COLLECTIVE VIOLENCE AND INTERNATIONAL CRIMINAL JUSTICE

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# COLLECTIVE VIOLENCE AND INTERNATIONAL CRIMINAL JUSTICE

## An interdisciplinary approach

*Edited by*

Alette Smeulers

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Groenstraat 31
2640 Mortsel
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Cover illustration: Francisco De Goya (1746–1828), Etching, Plate 19 from 'Los desastres de la guerra'

ISBN 978-94-000-0099-5
D/2010/7849/100
NUR 824

# CHAPTER 1

# COLLECTIVE VIOLENCE AND INTERNATIONAL CRIMINAL JUSTICE – TOWARDS AN INTERDISCIPLINARY APPROACH

Alette Smeulers

## 1. INTRODUCTION

Collective violence, especially if it takes extreme forms, can endanger international peace and security. The international criminal justice system has been set up in order to deal with the most extreme forms of organized and systematic manifestations of collective violence such as genocide, crimes against humanity and war crimes. Prosecution of these crimes (conveniently qualified as international crimes) was deemed important in order to restore international peace and security. These forms of collective violence are however extremely complex phenomena which are caused by a number of factors and are shaped by dynamic social processes stirring the conflict. It is the contention of the authors of this book that it takes an inter- and multidisciplinary approach to understand the true nature of this type of criminality and to effectively prosecute the perpetrators thereof. The aim of this book is to enhance our knowledge of this complex phenomenon by stimulating the inter- and multidisciplinary debate on international crimes and the international criminal justice system and to thus to contribute to a better and more effective system of international criminal justice.

## 2. A BRIEF HISTORY OF THE INTERNATIONAL CRIMINAL JUSTICE SYSTEM

International crimes as a term and concept might be relatively new but the phenomenon is certainly not. Incredible crimes and atrocities which nowadays

would qualify as international crimes have been committed within living memory, for example by western states while colonizing so-called third world countries and enriching themselves by taking control of the national resources of these countries and by enslaving the local population.[1] The Holocaust on the Jews committed by Nazi Germany during the Second World War was at the time still – to use the words of Winston Churchill – a crime without a name. Within the law there was no distinction between murder and mass murder. It was said that it was easier to get away with mass murder than a single murder. The Allies did not want this to happen and deemed it crucial to promptly prosecute and punish the major war criminals and hold them criminally responsible for the crimes they committed. In order to do so two international military tribunals (at Nuremberg and Tokyo) were established, charters were drafted and new legal concepts were developed. The planning, preparation, initiation and waging of a war of aggression in violation with international treaties were considered a crime against peace. Violation of the rules and customs of war – which had been codified in international law in the The Hague treaties – were considered war crimes and the crimes committed against civilian populations such as murder, extermination, enslavement and deportation were considered crimes against humanity.[2] At the time genocide was not yet an accepted term and thus did not feature in the charter or the indictment.

The Nuremberg and Tokyo trials mark the birth of an international criminal justice system. It was the first time in history that individuals were held responsible by an international tribunal for these types of collective violence. Hopes were high to create an effective international criminal justice system but the cold war, which lasted from 1945 to 1989, hampered the development of such a system. Under the auspices of the United Nations a number of treaties related to international crimes did however come into force, such as the Genocide Convention (1948),[3] the Geneva Conventions (1949) and additional protocols (1977 and 2005),[4] the

1 See e.g. Hochschild 1998 and De las Casas 2004.

2 See the definitions in the Nuremberg Charter, the Charter of the International Military Tribunal (United Nations Treaty series, vol. 82, 279) and Tokyo Charter, the Charter of the International Military Tribunal for the Far East (Special Proclamation by the Supreme Commander for the Allied Powers, as amended 26 April 1946, T.I.A.S. No. 1589).

3 The Convention on the Prevention and Suppression of the Crime of Genocide, Paris 9 December 1948 (United Nations treaty series, vol. 78, 2770).

