

WAR CRIMES TRIALS AND INVESTIGATIONS

A Multi-Disciplinary
Introduction

Jonathan Waterlow and
Jacques Schuhmacher

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Jonathan Waterlow
Jacques Schuhmacher

War Crimes Trials and Investigations

A Multi-Disciplinary Introduction

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macmillan

Jonathan Waterlow
St Antony's College
University of Oxford
Oxford, UK

Jacques Schuhmacher
Somerville College
University of Oxford
Oxford, UK

St Antony's Series

ISBN 978-3-319-64071-6

ISBN 978-3-319-64072-3 (eBook)

<https://doi.org/10.1007/978-3-319-64072-3>

Library of Congress Control Number: 2017956722

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Cover illustration: Forance / Alamy Stock Photo

Printed on acid-free paper

This Palgrave Macmillan imprint is published by Springer Nature

The registered company is Springer International Publishing AG

The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

For our families and friends
— JS & JW

The original version of this book was revised. An erratum to this chapter can be found at https://doi.org/10.1007/978-3-319-64072-3_11

Preface

In discussing our work on war crimes trials and investigations, we repeatedly found ourselves at the limits of our discipline's knowledge and expertise. Both the literature and our conversations with scholars from different fields working on the subject suggested we were certainly not alone in this perception, and so we decided to collaborate to draw together experts from numerous different fields to cross the disciplinary boundaries which both separate and limit us. Even within a given field, it is all too easy to get lost in the minutiae. In many ways, the danger of specialization can be that we come to know more and more about less and less. This is especially limiting when considering a subject area which requires extensive cooperation between, and knowledge of, other disciplines.

Seeking a resolution to this situation, we established an interdisciplinary research network on war crimes trials and investigations at the University of Oxford, which hosted two international, interdisciplinary workshops, and an eight-week seminar series featuring contributors from numerous disciplines involved in the study of this subject area. To ensure a broad range of perspectives, we invited contributors not only from the UK, but also Europe, Russia, North and South America, and Australia.

Although there are many scholars working on war crimes investigations and trials at different universities and policymaking institutions around the world, they tend to present their research at conferences dealing with specific countries, wars, or broader questions, such as gender or

the mentalities of the perpetrators. In the context of such conferences, there is normally little room for the discussion of the fundamental questions surrounding the investigations and trials themselves. There is also an understandable reluctance at conferences and other formal academic settings to reveal areas of weakness or the limitations of one's disciplinary approach and to learn about other approaches from a foundational level.

Our network therefore aimed to provide a forum in which these fundamental issues could be addressed, and by directly promoting open and frank reflection on the limits of individual disciplines and how each can benefit from the input of others (in part by recognizing how they already unconsciously, and/or uncritically, build upon each other). By promoting this atmosphere of openness and discovery, there was often a palpable sense of relief as we broke the implicit taboo on admitting to areas of ignorance, confusion, and misunderstanding. All contributors were to some degree surprised and relieved to find that, while they were aware of the weaknesses of their own discipline, other disciplines had their own shortcomings and areas of weakness, too. Discoveries such as these set the tone for the present volume, which exposes false certainties and thereafter develops stronger foundations for a productive, mutually enriching dialogue and cooperation between all the disciplines involved.

We decided to hold two workshops with the same participants: our experience is that when scholars from different disciplinary backgrounds come together, they frequently speak at cross-purposes due to elementary differences of approach and terminology. The first workshop therefore provided the foundations for the second by clarifying the key issues and drawing together the different interpretational frameworks and approaches developed by the various academic disciplines. This allowed us to untangle those differences, establishing common ground and analytical clarity. At the second workshop, we were able to deeply engage with the perspectives and insights—as well as the critiques and weaknesses—of our respective disciplines. Following the success of these two workshops, we invited specialists from other fields to present at the two-month seminar series which followed. This further enriched the development of both the Network and the present volume.

The fruit of these intensive days of debate and discussion is the collection now before you. To date, students and scholars have had to piece together disparate elements from various (often intimidating, jargon-heavy) handbooks and disciplinary overviews; this book provides a clear solution to this issue of fragmentation. It aims to provide a concise overview of each field's key interests, points of debate, evolution over time, or rationale for studying war crimes at all. As such it provides crucial orientation for readers from any discipline concerned with the study of war crimes trials and investigations and, it is hoped, will foster further valuable interactions in scholarship. Our aim in creating this volume is to provide the accessible entry-point which we wish had been available when we began our own research.

