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Comparative Law for International Criminal Justice

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KEY CONCEPTS

International criminal justice, International criminal law, Disciplinary taxonomy and conceptual analysis, Comparative legal method, International criminal courts, Institutional design, Legislation and adjudication, Transnational co-operation in policing and mutual judicial assistance, Legal harmonisation, The 'eternal triangle' of intellectual inquiry

I. INTRODUCTION

THIS CHAPTER'S PRINCIPAL argument can be summarised succinctly. Comparative law, it will be argued, is capable of making unique and indispensable contributions to the realisation of international criminal justice. Expressed in such deceptively simple terms, however, neither the significance nor the complexity of this contention is readily apparent.

Scholars express divergent opinions on the meaning, merits and distinctive methods of 'Comparative Law' as a discipline (see, eg Zweigert and Kötz, 1998; Ewald, 1995; Legrand, 1996; and Frankenberg, 1985). Perceptions of the value of Comparative Law for international criminal justice will necessarily be conditioned by the stringency of one's aspirations for comparative scholarship, and also (it must follow) by the capacity of Comparative Law's disciplinary resources—theoretical, methodological and empirical—to satisfy the expectations placed upon it. Anybody willing to contemplate a relatively inclusive concept of Comparative Law will almost inevitably discover more extensive uses for comparative legal method in the theory and practice of international criminal justice than those who insist on more restrictive definitions.

Part I of this chapter investigates the concept and substantive content of international criminal justice. A flexible approach to disciplinary taxonomy is

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maintained, in preference to stipulative definitions, by conceptualising a sequence of 'concentric circles' of international criminal justice. The significance of the events, institutions and practices in question will hopefully become self-evident as the discussion proceeds. Part II then takes up the chapter's central proposition, by exploring six different ways in which Comparative Law's contributions to international criminal justice should be regarded, in the aggregate, as both unique and indispensable. The discussion's overriding objective is to promote more explicit, systematic, and methodologically astute recourse to comparative legal method in the theory and practice of international criminal justice.

II. SEVEN CONCENTRIC CIRCLES OF INTERNATIONAL CRIMINAL JUSTICE

The very idea of international criminal justice is controversial to its core. Georg Schwarzenberger's mid-century evaluation is emblematic of the sceptical tradition:

> [I]n the present state of world society international criminal law in any true sense does not exist ... [T]he real swords of war and justice are still 'annexed to the Sovereign Power'. In such a situation an international criminal law that is meant to be applied to the world powers is a contradiction in terms (Schwarzenberger, 1950: 263 at 295).

Theorists of a Realist persuasion insist that Superpowers, if not all sovereign states, are *de facto* above the law. What hope, then, for legality—to say nothing of *justice*—within the anarchical world of power politics? Thinkers in the benign tradition of Immanuel Kant (1970 [1795]) who speak of international justice and perpetual peace are dismissed as idealistic dreamers. 'In the real world' (an appropriation of the concept of reality that can only be admired for its audacity), international diplomacy essentially involves outwitting foreigners in the single-minded pursuit of the national interest. This is best achieved by mutually-advantageous compromise, but ultimately rests on coercion, including, for the recalcitrant, resort to armed force—that is, less euphemistically, to guns and bombs. The 'law' of these relations is the law of the jungle. And if one still wishes to speak of justice in such environments, it is the 'justice' of Socrates' interlocutor Thrasymachus[1] or the lesson of the Peloponnesian War transmitted to posterity by Thucydides:

> right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must (quoted in Reichberg, Syse and Begby, 2006: 13).

[1] In Plato's dialogue, Thrasymachus bluntly informs Socrates,

> in all cities the same thing is just, namely what is good for the ruling authority. This, I take it, is where the power lies, and the result is, for anyone who looks at it in the right way, that the same thing is just everywhere—what is good for the stronger (Plato, 2000: 16).

Two-and-a-half thousand years later, the Realist school of law and international relations remains hale and hearty (see Dunne and Schmidt, 2005), predicting a looming 'clash of civilizations' (Huntington, 1996). But developments since the Berlin Wall came down in 1989 have made it much harder to maintain an unremittingly Schwarzenbergerian scepticism about international penal regulation. To establish the institutional reality of modern international criminal law, it is only necessary to point to the remarkable innovations which have occurred over the last decade-and-a-half in international criminal adjudication. This section will describe and critically evaluate these unprecedented institutional developments, having first reviewed some basic conceptual distinctions.

International criminal *law* is not to be equated with international criminal *justice*. This is merely an extrapolation to the international context of a familiar dichotomy. Institutionally valid (positive) law is patently capable of perpetrating injustice, sometimes extravagantly. Nazi racial purity laws, depriving Jews of their property, homes, livelihoods, liberty and ultimately their lives, were in this sense only an extreme example of a perfectly general phenomenon (Fraser, 2005). Conversely, however, justice is impossible without law—at least in complex modern societies in which legal duties are far from exhausted by simple, morally-intuitive prohibitions ('thou shall not kill'; 'thou shall not steal', etc). One can fairly be held responsible (that is, *answerable* morally or legally) only for deliberate rule-breaking or culpable neglect of duty through recklessness or ignorance. For morally-justifiable legal liability, these criteria presuppose general, prospective, publicised, clear, accessible and determinate criminal prohibitions, allowing citizens to order their conduct and affairs without fear of arbitrary penalisation. This is the kernel of the demand for justice under the rule of law.

Taken at its narrowest, 'international criminal law' might refer to the corpus of legal rules defining international crimes and procedures. Understood more broadly, 'international criminal law' might encompass, in addition to positive legal norms, the institutions—courts, tribunals, treaty regimes, international organisations, etc—created to implement, apply and develop international criminal laws. This rules-plus-institutions conception of international criminal law is frequently encountered in a rapidly expanding scholarly literature (eg Cassese, 2003; and Bantekas and Nash, 2003). A third, very different possibility is to regard international criminal law—or International Criminal Law (ICrimL)—as a fledgling academic discipline constituted by a distinctive set of norms, institutions, concepts, ideals, questions, issues, problems and challenges for further scholarly examination through research, teaching, analysis and critical commentary, and theoretical reflection. In a similar vein, International Criminal Justice (ICrimJ) might be regarded as a still broader academic discipline, integrating ICrimL within an overarching interdisciplinary enterprise also incorporating philosophical, historical, political and international relations, sociological, anthropological and criminological perspectives. ICrimJ, in this conception, is more methodologically

diverse and correspondingly less preoccupied with the institutional features of international criminal law (in either its first or second senses), than ICrimL. These contrasting approaches in reality overlap and intersect in various complex and significant ways.[2]

Beyond these basic conceptual clarifications, there is no settled or agreed definition of international criminal law, still less of the more emphatically normative concept of international criminal justice. The following survey begins with the incontestable core of international criminal justice institutions and works out, through a sequence of concentric and interactive jurisdictional circles, to the progressively more debateable periphery.

The initial point of departure for any contemporary discussion of international criminal law must be the International Criminal Court (ICC),[3] created by a multilateral treaty agreed at Rome in 1998 (see Cassese, Gaeta and Jones, 2002). The ICC became fully operational on 1 July 2002, having secured the requisite 60 ratifications.[4] By November 2005 there were 100 fully-ratified States Parties, although significant absentees still include China, Russia and the United States—all of which, of course, enjoy permanent vetoes on the United Nations Security Council, underwritten by irresistible economic leverage, diplomatic influence, and military might. The ICC is invested with, exclusively prospective,[5] jurisdiction over four groups of substantive crimes: genocide, crimes against humanity, war crimes and the 'crime of aggression' (unjustified resort to armed conflict).[6] Under Article 12 of its Rome Statute, the ICC's jurisdiction is essentially[7] limited to international crimes committed on the territory of a State Party or by one of its nationals. In conjunction with Article 98, this limitation allows countries which remain opposed to the ICC—notably the United States (see Dietz, 2004; and Wedgwood, 2001)—to extort agreements from individual ICC members promising never to surrender the non-signatory's nationals to the ICC. Though it is sometimes referred to colloquially as the 'World Court', the scope of the ICC's jurisdiction is therefore plainly less than globally comprehensive.

At the heart of the ICC's institutional structure is the 'principle of complementarity'. It is not envisaged that every jurisdictionally competent allegation of international criminality, including even genocide, will automatically be referred to the ICC after July 2002. Instead, the ICC is intended to assert jurisdiction 'over the most serious crimes of concern to the international community as a whole' in a

[2] One form of intersection worth emphasising is the potential for ICrimL and ICrimJ, *qua* academic disciplines, to influence the design, implementation and future prospects of international criminal law and justice in their normative and institutional manifestations. That is to say, scholarly discourse already permeates the theory and practice of international criminal justice.

