
Building the Conscience of Humankind: An Analysis of the Use of Selective Imagery on the 75th Anniversary of International Criminal Justice

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ABSTRACT

Last November marked the 75th anniversary of the start of the Nuremberg Trials, a milestone that the Tokyo Trial will in turn reach next May. These two proceedings instituted the long-awaited birth of international criminal justice, after the frustrated trial of Kaiser Wilhelm II following the Great War and the Treaty of Versailles. From the very outset, images played a fundamental role in shaping international criminal justice before its audience. This article analyses how the use of visual elements (i.e., the depiction of victim suffering) has been instrumental in driving international criminal justice – and, therefore, law – in certain directions, whereas censorship (i.e., the depiction of victimlessness) has contributed to the avoidance of undesired paths. I argue that this manipulation through image has been utilised to build a conscience of humankind and thus achieve greater legitimacy of international criminal law in its inaugural trials, while attempting to conceal one of the greatest pitfalls of the field: selectivity.

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INTRODUCTION

The trials of Nuremberg and Tokyo in 1945/1946 set in motion a system that, albeit with significant hiatuses, has been running for 75 years: international criminal justice. Even though these were two (obviously) distinct legal proceedings, Gerry Simpson has coined the term ‘Tokyoberg’ to refer to the twinned trials,¹ which can be analysed as a single event where multiple revolutions occurred in the way we understand, and articulate, concepts such as individual responsibility, the criminalisation of war, and the invention of crimes against humanity.² I will make use of the Tokyobergian idea throughout the essay.

In the late 1990s, international legal scholars conceptualised how international criminal justice, despite the contentions for its universality, had in fact been highly selective. McCormack asserted that selectivity is first found in relation to the acts the international community characterises as crimes and, secondly, in relation to the particular alleged atrocities that international criminal justice collectively prosecutes.³ Simpson argued that a fundamental requirement of the rule of law is generality, and therefore the selective application of international criminal law entails a serious flaw in the international legal system itself and an impediment to the just application of these laws.⁴ Bothe identified that states are very cautious when creating law enforcement mechanisms that could potentially assert jurisdiction over their nationals, while conversely applying much wider views of liability in ‘safe’ frameworks (i.e., in situations where the exercise of jurisdiction over their own nationals is unlikely).⁵

¹ Gerry Simpson, ‘Writing the Tokyo Trial’, *Beyond Victor’s Justice? The Tokyo War Crimes Trial Revisited* (Brill Nijhoff 2011) 24.

² Gerry Simpson, ‘Ch.2 Opening Reflections: Tokyoberg’ in Viviane Dittrich and others (eds), *The Tokyo Tribunal: Perspectives on Law, History and Memory* (TOAEP 2020) 17.

³ Timothy McCormack, ‘Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law’ (1997) 60 *Al L Rev* 681, 683.

⁴ Gerry Simpson, ‘War Crimes: A Critical Introduction’ in Gerry Simpson and Timothy McCormack (eds), *The Law of War Crimes: National and International Approaches* (Kluwer Law International, The Hague 1997) 11.

⁵ Michael Bothe, ‘International Humanitarian Law and War Crimes Tribunals: Recent Developments and Perspectives’ in K. Wellens (ed.), *International Law: Theory and Practice* (1998) 581, 593; See also Robert Cryer, ‘The Boundaries of Liability in International

Fast forward to the 2010s – now with a permanent International Criminal Court operating for some years – a group of scholars studied a phenomenon which, as they found, had been instrumental in developing international criminal law: the utilisation of images. Schwöbel-Patel observed that international criminal tribunals, probably more than any other international institutions, have relied on videos and other forms of images to narrate their purpose and showcase the discipline of international criminal law and its main protagonists.⁶ Tallgren remarked that there is a relationship between images of suffering from ‘atrocities’ and the desired support for international criminal justice: seeking empathy and commitment to action by images is a frequent practice of humanitarianism and international criminal law gives special attention to victimhood.⁷ As she puts it, ‘images and international criminal justice make an enigmatic couple’.⁸

The purpose of this essay is to combine the concepts of selectivity and imagery, by analysing the ways in which they intertwined in the emergence of international criminal justice. Today, 75 years after *Tokyo*, international criminal law still finds itself struggling to enhance its legitimacy by resorting to representational narratives⁹ – a technique that goes back a long way. I do not intend to add to the criticism about the great, routine failures of the field, or, as it was recently construed, become another ‘pragmatist pointing out the obvious defects in the system’.¹⁰ Rather, this essay will trace back to the origins of international criminal justice to focus on how visual elements were utilised or discarded in *Tokyo* to exploit audiences and masquerade the well-known selectivity. The result, I argue, is the engineered dichotomic portrayal of, either, deeply tormented victims, or no victims at all.

