

The End of Impunity? Global Law-Making and Atrocity Crimes¹

Den Kreislauf der Straflosigkeit durchbrechen: Internationales Strafrecht und Verbrechen gegen die Menschlichkeit

Susanne Karstedt

Abstract: There was nothing inevitable about the amazing development of international criminal law and justice institutions since the 1990s, and neither about the proliferation of international and domestic procedures to end impunity for gross human rights violations and international crimes, in particular atrocity crimes. As socio-legal researchers engaged with the processes of global lawmaking in the arena of international criminal justice, they found “recursive” cycles of lawmaking (Halliday 2009), which involved transnational and domestic politics and actors, and were driven by mechanisms resulting from structural characteristics of the global sphere, and the very nature of international law itself. The article explores this development through the lens of three “constitutional moments” and the diagnostic struggles and contestation of the legal and political concept of genocide. Finally it analyses the emerging power of international criminal law through the processes of commitment and compliance, deterrence and expressivism. In a surprising analogy to E.P. Thompson’s study of lawmaking in 18th century Britain, the self-binding power of law emerges as a decisive factor in international criminal lawmaking.

Zusammenfassung: Niemand hat die erstaunliche Entwicklung voraussehen können, die das internationale Strafrecht und seine Institutionen seit 1990 genommen haben. Ebenso wenig gab es zu dem Zeitpunkt überzeugende Anzeichen für die dann einsetzende globale Entwicklung von internationalen und nationalen strafrechtlichen und anderen Verfahren, die der Straflosigkeit für Menschenrechtsverletzungen, massive Gewalttaten und Genozid ein Ende setzen sollten. Diese Entwicklungen der strafrechtlichen Rechtssetzung im internationalen Raum haben für die Perspektive auf die einheimische Strafrechtsproduktion durchaus einschneidende Folgen. In der Sphäre internationaler Politik und internationalen Rechts findet die Rechtssoziologie eine neuartige Dynamik vor, die Halliday (2009) als „rekursive Zyklen“ globaler Rechtssetzung bezeichnet. Diese involvieren internationale, transnationale und nationale Akteure, und sie werden durch Mechanismen in Bewegung gesetzt und gesteuert, die einerseits aus den strukturellen Bedingungen der globalen Arena resultieren und andererseits der ‚Natur‘ des internationalen Rechts geschuldet sind. Der Beitrag sondiert diese Entwicklung, indem er drei „konstitutionelle Momente“ des internationalen Strafrechts, Konflikte um relevante Deutungsmuster und vor allem die politische und rechtliche Diskussion um Genozid und seine strafrechtliche Verfolgung in den Blick nimmt. Vor diesem Hintergrund wird dann der wachsende Einfluss des internationalen Strafrechts anhand der Prozesse von Verpflichtung (commitment) und Befolgung (compliance) sowie der Funktionen der Abschreckung und Expressivität untersucht. Dabei lässt sich in einer durchaus überraschenden Analogie zu E.P. Thompsons berühmter Studie zum Prozess der Strafrechtsproduktion im England des 18. Jahrhunderts („Whigs and Hunters“) zeigen, dass die normative Bindungskraft des Rechts für alle Akteure ebenso ein entscheidender Faktor in der Sphäre des internationalen Strafrechts ist.

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Introducing global lawmaking: Leaving the master paradigm behind

When the Marxist historian E.P. Thompson set out to research a particularly bad and nasty piece of 18th century legislation in Britain, he was not prepared for what he was going to find in the end. He had started his analysis from the firm preposition that the “Black Act”, which incriminated and imposed death sentences for hunting and poaching on the grounds of the landed gentry and governing class in the first half of the 18th century was a clear case of law as the instrument of class power. Initially, it had seemed to be an exemplary history of power and repression, class struggle and in particular the wielding of the law at the hands of the ruling class. Until today, his book “Whigs and Hunters” is famous for his final confession:

“But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power’s all-intrusive claims, *seems to me to be an unqualified human good.*” (Thompson 1977: 266, italics S.K.)

Law, he found, was “less an instrument of class power than a central arena of conflict” (Thompson 1977: 264), and it changed in the course of the ensuing conflict. It turned out that “the rulers were, in serious senses [...] the prisoners of their own rhetoric” (263), as the law became the “central legitimizing ideology” (ibid). When the government and the landowners were defeated in courts, this enhanced their legitimacy as well as their power by simultaneously curbing it and checking on intrusions on property. The pre-eminence of law and its ‘rule’ was not the least in their own interest. Thompson summarized his conclusions:

“And not only were the rulers (indeed the ruling class as a whole) inhibited by their own rules of law against the exercise of direct unmediated force (arbitrary imprisonment, the employment of troops against the crowd, torture, and those other conveniences of power with which we are all conversant), but they also believed in these rules, and in their accompanying ideological rhetoric, to allow, in certain limited areas, the law itself to be a genuine forum within which certain kinds of class conflict were fought out” (265).

There was nothing inevitable about the emergence of this “unqualified human good”. This turn could neither be predicted from the dominance of interests (which were thwarted in the end), as a Marxian perspective would have suggested, nor from the power of ideas and their spread among communities alone, nor just from serendipitously conspiring circumstances. The driving forces could not be squeezed into the mould of a master paradigm of lawmaking and implementation, or court decision making, as Thompson found. Rather the narrative of this amazing and unexpected development disintegrated into multiple stories, different episodes and processes. The process itself developed a dynamic that was recursive and changed the law itself. In an “arena of conflict” indeed it is difficult to predict outcomes of these conflicts, and with this conceptualization, Thompson discarded the certainties that a Marxian perspective might have offered. At the end of his journey through theories and archives, he emerged without a theory, which he had lost on his way, but with a new framework of inquiry, and with the insight that the “rule of law itself [...] [seemed] to be an unqualified human good.” Against this backdrop of one of the most influential texts of socio-legal analysis, the themes and problems of global law making against

atrocities spring to our eyes: law as central legitimizing idea; the rule of law against the uninhibited exercise of direct unmediated force and repression; the “self-binding” (Simmons & Danner 2010; Fearon 1997) of rulers according to a new rhetoric of human rights; and the end of impunity for the gross human rights violations and atrocity crimes, which are all included by Thompson as indicators of such unmitigated exercise of power. Is it possible to compare 18th century Britain with the global community of the 21st century? Certainly not, however, Thompson’s ‘way of viewing’ foreshadows the contours of contemporary perspectives on global lawmaking. With very rare exceptions the grand master paradigms – Marxian, Durkheimian, system theory or (post) modernity – seem to be out of use and assigned to the “dustbin of history”.² Instead, we find a pre-eminence of processual and dynamic concepts, of interactive processes, and a focus on “actors and mechanisms” (Halliday 2009: 265), which both produce a medley of extremely useful concepts, leads toward systematic theory but stop short of an overarching narrative or master paradigm, at least for now. Braithwaite and Drahos (2000) in their award-winning study of global business regulation successfully used an actor-mechanism-network perspective for a wide range of areas of global law-making and regulation, and they based this approach on Elster’s (1989) original work on mechanisms in the social sciences generally. One might regret this lacuna, however, it seems that such a paradigm might be as unwieldy for the 21st century global arena as it finally turned out for 18th century Britain, and for Thompson.

What are the mechanisms through which global lawmaking proceeds, and that lead to certain normative and institutional outcomes? One set of mechanisms comprises those that result in the adoption and implementation of global lawmaking by states; these include diffusion, learning and modeling, but also competition and coercion (Dobbin et al 2007; Braithwaite & Drahos 2000). Not dissimilar to Thompson’s account of 18th century Britain, power, interest and costs of actors are juxtaposed to binding, “self-binding” (Simmons & Danner 2010) or (voluntary) “hand-tying” of states (Fearon 1997), thus contrasting “rationalist” with “constructivist” approaches (Fehl 2004). Halliday (2009: 277pp) aims at transcending this divide between “rationalist” and “constructivist” approaches in an actor-mechanism based framework and identifies four mechanisms. It is the inbuilt tensions of global lawmaking that drive its iterant and recursive cycles: “actor mismatch”; “diagnostic struggles”; “contradictions” and “indeterminacy”. All four mechanisms are important in the field of international human rights and atrocity law.