[3] See www.icc-cpi.int/.

[4] ICC Statute, Art 126.

[5] ICC Statute, Art 11.

[6] ICC Statute, Arts 5–8.

[7] In addition, the United Nations Security Council may refer situations to the ICC involving non-Party States: ICC Statute Arts 12(2) and 13(b).

manner which is 'complementary to national criminal jurisdictions'.[8] In practice, this means that the ICC will normally allow national criminal processes to take their course, unless the ICC Prosecutor judges that the relevant state 'is unwilling or unable genuinely to carry out the ... prosecution'.[9] In accordance with the principle of complementarity, therefore, domestic criminal courts are intended to be the primary agents of international criminal justice, with the ICC as supervisor and ultimate failsafe.

Although the ICC has yet to complete its first fully-fledged criminal trial, substantial preliminary steps have been taken to make inquiries, gather evidence, and execute arrest warrants.[10] Article 13 of the ICC Statute provides that 'a situation' suspected of involving crimes within the ICC's jurisdiction may be referred to the Prosecutor by a State Party or by the United Nations Security Council, or alternatively, may be investigated on the Prosecutor's own initiative. Four investigations of suspicious 'situations' are currently on-going, concerning civil war in the Democratic Republic of the Congo (DRC), the guerrilla activities of the 'Lord's Resistance Army' in Uganda, allegations of genocide in the Darfur region of Sudan, and war crimes in the Central African Republic.

The ICC is the focus of future hopes and aspirations for international criminal justice. A second circle of institutional activity, with a more tangible record of ongoing achievement, comprises two ad hoc criminal tribunals created by the United Nations Security Council. Having previously been employed to authorise military intervention in Korea, Kuwait/Iraq and Somalia, the Security Council's Chapter VII enforcement powers were applied to the novel task of establishing judicial organs.[11] The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1999—normally abbreviated to the International Criminal Tribunal for the Former Yugoslavia (ICTY)[12]—was created in 1993 to deal with allegations of war crimes and crimes against humanity (including 'ethnic cleansing') arising from the break-up of Yugoslavia and the descent of the Balkans into a series of vicious civil wars in the early 1990s (see Bass, 2000: chapter 6). With this precedent established, the Security Council's second juridical experiment followed promptly in 1994. The International Criminal Tribunal for Rwanda (ICTR),[13] situated in Arusha, Tanzania, was the United Nations' belated response to genocide in the Great Lakes region of Africa. Certainly 800,000 people, perhaps a million or more, were systematically slaughtered in just 100 days following the premeditated assassination of Rwandan President Juvenal Habyarimana in April 1994. Civil strife in Rwanda has a long,

[8] ICC Statute, Preamble.
[9] ICC Statute, Art 17.
[10] *Report on the Activities of the Court* ICC-ASP/4/16.
[11] Ch VII concerns 'action with respect to threats to the peace, breaches of the peace, and acts of aggression'.
[12] See www.un.org/icty/.
[13] See www.ictr.org/.

colonial and post-colonial history, but the immediate conflagration targeted members of the minority Tutsi population, who were hunted out and brutally massacred (along with moderate Hutu sympathisers) by members of the Hutu majority. Unarmed Tutsi civilians—men, women, children and babies—were murdered on sight in bestial orgies of violence by machete-wielding gangs of their erstwhile Hutu neighbours. Lieutenant-General Roméo Dallaire, the commander of the small UN peacekeeping force stationed in Kigali during 1993–94, declared that in the midst of the Rwandan genocide,

> I shook hands with the devil. I have seen him, I have smelled him and I have touched him. I know the devil exists ... We were not in a war of victors and vanquished. We were in the middle of a slaughterhouse (Dallaire, 2004: xviii, 281).

Both the ICTY and the ICTR were tasked with exacting mandates. The immediate objective of bringing to justice those responsible for genocide, war crimes and crimes against humanity was conceived as part of an all-encompassing international agenda, extending to: establishing an unassailable historical record of events; satisfying victims' grievances (which if left to fester unattended might easily precipitate self-help revenge-taking and further cycles of inter-ethnic conflict); deterring future international criminality by clearly signalling an end to the 'culture of impunity' (*cf* Bassiouni, 2000) by which the worst international criminals—especially deposed heads of state and other political and military leaders—have generally eluded legal accountability without having to answer for their crimes; promoting reconciliation between former adversaries; facilitating national political, social and economic reconstruction in war-torn regions; instilling respect for human rights and the rule of law; and helping to create the conditions for stable democratic government—all with the (additional) ulterior purpose of contributing to the restoration and maintenance of international peace and security. The extent to which such broadly-drawn, ambitious and potentially conflicting objectives have been, or ever could be, accomplished by international criminal trials of any description seems destined to be a topic of interminable debate and controversy.

More tangible achievements can be registered in the shorter-term. By 31 July 2005,[14] the ICTY had completed 20 trials involving 39 accused, 36 of whom were convicted on at least some counts whilst the remaining three were acquitted. A further 18 accused had pleaded guilty. Thirty four trials, many of them involving multiple defendants, remained on foot, and a further 50 indicted accused were awaiting trial. The ICTY now has three separate Trial Chambers, allowing six trials to be conducted simultaneously (each Chamber running two trials apiece, alternating between morning and afternoon sessions). The scale of these judicial operations, which are without precedent in the history of international criminal adjudication, helps to contextualise in a more favourable light the ICTY's well-publicised embarrassment of presiding over the abortive prosecution of former

[14] See the ICTY's *Twelfth Annual Report* to the United Nations General Assembly and Security Council, A/60/267—S/2005/532, 17 August 2005.

Yugoslavian president Slobodan Milosevic.[15] Insisting on representing himself in court, Milosevic took every opportunity to disrupt proceedings by denouncing his prosecution as a show trial and attempting to *subpoena* Western politicians—Bill Clinton[16] and Tony Blair[17] amongst them—as witnesses for the defence. The trial dragged on for over four years and ran to almost 50,000 pages of transcript, until, in progressively failing health, Milosevic's heart finally gave out and (according to preferred penal theology) he either prematurely reaped his just reward or *in extremis* frustrated justice.[18] It speaks volumes for the international community's sincerity of purpose that Milosevic, as a former head of state, was put on trial at all, but neither advocates nor critics of international criminal trials can be satisfied with what ultimately transpired. Another long-standing bone of contention concerns the obstructive attitude of certain successor Balkan states towards tracking down and surrendering to the Tribunal fugitives believed to be located in their territories. Although co-operation with the ICTY has, generally speaking, improved over time, several notorious indictees remain at large, apparently with the connivance of governmental authorities. As Judge Theodor Meron, former President of the ICTY, summarised the position in his 2005 *Annual Report*:

> The failure to arrest high-level accused, such as [former Republika Srpska President] Radovan Karadžic, [Bosnian Serb General] Ratko Mladic and [Croatian Commander] Ante Gotovina, despite several resolutions of the Security Council, is of grave concern for the proper administration of justice. Repeated appeals to the Governments and entities in the region and the international community to pursue and arrest them have so far not borne results ... To achieve the Tribunal's mandate of contributing to the maintenance of peace and stability in the region it is imperative that those fugitives are given their day in court in The Hague ... Ten years after the genocide in Srebrenica, the Tribunal is continuing in its quest for justice, truth, peace and reconciliation.[19]

The ICTR, meanwhile, began its first trial in January 1997, and by June 2006 had rendered 22 judgments relating to 28 accused. These proceedings produced 25 convictions and three acquittals. Jean Kambanda, former Prime Minister of Rwanda, claims the dubious distinction of being the first statesman ever to be convicted (he pleaded guilty to genocide)[20] of the ultimate international crime

[15] Prosecutor v Slobodan Milosevic (IT–02–54).

[16] '"If someone commits a horrific murder in Britain, do you attribute it to Tony Blair?" Slobodan Milosevic shamelessly used his war crimes tribunal this week to blame everyone but himself': P Sherwell, *Sunday Telegraph*, 17 February 2002.

[17] See *Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schröder*, ICTY Trial Chamber, 9 December 2005.

[18] Judge Robinson's summation is exquisitely laconic:

> 'The Chamber has been advised of the death of the accused, Slobodan Milosevic. We express our regret at his passing. We also regret that his untimely death has deprived not only him but indeed all interested parties of a judgement upon the allegations in the indictment. His death terminates these proceedings' (Transcript p 49191, 14 March 2006).

