

## Genocide, crimes against humanity and war crimes

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# **Genocide, crimes against humanity and war crimes: a victimological perspective on international criminal justice**

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## **1. Introduction**

Violence is a human universal.<sup>1</sup> It is of all times. This relativist truism should not cloud our awareness of the fact that during the past century interpersonal violence has acquired a new dimension. The 20<sup>th</sup> century has demonstrated mass violence on a scale and with an intensity hitherto unknown to mankind (e.g. Glover 2001; Mazower 2002). To name but a few sobering examples: there were the two World Wars, the horrors of the Stalinist era and the cultural revolution in China, the killing fields in Cambodia, the atrocities in the Balkans, and quite a few so-called regional conflicts on the African continent (see f. e. Power 2003, Mann 2005; Prunier 2009). The atrocities involved hundreds of millions of casualties.<sup>2</sup> Like never before, the lethal combination of human flaws and modern technology and weaponry created an opportunity to inflict suffering beyond comprehension.

There has been another shift worth noticing. During previous centuries, mass violence was closely connected to warfare, while the latter was primarily an affair between the armies of sovereign nations. Hence the individuals who used to pay the ultimate price for these conflicts were predominantly professional soldiers. In the course of the 20<sup>th</sup> century this has gradually changed. In the First World War, a significant majority of casualties still came from military ranks. The Second World War reduced this proportion to some 50%, with the other half taken from the civilian population. During the Vietnam War, some 70% of ordinary civilians accounted for the total loss of life. In subsequent armed conflicts, this percentage further increased (Valentino

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<sup>1</sup> See for instance Baumeister 2005.

<sup>2</sup> The exact figure is unclear but according to the figures reported in McNamara and Blight (2001) 160 million people died in wars, while Rummel (1994) mentions a similar figure for '20<sup>th</sup> century democide'. Accounting for some overlap the total sum should be estimated to be somewhere between 250 million and 300 million deaths.

2005). In a macabre sense there is evidence of an unmistakable ‘civilization of warfare’ (see e.g. Chesterman 2001).

These developments necessitated the definition of new concepts of crime. Mass violence, often committed in the name of the State, called for its own labels to capture the essence of this new level of injustice (see Lemkin 1947; Bassiouni 1992; Power 2003). The abuse of sovereign power inherent in these atrocities led to the development of the so-called international crimes: crimes against humanity, war crimes and the crime of genocide.

Besides new categories of perpetrators, the conflicts of the 20<sup>th</sup> century also established a new kind of victims: victims of mass violence. It is noteworthy to review how the academic community dealt with this topic. We contend that academia’s response has been rather paradoxical. On the one hand, it can be argued that the horrors of the Second World War form part of the roots of the academic field of study called ‘victimology’ (van Dijk, Groenhuijsen & Winkel 2007, 10). After all, it was Hans von Hentig, supposedly one of the founders of this discipline, who mused in his military hospital bed in Jerusalem at the end of the war:

*“Why in history has everyone always focused on the guy with the big stick, the hero, the activist, to the neglect of the poor slob who is at the end of the stick, the victim, the passivist – or maybe, the poor slob (in bandages) isn’t all that much of a passive victim – maybe he asked for it?”* (quoted in Mueller & Adler 2005).

Hence the suffering brought about by the Nazi-regime is a main source of inspiration for the systematic study of causes and effects of victimization.

Yet on the other hand it cannot be denied that over the course of the following decades the new branch of research was largely preoccupied with victims of ordinary crime. Similar to criminology<sup>3</sup> and with a few notable exceptions,<sup>4</sup> mainstream victimology has concentrated on small scale crime. It is only after the atrocities in Rwanda and the former Yugoslavia and the subsequent developments in international criminal law (the Tribunals for Yugoslavia and Rwanda and the International Criminal Court) that criminologists recognised the need to develop a specialised

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<sup>3</sup> See e.g. Smeulders and Haveman (2008); Hagan and Rymond-Richmond (2009) for a discussion of criminology’s neglect of international crimes.

<sup>4</sup> Such as Yael Danieli, Irene Mellup, and other representatives of the World Society of Victimology who insisted on including victims of abuse of power in the UN Declaration.

criminology of international crimes (Smeulers & Haveman 2008). In its slipstream victimology has now rediscovered victims of international crimes as a special target group for academic research.

This chapter is structured as follows. First we will outline some of the features that distinguish the international crimes from criminal behaviour in the domestic sphere (section 2). In the subsequent sections these features will be examined in more detail (sections 3-5). We will reflect on these special features and use our reflections to develop a victimological framework concerning international criminal justice (concluding section 6).

From the above it follows that our observations cover a lot of ground. This chapter provides a general frame of reference for the rest of the volume, by identifying some of the basic problems and by providing an account of what directions the search for solutions might take. In quite a few instances, we leave the more in depth analyses to our colleagues.

## **2. Special features of genocide, war crimes and crimes against humanity**

In what way are the international crimes under consideration defined? For present purposes, it is not necessary to trace the historical roots of this branch of criminal law.<sup>5</sup> Suffice it to say that they originated in instruments of international law.<sup>6</sup> We will rely on the wording in the Rome Statute, since this represents the current state of the art (likewise: Haveman & Smeulers 2008 15).

The most serious crime, then, is genocide.<sup>7</sup> Article 6 of the ICC Statute conceives of it as acts such as murder or measures to prevent births when committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

War crimes are delineated in art. 8 of the ICC Statute. These amount to grave breaches and other serious violations of the law of the war, in particular when

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<sup>5</sup> See Bassiouni 1992.

<sup>6</sup> For genocide: the UN Convention on the Prevention and Punishment of the Crime of Genocide, Res. 260 A (III) 1948. For war crimes (grave breaches and other serious violations of the laws or customs of war), reference should be made to the 1949 Geneva Conventions and 1977 Additional Protocols. For crimes against humanity: the Neuremberg Charter, the Tokyo Charter and the Statutes of the ICTY, the ICTR and the ICC.

<sup>7</sup> In academic literature this is often referred to as 'the crime of crimes', or similar designations. De Brouwer 2005, 83 argues for an amended definition of genocide that includes genocidal rape and gender as a group.

committed as part of a plan or policy or as a part of a large scale commission of such crimes.<sup>8</sup>

Art. 7 of the ICC Statute concerns crimes against humanity. These are described as acts such as<sup>9</sup> murder, deportation and rape, if and when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

Comparing the definitions of the major international crimes, they appear to have at least three features in common (see also Kauzlarich, Matthews and Miller 2001) which –taken together - distinguish them from domestic crimes. First, government agencies are complicit in the behaviour that is criminalized.<sup>10</sup> The State participates in or at least condones the commission of these crimes and the direct or indirect involvement of government officials is conspicuous. As Luban (2005) calls it, these are situations of ‘politics gone cancerous’.

Secondly, the definitions consistently point to instances of mass victimisation. In the case of genocide it is a ‘group’ which lacked adequate protection; in the wording of war crimes reference is made to ‘a plan or a policy’ or ‘large scale commission of crimes’; and crimes against humanity are only possible when there is a ‘widespread or systematic attack’ against a ‘civilian *population*’. All of these phrases only apply to a multitude of victims, quite often even a vast number of victims when compared to conventional crime.