Criminal Law, or ‘Selectivity by Stealth’ (2001) 6(1) *Journal of Conflict & Security Law* 3, 5.

⁶ Christine Schwöbel-Patel, ‘Spectacle in International Criminal Law: The Fundraising Image of Victimhood’ (2016) 4 *London Review of International Law* 261.

⁷ Immi Tallgren, ‘Come and See? The Power of Images and International Criminal Justice’ (2017) 17(2) *International Criminal Law Review* 259, 265.

⁸ *ibid* 261.

⁹ See, for example, the debate on the International Criminal Court’s ‘trapezoid windows’ in www.twitter.com/intlcrimcourt/status/1351226875792777217, accessed 11 Mar 2021.

¹⁰ Gerry Simpson, ‘Ch.36 International Criminal Law: The Next Hundred Years’ in Kevin Heller and others (eds), *The Oxford Handbook of International Criminal Law* (Oxford University Press 2020) 848.

I. 'THE CONSCIENCE OF HUMANKIND': LEGALISM THROUGH IMAGERY

Nouwen and Werner illustrate that when an international criminal court is involved, the primary concern becomes 'convincing the international community that justice is done'; that is, that the form of justice preferred by the international community is done.¹¹ Contrasted with the notion of 'global justice', other conceptions of law appear as particular, local and traditional.¹² Therefore, one of the objectives of international criminal law is to monopolise the prevailing discourses of such global justice.¹³ In *Tokyoberg*, this pursuit was evident.

Hartley Shawcross, Chief British prosecutor at the Nuremberg Trials, argued that 'international law has in the past made some claim that there is a limit to the omnipotence of the state and that the individual ... is not disentitled to the protection of mankind when the state tramples upon his rights in a manner which outrages the conscience of mankind.'¹⁴ In a similar vein, Telford Taylor, the American lawyer who acted as Counsel for the prosecution at Nuremberg, addressed the judges by saying: '... we are not now indicting the German General Staff at the bar of history, but on specific charges of crimes against international law and the dictates of the conscience of mankind, as embodied in the Charter which governs this Court.'¹⁵ The phrasing 'conscience of mankind' had originated at Versailles and re-emerged years later to underpin the effective kick-off of the international criminal justice system.¹⁶ This effort to construct a global justice to foster the protection of an overarching moral humanity earned, on the one hand, the praise of the philosopher Karl Jaspers – who saw the trials as a possibility to reorient Germany to the tradition of

¹¹ Sarah Nouwen and Werner Wouter, 'Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity' (2015) 13 *Journal of International Criminal Justice* 157, 158.

¹² *ibid.*

¹³ *ibid.*

¹⁴ Hartley Shawcross, 'Nuremberg Trial Proceedings', (Nuremberg Trials, Nuremberg, 26 Jul 1946) <<https://avalon.law.yale.edu/imt/07-26-46.asp>> accessed 23 Jan 2021.

¹⁵ Telford Taylor, 'Nuremberg Trial Proceedings', (Nuremberg Trials, Nuremberg, 7 Jan 1946) <<https://avalon.law.yale.edu/imt/01-07-46.asp>> accessed 23 Jan 2021.

