

4-1-2023

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Recommended Citation

Holá, Barbora (2023) "Book Review: *Invisible Atrocities: The Aesthetic Biases of International Criminal Justice*," *Genocide Studies and Prevention: An International Journal*: Vol. 16: Iss. 3: Article 3.

DOI:

<https://doi.org/10.5038/1911-9933.16.3.1936>

Available at: <https://digitalcommons.usf.edu/gsp/vol16/iss3/3>

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Book Review: *Invisible Atrocities: The Aesthetic Biases of International Criminal Justice*

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Invisible Atrocities: The Aesthetic Biases of International Criminal Justice

Randle C. DeFalco

Cambridge, Cambridge University Press, 2022

300 Pages; Price: \$110.00 Hardcover

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“By then I had mustered the strength to look upon misfortune with composure, to still my emotions, by then I had begun to understand the beauty of destruction...”¹

“Not even one’s own pain weighs so heavy as the pain one feels with someone, for someone, a pain intensified by the imagination and prolonged by a hundred echoes.”²

What role do aesthetics and emotions play in recognizing and prosecuting atrocities? Which atrocities are placed in the spotlight and which remain hidden in the shadows—obscure, unseen, and invisible? And in turn, what do the (in)visibilities mean for accountability and quests for justice? These are the questions at the heart of Randle DeFalco’s new, thought-provoking book, *Invisible Atrocities: The Aesthetic Biases of International Criminal Justice*. The book, which is largely based on the author’s observations, impressions, and analysis of existing literature and legal material, “explores what roles aesthetics play in shaping how we conceptualize what international crimes are and, imagine how they might be committed.”³ DeFalco takes the reader on a critical journey into the ways international criminal justice imagines the “unimaginable atrocities that deeply shock the conscience of humanity”⁴ and what violences (and why) escape its gaze.

Even while *Invisible Atrocities* comes across as a plea to expand the scope and reach of international criminal justice, DeFalco contends that he does not aim “to advocate for the abolishment, continuation, or expansion of international criminal justice as a global project. Rather, given [his] ambivalence about the legitimacy and usefulness of international criminal law (ICL) [...] [his] ambition is to contribute to a more nuanced understanding of what this body of law actually does and does not do, and perhaps more importantly, what it can and should do if it continues existing.”⁵ And so he does. DeFalco, who is a law professor, presents an internally-focused critique of ICL’s performance; in particular, its selection of situations and

¹ Bohumil Hrabal, *Too Loud a Solitude* (Orlando: Harcourt Brace Jovanovich, 1990), 12.

² Milan Kundera, *The Unbearable Lightness of Being* (New York: Harper & Row, 1984), 30.

³ Randle C. DeFalco, *Invisible Atrocities: The Aesthetic Biases of International Criminal Justice* (Cambridge: Cambridge University Press, 2022), 3.

⁴ The Rome Statute of the International Criminal Court (1998), Preamble.

⁵ DeFalco, *Invisible Atrocities*, 9.

cases.⁶ DeFalco probes the imagined and self-expressed aspirations of ICL agents and protagonists (“to prosecute individuals who culpably participate in the large-scale abuse of others”⁷) against its lived realities (“to prosecute (or at least shame) a subset of individuals who participate in the production of *spectacular harm*”⁸). DeFalco’s book, in so doing, raises a mirror to the ICL’s scope as currently applied and practiced by its agents, and reveals the distorted image that appears in such a reflection. In this image only certain types of atrocities are visible, while others remain unseen, unrecognized.

De Falco observed visibilities and invisibilities at the core of atrocity recognition by ICL (and beyond) revolving around “aesthetic sensibilities relating to notions of atrocity and international crime,” which dictate (in addition to other political or pragmatic considerations) “the inclusion/exclusion of specific acts, situations, places, people.”⁹ “*We know it when we see it*” is the red thread throughout *Invisible Atrocities*. The fact that ICL itself is ambiguous and indeterminate, argues DeFalco, combined with a complex character of atrocity situations and high selectivity of international criminal justice, creates ample space for *aesthetic biases* to influence the determination of what international crime is and what it is not.¹⁰