In the sections to follow, I will explore involvement of actors and driving mechanisms in international criminal law making. This will be done against the backdrop of Thompson’s insights, and with guidance from Halliday’s framework. Neither am I going to use Thompson’s insights as a theoretical framework (as outlined above, it is definitely not) nor will I follow through with the full conceptual framework that Halliday provides, or use this exclusively. Rather I will do this selectively and in the context of three themes. I will capture the dynamics of international criminal lawmaking through the lens of three “constitutional moments”, which decisively changed laws and institutions, mechanisms and actors’

2 The same is true for comparative research on criminal law and punishment (Karstedt 2007) even if one does not share the harsh verdict of Whitman (2005, 24): “Durkheim’s theory is perhaps the classic example of an account of modernity that is plainly wrong.” Empirical sociolegal studies of global lawmaking are rarely embedded in grand theoretical design or classical theories (exception: Hagan & Levi 2005), and these are suspiciously absent in most of the research and writing (exception: Fischer-Lescano 2005).

involvement. This approach is based on Bruce Ackerman's (1991) influential concept. I will then proceed to analyze changes in the law and its implementation that have arisen from diagnostic struggles and contradictions in the field, using specifically one of Halliday's mechanisms. Finally I look at the outcomes of these processes, and analyze compliance, self-binding and deterrence, and thus the power of international criminal law. I will refer to different instances of international criminal law making, and will not base my analysis on just one instance (c.g. the Rome Statute). These analyses will be preceded by an overview over contemporary conceptualizations of global and international law making, in particular in the field of international criminal law. This overview will be then followed by a brief outline of the amazing proliferation of prosecutions of atrocity crimes by international and national courts and legal institutions, in particular of war crimes, crimes against humanity and genocide that are at the core of international crimes.

Contemporary conceptualizations of global lawmaking

In his "sociolegal agenda" for global lawmaking, Halliday (2009: 264) names two "distinguishing elements of global normmaking" that any analytical framework of global lawmaking needs to accommodate, and which apply to all fields of global law making from human rights, genocide and crimes against humanity to trade law and climate change. First, global lawmaking occurs in an unsettled "institutional forest" – which to many looks more like an impenetrable thicket (Kruckenberg 2011); second, global lawmaking has a "remarkable dynamism" as it takes place in transnational and supra-state bodies, which in turn "constantly negotiate the formulation and implementation of global norms with national and subnational actors [...]" (Halliday 2009: 264- 265). Global norms consequently are "formalized in bewildering variety", including treaties, conventions, charters and (optional) protocols. This applies to all fields of global normmaking, and human rights and international criminal law are by no ways exceptions, rather to the contrary. In particular in this field, national states and actors are not only implementing global norms, but have taken the initiative and actually instigated processes and episodes of global human rights lawmaking.³ In between the global sphere and national actors regional supra-state institutions have become increasingly influential in lawmaking on atrocity crimes and gross human rights violations. Both Europe and Latin America have emerged as regional actors, and their respective Courts of Human Rights have not only shaped regional law and procedures, but had repercussions on the global level (for Europe: Karstedt 2013a). Thus, the decision of the Inter-American Court of Human Rights on the prohibition of amnesties for gross human rights violations and atrocity crimes, or on forced disappearances had a considerable impact far beyond the region (Fernandes Carvalho Vecoso & do Amaral 2011). In contrast to lawmaking in nation states and their respective legal systems, lawmaking and implementation cannot be neatly kept apart in the global sphere, and courts on all levels are important and often decisive actors in the field.

Sikkink (2011, Dancy & Sikkink 2012) identifies Latin America as the region from where multiple domestic models emanated, which formed the backdrop for regional modeling and diffusion of models, but also for the international community to develop new legal doctrines and institutions. According to her comparative empirical analysis, Latin Ame-

3 Sikkink 2011; Dancy and Sikkink 2012; Simmons 2009; Simmons and Danner 2010.

rica has become the world leader in combating atrocity crimes through a variety of legal instruments and has succeeded in considerably curbing gross human rights violations. Between 1980 and 2010 it was the only global region in which state violence (including extrajudicial killings, torture and forced disappearances) was reduced (Karstedt 2013a). It is in particular at the intersection between global and international, domestic and regional actors, where law making on atrocity crimes takes place. This has generated an “institutional forest” and a variety of formal norms in this area, as well as a multitude of different but nonetheless simultaneous dynamics, episodes and cycles.

Indeed, the dynamism of global lawmaking in the field of atrocity crimes takes centre stage in contemporary socio-legal analyses. This mirrors not only the particular setting and environment of global lawmaking in this area, as argued by Halliday, but equally the undeniable proliferation of legal institutions and prosecutions of atrocity crimes across the past three decades (Karstedt 2012a; see below). Halliday (2009) conceptually captures this dynamism and the processual nature of global lawmaking with his terminology of “norm-making episodes”, “recursivity” and “interacting cycles”, through which he tries to link the different levels of global law making. Simmons (2009) builds upon the more conventional concepts of diffusion, adaptation and compliance among national actors, resp. states in her attempt at analyzing the dynamic processes through which international human rights law has emerged and become established internationally. Kathryn Sikkink (2011: chapt 4) coined the perhaps most influential term that best grasps the very nature of global lawmaking between domestic, regional and global actors and institutions. In the “justice cascade” two different streams combine and are channeled by a “hard law streambed”. The first stream includes international prosecutions, from the Nuremberg Trials to the ICTY and ICTR and finally the ICC. The second stream comprises domestic and foreign prosecutions, from Greece and Portugal in the 1970s, Argentina in the 1980s, and the Pinochet Case at the end of the century. Finally they converge in the emergent “decentralized, interactive system of global accountability” for atrocity crimes (*ibid.*: 98).

These approaches have in common that they all acknowledge that even in the face of undeniable proliferation of international and domestic criminal prosecution and other legal procedures like Truth Commissions, there is nothing inevitable about this development, and none of the ensuing dynamic models is deterministic. Global lawmaking against atrocity crimes does not follow a determined pathway that is carved out by external structures, necessities or vested interests, nor does it strictly follow the formal properties of law itself, and law’s capacity to expand and generate law and legal institutions. Rather, as Thompson realized, the formal properties of law as well as the ideas and concepts enshrined in these properties, interact with external structures of power, and do so with indeterminate outcome in a given conflict situation (see also Koskenniemi 2002: 508). As the Black Act was simply not an extension of the power of the land-owning gentry in 18th century Britain, global lawmaking is not simply an extension of state power (see e.g. Simmons 2009; Simmons & Danner 2010; Glasius 2006). In contrast, nearly all of the research in the area of international criminal lawmaking points to “institutional emergence” of bodies of norms and procedures, that achieve independence and independent influence on global and domestic behavior of states, governments and civil society actors, as well as on international bodies themselves (Halliday 2009: 285). Further, much of this work gives evidence and demonstrates the influence of weak actors rather than of the most powerful actors. Weak actors in the global sphere like e.g. NGOs are linked in “issue networks” (Sikkink 1993, 1995), or to international legal experts and commissions, and they forge coalitions with more power-

ful actors as e.g. in the negotiations leading to the Rome Statute which established the ICC (Glasius 2006). Rather than juxtaposing formal qualities of law and nonlegal external forces, the framework of “recursivity” of global lawmaking incorporates the “constitutive power of legal concepts” and the “formal properties of global law” giving these equal weight to the structure of global institutions and the politics of a variety of actors, including the “legal complex” and civil society actors, as well as courts (Halliday 2009; Glasius 2006).

