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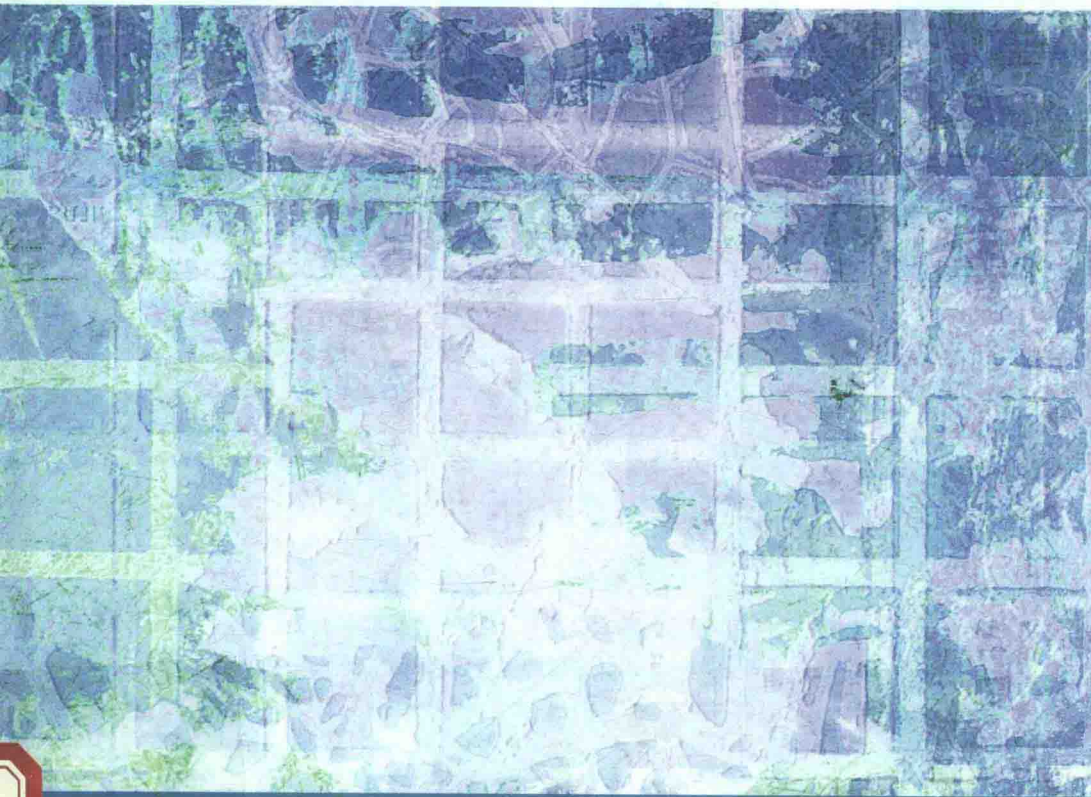

Gideon Boas Pascale Chifflet

PRINCIPLES OF INTERNATIONAL LAW

International Criminal Justice

Gideon Boas

Barrister-at-Law; Professor, La Trobe Law School, La Trobe University, Australia

Pascale Chifflet

Lecturer, La Trobe Law School, La Trobe University, Australia

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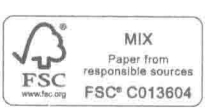

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Preface

This book is really an endeavour to grapple with some of the thematic intersections between mass atrocity and international responses to them. The term 'international criminal justice' has grown in recent years into a discipline of its own, yet it is still often used synonymously with international criminal law, with a profound focus on war crimes trials, particularly international war crimes trials. As this book explains, international criminal justice is much more. It embraces a variety of legal disciplines, but also other disciplines, including politics, history, psychology and more.

Trying to make sense of the responses to mass atrocity and how to respond to them, the international community, its scholars and practitioners have considered many causes and many responses. Themes of retribution and restoration continually emerge, as does how and whether these core ideas can be merged. We begin by considering the seminal question of what is international criminal justice, to set a framework for the book and our analysis. An understanding of the history of this discipline is also important, so we consider some of the ancient historical roots of international criminal justice and how communities, and ultimately the international community, have evolved in their responses to mass atrocity over time.

It is often suggested that international criminal justice is poisoned by politics. Rather, politics is an inevitable and dynamic aspect of international criminal justice, and we consider not just the presence of politics, but also the nature and effect that politics has on international criminal justice. We also turn to the discipline of psychology to explore how concepts of individual deviance, identity, obedience, truth and social narrative interplay in the leading to and aftermath of mass atrocity.