¹⁶ Noticeably, the concept still survives in the Preamble of the Rome Statute.

humanism as well as a renewal of the tradition of Western humanism itself for a cosmopolitan future – and, on the other, the mistrust of Hannah Arendt – who thought the social construction of moral or criminal guilt would exonerate not only Germans but humanity from the need for a more profound ethical and political response.¹⁷

The narratives behind international criminal justice attempted to offset the weaknesses of the system (such as the concerns about victors' justice and *ex post facto* criminal law) by appealing to the moral conscience of humanity, an allegedly globally shared value which was so superior, so intrinsic to the human being, that its damage could not be tolerated. This principle stemmed from the recognition of the supremacy of the law of humanity over the law of a sovereign state when it violates elementary human rights; particularly in a manner which may justly be held to shock the conscience of humankind.¹⁸ Consequently, the merged notions of 'conscience' and 'humankind' offered a creative way out of the predicaments of in-existent positive criminal law, and thus became the legal basis buttressing legality in *Tokyoberg*. In parallel, victims became fundamental to reinforcing the theory of a damaged conscience and its need for redress. Invoking victimhood generally comes with a claim to authority, a claim that one is entitled to speak on behalf of the category of the actual victims, and on behalf of the abstract victim (i.e., humankind).¹⁹ This authority is also a claim to 'authorship', namely the power to write the story – and history – of victims in a particular way.²⁰

Against this background, imagery played a crucial role in the development of monopolistic legitimising discourses. Photographs and videos of victims have been used in international criminal justice to draw attention to selected acts that *must* shock the conscience of humankind, whereas other visuals have been deliberately concealed to sterilise the shocking capacity of the acts that they

¹⁷ For an extensive analysis on the debate between Jaspers and Arendt about crimes against humanity: cf. Robert Fine, 'Crimes Against Humanity, Hannah Arendt and the Nuremberg Debates' (2000) 3(3) *European Journal of Social Theory* 293.

¹⁸ Lassa Oppenheim, *International Law: A Treatise*, Vol. 1, Hersch Lauterpacht (ed.) (8th edn, Cambridge University Press 1955) 752.

¹⁹ Sofia Stolk and Werner Wouter, 'Moving Images: Modes of Representation and Images of Victimhood in Audio-Visual Productions' in Kevin Heller and others (eds), *The Oxford Handbook of International Criminal Law* (Oxford University Press 2020) 585.

²⁰ *ibid.*

portrayed. The power culminates in shaping the focus: some suffering gets selected, passes through the elaborate international criminal justice procedural rites, is purified, and becomes confirmed as worthy of concern.²¹

Through this theoretical lens, the following sections examine the exhibition/concealment of imagery in the aftermath of the Second World War.

II. CONSCIENCE AND THE IMAGERY OF ATROCITY IN *TOKYOBERG*

The Allied powers were in need to forward the concept of global justice for the legitimacy of the trials. The task came not without dangers: the ghosts of *ex post facto* law and *ad hocery*, in addition to the sceptical – now contradictory – views that many Allies had had towards trying the Kaiser, threatened the success of the project. Versailles had been surrounded by a certain aversion to resorting to a law-rooted legitimacy for William II's trial, to the extent that Article 227 included all kinds of euphemisms for 'law', but never the exact word. In this vein, Clemenceau wrote in 1920 that this "was not a case of a public accusation fundamentally of a legal character, but of an act of high international policy demanded by the conscience of mankind".²²

In *Tokyoberg*, 25 years later, the legalistic approach attained much more preponderance. As Simpson contends, 'Roosevelt was worrying about acquittals on technicalities and Robert Jackson – pressed on the existence of crimes against humanity or aggression – replied by saying "we can save ourselves from these pitfalls of definition if our test of what is a crime gives recognition to those things which fundamentally outrage the conscience of the American people." The victims of war crimes had become the people in general ... This became at trial the idea of "shocking the conscience of mankind."²³ The trial was understood as an exercise in the reconstitution of the law, an act staged not only to punish extreme crimes but to demonstrate the power of the law to

²¹ Tallgren (n 7) 277.

²² Hersch Lauterpacht, 'The Law of Nations and the Punishment of War Crimes' in Guénaél Mettraux (ed), *Perspectives on the Nuremberg Trial* (Oxford University Press 2008) 53.

²³ Simpson, 'War Crimes: A Critical Introduction' (n 4) 11.

submit the most horrific outrages to the hand of justice.²⁴ In this regard, the trial was to serve as a spectacle of legality, making visible both the crimes of the Germans and the neutral authority of the rule of law: the idiom of judgment on this point took the form of ‘crimes against humanity’.²⁵

The situation presented other hurdles for the United States as well. International criminal law was supposed to redress the egregious acts carried out by the Nazi and Japanese regimes, and the core legitimacy to try the perpetrators was contained in the shocking capacity of those deeds of moral turpitude. But how could the bombings of Hiroshima and Nagasaki, crimes equally capable of shocking consciences, be left out? The Americans were not the only ones facing these quandaries, as the British carried the burden of the carpet bombings of several German cities (causing more than 300,000 civilian deaths)²⁶ and the Soviets faced responsibility for the terrible Katyn Massacre, among others.

