Responsibility for atrocity: individual criminal agency and the International Criminal Court

Book section

Responsibility for Atrocity: Individual Criminal Agency and the International Criminal Court

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This chapter is concerned with the shift in international political and legal discourse away from assigning responsibility for political violence to states, and towards assigning criminal responsibility to individuals, in particular with the establishment, in 1998, of the International Criminal Court (ICC). This new Court is premised on assumptions that there are universal moral standards which apply to human behaviour, and that through the assignation of responsibility to individuals and the infliction of punishment according to these standards, the international criminal justice system (ICJS) can deter crime, end conflict and bring about justice. The chapter takes seriously these goals, but questions the ability of the system to achieve them—and raises the question of whether the ICJS may in fact encourage atrocity by enabling state violence. It examines the move from state civil agency to individual criminal agency within international legal discourse, the limited and internally contradictory conception of international agency necessary to sustain this move and the uneasy relationship between morality, politics and law conceived by the framers of international criminal law, before considering the implications of the new system.

1. From State To Individual Agency

Past efforts by international society to control violence with law have focussed on the state as agent. However, since the Second World War and its attendant moral horrors, the approach to controlling violence has changed. Rather than structuring the relationships between states to deter conflict and suffering, the focus of international law has turned to the individual. This concentration on the role of the individual has been accompanied by a move away from narrating international violence as civil wrong and towards conceptualising it as international crime. Both the moves from state to individual and from civil to criminal responsibility pose problems for the international political theorist that will be examined below.

The characteristic use of international law is to regulate the interactions between states, with breaches of the law being classed as illegal but not criminal acts—analogous to civil wrongs within domestic legal systems. States are the originators of international law, and this law can be seen as a body of rules made freely between, and binding upon, equal and sovereign bodies.[1] International criminal law is often justified in

a similar way—international jurisdiction is seen as an extension, by delegation, of state power to determine criminal law norms and to punish transgressors. Sovereign states remain the originators of law and individuals its subject. The behaviour proscribed by international criminal law, according to this argument, is proscribed within all or most national criminal codes and is recognised universally as being heinous.

The analogy between domestic and international civil legal systems seems reasonable. Civil laws govern relationships between nominally equal bodies judged to be in contractual relations with each other. The move upwards from domestic to international sees the contracting bodies change from individuals or firms to states, and the guarantor of the contracts changes from state to confederation of states or international institution enabled by states. However, the domestic and international spheres are not so easily reconciled with respect to criminal law for two principal reasons: the cultural foundations of the domestic criminal system and the necessity of a particular type of agency.

Domestic criminal law sees a vertical relationship between the subject of the law and its enforcer, and concentrates on punishing individuals for breaching societal moral codes. Criminal behaviour is an acute form of deviance (deviance being "conduct which does not follow the normal, aggregate patterns of behaviour"[2]), judged to be so serious by the representatives of the society as to merit punishment. Punishment is needed to protect individuals or, for the communitarian theorist, to protect the common life of the community, by deterring future criminal action. Domestic criminal law therefore rests on a system of shared norms and values or an idea of natural law, and punishment is justified in terms of these norms.

The concept of international crime was until recently quite different from that of domestic crime. For centuries the term has been used to describe crimes which are "offences whose repression compel[s] some international dimension"[3] or which have taken place in the context of international armed conflict. However, the type of crime which prompted the establishment of the ICC is different in character and much more similar to the concept of crime just discussed. New international crime is international not because of the cross-border co-operation necessary to control it, but rather due to its apparently universal moral repugnancy. International criminal law is no longer limited to covering acts committed in times of international armed conflict. According to the Rome Statute, which established the ICC, genocide, crimes against humanity and war crimes can take place in the context of internal armed conflict, and

genocide and crimes against humanity can also take place in times of peace. A common or universal morality is therefore assumed to justify the criminalising of certain actions and the imposition of punishment by an international body. As will be discussed within Section 3 of this chapter, international society does not have a coherent idea of natural law or shared moral code, so it is difficult to see how it can be justified in the same way as its domestic counterpart.

Alongside this assumption of a shared cultural context, domestic criminal law envisages a particular type of agent. A traditional move from the domestic to international level would see states being punished for breaching the morality of the society of states. However, criminal law requires not just for certain actions to have taken place (*actus reus* or guilty action) but also for the perpetrator of the acts to have had a particular state of mind or intention (*mens rea* or guilty mind). Nothing in domestic criminal law allows us to conceive of states as having *mens rea* as it is a psychological property that can only be held by an agent with a mind. Thus, international criminal law requires a model of the *individual* international agent.