The two conceptual pillars on which sociolegal research in the global sphere rests are thus “actors” and “mechanisms” (Halliday 2009; see also Braithwaite & Drahos 2000). States are still primary actors in the global arena, but they move in a crowded field. Besides nation states, international organizations like the UN and its bodies; international professional associations and other international civil society actors, e.g. international and national non-governmental organizations (INGOs; e.g. Glasius 2006); and transnational advocacy and “issue networks”, sometimes organized as committees and commissions like the Inter-American Commission on Human Rights (Sikkink 1993, 1995) are all important actors. Since the 1990s, these actors became increasingly influential in the arena of human rights and international criminal justice, perhaps more so than in any other field of global law making (e.g. Halliday et al 2013). International courts and tribunals like the International Court of Justice (ICJ), the International Criminal Court (ICC), or the International Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR), hybrid courts like the Extraordinary Chambers in the Courts of Cambodia, as well as regional courts like the Inter-American Court of Human Rights are powerful players in global lawmaking, as their decisions have an immense impact in the field (see Schabas 2012). Finally, domestic courts are influential in shaping legal doctrine and concepts. Dancy and Sikkink (2012) demonstrate the interaction between domestic and international actors for compliance with Human Rights treaties and Human Rights prosecutions. In Argentina, local groups and networks used Human Rights treaties as a tool to advance prosecutions; in Montenegro, external forces and the country’s interest to join the EU resulted in a number of Human Rights prosecutions; finally, a complex situation of interactions between local and regional courts, and the parliament accounts for prosecution of atrocity crimes in the case of Uruguay (see also Hagan, Levi & Ferrales 2006 for the ICTY). International as well as domestic courts and prosecutors’ offices are the spaces where “fields of practice” and a “juridical field” emerge, and where successive and competing practices are prerequisite to promoting international humanitarian law (Hagan & Levi 2005, Hagan 2003).⁴

What are the mechanisms through which global lawmaking proceeds, and that lead to certain normative and institutional outcomes internationally and nationally? According to Halliday (2009: 277pp) the inbuilt tensions of global lawmaking drive its iterant and recursive cycles: “actor mismatch”; “diagnostic struggles”; “contradictions” and “indeterminacy”. ‘Actor mismatch’ refers to the representation of affected actors in the process of global lawmaking, and thus ultimately to challenges to the legitimacy of the global norm. Given the fact that sovereign states perceive themselves as actors on a level playing field in the

4 Hagan and his colleagues’ research at the ICTY focuses on role of the prosecutor; he is among the few who uses classical frameworks – from Weber to Bourdieu – for his analysis of the promotion, proliferation and development of international criminal law and its institutions (Hagan & Levi 2005). They clearly demonstrate the importance of the prosecutor in international criminal justice, even for a pre-Rome case where the prosecutor was not yet independent (Schabas 2010a).

international sphere (and they are formally), this in turn might affect adoption, implementation and compliance by state actors who do not feel appropriately represented or recognized as stakeholders in the negotiations or institutions. Perhaps one of the most prominent recent examples is the accusation by the African Union that the ICC prosecutor pursues a strategy biased against African states and leaders, raised in the context of charges laid against the President of Sudan, Bashir (African Union 2012; Schabas 2009; 2010a).

'Diagnostic struggles' is the mechanism that ensues from contests over the definition of a problem, and the type and range of norms and legal institutions that will remedy the problem. Diagnostic struggles involve a range of actors and institutions, and the final interpretative frame needs to resonate with critical audiences. Diagnostic struggles emerge in the legal, political and institutional environment in which global lawmaking takes place, and at the cross-roads of their different spheres of influence. In the arena of international criminal lawmaking, the crisis of Darfur is exemplary for such a diagnostic struggle. The loss of life can be and indeed was construed as ongoing civil war, crimes against humanity or genocide.⁵ Even if the convention on the Prevention and Punishment of Genocide is one of the earliest and most established Human Rights instruments, the legal definition and term give rise to such diagnostic struggles, as during the crisis in Darfur.

'Contradictions' refer to the tensions that are innate to the process of global lawmaking and are "internalized" within the normative framework. Here, Halliday recurs to the tensions between international law and sovereignty, and between the priority of power and interests versus the priority of rights. In the arena of global lawmaking against atrocity crimes, with a multitude of actors, and competing institutions that express contrasting values, different priorities and opposing interests these contradictions are particularly visible. Exemplary here is the position of the United States versus the coalition supporting the Rome Statute and the ICC that is vividly described by US negotiator and former US Ambassador-at-large for War Crimes David Scheffer (2012).

Finally, 'indeterminacy' of the normative framework is a driving force in the recursive cycles of global law making. Indeterminacy refers to a lack in clarification of normative hierarchies, to rather open-ended outcomes of global law-making efforts, or to the deficiencies in implementation and enforcement. Indeterminacy is particularly acute where a multitude of actors and institutions act according to contrasting and different exigencies and values, as in the arena of crimes against humanity. Where a deterrent effect of international criminal justice is assumed and propagated, indeterminacy of norms and institutions is widely seen as a major obstacle towards an effective deterrent threat of international criminal justice, and often as an argument against international criminal justice and its institutions (see Kim & Sikkink 2010).

The contemporary dominance of actor-mechanisms perspectives on global law making has advantages given the characteristics of the global arena, in which lawmaking takes place, and reflects the diversity of the disciplines involved – from international relations to socio-legal studies. In particular such an approach can grasp the multitude of actors involved in the global arena, and the links between national and supra-national actors, between local justice and international courts and institutions. Global lawmaking, according to Halliday comprises more than what is visible in the international sphere, as e.g. in the negotia-

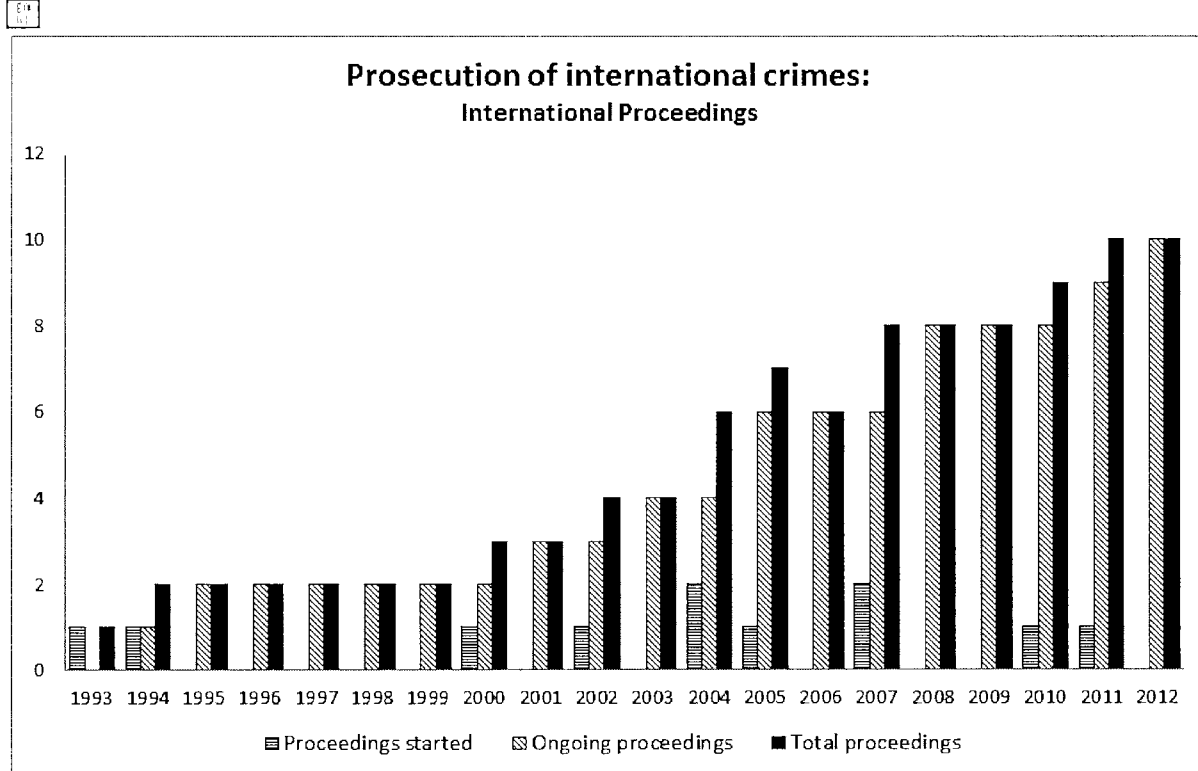
5 See for this discussion Hagan, Schoenfeld & Palloni 2006; Hagan & Rymond-Richmond 2009; Schabas 2010b; Hamilton 2011; International Commission of Inquiry into Darfur 2005; de Waal 2007; Karstedt 2013b.

tions for the Rome Statute. Local-national actors are given equal weight, be it courts or domestic lawmaking institutions. Global lawmaking, if we follow Halliday, is as much a local-national endeavor as it is an international one. The exclusive authority of the nation state over its territory, jurisdiction and its system of criminal justice is key in understanding the problems and tensions that are incorporated in the process of bringing gross human rights violations and mass atrocities to justice, and that inexorably shape the face of international criminal justice. This attempt at grasping the fragmented field of global lawmaking comes however with a drawback, the loss of the grand and master-narrative that an overarching framework and theory would provide. Rather, such a narrative is replaced by numerous and differing ones, and an assemblage of such narratives that in the best case fit together, coincide and overlap, and in the worst case, contradict each other and do not link up.

