

## **Bearing Witness to Atrocity Crimes: Photography & International Law\***

**'Let the atrocious images haunt us. Even if they are only tokens, and cannot possibly encompass most of the reality to which they refer, they still perform a vital function. The images say: This is what human beings are capable of doing-may volunteer to do, enthusiastically, selfrighteously. Don't forget.'**<sup>i</sup>

### **Abstract**

This article uses ideas propounded by Susan Sontag and Judith Butler on photography to illuminate the significant role of photography and visual media in international law jurisprudence. Two key questions are pursued: firstly, what role does photography have in international law (with a particular focus on abusive photography), and, secondly, how do photography and visual media bear witness to atrocity crimes in international law? The article commences with an overview of the evolution of war photography as it dovetails the inclusion of visual media in juridical settings, and interrogates ethical issues involved in the aestheticization of suffering for consumerist purposes. Drawing from scholarly definitions of atrocity crimes, the article settles on terminology which carves out the parameters of the socio-legal research space. In identifying the relevant areas of international law, the study reads the associated jurisprudence with a theoretical lens, evincing the critical evidentiary role that photography plays in the litigation of the most serious international crimes, such as genocide, war

crimes, and crimes against humanity. Tension between the transitive and probative functions of visual evidence is examined through a rich tapestry of international jurisprudence.

## **I. Introduction**

In her seminal work, *On Photography*, Susan Sontag explores the unique contribution of photography to the world, concluding that it introduced a new visual code which expands 'our notions of what is worth looking at and what we have a right to observe.'<sup>ii</sup> To photograph means to 'appropriate the thing photographed,' and to put 'oneself into a certain relation to the world that feels like knowledge-and, therefore, like power.'<sup>iii</sup> Tension exists between a view of photography as depicting primarily a world of fact where experience is mediated in a raw, direct and unpolluted manner, against the idea that whilst 'visual images can be a window into other people's lives, it is not necessarily a transparent window.'<sup>iv</sup> The advent of photography had profound socio-legal consequences in chronicling events, by both interrupting and expanding temporality through its objects. The power to shape and interpret history was recognised by one of its earliest proponents, who reportedly said that 'the camera is the eye of history.'<sup>v</sup>

Parallel to the rise of the daguerreotype and its employment on the field of battle was the ascendancy of ideological realism, which required the showing of unpleasant and hard facts.<sup>vi</sup> That is to say, capturing life in its depictions, along

with claims to mechanical objectivity, contributed to photography's 'special power of persuasion.'<sup>vii</sup> Taken into a legal context, photography provides evidence about something we might doubt, which 'seems proven when we're shown a photograph of it.'<sup>viii</sup> Jennifer Mnookin outlines how photography and various forms of 'machine produced visual images,' rapidly assumed a central evidentiary role in American civil and criminal trials in the latter half of 19<sup>th</sup> century.<sup>ix</sup> Photography's relevance to international law gained traction in the 20<sup>th</sup> century, underpinned by advancements in technology, the development of war photography as a profession, as well as evolving norms and standards internationally. This article queries how photography and visual media bear witness to atrocity crimes, and the manner in which the resulting records are incorporated as evidence before international courts and tribunals. Several issues, definitional, ethical, and philosophical, are explored before an in-depth discussion of the circumstances that contextualize the visual field - photography and video recordings captured by a range of image producing devices, from traditional cameras to modern smartphones that document the most serious international crimes. Lastly, the article explores the visual documentary hub of the evidentiary matrix incorporated into international legal jurisprudence in practice.

Photographing atrocity was established in the 19<sup>th</sup> century by Roger Fenton's daguerreotypes of post-battle theatres in the Crimean War. Matthew Brady's pictures of fallen soldiers during the American Civil War were made possible because the 'dead struck the most cooperative poses.'<sup>x</sup> Superseded by lighter cameras with faster films that were transportable to theatres of war and capable of capturing action, war photography was firmly established by World

War II.<sup>xi</sup> According to Sontag, the modern phenomenon of being 'a spectator of calamities taking place in another country' is driven by consumerist demands and thus the medium of photography allows customers to become reality tourists to the entire world made available 'as an object of appraisal.'<sup>xii</sup> Images of Nazi concentration camps at liberation, including an official documentary report filmed by the US Army Lieutenant Colonel George E. Stevens, ushered in a 'new, and at the time unknown, terrain of violation and horror.'<sup>xiii</sup> Essentially what Stevens and photojournalists such as Margaret Bourke-White and George Rodger depicted was the unrepresentable - crimes that SS guards informed camp inhabitants the world would not believe.<sup>xiv</sup>

Theodor Adorno was highly sceptical of what he viewed as the post-Holocaust culture of aestheticizing human suffering to a point of banality.<sup>xv</sup> In Adorno's view, the aesthetic style principle removes something of the horror these photographs portray, and the artistic rendering leaves the possibility that some pleasure may be derived from future viewings.<sup>xvi</sup> Adorno inadvertently alludes to the different contextual apprehensions of photographs, and his exploration of the relationship between aesthetics and representing human suffering is perspicacious because it points to a critical dimension of this debate, which is how we represent and react to atrocity that is beyond language?<sup>xvii</sup> Does communicating suffering through visual media lead to 'the normalization of atrocity'?<sup>xviii</sup> David Campbell identifies a growing gap or chasm between what is depicted and our moral responsiveness to such representations.<sup>xix</sup> However, it is submitted that Sontag's entreaty, 'let the atrocious images haunt us,' can be applied to international law jurisprudence, and human rights activism to a lesser extent.<sup>xx</sup>

The polysemic nature of photography helps to challenge the notion that photographs lose their capacity to shock; in this view, photographs carry ‘a variety of potential meanings.’<sup>xxi</sup> As ‘artefacts of history,’ images may open up alternative ‘historical and ethical paradigms’ antithetical to the oppressive cultures in which they were produced.<sup>xxii</sup> Of course, this argument could sustain the shifting contextualization of photography for less innocuous purposes, such as the historical revisionism of atrocity.<sup>xxiii</sup> However, from a legal evidentiary standpoint, it is possible to test visual evidence within and against the wider body of evidence that re-constructs an event.<sup>xxiv</sup> Whilst visual evidence may not be essential to legal claims, as a ‘future-oriented medium that resists oblivion’ it is extremely useful; the potential probative value of the image can trigger a particular legal response and contribute to a juridical determination that a violation occurred.’<sup>xxv</sup>

Piyel Halder observes that evidence links the court of law ‘to the outside world, an internal world of codes to an the external world of chaos, where an event as violation has occurred.’<sup>xxvi</sup> Visual evidence, such as photography, is regarded as *sui generis* and free of the inherent unreliability of verbal communication (hearsay). This is because the objective truth may be clinically recorded in an authentic manner by the camera, ‘the perfect instrument of evidence, the evidencer’s tool, an unimpeachable source of information,’ and as the camera’s statement, the photograph is a ‘perfect trace; an imprint or a transfer of the real.’<sup>xxvii</sup> Halder evokes a theory of evidence, whereby the visual (the sign) is associated with a pre-photographic referential event that is the basis of evidentiary representation.<sup>xxviii</sup> The photographic framing involving a ‘division between inside and outside’ is reflected in the legal framing and is critical to the

jurisprudential evidentiary matrix.<sup>xxix</sup> Since evidence is concerned with 'guarantees of authenticity' in the performance of law, such guarantees are essentially 'visual or oral in their perceptual form, and are privileged over the written, scriptural forms of communication.'<sup>xxx</sup>

Sontag argues that today the notion of war crime or atrocity 'is associated with the expectation of photographic evidence.'<sup>xxxi</sup> Judith Butler explores the idea that contemporary understandings of atrocity require photographic evidence.<sup>xxxii</sup> Undoubtedly, in this age, public awareness about human rights issues can depend on the availability of visual evidence.<sup>xxxiii</sup> The juridical opportunities presented by visual evidence is undeniable, but the absence of such evidence may also indicate crimes shielded by censorship and subterfuge. Incorporating visual evidence of atrocity crimes at international level first occurred during the Nuremberg and Tokyo trials following World War II. The International Military Tribunal for the Far East found that the Japanese government's suppression of images and the absence of photographs depicting the ill-treatment of prisoners of war actually testified to the government's complicity in these crimes and the Tribunal pinpointed several relevant censorship regulations as well as end of war directives regarding the destruction of inculpatory documents.<sup>xxxiv</sup> Indeed, a further visual anomie rests at the heart of the Tokyo judgment; not because of a lack of visual signifiers, but because the narrative regarding the Allied crimes of Hiroshima and Nagasaki was linked to the post-war power to determine the legal framework of accountability.<sup>xxxv</sup> Thus, certain visual evidence was admitted as the statute allowed, whilst other evidence of atrocity crimes was ignored.

At Nuremberg, twenty-two Nazi defendants were prosecuted for international crimes, such as initiating a war of aggression, war crimes, and

crimes against humanity, the latter charge indicating that for the first time international criminal responsibility transcended domestic legal frameworks for 'atrocities committed by a government against its own people.'<sup>xxxvi</sup> Similar to the way the Tokyo Tribunal prosecuted only Japanese crimes, the jurisprudential corpus focused solely on Nazi crimes, and the Court's gaze was averted from Allied crimes, such as the systematic rape of women in occupied countries by Russian soldiers, and the indiscriminate firebombing of German cities by Allied air forces.<sup>xxxvii</sup> Thus, the visual evidence submitted to the tribunal reflected this determinate judicial statute. Both photographic and video evidence undergirded the war crimes and crimes against humanity charges.<sup>xxxviii</sup> Two films were screened during the trial, including Lieutenant Colonel Stevens' hour-long film montage of scenes in several concentration camps at liberation titled 'Nazi Concentration Camps.'<sup>xxxix</sup> Lawrence Douglas highlights two key points with respect to this screening; firstly, that it was unprecedented in a juridical setting, and that 'prior to Nuremberg one can find no records of any court using graphic film of atrocities as proof of criminal wrongdoing.'<sup>xl</sup> Secondly, the film was admitted through relaxed rules of evidence, not requiring in court corroboration, which would have been excluded as hearsay in the normal course of events.<sup>xli</sup> Anglo-American legal convention precludes visual evidence deemed so gruesome that its probative value is substantially outweighed by the danger that a jury would be unfairly prejudiced.<sup>xlii</sup> These doctrines were swept aside by a charter that adopted to the greatest extent possible 'expeditious and non-technical procedure,' admitting any evidence which it deemed 'to have probative value.'<sup>xliii</sup> Thus, a novel visual record temporally distant from the alluded crimes, characterised by the absence of Nazi perpetrators and their collaborators, was

shown, not because of its evidentiary value, but because of its transitive or affective function.<sup>xliv</sup> The focus of those present was split between the 'extremity of the atrocity captured on screen,' and the affective reaction of the defendants in court, but the screening contributed very little to a determination of their individual guilt.<sup>xlv</sup> It was necessary because these were unprecedented atrocities and the visual evidence contextualised crimes that did not fit into conventional notions of wrongdoing.<sup>xlvi</sup> The momentum behind prosecuting those responsible for international atrocity crimes stagnated with the Cold War, but was revived following the fall of the Berlin Wall in 1989.<sup>xlvii</sup>

Larry Gross, John Stuart Katz and Jay Ruby, note that in recent decades 'the world of mediated images has undergone transformations that have profound implications for the moral and ethical, as well as the legal and professional, dimensions of image-producing practices.'<sup>xlviii</sup> Most significant has been the emergence of widely accessible digital imaging technologies, which can be rapidly disseminated online in an unfiltered manner.<sup>xlix</sup> New media technologies becoming 'ubiquitous in war zones' indicates a paradigm shift, whereby the professional war photographer or embedded reporter has been supplanted or supplemented by soldiers using mobile phones and digital cameras to capture images from the banal to the atrocious that are then shared with friends, military colleagues, family members and 'wider global audiences on the Internet.'<sup>l</sup> In some instances, new 'technologies of witnessing'<sup>li</sup> allow perpetrators to 'enjoy the reflection of their actions on the digital camera, and disseminate that particular accomplishment quickly, as digital technology allows.'<sup>lii</sup> Building on acts of torture, this abusive photography is also described by Butler as the 'digitalization of evil.'<sup>liii</sup> All kinds of photography produce an 'equivocation at the



level of the temporality of the event,' but this is heightened with the instantaneous dissemination capacities of the novel witness.<sup>liv</sup> In other words, photography is a 'kind of promise that the event will continue,' and therefore not strictly anterior or posterior to the event.<sup>lv</sup> Whilst the indefinite temporality of photography may be exploited by individuals or institutions as a mode of control or abuse, the resulting image may equally be utilised as a mode of resistance, exposing crimes and contributing to documentary evidence of violations.<sup>lvi</sup>

## **II. Understanding the Visual**

Sontag maintains that accompanying captions help us to interpret the image. For Butler, the act of framing the photograph is itself an interpretive act - images are framed for a purpose, which is carried within and through the frame.<sup>lvii</sup> By this view, every photograph 'in framing reality, is already interpreting what will count within the frame; this act of delimitation is surely interpretive, as are the effects of angle, focus, and light.'<sup>lviii</sup> Butler uses the notion of framing to show how social and ethical norms enter the visual field. These norms, which should not be confused with legal norms, 'govern when and where a life counts as human' and therefore 'when and where such a life is grievable.'<sup>lix</sup> These broader socio-political norms operate in many ways, such as through 'frames that govern the perceptible,' and essentially bring the image into focus 'on the condition that some portion of the visual field is ruled out.'<sup>lx</sup> Butler regards the frame as actively producing the field of representation, both by what is included and, significantly, by what is excluded from the frame. Ethical considerations

intersect with visual controls resulting in epistemological intelligibility, creating 'conditions for the inclusion and exclusion of human beings.'<sup>lxi</sup> Ontological norms are sublimated in discursive and visual fields that tend to either 'orchestrate or foreclose ethical responsiveness to suffering.'<sup>lxii</sup> Fundamentally, this means that certain norms impact the field of visual representation - whose life may be memorialised through seeing and whose life 'may leave no trace to grieve.'<sup>lxiii</sup>

Scholarly debate focuses on the political forces that mediate the interpretation and reception of images, with Mladjo Ivanovic discussing the topologies of power that influence which cases of suffering can be shown to western audiences.<sup>lxiv</sup> Sontag also explores the factors that shape our attention to global catastrophes and the evaluations attached to these crises.<sup>lxv</sup> One good example of the frame being overdetermined or pre-determined is the situation of embedded reporting. Butler maintains that the performative power of the state is facilitated by embedded journalists and photographers who carry out its 'forcible dramaturgy,' therefore validating a reality or perspective sanctioned by government. The mandated photographs structure the cognitive apprehension of war, or to put it another way, 'the reach and extent of the visual field.'<sup>lxvi</sup> Certain attributes that would pre-dispose a photographer to accept an 'interpretation of the war compelled by the state,' become embedded in the visual frame.<sup>lxvii</sup> Yet, the idea that socio-political values shape the visual field presents particularistic legal difficulties, especially when set against claims concerning the universality of human rights and customary law norms.<sup>lxviii</sup>

It is important not to conclude that exclusion from the frame signifies not being counted, not being grieved, or not having one's victimhood acknowledged, because there are counter-examples to be found in international jurisprudence.

