REFOCUSING ON 'ABSTRACT ENTITIES': A NOTE ON THE LIMITS OF INDIVIDUAL LIABILITY FOR MASS ATROCITIES

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ABSTRACT:

The International Military Tribunal's declaration that individuals, not "abstract entities," must bear accountability for violations of international law underpins much of the justification for international criminal law (ICL). This essay critiques the individualization of responsibility in ICL, arguing that such a focus obscures the roles of larger structures—corporations and the international legal system itself—in enabling extraordinary violence. It contends that these entities, often instrumental to mass atrocities, escape meaningful accountability under the current framework.

Section I outlines the general limitations of criminal law, noting its tendency to abstract individuals from the material conditions that shape criminality. This abstraction is mirrored on the international stage, where structural factors and systemic inequalities remain overlooked. Section II examines the implications of this individualization, highlighting how corporations, despite their growing economic and political influence, evade liability for complicity in atrocities. Drawing on examples such as corporate profiteering during the Rwandan genocide and Facebook's role in inciting violence against the Rohingya, the essay argues that existing mechanisms are inadequate to address corporate culpability.

The essay further critiques ICL's neglect of the international legal system's complicity in structuring conditions for mass violence. Drawing on critiques of neoliberal policies in Yugoslavia, it argues that law is not external to violence but deeply enmeshed in its production. Section III explores the normalization of violence, arguing that ICL's binary distinction between perpetrators and innocents fails to account for the widespread cultural and ideological processes that sustain atrocities.

Ultimately, the essay contends that ICL's focus on individual liability is insufficient to address the structural and systemic dimensions of mass violence. A shift in focus is necessary to reckon with the broader forces at play and ensure meaningful accountability.

Introduction

The IMT's famous pronouncement[1] that it is individuals and not "abstract entities" which must be held accountable for violations of international law, has served as the starting point of justifications offered for International Criminal Law. The project of ICL is unique in the sense that it makes an exception in public international law which ordinarily only governs states and not individuals. The debate on ICL often gets caught up between 'state responsibility' and 'individual responsibility'. This essay attempts to critique system of individual responsibility for inability to achieve the desired ends of ending extraordinary violence, without focusing on state responsibility as an alternative. Instead, it simply argues that the "abstract entities" are highly instrumental in the violence, and it is only through these "abstract entities" these individuals exercise any power.

Section I presents the general limitations of criminal law which are applicable to the very idea of 'crime' and 'criminal justice' across domestic and international spheres. Section II attempts to show that the individualization tendency of criminal law manifests in specific omissions when it occurs on an international scale, and Section III shall argue that there is another problem specific to international criminal law- that of violence being so normalized that it is no longer deviant behavior and there remain no 'innocent' people.

I: Limits of Criminal Law

Criminal Justice serves as a site of endless contention and debate between philosophers, lawyers, policy makers and generally anyone theorizing on the modern state. This is quite understandable given that criminal law is perhaps the most visible and arguably the primary manifestation of the state's monopoly over legitimate violence. In course of these debates, commentators generally argue over what is the common feature of most modern criminal justice systems in liberal democracies- a trial in consonance with the principle of *audi alter partem* to determine whether or not the conduct in question has been committed by the accused and is conduct the law has recognized as a crime before its commission, a sentencing proportional to the harm of said conduct and finally punishment.

[1] International Military Tribunal, Nuremberg, Judgment, 1 October 1946, in The Trial of German Major War Criminals (International Military Tribunal, Nuremberg, 1947) vol I, 1, 55.

The very fundamental assumptions of criminal law have not been free from critique. Activist and scholar Angela Davis has noted that the centrality of incarceration and punishment in our collective understandings of justice allows societies to construct "evil doers" (in opposition to the "innocent" non criminals), and abstract the individual from the material conditions which give rise to criminality and crime[2]. This means that societies do not perform the much harder work of reckoning which the root causes of what causes such crime to exist in the first place. Furthermore, given the deeply unequal nature of most societies, it is natural that some socio-economic groups would exist in conditions which gives rise to more crime; this obviously does not mean that certain groups are predisposed to criminal behavior, it simply means that poverty and discrimination leads to instability. However, this allows political rhetoric which further marginalizes these groups and paints them as criminals.[3]

Apart from more foundational criticisms, there have been serious critiques of specific parts of the criminal justice process. Scholars and activists have spoken at length about the site of prison itself- its sheer brutality[4], its gendered[5] and racialized[6] dimensions. It has also been argued that apart from custodial violence, the very design of prisons is torturous[7]. There have been criticisms of sentencing as well, primarily being that criminal justice regimes inadequately engage with severe environmental deprivation as a defense[8].