The third feature of these international crimes is not so much evident by their definition in the ICC Statute, but it becomes clear when one looks beyond the legal wording to the underlying reality. It concerns the relationship between the victims of these international crimes and their perpetrators. In fact, it is not so much a relationship as well as a perception of a complete absence of ‘normal’ human relationships. To be more precise: the relevant international crimes are usually

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<sup>8</sup> We are forced to give a general summary: art. 8 consists of 50 different subparagraphs.

<sup>9</sup> ‘Such as’ meaning that the list of concrete acts in art. 7 is enumerative rather than exhaustive. This is also evidenced by art. 7 section 1 sub k, reading: “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

<sup>10</sup> Technically the crime of genocide may be perpetrated by individuals. The crime of genocide, unlike the crimes against humanity and war crimes is defined by the collective nature of the *victim population*, which is targeted for extermination, rather than that of the perpetrators (Luban 2005). Indeed close inspection of the definition reveals that as long as there is *intent* to destroy a group, a single instance of violence may fulfill the definition. However, there is no instance of genocide of which we are aware that did not involve collective perpetration. Indeed as will be discussed in more detail in section 5, the perpetration of genocide normally involves a complex social process that includes many people in a variety of roles (e.g. Waller 2007).

committed by perpetrators who conceive of the victims as perpetrators of crime or even atrocity themselves (e.g. Mann 2005; Staub 1992; Waller 2007). And with this comes the connotation of ‘enemies’, of ‘other’ people who are dangerous. It is obvious that this special feature of the crimes under consideration usually is implicitly or explicitly invoked by those guilty of the acts to justify their deeds, but it also has consequences for the preferred way of reacting to injustice from the victims’ perspective.

Each of the special features has victimological significance. In the following sections we will discuss each of them in turn and summarize their implications in terms of victimological theories.

### **3. Victims of crime committed or condoned by the State**

Genocide, crimes against humanity and war crimes are usually committed under the cover of state authority. This fact alone accounts in large part for the so-called culture of impunity (e.g. Akhavan 2001; Crocker 1998; McSherry & Molina Mejia 1992). Former UN High Commissioner for Human Rights Lasso has stated that “a person stands a better chance of being tried and judged for killing one human being than for killing 100,000”, which has been repeatedly confirmed by research and experience (e.g. Opatow 2001). Some insights in this phenomenon are necessary for the development of our victimological perspective. Hence the following reflections.

#### *3.1 The culture of impunity as the ultimate perversion of the rule of law*

Let us briefly dwell on the foundations of a legal order. In essence, every legal system is aimed at the protection of its citizens. This is hard to capture in just a couple of well phrased sentences, but at its core this constitutes the vital difference between the *rule of law* and the *rule of men*. Legal subjects, ordinary people, citizens of the State should not only be protected by the system against fellow citizens and against enemies from the outside world, but above all against the potential enemy from within: i.e. against those persons within the jurisdiction who possess the definitional power, the power to determine the difference between right and wrong (e.g. Arendt 1970).

The most precious spot – and at the same time the most vulnerable one – of any legal order can be identified as the place where the content is defined of which types of behaviour shall be acknowledged as crime and which acts shall be considered as justified. In the well know vocabulary of H.L.A. Hart: in the end, every jurisdiction is based on an *ultimate rule of recognition* (Hart 1961). This rule of recognition has a formal nature. The point of concern here is that we have individuals and bodies operating the system who are charged with the institutional power to determine the way in which the ‘rule of recognition’ shall be substantively applied. In a democracy this is the majority (usually the majority of the parliament). In other societies it can be a more limited number of people, or even just one man. Those who are possessed with this definitional power bear a huge responsibility. Those who abuse the definitional power, the power to distinguish right from wrong, manoeuvre the people, the population, the citizens of society, into a defenceless position. Completely defenceless even, because the whole machinery of the State is geared towards enforcement of the validly proclaimed obtaining laws and its procedures rest on the truth of the claims to knowledge that are inherent in these laws. It logically follows that abusing the definitional power just referred to, constitutes the most fundamental perversion of the rule of law that can be conceived of within any legal order. Taking the argument one step further, the same applies to abusing the State monopoly on the use of physical force.

This is the core essence of many genocides, crimes against humanity and war crimes. Either formally or materially, the exact same power that was established in order to *protect* the citizens is then employed to *harm* them or even to *kill* a substantial number of them.<sup>11</sup> For the individual citizens involved, there is no defence available within the confines of that legal order. The severe damage wreaked by the international crimes is further compounded by the apparent support by society and even legality of these instances of extreme cruelty.

### *3.2 Reinstating the rule of law: backward and forward looking aspects*

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<sup>11</sup> Not all genocidal regimes have extended the perversion of the *formal* legal framework to the extremes of Nazi-Germany, re the well-known debate at the Wannsee conference concerning the legal framework of the Holocaust. See for an overview Mann 2005.

Now that we have gained some insight in the nature of the extreme injustices created by the international crimes, the next question is what this means in terms of considering a legitimate reaction. The answers to the ultimate perversion of the rule of law do not necessarily have to be limited to the same measures we deem adequate for responding to ‘ordinary’ violations of – or threats to – the legal order.<sup>12</sup>

As Teitel (2002) shows, reinstating the rule of law has ‘backward’ and ‘forward-looking’ aspects.<sup>13</sup> It should be backward-looking by offering a legal reaction to the mass atrocities committed under the previous regime. In a manner keeping with both its purpose (i.e. the protection of citizens versus arbitrary treatment; e.g. Radin 1989) and main features (presumption of innocence for the suspect and the like, see Aukerman 2002), the rule of law is formally reinstated as a reaction to criminal wrongdoing.

The forward-looking function relates to the rule of law in a material sense. Both legal scholars (f.e. Fallon 2005) and social scientists (f.e. Tyler 2003) confirm that perceived legitimacy of government and legal authorities are essential for the rule of law to take root. Inhabitants of countries where the rule of law has broken down and/or been perverted, have evidently good reason to withhold this perception of legitimacy. In our view, this means that, more so than at the national level, the legal reaction to international crimes should affirm ‘the value of law, strengthen social solidarity and incubate moral consensus among the public’ (Drumbl 2007, 17), or in other words the expressivist function of criminal justice (Feinberg 1970). Expressivism here concerns the messaging effect of the reaction to crime (e.g. Drumbl 2007).<sup>14</sup>

### *3.3 Reacting to atrocities: adapting criminal justice*

It strikes us that international criminal justice has until now primarily focused on the backward-looking aspects of reinstating the rule of law. Indeed the adaptation of

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<sup>12</sup> Indeed Aukerman (2002) concludes that the analogy of ordinary crime to the situation of international crimes is sometimes surprisingly ill-fitting.

<sup>13</sup> The reader should take care to refrain from confusing these backward and forward looking functions with the retributive (indeed reactive) and preventative (forward-looking) functions of criminal justice procedures in the domestic context.

<sup>14</sup> In fact we use expressivism in a slightly more expansive way than Drumbl (2007) does. He conceives it to be the purpose of trials, punishment and verdicts, see also Amann (2001), while we consider it can be applied to other elements of the reaction to crime as well.

criminal justice principles to the situation of international crimes is mainly related to this backward looking function.

