PRACTICES OF STIGMATIZATION

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I
INTRODUCTION

According to one popular minimalist account, contemporary international criminal justice features strictly forensic goals: investigating crimes, prosecuting the accused, and guaranteeing a fair trial. However, the limited number of international criminal prosecutions makes it difficult to believe that repression could be the only goal of contemporary international criminal justice. There must be something beyond repression for its own sake; repression must be a means to an end. A variety of justifications are thus deployed. The language of deterrence, for example, offers a reassuringly utilitarian and instrumental rationale for criminal justice, one that deals in the harsh delivery of disincentives. Other justifications for contemporary international criminal justice include contributing to international peace and security, facilitating transition, establishing a historical record, and providing victims with relief.

Yet behind this techno-legal façade lies a more potent and problematic conception of the actual goal of international criminal tribunals: to assign stigma to certain types of behavior. Given that the repressive rationale for contemporary international criminal justice is undermined by the scarcity of cases prosecuted by the International Criminal Court (ICC) and the somewhat symbolic dimension of its work, studying the stigma rationale may lead to a more realistic and ambitious account of the activity of the ICC, one that brings together sociological, criminological, and international relations (IR) approaches. Studying the stigma rationale will also help refocus attention from the accused or victims onto the *society* from which international criminal justice emanates and that, in turn, it helps shape.

Stigma is a form of social opprobrium that is its own end and can thus be distinguished analytically from actual punishment (imprisonment, for example). In fact, although I will argue that stigma is inherently linked to the criminal process, it is not only or even necessarily a result of punishment. Nor is stigma the same as shaming. Stigma attaches to its target regardless of that target's reaction to it: one can be stigmatized by society, even though one is not personally shamed. Stigma is not incompatible with other goals (such as retribution or deterrence), but it remains separate from them as a sociological consequence of the operation of a criminal system.

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The conception of stigma suggested here is also not the same as the legal category acknowledged explicitly in some legal cultures as a component of guilt or sentencing.[1] I will not examine, for example, the fairness of stigma as a function of a culture of rights as such, although I will consider this function in passing as a way of assessing, among other topics, the role of judges in the allocation of stigma. Nor will I consider the role that stigma might occupy in popular theories of punishment in criminal law. I will not investigate the individual and psychological dimensions of stigma and the role they may have in either deterrence or rehabilitation.

Rather, I will focus on the more general sociolegal role of stigma: delineating socially acceptable and inacceptable behavior, forming a society's deep sense of self, and constituting a society through the designation of its "other." In order to do so, I begin by describing the theoretical inspiration for this article. In part I, I identify that inspiration as the classical criminology inaugurated by French sociologist Emile Durkheim and its insistence on the role of stigma in constituting society.[2] However, in line with this symposium issue, I emphasize the insufficiency of Durkheim's structural and holistic focus, and the need to understand stigma not just as a reflexive product of society, but as the result of a series of institutional "practices"[3] of stigmatization by various international criminal justice actors. In part II, I analyze some of these "practices" of stigmatization by identifying their actors, methods, and status, in an effort to highlight their specific rationality. In part III, I focus on the way in which targets of stigmatization also have agency and may react to that stigma in ways that complicate the overall picture. I conclude in part IV with some further thoughts on where a stigma-focused theory of international criminal justice might lead us.

II
STIGMA: FROM "CONSCIENCE COLLECTIVE" TO MICROPRACTICES

A. Durkheim and the Constitutive Function of Stigma

This article is founded on some well-known insights into the sociology of deviance, particularly as conceived by the founding father of sociology, Emile Durkheim. The relevance of Durkheim for our understanding of processes of international criminal and transitional justice was first highlighted by Mark

1. *See generally* Alan Brudner, *Proportionality, Stigma and Discretion*, 38 CRIM. L. Q. 302 (1995) (discussing the requirement under Canadian law that stigma associated with criminal penalties is proportional to moral fault); Nancy K. Thomson, *Fundamental Justice, Stigma and Fault*, 52 U. TORONTO FAC. L. REV. 379 (1993) (discussing stigma as a component of fault under the Canadian Charter of Rights and Freedoms).

2. *See generally* EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (George Simpson trans., The Free Press, 1947) [hereinafter DURKHEIM, THE DIVISION OF LABOR IN SOCIETY].

3. *See* Jens Meierhenrich, *The Practice of International Law: A Theoretical Analysis*, 76 Law & Contemp. Probs., nos. 3–4, 2013 at 1, 10–27.

Osiel.[4] Instead of asking what criminal justice does to the accused, Durkheim uses the sociology of deviance to examine how criminal justice affects society.[5] Durkheim's central idea was that the criminal process is, fundamentally, a manifestation of the "collective conscience."[6] What shocks us about the commission of crimes is not that they are crimes, but that their commission contradicts our deeply held beliefs. This contradiction must be met by strong disapproval.[7]

The heart of the criminal process, therefore, lies neither in the deterrent effect of punishment nor in criminal procedure. Rather punishment, as "the soul of penality," consists in a "passionate reaction of graduated intensity"[8] through which society condemns what it cannot tolerate or in a sense exhausts itself as a society.[9]

In this context, punishment

> does play a useful role. Only this role is not where we ordinarily look for it. It does not serve, or else only serves quite secondarily, in correcting the culpable or in intimidating possible followers. From this point of view, its efficacy is justly doubtful and, in any case, mediocre. Its true function is to maintain social cohesion intact, while maintaining all its vitality in the common conscience. Denied so categorically, it would necessarily lose its energy, if an emotional reaction of the community did not come to compensate its loss, and it would result in a breakdown of social solidarity. It is necessary, then, that it be affirmed forcibly at the very moment when it is contradicted, and the only means of affirming it is to express the unanimous aversion which the crime continues to inspire, by an authentic act which can consist only in suffering inflicted upon the agent. Thus, while being the necessary product of the causes which engender it, this suffering is not a gratuitous cruelty. It is the sign which witnesses that collective sentiments are always collective, that the communion of spirits in the same faith rests on a solid foundation, and accordingly, that it is repairing the evil which the crime inflicted upon society.[10]

The specificity of modern criminal-justice systems is that this collective reaction is exercised "through the medium of a body acting upon those of its members who have violated certain rules of conduct."[11] In other words, tribunals are the tools of society's condemnation, through which society experiments its unity.[12] In another key passage in *The Division of Labor in*

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4. MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW (1999).

5. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY, *supra* note 2, at 70–108.

6. *Id.* at 80–81.

7. *Id.* at 81 ("[W]e must not say that an action shocks the common conscience because it is criminal, but rather that it is criminal because it shocks the common conscience.").

8. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY, *supra* note 2, at 90.

9. *Id.* at 97–98 ("[W]hen it is a question of a belief which is dear to us, we do not, and cannot, permit a contrary belief to rear its head with impunity. Every offense directed against it calls forth an emotional reaction, more or less violent, which turns against the offender. We inveigh against it, we work against it, we will to do something to it, and the sentiments so evolved cannot fail to translate themselves into actions. We run away from it, we hold it at a distance, we banish it from our society, etc.").

10. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY, *supra* note 2, at 108.

11. *Id.*

12. DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 2 (1993).

Society, Durkheim conceptualizes the relationship between the "collective conscience" and actual institutions of justice.[13] He thus prefigures the sort of enterprise that not only produces the ICC, but also is produced by it:

> [W]herever a directive power is established, its primary and principal function is to create respect for the beliefs, traditions, and collective practices; that is, to defend the common conscience against all enemies within and without. It thus becomes its symbol, its living expression in the eyes of all. Thus, the life which is in the collective conscience is communicated to the directive organ as the affinities of ideas are communicated to the words which represent them, and that is how it assumes a character which puts it above all others. It is no longer a more or less important social function; it is the collective type incarnate. It participates in the authority which the latter exercises over consciences, and it is from there that it draws its force.[14]

This fundamentally shapes the dialectical relation of the criminal law to society in a novel way: The criminal law does not exist because society (pre)exists; rather society exists because criminal law exists. Therefore, a society without criminal law is one that is not really a society, because it does not have an "other."

The Durkheimian equation is a radical one for lawyers, because it draws attention away from what practitioners and law-oriented scholars of criminal justice are typically interested in, namely, the extent to which society produces criminal law and not the other way around.[15] The Durkheimian attention to stigma reveals that—contrary to a widespread view—it is not just crime that derives from the existence of society but also society that derives from the existence of crime. In other words, stigma is both an *expression* of the inherent moral blameworthiness assigned to the perpetrators of certain heinous acts and a way of constituting the society that assigns this blameworthiness. "We can thus say without paradox"—according to Durkheim—"that punishment is above all designed to act upon upright people, for, because it serves to heal the wounds made upon collective sentiments, it can fill this role only where these sentiments exist, and commensurately with their vivacity."[16]

In other words, punishment has less to do with the fate of the accused or the protection of society (in the sense that social-defense theorists typically understand it) than with society's pure expressivist urge to manifest itself to itself. This proposition underscores the need to think fundamentally backwards about the relationship of society to stigma, or at least about the mutually constitutive relationship between both. It also highlights, again in tension with traditional lawyerly concerns with the concrete operation of the criminal system or its broader goals, the deep moral and emotional function of criminal justice.

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13. *Id.* at 84.

14. *Id.* at 84.

15. For examples of this view, see WOLFGANG FRIEDMANN, LAW IN A CHANGING SOCIETY (1959); PHILLIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW (2001).

16. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY, *supra* note 2, at 108–09.

B. The Challenge of the International

If for Durkheim the criminal law and stigma answers the question, what holds societies together? then one must wonder whether international criminal law and stigma are at least part of what keeps international society together, or perhaps even brings it together in the first place. One potential obstacle to transposing Durkheimian theory on the international realm is the radically different nature of that realm. There is a world of difference between what Durkheim sought to understand—the transition of France in particular from a rural to an industrial country in the late nineteenth century[17]—and the transformations of the international stage. Can one really place international criminal justice within the broader sociology of deviance?

