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Radical Dissents in International Criminal Trials

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Abstract

International criminal law, for much of its history, has been a law characterized by dissents. However, international law scholarship has largely ignored the role of the dissenting opinion in shaping the discourse of international criminal law. This article critically examines the nature and function of dissents at international criminal tribunals at a particularly crucial moment in the life of these courts, when the project of establishing accountability for mass atrocity through criminal trials is increasingly under attack. The article argues that the dissenting opinion is a crucial legal device that can have a transformative potential in international criminal adjudication through its creation of a civic space for contestation that paradoxically shores up the legitimacy of the international criminal trial. To this end, it constructs a discrete category of dissenting opinions at international criminal courts: 'radical dissents'. The content and rhetorical style of a radical dissent enables actors invested in the project of international criminal justice to use it as a vital dissentient voice both within and outside the courtroom. Agents who operate within the confines of the legal trial, such as defendants, lawyers, appellate chambers and future judges, may channel its authority to challenge the idiom in which the majority judgment speaks. Likewise, the radical dissent could provide a legal language through which academics, victims, civil society and other affected communities continue to grapple with constructing and coming to terms with events that defy human understanding.

1 Introduction

What role and purpose do trials serve in dealing with cases of mass atrocity? The conventional justification proffered by the lawyer is cast in terms of the standard aims

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of criminalization and punishment: retribution, deterrence and, less frequently, communication to the offender and the public that a wrong has been done for which the offender must be held accountable by the state acting on behalf of the community.[1] This litany of rationales has failed to impress critics of the enterprise of international criminal law; trials for mass atrocity, at least in their current form, appear to satisfy few of the objectives of trials for 'ordinary' crimes. Selective prosecutions and the impossibility of 'proportional' punishment, combined with scepticism about evaluations of desert in the context of mass atrocity, undermine the claim to retributive justice.[2] The prospect of true deterrence is remote given that perpetrators of mass atrocity are rarely susceptible to rational cost-benefit analyses.[3] The bleak assessment of the concrete practice of international and hybrid criminal tribunals from multiple quarters has contributed to the general malaise surrounding the project of international criminal trials. The list of accusations against their operation and functioning could scarcely be more damning: arbitrariness, selectivity, inefficiency, neo-colonialism, anti-liberalism, to state just a few. Champions of international criminal trials have thus offered an alternative account of the function served by international criminal trials – 'their role in norm projection: [T]rials are expressive acts broadcasting the news that mass atrocities are, in fact, heinous crimes and not merely politics by other means.'[4]

This speculative claim is belied by the actual reception of the work of international criminal tribunals in the communities most affected by them. At Nuremberg, while the initial German public opinion on the fairness and legitimacy of the proceedings of the International Military Tribunal (IMT) was largely positive, this figure changed dramatically in the 1950s with 30 per cent of those polled stating that the trials were unfair and 40 per cent claiming that the verdicts were too severe.[5] The attitude of the Japanese people towards the International Military Tribunal for the Far East (IMTFE) has similarly been described in negative terms as 'passive acceptance' combined with unease and frustration.[6] More recently, the International Criminal Tribunal for the former Yugoslavia (ICTY) has been under continuous assault for its alleged anti-Serbian bias: over 72 per cent of the polled population considered the ICTY to be a

1 Auckerman, 'Extraordinary Evil: Ordinary Crime: A Framework for Understanding Transitional Justice', 15 *Harvard Human Rights Journal* (2002) 39, at 41–43.

2 *Ibid.*, at 56–63.

3 Wippman, 'Atrocities, Deterrence, and the Limits of International Justice', 23 *Fordham Journal of International Law* (*FJIL*) (1999) 473. Cf. Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?', 95 *American Journal of International Law* (*AJIL*) (2001) 7.

4 Luban, 'Fairness to Rightness: Jurisdiction, Legality and the Legitimacy of International Criminal Law', in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (2010) 569, at 576; de Guzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court', 33 *Michigan Journal of International Law* (2012) 265, at 302; Amann, 'Group Mentality, Expressivism, and Genocide', 2 *International Criminal Law Review* (2002) 93, at 118, 133; Sloane, 'The Expressive Capacity of International Punishment', 43 *Stanford Journal of International Law* (2007) 39, at 83.

5 Burchard, 'The Nuremberg Trial and Its Impact on Germany', 4 *Journal of International Criminal Justice* (*JICJ*) (2006) 800, at 813.

6 Futamura, 'Japanese Societal Attitude towards the Tokyo Trial from a Contemporary Perspective', in Y. Tanaka *et al.* (eds), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (2011) 35, at 42.

threat to Serbian interests in the year 2000, and while this figure has diminished over the years, there is still significant distrust of the ICTY among the Serb population.[7] Discontent has also been voiced against the International Criminal Tribunal for Rwanda (ICTR), arguing that it has only prosecuted one side of the conflict by concentrating on predominantly Hutu defendants and ignoring crimes committed by the Rwandan Patriotic Front.[8] The International Criminal Court (ICC) has fared little better. In addition to repeated concerns about criminal proceedings at the ICC affecting local transitional justice processes,[9] the investigation and charging practice of the ICC has been embroiled in charges of politicization. The ICC is perceived as favouring investigations and prosecutions of one set of actors in the conflict[10] and as failing to pursue actors or investigations in situations that would antagonize powerful states.[11]

Blame, and the concomitant responsibility for remedial action, has been laid at the door of processes at the inception and conclusion of the trial process: prosecutorial policies that are selective, biased or non-transparent[12] and outreach programmes that are under-resourced and ineffective.[13] Little attention has been given to the importance of the form and content of the judgment or verdict as the legal text that communicates the normative message of the international criminal trial and the role of international judges as norm entrepreneurs. This article focuses on a discrete category of legal texts that have a transformative potential in furthering the expressive aims of international criminal trials: dissenting opinions.[14] International criminal law, for much of its history, has been a law characterized by dissents. From the judgment of Justice Radhabinod Pal at the IMTFE[15] to the powerful opinions of Judges

[7] Arzt, 'Views on the Ground: The Local Perception of International Criminal Tribunals in the Former Yugoslavia and Sierra Leone', 603 *Annals of American Academy of Political and Social Science* (2006) 226, at 232.

[8] Waldorf, '"A Mere Pretense of Justice": Complementarity, Sham Trials, and Victor's Justice at the Rwanda Tribunal', 33 *FJIL* (2001) 1221, at 1258–1262.

[9] See, e.g., Human Rights Center, *When the War Ends: A Population-Based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Northern Uganda* (2007), at 4, 34–35 (on the public perception of the International Criminal Court's [ICC] intervention in Uganda).

[10] *Ibid.*, at 18 (in Uganda); Congressional Research Service (CRS), CRS Report for Congress, *International Criminal Court Cases in Africa: Status and Policy Issues* (2008), at 28 (in the Democratic Republic of Congo).

[11] S. Hickey, 'African Union Says ICC Should Not Prosecute Sitting Leaders', *The Guardian* (12 October 2013), available at www.theguardian.com/world/2013/oct/12/african-union-icc-kenyan-president; D. Bosco, 'Why Is the International Criminal Court Picking Only on Africa', *Washington Post* (29 March 2013), available at www.washingtonpost.com/opinions/why-is-the-international-criminal-court-picking-only-on-africa/2013/03/29/cb9bf5da-96f7-11e2-97cd-3d8c1afe4f0f_story.html.

[12] See, e.g., Waldorf, *supra* note 8, at 1258–1268, 1271–1276; Greenawalt, 'Justice without Politics: Prosecutorial Discretion and the International Criminal Court', 39 *New York University Journal of International Law and Politics* (*NYUJILP*) (2007) 583; Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court', 97 *AJIL* (2003) 510.

[13] D. Orentlicher, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia* (2008), at 22, 78; Peskin, 'Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme', 3 *JICJ* (2005) 950, at 954–955.

[14] For an exceptional effort to link dissenting opinions with the legitimacy of international criminal trials, see Mistry, 'The Paradox of Dissent: Judicial Dissent and the Projects of International Criminal Justice', 13 *JICJ* (2015) 1.

[15] Dissenting Opinion of Justice Rabhadinod Pal, Judgment, *Araki Sadao et al.*, 1 November 1948.

Christine van den Wyngaert and Hans-Peter Kaul at the ICC,[16] the dissent has loomed large in nearly every major decision handed down by international criminal tribunals. Yet, there has been no systematic study of the influence of dissents in shaping the discourse of international criminal justice both within and outside the courtroom.[17]

The article argues that the dissent has a vital performative function in the theatre that is the criminal trial and that this role is especially important given the challenges that confront efforts to establish legal accountability for mass atrocity crimes. To this end, the article surveys dissenting opinions at the international and hybrid criminal tribunals to highlight that not all dissenting opinions are created alike. While dissents are an increasingly accepted and lauded feature of international adjudication more generally, many of the arguments supporting the legitimation function of dissents do not directly apply to a species of dissents that the article conceptualizes as 'radical dissents'. Radical dissents, both due to their content and their form, explicitly acknowledge the distinctly political character of mass atrocity and, following from that, recognize that any assessment of the responsibility for mass atrocity cannot escape being a political act to some extent. In rejecting, either directly or by implication, a comfortably sanitized version of events that defy human understanding, they have the potential to create a civic space for contestation that paradoxically shores up the legitimacy of the international criminal trial.