It is thus reasonable to extrapolate that these features of the criminal process get translated into international stage due to the use of international criminal law to maintain international law. Additionally, the ICL regime does not have the safeguards of extensive precedents and democratically elected governments which liberal democracies have, thus it is even more susceptible to abuse. Kerstin Carlson argues that since ICL is immensely focused on "progress" as its tool of legitimization, it marginalizes important criminal law principles like the rule against retrospective application by relying on natural law to create offences after their commission, and then going on to apply them with something resembling strict liability[9].

[2] Angela Davis, *Are Prisons Obsolete?* (Seven Stories Press 2003) 16. ["Davis"]
[3] Ibid
[4] *See* Anup Surendranath, 'The experience in Custody' in *Death Penalty India Report* (National Law University Delhi 2016).
[5] Davis (n2) 18
[6] ibid
[7] Yvonne Jewkes, Dominique Moran, 'Prison architecture and design: perspectives from criminology and carceral geography' in Alison Liebling, Shadd Maruna et al (eds), *Oxford Handbook of Criminology* (OUP 6th edn 2017).
[8] Kerstin Bree Carlson, 'Punishment, Legality, and Other Challenges of International Criminal Law' (2023) 23 International Criminal Law Review 123–144. ["Carlson"]
[9] Ibid,

According to Carlson, this means that ICL regime is always caught between being what Lyotard called *différend* wherein a discourse by its very existence precludes the existence of an injustice or, or becoming what Hannah Arendt called a "show trial" where the trial simply a way of legitimizing a pre-decided outcome. Thus, criminal justice regime may be flawed but it can be argued that even its flawed protections are absent in ICL.

II: What ICL Ignores

When International Criminal Law focuses culpability on the individual, it does so at the cost of more powerful actors and processes, and it is important to note what they are. The following section attempts to argue that the individualizing impulse of criminal law, and its tendency to create alibis for root causes translates into certain specific discursive omissions in international context. This essay presents two important actors which act beyond individuals- corporations, and the institutions of created by international law itself.

A. Corporate culpability

A 1999 study[10] showed that fifty one of the world's hundred largest economies were not countries but corporations. This figure may have changed over the years, but with the rise of Big Tech since said study, it is a reasonable assumption that the economic power of large corporations has only grown. Despite this, International Law does not regulate corporations as a subject. International Criminal Law supposedly presents a unique opportunity wherein it pierces the veil of sovereignty to regulate individuals under international law instead of states, and yet even here only 'natural persons'[11] are included.

The role of corporations in mass violence is discussed quite often. There is one aspect of corporate malpractice and negligence like gas leaks, oil spills, labor rights violations and environmental degradations which many scholars have discussed. For the purposes of this essay, there is another aspect- the culpability of corporations in what is ordinarily considered political violence (genocides, crimes against humanity and war crimes). This is the violence which ICL aims to address using individual responsibility. This author argues that the specific

[10] Sarah Anderson, John Cavanagh, 'Top 200: The Rise Of Corporate Global Power' (1999), available at <http://www.ips-dc.org/reports/top200text.htm>.
[11] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) art 25(1).

formulation of individual culpability, which is also at the heart of quote from the Nuremberg Tribunal, allows corporations to escape liability for complicity in mass violence.

In one of the most comprehensive accounts of the Rwandan Genocide and the events leading up to it, Linda Melvern talks about how various companies imported weapons including machetes which were later used to arm the Hutu militias responsible for the genocide[12]. She notes that the weapon imports in this country which was poor by every metric had reached proportions enough to make it the third largest weapons importer by October 1990.[13] One of these companies which imported weapons was owned by Felicien Kabuga who also funded the infamous Radio Rwanda, widely considered key in inciting violence against the Tutsi. Fascinatingly, Kabuga was in fact indicted to stand trial before the ICTR.[14] He was ruled. Unfit to stand trial in 2023 due to his dementia. Commentators have pointed out that had the trial happened, it would have been very difficult to prove elements of *mens rea* which are necessary to the criminal process given that Kabuga was arguably acting as a businessman[15]. Since corporations cannot be held liable for criminal wrongs that question did not arise at all. What is seen here is that the individual indicted most likely would not have been convicted, and the corporations clearly instrumental in the genocide cannot be held accountable because that mechanism simply does not exist. Corporations have a structural imperative to maximize profit, therefore in the absence of accountability mechanisms, they have inceptive to profit from mass violence given the range of opportunities it presents. This is not to argue that ICL is necessary the best mechanism to regulate corporations, although there are scholarly arguments made that existing corporations *can* be held responsible for genocide and the Rome Statute should be amended to make it possible[16]. Criminal law has certain standards of evidence which should not be lowered because that risks dilution of those standards elsewhere. So criminal liability may not be the best course of action, but it is important to note that neither is prosecuting individual businessmen- aside from the difficulty in proving intent, surely it has be appreciated that these individuals were empowered only by the corporate machinery; often these people do