In an attempt to halt the culture of impunity, to make trials for the crimes committed under the rogue regime an attainable objective, international criminal justice violates principles of criminal law and criminal procedure which are in normal circumstances regarded as valuable, even as virtually sacrosanct. Extraordinary remedies form part and parcel of the reaction to international crimes. A prime example of this is the criminalisation *ex post facto*. This occurred in the wake of the Second World War, both in domestic jurisdictions and in connection with the tribunals set up in Nuremberg and Tokyo. The exception made to the fundamental principle of ‘*nullum crimen, nulla poena sine praevia lege poenali*’ was deliberately accepted as the price to be paid to make justice possible.<sup>15</sup> In a similar vein the penalties for crimes included in criminal codes were made more severe at a point in time when the illegal acts had already been committed.

A third example of an extraordinary remedy is the situation where an amnesty law that was adopted by the government guilty of large scale violations of human rights is subsequently nullified by the succeeding government. During the past decades this has happened several times (e.g. Snyder and Vinjamuri 2004). Usually, the justification for this drastic measure has been found in principles of international customary law.

Finally, we point to the maxim ‘*male captus, bene detentus*’ and the doctrine of universal jurisdiction. The maxim, a procedural declaration, holds that when someone is apprehended by authorities exceeding their legal powers, the State shall nevertheless be considered competent to try and convict that person (Paulussen 2010). The most prominent example of this is the abduction of Eichman by Israeli authorities – in direct violation of the rights of the sovereign State of Argentina – which did not prevent them from staging a trial and procuring a conviction. The doctrine of universal jurisdiction removes the territorial limits of the competence of national courts (Bassiouni 2001; see also Ferstmann and Schurr, this volume). Where this competence normally only relates to events within the states borders, matters with direct implications for the states affairs or involving the states’ inhabitants, universal

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<sup>15</sup> See generally the well-known debate of Hart and Fuller (both 1958), Bassiouni 1996, Boot 2001 and for a full overview and rebuttal of arguments against the charge of retro-activity, Quint 2000. .

jurisdiction means that, for the relevant international crimes, none of these restrictions apply.

### *3.4 Some unresolved questions in International Criminal Justice*

However, other principles of criminal law have not been adapted, even though there is reason to question their applicability in situations of international crime. A full discussion of these differences is beyond the scope of our current endeavour, nor do we intend to pass judgement on the preferred way of dealing with these tensions, but the following issues are important:

- The complexities of establishing individual guilt for crimes committed as a collective and/ or in the name of a collective (e.g. Drumbl 2005; Levinson 2003; Osiel 2005); in other words the discrepancy between collective responsibility for the crimes committed and individual guilt;<sup>16</sup>
- The uncertain line between culpable and inculpable parties (Osiel 2000), including the role of bystanders (Drumbl 2007; Fletcher 2005; Staub 1996);
- The abundance of evidence of collective evil, coupled with a lack of proof of individual wrongdoing;
- The difficulty of finding a remedy suitable to the enormity of the crimes committed (Osiel 2000; 2005);
- And coupled with the previous points the diminished likelihood of reaching 'traditional' goals of criminal justice like retribution and general or special prevention (Aukerman 2002).

International criminal justice is wrestling with some of these issues (e.g. the debate concerning command responsibility and joint criminal enterprise; see Danner and Martinez 2005; Osiel 2005), has not paid much attention to others (clearly articulating (the limits of) its goals and aims) and may in fact just not be suitable to some. Indeed there appears to be an imbalance between the overtly optimistic and triumphant

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<sup>16</sup> The definition of international crimes in terms of collective perpetration, sits somewhat uneasily with the attempts to place the blame exclusively on individuals (see also Luban 2005). Indeed one can question the almost religious insistence on strict liberal legalism (see already a convincing critique in Shklar 1964) by many human rights scholars. Even a remote departure from this philosophy is attacked and ridiculed (e.g. viewing Joint Criminal Enterprise to be synonymous to 'Just Convict Everybody'), without any empirical support (see Aukerman 2002).

rhetoric surrounding international criminal justice and the extent to which it can or should be expected to deliver justice in the aftermath of international crimes (e.g. Drumbl 2005; 2007).

### *3.5 A rupture between backward and forward-looking functions of ICJ*

The point we want to stress here is that the difficulties mentioned put pressure on the presumed link between the backward-looking and forward-looking aspects of reinstating the rule of law. Where many scholars and human rights advocates assert that holding trials for previous atrocities will automatically contribute to rebuilding the rule of law (e.g. Orentlicher 1991; Landsman 1996), there is good reason and evidence to think otherwise (e.g. Drumbl 2007, Fletcher and Weinstein 2002; Snyder and Vinjamuri 2004; Vinjamuri & Snyder 2004). The theoretical underpinning of this automatism rests to a greater degree on good faith than good science. The notion that ‘norm-cascading’ (see Finnemore and Sikkink 1998) will lead the ravaged societies to replicate the good example of international criminal justice in their own domestic legal system is not confirmed by the evidence (Snyder and Vinjamuri 2004). As Snyder and Vinjamuri (2004, 6) succinctly state: “Justice does not lead; it follows”. Even the inevitable first step in this line of reasoning – that international criminal proceedings will succeed in delivering a sense of justice – is suspect. The extent to which this is likely to be the case is hampered both by the experience of these crimes in itself<sup>17</sup> and the awkward relationship between individualized criminal justice and collective perpetration. This is further compounded by at least three other problems, which all feed on each other.

In the first place international criminal justice in the aftermath of atrocities is necessarily selective. Only a minority of perpetrators will be tried for their crimes and although the aim will be to try the ‘Big Fish’, it is in fact likely that the difficulties in establishing individual culpability for the leaders of the atrocities will mean that relatively low level officials, the ‘Small Fry’, will bear the brunt of the criminal law

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<sup>17</sup> We have noted that the experience of the breakdown of the rule of law will inevitably limit the trust that a victimized population will have in the legitimacy of law and authorities. In addition Pemberton (elsewhere in this volume) emphasizes that the negative impact of victimisation in terms of psychological consequences also will have a detrimental effect on victims’ perception of justice. Victims suffering from PTSD are less likely to see the trial as having a fair outcome (Phom et al 2004; Orth et al 2006) and recent research show similar effects concerning victims with extreme feelings of anger (Murphy and Tyler 2008).

reaction (Goldstone 1996).<sup>18</sup> This leads to a discrepancy between (perceived) wrongdoing and punishment, which is not helped by the fact that the punishment meted out by institutions of international criminal justice is *lower* rather than higher than the punishment for severe crime in the domestic sphere and that punishment practices within international criminal justice suffer from good deal of incoherence.<sup>19</sup> Both the poor coverage rate and insufficiently proportional punishment practices sit uneasily with the need for justice in societies which have experienced international crimes.