We could not have created the War Crimes Research Network without the facilities and financial support of The Oxford Research Centre in the Humanities (TORCH), as well as the generous additional funding from Oxford University Press's John Fell Fund. We would like to thank TORCH's first director, Stephen Tuck, for his keen interest in the Network's activities, and we must also thank everyone in the hardworking administrative team at TORCH.

St Antony's College provided the venue for the two workshops, and we would like to extend our warm thanks to Han Kimmett and the rest of the conference team for providing such a welcoming setting.

In the early days of the Network, we received valuable advice and suggestions from (in alphabetical order): Dapo Akande; Paul Betts; Donald Bloxham; Patricia Clavin; Martin Conway; Robert Harris; Joanna Innes; Rana Mitter; David Priestland; David Rodin; Lyndal Roper; Connor Sebestyen; and Serena Sharma.

The engagement and support of several other research centres and networks was crucial and eye-opening. We would specifically like to thank: Leila Ullrich and the Oxford Transitional Justice Research (OTJR) network; Hew Strachan and The Changing Character of War Programme (CCW); and David Rodin and The Oxford Institute for Ethics, Law and Armed Conflict (ELAC).

We would also like to extend special thanks to our colleague and friend, Jan Lemnitzer, who not only contributed to the volume, seminar

series, and the workshops, but at our request undertook significant original research and supported the project in numerous other ways.

We would like to specifically thank the speakers at the Network's Seminar Series for their excellent and thoughtful contributions: Andreas Hilger; Jan Lemnitzer; Kerstin von Lingen; Brian Orend; Nikita Petrov; Tim Thompson; Leila Ullrich; and Annette Weinke.

We also learnt a lot from those who attended the Seminar Series and participated in the discussions: Roderick Bailey; Anja Bihler; Thomas Brodie; Elena Butti; Andrea Domenichini; Jack Doyle; Vincent Druliolle; Elizabeth Dykstra-McCarthy; Katherine Erickson; Suwita Hani; Jose Harris; Ruth Harris; Dan Healey; Christopher Huff; Fredrik Hjorthen; Jonathan Leader Maynard; Matilde Gawronski; Brian McCormick; Daniel O'Neil; Judith Pallot; Tien-Nhan Phan; Lijian Phil; Will Pooley; Sophie Rosenberg; Joanna Rozpedowski; Malcolm Spencer; Nick Stargardt; Steve Smith; Simon Unger; Zachary Vermeer; Jonathan Ward; John Watkins; Calum White; and Jennifer Wunn.

Thanks are also due the editorial team at Palgrave, the anonymous readers who supported and encouraged our project, as well as Halbert Jones and Matthew Walton, the editors of the *St Antony's Series*.

It gives us great pleasure to thank and to acknowledge the years of hard work that the contributors have put into this volume. Through the multiple meetings and several chapter revisions based on the often-challenging feedback from readers of other disciplines, their enthusiasm and support for the project never wavered.

We would also like to thank the following participants of the workshops:

Katie Engelhart of *Vice News*; Ozren Jungic; Ruben Reike; Kevin Reynolds; and Harry Rhea.

Finally, we would like to express our warm thanks to the European Commission.

Brussels, Belgium
December 2016

Jacques Schuhmacher
Jonathan Waterlow

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1

War Crimes Trials and Investigations: Major Trends and Disciplinary Challenges

Jacques Schuhmacher and Jonathan Waterlow

In a world of continuing conflict, mass violence and foreign interventions—and with the terminology of ‘war crimes’, ‘genocide’ or ‘crimes against humanity’ widespread yet little understood both in academic disciplines and in the media—the wide contemporary significance and need for greater understanding of the language and theoretical perspectives applied to the subject of war crimes trials and investigations could hardly be clearer.

War crimes and atrocities represent a series of powerful challenges that play out in the courtroom, but whose significance extends far beyond the legal sphere. They legitimize international action against perpetrators; they determine how a post-conflict society is structured and struggles to make sense of and respond to atrocities both historic and present; and they inform the development of the international laws of war concerning prevention and intervention. For these reasons, we must study

The original version of this book was revised. An erratum to this chapter can be found at https://doi.org/10.1007/978-3-319-64072-3_11

J. Schuhmacher (✉)

War Crimes Research Network, University of Oxford, Oxford, UK

J. Waterlow

St Antony’s College, University of Oxford, Oxford, UK

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J. Waterlow, J. Schuhmacher, *War Crimes Trials and Investigations*, St Antony’s Series,
https://doi.org/10.1007/978-3-319-64072-3_1

the conduct of these trials and investigations, as well as their priorities, limitations and contextual exigencies. It is only through the process of prosecution that we develop and propagate a vocabulary and interpretational framework for dealing with atrocities and war crimes and, as such, the study of these trials continues fundamentally to shape how we understand and respond to conflicts and mass violence in the world today.