Photography was absolutely prohibited in Nazi concentration camps; the vast majority of people perished in the absence of any visual record testifying to their journey through the camps.<sup>lxi</sup> Yet the murder of ‘approximately six million Jews’ was retrospectively acknowledged in the judgment at Nuremberg.<sup>lxx</sup> Although on a much smaller scale, several convictions were secured by the Special Court for Sierra Leone in the absence of photographic evidence and on the basis of eyewitness testimony alone.<sup>lxxi</sup> This point notwithstanding, legal opportunities to litigate atrocity crimes may be improved by the visual, and in such contexts the image may be re-interpreted, unmasking juridically significant aspects of the initial framing and exclusion. Photographs can ‘turn against’ their socio-political and military cultural genesis. When the visual landscape exposes a reality at odds with the official framing of events, whistle-blowers and leaks provide information essential for public dissemination and evidence of probative value to international courts and tribunals. Further ‘opportunities’ are presented by the digitalisation of suffering in modern warfare. Taken to its limit, the proliferation of visual recording devices means that anyone anywhere can capture images that contradict the visual field sanctioned by the state. More than just revealing the devastation of war, the digitalization of suffering provides evidentiary opportunities that easily and quickly transcend the original scene because of technological advancements.

As a mode of communication, photography is ‘transitive’ because it elicits a response in the viewer: ‘[f]or photographs to communicate effectively, they must have a transitive function: they must act on viewers in ways that bear directly on the judgments that viewers formulate about the world.’<sup>lxxii</sup> Affectivity can alter political viewpoints and trigger moral responsiveness, but photographs must

retain their capacity to shock and ‘appeal to our sense of moral obligation.’<sup>lxxiii</sup> Images provoked opposition to the Vietnam War, whilst international war journalists and photographers drawing attention to the state of siege in Sarajevo produced the so-called ‘CNN effect.’<sup>lxxiv</sup> Indeed, a photograph taken by Associated Press photographer Morten Hvaal, depicting a five-year-old girl injured by a mortar explosion, together with media commentary, ‘led to the first proper evacuation of wounded children from Sarajevo’ during the siege.<sup>lxxv</sup> While photographs occur within a deeper web of historical and social processes that affect us, Ivanovic argues that understanding these mechanisms reveals how ‘our subjectivity and agency are constituted through the effects of social forces that condition our capacity to perceive and understand.’<sup>lxxvi</sup> Moreover, the manner in which images of atrocity are instrumentalised may trigger ‘cognitive resistances.’<sup>lxxvii</sup> Thus, compassion does not necessarily translate into action, and ‘[s]o far as we feel sympathy, we feel we are not accomplices to what caused the suffering. Our sympathy proclaims our innocence as well as our impotence.’<sup>lxxviii</sup> To fully engage a compassionate response would be to reflect or acknowledge that our privilege and the suffering of others occur on the same global plane.<sup>lxxix</sup> Behind the smokescreen of ‘quasiempathetic responses and presentations in the media’ lies a core ‘numb blindness,’ especially if our privilege on the map drives consumption of such images.<sup>lxxx</sup> This might also explain our ‘civilised indifference’ to depictions of the dead, such as that of Syrian toddler Aylan Kurdi, delivered via social media through a ‘screen of abstraction,’ and we rapidly look away.<sup>lxxxi</sup>

Consumption of human misery happening elsewhere is a quintessentially modern experience that signals the predicament of compassion fatigue, whereby

a desensitised public motivates news editors and journalists to 'hunt for the more dramatic,' and higher thresholds to shock demand higher levels of atrocity and pain.<sup>lxxxii</sup> It is true that the modern dissemination of sensationalist images through a range of online and social media platforms eviscerates or negates content, and constant bombardment leads to a point of saturation (without understanding), callousness, apathy, and the 'deadening of feeling.'<sup>lxxxiii</sup> Sontag has highlighted both the instability of compassion and of attention. The former needs to be acted upon or it will wither and waste away, while the latter needs to be constantly jump started, resulting in an image-glut that keeps 'attention light, mobile, relatively indifferent to content.'<sup>lxxxiv</sup> In *On Photography*, Sontag concludes that this culture of spectatorship characterised by the 'relentless diffusion of vulgar and appalling images' reduces our capacity to respond with emotional vigour, but she later questions whether 'our culture of spectatorship neutralizes the moral force of photographs of atrocities.'<sup>lxxxv</sup> The assumption that images of atrocity have little effect or that there is an inherent cynicism in their diffusion through the media were no more than untested truisms for Sontag, concluding in her final book that 'harrowing photographs do not inevitably lose their power to shock' and to haunt.<sup>lxxxvi</sup> Haunting occurs because the visual iconography of vulnerable lives 'heading toward their own destruction' is present in every photograph of people.<sup>lxxxvii</sup> The frozen expressions of individuals who have since passed away undoubtedly capture the vulnerability, frailty and mortality of man and testify to 'time's relentless melt.'<sup>lxxxviii</sup>

Photography reveals twin temporalities; firstly, as dissociated moments that flash up in a 'Benjaminian sense... they are always atomic and punctual and discrete.'<sup>lxxxix</sup> In these *memento mori* time is arrested; the photograph 'is a thin

slice of space as well as time.<sup>'xc</sup> Yet, on the other hand, time frozen in the image creates a contradiction or a schism at the heart of photography, because the photograph 'is a kind of promise that the event will continue,' a powerful proposition with potentially profound consequences for the photographer and the subject.<sup>xc</sup> The digitalization of torture and suffering means that going over the scene retrospectively promises 'a further visual consumption of the sadistic pleasure of the event.'<sup>xcii</sup> The potential transcendence of the image can confer immortality on the event, exploited to further subjugate victims when orchestrating such photography without consent: 'after the event has ended, the picture will still exist.'<sup>xciii</sup> Asymmetrical power relations are preserved in the unchanging image, which serves as a commemoration of humiliation: the photograph's subjects are objectified, de-realised and dehumanised forever. There is a repetitive abuse on reserve through this type of photography and movie making. In the Abu Ghraib photographs, Butler contends that the temporality of the event was destroyed by its continuance in the photograph, because 'the indefinite circulability of the image allows the event to continue to happen and, indeed, thanks to these images, the event has not stopped happening.'<sup>xciv</sup> However, the infinite temporality of the digitalisation of suffering also presents the possibility of the visual record turning against the perpetrator, which can be exploited in future legal or disciplinary settings as evidence.

One cannot assume that the enjoyment of photography revelling in the suffering of others would automatically be shared by others, as '[n]o "we" should be taken for granted when the subject is looking at other people's pain.'<sup>xcv</sup> Examining lynching pictures taken in the United States between the 1890s and 1930s, which were kept as mementos and made into postcards, Sontag notes

that while they ‘tell us about human wickedness,’ they are also troubling because of the *quotidienne* nature of extreme racism they depict.<sup>xcvi</sup> Are we better off for viewing these pictures, ‘is looking at such pictures really necessary’?<sup>xcvii</sup> If viewing reduces us to the role of voyeur, then the exercise seems futile. However, it is important to apprehend visual representations of man’s inhumanity to man, because under a fresh gaze (informed by human rights norms and principles), the transitive function to mourn, eclipsed in the original socio-cultural framework, is activated, and we can say, ‘do not forget this not too distant history’. The photographs ‘turn against’ the original participants: ‘the grinning spectators’ and the ‘good churchgoing citizens’ of the lynching photos.<sup>xcviii</sup> Whilst the frame is immortalised, the referential paradigm in which the event is understood changes, depending on the ‘purpose for which they are invoked.’<sup>xcix</sup>

For abusive photography embedded in politico-military contexts, the ‘turning against’ life stage of the image is essential for subsequent disciplinary or legal proceedings. The Abu Ghraib photographs, in travelling outside the original scene, ‘left the hands of the photographer, or turned against the photographer him or herself, even perhaps vanquished his or her pleasure.’<sup>c</sup> Eleven individuals were convicted by martial courts for abuses depicted in the photographs instrumentalised in ‘radically different directions’.<sup>ci</sup>

Similar pictures from British occupied Iraq emerged; an anthology of violence captured in the Camp Breadbasket photographs. These images depict patterns of abuse, such as ‘beasting,’ whereby detainees were forced to run around the camp while being beaten on the legs.<sup>cii</sup> A smiling British soldier operates a forklift with an Iraqi man tied to the front prongs of the machine.<sup>ciii</sup> Several photographs were taken of restrained detainees about to be kicked or

punched by soldiers. There were also photographs that depicted naked detainees being forced to adopt compromising sexual positions.<sup>civ</sup> In these scenes of simulated anal and oral sex between male detainees, Muslim taboos were exploited so as to attack gender and cultural norms.<sup>cv</sup> The reinterpretation of the trophy photographs as evidence of crime occurred when staff at a film processing shop in England, tasked with developing photographs from the operation, realised their significance and alerted the authorities. Perhaps what was shocking to staff was the 'moral indifference' to the 'human suffering in the scene,' couched in a culture where such actions were not condemned.<sup>cvi</sup> Court martial proceedings followed and four soldiers were found guilty of mistreating Iraqi civilians, receiving sentences ranging from 140 days to two years imprisonment.<sup>cvi</sup> Of course, leaking visual materials exposing extra-judicial violence and brutality does not necessarily mean that the guilty parties will be prosecuted. Much will depend on the politico-legal climate of the day as the Chelsea Manning case attests.<sup>cvi</sup>

### **III. Atrocity Crimes & International Law**

The Preamble to the Rome Statute of the International Criminal Court recalls the unimaginable atrocities that deeply shocked 'the conscience of humanity,' costing millions of lives in the 20<sup>th</sup> century and threatening 'the peace, security and well-being of the world.'<sup>cix</sup> As a consequence, the international community prosecutes these crimes, listed in the Statute as genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>cx</sup> Substantively, international



lawmakers recognized that new categories of criminal law had to be codified to capture the egregious nature of 'extreme evil.'<sup>cxix</sup> Thus international interest stems from two related justifications. The first is deontological, insofar as these crimes are so severe that they victimize all of humanity and therefore jurisdiction is elevated to the supranational level. The second concern Mark Drumbl describes as pragmatic, because extraordinary international crimes can trigger 'security concerns, threaten regional stability, affect the viability of groups, and induce cross-border refugee movements.'<sup>cxii</sup>

David Scheffer regards atrocity crimes as collectively executed crimes of such a destructive character that they are inimical to human rights and international peace and security 'in an increasingly interdependent and sophisticated global society.'<sup>cxiii</sup> Scheffer identifies several overlapping bodies of law, such as international criminal law, international humanitarian law, and international human rights law, underpinning the ad hoc and hybrid tribunals established to prosecute the most serious crimes of international concern.<sup>cxiv</sup> William Schabas outlines the manner in which crimes are incorporated into the international law lexicon.<sup>cxv</sup> Some crimes are added to the taxonomy because they attack universal values, but others simply because of the politico-legal predilections of relevant stakeholders. Schabas observes that the Special Tribunal for Lebanon attempted to establish terrorism as an international crime.<sup>cxvi</sup> Some crimes for which international tribunals have jurisdiction, such as genocide and crimes against humanity, stem from international human rights law, whilst other crimes, such as the crime of aggression and war crimes, had earlier antecedents in post-World War II litigation, as well as treaty based and customary humanitarian law.<sup>cxvii</sup>

In essence, the principle that only the most serious crimes would be prosecuted by international criminal law is mirrored by provisions of international human rights law, such as Art 6(2) of the International Covenant on Civil and Political Rights (ICCPR) which prohibits capital punishment except for the 'most serious of crimes.'<sup>cxviii</sup> Schabas takes seriousness as crucial to international status and he argues that international law 'cannot leave individual states with the option of deciding what constitute "serious crimes" for the purpose of determining their treaty obligations.'<sup>cxix</sup> Thus, the focus of concern here is the most serious violations of international human rights law (usually torture and right to life violations), crimes set out by the Rome Statute, and grave breaches of the Geneva Conventions. Of course, several different bodies of law may overlap when considering jurisdiction for atrocity crimes, and the next section examines how the visual record reflects these crimes where jurisdiction has been established.

International human rights law protects the right to life as a non-derogable article in various treaties, regional instruments, and declarations.<sup>cxx</sup> The extra-territorial effect of human rights treaties means that state parties are bound to respect the codified rights when exercising control over individuals or territories outside their jurisdiction.<sup>cxxi</sup> Furthermore, in situations of conflict human rights law co-exists and complements other bodies of international law, such as international humanitarian law. The *lex specialis* or the rules with greater specificity supplant more general provisions and should frame the response to suspected violations during war or conflict.<sup>cxxii</sup> Photographic or visual evidence suggesting the use of lethal force by state agents could trigger procedural obligations to carry out an effective investigation into the killing.<sup>cxxiii</sup> Whilst not

specifically citing photographic evidence, the UN Human Rights Committee recommended that both the UK and the US governments conduct prompt and independent investigations into suspicious deaths and allegations of torture, cruel, inhumane and degrading treatment inflicted by state party personnel in detention facilities in Iraq and Afghanistan.<sup>cxxiv</sup>

The UN Convention Against Torture (1984) provides a comprehensive definition of torture in Article 1(1),

[T]he term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>cxxv</sup>

This definition signifies the twin-track relationship that photography has with the prohibition on torture. Abusive photography connotes interplay between the image producing device, its author, the camera's subject and the scene designed to intensify the victim's mental suffering. Degradation and humiliation is increased by the threat to wider dissemination as temporality is interrupted and expanded in the photograph. Acts designed to elicit mental suffering are also prohibited by Article 7 of the ICCPR, by Article 3 of the European Convention on Human Rights, and Article 5 of the Inter-American Convention on Human Rights,

as well as other regional instruments. Article 2 of the UN Convention Against Torture imposes a duty on state parties to give legislative, judicial and administrative effect to the prohibition on torture, pointing to the second essential function of the visual - as evidence in the prosecution of official acts of torture.<sup>cxxvi</sup>

There are very few references to photographic or video materials in the jurisprudence of the Committee Against Torture.<sup>cxxvii</sup> Most of these references pertain to visual identification, with two noteworthy exceptions, the first being the *MN v Switzerland* case in which the applicant submitted photographic evidence of his brother ‘in which it is clear that he has lost an arm,’ to support his claim that he would be tortured if returned to Bangladesh, which was rejected by the Committee.<sup>cxxviii</sup> Visual materials were also mentioned in *A.S. v Sweden*; the applicant submitted that she was sentenced to death in absentia for adultery in Iran and had been informed ‘that the authorities had found films and photographs of the couple in the Christian man’s apartment, which had been used as evidence.’<sup>cxxix</sup> Although no photographic evidence was shown to the Committee (nor indeed to the Swedish Immigration Board or the Aliens Appeal Board), *A.S.’s* claim was successful on the basis of her own testimony, corroborated by her son, and wider information about human rights abuses in Iran.<sup>cxxx</sup>