The article proceeds as follows. Part 2 gives an overview of the law and practice of dissents at international and hybrid criminal tribunals. Part 3 carves out a species of dissents called 'radical dissents' and focuses on instances of international judicial dissents that fall within this category and that have widely been regarded as having dramatically shaped the international criminal legal discourse. Part 4 argues that radical dissents make a distinctive set of contributions to the legal narrative of mass atrocity that must be assessed in the context of the communicative project of international criminal justice.

2 The Law and Practice of Dissents at International Criminal Courts

To the extent that scholars have paid any attention to dissents at international criminal tribunals, the academic commentary has typically focused on doctrinal issues[18] or on a particular case or even a specific judge.[19] This narrow lens has led to an attenuated conception of dissents; scholarship that favours dissents lumps all varieties of

[16] Minority Opinion of Judge Van den Wyngaert, Judgment, *German Katanga* (ICC-01/04-01/07), Trial Chamber II, 7 March 2014; Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya* (ICC-01/09), Pre-Trial Chamber II, 31 March 2010.

[17] For a notable recent, and only, exception, see Mistry, *supra* note 14.

[18] Sluiter, 'Unity and Division in Decision Making: The Law and Practice on Individual Opinions at the ICTY', in B. Swart, A. Zahar and G. Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (2011) 191; Jorgensen and Zahar, 'Deliberation, Dissent, Judgment', in G. Sluiter (ed.), *International Criminal Procedure: Principles and Rules* (2013) 1151.

[19] See, e.g., Nandy, 'The Other Within: The Strange Case of Radhabinod Pal's Judgment on Culpability', 23 *New Literary History* (1992) 45; Kopelman, 'Ideology and International Law: The Dissent of the Indian

dissents into the same category and tends to rely on oft-repeated and well-worn justifications for their permissibility with little regard for their specific position in trials for mass atrocity. Alternatively, analyses of isolated dissents or judges rarely abstract from the politics of individual cases to assess their transformative potential for international criminal justice as a whole. This section provides an overview of dissents at international and hybrid tribunals to paint a better picture of the law and practice of dissents in international criminal law.

Similar to the constitutive instruments of most international adjudicative bodies,[20] the legal instruments establishing various international and hybrid criminal tribunals have contemplated the possibility of dissents from the very first trials for mass atrocity crimes.[21] Thus, the Charters of the IMT and the IMTFE both provided that decisions at the tribunals will be made by majority vote, with the president's vote functioning as a tiebreaker.[22] The IMT judgment saw a single dissenting opinion by the Soviet member, Judge Iona Nikitchenko.[23] In contrast, notwithstanding an initial understanding on unanimity,[24] no less than five of the 11 judges at the IMTFE appended separate or dissenting opinions.[25] The statutes and rules of procedure and evidence of the ICTY, the ICTR, the Special Court for Sierra Leone (SCSL) and the Special Tribunal for Lebanon (STL) all provide for a reasoned judgment by majority vote, to which separate and dissenting opinions may be appended.[26] There are few other procedural or other (publicly available) rules guiding the drafting and form of dissenting opinions, though the SCSL has cautioned against significant delays or gaps between the time of publication of the majority judgment and that of the dissenting opinion.[27] At the Extraordinary Chambers in the Courts of Cambodia, judges are required to attempt to

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Justice at the Tokyo War Crimes Trial', 23 *NYUJILP* (1991) 373 (focusing exclusively on Justice Pal the man or on the International Military Tribunal for the Far East [IMTFE]).

[20] The European Court of Justice (ECJ) stands out as a rare exception. See Laffranque, 'Dissenting Opinion in the European Court of Justice', 9 *Juridica International* (2004) 14. Also, the Appellate Body (AB) of the World Trade Organization (WTO) permits separate opinions but requires them to be anonymous. Art. 17.11 Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, 1869 UNTS 401: 'Opinions expressed in the Appellate Body report by individuals serving on the Appellate Body shall be anonymous.'

[21] For a more comprehensive description of the deliberative processes and forms of judgment at the major international and hybrid criminal tribunals, see Jorgensen and Zahar, *supra* note 18.

[22] Art. 4(c) Charter of the International Military Tribunal 1945, 82 UNTS 279; Art. 4(b) Charter of the International Military Tribunal for the Far East (IMTFE Charter) 1946, 4 Bevans 20 (as amended 26 April 1946).

[23] Dissenting Opinion of Judge I.T. Nikitchenko, Judgment, *Schacht, von Papen, Fritzsche and Hess and Others*.

[24] N. Boister and R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (2008), at 98.

[25] See B.V.A. Röling and C.F. Ruter (eds), *The Tokyo Judgment: The International Military Tribunal for the Far East (I.M.T.F.E.), 29 April 1946–12 November 1948* (1977). For a summary of some of these issues, see Sluiter, *supra* note 18, at 198–199.

[26] Art. 23(2) Statute of the International Criminal Tribunal for the Former Yugoslavia 1993, 32 ILM 1159 (1993); Art. 23(2) Statute of the International Criminal Tribunal for Rwanda 1994, 33 ILM 1598 (1994); Art. 18 Statute of the Special Court for Sierra Leone 2002, 2178 UNTS 138; Art. 23 Statute of the Special Tribunal for Lebanon, UN Doc. S/RES/1757, 31 January 2007.

[27] Decision on Brima-Kamara Defence Appeal Motion against Trial Chamber II Majority Decision, *Brima-Kamara* (SCSL-2004-16-AR73), Appeals Chamber, 8 December 2005, paras 20–24.

achieve unanimity at both the trial and appellate level and can only resort to decisions by super-majority if this is not possible and append a separate or dissenting opinion.[28]

Finally, the Rome Statute of the International Criminal Court provides a somewhat incomplete framework on the permissibility of dissents.[29] While there is no provision on whether or not dissents are permitted in the Pre-Trial Chamber, judges at the trial level are enjoined to strive to achieve unanimity, failing which a decision shall be taken by majority vote.[30] No corresponding obligation of unanimity is specified for the Appeals Chamber. Instead, the 'judgement of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law'.[31]

A treaty injunction permitting dissents says little about the extent to which judges at courts may indulge in, or refrain from, dissenting as a matter of practice.[32] A few elements complicate the effort to arrive at generalizable conclusions from the data on dissents in international criminal trials. Among these are the labelling of individual opinions as 'declarations', 'separate opinions' and 'dissenting opinions', where it is often unclear whether the content of the individual opinion matches the categorization. Further, some judges account for a disproportionate percentage of dissenting opinions, which in turn affects the analysis.[33] Notwithstanding these challenges, scholars analysing judicial decision making in specific tribunals such as the ICTY have identified a consistent pattern in the percentage of dissenting opinions across judges and over a period of time.[34]

One would assume that given the ubiquity of dissenting opinions in common law countries, judges from a common law background would dissent more often than their civil law brethren. However, this is not borne out by the data. In a fascinating empirical study of individual opinions at the ICTY, Allison Danner and Erik Voeten conclude that while domestic legal background (civil versus common law) of the judge does not seem to have much bearing on whether he or she is more likely to dissent, there is a significant statistical correlation between the proportion of common law judges on a panel and the proportion of dissenting opinions.[35] Similarly, there is some evidence

[28] Art. 14 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, Doc. NS/RKM/1004/006, 27 October 2004; Rule 101(2) Extraordinary Chambers in the Courts of Cambodia, Internal Rules, as revised on 16 January 2015.

[29] See Sluiter, *supra* note 18, at 203. The drafting history suggests that some countries favoured unanimous opinions. Jorgensen and Zahar, *supra* note 18, at 1178–1179. Rome Statute of the International Criminal Court (Rome Statute) 1998, 2187 UNTS 90.

[30] Rome Statute, *supra* note 29, Arts 74(3), 74(5).

[31] *Ibid.*, Art. 83(4).

[32] At the Appellate Body of the WTO, for instance, several institutional factors are considered to contribute to the extremely low rate of dissents, including an informal agreement among its members favouring unanimity and the costs of dissenting. Alvarez-Jimenez, 'The WTO Appellate Body's Decision-Making Process: A Perfect Model for International Adjudication', 12 *Journal of International Economic Law* (*JIEL*) (2009) 289, at 291.

[33] Sluiter, *supra* note 18, at 206–207, 210–213 (noting that two judges account for 30 per cent of the individual opinions at the International Criminal Tribunal for the former Yugoslavia [ICTY]).

[34] *Ibid.*, at 204–206 (cataloguing individual and dissenting opinions at the ICTY).