A thorough understanding of how the knowledge informing war crimes trials was generated is essential, but is as yet significantly underdeveloped. Although war crimes prosecutions have been studied from numerous disciplinary perspectives, each of these has its drawbacks and limitations, as well as its specific points of focus. We believe these approaches will benefit greatly from dialogue. The subject is so complex that it is impossible to study without constant confrontations with issues outside of one's professional 'comfort zone'. A historian is inevitably confronted with complex questions of international law with which even specialists in the latter field continue to struggle; likewise, political scientists interested in conceptualizing genocide at an abstract level rely on historians' accounts, which themselves are constructed from the prosecutorial evidence generated in a given trial and political context. Perhaps most problematically, almost all disciplines draw unquestioningly on the evidence and conclusions of the forensic scientists who exhume and analyse the human remains of mass violence, but with little understanding of the significant limitations and subjectivity of the conclusions generated within that field. In other words, numerous disciplines build upon each other's works, but with little dialogue and, hence, very limited understanding of their respective foundations.

This book represents a first collaborative effort to establish a more systematic, integrated and original introduction to the study of war crimes investigations and prosecutions, anchored in history, but with a sharp awareness of the present-day and future implications. Contributors are experts in their respective fields, who write here with in-depth knowledge but in an accessible style with non-specialist readers borne strongly in mind. This volume intends to orientate rather than overwhelm, so these chapters are deliberately non-encyclopaedic: they do not attempt to describe a discipline from every angle or to cover the entire field. Rather, they highlight the major trends, debates, methods and approaches, and the interactions with and relevance of these to other disciplines.

To do interdisciplinary work, we must begin with a strong understanding of the other disciplines. We need this firm ground beneath our feet before we can begin more complex projects, so this volume aims to provide a clear introduction to neighbouring disciplines' work on the shared subject area of war crimes trials and investigations, allowing readers to develop their own work and knowledge beyond the traditional, artificial boundaries of their field.

The sequence of chapters mirrors both the chronological and disciplinary succession of the investigation and analysis of war crimes, proceeding from the initial gathering and study of evidence; on to the attempts to institutionalize and professionalize the prosecution of individuals for war crimes; and then the writing of histories based upon these events. We then turn to the ways these histories are thereafter used to generate analyses of the mentalities and psychologies of perpetrators of mass violence; before moving on, on the basis of all this, to theories and efforts at preventing future occurrences of mass violence; and, completing the cycle, philosophical reflections on the ethics and morality of war and conflict. This structure thereby demonstrates how each discipline builds upon others, but also how this process is cyclical, with the philosophical reflections and the theories of International Relations scholars feeding directly back into how wars are conducted and perceived by states and their leaders. This volume thereby encapsulates both the breadth of approaches to the subject and, crucially, their interdependence.

However, before we embark on this journey, it is vital that we orientate ourselves. The chapter, by Devin Pendas, provides an eagle-eyed view of the broad currents of how people have thought about and punished international crimes through the ages, from their earliest inception to the landmark post-Second World War Trials. He shows how important it is for war crimes trials to be situated in the history of their intellectual, philosophical and practical development, all of which are deeply interconnected. The aim is to establish common ground and a broader framework in which the more specialized chapters then sit. He illuminates the crucial themes which play a principal role in the more in-depth chapters, but which we must first understand in the broader perspective.

Each chapter will then outline, discuss and demonstrate a particular disciplinary approach, followed by a bibliographical essay which will

offer crucial orientation for approaching the specialist literature in each case. These essays do not aim to be comprehensive, but instead provide a targeted overview of the most relevant and stimulating works. The book will thereby equip readers with what they need to know in order to use effectively the specialist literatures of different fields, to understand the principal debates and foci of particular disciplines, as well as the terminology those disciplines employ.

Each chapter endeavours to answer several key questions: What does this discipline do? What questions drive it in the study of war crimes? What tools, techniques, theories and so on, does it employ? How have its priorities grown and developed over time? And how, in the author's view, can their discipline both strengthen and be strengthened by others? In considering this latter point in particular, we explicitly asked contributors to be critical of their own disciplines and to consider with an open mind the most common concerns raised about them by others.