The Human Rights Committee may also investigate allegations of torture under Article 7 of the ICCPR and did so in respect of the *Daljit Singh v Canada* application. Singh submitted photographs which purportedly established that ‘he and some of his family members [were] victims of torture,’ however, the state party disputed the veracity of these photos.<sup>cxxxi</sup> Ultimately, the Committee

deemed the communication inadmissible under Article 2 of the Optional Protocol because the author had not sufficiently adduced evidence ‘in support of a claim to the effect that he would be exposed to a real and imminent risk of violations of articles 6 and 7 of the Covenant if deported to India.’<sup>cxxxii</sup> Interestingly, in another non-refoulement case heard by the Human Rights Committee, *Masih Shakeel v Canada*, the applicant provided ‘a photo of his dead brother, who had died as a result of internal bleeding following the attack on him.’<sup>cxxxiii</sup> The Committee upheld Shakeel’s application to prevent his deportation to Pakistan because the Canadian government had not sufficiently explored the ‘author’s allegations about the real risk he might face if deported to his country of origin,’ potentially in violation of Articles 6(1) and Article 7 of the Covenant.<sup>cxxxiv</sup> While it is unclear how the probative value of the photo factored into this decision, the Committee did acknowledge that a Canadian Federal Court had accepted that the applicant’s brother was ‘beaten to death by unknown individuals.’<sup>cxxxv</sup>

Within international humanitarian law the visual field can be apprehended in similar ways; firstly, by reference to rules governing the treatment of protected persons, and secondly, as evidence substantiating breaches of humanitarian norms and customs. Whilst atrocity crimes or ‘unimaginable atrocities,’ such as crimes against humanity and genocide may occur in peacetime, they mostly occur in situations of conflict.<sup>cxxxvi</sup> International humanitarian law is a body of rules applicable both in situations of non-international and international armed conflict.<sup>cxxxvii</sup> Article 27 of the Fourth Geneva Convention indicates that protected persons, such as civilians, refugees, prisoners of war and other detainees, as well as the injured or sick not actively taking part in hostilities,

[...] are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.<sup>cxviii</sup>

This ban on public curiosity connotes a 'ban on photographs or films identifying a detainee's face.'<sup>cxix</sup> Whilst such photography is a violation of Article 27, it would not constitute a war crime, but when abusive photography is implicated in acts of torture this may violate the prohibition on torture and cruel treatment, outlined in Common Article 3 of the Geneva Conventions. Referencing the Abu Ghraib photos, Butler maintains that 'poor treatment [...] does not defy international law and put the US in direct violation of the Geneva Accord, a situation that could bring the US before the World Court or the International Criminal Court.'<sup>cxl</sup> However, 'inhuman treatment,' 'outrages upon personal dignity,' and 'humiliating and degrading treatment' do constitute grave breaches of the Geneva Conventions and are defined as crimes within the jurisdiction of the International Criminal Court.<sup>cxli</sup> And whilst the United States has not ratified the Rome Statute, the prohibition on torture and cruel treatment may be found in various US military manuals, violations of which give rise to martial law jurisdiction.<sup>cxlii</sup>

The second key modality of the visual record is to constitute evidence of probative value testifying to war crimes, which are 'serious violations of the laws and customs applicable in international armed conflict' and 'serious violations of the laws and customs applicable in an armed conflict not of an international

character.<sup>'cxliii</sup> The statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL) all have jurisdiction for serious violations of international humanitarian law, and the specific role of visual evidence in prosecuting war crimes (and other crimes) is examined below. Generally, war crimes involve death, injury, or the destruction of property. Furthermore, acts which breach important values, such as abusing dead bodies, subjecting persons to humiliating treatment, or the recruitment of child soldiers may amount to war crimes.<sup>cxliv</sup> Visual media can accurately depict the mutilation or desecration of dead bodies, the wanton destruction of property including attacks on protected objects, as well as testifying to the involvement of children in armies. Whereas most national military manuals prohibit war crimes, many of these do not include seriousness as critical to whether an act is defined as a war crime.<sup>cxlv</sup>

Studying the visual landscape integrated into international criminal law similarly lends itself to a twin track approach, firstly, by interrogating whether abusive photography could itself constitute a crime prosecutable by an international court or tribunal. Thereafter, the role of visual representation critical to the evidentiary matrix for atrocity crimes in international criminal forums is explored. Under the Rome Statute, the Court has jurisdiction for war crimes 'in particular when committed as part of plan or policy or as part of a large-scale commission of such crimes,' whereas neither the statute of the ICTY nor the ICTR contain this caveat.<sup>cxlvi</sup> Reflecting customary humanitarian norms outlined above, the Court has jurisdiction over grave breaches or serious violations of the Geneva Conventions occurring in the context of international

armed conflict and it also lists prohibited acts for non-international armed conflict in a much more detailed way than its ad hoc counterparts.<sup>cxlvii</sup> There are no cases where the crux of a war crime prosecution hinges on the actual act of photography in international criminal law jurisprudence. In theory, abusive photography occurring during either international or non-international armed conflict could constitute a war crime justiciable by the International Criminal Court (where it has jurisdiction).<sup>cxlviii</sup>

Eleven specified categories of action<sup>cxlix</sup> when committed 'as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack' are defined as crimes against humanity under the Rome Statute.<sup>cl</sup> Of particular relevance to this discussion are torture and 'other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.'<sup>cli</sup> Unlike the ad hoc tribunals, the Rome Statute clarifies the meaning of these terms in a subsequent paragraph, defining torture as 'the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.'<sup>clii</sup> Contrasting the CAT definition, the purpose of torture need not be the extraction of information from the victim, nor does it have to be conducted by an individual acting in an official capacity for international criminal responsibility to adhere. Could abusive photography on a wide scale be considered a crime against humanity? It is conceivable, though improbable, that if such acts constituted the sole method of torture and ill treatment in a widespread or systematic attack against a civilian population it could meet the definition of torture provided in



the Rome Statute. However, the main relevance of photography to international criminal law is in providing the evidentiary basis of crimes. Visual information is critical to documentary dossiers in cases of genocide, war crimes, and crimes against humanity.

#### **IV. Visual Evidence in International Law**

International criminal courts and tribunals incorporate rules governing procedure from both the common law and civil law traditions. With regard to the common law tradition, Richard May and Marieke Wierda point out that the evidence admitted must be relevant and probative.<sup>cliii</sup> The probative value of evidence relates to its capacity to prove something in court, which always has to be weighed against the possibility of prejudicing a jury, leading to restrictions and exclusions on the admission of evidence in common law. By contrast, within an inquisitorial system, evidence can be admitted which judges will subsequently evaluate for its probative value. International tribunals have drawn from both traditions to achieve fairness, demonstrating flexibility in the apprehension of documentary evidence quite distinct from the 'technical rules of evidence sometimes found in national jurisdictions.'<sup>cliv</sup> Visual materials, such as photographs and video recordings, fall under the rubric of documentary evidence, set out by the International Criminal Tribunal for Rwanda during the *Musema* trial as consisting of

[...] documents produced as evidence for evaluation by the Tribunal. For the purposes of this case, the term “document” is interpreted broadly, being understood to mean anything in which information of any description is recorded. This interpretation is wide enough to cover not only documents in writing, but also maps, sketches, plans, calendars, graphs, drawings, computerized records, mechanical records, electromagnetic records, digital records, databases, sound tracks, audio-tapes, video-tapes, photographs, slides and negatives.<sup>clv</sup>

Every court and tribunal has its own set of rules governing procedure. May and Wierda note that the Trial Chamber in the *Tadic* case held that while the Statute of the ICTY is not an international treaty but a *sui generis* legal instrument, the Vienna Convention on the Law of Treaties is applicable to matters of interpretation and, in particular, the Tribunal’s ability to ‘mold its rules and procedures to fit the task at hand,’ which is ‘to do justice, to deter further crimes and to contribute to the restoration and maintenance of peace.’<sup>clvi</sup>

Both sides may admit visual artifacts as documentary evidence to support their arguments and, similar to the ICTR, the ICTY holds that pursuant to Rule 89(C) documentary dossiers including ‘expert reports, orders, transcripts of intercepted communications, exhumation reports, photographs, maps, news agency reports, and audio tapes,’ may be admitted.<sup>clvii</sup> Some of these documentary dossiers are basically reports prepared by prosecution investigators in the field.<sup>clviii</sup> Of course, all courts and tribunals are underpinned by regulations regarding the treatment of exculpatory evidence, such as Rule 68 of the ICTY, which was consistently ignored by the Office of the Prosecutor in *Oric*, culminating in the disclosure of two additional documents and a video to

the defense only a week prior to the final judgment, much to the exasperation of the court.<sup>clix</sup>

There is a pattern in the way that documentary evidence is used in these contexts, which was neatly detailed in *Musema* (ICTR). The general rule is that oral testimony or other forms of independent evidence is used to corroborate the documentary evidence. In this sense,

[...] independent evidence may be used to “corroborate”, support, prove or disprove the authenticity and probative value of documentary evidence, once that independent evidence has been admitted. This principle is not limited to the use of oral testimony in supporting documentary evidence: it permits the use of multiple documents in mutual support (for example the combined use of maps, photographs and videos).<sup>clx</sup>

Likewise, documentary evidence can be used to corroborate oral testimony, secondary evidence, or hearsay evidence, and in this matrix multiple pieces of evidence operate simultaneously from which trends that testify to the defendant’s guilt or innocence may be deduced.<sup>clxi</sup> Thus, in bearing witness to atrocity crimes, photography and visual media can form documentary evidence with ‘probative value’ testifying to genocide, crimes against humanity, and war crimes. The ICC is governed by Rules of Procedure and Evidence, which may also be supplemented by provisional rules drafted by the Court.<sup>clxii</sup> Evidence must be reliable and, similar to the ad hoc tribunals, the ICC has demonstrated flexibility in balancing the probative value of such evidence against ‘any prejudice [it] may cause to a fair trial’ by being ruled admissible.<sup>clxiii</sup>

An E-Protocol guiding the submission of digital evidence to the ICC has two essential criteria for validation. The first concerns internal indicators, the metadata attaching to digital photos and videos (such as time and date stamps, and GPS coordinates), and the second pertains to information regarding the external identification of evidence, including the chain of custody ‘in chronological order, the identity of the source, the original author and recipient information, and the author and recipient’s respective organizations.’<sup>clxiv</sup> However, even where authentication has not been established using internal or external indicators, evidence may still be admitted. In the *Bemba* case, recordings that were not authenticated in court were still ‘admitted, as in-court authentication is but one factor for the Chamber to consider when determining an item’s authenticity and probative value.’<sup>clxv</sup> Similarly in *Tolimir* (ICTY), aerial photographs taken by US satellites were admitted in the absence of any information ‘on their origin, the method of their creation, the manner of their editing, how to interpret them or whether they were delivered to the Prosecution in their original form or previously modified.’<sup>clxvi</sup> Overlooking the absence of external indicators, the Trial Chamber found that the lack of source information did not necessarily impair the ‘credibility of the aerial images in general,’ which were accepted as evidence upon the corroboration of OTP investigators who testified to their provenance, but did not disclose the methods of collection.<sup>clxvii</sup>

A spectrum of visual iconography showing wide ranging subject matter is generally integrated into these dossiers of evidence. At one end, images depicting group affiliation can cast aspersions on the defendant’s claims of innocence. For example, video recordings showing Mathieu Ngirumpatse and Edouard

Karemara at several National Republican Movement for Democracy and Development (MRND) rallies were admitted into evidence during their trial at the ICTR.<sup>clxviii</sup> The Prosecution established that Karemara and Ngirumpatse were members of the MRND executive leadership - a key organisation involved in the commission of genocide in Rwanda.<sup>clxix</sup> During these rallies, calls for Hutu power were frequent, and one recording depicts the defendants addressing a crowd gathered at Nyamirambo Stadium in Kigali at which the Interahamwe provided entertainment.<sup>clxx</sup> Whilst not directly exhibiting criminality, the recordings formed a hub within the wider matrix of documentary evidence used to convict Karemara and Ngirumpatse of 'genocide, conspiracy to commit and direct and public incitement of the same, rape and extermination as crimes against humanity and serious violations of Common Article 3.'<sup>clxxi</sup> In the same way, video recordings of the well-known Rwandan composer and singer, Simon Bikindi, performing at various MRND rallies were introduced as evidence during his trial at the ICTR. The Trial Chamber described Bikindi's appearance at an MRND rally in 1993 where he performed, 'celebrating the victories of the MRND and Interahamwe.'<sup>clxxii</sup> Whilst Bikindi was convicted of incitement to genocide, this conviction hinged on statements he made at a roadblock while the genocide was ongoing, rather than the manner in which his music was used to galvanise violence during the slaughter.<sup>clxxiii</sup>

Also litigated at the ICTR was a high profile media case that involved the prosecution of three individuals constituting a 'common media front,' who together with the political party Coalition pour la defense de la republique (CDR) 'made up a Hutu power coalition that defined the enemy as the Tutsi ethnic group, normalized ethnic hatred as political ideology, and orchestrated

killings.’<sup>clxxiv</sup> Along with Ferdinand Nahimana and Jean-Bosco Barayagwiza (leading figures within Radio Television Libre des Mille collines (RTLM), a radio station dubbed ‘Machete Radio’), Hassan Ngeze, the founder, owner and editor of Kangura magazine, was found guilty of conspiracy to commit genocide, genocide, direct and public incitement to commit genocide, and persecution and extermination as crimes against humanity.<sup>clxxv</sup> Notwithstanding subsequent technical legal arguments on appeal, during Trial Chamber deliberations visual evidence exhibited dual modalities.<sup>clxxvi</sup> Firstly, several photographs were produced of Ngeze amongst CDR supporters or wearing CDR colors demonstrating his involvement in an organisation that promoted the genocide. Whilst acknowledging that a CDR tie had been superimposed on an image of Ngeze published in Kangura, because he did not later distance ‘himself from the impression created by this photograph,’ the Chamber found that Ngeze sympathised with and supported the CDR party.<sup>clxxvii</sup> When cross-examined about another photograph published by Kangura in which he appeared with several people wearing CDR t-shirts and caps, Ngeze claimed that it was taken at a football match. However, his co-defendant Nahimana confessed that it showed a CDR meeting, which the court ultimately found more convincing.<sup>clxxviii</sup> A second key function of visual evidence in this case, perhaps unique since Julius Streicher’s conviction of incitement to genocide for his *Der Stürmer* publications at Nuremberg, was to provide a visual and textual anthology of materials upon which incitement to genocide could be established.<sup>clxxix</sup> A key example of this was the cover of Kangura No. 26, which featured the picture of the former President and Hutu ‘emancipation’ leader, Gregoire Kayibanda, with a textual reference to re-launching the revolution and posing the question, ‘what weapon shall we use

to conquer the Inyensi [Tutsi] once and for all?’ alongside a photo of a machete.<sup>clxxx</sup>

