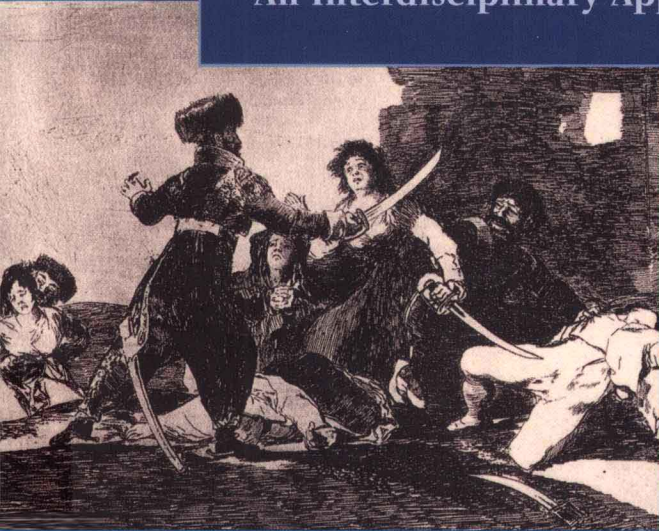


Alette Smeulers [ed.]

Collective Violence and International Criminal Justice

An Interdisciplinary Approach

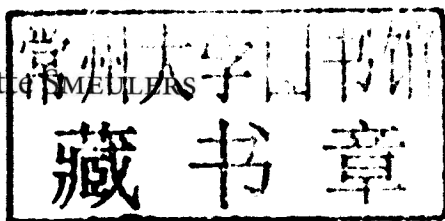


COLLECTIVE VIOLENCE
AND INTERNATIONAL
CRIMINAL JUSTICE

An interdisciplinary approach

Edited by

Alette SMELLERS



intersentia

Antwerp – Oxford – Portland

Distribution for the UK:

Hart Publishing Ltd.
16C Worcester Place
Oxford OX1 2JW
UK
Tel.: +44 1865 51 75 30
Email: mail@hartpub.co.uk

Distribution for the USA and Canada:

International Specialized Book Services
920 NE 58th Ave. Suite 300
Portland, OR 97213
USA
Tel.: +1 800 944 6190 (toll free)
Tel.: +1 503 287 3093
Email: info@isbs.com

Distribution for Austria:

Neuer Wissenschaftlicher Verlag
Argentinierstraße 42/6
1040 Wien
Austria
Tel.: +43 1 535 61 03 24
Email: office@nwv.at

Distribution for other countries:

Intersentia Publishers
Groenstraat 31
2640 Mortsel
Belgium
Tel.: +32 3 680 15 50
Email: mail@intersentia.be

Collective Violence and International Criminal Justice – An Interdisciplinary Approach

Alette Smeulers (ed.)

© 2010 Intersentia
Antwerpen – Oxford – Portland
www.intersentia.com

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

No part of this book may be reproduced in any form, by print, photoprint, microfilm or any other means, without written permission from the publisher.

ACKNOWLEDGMENTS

This conference book is the outcome of an expert-meeting organized in June 2009 by the Amsterdam Centre of Interdisciplinary Research on International Crimes and Security (ACIC) which is based at the VU University in Amsterdam. The expert-meeting was financed by the Netherlands Science Organization (NWO) for the research project entitled 'A criminological approach to individual criminal responsibility for international crimes' in the innovational research incentive scheme and which had been granted to me in December 2005. A first expert-meeting was organized in April 2007 at Maastricht University. The conference book thereof was also published by Intersentia in this series and is entitled: *Supranational criminology: towards a criminology of international crimes* and was edited by Roelof Haveman and myself. This book is a follow up on the first conference book.

I wish to thank a number of people for helping to organize the conference and for their support or advice with the editing of the conference book, namely Elies van Sliedregt, Lotte Hoex, Barbora Holá, Klaas Rozemond, Nicole Lijs and Diana Turcas. I would furthermore like to thank all the contributors to the conference book for their contributions. I am also grateful to the participants of the expert-meeting who did not submit a chapter but nevertheless contributed to the discussions during the expert-meeting: Elies van Sliedregt, Leila Sadat and Larissa van den Herik. I furthermore wish to thank Stephan Parmentier and Howard Morrison who both turned out to be excellent chairs and thus greatly contributed to the success of the meeting by ensuring a continuous and lively debate.