An end to impunity? The global proliferation of international criminal law and institutions

Without doubt, the emergence, propagation and stabilization of norms and institutions to combat genocide and crimes against humanities can be deemed one of the most important instances of the creation of global standards, norms and values in the latter half of the 20th century. Presently, and perhaps due to the nature of the crimes they can also be deemed the most visible and prominent instances of global lawmaking. The past two decades have witnessed the emergence of a global normative consensus on the necessity of prosecuting and adjudicating atrocity crimes, and the establishment of an international institutional framework to address these crimes. It is epitomized in the worldwide and consensual demand of an ‘end to impunity’, even confirmed by the African Union in a statement otherwise highly critical of the International Criminal Court (African Union 2012).

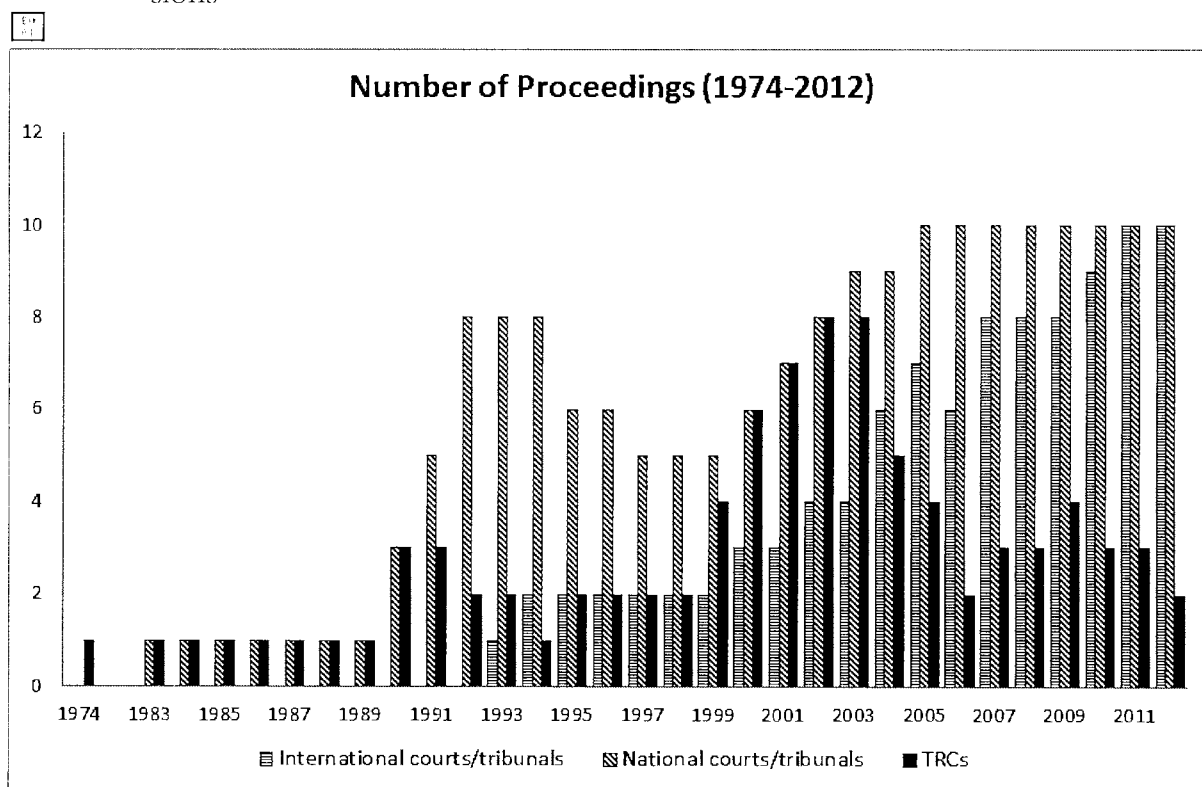
There was nothing inevitable about the proliferation of legal instruments to end impunity for gross human rights violations and atrocity crimes; only in hindsight the ‘justice cascade’ emerges as one of the most important achievements of the second half of the 20th and the first decades of the 21st century. The idea of ‘combating impunity’ that later became the battle cry of the Coalition for an International Criminal Court (CICC) was first developed in Latin America in the 1980s, however the first experiences with international criminal law and prosecutions after Nuremberg started in South-East Europe and Central Africa, and from the 2000s in Asia (Timor) and Near-East (Lebanon) (Glasius 2006: 30).

Figure 1. Prosecution of International Crimes: International Proceedings

Source: International Criminal Court (www.icc-cpi.int); Olsen et al (2010); Stan & Nedelsky (2013); own computations.

Global lawmaking in the area of international criminal law can be best assessed by its institutional outcomes in terms of actual international procedures. Figure 1 gives an overview over international proceedings. This is a count of “country-prosecution-years“, where every year is counted during which an international procedure/trial against perpetrators of crimes against humanity was conducted, independent of the number of cases and perpetrators.⁶ As such, it certainly underestimates the actual extent of proliferation of international criminal justice when impunity for individual perpetrators is considered. International criminal justice was particularly active during the first half of the 2000s, when the model spread to other situations and continents, and the ICTY and ICTR were processing numerous cases. Subsiding numbers of new procedures reflect the closing down of the ICTY (Hagan, Levi & Ferrales 2006).

6 This method of counting follows Sikkink’s Human Rights Prosecution Data Base which is based on the Country Reports from the US State Department (see Sikkink 2011; Kim & Sikkink 2010). It also takes account of the fact that the ICC addresses “situations” rather than individual perpetrators. The same method was used for counting domestic procedures (see Figure 2). As it is often difficult to determine the exact number of procedures in a given year the figures underestimate the actual increase and extent of proliferation. Sources: International Criminal Court www.icc-cpi.int ; Olsen et al 2010; Stan & Nedelsky 2013.

Figure 2. International and domestic proceedings: Courts, Tribunals and Truth Commissions


Source: International Criminal Court (www.icc-cpi.int); Olsen et al (2010); Stan & Nedelsky (2013); Hayner (2010); own computations.

However, the proliferation of international proceedings is part of and embedded in the development of multiple institutional forms to actually end impunity. This is the second “stream“ of Sikkink’s “justice cascade“, epitomized by the emergence of local and regional models of justice designed to end impunity for perpetrators of crimes against humanity. These were first predominantly Truth and Clarification Commissions in Latin America, which were soon complemented by local prosecutions, and strengthened by the regional Inter-American Court of Human Rights. The particular power of this Latin American “stream“ and its local actors is demonstrated by the recent trial of the former de facto President of Guatemala before a national court. Figure 2 shows that international lawmaking and procedures were preceded by a decade of national court and tribunal procedures as well as by Truth Commissions. The process starts with nearly two decades of national proceedings, and since the 1990s a slow increase of international and international/hybrid proceedings can be observed, which takes off into exponential growth with the start of the 21st century. Between 1989 and the early 2000s, Truth Commissions and local court procedures still significantly exceeded international and hybrid procedures. Global lawmaking and global procedures in this area have been advanced and supported by local and regional courts. However, as figure 1 demonstrates, much of the increase in proceedings before international courts is owed to the protracted nature of such proceedings, which becomes visible in the 2000s.