The gaze of the court may fix on the visual when it chronicles evidence of physical injury. Scars from bullet wounds are commonly shown,<sup>clxxxi</sup> but in a case against high ranking members of the Revolutionary United Front (RUF) at the Special Court for Sierra Leone, a photograph depicting markings where rebels had carved ‘RUF and/or AFRC [Armed Forces Revolutionary Council] on the bodies of all the captured civilians’ was admitted.<sup>clxxxii</sup> It is interesting to note that during General Galic’s prosecution at the ICTY, photographic evidence showing bullet wound scars on a victim’s back was favoured by the court over a medical certificate that presented a different account of how the injuries were acquired. In the court’s estimation, the photograph was determinative because it corroborated the witness’s testimony regarding the ‘point of entry and exit of the bullet’ and supported a theory about the direction of gunfire overlooked by the medical report.<sup>clxxxiii</sup> Visual media had a crucial role in the guilty verdict against Enver Hadzihasanovic and Amir Kubura at the ICTY on the basis of their command responsibility for the ill-treatment of detainees.<sup>clxxxiv</sup> Several individuals detained at Motel Sretno in Kakanj (current day Bosnia and Herzegovina) filmed their injuries following release and these clips were subsequently viewed by the court, which together with statements from three detainees, led the chamber to conclude that serious bodily harm was inflicted on the detainees and the ‘perpetrators of the mistreatment intended to cause the prisoners at Motel Sretno serious pain and suffering.’<sup>clxxxv</sup> Finally, photographic evidence contributed to Charles Taylor’s conviction for war crimes and crimes against humanity.<sup>clxxxvi</sup> These images depicted eye and limb amputations; a

medical doctor working at a Freetown hospital photographed two individuals who had had their eyes removed. One of the photographs depicted a young nursing mother, whose eyes were ‘protruding from the sockets,’ pulled out to prevent her from identifying her attackers.<sup>clxxxvii</sup> These exhibits, together with the doctor’s testimony and a confidential exhibit, led the court to find that the rebels ‘caused serious physical suffering and injury to the amputation and mutilation victims.’<sup>clxxxviii</sup> A photograph taken by the international photo-journalist Corinne Dufka of a 13-year girl with double hand amputations corroborated the ‘widespread nature of these amputations,’ reflecting the definition of crimes against humanity provided by Article 2 of the Statute of the Special Court for Sierra Leone.<sup>clxxxix</sup>

Visual evidence clearly established a link between Thomas Lubanga and the conscription of child soldiers in a case stemming from the Democratic Republic of Congo heard at the ICC. Lubanga was Commander in Chief of the Union des Patriotes Congolais (UPC), which had a military wing, the Force Patriotique pour la Liberation du Congo (FPLC). The Chamber concluded that Lubanga, together with his principle co-perpetrators, initiated and implemented a common plan to establish politico-military control over the Ituri region, which entailed the conscription of boys and girls under the age of 15 into the UPC/FPLC. Video evidence was critical to Lubanga’s conviction; firstly, as it established that he met with his staff, members of the military and demonstrated his ‘active role in making decisions and issuing instructions.’<sup>cxc</sup> However, even more crucially, a video was admitted showing Lubanga in military attire addressing UPC/FPLC recruits clearly under the age of 15 at a training camp in February 2003, where he ‘spoke to the recruits and encouraged them in their military training, and he



said that as soon as it was completed, they would be provided with weapons, prior to being deployed to protect the population. He indicated they would be useful soldiers in the field.’<sup>cxci</sup> This recording, when considered alongside eye witness testimony, persuaded the court that Lubanga used children in his personal escort and bodyguard, and, in particular, the video footage, provided ‘compelling evidence on Thomas Lubanga’s level of knowledge, which is directly relevant to the mental element of the charges.’<sup>cxcii</sup>

Visual evidence can attest to the destruction of civilian objects, such as dwellings, religious buildings, cultural property, historic monuments and educational institutions, which, in the context of armed conflict and unjustified by military necessity, may constitute war crimes.<sup>cxiii</sup> At the ICTY, aerial photography produced by the US Department of Defense depicted the bazaar in Priština burning, whilst other photographs admitted into evidence during Vlastimir Đorđević’s trial illustrated that the mosque had been heavily damaged.’<sup>cxiv</sup> In examining photographs depicting damage to a 16<sup>th</sup> century mosque in Brestovac/Brestoc (current day Croatia), expert witness for the Prosecution, Andrs Riedlmayer characterised it as ‘almost destroyed.’<sup>cxv</sup> Indeed, the Chamber found Đorđević guilty of persecution as a crime against humanity through his participation in a joint criminal enterprise that targeted Kosovo Albanians on racial grounds, and that, *inter alia*, destroyed and damaged property of cultural or religious significance to this group.<sup>cxvi</sup> Similar evidence was tendered in the Tihomir Blaškić case.<sup>cxvii</sup> General Blaškić was convicted of several charges, including ‘the destruction and plunder of property and, in particular, of institutions dedicated to religion or education,’ which was

categorised by the court both as a crime against humanity and a violation of the laws and customs of war.<sup>cxcviii</sup>

Separately, also at the ICTY, Pavle Strugar was successfully prosecuted for, amongst other things, the destruction and wilful damage ‘to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science,’ in violation of Article 3 of the ICTY Statute.<sup>cxcix</sup> This devastation was depicted in a video clip of the Old Town of Dubrovnik, a designated UNESCO world heritage site, showing considerable damage and ‘fires burning fiercely in many of its locales.’<sup>cc</sup> Video evidence regarding widespread destruction to villages in the Laska Valley was also significant in the prosecution of Dario Kordic and Mario Certež.<sup>cci</sup> Kordic and Certež were both found guilty of violating the customs of war with respect to the destruction of religious or educational institutions.<sup>ccii</sup> The physical destruction of property in these cases occurred within the wider context of violence and killing.<sup>cciii</sup> By contrast, at the International Criminal Court, Ahmad al-Faqi al-Mahdi pleaded guilty to the war crime of attacking objects protected by the Rome Statute for his role in the destruction of UNESCO heritage sites at Timbuktu (Mali).<sup>cciv</sup> This was the first time that the destruction of cultural heritage was the sole focus of prosecution, sustained by irrefutable photographic and video evidence showing the active destruction of the mausoleums, including comments made by al-Mahdi to journalists while the demolition was ongoing.<sup>ccv</sup>

Visual evidence at the crux of international criminal prosecutions usually attests to more serious crimes, such as genocide, crimes against humanity, or war crimes. Indeed, the ICTR admitted video footage taken by the British photographer Simon Cox, showing human bodies in the Kagera river near the

Tanzanian border, 'floating by at the rate of several corpses per minute.'<sup>ccvi</sup> Cox also photographed the dead in several churches, evidence which led the Chamber to conclude that in view of the widespread killings, the first requirement 'for there to be genocide' had been met, and the defendant, Jean Paul Akayesu, was found guilty of genocide, direct and public incitement to genocide, and crimes against humanity.<sup>ccvii</sup> Photographic materials collated by the forensic anthropologist, Dr William Haglund, indicated that mass killings had occurred in a cave in the Bisesero sector of Rwanda.<sup>ccviii</sup> In June 1994, hundreds of Tutsis who sought refuge there were subjected to a grenade attack and the cave was set alight. Over a year later, Dr Haglund observed the remains 'of many individuals, men, women and children protruding from the mud that had covered them up in the intervening rainy season, and at minimum, I observed at least 40 people in this area.'<sup>ccix</sup> His expert testimony corroborated an account told by the sole survivor of the attack and the two defendants, Clement Kayishema and Obed Ruzindana, were held criminally responsible for the massacre, which when taken alongside culpability for other atrocities, amounted to genocide.<sup>ccx</sup>

Photographic and visual materials tendered as evidence at the ICTY depicted bodies with fatal gunshot wounds,<sup>ccxi</sup> some with the cause of death unknown,<sup>ccxii</sup> blood splatters, blood stains and human tissue,<sup>ccxiii</sup> as well as burnt bodies.<sup>ccxiv</sup> Whereas these photographs suggest the occurrence of criminal violence, the perpetrators are missing from the frame.<sup>ccxv</sup> There are exceptions; visual evidence actually showing the commission of a crime, which can be authoritative in a judicial setting. A series of photographs illustrating an execution sequence may have influenced Goran Jelusic's guilty plea at the ICTY. It is interesting to

note that the Chamber only accorded ‘relative weight to his plea’ due to the probative value of the photographs showing Jelusic committing crimes.<sup>ccxvi</sup> The execution of six Bosnian Muslim men from Srebrenica was captured on video by a member of the Serb Scorpions unit and ultimately contributed to the conviction not of the individual perpetrators depicted on film, but of their military superiors.<sup>ccxvii</sup>

In fact, authors of atrocity display a finely tuned awareness that visual media may betray them. Slobodan Medic, implicated in the abovementioned Skorpions’ unit execution, later tried to ‘collect all the tapes and destroy them.’<sup>ccxviii</sup> During Casimir Bizimungu’s prosecution (ICTR), it was revealed that the accused ‘attempted to conceal the massacres in Kigali. During a meeting on 11 April 1994, Bizimungu told workers to get rid of the corpses before the white people took photographs of them.’<sup>ccxix</sup> Concealment of crimes precludes the existence of such evidence. When a truck carrying bodies of murdered Kosovo Albanians crashed into a river near Kladova revealing ‘two legs, an arm, and pieces of clothing protruding through a crack on the back door of the refrigerated freight container of the truck,’ a witness who had managed to take some photographs ‘depicting the back of the freight truck with a leg protruding from a crack on the door’ was prohibited from photographing the bodies being removed from the truck, as the local police chief, Caslav Golubovi, did not want the incident to attract any publicity.<sup>ccxx</sup> Golubovi’s superior, Đorđević, was found guilty of murder as a war crime and a crime against humanity, with the Chamber concluding the evidence demonstrated that ‘at the local level, as well at the highest levels in Belgrade, the MUP [Ministry of Internal Affairs of Serbia] sought to conceal the discovery and origin of the bodies of over 80 ethnic Kosovo Albanians removed from the

refrigerated truck that was found in the Danube river on 4 April 1999.<sup>'ccxxi</sup> Similarly, General Zdravko Tolimir prohibited the 'filming and photographing of prisoners' on the Zvornik-Vlasenica Road and POWs on the main Milici-Zvornik Road were to be removed 'somewhere out of sight from the ground or air.'<sup>ccxxii</sup>

During Tharcisse Muvunyi's ICTR trial, a witness recalled that when the defendant addressed a crowd in his capacity as an officer of the Rwandan Army, he criticised their actions not because the group had executed innocent people, but because they had left 'bodies on the hills, which were being photographed by satellites.'<sup>ccxxiii</sup> Aerial photography can reveal surface disturbances indicative of execution sites and mass graves, providing leads for onsite forensic investigators.<sup>ccxxiv</sup> Indeed, aerial photography taken by the US satellites showing the presence of surface disturbances was admitted as evidence in the prosecution of Vidoje Blagojevic and Dragan Jokic at the ICTY.<sup>ccxxv</sup> On the basis of this evidence, two teams of forensic investigators were deployed to the region, where they uncovered a mass grave with 33 male victims at one site and 12 men interred at another site.<sup>ccxxvi</sup> Aerial photographs produced by the US showing the existence of mass graves resulted in Security Council Resolution 1010 demanding that 'Bosnian Serb authorities allow UN and ICRC observers to enter into Srebrenica.'<sup>ccxxvii</sup> Given the modern omnipotence of satellite imaging, if atrocity crimes are occurring on earth, it will be practically impossible for perpetrators to conceal their acts or to prevent aerial photography from emerging.<sup>ccxxviii</sup>

Forensic photography forms a particular category of visual material within dossiers of evidence presented to international courts and tribunals litigating atrocity crimes.<sup>ccxxix</sup> Photography and image producing technologies are essential

to the exhumation and examination process associated with the excavation of individual and mass graves where atrocity crimes are suspected.<sup>ccxxx</sup> At Batajnica in Serbia, several grave sites were identified, five of which were mass graves and during the excavation '[a]t every stage the entire scene was photographed, video-recorded and sketches were made. Photographs were used as an auxiliary resource for identification and to help establish a possible cause of death.'<sup>ccxxxi</sup> In court, forensic photographs serve a variety of functions. They may be entered into evidence to corroborate exhumation reports.<sup>ccxxxii</sup> Autopsy photographs also function to support evidence from the exhumation process.<sup>ccxxxiii</sup> Forensic photographs may substantiate descriptions of what the victim was wearing when last seen alive.<sup>ccxxxiv</sup> Such evidence is recorded by forensic pathologists in the course of their work, to document and support theories about causes of death.<sup>ccxxxv</sup> When technical evidence is collated, independent experts can evaluate and comment on its provenance. In this way, the French forensic pathologist, Eric Baccard, synthesised an overview report from disparate forensic reports compiled by national teams across Kosovo.<sup>ccxxxvi</sup> Baccard analysed all of these reports, together with 'photographs and videos made during their investigations and exhumations,' and came to the conclusion that their scientific findings were sound, which was accepted by the Chamber during the Đorđević trial.<sup>ccxxxvii</sup> By contrast, Baccard's analysis of a video in which he hypothesised on how individual victims had died was rejected by the Chamber as reflecting 'forensic assumptions,' and could not be relied upon in isolation to reach any 'conclusion as to cause of death.'<sup>ccxxxviii</sup>

Photography may also be incorporated into ballistics reports tendered as evidence before international courts and tribunals. During General Stanislaw

Galic's prosecution for crimes committed in Sarajevo (1992-1995), one witness reported that two bullets hit his apartment; this testimony was supported by photography and a video depicting the 'entry points of the two bullets and where his wife was seated at the time of the incident.'<sup>ccxxxix</sup> In a separate incident also covered in Galic's trial, police officers recorded the impact of bullets inside a restaurant by taking photographs at the crime scene and noting the bullet trajectories.<sup>ccxli</sup> Such evidence can be used to establish the direction of fire.<sup>ccxli</sup> A defence theory pertaining to photographic evidence of crater impacts was at odds with the prosecution hypothesis in this case, but the Chamber ultimately dismissed the defence's argument about the trajectory of the mortar.<sup>ccxlii</sup> Galic's defence team also employed visual forensic evidence drawn from killing sites in the residential neighbourhood of Dobrinja which were photographed by a police crime technician and incorporated into the Viličić Shelling Report.<sup>ccxliii</sup> The Chamber accepted 'the forensic evidence that the latter two shells were 120 mm calibre and flew in from the east and from east-northeast, respectively,' but it rejected a claim made in the report that 'one of these shells could have been fired from a distance of only 300 metres, which would have resulted in a near-vertical angle of descent and near-circular impact traces.'<sup>ccxliv</sup> A defence expert's (Maj. Gen. Desimir Garovic) use of the 'photogrammatic method' was deemed unreliable by the Trial Chamber, which ruled that the photogrammatic method employed by Garovic as a way of establishing artillery projectiles was not convincing, particularly as he never visited the scene and based his conclusions on photographs alone.<sup>ccxlv</sup>

