
The Rise of International Criminal Law: Intended and Unintended Consequences: A Reply to Ken Anderson[†]

Amrita Kapur*

Professor Ken Anderson's essay is 'an unabashed survey, in a short space' (at 332), which 'surfs rather than dives' (at 358), in order to allow the reader to appreciate 'just how breathtakingly broad the horizon of our rising system of international criminal law turns out to be' (at 358). The concomitant risk of this approach is to mischaracterize the analysed phenomena by neglecting issues which fundamentally affect them. Highlighting counter-arguments and considering contradictory evidence, however briefly, would have been one way to canvas, albeit not capture, the complexity of the issues and avoid excluding critical aspects of international legal developments.

The humanization and individualization of international humanitarian law (IHL) lie at the heart of the rise of international criminal law (ICL). Anderson conspicuously fails to consider human-

ity as *the* foundational IHL principle in his argument in favour of reciprocity, the right to judge conditional on intervention, and his claim of a trend away from intervention. This article does not comprehensively address the process or driving forces behind the humanization of international law, which have promoted a trend *towards* intervention away from the historical post-Westphalian presumption of non-interference.

Briefly, it bears noting that Anderson's depiction of passive neutrality presumes that the ICC's existence reduces the pressure to intervene that would otherwise exist (at 334), when in fact international politics is evolving from a position of a complete lack of expectation, let alone pressure, to intervene. Veto power dynamics responsible for the lack of intervention in Sudan today are equally to blame for past failures to intervene in situations of massive human rights abuses. The use of the veto power predates the rise of ICL, has defined the Security Council since its inception, and is likely to remain a reflection of the political, military and economic interests that continue to dominate international decision-making. The humanization of international law prompted a

[†] Anderson, 'The Rise of International Criminal Law: Intended and Unintended Consequences', 20 *EJIL* (2009) 331, <http://ejil.oxfordjournals.org/cgi/reprint/20/2/331>.

* Visiting Fellow, International Center of Transitional Justice. Email: amrita.k@nyu.edu.

departure from neutrality as the de facto position in international affairs towards a position of condemnation of international crimes, which is still unfortunately coupled with passivity in action. Anderson's legitimate concern as to whether time will close this discrepancy may be answered to some extent through an analysis of the development of individual criminal responsibility in international law.¹

Section 1 of this reply describes the reasons why IHL preferences humanity over reciprocity and the unacceptable risks of relying on alternative principles to limit suffering in armed conflict. Section 2 discusses neutrality as a preferred prerequisite for 'the right to judge' over being a 'just' party.

1 Humanity in IHL

A *Humanity versus Reciprocity*

The principle of humanity, which recognizes that all people have equal dignity, is the cornerstone of contemporary IHL customary and treaty law.² The International Committee of the Red Cross (ICRC) defines humanity operationally as the endeavour to 'prevent and alleviate human suffering wherever it may be found', with the purposes of protecting life and health, and ensuring respect for the human being.³ In contrast, reciproc-

ity provides, 'the failure of one side to hold to the law releases the other side to respond in kind' (at 340).

IHL was developed to address, and is still defined by, the enduring tension between reciprocity and humanity permeating all decisions regarding the conduct of hostilities. This dichotomy has shaped, and limited, the effectiveness of IHL: historically, there was no method of enforcement external to the parties⁴ and no incentive to comply with IHL apart from the interests of humanity. Moreover, parties to conflicts and humanitarian NGOs continue to have diametrically opposed interests in the instrumentalization of IHL.

It is immediately curious that in discussing the decline of reciprocity, Anderson draws on proportionality, deterrence and military necessity but does not refer to humanity as a competing rationale dictating standards in armed conflict. His conclusion, that 'reciprocity still matters' (at 343), is made without any reference to the importance, or even the relevance, of the principle of humanity. And yet, 'humanization' has profoundly modified states' conduct during armed conflict. Various weapons inflicting unnecessary suffering have been prohibited by treaty and customary law, and are no longer used; the wholesale bombing of cities is no longer a routine method of attack; and members of armed forces are not killed when opportunity allows it, but instead are detained. This is not to say compliance is universal, but rather, that despite increasing capacities to inflict suffering, the employment of weaponry, tactics and strategies has nevertheless

¹ See Kapur, 'Humanity as the A and of Sovereignty: Four Replies to Anne Peters', 20 *EJIL* (2009) 560.

