Introduction: an interdisciplinary criminology of international criminal law

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Some reasons for the absence of interdisciplinarity in international criminal proceedings

Whereas the fusion of international criminal law with other disciplines is much more obvious in the context of academic research, principally because of the inroads made by non-legal scholars, the application of these disciplines to international criminal proceedings is rare. One explanation for this is the practical function of international tribunals whose role is to dispense justice to 'real' people. As a result, and given the tight deadlines within which tribunals must process a huge amount of evidence and conduct trial proceedings, they may well claim that they do not have the luxury of experimenting with other disciplines. If this was indeed a valid explanation, tribunals could very well make use of the vast existing literature – as is the case with the reliability of traumatised eye witnesses[1] – in order to make persuasive arguments concerning the pitfalls of testimony provided by those directly affected by hostilities and violent crimes.[2] Equally, the tribunals could apply indisputable findings from the natural and medical sciences demonstrating the stresses on human physiology arising from combat. Explanations for the absence of interdisciplinarity in international trials should clearly be sought elsewhere.[3]

[1] See, for example, B. L. Cutler, S. D. Penrod, *Mistaken Identification: The Eyewitness, Psychology and the Law* (Cambridge University Press, 1995).

[2] See N. A. Combs, *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press, 2011) at 63–105, which explores the decline and pitfalls of oral testimony specifically in the context of international criminal proceedings.

[3] To be fair, the ICTY in its early work did seek some expert testimony on evidence reliability, particularly from the late W. A. Wagenaar. See www.icty.org/x/cases/kupreskic/trans/en/990603it.htm. See also www.ictytranscripts.org/trials/kupreskic/990603it.htm. Subsequent chambers, however, made little use of these findings.

The judicial chambers of international criminal tribunals ultimately validate and dictate in what manner the prosecution and defence will present their evidence, including the methods by which such evidence will be presented. By way of illustration, if the judges of a particular tribunal encouraged the application of neuroscience in order to ascertain the mental condition of those claiming exculpatory defences (e.g., duress) then no doubt all future litigants would hire the assistance of neuroscientists and relevant legal arguments would depend on scientific data. In this manner, and in that particular context, the law's construction would be made dependent on extra-legal considerations. As a result, the dynamics of the parties' arguments would shift from legal to extra-legal. At present, such a shift is a fiction in international criminal proceedings (with, it has to be said, some exceptions), but not in other fields of legal inquiry. Neuroscience, for example, plays a central role in the application of an infant's attachment to its parents and the family courts of several nations attribute great significance to attachment theory in their determination of custody and visitation rights.[4]

Why is it, then, that national courts are ultimately receptive to scientific developments in fields such as family and criminal law – not without their fair share of resistance – whereas international criminal tribunals are generally disinclined to consider these at any length? Some personal reflections will be offered to explain this phenomenon, albeit by no means can they holistically disentangle this very complex state of affairs. National courts, as permanent institutions grounded in nation states, are continuously engaged with powerful stakeholders and institutions that exert significant influence upon them, which they cannot lightly ignore. By way of illustration, bar associations, universities, alumni, published research in local or international eminent journals, research by civil society and media coverage are organisations and factors that sway the courts' opinion on several matters, particularly if said matters are not politically contested. The science behind the battered wife syndrome, which is not politically charged, is far more acceptable than the science

[4] See the pioneering work of J. Bowlby, *Attachment* (revised edition, Pimlico, 1997). For an application in family proceedings, see especially, C. George, M. B. Isaacs and R. S. Marvin, 'Incorporating Attachment Assessment into Custody Evaluations: The Case of a 2-Year Old and her Parents', (2011) 49 *Family Court Review* 483 and A. Schore and J. McIntosh, 'Family Law and the Neuroscience of Attachment: Part I', (2011) 49 *Family Court Review* 501.

underlying abortions, which remains politically contested principally along religious lines.