[35] Danner and Voeten, 'Who Is Running the International Criminal Justice System?', in D. Avant *et al.* (eds), *Who Governs the Globe?* (2010) 35, at 66–68.

that the previous professional background of the judge (judge versus government official versus academic) influences the propensity to dissent.[36]

3 Ordinary and Radical Dissents

Given the range and frequency of dissents, it is not surprising that the subject matter of dissenting opinions runs the entire gamut of legal and factual disagreements, from the mundane to the momentous. This part of the article argues that dissents of various kinds do not serve the same function in an international criminal trial. 'Radical dissents' are substantively and stylistically distinct from ordinary dissents and can have a dramatic influence on the narrative of international criminal justice, which transcends the trial and the verdict.

A *Constructing the Radical Dissent*

Judges at international criminal tribunals have clashed with their colleagues on jurisdictional,[37] procedural (fair trial rights, standard of review),[38] substantive (modes of liability, definitions of crimes, defences),[39] evidentiary (assessment of facts and evidence)[40] and sentencing questions.[41] This looks very much like the usual variety of legal opinions of any shape and form in any court that hands down reasoned judgments. The scope of disagreement is typically an important substantive, procedural or evidentiary legal or factual issue – at times, fairly narrow and technical while, at others, relatively wide-ranging and complex. The standard tone of the dissenting opinions is fairly legalistic, and there is no attempt to question the authority or bona fides

[36] *Ibid.*, at 69.

[37] See, e.g., *Situation in the Republic of Kenya*, *supra* note 16 (on the jurisdictional requirements of a crime against humanity).

[38] See, e.g., Dissenting Opinion of Judge Georgios M. Pikis, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled 'Decision on the Release of Thomas Lubanga Dyilo', *Thomas Lubanga Dyilo* (ICC-01/04-01/06 OA 12), Appeals Chamber, 21 October 2008 (on the violation of the accused's rights to a fair trial); Judgment, *Blaškić* (IT-95-14-A) Appeals Chamber, 29 July 2004; Partial Dissenting Opinion of Judge Weinberg de Roca, Judgment, *Blaškić* (IT-95-14-A) Appeals Chamber, 29 July 2004 (on the standard of review).

[39] See, e.g., Separate and Dissenting Opinion of Judge Odio Benito, Judgment Pursuant to Article 74 of the Statute, *Thomas Lubanga Dyilo* (ICC-01/04-01/06), Trial Chamber I, 14 March 2012 (on the definition of crimes of enlistment, conscription and use of children under the age of 15 to participate actively in hostilities); Partially Dissenting Opinion of Judge Shahabuddeen, Judgment, *Brdanin* (IT-99-36-A), Appeals Chamber, 3 April 2007 (on the elements of a joint criminal enterprise); Separate and Dissenting Opinion of Judge Cassese, Judgment, *Erdemović* (IT-96-22-A), Appeals Chamber, 7 October 1997; Joint Separate Opinion of Judge McDonald and Judge Vohrah, Judgment, *Erdemović* (IT-96-22-A), Appeals Chamber, 7 October 1997; Separate and Dissenting Opinion of Judge Stephen, Judgment, *Erdemović* (IT-96-22-A), Appeals Chamber, 7 October 1997 (on the defence of duress).

[40] Partially Dissenting Opinion and Declaration of Judge Lui, Judgment, *Sainović* (IT-05-87-A), Appeals Chamber, 23 January 2014; Dissenting Opinion of Judge Tuzmukhamedov, Judgment, *Sainović* (IT-05-87-A), Appeals Chamber, 23 January 2014 (on the evaluation of evidence).

[41] See, e.g., Partially Dissenting Joint Opinion of Judges Agnieszka Klonowiecka-Milart and Chandra Nihal Jayasinghe, Appeal Judgment, *Kaing Guek Eav* (001/18-07-2007-ECCC/SC), Supreme Court Chamber, 3 February 2012 (dissents on sentence imposed on the accused).

of the court and its judges. These dissents rarely excite the wider public or invite much comment beyond elite legal and political circles.

There have been some initial efforts to develop a more sophisticated typology of dissents in international criminal courts through the proposed category of 'fundamental dissents'. The term is used in two senses – it signals both the dissenting judge's strong sentiment with respect to the disputed issue and the status of the disputed issue as fundamental to the legal outcome in the case.[42] Some scholars argue that categorizing a dissent in this fashion is at best superfluous (since dissents by their very nature are fundamental to the decision) and at worst detrimental to the authoritativeness of the majority decision.[43] Others are favourably disposed to fundamental dissenting opinions due to their role in interrogating the exercise of judicial power and, following from that, paradoxically contributing to the legitimacy of international criminal trials.[44]

The term 'fundamental dissent', however, does not convey much except to suggest that the disputed legal or factual issues might be more serious or grave than the typical scope of disagreement; the difference, thus, is one of degree rather than kind. There is, however, a type of dissent that is of a different quality in its content, form and intended audience: the radical dissent. The radical dissent, most crucially, is one that critiques the authorized version of the historical, political and cultural portrait set up by the trial and creates a civic space for counter-narratives to emerge and challenge the idiom in which the majority judgment speaks and which it takes as a given.

The significance of this contestation flows from the character of trials for international crimes: unlike the standard case of trials for ordinary crimes, extraordinary criminality such as mass atrocity requires the construction of a broader context that provides meaning and content to the conduct of the individual accused in the courtroom. This contextual setting is necessitated by the fact that an international crime, unlike its domestic counterpart, is inherently collective in nature – for the perpetrator as well as for the victim.[45] While the perpetrator of a crime such as ethnic cleansing or aggression is individually culpable, he invariably commits this crime on behalf of, or in furtherance of, a collective criminal project, be it that of a state or some other authority.[46] The hypothetical figure of the lone *génocidaire* hardly ever exists in practice: the perpetrator is part of, and acts within, a social structure that influences his conduct and in conjunction with other people.[47] Similarly, the victims of international crimes are also mostly chosen not based on their individual characteristics but, rather, based on their actual or perceived membership in a collective.[48] International crimes are also

[42] Jorgensen and Zahar, *supra* note 18, at 1191; Mistry, *supra* note 14, at 2.

[43] Jorgensen and Zahar, *supra* note 18, at 1191–1192.

[44] Mistry, *supra* note 14, at 2–3.

[45] Fletcher, 'The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt', 111 *Yale Law Journal* (2002) 1499, at 1514; Fletcher and Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation', 24 *Human Rights Quarterly* (2002) 573, at 605.

[46] Sloane, *supra* note 4, at 56.

[47] *Ibid.*

[48] Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity', 99 *Northwestern University Law Review* (2005) 539, at 571.

collective in the sense that they are committed with the consciousness on the part of the individual perpetrator that he is part of a common project. As academics have noted in their studies of the phenomenon of mass atrocity, more often than not, there is a 'communal engagement with violence'.[49]

The nature of international crimes such as genocide, or crimes against humanity that are committed as a systematic and widespread attack against a civilian population, entails that notwithstanding the best efforts of international judges, it will be very difficult to hold an individual defendant responsible for this crime without venturing into some explanation of the collective context that renders this crime possible and capable of description.[50] If the context itself cannot be questioned, the assessment of the accused's responsibility can seem pre-determined.[51] The radical dissent does not merely focus on legal or factual issues relevant to the individual conduct or mental state of the accused but, in addition, also queries this contextual narrative.

In broadening the contextual enquiry to include socio-economic, political and historical factors that are typically beyond the ken of a standard courtroom, the radical dissent challenges and reminds its audience of the way in which power, especially the imbalance in global political power, structures and limits the discourse surrounding the causes of, and responsibility for, atrocity. In this guise, it partakes of the character of an explicitly intellectual/political movement that interrogates authority. While the radical dissent may be primarily oppositional in character, it can also be reconstructionist and offer an alternative account of the narrative of mass atrocity and of the roles played by different parties in its orchestration and resolution. The version of history that emerges from the attempt to construct a counter-narrative might then be less linear, fragmentary and embrace gaps, ambiguities and contradictions.

Stylistically, radical dissents eschew any attempts at apology and appropriate many of the elements of the rhetorical style of majority judgments, thus seeking to regain some of the ground that is lost since the dissenting judge no longer 'speaks for the court'.[52] Rhetorically, the radical dissent is directed not only, or not even primarily, to the fellow judges on the court but also to the wider constituency of the potential stakeholders in the project of international criminal justice. The radical dissent may be forcefully individualistic in its tone, and, to the extent that remarks are addressed to

[49] Fletcher and Weinstein, *supra* note 45, at 605.

[50] Damaska, 'What Is the Point of International Criminal Justice?', 83 *Chicago-Kent Law Review*, (2008) 323, at 359–360 (exploring this tension between the individualization of responsibility and the broader didactic focus of international criminal trials). See also Osiel, 'Why Prosecute? Critics of Punishment for Mass Atrocity', 22 *Human Rights Quarterly* (2000) 118, at 126–127 (illustrating this problem through the trials of junta trials in Argentina).

