EXPLAINING MASS ATROCITY THROUGH CULTURE: THE MISSING LINK FOR INTERNATIONAL CRIMINAL JUSTICE

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ABSTRACT

The approach of international courts and tribunals to mass criminality is to examine blameworthiness in isolation of commonly-held beliefs and aspirations of victims and perpetrators, as well as their associated communities. This has allowed political elites to use pertinent legal judgments to exorcise the communities of which a convicted person is a member. This Article argues that anthropological analyses should inform all aspects of the international criminal justice process. Such analyses could be particularly helpful in determining how protagonists' underlying assumptions and external factors affect their beliefs about the types of actions that conflict-ridden societies should take.

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INTRODUCTION

International criminal justice enforcement generally requires that an actor satisfy strict evidentiary burdens of any given crime. Did the conduct of the accused satisfy the *mens rea* and *actus reus* of a crime? This deceptively simple deduction fails to capture the complexities underpinning mass crimes and the collective perceptions of perpetrators and victims.[1] This unspoken context is important because it elucidates the motives behind conduct, which allows the criminal justice system to fully understand *why* crimes occurred and *who* should bear the greatest responsibility. Accusing actor A of committing five murders, for example, is an altogether different proposition from accusing A, an uneducated farmer, of murdering five people because he and fellow clan members were under the common belief that the victims were part of an inferior race intent on destroying their culture. International criminal courts and tribunals rarely, if at all, try to map common cultural beliefs to decipher the complexity of mass crimes committed by multiple actors from the same group. Here, we encounter an interplay between psychology and anthropology. Unlike psychology, which is interested in ascertaining and explaining the inner workings of individuals, anthropology is focused on understanding and translating collective cultural phenomena. There is thus both a qualitative and a quantitative difference between the two disciplines. There cannot be a single psychological evaluation of more than one person because of the inherently unique traits and characteristics of each personality—this of course does not prevent the exposition of theories and conditions of general application. On the other hand, it is natural that shared or common understandings between a group of people (culture) exist in all members of the group, thus rendering them collective phenomena. It is thereafter a matter of appropriate methodology as to how they will be studied.[2] Of course, there is a

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[1] Criminal lawyers have long made use of forensic science, genetics (particularly DNA-related), and psychology/psychiatry in order to understand deviance and the way that criminals think and operate. This has led them to raise valid questions about the role of victims and witnesses, particularly the psychological impact of adversarial proceedings and their effect on memory and eyewitness perceptions among others. *See, e.g.*, BRIAN L. CUTLER and STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY AND THE LAW (1995).

[2] There have been numerous approaches to collective phenomena by non-anthropologists which possess a very solid anthropological dimension, even if not wholly intended. A prominent example is the theory of interpretative communities, coined by Stanley Fish, which posits that actors within a given community (be it social, intergovernmental, or industry-related) share common understandings about the culture and environment of their community and as a result, interpret relevant underlying assumptions in a uniform manner. The transnational arbitration, banking and construction industries no doubt verify Fish's theory. *See* STANLEY FISH, IS THERE A TEXT IN THE CLASS? THE AUTHORITY OF INTERPRETATIVE COMMUNITIES (1980).

great degree of overlap between anthropology and psychology. For example, when we delve into the "perceptions" of end users of criminal justice (e.g., accused, victims, witnesses, counsel, judges, prosecutors), we necessarily investigate their culture as demonstrated by their individual experiences, biases, understandings, and other personal characteristics. However, what is different between the perspective of culture and society provided by anthropology and the perspectives provided by other social sciences is its focus on the direct participants under observation.[3] The anthropologist is interested in the way that his or her subjects view family, lineage, religion, work, socialization and everything else that makes them who they are and influences how they behave. It is therefore no accident that the term "cultural relativism" that is so prevalent in human rights discourse[4] originated in anthropology, although the term had a very different meaning at the outset. Boas, who first conceived of but did not coin the term, was dissatisfied with evolutionist theories of his time that viewed some civilizations as superior to others. To him, cultural relativism was a method of examining cultural variation free from prejudice. Given that prejudice is inherent in all observation of the external world, Boas sought to see the world through the eyes of the informants or native peoples from different cultures.[5]

The process of understanding cultural perceptions requires a structure and a methodology by which to communicate to members of the group. The mediator must first understand the cultural underpinnings of the particular cultural perception. Once this has been achieved, the mediator must promote the use of cognitive tools (or heuristics) that are appropriate for the circumstances and adapted to match the cognitive tools of the subject community,[6] while at the same time recognizing the distinct moral intuitions[7] of that community.[8]

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[3] *See* SIMON ROBERTS, ORDER AND DISPUTE: AN INTRODUCTION TO LEGAL ANTHROPOLOGY (2013); FERNANDA PIRIE, ANTHROPOLOGY OF LAW (2013); JAMES M. DONOVAN, LEGAL ANTHROPOLOGY: AN INTRODUCTION (2007); LAWRENCE ROSEN, LAW AS CULTURE: AN INVITATION (2008); SALLY F. MOORE, LAW AND ANTHROPOLOGY: A READER (2004).

[4] In human rights it is taken to mean that culture ultimately validates the legitimacy and application of particular rights, thereby rejecting the notion that human rights apply to all without distinction, i.e., that human rights are universal. This conception of culture risks justifying violations of human rights, as is the case with the practice of female genital mutilation. *See* Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUMAN RTS. QUARTERLY, 400 (1984).

[5] Franz Boas, *Museums of Ethnology and their Classification* 9 SCIENCE, 589 (1887).

[6] This is known as the ecological rationality of the group. *See* GERD GIGERENZER, Heuristics, *in* HEURISTICS AND THE LAW (Gerd Gigerenzer and Christoph Engel eds., M.I.T. Press 2006), 7ff.

[7] *See* Daniel Kahneman and Cass R. Sunstein, *Indignation: Psychology, Politics, Law*, (J. M. Olin L. & Econ. Working Paper No. 346, 2007).

[8] One can view communities broader than simply on the basis of religion, ethnicity, tribe or religion. Consumer culture(s) provide a firm ground for this. Some successful corporations have gone as far as shutting down (or threatening to do so) to remain loyal to their shareholders' religious convictions. In the US, Hobby Lobby Stores, Inc., a chain of crafts stores, decided not to offer (certain forms of) contraceptive coverage to its employees because of the particular Evangelical Christian beliefs of their

This Article attempts to demonstrate the significance of anthropology in mass crimes typically falling within the ambit of crimes against humanity and genocide. International criminal tribunals are advantageously suited to study anthropological phenomena. These tribunals generally explore the background of a conflict, albeit mostly from a military point of view, and are accustomed to the complexities of mass criminality.[9] More importantly, international criminal trials ultimately give rise to a narrative, or fragments of a narrative, that the victim group and its elites use for political power or political bargains. A clearer exposition of the complexities, social, cultural, environmental, or other, associated with a situation of genocide or crimes against humanity would both decrease the likelihood of exorcising the entire losing faction and of condemning its members to an indefinite period of political victimization.[10] This may alleviate the impact of uncomfortable truths.[11] Finally, criminal judgments resonate far more with the general public than observations and decisions by an ever-growing body of human rights courts and quasi-courts/committees. A final judgment of a criminal court is conclusive as to an individual's criminal liability and apportionment of blame.[12]

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sole owners (the Green family). This decision was made despite its being in conflict with relevant health legislation, namely the Affordable Care Act. The Tenth Court of Appeals ruled in favor of the corporation, *Hobby Lobby Stores Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013). Values are, therefore, important to corporations in many different ways.

[9] The Special Tribunal for Lebanon further undertook an extensive analysis of Lebanon's political landscape. *See* Melia A Bouhabib, *Power and Perception: The Special Tribunal for Lebanon*, 3 BERKELEY J MIDDLE E. & ISLAMIC L., 173 (2010) (arguing that the Tribunal's legitimacy in this respect was strongly debated by the various factions in the country).

[10] There is an abundance of literature on criminal networks assuming some degree of charitable institutions. *See* Henrik Vigh, *Life's Trampoline: On Nullification and Cocaine Migration in Bissau*, *in* AFFECTIVE CIRCUITS: AFRICAN MIGRATION TO EUROPE AND THE PURSUIT OF SOCIAL REGENERATION 213 (Jennifer Cole, Christian Groes eds., 2016), 223; Henrik Vigh, *Caring Through Crime: Ethical Ambivalence and the Cocaine Trade in Bissau* 87 AFR., J. OF THE INT'L AFR. INST., 479 (2017).

[11] *See* Didier Fassin, *Beyond Good and Evil? Questioning the Anthropological Discomfort with Morals*, 8 ANTHROPOLOGICAL THEORY, 333 (2008); Erella Grassiani, *Moral Othering at the Checkpoint: The Case of Israeli Soldiers and Palestinian Civilians*, 35 CRITIQUE OF ANTHROPOLOGY, 373 (2015).

