

# International Criminal Law: An Ideology Critique

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## Abstract

The article engages in an ideology critique of international criminal-law texts and discourse, drawing on a theoretical framework developed by critical legal studies scholars in order to interrogate, in a different jurisprudential context, the assumptions undergirding contemporary international criminal-law (ICL) scholarship. It argues that the triumphalism surrounding ICL and its adequacy to deal with conflict and violence ignores the factors and forces – including specific international legal interventions in countries' political economies – that shape or even help establish the environment from which such conflict and violence emanate. In uncritically celebrating ICL and equating it with a pacific international rule of law, ICL scholarship risks shaping passive acquiescence in the status quo and discouraging more throughgoing efforts to address the systemic forces underlying instances of violence, including political–economic forces shaped by international legal institutions.

## Key words

international criminal law; international tribunals; criminal justice; ideology; rule of law

## I. INTRODUCTION

One finds today in international legal scholarship, as well as in popular discourse about international law, an enchantment with criminal law and a growing faith in international criminal trials as the most suitable response and remedy to the major forms of violence and destruction that continue to plague the modern era. The language of international criminal law (ICL) is now a staple not only of legal commentary but also of political discourse. During both the lead-up to and aftermath of the invasion of Iraq in March 2003 by a US-led 'Coalition of the Willing', much popular opposition to the war was framed in the language of legal argument and specifically the language of ICL: the war was the work of criminals and, as such, George Bush and Tony Blair should be tried in The Hague. Human rights activists similarly invoke international prosecutions as the appropriate response to atrocities in the Balkans and Sierra Leone or, today, in Sudan, Libya, and Syria. Indeed, many international-law scholars now herald international criminal trials as the means to

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restore or bolster international peace and order in the face of both transnational and internal violence and insecurity.

Such a view finds expression in the celebration of ICL as the engine of an expanding global rule of law, one that places moral limits on the tempestuous logic of realpolitik and the often violent behaviour of states, both internationally and towards their own populations. In subverting the rigid walls of state sovereignty and inter-state hierarchies, the internationalization of criminal law appears to advance cosmopolitan ideals and vindicate the basic moral claim that 'neither nationality nor state boundaries, as such, have moral standing with respect to questions of justice'.<sup>1</sup> While the perpetrators of violence decry international trials as little more than cynical political exercises, mainstream commentators insist international criminal trials are checks precisely on political power and a restraint on violence and atrocity.

Two key assumptions underlie this faith in ICL: first, instances of mass violence are attributable to an absence of international law, leaving power-political interests and the whims of unscrupulous leaders unchecked; and second, the extension of ICL, by holding individual perpetrators to account for their crimes, is able to address the broader phenomenon of violence and atrocity. This article argues that these are not innocent or analytically neutral assumptions. Rather, they should be understood as situated within, and contributing to, deeper narratives, which, in a myopic celebration of an end to impunity for individual criminal perpetrators, risk naturalizing the structural and systemic sources of conflict and violence and obfuscating the inherent limits to ICL's progressive potential for ending violence and atrocity.

In short, it is time for a consideration of the ideological character of ICL discourse, an area of inquiry largely absent from mainstream scholarship focused on doctrinal exegesis and self-affirming genealogies. While a large literature exists on ideology and the relationship between cultural representations and reproduction of social meaning, little attention has been focused specifically on ideology and international law, let alone on ICL or criminal trials.<sup>2</sup> The article revisits certain elements of earlier debates on criminal law inspired by Marxist and critical legal studies (CLS) critics, but does so in a different institutional and jurisprudential context. Whereas the earlier debates centred on legal discourse surrounding municipal criminal trials, this article draws on their insights to inform an argument about how international legal texts and the discourse of which they are constitutive operate at the ideological level.

In so doing, the article both builds on, and also in important ways differs from, existing critical work on ICL. In her seminal work on the 'sensitivity and sense' of ICL, Immi Tallgren interrogates the field's utilitarian aspirations (and consequentialist justifications), namely the prevention of future crime and reintegration of society.<sup>3</sup>

1 D. Satz, 'Equality of What among Whom? Thoughts on Cosmopolitanism, Statism, and Nationalism', in I. Shapiro and L. Brilmayer (eds.), *Global Justice* (1999), 67.

2 Notable exceptions, albeit not focused on the ICL field, include S. Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* (2000); S. Marks, 'Big Brother Is Bleeping Us – With the Message that Ideology Doesn't Matter', (1999) 12 EJIL 109; A. Orford, 'Muscular Humanitarianism: Reading the Narratives of the New Interventionism', (1999) 10 EJIL 679.

3 I. Tallgren, 'The Sensibility and Sense of International Criminal Law', (2002) 13 EJIL 561.

Such justifications for ICL, she suggests, when confronted with ‘the unpredictable “reality” of international politics’, seem simply ‘artificial’ or even ‘ridiculous’.<sup>4</sup> In other words, such justifications, with their apparent rationality, are attractive but implausible.

Having discounted the utilitarian justifications for ICL, Tallgren concludes with some possible alternate rationales for ICL: ‘Perhaps it is even true that the rational and utilitarian purpose of international criminal law lies elsewhere than in the prevention or suppression of criminality.’<sup>5</sup> Critics have long held that the creation of early ICL institutions was motivated by an effort to deflect responsibility, and assuage the conscience, of those states unwilling to prevent mass violence and genocide in the former Yugoslavia and Rwanda.<sup>6</sup> Without discounting such accounts, Tallgren offers her own suggestion, hazarded in the concluding lines of her article:

Perhaps international criminal law serves a purpose simultaneously both to reason and to mystify the political control exercised by those to whom it is available in the current ‘international community’. Perhaps its task is to naturalize, to exclude from the political battle, certain phenomena which are in fact the pre-conditions for the maintaining of the existing governance.<sup>7</sup>

How is this achieved? ‘By the decisions that are made by states to include some acts within the jurisdiction of new institutions to try individuals, some other acts and responsibilities are excluded.’<sup>8</sup>

The argument developed below echoes Tallgren’s concern that ICL is mystificatory and naturalizes ‘certain phenomena’, excluding them from the plane of political contestation. Yet it departs from Tallgren’s formulation in two important respects. First, it resists the language of ‘purpose’ and ‘task’, with its implication of instrumentality and intention. The critique developed below seeks to focus attention not on the motives behind jurists or the political architects of ICL, but rather on the ways in which ICL and the textual and symbolic practices surrounding it operate ideologically to constrain consciousness. And second, in focusing on consciousness, and the role of intellectual production in shaping it, the critique departs from a focus on ICL’s doctrinal content, the decisions by ‘some states’ to include or exclude certain acts from jurisdiction. The politics of ICL, the article argues, are no less a product of the generalized discourse and rhetorical patterns produced and reproduced by legal scholarship.

In short, the article argues that the triumphalism surrounding ICL and its adequacy to deal with conflict and violence ignores the factors and forces – including specific international legal interventions in countries’ political economies – that shape or even help establish the environment from which such conflict and violence emanate. In uncritically celebrating ICL and equating it with a pacific international rule of law, ICL scholarship risks shaping passive acquiescence in the status quo and

4 Ibid., at 564 and 590.

5 Ibid., at 594.

6 See, e.g., M. Mutua, ‘Never Again: Questioning the Yugoslav and Rwanda Tribunals’, (1997) 11 Temp Intl and Comp LJ 167.

7 Tallgren, *supra* note 3, at 594–5.

8 Ibid., at 595.

discouraging more throughgoing efforts to address the systemic forces underlying instances of violence – including political-economic forces shaped by international legal institutions – and to strive for a more just and peaceable world.

In section 2 below, I set out a theoretical framework for an ideology critique of criminal-law discourse. Drawing on early Marxist and 1980s CLS critiques, I present a brief restatement and evaluation of the challenges they levelled against municipal criminal law, namely that by foregrounding individual acts abstracted from their social context, legal discourse naturalizes and legitimizes the political-economic social structures in which crime is rooted. As Brad Roth puts it, legal discourse ‘normalises the indignities associated with the operation and maintenance of the prevailing order, while identifying as exceptional the harsh responses occasioned by that very order’s contradictions’.<sup>9</sup>

In the subsequent sections, I then extend this critique to ICL. Specifically, I argue that this critique is particularly apposite in light of the growing embrace of ICL as ‘the basis for the now emergent global rule of law’.<sup>10</sup> In section 3, I analyse this position in recent international legal texts, tracing their optimism to assumptions about international criminal trials’ form: by holding individuals criminally accountable, the rule of law is extended to international affairs. Focusing both on debates surrounding the role of the International Criminal Tribunal for the former Yugoslavia (ICTY) and on literature about ICL more generally, I argue that ICL has come to be largely accepted as a logical and efficacious response to international conflict and violence.