However, by initiating these reflections, neither we nor the authors are promoting interdisciplinarity for the sake of it. The aim of this book is not to offer unconditional praise or support for interdisciplinary approaches, but rather to explore where they can be of benefit, and where they fall short, or even become detrimental to analysis. We consider it a strength to complicate an orthodoxy rather than to offer straightforward 'answers'; indeed, the intention of approaching war crimes and investigations from multiple disciplinary perspectives is precisely to disrupt prevailing, rather balkanized assumptions and practices. This strongly critical approach is not aimed at undermining either trial processes or the disciplines which study them; on the contrary, the approach of identifying weaknesses honestly and without self-deception enables us ultimately to strengthen them both.

While handbooks and encyclopaedias provide comprehensive overviews, they frequently leave things at an abstract and theoretical level, offering little to no coverage or discussion of the numerous disciplinary 'toolkits' employed to study war crimes, trials and investigations. We therefore chose to include a case study in each chapter that illustrates how the respective disciplines work in practice, using examples drawn from cutting-edge research. Some of the cases are well-known, but we also draw into focus less famous, but extremely influential and telling, examples for the first time.

Overarching Themes and Key Issues

Although, from the perspective of the twenty-first century, holding trials after a conflict now seems like an obvious and natural step, in reality, ideas about having international tribunals at all have waxed and waned over the years. In considering their uncertain and uneven development, several overarching themes emerge and formed the subject of intense discussion at the workshops which preceded this volume. Therefore, in addition to the more specialized debates charted in the individual chapters, we highlight some of these broader issues here.

Terminology

The first of these concerns the aforementioned tension around the terminology we use to describe acts of mass violence and their prosecution. Often, when attempts are made to overcome interdisciplinary misunderstandings and divisions, scholars focus on issues of terminology, hoping that this will provide clarity, as though this alone would enable perfect dialogue across disciplines. In practice, these attempts rapidly devolve into one discipline trying to enforce its conventions on the others, especially lawyers, who can, with confidence, point to strict legal definitions which have tangible real-world consequences. However, legal terms do not emerge in a vacuum; rather, laws are birthed by specific political, cultural and social environments: as this volume shows, especially in the pieces by Pendas and Lemnitzer, these terms mean different things at different times, even in the courtroom.

Today, these terms may have a firmer, stricter legal definition, but they are also so widely used in the general and academic population that they continue to be surprisingly flexible. Although criminal lawyers express frustration at the imprecise way that everyone outside their discipline uses terms like ‘crime against humanity’, it is deeply limiting to think that they can own such terminology. Codification is self-evidently important, but legal definitions aim at binary outcomes (guilty/not guilty), whereas other fields are interested in many, more complex and less clear-cut questions and connections.

With this in mind, it is perhaps less surprising than one might have expected that, at the workshops which preceded this volume, terminological debates were not a big issue. These debates consume a great deal of energy, but ultimately produce more heat than light. The overwhelming feeling at the workshops was that an excessive focus on the specific terms used was counterproductive; it is an illusion to believe that we can definitively name and, thereby, somehow contain what are always complex and unique events. Even the classical tripartite division of ‘perpetrator’, ‘victim’ and ‘bystander’ rapidly breaks down when we examine particular case studies, dealing a serious blow to any theorists who would prefer their subjects to remain in orderly and cleanly divided categories. Instead, interdisciplinary discourse is most fruitful when we remain open to the perspectives of others.

The Holocaust Problem

The Holocaust is ever-present in the background of any discussions about mass violence and trials. As the single worst example of state-sponsored mass violence against a particular community in modern history, the Holocaust continues to mesmerize us not only due to its sheer proportions, but because it is synonymous with the dark side of Western modernity, and illustrates how technology and science can be harnessed to register, categorize and ultimately exterminate millions, all under the premise of rational action.

Thanks to Nuremberg and the subsequent trials, an unprecedented volume of evidence was generated, allowing researchers to probe numerous questions in unparalleled depth. Psychologists continue to be fascinated by the minds of perpetrators; philosophers grapple with the challenge presented by a shift in norms on such a wide scale; and, more concretely, scholars of Transitional Justice and International Relations—who frequently play an advisory role to modern states emerging from or at risk of descending into violent conflict—also use the Holocaust as the principal example of failures to be avoided in future.

Moreover, many scholars working on other instances of mass violence frequently use the Holocaust to give their own topics relevance and context:

both academics and the general public are so much more aware of the Holocaust than other atrocities that it functions as the default comparator and helps to illustrate the seriousness of other examples. This can have its drawbacks, however, because events do not always unfold according to the same formula and so there are limits to the usefulness of a Holocaust-centred approach to the study of mass violence. There is a problematic but understandable temptation to place the word 'Holocaust' in one's book title in order to generate interest, even if the relationship to the Holocaust itself is minimal. The unintentional side effect of this is to simultaneously make the Holocaust ubiquitous, but also to drain it of real meaning.