² See 1868 St Petersburg Declaration and Article 3 Common to the four Geneva Conventions.

³ ICRC, 'The Fundamental Principles of the Red Cross and Red Crescent', ICRC publication 1996 ref.0513, [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0513/\\$File/ICRC_002_0513.PDF](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0513/$File/ICRC_002_0513.PDF), 2.

⁴ See Posner, 'A Theory of the Law of War', 70 *U Chi L Rev* (2003) 297.

been limited, and the pool of legitimate targets also circumscribed. International criminal law has subsequently not only undermined reciprocity, but stressed its irrelevance, 'particularly in relation to obligations found within international humanitarian law which have an absolute non-derogable character'.⁵

The concern with this approach is that a 'more humane war may be one that is more likely to occur and more likely to persist once it begins',⁶ whereas inhumane conduct and weaponry may be effective deterrents to the very initiation of war because of the potential level of predicted suffering. However, as Theodor Meron notes, there is no certainty that 'harsher laws of war would either discourage wars or shorten them'.⁷ Reciprocity in practice belies equality between states, because there is no legal mechanism to check militarily advanced states' actions. Knowledge of an adversary's less advanced military capabilities or overstretched resources would allow a stronger state to act without fear of reprisal and its armed forces members to act with impunity, leading to violations of IHL.⁸

The 'humanization' of international legal obligations has eroded the role of reciprocity in the application of international humanitarian law over the last century:⁹ the question underlying a

claim of reciprocity's efficacy is whether reciprocity may more effectively curb the extent of suffering caused by armed conflict. The three principal arguments invoked by Anderson in support of reciprocity – military necessity, influencing non-state actors and honour – also illustrate exactly why reciprocity is inherently problematic as a principle to limit suffering in conflict.

B Military Necessity

The principle of military necessity justifies reprisals, as the most common manifestation of reciprocity, on the basis that belligerents cannot be compelled to be disadvantaged in conflict. Anderson foreshadows the first problem with this system: it 'only works if there is a common understanding between the two sides as to the meaning communicated by proportionate and similar retaliation' (at 341). That is, the effectiveness of reprisals is predicated on 'certainty about which actions rightly trigger a reciprocal response and which responses are properly reciprocal rather than violations themselves'.¹⁰ This is a dangerous assumption to rely on in times of conflict: trust between the parties is seriously degraded;¹¹ states are required to determine lawfulness under extreme time constraints, political pressure and military threat; then they are obliged to ensure the reprisal is proportional to the

⁵ *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, §511.

⁶ Posner, 'Terrorism and the Laws of War', *Chicago Journal of International Law* 5 (2005), 426.

⁷ Meron, 'The Humanization of Humanitarian Law', 94 *AJIL* (2000) 241.

⁸ Posner, *supra* note 6, at 429.

⁹ *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, §518.

¹⁰ D. Jinks, 'Humanization and Individualization in the Enforcement of International Humanitarian Law', *ILJ International Legal Theory Colloquium Spring 2009: Virtues, Vices, Human Behavior and Democracy in International Law*, <http://www.ilj.org/courses/documents/2009Colloquium.Session1.Jinks.pdf>, 7.

¹¹ *Ibid.*, at 2.

initial breach and executed only after an unsatisfied demand for reparations has been made.¹² This ratcheting down renders any reprisal susceptible to varying interpretations of lawfulness: retaliation is more likely to be interpreted as a violation, which risks a reciprocal violation, and a downward ‘spiral into unmitigated barbarity’.¹³

State military interests should not be assumed to align with the high standards of conduct prescribed by humanity. Recent history confirms that liberal democracies are equally capable of justifying lowered standards and procedural safeguards to achieve military ends¹⁴ in what has been termed the ‘cancerisation of the legal system’.¹⁵ For example, the USA torture memos demonstrate executive willingness to ignore a *jus cogens* norm prohibiting torture and accept unnecessary suffering in the pursuit of military advantage. Military necessity eradicates baselines and misguidedly places faith in decision-makers who are institutionally predisposed to view adversaries’ actions as unjustified – a combination conducive to reciprocal violations and blatantly inadequate to safeguard humanity.