4 There are four Geneva Conventions: Convention for the Amelioration of the Convention of the Wounded and Sick in Armed Forces in the Field (United Nations Treaty series, vol. 75, 31); Convention for the Amelioration of the Condition of Wounded and Shipwrecked Members of Armed Forces (United Nations Treaty series, vol. 75, 85); Convention relative to the treatment of prisoners of war (United Nations Treaty series, vol. 75, 1350; and Convention relative of the Protection of Civilian Persons in Time of War (United Nations Treaty series, vol. 75, 287). In 1977 these conventions were supplemented with two additional protocols,

Convention against Apartheid (1973)[5] and the Convention against Torture (1984).[6]

Despite the fact that the international community was – as of the 1990s – no longer hampered by the bipolar division which had characterized the cold war it failed to take effective action to prevent further atrocities. In the early and mid 1990s the UN was present but passively stood by while 7,000 men who were supposed to be protected by the international community (more particularly the UN peacekeeping force Dutchbat which was part of UNPROFOR) in the safe haven of Srebrenica were murdered[7] and 800,000 Rwandese Tutsis were slaughtered by the Hutus under the eyes of UNAMIR.[8] After these disasters the Security Council of the United Nations did however use its power derived from Chapter VII of the UN Charter to establish two international criminal tribunals: the International Criminal Tribunal for the former Yugoslavia (ICTY)[9] and the International Criminal Tribunal for Rwanda (ICTR)[10] to prosecute the individuals responsible for the atrocities committed in the territory of former Yugoslavia and Rwanda in the early nineties. The Security Council of the United Nations deemed the crimes committed in these areas a threat to international peace and security and considered it in the interest of international peace and security to prosecute the perpetrators thereof. In 1998 another milestone was reached with the signing of the Rome Statute which in 2002 led to the establishment of the International Criminal Court (ICC)[11] in The Hague. The ICC just like the ICTY and ICTR has jurisdiction for genocide, crimes against humanity and war crimes which can be considered the core international crimes. Next to these three major institutions, mixed tribunals have been set up in Sierra Leone and East Timor and more recently in Cambodia. All these international

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Protocol I, relating to the Protection of Victims of International Armed Conflicts (United Nations, General assembly, A/32/144, 15 August 1977) and Protocol II relating to the Protection of Victims of Non-International armed Conflicts (United Nations, General Assembly, A/32/144, 15 August 1977). In 2005 a third additional protocol was signed: Protocol III relating to the Adoption of an Additional Distinctive Emblem of 8 August 2005.

5 International Convention on the Suppression and Punishment of the Crime of Apartheid, New York 30 November 1973, International legal documents 1974, 50.

6 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York 10 December 1984, international legal materials 1984, 1027.

7 See Honig and Both 1996.

8 See Grünfeld and Huijboom 2007.

9 See the Security Council resolution 827 (1993) on establishing an International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law comitted in the Territory of the Former Yugoslavia, International Legal Materials, 1993, 1192 (text statute) and 1203 (text resolution); as amended by Security Council Resolution 1166 of 13 May 1998. See also: www.icty.org.

10 See the Security Council resolution 955 establishing the International Tribunal for Rwanda, International legal materials 1994, 1598. See also: www.unictr.org.

11 Rome Statue of the International Criminal Court, Rome 17 July 1998, U.N. Doc. A/CONF. 183/9, International legal Materials 1998, 999. See also www.icc-cpi.int/.

criminal courts and tribunals deal with international crimes and together with the national institutions which also do so they form the international criminal justice system.

## 3. NEW AREAS OF EXPERTISE

Since the establishment of the international criminal tribunals international criminal law has rapidly developed into a specialized field of expertise within international law.[12] While historians and genocide scholars[13] as well as psychologists[14] have studied genocide for several decades, a sociology or criminology of international crimes was lacking[15] and the available knowledge from various disciplines was scattered. In the last ten years the call for an interdisciplinary debate on this type of criminality became louder[16] and more successful: since a few years more and more criminologists[17] as well as political and social scientists[18] have published books and articles on international crimes and –even more importantly- have shown an enhanced interest in each others' work.[19] In addition to this development, new areas of expertise such as a research methodology for human rights violations have been developed.[20] These developments are important as the complex nature of extreme forms of collective violence raises many questions and challenges: theoretical, practical and legal.