[51] Koskenniemi, 'Between Impunity and Show Trials', 6 *Max Planck Yearbook of United Nations Law* (2002) 1, 17–18.

[52] See, e.g., the apologetic tone and attempt to downplay the issue by the dissenter in WTO, *United States – Subsidies on Upland Cotton*, WT/DS246, where every attempt is made to maintain collegiality and reach consensus. Kolsky Lewis, 'The Lack of Dissent in WTO Dispute Settlement', 9 *JIEL* (2006) 895, at 903–904. For the first century of the court's history, dissents at the US Supreme Court also struck an apologetic note. Note 'From Consensus to Collegiality: The Origins of the "Respectful" Dissent', 124 *Harvard Law Review* (*HLR*) (2011) 1305.

the other members of the court, they rarely exhibit the hope or expectation of a continued dialogue and at times veer towards the other extreme of reproachful or even accusatory denunciations.[53] In some cases, the refusal to engage comes at a serious cost to civility. The radical dissent typically avoids a point-by-point rebuttal of the legal or factual analysis set out in the majority judgment; instead, it seeks to construct its own version of the dispute and refutes the majority's argumentation within the structure of the dissenting opinion's discourse. In this sense, it aspires to equal the 'monologic' stance of the majority opinion: it appropriates alternative voices and allows differences to be aired but only to the extent they can be addressed and answered within the controlling narrative of the dissenting opinion.[54]

The content and rhetorical style of the radical dissent often lends it a peculiarly ritualistic quality that highlights and reinforces the character of the trial as performance. The radical dissent will usually display a distinctly extra-legal sensibility, both in the language it speaks and in what it chooses to include or exclude as relevant and material information for the adjudication of the narrower legal issue in contention. In this sense, it has an explicit or implicit outward-looking character. The non-technical, non-jurisprudential elements of the dissent have the ability to draw in and speak to various legal and non-legal audiences, although its dramatic impact may not be immediately visible and may take months or even years to percolate into the wider public consciousness and debate. This dissemination process is largely beyond the influence or control of the dissenting judge (who might, however, choose to hurry it along by generating some of the publicity), and the dissent, once unleashed, is susceptible to be taken up, and even put to unforeseen ends, by multiple constituencies.[55]

These characteristics may be present to a greater or lesser degree across dissents, individually or together, but it is their combination that lends the dissent its radical potential. The category of radical dissents, however, should not be taken as suggesting a binary distinction between radical and ordinary dissents: dissenting opinions can be on a spectrum ranging from those that embody all three features of the radical dissent, those that come close to it, those that share only some of these elements and others still that serve entirely different purposes and functions.

B *Radical Dissents at International Criminal Tribunals*

Given the elements that are required to constitute a radical dissent, they will usually represent a small fraction of judicial opinions in any tribunal or regime. This section

[53] For the acrimonious language used in some dissents at the ICTY, see Fundamentally Dissenting Opinion of Judge Schomburg on the Right to Self-Representation, Decision on Momcilo Krajišnik's Request to Self-Represent on Counsel's Motions in Relation to Appointment of Amicus Curiae, and on the Prosecution Motion of 16 February 2007, *Krajišnik* (IT-00-39-A), Appeals Chamber, 11 May 2007, para. 1; Dissenting Opinion of Judge Fausto Pocar, Judgment, *Gotovina* (IT-06-90-A), Appeals Chamber, 16 November 2012, paras 26, 39.

[54] See Ferguson, 'The Judicial Opinion as Literary Genre', 2 *Yale Journal of Law and Humanities* (1990) 201, at 205 (on the characteristics of the monologic judicial opinion).

[55] There are some analogues between this function of the radical dissent and another category of judicial dissents developed by Lani Guinier, the 'demosprudential' dissent. Guinier, 'The Supreme Court, 2007 Term – Foreword: Demosprudence through Dissent', 22 *HLR* (2008) 4, 14–17.

highlights the elements of a radical dissent through an analysis of some of the canonical dissents by judges of international criminal courts. Arguably the most famous dissent in international criminal law, Justice Pal's dissent at the IMTFE bears all of the hallmarks of the radical dissent. Justice Pal's 'explosive' dissent,[56] spanning 1,235 pages and resulting in the acquittal of all 'Class A' defendants for crimes against peace is widely regarded as a comprehensive challenge to the majority judgment's construction of the narrative of Japanese aggression involving a far-ranging conspiracy to dominate parts of Asia and the Indian and Pacific Oceans[57] and the casting of the Allies as liberal defenders.[58] The dissent covered a vast amount of ground, ranging from a positivist critique of the law governing the criminalization of crimes against peace and crimes against humanity to challenging the historical context of Japanese actions.[59] As a matter of pure positive law, Justice Pal argued that the IMTFE Charter, criminalizing the categories of 'crimes against peace' and 'crimes against humanity', had no basis in pre-existing international law and that this position remain unchanged notwithstanding the conclusion of the Pact of Paris and developments in customary international law.[60] Exposing the power dynamics at play in including these crimes under the IMTFE Charter, he declared:

> The so-called trial held according to the definition of crime *now* given by the victors obliterates the centuries of civilization which stretch between us and the summary slaving of those defeated in a war. A trial with law thus prescribed will only be a sham employment of legal process for the satisfaction of a thirst for revenge. It does not correspond to any idea of justice. Such a trial may justly create the feeling that the setting up of a tribunal like the present is much more a political than a legal affair, an essentially political objective having thus been cloaked by a juridical appearance.[61]

More crucially, in his reconstruction of Japan's conduct during the war, Justice Pal sought to explain Japanese acts of aggression in the context of Western colonial policies and imperialism. Rejecting any attempt to portray the definition of 'aggression' as a neutral exercise,[62] he immediately related the charge of aggression to the state's prerogative to act in self-defence and shifted Japan's conduct from the 'aggressive' (and illegitimate) to the 'defensive' (and justified) side of the scale.[63] Since Japan had acted in the genuine belief that its security was under threat, its conduct fell into the rubric of self-defence, even if the immediate threat was not military in character. Among the

56 Kopelman, *supra* note 19, at 377.

57 Comyns Carr, 'The Judgment of the International Military Tribunal for the Far East', 34 *Transactions of the Grotius Society* (1948) 141, at 146; Boister, 'The Application of Collective and Comprehensive Criminal Responsibility for Aggression at the Tokyo International Military Tribunal', 8 *JICJ* (2010) 425, at 430.

58 Mistry, *supra* note 14, at 12.

59 For a comprehensive analysis of the main issues highlighted in Pal's critique, see Kopelman, *supra* note 19. This section will touch on only a few of the instances that demonstrate its radical character.

60 Dissenting Opinion of Justice Pal, *supra* note 15, at 33–37, 104, 126, 151–152. Pact of Paris 1928, 94 LNTS 57.

61 Dissenting Opinion of Justice Pal, *supra* note 15, at 37 (emphasis in original).

62 Kopelman, *supra* note 19, at 419–423.

63 Sellars, 'Imperfect Justice at Tokyo and Nuremberg', 21 *European Journal of International Law* (2011) 1085, at 1096.

threats he included in this category were the rise of Chinese communism and Western support of anti-Japanese economic policies.[64]

Contrary to its subsequent depiction by Japanese revisionist historians, the dissent did not absolve Japan of culpability altogether. Justice Pal criticized Japanese actions in various theatres of war, particularly events such as the Manchurian Incident and the Japanese establishment of Manchuko.[65] However, he rejected the prosecution's attempt to frame this conduct as part of a consistent and deliberate Japanese conspiracy to dominate the world, which the prosecution likened to the conduct of Nazi Germany.[66] His opinion berated the prosecution for erecting a conspiracy edifice that presented a series of discrete events spanning more than a decade, and marked by a combination of foresight, accident and surprise, as a linear historical progression with a calculated object. To him, this represented a hopelessly simplistic and inaccurate judgment on the historical evolution of an entire nation.[67]

Even more tellingly, Justice Pal considered Japanese acts of aggression as motivated by, and seeking to imitate, Western colonialism.[68] In the aftermath of the conclusion of unequal treaties between Japan and various Western powers in the late Edo period, Japanese actions to revise these treaties took the form of imitating Western modes of thinking and actions. This led Japan to adopt a policy of territorial expansion, similar to that adopted by the West in different parts of the world, including the eastern hemisphere.[69] The implication was obvious: the Allies, as victors, were castigating Japan for the very conduct that their own policies had perpetuated. In the words of Ashis Nandy, 'Pal set the Japanese imperial guilt in this century in a larger global context. If the accused were guilty, the plaintiffs were guilty too'.[70]

Rhetorically, from the very outset, Justice Pal's dissent structured the legal and factual analysis in its own terms, setting out in clear detail the priority and ordering of the issues relevant for the disposal of the case.[71] Moreover, in evaluating the evidence and marshalling arguments dismissing the claims of the prosecution, the dissent pointedly refrained from even referencing the majority judgment; this was in marked contrast to extensive citations to the legal propositions stemming from the judgment of the IMT at Nuremberg. Striking a highly individualistic note, Justice Pal quoted the arguments of the prosecution in some detail and assessed and refuted them as if he were the sole authority tasked with their adjudication.[72]

64 Y. Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (2009), at 219.

65 Takeshi, 'Justice Pal (India)', in Tanaka *et al.*, *supra* note 6, at 127, 132.

66 Nandy, *supra* note 19, at 64.

67 For a detailed account of Pal's dissent, see Kopelman, *supra* note 19, at 416–417.

68 Takeshi, *supra* note 65, at 132, 135–138.

69 *Ibid.*, at 132, 135–137.