Although it is clear that Durkheim was not interested in international criminal justice or, for that matter, international relations, it is also clear that he meant his study of the fundamental character of crime in society as one that could be applied to all societies. Indeed, *The Division of Labor in Society* is replete with references to other eras and societies, which tend to prove rather than contradict Durkheim's fundamental intuition.[18] Yet there is also undeniably a specificity to international society, as a society of states that is only imperfectly a society in the strict sense,[19] and whose existence cannot be as easily presumed as it is in state-focused classical sociology. For what are the common values that bind international society as surely as domestic societies are bound, and can they make up for international society's relative anomie and lack of interdependence? Internationally, criminal justice cannot be seen as merely an effort to restore the moral force of the "collective conscience"; it is better seen as both a consequence and a cause of its existence, part of a process that makes society and criminal justice coconstitutive to the point where it is almost impossible to understand which came first.[20] In effect, the relation between international society and criminal justice is dialectical: International society exists only inasmuch as it can react sufficiently strongly, through criminal justice, to what challenges it at its core; and the more it does so, the more it can be said to actually betray that it really exists. Thus, Durkheimian analysis is probably, in its broad intuition, compatible with the international project of criminalization, one that purposefully seeks to manifest a society's very conditions of its existence.

Indeed, compared to the endless chicken-and-egg debate about which comes first—society or the criminal law—and in particular the old but biting realist critique that an international criminal law without an existing society is an

17. *Id.*

18. *Id.* at 75–78, 91–94.

19. *See generally* HEDLEY BULL, ANDREW HURRELL & STANELY HOFFMANN, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS (2002).

20. Note that this has always been seen as true even of some foundational domestic criminal trials, perhaps the most notable example being Eichmann's prosecution in Jerusalem. *See* SEGEV TOM, THE SEVENTH MILLION: THE ISRAELIS AND THE HOLOCAUST 328–338 (Haim Watzman trans., 1993).

impossible abstraction,[21] Durkheimian thought informs the debate in a much subtler fashion. International criminal law is in a sense the manifestation of an international society's will to exist and is constitutive of what some traditionally thought it could merely be declarative of. It seeks to affirm fundamental values of an international society in the making through international trials that embody an evolving international "collective conscience."

In that respect, it is worth noting that international criminal law has long had a role in "constituting" international society. International crimes are neither just international, nor are they simply grave; they are arguably crimes that target the essence of what makes, at any given moment, the fabric of humanity. For example, the "enemy of mankind" notion derives from a long genealogy of such designations that goes at least as far back as the notion of "pirate."[22] The very origin of international criminal law lied in its designation of pirates as *hostes humanis generis*.[23] That designation of piracy as not just a violation of international law, but a shameful one at that, had a key role in establishing and consecrating, by way of contrast with the crime, the existence of a peaceful society ordered around the needs of commerce and freedom of the seas.[24] It highlighted the particular position of pirates as deviants motivated by greed, knowing of no national allegiance and in a sense challenging states' monopoly on the use of legitimate force. Later on, the designation of the slaver as a pirate would reinforce the international community's emerging humanitarian sensitivity, at least as it expressed itself in fighting the slave trade.[25]

C. The Move to Practice Theory

For all its significant merit, the Durkheimian sociology of crime is predominantly functionalist and holistic. Durkheim is often credited for the insight that a society is more than the sum of its parts, that it speaks as a whole, as it were.[26] The "conscience collective"[27] has a transcendent feel to it, the origin of which is unclear. There is a sense in which the "collective conscience" is a sort of all-powerful, immanent force protecting society on its own, as evident in the following passage:

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21. *See* Georg Schwarzenberger, *The Problem of an International Criminal Law*, 3 CURRENT LEGAL PROBS. 263, 295–96 (1950) (arguing that without an overriding international authority, international criminal law is a legal fiction).

22. ILIAS BANTEKAS & SUSAN NASH, INTERNATIONAL CRIMINAL LAW 177 (3rd ed. 2007).

23. *See generally* Jacob Sundberg, *The Crime of Piracy*, *in* 1 INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS 799 (M. Cherif Bassiouni ed., 3d ed. 2008).

24. S*ee generally* EFTHYMIOS PAPASTAVRIDIS, THE INTERCEPTION OF VESSELS ON THE HIGH SEAS: CONTEMPORARY CHALLENGES TO THE LEGAL ORDER OF THE OCEANS (2013).

25. *See* JENNY S. MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW 114–40 (2011).

26. *See, e.g.*, Raul Magni-Berton, *Holisme Durkheimien et Holisme Bourdieusien.* 58 L'ANNÉE SOCIOLOGIQUE 299 (2008) (Fr.).

27. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY, *supra* note 2, at 86.

> Once constituted . . . [the directive power,] without freeing itself from the source whence it flows and whence it continues to draw its sustenance . . . nevertheless becomes an autonomous factor in social life, capable of spontaneously producing its own movements without external impulsion, precisely because of the supremacy which it has acquired. Since, moreover, it is only a derivation from the force which is immanent in the collective conscience, it necessarily has the same properties and reacts in the same manner, although the latter does not react completely in unison. It repulses every antagonistic force as would the diffuse soul of society, although the latter does not feel this antagonism, or rather, does not feel it so directly.[28]

As a result, Durkheim's focus on stigma as a factor in society's coagulation left very little space for the study of the production of stigma by actual actors and institutions. Durkheim, in fact, seemed to reduce the many actors of the criminal-justice system to mere mouthpieces for the "conscience collective"[29] in ways that minimized their agency. This led him to be particularly evasive on the question of the power that lies behind and constitutes the criminal-justice system, often treating it as one that has a sort of abstract will of its own, with the "collective conscience" as the linchpin of a quasi-religious system.

Conversely, an emphasis on the practices of the ICC can supplement the Durkheimian analysis by highlighting stigma not only as a transcendent phenomenon, but as an object produced by a multiplicity of actors in the international criminal-justice system (whether deliberately or unconsciously). Theories of practice[30] have the merit of highlighting how the production of fields is always the result of certain embodied practices, typically based on shared understandings about what it means to be involved in those fields. Although something bigger than the actors expresses itself and is reinforced by processes of stigmatization—stigma does operate at a macrosocial level—this does not mean that stigma is merely a mechanical by-product of criminal justice, or that its actors have no role in mediating its production. On the contrary, agents of the international criminal-justice system interact dialectically with the sort of structural demands implicit in Durkheimian theory, in both producing and containing stigma. In fact, what is needed in the ICC context is a concept of agency that extends beyond the strict institutional actors in international criminal justice (judges and prosecutors) to include victims, states, civil society, and even the accused themselves. Moreover, stigma must be conceptualized as something that is also a by-product of a set of routinized practices and implicit know-how. Practice theory, with its emphasis on what competent practitioners do, on action rather than representation, provides some of the crucial missing elements beyond grand and structural narratives about international criminal justice.[31]

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28. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY, *supra* note 2 at 84–85.

29. *Id.* at 84.

30. *See generally* INTERNATIONAL PRACTICES (Emanuel Adler & Vincent Pouliot eds., 2011); DAVIDE NICOLINI, PRACTICE THEORY, WORK, AND ORGANIZATION: AN INTRODUCTION (2013); THE PRACTICE TURN IN CONTEMPORARY THEORY (Theodore R. Schatzki et al. eds., 2001); Vincent Pouliot, *The Logic of Practicality: A Theory of Practice of Security Communities*, 62 INT'L ORG. 257 (2008).

31. *See generally* Emanuel Adler & Vincent Pouliot, *International Practices: Introduction and*

One key point is worth further exploring here. Practice theory in general might seem an awkward paradigm for the law. After all, the law has its own theory of its practice, one rooted in explicit understandings of what it means to do law that foreground "interpreting," "applying," or "enforcing" it. The framing of a moral charge against particular individuals hardly features among these ways of understanding the law's operation. Invocation of practice theories might even be suspicious because it does not necessarily correspond to what lawyers recognize as their own. In this respect, one evident question is, To what extent do the participants in international criminal-justice system consider themselves stigma entrepreneurs, or at least as willy-nilly involved in processes of stigmatization? Is the prosecutor of the ICC the more-or-less-unwitting heir to Durkheim's ghost? Or, to adapt a famous quote from Keynes, to what extent are "[p]ractical men, who believe themselves to be quite exempt from any intellectual influences . . . usually the slaves of some defunct [sociologist]?"[32]

Stigmatization is probably not a "practice" that most ICC lawyers spontaneously think of themselves as being engaged in. "Professionally scrupulous lawyers" engage in prosecutorial, adjudicatory, procedural, and substantive practices, and do not see themselves as social and historical demigods promoting grand constitutive narratives.[33] Stigmatization might appear at best as a rather distant sociological characterization, a typically "external" rather than "internal" portrayal, missing the importance for lawyers' identity of the idea of simply adhering to the law. In fact, there may be a very real distaste for the idea that international criminal justice is about stigmatization, a function that is associated with primitive retributory variants of the criminal process. Moreover, how can stigmatization be a "practice" (at least in the sense of practice theories), if it is not codified and self-consciously performed?

On the other hand, nothing in the theory of practices suggests that they must be absolutely (or indeed at all) deliberate and consciously performed. In fact, quite the contrary seems to be the case. The notion of "habitus" in practice theory has been described as the "embodied stock of unspoken know-how, learned in and through practice" that is "tacit and inarticulate."[34] The focus on practices of stigmatization might be revealing precisely in the sense that it allows us to conceptualize what international criminal lawyers *really* do, what their social function is beyond the law's own rhetoric about itself, and, as it were, its ideological self-presentation. If practice theory is confined to deliberate, consciously performed practices, then it becomes virtually indistinguishable from the study of the legal rules that are supposed to guide the action of participants in the legal process (and thus also becomes redundant and

Framework, *in* INTERNATIONAL PRACTICES 3 (Emanuel Adler & Vincent Pouliot eds., 2011).

32. JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY 383 (MacMillan & Co. 1947).

33. OSIEL, *supra* note 4, at 17.

34. Adler & Pouliot, *supra* note 31, at 15.

unhelpful). Much of practice theory, conversely, has recognized how practices operate at the level of the tacit know-how,[35] or perhaps as a "know-about" in the sense of knowing what the enterprise is really about rather than just how to manage it. The focus on practices of stigmatization may highlight what Nicolini has described as a "horizon of intelligible action"[36] for practitioners of international criminal justice, one that is a powerful rationalization of what international criminal lawyers do, and sustains a strong feeling of community, identity, and professional meaningfulness.

