1. What is international criminal justice?*

I. INTRODUCTION

What is understood by the phrase ‘international criminal justice’ is surprisingly difficult to articulate comprehensively. At a fundamental level, it describes the response of the international community—and other communities—to mass atrocity. This seems to be a broadly accepted definition. How we respond to war, to the rupture of society and to systematized murder and persecution, is at the heart of the issue. Which forms of transitional justice we respond with, and how our goals are best achieved, are important questions.¹ But international criminal justice is about more than responses. How do we learn from history or, sometimes, fail to do so? Can we use our understanding of human psychology to better respond to mass atrocity, or better, to prevent it or react to address it sooner? What of the sociological elements that are infused in our response to heinous international crimes; how do these affect our understanding and practice of international criminal justice?

This chapter explores some different perspectives and disciplinary approaches to this complex area, including political, historical and sociological perspectives. This is important because, while as international lawyers we have raised important questions about legitimacy and coherence, we do not always open ourselves to a genuinely multidisciplinary approach to what it means to talk about international criminal justice.

* A version of this chapter is also published in Gideon Boas, William A. Schabas and Michael P. Scharf (eds), International Criminal Justice: Legitimacy and Coherence (Edward Elgar 2012).

One might say that the obvious embodiment of international criminal justice comes in the form of international war crimes trials. All alternative responses, at least in the context of contemporary international relations, might be referred to as ‘other’.

The trial of individuals for the commission of the core international crimes—genocide, crimes against humanity or war crimes (and possibly aggression, after 2017)—is a powerful weapon in the armoury of international criminal justice. The proliferation of international and internationalized war crimes tribunals which began in the 1990s\(^2\) in some respects culminated in the creation of the International Criminal Court (‘ICC’), a project that might be said to have been first seriously considered by Gustave Moynier in the 1860s.\(^3\) As recent referrals to the ICC by the Security Council of the situations in Sudan and Libya confirm, the international community very much views war crimes trials as an important response to conflict and atrocity. This preference, and the implications of this for international criminal justice, is an important theme that must continue to be discussed.

There is of course a range of responses to atrocity. Truth and Reconciliation Commissions, of which there have been over 30 since the 1970s,\(^4\) reflect a less retributive, more reconciliatory emphasis. Other, community-based, approaches reflect a more culturally specific response to the subject matter of international criminal justice. Examples of this

\(^2\) International Criminal Tribunal for the Former Yugoslavia, International Criminal Tribunal for Rwanda, Special Court for Sierra Leone, Special Panels for the Dili District Court, Extraordinary Chambers in the Courts of Cambodia and Special Tribunal for Lebanon.

\(^3\) Jackson Maogoto, ‘Early Efforts to Establish an International Criminal Court’ in José Doria, Hans-Peter Gasser, and Mahmoud Cherif Bassiouni (eds), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (Martinus Nijhoff 2009) 3, 5. Maogoto notes that Moynier was not originally in favour of establishing an international criminal court, believing that, like many humanists of the time, descriptions of human suffering would shock the public into outrage and by extension pressure states to adhere to the humanitarian norms and rules: at 5.

include the *Gacaca* courts in Rwanda,\(^5\) the *Fambul Tok* in Sierra Leone\(^6\) and the *Mato Oput* in Northern Uganda.\(^7\)

Another aspect of the international criminal justice patchwork is the extent to which it engages other disciplines. As already mentioned, this field has been traditionally viewed as a strictly (or at least predominantly) legal discipline, with images of the trial of the major war criminals at Nuremberg, and more recently the Milošević or Taylor trials, standing as masculine statements that impunity will not stand. However, an increasing sensibility has emerged in relation to other disciplines and views. Clearly, a discussion about what international criminal justice is requires a broader analysis than that offered by international criminal law. Like international justice itself, different voices speak to the content and meaning of this complex topic and struggle to influence outcomes and processes.

Further fundamental questions about the coherence and legitimacy of international criminal justice itself are prompted by whether these voices are heard, and how they influence our understanding and responses. It is the purpose of this chapter then to examine some of these threads, to hear some of these voices and to consider them under the broad question: what is international criminal justice?

## II. RETRIBUTIVE CONCEPTIONS OF INTERNATIONAL CRIMINAL JUSTICE—WAR CRIMES TRIALS

### A. Development of International War Crimes Trials

A reasonable place to start is the development of international war crimes trials. The first real example of this followed the Second World War. The Nuremberg, Tokyo and other post-War trials launched the new post-UN Charter world conception of international criminal justice. The goal of


Nuremberg was to bring to justice the most senior German perpetrators of atrocities committed at the beginning of and during the War. US prosecutor, Robert Jackson, emphasized that while the trial was clearly one carried out by victorious nations over the vanquished, this did not mean that the court could surrender to an inevitable ‘victor’s justice’. These Nazi war criminals were to be given a ‘fair and dispassionate hearing’, a fair trial, and accorded the presumption of innocence. Moreover, he emphasized that the purpose of the trial was to incriminate the German leaders, not to act as an indictment upon the German people. The individual was thus on trial, but not the state, and not the population. The extent to which these impressive and lofty goals were achieved has been heavily debated in the 60 plus years since that trial and will no doubt continue to be assessed in light of the work of the modern war crimes tribunals.