70 Nandy, *supra* note 19, at 65.

71 The judgment consists of seven chapters: 'Preliminary Question of Law,' 'What Is "Aggressive War"?', 'Rules of Evidence and Procedure', 'Over-all Conspiracy', 'Scope of Tribunal's Jurisdiction', 'War Crimes *stricto sensu*' and 'Recommendation'. Dissenting Opinion of Justice Pal, *supra* note 15.

72 See, e.g., the analysis of whether crimes against peace could legitimately be criminalized under the IMTFE Charter. *Ibid.*, at 33–37.

The deliberate omission to allude to the majority judgment is hardly surprising given Justice Pal's attitude towards the majority that was revealed in a subsequent speech he gave at Hiroshima in the aftermath of the trials, where he characterized the majority decision as having been written 'on an emotional impulse' that was devoid of evidence and analysis in contrast to his own thoroughly researched and comprehensively argued opinion.[73] Indeed, having decided relatively early on in the trial proceedings to register his dissent,[74] Justice Pal did not even attend a significant proportion of the court proceedings and closeted himself in his lodgings to personally collate the facts and evidence he felt he needed to write his lengthy opinion.[75] In this feat though, it must be noted that he was eclipsed by the frequent absences of Judge Sir William Webb, the president of the tribunal, who journeyed regularly to Brisbane during the course of the trial.[76]

Justice Pal's was not the only dissent at the IMTFE; arguably, it was not even the one that had the most compelling legal logic or the most penetrating grasp of the facts and evidence.[77] However, it was Justice Pal's dissent that captured the Japanese imagination and that has since been instrumental in shaping the Japanese collective memory of the events leading up to World War II.[78] For critics of the Tokyo trial, the acquittal of the accused and the absolution of Japan from having plotted and engaged in an aggressive war were a vindication of Japan as a nation and an exposé of Western hypocrisy.[79] Justice Pal himself became a household name; to him were dedicated memorials, shrines and even a haiku by the wartime prime minister, Hideki Tojo.[80] Parts of the dissenting opinion were misappropriated to support and further the right wing revisionist discourse of the legitimacy of the Greater East Asia War and to denounce the Tokyo proceedings.[81] This position shifted in the 1980s with a new generation of progressive historians who argued that the real failing of the Tokyo trial was that it had not gone far enough, highlighting, among other things, the failure to prosecute the Allied powers' crimes in Hiroshima and Nagasaki.[82]

The different causes that Justice Pal's opinion seems to serve is perhaps equally a product of its deeply ambiguous nature: as scholars have pointed out, the opinion teeters between a conservative, staunchly positivist approach to the rule of law, a distinctly Asian and nationalistic spirit and a radical anti-colonial critique of Western hypocrisy.[83] Nonetheless, whether invoked by the right or the left, the most important

[73] Totani, *supra* note 64, at 225.
[74] Kopelman, *supra* note 19, at 419.
[75] Totani, *supra* note 64, at 225–226.
[76] B. Hill, *Peacemongers* (2014), at 362.
[77] See, e.g., Cryer, 'Röling in Tokyo: A Dignified Dissenter', 8 *JICJ* (2010) 1109, at 1122–1123 (favourably contrasting the dissent of Justice Röling with that of Justice Pal).
[78] Mistry, *supra* note 14, at 13.
[79] See Totani, *supra* note 64, at 224.
[80] Nandy, *supra* note 19, at 47; Totani, *supra* note 64, at 229.
[81] Takeshi, *supra* note 65, at 141, 144; Futamura, *supra* note 6, at 43.
[82] Sellars, *supra* note 63, at 1100. It bears noting that Pal had specifically alluded to the Allied bombing of Hiroshima and Nagasaki. Dissenting Opinion of Justice Pal, *supra* note 15, at 137–138.
[83] Kopelman, *supra* note 19, at 411–431.

legacy of Justice Pal's dissenting opinion has been 'to open up a space in Japanese political culture to argue about and debate questions of responsibility arising out of the Asia-Pacific War'[84] – questions that may have been harder to raise or address in its absence.[85]

Another, more recent, judicial opinion that has received very little attention but that has features of a radical dissent is the appellate opinion of Judge George Gelaga King in the *Fofana* case at the SCSL.[86] While superficially a legal analysis of the contextual requirements for a crime against humanity, the dissent challenged the majority's narrative of the role of the Civil Defence Forces (CDF) in the conflict in Sierra Leone and Western participation in, and support of, CDF forces. The narrow issue that was the subject of the dissent was the Appeals Chamber's overruling of the Trial Chamber's determination that the civilian population had not been the primary target of attacks carried out by the CDF in various parts of Sierra Leone. According to the Trial Chamber's judgment, while the attacks were widespread and systematic, since they were intended to target rebels and juntas, they were not directed against any civilian population as required by the legal definition of crimes against humanity.[87]

In a manner reminiscent of Justice Pal's dissent, Judge King did not merely offer a technical refutation of the majority judgment's legal and factual analysis. Instead, he addressed, on his own terms, whether the evidence was sufficient to prove the nature of, and intent motivating, the attacks by framing it in the context of the history of Sierra Leone and objects and purposes of the CDF.[88] The CDF was the nodal force consisting of traditional 'Kamajors' (hunters) who had been trained as vigilantes at the outbreak of the civil war by Sierra Leonean armed forces and other militias and civil defence forces.[89] The CDF, with the accused Hinga Norman at its helm, was expected to coordinate with the Economic Community of West African States Monitoring Group (ECOMOG) to restore the democratically elected government of Sierra Leone and defeat dissident military groups.[90] ECOMOG, with the assistance of Nigeria and Britain, even went so far as to supply the CDF with financial and logistical support.[91] For Judge King, the fact that the CDF was engaged in a conflict with the rebel forces to restore to power the Western-backed democratically elected government of Sierra Leone was entirely germane to evaluating whether the CDF had carried out attacks directed at the civilian population.[92] Having recharacterized and contextualized the aims of the CDF, Judge King assessed the Trial Chamber's findings on the nature of the

[84] Simpson, 'Writing the Tokyo Trial', in Y. Tanaka *et al.*, *supra* note 6, 23, at 32.

[85] *Ibid.*, at 32. See also Mistry, *supra* note 14, at 13 (claiming that the dissent may have stimulated 'a discourse outside the courtroom that may be more conducive to the ends of historical truth seeking than courtroom processes').

[86] Partial Dissenting Opinion of Honourable Justice George Gelaga King, Judgment, *Fofana* (SCSL-04-14-A), Appeals Chamber, 28 May 2008.

[87] *Ibid.*, paras 4–9.

[88] *Ibid.*, paras 15–21.

[89] *Ibid.*, para. 16.

[90] *Ibid.*, para. 21.

[91] *Ibid.*, paras 22–24.

[92] *Ibid.*, paras 27–29.

CDF's attacks within this framework to conclude that they were directed towards the achievement of military objectives.[93]

Judge King also took issue with the factual findings of the Appeals Chamber on the charge of war crimes, ending on a note that queried whether Western powers, including the United Kingdom and the USA, and ECOMOG, who supported the CDF, should be held liable alongside it for having been complicit in the alleged war crimes.[94] Drawing an analogy with the failure to pursue prosecutions for alleged war crimes by the forces of the North Atlantic Treaty Organization in Yugoslavia, he insinuated that if international criminal trials were experiments in victor's justice they should perhaps initially focus on the more developed nations, lest they be accused of double standards.[95]

Judge King's opinion followed on the heels of several other attempts at dissentient strategies undertaken during the course of the trial.[96] Even at the trial stage, one of the three accused, Sam Hinga Norman, having initially dismissed his entire legal team, made an opening statement at the trial's resumption refusing to answer the charges levied by the prosecution and claiming that the court lacked constitutional authority.[97] In the words of Tim Kelsall, 'Norman was at least as interested in being tried in the court of public opinion as he was in a court of law' and marked his repudiation of the trial by boycotting most of the proceedings.[98] Both Norman and the defence team also used various tactics to try and shift the discourse by moving the focus away from the narrow legal issue of his individual conduct to that of the broader political context of the Sierra Leone conflict and the role played in it by the CDF. The Trial Chamber was, however, not persuaded as to the materiality and relevance of the evidence, and these efforts ultimately foundered and were abandoned in the later defence strategies for the trial.[99] Indeed, at the trial stage, the prosecution and the bench were emphatic in their characterization of the SCSL proceedings as a 'non-political' trial,[100] a portrayal that carried through in the final verdicts that massively downplayed the identity of the CDF as a political movement.[101] The proceedings against Norman were terminated due to his death caused by a medical condition, while the judgment and sentence on the remaining CDF accused was delayed, but not before widespread speculation on their potential impact on the national elections, given that the CDF enjoyed considerable support among various parts of the Sierra Leonean population.[102]

93 *Ibid.*, paras 34–41, 51–53.