Parts 4 and 5 question this discursive consensus. By focusing on the example of the conflict in the former Yugoslavia, I suggest that an examination of the ways in which systemic economic, political, and legal forces, including the intervention of international legal institutions, contributed to the conditions leading to conflict and violence complicates the dominant discourse. The linkages between political-economic forces and social conflict, I argue, are overlooked by this discourse and the former are placed beyond critical scrutiny, accepted as natural and legitimate features of the contemporary international order. Section 6 concludes.

## 2. CRIMINAL TRIALS, LEGAL TEXTS, AND IDEOLOGY

One of the central features of 1980s CLS scholarship was its critique of the celebrated neutrality of the rule of law.<sup>11</sup> On the CLS view, if the rule of law and legal discourse are cast in the terms of neutral legal doctrine, this is at best a sleight of hand; at heart

<sup>9</sup> B. Roth, ‘Retrieving Marx for the Human Rights Project’, (2004) 17 LJIL 31, at 66.

<sup>10</sup> R. Teitel, ‘Humanity’s Law: Rule of Law for the New Global Politics’, (2002) 35 Cornell Intl LJ 355, at 368.

<sup>11</sup> For classic defences of the rule of law see J. Raz, *The Authority of Law: Essays on Law and Morality* (1979), 212–19; R. H. Fallon, ‘“The Rule of Law” as a Concept in Constitutional Discourse’, (1997) 97 Colum L Rev 1. For discussions of the rule of law in Western legal thought, see T. Krever, ‘The Legal Turn in Late Development Theory: The Rule of Law and the World Bank’s Development Model’, (2011) 52 Harv Intl LJ 287, at 307–8; B. Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004); P. Costa and D. Zolo (eds.), *The Rule of Law: History, Theory and Criticism* (2007).

they reflect and reproduce political relations of power.<sup>12</sup> It is precisely in acting *as though* law were neutral that legal discourse operates *ideologically*, not merely masking social inequalities but making those inequalities appear the inevitable concomitant to a neutral and impartial legal order.

The invocation of ideology has a potential for confusion. Contrary to its common usage in contemporary political discourse, I do not mean by ideology a dogma or rigid framework of preconceived ideas, although large parts of ICL scholarship indeed suggest a certain dogmatism.<sup>13</sup> The conception of ideology that I employ here is one associated with the *ideology critique* developed within critical theory, most notably by Frankfurt school theorists, although with its roots in the work of Marx. This approach locates ideology not in particular ideas but, rather, in ‘signifying processes that have particular effects’.<sup>14</sup> The focus is on how rhetorical and other symbolic practices work to constitute and stabilize relations of power. Ideology, in other words, points us to how ‘the meaning constructed and conveyed by symbolic forms serves, in particular circumstances, to establish and sustain structured social relations from which some individuals and groups benefit more than others’.<sup>15</sup> The symbolic forms and practices that I am concerned with here are specifically legal texts and the wider discourse of which such texts are constitutive.

Consider, for instance, a particularly famous discussion of legal ideology in Marx’s work.<sup>16</sup> In the sphere of exchange, individuals are understood legally as juridical equals meeting in the marketplace to engage in acts freely of their own will. This legal construction of abstract equality, however, obscures the unequal power of capitalist and worker – namely the economic need of the worker to sell his labour – that lies behind, and in the first place animates, the exchange relationship. But this inequality has no bearing under the rule of law: however unequal they may be, ‘parties to the exchange transaction appear as equal persons who just happen to own different things’.<sup>17</sup> The power that capitalists exert over workers, as well as broader questions about the distribution of and access to material and cultural resources in society that constrain the enjoyment of formal freedoms, recede from view. We may recognize that labour relations are not in reality equal, but we act – and the law treats them – as though they were. The focus on formal equality under the rule of law thus serves to deflect attention from, and social criticism of, the economic conditions and inequalities undergirding, for instance, labour relations. Cloaked in the rule of law’s garb of equality and freedom, inequalities of capitalist social relations appear not only legitimate but fair.

Marx’s analysis provides an insightful framework for ideology critique and points to the need for critical scholars to look beyond the neutral facade of law to how

12 D. Polon, ‘Toward a Theory of Law and Patriarchy’, in D. Kairys (ed.), *The Politics of Law: A Progressive Critique* (1982), 294. See also T. Krever, ‘Calling Power to Reason?’, (2010) 65 *New Left Rev* 141.

13 See F. Mégret, ‘Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project’, (2001) 12 *FYBIL* 193.

14 S. Marks, ‘International Judicial Activism and the Commodity-Form Theory of International Law’, (2007) 18 *EJIL* 199, at 208. See also the discussion of ideology critique in Marks, *Riddle of All Constitutions*, *supra* note 2.

15 J. Thompson, *Ideology and Modern Culture: Critical Social Theory in the Era of Mass Communication* (1990), 72–3.

16 See K. Marx, *Capital*, Vol. 1 (1977), 272 and 280.

17 J. Reiman, ‘The Marxian Critique of Criminal Justice’, (1987) 6 *Crim Justice Ethics* 30, at 38.

legal discourse operates ideologically to sustain constellations of power. In the CLS-inspired debates of the 1980s, this insight was extended to an analysis of legal discourse focused on criminal law.

The criminal trial, with its rules of due process and conspicuously even-handed treatment of the accused, has been understood historically as exemplary of the rule of law.<sup>18</sup> In the legal imagination, the trial stands for fairness and justice, the most appropriate response to acts of violence and criminal behaviour that contravene society's moral norms. Legal texts affirm a formal and value-free discourse, reproducing the image of a society governed by impartial proceedings involving the neutral application of legal rules and judicial principles to adjudicate social conflict. The 'state's accusation of crime is not taken for granted' but must be proven beyond a reasonable doubt; the defendant is afforded an 'opportunity to contest the charges and provided with a panoply of rights that regulate the trial process in a fair manner and protect the defendant from government overreaching'.<sup>19</sup>

Against this consensus, CLS critics contended that the criminal trial did not simply represent the disinterested application of legal principles to reach judicial conclusions. The trial reproduces society's image of itself, expressing 'fundamental notions about justice and injustice, right and wrong, law-abiding and crime'.<sup>20</sup> In labelling particular conduct as deviant, the trial mobilizes censure and social sanction. But the criminalization of others' conduct is also the validation of one's own behaviour; approbation and affirmation are two sides of the same coin. While 'acts of individuals that threaten violence to persons or property'<sup>21</sup> are criminalized and censured, other systemic forms of social violence – economic exploitation, say – and the social order in which they are rooted are implicitly approved.<sup>22</sup>

An inherent constraint thus exists at the heart of criminal law and trial: they are, on the CLS view, incapable of dealing with either the material circumstances in which individual acts of crime are rooted or with the systemic violence of the contemporary social order. The law is structured so as to address, through trial and judgment, individual acts of violence or individual disputes – never the structural whole from which those acts or disputes arise (or the complex economic and social forces that shape and animate individual manifestations of crime). 'All forms of serious social conflict', Gabel and Harris observed, are 'channelled into' individual trials and '[e]ach discrete conflict is treated as an isolated "case"'.<sup>23</sup> In this respect, criminal trials differ little from non-criminal trials. In a labour dispute, say, the law is applied neutrally with worker and owner of capital treated as equals; the individual labourer may even win judgment. This very process, however, reifies – making seem

18 O. Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (1961), 48.

19 K. B. Nunn, 'The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process – A Critique of the Role of the Public Defender and a Proposal for Reform', (1995) 32 *Am Crim L Rev* 743, at 798.

20 *Ibid.*, at 746.

21 *Ibid.*

22 See M. Kelman, 'The Origins of Crime and Criminal Violence', in D. Kairys (ed.), *The Politics of Law: A Progressive Critique* (1982), 215.

23 P. Gabel and P. Harris, 'Building Power and Breaking Images: Critical Legal Theory and the Practice of Law', (1982) 11 *NYU Rev L & Soc Change* 369, at 369–70.

natural and inevitable – the division of people into labourers and capital-owners and the social conditions and inequalities that generate social conflict.