From a theoretical point of view one may wonder to what extent international crimes are a different type of criminality compared to ordinary crimes and to what extent the perpetrator of international crimes is a different type of perpetrator compared to the ordinary and common criminal. In the last few

12 There are numerous books and volumes on international criminal law and most universities give courses in international criminal law. Amongst the two most used course books are Cassese 2008 and Cryer et al. 2007.

13 See the works of Kuper 1981; Hilberg 1985; Kershaw 1990; Browning 1992 and Fein 1992.

14 See the works of Dicks 1972; Lifton 1988; Staub 1989; Kelman and Hamilton 1989; Haritos-Fatouras 2003 and Zimbardo 2008.

15 Until recently criminologists showed a complete lack of interest in international crimes, see Yacoubain 2000.

16 See calls for a criminology of international crimes by a.o. Drumbl 2003–2004 and Roberts and MacMillan 2003. See also an earlier call by Cohen 1993.

17 See the books by Neubacher 2005; Smeulers and Haveman 2008; Hagan and Rymond-Richmond 2009 and Alvarez 2010 as well as the growing number of international peer reviewed articles in leading criminological and legal journals such as Hagan et al. 2005 in Criminology, Neubacher 2006 in Journal of International Criminal Justice; Maier-Katkin et al. 2009 in Theoretical Criminology and a special issue of British Journal of Criminology in 2005 and several more recent articles by Mullins 2009 and Smeulers and Hoex 2010 on the Rwandan genocide in the same journal.

18 See the work of Kressel 1996; Gupta 2001; Kalyvas 2006, Straus 2006 and Wood 2009.

19 See the international network: www.supranationalcriminology.org.

20 See Asher et al. 2008 and Sriram et al. 2009.

decades criminology has developed many theories which can explain ordinary and common crime but one might wonder to what extent these theories can be applied to these forms of collective violence? Or do we need to develop new theories? Theories which help us understand the role of the state and the collective nature of this type of criminality. To what extent can we apply theories from political science, sociology and psychology to this type of criminality? Which theories would be applicable and to what extent do they need to be adapted?

From a practical point of view the collective nature of international crimes poses many challenges to those who investigate the crimes. What research methods can be used and applied? Which difficulties are encountered? How can we measure the number of victims? How can we conduct research? How can we establish patterns and what can we learn from these patterns? The difficulty when studying the incidence and prevalence of this type of criminality is that many thousands of people are involved, the crimes are usually committed on a large territory over a prolonged period of time in which the country is often ruined because of the collective violence and researchers and investigators are confronted with a lack of data. It is difficult enough to investigate a single murder but what about a genocide? New methods and research techniques need to be developed and used to study and investigate these crimes.

The collective nature of international crimes also raises many legal issues. International criminal law uses criminal law concepts which have been based on national criminal law. Domestic criminal law deals with ordinary and common crime and one may wonder whether these concepts are suited well enough to deal with such forms of collective violence.[21] Many questions can be raised such as: how to attribute individual criminal responsibility to individuals when so many people are involved? How to deal with functionaries of the state who operate within hierarchically structured organizations and "merely" act in line with state policy? How to hold the *auctor intellectualis* of the crimes responsible for the crimes when he is so far removed from the physical perpetrators?

At an expert-meeting organized by the Amsterdam Centre of Interdisciplinary Research on International Crimes and Security (ACIC)[22] which is situated at VU University in Amsterdam professionals and practitioners from within the field and academics from various disciplines such as law, criminology, political science, psychology, statistics, research methodology and information technology were brought together and discussed these issues. It was continuously stressed that genocide, crimes against humanity and war crimes are extremely complex