We must be cautious, therefore, not to allow the long shadow of the Holocaust to conceal from us the particularities and backgrounds of other cases. However, we must be equally aware that, at the other end of the spectrum, one finds a strong resistance to all comparisons between the Holocaust and other instances of mass murder, wherein comparisons are interpreted as somehow downplaying one or judging another to be 'worse'. This desire to emphasize 'uniqueness' is misplaced: comparison is essential to sharpen and contextualize our understanding of mass violence. In any case, the assumption that something is unique is itself based on an implicit comparison which goes silently untested.

Therefore, although this volume is not centred upon, nor structured around, comparisons to the Holocaust, it will become evident in the following chapters that its influence has and continues to shape how we approach the topic of war crimes and atrocities.

Western Bias/Neo-Imperialism

One of the most persistent and uncomfortable questions which arises when discussing the prosecutions and even analyses of war crimes is how far their implementation is merely an exercise in power relations? It is uncontroversial to note that international law has strong roots in Western imperialism and keeping other peoples subjugated, but the question is to what extent this continues to play a role today.

A common accusation is that Western countries get away with violations of international law, while only poorer nations have to fear that they will be held responsible for their actions. It is often pointedly remarked, for instance, that while the United States refuses to participate in the International Criminal Court (ICC; effectively rendering itself immune to prosecution), much of the Court's time is spent on prosecuting individuals from African countries. The picture becomes more complicated, however, when we consider the fact that the majority of African cases before the ICC have resulted from *self*-referrals. Justified concerns about asymmetrical power relations thus run the risk of denying agency to the countries that they seek to protect and empower (politically and emotionally volatile issues, which are explored in depth in the chapters by Han and Bellamy). We must also not forget that it can hardly be a straightforward case of imposing 'Western values' if the countries in question have officially declared their commitment to the international laws of armed conflict, which almost all countries in the world have done.

Nevertheless, charges of moral hypocrisy have gained traction due to high-profile cases of Western war crimes and atrocities which have, despite attempts to sweep them under the rug, become known but have remained insufficiently punished. When cases like the serial abuse of inmates at Abu Ghraib in Iraq, or the torture of prisoners at CIA dark sites emerge, it is hard to escape the impression that states of exception continue to be made for 'our boys', using euphemisms like 'excessive violence' restricted to a few 'isolated cases'. It often falls to scholars and journalists to assume the role of activists to point out these discrepancies which undoubtedly undermine the project of a universal set of moral and legal standards to which all nations are equally committed and answerable.

Nevertheless, although we must freely acknowledge that, like the disciplines themselves, this volume is rooted in a Western perspective (albeit with contributors from around the world), we continuously and openly acknowledge the limitations of this perspective, but we also do not let the debate end there. The alternative would be, as Brian Orend explores in his chapter, a potential regression into purely relativistic positions wherein, purely because of their origins, we would deny the possibility of finding a set of basic 'ground rules' for armed conflict and the punishment of their transgression which, even if not perfect (and, sometimes,

intensely problematic), reduce the suffering of combatants and civilians alike. Under the guise of respecting all cultures equally, this toxic brand of relativism can effectively endorse terrible violence against innocents and, as such, is ultimately an act of intellectual cowardice.

Travelling Models

Talking in terms of ‘impositions’ and ‘imperialism’ does not do justice to the complex dissemination and adulteration on the ground of knowledge and practices. Instead of talking in terms of a forcible imposition of Western values, in this volume we repeatedly encounter trends perhaps best understood as ‘travelling models’. These models of investigation, analysis, prosecution and post-conflict reconstruction often do arrive from outside, but their expertise, values and practices are often rapidly and necessarily adapted to local circumstances. Chapter 3, on Forensic Anthropology, shows how this continues to play out at the very earliest stages of investigation, but the theme reverberates throughout this volume.

What Does Success Mean?

Debates around war crimes prosecutions inevitably raise the perhaps unanswerable question of what would constitute a truly successful trial process. Each trial has to strike a delicate and maybe even impossible balance between the need to conduct them in a timely manner and have the appearance of fairness; and, beyond the judicial aspects, to mark a clean break with the past and to point the way towards a more humane future, and away from the possibility of regression and repetition. There is clearly a tension between these two points of emphasis which cannot be easily resolved.