Similarly, the criminal trial presents a conspicuous application of legal rules in a neutral, even-handed manner, punishing criminals and affirming social order, but without ever touching on the social relations in which crime is rooted.<sup>24</sup> Legal discourse reproduces the image of the scrupulously legalistic trial with all the procedural trappings that speak to fairness and neutrality. Moreover, insofar as the trial is concerned with actual discrete instances of social conflict, it does in fact adjudicate and resolve the particular dispute at hand – judgment is passed, the accused found guilty or innocent, justice served, and the rule of law upheld. However, it is precisely this apparently neutral application of legal rules and procedures that ‘best serves to reinforce the apparent legitimacy of the existing social order in people’s minds’.<sup>25</sup> As the site for the production of authoritative judgments and discourses about society, the trial contributes to what Stuart Hall called a general ‘consensus’ regarding the accepted character of social conduct and institutions – a consensus, in other words, to ‘a particular kind of social order’, one that reflects a ‘very definite set of social, economic and political structures’.<sup>26</sup>

To argue that legal discourse about criminal trials functions as ideology is not to suggest that practitioners and scholars are involved in any conscious effort to dissemble. Ideology, as William Robinson writes, should not be confused with deliberate falsehood:

It is not necessary to assume a conspiracy among scholars in the service of hegemony. . . . [W]hat is pertinent is not the subjective status or conscious intent . . . but the objective significance of the scholarship in question, independent of its agents.<sup>27</sup>

The concern of the CLS critique, as well as that pursued below, is not with intention but effect.

The ideology critique suggested here also avoids the instrumental view of criminal law, attributed to orthodox Marxist theory, as ‘mere instrument of force’ or coercive tool of the ruling class through which it exerts political domination.<sup>28</sup> Instead, it is at the ideological level that law, trial, and text operate to constrain consciousness – to create, in other words, a social consensus that can persuade people to accept the legitimacy but also the apparent inevitability of the status quo, with its existing hierarchical arrangements.<sup>29</sup> The ideological function of legal text and discourse is thus not so much to ‘enforce’ existing social relations as it is to legitimize them.

24 Ibid.

25 Ibid., at 369–70.

26 S. Hall, ‘The Rediscovery of “Ideology”: The Return of the Repressed in Media Studies’, in M. Gurevitch et al. (eds.), *Culture, Society and the Media* (1982), 63.

27 W. I. Robinson, *Promoting Polyarchy: Globalization, US Intervention, and Hegemony* (1996), 43–4.

28 A. Supiot, *Homo Juridicus: On the Anthropological Function of the Law* (2007), xviii. This view, of course, has little in common with Marx’s own writings on law, nor with those of the Bolshevik jurist Pashukanis. The latter neither reduced law to force nor viewed ideology as law’s primary function, but rather grounded the dominant role assumed by law in modern capitalist society in concrete material relations.

29 M. Cain, ‘Gramsci, and the State and the Place of Law’, in D. Sugarman (ed.), *Legality, Ideology and the State* (1983).

### 3. THE PROMISE AND PROGRESS OF INTERNATIONAL CRIMINAL LAW

International legal scholarship increasingly bears the stamp of a faith in ICL as establishing an international rule of law, comparable in reach and character to its domestic avatar. Two key assumptions underlie this discourse. First, this view rests on the belief that instances of mass violence are in part attributable to an absence of law and, in particular, international law: in the face of such dearth, power-political interests remain unchecked, giving free reign to the violent propensities of *realpolitik*. Second, this view holds that ICL, with its focus on individual responsibility and a coercive apparatus for enforcement, is the appropriate solution. This section traces these assumptions in mainstream legal literature where they undergird the equation of ICL with an international rule of law.

#### 3.1. Speaking law to power: a global rule of law

Law has long been seen as a check on the vagaries of power in the international sphere. The Grotian world of international law, as Hersch Lauterpacht noted, envisioned 'the subjection of the totality of international relations to the rule of law'.<sup>30</sup> Following Grotius, jurists have delineated sharply between the legal and political realms, with international law celebrated as 'speaking law to power', that frequently cited *bon mot* inevitably evoking, as Nathaniel Berman aptly puts it, the 'valiant image of the international lawyer, striving to turn the ear of power away from the appeals of *realpolitik* and towards the claims of normativity'.<sup>31</sup> While politics is identified with competition, conflict, and struggle, law is associated with harmony and regulation independent of sovereign bias.<sup>32</sup> The subjection of international relations to the rule of law is understood as a necessary prerequisite to any long-term peace and realization of human rights.<sup>33</sup>

If international law represents an effort to impose a neutral restraint on power, international *criminal* law has, since the Second World War, been central to this project. Its rapid development, along with a system of international and 'internationalized' tribunals, undergirds, on the view of mainstream jurists, the 'transformation of global politics through its articulation of an international discourse of rule of law'.<sup>34</sup> The international response to the horrors of the Second World War was an emphasis on *criminal* accountability, symbolized by the Nuremberg and Tokyo proceedings and championed as promoting a world community under law.<sup>35</sup> The

30 H. Lauterpacht, 'The Grotian Tradition in International Law', in R. Falk et al. (eds.), *International Law: A Contemporary Perspective* (1985), 30.

31 N. Berman, 'Legitimacy through Defiance: From Goa to Iraq', (2005) 23 Wisconsin Intl LJ 93. Critically minded scholars have questioned the implicit opposition of international law to politics. See, e.g., M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005); S. Marks, 'State-Centrism, International Law, and the Anxieties of Influence', (2006) 19 LJIL 339.

32 This idea, of course, pre-dates Grotius; Rommen traces it at least to Suarez, who, in his conception of a *jus gentium*, 'initiated the progressive juridical taming of the power-struggle between states'. H. Rommen, 'Francis Suarez', (1948) 10 Rev Politics 437.

33 A. Buchanan, 'The Legitimacy of International Law', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (2010), 89.

34 Teitel, *supra* note 10, at 371.

35 See E. S. Kopelman, 'Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial', (1991) 23 NYU J Intl L & Pol 373, at 404.

past two decades have seen a dramatic growth of international criminal tribunals. The UN Security Council created the ICTY in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994. Hybrid tribunals have been established in Sierra Leone, East Timor, Kosovo, Cambodia, Bosnia, and Lebanon. And today an International Criminal Court (ICC) sits in The Hague. These are now widely seen as ‘the pre-eminent institutions and processes aimed at managing present global politics’.<sup>36</sup> The rule of law in the international realm, one scholar insists, has become ‘coincident with international criminal justice’.<sup>37</sup>

As the hinge in this process of unfurling a global rule of law, ICL, its advocates insist, imposes limits on the exercise of power. In the extension of a universal rule of law, upheld and enforced even-handedly by a new regime of international courts, justice, Chérif Bassiouni triumphantly proclaims, will no longer be sacrificed at the altar of power politics.<sup>38</sup> Instead, former ICTY president Antonio Cassese likewise argues, international criminal justice and its constituent tribunals have ushered in a ‘new world order based on the rule of international law’.<sup>39</sup>

Subjecting international relations to the rationality of law, international criminal trials are understood to bring ‘a sense of order to a violent world’.<sup>40</sup> As one commentator puts it, ‘[c]ourtrooms have gained ascendancy as the forum to censure extreme evil’.<sup>41</sup> ICL not only is increasingly viewed as the single most appropriate response to instances of mass violence and atrocity; it is also heralded as the most promising means of preventing conflict and violence altogether. As one recent intervention has it, ‘many actors within the field of international criminal justice . . . have heralded the deterrent power of the [ICC] and its ability to remove impunity for violations of international criminal law’.<sup>42</sup>

Bassiouni, one-time candidate for chief prosecutor of the ICTY, forcefully argues that ICL has the power not only to ‘provide retribution for victims of war crimes and atrocities’, but also to prevent future atrocities, preserving world order and maintaining peace and security. ‘The pursuit of justice and accountability’, he opines, ‘expresses key values necessary for the prevention and deterrence of future conflicts’.<sup>43</sup> More recently he has argued that prosecutions ‘serve as deterrence,

36 Teitel, *supra* note 10, at 368.

37 *Ibid.* See also R. Teitel, ‘The Universal and the Particular in International Criminal Justice’, (1999) 30 *Colum Hum Rts L Rev* 285, at 285.

38 M. C. Bassiouni, *The Legislative History of the International Criminal Court* (2005), 121. See also M. C. Bassiouni, ‘From Versailles to Rwanda: The Need to Establish a Permanent International Criminal Court’, (1996) 10 *Harv Hum Rts J* 1.

39 A. Cassese, ‘On the Current Trend towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law’, (1998) 9 *EJIL* 2, at 8.