Table 1a – 1c: Atrocity crimes and impunity

Table 1a. Atrocity crimes and total impunity

Mass atrocity events with impunity (1945-2012)			
	Total number of mass atrocities	Mass atrocities with impunity	Average period of total impunity (years)
Africa	56	34	19.2
Americas	16	8	27.1
Asia	68	60	22.3
Europe	7	2	11
All	147	104	21.4

Table 1b. Atrocities crimes and interim impunity period 

Mass atrocities and proceedings (1945 – 2012)			
	Total number of mass atrocities	Total number of proceedings	Average interim period (years)
Africa	56	30	1.4
Americas	16	13	5.2
Asia	68	10	4.4
Europe	7	7	1.9
All	147	60	2.8

Table 1c. Atrocity crimes, international and domestic procedures and interim impunity period 

Mass atrocities and number of proceedings (1945 – 2012)						
	International courts/tribunals		National courts/tribunals		Truth Commissions	
	Proceedings	Interim period (years)	Proceedings	Interim period (years)	Proceedings	Interim period (years)
Africa	8	0.6	6	2.3	16	1.5
Americas			7	7.3	6	2.7
Asia	3	1	3	9	4	3.5
Europe	1	0	2	4	2	2.5
All	12	0.6	18	5.6	28	2.2

Source: International Criminal Court (www.icc-cpi.int); Olsen et al (2010); Stan & Nedelsky (2013); Hayner (2010); own computations

Did the proliferation of international and local procedures in fact end impunity, and thus also curb the ‘indeterminacy’ of global norms on atrocity crimes? In order to measure impunity, we take as baseline all cases of mass atrocity crimes between 1945, after the end of WWII, and 2012 as listed by Harff (2003) and Genocide Watch (Genocide Watch 2010; Karstedt 2012a). The first measure of impunity are the number of cases that have not been prosecuted, brought to trial or before a tribunal or truth commission, in contrast to those that have been. As such we include international and local procedures as well as all types of transitional justice in the widest sense. A second indicator of impunity is based on those cases that have been brought to trial; it measures the interim period between the end of the conflict (period under investigation) and the start of proceedings (if proceedings start during the conflict, the interim period is 0). A third measure is based on all cases, including those with absolute impunity, and measures thus a ‘total’ period of immunity. Table 1 a – c show the results for regions, as the overlap between end of conflicts, resurgence of conflicts and start of proceedings makes it impossible to calculate meaningful indicators for decades.

Table 1 a (column 1 and 2) shows the leading role of Latin American countries in the proliferation of justice and ending impunity with 50% of all situations prosecuted, if we leave Europe with its small number of cases aside, that do not include the Nuremberg trials and follow-up trials (as the Holocaust is not included in the post-1945 count of mass atrocities). Asia has the worst record of impunity, with only 15% of the cases prosecuted, followed by Africa. Nonetheless, the Americas and specifically Latin America have the longest periods of ‘total’ impunity (Table 1 a, column 3), as it took slightly longer for proceedings to start, if they started at all. As table 1b demonstrates Latin American countries also had the longest interim period that elapsed between the conflict and incidents of mass atrocities and the start of proceedings. Their pioneering role might account for the longer time. For Africa the shortest interim period of impunity is recorded before proceedings start; this is presumably due to the fact that most conflicts in Africa were rather recent, and proceedings started as a result of the proliferation of international criminal justice during the past decades. As the Human Security Report 2009/2010 records, most conflicts in Asia that involved mass atrocities subsided before the 1980s; since then they have more than halved. Most of the conflicts ended before international criminal justice re-emerged, and perpetrators were not prosecuted then or have been since; most of the more recent cases have been subjected to some kind of procedures, and a country-by-country analysis demonstrates that Asia has moved slowly towards breaking with the past of impunity.

Table 1c compares international and national procedures, and Truth and Reconciliation Commissions, where the ICTY is counted as one procedure independent of the countries involved. National court and tribunal procedures take the longest time to start after mass atrocities, testifying to the immense difficulties for sovereign states and governments to “police themselves” (Jorgensen 2009) and to bring perpetrators to justice. On the local level, Truth and Reconciliation Commissions seem to be the first legal institutions to move in and – if not reigning into impunity – at least to pave the way for further procedures (Dancy & Sikkink 2012). Guatemala with its Truth Commission in the first half of the 1990s, and now trials against those who orchestrated the genocide against the indigenous Maya population is exemplary in this respect (Rothenberg 2012). Both Truth Commissions and national trials seem to complement each other in ending impunity, and local cycles of law-making and institutional design are inextricably linked to regional and international law-

making. In which ways did the proliferation of international criminal justice gain its momentum? In the following section I will explore this process.

Three Constitutional Moments

Halliday's (2009) conceptualization of global lawmaking as „recursive“ emphasizes the continuity and seriality of the process, its endless and perhaps ‘Escher-like‘ bewildering loops. In international criminal lawmaking recursivity might be a characteristic more of the last decades, as historically, its defining feature seems to be discontinuity, interruption and “hibernation“ (Schabas 2010a). According to Sikkink (2011: 245) it is the experience of severe “shocks“ that triggers action to reign into the “orthodoxy“ of the impunity model, and starts cycles of international criminal lawmaking. This suggests that international criminal lawmaking is particularly shaped by what can be termed as “constitutional moments“. The concept was first defined by Bruce Ackerman (1991) for his exploration of the development of the US constitution. In his original formulation, a constitutional moment is rare and brief – he identified only three in more than 200 years of US history. It is a short episode in constitutional politics which is distinguished from the seriality and continuity of ‘normal‘ constitutional changes as it alters the framework in which constitutional politics unfold. As such, constitutional moments are markers of both discontinuity and transformation (Walker 2004). Expanding on Ackerman's formulation, Sajo (2004:1) sees constitutional moments as “lasting constitutional arrangements that result from specific, emotionally shared responses to shared fundamental political experiences“, and he cites post-Apartheid South Africa as one of his few examples. Taking the concept to the supra-state level implies that a phase is constitutionally momentous if it transforms “macropolitical means and macropolitical ends“ (Walker 2004: 370).

Constitutional moments in international criminal lawmaking imply decisive changes in the framework of international law, its legal concepts and institutional design that clearly distinguish between ‘before‘ and ‘after‘. Most observers would agree that the Nuremberg International Military Tribunal in 1945, the two international tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) in 1993 and 1994 respectively, and the Rome Statute of 1998, which entered into force in 2002, are such “constitutional moments“ for international criminal lawmaking. All of them were reactions to specific and shocking experiences of unimaginable atrocities, as the documents that established them, preambles and speeches by politicians, prosecutors and judges testify: the Holocaust; the mass atrocities committed during the Yugoslavian wars and civil wars; the genocide in Rwanda; and the ongoing conflicts and wars on the African continent. The Rome Statute was in particular a reaction to the long history of massive human rights violations and atrocities that had involved Asia, Latin America and Africa during the second half of the 20th century, and the result of the firm resolve to stop the series of mass atrocities that had haunted the continents with millions of victims (Harff 2003). They all stand out as major turning points in the history of international criminal lawmaking.

The Nuremberg Tribunal and the follow-up trials were the first serious and also (mostly) successful attempt to bring those to justice who had orchestrated war crimes and crimes against humanity. It was a landmark trial that shaped subsequent instruments and concepts of international criminal law. In particular the concept of ‘crimes against humanity‘, at the time of the IMT conceived of as a kind of minor and “atrophied“ complement to the other three major charges has evolved into the “best legal tool to address atrocities“

(Schabas 2010b, 141). Simultaneously with the Nuremberg Trials, the horror at the crimes of the Germans initiated a first cycle of human rights lawmaking, during which the UN Convention on the Prevention and the Punishment of the Crime of Genocide and the Universal Declaration of Human Rights were adopted. Today, the IMT stands out for its proceedings which at the time “certainly met highest standards on a procedural level“ (Schabas 2010a), a fact reflected in public opinion in Germany at the time: a majority found the trials “fair“, and the final judgments and death sentences “just“ (Karstedt 1998). In 2010, the Grand Chamber of the European Court of Human Rights upheld the legitimacy of the Nuremberg trial and refuted the accusation that it had been “victor’s justice“ (see Schabas 2010a). The Nuremberg Trial laid the groundwork for the subsequent Tribunals in the 1990s, and the “substantive law faithfully reflected the post-Second World War precedent [...]“ (Schabas 2010a: 537).