[12] Two legitimacy-based approaches have been advanced in the literature and these have been adapted in turn to explain the concept of judicial legitimacy from the perspective of international law, namely: sociological (or descriptive) and normative legitimacy. The sociological approach is chiefly concerned with the perception of legitimacy ascribed to a particular judicial institution, whereas the normative approach investigates whether such institution deserves to be regarded as authoritative (or whether its authority is justified). Irrespective of the source of authority of an international tribunal, its legitimacy is guaranteed only where its outcomes and processes are in the public interest, namely if they adhere to fundamental human rights standards (or whichever of the two generates a higher standard). Von Bogdandy and Venzke argue that international courts are multifunctional actors who exercise public authority and therefore require democratic legitimacy. Their perception of a public law theory of international adjudication is predicated on three main building blocks, namely: multi-functionality, the notion of an international public authority, and democracy. *See* ARMIN VON BOGDANDY & INGO VENZKE, IN WHOSE NAME? ON THE FUNCTIONS, A PUBLIC LAW THEORY ON INTERNATIONAL ADJUDICATION 528 (2014).

An accurate anthropological account would divorce personal culpability from group accountability and emphasize how similar situations may be avoided. This Article does not consider the destruction of what may be termed "cultural rights,"[13] namely tangible or intangible property associated with a group's cultural identity, such as monuments, artifacts, language or common practices.

I.
WHY ANTHROPOLOGY IS RELEVANT TO THE INVESTIGATION OF INTERNATIONAL CRIMES

Anthropology and law seem, at first glance, to have little in common. The first seeks to elucidate collective human behavior and assess the participants' (also called informants in anthropological parlance) particular understandings, whereas the second is concerned with rules and order. However, it is evident that rules and order are not produced in a void. Rather, they aim to regulate human relations. It follows, then, that law is a necessary component of culture, just as work, leisure, art, religion and other core elements of life are.[14] Law need not necessarily be formal, as is otherwise the case with legislation promulgated under strict constitutional procedures. It may just as well be informal without governmental sanctions. This informal law lives not only in past and present rural societies in the heartlands of Africa and Asia,[15] but also exists in the very midst of industrialized Western societies. The so-called *lex mercatoria* and the pursuit of self-regulation by particular industries, as is the very concept of contract and party autonomy thereto,[16] is evidence of man's desire to regulate human

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[13] On this issue, *see* Marina Lostal, Kristin Hausler & Pascal Bongard, CULTURE UNDER FIRE: ARMED NON-STATE ACTORS AND CULTURAL HERITAGE IN WARTIME 25 (2018); International Journal of Cultural Property 12-26; Eleni Polymenopoulou, *Cultural rights in the Case-Law of the International Court of Justice* (2014), 27; (2) (Leiden Journal of International Law), 447-464, (discussing the case of the Bosnian genocide).

[14] *See generally*, John M Conley and William M O'Barr, *Legal Anthropology comes Home: A Brief History of the Ethnographic Study of Law*, 27 Loy. of LA L. Rev. 41 (1993).

[15] For what may now have a pejorative connotation, *see* the classic work of Alfred Radcliffe-Brown, *Primitive Law 35 Man 47* (1935). Customary/tribal law is now recognized as having the same standing as quality as other statutory law. This is true of most jurisdictions, even if such law is not fully codified. The New Zealand Supreme Court in *Trans-Tasman Res. Ltd v. Taranaki- Whanganui Conservation Bd. et al.* 127 NZSC (2021), held that tikanga-based customary rights and interests constituted "existing interests" when considering "any effects on the environment or existing interests of allowing the activity" under a section in the New Zealand Exclusive Economic Zone (EEZ) Act. The Court further held that tikanga as law must be taken into account as "other applicable law." NZSC 127 (2021).

[16] According to Teubner, the ultimate validation of *lex mercatoria* rests on the fact that not all legal orders are created by the nation State and accordingly that private orders of regulation can create law. Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society*, *in* GLOBAL LAW WITHOUT A STATE 15 (Teubner ed., 1997).

interaction by means of informal, but no less binding, prescriptions. Aside from regulating human relations, both formal and informal law, particularly the latter, provide evidence of social relations, status, and social interaction within a given community. By way of illustration, the village chief is typically the judge and the recognized authority in the interpretation of customary law and, as such, is regarded as a revered figure. Equally, the male warriors of the tribe, whose authority to hunt is recognized as a customary entitlement, may enjoy first rights to the tribe's game. Social status and the existence of complex roles and rules are also evident in the internal sphere of criminal gangs operating in industrialized settings.[17] In Islamic law, too, the *social* from the *legal* is inseparable in countries strictly adhering to classical *Shariah law*.[18]

The study of social interaction should have been of primary importance to international criminal tribunals, but in practice it has been peripheral if not outright absent. The Office of the Prosecutor (OTP) in the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) did assess the background of the conflicts in Yugoslavia and Rwanda, but the emphasis was on political and military organization. The prosecutors and their assistants were lawyers. Although some were successful prosecutors in their own jurisdictions, they were not anthropologists, and where the nature of crimes was fairly straightforward, the background assessments were deemed unnecessary. Hence, no one even considered that the participants' own perceptions about class, ethnicity, race, symbolism, peace, and aggression were of any significance to the work of the tribunals. Notably, two of the stated aims of the tribunals were to record history and promote reconciliation.[19] It is certainly difficult to record the nature of discord without a solid understanding of the views and perceptions of the participants in

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[17] *See* James D Vigil, *Urban Violence and Street Gangs*, 32 ANN. REV. OF ANTHROPOLOGY 225 (2003); *See generally* Deborah Lamm Weisel, CONTEMPORARY GANGS: AN ORGANISATIONAL ANALYSIS (LBF Scholarly Publishing, 2002).

[18] Polygamy is illustrative of this approach, where English courts were unsure how to handle a practice lawful under the subjects' personal law, but abhorrent under English law. *See* LAW COMMISSION FOR ENGLAND AND WALES, *Family Law: Report on Polygamous Marriages* (HMSO, 1972) and later LAW COMMISSION, *Private International Law: Polygamous Marriages—Capacity to Contract a Polygamous Marriage and Related Issues Report No. 146* (HMSO, 1985). *See also* Prakash A Shah, *Attitudes to Polygamy in English Law*, 369 INT'L & COMPAR. L. Q. 52 (1993).

[19] For example, reference to universally-accepted anthropological thinking about aggression could have been incorporated into the historical analyses of the tribunals' judgment. According to this, there is no empirical basis for the contention that aggression is an inborn quality. In fact, the word itself is unknown in the more traditional societies, such as the Chewong in the Malay peninsula. If anything, humans exhibit a disposition towards solidarity and peace. *See* SIGNE HOWELL & ROY WILLIS (Eds.), SOCIETIES AT PEACE 25 ff. (1989). Without such an analysis, the tribunal may, inadvertently or otherwise, give the impression to the entire world that the perpetrator's entire ethnic group is naturally inclined to violent crime, which cannot surely lead to any sort of reconciliation and explains to a large degree the hostility of the Serbian people towards the ICTY.

the turmoil. Equally, reconciliation is meaningless unless one is acutely aware of the divisions between the feuding parties as expressed and felt by them alone; although admittedly external, unbiased, views are also significant.

The ICTY, in a very cursory manner, opined that Bosnian Muslim identity and culture could be traced to "the long Turkish" occupation,[20] during which the three ethnic groups (i.e. Muslim, Serb, and Croat) lived largely in separate villages but often intermarried[21] and all considered themselves Slav.[22] It concluded its analysis by claiming that "politics began to divide along the lines of ethno-national communities."[23] This explanation fails to say anything about the actual identity and culture professed by Bosnians given that it was not concerned with such matters in its legal assessment of the facts of that case or even to challenge the narrative of the genocide. Similarly, several years later, the International Criminal Court (ICC) missed an historic opportunity to determine whether there exists an Islamic culture, as claimed by the accused, which compelled them to destroy non-Islamic artefacts and institutions.[24] Recent scholarship denies the existence of a common Islamic culture that allows Muslims to destroy cultural heritage.[25] Perhaps the ICC saw this question as difficult because of its significant political and inter-cultural implications. This is defined in the introduction of this Article as the sort of uncomfortable truths that anthropological inquiries may well discover.[26] The ICC was content with defining the concept of crimes against cultural property.[27]

Culture is a complex phenomenon and scholars, such as Geertz, have viewed it as a web of shared meanings expressed through public communication, not in the sense of sharing the same knowledge and skills, but in the sense that

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[20] Prosecutor v. Tadić, Case No. IT-94-1, ¶ 56 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997). In reality, a Turkish nation and distinct Turkish culture were proclaimed in the early 1920s, although the Neo-Turkish movement was active at least a decade before. From the fourteenth to the early twentieth century what the ICTY calls "Turkish" was in fact distinctly Ottoman which was quintessentially multicultural, as are all empires.

[21] *Id*. ¶ 64.

[22] *Id*. ¶ 67.

[23] *Id*. ¶ 83.