Moreover, there is certainly a sense that many observers of international criminal justice see it as producing stigma in ways that result from strategic and tactical practices.[37] Although international criminal practitioners might not formulate it quite like this, an ongoing participation in practices of stigmatization probably comes close to what at least an elite segment of the profession (the prosecutor of the ICC, for example) thinks of itself, perhaps in its less guarded moments, as doing. Certainly, given the degree of stigma effectively produced by an institution such as the ICC, it would be striking if its practitioners turned out to be unaware of this dimension of their work and, indeed, had not reflectively developed a sophisticated craft of stigma manipulation. In the following parts, my hypothesis will therefore be that stigma serves as a broad, implicit orientation of the practices of actors in the criminal-justice system, one that in fact makes better sense of what the ICC is involved in. Stigmatization practices, then, describe the totality of practices engaged in by various actors of international criminal justice that aim to produce, channel, or deflect stigma. Further, I will argue that the accumulation of these practices, both deliberate and unarticulated or subconscious, effectively helps the ICC become the powerful vehicle for stigmatization and international social regeneration that it is and thus provides a horizon within which the meaning of the court in international relations and law can be better understood.

II
SITUATING STIGMA

The power to allocate stigma is a considerable one. Practices of international criminal justice suggest a world in which significant capital is gained by being able (and being seen as able) to target stigma. The question,

35. Pouliot, *supra* note 30, at 266–67.

35. Adler & Pouliot, supra note 31, at 15.

36. NICOLINI, *supra* note 30, at 5.

37. The role of the prosecutor as a "great stigmatizer" is one that is evident in the literature. *See* Payam Akhavan, *Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism*, 31 HUM. RIGHTS Q. 624 (2009); Eric Blumenson, *The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court*, 44 COLUM. J. TRANSNAT'L. L. 801, 825, 869–870 (2006); Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT'L LAW 481, 489 (2003).

then, is how stigma is allotted, considering the huge stakes not only for the constitution of international society but also for the exercise of power in the international sphere. It is here that attention to particular practices can help us to "situate" stigmatization as a particular form of practice. Specifically, the allocation of stigma must be understood as a professionally specific, both shared and contested understanding of who can legitimately allocate stigma (addressed in part II.A), when (part II.B), and by what methods (part II.C).

A. Actors

Stigma is, as already hinted, not the univocal manifestation of a transcendent collective conscience but the result of a set of practices engaged in by a great many actors involved in international criminal justice. These actors are often part of an intense ongoing competition for the legitimate allocation of stigma. The prosecutor of the ICC (or, beyond her, of most other international criminal tribunals) is of course the demiurge of stigma, in that a prosecutor alone can be cause for shunning and shaming. More importantly, the prosecutor has the upper hand in launching the process of designating what is most worth stigmatizing, and therefore has a considerable power in the global economy of shame. It is she who will typically be criticized if certain states, groups, crimes, or victims are insufficiently represented in charges.[38] The international criminal prosecutor is also a notable public and media figure, much more so than would typically be the case domestically, whose practices of confiding and granting interviews and issuing declarations considerably help him in channeling stigma strategically.

It is the judges, however, who ultimately decide whether stigma will be confirmed through judgment. Moreover, one could argue that judges have a central role in guaranteeing the fairness of the attribution of stigma, for example by overseeing the fairness of the trial and ensuring that individuals are not convicted of offenses that do not adequately represent their level of responsibility. Moreover, judges may act as guardians of the relative exceptionality of stigma by ensuring that the ICC's resources are used only to prosecute the worst crimes.[39]

Beyond these strictly judicial actors in the allocation of stigma, there are a range of interveners competing to exercise influence on the court and trying to direct its stigma at certain targets. These include the UN Security Council, which can refer certain situations to the court; states, which can refer their own situations; and civil-society actors and victims, who can encourage the court to

38. Luc Côté, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, 3 J. INT'L CRIM. JUST. 162 (2005); Alexander K.A. Greenawalt, *Justice without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT'L L. & POL. 584, 647 (2006).

39. Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (Mar. 15, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1039485.pdf.

focus on certain individuals and certain crimes. For each of these interveners, stigma is part of different strategies linked to different agendas which may complement or contradict each other.

For the Security Council, stigma of individuals, groups, or states via an ICC referral may be a way of judicially validating attempts to isolate certain regimes. A referral may even serve to prepare the political terrain for stronger measures, including the use of legitimized international violence. Those stigmatized are already outliers. A Security Council referral stigmatizes them both as threats to international peace and security and as potential criminals; that is, as threats to international order, law, and justice.[40] It also stigmatizes particular types of behavior that have increasingly come to be seen as adverse to international peace and security. This was quite evident in the case of Libya where the Security Council did not mince its words in "[d]eploring the gross and systematic violation of human rights, including the repression of peaceful demonstrators, expressing deep concern at the deaths of civilians, and rejecting unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government."[41] In exchange for referring situations to the court, the Security Council may hope that the ICC will judicially validate the stigma already arising from the "situation" referral by investigating, and then by prosecuting or convicting, particular individuals.

States, for their part, lie at the center of stigmatization strategies, particularly through the medium of self-referrals, which have been described as "just a way for governments to use the ICC to further stigmatize their enemies."[42] This is particularly evident in the way self-referrals seek to direct the prosecutor's attention towards certain crimes: those crimes that are committed more frequently by nonstate actors than by other states. For example, Uganda referred its own situation to the ICC not to delegitimize a state, but rather to delegitimize the Lord's Resistance Army (LRA) by exposing the LRA to the ongoing stigma of crimes against humanity.[43] More generally, the tendency to prosecute nonstate actors can be seen as part of broader efforts by states to stigmatize nonstate violence of any kind, while validating their monopoly on the legitimate use of force. It is telling in this respect that the ICC is sometimes at risk of turning into a machine to prosecute warlords. By contrast, state sponsors of criminal violence have so far

40. Frédéric Mégret, *ICC, R2P and the International Community's Evolving Interventionist Toolkit*, 21 FINN. YEARB. INT'L L. 21 (2010).

41. S.C. Res. 1970, ¶ 3, U.N. Doc. S/RES/1970 (Feb. 26, 2001).

42. *Discussion*, 6 J. INT'L CRIM. JUST. 763, 765 (2008) (remarks of Kenneth Roth, Executive Director, Human Rights Watch).

43. PHILIPP KASTNER, INTERNATIONAL CRIMINAL JUSTICE IN BELLO?: THE ICC BETWEEN LAW AND POLITICS IN DARFUR AND NORTHERN UGANDA 78 (2012). The LRA is a guerilla movement that has been active in Uganda since the 1980s and is widely suspected of having engaged in international crimes. Uganda's surprising referral of its "own" situation to the ICC was widely understood as directed at the LRA and not itself. *See, e.g.*, William A. Schabas, *'Complementarity in Practice': Some Uncomplimentary Thoughts*, 19 CRIM. L. FORUM 5, 10 (2008).

remarkably eluded sanction, in ways that suggest a deeper alignment of the interests of sovereigns and the ICC.[44]

Civil society has long had a vested interest in the potential stigmatizing function of international criminal justice as a sort of broadly understood extension of its own ability to shame by referencing international-community standards. However, civil society is also intensely divided about what the stigma should be directed at. In effect, international criminal justice is a locus of rivalry between different groups competing to attract the highest possible stigma on a certain crime. Competing for the ICC's attention both within and without are groups that focus on each core crime for their separate reasons, each with a particular structured view of what can go wrong in the world and what the worst crimes ought to be. For pacifists, aggression is the cardinal sin; for humanitarians, war crimes; for those inclined towards the protection of human rights, crimes against humanity; for those who seek to defend particular groups, genocide; and for feminists, sexual violence. Each of these various constituencies hopes that the prosecutor will bring their choice of charges, and that the judges will validate those charges. When a group's crime of choice is never prosecuted, it sends a not-so-discreet signal that the crime is not quite as grave as others. Conversely, when a group's crime is the only one selected for prosecution, particularly in a context where many other crimes could have been prosecuted, the ICC is giving the crime considerable symbolic recognition. Hence the prosecution of Lubanga for child recruitment (and for child recruitment only)[45] in and by itself considerably elevated the stigma of child recruitment, whereas the failure by Prosecutor Moreno-Ocampo to include sexual violence charges was seen as a major setback by others.[46]

Finally, international criminal justice provides opportunities for victims to ascribe stigma. The presence of victims at the trial might be seen as in itself a factor of prior and ongoing stigmatization, in that the accused has to stand under the reproachful gaze of those who in all likelihood consider him or her to be the source of their harm. One is not only facing a hypothetical international community for a violation of its laws, but a very real community of suffering incarnated by victims. Of course, the presumption of innocence still legally protects the accused, but the presence of victims in the courtroom undeniably adds an element of confrontation and raises the moral stakes by reducing the degree of intermediation normally provided by a society's organs of prosecution. The practice of victims at the ICC suggests that stigmatization is on their minds (indeed it is hard to imagine a scenario in which the victims would not seek to stigmatize the accused and his behavior). For example, when

44. *See* Payam Akhavan, *Self-Referrals Before the International Criminal Court: Are States the Villains or the Victims of Atrocities?*, 21 CRIM. L. FORUM 103 (2010).

45. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Public Judgment Pursuant to Article 74 of the Statute, ¶¶ 1–8 (Mar. 14, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf.

46. *See, e.g.*, *Trial Chamber I issues first trial Judgement of the ICC—Analysis of sexual violence in the Judgement*, WOMEN'S INITIATIVES GEND. JUST. (May 2012), http://www.iccwomen.org/news/docs/WI-LegalEye5-12-FULL/LegalEye5-12.html#2.

offered to present their concluding observations at the close *of Prosecutor v. Lubanga*, victims focused insistently on the trauma and harm that they and others had suffered.[47] Although some indicated that they would not pronounce on the length of the sentence, they did nonetheless indicate that it should include recognition of the gravity of the crimes, notwithstanding the defense's attempt to minimize it.[48] The fact that stigma is at stake is also reflected in efforts by the defense of Lubanga to exclude representations from victims from the determination of the sentence.[49]

B. Timing

Stigma is perhaps most decidedly a function of a conviction and a sentence. It is at this stage that the individual is branded as deviant, and the crime solemnly condemned. However, although the dominant legal understanding of stigma is that it should merely result from such a conviction, from a sociological point of view stigma does not wait that long and can arise long before or after, and relatively independently of, convictions. It does so, with increasing degrees of severity, as early as the investigation stage and during the actual trial. Even being a mere suspect before the ICC can lead to a degree of stigma, despite the presumption of innocence and the absence, contrary to the ad hoc tribunals,[50] of an indictment procedure. The fact that preventive detention is frequently used ensures that individuals will be, socially at least, in a grey zone for as long as they are going through trial: Even being implicitly branded a flight risk includes some stigmatizing dimension. Appearing in the seat of the accused, the seat previously occupied by others who have been convicted, and having one's picture taken and circulated the world over, framed by two square-jawed ICC security guards, already begins to shape the accused's body as that of a convict *en puissance*, rather than as an innocent in the wrong place.