[19] See the ICTY's *Twelfth Annual Report* to the United Nations General Assembly and Security Council, A/60/267—S/2005/532, 17 August 2005, paras 182, 257, 258.

[20] V Brittain, 'Rwanda's former PM admits role in Genocide', *The Guardian*, 2 May 1998.

(*cf* Friedrichs, 2000). In June 2006 the ICTR was conducting a further 11 ongoing trials involving 27 defendants. Another 14 accused were awaiting trial in the Tribunal's detention facility in Arusha, and a further 18 indictees remained at large. This modest total of indicted individuals pales in comparison, however, to the overall numbers of perpetrators and collaborators in the Rwandan genocide. Over 130,000 suspects were initially detained, and many more—perhaps as many as a million people—were directly implicated in one way or another. Genocide in Rwanda was experienced alike by victims, perpetrators and bystanders as a virulent cultural virus which saturated the entire social fabric and infected every pore of the body politic. The sheer impossibility of prosecuting every perpetrator, at the ICTR or anywhere else (Rwanda's own depleted criminal justice infrastructure was manifestly unequal to the task), posed acute problems of selection. Jurists and administrators were forced to improvise imaginative alternatives to traditional penal process in their endeavour to promote justice, peace, security and reconciliation without backsliding into impunity (Drumbl, 2000a).[21]

The ICTR's general strategy has been to 'concentrate on the prosecution of those persons who bear the greatest responsibility for the tragic events which occurred in Rwanda',[22] whilst diverting lesser offenders to national prosecutions or indigenous '*gacaca*' mediation processes. This bifurcated approach, reserving international prosecution for the very worst or most high-profile offenders, has become a familiar pattern in international criminal adjudication.

The ad hoc Tribunals were never intended to be permanent institutions. Both the ICTY and the ICTR have formulated 'completion strategies', according to which all trials should be finalised by 2008, and appeal hearings (which are plentiful in these cases) concluded by 2010. By this time, outstanding work should have been transferred to local courts and prosecutors, and the ICC will henceforth be on-hand to assert jurisdiction if fresh atrocities should occur. A prominent place in the unfolding history of international criminal justice is already assured to the ad hoc Tribunals. Confounding Schwarzenbergerian sceptics, they have broken the spell of perpetrator-impunity in the most emphatic terms, by demonstrating that *there is something that can be done* by the international community in response to genocide, crimes against humanity and other massive, state-sponsored violations of fundamental human rights during civil wars or by tyrannical governments abusing their own people. Almost irrespective of the local merits and scope for replication of the Tribunals' activities, the practical enforcement of international criminal law can no longer be dismissed peremptorily, as the fantasy of idealists or logical self-contradiction.

As a template for the ICC, bequeathing personnel and experience as well as doctrinal innovation, the legacy of the ad hoc Tribunals will be subsumed into the core of international criminal justice. In the meantime, the ICTY and the ICTR have

[21] *Cf* D Gough, 'Mass jail release haunts Rwanda', *The Guardian*, 19 October 1998.
[22] ICTR *The Tribunal at a Glance—Fact Sheet No 1,* para 15. See www.ictr.org/.

stimulated the proliferation of a third concentric circle of international criminal tribunals, known as 'internationalised' or 'hybrid' courts (Romano, Nollkaemper and Kleffner, 2004). Whilst precise legal arrangements differ, these tribunals share the characteristic of being neither fully international, like the ICC and the ad hoc Tribunals, nor exclusively domestic in character. Instead, they blend features of municipal and international criminal proceedings in more or less unique combinations, tailored to particular circumstances. At one end of the spectrum, lobbying by international organisations might have been instrumental in creating a tribunal, whilst on-going international support—financial, administrative, legal, political and military—may condition its institutional design, operational protocols and future prospects. The Special Court for Sierra Leone, fashioned by treaty between the government of Sierra Leone and the United Nations, fits this pattern of major international sponsorship (see Cryer, 2001). Similar partnerships between post-conflict states and the international community have precipitated internationalised criminal tribunals in East Timor, Kosovo and Cambodia as an integral part of national processes of victim reparation, social reconciliation and political reconstruction. Towards the other end of the spectrum are predominantly national legal proceedings underpinned by international support and good will. For example, the Iraqi High Tribunal, established in the wake of the 2003 Gulf War to try Saddam Hussein and his henchmen for atrocities perpetrated against the Iraqi people, is, strictly speaking, a creature of Iraqi domestic law, but clearly would never have existed without United States-led military intervention to topple Saddam's Ba'athist regime and subsequent facilitation by the occupation Iraqi Provisional Authority. Indeed, it has been said that the

> Tribunal's origins doom its legitimacy, not merely because it appears to be yet another instance of the Hegemon applying to others what it refuses to apply to itself ... but because it suits US policy goals—including to undermine the ICC (Alvarez, 2004: 319 at 326–7).

The Scottish criminal court temporarily convened in the Netherlands to try two Libyan nationals suspected of having planted the terrorist bomb which brought down Pam Am Flight 103 over Lockerbie in 1988 (Murphy, 2001), is another illustration of the exotic legal combinations to be found at the domestic end of modern 'internationalised' criminal tribunals.[23]

A fourth 'concentric circle' of international criminal justice strains the geometric metaphor, because it takes us back in time as well as further from the core. The International Military Tribunal (IMT) 'for the just and prompt trial and punishment of the major war criminals of the European Axis',[24] located in Nuremberg during 1945–46, is often regarded as the *fons et origo* of modern international

[23] For international interest in the Lockerbie trial, see eg Security Council Res 1192/98, welcoming the initiative and calling on all United Nations members to co-operate with it.

[24] IMT (London) Charter, Art 1. Materials relating to the IMT, including a full trial transcript, can be found on Yale Law School's excellent *Avalon Project* website: www.yale.edu/lawweb/avalon/imt/imt.htm.

criminal proceedings.[25] It set a remarkable historical precedent, in subjecting to formal trial and judicial punishment—rather than summary execution, as many contemporaries would have preferred—the most prominent politicians, military leaders, ideologues and civil administrators in Hitler's Nazi government, including *Reichsmarschall* Hermann Goering. The Nuremberg trial in total produced 18 convictions of individuals,[26] three acquittals and 12 sentences of death (which Goering sensationally pre-empted by committing suicide hours before his planned execution: see Persico, 1994). The iconic significance of the 'legacy of Nuremberg' is still hotly debated (for contrasting views, see eg Taylor, 1992; Eckhardt, 1996; Falk, 1999; King, 1998; and Washington, 2003). Passing over more detailed criticisms and objections, there is broad agreement that the IMT did not conduct a truly international criminal process. As a joint-venture of the four principal victorious powers (Britain, France, Russia and the United States), it was more in the nature of military justice imposed by the Allies as the *de facto* government of occupied Germany (see Cassese, 2003: 332–3). The 'Nuremberg Principles', which were subsequently endorsed by a fledgling United Nations,[27] have nonetheless continued to exert a major influence on the development of international criminal law. Nuremberg pioneered the notion of individual criminal responsibility for international crimes which has subsequently been consolidated by the ad hoc Tribunals and the ICC.

Our fifth concentric circle might be termed 'transnational criminal law' (*cf* Boister, 2003). It embraces various forms of international co-operation, co-ordination and mutual judicial assistance in penal affairs, sometimes involving relatively modest bilateral agreements between two or more states but often founded upon major multilateral treaties or 'conventions' under the sponsorship of the United Nations or some other competent international organisation such as the Council of Europe (CoE).[28] Paradigmatic are the so-called 'suppression conventions': international agreements by which signatory states promise to enact national criminal laws to combat particular conduct of international concern. Suppression conventions have addressed, amongst other topics, torture, apartheid, drug-trafficking, environmental degradation, and international terrorism (see Bantekas and Nash, 2003: chapters 3–5; and Sunga, 1997: chapters 2–3). Transnational criminal law, broadly conceived, also includes extradition agreements, transborder mutual assistance in criminal investigations and prosecutions, and even state-sponsored abductions of suspects on foreign soil and other, more prosaic types of informal co-operation between national police forces,

[25] Much less is said, or even remembered, about the International Military Tribunal for the Far East, established in Tokyo between 1946 and 1948 to try alleged Japanese war criminals (Clark, 1997). For various legal and political reasons, the Tokyo Tribunal is not regarded as a particularly happy precedent for international criminal proceedings.

[26] Several corporate entities were also prosecuted, including, the SS, the Gestapo and the Leadership Corps of the Nazi Party, in order to facilitate subsequent prosecutions of their members.

[27] United Nations General Assembly Res 95(I), 11 December 1946.