It is unlikely that this will be remedied by emphasizing procedural requirements of criminal law. In the domestic sphere, the legitimacy of the process and the authorities may cushion the experience of negative outcomes (Tyler 2003; Wemmers 1996).<sup>20</sup> However, within international criminal law, it is apparent that those affected by international crimes will not automatically perceive the organisations holding the trials as legitimate bearers of justice. This of course is the case for those who belong to the same collective as the perpetrators of these crimes – the perception of victor’s justice may be reduced, not overcome – but for the victimized population as well. Indeed, the failure of the international community to do anything while the atrocities took place in former Yugoslavia and Rwanda does not bode well for the acceptance of the same international community to address justice violations, which they could and should have prevented (see Minow 1998). As Aukerman (2002) notes: “If the international community sits by and watches while atrocities occur, demanding prosecution only after the violence stopped, arguments about deterrence will ring hollow.”<sup>21</sup>

Finally international criminal justice follows domestic criminal justice in its independence. An independent and neutral administration of justice is, it goes without

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<sup>18</sup> This may also be due to the political reality. Trying previous leaders may result in renewed bloodshed (e.g. Snyder and Vinjamuri 2004).

<sup>19</sup> Unfortunately we can expand ‘a person stands a better chance of being tried and judged for killing one human being than for killing 100,000’ with ‘...and his punishment will be more severe as well’. See Drumbl 2007.

<sup>20</sup> An important caveat is that also in the domestic situation the pre-eminence of procedural justice for severe crimes is highly questionable, see Rock 1998; Armour 2007, Pemberton 2009 and Pemberton, this volume.

<sup>21</sup> In addition the wisdom of removing the trials from the communities that experienced them, is often questioned. The site of the trials is often far away from where the crimes were committed. The persons undertaking them are members of the international rather than the afflicted community. The probable goal is to prevent perceptions of victors’ justice, although this perception persists, while the removal of trials may negatively affect the perception of justice in afflicted communities (Drumbl 2007; Fletcher and Weinstein 2002).

saying, crucial to its realisation. In individual trials judges should under no circumstance be swayed by any other considerations than the facts of the case before them. However an excessive level of independence is not necessary for the institution of international criminal law as whole. Commentators have correctly criticized the divorce of international criminal proceedings from other, simultaneous, domestic attempts to try atrocities and to reinstate the rule of law and rebuild ravaged societies;<sup>22</sup> the shortcomings of an enforcement of one-size-fits-all-justice that trumps domestic traditions,<sup>23</sup> and the reluctance to acknowledge the importance of political realism and the subsequent absence of a principled manner to balance power considerations and human rights (e.g. Licklider 2008; Snyder and Vinjamuri 2004). The principled difficulties and shortcomings in implementation suggest that international criminal justice is not yet reaching its full potential. Indeed the results from research into the perceptions of inhabitants of former Yugoslavia and Rwanda reveal a lack of information about and a diminished sense of satisfaction with the results of the respective tribunals and a good measure of scepticism concerning the large investment needed for their functioning (see Longman, Pham and Weinstein 2004; Meernik 2005, and Lutz 2006).

### *3.6 Basic premises of a victimological perspective*

Both backward and forward looking aspects of reinstating the rule of law are of great importance to victims who suffered atrocities. In turn, their acceptance of the rule of law is crucial for its working. Victims of international crimes are a main, maybe *the* main, constituency in the reinstatement of the rule of law.<sup>24</sup> It is their assessment of the reaction to the atrocities that provides its link with the restitution of an effective rule of law. This does not imply that their need for justice will automatically trump other considerations. The prevention of further bloodshed and/ or an assessment of the

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<sup>22</sup> Drumbl calls this the neglect of vertical and horizontal integration respectively. See Drumbl 2007.

<sup>23</sup> This is the main shortcoming that Fletcher and Weinstein seek to remedy in their ecological model of social repair: see Fletcher and Weinstein 2002.

<sup>24</sup> It may be argued that crime is in the first place a breach of an abstract legal order rather than a wrong committed against an actual victim (see f.e. Ashworth 2002). This would suggest that the victimized population is of no more concern than the rest of the world's citizens. We however view this perspective as outmoded. In the past thirty years it has been increasingly recognized that a criminal event is in fact both. Accordingly victims should be awarded more consideration in their cases than non-victims (see also Groenhuijsen 1999; Pemberton 2010c).

political reality will also factor in victim's perceptions.<sup>25</sup> Insufficient attention to the perception of victims, however, may result in enduring violence and political instability, when the erstwhile victims retaliate and become perpetrators themselves (see e.g. Mani 2005).

Moving from a mere legal reaction to one that incubates a sense of justice is therefore paramount in establishing the link between the backward and forward-looking aspects of reinstating the rule of law. In the first place this means that the legal reaction should be adapted, as much as possible, in an attempt to meet the realities and needs of the victimized population. Legal practices and principles, even those that may be sacrosanct in the domestic sphere, need to be rethought and recast in the arena of international criminal justice. We will suggest a number of concrete victim oriented reforms, related to the general characteristics of victims of international crimes, throughout the remainder of this chapter. In addition the reaction should be sensitive to the differences between situations. Both the notion of vertical integration – establishing a clear connection between the domestic and international criminal reaction (Drumbl 2007) – and the ecological model of social repair (the extent to which the legal reaction meshes with cultural and political realities (Fletcher and Weinstein 2002) are of great importance in this respect.

In the second place the limits of international criminal law should be clearly acknowledged. International criminal justice is partial justice, at best (see also Roberts 2003). The issues of collective responsibility versus individual guilt, the role of bystanders and the selectivity of international criminal justice are not likely to be resolved within the criminal justice setting, at least not without discarding most of its main features. Nor should we hold high expectations for the extent to which international criminal justice will deter future wrongdoing or serve as sufficient retribution, not in the least because sufficient retribution for genocide is not a likely outcome in any case.<sup>26</sup> Acknowledging these limitations opens up the possibilities for linking international criminal justice, to other measures which may contribute to the sense of justice (what Drumbl calls horizontal integration), like truth commissions,

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<sup>25</sup> See for instance Gibson (2004)'s results concerning South Africa.

<sup>26</sup> An additional limitation that may be self-evident is the inherently pragmatic nature of international criminal justice. Establishing criminal justice processes at the international level that can challenge vested power interests seems – at least for now – a bridge too far. That means that expectations of any international-preventative effect of international criminal justice should be greatly reduced. Like in the past perpetrators of gross human rights violations have every reason to expect impunity as long as their standing with Security Council members is in the latter's interest (see also Sands 2006).

reparations programs and other means to hold perpetrators, or collectives of perpetrators accountable and in addition, to programmes of broader social repair and reconstruction. It allows reflection on the use and the purpose of international criminal justice in the aftermath of atrocities and its place vis-à-vis other available options.

### *3.7 Consequences of state crime for a victimological perspective*

As noted, considering extraordinary remedies in the case of international crimes is in line with the peculiar character of these crimes and the legal reaction to them. That is to say: remedies which are at odds with principles that in normal times must prevail. In any event, the level of consideration of the interests of victims of crime should be higher, and under no circumstances be lower than in instances of conventional crime. To be more specific, we envisage several areas where additional protection can be awarded.