[24] *Situation in the Republic of Mali in the Case of the prosecutor v. Ahmad Al Faqi Al Mahdi, Pre-Trial Chamber I*, ICC-01/12-01/15-84-Red 24-03-2016, and ICC-01/12-01/15, (September 27, 2016), Public Judgment and Sentence [hereinafter '*Al Mahdi* judgment']. Al Mahdi was charged under art.8 (2) (e)(iv) of the ICC Statute for planning and overseeing the attacks against cultural sites in Mali.

[25] Eleni Polymenopoulou, *Caliphs, Jinns and Sufi Shrines: The Protection of Cultural Heritage and Cultural Rights under Islamic law*, 36 Emory Int'l L. Rev. (2022).

[26] *See* Mohammed E Badar & Noelle Higgins, *Discussion Interrupted: The Destruction and Protection of Cultural Property under International Law and Islamic Law - the Case of Prosecutor v. Al Mahdi*, 17 Int'l Crim. L. Rev. 486, 500-502 (2017). The authors argue that the Wahhabi school of Islamic thought has generally accepted the legitimacy of destroying tombs, including even that of the son of Ali (the son of the Prophet and fourth Caliph).

[27] Paige Casaly, *Al Mahdi before the ICC: Cultural Property and World Heritage in International Criminal Law*, 14 J. Int'l Crim. Just. 1199 (2016).

persons who share a culture also share a common world view that is expressed through common symbols and language.[28] What is this Slavic world view in Bosnia and what metaphors or literal meanings are used to express it? Moreover, if the people of Bosnia had achieved social integration, how was this possible given their conflicting individual/clan tendencies? There are various ways of thinking about this conundrum, so I will only mention two, namely *doxa* and opinion, as expounded in the sociology/anthropology literature. Barth believed that shared values, expressed through interaction, are the result of strategic and calculated *transactions* between agents driven by a desire to achieve value maximization.[29] For Bourdieu, in order to assess whether the members of a group share or do not share common values, one must distinguish that which is taken for granted by the group and is beyond discussion (*doxa*), such as faith in God or unquestionable adherence to a political system, from things that are actively discussed among group members and are not therefore axiomatic (opinion).[30] If we knew precisely what constituted common or disparate *doxic* perceptions among the various groups in Bosnia, pertinent choices would have been severely curtailed and we would also understand by default which *doxic* beliefs may have shifted to the realm of opinion over time. In fact, anthropology has largely dismissed the notion of static ethnic identity based merely on the enjoyment of a particular culture and belonging to a specific ethnic group.[31] Boundaries between ethnic groups, especially those living in close proximity to one another, are ambiguous and in a state of continuous fluctuation. The ICTY's characterization that the Slav population of Bosnia in 1993 identified itself along three ethnic groups with some inter-marriages was inaccurate and not predicated on any scientific data. Anthropologists studying Bosnian society agreed with the general theory that variations among ethnic groups are greater regarding key indicators (such as religion or ethnic origin) than with respect to systematic differences. They dismissed theories that the conflict(s) was ethnic or easily explained by reference to culture and ancient animosities. The conflicts were relatively recent and were not caused in any way by cultural differences. In important respects, the differences between town and country were greater than between Serbs and Croats within a given territory.[32]

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[28] CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES (1973).
[29] FREDRIK BARTH, MODELS OF SOCIAL ORGANISATION (Royal Anthropological Institute Occasional Paper No. 23, 1966). These transactions are numerous and are continuously negotiated by the relevant actors.
[30] PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE 164-70 (1977).
[31] *See* FREDRIK BARTH, ETHNIC GROUPS AND BOUNDARIES: THE SOCIAL ORGANISATION OF CULTURE DIFFERENCE (1969).
[32] THOMAS HYLLAND ERIKSEN, WHAT IS ANTHROPOLOGY? 158 (2004).

As this Article will subsequently demonstrate, anthropological research is important for reasons beyond gaining a clear understanding of the background of conflicts and the motives of the immediate perpetrators and their victims. It also provides the international community with the tools necessary for deciphering the elements of international crimes by contextualizing terms such as "racial",[33] "ethnic" and "religious" in genocide, and "kinship",[34] "loyalty" and "clan membership" as they relate to accessory liability. All these terms lose their meaning when subject merely to strict legal characterizations.

On yet another dimension, the labors and methods of anthropology assist us in distinguishing between myth and reality and give us a fundamental idea about *mens rea* and *mens rea*-related defenses and excuses. A defendant concedes that he killed his mother but, in fact, it could very well have been a distant cousin, simply because his linguistic tradition uses a single word for all females in his lineage. This is pretty clear to him but not to a foreign judge without any anthropological or linguistic insights into the defendant's culture. The Japanese word *aoi*, for example, encompasses what in Europe we conceive as green, blue, and pale (as in a pale demure) and the Welsh language had, until recently, similar color connotations that departed from those employed by their English neighbors.[35] Below, this Article examines the mythology and symbolism of cannibalism in Sierra Leone and the limitations of language therein, but it is instructive at this point to emphasize that what are otherwise rather straightforward notions, which cannot under any circumstances possess a third meaning, are in fact diffuse and ambiguous to other cultures. In a landmark study of the 1920s, Rivers examined the Melanesian people of the Solomon Islands. What is particularly striking is the use of the local word *mate* which translates as "dead," but also "very sick" and "very elderly". Clearly, this is not in accord with

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[33] It is interesting to note that the science of genetics has long disproved the existence of distinct races as such. Nonetheless, race as a social construction remains important because it tells us how people view themselves and others.

[34] In Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶ 81 (Sept. 2, 1998), the Trial Chamber made some mention of kinship, arguing that Rwandan society was comprised of eighteen clans whose distinguishing feature was lineage as opposed to ethnicity. Even so, the tribunal argued, the demarcation line was blurred and people could pass through each clan. The Trial Chamber then discussed the views and considerations not of the local population about their membership but of their colonizers, *id.* ¶ 82-84. This lacked any sound methodology and when later the Chamber was forced to admit that the Genocide Convention does not encompass conduct against members of one's own ethnic or racial group. The Trial Chamber then had to turn to the particular perceptions of the perpetrators and the victims. This selective anthropology is misleading and is utilized only to serve a particular conclusion. The vast literature on African kinship would have made it abundantly clear that in weakly integrated African nations the operational level of political power is located at the kinship level of the periphery. As a result, *de facto* power based on kinship is usually much stronger than *de jure* power structures. *See* LADISLAV HOLY, ANTHROPOLOGICAL PERSPECTIVES ON KINSHIP (1996).

[35] *See* EDWIN ARDENER (ed.), SOCIAL ANTHROPOLOGY AND LANGUAGE xxiv, xxii (1971).

our strict distinction between dead and alive. In English, a person can only be one or the other. Rivers understood this to project a classification, rather than a biological determination, from the point of view of the Melanesians. The very infirm and the very elderly were as good as dead because they could no longer partake in the group's activities and the idea was to draw a dividing line between the *mate* and the *toa* (alive).[36] Under this light, it would have been perfectly acceptable for the Melanesians to eliminate all the *mate* in their midst. However, from the perspective of international criminal justice such an act would not only be reprehensible, but would also no doubt constitute a crime against humanity. The juristic and ethical problem here is obvious. Is it legitimate to convict someone of conduct undertaken throughout their lifetime that constitutes part of their culture? Even without discussing whether this anthropological finding is pertinent to excusing the accused from liability (as a defense) or in mitigation of punishment, the reader surely understands the implications. I am certainly not defending the contention that unchecked, self-proclaimed cultural relativism is a valid defense to all international crimes.[37] Rather, my desire is to offer a new, or additional, perspective to our understanding and application of international criminal norms through the study of *context*.

II. INFUSING ANTHROPOLOGICAL RESEARCH METHODS IN INTERNATIONAL CRIMINAL INVESTIGATIONS

The principal research method for anthropological research is *participant observation* through fieldwork. This requires framing a research question from the outset and identifying a community for observation. Fieldwork is generally constant and significant periods of time must be spent living with the observed group and mastering the group's particular language, if possible, for a thorough investigation to be completed. One year is generally considered the minimum length of time required for such an investigation. Once fieldwork has been completed, notes and interviews are taken back home and the researcher must try to make sense of them with the goal of shedding light on their research question. The researcher may or may not compare their findings to those about other groups.[38]

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[36] William HR Rivers, *The Primitive Conception of Death*, 10 Hibbert J. 393, 406 (1911-12).

[37] The proponents of such arbitrary cultural relativism have claimed that the recruitment of children in Africa to fight in armed conflicts is largely voluntary and the enlisters do not consider their actions as legally or morally culpable. TIM KELSALL, CULTURE UNDER CROSS-EXAMINATION: INTERNATIONAL JUSTICE AND THE SPECIAL COURT FOR SIERRA LEONE 146-70 (2009). *See also*, from a socio-legal perspective, Ilias Bantekas, *Individual Responsibility and the Application of Ignoratio Juris Non Excusat in International Law*, 19 EUR. J. OF CRIME, CRIM. L. & CRIM. JUST. 85 (2011).