Another important function of visual evidence is in the identification of suspects,<sup>ccxlvi</sup> usually in a structured way, via photo boards and photo

spreads.<sup>ccxlvii</sup> Legally the identification of the accused as a perpetrator must be proven beyond a reasonable doubt.<sup>ccxlviii</sup> This threshold can be difficult to meet due to certain material factors that may impinge on the prosecution's use of photo boards and photo spreads. Substantively, a photo of the accused might accurately record the subject's likeness at one point in time, but 'may not be a typical likeness,' and the quality or clarity of the photograph, together with 'limitations inherent in a small two-dimensional photograph,' may differ from a three dimensional view of a person.<sup>ccxlix</sup> In judgment of Fatmir Limaj, Haradin Bala and Isak Muslin, the Trial Chamber (ICTY) placed significance on whether an 'individual witness was familiar with the subject of identification and simply "recognising" someone previously known or "identifying" a stranger.'<sup>ccl</sup> To provide safeguards to the accused,<sup>ccli</sup> the Chamber considered photo identification as being only one element of all the evidence presented by the Prosecution that has a 'bearing on the identification of the Accused.'<sup>cclii</sup> In this case, the Prosecution did not discharge of its obligation in respect of Limaj and Musliu who were acquitted of crimes committed by the Kosovo Liberation Army in Kosovo with the issue of criminal responsibility turning, although not solely, 'on the question of identification.'<sup>ccliii</sup>

The Trial Chamber of the ICTR has highlighted socio-cultural issues regarding the interpretation of visual evidence that challenges Western assumptions that such iconography represents the real. During Georges Rutaganda's case, the Chamber considered various 'social and cultural factors in assessing the testimony of some of the witnesses,' such as their agricultural background, low educational attainment, and their profound unfamiliarity with methods of 'identifying and testifying to some of the exhibits, such as



photographs of various locations, maps etc.’<sup>ccliv</sup> The Chamber adopted a similar approach in the prosecution of clergyman Elizaphan Ntakirutimana and his son, Gérard Ntakirutimana, for their role in the Rwandan genocide, concluding that it was not significant that a witness was unable to identify a church from a prosecution photograph, as the witness was ‘not used to identifying photographs.’<sup>cclv</sup> This sensitivity was expressed by the Trial Chamber in stating that ‘certain witnesses had difficulty in being specific as to dates, times, distances and locations, and appeared unfamiliar with the use of maps, films, photographs and other graphic representations.’<sup>cclvi</sup> The Chamber refused to draw any adverse inferences from such reticence, recommending that the cultural sensitivity exhibited by parties to the proceedings should be extended ‘to the gathering and preparation of evidence.’<sup>cclvii</sup> The court criticised the Prosecutor’s use of aerial photography when other forms of identification were available.<sup>cclviii</sup>

The foregoing signals the critical axis on which visual evidence turns in either corroborating or discounting witness testimony. Exculpatory evidence may be drawn from visual media, such as a video recording that was presented by Slavko Dokmanović to the ICTY to support his alibi.<sup>cclix</sup> Statements provided by a prosecution informant ‘Jean-Pierre’ in the Theoneste Bagosora case (ICTR) was corroborated by other witness testimony, as well as ‘video footage of him at an Interahamwe rally demonstrat[ing] that he was a well-placed member of the organisation.’<sup>cclx</sup> Similarly, photographs were admitted in the context of Clement Kayishema’s and Obed Ruzindana’s prosecution at the ICTR, which showed that it was possible for two witnesses to have an unobstructed view of the defendant while remaining concealed.<sup>cclxi</sup> In the same vein, the Trial Chamber in Đorđević accepted the truthfulness of Agim Jemini’s testimony, having viewed ‘photos

depicting his vantage point and the views from it.’<sup>cclxii</sup> Another significant piece of evidence admitted in Đorđević was a video taken by Dr Liri Loshi, deemed to conclusively depict the aftermath of events which occurred in the Izbica/Izbic region of Kosovo in March 1999, ‘as described in his [Loshi’s] evidence.’<sup>cclxiii</sup> The video depicts victims at several locations where they were killed, and the court found that it definitively proved that the victims had not been moved from elsewhere, as alleged by the defence. In an adversarial system, if visual evidence corroborates one narrative version of events, it is likely to weaken, dispel, or seriously damage the opposing view.

Photographic evidence may also cast doubt on witness testimony.<sup>cclxiv</sup> Such discrepancies, if innocuous, may not necessarily discredit the witness; a photograph tendered as evidence during Emmanuel Ndindabahizi’s ICTR trial showed no vegetation where the witness was allegedly hidden, but the prosecution pointed out that the photo had been taken long after the event in question and that the bush had been removed in the meantime.<sup>cclxv</sup> However, contradictions may be indicative of more sinister motives to mislead or lie to the court. The way in which witnesses interface with visual documentary evidence may render their evidence implausible. During the Ljube Boskoski and Johan Tarculovski ICTY trial, two witnesses marked photographs indicating the direction from which an army position allegedly received fire, demonstrating to the Chamber ‘that their evidence of material events that morning [was] not honest.’<sup>cclxvi</sup> Ultimately, the probative value of some visual material can completely discredit witnesses. This occurred during Augustin Ndirabatware’s trial (ICTR) when witness DWAN-7 disputed ‘video footage contained in Prosecution Exhibit 32 depicting Ndirabatware with Interahamwe in a MRND

rally in 1992,' suggesting that the footage had been manipulated, and as a result, the court found the witness's testimony neither objective nor reliable.<sup>cclxvii</sup> Several pieces of visual evidence contributed to the documentary dossier in Major General Radislav Krstic's prosecution for genocide in connection to Srebrenica, but two inculpatory videos were produced which directly contradicted his oral testimony.<sup>cclxviii</sup> In the first, Krstic is seen walking past soldiers belonging to the 10<sup>th</sup> Sabotage Detachment, but he later claimed that he was unaware of the presence of this unit in Srebrenica on the relevant date. The second video portrays an interview that Krstic gave at a checkpoint, showing buses moving past, although he alleged that he did not see 'the refugee population or any signs of the buses transporting them.'<sup>cclxix</sup> On balance, the ICTY found the visual evidence much more compelling, which contributed, according to commentators, to Krstic's conviction.<sup>cclxx</sup>

From a jurisprudential perspective, the presence of international observers photographing and recording atrocities is desirable. These individuals range from military photographers to UN peacekeepers, international photojournalists and videographers, investigators, and forensic photographers. The gaze of 'white people' on atrocities is sometimes woven into the fabric of the unfolding events. This was illustrated in the Pauline Nyiramashuko case (ICTR), when a witness recounted that whereas provisions a 'white man' brought for refugees sheltered in Rango Forest were not distributed, after "'white people" came and photographed the refugees,' the maize was distributed.<sup>cclxxi</sup> It appears that two or three individuals were 'saved' when 'white journalists' started taking photographs of buses transporting victims to their death at the Leon Minor Seminary in Rwanda in May 1994.<sup>cclxxii</sup> By contrast, the complicity of an

individual who acted as a translator for a group of ‘white people’ that took ‘pictures of the refugees’ at a site in southern Rwanda in June 1994, may have contributed to his targeted execution the following day.<sup>cclxxiii</sup>

## **V. Conclusion**

In essence, patterns and trends in how international professionals witness some atrocities while ignoring others raises profound moral questions about how ‘we’ view the ‘other,’ and to evoke Butler’s terminology, which lives are grievable. In the legal realm, there are other forms of evidence upon which the prosecution of atrocity crimes may hinge, but the probative value of evidence from image producing technologies is irrefutable. In fact, the capacity of international observers to comprehend these sophisticated technologies means that their evidence is highly regarded by international bodies. A pattern emerges in the way these ‘super witnesses’ engage with jurisprudential mechanisms largely aligned to their own socio-cultural backgrounds; the politico-juridical bodies can apprehend their epistemological journey in the production and interpretation of the visual products. It is notable that the aforementioned evidence produced by the photojournalist Corinne Dufka was significant to Charles Taylor’s successful prosecution, but Dufka also appeared as a witness at the ICTR. Visiting Rwanda three times in May 1994, Dufka’s photographs showing heavily armed militia at a roadblock were seen to decisively corroborate the oral testimony of a witness who had survived the genocide.<sup>cclxxiv</sup> Similar trends in the way that the testimony of professional witnesses is received by international tribunals are observable

elsewhere,<sup>cclxxv</sup> punctuated by the rare criticism of a UN peacekeeper in Justice Nyambe's separate and concurring opinion in the Tolimir judgment (ICTY).<sup>cclxxvi</sup> These trends may in part stem from the conventional monopoly that international witnesses have had on recording technologies and associated resources.<sup>cclxxvii</sup> However, as pointed out by Reading, the advent of digital technologies, such as smartphones, instant dissemination via the Internet, iCloud computing and storage, ushers in a new era of digital witnessing more accessible than the traditional model of media reportage.<sup>cclxxviii</sup>

Drawing together the threads of discussion, the article maps out a tripartite structure in studying the significance of the visual as evidentiary witness to atrocity crimes before international courts and tribunals. Two key modalities: the transitive function of photography, and the probative value of visual evidence map a connection to 'the real.' Photography's transitive function describes an audience's affective reaction to images that shatter imagined utopias, sustained by photography's mechanical capacity to depict 'the real.' Our affective response is not predictable, and greatly depends on the contextual apprehension of the image. While the transitive function of photography is critical for mass media (and now the main vehicle for information on social media streams), the capacity of photos to shock or to haunt also determines the journey of the visual in providing evidence of the most serious crimes in international law. This is because during the life stage of the image a viewer notices that what is depicted contravenes moral, social or legal norms.<sup>cclxxix</sup> Undoubtedly, there are politico-military contexts that condition individuals to be inured to such scenes, making it difficult for images to transcend the original scene. But the potentiality for a different transitive response remains all the

same: the photo may turn against its creator. This is because the ‘constitutive ambivalence of all photography ensures that no final meaning will ever prevail,’ although jurisprudence will construct a legal narrative of events around visual artefacts at a particular moment in time.<sup>cclxxx</sup> The high probative value attached to visual evidence stems from its claims to mechanical reliability in relation to ‘the real.’ Visual records provide an authoritative account of reality; proving that which is depicted in the image. Utilising photography to reimagine the scene was preferred over a site visit in the Galic trial.<sup>cclxxxi</sup> Essentially, the visual may present an insurmountable challenge to defence arguments, by disrupting and contradicting oral testimony and hearsay evidence. Tensions do sometimes arise between the transitive function of photography and its probative role as evidence, illuminated by common law rules of evidence that exclude visual evidence which would risk of prejudicing a jury. Having detailed the multi-functional role of the visual field of representation in documenting the most serious international crimes, it is submitted that the visual field will continue to occupy a critical hub in the evidentiary matrix, although the nature of witnessing based on more advanced technologies is undoubtedly changing.

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<sup>i</sup> SUSAN SONTAG, *REGARDING THE PAIN OF OTHERS* 115 (2004).

<sup>ii</sup> SUSAN SONTAG, *ON PHOTOGRAPHY* 3-4 (1979).

<sup>iii</sup> *Id.* at 4.

<sup>iv</sup> Matthew Cowie, ‘Video Technology and Human Rights Fact Finding,’ 13(2) *NETHERLANDS QUARTERLY OF HUMAN RIGHTS* 139, 145 (1995).

<sup>v</sup> This quote is attributed to the photojournalist, Matthew Brady, in SONTAG, *REGARDING THE PAIN OF OTHERS* at 52.

<sup>vi</sup> *Id.*

<sup>vii</sup> Jennifer Mnookin, ‘The Image of Truth: Photographic Evidence and the Power of Analogy,’ 10(1) *YALE JOURNAL OF LAW AND THE HUMANITIES* 1-2 (1998).

<sup>viii</sup> SONTAG, *ON PHOTOGRAPHY*, 5.