First, one could conceive of robust measures to protect the physical safety of victims of international crimes. We have to bear in mind that – as a consequence of government involvement in these crimes – it can be extremely dangerous for victims to testify as witnesses in subsequent proceedings. Hence it appears to be realistic to provide for precautions in connection with their physical safety which exceed the levels of these provisions in ordinary criminal trials. In trials where conventional crimes are at stake, most jurisdictions employ methods like screens, CCTV and questioning in a room separate from the courtroom, in order to avoid face to face confrontations between defendant and victim/witness. In the case of international crimes, complete anonymity should be an option for victims/witness to provide testimony. This instrument should be explicitly provided for in protocols on international criminal proceedings, and where such explicit provisions are lacking – like in the Rome Statute, the prevailing articles should be interpreted in such a way as to come as close to anonymity as is possible (see for a full overview of pros and cons Garkawe 2003).

The second area where ‘normal’ standards should be adapted to extraordinary circumstances is reparation.<sup>27</sup> The standard of proof in connection to individual claims

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<sup>27</sup> ‘Reparation’ is referred to here in the classical sense of a transfer of payment to the victim. In paragraph 5 we will examine a broader meaning of the concept of reparation.

for damages needs to be reconsidered. In warlike circumstances it is virtually impossible for victims to collect the kind of material evidence that can normally be expected in cases of conventional crime. This is indeed the main reason for the difficulties in succeeding to convict the main perpetrators. It only seems fair to take this basic fact into account when assessing the merits of a claim for damages in cases of international crimes.

There is another way in which reparation in these cases merits different decision criteria. When conventional crime has been committed, it is good practice to order reparation to be paid on the basis on the individual guilt of the perpetrator. However, considering the number of victims involved, the individual perpetrator in international crimes is unlikely to be in a position to compensate each of his victims. Moreover the meagre conviction rate of perpetrators implies that following the domestic order will lead to many victims not receiving compensation.

The solution should lie in the administration of compensation invoking notions of collective responsibility. The qualms with notions of collective perpetration when it comes to punishment do not apply with equal force to compensation issues (see e.g. Drumbl 2007). Where collective responsibility may not be a suitable concept in punishment, it is in settling compensation matters. We will return to this matter in section 4.

#### **4. Large numbers of victims**

Conventional crime usually is targeted against only one person, or at most against a small group of individuals. These victims are awarded procedural rights in a subsequent criminal trial. In most domestic jurisdictions, it is rare that the system has to deal with a much larger group of victims (see for a more extensive discussion Letschert and Ammerlaan 2010). These exceptions do occur, for instance, in some notorious cases of financial or economic crime (e.g. 'pyramid-schemes'). When a situation like that presents itself, the most common response is to suspend the rights of the victims to play their normal role. Many jurisdictions have special provisions preventing victim involvement from disturbing the ordinary course of a criminal trial;

in others ‘force majeure’ is invoked to dissuade the victims from playing their normal part.<sup>28</sup>

In the case of international crimes, the exception and the rule are reversed. Genocide, crimes against humanity and war crimes are almost by definition targeted against large numbers of victims. The overviews of death tolls in Rummel (1994) and Harff (2003) are telling. The crimes at stake in the trial of individual suspects in international criminal justice proceedings will normally involve many victims. Invoking a ‘force majeure’ in these cases is therefore tantamount to denying victim involvement in these cases.

The model of the Rome Statute<sup>29</sup> is superior to the procedural rules governing the operation of the ICTY and ICTR in the sense that it awards victims the right to participation and the right to reparation. The model may be hailed as ‘state of the art’ from a victimological point of view, although it suffers from severe shortcomings and one may have grave doubts about its operation in the face of access by large numbers of victims (Groenhuijsen 2009). Three main issues can be identified in this respect: the difficulties in achieving victim status, the possibility that large numbers of victims will access procedural rights and the implementation of reparation measures. We will discuss these issues and reflect on both good practice and shortcomings of this ICC-model to further our understanding of international criminal justice.

#### *4.1 The presumption of victimhood*

The RPE of the ICC provides for a strict definition of a ‘victim’. Rule 85(a) reads: “‘Victims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.” A victim is not automatically accepted in that capacity by his claim that he meets the standards of Rule 85(a). Instead, an application procedure has been devised as a sort of entrance gate into the ICC-system. And the gate is built to deter all but those with the most stamina. A person who wishes to receive the status of ‘victim’ in a situation or in a case must complete an application form (17 and 19 pages long, respectively). The length of the forms and the details required in order to complete the forms is

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<sup>28</sup> In Dutch case-law, for instance, the Supreme Court sustained a ruling by a Court of Appeals which held that a number of 302 victims is in and of itself prohibitive for dealing with their claim for damages in a criminal trial. HR 18 April 2006, NJ 2007, 295 with comments by M.S. Groenhuijsen.

<sup>29</sup> Including its accompanying RPE and Regulations of the Court.

troublesome for many victims (De Brouwer & Groenhuijsen 2009). Two specifics might suffice to indicate how unsatisfactory the operation of the model has been up to now. Many victims who have submitted an application years ago, are still waiting for a decision of the Chamber today. And secondly: those applicants who did receive a decision, were in an overwhelming majority denied the status of victim.<sup>30</sup> This must be devastating for the confidence of victimised populations in the entire ICC-model. It surely cannot be seriously argued that victims should find justice in a system that repeatedly does nothing to prevent atrocities from occurring; subsequently fails to punish all but a small minority of perpetrators and then informs them after a few years wait that they, in the eyes of the international community, are not considered to be victims after all.

The procedure of the ICC in determining victimhood is an unfortunate departure from domestic practice. Here, when a person reports a crime and claims he is the victim of it, police and subsequent other authorities handling the case will automatically treat the person in the capacity of ‘victim’, until the moment when either law enforcement officials or a court determines that there was no crime or that the person did not suffer as a result of the crime committed.<sup>31</sup> Seeing that it is extremely unlikely that the International Criminal Court will decide the former – the question at stake is normally not whether a crime was committed, but rather whether the suspect can be deemed sufficiently culpable for its perpetration – and is most often not in a position to determine the latter, the only reason for the excessive procedure to grant someone victim status must lie in the ICC’s need to establish a barrier against access by large numbers of victims. As noted, this comes with a high price; too high indeed, for this mode of operation is likely to defeat any expected benefit of victim participation.

#### *4.2 Procedural rights*

In the *Lubanga* case the trial decision of 18 January 2008 made it clear that there are at least five modalities of victim participation under the ICC rules:

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<sup>30</sup> For a recent breakdown see [http://www.icc-cpi.int/iccdocs/asp\\_docs/RC2010/Stocktaking/Victims%20Factsheet.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Stocktaking/Victims%20Factsheet.pdf) (accessed 06-10-2010).

<sup>31</sup> See Brienen and Hoegen 2000, p.30.

- access to the public record;<sup>32</sup>
- to tender and examine evidence, and to challenge the admissibility or relevance of evidence when the victims' interests are concerned;
- access to hearings, status conferences and trial proceedings & to file written submissions;
- to make opening and closing statements;
- to initiate special proceedings.

It is obvious that these are far-reaching interventions. The participation of victims in these ways could have a considerable impact on the course of the proceedings (Zappala 2010). It can significantly affect the procedural battle between the prosecution and the defence. Since it involves numerous modalities, it could also impact an orderly and expeditious course of the trial. The main problem, of course, would be if many victims would present themselves in order to give essentially the same input. It would be clearly impractical if, say, 25 victims would exercise their right to make an opening statements, if they would rehearse the very same facts many times over.