In this delicate scenario, the portrayal of images to audiences was meticulously designed. Which events to expose graphically, and which to hide, became a matter that the victor states carefully calculated in parallel to the *Tokyobergian* implementation. This exploitation was instrumental in perfecting the legalism that was needed as a pillar of the trials. Michalczyk presents a thorough review of the usage of visual elements before and during Nuremberg, where accounts in the form of both photographs and movies were broadcasted to a big portion of the world’s population, especially to those affected by the war.²⁷

In February 1945, some months after the first camps were liberated by the Soviets, a director working for the British Ministry of Information Film Division contacted the Allied Psychological Warfare Division in order to collect and produce material ‘with a view to preparing a film which will show the German atrocities in many parts of the world’.²⁸ By June, camps had also been

²⁴ Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (Yale University Press 2001) 41.

²⁵ *ibid.*

²⁶ Mahmood Mamdani, ‘The Logic of Nuremberg’, (2013) 35(21) *London Review of Books* 2.

²⁷ John Michalczyk, *Filming the End of the Holocaust: Allied Documentaries, Nuremberg and the Liberation of the Concentration Camps*. (London: Bloomsbury Academic 2014) 66.

²⁸ Elizabeth Sussex, ‘The Fate of F3080’ (1984) 53(2) *Sight and Sound* 92.

discovered by the Allies advancing from the West. The Anglo-German newsreel 'Welt im Film' ('The World on Film') was released, explicitly depicting the atrocities in a series of graphic scenes from concentration camps. Its showcase became part of the denazification plan, encompassing the message 'Dass ist Faschismus, dass ist Nationalsozialismus' ('That is Fascism, that is National Socialism').²⁹ Screenings were made compulsory in Allied-occupied Germany.³⁰

In September 1945, Robert Jackson, Chief US Prosecutor at Nuremberg, personally reviewed a film called 'That Justice Be Done' (produced by the Office of Strategic Services and also translated to German) and believed that the short documentary would be a means of educating the public about the rationale for an international trial. Released in theatres in October, the film allowed Americans to view on screen the oppressive Nazi rule in the context of the ideals of the American system of justice.³¹ The US Signal Corps were instructed to document extensively – and vividly – the results of the Nazi monstrous atrocities, producing photos and films that were designed to 'document history as well as inform an incredulous world that lay unaware of the concentration camp nightmare.'³²

Accordingly, the Soviets also did their part. During the trial they presented significant amounts of film evidence showing the civilians that had been massacred in various Nazi camps. The piles of corpses and emaciated prisoners were displayed explicitly. In the minds of the Soviets, the presentation of this footage of atrocities at Nuremberg would further assure that their victimhood at the hands of the Nazis would be viewed in an international forum. This compilation of four reels of material, lasting approximately one hour, screened for the Tribunal, included the newsreels and documentaries which had already been shown in Russian theatres.³³ The footage established an important narrative in which Soviet images of Nazi atrocities predominated, in addition to depictions of the triumphant marches of the Red Army.³⁴ Hicks reflects that

²⁹ Michalczyk (n 27) 34.

³⁰ Cf. Ulrike Weckel, *Beschämende Bilder: Deutsche Reaktionen auf alliierte Dokumentarfilme über befreite Konzentrationslager*, (Stuttgart: Franz Steiner Verlag 2012).

³¹ Michalczyk (n 27) 66.

³² *ibid* 30.

³³ *ibid* 102.

³⁴ Jeremy Hicks, *First Films of the Holocaust: Soviet Cinema and the Genocide of the Jews, 1938–1946*, (University of Pittsburgh Press 2012) 47.