War crimes trials resist simplification and we must bear in mind that evaluations of them change repeatedly over time. Consider, for instance, that the German and Japanese post-war trials have frequently been criticized as insufficient at the judicial level; yet, despite the lack of a comprehensive prosecution of war criminals, the peaceful history of both countries post-1945 has been an unparalleled success that continues to serve as a

model for future action—something which certainly did not seem obvious immediately after the trials, when the general feeling domestically was one of resentment.

Given the scope of what trials attempt to accomplish on a judicial and societal level, Orend's and Bellamy's chapters raise the pointed question of why we would expect this process to be either simple, or without considerable problems and moments of compromise. As Bellamy puts it in Chap. 9, 'A Court charged with holding heads of government to account for atrocity crimes *ought to be* controversial, contested and difficult. If it is not, then it is probably not doing its job'.

All the same, there is an increasing shift towards the goal of truth and reconciliation as the key ingredients in any successful transition from situations of violence into peace, signalling a pragmatic realization that a comprehensive prosecution for all perpetrators after the cessation of violence is perhaps neither achievable nor desirable for the sake of a stable post-conflict order. Truth and reconciliation commissions, such as took place in post-Apartheid South Africa, provide a model which is increasingly influential in how the post-conflict situation is addressed. Such commissions have related but markedly different aims and forms, although they are clearly more successful if the desired aim is to defuse tensions, allow space for grief, permit confrontations within controlled environments and ultimately foster a sense of closure in a way that judgments of guilt and punishment rarely, if ever, achieve. This is at least a tacit recognition that the kind of clean slate that trials aim at can never be achieved by judicial processes alone.

Narratives of Progress

Despite the many criticisms which may fairly (and productively) be levelled at war crimes trials, it would be hard to deny that genuine progress is being made. Not only are such trials being conducted by international bodies rather than the winners of a given conflict—which can never escape the smell of victor's justice—strategies have been developed to pre-empt the need for trials by defusing potential outbreaks of mass violence before it is too late. As Bellamy's chapter showcases, the doctrine of the Responsibility to Protect (R2P) has been successfully put to the

test in several instances. To be sure, these are still not without problems; the experiences of Iraq and Libya show us that interventions are intensely complex affairs which seldom provide a clear picture of ‘good’ or ‘bad’ sides to support or remove. However, the R2P philosophy represents a significant shift in international commitments to the principles of preventing, rather than merely punishing, mass violence.

A lot has been achieved, but there are new challenges and little cause for complacency. One thinks immediately of the actions of the ISIS, which confront us with mass violence that simply does not follow the anticipated script around which the instruments of international justice have been developed. Rather than hiding or denying their responsibility for atrocities, they document and propagate them with the aim of prompting armed conflict. In other words, they do not fear intervention; they seek to provoke it. It is seductive to focus on their use of modern technology (their use of social media, encrypted channels of communication to reach their supporters and the cinematic aesthetics of their propaganda videos); however, we should focus on the content of their communications, for this reveals a rationale that, although markedly different to our own, still follows their own version of justice. The group’s interpretation of the conflict becomes apparent in the executions performed at sites and in the same manner where their own fighters or civilians had been killed in a fashion that they consider criminal. Troubling as it may be to say, these are, in essence, their own form of war crimes trials, about which our traditional models have little to tell us.

At the same time as we grapple with new phenomena, recent events draw us back into more traditional questions about states’ responsibility for war crimes and atrocities. The shooting down of a civilian plane—MH17—over Ukrainian airspace in 2014 prompted competing investigations that sought to determine whether Russia or its proxies were responsible. Similarly, international investigations sought to clarify whether the Assad regime in Syria used poison gas against its opponents. In their essence, these cases would seem entirely familiar to audiences from a hundred years ago.

Both in the modern and these more ‘traditional’ cases, the media and scholarly debates surrounding them often start from scratch, without an awareness of the long-standing influences—historical and philosophical—that quietly inform our immediate reactions to these issues. Even as debates

concerning the use of drones and private military contractors (most notably by the USA) imply that these are entirely novel concerns, as Orend's chapter reminds us, these are debates which emerge every time a new technology or practice is introduced to the battlefield. Indeed, the very concepts that soldiers should be employees of the state, or that killing should happen face-to-face, are not timeless norms, but have their own contingent histories.

Perhaps the most complex or widely influential 'modern' element of contemporary instances of mass violence is the rapidity with which the general population is kept informed about them. This continues to inflect attitudes towards conflict; yet, due to the speed and availability of conflict zone reporting, the media forces two very different contexts to constantly encounter each other. We experience a clash of wildly different norms of conduct: on the one hand, in any warzone, extreme violence is directly permitted, but, on the other hand, when this is shown to the domestic audience, it cannot help but strongly clash with their everyday norms and expectations of acceptable conduct. Indeed, social media exacerbates this jarring confrontation by undermining the traditional media's attempts to conceal the true extent of violence in these settings. One of the many consequences of this exposure has been to increase activists' demands for interventions and prosecutions—an example of which was the #Kony2012 campaign, the many complexities and ramifications of which are explored in Han's chapter.