These 'pressure groups' are absent in the judicial politics of international criminal tribunals, where the principal stakeholders are the organs that created them and, in some cases, the victim population – especially where the tribunal is operating on the territory of the inflicted state. Given that in the vast majority of cases the victim population is largely illiterate and destitute there would be no direct interest in scientific advances outside the courtroom. Local populations would only take issue with the potential impact of particular scientific data on their commonly perceived notions of justice, which are understandably coloured by bias and clan affiliation (e.g., acquittal of an accused on account of his mental state). International bar associations are institutionally weak and members generally view their case loads before international tribunals through a temporary lens; universities and alumni exert little influence given the disparity in the ethnic composition of chambers; the only journals of influence upon the judges are law-related as this is their domain and, as has already been explained, the vast majority of writings on international criminal law in legal journals are not interdisciplinary; the agenda of civil society (at least that of the heavily funded and transnational non-governmental organisations (NGOs)) is largely geared towards anti-impunity (including lawfare) and is disinterested in the introduction of interdisciplinary approaches; and media coverage of the work of international tribunals by the large networks is minimal and hence the judges do not feel any media pressure as such. It is only the local media of the inflicted nations that report extensively, but this hardly exerts significant pressure on foreign judges who do not converse in the local language and see their judicial post as a temporary appointment and perhaps as a step to a subsequent post which is definitely unaffected by local media.

The second explanation for the absence of an interdisciplinary dimension in the work of international tribunals is simply the lack of expertise by lawyers in other sciences and disciplines.[5] One need only recollect how complex law itself has become, forcing lawyers to become specialists in narrow areas. This is true even in the academic sphere where forays into neighbouring legal disciplines are exceptional for fear of failure and rejection of one's writings. This 'closed' and distorted form of scholarship

[5] This is not necessarily true for those with a US-style legal education who will have undertaken a first degree unrelated to law.

breeds confirmation bias and blocks the emergence of new ideas and methodologies by 'outsiders'.[6] However, the absence of science and humanities in the operation of international tribunals' judicial reasoning is not the result of ignorance on the part of the judges (i.e., ignorance as to the exact science). No judge is expected to follow scientific developments or obliged to infuse law with science. Rather, in their dispensation of justice, judges must (in theory) be open to all those factors that serve justice in the best possible way. Hence, they must invite, rather than oppose, expert opinion on matters that affect the types of human conduct they are determining, in the same manner they employ military analysts to inform themselves of the military structure of the warring parties (e.g., in order to ascertain command hierarchies for the purpose of determining command responsibility). Judges must breed a culture of scientific exchange, inviting expert reports from eminent scientists and should call upon their sponsors to establish a scientific entity that will be charged with the following tasks:

(1) contextual study of each situation (historical, sociological and anthropological);
(2) consult the court and the parties on the available scientific evidence and authorities in respect of a particular issue (i.e., what is the dominant theory on the effects of post-traumatic stress disorder (PTSD) on soldiers in the field); and
(3) arrange for leading experts to offer expert determinations on said issues and assist the court in making sense of scientific data.[7]

The third factor inhibiting international judges' reluctance to introduce extra-legal elements into their judicial reasoning concerns their apprehension of the effects that science may have on judicial outcomes. By way of illustration, if a court had embraced neuroscience which had conclusively

[6] Confirmation bias entails the publication of works endorsed by editors of journals and book series, while rejecting other perhaps better works with which they are not in agreement. For an early empirical exposition of the problem, see J. Mahoney, 'Publication Prejudices: An Experimental Study of Confirmatory Bias in the Peer Review System', (1977) 1 *Cognitive Therapy and Research* 161.

[7] One of the biggest problems in science is the vast diffusion of lab-based results and the lack of inter-connectedness. Biologists, for example, typically study the operation of minute elements in human cells. Although their results are unique they are not directly (or necessarily) related to any particular disease. In the maze of very particular biological discoveries much is lost to medical researchers who are unable to connect every result to a disease.