Accordingly, describing a situation as atrocious has come to be associated, according to DeFalco, with a particular *aesthetics of horrific spectacle*, conforming to “a set of aesthetic conventions.”¹¹ Such *atrocious aesthetics* became “deep-seated, unquestioned, and foundational”¹² in recognizing potential international crimes. DeFalco convincingly argues how “canonical genocides and atrocities, especially the Holocaust, operate as implicit aesthetic reference points that are relied on in the recognition of new atrocities.”¹³ That is, atrocity crimes are expected to manifest themselves as highly visible, shocking displays that capture attention, resemble previous well-known atrocities, and elicit a host of negative emotional reactions (horror, disgust, sadness), while at the same time attracting and intriguing the observers.¹⁴ In addition, atrocities, according to DeFalco’s account, not only upset but also outrage; viewers feel, intuitively, that someone is to blame for the horrors of an atrocity they are exposed to. Even if who is responsible may not be readily apparent.¹⁵

In contrast, *invisible atrocities* are, in DeFalco’s words, “slow, banal, bureaucratic, attritive, or otherwise aesthetically unspectacular and unfamiliar in nature.”¹⁶ He explicitly identifies and discusses four different examples of mass harm causation that *prima facie* do not conform to the atrocity aesthetics: creation/enforcement of famine conditions, extreme forms of corruption, aid interference, and socioeconomic oppression.¹⁷ These *invisible, slow-moving atrocities* are excluded from international criminal justice’s imagination and gaze, despite the fact that no compelling normative nor doctrinal limitations or obstacles exist that might hinder their inclusion. Next to a normative and doctrinal analysis, DeFalco illustrates his reasoning with ample examples of historical and more contemporary instances of “familiar and unfamiliar

⁶ There have been many works theorizing and/or empirically testing and assessing prosecutorial discretion, selection, and selectivity of ICL. DeFalco’s insights thus complement and add to this body of literature. See for example Cale Jordan Davis, “Prosecutorial Discretion in International Criminal Justice” (PhD diss., Leiden University, 2021), on file with the author; Birju Kotecha, “The International Criminal Court’s Selectivity and Procedural Justice,” *Journal of International Criminal Justice* 18, no. 1 (2020), 107–139.

⁷ DeFalco, *Invisible Atrocities*, 69.

⁸ *Ibid.*, emphasis added.

⁹ *Ibid.*, 6.

¹⁰ *Ibid.*, 63.

¹¹ *Ibid.*, 43.

¹² *Ibid.*, 7.

¹³ *Ibid.*, 49.

¹⁴ *Ibid.*, 41, 49.

¹⁵ *Ibid.*, 52.

¹⁶ *Ibid.*, 4.

¹⁷ *Ibid.*, 99–148.

processes of atrocity,”¹⁸ such as atrocities against indigenous populations, against Herrero, long-term persecution of minorities in Myanmar, or socio-economic oppression in North Korea or Zimbabwe. He pays particular attention to the situation of Cambodia,¹⁹ which he intimately knows from his own working experience as a legal advisor to the Documentation Center of Cambodia (DC-Cam) that, for a while, closely cooperated with the Extraordinary Chambers in the Courts of Cambodia (ECCC).

In the second half of the book, DeFalco argues how such aesthetic biases undermine ICL’s values and goals, such as retribution, deterrence, or expressivism, and its legal legitimacy.²⁰ He contends that detrimental consequences of ICL’s blind spots reach well beyond ICL. According to DeFalco, given the prominence of ICL as the international community’s primary tool to respond to atrocities, the consequences of its limited imagination and constrained focus affect formation of historical memory and narratives, human rights, and broader transitional justice practices or peacebuilding.²¹ DeFalco concludes his critique of ICL performance by suggesting how its aesthetic selectivity caters primarily to particular sensibilities of “constituencies” and “elite technocrats” from the Global North.²² International criminal justice, therefore, he writes, could also be seen as “a vehicle for pursuing the relief of catharsis [...] for those of us in the Global North who experience discomfort and negative emotions associated with witnessing atrocities from afar”²³—while at the same time “allowing us to continue to ignore the root causes of such violence, along with other less discomforting forms of mass harm causation (and our relation thereto), even if potentially criminal in nature.”²⁴

Emotions are thus at the center of DeFalco’s account of ICL and, even if not explicitly engaging with that literature, his book falls within the law and emotions stream of legal scholarship. This is a very welcome and long overdue addition to the existing literature on international criminal justice. In contrast to domestic laws, where already for decades researchers have acknowledged that “emotion is everywhere in law,”²⁵ ICL’s emotional side seems to have been largely a taboo.²⁶ His book offers an innovative and intuitive outlook on the process of seeing and recognizing atrocities, which is grounded in sensory experiences and emotional responses. For DeFalco, emotions play a crucial role in how the reach and scope of ICL is imagined, interpreted, and applied. Interestingly, De Falco seems to assume that such emotions remain static and constant over time and place, in their manifestations and intensity (at least when it comes to the constituencies and elites from the Global North). He casts emotions and emotional reaction to

¹⁸ *Ibid.*, 187.