B. War Crimes Trials from the 1990s—The New Model

While some important domestic war crimes trials were held between the 1940s and the 1990s, in reality, very little occurred on the international
front until the creation of the International Criminal Tribunal for the former Yugoslavia (‘ICTY’) in 1993 to try those accused of committing war crimes in the course of the Bosnian conflict. The aims and goals of this tribunal were not dissimilar to those in Nuremberg—to provide redress for the victims of atrocities, to express the moral outrage of the international community, to provide a vehicle of retributive justice and, of course, to stand as a deterrent to those who would repeat such heinous crimes in the future.

There were, however, some noteworthy differences and interesting features to this new model. For a start, it (happily) lacked the features of victor’s justice that had marred the successes of the post-War tribunals. Of course, the Serbs complained that they were the target of the Tribunal and that this was a new version of victor’s justice, wielded by the US, Germany and others through the UN system. Such accusations are understandable but quite wrong. They also distract argument away from other far more legitimate challenges to the ICTY and other international tribunals, which relate to the politics of selecting which crimes to prosecute, in which regions of the world, and why.

Another feature of the Yugoslav and Rwanda Tribunals was the fact that the Security Council created them as a measure, under Chapter VII of the UN Charter, to restore and maintain international peace and security. Apart from an early challenge within the ICTY and some

highlight that ‘the intervention of the Cold War saw both the concept and practice of international criminal justice removed from the forefront of global politics and relations’: Findlay and McLean, above note 4, 458.


15 See Prosecutor v Tadić (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 2 October 1995).
initial scholarly disquiet,\textsuperscript{16} this extraordinary development in the armoury of the Security Council has quickly been accepted as legitimate. Of course, this has now been replaced by the methodology of referring matters to the ICC by way of Security Council resolution (a technique ironically supported enthusiastically by the US, which is not a state party of the Court and was, under its previous administration, the Court’s arch enemy).

The fact that the \textit{ad hoc} tribunals were set up under Chapter VII of the UN Charter made their relationship with the conflict in their respective regions necessarily deeper than a traditional criminal jurisdiction. Any criminal court established as a measure to re-establish peace and security must surely need to contribute to reconciliation and sustained post-conflict measures to stabilize the region. Additionally, to the tribunals’ credit, they espoused broader goals of accountability and justice—in their judicial and political rhetoric, as well as in substantive areas of their core work. An important example of this was reference to a contribution to reconciliation as a mitigating factor in sentencing.\textsuperscript{17}

The other interesting aspects of the new tribunal model were the development of a human rights regime since the post-War tribunals and the effect of the \textit{jus cogens} norm of a right to a fair trial on the work of these courts.\textsuperscript{18}


\textsuperscript{17} See, e.g., \textit{Prosecutor v Plavšić (Sentence Judgement)} (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-00-39&40/1S, 27 February 2003) [94]. This case was followed in \textit{Prosecutor v Jokić (Sentence Judgement)} (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-01-42/1-S, 18 March 2004), the Trial Chamber noting that ‘the parties agree that Miodrag Jokić was instrumental in ensuring that a comprehensive ceasefire was agreed upon and implemented’: at [90]; \textit{Prosecutor v Blažojević (Judgement)} (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-02-60-A, 9 May 2007), the Chamber stating that the conduct of an accused that promotes reconciliation in the former Yugoslavia has been considered as a mitigating circumstance, at [330].

\textsuperscript{18} See generally Boas, above note 13, Ch. 1.
C. The Special Place of the International Criminal Court

Like Nuremberg, modern war crimes tribunals focus primarily on the senior participants in the conflicts addressed. The era of ad hoc and hybrid tribunals might be seen, in one sense, as preparatory work for the creation of the now functioning ICC. Determined somewhat optimistically in its statute to ‘put an end to impunity’, the ICC operates on a predominantly similar model to that of the ad hoc tribunals. Its struggle for existence through several International Law Commission drafts and the derelict Cold War years may have created an odd psychological facet to the Court, which on one level is played out in its substantive legal work. The Court is regarded, and regards itself, as the pre-eminent expression of global retributive justice. It is empowered to investigate crimes within its various jurisdictional limitations and is used as an increasingly important (albeit selective) aspect of the Security Council’s redress of atrocity. An important example is Security Council Resolution 1970, referring the Libya situation to the ICC.19

