 25 per cent of peace agreements negotiated in the last 40 years have expressly addressed economic issues.[117] Resistance to addressing structural violence has also arisen in the form of informal war economies. These economies encompass new structures of political power that emerge during conflicts, and may persist in the form of clandestine coercion, bribery and nepotism in post-conflict societies in ways which circumvent and undermine structural reforms.[118] Finally, international financial institutions, such as the World Bank and the International Monetary Fund, often wield significant influence over States emerging from mass violence, exerting considerable pressure on them to adopt neoliberal economic policies, notwithstanding the fact that "in many cases the pathologies of liberalization may have caused or exacerbated the conflict or repression before transition".[119]

Beyond these political-economy factors, it is also worth considering the extent to which anti-impunity institutions can help direct public attention towards particular conflicts, and provide a discursive beginning for broader conversations concerning both structural causes of mass violence as well as the involvement and responsibility of collective actors such as States and private business entities. For example, reflecting on the work of the ICTY and the ICTR, Robert Cryer has argued that the conflicts in the former Yugoslavia and Rwanda "remained in the public eye, and this

[116] Pádraig McAuliffe, "Weighing domestic and international impediments to transformative justice in transition", in *London Review of International Law*, 2015, vol. 3, no. 1, p. 184.

[117] *Ibid*., p. 184.

[118] *Ibid*., pp. 189–92.

[119] *Ibid*., p. 194. See similarly, Anne Orford, "Locating the International: Military and Monetary Interventions after the Cold War", in *Harvard International Law Journal*, 1997, vol. 38, no. 2, p. 443; Isaac A. Kamola, "Coffee and Genocide: A Political Economy of Violence in Rwanda", in *Transition*, 2008, vol. 99, p. 67; Regine Andersen, "How Multilateral Development Assistance Triggered the Conflict in Rwanda", in *Third World Quarterly*, 2000, vol. 21, no. 3, p. 441; Michel Chossudovsky, "Economic Genocide in Rwanda", in *Economic and Political Weekly*, 1996, vol. 31, no. 15, p. 938; David Keen, "Liberalization and Conflict", in *International Political Science Review*, 2005, vol. 26, no. 1, p. 73; and David Keen, "Greedy Elites, Dwindling Resources, Alienated Youths The Anatomy of Protracted Violence in Sierra Leone", in *International Politics and Society*, 2003, vol. 6, no. 2, p. 67.

[…] led to at times agonised reflection on what states, through the UN, ought to have done to prevent those offences".[120]

These lines of thought should, at the very least, give pause to those who place particular weight on the power of the anti-impunity mindset to crowd-out issues of structural injustice. Overstating the diversionary power of the anti-impunity mindset is far from inconsequential, since it risks giving the impression that anti-impunity institutions are a significant part of the problem in the quest to respond to structural causes of mass violence, whilst at the same time occluding other factors that may have proven far more obstructionist in practice. As McAuliffe has argued:[121]

> To those who doubt whether a truth commission examining rape, or a trial punishing a massacre, automatically contributes to a liberal peace-building project by dint of what they *don't* address, the argument that transitional justice provides intellectual scaffolding for neo-liberal economics that so often exacerbates socio-economic distributional inequalities resembles something akin to guilt by association.

Indeed, there is little to suggest that the silence of anti-impunity frameworks on structural violence poses a significant obstacle to reliance being placed on other emancipatory vocabularies and initiatives directed towards addressing structural injustices.[122] As James Stewart has argued, not only does there seem to be "no reason why accountability need *necessarily* crowd out distributive justice projects", but also "with care, consciousness, and a modicum of coordination, it is at least conceivable that these things might peaceably coexist, or even operate synergistically".[123]

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[120] See similarly, Robert Cryer, "International Criminal Law vs. State Sovereignty: Another Round?", in *European Journal of International Law*, 2006, vol. 16, no. 5, p. 997.