[38] For an excellent practical guide, *see* KAREN O'REILLY, ETHNOGRAPHIC METHODS (2d ed. 2012).

If prompted, prosecutors would likely contend that there is little time to send out an anthropologist for a year to conduct field research. This is not an insurmountable problem, however, given that it typically takes at least three years, and often much longer, from the time international criminal tribunals are established to render their first judgment. This time frame is more than sufficient for a group of anthropologists—who are experts in the particular group(s)—to undertake thorough field work and come up with concrete findings for the tribunal or commission.[39] The ICC may well require six months to a year before embarking on solid prosecutions. The more serious methodological concern is that the situation before and after the commission of widespread atrocities will, in all likelihood, be fundamentally different. Several parameters of culture will necessarily change—although this has not been tested—and previous power structures will be altered by the disappearance of the perpetrators for fear of revenge or prosecution.

If any form of participant observation is to take place at all in post-conflict societies, it must be undertaken with this context in mind (i.e., post-conflict power shifts) and with very specific research agendas.[40] Fortunately, most societies have been studied by anthropologists in one form or another. That is to say, there is a significant body of literature on most social groups, though it does not encompass all their cultural traits and social interactions. [41] Hence, the courts, with the assistance of experts, can readily turn to the existing body of knowledge and decide whether more research is necessary to fill in gaps. The abundance of material collected by the prosecutor and non-governmental organizations (NGOs) in the course of their investigation, or gathered in the course of providing assistance to victims and witnesses should also be accessible to anthropologists.[42]

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[39] It is assumed that mass offences such as crimes against humanity are prosecuted by domestic or international criminal tribunals. However, it is not unusual for several serious international offences to be handled by truth commissions, whether UN-based or other. The findings in this Article are pertinent to the work of these commissions even if they are composed solely of people belonging to the same ethnic group as the perpetrators. It should not be assumed that they have a perfect understanding of their culture. We have already discussed Bordieu's concept of *doxa*. Anthropologists frequently refer to *homeblindedness* as a methodological limitation. This refers to fieldwork undertaken by someone well-versed in the society under examination which prevents him from gaining deeper insights because he takes things for granted and looks at them through a distorting lens.

[40] By agenda we refer here to the framing of a prosecutorial strategy encompassing a coherent understanding of cultural dynamics. *See*, *e.g.*, Anita-Kalunta Crumpton, RACE AND DRUG TRIALS: THE SOCIAL CONSTRUCTION OF GUILT AND INNOCENCE (2018), which traces the impact that courts have upon the representation of black people in criminal statistics in the UK.

[41] For an African perspective, *see* Frank Knowles Girling & Okot P'Bitek, LAWINO'S PEOPLE: THE ACHOLI OF UGANDA (2019); William Allan, THE AFRICAN HUSBANDMAN (2005); Aidan Southall, ALUR SOCIETY: A STUDY IN PROCESSES AND TYPES OF DOMINATION (2004); Audrey Richards, LAND, LABOUR IN DIET IN NORTHERN RHODESIA: AN ECONOMIC STUDY OF THE BEMBA *Tribe* (1995).

[42] This will aid not only prosecutorial efforts per se, but also the cultural sensitivities of witnesses and victims and will further contribute to post-conflict processes. *See* Richard Ashby Wilson, INCITEMENT

Much of this evidence may appear irrelevant either because it is hearsay, repetitive, or biased, but an anthropologist may be able to detect solid patterns linked to existing findings that are not repudiated by the scholarly community. These observations do not suggest that judges must confer their fact-finding and judicial role to anthropologists, but rather that judges must take cognizance of social relationships with which they are unfamiliar to serve both the narrow (dispensing of justice) and broad (history-writing, reconciling) aims of international criminal justice.[43] A necessary caveat should, of course, underlie all interactions between judges and anthropologists: namely, "publication" confirmation bias. Confirmation bias is, essentially, a distortion in human information processing where reviewers or editors of books and scientific journals accept papers that support their views for publication while ignoring and discrediting those that do not.[44] This phenomenon is more prevalent in the humanities than in legal scholarship because of the tendency to set up doctrinal "schools" upon which succeeding scholars base their theoretical and empirical work. Hence, tribunals should verify the veracity of their information from multiple sources if possible.[45]

III. ANTHROPOLOGY AS A TOOL FOR ASSESSING COMPLEX LIABILITIES

At a fundamental level, with respect to assessing complex liabilities pertinent to international crimes such as command responsibility, anthropology can assist with ascertaining those elusive *de facto* indicia that are necessary for constructing authority, power, and, ultimately, effective control. Anthropology

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ON TRIAL: PROSECUTING INTERNATIONAL SPEECH CRIMES (2017); Holly Porter, AFTER RAPE: VIOLENCE, JUSTICE, AND SOCIAL HARMONY IN UGANDA (2016); Louisa Lombard, STATE OF REBELLION: VIOLENCE AND INTERVENTION IN THE CENTRAL AFRICAN REPUBLIC (2016).

[43] *See* Brianne N McGonigle, *Two for the Price of One: Attempts by the Extraordinary Chambers in the Courts of Cambodia to Combine Retributive and Restorative Justice Principles*, 22 LEIDEN J. OF INT'L L. 127 (2009); Charles Trumbull, *The Victims or Victim Participation in International Criminal Proceedings*, 29 MICHIGAN J. OF INT'L L. 779 (2008); Carsten Stahn, *Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor* 95 AM. J. INT'L L. 952 (2001).

[44] Michael J Mahoney, *Publication Prejudices: An Experimental Study of Confirmatory Bias in the Peer Review System*, 1 COGNITIVE THERAPY & RSCH. 161 (1977).

[45] *See* Gordon W Allport, THE NATURE OF PREJUDICE (1958); Craig Cooley & Brent E Turvey, *Observer Effects and Examiner Bias: Psychological Influences on the Forensic Examiner*, Crime Reconstruction (2007); John Earman, BAYES OR BUST? A CRITICAL EXAMINATION OF BAYESIAN CONFIRMATION THEORY (1996); Lisa E Hasel, *Evidentiary Independence: How Evidence Collected Early in an Investigation Influences the Collection and Interpretation of Additional Evidence*, Memory & L. 142 (2013); David Klahr, *Designing Good Experiments to Test "Bad" Hypotheses*, , Computational Models of Discovery and Theory Formation 335 (2000); Hannah R Rothstein et al., PUBLICATION BIAS IN META-ANALYSIS: PREVENTION, ASSESSMENT AND ADJUSTMENTS (2005); Brent D Slife & Richard N Williams, WHAT'S BEHIND THE RESEARCH? DISCOVERING HIDDEN ASSUMPTIONS IN THE BEHAVIORAL SCIENCES (1995).

also allows us to understand whether the "subordinates" that committed the crimes were under sufficient compulsion or control by their superior such that the latter's conviction, despite the absence of direct fault, would be justified. However, I must note an important observation that relates to semantics. If anthropology is viewed as a method through which to draw conclusions pertinent to the fault-liability paradigm or complex liabilities, then this method requires an appropriate language for communicating concepts and ideas in the sphere of law.[46] Communication is crucial not only because certain words are not translatable from one language to another, as has been discussed above, but also because wholesale concepts and ideas themselves are alien from one culture to another.[47] The so-called Sapir-Whorf hypothesis, elaborated by anthropologists in the 1930s, suggests that language gives rise to fundamental differences between respective life-worlds that the various groups inhabit.[48] In their case study, the North American native Hopi language was found to contain few nouns but many verbs that connoted action and movement. Anthropologists concluded from this study that the Hopi world was founded upon movement and that it was largely disinterested in material objects.[49]

Another poignant example is the case against Liberian President Charles Taylor. A witness for the prosecution, "ZigZag" Marzah, was quite "clearly unfamiliar with the Western idiom of remorse and conscience."[50] Marzah also claimed to be involved in the cannibalism of enemy corpses, arguing that this practice was expected of all warriors battling on the side of Charles Taylor.[51] Regardless of the validity of this statement, it certainly stirred a wealth of emotions in the Western psyche and reinforced myths and stereotypes associated

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[46] *See* Elizabeeth Mertz, *Language, Law and Social Meanings: Linguistic/Anthropological Contributions to the Study of Law* 26 L. & SOC. REV. 413 (1992).

[47] *See* Mark Van Hoecke, LAW AS COMMUNICATION (2002), in which the author's central thesis is that all legal relations are to be understood in terms of dialogue, conversation and communicative processes, rather than as traditional command-obedience structures. Legal anthropologists such as Bohannan argued that Western legal terms and categories should not be employed to study the organization and order of non-Western societies. He believed that such a methodology prevented a comprehensive understanding of other cultures and argued in favor of using native legal terms whose meaning would become evident within an ethnographic context. *See also* Paul Bohannan, JUSTICE AND JUDGMENT AMONG THE TIV (1957). This also leads to the so-called methodological distortion of *ethnocentrism*.