I sincerely hope that this book will further contribute to this newly developing field of international crimes and of international criminology and that it will stimulate the academic and interdisciplinary debate on international crimes in order to enhance our knowledge and understanding of these crimes and thus ultimately contribute to preventing such crimes in the future.

Alette Smeulers
Amsterdam, June 4 2010

CONTENTS

Acknowledgements v

INTRODUCTION

Chapter 1. Collective violence and international criminal justice –
towards an interdisciplinary approach
 Alette SMEULERS 3

1. Introduction 3
2. A brief history of the international criminal justice system. 3
3. New areas of expertise 6
4. Outline of the book 8
References 13

PART I.

PERPETRATORS OF INTERNATIONAL CRIMES

Chapter 2. The ordinariness of extraordinary evil: the making of
perpetrators of collective violence
 James E. WALLER 19

1. Introduction 19
2. Ordinary origins of extraordinary human evil 22
3. Cultural construction of worldview 26
4. Psychological construction of the “other” 28
5. Social construction of cruelty 31
6. Conclusion 36
References 37

Chapter 3. Rethinking the subjectivity of perpetrators of political violence
 Don FOSTER 39

1. Introduction 39
2. Dominant accounts of perpetrators 40
3. Criticism of the dominant accounts. 42
4. An alternative approach 44

5. Two case studies.....	48
5.1. The Eichmann case.....	48
5.2. The case of John Deegan	54
6. Implications and concluding remarks	58
References	60

PART II.

COLLECTIVE CRIMES – INDIVIDUAL RESPONSIBILITY

Chapter 4. Discourses on international criminality	
Athanasios CHOULIARAS	65
1. Introduction	65
2. The collective nature of core crimes as the common ground of different fields of knowledge	67
3. Criminology: state and state-corporate crime as instances of organizational deviance	70
4. International criminal law: looking for the individual criminal, losing the delinquent state	77
4.1. Contextual elements and admissibility criteria: ‘Walks like a duck, swims like a duck, and quacks like a duck’... Ain’t a duck!	78
4.2. Modes of individual criminal liability: in search of the organizational role	84
5. The rationale for the international criminal justice system	89
6. Discussion.....	92
References	94
Chapter 5. Ascribing individual liability within a bureaucracy of murder	
Mark OSIEL.....	105
1. Introduction	105
2. Easing superior responsibility: a new concept of effective control	106
2.1. Roxin’s theory of “domination over an organizational apparatus” ..	107
3. Difficulties with Roxin’s approach: a post-Weberian update	110
3.1. The fungibility of subordinates.....	114
3.2. Discretion enjoyed by subordinates.....	114
3.3. Non-western military organization	116
3.4. Shifting the evidentiary onus	119
3.5. The sociology of mass atrocity	122
3.6. The mental element.....	124
4. Conclusion	125
References	127

Chapter 6. Seizing the “Grotian Moment”: application of joint criminal enterprise liability to the proceedings of the Cambodia genocide tribunal Michael P. SCHARF.	131
1. Introduction	131
2. Did the Nuremberg precedent establish JCE as customary international law?	134
2.1. Application of JCE at Nuremberg.	134
2.2. Nuremberg as a “Grotian Moment”	143
2.3. The Concept of “Grotian Moment”	146
3. Conclusion	148
References	151
 Chapter 7. Criminologically explained reality of genocide, structure of the offence and the ‘intent to destroy’ requirement Kai AMBOS	 153
1. Introduction	153
2. Typologies in criminology	154
3. The significance of the criminological typology of perpetrators for the offence of genocide	159
4. Correspondence of categories of international criminal law with criminological typologies of perpetrators	163
4.1. Regarding top-level perpetrators “intent to destroy” means knowledge and purpose.	166
4.2. As to mid-level perpetrators the knowledge-based approach is applicable	166
4.3. Regarding the low-level perpetrators it is necessary to distinguish between state agents and private actors. While the former are normally informed about the genocidal (state) plan, the latter are not	168
5. Conclusion: the structure of the genocide offence in light of the criminological findings.	170
References	171
 Chapter 8. ICTY and the culpability of different types of perpetrators of international crimes Alette SMEULERS and Barbora HOLÁ	 175
1. Introduction	175
2. Culpability of different types of perpetrators	179
2.1. Highest level of blameworthiness: criminal masterminds.	180
2.2. High level of blameworthiness: careerists and fanatics	181