C Non-state Actors

The second problem with reciprocity relates to flawed assumptions in predict-

ing behaviour of non-state actors likely to breach IHL, particularly in conflicts involving identity politics. Humanization has coincided with a dramatic reduction in inter-state conflict: today, the overwhelming majority of conflicts involve at least one non-state armed group, and often several; and intrastate conflict has been the most common form of conflict since World War II.¹⁶ Accordingly, the more pressing contemporary challenge is securing compliance from non-state actors not bound by the same laws nor subject to the same pressures as states. Anderson suggests that reprisals on groups that consistently violate IHL ‘*might* have had an influence upon Hamas and Hizbollah’s behaviour’ (at 342) as opposed to a law of war that rewards defending forces for recognizing that war crimes against their own civilians are the best strategy against a powerful but scrupulous enemy.¹⁷

However, the efficacy of deterrence depends on underlying presumptions about motivations, incentives, and the likely response to reprisals, which do not necessarily apply to non-state actors whose motivations to participate in, and experiences of, conflict differ from states. Firstly, deterrence results from a rational calculation of prospective gains and losses which often, but not always, corresponds with states’ decisions to initiate, continue or withdraw from an offensive

¹² Hampson, ‘Belligerent Reprisals and the 1977 Protocols to the Geneva Conventions of 1949’, *ICLQ* 37 (1988), 823.

¹³ Jinks, *supra* note 10, at 7.

¹⁴ International Commission of Jurists (ICJ), Eminent Jurists Panel, ‘Report on Terrorism, Counter-Terrorism and Human Rights: Assessing Damage, Urging Action’ (2009), available at http://ejp.icj.org/hearing2.php3?id_article=167&lang=en, at 12.

¹⁵ *Ibid.*, at 157.

¹⁶ Uten Riks Department, Halvard Buhaug, Scott Gates, Håvard Hegre and Håvard Strand, Centre for the study of civil war, International Peace Research Institute, Oslo, *Global Trends in Armed Conflict*, <http://www.regjeringen.no/nb/dep/ud/kampanjer/refleks/innsspill/engasjement/prio.html?id=492941>

¹⁷ Anderson, ‘Who owns the rule of war?’, *The New York Times*, 13 April 2003.

operation. Non-state groups *may* apply similar logic, but it is more likely that the non-state groups most likely to commit IHL violations will not. A brief survey of conflicts in Sri Lanka, Colombia, Northern Ireland, Chechnya and the Middle-East suggests that non-state causes often go beyond rationally pursuing political power and territorial autonomy to encompass ethnic, religious and social identity.¹⁸

For example, the increased use by non-state groups of suicide bombers, particularly women, to target civilians reflects vastly different motives held both by the command structure, and by participating individuals. The very endorsement of tactics resulting in certain death reflects a cost-benefit analysis which views loss of human life as inevitable and inherently proportionate to the ultimate goal. The dramatic increase in female suicide bombings has been variously attributed to revenge for lost family members, the hope that the sacrifice will improve the future, and protest against the loss of family and the breakdown of society as a result of conflict. Reprisals are an ineffective deterrent to individuals who participate in armed conflict and violate IHL for personal reasons not captured in a conventional cost-benefit analysis.

Secondly, reprisals are collective sanctions to the extent that they target a command structure better positioned to monitor and control the individual wrong-doer than the sanctioning agent.¹⁹ Derek Jinks identifies two ways

in which collective sanctions are likely to reduce compliance with IHL: firstly, they increase the entitativity of a group, which in turn increases individual social identification with the group,²⁰ particularly since this results in perceived victimization during conflict;²¹ and secondly, they increase the glorification of the in-group, even if atrocities are committed, against members of an out-group.²² Jinks notes that 'some evidence suggests that this process is also strongly associated with dehumanization of the victims of in-group acts'.²³

Jinks concludes, '[e]ven if inter-belligerent enforcement is the most important axis along which to enforce IHL and even if any such enforcement scheme requires some form of reciprocity, the humanization and individualization exhibited in the Geneva Conventions better capture the advantages of this approach while minimizing the disadvantages'.²⁴ Arguably, President Obama's recent decision to close Guantanamo Bay reinforces this logic: he characterizes tor-

¹⁸ See Abrahms, 'What Terrorists Really Want: Terrorist Motives and Counterterrorism Strategy', 32(4) *International Security* (2008), 78.