While this book examines themes and disciplines, the impact of terrorism and responses to it have elevated the significance of this field such that it really is not possible any longer to discuss international criminal justice without also addressing the nature of modern terrorism, its positioning between war and peace, and how the international community has responded, or failed to respond, in a way that advances

the ideals of international justice. More broadly, conflict and mass atrocity naturally leave behind fractured communities facing a difficult transition, which calls for a discussion of existing mechanisms of transitional justice. These mechanisms, whether retributive or restorative, are hardly perfect but provide much needed avenues toward reconciliation.

It seems to us that tying up these themes and analyses is best done through the prism of hope, an abstract concept that infects much of the work of courts, politicians and scholars of international criminal justice. How does what has been done, and what is to come, leave the world? Can we really ameliorate the horror of mass atrocity; can our responses be seen as a normative shift toward more accountability and prevention? Or are we merely travelling in circles?

As ever, a book of this kind is not possible without the assistance of others, and some acknowledgements are warranted. We would like to offer special thanks to the contribution of key researchers who assisted in this work, Andrew Roe and Sylvester Urban, as well as the considerable contribution toward the end of this work by Evan Ritli. Others who made important contributions along the way include Ben Nelson, Patricia Saw, Sayomi Ariyawansa, Kiran Iyer, Amelia Hughes, Damien Bruckard and Melissa Kennedy.

Gideon Boas and Pascale Chifflet
August 2016

Contents

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.

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* 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).

[1] See e.g., Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press 2001).

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

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[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.

[4] Paavani Reddy, 'Truth and Reconciliation Commissions: Instruments for Ending Impunity and Building Lasting Peace' (2004) 41(4) *UN Chronicle* 19, 19; See also the discussion of 'alternative paradigms' in Mark Findlay and Clare McLean, 'Emerging International Criminal Justice' (2007) 18 *Current Issues in Criminal Justice* 457, 469.

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

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[5] See Phil Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice Without Lawyers* (Cambridge University Press 2010).

[6] See Elisabeth Hoffman, 'Reconciliation in Sierra Leone: Local Processes Yield Global Lessons' (2008) 2 *Fletcher Forum of World Affairs* 129; Tim Kelsall, 'Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone' (2005) 27(2) *Human Rights Quarterly* 361.

[7] Barney Afako, 'Reconciliation and Justice: "Mato Oput" and the Amnesty Act' (2002) 11 *Accord* <http://www.c-r.org/downloads/Accord%2011_13Reconciliation%20and%20justice_2002_ENG.pdf>.

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'.[8] These Nazi war criminals were to be given a 'fair and dispassionate hearing',[9] 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.[10] 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[11] 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,[12] in reality, very little occurred on the international

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[8] Of course, all the post-Second World War tribunals were classic examples of victor's justice, even if the expression of it accorded with established principles of criminal justice. For a discussion of this aspect of the Nuremberg, Tokyo and other post-War trials, see Antonio Cassese, *International Criminal Law* (Oxford University Press 2003) 332–3; Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (Kluwer Law International 1999) 552–4; Timothy L H McCormack, 'Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law' (1997) 60 *Albany Law Review* 681, 717; Gerry J Simpson, 'Problems Confronting International Law and Policy on War Crimes and Crimes against Humanity' (1997) 60 *Albany Law Review* 801, 805–6; Timothy L H McCormack, 'From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime' in Timothy L H McCormack and Gerry J Simpson (eds), *The Law of War Crimes: National and International Approaches* (Martinus Nijhoff 1997) 31; Richard H Minear, *Victor's Justice: The Tokyo War Crimes Trial* (Princeton University Press 1973).

[9] Yale Law School—Lillian Goldman Law Library, 'Nazi Conspiracy and Aggression' (*The Avalon Project—Documents in Law, History and Diplomacy*, 2008) vol. 1 Ch. V 'Opening Address for the United States' <http://avalon.law.yale.edu/imt/chap_05.asp>.

[10] Ibid.

[11] For a small sample of some of this debate, see Gerry Simpson, *Law, War and Crime* (Polity 2007); Bass, above note 1.

[12] Obvious examples include the trials of Adolf Eichmann in Israel, Klaus Barbie in France and Ivan Polyukhovich in Australia. Findlay and McLean

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.[13] 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.[14]

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[15] and some

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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.

[13] See Gideon Boas, *The Milošević Trial: Lessons for the Conduct of Complex International Criminal Proceedings* (Cambridge University Press 2007) 38; Michael P Scharf, 'The Legacy of the Milosevic Trial' (2003) 37(4) *New England Law Review* 915, 921–3; Enrique Carnero Rojo, 'The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From "No Peace without Justice" to "No Peace with Victor's Justice"' (2005) 18 *Leiden Journal of International Law* 829, 867–8.

[14] See Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press 2005) 191–291; Gerry Simpson, 'War Crimes: A Critical Introduction' in Timothy L H McCormack and Gerry Simpson (eds), above note 8, 1, 8–9; Alfred Rubin, 'International Crime and Punishment' (1993) 33 *The National Interest* 73; Ian Brownlie, *Principles of Public International Law* (6th ed, Oxford University Press 2003) 575.