¹⁹ *Ibid.*, 149–184.

²⁰ In this sense, DeFalco’s book also offers a fresh, critical perspective to a long list of works analyzing legitimacy of ICCTs from various angles such as Nobuo Hayashi and Cecilia M. Bailliet, eds., *The Legitimacy of International Criminal Tribunals* (Cambridge: Cambridge University Press, 2017); Margaret deGuzman, *Shocking the Conscience of Humanity: Gravity and the Legitimacy of International Criminal Law* (Oxford: Oxford University Press, 2020); Marieke de Hoon, “The Future of the International Criminal Court: On Critique, Legalism and Strengthening the ICC’s Legitimacy,” *International Criminal Law Review* 17 no. 4 (2017), 591–614.

²¹ DeFalco, *Invisible Atrocities*, Chapters 6 and 7.

²² *Ibid.*, 252.

²³ *Ibid.*

²⁴ *Ibid.*, 253.

²⁵ Kathryn Abrams and Hila Keren, “Who’s Afraid of Law and the Emotions?,” *Minnesota Law Review* 94 no. 6 (2010), 2009; see also Susan A. Bandes and Jeremy A. Blumenthal, “Emotion and the Law,” *Annual Review of Law and Social Science* 8 (2012), 161–181.

²⁶ For a notable exception of engagement with aesthetics (and emotions) of prosecutions see Mark Drumbl and Caroline Fournet, eds., “The Visualities and Aesthetics of Prosecuting Aged Defendants,” special issue, *International Criminal Law Review* 22 no. 1 and 2 (2022). In contrast to relative invisibility of emotions in ICL-related literature, literature on broader transitional justice processes offers richer and broader examinations of the role of emotions. For an overview, see Susanne Karstedt, “The Emotion Dynamics of Transitional Justice: An Emotion Sharing Perspective,” *Emotion Review* 8 no. 1 (2016), 50–55. See also Mihaela Mihai, *Negative Emotions and Transitional Justice* (New York: Columbia University Press, 2016).

certain, specific spectacles of violence as an anchor, source of predictability, and constancy in ICL, which is intriguing. However, in reality, emotions tend to be messy, subjective, and dynamic—be it at an individual or collective level. And ICL itself is messy, multi-dimensional, multi-institutional, dynamic field performed by a large variety of individuals stemming from different countries, cultures and (legal, political and social) backgrounds and traditions. What role, if any, does this messiness, fluctuation and variation play in shaping and driving aesthetic biases and in the selection of atrocity situations (and cases within such situations) that ultimately end before international judges? What further role, if any, do aesthetic biases and emotions play throughout the life cycle of atrocity prosecutions when it comes to litigation, judging, and sentencing? These and many other questions remain to be answered. DeFalco's book, however, inspires, provokes, and opens new windows and avenues for exploration, further questioning, and (empirical) research on emotions in ICL.

DeFalco's book is a powerful, innovative and thought-provoking account and critique of ICL performance. DeFalco discerns how international criminal justice (in recognizing only certain subset of atrocities as worthwhile of its attention) is influenced by aesthetic considerations and emotions. He suggests how only certain types of mass violence forcefully trigger our emotions—or, in the words of Kundera's opening quote—how they “weigh so heavy,” elicit “pain intensified by the imagination and prolonged by a hundred echoes,” and subsequent condemnation and action by ICL activists and agents. And, how, simultaneously, in the face of other types of mass violence of comparable seriousness (which we do not intuitively recognize as atrocities)—as in the Hrabal quote—we seem to “still our emotions,” “look upon [suffering] with composure” or turn away and not look at all. In its breadth and depth, DeFalco's book is a first of its kind, gesturing towards emotions underlying ICL performance and a must read for all interested in, researching, and practicing, not only ICL but also transitional justice, human rights, and atrocity/genocide studies.