[121] McAuliffe, 2015, pp. 175–76, see above note 116 (emphasis in original).

[122] See similarly, Natalie Sedacca, "The 'turn' to Criminal Justice in Human Rights Law: An Analysis in the Context of the 2016 Colombian Peace Agreement", in *Human Rights Law Review*, 2019, vol. 19, p. 321 (noting how critiques relating to international criminal law's focus on particular atrocities rather than broader structural and redistributive issues "militate against a focus *only* or even primarily on individual criminal law […] [and] do not necessarily preclude the use of criminal law as part of a broader strategy aimed at more strategic and redistributive goals") (emphasis in original). See also, Paul O'Connell, "Human Rights: Contesting the Displacement Thesis", in *Northern Ireland Legal Quarterly*, 2018, no. 69, no. 1, p. 27 (discussing "emancipatory or critical multilingualism").

[123] James G. Stewart, "The Turn to Corporate Liability for International Crimes: Transcending the Alien Tort Statute", in *New York University Journal of International Law and Politics*, 2014, vol. 47, no. 1, pp. 139–40 (emphasis in original). See also, James G. Stewart, "To-

7.6. Conclusion

In recent decades, the anti-impunity mindset has achieved a degree of normalisation that few thought imaginable. At the same time, anti-impunity thinking has also been subjected to ever increasing scrutiny. Critical scholars, in particular, have helped to illuminate the productive and representational power of the anti-impunity mindset. By examining the tendency of anti-impunity frameworks to become aligned with the balance of power between and within States, critical scholarship has revealed the risk of anti-impunity practices being co-opted in support of oppressive regimes, as well as the importance of developing a greater sensibility for the potentially darker sides of anti-impunity interventions in particular contexts. In addition, by scrutinizing the narrow conceptions of responsibility relied upon by anti-impunity institutions, as well as their occlusion of structural violence, critical scholarship has revealed the tendency for such institutions to construct simplified and incomplete narratives of mass atrocities. At best, these narratives provide a limited form of justice for victims and a partial deterrent against future atrocities; at worst, they may constitute an additional source of grievance and division within local communities.

The critical scrutiny directed towards the anti-impunity mindset is both important and healthy. By revealing blind spots in anti-impunity frameworks, critical scholarship can trigger changes within anti-impunity institutions – for example, the emergence of thematic prosecutions in response to traditionally under-prosecuted social, cultural, environmental, and economic forms of violence.[124] In addition, critical scholarship can prompt creative thinking beyond anti-impunity frameworks – for example, the establishment of people's tribunals that examine structural causes of

wards Synergies in Forms of Corporate Accountability for International Crimes", *Blog of James G. Stewart*, 23 February 2019 (discussing "synergistic accountability"). See, however, Sarah M.H. Nouwen and Wouter G. Werner, "Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity", in *Journal of International Criminal Justice*, 2015, vol. 13, p. 174 ("The real issue is not whether both restorative justice and distributive justice, as well as equality before the law and retributive justice can be pursued – which is obviously possible – but which conception of justice prevails in times of clashes or limited resources. In a world of horrific constraint, conceptions of justice compete for their realization").

[124] See generally, Sander, 2015, above note 25.

violence as well as the possibility of less retributive-centric justice mechanisms.[125]

At the same time, this chapter has argued that it is also important to reflect on the limits of the anti-impunity mindset's power, in particular with respect to its capacity to divert attention from and become complicit in the perpetuation of structural violence. Although some displacement of other emancipatory vocabularies and institutions may have occurred as a result of the rise of anti-impunity thinking, to focus on the silences of anti-impunity institutions is to neglect the range of political economy factors that have obstructed the realisation of addressing structural violence at times of transition in practice. Moreover, while displacement critiques may serve as a useful reminder that anti-impunity thinking constitutes an inadequate response to the root causes of mass violence, they do little to diagnose why issues of structural violence tend to be marginalised in moments of transition, or to articulate different frameworks that might address areas that fall beyond the purview of anti-impunity institutions.[126]

[125] See generally, Dianne Otto, "Impunity in a Different Register: People's Tribunals and Questions of Judgment, Law, and Responsibility", in Engle *et al.* (eds.), 2016, p. 291, above note 1.