21 See amongst others the discussions by Drumbl 2007 and Osiel 2009.
22 See www.rechten.vu.nl/ACIC.

social phenomena and it takes an interdisciplinary and multidisciplinary approach to understand the underlying social dynamics of these crimes and it takes a lot of skills to effectively prosecute the perpetrators thereof. In order to understand the causes and social dynamics which stir the processes leading to this type of criminality, there is a need to grasp the collective and organizational features, to understand group processes and to understand the effect thereof on the individual perpetrators. We need to develop research strategies and methods to discover patterns and to pinpoint the difference between cause and effect, between those carrying the main responsibility and those who merely follow and to find ways and means on how to process information. In order to tackle all these difficulties, scholars, professionals and practitioners within the field need to work together. The aim of this book was to do so and thus stimulate a multi- and interdisciplinary debate which enhances our knowledge of collective violence as a phenomenon and contributes to a better and more effective international criminal justice system.

## 4. OUTLINE OF THE BOOK

Next to this introductory chapter (chapter 1) and an epilogue (chapter 18) the book is divided in four parts. The first part focuses on the perpetrators of international crimes. In the first contribution (chapter 2) **James Waller** offers a psychological explanation of how ordinary people commit genocide and mass killing. Waller notes that 'the most outstanding characteristic of perpetrators is their normality not their abnormality' and presents an explanatory model which explains 'the process through which perpetrators themselves […] are changed.' Crucial to the process is the cultural construction of the worldview, the social construction of cruelty and the psychological construction of the other which are enforced by -amongst others- professional socialization and group identification. Although Waller notes that the transformation process may not be seen as inevitable: 'on the road to committing atrocities, there are many choice points for each perpetrator', he also notes that it takes strength and courage to resist the 'compelling cultural, psychological, and social constructions'.

In chapter 3 **Don Foster** also takes a psychological approach and equally focuses on the perpetrators. Foster argues that rather than taking a situationist or a voluntarist approach as many scholars do we need to take a relational approach. Foster contends that perpetrators might be ordinary people but not just anyone will commit international crimes. A crucial concept in his approach is entitlement. Perpetrators commit crimes because they feel entitled to do so and according to Foster entitlement is a relational concept. The relational model takes ideological factors, organizational and group dynamics as well as space-time

configurations into account. Foster uses two case studies – of Adolf Eichmann and John Deegan – to prove his point that perpetrators retain their agency while functioning in an influential social environment.

The second part of the book is entitled collective crimes and individual criminal responsibility. In this part of the book all chapters focus on the dilemmas and difficulties of attributing individual criminal responsibility for crimes which are so clearly collective in nature. In the first contribution of this part of the book **Athanasios Chouliaras** (chapter 4) touches upon one of the core themes of this book and discusses the paradoxical aim of the international criminal justice system to hold individuals rather than states responsible for international crimes. In his chapter, entitled discourses in international criminal law, Chouliaras points out that the discourses in criminology have clearly identified international crimes as forms or organized deviance and that the ICC only has jurisdiction for crimes committed by the state but that nevertheless the aim of the international criminal justice is to hold individuals responsible. Chouliaras argues that the international criminal justice system has set itself the impossible task: to disassociate individual responsibility from state responsibility while these are in practice intertwined.

In chapter 5 **Mark Osiel** discusses the options, possibilities and difficulties in attributing liability within a bureaucracy of murder. The central point of Osiel's paper is that current theories of liability can lead to a situation in which people are blamed for crimes which were beyond their control or contemplation. On the other hand it is very difficult to fulfil the requirements to prove command responsibility which requires the proof of effective control. In his line of argumentation Osiel strongly relies on Roxin's analysis of the Eichmann case. Eichmann is generally considered the typical arm chair perpetrator who has not killed anybody with his own hands but whose role was crucial in organizing the mass destruction of the Jews. He however was not the only bureaucrat involved; many other colourless bureaucrats became -so to speak- cogs in a destructive machine. Osiel assesses the law on perpetration through others with the aim to find a means to attributing responsibility in a fair manner amongst the people within an organization.