[28] See www.coe.int/.

prosecutors and judiciaries. These arrangements do not, by and large, impose legal duties directly on ordinary citizens or public officials, and for this reason some commentators would exclude them from the core concept of international criminal law (eg Broomhall, 2004: chapter 1). It can be objected that transnational criminal law is not genuinely supra-national in conception or effect. We may grant that suppression conventions technically specify 'crimes under international law' rather than international crimes *stricto sensu*. However, this is no reason to downplay the obvious affinities between transnational criminal law and other norms of international criminal justice in constructing a reasonably comprehensive and inclusive disciplinary taxonomy.

Until recent times, the application of international criminal law was virtually the exclusive preserve of *national* criminal courts and military tribunals. This is a sixth concentric circle of international criminal process. Post-Second World War trials of Nazis and traitorous collaborators were mostly conducted by national courts (Marschik, 1997), and with some notable milestones along the way—including the trial of the Holocaust's senior bureaucrat Adolf Eichmann by the Israeli courts in 1961 (Douglas, 2001: Part 2; and Arendt, 1994 [1963])—national prosecutions have continued right up to the present day (Hirsch, 2001).[29] Erstwhile Latin American premiers, such as ex-Chilean dictator Pinochet (Webber, 1999), have also found themselves arraigned before national courts on charges of torture, murder, 'disappearances' and other systematic human rights violations. Moreover, even where fully international or hybridised criminal tribunals are established to prosecute the worst offenders, the bulk of the relevant caseload is always carried by domestic criminal courts and military courts martial. This was the experience in post-war Germany, in the Balkans and in Rwanda, and it will continue to be the pattern under the ICC's jurisdictional regime of complementarity. Treating national criminal proceedings as the sixth 'concentric circle' of international criminal justice might therefore be regarded as inappropriately marginalising, since national courts arguably populate the core.

The seventh, and final, 'concentric circle' of international criminal justice is more aptly conceptualised as a chord running through the entire enterprise. For it comprises scholars' and researchers' contributions to the broader 'ICrimJ' project, conceived programmatically as an emerging new academic discipline. In a nutshell, ICrimJ epitomises interdisciplinarity. Some of its specifically legal and jurisprudential complexities have already been touched upon, and will be elaborated further in Part II, where the significance of socio-legal and criminological contributions to ICrimJ will also become apparent. There is enormous scope for Criminology to enrich the theory and practice of ICrimJ (Roberts and McMillan, 2003; and Drumbl, 2003). Criminology has developed the methodological tools for investigating both the nature of international 'crime' and the variety of

[29] See also D Fuchs: 'Nazi war criminal escapes Costa Brava police search', *The Guardian* 17 October 2005; and I Traynor, 'Nazi sentenced to 10 years in Germany's "Last war crimes trial"', *The Guardian* 21 May 1999.

informal and official responses it provokes. Formal trial and punishment on the traditional model is only one amongst several potential responses to international criminality, which may also include—for example—'restorative justice' processes and indigenous dispute resolution (Drumbl, 2000b; and Alvarez, 1999).

The overlapping disciplines of Politics and International Relations (IR) frame the immediate geo-political and strategic context for concrete developments in international criminal justice, and thus also naturally figured in the preceding discussion. Since armed conflict has typically been the precursor, as well as the subject-matter, of international criminal trials, a role for sociologies of the military, and of waging war and making peace, is also implied by this disciplinary taxonomy. History (for these purposes incorporating Holocaust Studies) must inevitably infuse a subject on which the Second World War and the bloodstained annals of aggressive war, genocide and state-sponsored atrocity cast a long shadow.

Last but not least, Philosophy is always indispensable to serious theoretical enquiry, importing refined generic skills of logical reasoning, taxonomy and conceptual analysis, supplemented by more substantive ethical reflections on justice, authority, government, retribution, the nature of evil, wrongdoing, rights, human dignity, personal autonomy, punishment, responsibility, and moral culpability. These topics figure prominently amongst other pressing issues and questions demanding practical answers from the advocates, architects and practitioners of international criminal justice.

III. COMPARATIVE LAW'S UNIQUE AND INDISPENSABLE CONTRIBUTIONS

Having developed a sophisticated conceptualisation of international criminal justice, we may now explore Comparative Law's distinctive contributions, organised under six broad headings: institutional design; legislation; jurisprudence; operational policy-making and mutual judicial assistance; legal harmonisation; and research, analysis and critical evaluation. Since conceptual definition is paramount, not every example will be regarded by every reader as legitimate. Different examples might have been substituted, and those actually chosen could have been developed at much greater length. This flexible approach is calculated to persuade even conceptual sticklers that Comparative Law, however conservatively conceived, is capable of making *some* unique and essential contributions to international criminal justice, however narrowly defined. Readers who share my own preference for more inclusive conceptualisations should find that Comparative Law has much more to offer than conceptual minimalists perceive.

Designing the Institutional Frameworks of International Criminal Law

Modern domestic legal systems are grown, rather than deliberately made, normative orders (Allen, 1996: Part I), that is, slowly sedimented products of history, politics, jurisprudence and culture. International criminal tribunals, by contrast,

have no institutional history, politics, culture or legal tradition to call their own, at least until they become fully operational. International legal orders are made, not grown. Everything about them is either borrowed or tailor-made. For their planners and architects, international criminal tribunals present the unique challenge that their institutions and foundational legal instruments must be designed essentially from scratch. This, however, does not necessarily imply that the drawing board is completely blank. We have already seen that the United Nations ad hoc Tribunals supplied an institutional model which was promptly adopted and adapted by various internationalised tribunals, and by the ICC. Historically, however, the primary source of ideas and inspiration for institutional and procedural models has been national criminal justice systems. In an ideal world, the architects of international criminal tribunals would draw upon the best examples of domestic institutional design from around the globe, suitably modified for the specialist task in hand. And this, of course, is where Comparative Law should make its mark, not as the fountain of all wisdom, but as an indispensable contributor to an interdisciplinary conversation (also see Delmas-Marty, 2003).

At least since Nuremberg, questions of basic institutional design have been conceptualised in terms of the distinction between 'adversarial' and 'inquisitorial' procedures. Notwithstanding the problematic nature of that dichotomy (see Jackson, 2005; and Nijboer, 1993), it remains a useful starting point for analysis. Describing negotiations over the drafting of the IMT's Charter, Telford Taylor remarks that

> [p]erhaps the most intractable problem was the technical one of stating the respective functions and responsibilities of the Tribunal and the prosecution—a problem caused by the differences between Continental and Anglo-American criminal procedures (Taylor, 1992: 63).

Chief Prosecutor Robert H. Jackson apparently shared this assessment:

> From the very beginning it has been apparent that our greatest problem is how to reconcile two very different systems of procedure (quoted *ibid*: 64).

In the event, the Russians and the French were willing to let adversarial preferences prevail in order to placate the Americans, and 'differences were resolved by compromises which were crude but proved workable' (Taylor, *ibid*). Yet there was plainly much ignorance and suspicion of unfamiliar trial procedures on all sides. Even Taylor's authoritative memoir, which is careful to acknowledge differences *within* as well as between the two procedural families, makes generalisations about 'Anglo-American practice', which look suspect through English eyes.[30] Greater

[30] According to Taylor, for example, it was 'contrary to Anglo-American practice' that defendants before the IMT 'could also make an unsworn statement at the end of the trial'. However, criminal defendants in England and Wales did not generally become competent witnesses in their own defence until 1898, and the accused's right to make an unsworn statement from the dock was maintained throughout most of the 20th century, until it was finally abolished by the Criminal Justice Act 1988 (primarily to stop bombers and assassins of the Irish Republican Army (IRA) from using their criminal trial as a platform for making political speeches and denouncing the authority of British courts).

comparative insight would help to distinguish those features of national criminal proceedings which are regarded as essential and more or less non-negotiable, from relatively ephemeral details attributable largely to historical accident or whimsical cultural preference. This exercise, if undertaken in a spirit of candour and co-operation, might ease the path to more acceptable compromises in the design of international criminal procedures.

In more recent history, the ICTY, ICTR and ICC have all combined characteristic features of adversarial and inquisitorial process in novel and imaginative ways. Very roughly speaking, United Nations-sponsored international criminal *trials* have been modelled on common law adversarial proceedings (Cassese, 2003: chapter 20), whereas the *pre-trial* phases of international criminal investigations and prosecutions have drawn substantially on the continental inquisitorial tradition. Comparative understanding of how these processes work in their native settings, and their capacity to withstand extrapolation to the international context, is surely no less important for successful institutional design than expertise in international law, diplomacy or international relations.