[126] See similarly, McAuliffe, 2017, p. 13, see above note 115 ("while advocates of transformative justice are adept at identifying the need for structural alterations, they pay strikingly little attention to structural variables that explain the lack of prior and current transformation"); and Lauren Marie Balasco, "Locating Transformative Justice: Prism or Schism in Transitional Justice?", in *International Journal of Transitional Justice*, 2018, vol. 12, no. 2, p. 373 ("Transformative justice scholars thoroughly engage with reasons *why* transitional justice should assume transformative justice principles, but much less attention is devoted to identifying the paths by which transformative justice can achieve change") (emphasis in original). See also, with respect to the relationship between human rights and neoliberalism, Moyn, 2014, pp. 151 and 169, see above note 110 ("[T]here is not much critical or political value in opposing human rights out of understandable outrage at neoliberalism. […] In an era in which human rights norms and movements are frequently overloaded with expectation, […] [a]nalytically and politically, the mere act of criticizing human rights does little to provide useful alternatives to human rights frameworks, regimes, and movements that might succeed in areas where human rights have failed—in part because human rights are (so far) not designed to succeed in those areas. To bring the limited aims and often glancing successes of human rights movements into focus is simply to demand another politics to supplement goals that are inadequate in the first place and strategies that rarely work, especially in the socioeconomic domain").

Publication Series No. 28 (2020):

Power in International Criminal Justice

Morten Bergsmo, Mark Klamberg, Kjersti Lohne and Christopher B. Mahony (eds.)

This book comprehensively explores the role and manifestations of power in international criminal justice. Twenty chapters discuss this topic in four main parts: power in international criminal justice institutions (Part I), representational power in international criminal justice (Part II), state power and autonomy in international criminal justice (Part III), and non-state power and external agents in international criminal justice (Part IV). The book invites the crystallisation of a sociology of international criminal justice, and argues that among its focuses should be the wielding of power within and over international criminal justice institutions, just as this is a feature of sociology of law within several countries.

The contributors to this anthology are Marina Aksenova, Mayesha Alam, Helena Anne Anolak, David Baragwanath, Morten Bergsmo, Mikkel Jarle Christensen, Marieke de Hoon, Djordje Djordjević, Gregory S. Gordon, Jacopo Governa, Alexander Heinze, Emma Irving, Mark Klamberg, Sarah-Jane Koulen, Kjersti Lohne, Christopher B. Mahony, Jolana Makraiová, Jackson Nyamuya Maogoto, Benjamin Adesire Mugisho, Tosin Osasona, Sara Paiusco, Barrie Sander, Joachim J. Savelsberg, Jacob Sprang, Chris Tenove and Sergey Vasiliev. The chapters draw on papers presented at a conference held in Florence in October 2017 co-organized by the Centre for International Law Research and Policy (CILRAP) and the International Nuremberg Principles Academy.

ISBNs: 978-82-8348-113-6 (print) and 978-82-8348-114-3 (e-book).

candidate for Prosecutor at the end of their term.

252. The Experts recognise the difficulty of applying a new tenure system to staff already in the Court, so they suggest that the system be applied only to new recruitments for P-5 and Director-level positions as these come vacant. This would not preclude the Court from encouraging senior staff who have served in the Court for a long time to consider taking early retirement, including through offering financial packages.

253. Notwithstanding that this would not apply to existing staff, there is likely to be considerable resistance to the introduction of tenure in many parts of the Court (even if there is also some enthusiasm for this approach in other quarters). But it is th this is a measure essential to addressing effectively a r knesses of the Court. Not least it would bring fresh ap well as more dynamism into the Court across all its Organs.

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