94 *Ibid.*, para. 90.

95 *Ibid.*, para. 91.

96 T. Kelsall, *Culture under Cross-examination: International Justice and the Special Court for Sierra Leone* (2009), at 49–51.

97 Opening Statement by Sam Hinga Norma, *Norman, Fofana, and Kondewa* (SCSL-04-14-T), Trial Chamber I, 15 June 2004, 3–4, available at www.rscsl.org/Documents/Transcripts/CDF/CDF-061504.pdf.

98 Kelsall, *supra* note 96, at 50.

99 *Ibid.*, at 50–51.

100 Gberie, 'The Civil Defense Forces Trial: Limit to International Justice?', in C.C. Jalloh (ed.), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (2014) 624, at 641; Kelsall, *supra* note 96, at 49, 51, 67.

101 Hoffman, 'Citizens and Soldiers: Community Defence in Sierra Leone before and after the Special Court', in L. Gberie (ed.), *Rescuing a Fragile State: Sierra Leone 2002–2008* (2009) 119, at 124–127.

102 Penfold, 'The Special Court for Sierra Leone: A Critical Analysis', in Gberie, *supra* note 101, 53, at 66.

Viewed against this background, it is not entirely clear why Judge King's dissent, while nearly as critical as that of Justice Pal, has not garnered almost any legal or academic commentary.[103] Nor does it seem to have influenced the national debate in Sierra Leone. This is a notable oversight, as the SCSL trial records are considered likely to constitute one of the most important historical records of the Sierra Leone conflict.[104] It is difficult to speculate on the reasons for this reception – it is conceivable that Judge King, who hails from Sierra Leone, cannot claim the impartiality and independence that was Justice Pal's due, or perhaps it is simply too early to try and judge the legacy of the SCSL (and the dissent) for the public debate on the civil war in a country that is still too shattered for any robust engagement with its past.

Elements of a radical dissent can be found in another blistering opinion rendered very recently, this time at the ICTY: the dissent of Judge Flavia Lattanzi in *Šešelj*.[105] Vojislav Šešelj, the president of the Serbian Radical Party and a member of the Assembly of the Republic of Serbia, was acquitted by the ICTY Trial Chamber of all charges of crimes against humanity and war crimes for his participation in crimes alleged to have been committed by Serbian nationalists against Croat and other non-Serb civilian populations during the conflict from August 1991 to September 1993.[106]

To determine Šešelj's individual responsibility, the majority judgment deemed it necessary to address the prosecution's central thesis that the crimes were committed in pursuit of the ideology of a 'Greater Serbia', which involved the establishment of a territorially unified Serbia through the forcible displacement of non-Serb populations inhabiting parts of the former Yugoslavia considered to be 'Serbian' land.[107] The majority rejected this claim, arguing that the prosecution had omitted to situate the creation of autonomous Serbian regions in Croatia and Bosnia and Herzegovina (BiH) within the context of the latter's secession. While the establishment of Serbian local institutions in Croatia and BiH and the declaration of autonomy might be considered discriminatory, it was not a criminal enterprise. Šešelj's vision of a Greater Serbia, and his participation, whether directly or indirectly, in these actions, were thus part of a political rather than a criminal plan. Given this context, all of his actions, such as the recruitment and deployment of Serb volunteers and cooperation with other Serb forces – could be interpreted to be in furtherance of the war effort and were not

[103] The dissent is discussed briefly by Robert Cryer as an example of just war/naturalism reasoning. Cryer, 'The Philosophy of International Criminal Law', in A. Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law* (2011) 232, at 253. Aspects of the dissent criticizing the majority's attribution of a leadership position to the accused on the basis of his magical powers are discussed in Provost, 'Authority, Responsibility, and Witchcraft: From Tintin to the SCSL', in Jalloh, *supra* note 100, 159, at 175–179. The Civil Defence Forces trial and verdicts (though not the dissent) have been discussed by various non-legal academics. See Kelsall, *supra* note 96; Gberie, *supra* note 100.

[104] Hoffman, 'The Meaning of a Militia: Understanding the Civil Defence Forces of Sierra Leone', 106 *African Affairs* (2007) 639, at 640.

[105] Partially Dissenting Opinion of Judge Flavia Lattanzi, Judgment, *Šešelj* (IT-03-67), Trial Chamber III, 31 March 2016.

[106] Judgment, *Šešelj* (IT-03-67-T), Trial Chamber III, 31 March 2016.

[107] ICTY, Trial Judgment Summary for Vojislav Šešelj, 31 March 2016, at 1, available at www.icty.org/x/cases/seselj/tjug/en/160331_judgement_summary.pdf.

criminal in character. Furthermore, his conduct occurred in a scenario where all the different factions in Croatia and BiH, including Croatian and Muslim civilians, were arming and preparing to fight for the land they claimed as rightfully belonging to them. Therefore, it would be incorrect to label the Serbs as unilateral occupiers acting in furtherance of a criminal plan to forcibly remove non-Serbian civilians from these territories.[108]

From the very outset, Judge Flavia Lattanzi made no effort to conceal her contempt for, and disappointment with, the majority judgment, claiming that the addition of the term 'partial' to her dissent was but a euphemism, given that, 'unusually for a dissenting opinion', her disagreement could hardly be more complete on every aspect of the case including the context, the law, the evidence, the analysis and the conclusions.[109] She upbraided the majority for blaming the prosecution, rather than the Trial Chamber as a whole, for the poor handling of the case[110] and consistently criticized the judgment for its failure to apply the correct law, properly evaluate the evidence and supply clear reasoning or, indeed, any reasoning at all for its conclusions.[111]

Judge Lattanzi disagreed vehemently with the majority's characterization of the criminal enterprise in pursuit of the plan of establishing a Greater Serbia and the accused's role in its effectuation, both as a matter of method and content.[112] The ICTY's Trial Chamber II had previously determined that the alleged purpose of the joint criminal enterprise, as stated in paragraph six of the indictment, was the 'permanent forcible removal ... of the Croat, Muslim, and other non-Serb populations from approximately one-third of the territory of the Republic of Croatia and large parts of Bosnia and Herzegovina and from parts of Vojvodina ... in order to make these areas part of a new Serb-dominated state'.[113] The majority cited this statement, which contained specific criminal charges, but went on to equate it with the political goal of establishing a Greater Serbia.[114] In doing so, it distorted the prosecution's allegation that the political vision of a Greater Serbia was both the reason for, and a natural consequence of, an explicitly criminal enterprise.[115]

The dissenting opinion was severely critical of the majority's further interpretation of this political context. Judge Lattanzi traced the political history of the dissolution of the former Yugoslavia and the various armed conflicts that resulted from this dissolution.[116] While the majority had characterized the conflict between Serb forces, on the one hand, and Croatia and BiH, on the other, as one between opposing 'military forces with civilian components',[117] the dissenting opinion clearly interpreted them as

[108] *Ibid.*, at 9–10.
[109] Partially Dissenting Opinion of Judge Flavia Lattanzi, *supra* note 105, para. 1.
[110] *Ibid.*, para. 3.
[111] *Ibid.*, paras 10–13, 15, 18, 22, 32, 72, 74, 78, 89, 115.
[112] *Ibid.*, paras 75–76.
[113] Decision on Motion by Vojislav Šešelj Challenging Jurisdiction and Form of Indictment, *Šešelj* (IT-03-67/PT), Trial Chamber II, 26 May 2004, para. 55.
[114] Partially Dissenting Opinion of Judge Flavia Lattanzi, *supra* note 105, paras 73–74.
[115] *Ibid.*, para. 77.
[116] *Ibid.*, paras 26–37.
[117] *Ibid.*, paras 16, 38.

widespread and systematic attacks of persecution, murder, torture, sexual violence, other inhumane treatment and acts of destruction of villages and places of religious significance, directed by the Serb forces against the civilian population with a view to their forcible expulsion from these territories.[118]

After conducting an exhaustive analysis of the evidence supporting the charges of crimes against humanity and war crimes against the accused, Judge Lattanzi concluded by accusing the majority of not only displaying contempt for the court's own previous jurisprudence on international humanitarian law but also of having strayed from its mandate to adjudicate the individual criminal responsibility of the accused.[119] According to Judge Lattanzi, the majority judgment had engaged in a reinterpretation of the historical basis of the armed conflict in Yugoslavia that portrayed some of the violence as 'inevitable'.[120] Her closing statement, reflecting her overall assessment of the majority judgment, could not have been more damning: '[W]ith this Judgment we have been thrown back centuries into the past, to a period in human history when we used to say – and it was the Romans who used to say this to justify their bloody conquests and the assassinations of their political enemies during civil wars: "*Silent enim leges inter arma.*".'[121]

Not much time has elapsed since the verdict in *Šešelj*, and an authorized English translation of Judge Lattanzi's dissent, which was originally in French, has been made available only fairly recently. However, the broader public reaction, both to the judgment and the dissent, has been electric.[122] The judgment has been described as 'comprehensively bad', 'a fiasco', 'a stain on the Tribunal's reputation', as 'reinforcing diverging ethnic realities in the Balkans'[123] and as a 'great victory for bloated, violent lunatics everywhere'.[124] Various academic commentators and media blogs have been deeply critical of the majority judgment and have speculated on its implication for Serbia's politics and prospects for accession to the European Union, while Croatia has banned Šešelj from entering the country.[125] Unsurprisingly, the prosecution has filed an appeal comprehensively challenging the majority's reasoning on the facts and law and labelling it a 'uniquely inadequate adjudication of the case' that 'risks seriously

[118] *Ibid.*, paras 38–41.