40 G. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (2000), 36.

41 M. A. Drumbl, *Atrocity, Punishment, and International Law* (2007), 5.

42 C. W. Mullins and D. L. Rothe, ‘The Ability of the International Criminal Court to Deter Violations of International Criminal Law: A Theoretical Assessment’, (2010) 10 *Intl Crim L Rev* 771, at 771–2.

43 M. C. Bassiouni, ‘Justice and Peace: The Importance of Choosing Accountability over Realpolitik’, (2003) 35 *Case W Res J Intl L* 191, at 192. See also M. C. Bassiouni, *Introduction to International Criminal Law* (2003), 680–2 and 737.

and thus prevent future victimization. . . . Accountability must be recognized as an indispensable component of peace and eventual reconciliation'.<sup>44</sup>

Luis Moreno-Ocampo, chief prosecutor at the ICC, is another proponent of ICL's contribution to the maintenance of peace and order. '[B]y putting an end to impunity for the perpetrators of the most serious crimes', he insists, the ICC 'can and will contribute to the prevention of such crimes, thus having a deterrent effect'.<sup>45</sup> Cassese makes a similar case for ICL, albeit in the inverse: the 'result of the impunity of the leaders and organisers of the Armenian genocide', he writes, 'is that it gave a nod and a wink to Adolf Hitler and others to pursue the Holocaust some twenty years later'.<sup>46</sup> On Cassese's view, not only can ICL deter future atrocities; its absence – the failure to prosecute perpetrators of violence and realize justice – will in fact encourage further cycles of violence.

Others go further, insisting not only that international criminal prosecutions have the *ability* to prevent future crime and atrocity, but that we are already seeing such deterrence. David Crane, former chief prosecutor in the Special Court for Sierra Leone, insists that '[a]t the end of the day, [then President Charles Taylor's] indictment brought a more sustainable peace for the people of Liberia, and [President of Sudan Omar al-Bashir's] indictment will do the same for the people of the Sudan'.<sup>47</sup> Roberto Bellelli, turning to the concrete effects of the ICC, contends that the court

has already demonstrated its deterrent impact on the perpetration of widespread and systematic atrocities, contributing to the reconciliation of conflicts involving the worst international crimes and encouraging parties to peace negotiations in Uganda, the Democratic Republic of the Congo and the Central African Republic.<sup>48</sup>

The confidence with which cause and effect are asserted may be misplaced; some scholars have noted the lack of empirical support for the deterrent value of international criminal tribunals.<sup>49</sup> Nonetheless, in the face of this forceful belief in the promise of ICL, dissent from within the legal academy has been at best in a milquetoast register: a nod at international criminal justice's historical imperfections followed quickly by paeans to the promise of the field and its ineluctable progress.<sup>50</sup> If political concerns tarnished international criminal justice in the past – amnesties or immunities for political leaders; abeyance in the face of Cold War geopolitical imperatives – we are seeing, Geoffrey Robertson assures us, 'a kind of millennium

44 M. C. Bassiouni, 'The Need for International Accountability', in M. C. Bassiouni (ed.), *International Criminal Law*, Vol. 3 (2008), 20.

45 L. Moreno-Ocampo, 'The International Criminal Court: Some Reflections', (2009) 12 Ybk Intl Hum L 3, at 5.

46 A. Cassese, 'Reflections on International Criminal Justice', (1998) 61 MLR 1, at 2.

47 D. M. Crane, 'The Bright Red Thread: The Politics of International Criminal Law – Do We Want Peace or Justice? The West African Experience', in L. N. Sadat (ed.), *Forging a Convention for Crimes against Humanity* (2011), 59.

48 R. Bellelli, 'The Establishment of the System of International Criminal Justice', in R. Bellelli (ed.), *International Criminal Justice: Law and Practice from the Rome Statute to Its Review* (2010), 62.

49 See, e.g., M. Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity', (2005) 99 Northwest UL Rev 539, at 548; D. Zolo, 'Peace through Criminal Law?', (2004) 2 JICJ 711; Tallgren, *supra* note 3.

50 See, e.g., A. C. Grayling, *Towards the Light: The Story of the Struggles for Liberty and Rights that Made the Modern West* (2007), 252.

shift, from diplomacy to justice as the dominant principle of global relations'.<sup>51</sup> The horizon, already in sight, is one where a universal rule of law will stand strong against the contingencies and violence of the contemporary international order.

### 3.2. Individual criminal responsibility

The view that ICL is at the vanguard of a project to establish an international legal order able to prevent future crime and atrocity rests on an assumption that such crimes are acts of individuals (albeit often within complex organizational structures) and thus responsive to deterrence. That is, it rests on the novel, and once controversial, understanding that individuals can and should be held liable for infractions of international law. International law has traditionally been understood as a horizontal framework, based on the willingness of equal states to conform to a mutually agreed rule. This was the basis of Austin's famous criticism that such a system, lacking sovereign command and a centralized enforcement or sanctions system, could never be the basis of an effective legal regime. One implication was that 'only individualized justice [can] ensure the relevance and meaningfulness of international law'.<sup>52</sup>

If international criminal trials take as their subject instances of often unimaginable violence, they are first and foremost a mechanism for establishing *individual criminal responsibility* for that violence (more accurately, they establish responsibility for particular acts or omissions defined as constituting international crimes).<sup>53</sup> In any given invocation of ICL, one or more individuals are held as being responsible for its violation. In their assessment of those violations, trials focus on the discrete acts or omissions of particular persons to whom they assign individualized responsibility. The international criminal trial represents, in other words, an 'effort to fix individual responsibility for history's violent march'.<sup>54</sup> In this respect, international criminal trials and the body of ICL they apply are firmly embedded in the 'free individualism' of the Western criminal-law tradition, replicating its categories of individual responsibility and doctrinal mechanisms for attributing fault to individuals.<sup>55</sup> The principle that ICL exclusively punishes individuals was first established by the International Military Tribunal at Nuremberg, which declared: 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'<sup>56</sup> Subsequent jurisprudence has affirmed

51 G. Robertson, *Crimes against Humanity: The Struggle for Global Justice* (1999), 374.

52 G. Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (2007), 57.

53 The International Law Commission has grappled with the question whether states can face penal responsibility for violations of international law but its articles on state responsibility exclude language on so-called 'state crimes'. See J. Crawford (ed.), *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002); 'Symposium: The ILC's State Responsibility Articles', (2002) 96 AJIL 773.

54 A. M. Danner and J. S. Matinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law', (2005) 93 Cal L Rev 75.

55 A. Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (2001), 24.

56 Judgment of the Nuremberg International Military Tribunal 1946, (1947) 41 AJIL 172.

individual criminal responsibility as the bedrock of ICL,<sup>57</sup> while also recognizing that the commission of international crimes often involves not single individuals but organized groups – what has been called ‘macro-criminality’.<sup>58</sup> Nonetheless, there remains widespread consensus that guilt and punishment should be based solely on individual responsibility and personal culpability, regardless of the complexity of organizational structures within which an individual acts. As Gerhard Werle puts it, ‘the collective nature of crimes under international law does not absolve us of the need to determine individual responsibility’.<sup>59</sup>

The focus on individual criminal responsibility is widely understood not as a limitation of ICL but as a key asset. Whereas once perpetrators of mass violence could hide behind invocations of state sovereignty, the new universalized rule of law represents a ‘moral conquest over the sovereign indifference of cold leviathans’.<sup>60</sup> Under this paradigm, there is ‘no outside-of-law’: everyone, regardless of nationality or office, should be accountable for his or her actions (or inactions).<sup>61</sup> As Katharina Peschke puts it, ‘individual criminal responsibility has become a real possibility, even for the mighty’.<sup>62</sup> Writing with reference to the ICTY, Franca Baroni explains:

[T]he Tribunal has sanctioned political leaders who ordered the massacre, being held individually accountable for their decisions, and invalidated the cover of the abstract, irresponsible state . . . Individuals in power can no longer hide behind the shield of national sovereignty and escape criminal accountability.<sup>63</sup>

In short, as Carla Del Ponte, then chief prosecutor at the ICTY, insisted in opening her prosecution of Milošević, no one is above the law or beyond its reach.<sup>64</sup> Danilo Zolo describes the emergence of this new paradigm:

[I]nternational criminal justice appears to be a suitable answer to the spreading of ethnic conflicts, virulent nationalism and religious fundamentalism, leading to widespread and gross violations of human rights since the Cold War. From now on, [commentators] argue, nobody will be able to think that he or she can start conflicts or stir up nationalist campaigns, leading to genocide, without being tried by a court of justice and pursued by international police. From this standpoint, criminal prosecution may even effectively prevent new wars.<sup>65</sup>

57 *Prosecutor v. Tadić*, Judgement, Case No. IT-94-I-A, A.Ch., 15 July 1999, para. 186. See also M. Damaska, ‘The Shadow Side of Command Responsibility’, (2001) 49 *Am J Comp L* 455, at 470.