¹⁹ Jinks, *supra* note 10, at 8.

²⁰ See, e.g., Simona Sacchi, *et al.*, 'Perceiving One's Nation: Entitativity, Agency and Security in the International Area', *International Journal of Psychology* (2008): 'Entitativity' – an increasingly well-studied psychological phenomenon – refers to the extent to which a group is considered an actual entity with purpose and agency; see Jinks, *supra* note 10, at 8.

²¹ See Munoz-Rojas and Fresard, 'The Roots of Behavior in War: Understanding and Preventing IHL Violations', 86 *Int Rev Red Cross* (2004) 189, [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0854/\\$File/ICRC_002_0854.PDF](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0854/$File/ICRC_002_0854.PDF)

²² See, e.g., Castano, 'On the Perils of Glorifying the Ingroup: Intergroup Violence, In-group Glorification, and Moral Disengagement', 2/1 *Social & Personality Psychology Compass* (2008) 154; cited in Jinks, *supra* note 10, at 9.

²³ *Ibid.*, at 9.

²⁴ *Ibid.*, at 14.

ture techniques and Guantanamo Bay as recruitment tools for terrorists, as incentives to mistreat captured US soldiers, and as rallying cries for US enemies.²⁵ The radical change in policy reflects an acknowledgement that violations of international standards on a reciprocal *tu quoque* basis cannot be justified either morally or practically.

D Honour in Armed Conflict

In preference to a contractarian view of reciprocity, Anderson supports 'reciprocal obligations of soldiers' relating to their professional role and social relations based on the concept of honour (at 341). Much more has been written about honour than can be discussed here, but at the very least, it is clear that honour is not a sufficient 'medium for enforcing decency on the battlefield'.²⁶

The sociological reality that exists in opposition to honour, and permeates even professional armed forces, is the persistent dehumanization of adversarial forces. The atrocious abuses of Abu Ghraib and Guantanamo are not the result of a failed chain of command, or rogue individuals acting outside the acceptable code of conduct: they are symptoms of a 'rationalized system of violence'.²⁷ This phenomenon is not recent, nor is it exclusive to the US armed forces – it is a universal trend powerfully demonstrated in social

psychological experiments and also recognized by the ICRC. For example, Zimbardo's (1972) college prison experiment was infamously aborted after students role-playing guards exhibited such cruelty that Zimbardo feared the students role-playing 'prisoners' would suffer mental and physical harm. The research challenged the 'bad apple' thesis, and has been invoked to explain the systemic nature of abuses inflicted by soldiers on enemy forces.

Stanley Milgram's (1974) renowned experiment produced equally disturbing results: in certain conditions, 65 percent of participants delivered what they believed to be a 450-volt electric shock capable of killing a person, in response to an order from someone in authority. A 2009 modified replication found almost identical obedience rates, while meeting more demanding contemporary ethical standards and fully informing participants.²⁸ It seems that even 'ordinary people, simply doing their jobs, and without any particular hostility on their part, can become agents in a terrible destructive process . . . even when the destructive effects of their work become patently clear, and they are asked to carry out actions incompatible with fundamental standards of morality, relatively few people have the resources needed to resist authority'.²⁹

A 2004 ICRC applied sociological study found: group membership inevitably generates prejudices, simplifications

²⁵ Office of the Press Secretary, The White House, Remarks by the President on National Security, Washington DC, 21 May 2009, http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/

²⁶ Anderson, 'First in the Field', 31 July 1998, *Times Literary Supplement* no. 4974 (1998), 4.

²⁷ Hooks and Mosher, 'Outrages against Personal Dignity: Rationalizing Abuse and Torture in the War on Terror', 83 *Social Forces* (Jun., 2005) 5.

²⁸ Burger, 'Replicating Milgram: Would People Still Obey Today?', *American Psychologist* (January 2009).