[119] *Ibid.*, para. 144.

[120] *Ibid.*, para. 143.

[121] *Ibid.*, para. 150.

[122] On another recent ICTY verdict with two strong dissents, which has provoked similar controversy, see Clark, 'Courting Controversy: The ICTY's Acquittal of Croatian Generals Gotovina and Markac', 11 *JICJ* (2013) 399.

[123] M. Milanovic, 'The Sorry Acquittal of Vojislav Seselj', *EJIL Talk* (4 April 2016), available at www.ejiltalk.org/the-sorry-acquittal-of-vojislav-seselj/.

[124] 'Vojislav Seselj's Acquittal Is a Victory for Advocates of Ethnic Cleansing', *The Economist* (31 March 2016), available at www.economist.com/news/europe/21696145-international-tribunal-creating-confusing-standards-war-crimes-and-politicians-vojislav (quoting sociologist Eric Gordy).

[125] See, e.g., O. Bowcott, 'Serb Nationalist Vojislav Šešelj Acquitted of War Crimes at The Hague', *The Guardian* (31 March 2016), available at www.theguardian.com/law/2016/mar/31/serb-nationalist-vojislav-seselj-acquitted-war-crimes-crimes-against-humanity-icty-the-hague; T. Prelac, 'Will the ICTY's Acquittal of Vojislav Šešelj Heighten Tensions in the Balkans?', *London School of Economics and Political Science* (1 April 2016), available at http://blogs.lse.ac.uk/europpblog/2016/04/01/can-the-ictys-acquittal-of-vojislav-seselj-hasten-tensions-in-the-balkans/.

undermining the credibility of the ICTY and the MICT'.[126] The prosecution's appeal brief draws liberally on several points in Judge Lattanzi's dissent,[127] which has been quoted widely in scholarly and public criticism of the judgment and is already proving to be pivotal in discussions within and outside the courtroom.[128] Judge Lattanzi, like Justice Pal, has been unusually vocal in giving expression to her disdain for the majority's reasoning, claiming to have personally suffered a great deal at the way the judgment was reached and stating that the 'ruling amounts to nothing' because 'it is done so poorly, both in fact and law, that it is a nullity'.[129]

4 The Transformative Potential of Radical Dissents

Trials for mass atrocity differ from trials for ordinary crimes in significant ways. The most important of these is that the conduct they prosecute is invariably collective in nature and intimately tied to broader social and political narratives of the imagined identity of a nation. This part argues that, given the nature of mass atrocity, it is not possible for an international criminal trial to completely individuate responsibility without pronouncing in some fashion on this broader context. The need for the latter judgment and the inevitability of its truncated nature is one of the most serious threats to the legitimacy of international criminal trials. The radical dissent serves to shore up this legitimacy deficit by opening up a public space that allows evaluations of the broader political and historical context to be contested. In this process, however, it is important not to underestimate the very real costs it can impose on the integrity of the judicial office and on the real or perceived need for closure.

A *The Communicative Function of International Criminal Trials*

Lawyers, and legal trials, are typically self-conscious of their limitations. The trial process, with its adversarial structure, forensic approach to facts and tight legal framework is not well placed to generate accurate or even approximate grand narratives. Neither does the legal training of a judge, who must additionally operate within the limitations imposed by the rules of evidence and the practical challenges of the time- and resource-constrained trial, enable her to perform the job of a historian or a social scientist. It is for this reason that scholars have been critical of attempts by international criminal trials to engage in pedagogy and history telling.[130] Indeed, sceptics suggest that trials for mass atrocity should refrain from embarrassing forays into complex

[126] Prosecution Appeal Brief, Judgment, *Šešelj* (MICT-16-99-A), Appeals Chamber, 18 July 2016, paras 1–9.

[127] *Ibid*., paras 16, 46, 78, 122, 135, 149, 198.

[128] Milanovic, *supra* note 123; Prelac, *supra* note 125; N. Buckley, 'Karadzic and Seselj Decisions Risk Reputation of ICTY', *Financial Times* (1 April 2016), available at www.ft.com/content/a74ea278-b60a-349c-8af0-1554f34883ad.

[129] A. Oskari Rossini, *Šešelj Verdict: The Dissenting Judge* (8 April 2016), available at www.balcanicaucaso.org/eng/Areas/Serbia/Seselj-verdict-the-dissenting-judge-169740 (recounting an interview with Judge Flavia Lattanzi).

[130] See, e.g., Damaska, *supra* note 50, at 336–338; Koskenniemi, *supra* note 51, at 2–3, 16–19; Simpson, *supra* note 84, at 28.

historical and societal assessments and do exactly what domestic criminal trials purport to do: adjudicate the individual criminal responsibility of the defendant before the court in light of his actions and mental state.[131]

However, this is a myopic view of the way in which even 'ordinary' criminal trials operate and certainly runs contrary to the experience of trials for mass atrocity. A domestic criminal trial for a garden variety wrong such as theft may purport to be above politics and history, and, indeed, the technical, sanitized terms in which legal proceedings are typically cast strive to emphasize the mundane, legalistic and apolitical character of the trial and judgment. The non-legal world, nonetheless, often intrudes; is it plausible to divorce the legal question of consent in a trial for the offence of rape, for example, from broader enquiries about sexual mores in a community or to ignore issues of race and class when discussing appropriate uses of force by police forces in a highly racialized and unequal society?

This inability to artificially isolate the conduct of the individual accused in the trial from larger societal forces and perceptions and to confine the judgment to rigidly legal dimensions is only amplified when adjudicating responsibility for crimes that are inherently collective in nature. And once any judicial statement as to this collective context is made, no matter how narrow or qualified it is, the message as to the collective judgment will be transmitted and taken up by multiple stakeholders in international criminal justice. One only has to look to the academic, public and media reaction sparked by the majority judgment in *Šešelj*, even though it went out of its way to emphasize that '[t]he Chamber's findings … do not claim to establish the entire truth about the events that occurred, let alone to recount the complex history of a conflict'.[132]

The judgment of an international criminal tribunal has this expressive effect in part due to the semantic authority that courts, and, by extension, judges, possess in the creation and dissemination of norms.[133] Judges, of course, are not the only dissentient voices in the trial. Discordant notes may be struck both within and outside the courtroom at various stages of the trial by the media, by civil society groups, by defence counsel and by the accused himself. From Slobodan Milošević at the ICTY to Samuel Hinga Norman at the SCSL, history is replete with defendants using the trial, both domestic and international, as a stage for civil disobedience and a high profile forum for communicating their version of the story. One only has to think of famous or infamous trials in domestic courts around the world where defendants like Nelson Mandela or Mahatma Gandhi used the trial as a device for moral education and messaging. In trials for mass atrocity, some of the most dramatic oppositional moments have been produced by the accused themselves, such as the image of Adolf Eichmann seated in a glass booth, transformed into a petty bureaucrat conducting his defence in clinical fashion.

[131] See Damaska, *supra* note 50, at 360 (outlining the reasons why international trials may want to thus restrict themselves).

[132] ICTY, *supra* note 107, at 1.

[133] On the semantic authority of international criminal courts, see Mistry, *supra* note 14, at 8.

In this cacophony of discordant narratives, the radical dissent, emanating as it does from the exercise of the judicial function, occupies a unique function. While the counter-narrative generated by the accused, defence counsel or constituencies outside the courtroom, such as the media, may be dismissed as ignorant, biased or hyperbolic, a statement or decision pronounced by an adjudicator endowed with the authority of the judicial office generates the expectation that it will and must be taken into account in any subsequent judicial or extrajudicial consideration of the dispute.[134] The judge, unlike the defendant, is charged with the duty of impartiality and fairness as an integral part of the judicial function. While the accused, defence, prosecution, witnesses and victims might all be dismissed as advocates for their own partial vision of the truth, the judge is expected to recognize no authority greater than the law and favour no position that cannot be grounded in a rigorous evaluation of the law, facts and evidence. Politicians may rely on rumour and hearsay, the non-governmental organization can plead confidentiality of sources and the media or the academic may speculate. None of these options for subterfuge or concealment are available to the judge, who must adhere to strict rules of procedure and evidence, and whose analysis and arguments must be backed by publicly accessible facts and the law. The experience of the radical dissenting opinions of Justice Pal and Judge Lattanzi demonstrates that the Janus-faced character of the radical dissent enables actors invested in, and impacted by, the project of international criminal justice to use it as a vital dissentient voice both within and outside the courtroom. Agents who operate within the confines of the legal trial, such as defendants, lawyers, appellate chambers and future judges, may channel its authority to challenge the *différend*.[135] Likewise, the radical dissent could provide a legal language through which academics, politicians, victims, civil society and other affected communities continue to grapple with constructing and coming to terms with events that defy human understanding.