‘propaganda was inextricably entwined with atrocity; indeed, the latter would not have been shown without the former.’³⁵

The Nuremberg trial spectacle included not only films and photographs of victims, but actual victims’ remains. ‘The shrunken head of Buchenwald’ – a fist-sized human head with the skull bone removed, stuffed, and preserved – was exhibited in the courtroom as vivid proof of the barbarous Nazi experiments. The scholar Lawrence Douglas has analysed the prosecution’s rhetoric around the shrunken head, in connection to the legalistic discourse that acted as bedrock to the ‘crimes against humanity’ limb of the accusation. The cranium, Douglas concludes, served as the most tangible representation of Nazi crimes as atavistic: an unquestionable testimony that the acts performed at the camps belonged to an era that predated civilisation.³⁶ Therefore, law was meant to act as the protector of a civilised humankind. In Robert Jackson’s words: ‘If we cannot eliminate the causes and prevent the repetition of these barbaric events, it is not an irresponsible prophecy to say that this twentieth century may yet succeed in bringing the doom of civilization.’³⁷ Photos of the shrunken head became some of the best-known images associated with the trial.³⁸

The fact that great part of the visual testimonies was not only used at the trials, but also broadcasted to the general population, speaks significantly about the intention that underlay the juridical necessity of presenting evidence that could not only contribute to the criminal conviction of the accused, but also outrage the civilised conscience. Schwöbel-Patel’s theory on spectacle in international criminal law is an applicable framework to reflect the logic behind *Tokyoberg*: ‘Understanding victims of international crime as spectacularized directs attention to the visual and rhetorical signification of the social construction of victimhood ... and more broadly to the understanding of international criminality and its apparent antithesis of humanitarianism.’³⁹ The

³⁵ *ibid.*

³⁶ Lawrence Douglas, ‘The Shrunken Head of Buchenwald: Icons of Atrocity at Nuremberg’ [1998] 36 *Representations* 39, 46.

³⁷ Robert Jackson, ‘Nuremberg Trial Proceedings’ (Nuremberg Trials, Nuremberg, 26 Jul 1946) <<https://avalon.law.yale.edu/imt/07-26-46.asp>> accessed 10 Mar 2021.

³⁸ Douglas (n 36) 40.

³⁹ Christine Schwöbel-Patel, ‘Spectacle in International Criminal Law: The Fundraising Image of Victimhood’ (2016) 4 *London Review of International Law* 249.

creation of images – and their timely distribution – became part of the legitimising machinery claiming for justice to be done in *Tokyoberg*.

III. 'THE MUSHROOM CLOUD': CENSORSHIP IN OCCUPIED JAPAN

On the other hand, *Tokyoberg* worked to erase (or, worse, instrumentalise) the atomic bombings Hiroshima and Nagasaki. Until the United States ceased the Japanese occupation in 1952, no photographs or videos portraying the damage caused to civilians were released.

One of the earliest accounts on selectivity applied in international criminal justice belongs to Justice Pal in his famous dissent at Tokyo. He was outraged by the concept of trying leaders for crimes of which the prosecutors were themselves guilty: the decision of the American government to drop nuclear bombs on Hiroshima and Nagasaki was, in his assessment, a clear example of a crime against humanity.⁴⁰ Cryer praises Pal's exposition for identifying this primeval bias in international criminal justice,⁴¹ which contrasted with the widespread notion that *Tokyoberg* should be regarded as the beginning of a new era of accountability, a milestone in the fight against the impunity of those who shock the conscience of humankind.⁴² In addition, Justice Pal stated: 'his decision to use the atom bomb is the only near approach to the directives of the German emperor during the first world war and of the Nazi leaders during the second world war. Nothing like this could be traced to the credit of the accused.'⁴³ Pal's dissenting opinion was not read at the trial and it was not published in Japan after the American occupation ended.

⁴⁰ Elizabeth Kopelman, 'Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial' (1991) 23 NYU J Int'l L & Pol 373, 407.

⁴¹ Robert Cryer, 'Selectivity in International Criminal Law' in Cryer (ed.) *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press 2005) 207.

⁴² See, for example, Philippe Kirsch, 'Applying the Principles of Nuremberg in the International Criminal Court' (2007) 6(3) Washington University Global Studies Law Review 501.

⁴³ Dissenting Opinion from the Member From India, Judge Pal, in Pritchard and Zaide (eds.), *The Tokyo War Crimes Trial, 21: Separate Opinions* (New York: Garland 1981) at p. 1091.