The inquisitorial caste of pre-trial international criminal process is personified in the figure of the prosecutor. In the ICC system, the Prosecutor 'may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court', and to this end,

> may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources ... and may receive written or oral testimony at the seat of the Court.[31]

The ICC Prosecutor must, however, obtain the authorisation of the Court's Pre-Trial Chamber in order to proceed with an investigation and prosecution.[32] This institutional arrangement is modelled directly on continental criminal procedure codes. It is in marked contrast to the rigid separation between English police and prosecutors enshrined in the Prosecution of Offences Act 1985, which has dictated a somewhat estranged relationship between police investigators and the Crown Prosecution Service in England and Wales.[33] At the ICTY and ICTR, a succession of talented, energetic and personally well-respected prosecutors (Arbour, 1997; and Goldstone, 2000) has been instrumental in implementing the Tribunals' mandate (to the extent that it has been implemented) by doggedly pursuing fugitive indictees, amassing evidence of international crimes, preparing cases for trial, and cajoling or embarrassing reluctant national governments to fulfil their international obligations by complying with the Tribunal's requests for assistance.

[31] ICC Statute, Art 15(1)–(2).

[32] ICC Statute, Art 15(3).

[33] Recent developments, culminating in a transfer of the initial power to charge suspects form police to prosecutors under the Criminal Justice Act 2003, are in the process of reducing this institutional distance (Brownlee, 2004). Whether closer contact will facilitate effective prosecution, or damage Crown prosecutors' vaunted 'independence', remains to be seen.

The tendency of international criminal trial proceedings to conform to a broadly adversarial format, with party-orchestrated presentation of evidence and oral examination of witnesses, is attributable to several factors. Looking beyond the United States' disproportionate influence in all of these initiatives, the global human rights movement has left its mark. International human rights instruments like the United Nations' Universal Declaration of Human Rights (UDHR) 1948 and the International Covenant on Civil and Political Rights (ICCPR) 1966 contain various criminal process-related provisions—including the 'right to a fair trial', which is elaborated in considerable detail.[34] Global human rights instruments have been reinforced by regional organisations and treaties, such as the European Convention on Human Rights (ECHR). In extending its activities into the sponsorship of international criminal trials, the United Nations has naturally been at pains to preserve its long-standing commitment to human rights.[35] The ICTY, ICTR and ICC all consequently reproduce within their respective statutes a full suite of rights for suspects and the accused, including faithful translations of the ICCPR's Article 14 right to a fair trial.[36] Thus, every person facing criminal charges must be allowed to conduct their own defence, with the assistance of counsel if they prefer, and their entitlements shall include the right

> to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.[37]

Anglo-American style examination-in-chief and cross-examination of party-summoned witnesses are clearly contemplated, in preference to the *dossier*-based, judicially-directed factual inquiry characteristic of continental criminal trials. Yet these generalisations barely scratch the surface of some complex and imperfectly digested legal issues. Comparative investigation would reveal that oral examination of witnesses by the parties has been embraced enthusiastically (albeit not always entirely successfully) in several historically 'inquisitorial' legal systems (see Weigend, 2003; Siegel, 2006; and Vogler, 2005), at the same time as classically adversarial exclusionary rules of evidence have been relaxed (Roberts, 2006) and judges have assumed more directive case-management functions in common law jurisdictions (Duff, 2004). Traditional procedural dichotomies have shifted and blurred. Nor is JH Wigmore's notorious boosterism for cross-examination as 'the greatest legal engine ever invented for the discovery of truth' (Wigmore, 1974: vol 5, para 1367) today unequivocally endorsed in the common law's heartlands. Even if cross-examination worked flawlessly in England and Wales or New York, which many critics vehemently dispute (see Roberts and Zuckerman, 2004: 215–21), it would be foolhardy to assume that it can be replicated with equal success in

[34] UDHR, Arts 10 and 11; ICCPR, Art 14. For general discussion, see Bassiouni (1993).

[35] The Preamble to the UN Charter reaffirms 'faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small'.

[36] ICTY Statute, Art 21; ICTR Statute, Art 20; and ICC Statute, Arts 66 and 67.

[37] ICCPR, Art 14(3)(e).

the multi-lingual, culturally diverse international courtrooms of The Hague or Arusha.[38] Microscopic examination of proof-taking and evidence-testing at the domestic level is required to identify the comparative strengths and weaknesses of procedural mechanisms, and to assess their capacity for extrapolation to the international context.

Comparative Law generates both 'negative' and 'positive' contributions to the basic design of international criminal justice institutions and procedures, potentially building into an indispensable reference-library of 'do's and don't's'. On the negative side, comparative analysis should help to dispel all-too-familiar caricatures of domestic legal systems as inflexibly static, exclusively parochial, ciphers of national mores. Ignorance of this kind is a crutch for nationalistic prejudice and an obstacle to successful international co-operation in penal affairs. Viewed more positively, Comparative Law supplies invaluable models, experience and juridical resources for robust institution-building at the international level.

Legislating Substantive International Criminal Law

International criminal law is *sui generis*, and one must avoid facile analogies to domestic criminal litigation (*cf* Tallgren, 2002: 561 at 572). This unique supranational enterprise should nonetheless be informed and enriched by comparative studies of municipal criminal law and process. The task of legislating substantive international criminal law exemplifies this duality.

Consider the four 'core international crimes', as specified by the ICC Statute. They comprise, first, genocide, which means (in summary) killing, seriously harming or interfering with human reproduction or childrearing 'committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'.[39] Secondly, 'crimes against humanity' involve murder, extermination, enslavement, deportation, unlawful imprisonment, torture, rape, sexual slavery, discriminatory persecution, enforced disappearances, apartheid, or 'other inhumane acts of a similar character' when 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.[40] Thirdly, 'war crimes' are specified in elaborate detail. They include generic criminal violations such as murder, rape and assault; breaches of military ethics like hostage-taking, mistreating surrendered combatants or POWs, or declaring 'no quarter'; and discrete prohibitions of illegal weaponry (eg poison gas or dum-dum bullets) and forbidden tactics (eg bombardment of non-military targets or deployment of 'human shields'). Finally, fourth, the 'crime of aggression' concerns unjustified resort to warfare, in unprovoked armed attack or military conquest,

[38] Cross-examination of Goering at the Nuremberg IMT backfired for somewhat different reasons: Jackson's preparation was flawed and the former *Reichsmarschall* was adept at political point-scoring (Johnson and Hinderaker, 2002).

[39] ICC Statute, Art 6.

[40] ICC Statute, Art 7.

for example. Aggression violates the cardinal principle of state sovereignty, which is the legal and political foundation-stone of modern international relations. The ICC cannot assume jurisdiction over crimes of aggression unless and until the Assembly of States Parties reaches agreement on the meaning of 'aggression',[41] however, and this could be a long time coming.

The core crimes derive predominantly from International Humanitarian Law (IHL). Much of their substance is plainly far removed from the everyday concerns of criminal lawyers in domestic practice. To this extent, 'ICrimL' appears to be exactly what most of its exponents take it to be, a specialised branch of public international law (PIL). Yet two further considerations bring Comparative Law firmly back into focus.

First, ICrimL *does* draw directly on domestic criminal laws, both in its definitions of generic crimes like murder, rape and assault, and also in its general principles of criminal liability. Article 30 of the ICC's Rome Statute, for example, specifies that

> a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge

and the meaning of 'intent' is further defined. Articles 31 and 32 address such familiar topics as insanity, intoxication, self-defence, duress, and mistake of fact or law. Article 25 deals with accomplices, incitement and criminal attempts. Each of these definitional elements raises points of legislative drafting and underlying moral rationales on which domestic criminal legislation could shed important light. Comparative inquiry might ascertain not only points of convergence in national criminal laws—suggestive of international 'best practice' in criminalisation—but also distinctive domestic innovations potentially worthy of emulation at the international level. English criminal law, for example, has generated acres of judgments and commentary on the meaning of mens rea terms such as 'intention' (Ashworth, 2006: 174–81; and Simester and Sullivan, 2003: 126–36, 334–8) and 'knowledge' (Shute, 2002) which might inform drafting choices in international criminal legislation. To cap it all, Article 21 of the ICC Statute expressly qualifies 'general principles of law derived by the Court from national laws of legal systems of the world' as a formal, albeit tertiary,[42] source of legal authority in proceedings before the ICC.

Moreover, traffic between international and domestic criminal legislation is a two-way street. Many States Parties to international treaties are obliged by their national constitutions to enact enabling legislation to give effect to international agreements in domestic law.[43] Authentic interpretation is obviously essential for

[41] ICC Statute, Art 5(2).