2.3. Medium level of blameworthiness: devoted warriors	183
2.4. Low level of blameworthiness: “criminals and sadists” and the otherwise law abiding citizens	185
2.5. Lowest level of blameworthiness: compromised perpetrator	188
3. ICTY sentencing case law	188
4. Empirical findings	190
4.1. Methodology	190
4.1.1. Data Collection	190
4.1.2. Method	193
4.2. Results	194
4.3. Discussion	200
5. Conclusions	203
References	204

Chapter 9. Child soldiers: agency, enlistment, and the collectivization of
innocence

Mark A. DRUMBL	207
--------------------------	-----

1. Introduction	207
2. Criminally punishing adults for the conscription, enlistment, or use of child soldiers in hostilities	210
2.1. Special Court for Sierra Leone	210
2.2. International Criminal Court	213
2.3. The agency of child soldiers: assumptions, narratives, and strategies	215
2.4. Conclusion	218
3. How do children end up in fighting forces?	218
3.1. Forced conscription	219
3.2. Voluntary enlistment	222
3.3. Summary	226
4. Conclusion	227
References	229

PART III.

REFLECTIONS ON INTERNATIONAL CRIMINAL JUSTICE AND
THE ICC

Chapter 10. The rough edges of the delicate mosaic: complexity theory
and the early practice of the International Criminal Court

Salim A. NAKHJAVANI	235
-------------------------------	-----

1. Introduction	235
2. Some characteristics of complex adaptive systems	237

3. Lens, metaphor, analogy, model ... or nothing at all?	239
4. Seeking complexity in international criminal justice	243
4.1. The entry-into-force of the Rome Statute sets in motion a nonlinear, dynamic system	243
4.2. Outcomes of decisions of the Court may be sensitively dependent on initial conditions and path-dependent	245
4.3. The Rome Statute may co-evolve with ‘neighboring’ treaties	246
5. Novel insights or repackaged goods?	250
References	251

Chapter 11. The law and politics of self-referrals

Sarah NOUWEN and Wouter WERNER	255
1. Introduction	255
2. Self-referrals and complementarity	257
2.1. Inaction as a ground for admissibility	260
2.2. Narrowing down the definition of a ‘case’	264
2.3. Broadening the concept of unwillingness	265
2.4. Conclusion: legal aspects of self-referrals	267
3. The politics of self-referrals	267
3.1. ICC politics	267
3.2. National politics	268
3.3. Conclusion: politics of self-referrals	269
References	270

PART IV.

FROM FACTS TO FIGURES

Chapter 12. On research methods for international crimes – methodological issues in the empirical study of international crimes

Catrien BIJLEVELD	275
1. Introduction	275
2. Criminological areas of study	276
3. Methodological backdrop to social science research	278
3.1. Working with samples	278
3.2. Causality	280
3.3. The role of assumptions	282
4. Research on international crimes	283
4.1. Studying prevalence	283
4.2. Etiology	288
4.3. (Legal) reaction	291
4.4. Victim studies	292

5. Conclusion and some ways forward 294
 References 295

Chapter 13. Sexual violence during war: variation and accountability
 Elisabeth Jean WOOD 297

1. Introduction 297
 2. Key concepts 299
 3. Incomplete explanations 303
 3.1. Type of conflict 303
 3.2. Opportunity 303
 3.3. Incentives 305
 3.4. Rape as a substitution for consensual sex 306
 3.5. Female combatants 307
 3.6. Sexual violence as instrumental for the group 307
 4. Theoretical framework 309
 4.1. Individual combatants 309
 4.2. Leadership strategy 310
 4.3. Institutions for combatant socialization 310
 4.4. Wartime dynamics 312
 4.5. Military hierarchy 313
 5. When is wartime rape a strategy of war? When is it rare? Top-down
 and bottom-across logics 314
 5.1. Explaining the absence of sexual violence: two logics 315
 5.1.1. The top-down logic 315
 5.1.2. The bottom-across logic 317
 5.2. Explaining rape as a strategy (or tactic) of war: two logics 318
 5.2.1. Top-down logic: rape as a strategy of war 318
 5.2.2. Bottom-across logic: rape as a tactic of war 318
 6. Conclusion 319
 References 322