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- ix Mnookin, 'The Image of Truth: Photographic Evidence and the Power of Analogy,' at 12.
- x LAWRENCE DOUGLAS, *THE MEMORY OF JUDGMENT* 28 (2001).
- xi The 35mm Leica camera which first appeared in 1925 was critical to this development, see CAROLINE BROTHERS, *WAR AND PHOTOGRAPHY: A CULTURAL HISTORY* 5-6 (1997).
- xii SONTAG, *ON PHOTOGRAPHY*, at 110.
- xiii Barbie Zelizer, 'From the Image of Record to the Image of Memory: Holocaust Photography Then and Now,' in BONNIE BRENNEN AND HANNO HARDT (eds.), *PICTURING THE PAST: MEDIA, HISTORY AND PHOTOGRAPHY* 98-121 (1999). See also CHRISTIAN DELAGE AND PETER GOODRICH (eds.), *THE SCENE OF THE MASS CRIME: HISTORY, FILM AND INTERNATIONAL TRIBUNALS* 20-21 (2013).
- xiv PRIMO LEVY, *THE DROWNED AND THE SAVED* 1 (1988).
- xv Adorno was a prominent philosopher and social critic in Germany after World War II. See Mladjo Ivanovic, 'Lives Rendered Invisible: Bearing Witness to Human Suffering,' *NORD. J. APPL. ETHICS* 1 (2015).
- xvi THEODOR ADORNO, *CAN ONE LIVE AFTER AUSCHWITZ? PHILOSOPHICAL READER* 252 (2003).
- xvii Anna Reading, 'Mobile Witnessing: Ethics and the Camera Phone in the 'War on Terror',' 6(1) *GLOBALIZATIONS* 66 (2009).
- xviii David Campbell, 'Atrocity, Memory, Photography: Imaging the Concentration Camps of Bosnia – the Case of ITN versus Living Marxism, Part 2,' 1(2) *JOURNAL OF HUMAN RIGHTS* 143, 159 (2002).
- xix *Id.* at 160.
- xx SONTAG, *REGARDING THE PAIN OF OTHERS*, at 115.
- xxi Larry Gross, John Stuart Katz and Jay Ruby, *IMAGE ETHICS: THE MORAL RIGHTS OF SUBJECTS IN PHOTOGRAPHS, FILM AND TELEVISION* 18 (1991).
- xxii Karen Beckman, 'Nothing to Say: The War on Terror and the Mad Photography of Roland Barthes,' 34 *GREY ROOM* 125 (2009).
- xxiii Minoru Iwasaki, Steffi Richter, Richard F. Calichman, 'The Topology of Post-1990s Historical Revisionism,' 16(3) *EAST ASIA CULTURES CRITIQUE* 507, 518 (2008).
- xxiv Campbell, 'Atrocity, Memory, Photography,' at 159.
- xxv Judith Butler, 'Torture and the Ethics of Photography,' 25 *SOCIETY AND SPACE* 951 (2007).
- xxvi Piyel Halder, 'The Evidencer's Eye: Representations of Truth in the Laws of Evidence,' 2(2) *LAW AND CRITIQUE* 171 (1991).
- xxvii *Id.* at 179.
- xxviii *Id.* at 179-180.
- xxix *Id.*
- xxx *Id.* at 182.
- xxxi SONTAG, *REGARDING THE PAIN OF OTHERS* at 86.
- xxxii Butler, 'Torture and the Ethics of Photography,' at 957.
- xxxiii Noel Whitty, 'Soldier Photography of Detainee Abuse in Iraq: Digital Technology, Human Rights and the Death of Baha Mousa,' 10 (4) *HUMAN RIGHTS LAW REVIEW* 691 (2010).
- xxxiv International Military Tribunal for the Far East, judgment of 4 November 1948, at 49,744; 49,760; See Whitty, *id.* at 699, fn 46; See also Minoru Iwasaki, Steffi Richter, Richard F. Calichman 'The Topology of Post-1990s Historical Revisionism,' 16(3) *EAST ASIA CULTURES CRITIQUE* 507, 518 (2008).
- xxxv BVA ROLING AND ANTONIO CASSESE, *THE TOKYO TRIAL AND BEYOND* 2-4 (1994).
- xxxvi WILLIAM SCHABAS, *UNIMAGINABLE ATROCITIES: JUSTICE, POLITICS AND RIGHTS AT THE WAR CRIMES TRIBUNALS* 1 (2014).
- xxxvii *Id.* at 94.
- xxxviii Whitty, 'Soldier Photography of Detainee Abuse in Iraq,' at 699.
- xxxix JEFFREY SHANDLER, *WHILE AMERICA WATCHES: TELEVISIONING THE HOLOCAUST* 19-20 (2000). See also also CHRISTIAN DELAGE AND PETER GOODRICH (eds.), *THE SCENE OF THE MASS CRIME* 20-21 (2013).
- xl DOUGLAS, *THE MEMORY OF JUDGMENT* at 23.
- xli *Id.* at 29.
- xlvi *Id.* at 30.
- xlvi Neal Feigenson, 'Visual Evidence,' 17(2) *PSYCHONOMIC BULLETIN & REVIEW* 149-154 (2010).
- xliv SHANDLER, *WHILE AMERICA WATCHES*, at 22.
- xlvi *Id.* at 22, see also DOUGLAS, *THE MEMORY OF JUDGMENT* at 37.
- xlvi DOUGLAS, *THE MEMORY OF JUDGMENT* at 37.
- xlvi ROBERT CRYER, *PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL CRIMINAL LAW REGIME* 48-51 (2005).

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- xlvi GROSS, KATZ AND RUBY, IMAGE ETHICS IN THE DIGITAL AGE.
- xlvi *Id.* at vii.
- l Whitty, 'Soldier Photography of Detainee Abuse in Iraq,' at 691.
- li Meg McLagan, 'Making Human Rights Claims Public', 108 AMERICAN ANTHROPOLOGIST 191 (2006).
- lii Butler, 'Torture and the Ethics of Photography,' at 957.
- liii *Id.* at 960.
- liv *Id.* at 959.
- lv *Id.*
- lvi Matthew Cowie, 'Video Technology and Human Rights Fact Finding,' 13(2) NETHERLANDS QUARTERLY OF HUMAN RIGHTS 139, 141 (1995). For the most up to date reading of these technological capabilities, see the work of the non-governmental organization, Witness, in supporting individuals who are using video and other technologies to record human rights abuses, available at <https://witness.org>.
- lvii Judith Butler, 'Photography, War and Outrage,' 120(3) PMLA 822 (2005).
- lviii *Id.* at 823.
- lix Butler, 'Torture and the Ethics of Photography,' 25 *Society and Space* (2007), 953.
- lx *Id.*
- lxi Ivanovic, 'Lives Rendered Invisible,' 11.
- lxii JUDITH BUTLER, *FRAMES OF WAR: WHEN IS LIFE GRIEVABLE?* 75 (2009).
- lxiii Butler, 'Torture and the Ethics of Photography,' 953.
- lxiv Whilst McLagan has stated: 'In today's globally mediated world, visual images play a central role in determining which violence are redeemed and which get recognized,' in 'Making Human Rights Claims Public', at 191.
- lxv SONTAG, REGARDING THE PAIN OF OTHERS, at 104-5.
- lxvi Butler, 'Torture and the Ethics of Photography,' 952.
- lxvii *Id.* at 952.
- lxviii See also Jurgen Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights,' 41(4) METAPHILOSOPHY 464 (2010); Antje Wiener, 'The Dual Quality of Norms and Governance Beyond the State: Sociological and Normative Approaches to "Interaction",' 10(1) CRITICAL REVIEW OF INTERNATIONAL SOCIAL AND POLITICAL PHILOSOPHY 47 (2007).
- lxix Essay by Sybil Milton: The Nazis were aware that the camera could also be used as a weapon against them, and that images of the concentration camps would reveal the evils and horrors of political terror and racial fanaticism. After December 1944, Allied soldiers liberating France and Holland photographed identically worded French and Dutch signs posted near the Natzweiler-Struthof and Vught (Hertogenbosch) concentration camps: 'Trespass of the camp grounds and taking photographs are absolutely prohibited. Violators will be shot without warning.' These examples are but the most obvious instances of Nazi use of cameras as weapons of intimidation and propaganda and also show their justifiable fear that cameras in the hands of their opponents would become instruments for revelation of Nazi misdeeds, available at <http://motlc.wiesenthal.com/site/pp.asp?c=gvKVLcMVIuG&b=394975> fn 5: 5. Douglas notes that 'millions of feet of film were examined for their evidentiary value. Twenty-five thousand captured still photographs were reviewed, of which eighteen hundred were prepared as trial exhibits,' in THE MEMORY OF JUDGMENT at 12.
- lxx Referenced in the context of the conviction of Ernst Kaltenbrunner (head of the last unified Reich security and intelligence services or RSHA). International Military Tribunal (Nuremberg), Judgment of 1 October 1946. ANA TUSA AND JOHN TUSA, THE NUREMBERG TRIAL 495 (2010).
- lxxi Charles Chernor Jalloh, 'Special Court for Sierra Leone: Achieving Justice?' 32 MICHIGAN JOURNAL OF INTERNATIONAL LAW 396 (2011).
- lxxii Butler, 'Photography, War and Outrage,' at 823.
- lxxiii *Id.* at 824.
- lxxiv SONTAG, REGARDING THE PAIN OF OTHERS at 104.
- lxxv Prosecutor v Momcilo Perisic, IT-04-81-T, ICTY judgment, 6 September 2011, at ¶ 1510. It should also be noted that the degree of media coverage in Sarajevo was such that the Trial Chamber found that General Perisic, while serving as Chief of the VJ General Staff, would have been aware that civilians were being attacked by the VRS in the city, at ¶ 1522.
- lxxvi Ivanovic, 'Lives Rendered Invisible' at 11.
- lxxvii *Id.* at 6.
- lxxviii SONTAG, REGARDING THE PAIN OF OTHERS at 102-3.



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- lxxix *Id.*
- lxxx Ivanovic, 'Lives Rendered Invisible,' 15.
- lxxxi Diane Courpasson, 'Looking away? Civilized indifference and the carnal relationships of the contemporary workplace,' 53(6) JOURNAL OF MANAGEMENT STUDIES 1094, 1098 (2016). See also Caroline Lenette and Natasa Miskovic, 'Some viewers may find the following images disturbing': Visual representations of refugee deaths at border crossings,' CRIME MEDIA CULTURE 1 (2016).
- lxxxii *Id.* and SONTAG, REGARDING THE PAIN OF OTHERS at 23. See also SUSAN MOELLER, COMPASSION FATIGUE: HOW THE MEDIA SELL DISEASE, FAMINE, WAR AND DEATH (1999).
- lxxxiii SONTAG, REGARDING THE PAIN OF OTHERS at 106.
- lxxxiv *Id.* at 105.
- lxxxv *Id.* at 105.
- lxxxvi *Id.* at 89.
- lxxxvii SONTAG, ON PHOTOGRAPHY at 70.
- lxxxviii *Id.* at 15. See also Roland Barthes, CAMERA LUCIDA: REFLECTIONS ON PHOTOGRAPHY (1981), 31-2.
- lxxxix Butler, 'Torture and the Ethics of Photography,' at 952.
- xc SONTAG, ON PHOTOGRAPHY at 22.
- xcI Butler, 'Torture and the Ethics of Photography,' 957.
- xcII *Id.* at 961.
- xcIII SONTAG, ON PHOTOGRAPHY at 11.
- xcIV BUTLER, FRAMES OF WAR at 86.
- xcV SONTAG, REGARDING THE PAIN OF OTHERS at 7.
- xcvi *Id.* at 91.
- xcvii *Id.* at 92.
- xcviii *Id.* at 91.
- xcix Butler, 'Torture and the Ethics of Photography,' 957.
- c *Id.* at 964.
- ci *Id.* See also Lisa Hajjar, 'Torture and the Future,' GLOBAL & INTERNATIONAL STUDIES 6 (2004). These included privates Lynndie England and Charles Graner, and the former camp commandant, Brigadier General Janis Karpinski, was demoted, see George Mastroianni, 'Looking Back: Understanding Abu Ghraib,' 43(2) PARAMETERS 5 (2013).
- cii *Iraq Prisoner Abuse Photos*, available at [http://news.bbc.co.uk/2/hi/in\\_pictures/4185719.stm](http://news.bbc.co.uk/2/hi/in_pictures/4185719.stm).
- ciii *Id.*
- civ JACK FAIRWEATHER, A WAR OF CHOICE: HONOUR, HUBRIS AND SACRIFICE: THE BRITISH IN IRAQ 46-48 (2012).
- cv BUTLER, FRAMES OF WAR at 89.
- cvi *Id.* at 91.
- cvi Despite the visual evidence, no one was charged for the sexual abuse depicted in the photographs. Lance Corporal Darren Larkin was found guilty of assaulting Iraqi prisoners and sentenced to 140 days in prison, Lance Corporal Mark Cooley was sentence to two years for assault, Fusilier Gary Bartlam was found guilty of aiding and abetting assault and sentenced to 18 months, while Corporal Daniel Kenyon was 'convicted of aiding and abetting abuse by failing to report it to more senior officers and sentenced to 18 months,' RACHEL KERR, THE MILITARY ON TRIAL: THE BRITISH ARMY IN IRAQ 19 (2008).
- cviii Dawn Rothe and Kevin Steinmetz, 'The Case of Bradley Manning: State Victimization, Realpolitik and Wikileaks,' 16(2) CONTEMPORARY JUSTICE REVIEW 280 (2013).
- cix Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, Art. 5, Preamble.
- cx *Id.*, Art. 5. See also ROBERT CRYER, HÅKAN FRIMAN, DARRYL ROBINSON, ELIZABETH WILMSHURST, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 3-5 (3<sup>rd</sup> ed., 2014).
- cxI MARK DRUMBL, ATROCITY, PUNISHMENT AND INTERNATIONAL LAW 4 (2007).
- cxII *Id.* at 34.
- cxIII Scheffer, 'Genocide and Atrocity Crimes,' 1(3) GENOCIDE STUDIES & PREVENTION 238 (2006).
- cxIV *Id.*
- cxV SCHABAS, UNIMAGINABLE ATROCITIES at 33.
- cxvi The relevant section of the judgment reads, '[t]o turn into an international crime, a domestic offence needs to be regarded by the world community as an attack on universal values (such as peace or human rights) or on values held to be of paramount importance in that community; in addition, it is necessary that States and intergovernmental organisations, through their acts and

pronouncements, sanction this attitude by clearly expressing the view that the world community considers the offence at issue as amounting to an international crime,' Unnamed defendant (STL-11-01/I), Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, para. 91.

cxvii SCHABAS, UNIMAGINABLE ATROCITIES at 26.

cxviii *Id.*

cxix *Id.* at 41.

cxx Universal Declaration of Human Rights, Article 3; International Covenant on Civil and Political Rights, Article 6; European Convention on Human Rights, Article 2; Inter-American Declaration on Human Rights, Article 1; Inter-American Convention on Human Rights, Article 4.

cxxi See generally, KAREN DA COSTA, THE EXTRATERRITORIAL APPLICATION OF SELECTED HUMAN RIGHTS TREATIES (2013). The European Court of Human Rights in *Al-Skeini and Others v the United Kingdom*, Application no. 55721/07, judgment 7 July 2011, affirmed the extraterritorial effect of the European Convention of Human Rights.

cxixii International Court of Justice, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, paras. 24–25; see also International Court of Justice, *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, paras. 102, 105. See also, William Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya,' 16(4) THE EUROPEAN JOURNAL OF INTERNATIONAL LAW 741, 744 (2005).

cxixiii The positive duty on the state to effectively investigate lethal force cases was set out by the European Court in the case of *McCann and Others v the United Kingdom*, Application no. 18984/91, judgment 27 September 1995. See also, Juliet Chevalier-Watts, 'Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?' 21(3) THE EUROPEAN JOURNAL OF INTERNATIONAL LAW 701, 703, 705 (2010).

cxixiv Additionally, with respect to the US, in Guantanamo and other overseas locations, ICCPR, Concluding Observations US State Party Report, 2006, at para. 14. See also, ICCPR, Concluding Observations UK State Party Report, 2008, at para. 14.

cxixv UN Convention Against Torture, Article 1(1).

cxixvi UN CAT, Article 2.

cxixvii For example, *DY v Sweden*, Communication No. 463/2011, decision May 2013, para. 2.8; see also *ET v Switzerland*, Communication 393/2009, 13 May 2012, at ¶ 4.5.

cxixviii *MN v Switzerland*, Application 259/2004, decision 17 November 2006.

cxixix *AS v Sweden*, Application 149/1999, 6 November 1999, at ¶ 2.8.

cxixxx *Id.* at ¶ 9.

cxixxxi *Daljit Singh v. Canada*, Communication No. 1315/2004, 30 March 2006, at ¶ 6.3.

cxixxxii *Id.*

cxixxxiii *Masih Shakeel v Canada*, Communication No 1881, 24 July 2013, at ¶ 2.8.

cxixxxiv *Id.* at ¶¶ 8.5, 8.6.

cxixxxv *Id.* at ¶ 8.5. See MICHELLE FARRELL, THE PROHIBITION OF TORTURE IN EXCEPTIONAL CIRCUMSTANCES 55–66 (2013); Jeremy Waldron, 'Torture and Positive Law: Jurisprudence for the White House,' 105(6) COLUMBIA LAW REVIEW 1681 (2005); Jack Donnelly and Rhoda Howard, 'Assessing National Human Rights Performance: A Theoretical Framework,' 10(2) HUMAN RIGHTS QUARTERLY 214 (1988), and Julie Lantrip, 'Torture and Cruel, Inhumane and Degrading Treatment in the Jurisprudence of the Inter-American Court of Human Rights,' 5 ILSA J. INT'L & COMP. L 551 (1998–1999).

cxixxxvi SCHABAS, UNIMAGINABLE ATROCITIES at 26.

cxixxxvii Alexander Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?' 19(1) EUROPEAN JOURNAL OF INTERNATIONAL LAW 161, 162 (2008).

cxixxxviii The Geneva Convention relative to the Protection of Civilian Persons in Time of War, Article 27.

cxixxxix Whitty, 'Soldier Photography of Detainee Abuse in Iraq,' 700.

cxli Butler, 'Torture and the Ethics of Photography,' 960.

cxlii Rule 90: Prohibition on torture available at [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule90](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule90).