²⁹ Milgram, 'The Perils of Obedience', *Harper's Magazine*, abridged and adapted from his *Obedience to Authority: An Experimental View* (1974).

and discrimination, all of which are exacerbated when another group is declared to be the enemy; a cycle of vengeance leads victimized combatants to commit IHL violations which initiates a downward spiral of violence;³⁰ and willingness to obey authority is further reinforced by a military hierarchy which institutionally supports demonization and dehumanization of the enemy, resulting in moral disengagement.³¹ The conclusion, that 'the perception that there are legal norms is more effective than the acknowledgement of moral requirements in keeping combatants out of the spiral of violence',³² further undermines the claim that honour is an effective sociological code of conduct.

Psychological and sociological research comprehensively describes the contours of these phenomena, and the inevitability of their occurrence without legal codification and enforcement. Violence is practised across time and context by one group against another to 'dramatize the fact that the human community and its ties extend only to a certain limit, and that persons outside are alien and subordinate'.³³ Social norms are easily distorted, and a 'culture of the professional honor of soldiers, [which determines] what they are willing or not willing to do on the battlefield'³⁴ has an extremely limited protective capacity.

The shortcomings of honour as an effective code of conduct are most obvious in egregious acts which cannot be justified on any grounds – not by military necessity, nor proportionality, nor deterrence – such as rape and sexual violence. Despite its long-standing status as a crime under customary international law and IHL,³⁵ 'in many conflicts, some soldiers, perpetrators, and world leaders viewed rape as a fringe benefit of war, an unspoken perk':³⁶ before 1994, honour did not prevent the systemic and widespread commission of crimes of rape and sexual violence in armed conflict. Anderson refers to the reciprocal obligations of soldiers on the basis of honour, but surely honour should also protect those who are unable to defend themselves, and not only those who have the capacity to reciprocate with dishonourable violations? Yet honour comprehensively failed to address the acceptance and practice of sexual violence by members of regular armed forces in countless conflicts, either through internal military proceedings or through independent inquiries or prosecutions.

Conversely, in many conflicts, including the genocides in Bangladesh, Rwanda and Yugoslavia, 'sexual violence is seen as a crime of honor, an act against the community not the physical integrity of the individual

³⁰ The ICRC noted there is a high rate of 'victimization' (being victims of violence) among armed combatants; Munoz-Rojas and Fresard, *supra* note 21, at 7.

³¹ See *ibid.*, at 18.

³² *Ibid.*, at 18.

³³ Collins, 'Three Faces of Cruelty: Towards a Comparative Sociology of Violence', 1 *Theory and Society* (1974) 420.

³⁴ Anderson, *supra* note 26, at 8.

³⁵ See e.g., 1863 Lieber Code, 1907 Hague Convention No. IV concerning the Laws and Customs of War on Land.

³⁶ D. J. Scheffer, *Ambassador-at-Large for War Crimes Issues Remarks*, Fordham University New York, October 29, 1999, <http://www.converge.org.nz/pma/arape.htm>

victim.³⁷ '[D]uring ethnic conflict, rape and sexual violence become strategies for . . . assaulting the honor of the community'.³⁸ Paradoxically a soldier's perceived 'honour' in armed conflict may depend on the active destruction of the 'honour' vested in women of the adversarial party.

Only after intensive NGO lobbying at the *ad hoc* tribunals were crimes of rape and sexual violence finally punished as international crimes.³⁹ Only through ICL, were accepted norms challenged and standards of conduct modified to conform to the requirements of humanity. Honour, therefore, is an inadequate method in times of conflict of reducing suffering and ensuring respect for human dignity. This is not to say that ICL has eliminated crimes of sexual violence in armed conflict; but it has facilitated the identification of such conduct as a crime, condemned its commission, and brought about convictions and sentences for perpetrators. Modifying international standards in turn catalysed military forces to reform internal regulations and enforcement mechanisms. While we may not yet see the uniform application of such laudable reforms, their very existence is owed to legal norms generated by international criminal law.

Reciprocity would matter more if it guaranteed deterrence, and if its assumptions about behaviour were sound. Instead, it stimulates a race to the bot-

tom limited only by a mistaken presumed rational appraisal of military acts and material self-interest undertaken by both sides. Reciprocity, military necessity and honour appeal to military interests and cultures rather than interests of humanity; each is more likely to exacerbate human suffering. In contrast, through the humanization of international law humanity establishes a necessary minimum standard, which has effectively been used to cajole and pressure governments to improve military practices, albeit imperfectly.