[48] Edward Sapir, CULTURE, LANGUAGE AND PERSONALITY (1958); Benjamin L Whorf, *Science and Linguistics*, 35 TECH. REV. 229 (1940).

[49] The most contemporary manifestation of the hypothesis is currently known as *linguistic relativity* which posits that language does have some effect on thought, but this is small as opposed to decisive. *See* Paul Kay, Willett Kempton, *What is the Sapir-Whorf Hypothesis?* 86 American Anthropologist 65 (1984).

[50] Gerhard Anders, *Testifying about Uncivilised Events: Problematic Representations of Africa in the Trial against Charles Taylor* 24 LEIDEN J. OF INT'L L. 937, 944-45 (2011).

[51] *Id*. at 948-49.

with "primitive Africa."[52] Up until the mid-1990s, scholarly output suggested that the origin of cannibalism was historically unknown,[53] and, at the very least, alien to contemporary African societies. Contemporary research, on the basis of archaeological findings, begs to differ.[54] Critics argue that the older anthropological scholarship was convinced that any association of colonized people with cannibalism would be tainted by neo-imperialism.[55] Of course, this research does not necessarily change the popular Western imagery of cannibalism. Anders recalls the *Human Leopards* case investigated by a Special Commission Court established by British colonial authorities in early twentieth century Sierra Leone.[56] There, without any corroborating forensic evidence, the court was convinced that members of a secret society dressed up in leopard skins and committed ritual cannibalism. The story was described by insider witnesses whose communication with their colonizers must have been agonizing through language fraught with significant misunderstanding and symbolism. Moreover, this story was read through two very different socio-cultural perspectives.[57] Anders accurately captures this story as follows:

> In Sierra Leone and Liberia, as in many parts of Africa, social relationships and personal development are framed in a rich language of eating and consumption. Initiation into secret societies such as the *poro* is also expressed in an idiom of being eaten or devoured by the bush spirits in order to be reborn as a full member of the community. The political sphere, in particular, is conceptualised as a potentially dangerous terrain where powerful people 'eat' each other in order to grow 'big'. This has been famously coined by Bayart as the politics of the belly, who describes

[52] *Id.*
[53] For the sake of scientific accuracy, it must be said that a good number of anthropologists reject the claim that cannibalism is just a myth created from prejudice. Works such as that of William F Arens, THE MAN-EATING MYTH: ANTHROPOLOGY AND ANTHROPOPHAGY (1980) are reflective of the attitude that rejects cannibalism. More recent forensic research of human bones from an Anasazi pueblo in southwestern Colorado reveals that nearly 30 men, women and children were butchered and cooked there around 1100 AD. *See* Tim D White, PREHISTORIC CANNIBALISM AT MANCOS 5MTUMR—2346 (1992).
[54] More recent forensic research of human bones from an Anasazi pueblo in southwestern Colorado reveals that nearly 30 men, women and children were butchered and cooked there around 1100 AD. *See* Christy G. Turner II & Jacqueline A. Turner, MAN CORN: CANNIBALISM AND VIOLENCE IN THE PREHISTORIC AMERICAN SOUTHWEST (2009).
[55] *See* Ann B McGinness, *Between Subjection and Accommodation: The Development of José de Anchieta's Missionary Project in Colonial Brazil* 1 J. of Jesuit Studs. 227 (2014); Neil Whitehead, HANS STADEN'S TRUE HISTORY: AN ACCOUNT OF CANNIBAL CAPTIVITY IN BRAZIL (2008).
[56] Anders, *supra* note 51 at 956.
[57] *Id.*

> the consumption of the State's resources by politicians and bureaucrats. In Sierra Leone, corrupt politicians are referred to as *bobor bele* – literally, guys with a belly eating . . . the State's resources. Therefore, the frequent cannibalism accusations in West Africa must not always be read literally. They should rather be interpreted in terms of a highly symbolic political language and critique of existing injustices.[58]

To a Western audience, it may seem implausible that anyone could genuinely confuse symbolism with reality or, to put it concretely, confuse actual cannibalism with its metaphors. How is it that symbolism can be so easily transformed into action? These issues are perhaps better reserved for another article; nevertheless, it is widely argued in anthropological literature that ideas of witchcraft, spirit possession, and shamanistic injunctions had a normative effect on members of the vast majority of traditional societies.[59] The same is largely true today in the industrialized world for pious members of religious groups. To illustrate this point, I shall offer two case studies.

A significant part of the Rwandan genocide was predicated on a myth reiterated and propagated by the Hutu that the Tutsi were cockroaches and inferior beings. The same is true of other genocidal campaigns.[60] Whereas no Hutu would typically act on this myth unilaterally, it was the seed for future events when animosity was stirred through artificial means. Given those circumstances, a largely illiterate and highly polarized populace was unable to separate myth from reality.[61] Anthropological research on the Rwandan genocide tends to show that one of the principal cultural metaphors in Rwanda, the "flow," may shed light on Hutu killing and torture methods. Flow, in general, represents something healthy, as is the case with our blood stream, the transformation of food into feces, and insemination into childbirth; blockage of flow is then associated with disease and death. The genocide in Rwanda was characterized by conduct that comes across as utterly horrendous and senseless. One method included the impalement of victims from the anus to the mouth, the aim of which was to symbolize the end of

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[58] *Id.*

[59] *See* STANLEY H. BRANDES, POWER AND PERSUASION: FIESTAS AND SOCIAL CONTROL IN RURAL MEXICO (1988); *see also* Harold M. Bergsma, *Tiv Proverbs as a Means of Social Control* 40 AFR.: J. INT'L AFR'N. INST. 151 (1970).

[60] *See* Ben Kiernan, *Myth, Nationalism and Genocide* 3 J. GENOCIDE RCSH. 187 (2001) (tracing myths perpetuated by the Khmer Rouge in Cambodia in order to justify the annihilation of the country's intelligentsia).

[61] *See* David Newbury, *Canonical Conventions in Rwanda: Four Myths of Recent Historiography in Central Africa* 39 HIST. IN AFR. 41 (2012).

flow and hence the end of the victims' being.[62] From a prosecutorial point of view, it is clear that the leaders of the genocide made use of a myth in a way that stimulated public animosity against the Tutsi. Such a conclusion allows us to understand why a large portion of the Hutu population would engage in this degree of violence against their neighbors.

The second example, Nazi propaganda, similarly fueled the psyche of a much more literate population. Nazi propaganda prior to the onset of World War II in 1939 was characterized by a process of dehumanizing its enemies, such as Slavs (mainly Russians), communists, and Jews. In a world where international travel was exceptional and propaganda had crept into every aspect of social life (school, private clubs, censoring of all publications and broadcasts), it did not take long for the Nazi Party to render the German population doubtful about the humanity of other races and peoples. This dehumanization was nothing more than myth-creation,[63] as was the case for the superiority of the Aryans.[64] It is well known that such myths occupy a significant place in the collective consciousness of a nation, which is susceptible to manipulation for committing crimes against class or other enemies[65] or to achieve less "innocuous" political objectives.[66]

In the context of the ICTR's investigation, legal anthropology played a significant part in the reconstruction of liability for genocide, albeit largely unbeknownst to the judges.[67] In its first case, that of Jean-Paul Akayesu, the tribunal was reluctant to apply the exact terms of Article II of the Genocide Convention, which required that the crime be committed against members of another ethnic, national, religious, or racial group. Forensic evidence demonstrated that the Hutu and the Tutsi were not ethnically or racially distinct. Their respective "ethnic" designations were created by Belgian colonizers and subsequently evolved into distinctions of class or social status. The Tribunal

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[62] Christopher C. Taylor, *The Cultural Face of Terror in the Rwandan Genocide*, *in* ANNIHILATING DIFFERENCE: THE ANTHROPOLOGY OF GENOCIDE 137-78 (2002).

[63] Johannes Steizinger, *The Significance of De-Humanization: Nazi Ideology and its Psychological Consequences* 19 POLS., RELIGION & IDEOLOGY 139 (2018) (arguing that significance of dehumanization in the context of National Socialism can be understood only if its ideological dimension is taken into account. The author concentrates on Alfred Rosenberg's racist doctrine and shows that Nazi ideology can be read as a political anthropology that grounds both the belief in the German privilege and the dehumanization of the Jews.).

[64] DANIEL J. GOLDHAGAN, HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST (1996).

[65] *See* Cheng C. Wang, WORDS KILL: CALLING FOR THE DESTRUCTION OF CLASS ENEMIES IN CHINA, 1949-1953 (2004).

[66] An interesting, highly critical, insight is offered by Chomsky on the imagery employed in liberal nations to achieve pre-ordained social and political goals by elites. NOAM CHOMSKY, NECESSARY ILLUSIONS: THOUGHT CONTROL IN DEMOCRATIC SOCIETIES (1989).