[42] The ICC's primary law is the ICC Statute itself (plus ancillary materials), followed by applicable treaties and custom binding in public international law 'including the established principles of the international law of armed conflict'.

[43] See, eg the International Criminal Court Act 2001, giving effect in English law to the ICC Statute.

faithful transposition. But if international norms are partly derived from the legislation, jurisprudence and legal commentary produced by a diversity of national legal cultures and traditions, working knowledge of these domestic origins must surely be advantageous for any government lawyer or judge attempting to interpret international legal instruments. The challenge of transposition therefore implies a second reason why ICrimL cannot be relegated to a mere out-post of PIL, and another schedule of major works for comparative legal studies. For the reception of international criminal law into domestic legislation is only the first strand in a seamless web of normative migration, adaptation and reinvention in which comparative methodology assumes a central role. Straightforward enough, in conception if not in practice, at the macro level of legislation, these processes become infinitely more complex and variegated in the micro-dynamics of judicial practice.

Judicial Development of International Criminal Jurisprudence

National legal systems differ in the extent to which judicial law-making is formally acknowledged. Whether or not they embrace a formal system of precedent on the common law model, however, all appellate tribunals in mature legal systems contribute to the development of domestic law through their judgments in contested cases. This quasi-legislative side of legal adjudication bears profound significance for international criminal justice, and for the role of Comparative Law as its handmaiden.

It is impossible for a criminal code of any description to anticipate and legislate comprehensively for every conceivable contingency. Legislators therefore sensibly confine themselves to enacting general normative frameworks, leaving finer details to be supplied through judicial interpretation. Judicial contributions to international criminal law and procedure have been immense, not least because legislative materials prior to the enactment of the ICC Statute were remarkably sparse. The Nuremberg IMT's London Charter contained just 30 succinct Articles, briefly elaborating the Tribunal's jurisdiction, powers and procedure. Substantive legal doctrine and process had to be improvised by the judges, with the assistance of counsel, as the proceedings unfolded. The Statutes of the ICTY and ICTR are noticeably more detailed in specifying the form of trial,[44] suspects' procedural rights[45] and protections for victims and witnesses.[46] But they inevitably remain silent on the technical minutiae of criminal law and process (see May and Wierda, 1999). Indeed, there is a formal mechanism for the judges of the ICTY and ICTR to draft and update their own Rules of Procedure and Evidence.[47] This is a

[44] ICTY Statute, Art 20; ICTR Statute, Art 19.
[45] ICTY Statute, Art 21; ICTR Statute, Art 20.
[46] ICTY Statute, Art 22; ICTR Statute, Art 21.
[47] ICTY Statute, Art 15; ICTR Statute, Art 14. The ICTY's *Rules of Procedure and Evidence* are in their 37th revision: IT/32/Rev 37 (April 2006); and the ICTR's *Rules of Procedure and Evidence* had been amended 14 times to June 2005.

delegated legislative function. In their more familiar adjudicative role, the judges of the ICTY and ICTR are credited with having contributed substantially to the doctrinal development of international criminal law and procedure through evidentiary rulings and judgments in trials and appeals (see Cassese, 2003: Part II).

The centrality of comparative legal analysis to international criminal adjudication is guaranteed by multinational judiciaries. At Nuremberg, the IMT's judges represented four different legal traditions, though the Anglophones were common law cousins and the Russians and French shared an 'inquisitorial' legal heritage. Fast-forward half a century, and the ICC's 18 judges are drawn from 100 States Parties.[48] Consciously or otherwise, individual judges bring their national legal and cultural expectations, assumptions, preferences and prejudices (*cf* Merryman, 1988) into international courtrooms. A comparative approach is necessitated by the impetus in adjudication to debate national legal traditions. To be an effective member of a collegiate multinational bench, the international judge must gauge where his or her judicial colleagues are 'coming from', in terms of their legal background, training and professional cultural assumptions. How else can nationally-trained judges serving on international criminal tribunals hope to engineer appropriate compromises on points of disagreement, or garner support for their own preferred legal solution, or even just arrive at authentic and sustainable interpretations of international criminal law?

In a fundamentally devolved system of law, the comparativism integral to the work of international criminal courts is magnified at the regional and domestic levels. Both the ICTY and the ICTR are currently transferring selected defendants for trial before national courts and building up local judicial capacity as part of their respective 'completion strategies'. The 'internationalised' criminal tribunals are distinguished—from other forms of judicial process as well as from each other—precisely by their unique conjunctions of international and local laws. Referring generally to hybrid tribunals, Cassese observes:

> Both the prosecution and the bench are of mixed composition and there you have this huge problem—to make sure that the local component, and the international component, do cooperate, do understand each other, do work effectively in their pursuit of the common and shared goal of rendering justice (Cassese, 2004: 7).

And looking ahead, domestic courts in transitional or post-conflict societies will need to ensure that local prosecutions of international crimes are conducted in accordance with international due process, or risk intervention by the ICC Prosecutor asserting residual jurisdiction.[49] At each of these junction-points where international and domestic laws converge, the quality of legal analysis and decision-making can only be enhanced by expertise in Comparative Law. To qualify as the international community's agents in enforcing international

[48] The Court is currently comprised of judges from Brazil, Bolivia, Bulgaria, Canada, Costa Rica, Cyprus, Finland, France, Germany, Ghana, Ireland, Italy, Republic of Korea, Latvia, Mali, South Africa, Trinidad and Tobago, and the United Kingdom.

[49] ICC Statute, Art 17.

penal law, domestic courts must strive for a co-ordinated, culturally-sensitive, 'cosmopolitan' approach which is capable of being endorsed by the reasonable[50] majority of states, international organisations, NGOs, activists, and a 24-hour-global-news-led international public opinion.

The synthetic integration of comparative legal method within international criminal adjudication is reinforced by the salience of international human rights law (IHRL) for international criminal justice. Although human rights courts do not directly receive appeals from domestic criminal convictions, they *are* empowered to rule that a particular domestic criminal law or procedure, as applied to the accused in the instant case, is incompatible with respect for fundamental human rights. In this indirect fashion, international human rights courts exert tangible influence over the development and application of domestic criminal law and procedure—another facet of the contemporary internationalisation of municipal state law. Via the burgeoning jurisprudence of the Strasbourg-based European Court of Human Rights,[51] for example, IHRL indirectly informs interpretations of ICrimL at the domestic level (reinforcing IHRL's more overt presence in international treaties and their interpretational jurisprudence). Since comparative methodologies are already built-into European human rights adjudication (*cf* Carozza, 1998), this integral comparativism is automatically extended when human rights standards are subsumed within international criminal law. The interweaving circuits of jurisprudential influence and authority continue to expand, consolidate, and diversify exponentially and self-reflexively, as courts and tribunals with overlapping jurisdiction constantly revisit and rework their own and each other's previous decisions into novel legal arguments.

Operational Policy-Making and Mutual Judicial Assistance

Lawyers have a tendency to focus on formal treaties, constitutions, statutes and precedent cases, and specialists in PIL are far from immune from this fascination with positive sources of law. At least since the 1970s, however, socio-legal scholars have insisted that law must be conceptualised as an interlocking set of institutionalised 'social ordering practices' (Lacey, 1994: 28) which simultaneously shape and are shaped by their juridical, cultural, social, political, economic and historical environments. The 'law in the books' must be augmented by investigations of the 'law in action'. Having traditionally concentrated on national law and legal process, socio-legal scholars and criminologists have more recently branched out into the study of international crime and criminal justice (eg Morrison, 2006; Ruggiero, 2005; and Day and Vandiver, 2000).

[50] This equivocation implies something approximating Rawls's idea of an 'overlapping consensus' around 'reasonable pluralism' (Rawls, 1996: see especially Lecture IV). International criminal justice could never be founded on universal consensus, if only because international criminals will rarely assent to their own punishment.

[51] See www.echr.coe.int/echr.

Socio-legal research has repeatedly demonstrated that officials' conduct and decision-making are strongly influenced by a variety of 'soft' legal instruments and informal occupational routines or 'working rules', which tend to mediate—where they do not eclipse entirely—the strict letter of the law (see, eg Hawkins, 2002; Dixon, 1997; and McConville, Sanders and Leng, 1991). 'Soft law' sources and informal operational policy-making are no less significant for international criminal law and its enforcement than for domestic criminal process. PIL is awash with non-binding legal instruments and materials, such as United Nations General Assembly resolutions, International Law Commission (ILC) reports and working papers, multilateral draft conventions, accords, codes, guidelines and other indicia of 'state practice', a great many of which concern criminal justice issues (Bassiouni, 1994). The European Union's expanding portfolio of activities in the field of Justice and Home Affairs is another energetic contributor of soft law instruments bearing on the formation and implementation of criminal justice policy in the 27 EU Member States, and beyond via the European Union's 'external relations' (foreign policy) agenda. The European Union, for example, is a major sponsor of the ICTY, and the Tribunal dangles the carrot of potential European Union membership to coax reluctant governments in Belgrade and Zagreb to comply with its requests for indictees to be arrested and transferred to The Hague.