58 V. Militello, ‘The Personal Nature of Individual Criminal Responsibility and the ICC Statute’, (2007) 5 *J Intl Crim Jus* 941, at 944.

59 G. Werle, ‘Individual Criminal Responsibility in Article 25 ICC Statute’, (2007) 5 *J Intl Crim Jus* 953, at 953.

60 Mégret, *supra* note 13, at 204.

61 M. Koskeniemi, ‘Between Impunity and Show Trials’, (2002) 6 *Max Planck Ybk UN L* 1, at 2.

62 K. Peschke, ‘The ICC Investigation into the Conflict in Northern Uganda: Beyond the Dichotomy of Peace versus Justice’, in B. S. Brown (ed.), *Research Handbook on International Criminal Law* (2011), 178.

63 F. Baroni, ‘The International Criminal Tribunal for the Former Yugoslavia and Its Mission to Restore Peace’, (2000) 12 *Pace Intl L Rev* 233, at 242.

64 *Prosecutor v. Milošević*, Transcript, Case No. IT-02-54-T, 12 February 2002.

65 Zolo, *supra* note 49, at 727.

By introducing individual accountability into international relations, Payam Akhavan opines, international criminal trials instil 'long-term inhibitions against international crimes in the global community'.<sup>66</sup> Akhavan explains:

The punishment of leaders . . . will contribute in significant measure to a much needed internalization of human rights norms and considerations for justice in the international political culture. . . . Over time, as a culture of deterrence takes hold, the reality will be that punishment awaits those who foment ethnic hatred and genocide. In the long run, it is such lofty moral ideals that will establish the foundation for lasting international peace and security.<sup>67</sup>

This view can also be found in the statute of the ICC, which links prosecution specifically of individuals to ending impunity, preventing future crimes, and, in general, with the 'peace, security and well-being of the world'.<sup>68</sup>

### 3.3. The International Criminal Tribunal for the former Yugoslavia

Such faith in ICL's ability to effect what Habermas has called the 'the taming of state power by law',<sup>69</sup> and the attribution of criminal responsibility to individuals which undergirds such faith, is apparent in academic discourses around (but by no means limited to, as is clear from the above discussion) the ICTY. That tribunal was seen as contributing to deterrence, reprobation, and the broader aim of maintaining peace and security in the former Yugoslavia.<sup>70</sup> The violence that wracked the region in the 1990s is widely understood as a key catalyzing force for the dramatic expansion of ICL and its attendant institutions and legal bureaucracy.<sup>71</sup> In contemporary legal literature, the ICTY, established by the UN Security Council in 1993,<sup>72</sup> is celebrated as a triumph of liberal legalism and a lynchpin in the narrative of an unfolding universal rule of law that moralizes international affairs and ends impunity. As Baroni has it, '[t]he creation of the Yugoslavia Tribunal was most certainly a breakthrough in the enforcement of international humanitarian law and marked the beginning of a new era in international criminal justice'.<sup>73</sup> The Tribunal itself considers that it has 'played a crucial role in bringing justice not just to people in the former Yugoslavia but across the globe'.<sup>74</sup> Prosecution and trial of the leaders allegedly responsible for crimes committed in the Balkans are held to have helped bring conflict and violence to an end while also deterring their recurrence in an unstable region,<sup>75</sup> extending

66 P. Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?', (2001) 95 AJIL 7, at 27.

67 P. Akhavan, 'Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal', (1998) 20 Hum Rts Q 739, at 815.

68 1998 Rome Statute of the International Criminal Court, 2187 UNTS 90, preamble.

69 J. Habermas, *The Divided West* (2006), 134.

70 *Prosecutor v. Erdemović*, Sentencing Judgement, Case No. IT-96-22-T, T.Ch., 29 November 1996, para. 58.

71 T. Meron, 'War Crimes Law Comes of Age', (1998) 92 AJIL 462, at 464; Tallgren, *supra* note 3, at 563.

72 UNSC Res 808, (1993) UN Doc. S/RES/827.

73 Baroni, *supra* note 63, at 234.

74 ICTY, 'Achievements', www.icty.org/sid/324.

75 Akhavan, *supra* note 67, at 743–51; T. Meron, 'Answering for War Crimes: Lessons from the Balkans', (1997) 76 *Foreign Affairs* 2, at 6–8; M. C. Bassiouni, 'Searching for Peace and Achieving Justice', (1996) 50 LCP 9, at 18–19.

the rule of law to the supposed legal void of what was Yugoslavia.<sup>76</sup> According to Fausto Pocar, for instance, '[t]he Tribunal's continued insistence on accountability has irrevocably altered a culture of impunity and has helped to prevent a recurrence of armed criminal conduct on a massive scale'.<sup>77</sup>

The most important trial before the ICTY, although cut short by the defendant's death, was that of the former Yugoslav president Slobodan Milošević, who stood in The Hague accused of grave breaches of the Geneva Conventions, crimes against humanity, and genocide. This, Michael Scharf explains, was 'clearly the trial for which the Ad Hoc Court was created'.<sup>78</sup> The trial was also one that is now widely celebrated as the most significant step in bringing justice and a rule of law to the Balkans.<sup>79</sup> Scharf explains:

By pinning prime responsibility on Milosevic and disclosing the way the Yugoslav people were manipulated by their leaders into committing acts of savagery on a mass scale, the trial would help break the cycle of violence that has long plagued the Balkans.<sup>80</sup>

Scharf's view reflects the widespread faith that the universalization of the rule of law and the realization of criminal responsibility and accountability for senior figures such as the former Serbian president will necessarily be a pacific force militating against social conflict. But Scharf also implicitly maintains that blame for the destruction of Yugoslavia lies squarely with Milošević. This is an assumption reproduced in much mainstream commentary – 'the architect of the catastrophe',<sup>81</sup> 'the driving force behind a decade of ethnic wars in the Balkans',<sup>82</sup> 'the man who had terrorized the turbulent Balkans for a decade'<sup>83</sup> – and, indeed, by the Prosecution itself.<sup>84</sup> But to what extent can responsibility for the conflict be attributed to Milošević, or any individuals, for that matter, alone? And if other influential forces can be identified, what implications follow for the discursive consensus described above and its role in reproducing an image of ICL as messianic project?

76 L. Weschler, 'International Humanitarian Law: An Overview', in R. Gutman and D. Rieff (eds.), *Crimes of War: What the Public Should Know* (1999), 19.

77 F. Pocar, 'The International Criminal Tribunal for the Former Yugoslavia', in Bellelli, *supra* note 48, 69.

78 M. P. Scharf, 'The Legacy of the Milosevic Trial', (2003) 37 *New Eng L Rev* 915, at 916.

79 Koskeniemi, *supra* note 61, at 2; M. Mandel, *How America Gets Away with Murder: Illegal Wars, Collateral Damage and Crimes against Humanity* (2004), 150; P. Akhavan, 'Justice, Power, and the Realities of Interdependence: Lessons from the Milosevic and Hussein Trials', (2005) 38 *Cornell Intl LJ* 973, at 982.

80 Scharf, *supra* note 78, at 916.

81 D. Rieff, 'A New Age of Liberal Imperialism?', (1999) 16(2) *World Pol J* 1.

82 R. J. Smith, 'Serb Leaders Hand over Milosevic for Trial by War Crimes Tribunal', *Washington Post*, 29 June 2001.

83 'Bagging the Butcher', *Time*, 9 April 2001.

84 *Prosecutor v. Milošević*, Transcript, Case No. IT-02-54-T, 12 February 2002; C. Del Ponte, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals & the Culture of Impunity* (2009), 37.

## 4. INTERNATIONAL LEGAL INTERVENTIONS AND THE POLITICAL ECONOMY OF ATROCITY

### 4.1. Conflict in the former Yugoslavia

As I have argued, much of the commentary on international criminal trials locates the sources of mass violence (and concomitant crimes) in the absence of international law and the political machinations of individual leaders in the face of such dearth. Such assumptions, however, appear problematic in light of recent historical analyses of the social origins of war and violent conflict. While the argument has broad application, it may be helpful to briefly continue the focus on the example of the former Yugoslavia before generalizing.