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cxlii For example, the US ARMY/MARINE CORPS COUNTERINSURGENCY FIELD MANUAL (2007). Section 1003 refers to the Prohibition on Cruel, Inhuman, or Degrading Treatment or Punishment of Persons Under Custody or Control of the United States Government, at 355.

cxliii Rule 156, Definition of War Crimes, available at [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule156](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule156).

cxliv *Id.*

cxlv *Id.*

cxlvi Rome Statute of the International Criminal Court, Article 8(1).

cxlvii *Id.*, Article 8(2)(c) and (e).

cxlviii However, this is unlikely because under the complementarity principle domestic criminal or military legal systems that incorporate international customary understandings of war crimes through statutory or regulatory provisions could simply exercise jurisdiction, see Antonio Cassese, 'The Statute of the ICC: Some Preliminary Reflections,' 10 EJIL 144, 158 (1999).

cxlix (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health - Rome Statute, Article 7(1).

cl Whilst the link to conflict does appear in the ICTY definition, this nexus was absent in the statutes of the ICTR and the SCSL, nor did the latter two require previous 'knowledge of the attack' in the commission of crimes. For more on the development of crimes against humanity in the context of the Nuremberg judgment see DOUGLAS, THE MEMORY OF JUDGMENT at 44-45.

cli Rome Statute of the International Criminal Court, Article 7(1)(f), (k).

clii *Id.* at Article 7(2)(e).

cliii Richard May and Marieke Wierda, 'Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha,' 37 COLUM. J. TRANSNAT'L L. 725 (1998-1999).

cliv Fofana & Kondewa, Special Court for Sierra Leone, 2007, para 272. See also CRYER ET AL, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE at 464.

clv *Prosecutor v Alfred Musema*, ICTR, ICTR-96-13-A, judgment, 27 January 2000, ¶53.

clvi *Prosecutor v Duško Tadić*, ICTY, IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, at ¶ 23.

clvii *Prosecutor v Momčilo Krajišnik*, ICTY, IT-00-39-A, judgment, 27 September 2006, at ¶1185.

clviii For example, in the *Dario Kordić & Mario Cerdez* case before the ICTY, the Tulica dossier was admitted to evidence and this contained a report prepared by the Investigations Team Leader, together with i. Eight witness statements; ii. Four transcripts; iii. Five maps; iv. Exhumation documents, including an on-site report, photographs and death certificates; v. Photographs, diagrams and maps; vi. A video; vii. Photographic "stills" taken from the video footage,' ICTY, IT-95-14/2-T, judgment, 26 February 2001 at ¶ 40.

clix *Prosecutor v Naser Oric*, ICTY, IT-03-68-A, judgment, 3 July 2008, at ¶ 77.

clx *Prosecutor v Alfred Musema*, judgment, 2000, ¶78.

clxi Cryer et al note that the trial chambers of the ICTY and the ICTR, as well as the ICC have accepted video and audio recorded testimonies and statements to shorten the duration of trials, in AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE at 466.

clxii ROY LEE AND HAKAN FRIMAN (EDS.), THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE (2001).

clxiii CRYER ET AL, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE at 466.

clxiv AIDA ASHOURI, CALEB BOWERS AND CHERRIE WARDEN, AN OVERVIEW OF THE USE OF DIGITAL EVIDENCE IN INTERNATIONAL CRIMINAL COURTS, SALZBURG WORKSHOP ON CYBERINVESTIGATIONS (October 2013).

clxv *Prosecutor v. Jean- Pierre Bemba Gombo*, ICC, Case No. ICC-01/05-01/08, Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute, (Oct. 8, 2012), 120. Ashouri, Bowers and Warden note that ultimately audio excerpts were not admitted in this case because the court preferred whole recordings, rather

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than excerpts, see *id.*, 5.

clxvi *Prosecutor v Tolimir*, ICTY, Case No. IT-05-88/2-T, judgment, 12 December 2012, ¶¶ 69-70.

clxvii ASHOURI, BOWERS and WARDEN, 'Use of Digital Evidence in International Criminal Courts,' 9, 12.

clxviii One of these recordings from 11 October 2005 was supported by linkage or external indicator, in the form of a transcript of the radio broadcast of the speech. See *Prosecutor v Karemera*, ICTR, Case No. ICTR-98-44-T, ICTR judgment, Feb 2012, ¶ 508.

clxix Kevin Jon Heller, 'Prosecutor v. Karemera, Ngirumpatse, & Nzirorera. Case no. ICTR-98-44-AR73(C) - Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice,' 101(1) THE AMERICAN JOURNAL OF INTERNATIONAL LAW 157 (2007).

clxx *Prosecutor v Karemera*, ICTR, Case No. ICTR-98-44-T, ICTR judgment, Feb 2012, ¶ 556.

clxxi International Criminal Database, available at

<http://www.internationalcrimesdatabase.org/Case/224/Karemera-and-Ngirumpatse/>. See also, Kevin Jon Heller, 'The ICTR's Troubling Karemera Decision,' available at <http://opiniojuris.org/2006/07/13/the-ictrs-troubling-karemera-decision/>.

clxxii *Prosecutor v Bikindi*, Case No. ICTR-01-72-T, ICTR judgment, 2 December 2008, ¶ 64.

clxxiii JAMES E. PARKER, ACOUSTIC JURISPRUDENCE: LISTENING TO THE TRIAL OF SIMON BIKINDI (2015) at 4.

clxxiv Catharine A. MacKinnon, 'Prosecutor v. Nahimana, Barayagwiza, & Ngeze. Case No. ICTR 99-52-A,' 103(1) THE AMERICAN JOURNAL OF INTERNATIONAL LAW 97 (2009).

clxxv For more about the origins of Kangura, see William Schabas, 'Hate Speech in Rwanda: The Road of Genocide,' 46 *McGill Law Journal* 141, 145 (2000-2001).

clxxvi Catherine MacKinnon critiques the Appeals Chamber's decontextualised approach to causality and temporality when it set aside Ngeze's convictions in respect of genocide and persecution, while affirming the incitement to genocide charge, MacKinnon, 'Prosecutor v. Nahimana, Barayagwiza, & Ngeze,' at 97.

clxxvii *Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze*, Case No. ICTR-99-52-T, ICTR judgment, 3 December 2003, ¶ 274.

clxxviii *Id.*, at 926.

clxxix For example, Kangura was a newspaper 'designed to create division,' and 'ethnic hatred,' *id.* at 6.5. See also Gregory Gordon, '"A War of Media, Words, Newspapers, and Radio Stations": The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech,' 45 VIRGINIA JOURNAL OF INTERNATIONAL LAW 139 (2004-2005).

clxxx *Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze*, judgment, 2003, ¶ 171; see also Gordon, 'A War of Media, Words, Newspapers, and Radio Stations,' at 157.

clxxxi *Prosecutor v Germain Katanga*, ICC, Case No. ICC-01/04-01/07, ICC trial judgment, 7 March 2014, ¶ 814, and fn 344. See also *Prosecutor v Ante Gotovina, Ivan Cermak and Mladen Markac*, IT-06-90-T, ICTY trial judgment, 15 April 2011, ¶ 1124.

clxxxii Issa Hassan Sesay, Morris Kallon and Augustine Gbao, Case No. SCSL-04-15-T, judgment, 2 March 2009, ¶ 1190. *Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, SCSL, Case No. SCSL-04-16-T, judgment, 20 June 2007, ¶ 1426.

clxxxiii *Prosecutor v Stanislav Galic*, ICTY, Case No. IT-98-29-T, judgment, 5 December 2003, ¶ 550.

clxxxiv Christopher Greenwood, 'Command Responsibility and the HADŽIHASANOVIĆ Decision,' 2 J. INT'L CRIM. JUST. 598 (2004).

clxxxv *Prosecutor v Enver Hadzihasanovic and Amir Kubura*, IT-01-47-T, trial judgment, ¶ 1510. 1513.

clxxxvi Marlies Glasius and Tim Meijers, 'Constructions of Legitimacy: The Charles Taylor Trial,' 6(2) INTERNATIONAL JOURNAL OF TRANSITIONAL JUSTICE 229 (2012); see also Kirsten Keith, 'Deconstructing Terrorism as a War Crime: The Charles Taylor Case,' 11 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 813 (2013).

clxxxvii *Prosecutor v Charles Ghankay Taylor*, SCSL, Case No. SCSL-03-1-T, judgment, 26 April 2011.

clxxxviii *Id.* at ¶ 1272.

clxxxix *Id.* at ¶ 1320.

cx *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, trial judgment, 14 March 2012, ¶ 1212.

cxci *Id.* at ¶ 793.

cxcii The Court found a violation of Article 8 of the Rome Statute with respect to the UPC/FPLC's conscription of child soldiers, see *id.* at ¶ 1278.

cxciij JEAN-MARIE HENCKAERTS, LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL LAW, VOL I: RULES 34, 128 (2006).

cxciiv *Prosecutor v Vlastimir Đorđević*, IT-05-87/1-T, judgment, 23 February 2011, ¶ 1807.

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<sup>cxv</sup> *Id.* at ¶ 1812.

<sup>cxvi</sup> For more detail on the various stages of the proceedings, see International Criminal Database, available at <http://www.internationalcrimesdatabase.org/Case/70>.

<sup>cxvii</sup> The evidence in question was aerial photography showing the devastated private residences of Muslims forced out of their homes was corroborated by testimony which confirmed that various religious and cultural buildings in the town of Donja Večeriska (Bosnia-Herzegovina) had been destroyed, *Prosecutor v Blaškić*, ¶ 540. Auxiliary to other more serious crimes, photographic evidence showing widespread destruction and looting of houses in Knin, and Gracac (current day Croatia) helped sustain the case against Gotovina and Markac at the ICTY, see *Prosecutor v Ante Gotovina, Ivan Cermak and Mladen Markac*, IT-06-90-T, ICTY trial judgment, 15 April 2011, ¶¶ 535, 684, 685, 1098.

<sup>cxviii</sup> See *id.* pp. 267-269. The specific violations relevant to this section were: a grave breach under Article 2(d) of the Statute: extensive destruction of property (count 11); a violation of the laws or customs of war under Article 3(b) of the Statute: devastation not justified by military necessity (count 12); a violation of the laws or customs of war under Article 3(e) of the Statute: plunder of public or private property (count 13); a violation of the laws or customs of war under Article 3(d) of the Statute: destruction or wilful damage done to institutions dedicated to religion or education (count 14); a grave breach under Article 2(b) of the Statute.

<sup>cxix</sup> *Prosecutor v Pavle Strugar*, IT-01-42-T, trial judgment, 31 January 2005, ¶¶ 109, 317.

<sup>cc</sup> *Id.*

<sup>cci</sup> This recording taken from a helicopter ‘showed the village of Tulica where most of the roofs have disappeared from the houses. In Kiseljak the minaret of the mosque has disappeared. The helicopter then travelled north, up the valley, over Višnjica, where almost all the houses were gutted; Polje Višnjica, with intact Croat houses among the destroyed houses; Hercezi, with a destroyed mosque; Behriji, where almost all the houses were destroyed; Gomionica, where the destruction is almost total; Svinjarevo, with a damaged mosque. Throughout there were scenes of totally destroyed houses with their roofs off or gutted houses with roofs on, but windows blackened.’ *Prosecutor v Dario Kordic and Mario Cerdez*, IT-95-14/2-T, trial judgment, 26 February 2001, ¶ 804.

<sup>ccii</sup> Hiram Abtahi, ‘The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia,’ 14 HARVARD HUMAN RIGHTS JOURNAL 1, 28 (2001).

<sup>cciii</sup> For example, the photographs included in the documentary dossier in the Kordic and Cerdez case showed ‘scenes of devastation in the market area, bodies lying on the ground, destroyed cars, a demolished bus shelter and damaged buildings. One witness identified 13 corpses but said that 15-16 people in all (he produced 15 death certificates) were killed,’ *Prosecutor v Dario Kordic and Mario Cerdez*, judgment, 2001, ¶ 804.

<sup>cciv</sup> He was charged under Article 8(2)(e)(iv). For more on this case, see Paige Casaly, ‘Al Mahdi before the ICC: Cultural Property and World Heritage in International Criminal Law,’ 14(5) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 1199, 1200 (2016).

<sup>ccv</sup> *Prosecutor v Ahmad al Faqi al-Mahdi*, ICC, Case No. ICC-01/12-01/15, judgment, 27 September 2016, ¶ 38.

<sup>ccvi</sup> *Prosecutor v Jean-Paul Akayesu*, ICTR, Case No. ICTR-96-4-T, judgment, 2 September 1998, ¶ 161.

<sup>ccvii</sup> *Id.* at ¶ 116; see also, Antonio Cassese (ed.), THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL LAW (2009), at 577-580.

<sup>ccviii</sup> Dr Haglund also excavated mass graves in the former Yugoslavia, details of which are chronicled in the book by Gilles Peress and Eric Stover, THE GRAVES: SREBENICA AND VUKOVAR (1998).

<sup>ccix</sup> *Clement Kayishema & Obed Ruzindana*, ICTR, Case No. ICTR-95-1-T, judgment, 21 May 1999, ¶ 432.

<sup>ccx</sup> *Id.* at ¶¶ 567, 570, verdict at p. 237.

<sup>ccxi</sup> *Prosecutor v Ante Gotovina, Ivan Cermak and Mladen Markac*, ICTY, Case No. IT-06-90-T, judgment, 15 April 2011, ¶¶ 235, 362; *Prosecutor v Đorđević*, judgment, 2011, ¶ 626.

<sup>ccxii</sup> *Prosecutor v Gotovina, Cermak and Markac*, judgment, 2011, ¶ 298 [P700 (UNCRO photographs of bodies and crime sites in Sector South)], pp. 2, 31-32].