[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,[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 *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.[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 *jus cogen* norm of a right to a fair trial on the work of these courts.[18]

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[16] See e.g., V Gowland-Debbas, 'Security Council Enforcement Action and Issues of State Responsibility' (1994) 43 *International Criminal Law Quarterly* 55; Gabriël H Oosthuizen, 'Playing Devil's Advocate: The United Nations Security Council is Unbound by Law' (1999) 12 *Leiden Journal of International Law* 549.

[17] See, e.g., *Prosecutor v Plavšić* (*Sentencing 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 *Prosecutor v Jokić* (*Sentencing 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]; *Prosecutor v Blagojević* (*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].

[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

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[19] SC Res 1970, UN SCOR, 6491st mtg, UN Doc S/RES/1970 (26 February 2011) ('SC Resolution 1970').

[20] Eric Ellis, *Room for Everyone at The Hague* (8 February 2012) <http://ericellis.com/room-for-everyone-at-the-hague/>.

[21] Bass, above note 1, 284. See also Colonel Murray C Bernay, 'Memorandum 15 September 1944' in Bradley F Smith (ed.), *American Road to Nuremberg—The Documentary Record, 1944–1945* (Hoover Institution Press 1981) 36.

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.

[24] See generally, Gideon Boas et al, *International Criminal Law Practitioner Library—Volume III—International Criminal Procedure* (Cambridge University Press 2011); Boas, above note 13.

being questioned as recently as the 1980s,[25] 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.[26]

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.[27]

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

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[25] Georg Schwarzenberger, 'The Province of International Judicial Law' (1983) 21 *Notre Dame International Law Journal* 21, 25. Indeed, Schwarzenberger had maintained such a view since 1950. See generally Georg Schwarzenberger, 'The Problem of an International Criminal Law' (1950) 3 *Current Legal Problems* 263.

[26] However, Bass takes a more skeptical view as to whether war crimes trials are an effective deterrent, noting that it is 'far from clear that war crimes tribunals have much of a deterrent effect'—Bass, above note 1, 291, 294–5. On the other hand, Peter Galbraith states: 'I thought the whole war crimes issue was a very effective tool to stopping war crimes'—Bass, above note 1, 295. Wippman, quoted in Findlay and McLean, above note 4, 474, notes '[t]hat for many "deterrence is the most important goal" of tribunals'.

[27] Not only have the *ad hoc* and hybrid tribunals been created and supported, but the ICC has been the recipient of two Security Council referrals (despite three of the Council's permanent members not having ratified its Statute), including as recently as SC Resolution 1970 of February 26th 2011, referring the Libya situation.

before the International Court of Justice ('ICJ')[28] and some bullying from then US President George W Bush and his Secretary of Defence Donald Rumsfeld,[29] 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.[30] 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.[31] The use of Guantanamo Bay as a holding

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[28] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3.

[29] Following action sought by Iraqi victims against US President George H W Bush, Vice-President Dick Cheney and others for committing war crimes in the 1991 Gulf war, overt threats by US Secretaries of State Colin Powell and later Donald Rumsfeld (including the refusal to fund a new NATO headquarters in Belgium), led to a series of amendments brought by the Belgian Prime Minister that significantly emasculated the Belgian law, including the removal of the *partie civile* component and recognition of a wide range of immunities under international law. For a detailed account of these events, see Steven Ratner, 'Belgium's War Crimes Statute: A Postmortem' (2003) 97 *American Journal of International Law* 888.

[30] See generally, Gideon Boas, 'War Crimes Prosecutions in Australia and Other Commonwealth Countries: Some Observations' (2010) 21(2) *Criminal Law Forum* 313; Helen Durham and Michael Carrel, 'Lessons from the Past: Australia's Experience in War Crimes Prosecution and the Problem of the Applicable Legal Framework' (2006) 2 *Asia-Pacific Yearbook of International Humanitarian Law* 135; Aegis Trust, *Strengthening UK Law on Genocide, War Crimes and Crimes against Humanity—House of Lords Briefing Note on Planned Amendments to the Coroners and Justice Bill*, June 2009; Sharon A Williams, 'The Prosecution of War Criminals in Canada' in Timothy L H McCormack and Gerry J Simpson (eds), above note 8.

[31] See Marco Sassoli, 'The Status of Persons Held in Guantanamo under International Humanitarian Law' (2004) 2 *Journal of International Criminal Justice* 96; Knut Dörmann, 'The Legal Situation of "Unlawful/Unprivileged Combatants"' (2003) 849 *International Review of the Red Cross* 45; Daryl A