Frontline professionals' decision-making and conduct is typically motivated by 'third-tier' directives, such as police force orders, prosecutorial codes or military training manuals (which are not necessarily publicly available), rather than by primary legal rules or secondary delegated legislation. Sometimes 'policy' is not even written down; occasionally it is not written down *on purpose*. Unwritten operational policies occupy the shadow-lands of informal agreements, institutionalised routines, shared professional understandings, and taken-for-granted cultural assumptions. A striking recent example is the highly controversial policy of 'extraordinary rendition' (Weissbrodt and Bergquist, 2006),[52] whereby suspected terrorists have allegedly been handed over by Western powers to friendly jurisdictions with brutal policing methods, in order to circumvent domestic legal restrictions on torture—a backhanded compliment to American civil liberties and European human rights law, which simultaneously exposes the inadequacies of regionally discrepant approaches to human rights protection.

Comparative Law is an essential practical resource at all levels and in all phases of formal and informal operational policy-making and mutual judicial assistance. Towards the more formal end of international judicial co-operation, for example, extradition proceedings require judges to undertake comparative assessments of the compatibility of criminal laws in the requesting and requested states. This is not necessarily a straightforward textual exercise: concepts, terminology, rules and doctrines encountered in domestic criminal legislation must be interpreted

[52] R Verkaik: 'The Big Question: What is Extraordinary Rendition, and What is Britain's Role in it?', *The Independent*, 8 June 2006.

holistically against the background of a distinctive national legal culture and tradition, itself dynamically responsive to social pressures and political events and increasingly moulded by extra-territorial normative influences, prominently including IHRL. Proceedings to extradite Senator Pinochet from the United Kingdom,[53] for example, turned in part on a somewhat convoluted legal analysis to ascertain whether internationally-proscribed torture had been a crime in English law at the material time (see Boister and Burchill, 1999). Likewise, transborder co-operation in police investigations must be informed by an appreciation of comparative criminal procedure, in order to satisfy proof-taking requirements and comply with evidentiary standards observed by the requesting state or tribunal. Despite a notable modern trend towards convergence (Safferling, 2001; and Bradley, 1993), rules of criminal procedure and evidence still differ markedly across legal jurisdictions, both national and international. The English courts, for example, have deprecated informal collaboration between national police forces designed to circumvent the inadequacies of existing extradition arrangements by deceit.[54] Israeli courts[55] and the United States Supreme Court,[56] on the other hand, do not regard even outright kidnapping as fatal to the successful prosecution and conviction of suspects identified and apprehended extra-judicially. Police officers of all ranks involved in international mutual judicial assistance need to be alive to these comparative legal distinctions.

Socio-legal studies of national criminal justice processes have frequently emphasised the ubiquity of *operational discretion*. From the informal 'working rules' of their occupational culture, police officers learn where to patrol or watch, the cues constituting 'suspicious' behaviour, which vehicles to stop and search, when to effect an arrest or, alternatively, settle for 'having a quiet word', when to interview a witness or suspect, how to handle informants, etc. Local variations in occupational culture virtually guarantee that comparative understanding will be a significant operational asset in co-ordinating transborder co-operation and international policing networks. Similar considerations apply to international co-operation between prosecutors, defence lawyers, judges, penal administrators, and military personnel, and in every sphere of informal operational policy-making and mutual judicial assistance. For as President George W. Bush recently reflected: 'Not everybody thinks the exact same way we think. Different words mean different things to different people'.[57]

[53] *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International and others intervening) (No 3)* [2000] 1 AC 147 (HL).

[54] See *R v Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42 (HL); see also *R v Mullen (Nicholas Robert) (No 2)* [2000] QB 520 (CA).

[55] *Attorney General of Israel v Eichmann* (1961) 36 ILR 5 (Isr DC, Jerusalem); aff'd, (1962) 36 ILR 277 (Isr Sup Ct).

[56] In *US v Alvarez-Machain* (1992) 504 US 655 112 S Ct 2188 a 6-3 majority of the United States Supreme Court held (*per* Rehnquist, CJ) that although it might be true that the

> respondent's abduction was 'shocking'... and ... in violation of ... international law ... The fact of respondent's forcible abduction does not therefore prohibit his trial in a court in the United States.

[57] S Blumenthal: 'A Pantomime President', *The Guardian*, 18 July 2006.

Harmonising National Criminal Laws

Legal harmonisation lies at the more ambitious pole of international co-operation in criminal justice and penal affairs. Experience suggests that progress is best achieved by facilitating incremental assimilation of domestic criminal laws rather than by sweeping legislative schemes. Criminal law, in contrast to the law of commerce, property entitlements or even civil wrongs, tends to encapsulate a nation's fundamental political, social, moral and religious commitments, which states will not readily compromise for the sake of international uniformity. Nonetheless, through a series of United Nations-sponsored 'suppression conventions', and in softer legal instruments such as minimum standards for the treatment of detainees and indicative codes of professional conduct for police, prosecutors and judges,[58] a measure of convergence in domestic criminal law and practice has been promoted.

Gradual, piecemeal assimilation respects national sovereignty and acknowledges the reality of international law as a devolved and potentially dysfunctional system. Even the ICC Statute, the most unified and comprehensive system of international criminal law ever implemented, still defers to national variation within the loose parameters of complementarity. On a broader view of ICrimL, it is possible to find further examples of harmonisation of national laws through vertical legal integration within the European Union (generally, see Baker, 1998; and Peers, 2000). First pillar EC law, including competition law enforced by penal fines, is binding in Member States and takes precedence over conflicting national law.[59] Domestic criminal legislation infringing European Community rights may incur public liability to compensate affected parties.[60] And the exercise of discretionary powers by officials, including operational policy-making by senior police officers (Baker, 2000), must a fortiori be consistent with European Community prescriptions.

Other developments are more ad hoc and uneven in their impact. The *Corpus Juris* (Delmas-Marty and Vervaele, 2000) was an ambitious attempt to design a European-style criminal 'code', comprising both substantive offence definitions and procedural rules, to regulate European Union fraud (see Kuhl, 1998). Like the ill-starred European Union Constitution (which also contains provisions affecting criminal law and process), efforts to implement the *Corpus Juris* currently appear to have stalled. However, related initiatives have been taken forward, notably the adoption of a pan-European Arrest Warrant.[61] With mounting pressures for closer legal cooperation between Member States to combat fraud, illegal immigration, people trafficking, drug-smuggling, cross-border arms running, and—above

[58] See, eg http://www.uncjin.org/Standards/standards.html.

[59] *Costa v ENEL* [1964] CMLR 425 (ECJ).

[60] *R v Secretary of State for Transport, ex parte Factortame Ltd (No 5)* [2000] 1 AC 524 (HL).

[61] EC Framework Decision 2002/584/JHA on the *European Arrest Warrant and the Surrender Procedures between Member States* came into force on 1 January 2004 in those eight Member States (including the United Kingdom) which had satisfied the agreed implementation criteria.

all—international terrorism, the impetus towards integration and harmonisation of Member States' domestic laws is bound to intensify. Although regional examples of harmonisation in ICrimL are by definition geographically restricted, the extent of legal integration in criminal justice and penal affairs already achieved by Western European powers is unparalleled around the globe.

Comparative Law and legal method are indispensable resources for projects of legal harmonisation (Delmas-Marty, 2003). Pre-existing national laws must be surveyed, collated and subjected to critical examination as essential preliminaries. The tantalising prospect of harmonisation has inspired Comparative Law since its formative years (Clark, 2001: Part VI), and contemporary developments in international criminal law, including the European Union initiatives just mentioned, retain a strong comparative ethos (see, eg van den Wyngaert, 2001). The uncertain fate of the *Corpus Juris* testifies to the political obstacles standing in the way of fully-fledged supra-national vertical integration in domestic criminal legislation, even amongst broadly similar, economically developed, geographically proximate, secularised western democracies. One size invariably does *not* fit all. Successful programmes of legal harmonisation need to work with the grain of national legal traditions, and even sometimes to accommodate their foibles—so long as local variations are substantially consistent with the overall scheme. Without rigorous planning incorporating comparative legal analysis, however, projects of legal harmonisation are almost guaranteed to fail, even with committed political sponsorship.