The Court is under pressure to investigate an enormous range of crimes and conflicts, develop technical assistance to states through a policy of positive complementarity, and develop an expeditious and efficient pre-trial, trial and appeal model—a task acknowledged by its own judges to be proving difficult.20

D. Where do War Crimes Trials Leave Us in Relation to Understanding International Criminal Justice?

So where do war crimes trials leave us in relation to understanding international criminal justice? As Bass put it, the various objectives for international war crimes tribunals include: ‘to bring justice, establish peace, outlaw war altogether, erase bitterness, or to establish new international norms that will help lift us out of anarchy’.21 Considering these lofty goals, can it be said that war crimes trials are a successful method of achieving international criminal justice? Do they at least contribute to ending impunity? Are they really a deterrent for murderous


dictators and would-be genocidaires? Do they promote reconciliation in transitional communities? Or do they adversely impact on community rebuilding and on victims’ need to establish the truth, to be heard and to take control of their own narrative?

Of course, it is not simply a question of spouting platitudes about impunity and justice. For war crimes trials to work, the accused must be tried fairly and expeditiously, account must be had of the role and rights of victims (individual and community) and the place of reconciliation must at least be considered in the process. There are a number of impediments, some external and some self-created, that these tribunals face in achieving even the most basic aspect of these goals.

The most pressing external problem facing the international tribunals has been a varying preparedness on the part of states to support them. For example, states have at times demonstrated a reluctance to arrest accused perpetrators. This can be explained in part by the ‘unwillingness of even liberal states to endanger their own soldiers either by arresting war criminals or in subsequent reprisals’22 and in part by the role national interest ‘shaped by political culture … dictates whether or not states support the international criminal tribunals’.23

International criminal tribunals also face challenges partly of their own making in the form of their internal procedures, which have had a tendency to frustrate the expedient running of the trial process. These factors—including lack of prosecutorial restraint, a preparedness on the part of the courts to implement their powerful case management provisions and trial inefficiencies—have been recited at length elsewhere,24 but they continue to plague the work and viability of these important institutions.

At the same time, the international tribunals have enjoyed a number of successes in attempting to fulfil their mandate to try those accused of war crimes. First, it is important not to take the existence of international criminal tribunals and international criminal law for granted. The existence and legitimacy of international criminal law as a body of law was

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22 Bass, above note 1, 277.
23 Ibid.
being questioned as recently as the 1980s, although thankfully that debate can now be put firmly to one side. The creation of these tribunals as a juridical response to mass atrocity is an achievement in and of itself, and the broader impact these tribunals have had both in a punitive sense and as a deterrent should not be underestimated.

Secondly, despite the myriad complexities associated with war crimes trials, the fact that modern international criminal law has been crafted from next to nothing in under 20 years is an extraordinary achievement. A significant number of trials have been held at the international criminal tribunals and, while far from perfect, they represent something of a credible system of criminal justice that responds to unspeakable crimes. The oft-referred to ‘road from Nuremberg to The Hague’ was a difficult one, and many questions await reply from the ICC, but the international community continues to value such a juridical response.

E. National War Crimes Trials—A Lack of Action

Despite ratification of the Rome Statute of the International Criminal Court (‘Rome Statute’) leading to the implementation of legislation in numerous countries, and despite the ICC clearly being set up by states as a court of last resort, there is little evidence that states are enthusiastically taking to the task of trying war criminals under their domestic criminal justice systems. While Belgium in the early part of this century exploded into action as the state of universal jurisdiction, the Arrest Warrant case...
before the International Court of Justice (‘ICJ’)
and some bullying from then US President George W Bush and his Secretary of Defence Donald Rumsfeld,
extinguished this brief excitement. The general disposition
of states—particularly those of the common law persuasion—is well
reflected in the experience of Australia, Canada and the UK, where few
prosecutions have been launched, and fewer still have been successful.
Whether the unwillingness of able states to prosecute crimes of mass
atrocity is a threat to the capacity of the retributive model is difficult to
assess, but it seems likely to be one.

F. The Threat to International Criminal Justice Posed by
Guantanamo Bay and the ‘War on Terror’

Another, slightly sinister, development in the response to mass atrocity
has arisen following the 9/11 attacks in the US. The ‘war on terror’ has
led to some genuine challenges to the legitimacy and coherence of
international criminal justice. The use of Guantanamo Bay as a holding
station for state-sanctioned torture and exclusion from state-based jurisdiction for the purpose of denying accused persons basic criminal process rights—including the *jus cogens* norm of a right to a fair trial—posed a serious threat to international criminal justice and the rule of law. The war on terror also gave birth to the implementation of counter-terrorist measures that threatened some of the fundamental criminal process rights in countries that have a highly developed system of criminal justice. Finally, and significantly, responses to the Al Qaeda attacks have led the US and its allies into full-blown international armed conflicts, some with lawful justification (Afghanistan) and some without (Iraq).