demonstrated that combat-weary soldiers, whose physiology had been severely strained, possessed few cognitive powers, it would have no alternative but to determine that the culprits exhibited a diminished intention compared to the typical *mens rea* requirements of the criminal law. Hence, if non-legal sciences are kept as far removed as possible from the judicial reasoning process the courts decrease the risk of reliance on subjectivity. It is not, of course, that international judges desire unjust outcomes; rather, it is natural to fear that science (including criminological theories) is susceptible to absolute and irreversible results which subsequent judicial reasoning cannot escape without severe criticism. That judges may become slaves to scientific 'truths', dressed in an immutable facade, is as dangerous as uncontrolled judicial subjectivism that is altogether sceptical towards science and criminological thinking. However, no scientific advancement can ever substitute sound judicial reasoning, because the determination of justice in a particular case requires good use of one's inner faculties. Science can never achieve justice without the intervention of rational faculties. Hence, judges may ultimately decide that the application of a universally accepted theory to the facts of a particular case does not produce just outcomes. Practice has shown that in the few instances where international criminal tribunals have sought expert advice on non-legal issues – as in the anthropological construction of genocide – they did so with a view to reaching a just result.[8]

Transplanting criminology into the realm of international crimes?

The principal difference between ordinary (domestic) crime and international crime is context. Ordinary crime involves deviant conduct in a given societal setting that is subject to a degree of control by the local authorities. International crimes, on the other hand, particularly so-called core crimes (genocide, crimes against humanity and war crimes) occur in situations of lawlessness and breakdown of authority. Most transnational crimes, therefore, such as organised crime and terrorism, are akin to ordinary crime as far as their context is concerned. As a result of this diffused context between ordinary and international crimes it is not possible simply to transplant existing criminological theories to explain deviant conduct in the international realm.[9] The evolution and

[8] Anthropology has generally played a minor role at the ICTY, save for the construction of the pertinent groups susceptible to genocide. See Chapter 9.
[9] See Chapter 1.

application of criminological theories has been largely premised on the notion that criminal conduct is the result of several complex factors; some are attributable to the individual as such (e.g., biological and mental problems and dispositions, aggression theories), but many exist outside the individual and concern his or her interaction with society. Differential association theory, social disorganisation and sub-cultural theory are but a few of the theories that were developed to explain the link between socio-economic circumstances and deviance. Most importantly, criminology has never really dealt with atrocity crimes and the dynamics behind these (such as power relations, broader geostrategic interests etc.), having principally focused on individual deviance.[10]

A criminology of international criminal law, therefore, gives rise to two important questions, namely: (1) Are existing theories on the links between society and deviance still relevant in explaining international crimes, given that in most cases core international crimes occur as a result of the political decisions of a few individuals; and (2) to what extent do we need a new (or perhaps adapted) criminology to address crimes in situations of lawlessness (as in the case of armed conflict), semi-lawlessness (such as piracy and terrorism in failed states) and mass spontaneity (if indeed such spontaneity actually exists) of the type associated with genocide and crimes against humanity independent of armed conflicts?

As to the first question, little empirical research has been conducted to explain why individuals who are not ordinarily exposed to delinquent and deviant behaviour (as per existing criminological theories) exhibit brutal attributes in the context of mass criminality. In the Rwandan genocide even priests participated in the killings, neighbours massacred neighbours and, in the former Yugoslavia, ordinary people turned into heinous torturers. Of course, given that not everyone transforms into a sadistic murderer when mass conflict erupts it is evident that mass criminality and lawlessness do not suddenly awake a latent deviance in all those caught up in it, especially those in positions of power over others. In the *Erdemović* case, for example, the accused, a conscript in the Bosnian-Serb army, refused to execute unarmed civilians in *Srebrenića* as did most of his peers. Equally, most Germans rejected Nazi ideology even if they felt powerless to actively resist it. Criminologists have only recently begun to examine such phenomena,[11] albeit a consistent theory

[10] See the discussion of atrocity crimes in Chapter 1.