In chapter 6 **Michael Scharf** explores the concept of Joint Criminal Enterprise (JCE) and its historical underpinnings. Joint criminal enterprise is a form of liability in which participants in a criminal enterprise can be held responsible for foreseeable crimes committed by others. Scharf concludes that the Nuremberg tribunal applied concepts which were closely related to the concept of joint criminal enterprise. Just like many international criminal tribunals nowadays, the Nuremberg tribunal struggled with how to attribute individual criminal responsibility for crimes which are by definition manifestations of collective

violence. Scharf however concludes that the unique nature of these types of crimes requires unique modes of liability and that this has been established during the Grotian Moment of Nuremberg. Scharf thus endorses the principle of joint criminal enterprise but warns us to be careful in applying the principle.

In the next contribution (chapter 7) **Kai Ambos** argues that the 'intent to destroy' requirement which is needed to prove genocide, should be replaced by a more refined approach in which a distinction is made between three levels of perpetrators, namely top, middle and low ranking. Ambos concludes that criminological research so far supports this three fold distinction. He furthermore builds upon the typologies developed in literature to show how different but at the same time intertwined motive and intent are. Ambos argues that it is crucial that we take the context into account and differentiate between state actors and private actors. In a clarifying scheme Ambos shows how requirements in relation to intent and knowledge can and should change depending on the level, type and affiliation of the perpetrator. Ambos thus shows how refined perpetrator typologies and the distinctions between motive and intent; state and private and intent and knowledge are useful tools to test legal theory and can ultimately contribute to the development of the international criminal justice system.

In chapter 8 **Smeulers and Holá** use the typology of perpetrators developed by the first author in prior research and discuss the culpability of different perpetrators of international crimes. They distinguish between five different levels of blameworthiness which are related to the rank, agency and personal autonomy of the ten types of perpetrators. Smeulers and Holá then investigate to what extent the ICTY sentencing practice corresponds to the presented theoretical framework. In doing so they use a homogeneity analysis. This exploratory technique helps to investigate the multivariate associations between perpetrators' characteristics relevant for the typology (motivation and rank) and sentencing. Although the overall fit is rather low, the authors conclude that to a certain extent the ICTY sentencing practice reflects the presented theoretical framework.

Child soldiers and the construction of a discourse of childhood innocence are the central themes of chapter 9. In this contribution **Mark Drumbl** interrogates the fact that international criminal process insulates child soldiers from responsibility for their conduct. International criminal law as it stands views children as hapless individuals who lack agency and free will. Scholars such as ethnographs and anthropologists who have studied child soldiers indeed concluded that many child soldiers are abducted and that many have been forced to kill but many others show resilience, free will and agency and resisted the pressure while yet others independently committed terrible crimes. Drumbl

argues that there are a number of risks to consider child soldiers who have committed terrible crimes helpless automatons by definition.

In the third part of the book the authors critically reflect on the international criminal justice system and the International Criminal Court (ICC). In chapter 10 **Salim Nakhjavani** suggests that complexity theory could be used as a new intellectual tool to study the international criminal justice system. The concepts of complexity theory can be used as metaphors and analogies and can help us better understand the system. In this contribution several examples are given and by doing so the author sheds a new light on how to study the international criminal justice system. Nakhjavani states that good lawyers bring the law to life and this is precisely what this contribution does.

In chapter 11 **Sarah Nouwen and Wouter Werner** focus on the law and politics of self-referrals to the International Criminal Court. When the ICC was established it was expected that states would not refer cases to the ICC but the contrary seems to be true. From the four cases currently under investigation of the ICC, three have been referred to the court by states where crimes were committed. The authors analyze and critically reflect on the legal reasoning used by the court to accept (and even encourage self-referrals) and they point to the danger of self-referrals which can be easily used and abused for political means.

In the fourth part of the book entitled from facts to figures three scholars focus on the difficult issues of finding the right research methodology, explaining variance in international crimes and presenting the results of their investigation in court. The contribution of **Catrien Bijleveld** (chapter 12) focuses on methodological issues in the empirical study of international crimes. By discussing various methods, their usefulness and shortcomings Bijleveld shows that we are in a dire need of a methodology for international crimes in order to tackle the particularities of this type of crime in measuring the prevalence, studying the etiology and the effect of the legal response. Yet Bijleveld also shows that – although studying international crimes – is not an easy task a lot can still be achieved. In her contribution she provides many examples of research done so far thus showing that although more research is needed, there is already a lot to build upon.