Can this problem be tackled without denying the victims the kind of involvement they are entitled to? The key to the question lies in the concept of common legal representation (Rule 90 and Regulation 79). The ICC has the power to “request” the victims or a particular group of victims “to choose a common legal representative or representatives for the purposes of ensuring the effectiveness of the proceedings”. The application of Rule 90 seems to be more difficult than may have been foreseen (De Brouwer & Groenhuijsen 2009). First, early case law appears to indicate that victims can decline the ‘request’ by the Court and still retain their standing in the proceedings (Zegveld 2009). This interpretation is self-defeating and does not serve victims’ interests in the long run (Groenhuijsen 2009 307). A second problem that remains is that victimized populations are not homogenous. They will differ on many demographic characteristics, the exact nature of the crime suffered and will not necessarily hold the same opinions about the best way to proceed with the criminal trial (see more extensively Pemberton 2009). In those cases a solution could be to

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<sup>32</sup> Only in exceptional circumstances access to confidential filings is allowed.

organise subgroups and provide each one of them with separate common legal representation (De Brouwer & Groenhuijsen 2009 171).

### *4.3 Reparation*

As a starting point, it has to be recalled that in domestic jurisdictions reparation has consistently proved to be the single most difficult aspect of legal reform on behalf of crime victims. On the international stage, reparation to individual victims has played no role at all after the second World War and only a theoretical role at the ICTY and ICTR (van Boven 1999). The reparation regime under the ICC<sup>33</sup> is clearly a novelty in international criminal law (De Brouwer & Groenhuijsen 2009, 187). Three elements are of particular relevance.

First, Rule 97 opens the possibility to order reparation on an individualised basis or, where it deems it appropriate, on a collective basis, or both. The power to award reparation on a collective basis can simultaneously reduce the necessity for individual proof (see section 3) and provide for a more efficient way to handle the reparation needs of large groups of victims. In this way an entire group of victims may be awarded a symbolically significant sum of money and at the same time be granted recognition of their suffering.

The second innovation is that the Court is supposed to establish principles relating to reparations, including restitution, compensation and rehabilitation (art. 75 Statute). The preparatory documents leading up to the Rome Statute clearly indicate that the principles for reparation should be inspired by the so-called Van Boven/Bassiouni Principles. This means that the classical vocabulary used in victimology is abandoned. Victimologists used to speak of reparation and restitution as interchangeable concepts, meaning: forced payment of money by the offender to the victim, based on liability for the damages caused by the crime. By contrast, the concept of compensation was used to refer to the mechanism of a payment by the State to the victim, based on the idea of social solidarity. The Van Boven/Bassiouni principles have enriched and improved this conceptual framework. According to these principles, reparation includes the following forms: restitution (restoration of liberty, return to one's place of residence, return of property), compensation (economically assessable damage

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<sup>33</sup> Articles 75 and 79 of the Statute and Rules 94-99 RPE.

(material damages and loss of earnings, moral damage), rehabilitation (medical and psychological care, legal and social services), satisfaction (verification of the facts, public apology, commemorations and tributes to the victims), and guarantees of non-repetition. We feel that this wide range of mechanisms to achieve reparation could and should be used in a creative way to best meet the circumstances of every single case and are convinced that dogmatic or doctrinal objections to linking this kind of reparation to more general projects of humanitarian assistance, like projects of the World Bank, are misguided.<sup>34</sup>

Finally, the reparation regime under the ICC is innovative because it has introduced the Trust Fund for Victims. In a way this fund can be regarded as the international equivalent of a State compensation scheme, but it also has additional meaning. The mission of the Trust Fund is “to support *programs* which address the harm resulting from the crimes under the jurisdiction of the ICC by assisting the victims to return to a dignified and contributory life within their communities.” The Fund has a dual mandate:

- to implement reparations awards from the Court, and
- to provide assistance to victims in general through the use of “other resources”.

In January 2008 the Trust Fund notified the Court that it had identified two ‘situations’ (the DRC and Northern Uganda) where projects assisting victims should be proposed. Examples of projects in the DRC include (De Brouwer & Groenhuijsen 2009): ‘rehabilitation reinsertion of victims’ and ‘socio-economic reintegration’ as projects aiming for physical rehabilitation; ‘healing of memories’ and ‘support to victims of sexual violence’ as projects aiming for psychological rehabilitation; and finally ‘holistic community rehabilitation’, ‘non-formal education’ and ‘taking care of each other’ as projects aiming materially to support victims.<sup>35</sup>

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<sup>34</sup> Even though these kinds of joint ventures were explicitly rejected by those negotiating the Rome Statute.

<sup>35</sup> The most inspiring concrete example we have found so far is the Secretariat of the Trust Fund’s gesture to provide a group of widows in the DRC with 200 chickens on loan for a year. After eight months, the chickens were returned as the animals had sufficiently multiplied and had enabled the women to buy cattle to generate an even better income. For an overview of recent projects, see <http://www.trustfundforvictims.org/>

#### *4.4 Notions from a victimological perspective*

As stated in the introduction of this section, the ICC model is the state of the art in victim-oriented handling of international criminal justice cases. It offers a wider range of participation options for victims of international crimes, which, as we shall further show in section 5, may be of great importance in handling of international crimes. The reparation programme has been significantly adapted to the situation of victims of international crimes. The possibilities for collective reparation may relieve a number of the problems discussed in section 3. Finally the use of the Van Boven/ Bassiouni principles allow for increased flexibility in the manner of providing redress and the Trust Fund has the potential to advance on being an International Compensation Scheme.

So far, so good. However the barrier erected before victims may be recognized as such already negates the benefits of these improvements for most applicants, as they will not be afforded victim status.<sup>36</sup> In fact this is more than a denial of benefits, as rejecting victim status, in particular considering the laborious and time-consuming application process, amounts to secondary victimization. Even for those able to pass this ‘victim exam’, problems remain. Instead of a clear endorsement of the connection to reparation measures external to the ICC, the Rome statute explicitly rejects these links. Seeing our arguments for horizontal integration in the previous section, we find this a regrettable and unnecessary shortcoming. The Trust Fund may be imbued with generally well-chosen principles, but the Fund’s funding remains an issue (see Garkawe 2003). The merits of individual participation may run foul of the overall collective objective of a swift and expeditious trial of the perpetrators, while overtly repetitive use of procedural rights may diminish much of the worth of participating for each individual participant.

On a more general level we find that, like in the domestic sphere, the benefits of victim participation are as much related to practice as principle (see Groenhuijsen and Pemberton 2009). Victims’ rights will only benefit victims, when their implementation in practice is secured. The notion that anything is better than nothing when it comes to victims procedural rights has been repeatedly refuted by research (e.g. Herman 2003). Allowing victims to participate and then disrespecting them or

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<sup>36</sup> This specifically applies to the Chamber, rather than the Trust Fund.

flagrantly failing to meet their expectations will lead to secondary victimisation (Orth 2002). One of us has extensively argued that a bedrock principle of victims' procedural rights is 'do no further harm' (Groenhuijsen 1999; Groenhuijsen & Kwakman 2002).