Chapter Overviews

These broader issues find reflection in the character of each chapter in the volume, each of which incorporates both a critical introductory overview of their respective discipline and a specific case study to demonstrate that discipline 'in action'.

Forensic Anthropology

Although the analysis of human remains is the ultimate foundation of all evidence on which other disciplines rest, outside the fields of forensic science there is very limited knowledge of how that evidence is produced

and understood. Scholars from other disciplines accept the findings of forensic science as ‘hard’ and immutable facts, but in reality, as Chap. 3 reveals, this evidence is, to a significant extent, an exercise in subjective interpretation, not dissimilar to how historians may interpret the archival record. It is therefore crucial to have an understanding of how this evidence is generated and the standards employed to uncover and assess that evidence, for it gives legitimacy to particular versions of events, especially in the courtroom. Without a thorough understanding of what the human record can and cannot tell us, all further research and conclusions rest on very shaky foundations.

The authors—who have worked directly on a wide variety of sites of mass violence—introduce the interests of Forensic Anthropology and its relation to human rights investigations, a relationship which is still, surprisingly, in its infancy. The authors then explore the different (socio-) physical anthropological approaches and contexts of their discipline, outlining the often very different standards and practices which are applied in different countries.

By comparing several case studies, they highlight the many differences which exist in the methodologies, legal status and even the intentions of forensic anthropological teams around the world. Not only is a significant degree of adaptability to local conditions—cultural as well as practical—essential to their work, but when protocols developed elsewhere are imported to a new context, serious problems can arise. For instance, methods developed to determine age, sex or racial backgrounds among one population simply cannot be—but often have been—transferred, unadulterated, to another. Indeed, their concept of ‘travelling models’—of imported and imposed interpretative lenses—is an important theme which emerges time and again in the following chapters.

Anthropometrics

Chapter 4 continues the focus on the generation of evidence by turning to the discipline of Anthropometrics, an emerging field which is itself interdisciplinary, and which draws on both medical and economic datasets to establish the effects of indirect violence against non-combatants. There are long-running debates about the morality and possible criminality

of blockades and sanctions against an enemy, because these disproportionately affect the most vulnerable in society and, as such, arguably constitute war crimes.

Whereas the forensic anthropologists showed the significant limitations of the conclusions they can draw from their analyses, the Anthropometric approach provides definite empirical clarity ('was there an impact on population health or not?') in cases which are often sucked into painful and long-running memory wars.

In specific cases, we recognize that sanctions or blockades are unacceptable—for example, the Sieges of Leningrad or Sarajevo—yet in others, they are uncritically deployed, as against Germany or Iraq. These debates often lead nowhere, however, because there is usually no clear evidence to demonstrate the violence or damage done to the people affected. This is where the field of Anthropometric analysis comes into its own, by providing evidence that is not as immediately obvious as, for example, a mass grave.

Using, among others, the example of the so-called British Hunger Blockade of Germany in the First World War, Mary Cox uses data collected annually by German school doctors to assess the impact of the blockade on those most susceptible to the effects of nutritional deprivation. The chapter therefore highlights the significance of using 'indirect evidence' (i.e. evidence that was not collected or generated for the explicit purpose of trial) for establishing, for the historical if not for the immediate trial record, the human nature and full scope of certain war crimes. Indeed, counter-intuitively, this seemingly cold data actually brings to life the true suffering of those involved—including the survivors, rather than solely the dead.

International Legal History

Evidence is vital for the establishment of trial proceedings; however, before we enter the courtroom, we must examine the development of the legal norms which cause us to consider certain acts war crimes at all. Although all disciplines make use of terms such as 'war crime' and 'atrocities', and refer to various conventions or precedents that give legitimacy to

trials, most have little or no awareness of the improvised, often instrumentalized, and extremely complicated development of these terms as they gradually transformed from evocative labels to legal categories.