2 The Value of Neutral Justice

A Neutrality Explains Why the 'Right to Judge' Should Not Flow from Intervention

Anderson's claim of an 'earned right' to administer justice is contrasted with an ideal of neutrality which in this context implies restraint in actions that advantage one side of the conflict over another. He gives preference to victor's justice over the 'moral poverty of neutrality', claiming 'it would have been morally monstrous to have entertained the idea of turning [the Nazi leadership] over to neutrals for trial'.⁴⁰

For the purposes of this discussion, criminal justice denotes the process of evaluating properly admitted evidence

³⁷ R. Coomaraswamy, UN Special Rapporteur on Violence Against Women, Lecture delivered at the Third Minority Rights Lecture on 25 May 1999 at Hotel Intercontinental, Geneva. <http://www.sacw.net/Wmov/RCoomaraswamyOnHonour.html>

³⁸ *Ibid.*

³⁹ *Prosecutor v Akayesu*, ICTR -96-4-T, Judgment, §5.5.

⁴⁰ Anderson, 'Humanitarian Inviolability in Crisis: The Meaning of Impartiality and Neutrality for U.N. and NGO Agencies Following the 2003–2004 Afghanistan and Iraq Conflicts', 17 *Harv Hum R J* (2004) 66.

in accordance with criminal law principles and due process rights followed by a determination of guilt and innocence; the former attracting a punishment regarded by law and the community as proportional to the crime/s committed. Anderson's moral conviction that 'a trial . . . puts the symbolic seal of justice on what armies have rectified with force' (at 337–338) displays a preoccupation with a 'just' outcome, at the expense of a just process. Neutrality is conceived merely as a path to impartiality, which equates to a 'certain suspension of judgment about guilt and innocence',⁴¹ despite being rooted in a particular political community.

However, the administration of justice cannot be separate from justice as a concept or an outcome – to abandon justice in the process is to undermine the justness of the outcome, both empirically and normatively. The two distinct categories considered by Anderson are firstly a conventional armed conflict involving states' armed forces, which warrants victor's justice and, secondly, crimes perpetrated by a government against civilians warranting 'humanitarian intervention', which the civilians should be entitled to judge. Thus, the appropriate judge appears not to be the victor, so much as the wronged party.

Forcibly stopping the commission of crimes does not automatically generate the ability to fairly and accurately ascertain individual responsibility for particu-

lar crimes and determine appropriate sentences. It may be self-evident that a defendant is guilty of some crime/s, but the identification of the specific crimes justifying punishment is an independent outcome shaped by the nature and the quality of the trial process. If suspension of judgment is not fully effected then the conclusion of any trial is pre-ordained. The Tokyo and Nuremberg trials were criticized as victor's justice for precisely this reason – the trials were denuded of justice as a process and the foundational presumption of innocence. In contrast, the ICC Trial Chamber's decision to order the release of the first ICC defendant, Thomas Lubanga Dyilo, reflects a fundamental shift in priorities from a 'conviction at all costs', to procedural fairness at all costs.⁴²

Anderson assumes that a fair trial, both in substance and in appearance, is desired, despite the fact that he seems to conceive of justice purely as an outcome and not as a process. To this extent, there remains the question of whether the victor's justice process is capable of guaranteeing a just process. It seems likely that the more horrendous the crimes, the more outraged the community is, and the harder it is to genuinely suspend judgment.

At a domestic level, particularly egregious crimes provoke vengeful community responses often requiring a change in trial venue and the vetting of jurors on the basis of negative pre-trial publicity

⁴¹ Note, however, that Anderson argues that the state should not be neutral or even impartial; *ibid.*, at 67.

⁴² See ICC-01/04-01/06-1418, Trial Chamber I, *Decision on the release of Thomas Lubanga Dyilo*, 02-7-2008, <http://www.icc-cpi.int/NR/rdonlyres/3A01D0E2-39A2-47A9-82EB-012725EBF91E/277765/ICC010401061418ENG.pdf>

to guarantee a fair trial. ‘Victors’ justice’ (which in this context is more appropriately termed ‘victims’ justice’) does not limit this tendency to vengeance but gives it expression through proceedings designed to secure convictions and sentences. If we are to be truly just, then we must be committed to punishing defendants only for what they are guilty for, and allow them the opportunity to prove their innocence. A ‘seal of justice’ that merely vindicates victors’ actions through a wholesale condemnation of the vanquished party’s wrongs, does not provide meaningful truth or justice.