[67] *See* Anders, *supra* note 51, resting her thesis on the fact that a big part of the debate in the ICTR and Sierra Leone cases was anthropological in nature—e.g., whether Tutsis constitute a distinct group from the Hutus—but the judges approached the pertinent issues from a legal perspective).

therefore turned to legal anthropology to construct a more objective theory of victimhood for the purposes of the Genocide Convention. It held that beyond external characteristics such as race and ethnic origin, membership of a group may also come about by the personal belief of a group's members as to their distinctiveness.[68] Thus far, this is on par with the fundamental tenets of social anthropology. However, personal self-distinction and self-categorization are only sanctioned if perceived as such by the group under consideration itself (informants) and not by external observers. The tribunal offered no prior study, nor did it commission one itself, to clarify the views of the informants. This anecdote demonstrates how international criminal tribunals perceive extra-legal matters as common knowledge, not worthy of further scientific research, upon which a reasonable person is well-suited to reach a reasonable conclusion.

This is, no doubt, a convenient mechanism to construct group characteristics in an artificial rather than a social scientific manner. Its foundation is hardly scientific; it is based on the judges' effort to fit the groups under discussion, and their members, within the terms of the Genocide Convention and other forms of criminal liability. Whether or not the tribunal's assessment of collective identity would stand up to thorough anthropological research is a different issue altogether. It is, therefore, critical that foreign judges receive assistance from a team of anthropologists who are experts on the people in question when assessing the criminal liability of persons from those cultures they know little about. The experts' objective must be to map the various social interactions and institutions of the pertinent people to provide a guide as to what is acceptable in the community, distinguish myth and symbolism from reality, and apprise the tribunal of those cultural factors that may inhibit witnesses and victims from testifying. This will no doubt assist the prosecutor and the defense in asking the right questions, saving precious judicial time.

IV. OBEDIENCE AND EFFECTIVE CONTROL IN SOCIAL CULTURE: UNDERSTANDING LEADERSHIP AND COMMAND IN ARMY AND REBEL OUTFITS

One of the key issues in war crimes trials is the degree to which a subordinate would obey a superior order, not as a matter of military compulsion,

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[68] Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Trial Chamber Judgment ¶ 320 (Sep. 2, 1998). In Prosecutor v. Al-Bashir, …, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Al-Bashir ¶ 137 (Mar. 4 2009) [*Al-Bashir Warrant Decision*], an ICC Pre-Trial Chamber claimed that three Sudanese tribal groups living in the same area, namely the Fur, the Masalit and the Zaghawa constituted distinct ethnic groups because each possesses its own language, tribal customs and traditional links to its lands. Without realizing it, the Pre-Trial Chamber made an anthropological observation with legal significance.

but as a matter of ingrained culture. An assessment of such a culture, in combination with class or similar social constructs, is important because it signifies the degree to which one may assume effective control of jungle-based armies and militias. An assessment of this nature helps to provide an understanding of the structure of hierarchical systems and their distinct organization, which has troubled law-makers and courts since complex liabilities—such as command responsibility—first appeared on the legal map with the *Yamashita* case.[69] There, it was controversially held that Yamashita retained effective control over Japanese troops that went on the rampage against civilians in Manila, even though he had split the Japanese forces in the Philippines into four distinct groups and all communication between those groups had been severed by their adversaries. The tribunal maintained that the atrocities were so widespread that Yamashita must have known about them and could have prevented them, despite the accused's argument that he had given strict instructions to the Manila-based commander to evacuate the island and return to Japan. Clearly, in the absence of any direct orders, the tribunal could not have constructed Yamashita's command liability without arbitrarily assuming that he enjoyed effective control of all Japanese forces on the island.

Regardless of the facts on the ground, anthropological data would no doubt clarify a retrospective examination of effective control. Again, this Paper will not go into any significant detail, but given that the case hung on whether Yamashita's subordinates had, in fact, disobeyed his orders to evacuate and do no harm to civilians, it is worth investigating Japanese military culture at the time. In 1890, Japan adopted Shinto as its official State religion, establishing an imperial cult in which the emperor's divinity was based on his descendance from the Goddess Amaterasu. This meant that the emperor's commands, and by implication those of his representatives, were to be obeyed without objection. This unswerving loyalty to the emperor as the basis of the Japanese State (known as *kokutai*, which may be translated manifoldly, particularly as "sovereign" or "national essence") was institutionalized earlier by the introduction of universal conscription, which resulted in the indoctrination of the country's youth and continued through subsequent generations.[70] This cultural dimension, coupled undoubtedly with fear and other elements, accounts for the acceptance of brutality within the ranks of the Japanese army and its members' loyalty-to-the-death. As

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[69] *See Trial of General Tomoyuki Yamashita*, 4 L. REPS. OF TRIALS OF WAR CRIMS. 1.

[70] In fact, *kokutai* was introduced as a fundamental building block in Article 4 of Japan's 1890 Constitution, also known as the Meiji Constitution, on account of the Tenno dynasty which assumed power through the 1868 Meiji restoration, remaining in power until 1945. *See* GEORGE M. BECKMANN, THE MAKING OF THE MEIJI CONSTITUTION: THE OLIGARCHS AND THE CONSTITUTIONAL DEVELOPMENT OF JAPAN, 1868-1891 (1957).

a result, it would have been characteristically unusual and illogical for the forces under Yamashita's de jure command to disobey their commander's direct orders. By logical implication, no distinction can be made between de jure and de facto command with respect to Japanese military organization during World War II because even if separated from their commanders, units and subunits would, nevertheless, religiously adhere to their superiors' original orders—unless of course there were no other available orders. This observation also suggests that in this particular socio-military context, the absence of material capacity to prevent or punish is irrelevant in establishing de facto or de jure command because the conduct of subordinates is uniform irrespective of the person under command.

In the Rwanda conflict, de facto command and control became a central issue because, unlike the military-styled paramilitary groups on the territory of the former Yugoslavia, a significant amount of authority was exercised on the basis of traditional socio-economic structures. Rwandan society, like most of Africa, is tribal and class-based, with authority and privileges typically belonging to the elite in each tribe or clan.[71] As a result, authority and wealth go hand-in-hand, meaning the elite are also the richest and most educated among the tribe. Until the creation of the ICTR, the construction of command responsibility had been applied to regular armies and, at worst, to tightly-structured paramilitary units, which resembled regular armies principally because they were formed and run by ex-military personnel, as was the case with indictments before the ICTY. The most complex cases had been those dealt by subsequent WWII military tribunals in respect of civilians, particularly industrial and political leaders.[72]

The ICTR paid particular attention to these distinct anthropological features in its construction of hierarchies and authority in Rwandan society, although admittedly inadvertently and without the requisite methodological or scientific rigor. In the *Akayesu* case, the accused was the burgomaster of Taba commune, a position akin to that of mayor in Western parlance. Whereas Western mayors generally have limited authority to enact peripheral by-laws and set the municipality's economic agenda on the basis of municipal taxes and other income,

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[71] For an excellent anthropological account, *see* Rene Lemarchand, *Power and Stratification in Rwanda: A Reconsideration* 6 CAHIERS D' ÉTUDES AFRICAINES 592 (1996).

[72] *See, e.g., Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v Roechling* 14 Trials of War Criminals before the Nuremberg Military Tribunals [Trials] 1097; *USA v Flick* 6 Trials 1187, and; *USA v von Weizsaecker* [*Ministries* case] 14 Trials 383. Once again, although no direct anthropological questions were asked by these tribunals, it was deemed implicit that those to whom powers were delegated by the Nazi regime enjoyed sufficient control over persons committing particular crimes. This was a direct consequence of Nazi culture which permeated all elements of the Reich's socio-economic raison d'être.

the burgomaster in Rwanda enjoyed far greater authority.[73] His powers were much wider than his *de jure* authority.[74] In fact, he was perceived as the "father" of the people, whose every order was to be obeyed without question or deviation.[75] Clearly, informal law and power arrangements, whether explicit or implicit, played an important role in ascertaining the enjoyment of effective control over the actions of civilian populations acting as mobs, random groups or under a self-perceived identity. The existence of such effective control is further reinforced by class and education. This Rwandan case study exemplifies the tribunal's desire to construct (or expand) complex liabilities on the basis of anthropological observations in order to reach a just conclusion; in the case at hand, to establish the liability of an influential figure urging those under his circle of influence to commit genocide.

A. THE ROLE AND ORIGIN OF *INFLUENCE* IN SIERRA LEONE'S ARMED GROUPS

I have already made extensive reference to myth and symbolism in the popular culture of Sierra Leonean society. The Sierra Leone Special Court (SLSC) has only indirectly examined the anthropological dimension of the various armed groups and its relevance to our understanding of conduct and hierarchies. With respect to the latter, the jurisprudence of the SLSC has revealed two broad types of military authority. The first is consistent with that found in regular armies and rebel forces, based on a strict or not so strict hierarchical structure. This appears to be the case with the Armed Forces Revolutionary Council (AFRC) and the Revolutionary United Front (RUF). The second type of authority depends less on formal hierarchies and is instead entrenched in symbolism and mythology. This is true of the *Komajors* and their Civil Defence Forces (CDF). No doubt, elements of both types of authority are found in all groups in one form or another.