The use of atomic weapons in Hiroshima and Nagasaki did not awaken what some hoped would 'bring about a unity of humanity, linked to all our fellow human beings, irrespective of race, creed, or color, by bonds which have been fused unbreakably in the diabolical heat of these explosions'.⁴⁴ In the end, Justice Pal concluded, there was no justification for these inhuman blasts.⁴⁵ In the same vein, one of the Japanese members of the defence counsel, Okamoto Shoichi,⁴⁶ strived to bring justice to the victims of the bombings: he was convinced that indiscriminate attacks on civilians with atomic bombs clearly constituted war crimes that should not have gone unnoticed in the Tokyo Trial.⁴⁷

However, the lack of consideration of the atrociousness of the atomic bombings at the trial received surprisingly meagre commentaries outside of Pal's and Shoichi's. As Polunina highlights, even the Soviets – who had complained about many failures of the proceedings – remained remarkably reserved about Hiroshima and Nagasaki during the trial and in their home press.⁴⁸

The United States carefully engineered a strict censorship mechanism which was in force during most times of the American occupation, and even when there were brief periods of press freedom, reporting on atomic damage was basically done through eyewitness accounts and scarce scientific evidence.⁴⁹ A special unit was created: the 'Publications, Pictorial and Broadcast Section'.⁵⁰

⁴⁴ David Crowe, 'The Tokyo and Nuremberg International Military Tribunal Trials: A Comparative Study' in Viviane Dittrich and others (eds), *The Tokyo Tribunal: Perspectives on Law, History and Memory* (IOAEP 2020) 57.

⁴⁵ *ibid.*

⁴⁶ Shoichi also pursued a second legal battle to redress the atomic bombings, after the Tokyo Trial was over.

⁴⁷ Yuki Tanaka, 'The Atomic Bombing, the Tokyo Tribunal and the Shimoda Case: Lessons for Anti-Nuclear Legal Movements' in Yuki Tanaka, Timothy McCormack and Gerry Simpson (eds), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (Brill Nijhoff 2011) 295.

⁴⁸ Valentyna Polunina, 'The Soviets at Tokyo: International Justice at the Dawn of the Cold War' in Kerstin von Lingen (ed), *Transcultural Justice at the Tokyo Tribunal* (Brill 2018) 136.

⁴⁹ Glenn D. Hook, 'Censorship and reportage of atomic damage and casualties in Hiroshima and Nagasaki, (1991) 23(1) Bulletin of Concerned Asian Scholars 18.

⁵⁰ For a more detailed account on the censorship apparatus, Cf. May Grzybowski, 'Knowledge and Power in Occupied Japan: U.S. Censorship of Hiroshima and Nagasaki' (2018) *Bard Senior Projects Spring 2018*. 134.

It issued a 'Manual on Censorship in Japan' directed to the censors, in which they were told that their primary mission was to ensure that the efforts of Japan to emerge from its defeat as a new nation, entitled to a place among the peace-loving nations of the world, would not be harmed.⁵¹ In January 1946, the motion picture industry in Japan was informed that no film could be shown without prior clearance by the censors, including simple paper movies shown by itinerant storytellers.⁵² Even those who owned films had to make detailed reports of them.⁵³ Alongside the endeavours to conceal the horrifying effects of the bombings, the manipulation of photographs and videos was intended to portray an image of Japan's war guilt, both inside Japan and to the rest of the world.

Even prior to the outbreak of the Second World War, imagery had been utilised for the stigmatisation of the Japanese regime within the Western collective imagination. When the Japanese army attacked Shanghai in the summer of 1937, the photographer H. S. Wong, working for an American agency, captured the image of a Chinese baby covered in blood, crying desperately, surrounded by destroyed railway tracks. Wong would later recall that the baby's mother lay dead some metres away from him.⁵⁴ The picture, titled 'Bloody Saturday', was sent to New York and featured in Hearst newsreels, newspapers and life magazine—the widest audience a picture could then have.⁵⁵ Viewed by more than 136 million people, it struck a personal chord that transcended ethnicity and geography: to many, the infant's pain represented Japan's bloodlust.⁵⁶ The photograph is now included in TIME Magazine's 'Most Influential Images of All Time'.