Some of these measures have an inevitable and unavoidable relationship with international criminal justice. The development and application of substantive and procedural criminal law in one jurisdiction affects that in another. The preparedness of one or more states to bypass fundamental principles and defensible interpretations of the law when trying certain kinds of accused, or when deciding to prosecute one conflict or party over another, has certain consequences. It creates a challenge to the legitimacy of a juridical response to atrocity and social rupture, because inconsistent and *sui generis* responses open international criminal justice up to allegations of partiality and prejudice—perhaps a modern, post-Nuremberg version of ‘victor’s justice’. Also, varying structures and practices across war crimes tribunals can lead to a sense of incoherence, which in turn raises questions of legitimacy.

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32 Sassoli, ibid.
34 Much criticism has been made of such measures in a large number of jurisdictions. See generally Ben Saul, “‘Why Do They Hate Us? … They Hate Our Freedoms’: The Globalisation of Terrorism and Counter-Terrorism’ in Swawkat Alam, Natalie Klein and Juliette Overland, *Globalisation and the Quest for Social and Environmental Justice: The Relevance of International Law in an Evolving World Order* (Routledge 2011) 205; Ben Saul, ‘Defining Terrorism to Protect Human Rights’ in Deborah Staines (ed.), *Interrogating the War on Terror: Interdisciplinary Perspectives* (Cambridge Scholars Publishing 2007) 190–210.
35 See discussion in Boas et al, above note 24, Ch. 1.
Another unavoidable aspect of this is the employment of permissive universal jurisdiction as a structural underpinning in international criminal justice. While international criminal tribunals can rely upon Security Council resolutions, engaging the UN Charter’s Chapter VII powers, or, in the case of the ICC, multilateral treaty agreements or self-referral measures, the reality is that the entire system of international criminal justice is predicated on various expressions of universal jurisdiction.\(^{36}\) Natural law conceptions of humanity and protection of communities are infused with the dialogue of what is international criminal justice; these require a sense of an ‘international community’ acting ‘collectively’ against certain opprobrious behaviour. In this way, international criminal justice is an expression of global community—a dysfunctional one to be sure—but, just as any community needs rules and a predictable application of them, so too does international criminal justice need to reflect such principles.

All of this suggests that while war crimes trials remain the preferred model for addressing mass atrocity (at least at the UN level), serious questions about coherence and legitimacy remain. The risk is that a pluralistic and diverse expression of principle could unravel into a chaotic and fragmented system of justice. The US system of military tribunals post-9/11 certainly showed just how much of a threat this was. Worse, perhaps, is that a lack of commitment from states—political, strategical and financial—is always a possibility.

III. RESTORATIVE JUSTICE

For all the emphasis that has been placed on a retributive model, it is not the only expression of international criminal justice. As Richard Goldstone has pointed out, prosecution is ‘not the only form [of justice], nor necessarily the most appropriate form in every case’.\(^{37}\) Restorative justice approaches mass atrocity and social rupture from a very different


perspective. It focuses upon discovering the truth, reconstructing the narrative of a conflict or human rights affected society, and re-empowering victims and victimized communities.

A number of different conceptions of the relationship between restorative and retributive justice have been advanced. One is that restorative justice operates on a fundamentally different level to international war crimes trials. While international criminal tribunals can be said to operate as a retributive/guilt-based justice model, restorative justice is designed to function on the level of establishing the truth and on reconciliation and healing.38 Under this approach, the two are ‘mutually exclusive, incapable of happy coexistence’.39

Another view is that the two can, with institutional transformation, coexist in a transitional context—that there is also scope for restorative themes to be incorporated into the procedural framework of international trials.40 The problem with this attempt to marry the retributive with the restorative is that the forensic requirements of war crimes trials are in some respects manifestly incompatible with restorative approaches.

One such example of an attempt to integrate ‘formal’ and ‘informal’ approaches can be seen in Sierra Leone. Following that bloody conflict, involving numerous rebel groups and the displacement of nearly half of the population of the country, a UN-backed peace agreement was finally reached in 2002. This was preceded by the Lomé Peace Accords in 1999 which provided for the creation of a Truth and Reconciliation Commission, which had a legislative mandate to:

create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone; … to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.41

In 2002, at the request of the Sierra Leone President, a Special Court was created to try those responsible for crimes committed during the conflict, independently of the Commission. The Sierra Leone Commission concluded in 2004, releasing its final report. It has been criticized as being a

39 Ibid.
40 Ibid.
41 Truth and Reconciliation Commission Act 2000, Sierra Leone Gazette, No 9, 10 February 2000, s. 6(1).
‘deeply flawed and problematic process’ and as being in conflict with the Special Court. This was for a variety of reasons, including the relationship between the Commission and the Court, internal organizational problems within the Commission and the cultural difficulty of encouraging public truth-telling. Others, including one of the Commission members, William Schabas, believe that the Sierra Leone model ‘may help us to understand that post-conflict justice requires a sometimes complex mix of therapies, rather than a unique choice of a single approach from a menu of alternatives’. At any rate, while the Truth and Reconciliation model may well have benefits in a transitional environment, it seems that a cooperative or integrated approach with war crimes trials carries some difficulties.