In this context, local and international public opinions may not fully realize that preventive detention in no way prejudices the outcome of the trial. Moreover, the huge publicity surrounding prosecutions all but guarantees that some of the accused will bear significant negative shortfalls as a result of the

47. *See, e.g.*, *Lubanga*, Case No. ICC-01/04-01/06, Observations sur la fixation de la peine et les réparations de la part des victimes a/0001/06, a/0003/06, a/0007/06 a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09, et a/1622/10 (April 18, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1396912.pdf.

48. *Lubanga*, Case No. ICC-01/04-01/06, Observations sur la peine pour le groupe de victimes V01, ¶ 7, (May 14, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1411251.pdf.

49. *Lubanga*, Case No. ICC-01/04-01/06, Requête de la Défense aux fins de juger que seuls le Procureur et la Défense peuvent présenter des observations sur la peine à prononcer à l'encontre de M. Thomas Lubanga, (May 2, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1406845.pdf.

50. The indictment procedure before the ad hoc tribunals was seen in some local communities as evidence that the "international system is unfair, or inferior to the domestic one, because it exposes individuals to the stigma of indictment for horrendous crimes before they are given the chance to respond to incriminating evidence and avert stigmatization." Mirjan Damaška, *What Is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 348 n.31 (2008).

very fact of prosecutions.[51] Commentators, pundits, journalists, politicians, and activists will typically not wait for the outcome of the trial to express opinions about the guilt of the accused. In the context of the ICC, the issuance of summonses against Kenyatta and Muthaura while Kenyan finance minister and cabinet secretary respectively is a good illustration of the tensions of being an accused while holding public office, both having had to resign their posts.[52]

Of course, the stigma of prosecutions that do not result in conviction may wax and wane depending on the prosecutor's conviction record. Also, as the broader public begins to acknowledge acquittal as a possible outcome of trials before the ICC, some of the stigmatizing charge may relent. Still, at least in the early stages of an international court's activity, stigma is an inevitable by-product of any prosecution.

At all junctures, moreover, it is important to understand that there is a "long tail" of stigma, in that the courtroom is often only an echo chamber for various discussions—about guilt and responsibility, and also about peace, justice, and transition—that are occurring elsewhere. In other words, practices of stigmatization that may appear circumscribed in time by the trial in fact continue to manifest themselves far beyond the courtroom and long after the trial has ended, even as they may organize themselves around the particular stigmatizing outcomes that result from the trial.

C. Methods

One of the ways that stigma is typically attracted is by declarations made in the course of and at the culmination of trials. Indeed, the practices of international criminal justice are, fundamentally, logorrheic and hortatory, and involve the constant attempt to characterize situations and persons through the appropriate use of words. A careful study of the prosecution's rhetoric shows how the trial is a constant theater of efforts to up the ante of moral indignation at the accused. It is as if the moral indignation behind the law needs to be constantly revived. As Durkheim notes, "A simple restitution of the troubled order would not suffice for us; we must have a more violent satisfaction. The force against which the crime comes is too intense to react with very much moderation."[53]

Pronouncing the words "genocide," "crimes against humanity," or "war crimes" in relation to a person's name is of course already an exercise in inchoate stigmatization. However, prosecutorial practices typically go beyond bare legal allegations to include language that portrays the acts of the accused

51. It is worth noting that in the domestic context, not releasing the identity of those prosecuted has been suggested as a way of reducing stigma that would be fairer to the accused. *See* NIGEL WALKER, PUNISHMENT, DANGER AND STIGMA: THE MORALITY OF CRIMINAL JUSTICE 162 (1980).

52. *Kenya ICC: Kenyatta Resigns From Finance Role*, BBC NEWS (Jan. 26, 2012, 9:03 AM), http://www.bbc.co.uk/news/world-africa-16745446. Kenyatta's subsequent election in 2012 as president seems to have reemboldened Kenyans to reject the accusations leveled at him as politically motivated.

53. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY, *supra* note 2, at 99–100.

as particularly horrendous, and rely on the ability to simultaneously monopolize a high degree of pathos (against the background of impeccable technical reasoning). The prosecutor's opening and concluding statements are typically an attempt to brand the accused's crime or crimes as particularly heinous. For example, in his opening statement in *Prosecutor v. Bemba*, the prosecutor emphasized that the acts of the accused were not "isolated" and that "the nature of the crimes . . . was unspeakable."[54] The prosecutor also stressed that the accused's

> troops stole from the poor people of one of the poorest countries in the world. The massive rapes were not just sexually motivated, as gender crimes, they were crimes of domination [and] humiliation directed against women but also directed against men with authority. These crimes spread terror and devastated communities by means of the cheapest weapons and most available ammunition. Women were raped systematically to assert dominance and to shatter resistance. Men were raped in public to destroy their authority, their capacity to lead.[55]

One of the ways that stigma is projected is through a systematic invocation of the continuing suffering of the victims. (After all, victims suffer not just at the moment of the crime, but to this day, and also in the future.) In other words, the evil of the accused's act is not a spent force, but one whose effects will continue to be felt. Consider, for example, the following passage in the prosecutor's opening statement in *Lubanga*:

> Hundreds of children still suffer the consequences of Lubanga's crimes. They cannot forget what they suffered, what they saw, what they did. They were 9, 11, 13 years old. They cannot forget the beatings they suffered; they cannot forget the terror they felt and the terror they inflicted; they cannot forget the sounds of their machine guns; they cannot forget that they raped and that they were raped. Some of them are now using drugs to survive, some of them became prostitutes and some of them are orphaned and jobless.[56]

It is of course hard to imagine a more severe indictment of the consequences that an individual's acts can have on others.

At any rate, acts do ultimately speak louder than words and stigma is perhaps above all a result of convictions. Sentencing and stigma have an intimate relationship, and as a rule of thumb the greater the sentence the greater the stigma. Although judges are typically careful not to say anything during the course of trial that might stigmatize an accused before conviction, sentencing itself is generally accompanied by further characterizations of the crime, beyond the issue of guilt or innocence. These further statements stigmatize certain types of behavior or even personal characteristics. In *Lubanga*, the only sentence before the ICC so far, the judges, although adopting neither the prosecutor's level of rhetoric nor all of his suggestions, at

54. Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Opening Statement, ¶ 4 (Nov. 22, 2010), http://www.icc-cpi.int/NR/rdonlyres/30DF9EE7-E1F2-4407-BA21-D81D8C7A785C/282701/101122 BembaProsecutorsOpeningStatementformatted.pdf.

55. *Id.*

56. *Lubanga*, Case No. ICC-01/04-01/06, Opening Statement, 2 (Jan. 26, 2009), http://www.icc-cpi.int/NR/rdonlyres/89E8515B-DD8F-4251-AB08-6B60CB76017F/279630/ICCOTPSTLMO 20090126ENG2.pdf.

least gave indications as to what factors they would consider in assessing the appropriate sentence. These included the gravity of the crimes (the chamber determined, on the basis of expert testimony about its consequences for those involved, that child recruitment was very grave), the large-scale and widespread nature of the crimes committed, and the degree of participation and intent of the convicted person.[57] Potential aggravating circumstances included the punishment of child soldiers, sexual violence, commission against victims who were particularly defenseless, and the existence of a discriminatory motive.[58] The net effect of all of these factors was to further delineate the conditions under which stigmatization of an individual and his crimes will ensue. Earlier verdicts before the International Criminal Tribunal for the former Yugoslavia (ICTY) had gone further in rhetorically consigning some of the accused to infamy.[59]

III
TARGETING STIGMA

The nature of the stigma produced by international criminal proceedings is a fundamentally profound one, which threatens to put its targets (the criminal defendants) on the outer borders of humanity. It is the stigma, no less, of being an enemy of mankind, humanity's constitutive "other." For example, in the *Lubanga* case, the prosecutor alleged that the accused "committed some of the most serious crimes of concern to the international community as a whole: crimes against children."[60] Practices of stigmatization therefore also include, crucially, a number of implicit understandings about whom or what should be stigmatized. Stigmatization practices, when analyzed, reveal certain preconceptions about the worthy objects of stigma. These practices help construct a particular international society. The emphasis in most influential theories of criminal justice is on stigmatizing the accused. In part III.A, I discuss the accused as a target of stigma. However, a sociological approach to criminal justice would also emphasize the importance of stigmatizing particular crimes, as discussed in part III.B. Of course, whether the accused or a crime is the intended target of stigma, there is a risk that stigma will not easily be contained and that it will be spread beyond its intended target to various other entities, something that ICC practices may both seek to reduce and to render possible. Therefore, in part III.C, I address the risk that stigma will spread.

57. *Lubanga*, Case No. ICC-01/04-01/06, Decision on Sentence Pursuant to Article 76 of the Statute, ¶¶ 36–56 (July 10, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1438370.pdf.

58. *Id.* ¶¶ 57–81.

59. *See* Press Release, Trial Chamber, Radislav Krstić Becomes the First Person To Be Convicted of Genocide at the ICTY and Is Sentenced to 46 Years Imprisonment, ICTY Press Release OF/P.I.S./609e *Aug. 2, 2001), *available at* http://www.icty.org/sid/7964 (emphasizing the accused's evil).

60. *Lubanga*, Case No. ICC-01/04-01/06, Opening Statement, ¶ 3 (Jan. 26, 2009), http://www.icc-cpi.int/NR/rdonlyres/89E8515B-DD8F-4251-AB08-6B60CB76017F/279630/ICCOTPSTLMO 20090126ENG2.pdf

A. The Accused

The selection of individuals to stand trial is the perhaps the set of ICC practices that is most prone to controversy and that remains most shrouded in mystery. The relatively diversified choices of prosecutors so far reflect a set of strategic preferences to stigmatize a sort of "representative sample" of potential international criminals, which includes military commanders, warlords and soldiers, as well as heads of state, and politicians. But, even as prosecutorial and adjudicatory practices stigmatize an ostensibly representative group of individual defendants, those same practices avoid stigmatizing the very structures for which the defendants act as agents. This helps sustain some of international criminal justice's founding myths.