In each of the three constitutional moments the “fundamental contradiction“ between international law and sovereignty, and might versus right became visible as ‘victor’s justice’. In terms of institutional design the contest coalesced around the issue of the independence of the prosecution and the court, and the question who could “trigger“ the jurisdiction of international criminal tribunals and courts (Schabas 2010a; Glasius 2006). Victor’s justice emerged as a focal point of concern, criticism, and delegitimation of the tribunals. In each instance, the problem of victor’s justice pushed for change, new institutional design and procedural mechanisms. The IMT at Nuremberg had been established by the four Allies in the Charter of London, and they were well aware that the whole enterprise could considerably suffer from such accusations. The prosecutors were designated by their governments and took instructions for the selection of cases, defendants and witnesses from them. However, in particular the judges tried to impose substantive and procedural safeguards against such accusations, by insisting on independence, or dropping charges where the victorious Allies had been implicated in similar action.⁷ When in the next constitutional moment nearly four decades later after the end of the Cold War the ICTY and ICTR were established, they were created by the United Nations Security Council which represented the international community and its concerns. In contrast to Nuremberg, the prosecutor at the ICTY was to “act independently as a separate organ of the Tribunal“ (Statute of the International Criminal Tribunal for the former Yugoslavia 1993). The office and the role of the prosecutor were thus seen as the distinctive achievement and new institutional design, with which the Tribunal set itself apart from “its closest precedent“ (quoted in Schabas 2010a: 537), and which was a defining feature of its constitutional moment. In the course of the Tribunal, and even more pronounced for the ICTR, it turned out to be difficult to prosecute and mete out justice to both sides involved in the conflict, amounting to outright refusal in the case of the ICTR. Thus the “contradictions“ persisted, and the independence of the prosecutor became a rallying cry and took centre stage during the next constitutional moment, the drafting of the Rome Statute in 1998, which established the permanent International Criminal Court. While the IMT and the ICTY/ICTR had been already “triggered by the political bodies that had created them“, which left little space for

7 Particular charges against Dönitz were dropped, after US Admiral Nimitz had indicated that the US Navy used similar practices in the Pacific theatre (Karstedt 1998). The Tokyo Trial in contrast is deemed a more blatant and unmitigated case of victor’s justice and interference from the US (Schabas 2010a).

the prosecution to select their cases (Schabas 2010a: 538), the International Criminal Court should move on to a truly independent institution of international criminal justice.

The constitutional moment of the Rome Statute and the International Criminal Court was outstanding in more than one way. First, in the words of UN Secretary-General Kofi Annan the adoption of the Statute was an “achievement, which, only a few years ago, nobody would have thought possible” (quoted in Glasius 2006: 111). Second, a most decisive change of the institutional framework of international criminal justice was achieved with the establishment of an independent prosecutor, which Glasius (2006: chpt. 3) terms “the victory” in this constitutional moment. The proposal was first aired by a small number of states in 1995, including Austria, Greece, Norway, the Netherlands and Switzerland, who were part of a group of states that became known as the Like-Minded Group (including thirteen EU countries with the exception of France and the United Kingdom). This group pushed for the establishment of an independent prosecutor in opposition to the US and other permanent members of the Security Council. This position was soon to be taken up by the Coalition for an International Criminal Court (CICC). This was a network of civil society actors, ranging from local actors like the Mothers of the Plaza de Mayo in Argentina to “issue networks” (Sikkink 1993, 1995) and large and influential international non-governmental organisations like Amnesty International. The active and actually influential involvement of civil society actors aligned in the CICC is the third characteristic, which makes the establishment of the ICC a truly constitutional moment. Further, the involvement of the CICC is indicative of decisive changes in the arena international criminal lawmaking itself, and thus heralds a new era of global lawmaking in this field.

In Ackerman’s original formulation, constitutional moments are defined by increased public involvement and debate, and a heightened preoccupation with “polity-generative questions” (Walker 2004: 368). The CICC represented the public involvement and debate of the international community across the globe and from different local and international, as well as professional perspectives. Human rights organisations (31%) and legal associations (18%) made up half of the groups represented, beside a strong presence of women’s groups (14%). With regard to distribution across the globe, international organisations constituted the largest group (20%), closely followed by North American (19%) and European (18%) representation. Sub-Saharan African (15%) and Latin American (12%) involvement reflected the recent history of human rights violations and conflict in these regions (Glasius 2006: 31- 36). The coalition brought together a range of norm entrepreneurs who notwithstanding their different ideological, regional and national alignments and different interests, came to speak in a unified voice and to enter into coalitions with states, in particular members of the Like-Minded Group. The larger and more powerful international non-governmental organizations assigned advisors to small and inexperienced delegations from developing countries, and the Coalition developed policies of public shaming of powerful state delegations. They designed strategies that disclosed the inclination of states in “virtual votes”; thus it was revealed that 80% of the states favoured an independent prosecutor, a fact that would have otherwise gone unnoticed among the powerful actors (Glasius 2006: 117). CICC’s involvement in the Statute negotiations was so massive that it has been described as “hijacking the process” (Fehl 2004; Davenport 2002).

Even if this assessment can be deemed slightly exaggerated, there can be no doubt that this involvement was indicative of an era of “new diplomacy” after the Cold War (Davenport 2002). The empowerment of less powerful and weaker states in the negotiations, and their backing and support from international non-governmental organizations, that forged

new coalitions often below the radar of the most powerful actors (see e.g. Scheffer 2012) is a central characteristic of the new diplomacy. In terms of outcome and style of negotiations, the “lowest common denominator style“ of the Cold War Area was abandoned in favour of a new approach that assumed “that it is better to have a workable, effective treaty that lacks the support of some important countries than a bad, inefficient regime with universal support“ as the coordinator of the CICC, William Pace put it (1999: 205). In concrete terms of the Rome Statute, this meant to opt for a court with less control by and less support from the most powerful actors, particularly the US, but also with less loopholes to accommodate their interests, in contrast to more control, and more support, but also more loopholes (Fehl 2004: 380). The lack of support from the US was not detrimental for the adoption of the Statute and ratification by countries, and the ensuing attempt to control the court and protect the interests of the US by bilateral agreements with states turned out to be counterproductive and was finally abandoned (Simmons & Danner 2010). Even if it was not the first field of global lawmaking where the new diplomacy approach was adopted (see Braithwaite & Drahos 2000), the Rome Statute marked a constitutional moment and changed the arena for global lawmaking against atrocity crimes irrevocably.

Diagnostic Struggles – genocide, crimes against humanity and atrocity crimes

Perhaps nowhere in the field of global lawmaking diagnostic struggles are as public, visible, and emotionally charged as in the arena of international criminal law. Whether a ‘situation’, and incidents of mass violence should be defined as genocide, crimes against humanity or just as civil war and conflict is highly contested between different actors, including the states and governments involved, the UN Security Council and other international organizations, international legal networks, and civil society actors and social movements. The “special cachet” of genocide (Schabas 2007a: 962) has instigated numerous attempts at expanding the scope of the term genocide, so that it covers a diversity of mass violence incidents and victims. Such expansion beyond the narrow legal definition of the Convention includes e.g. the adoption of the term “politicide” (see Harff 2003). This is reflected in the terminology used by the US Genocide Prevention Task Force (2008) in its report, which aims at such an extension of the use of the legal term in international politics, in order to prevent and intervene into a crisis situation as early as possible and with maximum impact. However such extensions have ultimately worked against its applicability in situations of humanitarian crises and catastrophes that the law has to confront. International criminal lawmaking therefore has moved away from the centrality of genocide in what William Schabas (2007b) deems a decisive turn against a narrow “normative, action-oriented concept” (Gerlach 2006: 463), which appeared increasingly dysfunctional for the task of the international community to prevent, intervene, and prosecute – and its practical operation. Its connotations with legal, political, and moral action fuelled diagnostic struggles in an arena, where victims and civil society actors demanded action from the international community and states that conflicted with vital interests of these powerful actors. As prosecutors at tribunals and international courts raised expectations of civil society actors and in particular victims, when charging defendants with genocide, these were more often disappointed than satisfied. This became evident in the Darfur crisis, when hugely differing accounts of the crisis contested its definition and classification as genocide, and a global debate ensued (de Waal 2007; Hagan, Schoenfeld & Palloni 2006, Hamilton 2011). The link between genocide and a duty to intervene, which had been set out – though vaguely – in the

United Nations Genocide Convention was the mechanism which triggered diagnostic struggles, and simultaneously thwarted international action or intervention by powerful actors (Schabas 2007b).