An even less successful attempt to integrate ‘formal’ and ‘informal’ approaches to international criminal justice occurred in the former Yugoslavia, where a Truth and Reconciliation Commission was formed in 2001 to operate parallel to the ICTY. However, after facing considerable internal conflict, numerous withdrawals by key personnel, concerns over resources and the mandate of the commission, and little substantive progress, it ceased to exist in 2003—oddly, without any official statement or decree.

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43 Laurel E Fletcher et al, ‘Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective’ (2008) 31(1) Human Rights Quarterly 163, 183. These views have been shared by others, including, for example, Rosalind Shaw, Rethinking Truth and Justice in Sierra Leone—United States Institute of Peace Special Report SR- 130 (United States Institute of Peace 2005).

44 Kelsall, above note 6.


A. Truth and Reconciliation Commissions

Of course, Truth and Reconciliation Commissions have for some time been used as an expression of international criminal justice—indeed, their use predates the modern system of international war crimes trials. The truth commission model, which is mostly utilized in a period of political or post-conflict transition,\(^{47}\) is defined by Freeman as:

an ad hoc, autonomous, and victim-centred commission of inquiry set up in and authorized by a state for the primary purposes of (1) investigating and reporting on the principal causes and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the state during determinate periods of abusive rule or conflict, and (2) making recommendations for their redress and future prevention.\(^{48}\)

The South African Truth and Reconciliation Commission\(^ {49} \) is often cited as the eminent example of a restorative response to social rupture. As Schabas points out, it is in that category of commissions established when social transition is already well underway (following the abolition of apartheid), and it was therefore more likely to succeed.\(^ {50} \) Established in the mid-1990s, the Commission was tasked with the underlying goal of uniting the still heavily divided nation. Victims of gross human rights violations were encouraged to come forward and give statements about their experiences, some of which were shared with the broader community. The central involvement of victims in the process has been credited with having ‘an unparalleled impact on the level of public awareness and engagement in a truth commission process’.\(^ {51} \) Perpetrators were also encouraged to give testimony, the Commission utilizing a truth-for-amnesty procedure, allowing for amnesty to be granted to perpetrators who admitted their crimes. Although questions have been


\(^{48}\) Freeman, ibid., 18.

\(^{49}\) Ibid., 26—see generally regarding the South African Truth and Reconciliation Commission.


\(^{51}\) Freeman, above note 47, 26.
raised about the frankness of disclosure by perpetrators and the satisfaction felt by victims, the Commission is broadly viewed as a successful use of restorative justice and was credited with assisting South Africa in the transition to full democracy.\textsuperscript{52}

The value of Truth and Reconciliation Commissions has also been expressed from the perspective of storytelling as a therapy. The use of narrative to expose truth and correct false and damaging stories can have considerable value for individual victims and communities.\textsuperscript{53}

Truth and Reconciliation Commissions are a global phenomenon and have been established in states including Argentina, Chile, El Salvador, Uganda, Germany, Zimbabwe, Guatemala and, more recently, Burundi and East Timor. They will no doubt continue to be relied upon as a mechanism of international criminal justice. Their effectiveness will probably much depend on the social context in which they are created and how they are designed to interact with juridical responses to crimes committed.

B. Community-based Responses to Mass Atrocity

Moving perhaps further towards the perimeter of international criminal justice is a range of community-focused programmes for transitioning societies. Alternative forms of justice such as localized courts are approaches that can ‘more accurately reflect sociolegal norms of the places most immediately afflicted by mass atrocity’.\textsuperscript{54}

An interesting example of this approach is the Gacaca courts used in post-genocide Rwanda. While the international response to the genocide came in the form of the International Criminal Tribunal for Rwanda (set up to try those responsible for the genocide) and national courts (which prosecuted others), the government also employed traditional justice methods. The decentralized nature of the Gacaca courts allowed greater engagement at a community level for victims. The courts were not permitted to try serious offenders, but rather heard cases over property and other more minor offences. From a practical perspective, the national