In chapter 13 **Elisabeth Wood** argues that although sexual violence occurs in all wars, its extent varies dramatically. Explanations given in literature often ignore variance of sexual violence. Wood thus shows how important it is to study patterns and variance. In her contribution Wood develops a theoretical framework in which she takes several factors into account and ultimately distinguishes a top down and a bottom across logic which can either be focused on restraint towards sexual violence or on tolerance towards sexual violence. In

extreme cases sexual violence can be deliberately used as a strategy of war. In other conflicts sexual violence and rape are rare. Wood thus shows that rape is not an unavoidable aspect of war. Wood concludes her chapter by assessing the policy implications of her argument.

**Amelia Hoover Green** in chapter 14 shows how statistical evidence can play a key role in bringing perpetrators to account. Statistical evidence can help show patterns which would otherwise not be detected. Yet judges are seldom trained in statistics and a trial in which the facts are presented is not an ideal place to sufficiently explain the outcome of a statistical analysis to untrained lawyers. Hoover draws from her experience in the Milutinovic et al. case[23] in which she together with Patrick Ball provided testimony based on a statistical analysis which was ultimately rejected by the court. In her contribution Hoover explains what went wrong and analyzes how the presentation of the statistical evidence could have been more successful. Important lessons can thus be drawn from her experience and analysis.

The last part of the book is entitled from figures to facts. In chapter 15 **Xabier Agirre** focuses on the methodology for the criminal investigation of international crimes. His articles starts with a quote from Telford Taylor the public prosecutor of Nuremberg who concluded that the 'issue of international crimes and their investigations is "far bigger and far more difficult than anyone had anticipated" beforehand'. The author who has had many years of experience working at the offices of the prosecutors of first the International Criminal Tribunal for the former Yugoslavia and currently the International Criminal Court uses his experience to provide us with 10 basic principles which together form a basis for successfully conducting investigations.

In chapter 16 **Martin Witteveen** draws from his own experience as an investigative judge in noting that the truth in cases of international crimes is often hard to establish. One of the reasons is that usually a lot of time has already passed by since the crimes were committed and the prosecutors and judges start to deal with them (sometimes up to ten or even twenty years). When interviewing witnesses prosecutors and judges have to face many challenges such as time lapse, memory loss, a traumatized witness, language barriers and cultural differences. Despite all the difficulties judges face, Witteveen is optimistic about the future as prosecutors and judges have become more and more experienced in dealing with all these difficult issues in the last few years

In the last contribution of this part **Morten Bergsmo, Olympia Bekou and Annika Jones** (chapter 17) discuss the possibilities of the ICC case matrix which

23 *Prosecutor v. Milan Milutinovic et al.* Case No. IT-05–87, T.Ch. III, 26 February 2009.

was designed several years ago by Morten Bergsmo. The case matrix is one of the legal tools and a means to transfer information and knowledge. International crimes are by definition very complex cases in which an extremely large number of facts and evidence needs to be processed. The case matrix offers a 'methodology to document, investigate, prosecute, defend and adjudicate core international crimes' and provides access to relevant legal documents and practice. The authors thus convincingly show that the case matrix can contribute to a better and more efficient international criminal justice system which serves the needs of both the prosecution and the defence.

Last but not least: the epilogue of the book is written by **Stephan Parmentier and Estelle Zinsstag** (chapter 18). In the epilogue the authors raise several interesting issues and conclude above all that: 'many of the issues listed above strongly reflect the importance, even the need, for a multidisciplinary approach to collective violence and international criminal justice' and I couldn't agree more. With Parmentier and Zinsstag I hope that this volume indeed will not be the final product but that many meetings and volumes will follow in which academics from various disciplines will meet and discuss international crimes together with professionals and practitioners within the field. Only then can we hope that the body of knowledge which is gradually built by these endeavours will ultimately contribute to a better international criminal justice system and a better understanding of the causes of international crimes and thus contribute to a fairer world.

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