TIME's collection also contains a depiction of the drop of the atomic bomb. When the 20-kiloton weapon hit Nagasaki, approximately 80 thousand people died instantly. However, the iconic photograph shows no humans, but a massive cloud of radioactive debris, as it was taken by Lieutenant Charles Levy

⁵¹ Monica Braw, *The Atomic Bomb Suppressed: American Censorship in Occupied Japan* (New York: East Gate 1991) 62.

⁵² *ibid.* 43.

⁵³ *ibid.*

⁵⁴ 'Bloody Saturday' (TIME 100photos) <<http://100photos.time.com/photos/hs-wong-bloody-saturday>> accessed 23 Jan 2021.

⁵⁵ *ibid.*

⁵⁶ *ibid.*

from the US observation aircraft named, paradoxically, ‘The Great Artist’. According to TIME, ‘Officials censored photos of the bomb’s devastation, but Levy’s image ... was circulated widely. The effect shaped American opinion in favor of the nuclear bomb, leading the nation to celebrate the atomic age.’⁵⁷ The sanitised depersonalisation of the bombings was rigorously devised and presented as nothing but military progress against the bellicose enemy.

Perhaps the quote by Benjamin Wright, a historian at UT Texas who recently contributed to curate a book containing Japanese photographs of the bombed cities and populations, can illustrate a sentiment that still lingers: ‘Americans, when they think about atomic war, think about the mushroom cloud’.⁵⁸

CONCLUSION

Kendall and Nouwen argue that international criminal justice operates in the representation of victims in two ways: through their participation in trials, and through the discursive invocation of abstract victimhood.⁵⁹ The latter, which transcends all actual victims and corresponds to no individual victims in their particularity, becomes a figure of victimhood that is deployed as a kind of new sovereign of international criminal law.⁶⁰ The aesthetics of this victimhood, coming back to the notion of spectacle in international criminal law, are presented to the audience in the most colourful and dramatic way possible.⁶¹

⁵⁷ ‘Mushroom Cloud Over Nagasaki’ (TIME 100photos) <<http://100photos.time.com/photos/mushroom-cloud-over-nagasaki-lieutenant-charles-levy>> accessed 23 Jan 2021.

⁵⁸ Mike Ives, ‘After Atomic Bombings, These Photographers Worked Under Mushroom Clouds’ *New York Times* (New York, 6 August 2020) <www.nytimes.com/2020/08/06/world/asia/hiroshima-nagasaki-japan-photos.html> accessed 23 Jan 2021. Cf. The Dolph Briscoe Center for American History, *Flash of Light, Wall of Fire: Japanese Photographs Documenting the Atomic Bombings of Hiroshima and Nagasaki* (University of Texas Press 2020).

⁵⁹ Sara Kendall and Sarah Nouwen, ‘Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood’ (2014) 76 *Duke, Law and Contemporary Problems* 235, 241.

⁶⁰ *ibid.*

⁶¹ Schwöbel-Patel (n 6) 254.

The narratives around *Tokyoberg* were constructed to invoke the sentiments of the international community towards the pressing need to punish those who had outraged the conscience of humankind. In that effort, a massive display of imagery was presented to the different audiences around the world, which were juridically and sensorially summoned to integrate the morality of international law and claim for justice. For this purpose, the vivid construction of victimhood was paramount.

However, *Tokyoberg* also represents the dialectic dyad of victimhood versus *victimlessness*. These two contrasting concepts encompassed the building of a conscience of humankind that was carefully produced and discursively engineered to consolidate a juridical humanity 75 years ago. In the prevailing discourse, the Hiroshima and Nagasaki atrocities were sterilised: they became the mushroom clouds, the deserved response to a war-guilty nation, the effort to bring war to an end. Unseen were the images of humans suffering, and intact remained the assembled conscience of humankind. The *hibakusha* victimhood belongs to the ‘missing scenes’ of the *Tokyoberg* movie. In its place: the dehumanised victimlessness.⁶²

⁶² Sankichi Tōge was 28 years old when he became a survivor of the Hiroshima atomic bomb. In 1951 he presented his ‘Genbaku Shishu’ (‘Poems of the Atomic Bomb’). The following one, titled ‘Give Back the Human’, is engraved in the monument dedicated to him in Hiroshima: Give Back the Human / Give back my father, give back my mother; / Give grandpa back, grandma back; / Give my sons and daughters back. / Give me back myself, / Give back the human race. / As long as this life lasts, this life, / Give back peace / That will never end.