\textsuperscript{54} Mark A Drumm, \textit{Atrocity, Punishment and International Law} (Cambridge University Press 2007) 70. See also Kelsall, above note 6.
courts could not hear cases for all the detainees who were incarcerated awaiting trial—as Drumbl pointed out, it would take over a century to hear that many trials. The Gacaca were to allow for mechanisms that were more akin to Rwandan social and legal cultures, the purpose being to give greater social ownership of the process, leading to a deeper reconciliatory effect.55

Another example is support for local peace alternatives in Northern Uganda (ceremonies such as Mato Oput—a ritual of the clan group that involves both the political and spiritual sphere).56

These alternatives are seen as important paths in the reconciliation process. They can provide a sense of ownership within a community and an alternative to perceived paternalistic responses from external forces. However, traditional justice methods are not without their critics. Tim Allen notes that crimes committed in Uganda have no parallel in traditional alternatives to justice and that the ceremonies were never designed to be used for crimes of the gravity dealt with under international criminal law.57 In Rwanda, reports varied considerably as to the success of this process.58 Others note that community-based responses are a reworking of tradition; some view this as positive, while others, such as Human Rights Watch, do not disapprove of traditional justice but note that these methods do not meet international standards of justice.59

IV. DIFFERENT DISCIPLINARY APPROACHES AND CONCERNS WITH INTERNATIONAL CRIMINAL JUSTICE

The expressions of international criminal justice discussed thus far can all be—and often are—considered from a legal perspective. War crimes trials are an inherently juridical response to atrocity. While reflecting a more restorative, truth-finding approach, Truth and Reconciliation Commissions must be understood (at least partly) from the perspective of the legal structure of, and constraints on, their work: how will testimony be taken? Are amnesties available and, if so, what test will be applied and by whom?

55 See Kelsall, above note 6.
56 Ibid.
58 See Kelsall, above note 6.
59 Ibid.
The international lawyer’s reflex is to sublimate other threads, or voices, in the myriad conceptions of international criminal justice. Part of this reflex is founded in the sense that international criminal law is equated to international criminal justice. However, while war crimes trials are a species of any criminal trial, they are also much more than this. This is a space in which other disciplines can help us understand what international criminal justice is more broadly. Other disciplinary perspectives—historical, political, sociological and victimological—are all worthy participants in the debate about what international criminal justice is.

A. Politics

Consider for a moment the relationship between politics and international criminal justice. Politics have been, and in mainstream international criminal law still are, considered something inherently undesirable. This perspective, as Gerry Simpson puts it, views the trial ideally as ‘a place liberated from politics and the contamination politics threatens’. In fact, war crimes trials are infused with politics in a range of critical ways: in a practical sense, from their creation, implementation and ongoing support; in a conceptual sense, from the fact that all law is an expression of politics; and finally, in the sense that war crimes trials invariably mean different things to different people. Clearly, the creation of any of the ad hoc and hybrid criminal tribunals is a product of the political relationship between states. The creation of the International Criminal Court represents a major shift in international norms relating to the prosecution of international crimes.

The same is true for Truth and Reconciliation Commissions and other ways of responding to mass atrocity. Indeed, one simply needs to take a step back and ask a simple question to see just how profound the role of politics is in international criminal justice. Why is there a court to try crimes in the former Yugoslavia, Rwanda and Sierra Leone but not in Somalia, Zimbabwe or Sri Lanka? Why is there a Security Council Resolution referring Sudan and Libya to the ICC but not Yemen or Gaza?

_60_ See e.g., Boas, above note 13, 4—arguing that international criminal trials are a forensic process and that extra-legal considerations are to be pushed aside (a position from which I now somewhat resile).

_61_ Simpson, above note 11.

Politics dictates expressions of international criminal justice and in doing so shapes our consciousness about where, why and how it applies. Of course, what we do only serves to highlight what we do not, but perhaps should, do.

B. Victimology

A critical sociological and psychological element of international criminal justice concerns the role and status of victims. This is an emergent area of research which raises difficult theoretical, methodological and conceptual questions. What constitutes victimhood, the role and significance of individual and collective victims, the experience of indirect victimization, access to justice and victim rights, must all be considered within the wider debates surrounding the normative evolution of international criminal justice.

Within this area, the line between victim and witness—and therefore between possible conflicting roles, participation and interests within proceedings—remains unclear. The appropriate boundaries for victim participation and its implications for the relationship between different expressions of international criminal justice remains a contested area in which the legitimate interests of victims needs to be considered in relation to the efficiency and fairness of the proceedings and the rights of the accused.

While many expressions of international criminal justice promote a certain type of justice, based on Anglo-Continental legal tradition, legal anthropology reveals a diversity in conceptions of justice: from the manner in which people, and more importantly victims, conceptualize rights, to their understanding of an individual’s duties vis-à-vis ethnic or cultural groups and attitudes towards appropriate punishment.