Research, Analysis and Critical Evaluation

We have been exploring Comparative Law's contributions to international criminal justice predominantly from the perspectives of policymakers and practitioners (and policy-maker practitioners): legislators, government ministers, diplomats, civil servants, judges, lawyers, police, military commanders, armed services personnel, and the rest. Here we emphasise the scholarly component of ICrimJ, its seventh 'concentric circle'. ICrimJ needs to develop a systematic research base underpinned by mature theoretical inquiries, and Comparative Law and legal studies should be in the vanguard of this trail-blazing intellectual endeavour.

Comparative legal studies contribute to ICrimJ on every (inter)disciplinary front. Comparative lawyers have applied their research methods and data to illuminate the fundamental character of law and legality (Twining, 2000; and Glenn, 2004). A growing body of impressive work in the overlapping fields of comparative criminology and comparative criminal justice studies is making a determined effort to push Criminology beyond its traditional state-based comfort-zone (eg Sheptycki and Wardak, 2005; and Nelken, 2000). Comparative analyses of legal institutions today figure in Politics and IR textbooks (eg Christiansen, 2005) and curricula. Comparative histories of criminal justice have been written (Godfrey, Emsley and Dunstall, 2003). The philosophy of punishment has been enriched

by comparative studies of criminal justice policy-making (Rutherford, 1996; and Garland, 2001; but *cf* Zedner, 2002), distinctive cultures of penality (Whitman, 2003), and the legal regulation and practical realities of penal treatment (Lazarus, 2004).

Conventional disciplinary taxonomies are stretched beyond breaking point by these novel conjunctions. Is a comparative study of the evolution of criminal procedure (*cf* Vogler, 2005) 'really' Comparative Law, Legal History, Criminology, Criminal Justice, all of the foregoing, or none of the above? Does it matter? Howsoever characterised, comparative legal theory, method, and research are manifestly integral to theorising, researching, advocating and institutionalising international criminal justice. When Comparative Law's contributions are not strictly unique, in the way of original empirical data or *bona fide* jurisprudential innovation, they nonetheless reinforce the multiple strands of ICrimJ's incomparably interdisciplinary constitution.

IV. SUMMARY AND CONCLUSIONS

Any research project can usefully be broken down into three foundational questions, which may be conceptualised, meta-methodologically (ie specifying the method of method), as an 'eternal triangle' of intimately interrelated, mutually conditioning considerations. First, the 'Question of Subject-Matter' concerns issues of taxonomy and conceptual definition. Secondly, the 'Question of Motivation' asks why the inquiry is worth undertaking and what one hopes to gain from it. Thirdly, the 'Question of Method' raises issues of methodological perspective and technique. The eternal triangle, in short, specifies the What?, Why? and How? of intellectual inquiry. To recap and conclude, let us apply this explanatory framework to the argument developed in this chapter.

To claim that Comparative Law is capable of making unique and indispensable contributions to international criminal justice might be regarded as puzzling on many levels. Most profoundly, neither 'Comparative Law' nor—still less—'international criminal justice' are terms with settled or transparent conventional meanings. Much of this chapter was consequently given over to taxonomy and conceptual definition in an effort to clarify the 'Question of Subject-Matter'. Comparative Law is plainly something to do with comparison and something to do with law, but it is not particularly illuminating to extend the label to all juridical comparisons of any description. Cross-jurisdictional comparisons between domestic national laws are the paradigm case. Yet the simple 'compare and contrast' model, conceptualising national legal systems as two discrete units of analysis, has been vastly complicated by modern law's promiscuously cosmopolitan tendencies, facilitated and reinforced by growing experimentation in supra-national legal regulation.

International criminal justice is controversial to its core. Many have denied its existence, and even scoffed at the suggestion. Rather than trying to formulate and defend a particular stipulative definition, this chapter explored the notion

of 'international criminal justice' through a series of seven 'concentric circles', starting with the core activities of international criminal tribunals and fanning out into the hinterlands of transnational legal co-operation, national trials of international criminality, and related—both visionary and parasitic—scholarly commentaries and research. Sceptics might say that appeals to international criminal justice are really just the latest disingenuous apologetics for national self-interest, international finance capital, neo-colonialism or Western cultural imperialism. What can no longer be claimed, however, is that international criminal trials are a logical impossibility, or that political and military leaders can bank on impunity for atrocities, or that nobody will ever be convicted of genocide, or that rape will never be taken seriously as a war crime, or that the international community will forever sit on the sidelines wringing its hands. The very existence of the ICC, building on the unprecedented achievements of the ICTY and ICTR, demonstrates that (for all their admitted weaknesses and deficiencies) recent institutional and normative developments in international criminal justice have major significance for legality, for justice, for world peace, and—it is no exaggeration—for the future of humanity on this earth.

The 'Question of Motivation' barely requires extended examination in the light of these remarks, and this chapter's content. Why should one take an interest in the Holocaust and post-Second World War trials of Nazi war criminals, or in endeavours to resolve ethnic conflict in the Balkans, or in internationally-co-ordinated efforts to rescue the Great Lakes region of Africa from the fires of the Rwandan genocide—'one of the defining events of the twentieth century'[62]? Why be concerned about the ICC Prosecutor's investigations in northern Uganda and the Darfur region of Sudan, or the fate of child soldiers in Sierra Leone, or the outcome of the trial of Saddam by the Iraqi High Tribunal? To readers who already care passionately about promoting law, justice, human rights and human dignity at home and abroad, the answer will be all-too-painfully obvious. Those less secure in their convictions might profitably meditate on this epistemological and existential conundrum: what else could possibly matter, if these things don't? Once upon a time, it might have been possible for governments virtually to ignore foreign affairs whilst concentrating on improving national well-being within secure frontiers. But those days of Splendid Isolationism are gone. Drugs barons, people-smugglers, white-slavers, black-market arms traders, political insurgents and suicide bombers testify with one voice to this implication of globalisation: there is no rigid distinction between national and international criminal justice, just as there can be no 'domestic policy' hermetically sealed off from 'foreign policy'. There is only justice, and policy, in a global context, just as there is only a single human family to make this one world our home.

[62] Human Rights Watch (2004) *Leave None to Tell the Story: Genocide in Rwanda*. www.hrw.org/reports/1999/rwanda/index.htm.

If international criminal justice matters profoundly, and if Comparative Law might potentially make unique and indispensable contributions to its ultimate realisation, then this virtuous conjunction should be explored and explained, and its significance widely advertised. The strength of Comparative Law and legal scholarship lies in its distinctive methodologies, which brings us to the third point on the eternal triangle. *How* does Comparative Law contribute to international criminal justice? By extending comparative method, perspectives and insight into every phase and corner of international criminal justice policy-making and practice, including institutional design, legislation, adjudication, operational policy-making and transborder co-operation in policing, mutual judicial assistance, legal harmonisation, and scholarly theorising, commentary and research.

The precise nature and extent of Comparative Law's overall contribution to international criminal justice turns on questions of conceptual definition. My own preference for broadly inclusive conceptualisations has the congenial implication of maximising Comparative Law's potential in this respect. But those who prefer more orthodox conceptions of Comparative Law, or are disinclined to venture beyond the inner circles of international criminal law and practice, should still conclude, on the evidence of this chapter, that Comparative Law's contributions to international criminal justice are potentially both indispensable and unique.

QUESTIONS FOR DISCUSSION

1. What distinguishes 'international criminal law' from 'international criminal justice'? When, and why, are the differences important?
2. What, if anything, distinguishes international criminal justice from International Criminal Justice? Or international criminal law from International Criminal Law?
3. In what ways, and to what extent, can Comparative Law contribute to international criminal justice? (How are you defining 'Comparative Law'? How does your definition of 'Comparative Law' affect your answer to the original question? Would you like to reconsider your definition of 'Comparative Law' in the light of its implications for the relationship between Comparative Law and international criminal justice? Why (not)?)
4. Is there any (interesting, non-trivial) sense in which international criminal law is *not* comparative?
5. Are there any significant aspects of international criminal justice that comparative legal method cannot explain, or important questions it cannot answer?
6. Is disciplinary taxonomy completely arbitrary? Is conceptual analysis just sterile logic-chopping? Why (not)?
7. What is the 'eternal triangle' of intellectual inquiry? Can you apply it to illuminate any other research topic or question mentioned in this book? Or any other research topic or question you can think of?

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