Mythology, mysticism, and symbolism played a significant role in the military organization of Sierra Leone's factions. This was further facilitated by the fact that, although the country is home to twenty African groups (the largest of which are the *Temne* and *Mende*), it is multi-religious and the war did not start along ethnic or religious lines. Rebel groups and militias were thus ethnically and religiously diverse, a phenomenon already reflected in the membership of the country's secret societies, particularly the *poro* and the *bondo*. Exceptionally, the composition of the *Kamajors* was *Mende*-based, though their aim was not

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[73] This is confirmed by the vast literature in respect of weakly integrated nations where the real power lies with powerful individuals in the periphery. *See, e.g.*, John Gledhill, POWER AND ITS DISGUISES: ANTHROPOLOGICAL PERSPECTIVES ON POLITICS (1994).
[74] Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Trial Chamber Judgment ¶ 57 (Sep. 2, 1998).
[75] *Id*. at ¶¶ 55, 74.

necessarily to engage in inter-ethnic rivalries.[76] That the Special Court made a serious effort to explain the mythology and mysticism underlying the organization of the *Komajors* is evidence of the fact that social phenomena are of acute relevance in ascribing the attributes of authority when constructing complex liabilities. Recall that the ICTY largely rejected or, at least, ignored such factors on the assumption that Bosnian factions were neatly divided along ethnic and religious lines and, as a result, there was no need to inquire into shared traits between members of different groups.

One element that should have influenced the jurisprudence of the Special Court is the use of power or authority to "influence" as an indication or evidence of effective control. In the *Čelebići* case, the accused Delalič was found to be a highly influential figure in the Bosnian army.[77] He had authority to sign contracts, release orders in a prisoner-of-war (POW) camp, and liaise with the highest echelons of the Bosnian Muslim authorities. Yet, he did not possess formal authority over other subordinates, especially those in the POW camp. The Tribunal did not consider that this highly influential individual, lacking any direct subordinates, yielded sufficient control over those running the POW camp such that he could have intervened in the commission of crimes against the prisoners.[78] This conclusion was drawn at a time when the construction of the complex liability of command responsibility did not warrant open-ended expansion. It was enough for the Tribunal that only persons exercising effective control over subordinates were subject to the doctrine. The Tribunal rightly felt that if everyone wielding influence could be subject to command responsibility, it would be opening the floodgates to convict persons who were not at fault.[79] The key word here is *fault*. If D, a boy scout leader, has exerted and continues to exert significant influence over a group of boy scouts who were recruited as minors by a rebel group, it cannot seriously be claimed that he possesses sufficient control over all their future actions, particularly when they are spatially and geographically removed from him. A defendant clearly lacks fault for failing to use his powers of influence to dissuade the youths. However, if the defendant was in proximity

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[76] KENDRA DUPUY & HELGA M. BINNINGSBØ, POWER-SHARING AND PEACE-BUILDING IN SIERRA LEONE, at 3–4 (2007).

[77] *See* Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT'L L. 573, 577 (1999).

[78] Prosecutor v. Delalić, Case No. ICTR 96-21-T, Trial Chamber Judgment ¶¶ 266, 653–58 (Nov. 16, 1998).

[79] This is particularly reflected in its pronouncements in Prosecutor v. Radoslav Brdjanin, Case No. IT-99-36-T, Trial Chamber Judgment ¶¶ 276, 281 (Int'l Crim. Trib. for the Former Yugoslavia Sep. 1, 2004); Prosecutor v. Naletilić, Case No. IT-98-34-T, Trial Chamber Judgment ¶ 68 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 21, 2003). These judgments certainly influenced the decision of the State Court of Bosnia and Herzegovina in Prosecutor v. Alić, Case No. X-KR-06/294, Trial Chamber Judgment, (Apr. 11, 2008) at 46.

to the minors and was an influential figure in the broader echelons of the group, he possesses the material capacity to employ his influence over the minors, even if he does not enjoy effective control by reason of direct subordination. In this latter scenario, the defendant is at material fault, although the determination as to whether this fault may substantiate command responsibility or other types of complex liabilities will depend on the particular circumstances, such as the defendant's material capacity to act.[80] It defies logic and the dictates of justice to assert that a person with direct capacity to save hundreds of lives by forestalling would-be perpetrators bears no liability simply because he was not incumbent with a pre-existing duty to act. This is not merely an iteration or transplantation of the duty to save strangers typically associated with civil law jurisdictions. It goes to the very heart of material fault and all that it stands for.

It is not clear whether the SLSC shares this conviction given that it has not expressly rejected or upheld this thesis.[81] The Special Court was unaware of the scholarly literature suggesting that power of influence is possible even in the absence of authority over one's target audience.[82] Imagine that influence and authority are merged into a single entity. Had the Special Court been cognizant of such arguments, it might have taken up the proposition that in situations where power relations and social status between several individuals are chaotic, direct subordination is not necessary for the more influential person to establish effective control.[83] This chaotic power gap existed in the context of the military factions engaged in Sierra Leone's bloody wars. The spiritual leader of the *Kamajors*, Kondewa, is an interesting case study. The *Kamajors* originally organized as a group of *Mende* hunters who responded to the directives of their various chiefs to protect people from the rebels.[84] As a result, its members did not possess the military skills and discipline of a regular or rebel army. They needed the

[80] This is why Mettraux sides with the judgments of the ICTY to reject influence as establishing *de facto* control. *See* GUÉNAËL METTRAUX, THE LAW OF COMMAND RESPONSIBILITY 183–87 (2009).
[81] In Prosecutor v. Brima, Case No. SCSL-04-16-T, Judgement ¶ 788 (June 20, 2007), the Special Court referred to a number of indicia as evidence of effective control. These may implicitly be read—although one could argue otherwise—as encompassing cases of significant and overpowering influence.
[82] See LINDA A. HILL, EXERCISING INFLUENCE WITHOUT FORMAL AUTHORITY: HOW NEW MANAGERS CAN BUILD POWER AND INFLUENCE (2008); ALAN R COHEN & DAVID L BRADFORD, INFLUENCE WITHOUT AUTHORITY (3d ed. 2017). Hill's motto, a pioneer on this topic, is that: "all influential managers have power but not all powerful [sic] managers have influence".
[83] "Influence" is probably not the appropriate term here and this certainly explains why the ad hoc tribunals have rejected influence-based effective control out-of-hand. It should be understood as possessing the material and mental power to compel another to do or abstain from doing something.
[84] Prosecutor v. Fofana, Case No. SCSL-04-14-T, Trial Chamber Judgment ¶ 354 (Aug. 2, 2007).

organization and guidance of military and spiritual leaders to become an organized fighting unit.[85] Kondewa was a spiritual leader:

> He was the head of all the CDF initiators initiating the *Kamajors* into the *Kamajor* society in Sierra Leone. His job was to prepare herbs which the *Kamajors* smeared on their bodies to protect them against bullets. Kondewa was not a fighter, he himself never went to the war front or into active combat, but whenever a *Kamajor* was going to war, he would go to Kondewa for advice and blessing. (…) The *Kamajors* believed in the mystical powers of the initiators, especially Kondewa, and that the process of the initiation and immunisation would make them bullet-proof. The *Kamajors* looked up to Kondewa and admired the man with such powers. (…) Because of the mystical powers Kondewa possessed, he had command over the *Kamajors* from every part of the country.[86]

The Special Court opined that Kondewa's spiritual or mystical powers did not automatically confer upon him military authority over the recruits and their operations.[87] However, his *de jure* position of High Priest of the CDF granted him some degree of effective control in certain situations. He was found to enjoy effective control with respect to these situations only.[88]

The Special Court missed a golden opportunity to defy the *Čelebići* myth—that significant influence does not entail a degree of power—by failing to expressly stipulate that, under certain circumstances, the yielding of influence between asymmetric actors can give rise to effective control irrespective of the military, civilian, or other context in which it is exercised. If a person can convince another that he will be unaffected by his adversaries' weapons by following a ritual, it is absurd to claim that this person does not possess powers akin, if not far superior, to those enjoyed in a superior-subordinate relationship. Such powers of influence are no doubt rare, but in Sierra Leone where the mystical and the symbolic coincide with the real and the brutal, the anthropological basis of the relevant relationships should have been given far more weight. Just as the results of one anthropological study cannot be transplanted into another, the findings of the Special Court need not be accepted as immutable truths applicable to all future conflicts. I am not convinced by the argument that influence can never give rise

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[85] Even so, universal discipline remained problematic because some fighters "acted on their own without knowledge of central command because their area of operation was so wide." *Id*. para. 358.
[86] *Id*. paras. 344-346.
[87] *Id*. para. 806.
[88] *Id*. para. 686.

to effective control-type situations. This position is sustainable as long as it is proven that the person in question had the material capacity to prevent or punish the crimes committed by those persons over whom he enjoyed significant influence. I can only hope that the jurisprudence will take anthropological evidence into consideration and finally move in this direction.