<sup>ccxiii</sup> *Prosecutor v Vidoje Blagojevic and Dragan Jokic*, ICTY, Case No. IT-02-60-T, judgment, 17 January 2005, ¶ 356; *Prosecutor v Gotovina, Cermak and Markac*, judgment, ¶ 405; *Prosecutor v.*

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Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero and Vinko Pandurević, ICTY, Case No. IT-05-88-T, judgment, 10 June 2010, ¶ 544.

ccxiv *Prosecutor v Zoran Kupreškić; Mirjan Kupreškić; Vlatko Kupreškić; Drago Josipović; Dragan Papić and Vladimir Šantić*, ICTY, Case No. IT-95-16-T, judgment, 14 January 2000, ¶ 188.

ccxv Debbie Lisle, 'The Surprising Detritus of Leisure: Encountering the Late Photography of War,' 29 SOCIETY AND SPACE 873, 877 (2011).

ccxvi *Prosecutor v Goran Jelusic*, ICTY, Case No. IT-95-10-T, judgment, 14 December 1999, ¶ 127.

ccxvii Whilst this incident occurred temporally after the fall of Srebrenica near the town of Trovno, it considered within this genocidal context, *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero and Vinko Pandurević*, judgment, 2010, ¶¶ 597, 599.

ccxviii *Prosecutor v Jovica Stanisic & Franko Simatovic*, ICTY, Case No. IT-03-69-T, judgment, 30 May 2013, ¶ 881.

ccxix *Prosecutor v Casimir Bizimungu, Justin Mugenzi, Jerome-Clement Bicamumpaka, Prosper Mugiraneza*, ICTR, Case No. ICTR-99-50-T, judgment, 30 September 2011, ¶ 838.

ccxx *Prosecutor v Đorđević*, judgment, 2011, ¶ 1302.

ccxxi *Id.* at ¶ 1320.

ccxxii *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero and Vinko Pandurević*, judgment, 2010, ¶ 465.

ccxxiii *Prosecutor v Tharcisse Muvunyi*, ICTR, Case No. ICTR-00-55A-T, judgment, 11 February 2010, 63.

ccxxiv *Prosecutor v Radislav Krstic*, ICTY, Case No. IT-98-33-T, judgment, 2 August 2001, ¶ 64.

ccxxv These sites were Nova Kasaba and Glogova (current day Bosnia and Herzegovina), see *Prosecutor v Vidoje Blagojevic and Dragan Jokic*, judgment, 2005, ¶¶ 255, 313. See also Patricia Wald, 'The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court,' 5 WASHINGTON UNIVERSITY JOURNAL OF LAW AND POLICY 87, 101 (2001).

ccxxvi *Prosecutor v Vidoje Blagojevic and Dragan Jokic*, judgment, 2005, ¶¶ 255, 313.

ccxxvii *Id.* at ¶ 83.

ccxxviii Similarly, aerial reconnaissance photographs were tendered into evidence by the Prosecution in the Krstic case at the ICTY, which confirmed 'the presence of masses of people in these locations on 13 July 1995,' ¶ 64 judgment.

ccxxix *Prosecutor v Gotovina, Cermak and Markac*, judgment, 2011, ¶ 26.

ccxxx William D. Hagland, ADVANCES IN FORENSIC TAPHONOMY: METHOD, THEORY, AND ARCHAEOLOGICAL PERSPECTIVES (2002), at 254-255, 447.

ccxxxi The process is described in greater detail in the trial judgment of *Prosecutor v Đorđević*, judgment, 2011, ¶ 1481.

ccxxxii This occurred when an exhumation image of a corpse taken by Henry Bolton was matched against the exhumation record to establish the crimes of Ljube Boskoski and Johan Tarculovski (ICTY), *Prosecutor v Ljube Boskoski and Johan Tarculovski*, ICTY, Case No. IT-04-82-T, judgment, 10 July 2008, ¶ 322; See also ¶ 337 regarding exhumation of photographs of Bajram Jashair and ¶ 338 re exhumation report of Kadri Jashair and subsequent photographs taken by Henry Bolton.

ccxxxiii For example, when photos from Xhelal Bajrami's post-mortem were matched up with 'photographs taken of the body in situ on 14 August,' see *Prosecutor v Ljube Boskoski and Johan Tarculovski*, judgment, 10 July 2008, ¶ 335.

ccxxxiv *Id.* at ¶ 316.

ccxxxv With respect to Body G07/022B and G06/021B, a forensic pathologist found it probably likely that they had died from explosive injuries and took photographs of their bones and the skull of the unknown victim, G06/021B, for the report, *Prosecutor v Gotovina, Cermak and Markac*, judgment, 2011, ¶¶ 240, 263.

ccxxxvi Baccard prepared a report entitled 'Medico-Legal Analysis and Synthesis Report about the Forensic Expertises Missions Conducted in Kosovo During the Year 1999,' *Prosecutor v Đorđević*, judgment, 2011, ¶ 1381.

ccxxxvii *Id.* at ¶ 1383.

ccxxxviii *Id.* at ¶ 1416.

ccxxxix *Prosecutor v Stanislav Galic*, ICTY, Case No. IT-98-29-T, judgment, 5 December 2003, ¶ 747.

ccxl *Id.* at ¶ 288.

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ccxli For example, members of the UN came to D'onko's apartment while hospitalized because of a gun shot wound and took photographs of 'the impact points of the bullet which had hit him' and removed the bullet,' *id.* at ¶323.

ccxlii *Id.* at ¶ 378.

ccxliii Where eight people were killed and a further 22 wounded, see *Prosecutor v Stanislav Galic*, judgment, 2003.

ccxliv *Id.* at ¶ 408.

ccxlv The photogrammatic method entailed taking 'measurements of the scene on the basis of the panoramic photographs and applied them to the two sketches and concluded that, according to his calculations, it was impossible for the shell to land on the street without hitting the roof of the Markale Market,' *Prosecutor v Dragomir Milosevic*, ICTY, Case No. IT-98-29/1-T700, judgment, 12 December 2007, ¶ 718.

ccxlvi As an example - the identification of Serbian MUP implicated in killing Kosovo Albanians through photographs a journalist found in Serbian houses in the area, *Prosecutor v Đorđević*, judgment, 2011, ¶ 482, fn 1712.

ccxlvii *Prosecutor v Đorđević*, judgment, 2011, ¶ 468. For more on more advanced forms of facial mapping used in criminal law prosecutions in Australia and England, see Gary Edmond, Katherine Biber, Richard Kemp and Glenn Porter, 'Law's Looking Glass: Expert Identification Evidence Derived from Photographic and Video Images,' 20(3) CURRENT ISSUES IN CRIMINAL JUSTICE 337 (2009).

ccxlviii *Prosecutor v Fatmir Limaj, Haradin Bala, and Isak Musliu*, ICTY, Case No. IT-03-66-T, judgment, 30 November 2005, ¶ 20.

ccxlix *Id.* at ¶ 19.

ccl *Id.* at ¶ 19.

ccli The Trial Chamber specified that it would consider 'whether the photograph was clear enough and matched the description of the Accused at the time of the events, whether the Accused blended with or stood out among the foils, whether a long time had elapsed between the original sighting of the Accused and the photo spread identification, whether the identification was made immediately and with confidence, or otherwise, whether there were opportunities for the witness to become familiar with the appearance of the Accused after the events and before the identification, be it in person or through the media, and whether the procedure in some way may have encouraged the witness to make a positive identification despite some uncertainty, or encouraged the witness to identify an Accused rather than someone else,' *Prosecutor v Fatmir Limaj, Haradin Bala, and Isak Musliu*, judgment, 2005, ¶ 19.

cclii *Id.* at ¶ 20.

ccliii [http://www.icty.org/x/cases/limaj/tjug/en/051130\\_Limajetal\\_summary\\_en.pdf](http://www.icty.org/x/cases/limaj/tjug/en/051130_Limajetal_summary_en.pdf) judgment summary, 30 November 2005. In a separate case, the trial chamber criticised prosecution investigators for not following the relevant guidelines in their use of photo boards to obtain identification evidence. As a consequence, photo board identification represented a weak hub in the evidentiary matrix and may have contributed to two of the defendants' eventual acquittal, *Prosecutor v Ramush Haradinaj, Idriz Balaj and Lahi Brahimag*, ICTY Case No. IT-04-84-T, judgment, 3 April 2008, ¶ 31.

ccliv *Prosecutor v Georges Anderson Nderubumwe Rutaganda*, ICTR, Case No. ICTR-96-3-T, judgment, 6 December 1999, ¶ 23.

cclv *Prosecutor v Elizaphan and Gerard Ntakirutimana*, ICTR, Cases No. ICTR-96-10 & ICTR-96-17-T, judgment, 21 February 2003, ¶ 1020.

cclvi *Prosecutor v Alfred Musema*, judgment, 2000, ¶¶ 104, 105.

cclvii *Id.* at ¶¶ 104, 105.

cclviii It is notable that at least three witnesses were unable to identify physical locations from photographic evidence, with two of them stating it would be easier to identify the specific locations on site, see *Prosecutor v Alfred Musema*, judgment, 2000, ¶¶ 380, 436. By contrast, the ICC held that the testimony of a former UPC soldier in the Katanga case was marred by internal inconsistencies and 'unexplained differences as to her date of birth in both her testimony and the documentary evidence,' and that element of her submission was excluded, whilst the witness's comments on video evidence were unaffected by these criticisms, *Prosecutor v Germain Katanga*, ICC, Case No. ICC-01/04-01/07, judgment, 7 March 2014, ¶ 268.

cclix Cited in Richard May and Marieke Wierda, 'Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha,' 37 COLUM. J. TRANSNAT'L L. 725 (1998-1999); I should

look up the judgment separately to completely understand its wider relevance to my arguments here.

cclx *Prosecutor v Theoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, ICTR, Case No. ICTR-98-41-T, judgment, 18 December 2008, ¶ 518.

cclxi *Clement Kayishema & Obed Ruzindana*, judgment, 1999, ¶ 460.

cclxii *Prosecutor v Đorđević*, judgment, 2011, ¶ 518. See also *Prosecutor v Ildephonse Nizeyimana*, ICTR, Case No. ICTR-2000-55C-T, judgment, 19 June 2012, ¶ 999.

cclxiii *Prosecutor v Đorđević*, judgment, 2011, ¶¶ 626-630.

cclxiv Such as the unobstructed views claimed by witnesses in *id.*, ¶¶ 986, 1048; and *Prosecutor v Gaspard Kanyarukiga*, ICTR, Case No. ICTR-2002-78-T, judgment, 1 November 2010, ¶ 263.

cclxv *Prosecutor v Emmanuel Ndindabahizi*, ICTR, Case No. ICTR-2001-71-I, judgment, 15 July 2004.

cclxvi *Prosecutor v Ljube Boskoski and Johan Tarculovski*, judgment, 10 July 2008, ¶ 153.

cclxvii *Prosecutor v Augustin Ngirabatware*, ICTR, Case No. ICTR-99-54-T, 20 December 2012, ¶ 674.

cclxviii Patricia Wald, 'General Radislav Krstic: A War Crimes Case Study,' 16 *Georgetown Journal of Legal Ethics* 455, 457 (2002-2003).

cclxix *Prosecutor v Radislav Krstic*, ICTY, Case No. IT-98-33-T, judgment, 2 August 2001, ¶¶ 278, 348.

cclxx ASHOURI, BOWERS and WARDEN, 'Use of Digital Evidence in International Criminal Courts,' 6.

cclxxi *Prosecutor v Pauline Nyiramasuhuko, Arsene Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi, and Elie Ndayambaje*, ICTR, Case No. ICTR-98-42-T, judgment, 24 June 2011, ¶ 5015.

cclxxii *Prosecutor v Emmanuel Rukundo*, ICTR, Case No. ICTR-2001-70-T, judgment, 27 February 2009, ¶ 304.

cclxxiii *Prosecutor v Pauline Nyiramasuhuko, Arsene Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi, and Elie Ndayambaje*, judgment, 2011, ¶ 2262.

cclxxiv *Prosecutor v Tharcisse Renzaho*, ICTR, Case No. ICTR-97-31-T, judgment, 14 July 2009, ¶ 626.

cclxxv *Prosecutor v Pauline Nyiramasuhuko, Arsene Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi, and Elie Ndayambaje*, judgment, 2011 – a major discrepancy in Fergal Keane's estimation of the number of refugees at BPO (whether this figure was 200 or 500) barely passes without comment at the ICTR, even though he was appearing as a witness for the Defence, paras. 2385, 2776. *Prosecutor v Vidoje Blagojevic and Dragan Jokic*, ICTY, Case No. IT-02-60-T, judgment, 17 January 2005, ¶ 194-196; *Prosecutor v Sefer Halilovic*, ICTY, Case No. IT-01-48-T, judgment, 16 November 2005, ¶ 650; *Prosecutor v Zoran Kupreškić; Mirjan Kupreškić; Vlatko Kupreškić; Drago Josipović; Dragan Papić and Vladimir Šantić*, judgment, 2000, ¶¶ 188-190; *Clement Kayishema & Obed Ruzindana*, judgment, 1999, ¶¶ 355, 375; *Prosecutor v Jean-Paul Akayesu*, judgment, 1998, ¶ 162.

cclxxvi The Chamber was concerned that Rutten 'destroyed exactly the evidence that one would need to properly document the violations in a report; yet the reasons he gives for such order for destruction raise severe doubt. Likewise troubling is that the photos of the nine bodies, which were sent for developing to a laboratory in the Netherlands, were destroyed under peculiar and unknown circumstances; the Chamber is left with the unsatisfactory explanation that "something had happened during the development and the photos were never developed or seen". Taken all this together, I can only conclude that Rutten's evidence regarding the nine bodies leaves more questions than answers,' *Prosecutor v Tolimir*, ICTY, Case No. IT-05-88/2-T, judgment, 12 December 2012, ¶ 97.

cclxxvii As an illustration, Alan Roberts (UN Press and Information Officer) and Richard Lyntton (UNTV producer), were able to remove video footage they had shot showing atrocities in and around Knin (Croatia) to safety by helicopter in Zagreb, *Prosecutor v Ante Gotovina, Ivan Cermak and Mladen Markac*, judgment, 2011, ¶ 363.

cclxxviii Reading, Mobile Witnessing: Ethics and the Camera Phone in the 'War on Terror,' 61.

cclxxix Of course, photos may at their inception be taken with that purpose in mind.

cclxxx Debbie Lisle, 'The Surprising Detritus of Leisure: Encountering the Late Photography of War,' 29 *SOCIETY AND SPACE* 873 (2011).

cclxxxi The Trial Chamber noted that the purpose of an on-site visit was for it to become better acquainted with certain locations in Sarajevo and its surroundings. It however found that those places were described by witnesses, that photographs and maps of the locations were shown,



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that videos were played during trial, and that “such visualization was of substantial assistance to the Trial Chamber in its process of adopting an image of the terrain”,’ para. 805.