Chapter 14. Learning the hard way at the ICTY: statistical evidence of
 human rights violations in an adversarial information environment
 Amelia HOOVER GREEN 325

1. Introduction 325
 2. The prosecution’s analysis 327
 2.1. Descriptive analysis 327
 2.2. Causal analysis 330
 3. Defense challenges 333
 3.1. Defining “statistics” and “the scientific method” 334
 3.2. “Fundamental flaws” 336

4. The judgment	337
5. Lessons learned	343
6. Conclusions	349
References	350

PART V.

FROM FIGURES TO FACTS

Chapter 15. Methodology for the criminal investigation of international crimes

Xabier AGIRRE ARANBURU	355
1. Introduction	355
2. Seize the opportunity structure	356
3. Beware of the inquisitorial temptation.....	358
4. Take a multi-disciplinary approach	361
5. Disregard simplistic explanations.....	364
6. Analysis first.....	365
7. Focus on specific and contextual elements	367
8. Prioritize documentary evidence	369
9. Look at the evidence as sample	375
10. Prioritize insider and international witnesses	376
11. Anticipate security needs.....	379
References	380

Chapter 16. Closing the gap in truth finding: from the facts of the field to the judge's chambers

Martin WITTEVEEN.....	383
1. Introduction	383
2. The facts.....	384
3. The investigation	386
3.1. Time lapse	386
3.2. Consequences of time lapse.....	388
3.3. Lack of documentation	388
4. Issues of witnesses' memory	389
4.1. Encoding phase.....	390
4.2. Retention phase.....	392
4.3. Retrieval phase	393
5. Witnesses' recount of the facts – unprecedented challenges in the context of international crimes	395
5.1. Trauma	396
5.2. Quantative answers	397

5.3. Misunderstandings.....	398
5.4. Language challenges.....	399
5.4.1. Rare languages.....	400
5.4.2. Translation errors.....	400
5.4.3. Lack of vocabulary.....	401
5.5. Cultural differences.....	402
5.5.1. Education and personal identities.....	402
5.5.2. Behavior of witnesses.....	403
5.5.3. Misinterpretation.....	404
5.5.4. Witness's reluctance.....	404
5.5.5. Oral culture and lack of sourcing.....	405
6. After the witnesses the professionals take over.....	406
6.1. Role of investigators.....	406
6.2. Role of the prosecutor or trial attorney.....	407
6.3. Role of the judges.....	408
6.4. Dilemmas and possible changes.....	409
7. The final stage – The judge's chambers.....	411
References.....	411

Chapter 17. Preserving the overview of law and facts: the Case Matrix

Morten BERGSMO, Olympia BEKOU and Annika JONES..... 413

1. Introduction.....	413
2. Some difficulties faced in relating law to facts in core international crimes cases.....	416
2.1. Understanding the legal requirements for the prosecution of core international crimes.....	416
2.2. Applying the legal requirements to large quantities of evidence....	419
3. The significance of an informed, efficient and precise approach to the application of law to facts in core international crimes cases.....	420
3.1. The ability to pursue justice and the quality of the process.....	421
3.2. The efficiency of the criminal justice process and the fight against impunity.....	422
3.3. Promotion of the rights of the accused.....	423
3.4. Summary.....	424
4. The Case Matrix and the facilitation of the application of law to facts....	425
4.1. The Case Matrix.....	425
4.2. The facilitation of the application of law to facts through use of the Case Matrix.....	428
5. The ICC and the Case Matrix.....	429
5.1. Adoption of the Case Matrix logic.....	429
5.2. Justifications for the approach of the Chambers.....	431

5.2.1. Expediency of the criminal process	431
5.2.2. Protection of the rights of the accused	432
6. Conclusion	433
References	433

EPILOGUE

Chapter 18. Future perspectives on collective violence and international criminal justice

Stephan PARMENTIER and Estelle ZINSSTAG	439
1. Introduction	439
2. Types of violence: collective, international and political	439
3. Types of responses: criminal prosecutions and beyond	442
4. The need for an interdisciplinary approach	445
References	445
<i>Contributors</i>	447

INTRODUCTION

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 Condition 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,