Where victims’ ideas of justice do not align with international legal regimes, the result is their exclusion from a legal political system. This

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66 Ibid., 187.
requires a discussion of the diverging ideas of justice in the context of
victimology.\(^{67}\) One (traditional, forensic) view of international criminal
justice is that it is designed to be the ‘end of impunity’ not the ‘end of
suffering’.\(^{68}\) On this view, it is a system that punishes people ‘for the fact
that they have breached the law, not for the fact that they have inflicted
trauma as perceived subjectively [by victims]’\(^{69}\). Victims are not owed
convictions, but society at large has a right to pursue a conviction.\(^{70}\)

On the other hand, the endless stories of victims re-traumatized by the
process of testifying in international trials, the further marginalization of
victims from the trial process through the ‘paperization’ of trials and
dissatisfaction with sentences, are all legitimate concerns that call for a
revision of traditional common law perspectives of the victim in criminal
justice. The ICC may have addressed the lack of victim rights by
granting participation and compensation rights, but this process is yet to
pass the true test of time.\(^{71}\)

Furthermore, complaints about the truth and reconciliation process and
community-based models raise questions about how international crim-
inal justice is responding to the critical needs and rights of victims and
how it is being shaped by them. The future for the relationship between
international criminal justice and victimology rests on finding a middle
ground between community-based responses and a purely legalistic
characterization of the purpose of internationalized justice.

and Victim Responses to the International Criminal Court’s First Investigations’
(2009) 31(2) Human Rights Quarterly 496, 516. Glasius goes further, noting:
‘Both secondary sources in Uganda and the DRC and primary research for this
article in the CAR suggest that victims have a distinct and sometimes passionate
interest in the doings of the Court.’

\(^{68}\) Uwe Ewald, ‘Large-Scale Victimisation and the Jurisprudence of the
ICTY: Victimological Research Issues’ in Uwe Ewald and Ksenija Turković
(eds), Large-scale Victimisation as a Potential Source of Terrorist Activities:
Importance of Regaining Security in Post-Conflict Societies (IOS Press 2006)
171, 173.

\(^{69}\) Mina Rauschenbach and Damien Scalia, ‘Victims and International Crim-
441, 550.

\(^{70}\) Larry May, Crimes against Humanity: A Normative Account (Cambridge
University Press 2005) 220.

\(^{71}\) See Garkawe, above note 64.
Another, perhaps less obvious, lens through which to view international justice is the field of psychology. The application of psychological theory and research provides a unique insight into the psychological processes both underpinning and resulting from crimes of atrocity. Psychology can offer explanations as to how and why perpetrators of heinous crimes, including genocide, come to engage in behaviour typically regarded as ‘inhumane’. In the aftermath of such devastation, psychology can also aid in the understanding of the various behavioural and emotional reactions experienced by victims at both the individual and community levels. It can also inform governmental and international bodies of the most efficient and effective ways of promoting the resilience and recovery of those affected by international crime.

1. The psychology of genocide

An example of the place of psychology in international criminal justice can be seen in an examination of perpetrators of genocide. One approach (dispositional), groups together explanations of genocide occurring as a result of the specific internal characteristics of perpetrators. It is an individual approach which states that people, especially leaders, commit acts of genocide due to some form of pathology or dysfunction within themselves; that is to say, that perpetrators possess internal traits or profiles predisposing them to genocidal behaviour. While some authors use simple descriptors such as ‘sadistic’ or ‘authoritarian’ to describe perpetrators of genocide, others have suggested more specifically that a series of traits play a role in genocide, including social conformity, xenophobia, submissiveness and a deep ideological commitment. However, while it might be reasonable to accept that theories of pathological and personality dysfunction explain the genocidal behaviour of some leaders, it has been argued that theories such as these cannot alone

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73 Ibid.
account for the millions of people who, having previously been considered to be mentally healthy members of society, come to partake in genocidal behaviour alongside these leaders.76

Situational approaches focus instead on the role of external social factors in the development of genocidal behaviour, including obedience to authority.77 Others have suggested that the concept of identity is central to the act of genocide. Moshman, for example, argues that genocide occurs as a result of four overlapping phases of extreme identity formation: dichotomization, dehumanization, destruction and denial.78