For example, international criminal justice is based on the notion of individual guilt, and therefore on the need to particularly stigmatize individual behavior and decisions. It is through the stigmatization of individuals that one will avoid the stigmatization of entire communities and the notorious "Versailles stigma" that, through the so-called "war guilt clause," branded all Germans as guilty of provoking World War I and, it is often argued, helped cause World War II.[61] This concern is evident in writings about the ICC.[62] Yet there is no reason to believe that individuals should be the preferred targets of stigma in all cases. If the acts of the individual can be attributed to some larger context, structure, or group, then the individual should be relatively less stigmatized; if, on the contrary, the acts can be seen as the individual's alone, then he or she will incur relatively deeper stigmatization. There may be some cases where individuals are more the products of events and other cases where they are more the producers of those events.

Although the practices of the ICC evidence the need to consign responsibility to the individual, they also demonstrate the difficulty of entirely abstracting responsibility from context. The relatively minor sentence of fourteen years imposed by the ICC on Thomas Lubanga,[63] for example, might be explained by the fact that the latter was hardly the only person responsible for child-soldier recruitment during the Ituri conflict.[64] As a result, even though he could certainly be legally blamed for the specific offense, he could hardly be stigmatized as being responsible for the entire phenomenon. And—although the particular practice of crafting indictments is generally an exercise in assigning blame to individuals, as opposed to groups or structures—overarching court practices that are too isolating might be seen as trivializing contextual

61. ANTHONY P. ADAMTHWAITE, THE MAKING OF THE SECOND WORLD WAR 28 (2013).

62. *See, e.g.*, INT'L CTR. FOR POLICY & CONFLICT, BUILDING SUSTAINABLE PEACE THROUGH ENDING CYCLE OF IMPUNITY IN KENYA 7 (2011), *available at* http://www.icpcafrica.org/pdf/ICPC%20DRAFT%20POST%20PAPER%20ON%20PROSECUTION%20MECHANISMS%20FOR%20POST-ELECTION%20VIOLENCE%20ATROCITIES.pdf ("The court can help avoid a collective stigma, by clearly identifying individuals responsible for crimes.").

63. *Lubanga*, Case No. ICC-01/04-01/06, Decision on Sentence Pursuant to Article 76 of the Statute, ¶ 107 (July 10, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1438370.pdf.

64. Id. ¶ 83.

responsibility. Thus the court's practices, particularly its judgments, inevitably show an attention to the history and events leading to the commission of crimes, while still seeking to establish the accused's "essential contribution."[65] If nothing else, the individual responsibility of most accuseds before the ICC will be interwoven with issues of characterization: for example, whether an armed conflict is international or noninternational.[66]

Practices of stigmatization also reveal certain implicit and strategic assumptions about what types of behavior are most worth stigmatizing. Stigma can be increased by a high position despite relatively benign politics (as with Doenitz in the Nuremberg Trials comes),[67] or by malevolent politics despite a relatively benign position (as with Streicher in the Nuremberg Trials).[68] Stigma can be a function of personal participation in crimes, especially when it reveals a particular sadistic streak (Tadić before the ICTY comes to mind).[69] But stigma is most likely to result from a position of high office. Those in positions of power have abused their positions in a way that resonates particularly badly with the human-rights ethos that undergirds much of international criminal justice. As the prosecutor put it emphatically in *Bemba*,

> The Prosecution will submit that as their superior, Jean-Pierre Bemba is even more responsible than the direct perpetrators, his subordinates. A commander that lets his troops carry out such criminal tactics is a hundred times more dangerous than any single rapist. Jean-Pierre Bemba knowingly let the 1,500 armed men he commanded and controlled commit hundreds of rapes, hundreds of pillages.[70]

The Rome Statute of the International Criminal Court (Rome Statute) suggests that those in positions of power ought to be criminally liable even in situations where they are guilty mostly of negligence, as in the case of command responsibility.[71] Few things have irked liberal-minded criminal lawyers more

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65. *Lubanga*, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, *passim* (March 14, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf.

66. *See id*. ¶¶ 565–66.

67. Karl Doenitz was a German admiral, who was briefly the head of the Third Reich after the death of Hitler. Although he commanded Germany's submarine fleet during the war, he was never formally a Nazi party member. He was sentenced to ten years imprisonment by the Nuremberg Tribunal. *See International Military Tribunal (Nuremberg), Judgment and Sentences*, *October 1, 1946*, 41 AM. J. INT'L L. 172, 332 (1947).

68. Julius Streicher was an editor and prominent Nazi before the Second World War known for his intense anti-Semitism. However, he had been sidelined by the Nazi party from 1938 and occupied no significant position of power during the war. *See id.*

69. Duško Tadić was the first person convicted by the International Criminal Tribunal for the former Yugoslavia. A Bosnian Serb, he was a relatively minor figure in the events of the war, but was found to have been personally involved in a series of sadistic beatings. *See* Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997), http://www.icty.org/x/cases/tadic/tjug/en/tad-tsj70507JT2-e.pdf.

70. Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Opening Statement, ¶ 6 (Nov. 22, 2010), http://www.icc-cpi.int/NR/rdonlyres/30DF9EE7-E1F2-4407-BA21-D81D8C7A785C/282701/101122BembaProsecutorsOpeningStatementformatted.pdf.

71. Rome Statute of the Int'l Criminal Court art. 28(a)(i), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

than this move to strict liability in relation to major international crimes[72]: it betrays an international society that is willing to blur the line between human negligence and human evil. At any rate, strict liability puts a high onus on the commander or the governor in a way that presumes to *create* a certain social reality—one in which those concerned would be alert to the consequences of their acts—rather than to simply flow from that reality.

There is a sense in which being selected for prosecution is in itself a mark of infamy because of the number of other people that could have been prosecuted. This excess of stigmatization is apparent in the Kenyan context,[73] where the exact extent of individual stigmatization will partly depend on whether others are being prosecuted domestically for similar offenses or not. The possibility that those convicted by the ICC are scapegoats of sorts cannot be ignored. The stigma inflicted on those convicted by the court goes beyond their crime, and has to do with the fact that it is *they* who were selected to be prosecuted, suggesting to the world that there is something particularly emblematic, perhaps even particularly reprehensible, about *their* crimes. The *Lubanga* case is revealing in this respect. Although Lubanga's name will almost certainly go down in history as the first person convicted internationally for recruiting children, he is hardly the only one in the Democratic Republic of the Congo or beyond to have been involved in the practice. In a sense, he is therefore called upon to symbolically absorb the stigma of child recruitment for all who engage in it. The burden may come to be shared before international and domestic courts, but there is no doubt that Lubanga is exposed. A number of reactions from the accused or convicted are only understandable in this light, not necessarily as protestations of innocence but as strident questions to the effect of, Why me (of all people who might plausibly be accused)?

B. Particular Crimes

The true goal of stigmatizing practices in a Durkheimian framework should be to stigmatize the *crimes themselves* as forms of reprehensible deviancy, rather than the individuals as such. In that respect, the individual condemnation discussed in part III.A has an almost instrumental function rather than being an end in itself. Focusing now on the stigmatization of underlying crimes, one might argue that the ICC is a contested field, in which the relative importance of offenses in relation to each other is disputed or negotiated. Although references to "core crimes" and the stabilizing effects of the law suggest a high degree of consensus about these offenses, their relative gravity or even the

72. *See, e.g.*, Mirjan Damaška, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455, 480–81 (2001); George P. Fletcher & Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT'L CRIM. JUST. 539, 550 (2005); Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT'L L. 925 (2008).

73. *See, e.g.*, *Stop Stigma Against ICC Suspects*, DAILY NATION (Dec. 15, 2012), http://www.nation.co.ke/oped/Opinion/Stop-stigma-against-ICC-suspects/-/440808/1644738/-/1hksvgz/-/index.html (Kenya).

reasons for their gravity are intensely disputed issues,[74] behind which lie struggles about the meaning of the field of international criminal law and the ability and authority to define it. In effect, the ICC's practices suggest particular agendas at work to prioritize, by necessity, the stigmatization of certain offenses over others. In *Lubanga*, the prioritization of the child-recruitment crime over all other offenses (including, notably, sexual violence) could be seen as a way of using the scarce resources of the court to "upgrade" that international crime, which had arguably been neglected historically.[75]

An overview of the stigmatizing thrust of the ICC in its first ten years suggests that an international society is both struggling to emerge through the practices of ICC actors and being retro-projected by the court's stigmatizing practices. Reviewing the court's stigmatizing practices also suggests the precise nature of this burgeoning international society.

First, the nature of the international society is suggested by the very subject-matter jurisdiction of the ICC, which reserves stigma for a small subset of offenses. In particular, the ICC is notable for a particularly forceful condemnation of "atrocity crimes" in the form of genocide, crimes against humanity, and war crimes.[76] As a result, the society that emerges is one that singles out public crimes of explicit armed violence at the expense of other forms of violence that are not so stigmatized.[77]

Second, the nature of international society is also suggested by the normative ordering of international crimes, the designation of what the society *most* abhors. This ordering indicates that international society is truly a society insofar as it is capable of sophisticated differentiations between levels of evil or blameworthiness.[78] A society that would put an isolated war crime on par with conspiracy to commit genocide on a vast scale, for example, would not be much of a society. Hierarchy in stigma, therefore, also reflects international criminal justice's expressivist ambition.

The ordering of crimes over time tells us something crucial about what is most stigmatized in a given configuration of the international order. At the Nuremberg Trials, interstate crimes against peace were described by the court as "the supreme international crime[s]."[79] Sixty years later, one might argue that the crime of aggression (a corollary of crimes against peace insofar as it is also

74. *See* Andrea Carcano, *Sentencing and the Gravity of the Offence in International Criminal Law*, 51 INT'L & COMP. L.Q. 583, 583 (2002).

75. *See* Justin Coleman, *Showing Its Teeth: The International Criminal Court Takes on Child Conscription in the Congo, But Is Its Bark Worse Than Its Bite*, 26 PENN STATE INT. L. REV. 765, 781 (2007).

76. David Scheffer, *Genocide and Atrocity Crimes*, 1 GENOCIDE STUD. & PREV. 229 (2006).

77. Frédéric Mégret, *The Problem of an International Criminal Law of the Environment*, 36 COLUM. J. ENVTL. L. 195, 211 (2011).

78. *See* Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415, 489–500 (2001).