The same may be said concerning the provision of victims' rights that lack coherence. In the case of the ICC the rather extensive procedural rights for some victims lead to the necessity of denying many others any acknowledgement of their victimisation. Indeed, seeing the characteristics of victimisation by international crimes, the latter issue – some formal recognition of victimisation - may be of far greater value than the former. Furthermore, it seems fair to question the necessity of applying the same application procedures to victims who do not seek the far-reaching forms of individual participation. If the domestic experience is anything to go by, a majority of victims will find acknowledgement, some information and maybe compensation and collective participation to be sufficient (see e.g. Pemberton 2010a).

## **5. Victims are perceived as enemies and as perpetrators**

The final defining feature of international crimes is the way the crimes against victims and survivors of mass killing and genocide are perpetrated. Contrary to popular perception these atrocities are not mainly the work of handful of demonic perpetrators, but are committed by ordinary people (see Baumeister 1997; Chirot and McCauley 2006; Staub 2000; Waller 2007; Zimbardo 2007). As Baumeister has convincingly shown, 'pure evil' is most often a myth.

The consequences are no less severe, though. Apart from the multitude of fatalities, survivors are faced with an immense damage to their personal and social life (see for an overview Danieli 2009 and Danieli in this volume). Their health may be severely impaired, their houses destroyed, their jobs gone. They may have lost their families, have suffered and/or witnessed horrific events, and their psychological and social functioning may be tremendously impaired as a consequence. The experience of extreme and severe crime and its psychological consequences are also important for the way victims may view justice. Both the severity of crime (see Robinson & Darley 2007) and traumatization (see Orth, Montada and Maercker 2006; Lens, Pemberton & Groenhuijsen 2010) are connected with a desire for revenge and retribution.

### 5.1 *The social death of victims*

The features of the experience of genocide and mass killing have other implications for the way victims view justice. James Waller (2007) shows that, although there is variation in the exact circumstances of the perpetration of genocide, three constructions converge interactively to impact individual behaviour in situations of collective violence.

In the first place there is the *cultural construction of worldview*. Perpetrator groups may often be defined by a combination of collectivistic values, a strong adherence to authority and a high need for social dominance.<sup>37</sup> In the second place there is the *social construction of cruelty*. This concerns the influence of professional socialization, group identification and other group processes in creating an immediate social context in which perpetrators initiate, sustain and cope with their cruelty.<sup>38</sup>

For our current purpose Waller's *psychological construction of the 'other'* is the most important. In essence justice does not apply to victims anymore. Their suffering and the cruelty visited upon them falls beyond the scope of justice (see also Clayton and Opatow 2003). Victims of genocide and mass killing become simply 'objects' of perpetrators' actions through the processes of us-them thinking, moral disengagement and blaming the victims, which together leads to their 'social death': victims become excluded from the perpetrator's moral community.

1. *Us-them thinking*. Research has shown from Sherif et al (1954) onwards, the tendency to define the world into us and them is one of the true human universals, while collectives may differ in the extent to which this is reproduced in their shared culture. Both ethnocentrism and xenophobia are innate realities of human life, when viewed through their least normative

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<sup>37</sup> Collectivistic cultures, focus on the group over the individual, with preeminent values like obedience, conformity, tradition, safety (e.g. Brewer & Chen 2007). Here group-based identity is an integral and defining characteristic of one's own identity, and group goals are often indistinguishable from individual goals. Authority orientation refers to a cultural model that orders the social world and relates to people according to their position and power in social hierarchies (see e.g. Haidt 2007). Social dominance orientation refers to the degree to which people want their own group to dominate other groups. People high on SDO are more often racist, patriotic and against equal rights for minorities and women (e.g. Sidanius & Pratto 1999).

<sup>38</sup> See Darley 1999; Baumeister 1997

definitions.<sup>39</sup> Tapping into a severely escalated form of us-them thinking is essential to the perpetration of mass killing.

2. *Moral disengagement*. Singer (1981) discusses the notion of a moral circle, that embraces those worthy of our moral consideration. The process of civilisation can be tied to an expansion of this circle from our closest kin to all of mankind (as in the Universal Declaration of Human Rights). However this circle can contract rapidly in times of fear, hatred and scarcity of resources. This moral disengagement, in which victims are defined as being outside the perpetrator's universe of moral obligation, is a necessary, although not sufficient condition for genocide and mass killing. Moral disengagement contains three processes through which perpetrators make their reprehensible conduct acceptable and to distance themselves from the conduct of their actions: moral justification, dehumanization of the victims and euphemistic labelling of evil actions.

In *moral justification* the mass-murder of the victims is justified by its portrayal as serving a worthwhile cause in either social or moral terms. This may reach the level a moral imperative; where the violence is an essential means of self-defence (see also Mann 2005). This may have some factual base; victimized populations may be more likely to commit mass political violence than populations without such a history (Staub 2000). But it may also be 'a self-justifying mental gymnastic', a component of an ideology that breathes hate into populations, by convincing them that they are under continuous threat from the out-group (Waller 2007).

*Dehumanization* involves casting an out-group as subhuman creatures (animals) or negatively evaluated unhuman creatures (monsters) (e.g. Haslam 2006). This often proceeds through processes of infra-humanization, in which out-group members 'lose' secondary, more human, emotions, like jealousy, love, shame etc. and become defined in primary emotions, like anger and fear (Leyens et al 2004)<sup>40</sup> and involves derogatory linguistics (for instance the use

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<sup>39</sup> Ethnocentrism is then the technical name for the view of things in which one own's group is the centre of everything, and all others are scaled and rated with reference to it. Xenophobia relates to the fear of outsiders and strangers.

<sup>40</sup> The stereotype of the angry Muslim in many Western media outlets is a clear case in point. By shedding secondary emotions the out-group becomes more similar (i.e. all Muslims are angry) while gaining a sense of collective and negative purpose (i.e. all Muslims are angry at us). See Pemberton, 2010b.

of cockroaches in the case of Rwanda). Kelman and Hamilton (1989) show that this leads to the dual deprivations of being placed outside the realm of humanity, but also losing individuality.

*The euphemistic labelling of evil actions* refers to the fact that genocides are rarely named as such. For instance the Nazi's named the extermination of Jews the Final Solution. Other genocidal campaigns have used similar linguistic devices. In addition genocides and mass killing are commonly discussed in agentless, passive style, conveying a sense that they happen by a force of nature rather than by conscious evil-doing (Bandura 1999).

3. *Blaming the victims.* Lerner's just world theory concerns the fundamental delusion that people have a fundamental need to believe that good things happen to good people and bad things to bad people (Lerner 1980; Hafer and Begue 2005) and subsequently that those suffering misfortune and injustice are in some way deserving of this fate. The need to believe in a just world leads to the rationalization of genocide due to the blameworthiness of the victims. In the commission of genocide and mass killing victim-blaming transcends mere self-protective use (Waller 2007). Blaming the victims here provides perpetrators with self-esteem. The fact that the victims are suffering due to their own shortcomings, reinforces both the cultural and moral superiority of the group to which the perpetrator belongs.