Therefore, to understand the origins of the twentieth- and twenty-first century tribunals, we need to explore not only what values and ideas inspired the creation of the legal order for wartime that was established by The Hague and Geneva Conferences, but also the practical and ad hoc steps of this process. This development owes as much to unintended consequences as it does to the pursuit of high-minded ideals. Chapter 5 shows convincingly that we must not take the Second World War and Nuremberg as our starting point in this story, but as just one more step along a longer, more twisted path. Jan Lemnitzer disrupts the narrative propounded by legal scholars of a linear development from medieval tribunals to current international trials, and carefully reconstructs the uneven and sporadic changes in moral and legal norms. In doing so, he explores the influence of events ranging from the notorious Armenian Genocide to almost entirely forgotten, but no less influential, precedents such as the 1904 Dogger Bank incident, in which the Russian Navy opened fire on British fishing boats.

In discussing these developing legal norms, he reminds us that the perception of acts which we would today consider war crimes has changed significantly over time. The very concept that killing non-combatants in wartime should merit international concern is surprisingly novel, and continues to be problematic to this day, not least in conflicts involving ethnic violence that draw their destructive potential from the assumption that whole communities are culpable for individual actions.

This development owes a great deal to the rise of modern mass media over the past century. Although media coverage today is often intensely critical of war in general, this was rarely so in the past. To the contrary, the media's role was, as an arm of the state, to mobilize societies in support of war by highlighting only the atrocities of the enemy. In this context, Lemnitzer explores the role of atrocity reports in nurturing demands for war crimes prosecutions to be initiated—documents which play a major role in several other chapters, but which as a source sit uneasily on the boundary line of evidence-gathering and propaganda. Nowadays, a more independent media continues to compile testimonies and images of

atrocities before investigators set foot on the scene, often thereby taking on the role of activists agitating for an international response.

History

Having explored the ways evidence is gathered, as well as the roots and rationales of the trial medium itself, Chapter 6 examines the role of historians, who are involved both in the trials themselves, and in the ways they are remembered.

History as a discipline is not only vital to the study of war crimes and trials because of the obvious fact that historical accounts are what most people turn to in order to learn about these events, but also (and just as importantly) because other disciplines, especially the Social Sciences, build their own theories and interpretations on the work of historians without sufficiently appreciating the nature and limitations of this field. Peter Romijn examines those limitations, as well as the more problematic ways in which historians come to act as expert witnesses within trial processes. By working for state institutions and when taking the stand, many historians effectively canonize certain documents and interpretations, the impact of which extends far beyond academia, shaping popular memory and influencing future politics.

In this context, he presents specific case studies charting the experience, interpretation and legacy of German war crimes in the occupied Netherlands, as well as Dutch war crimes in the subsequent Indonesian War of Independence. This pairing is particularly revealing, as a nation now synonymous with international justice, due to the ICC sitting in The Hague, had, amid much media and emotional controversy, to publicly come to terms with their own colonial crimes.

With the exception of historians who are still working to establish the basic facts of a given mass violence event, historiographical debates do not focus on whether specific crimes were committed, but what these crimes can tell us about the experiences of conflict—of issues concerning identity; obedience to authority; processes of radicalization; how malleable our moral compass may be; and more. As such, the historian's approach is inherently (and increasingly) interdisciplinary. However, when historians

and others engage in reflections on the actions of the perpetrators of war crimes, they frequently do so with little understanding of the complex theories and concepts developed by the Social Sciences to study these very issues, and which form the centre of the following chapter.

Violence Studies

The rich empirical and theoretical work from the disciplines of Social Psychology, Sociology and Cultural Psychology are especially useful in explaining the occurrence of crimes within a context of deliberate, systematic destruction, killing and harming. Violence Studies, which draws upon all these disciplines, engages with the persistent and troubling questions of the reasons behind mass violence, often using the same resources that trials employ, but seeking to understand, rather than specifically to punish, these acts.

Violence Studies does justice to the fact that people are not born perpetrators—something which may seem obvious, yet is quickly obscured when the language of ‘evil’ and ‘monsters’ is deployed to describe the perpetrators of mass violence. This forms part of a pan-disciplinary shift in focus away from military leaders and political elites who were put on trial, to the role and experiences of ‘ordinary men’ who are no longer seen as blameless puppets, but as agents in their own right, which Romijn also explores in his case studies (Chap. 6).

Approaching this field from a Violence Studies perspective means focusing on the concrete actions in question and the conditions of their emergence. These studies and theories have shaped broader understandings of mentalities, motivations and ideas of peer pressure and obedience. Defence attorneys in trials always, implicitly or explicitly, draw on assumptions about social dynamics and individual agency, most emblematically the issue of soldiers being unable to refuse superior orders, or of being so under the sway of ideological propaganda that they carried out war crimes because they feared that, if they did not, they would themselves fall victim to the same logics of destruction.

Many of these perspectives are based on such famous psychological studies as the Milgram Experiment, which, as Christian Gudehus shows,