79. 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 421 (1947), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf.

an interstate crime) now suffers from a much more hesitant opprobrium. Although the Assembly of States Parties eventually and after much controversy managed to find a particular regime for the crime of aggression, so many controversies and caveats surround its implementation[80] as to suggest the offence's descent into decadence. The international society of 1998 or 2011 is evidently not that of 1945, when interstate crimes against peace seemed to condition all else. Without going into the details, this reflects the relative downgrading of the interstate component of the international legal system, not to mention the significant softening of the prohibition on the use of force that is apparent in a context of repeated exceptions, extensive interpretations, and superpower hegemony.[81]

By contrast, the ICC's inception marks the culmination of the rise of genocide as the "crime of crimes."[82] This evolution began with the creation of the ad hoc international criminal tribunals, a process that demoted aggression for the benefit of a more cosmopolitan vision of the worst international crimes. Genocide has become the most visibly stigmatized crime in international criminal justice. As Paul Behrens has argued,

> [T]he crime in its codified form carries a stigma that goes far beyond that attached to ordinary offenses and possibly beyond that which other international crimes carry. It is 'condemned by the civilized world'. It 'shocks the conscience of mankind', and its punishment and prevention endorse 'the most elementary principles of morality.'[83]

More generally, the emphasis on crimes against humanity as the worst crimes suggests an international society that is much more willing to see crimes that occur domestically in times of "peace" as extremely grave. In other words, international crimes are increasingly influenced by a cosmopolitan vision of international society, one in which mass rights violations are considered to be the worst offenses.[84]

By contrast, war crimes—despite all their ostensible inherent gravity—are perhaps the least stigmatized. There may be several reasons for this, one of them being that "armed conflict is regulated but not proscribed by international law, whereas mass atrocities are outlawed as crimes."[85] Mass atrocities represent particularly "stigmatized behavior that has been condemned by the international community," whereas war crimes do not.[86] In other words, war crimes are a form of excess within a framework of otherwise legal violence. This

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80. Sean D. Murphy, *The Crime of Aggression at the ICC*, *in* OXFORD HANDBOOK ON THE USE OF FORCE (Marc Weller ed.) (forthcoming 2014).

81. *See* Andreas Paulus, *Second Thoughts on the Crime of Aggression*, 20 EUR. J. INT'L L. 1117 (2009).

82. WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES (2000).

83. Paul Behrens, *The Need for a Genocide Law*, *in* ELEMENTS OF GENOCIDE 237, 239 (Paul Behrens & Ralph Henham eds., 2013).

84. *See* DAVID HIRSH, LAW AGAINST GENOCIDE: COSMOPOLITAN TRIALS (2012).

85. OXFORD INST. FOR ETHICS, LAW & ARMED CONFLICT, POLICY BRIEF: OPERATIONALIZING THE RESPONSIBILITY TO PREVENT 5 (2012), *available at* http://www.elac.ox.ac.uk/downloads/elac%20operationalising%20the%20responsibility%20to%20prevent.pdf.

86. *Id.*

sets war crimes apart from genocide and crimes against humanity, which are ipso facto illegal. There may also be more sympathy overall for war crimes committed in difficult circumstances, in the "fog of war." This sympathy disappears entirely when, for example, a sovereign systematically targets an innocent population.

Various strategies of stigmatization are organized around the hierarchical sliding scale of stigma (however rough and imperfect that scale is). Thus, groups vying for recognition of their cause will, for example, first seek to have the harms committed against them recognized as genocide, or, if not that, as crimes against humanity, or at the very least as war crimes. This was evident in Darfur where so much seemed to hinge on whether genocide had been committed.[87] The struggle for stigma status is also evident in various strategies to fit sexual violence within the upper tiers of international criminal law. The ability to peg sexual violence to the most stigmatizing offense is often understood as a measure of success, whether the offense is a broad one (war crimes[88] or, notably, genocide[89]) or a narrow one (the various constitutive offenses of war crimes that could encompass rape, for example).

C. Other Entities?

Beyond individuals and actual crimes, the stigmatizing logic of the ICC also affects other entities in a variety of ways. It typically does so indirectly and unwittingly. The ICC hesitates to stigmatize other entities directly out of fear that individuals will seek to escape the stigma of their own condemnation by ascribing responsibility to some overarching entity or structure. Nonetheless, stigma (as opposed to conviction per se) is in practice difficult to contain, and much broader messages are being channeled via the ICC's practices than those that relate strictly to individuals taken out of their social context.

Perhaps the most evident indirect target of stigma is none other than the *states themselves*. Because that stigma is of course indirect, one will search in vain for specific admonishments of states. However, a head of a state and the state itself are frequently so proximate that stigma channeled at the former will

87. *See* Beth Van Schaack, *Darfur and the Rhetoric of Genocide*, 26 WHITTIER L. REV. 1101 (2004) (arguing that designation as genocide has become regrettably central to triggering humanitarian intervention).

88. *See generally* Christin B. Coan, *Rethinking the Spoils of War: Prosecuting Rape as a War Crime in the International Criminal Tribunal for the Former Yugoslavia*, 26 N.C. J. INT'L L. & COM. REG. 183 (2000) (analyzing the treatment of rape by the ICTY); Patricia H. Davis, *The Politics of Prosecuting Rape as a War Crime* 34 INT'L L. 1223 (2000) (discussing the political barrier to prosecuting rape as a war crime); Richard J. Goldstone, *Prosecuting Rape as a War Crime*, 34 CASE W. RES. J. INT'L L. 277 (2002) (considering the broadening of categories of international crime under which gender crimes may be prosecuted).

89. *See generally* Chile Eboe-Osuji, *Rape as Genocide: Some Questions Arising*, 9 J. GENOCIDE RES. 251 (2007) (discussing rape as an act of genocide); Frances Pilch, *Rape as Genocide*, *in* PLIGHT FATE WOMEN GENOCIDE 169 (Samuel Totten ed., 2009) (considering the inclusion of rape as a war crime at the International Criminal Tribunal for Rwanda); Sherrie L. Russell-Brown, *Rape as an Act of Genocide*, 21 BERKELEY J. INT'L L. 350 (2003) (discussing rape as an act of genocide in the context of Rwanda).

inevitably have repercussions for the latter.[90] In the ICC context, the indictment of Omar Al Bashir and several high-ranking Sudanese officials clearly conveys a not-so-subtle message about the Sudanese state's role in the Darfur conflict. Moreover, heads of state will often seek to portray accusations leveled against them personally as attacks on their nations themselves. Indeed, beyond the state, entire collectivities (for example, "the people" or "the nation") may be stigmatized. In the ICTY context, for example, Croats frequently complained of the "stigma Hrvatska" (Croatian stigma).[91] The accusation that Croats had committed war crimes in obtaining independence, such that the national project was compromised from day one as a result of ethnic cleansing, went to the heart of that young nation's self-understanding.[92]

Another clear way that states are stigmatized is by being portrayed as "unwilling or unable" to carry out an investigation or prosecution, such that the underlying case is admissible before the ICC (pursuant to article 17 of the Rome Statute).[93] States designated as unwilling or unable are highlighted not only as cradles of potential international criminals but also, more pointedly perhaps, as malfunctioning, failed cogs that disrupt the mechanics of international criminal justice. Although only an issue of case admissibility is technically at stake, it is not hard to see how an admissibility finding comes dangerously close to a finding that the relevant state is responsible for violating an obligation to try or extradite suspected criminals (unless the admissibility arises on other grounds, such as state referral or failure to contest). It may even suggest that the state is effectively endorsing the crimes in question. Many individuals came to this conclusion in the Kenyan context. As the Kenyan Vice President Kalonzo Musyoka put it, "An indictment by the ICC carries with it a certain stigma, a lot of stigma, and gives the impression that a country is in the category of a failed state. Kenya is not in that category."[94] Hence ICC indictments and condemnations do tend to have multiple ricochet effects on states, stigmatizing them indirectly as substantively or procedurally delinquent.

Beyond the state, though, the ICC may have a more complex role in ascribing stigma to certain communities, ethnic or political. This is because in practice, and especially in many contemporary internecine conflicts, individuals will be seen less in their individual capacity than as members of their communities. This was evident in the former Yugoslavia, for example, where

90. André Nollkaemper, *Concurrence Between Individual Responsibility and State Responsibility in International Law*, 52 INT'L COMP. L. Q. 615 (2003).

91. James Hopkin, *Croatia Starts to Hope Again, as a "War Crime" Stigma Is Lifted*, GUARDIAN (Nov. 20, 2012, 7:11 AM), http://www.guardian.co.uk/commentisfree/2012/nov/20/croatia-war-crime-stigma-lifted.

92. *Id.*

93. Rome Statute, *supra* note 71, at art. 17 ("The Court shall determine that a case is inadmissible where . . . [t]he case is being investigated or prosecuted by the State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.").

94. *Kenya Wins African Support to Defer ICC Prosecutions*, VOICE OF AM. (Jan. 20, 2011), http://www.voanews.com/content/kenya-wins-african-support-to-defer-icc-prosecutions-114375004/157290.html.

public opinion was less concerned about the responsibility and fate of individuals than about the ratio of indictees within each community.[95] Although these communities are supposed to escape stigma through the device of individualized responsibility, they can end up being stigmatized, or feeling as if they are. In the ICC context, the relative stigmatization of entire communities has emerged not only from the inherent selectivity of prosecutions—which almost always makes it seem as if certain communities are more to blame than others—but also from the court's practices in terms of assessing who is a "rightful" victim. In the *Lubanga* case, one of the questions was whether the Hema community or its individual members should benefit from reparations, that is, whether they could be conceived as "victims" of Lubanga.[96] The legal representative of the victims did not hesitate to emphasize that, although the Hema community did suffer from having some of its youth recruited as child soldiers, a significant proportion of the community also supported those responsible for their recruitment.[97]

IV
RECEIVING STIGMA

To be prosecuted by the ICC is in a sense a double stigma: The substantive charge imposes stigma, but so does the fact that one is being tried by the ICC, a body that presents itself as an emanation of mankind. ICC prosecutions carry particular stigma given their highly selective character and the attendant belief, apparent from public opinion, that the prosecutor "must be pretty sure" of her case to have selected a particular defendant. To be selected by the ICC prosecutor in the tribunal's early years is also a guarantee that one will go down in history, alongside the Tadićs, Akayesus, and Lubangas of this world, as one of the first people to be tried before the ICC. This stigma's significance is perhaps underlined by the rarity of any dialogue about rehabilitation as a potential prospect for those convicted.[98] It is as if the accumulated weight of the stigma compromises the ability of any individual to ever atone for it within a lifetime.[99]

The effects of ICC-imposed stigma are difficult to project because the ICC does not dictate those effects. For stigma to become part of the reinforcement

95. Frédéric Mégret, *The Legacy of the ICTY as Seen Through Some of its Actors and Observers*, 3 GOETTINGEN J. INT'L L. 1013, 1041 (2011).

96. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision Establishing the Principles and Procedures to Be Applied to Reparations, ¶ 51–53 (Aug. 7, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1447971.pdf.

97. *Lubanga*, Case No. ICC-01/04-01/06, Observations sur la fixation de la peine et les réparations de la part des victimes, ¶ 15–17 (April 18, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1396912.pdf.

98. *See* Ralph Henham, *The Philosophical Foundations of International Sentencing*, 1 J. INT'L CRIM. JUST. 64, 69 (2003) (emphasizing that although rehabilitation is mentioned as one of the goals of international sentencing, the latter is hardly theorized in the ICTY's and the International Criminal Tribunal for Rwanda's jurisprudence).

99. This is not to say that some degree of rehabilitation is not possible and that some individuals have not over time recovered from the stigma of international prosecutions or convictions.

of social bonds—to play a role in the constitution of society—it must to a degree be accepted by the society it addresses. In other words, criminal justice alone cannot produce stigma without some social relay. Criminal justice only gives the signal for a reaction that must ultimately be collective. There is certainly evidence that prosecutions and, a fortiori, convictions will lead to some degree of social shunning. It has been argued, for example, that "[s]tigmatizing delinquent leaders through indictment, as well as apprehension and prosecution, undermines their influence."[100] There is also hope that stigmatization will facilitate transitional justice processes.[101] It is probably too early to determine whether Lubanga or child-soldier recruitment (in the best of cases) have become more stigmatized as a result of ICC practices, although that is not implausible.

However, there is also reason to be skeptical of too linear a vision of the operation of stigma, because the effects of criminal justice are distorted and twisted by the operation of the international realm and the complexity of their reception. In particular, a truly agentic approach to practices of international criminal justice must emphasize the degree to which the overall level of stigma in any given case is also affected by the way in which its targets react to it, whether by acknowledging and accepting it or by rejecting it individually or collectively. International criminal justice, needless to say, is also written by the accused and convicted and their defense counsel, as well as the societies that are supposed to be the ultimate beneficiaries of its realizations.

A. Acknowledgment

The operation of stigma presupposes a somewhat unitary social sphere, one in which a particular "conscience collective" manifests itself to stigmatize certain crimes.[102] In the domestic context, the accused or convicted are surely a part of this "conscience collective." Although the domestically accused may vigorously deny the facts, claim their innocence, or insist that a punishment is too harsh, their challenge to the operation of the criminal-justice system is not one that denies it the power to assign stigma altogether, or that fundamentally disagrees that the crimes they are accused of ought to be stigmatized. In fact, the domestic accuseds' denials of guilt reinforce the sense that these accused do not wish to be the targets of a legitimate effort to assign stigma. The exception here is quite rare, manifested in the figure of the "rebel outlaw" who challenges the ability and rightfulness of society to stigmatize his behavior.[103]

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100. Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 7 (2001).

101. Juan E. Méndez, *National Reconciliation, Transnational Justice, and the International Criminal Court*, 15 ETHICS & INT'L AFF. 25, 32 (2001).

102. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY, *supra* note 2, at 84.

103. For an exploration of the "rebel outlaw" in the context of offences against property, see EDUARDO MOISÉS PEÑALVER & SONIA K KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP (2010).

By contrast, those stigmatized by international criminal justice have at times manifested an attempt to overthrow the dominant legal order. The Third Reich comes to mind as a project that thought of itself not (only) as one of norm transgression, but of fundamentally reconstituting the norms of the international order in its own image.[104] There are many examples of international criminals mounting vigorous challenges to the ability of international criminal tribunals to stigmatize them, from Hermann Göring to Slobodan Milosevic.[105] In conditions of extreme social, psychological, and moral polarity, where, as the saying goes, one man's terrorist is another's freedom fighter (and one man's dictator is another's liberator), the very project of international criminal justice may be put in question.

This contrast between the international and the domestic, however, must be tempered. Even among the Nuremberg defendants, many were arguably more interested in defending their individual innocence than in mounting a radical ideological challenge to the liberal and humanitarian values that dominate the tribunal. Indeed, it has been pointed out that dispensation of stigma, if it is done in conditions that appear fair over time, may "suck in" the defendants into a grudging form of cooperation with, ultimately, their own stigmatization.[106] Many of the accused that the ICC has dealt with so far probably do not seek to overthrow the international legal order. Theirs are crimes of hate, cynicism, or avidity (folly even), but they are not necessarily anchored in an articulated alternative vision of society, one based on a radical exaltation of violence, for example. In that respect, Lubanga provided the ICC with an ideal first conviction: someone who strenuously denied that he had been knowingly involved in the recruitment of child soldiers[107] and thus seemed to be conceding the very rationale of international criminal justice's stigmatizing effort, namely the social evil of that offense. The corresponding bodily practices suggest docility, deference, acceptance of the authority of the judges, an emphasis on factual denegation or relatively arcane legal points as a defense, and "playing by the rules."

Indeed, all of the accused appearing before the ICC seem to have implicitly acknowledged that there are such things as the international crimes of which they are accused. They merely insist that they are not guilty of the crimes. They appear before the court as innocents, rather than as challengers; or—even as

104. *See* Detlev F. Vagts, *International Law in the Third Reich*, 84 AM. J. INT'L L. 661 (1990).

105. A rather fascinating psychological study of this phenomenon can be found in Jerrold M. Post & Lara K. Panis, *Tyrrany on Trial: Personality and Courtroom Conduct of Defendants Slobodan Milosevic and Saddam Hussein*, 38 CORNELL INT'L L. J. 823 (2005). And Lydwine Helly observes that Milosevic's attitude at trial corresponded precisely to "*la défence de la rupture*" as made famous by Jacques Vergès. L'APARTHEID JUDICIAIRE: LE TRIBUNAL PÉNAL INTERNATIONAL ARME DE GUERRE (Pierre Marie Gallois & Jacquer Vergès eds., 2002) (Fr.).

106. GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE 203 (2000).

107. Wairagala Wakabi, *Lubanga's Defense Opening Statement – Witnesses Lied, Lubanga is Not Guilty*, LUBANGA TRIAL (Jan. 27, 2010), http://www.lubangatrial.org/2010/01/27/lubangas-defense-opening-statement-witnesses-lied-lubanga-is-not-guilty/.

they challenge the court itself—they rarely challenge the crimes as such. Today's ethnic cleanser is more likely to ascribe blame to others, to recharacterize crimes against humanity as armed conflict or counterinsurgency, or to simply deny that he was there than he is to challenge the existence of a global corpus of offenses or even the court itself. There is evidence of a surprising degree of cooperation with the ICC, as when the six individuals accused by the ICC prosecutor in Kenya decided to respond to the court's summons.[108] In that respect, ICC practices, including the conduct of defendants themselves before the court, do seem to reflect the gradual normalization of international criminal-law discourse as a set of stigmatized motifs, which delineate a paradoxical community of values between accused and accuser.

There are also well-documented examples of a more open recognition by defendants of the validity of the stigma directed at them. At Nuremberg[109] and before the ICTY,[110] this recognition lead to forms of soul-searching and even repentance. Even though the ICC has not yet had a great repentant, there is no doubt that contrition would be a powerfully validating force, for court as much as victim.

B. Defiance

Historically, however, the accused will not always be crushed by stigma and there has been a distinct pattern of reacting with overwhelming defiance and attempting to inflict counterstigma on the accuser (the international community). Even though, as has been seen, those accused may not challenge the very idea of international criminal justice, this does not mean that they take the stigma directed at them easily, or that they do not challenge international criminal tribunals' authority to be the distributors of that stigma. Attacks against international criminal justice by the accused have often been strong and sustained, all the more so because they are often collective. For example, Hermann Göring[111] and Slobodan Milosevic[112] lambasted the Nuremberg Tribunal and the ICTY respectively as unjust courts that had little understanding for history or authority to condemn them.

More recently, the critique that the ICC has exclusively focused on Africans, implicitly or explicitly stigmatizing the court as racist, has of course proved to be a powerful plank in counterstigmatizing strategies: What credit, indeed, should

108. Peter Obuya, *Deputy President William Ruto Leaves for International Criminal Court Trial*, DAILY NATION (Sep. 9, 2013), http://www.nation.co.ke/news/politics/William-Ruto-leaves-for-International-Criminal-Court-trial/-/1064/1984858/-/11wosy0/-/index.html (Kenya).

109. *See* DONALD M. MCKALE, NAZIS AFTER HITLER: HOW PERPETRATORS OF THE HOLOCAUST CHEATED JUSTICE AND TRUTH 165–66 (2012).

110. *See, e.g.*, Alan Tieger, *Remorse and Mitigation in the International Criminal Tribunal for the Former Yugoslavia*, 16 LEIDEN J. INT'L L. 777 (2003).

111. 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 366–68 (1948), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-XXII.pdf.

112. *See* GIDEON BOAS, THE MILOŠEVIC TRIAL: LESSONS FOR THE CONDUCT OF COMPLEX INTERNATIONAL CRIMINAL PROCEEDINGS 11 (2007).

be attached to the stigmatizing messages of an international institution that is itself the subject of reproach?[113] In cases where the stigma of international prosecutions cannot entirely be countered on the world stage, defendants and convicts may engage in strategies of martyrdom, accepting their fate before international criminal justice but only as a way of enhancing their status with local audiences.[114]

Narratives of stigmatization before the ICC must therefore take into account the agency of those accused or convicted and their ability to put up a resistance against the international criminal-justice system's attempts to ostracize them. The ability of the accused or convicted to counteract stigma will depend on the availability of a strong alternative narrative to the one proposed by the ICC and, perhaps most of all, on the strength of communal and political ties. In that respect, it is fair to say that someone like Omar Al-Bashir has done reasonably well in neutralizing some of the stigma attached to his prosecution by enlisting support both at home and abroad. For example, Al-Bashir has sought to counterstigmatize the ICC as a neocolonial institution, thus using the fact of his prosecution to his advantage.[115] Although his success in doing so may be limited on the global plane, it has not been insignificant in Africa and is undoubtedly part of the African Union's turnaround vis-à-vis the court.[116]

C. Uncooperative Societies?

One of the assumptions of Durkheimian stigmatization theory seems to be that the source and recipient of stigma are essentially the same society, so that the stigmatizing message will be received more or less unmodified by the society at which it is targeted.[117] The problem in the international context is of course that "international society" is a "society of societies," one whose messages must in practice cross borders to be heard locally and that does not perfectly coincide with the recipient societies. In fact, the very challenge of international criminal justice is that it is not always clear which society its operation is supposed to invigorate (whether international or domestic society). In this context, the difficulty for the ICC is not only that not all the accused and convicted accept their share of the stigma but, perhaps more interestingly from a sociological

113. *See, e.g.*, Udo Froese, *Raping Africa Through the ICC*, S. TIMES (Oct. 18, 2013), http://www.southerntimesafrica.com/news_article.php?id=8862&title=Raping%20Africa%20through%20the%20ICC; *but see* David Smith, *New Chief Prosecutor Defends International Criminal Court*, GUARDIAN (May 23, 2012, 9:12 AM), http://www.theguardian.com/law/2012/may/23/chief-prosecutor-international-criminal-court.