## *5.2 The characteristics of perpetration of genocide and a victimological perspective*

What does this analysis have to teach us about the development of a victimological perspective on justice procedures after genocide? We find justice procedures should strive to act as a countervailing force to the processes mentioned under the psychological construction of the other (us-them thinking, moral justification, dehumanizing, euphemistic labelling of evil actions and blaming the victims). Thus justice should involve re-humanizing victims, communicating their membership of the moral sphere and reducing victim blame. In addition it should take into account the dynamics of perpetration of mass atrocity, and in particular the somewhat unsettling observation that ordinary people are the perpetrators of these crimes, as well as viewing the potential impact of criminal justice processes in lieu of the enormity of the consequences. This leads us to the following reflections.

In the first place the positive impact of criminal justice processes on participating victims is highly limited. Criminal justice procedures should not be expected to overcome the deep-seated causes of genocide, nor the fundamental human processes of which it may be the extreme outcome. Fletcher has correctly noted that the expectations of a large therapeutic impact of these processes have no actual base in fact and reflect an understanding of psychology that has been outmoded for a very long time (Fletcher 2005). Recovering from extreme trauma is a process: not one cathartic moment.

Nevertheless including victims in justice procedures after genocide is of great importance. In genocide and mass killing victims have been placed outside the scope of morality and justice. A justice procedure dealing with genocide should attempt to communicate to victims that they are part of a moral community, in the very least by acknowledging their victimization. That may in fact be a more important component, than more far-reaching rights. A justice procedure that does not do so or treats victims in a disrespectful manner is likely to reinforce the experience of exclusion from the moral sphere that the genocide was already viciously inflicted on victims.

Similarly the acknowledgement of victim status, may contribute to a reduction of victim blame. Blaming the victims is not only endemic among perpetrators of genocide, but among victims as well. Many suffer from PTSD, of which self-blame is often an integral part (see Foa and Rothbaum 1998; Janoff-Bulman 1985; Staub et al 2005). Clear allocation of responsibility and communication of this responsibility may serve to reduce this victim blame after mass victimisation, although a justice procedure should not be expected to achieve this feat alone. Indeed the complexities of assigning responsibility, for instance in the case of bystanders, who may not be deemed criminally culpable, but are a necessary component in the commission of international crimes (e.g. Staub 2000), entail the implementation of additional measures.

One of those measures may be a truth commission of some form. A major benefit of such a commission from a victimological perspective may be its value in re-humanizing victims; allowing them to voice their individual perspective and combatting euphemistic language. In Truth Commissions victims may act as individuals, rather than as a member of a victimized group. In addition they allow more personal language use, than formal criminal justice procedures. Like criminal justice procedures, one should, however, not expect a Truth Commission to be a

highly effective therapeutic method. There is no evidence of 'healing' impacts of these measures and even evidence of counterproductive functioning (e.g. Brouneus 2008, 2010; see also Mendeloff 2009; Brahm 2006).

Finally one can wonder what version of the truth may be most beneficial to victimized populations. Unfortunately the real truth of genocide is that ordinary people are capable of unspeakable acts and that many, many others will do nothing to prevent perpetration of these acts. That does not seem reassuring, but the alternative: reviewing individual atrocities outside of their social context will merely reinforce the Myth of Pure Evil (Baumeister 1997; Smeulers in this volume). It may make sense then to supplement the accounts of the perpetrators with interventions that strive to help victims understand the causes of genocide. In the work of Ervin Staub and his colleagues in Rwanda this combination has proved beneficial, both for victims and perpetrators (Staub et al 2005; Staub 2006).

## **6. A victimological framework for reviewing international criminal justice**

International criminal justice is an integral part of the international community's attempt to remedy some of the most heinous acts committed by man. It seeks to combat the culture of impunity for crimes committed in jurisdictions where the rule of law has collapsed and also to rebuild the rule of law in these areas. These are the backward and forward looking aspects of reinstating the rule of law.

These two aims are separate. Where many advocates of international criminal justice seem to suggest a smooth link between holding trials for perpetrators of international crimes and rebuilding a sense of justice in brutalized countries, we find this connection to be more problematic. Indeed, in its current state, there is good reason to doubt what, if anything, international criminal justice is contributing to the resurrection of the rule of law in these cases.

In our opinion improving this link rests to a great deal on the extent to which the position of victimized populations can be improved. The framework for doing so rests on three principles.

In the first place the criminal legal reaction should be adapted to the needs of the victimized population. We have argued for a review of principles in the domestic sphere of criminal justice to see the extent to which they are appropriate at the international level. This should acknowledge the specific situation of victimized

populations. We have noted the importance of mere acknowledgement of victims in international criminal justice, in the sense that this welcomes victims back into the moral sphere from which they were excluded by the genocide. In similar vein the reaction to atrocities should attempt to re-humanize victims and reduce the extent of victim-blame, although this in large part may be beyond the remit of criminal proceedings. The conversion from the domestic to the international sphere should also acknowledge cultural and political realities. Societies' perspectives on doing justice may differ, the measures needed for social repair may differ and indeed the political playing field may do so as well. The positive impact of international criminal justice is then likely to depend on its link with domestic justice procedures and its ecological appropriateness.

In the second place we should acknowledge the limits of international criminal justice. Trials are not magical vessels of catharsis, nor should they be expected to be. Both the impact of international criminal justice as a means of retribution or of deterrence is likely to be very slight. Future atrocities are not likely to be prevented and the enormity of evil in these cases explodes the limits of sufficient retribution. This implies that the expressive function of criminal justice is its most important one. The contribution of international criminal justice, concerns the extent to which justice is *seen* to be done. Moreover international criminal justice is partial justice. It will not be feasible to successfully try all perpetrators or indeed all those people who were necessary for the atrocities to come about. Acknowledging these limits also allows international criminal justice to cooperate with other legal and quasi-legal measures that seek to provide justice, redress and reparations for victimized populations. This horizontal integration makes more sense than debating which solution – Trials, Truth Commissions, Amnesties – is the best.<sup>41</sup>

Finally the structure of victim-oriented measures needs to be internally coherent and to be complemented by adequate implementation. As in the domestic sphere the proof of the pudding of providing victim benefits in the criminal justice system is in the eating, more so than in its guiding principles. A main component of both principle and implementation should be the prevention of secondary victimisation. Do no further harm. Respectful treatment in practice and more extensive protection rights both share this aim. Acknowledgement and formal recognition of victimisation may be the most

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<sup>41</sup> See for similar reflections Roht-Arriazza 2006.

important features of participating in international criminal justice. Providing more extensive procedural rights for some victims should not stand in the way of this acknowledgement for many others. Finally where one can consider the notion of collective responsibility to be an empirical fact in genocide, it is at odds with the individualized base through which criminal justice determines punishment. We would not argue that criminal justice should override this principle, but do consider a collective responsibility approach to be advisable in compensation matters.

The 20<sup>th</sup> century saw the human predisposition for violence taken to new extremes. We have not much hope that humanity will be able to avoid similar massive atrocities in the 21<sup>st</sup> century, irrespective of the advances international criminal justice will or will not make. The best we can hope for is a legal reaction that does some good and no additional harm to the victims of future atrocities. Pursuing the lines of thought we have outlined in this chapter, hopefully will contribute to this modest, but nevertheless important, goal.

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