The question is one of scale and degree of distance. International crimes are inherently systematic and on a societal scale – the entire community suffers because of the scale and egregiousness of the violations. When every member of the wronged community is likely to have been personally affected by the crimes, achieving the distance necessary to be impartial may be impossible. There is an essential and central role to be played by those who have been wronged or have proven themselves the victors, but it is not limited to the courtroom. Anderson is convinced that unless ‘an army sits atop its vanquished enemy’ (at 337) the enormity of the crimes left unaddressed by courts mocks justice. This is precisely the point: the courtroom will always be an inappropriate and inadequate tool to reveal the enormity of the crimes. Justice (meaning criminal justice) is not a process designed to produce the most comprehensive and accurate version of the wrongs committed – its purpose is to attribute responsibility to a particular individual for specifically articulated acts on the basis of admitted evidence. Criminal justice systems are simply

ill-equipped to address the totality of criminal conduct encompassed in the commission of international crimes.⁴³ For the victims and society at large, a range of other mechanisms better elicit the truth, recognition for the wrong suffered and prevent recurrence, including truth commissions, reparations, lustration and memorialization. Criminal justice can only ever achieve a very narrow range of goals. These goals are important, and they should be pursued in conditions that maximize the justness of the process and the likelihood of a just outcome. Trials should not, however, be perceived as the only mechanism through which the perpetration of international crimes can be addressed.

B The Myth of the ‘Just’ Party

According to Anderson, the right to administer justice is contingent on showing oneself to be ‘not the neutral, but the just party or the party of the just party’ (at 338). There are two rejoinders to this proposition: firstly, contemporary conflicts render this analysis simplistic; and secondly, a just party in one scenario nevertheless sets a precedent for those who would seek to justify self-interested interventions on a ‘just’ basis for intervention.

The Ugandan, Colombian and Liberian situations are particularly prominent examples where government claims of being the ‘just’ party *vis-à-vis* their protective role of citizens simply do not mirror the facts. Victims’ stories testify to a pattern of violence charac-

⁴³ P. van Zyl, ‘Justice without Punishment,’ in A. Sajo (ed.), *Out of and Into Authoritarian Law* (2003) 53, at 58.

terized by crimes committed both by non-state armed groups upon civilians and government forces which commit comparable crimes upon the population they are entrusted to protect. Intervention on behalf of the civilians may constitute being the party of a just party, but the corollary right is to judge *all* parties guilty of crimes, which is not politically realistic or pragmatically feasible for likely intervening parties. If the Ugandan government genuinely attempts to bring LRA members to justice, reintegrate child soldiers, and provide reparations to victims, are they re-defined a 'just' party, despite the crimes committed by government forces against the civilian population? Transitional justice literature and research indicate that the process of accountability is more complex, and better envisaged as a long-term domestic project than victors' justice would suggest.

Further, the logic of earned justice dictates that the 'Coalition of the Willing', as the victors, have earned the right to judge Saddam Hussein because their actions stopped him committing further crimes. Yet Anderson argues the Iraqis have an 'overwhelmingly first claim on justice against Saddam'.⁴⁴ Is it the victorious or the victimized who have earned the

right? Either party as a determinative body is equally likely to denude the process of integrity and justice and replace it with a mere symbolic seal on punishment.

Humanity is a unifying principle which has catalysed improvements in three different areas of international law and activity discussed by Professor Anderson. The humanization of IHL and ICL has facilitated continuous, if not always consistent, improvement in state conduct during hostilities which could not reasonably be expected of competing norms such as reciprocity, military necessity or honour. Humanity has also driven the growing commitment to fairness to all defendants, irrespective of scale of atrocities likely committed by them. Vesting the right to judge in neutral professionals allows the accurate allocation of individual responsibility for international crimes – it may not achieve perfect justice, but it promotes fundamental principles of criminal justice better than the unachievable 'impartiality' of victor's justice. Professor Anderson's analysis of IHL and ICL is thought provoking, but appreciating the importance of humanity affords a more nuanced and constructive understanding of contemporary developments in international law.

⁴⁴ Anderson, *supra* note 40, at 68.