[12] Linda Melvern, *Conspiracy to Murder: The Rwandan Genocide* (Verso Books 2nd Ed 2006) 44.
[13] Ibid, 45
[14] *Amended Indictment*, Case No. ICTR-98-44B-I, *The Prosecutor v Félicien Kabuga (International Criminal Tribunal for Rwanda*, 1 October 2004.
[15] Jonathan Kolieb, Ann Letch, "The Business of Genocide: The Trial of Félicien Kabuga – Can International Criminal Law Hold Corporate Criminals Accountable?", (*Opinio Juris* 14th November 2022) < https://opiniojuris.org/2022/11/14/the-business-of-genocide-the-trial-of-felicien-kabuga-can-international-criminal-law-hold-corporate-criminals-accountable/ >
[16] Michael J. Kelly, 'Prosecuting Corporations for Genocide Under International Law' (2012) 6 *Harvard Law & Policy Review* 339.

not act in individual capacities but in their *role* as a part of a larger structure designed to make profits. Kabuga owned companies which were instrumental in genocide, but many times modern corporations have far more complex structures where it may be impossible to pinpoint any singular individual to blame. An appropriate example would be Meta, which according to a notable report by Amnesty International knew or should have reasonably known that its social networking platform Facebook was extremely instrumental in the violence incited against the Rohingya, and Facebook's weak content moderation policies enabled this incitement.[17] While indictments have not yet been issued in the Rohingyas genocide, it is unlikely that individual executives from Meta would be indicted.

The conclusion from this section is that individuals may profit from violence, and may even rightly be held accountable, but the hyper focus on individual liability means that corporations have minimal incentive to act in any way whatsoever to prevent mass violence.

B. International Law and its Institutions

In building a meticulous critique of International Criminal Law, Tor Krevor notes that International Law is seen to be placing a "neutral restraint on the exercise of power", i.e. it is seen to be intervening in an otherwise violent sphere and replacing that with the 'rule of law'[18]. Therefore, the space of violence, war and atrocity is seen as a space devoid of law. Krevor argues that this is one of the central faulty assumptions which champions of ICL fall to[19]. However, this is an untenable proposition. International Law is the language through which politics of the modern world is articulated; categories like 'state', 'self-determination', 'human rights', 'citizenship' and other forms over which almost all violence of modern world takes place, are *legal* categories. John Austin in his rebuttal to natural law theory pointed out that if he were to object to being condemned under an unjust law which criminalizes harmless conduct, "the Court of Justice will demonstrate the inconclusiveness of… [his]… reasoning by hanging…[him]… up, in pursuance of the law of which…[he has]… impugned the validity.[20] One does not have to be an Austinian positivist to appreciate the limited point about pervasiveness of legality. There is not 'outside' to the law; the omissions, absences, and

[17] The Social Atrocity: Meta And The Right To Remedy For The Rohingya (Amnesty International 22nd Sept 2022) < https://www.amnesty.org/en/documents/ASA16/5933/2022/en/ >
[18] Tor Krever, "International Criminal Law: An Ideology Critique", (2013) 26 *Leiden Journal of International Law* 701. ["Krevor"]
[19] ibid
[20] John Austin, *The Province of Jurisprudence Determined* (Cambridge University Press, 2001) 158

silences are as much in the sphere of law as the explicit presence of law. It is the law which frames the contexts within which mass violence takes place. Krevor provides a detailed analysis of the ethnic violence in Yugoslavia to illustrate how the excessive focus on Slobodan Milošević takes away the blame from the political economy of which Milošević was merely a symptom[21]. There are many other commentators from various disciplines who have noted the role of extraneous factors in the Yugoslavian crisis[22]. Anne Orford argues that IMF imposed austerity programs systematically eroded the welfare state and encouraged constitutional reforms in order to implement economic agendas which were instrumental in polarizing identity politics and nationalism eventually erupting in genocide.[23]

None of this is to argue that actors like Milošević were free of agency or blame. The point is that these individuals cannot be abstracted from the systems which enabled them. Arguably, the ethno-supremacist political and military leadership gained fuel and the conditions in which they could make that ideology consequential, was provided by international law and its institutions. When the primary focus is maintained on individuals, then the culpability of international law itself is excused which makes it harder to struggle over the law itself.