Without sanctioning the criminal acts of individual perpetrators, or downplaying their *individual responsibility*, a number of commentators, ranging from historians of Yugoslavia to political economists to legal scholars, have argued that violence and war were no less a product of external forces, including the economic, political, and legal intervention of international institutions, and systemic political-economic forces manipulated by these institutions.<sup>85</sup> Scholars point, in particular, to the neo-liberal programme of economic liberalization and restructuring of the Yugoslav state implemented by international financial institutions (IFIs), namely the World Bank and International Monetary Fund (IMF), from the late 1970s through to the early 1990s.

Following strong economic growth in the 1950s and 1960s, Yugoslavia's economy was hit hard by recession in Europe in the 1970s. In an effort to ward off economic decline, the country borrowed heavily and foreign debt grew rapidly in the last years of the decade.<sup>86</sup> Faced with a debt crisis, Yugoslavia also turned to the IMF for transitional aid, which was forthcoming but tied to the implementation of austerity programmes and, later, structural adjustment programmes. The economic reforms prescribed by the IMF and other creditors initially called for cuts to government expenditures (including social spending), liberalization of trade and prices, and import restrictions and the promotion of exports.<sup>87</sup>

Early macroeconomic reforms were soon expanded to include wage caps, wide-scale privatization, and deregulation.<sup>88</sup> In 1989, under pressure from the IMF, a further 'shock therapy' programme was instituted. A dramatic decline in industrial growth (dropping to 2.8 per cent in the 1980–87 period and further to

85 See, e.g., P. Gowan, 'The NATO Powers and the Balkan Tragedy', (1999) 1/234 *New Left Rev* 83, at 85; M. Chossudovsky, 'Dismantling Former Yugoslavia, Recolonising Bosnia', (1997) 7 *Development in Practice* 375; S. Woodward, *Balkan Tragedy: Chaos and Dissolution after the Cold War* (1995); P. Phillips, 'Why Were We Bombing Yugoslavia?', (1999) 60 *Studies in Political Economy* 85; J. Petras and S. Vieux, 'Bosnia and the Revival of US Hegemony', (1996) 1/218 *New Left Rev* 3; L. J. Cohen, *Broken Bonds: Yugoslavia's Disintegration and Balkan Politics in Transition* (1995). A useful synthesis of historical, political-economic, and legal work on the former Yugoslavia and its wars can be found in A. Orford, 'Locating the International: Military and Monetary Interventions after the Cold War', (1997) 38 *Harv Intl LJ* 443, at 451–9. This section draws heavily on this latter article in particular.

86 Phillips, *supra* note 85, at 89.

87 Woodward, *supra* note 85, at 51.

88 Orford, *supra* note 85, at 453. Milošević himself, it is worth noting, was an enthusiastic supporter of neo-liberal reform, urging Yugoslavs to 'overcome their "unfounded, irrational, and . . . primitive fear of exploitation" by foreign capital'. Cohen, *supra* note 85, at 56.

–10.6 per cent in 1990)<sup>89</sup> was accompanied by ‘escalating inflation, falling real incomes, consumer goods shortages [and] unemployment’.<sup>90</sup> Shock therapy measures inevitably increased the ‘inflammability of social relations’ throughout Yugoslavia as living standards declined precipitously, creating a layer of unemployed and frustrated youth,<sup>91</sup> and destroying faith in the federal government.<sup>92</sup> At the same time, these policies removed or precluded the mechanisms that might have provided some state support to individuals suffering most from unrestrained economic liberalization.<sup>93</sup> The centrality of these policies in generating the social and economic conditions in which conflict took root is emphasized by Susan Woodward in her trenchant account of the conflict’s origins:

The conflict is not a result of historical animosities and it is not a return to the pre-communist past; it is the result of transforming a socialist society to a market economy and democracy. A critical element of this failure was economic decline, caused largely by a programme intended to resolve a foreign debt crisis. More than a decade of austerity and declining living standards corroded the social fabric and the rights and securities that individuals and families had come to rely on.<sup>94</sup>

IFI policies also had overt political implications. Supposedly ‘technical’ economic policies in reality required far-reaching political reform, including ‘fundamental changes in the locus of economic decision-making’.<sup>95</sup> From the 1980s, the IMF began to condition access to credit on constitutional and institutional reform that, in turn, sharpened inter-republican conflict. Re-centralization – the shifting of political and economic authority from republican administrations to the federal government – was followed by a mandated end to subsidies and federal transfer payments that, by decreasing inequalities between the republics, had been central to Tito’s balancing act through the post-Second World War era.<sup>96</sup>

Further constitutional reforms included a shift of ‘the balance of economic policy in favour of particular firms, sectors, and republics’ with more ties to Western markets.<sup>97</sup> IFI programmes in short fuelled a nationalist dynamic and concomitant political breakup by ‘rapidly restructuring republican and federal levels of government’ and by ‘implementing policies with divisive social consequences’.<sup>98</sup> By the start of the 1990s, Yugoslavia’s economy was in shambles, the federal government bankrupted, and the legitimacy of federal authority increasingly challenged by the republics. The economic crisis, furthermore, made it impossible for the federal

89 Chossudovsky, *supra* note 85, at 376.

90 Woodward, *supra* note 85, at 52.

91 Petras and Vieux, *supra* note 85, at 10.

92 C. Cramer and J. Weeks, ‘Macroeconomic Stabilization and Structural Adjustment’, in E. W. Nafziger and R. Väyrynen (eds.), *The Prevention of Humanitarian Emergencies* (2002), 52. See also C.-U. Schierup, ‘Quasi-Proletarians and a Patriarchal Bureaucracy: Aspects of Yugoslavia’s Re-Peripheralization’, (1992) 44 *Soviet Studies* 79; R. Blackburn, ‘The Break-Up of Yugoslavia and the Fate of Bosnia’, (1993) 1/199 *New Left Rev* 100.

93 Orford, *supra* note 85, at 455.

94 Woodward, *supra* note 85, at 15. A similar point is made in P. Gowan, *The Global Gamble: Washington’s Faustian Bid for World Dominance* (1999), 230.

95 Woodward, *ibid.*, at 58.

96 *Ibid.*, at 39–40 and 69–70.

97 Orford, *supra* note 85, at 455.

98 *Ibid.*

government to provide the material incentives necessary to satisfy the constituent republics. As David Chandler observes, '[w]ithout the security provided by the counterbalancing mechanisms of the federal state, questions of security became closely tied up with those of ethnic or nationalist orientation'.<sup>99</sup> In Bosnia, for instance, 'the reform of the constitutional framework put to question the guarantees of security and equal treatment for the three ethnic groups'.<sup>100</sup>

Surveying a wide range of literature, Orford identifies four key ways in which external political-economic interventions in the form of austerity, structural adjustment, and shock therapy contributed to the onset of violence in the former Yugoslavia. First, these programmes encouraged social instability by promoting inflation, falling real incomes, consumer goods shortages, unemployment, an end to food subsidies, and rising costs of staples, including fuel and food.<sup>101</sup> Second, political and constitutional reforms, motivated by economic policies, destroyed the system of protection of minority rights premised on distribution of government positions and resources according to national status and state expenditures on cultural rights. Fiscal cuts and political centralization mandated by IMF programmes saw an end to the system of 'multiple political arenas' that served to protect rights and freedoms and accommodate ethno-national differences.<sup>102</sup> Third, the weakening of minority rights and the social polarization attendant on economic liberalization animated a rise in republican nationalism and a decrease in the federal government's legitimacy premised on its ability to provide economic and social support. As Orford puts it, the IMF-imposed structural adjustment policies of the 1980s 'led to the state as usual being stripped of most of its functions, except maintaining law and order'.<sup>103</sup> The 'radical narrowing' of what governments could provide 'in terms of previously guaranteed rights to subsistence, land, public employment, and even citizenship'<sup>104</sup> led many to look to 'other sources of community' and, in turn, allowed nationalist republican governments to gain popular support.<sup>105</sup> Finally, Orford stresses the speed with which structural adjustment and shock therapy programmes were implemented:

[T]here was a clear conflict between the conditions necessary for peace and those deemed necessary for economic liberalization. Although time was needed to build 'cross-republican, society-wide political organisations' to avoid civil war and genocide, the IMF . . . and financial institutions considered it essential that economic and political change be rapid.<sup>106</sup>

Miall et al. reach similar conclusions in their analysis of the former Yugoslavia. They argue that the austerity and adjustment programmes imposed by IFIs in the 1990s 'contributed to reduced public services and employment and increased competition

99 D. Chandler, *Bosnia: Faking Democracy after Dayton* (2000), 30.

100 *Ibid.*

101 Orford, *supra* note 85, at 456.

102 *Ibid.*, at 456–7.