V. CULTURE AND ENVIRONMENT IN THE DARFUR CONFLICT

We are still quite far from comprehending the origins of mass crimes in communities whose cultures evade our understanding. In the Darfur conflict, much was rightly said about the harmful role played by the Al-Bashir government, but such criticism has failed to discuss the onslaught of desertification and the failure of the government to take action as contributing factors.[89] The UN's Environment Program (UNEP) viewed Sudan's environmental issues at the time as contributing causes to conflict rather than root causes themselves.[90] It listed, specifically, competition over oil and gas reserves, water and timber, and confrontations over the use of agricultural land, with particular emphasis on rangeland and rain-fed land in the drier parts of the country, such as Darfur.[91] The government of Darfur has kept precipitation records since 1917 and the data clearly showed that a dramatic decrease in rainfall in the region had turned millions of hectares of semi-desert land to desert plains.[92] Instructively, between 1946-1975 the average annual rainfall in Northern Darfur was 272.36 mm, while in 1976-2005 it had fallen to 178.90 mm, constituting a decrease of 34 percent. Within the same time period, Southern Darfur experienced a decrease in rainfall of 16 percent, while the decline in Western Darfur was approximately 24 percent.[93] Lack of sufficient rainfall has rendered 24 percent of Sudanese territory real deserts. Desertification forced pastoralists to move to greener belts, consequently leaving more people to share less land. The absence of proper agricultural management brought about the last cycle in this environmental catastrophe. Farmers cut down millions of hectares of woodlands to make way for grazing grounds for their cattle and to otherwise free up land for cultivation.

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[89] *ICC Prosecutor v Al-Bashir* (Warrant of Arrest Re Situation in Darfur) ICC Doc ICC-02/05-01/09 (4 March 2009). Note that there is nothing in the indictment regarding Al-Bashir's intentional or reckless environmental policy. This should not deter the ICC Prosecutor, however, when formulating more detailed charges to lay some stress on this matter, even if only to underline the seriousness of the matter.

[90] *See generally* DOUGLAS H. JOHNSON, THE ROOT CAUSES OF SUDAN'S CIVIL WARS (2003).

[91] UNEP, Sudan: Post-Conflict Environmental Assessment, 8, UNEP Doc DEP/0816/GE (2007).

[92] Sudan's desertification has in fact been documented as early back as 1953. *See* EP STEBBING, THE CREEPING DESERT IN THE SUDAN AND ELSEWHERE IN AFRICA (1953).

[93] Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Trial Chamber Judgment ¶ 60 (Sep. 2, 1998).

Deforestation in Sudan occurred at a rate of 0.84 percent per annum and it is estimated that between 1990 and 2005, the country lost 11.6 percent of its forest cover. In Darfur alone, a third of the forest cover was lost between 1973 and 2006.[94] The uncontrolled and wholly unsustainable agricultural policy of Sudan was aptly reflected in its livestock breeding. Numbers rose from 28.6 million livestock in 1961, to 134.6 million in 2004. This dramatic increase in livestock under particularly arid conditions due to lack of rainfall resulted in widespread degradation of rangelands that could not subsequently be restored.[95] Conflict was inevitable. Even so, localized conflicts are not a recent phenomenon in Sudan. Between 1930 and 2000, competition for pastoral land among Sudan's pastoralists was a constant source of conflict.[96] The twist in the Darfur crisis, however, lay in the following factors: (a) desertification persisted at an alarming rate, thus shrinking available arable lands; (b) dramatic increase in livestock; (c) depletion of natural resources, particularly water; and (d) sharp increase in population growth.[97] The combination of all these combustive elements in such a small time frame was more than enough to ignite a bitter conflict between pastoralist and farmer groups in Darfur competing for space. None of this is to say that ethnic rivalries and the intervention of the Sudanese government have not played a role in the ensuing humanitarian catastrophe. In fact, other causes are more significant than the effect of environmental scarcity, and it is now evident that the Al-Bashir government has inflamed the conflict through its support of Arab Darfurians.[98]

The cultural narratives of the various groups in Darfur, whether painted by environmental degradation, poor environmental management, land scarcity, or other external calamities, were never made known. In mass crimes, it is much more expedient to identify the human element (i.e., *actus reus* and *mens rea*) behind criminal conduct, as opposed to other factors that require anthropological research or a combined approach from various disciplines that seem far removed from the courtroom, such as environmental science.[99] Ultimately, while apportioning criminal blameworthiness is quintessential to attaining justice and rule of law, international courts and tribunals must not make themselves oblivious to the complexities underpinning collective human behavior. International

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[94] *Id*. paras. 10-11.
[95] *Id*. para. 10.
[96] *Id*. para. 83.
[97] *Id*. para. 87.
[98] *See* UNEP, Understanding Environment, Conflict, and Cooperation, 6-7, UNEP Doc DEW/0571/NA (2004). The authors of the report start as far back as the Peloponnesian war between Athens and Sparta.
[99] Brian F. Chase, Tropical Forests and Trade Policy: The Legality of Unilateral Attempts to Promote Sustainable Development under the GATT, 14 Third World Q. 749 (1993) (arguing as far back as 1993 that poverty was the most serious cause for African deforestation).

criminal courts and tribunals would do well to look at the practices of many courts in developed nations that delve into the parties' cultural choices to offer more just outcomes.[100]

CONCLUSION

This Article has demonstrated the centrality of culture in cases or situations involving armed conflict between dissident groups, particularly where mass crimes have occurred, whether genocide or crimes against humanity. Anthropological research must become one of the first axes of any international criminal investigation, particularly where a part of the civilian population has participated, whether actively or passively, in the criminal activity instigated by the group's leadership. The outcomes of rigorous anthropological research will assist the appointing entity (international tribunal or organ of the United Nations) in several respects: (a) by demonstrating how particular leaders manipulated a myth/narrative in order to instigate animosity among the public, with a view to concretizing the case for leader-related criminal liability charges; (b) by painting a more accurate account of the underlying context of the conflict, its history, and the role of myth, with a view to re-writing the myth in post-conflict life of embattled groups; and (c) by allowing genuine reconciliation to take place on the understanding that popular narratives are distorted and manipulated. To add a timely example, the majority of the Russian public's conviction that the invasion in Ukraine is justified is very much the result of several official narratives that seek to perpetuate the myth that the Russian-speaking population in Ukraine is subjected to genocide by a Nazi regime.

The cultural dimensions of international criminal proceedings have certainly been underestimated and to a very large degree rejected by prosecutors and judges. Both are expected to operate under a considerable degree of stress and produce speedy outcomes with minimal expenses. As a result, prosecutors avoid any considerations that do not involve strict evidence gathering processes, as they are unable to comprehend their value in the overall universe of transitional justice of which criminal trials are only a single part. When the judges themselves attempt to paint a non-legal picture of the underlying conflict, they do so in the absence

[100] Exceptionally, the courts will look at the wife's disadvantaged position in the pertinent Muslim jurisdiction as was the case in *NA v MOT* [2004] EWHC 471 (Fam), para. 2, where the court examined the wife's options for divorce under Iranian law. It held that, if the wife wanted a divorce in Iran, she would have to negotiate the amount of the marriage portion she would have to forgo in exchange for her freedom. If the price was too high, she would be forced to remain married, but, in reality, she would be separated. Ultimately, however, the court applied Iranian law and did not seek to deviate from it in order to alleviate the wife's position. *See also Otobo v Otobo* [2002] EWCA Civ 949.

of solid anthropological evidence and only as a means of introduction to the legal context. It is not therefore surprising that international criminal proceedings seldom, if at all, culminate in meaningful platforms for national reconciliation. Entire populations (including child soldiers, brainwashed civilians and others) are conflated with those leaders that manipulated them or abducted them (in the case of child soldiers) and are then pitted against the group that was victimized.

The key finding of this Paper is that an anthropological component must be embedded in all existing and future international criminal tribunals, truth and reconciliation commissions, and international commissions of inquiry. This component should be independent from both the judicial and prosecutorial chamber in order to avoid conflicts of interest. Its role would be to offer an informed account of the history and cultural account of the relationship of the warring parties, which would allow the prosecutor to better apportion culpability and assist the Court and subsequent national processes. It is important for this proposed anthropological component of criminal proceedings to be institutionalized so that it is not side-lined by its stakeholders (i.e., courts, prosecutor, public defender, UN entities, and organs). Although courts retain their independence and inherent competence to decide the relevance and veracity of anthropological findings, they should not lightly dismiss them in the absence of strong evidence to the contrary. To this end, it is imperative that the process be open and transparent so that it cannot be tainted by bias. Hopefully, anthropology will become a key component of the international community's post-conflict reconstruction and reconciliation processes in the future.