[11] D. Maier-Katkin, D. Mears and T. J. Bernard, 'Towards a Criminology of Crimes against Humanity', (2009) 13 *Theoretical Criminology* 227. A. Smeulers and R. Haveman (eds.),

backed by empirical evidence is missing, as relevant discussions so far have been largely theoretical and of a reconnaissance nature into the realm of international criminal law.[12] It is certainly worth undertaking a detailed social and psychological profiling of all those mid- to lower-level executioners convicted by international and domestic tribunals in the context of the Yugoslav, Rwandese and Sierra Leone conflicts. Such a study would highlight particular traits common among the perpetrators, their associations prior to the outbreak of hostilities, quality of family life, income distribution, influences from external sources, etc., which, in turn, would possibly point to characteristics shared among the observed group. Hence, the answer to the first question is that criminology does indeed have a role to play in the assessment of characters and their societal interaction prior to the triggering of mass criminality. This process must be adapted to the exigencies of the international crimes under consideration, since the transplantation of existing theories as such is probably inappropriate, albeit certainly the starting point for any subsequent discussion.

As to the second question, significant empirical work has been undertaken by psychiatrists on the physiology and cognitive faculties of those involved in combat.[13] In a study completed at the close of World War II on US infantry who had fought in northern Europe it was demonstrated that after a period of sixty days of continuous combat, 98 per cent of troops would suffer from a psychological condition, such as acute anxiety, combat exhaustion or depression, whereas the remaining 2 per cent developed an 'aggressive psychopathic personality' on the basis of which they could endure long periods of combat without any of the aforementioned symptoms common to the majority of their comrades.[14] Even so, we are still unaware of the effects of combat or non-organised violence on civilians-turned-combatants, or the impact of one's socio-economic history in the context of lawlessness. Equally, anthropological

Supranational Criminology: Towards a Criminology of International Crimes (Intersentia, 2008), have called for the establishment of a 'supranational criminology' for the purpose of examining mass international crimes.

[12] See, for example, N. Theodorakis and D. P. Farrington, 'Emerging Challenges for Criminology: Drawing the Margins for Crimes against Humanity', (2013) 6 *International Journal of Criminology and Sociological Theory* 1150.

[13] D. Grossman and L. Christensen, *On Combat: The Psychology and Physiology of Deadly Conflict in War and in Peace* (PPCT Research Publications, 2008).

[14] R. L. Swank and W. E. Marchand, 'Combat Neuroses, Development of Combat Exhaustion', (1946) 55 *Archives of Neurology and Psychiatry* 236, at 244.

data reflecting the views among the warring factions of a conflict are typically collected after the eruption of violence and, as a result, we possess a foggy picture as to the social relationships between victims and attackers at various temporal periods prior to the outbreak of hostilities. If we did possess such data, by means of early warning mechanisms, criminologists would be able to assess at what point in time social relations deteriorate. This would provide them with an opportunity to pinpoint those factors that exacerbate or ignite the change of circumstances, such as acute propaganda, high concentration of criminal elements in positions of authority, or other factors. Criminologists could then inform policy makers but also come to grips with those factors that trigger large social meltdowns that lead to mass unrest and criminality.[15]

It is clear, therefore, that the transplantation of existing criminological theories into the realm of international crimes – save for most transnational crimes – is inappropriate for addressing the multifaceted dimensions of these offences and their particular contexts. The social, anthropological and psychological context of international crimes demands new methodological approaches and new theories that link the individual to mass spontaneous phenomena.

Designing an appropriate research agenda

The organisation of the chapters in this book reflects a very specific thinking about what should be encompassed in a supranational (or international) criminology. This author does not view the aforementioned core crimes as the only international crimes, as they do not exist in isolation of other so-called transnational crimes,[16] such as terrorism, organised crime, corruption etc., which almost exclusively feed, to a larger or smaller degree, international conflicts and mass criminality.[17]

[15] In the Rwandese conflict, propaganda was a major tool in the hands of the *genocidaires* and at some point all transmission by radio was blocked through concerted international effort. See J. F. Metzl, 'Rwandan Genocide and the International Law of Radio Jamming', (1997) 91 *American Journal of International Law* 628.

[16] For a discussion as to their distinction, see I. Bantekas, *International Criminal Law* (4th edn, Hart, 2010), at 9.