103 *Ibid.*, at 457.

104 Woodward, *supra* note 85, at 17.

105 Orford, *supra* note 85, at 458.

106 *Ibid.*, at 459.

among the republics for a shrinking federal budget, and weakened the state's capacity to manage conflicts and maintain civic order'.<sup>107</sup>

None of this is to argue that individuals did not perpetrate often horrific crimes or that such crimes were inevitable consequences of the changing Yugoslav environment. I simply argue that international interventions profoundly shaped the political, economic, and social make-up of the former Yugoslavia and, as such, were centrally implicated in the ensuing violence. Such intervention was not, of course, the sole cause of war in the former Yugoslavia and mass violence certainly did not take place without the agency of local actors, among them Milošević. But nor can individuals be abstracted from the context in which they are moved to act. To focus primarily on local actors, as with the legal discourse surrounding the ICTY, overlooks the role of international actors and the role of international law, in the form of political-economic interventions, in occasioning instances of international crime. The Yugoslav experience, at the very least, complicates the discourse celebrating individual criminal responsibility as effecting an end to violence and social conflict.

#### 4.2. The political-economic aspects of atrocity

That violence and conflict tend to arise in environments exacerbated or even directly shaped by systemic economic and political forces may also be seen in other instances of atrocity such as in Rwanda or Sierra Leone.<sup>108</sup> Indeed political economist Christopher Cramer, in a careful study of violence and economic transformation, argues that 'much of the violence in the world may represent the consequences of and reactions to the failures and choices of government policies, including those policies of wholesale liberalisation and deregulation encouraged by international financial institutions'.<sup>109</sup>

IFI adjustment programmes and policies tend to exacerbate the very conditions – social, economic, legal, and political – associated with a breakdown of social order.<sup>110</sup> At the core of IFI programmes was and remains an emphasis on the opening of countries' political economies to the free movement of goods and financial flows from the North and a transformation of states' domestic social relations. In addition to macroeconomic reforms – opening domestic economies to imports, freeing prices from controls, macroeconomic stabilization – governments are also instructed to undertake microeconomic reforms such as privatization of state-owned enterprises, financial and labour market liberalization, and deregulation. The role of the state in the economy is to be curtailed and limited to protecting the operation of the

107 H. Miall et al., *Contemporary Conflict Resolution: The Prevention, Management, and Transformation of Deadly Conflicts* (1999), 109.

108 See A. Storey, 'Economics and Ethnic Conflict: Structural Adjustment in Rwanda', (1999) 17 *Dev Pol Rev* 43; M. Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (2003); Cramer and Weeks, *supra* note 92, at 50; J. Weeks, *Development Strategy and the Economy of Sierra Leone* (1992).

109 C. Cramer, *Violence in Developing Countries: War, Memory, Progress* (2007), 198.

110 See R. Paris, *At War's End: Building Peace after Civil Conflict* (2004), 124.

free market.<sup>111</sup> The consequence of these reforms, in almost all cases, has been the growth of socioeconomic inequality, insecurity, and human misery.<sup>112</sup>

In surveying this literature, I do not mean to imply that it is possible to identify the ‘root causes’ of particular conflicts. Efforts to do so are common in the social sciences, but there is inevitably a tendency for scholars to focus narrowly on particular factors at the expense of others. As Susan Marks has recently noted, preoccupation with root causes may in fact give rise to new blinders and elisions.<sup>113</sup> Moreover, it would undoubtedly be both facile and incautious to argue a simple causal relationship between interventions in a country’s political economy and the outbreak of violence. Indeed, as Craven and Weeks note, it is difficult to generalize about the link between, say, economic adjustment and conflict: ‘unreliable or missing data, differences among countries undergoing adjustment, variations in the intensity of adjustment, variations in programmes, unpredictable timelags, and the impact of causal factors other than adjustment’ all muddy the waters for any empirical research.<sup>114</sup>

It is apparent that such interventions do not always lead to war or atrocity. Structural adjustment and shock therapy programmes have been implemented in various countries without subsequent violence on the scale seen in Yugoslavia. There may equally be instances where interventions enabled a country to avoid a greater cataclysm that would have led to much greater violence.

Moreover, to identify structural forces is not to discount the role of individual agency. When faced with questions of responsibility, we seem to face the Scylla and Charybdis of criminal judgment – to acknowledge the social causes of violence and take seriously explanations other than an accused’s free-floating guilt is to evade responsibility and accept impunity; to insist on an accused’s individual responsibility is to disavow the structural violence of the modern globalized political economy. A similar opposition, of course, was ascribed by many to Hannah Arendt’s portrait of Eichmann and was at the root of her ostracism by sectors of American Jewry: for her detractors, Arendt’s description of Eichmann as banal implied some diminished responsibility. But to insist on such an alleged dichotomy is to resort to what Slavoj Žižek has called a ‘double blackmail’.<sup>115</sup> The antipodal opposition of structure and agency is arguably false. We may reject the idea of *absolute* free will without rejecting notions of responsibility. Might it not be better to see the rational and culpable criminal not as the opposite of socially determined structural forces but as their *symptom*?

In any case, the point here is not to argue that socioeconomic conditions generally, and IFI programmes and policies specifically, are the only or even most important contributing factors for social conflict and war. Rather, it is to elucidate how these background contexts – including poverty, discrimination, marginalization,

111 Krever, *supra* note 11, at 297.

112 Robinson, *supra* note 27, at 339; B. Milanovic, ‘The Two Faces of Globalization: Against Globalization as We Know It’, (2003) 31 *World Dev* 667, at 679.

113 S. Marks, ‘Human Rights and Root Causes’, (2011) 74 *MLR* 57.

114 Craven and Weeks, *supra* note 92, at 44–5.

115 S. Žižek, ‘Against the Double Blackmail’, (1999) 1/234 *New Left Rev* 76.

and social exclusion, exacerbated significantly by IFI policies – are eclipsed in ICL discourse and lost from sight by advocates of ICL as a panacea for atrocity.

## 5. JUDICIAL REDUCTIONISM AND JUSTIFICATORY EXCEPTIONALISM

What consequences follow from this reductionism at the heart of ICL discourse? The CLS-inspired debates on criminal trials and legal discourse have clear implications for ICL. The latter's focus on, and celebration of, individual responsibility appears to place beyond the line of sight precisely the structural political-economic forces implicated in many instances of mass violence. While international criminal trials foreground individual actors, they leave the interventions of international institutions unscrutinized. In adopting a blinkered focus on the individual – Milošević, say – international legal discourse – as well as international criminal trials themselves – systematically ignore the economic, political, legal, and social forces that give rise to Milošević's ICL thus neglects, and arguably as a consequence absolves, the role of international institutions and transnational economic processes in exacerbating conflict and creating environments conducive to violence. While this does not necessarily undermine the law's efficacy in holding individual perpetrators to account, it is problematic when much broader claims are made of the law's role in constraining violence and conflict more widely. The legal texts and concomitant discourse surveyed in section 3 above, in suggesting that a regime of individual criminal responsibility is appropriate and even sufficient to ensure peace and security and realize human rights, implies that systemic political-economic forces and international juridico-economic interventions are divorced from responsibility for conflict and violence.

A parallel may be drawn with what Susan Marks, writing about torture, calls 'justificatory exceptionalism'.<sup>116</sup> In response to the now familiar images of Iraqi detainees tortured at Abu Ghraib prison, the US administration insisted on the exceptionalism of these acts. They were 'abhorrent', President Bush proclaimed, condemning the conduct, in Marks's words, as 'the work of a few wreckers, who properly belong, and will now be removed, outside American institutions'.<sup>117</sup> These were the exceptional acts of 'rotten apples', as the recurrent refrain from US officials had it. But this language of 'exceptionalism', Marks contends, actually works to cabin instances of torture from the conditions 'that lie behind, and provide the context for, these acts of torture', thus obscuring those conditions.<sup>118</sup>

ICL similarly abstracts individuals from a concrete context in which they act, or are moved to act, and in which the specific crimes with which they are charged occur. In so doing, the trial tends to portray the incidents at its centre as resulting from 'rotten apples' and their bad behaviour, or 'monsters' and their demagogic thirst for

<sup>116</sup> S. Marks, 'Apologising for Torture', (2004) 73 Nord. J Intl L 365, at 368.