These diagnostic struggles became the seedbed of change of the legal framework that was mainly driven by court decisions but equally emerged in the realm of diplomacy. The term “atrocities crimes” used here as a broad concept was introduced into the debate by David Scheffer, previously US Ambassador-at-Large for War Crimes Issues. He wanted to separate the political use of the term genocide from its legal definition, thus ensuring the independence of international criminal courts and jurisdiction from political action. His suggested term ‘atrocities crimes’ would cover all types of international crimes, including genocide, war crimes, and crimes against humanity. The respective international laws would combine into “atrocities laws” as a new field of international law. He aims to address in particular the needs of the international community to meet the challenges of mass atrocities crimes “during the early phases of such crimes [...] thereby standing a better chance of influencing the development of effective responses to massive death, injury and destruction” (Scheffer 2007: 92). Atrocities crimes are “precursors of genocide [...] occurring immediately prior to and during possible genocide that can point to an ultimate legal judgment of genocide but which should be recognised and used in a timely manner to galvanize international action to intervene, be it diplomatically, economically or militarily” (Scheffer 2006: 232). Precursors such as forced displacement, illegal use of force by security forces, looting, and forced disappearances can in this sense be markers of dangerous situations, that is, signals of increasing tensions, expanding use of illegal force by security forces, or engagement of militias (Hagan 2009, Hagan & Kaiser 2011). Importantly, as a legal and political concept, “atrocities crimes” disconnect charges by the prosecution and an ultimate legal judgment from preventive and protective action, which necessarily has to precede it. Scheffer opens up a “recognized and accepted space between the finding of evidence of atrocity crime and the unfolding of atrocity law” (Hagan (2009: 34) where intervention can move in.

Building on his experience as a diplomat Scheffer captured a change in terminology and conceptualization in the legal field that was already on its way but has gathered momentum since then, not the least signified by the establishment of the Task Force on the EU Prevention of Mass Atrocities (2013) and the release of its report in 2013, which contrasts in terminology with the US Genocide Prevention Task Force (2008). For Schabas (2007b), it was an “idea whose time has come” (32) as international law moved “towards greater coherence and more simplicity” (31). This was a move away from domination by the terminology of genocide and towards the concept of crimes against humanity as the core and defining legal concept. Schabas sees this as one of the major conceptual developments in the field: when international criminal law “went through a phase of stunning development [in the 1990s], it was the atrophied concept of crimes against humanity that emerged as the best legal tool to address atrocities. A gap in the law needed to be filled. Instead of enlarging the definition of genocide in order to achieve this, the international legal community opted for an expanded view of crimes against humanity” (Schabas 2010b: 141). Today, genocide, crimes against humanity, and war crimes constitute a “seamless body of ‘atrocity law’ covering all serious violations of human rights” (Schabas 2007b: 34). As the Resolution on the Responsibility to Protect by the UN General Assembly in 2005 disconnected the link between genocide and a duty to intervene, it opened the route toward action in cases of crimes against humanity (Schabas 2007b, 2007c, 2010a). This change became evident with the Darfur crisis, when in its report to the UN Secretary-General, the

International Commission of Inquiry on Darfur (2005: para. 533) concluded against the crisis being genocide but stated, “Depending upon the circumstances, such international offences as crimes against humanity or large scale war crimes may be no less serious and heinous than genocide.” As the “special cachet” of genocide remains, diagnostic struggles in the field will continue, however the legal framework has undergone decisive changes that will affect institutions and actors in the field, and that are “likely to prevail in case law for many years to come” (Schabas 2010b: 141).

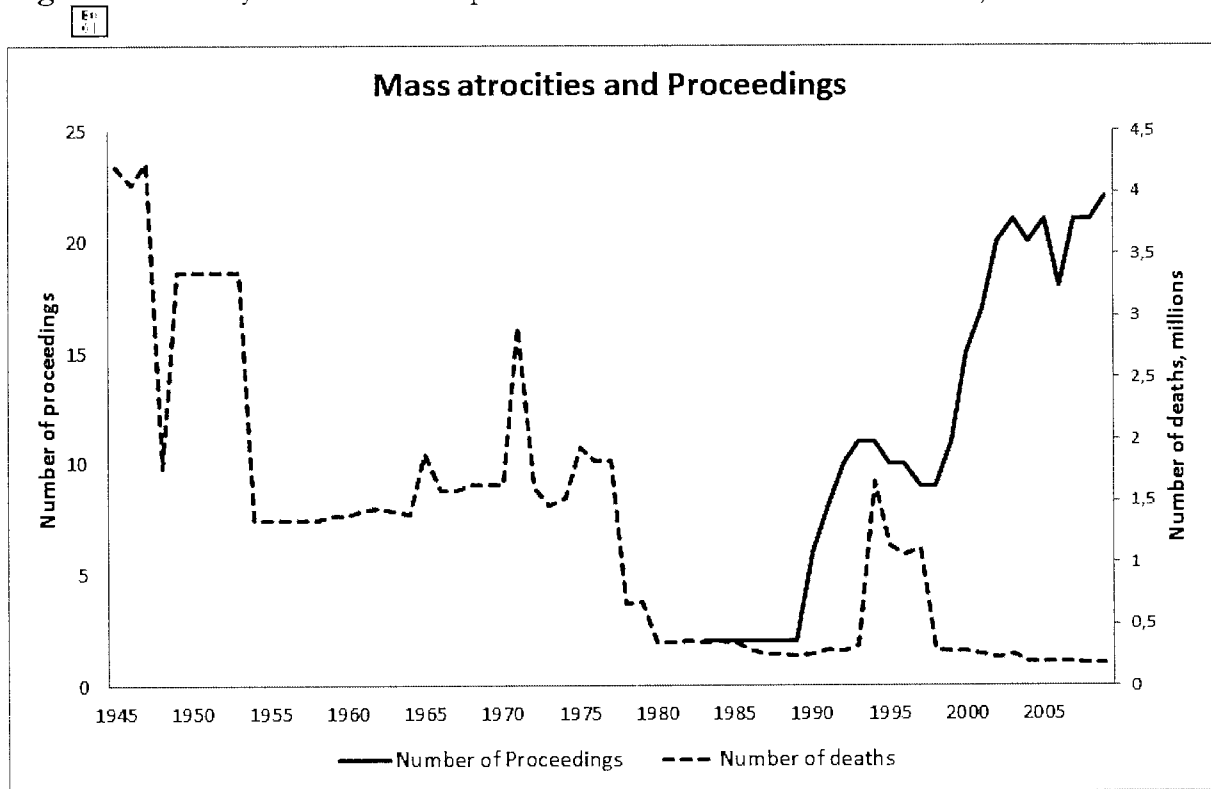
Outcomes and the power of international criminal lawmaking: Commitment, compliance, deterrence

Global lawmaking does not end at the borders of the nation state. To the contrary, it enters a decisive stage when it comes to the commitment of individual states to global norms and the outcomes of global normmaking. The process continues with national legislation that implements global norms in local laws and legal institutions, which is an integral part of the recursive cycles of global lawmaking. The transition from the global to the local sphere is the crucial point for global normmaking, and the proving ground for the robustness and viability of its outcomes and international institutional design. Weaknesses, tensions and indeterminacy of global lawmaking will become visible at the transmission, and become the target of criticism, opening a new cycle of global lawmaking. It is here where ultimately the legitimacy of global norms and of the processes which generated them is decided. The actors that stand between the local and the global, or vice versa, are “key conduits” (Halliday 2009: 285) for transferring global normmaking into the local sphere, and translate it into institutional design and action. Dancy and Sikkink (2012) demonstrate that the global-local transfer in Argentina and Uruguay was by no means a one-way street (see also Schabas 2003). In this section, I will focus on the outcomes of international criminal lawmaking, and thus the power of international criminal law. This firstly concerns the process of commitment of states to the international criminal justice and human rights regime, as the clout of international lawmaking depends on commitment to this regime by sovereign states. Secondly, the power of international criminal justice can be assessed in the very traditional terms of criminal justice, namely its deterrent effect. Both are intricately linked as the commitment of states to prosecute such crimes, to accept and bind themselves and their very own institutions to these norms, and to support either international prosecution or national prosecution of such crimes are essential for achieving a deterrent effect. To paraphrase Thompson’s observations, the governments of contemporary states need to become “inhibited by their own rules of law against the exercise of direct unmediated force (arbitrary imprisonment, the employment of troops against the crowd, torture, and those other conveniences of power with which we are all conversant), but they also [have to believe] in these rules, and in their accompanying ideological rhetoric [...]” (Thompson 1977, 265).