III: The normalization of violence

The above section presents two specific way in which criminal law's general tendency to remove focus from complicity of larger institutions in favor of the individual, manifests in specific ways when it comes to International Criminal Law. There is another criticism of ICL, which is unique to the kind of violence International Law seeks to regulate. Unlike criminal offences in domestic jurisdictions, the offences which ICL governs are not one-off events; they are long drown processes which have many complex factors and events leading up to the set of atrocities in focus. There is an important factor across all this- that of criminogenic culture, or the problem of 'evil' becoming banal.

The phrase 'banality of evil' is of course owed to Hannah Arendt's influential writings on the trial of Nazi officer Adolf Eichmann before the Supreme Court of Israel.[24] She notes-

[21] Krevor (n18)
[22] *See* P. Gowan, 'The NATO Powers and the Balkan Tragedy', (1999) I/234 *New Left Review* 83.
[23] Anne Orford, 'Locating the International: Military and Monetary Interventions after the Cold War', (1997) 38 *Harvard International Law Journal* 443.
[24] Hannah Arendt, 'Eichmann in Jerusalem: A Report on the Banality of Evil' (1963) *The New Yorker* 16.

> "Eichmann was not Iago and not Macbeth, and nothing would have been farther from his mind than to determine with Richard III 'to prove a villain.' Except for an extraordinary diligence in looking out for his personal advancement, he had no motives at all… He merely, to put the matter colloquially, never realized what he was doing… It was sheer thoughtlessness—something by no means identical with stupidity—that predisposed him to become one of the greatest criminals of that period."[25]

This is an important insight- that it is not fanatically evil or violent people, but ordinary people just doing their job who had no extraordinary motivations, who make up a genocide. Similar arguments were raised before the ICC in defense of Dominic Ongwen, a former child soldier who became a militia leader himself and was charged for numerous crimes.[26] His defense team argued that his adult experiences were intrinsically shaped by his experiences as a child kidnapped and forced to fight.[27] Ongwen did not see anything he did as being immoral or wrong because his sense of morality was shaped within a religious cult he was kidnapped into and raised.

Even the cases of Eichmann and Ongwen do not completely capture the sheer banality of violence. The two people were at least actively involved in the genocide even if their motivations were not villainous as their actions would suggest. In context of Holocaust it is well theorized that bystanders who really had no active involvement with the Nazi Party had bought so entirely into the Nazi ideology that they were indifferent to the violence against the Jewish people, infact they sold out their neighbors and coworkers.[28] Jason Stanley in his work on fascism notes-

> "What normalization does is transform the morally extraordinary into the ordinary. It makes us able to tolerate what was once intolerable by making it seem as if this is the way things have always been."[29]

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[25] ibid
[26] "Dominic Ongwen declared guilty of war crimes and crimes against humanity committed in Uganda", *International Criminal Court* (4th Feb 2021) < https://www.icc-cpi.int/news/dominic-ongwen-declared-guilty-war-crimes-and-crimes-against-humanity-committed-uganda >
[27] Carlson (n8)
[28] "Bystanders", (*The Holocaust Encyclopaedia*) <https://encyclopedia.ushmm.org/content/en/article/bystanders>
[29] Jason Stanley, *How Fascism Works: The Politics of Us and Them* (Random House 2018) 52.

Happenings which seem so 'obvious' as immoral often seem 'normal' when the axis of 'normal' has culturally shifted to allow for violence against certain groups. It is not possible to carry out the scale of violence which ICL seeks to address without this ideological normalization process. In this light, the binary between 'innocent' and 'perpetrator' is blurred. Are the civilians who actively reported to the police, locations where Jewish people could be hiding perpetrators or innocent? What about the people who actively did nothing but refused to help their Jewish neighbors (either due to anti semetic beliefs or fear of persecution)? What about those who saw their neighbors being lined up for gas chambers but never spoke up against it? Are people who consistently vote for a right-wing party with explicitly anti- minority agenda perpetrators? Maybe not, but are they 'innocent'? These are complex questions which certainly do not necessarily have to be answered by ICL, but the fact that ICL so clearly takes out the 'bad apples' reifies the highly fictious boundary between 'innocent civilians' and 'criminals'.

Conclusion

The above sections have attempted to build a case against inordinate focus on individual liability. The point of the essay is not to argue that individuals should not be held accountable or that individuals have no agency and have a slavish compulsion to act in consonance with structural factors. Instead, the essay attempts to argue that the ends which are sought, i.e. to prevent the worst atrocities against vulnerable populations simply cannot be achieved by prosecuting individuals. The focus on individuals is not a neutral choice either, it comes at the cost of ignoring structural factors and societies refusing to reckon with their collective culpability.