<sup>117</sup> *Ibid.*, at 377.

<sup>118</sup> *Ibid.*, at 378.

power – the ‘unscrupulous leaders’, in Akhavan’s words, who ‘goad and exploit the forces advocating a spiral of violence’.<sup>119</sup>

The limits of a reductionist ICL have not gone unnoticed within the legal academy. Mainstream critiques, however, remain inadequate in theorizing the role of structural violence, hamstrung by assumptions about individual agency rooted in liberal political philosophy. A number of jurists, for instance, have recognized that culpability for mass violence extends beyond the handful of individuals prosecuted in war crimes trials.<sup>120</sup> ‘[M]odern mass atrocity’, with its ‘polymorphic’ forms of responsibility and perpetration, involve the ‘intermixing of “many hands”’.<sup>121</sup> For these commentators, the defining feature of mass atrocity is its *collective* nature: it involves a broad range of perpetrators – leaders and ‘conflict entrepreneurs’, mid-level officials, actual killers, community members who profit from a conflict, bystanders – each with different levels of blameworthiness but all necessary for atrocity to occur.<sup>122</sup>

Such critics suggest that ICL should adopt different forms of process and punishment. Drumbl goes so far as to advocate certain limited forms of collective punishment, arguing that ‘international criminal lawyers’ fears of collective responsibility have inhibited dispassionate conversations about its potential in thwarting atrocity and retrospectively promoting justice’.<sup>123</sup> Others, if wary of the spectre of collective punishment, argue for more expansive rules of liability. These critics advocate – and, to the extent they have hitherto been employed, applaud – the use of theories of culpability that are able to take into account the role of *collective* action: theories of joint criminal enterprise (JCE), conspiracy, complicity, command responsibility, and incitement.

What questions might be posed of these prescriptions? On the one hand, they are controversial and remain on the margins of mainstream ICL scholarship, seemingly deviating too far from accepted principles of individual culpability. As one scholar notes, ‘the abjuring of collective punishment is still a reflexive rhetorical posture’ for most jurists.<sup>124</sup> On the other hand, these doctrinal innovations, with their ‘broader ascription of individual responsibility’,<sup>125</sup> retain a focus merely on the acts of violence or instances of crime without any focus on the reasons or broader context behind the violence or violation of ICL. Expansive theories of liability entail recognition that it took many individuals to slaughter several hundred thousand Rwandans, but continue to elide any connection between acts of violence and structural forces. These are technical responses to the problem of assigning legal responsibility in situations where responsibility is not easily attributed or the identity of multiple

119 Akhavan, *supra* note 66, at 10.

120 Drumbl, *supra* note 41.

121 M. Osiel, *Making Sense of Mass Atrocity* (2009) xi, 241, 243.

122 L. E. Fletcher and H. M. Weinstein, ‘Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation’ (2002) 24 Hum Rts Q 573, 618; Drumbl, *supra* note 41, at 25; David Cohen, ‘Beyond Nuremberg: Individual Responsibility for War Crimes’, in C. Hesse and R. Post (eds.), *Human Rights in Political Transitions: Gettysburg to Bosnia* (1999).

123 Drumbl, *ibid.*, at 201.

124 T. W. Waters, ‘Killing Globally, Punishing Locally? The Still-Unmapped Ecology of Atrocity’, (2008) 55 Buff L Rev 1331, at 1334.

125 Drumbl, *supra* note 49, at 1309.

individual perpetrators is difficult to ascertain. They bear primarily on whether one or several or many actors can or should be held answerable for an act or omission. They, too, however, are silent about why that act or omission occurred and about the enabling conditions that open the path to individual outbreaks of violence.

Even where the trial takes a broader optic, the problem of focusing on the individual perpetrator is merely displaced to a focus on the *incident*. The trial – and ICL more generally – takes as its focus the particular, never the general: the specific international legal norm breach, the specific war crime, the specific act of violence, or, at a slightly wider remove, the specific conflict with its several or many crimes and violations of human rights or international norms. Hilary Charlesworth has written of international law's preoccupation with crises – a myopia that promotes attention to particular incidents and outbreaks of violence without ever systematically engaging with structural issues.<sup>126</sup> In the case of ICL, the preoccupation remains with the *abnormality* of conjunctural violence, rather than with the *normality* of the forces – including economic and legal structures – that lurk beneath. The former is subjected to war crimes trials and hailed as an example of what needs to be addressed while the other is obscured and legitimized as a permanent, even beneficent, trait of international life. The problem is not simply that trials have limitations not accounted for by liberal legal scholarship but rather lies in the fact that by obfuscating these limitations, and uncritically celebrating individual convictions, such scholarship (even if unconsciously) contributes to the reification of violent juridical and economic structures.

## 6. CONCLUSION: INTERNATIONAL CRIMINAL LAW AS RULE OF LAW?

Faith in the progressive promise of ICL as the appropriate response to mass violence is widely entrenched within contemporary legal discourse and mainstream scholarship. But legal texts do not exist in a vacuum; ICL's potential for constraining international conflict and vindicating human rights is now also widely accepted in popular political discourse.<sup>127</sup> The language of ICL has become an effective rhetorical vernacular to mobilize *extra*-legal public opinion. As noted in the introduction above, today, much popular opposition to war invokes the language of ICL.

These popular invocations of ICL reveal a widespread faith in the field's promise to address the turmoil of a violent periphery. Such faith mirrors, and is arguably the product of, contemporary ICL scholarship. I have written critically of such scholarship and the authors, practitioners, and commentators who produce and reproduce it in a plethora of scholarly and journalistic texts. I have not, however, suggested that such work is calculatedly obscurantist. It is no doubt safe to assume that those labouring at the coalface of international criminal justice recognize that there is

<sup>126</sup> H. Charlesworth, 'International Law: A Discipline of Crisis', (2002) 65 MLR 377, at 386.

<sup>127</sup> For a recent discussion of the relationship between ICL and international human rights law see C. Schwöbel, 'The Comfort of International Criminal Law' (2013) 24 *Law and Critique*.

a systemic context to international crimes. And yet their work seems incapable of moving beyond its narrow conceptual horizons. This may be an inevitable limit to the paradigm of ICL and its institutions, their transformative power unable to address the social structures that give rise to war, violence, and other social ills.<sup>128</sup> Of course, if such structures cannot be addressed by ICL, they are not altogether absent from the international criminal trial. The trial, unless it is an orchestrated show trial, provides a potential pulpit from which a defendant might make his or her case, often invoking structure, before a global audience. Jacques Vergès's theory of 'trial by rupture' was premised precisely on a defence conducted as an 'attack on the system represented by the prosecution case'<sup>129</sup> – an indictment of French colonialism, for instance.<sup>130</sup> Whether or not such counterhegemonic discourses stand any chance of destabilizing the dominant ideology is, of course, another matter.

The ideology critique offered here points not necessarily to throwing away wholesale the institutional and doctrinal architecture of ICL. Rather it invites us first to consider the conditions under which international crimes occur, the material context of violence and social conflict, if we are to challenge and repoliticize that context. Blinkered attention to individual criminal responsibility and pious celebration of ICL as the solution to violence or conflict narrow our field of vision and prevent us from seeing, let alone challenging, that wider context. I have highlighted here certain aspects of that context – namely the political-economic arrangements of late capitalism and the neo-liberal interventions of IFIs – that are elided in ICL discourse. They are not the sum total of that context, but nor, I have argued, are they insignificant.

The neo-liberal project of economic liberalization exercised by international legal institutions in Yugoslavia, Rwanda, and elsewhere continues and remains an influential area of international engagement. Indeed, today it is perhaps more far-reaching, advocating not only economic reforms but also a raft of political and legal reforms under the heading of good governance and rule-of-law promotion.<sup>131</sup> But any scrutiny of such political-economic forces remains absent from ICL discourse. The risk of contemporary ICL discourse, and especially that of the self-congratulatory paeans of the field's boosters who uncritically trumpet the moral virtues of their undertaking, is that socioeconomic conditions and interventions that shape such conditions are at best invisible and at worst understood as intransigent, the depoliticized institutional components of an international rule of law rather than inimical to such a rule.

128 For a discussion of the limits of the international legal form more generally, see R. Knox, 'Marxism, International Law, and Political Strategy', (2009) 22 LJIL 413.

129 Koskenniemi, *supra* note 61, at 26.

130 See R. Knox, 'Strategy and Tactics', (2010) 21 FYBIL 193.

131 For a discussion of the changing contours of neo-liberal policy in the World Bank, see Krever, *supra* note 11.