[17] 'A Comprehensive Report of the Security Council-appointed Panel of Experts on the Illegal Exploitation of Natural Resources and other Forms of Wealth of the Democratic Republic of the Congo underlined the direct or indirect implication of 157 corporations, the operations of which fueled the purchase of arms, the perpetration of war crimes and crimes against humanity and the exploitation of Congo's natural resources to the detriment of its people.' Letter dated 23 October 2003 from the Secretary-General

Going a step further, terrorism and corruption, among other crimes, have been found to produce the same effects as war crimes and crimes against humanity.[18] As a result, while victimologists do undertake research on the effects of particular international crimes,[19] they are typically concerned with objective criteria, such as mortality rates and particular criminal incidences. Four broad phases are identified in a criminological study of international crime, namely:

(1) establishing context and understanding criminal conduct from multiple perspectives;
(2) investigation of crime by examination of available evidence;
(3) collaboration and enforcement through the use of appropriate and legitimate techniques; and
(4) transitional justice.

The first three phases are directly relevant to the work of international criminal tribunals, whereas the fourth concerns policy makers. By comparison, context is largely irrelevant to domestic criminal proceedings and there is no equivalent to transitional justice other than a generalised crime policy. Moreover, the degree of collaboration among institutions in a single nation is far more effective, less complex or cumbersome as compared to cooperation between states or institutions at the international level.

Anthropology and state crime studies reveal practical and theoretical approaches to context which are not obvious to the enforcer of law. In the Sierra Leone conflict, admission of cannibalism by the culprits was found to possess an altogether metaphorical meaning,[20] whereas accidental deaths caused by an earthquake may be attributed to the negligence of the state through its failure to enforce the highest standards of diligence upon its construction industry.[21] Neuroscience and psychology offer useful insights into the context of an armed conflict and explain from a clinical perspective the conduct of the persons involved in mass criminality.[22]

addressed to the President of the Security Council, UN Doc S/2003/1027 (2003), paras. 10–13.

[18] A. Cassese, 'The Multifaceted Notion of Terrorism in International Law', (2006) 4 *Journal of International Criminal Justice* 933.

[19] As is the case with Chapter 12 of this book, which examines victimisation in the context of armed conflicts and war crimes.

[20] See Chapter 9. [21] See Chapter 3. [22] See Chapters 8 and 10.

Examination of evidence is the bread and butter of criminal proceedings. A detailed study of context will have already provided a solid basis for reading the available evidence. Although the methodology will largely remain the same, there are crucial differences between the construction of evidence before international criminal tribunals and other courts. International tribunals typically prosecute senior figures and, as a result, prosecutors therein must link the criminal conduct of mid- and lower-level executioners to their source and inspiration. Moreover, eye witnesses may be in the thousands and forensic evidence will be extensive, including scores of rape and mutilated victims, displaced communities and mass graves. Victims and witnesses will have to return home at the end of their testimony, perhaps in close proximity to the friends and allies of the person they testified against. Unlike ordinary crime the majority of the culprits will perceive their role from a gallant lens, reinforced by notions of nationalism, patriotism, religious mission etc., which naturally dissolves their sense of guilt, even in respect of the most heinous crimes. This is further augmented by popular perception of the culprits' heroic image and their contribution to the group as such. As a result, oral testimony in mass criminality cases may be misleading due to the fact that an entire class of witnesses colours events, even heinous acts, according to its particular view and does not attach the requisite degree of importance to conduct as do the prosecutor or the judges. Equally, although much research has taken place on urban gangs and domestic organised criminal groups, as well as terrorist organisations, little work has been undertaken on the organisational aspects of mass crime organisations of the type involved in the context of the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and the Sierra Leone Special Court (SLSC).[23] International tribunals have used abstract and, to a large degree, arbitrary legalistic criteria to explain participation in 'groups' engaged in genocide and crimes against humanity and have, as a result, developed concepts such as joint criminal enterprise (JCE) in order to achieve justice. These concepts have not, however, been tested from a criminological perspective and, hence, there is uncertainty as to whether participants share the same goals, motivations or intentions.

The theme on collaboration and enforcement concerns the field of transnational criminal law and not the work of international criminal

[23] See O. Olusanya, 'A Macro–Micro Integrated Theoretical Model of Mass Participation in Genocide', (2013) 53 *British Journal of Criminology* 27.