The exclusive authority of the nation state over its territory, jurisdiction and its system of criminal justice is key to the adoption of instruments of international criminal law. International criminal justice and its bodies have been accused of biased prosecution and targeting the global South, of criminalizing conflicts and leaders in particular in African states (Bendana 2008; African Union 2012). The international community has been blamed for highly selective attention to ongoing mass atrocities, and its differential and discretionary willingness to protect, intervene and prosecute (Melvern 2010). The ICC’s pre-

sident has called the court “a judicial institution operating in a political world” (quoted in Goldstone 2010: 2); in this he acknowledged the role of political pressure and powerful actors in forcing nation states to prosecute and extradite offenders to international criminal justice, and how these shape the procedures and outcomes of international criminal tribunals. In the arena of international criminal law making the in-built tensions of globalization are sharply illuminated: the proliferation, acceptance and impact of standards and norms that constitute a “world society” on the one hand, and the role of nation states within an international system defined by political, economic and normative power relations, and competition, on the other. Who obeys global norms of criminal justice and why? Why do states commit themselves to the ICC and the wider human rights regime, and does such commitment have an impact on compliance? Both questions are intricately linked, and Simmons (2009:351) names them as the “twin puzzles“ of international human rights law.

Figure 3. Atrocity crimes and the proliferation of international criminal justice 1945-2010



Source: Genocide Watch (2010); International Criminal Court (www.icc-cpi.int); Olsen et al (2010); Stan & Nedelsky (2013); Hayner (2010); own computations.

Did the global proliferation of local and international prosecution of perpetrators of atrocity crimes and genocide, as well as gross human rights violations have an impact on the frequency and severity of such crimes? Figure 3 juxtaposes the death toll from atrocity crimes as estimated by Genocide Watch (2010) with the development of all procedures for atrocity crimes on the national and international level (see figure 1 and 2). The proliferation of legal institutions and procedures dealing with mass atrocities clearly coincides with a significant downturn in such incidents and the resulting death toll during the first decade of the 21st century. This trend has continued without interruption into the next decade (Hu-

man Security Report Project 2010, 2012). Three general trends have contributed to this development: the number of conflicts decreased, as did the death toll of each conflict; one-sided violence by the most deadly actor, the state, subsided (but not substantially by non-state actors in particular in Africa); more peace accords and peacemaking procedures were launched, and more of them turned out to be stable and successful in curbing violence. In which ways is this related to the proliferation of international criminal justice and human rights procedures, if at all?

In 1999, Senegal, a country in rather close neighbourhood to the sub-Saharan conflict zone, became the first to ratify the Rome Statute. In 2007, more than half of the sovereign states of the world had committed to this institution and its demands. Senegal was representative of the large group of states who were quite vulnerable to a prosecution by the ICC, which were nonetheless among the first to ratify. Equally, those states that were the least vulnerable like e.g. the Scandinavian countries, were among the first signatories of the Rome Statute. Notwithstanding considerable opposition from major actors, these two groups contributed substantially to the international commitment to the ICC, and both large and small countries were comprised. In addition, unaccountable autocracies that had experienced recent internal conflicts decided to cooperate with the ICC in “surprising numbers”, and as Simmons and Danner (2010: 277) show, they are more likely to commit than democracies with an equal experience of conflict. These patterns suggest that governments rationally decide whether to commit or not. This is a process of “self-binding” to the global human rights regime: on the one hand the ICC “ties the hands” of governments, but this is only achieved if on the other hand governments see this as advantageous, and engage in a “self-binding” process. Signing the Rome Statute thus *pre-commits* governments to prosecute atrocity crimes or submit them for prosecution. Such a commitment thus endows governments with credibility towards their opponents in the case of conflict that they otherwise would lack. This applies in particular to those with a history of violence that makes them less credible overall to their opponents. As commitment to the ICC increases their credibility, this might help to ease-in cease-fire agreements and peace negotiations. Simmons and Danner’s (2010) empirical results mainly support this argument, which is additionally corroborated by the global trends as identified in the Human Security Reports (Human Security Report Project 2010, 2012). Further support is provided by comparative analyses of cases of extremely violent societies. Violence and repression committed by the state (and governments) subside *preceding* the peace accords; by reducing repression and gross human rights violations governments signal credible commitments to their opponents (Karstedt 2012b). Ratification of the Rome Statute and commitment to the ICC thus is more than a purely symbolic gesture, and ties in with the interests of states most affected by such violence.

Though it could be argued that credible commitment and self-binding act as a deterrent and control mechanism, Simmons and Danner’s research cannot answer this question. Sikkink and her colleagues (Sikkink 2011; Kim & Sikkink 2010; Dancy & Sikkink 2012) promote an integrated model, where prosecutions have a normative and deterrent effect. Kim and Sikkink (2010) show that prosecutions in general as well as the number of prosecutions reduce state repression and violations of human rights. In addition, the normative impact that truth commissions provide reduces human rights violations by the state substantially, and none of these mechanisms exacerbates the human rights situation, as has been repeatedly argued. Both the threat and execution of punishment issued by international and national criminal justice, and the information and normative communication pro-

vided by truth commissions are successful mechanisms that are capable of increasing the level of human rights protection in post-conflict situations and transitional countries. The mechanisms of deterrence, self-binding and credible commitment, as well as genuine belief in normative and legal standards broadly seem to work as controls on the use of massive violence and the engagement in mass atrocity crimes by all actors in a violent conflict. These controls might be particularly effective with regard to state actors who are more visible and more vulnerable on the global stage, and apply less to non-state actors.⁸

Notwithstanding the proliferation of international criminal justice, trials are rare and time consuming. Actual punishment thus is achieved rarely, given the number of perpetrators involved, and particularly for those who initiated and orchestrated atrocity crimes with command responsibility. The ICC and international criminal justice are thus seen as not capable of signaling deterrence, but rather as merely “expressing” the normative standards of the human rights regime. The genuine accomplishment of international criminal lawmaking therefore is not retribution or deterrence, but “norm projection” (Luban 2006: 354). However, courts, tribunals and also truth commissions are the spaces where the normative standards of the human rights regime are expressed in a dramaturgically most powerful way (Osiel 1997; Damaska 2008; but see Meijers & Glasius 2013), both on the local and international level.

Conclusion: Global and local lawmaking

Socio-legal researchers in the field of international criminal lawmaking are aware of the interplay between the domestic and the international at all stages and cycles of the process, including treaties, commitment and implementation. In the proliferation of international criminal law making and the human rights regime generally, transnational politics, actors and mechanisms were and are as important as domestic ones. With the focus on actors, mechanisms and dynamics of these processes, socio-legal scholars have revived much of Thompson’s way of viewing. His nuanced account of interests and power, local and other actors, local conflicts and national politics resonates strongly with their endeavours. The self-binding power of law shaped the contours of justice in early 18th century Britain as it does in the international sphere of 21st century criminal justice. Socio-legal theories and master paradigms of national criminal law making seem to be particularly unwieldy for the international level, and an approach that favours an assemblage of multiple narratives seems to be more seminal for empirical exploration and conceptual understanding. However, it might be that a lot is to be learned for domestic criminal lawmaking and comparative perspectives on punishment from global lawmaking. As the theories of lawmaking and punishment developed at the level of societies and jurisdictions seem to be resistant to application at the international level, it seems that the other direction, from international and global lawmaking down to the local and national level might be more promising. As much as Thompson starts us on a journey in space from local conflicts in 18th century Britain to the international sphere in the 21st century, he might also send us on a journey in time from 18th century to contemporary societies.

8 The surrender of warlord Bosco Ntaganda, who operated in the Eastern Democratic Republic of Congo, to the ICC in May 2013 is generally seen not as a result of the threat of prosecution, but as a flight into the arms of the rule of law and the protection provided by the ICC.

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Autorinadresse:

Prof. Dr. Susanne Karstedt, Centre for Criminal Justice Studies, School of Law, University of Leeds, Leeds LS2 9JT, Tel. +44 113 3438260, email: s.karstedt@leeds.ac.uk

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