114. KATHARINA VON KELLENBACH, THE MARK OF CAIN: GUILT AND DENIAL IN THE POST-WAR LIVES OF NAZI PERPETRATORS 112–37 (2013).

115. *See Sudan's Bashir Blasts ICC's 'New Face of Colonisation,'* FRANCE 24 (May 27, 2013), http://www.france24.com/en/20130527-african-union-icc-justice-sudan-bashir-kenya-kenyatta.

116. Charles C. Jalloh, Dapo Akande & Max Du Plessis, *Assessing the African Union Concerns About Article 16 of the Rome Statute of the International Criminal Court*, 4 AFR. J. LEG. STUDS. 5 (2011).

117. In Durkheim's work, the reference is exclusively national societies, and it is the strength of such societies that the assertion of criminal law reinforces.

perspective, that not all societies will accept that they should be relays of that stigma.

Even though some ICC cases result in broad local social support for the stigmatization of certain behavior,[118] stigmatization efforts nonetheless still require careful calibration. The ICC's stigmatization efforts can backfire if they are heavy-handed in relation to the actual behavior or to domestic perceptions. For example, Damaška has expressed fear that stigma will be ineffective if applied "not only [to] truly reprehensible individuals but also [to] those who are only marginally culpable," where "to treat the latter as perpetrators of the most heinous crimes imaginable strikes ordinary people as too harsh or morally obtuse."[119] He cautions against the "dilution of the disgrace of convictions for grossly inhuman acts."[120] It is unclear at this stage whether ICC prosecutorial practices run this risk, but it bears mentioning that public opinion in Ituri seems to suggest anxiety over the opposite possibility, namely that Lubanga was prosecuted for lesser charges (child soldier recruitment) than he could and arguably should have been (killing of civilians, systematic sexual violence, and so forth).[121]

Even so, in cases where the legitimacy and authority of international criminal tribunals are shaky, attempts to point the finger at those accused may backfire by endowing them with a heroic sort of status. This occurred in the former Yugoslavia, where new governments either stood by the accused, or gave them a hero's farewell, as well as a hero's welcome when they came back from the ICTY.[122] This tendency has also been evident in the ICC context where the attempt to stigmatize leaders like Al Bashir, Kenyatta, or Gbagbo has been resisted either in part or in whole by local societies, and where the status of the accused may even have been enhanced.[123] In these scenarios, the ICC can become counterstigmatized, in a sense, as alien or arbitrary.

Thus, international criminal justice is probably most useful in contexts where local societies are likely to relay the international stigma. Historical breakdowns in the "stigma chain" (for example, between the Tokyo Tribunal and post–World War II Japan) have not necessarily nullified the impact of

118. For example, as many as sixty percent of Kenyans were at one point said to support the ICC prosecutor's bringing charges against those who became known as the "Ocampo Six." *Kenyans Want the Ocampo Six Tried in Hague*, DAILY NATION (Dec. 24, 2010), http://www.nation.co.ke/news/politics/Kenyans-want--Ocampo-Six-tried-in-Hague-/-/1064/1078458/-/hnw0vh/-/index.html (Kenya).

119. Damaška, *supra* note 50, at 351.

120. *Id.* at 353.

121. INT'L REFUGEE RIGHTS INITIATIVE & APRODIVI-ASBL, STEPS TOWARDS JUSTICE, FRUSTRATED HOPES: SOME REFLECTIONS ON THE EXPERIENCE OF THE INTERNATIONAL CRIMINAL COURT IN ITURI 13–14 (2012), *available at* http://www.refugee-rights.org/Assets/PDFs/2012/StepsTowardJusticeFinal.pdf.

122. *See, e.g.*, Enis Zebic et al., *Croatian Joy, Serbian Anger at Gotovina Acquittal*, INST. FOR WAR & PEACE REPORTING (Nov. 19, 2012), http://iwpr.net/report-news/croatian-joy-serbian-anger-gotovina-acquittal.

123. *See, e.g.*, Jess Kyle, *Kenya's ICC Withdrawal: The Wrong Face for ICC-Africa Relationship Debates*, JURIST (Oct. 8, 2013), http://jurist.org/dateline/2013/10/jess-kyle-icc-kenya.php.

international verdicts but have dampened that impact.[124] Conversely, continuity in the stigma chain has magnified the stigma attached to those convicted, as in Rwanda, for example, where the state and the international community's stigmatizing goals have been broadly aligned.[125] The ICC is always at risk of over- or understigmatizing behavior from a domestic point of view: There will be those who argue, for example, that Lubanga's conviction for recruiting child soldiers overburdened the man and made too much of a lone offense. Lubanga is thus a bit more likely to be seen as an expiatory victim of international criminal justice, and the stigma resulting from his conviction as attaching to the operation of an artificial international society (rather than Congolese or Iturian societies). On the other hand, there will also be those who will argue that certain crimes or certain individuals are curiously escaping stigma.

V
CONCLUSION

Practices of stigmatization at the ICC are rich and complex. Stigma is attached, intentionally or not, to the accused and, a fortiori, to the convicted. Practices of stigmatization reveal the significance of stigma and the ongoing competition to assign it. Stigma may have some broad consequences, whether intended or unintended. It certainly seems to be the case that stigma is difficult to contain: Stigma is always at risk of extending beyond its more immediate targets. The fact remains that getting the right balance of stigma is a condition of the authority and legitimacy of international criminal justice, and thus ultimately of its efficacy and sustainability. Practices of stigmatization reveal the never-ending struggle to neither over- nor understigmatize, in ways that sustain the credibility and success of the international criminal-justice enterprise both domestically and internationally.

Beyond this, it seems that the emphasis on stigma as a principal function of international criminal justice can help us reformulate questions about the nature of the ICC's practices in at least three ways.

First, the emphasis on stigma allows us to think about the goals and impact of international criminal justice as they emerge through repeated practices of key actors. Because for Durkheim the target of the criminal law is not the criminals but society's law-abiding elements, the sociology of stigma helps us move beyond somewhat tired debates about whether international criminal

124. *See* MADOKA FUTAMURA, WAR CRIMES TRIBUNALS AND TRANSITIONAL JUSTICE: THE TOKYO TRIAL AND THE NUREMBURG LEGACY 68–86 (2007).

125. The Rwandan government has been broadly committed to an agenda of punishing the perpetrators of genocide and as a result, even though it has had its differences with the international community, the stigma of convictions by the International Criminal Tribunal for Rwanda is likely to be carried over into Rwandan society. If anything, the government and Rwandan public opinion have occasionally deplored that the tribunal did not sufficiently stigmatize those involved in the genocide. Kinglsey Chiedu Moghalu, *Image and Reality of War Cimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda*, 26 FLETCHER F. WORLD AFF. 21, 28–30 (2002).

justice has a protective or deterrent power.[126] Instead, it forces us to think more about how criminal justice consolidates expectations of the "normal." If the goal is less to deter criminals as such than to reinforce the international community's sense of self, then does the ICC achieve this goal, and if so how would we know it? A stigma-based approach would recommend that we look for the impact of international criminal justice far beyond the immediate operation of the ICC, in the reinforcement of some sort of global "conscience collective." It is an understatement to say that measuring such a conscience is an arduous and problematic task. Certainly, though, it can be conceded that, through the rise of international criminal justice, a social element is struggling to express itself. Even a relatively ineffective international criminal-justice system (ineffective in terms of the number of people it can arrest, prosecute, and convict) might be a socially significant tool if its stigmatizing signals end up shaping international society. Although the doctrine of international criminal justice is often seen as based on developments over the last decades in international human rights and international humanitarian law, there is no doubt that the stigmatizing thrust of international criminal justice in turn helps reinforce the sense that the relevant norms have now become entrenched.

Second, focusing on stigma as the ICC's most central function can also help us problematize the court's efficacy relative to other transitional mechanisms of international criminal justice. If stigma is indeed important and the court is less about sanction than about shaming, then this makes its claim to specificity less strong. Alternative modes of transition—be they truth commissions or traditional justice—are arguably just as if not more effective at shaming.[127] For example, these mechanisms allocate stigma in ways that are more community-based and diffuse. As Linda Keller put it, alternative justice mechanisms have "the ability to reach more than the select few, but preserve the stigma of punishment by incorporating local beliefs and customs as accountability measures for a larger number of offenders."[128] The inability of the ICC to speak quite the language of stigma spoken within given societies is an argument in favor of translating international stigma (something to which outreach efforts by the tribunals are dedicated). Comparing stigmatizing practices in international criminal justice and in various institutions of transitional justice may yield interesting insights as to the role that stigma serves in each context, and how it is more or less well served by its practitioners.

Third and finally, the focus on stigma can help us to think more creatively about the relationship of international criminal justice to power. International criminal justice has the power not only to convict a few distinct individuals but

126. *See, e.g.*, Akhavan, *supra* note 100 (discussing whether international criminal justice prevents future atrocities).

127. *See* ROBERT I. ROTBERG & DENNIS THOMPSON, TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 16, 25, 82, 100, 103, 164 (2010).

128. Linda M. Keller, *Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms*, 23 CONN. J. INT'L L. 209, 271 (2007).

to stigmatize entire types of deviancy and, in the process, to help constitute a "normal" international society. The ability to control decisions about what ends up being stigmatized is thus absolutely central to the constitution of the international system, and points to the potentially ideological and partial nature of certain practices before international tribunals. The question is not only whether an international society exists, but which international society exists, and how it is constituted by the stigmatizing practices of a court. Here, the ICC prosecutor and judges appear to wield considerable power as the ultimate arbiters of an international order of stigma.