Dichotomization refers to the way in which people classify themselves according to different dimensions (gender, religion, age, profession, etc.) and how in some instances instead of defining themselves according to many different dimensions, people may come to define themselves in one dimension, creating a simple ‘us and them’ mentality.79 The second phase, dehumanization, involves ranking one side of this dichotomy above the other, such that those deemed to be without a certain dimension are considered to be inferior, subhuman, even. The prime example of this phenomenon is the Holocaust, during which those of Jewish ancestry were deemed to be subhuman by those who subscribed to the Nazi ideology. Conceptualizing the other as subhuman allows for the cessation of any moral obligations towards that group, resulting in destructive behaviour toward those of ‘inferior’ status. Finally, in an attempt to align their moral identities, members of the ‘superior’ group partake in the process of denial, in which true acceptance of what has occurred is avoided. Each of the stages in Moshman’s theory are thought to reinforce the other such that dehumanization increases the salience of dichotomization and involvement in destruction strengthens the ideas of dehumanization. Thus, the extreme development of identity that is based on a singular dimension can create the perception of a dichotomous society in which one group dominates over the other, often leading to violent and genocidal behaviour.80

Examined from these ‘different’ (non-legal) perspectives, psychology might be seen at once as a tool for ‘treating’ the consequences of mass atrocity, but also for understanding the ‘why’ and ‘how’ and thus

76 Blass, above note 72.
77 Ibid.
80 Moshman, above note 78.
becoming a means of preventing, predicting and responding better and more quickly to events.

D. History

Another discipline of inevitable importance to international criminal justice is history. As vehicles for truth telling and teaching history, war crimes trials have attracted a large body of literature. However, the potential for war crimes trials to explain events and set a historical record is limited. Constrained by the rules of evidence and the overarching forensic purpose of the criminal trial, only fragments of the story can emerge. Reference to the didactic function of international war crimes trials in the judgments themselves shows a belief in those drafting them that these are vehicles for storytelling. In reality, however, their accounts are usually a collage of the reports and testimony of historical ‘experts’ led by the prosecution and defence, possibly with a random layering of accounts by victims and political leaders who testified.

Truth and Reconciliation Commissions offer a better vehicle for truth telling—that is, after all, their primary purpose. While they are themselves imperfect, they are probably better equipped to piece together the history of events and the stories of victims and victimized communities. However, through whichever practical lens one views international criminal justice, the presence of history is palpable. Indeed, failure to remember similar events, obsessions with past wrongs and judicial or other preoccupations with the precedent-setting of international war crimes trials are but a few examples of how history perpetually infuses dialogues about international criminal justice.

E. Use of Force as a Means of Expressing International Criminal Justice

A final word on international criminal justice is required. An interesting development, at least since the NATO bombing of Serbia in 1999, is the growing prevalence of the use of force by the international community as a ‘tool’ of international criminal justice. Military action in Kosovo and Iraq was justified in part by rhetoric of justice, and both incursions led to the arrest and trial of those countries’ leaders for genocide and other

81 See Boas, above note 13, 4.
82 See Phelps, above note 53.
crimes. Neither were sanctioned by the Security Council. It is hard to imagine that one of the key aims of these military incursions was not the removal of these dictators.

Since these conflicts, a key development has been the creation of the ICC, adding another dimension to this international policing. The provision for Security Council referral under the Rome Statute has been exercised twice in relation to alleged crimes against humanity and genocide—in Sudan and Libya. While neither has been particularly successful, it does suggest something of a shift in the international political landscape.

Libya in particular is fascinating. A mandate to set up a no-fly zone and protect civilians metamorphosed into something quite different. The substantial provision of strategic aid to rebel forces in order to assist them in setting up a strong and permanent opposition force, coupled with attempts to target and kill Gaddafi in air strikes, set up a very different international landscape. Considered in light of the much-lauded assassinations of Osama bin Laden in Pakistan and Anwar al-Awlaki in Yemen and the recent developments in Syria and Iraq due to the emergence of the Islamic State, a very uncertain picture of international criminal justice begins to emerge.

V. CONCLUSION

Peter Goodrich suggests that ‘justice is best understood as an imperfect and flawed practice of virtue … an always-failed attempt to actualize an ethical commitment and accounting of the past’. Looked at through a purist lens, justice must always fail: how can it account for the evil of

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Slobodan Milošević, Saddam Hussein, Omar Al Bashir or Klaus Barbie?
In any case, one person’s Barbie might be another’s Bush. But justice is not pure and therefore neither can international criminal justice be. It is a work in progress, driven by a mixture of moral values and pragmatic responses.

There are many different ways to skin the international criminal justice cat. Restorative and retributive justice models provide a range of options. Examining these from different disciplinary perspectives can only serve to amplify our understanding and improve our capacity to respond to mass atrocity. This chapter has attempted to discover what international criminal justice is, but, truth be told, it means different things to different people at different times. The Mothers of Srebrenica will never be satisfied that justice has been done, even when Radovan Karadžić and Ratko Mladić are locked up for life. This is much like Arendt’s account of the Eichmann trial—even his conviction and hanging were appallingly unsatisfactory. What we expect of international criminal justice is just as perplexing as trying to understand what it is; indeed, one invariably influences the other.