B *Risks to the Normative Enterprise of International Criminal Justice*

The discordant narrative generated by the radical dissent comes at a price, and, in some cases, this price may be deemed too high for international criminal trials to be able to fulfil their normative function. The most obvious of these costs is the muddying of the central message sought to be conveyed by trials for mass atrocity: that these were heinous acts that we cannot afford to see repeated and for which accountability is imperative. It is not as if the radical dissent makes light of, or does not take seriously, mass killing, tortures and rapes. However, it allows for contestation as to the occurrence of these crimes and their scale and scope, as to the motivations and intentions of the individuals and collectivities that allegedly perpetrated these crimes and as to the possibility of these crimes being justified or excused because of the circumstances

[134] According to Venzke, this social expectation that an actor's claim will be heeded in legal discourse is the hallmark of semantic authority. See Venzke, 'Semantic Authority, Legal Change, and the Dynamics of International Law', 12 *No Foundations* (2015) 1, at 10.

[135] Somewhat more prosaically, the dissent will also contribute to future litigation strategy and the development of the law through engaging a diverse set of voices. See Mistry, *supra* note 14, at 9.

in which they took place. Given the magnitude of the events and the stakes involved in the very real need for closure and transition, there is a plausible claim that denies the desire for, and legitimacy of, a space for contestation. Indeed, the law countenances this possibility in other areas that touch upon mass atrocity, as evidenced by the prevalence of Holocaust denial laws and related legislation in various parts of the world.[136]

This is a position that invites sympathy but, nonetheless, needs further elaboration in order to succeed in making a convincing case. The precise point of a trial – any trial – is that no legal or factual issue that is of central importance to the case should be beyond dispute. Are trials for mass atrocity truly so exceptional that in these specific cases we can set that presumption aside? And, if they are, what are these seminal values or considerations that would justify overriding the cornerstone of a criminal trial – closure, peace, prevention, victim protection?

Perhaps the greater concern with a radical dissent is the potential cost to the integrity of the judicial office. Not all dissents threaten the image or reputation of the court; indeed, they can even enhance its stature by promoting judicial accountability and independence,[137] or heralding law reform or development by appealing to 'the intelligence of a future day',[138] or assisting in the crafting of more intelligent and finely reasoned majority judgments.[139] However, the dissenting judge stands in danger of compromising the judicial office if, either through the mode of his participation in the trial or by virtue of the tone and content of his decision, he shows a lack of respect for the court and the trial process. Arguably, Justice Pal's dissent displays some of these less laudatory features. It would not be uncharitable to Justice Pal to suggest that his failure to even attend a significant proportion of the trial proceedings, the dissenting opinion's pointed lack of engagement with the arguments of the majority and Justice Pal's subsequent public speeches on the competence and motives of his fellow judges, might not only have served to erode confidence in the institution of the trial as a whole but could also have contributed to the opinion's subsequent misappropriation by revisionist historians.

Of course, there is a different way of dissenting, even radically dissenting. This dissent takes seriously the legitimacy of the trial and the business of sitting in judgment, alongside and in concert with the other members of the court, united in the belief that it is not only possible but also imperative for the court to conduct the trial with respect for due process and the rights of the accused and to reach a reasoned judgment based upon the facts, law and evidence. This philosophical difference is what separates Judge Lattanzi's dissent from Justice Pal's opinion. The former does not question the authority of the ICTY to be conducting the trial, even as it acknowledges the politics involved in doing so and engages fully with the reasoning and conclusions of the majority while charting a different course for assessing the accused's responsibility. Similar to Justice Pal, though, Judge Lattanzi's ensuing remarks in her personal

[136] I am grateful to Gerry Simpson for suggesting this valuable line of enquiry.

[137] Brennan Jr, 'In Defense of Dissents', 37 *Hastings Law Journal* (1986) 427.

[138] C. Hughes, *The Supreme Court of the United States* (1936), at 68; Ginsburg, 'Remarks on Writing Separately', 65 *Washington Law Review* (1990) 133, at 144.

[139] Ginsburg, 'The Role of Dissenting Opinions', 95 *Minnesota Law Review* (2010) 1, at 3.

capacity on the quality of the judgment and judicial decision making tend towards a less dialogic attitude towards the role of a judge.

5 Conclusion

In his critique of international criminal trials as 'show trials', Martti Koskenniemi explores what he perceives as the paradox of trials for mass atrocity. If the trial permits the accused to be a force for disruption and for challenging the complexity of the historical narrative, it will cease to be a venue for closure and fail to provide a conclusive rendition of the events surrounding the crimes for which the accused is convicted. The accused's version of history will be elevated to the status of a competing account that has enough credibility to be aired in the course of the trial, and his personal culpability and conviction will be presented as an integral part of a partial – and potentially false – interpretation of the past.[140] On the other hand, if the trial purports to be a complete and definitive historical truth, it will be unable to achieve this authoritativeness except by preventing the accused from questioning this narrative. In the latter case, it will be little better than a show trial.[141]

This article points to the radical dissent as the legal device that can simultaneously navigate this paradox and demonstrate why the tension at its core is overstated. The radical dissent questions the claim that international criminal trials for mass atrocity are only legitimate or useful if they function as instruments for the establishment of an irrefutable grand narrative, which is in turn necessary for healing, reconciliation and closure. The point of the radical dissent is not to offer a better or more accurate version of the truth; the account of the collective context in which the crime takes place will be no more complete or credible simply because it is written by a single judge, or multiple judges, instead of being the product of a compromise between judges acting as a collective entity. Rather, the radical dissent offers a counter-narrative, which draws its authority from the majesty of the judicial office rather than from advocacy that is presumed partisan, to the sanitized and linear historical truth constructed by the official judgment. In doing so, it provides a civic space for the definitiveness of the historical assessment to be debated – not only by the accused but also by multiple stakeholders in the project of international criminal justice.[142]

The radical dissent is less of an attempt to speak truth to power and more of a mirror in which the politicization of power and the way it seeps into the judicial decision is reflected. As Gerry Simpson observes, trials for international crimes are acts of both remembrance and closure through their narration of 'a historical episode in

[140] Koskenniemi, *supra* note 51, at 31–32.

[141] *Ibid.*, at 35.

[142] It bears noting that this species of dissent may well exist in other non-criminal international tribunals and serve a similar function of opening up a space for public debate and contestation. For recent scholarship arguing that even ordinary dissents at international tribunals promote the value of judicial transparency and have the potential to fundamentally reshape the law, see Dunoff and Pollack, 'The Judicial Trilemma', 111 *AJIL* (2017) 225.

which good and evil are clearly identified and delineated'.[143] This attempt at legitimation backfires, however, when discordant voices such as disruptive defence strategies (as practised by French lawyer Jacques Verges in the Klaus Barbie trial) or dissident texts (such as Hannah Arendt on Eichmann) threaten to set up a counter-narrative.[144] Rather than foreclosing debate over the contested issue, the dissent deliberately withholds the imprimatur deemed necessary for the settlement of a criminal, historical and political dispute.

For those who favour the criminal trial as a forum for official closure, history telling and pedagogy, the counter-narrative generated by the radical dissent might be viewed as an undesirable and unnecessary irritant in the judicial resolution of responsibility for mass atrocity. This would include advocates who are cognizant of the simplification this adjudication entails but who nonetheless believe that this is a price worth paying. A more realistic and sober assessment of trials for international crimes would be to acknowledge their limited ability to comprehend and articulate the evil that seems extraordinary.[145] On this view, by putting the 'trial on trial', the radical dissent serves as a reminder of the limitations of the legal process while simultaneously functioning as a catalyst for the potential, and, in all likelihood, more messy and less definitive, resolution of the dispute. The creation and facilitation of this public space for debating the inevitably convoluted historical and political narrative produced by the official judgment may be one of the most valuable legacies of the international criminal trial.

[143] Simpson, 'War Crimes: A Critical Introduction', in T.L.H. McCormarck and G.G. Simpson (eds), *The Law of War Crimes: National and International Approaches* (1997) 1, at 21–22.

[144] *Ibid.*, at 26–27.

[145] On mass atrocity as 'radical evil', see C.S. Nino, *Radical Evil on Trial* (1996), at vii.