This move from state civil agency to individual criminal agency can be seen as illegitimate rather than just difficult. There are good reasons to think that post Second World War prosecutions of individuals for international war crimes violated the maxim *nullum crimen sine lege*. This maxim, which applies in international as well as domestic law, states that there can be no crime committed, and no punishment meted out, without a violation of penal law as it existed at the time. The Nuremburg and Tokyo prosecutions were for acts which were almost certainly not crimes under international law at the times they were committed. The first significant codifications of the laws of war into international treaties—the Hague Conventions of 1899 and 1907—were intended to impose duties and responsibilities onto states, and not to create criminal liability for individuals. They do not mention sanctions for breaches of the conventions, and such breaches should properly therefore be regarded as "illegal" rather than "criminal." By 1913, however, the Conventions were being presented as a source of the law of war *crimes*, and at Nuremburg *individuals* were prosecuted for the first time for breaches of the Hague Conventions. The sources of law claimed for other Nuremburg prosecutions were also problematic—the 1929 Geneva Convention was cited alongside the 1907 Hague Convention as the basis for war crimes prosecutions, and the 1928 Kellogg-Briand pact served the same purpose for the prosecution of crimes against peace. These treaties were intended to

apply to states as international agents, not individuals, and as such were dubious sources for international criminal law.

There is a second reason to doubt the legitimacy of the move to individual criminal agency: the effect it has in upsetting the relationship between the state and violence. By shifting attention towards individuals, states retain a monopoly of legitimate violence but have few formal constraints upon its use. Making the outcomes of political violence the criminal responsibility of individuals removes significant legal and moral consequences for states of using such violence, and thus renders force a more attractive tool of statecraft.

Having illustrated the problems involved in making the move to individual criminal agency and responsibility in the international sphere, I will now concentrate on the conception of individual agency necessary to sustain international criminal law.

2. Characteristics of Individual Agency in the Rome Statute

What follows is an examination of the Rome Statute that seeks to identify and critique the principal clauses which conceptualise the perpetrator and the victim of international crime. I argue that the Statute presents an internally inconsistent concept of the individual: at times seeing the person as a free and rational actor, independent of social role and culture, but conversely requiring that some persons (the victims) are entirely defined by their social role or group membership. The implications of this confused conceptualisation will be explored towards the end of the chapter.

A. The Perpetrator of International Crime

The fact that the Rome Statute follows the Nuremburg philosophy that men, not abstract entities (i.e. states), commit crimes against international law is not in doubt. Article 25 of the Statute, entitled "Individual Criminal Responsibility", explicitly declares that the Court shall have jurisdiction over individuals ("natural persons") and that "[a] person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute." However, the nature of a person is not elaborated further, and it is necessary to look at the detail of the Statute, particularly at Part 3: General Principles of Criminal Law, to understand how the Court conceptualises the perpetrator of international crime. I will examine the requirement of *mens rea*, the defences allowed and the rules outlining mitigating or aggravating factors of crimes with regard to punishment, to establish the qualities assumed to be held by the international criminal.

As outlined in the previous section of this chapter, a crime involves both a certain action (*actus reus*)and a particular state of mind or intention (*mens rea*). Article 30 of the Rome Statute concerns *mens rea* and sets a high standard for the mental element of crimes: "Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge." Intent is defined as having two necessary parts—one which relates to conduct and another to consequence. Thus, a person has intent according to Article 30 where: "(a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events." Finally, to fulfil the mental requirement, the accused must have "knowledge" of the material elements of the crime: "For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events." Most Rome Statute crimes also have the necessary *mens rea* written into the definition of the crime. Genocide must be committed with "intent to destroy" and crimes against humanity with "knowledge of the attack." Many of the war crimes listed have "wantonly," "wilfully" or "treacherously" written into their definitions.

The requirements for *mens rea* are well specified within the Statute, and signal the high level of intent necessary to convict a person of an international crime. This intent is a quality closely bound up with the conception of a person as a sovereign, bounded unit, whose actions and desires are under the control of his reason—a view of the person that appears throughout the Statute. Unfortunately, proving the intent a person had at the time of an action is, in practice, tremendously difficult to do; therefore inference and legal fictions tend to be used within domestic systems to satisfy the *mens rea* requirement. For instance, it is assumed that all agents know "the law" (Barnes notes the irony of this situation, given the inability of lawyers to agree on what many given laws mean[4]) and that all agents know whatever a "reasonable person" would know in their circumstances. This use of inference and fiction is likely to be a feature of prosecutions under the ICC, and may either allow the concept of the perpetrator as rational, intentional being to stand unchallenged, or lead to an inability to prosecute on the basis that the intent required is too extensive and/or specific to be satisfactorily inferred.

The defences which can be offered before the Court also offer significant clues to the type of individual the Court envisages as

responsible for international atrocities. Articles 31, 32 and 33 of the Rome Statute cover defences which perpetrators can offer. Article 31 outlines the defences of insanity, intoxication, self-defence, duress and necessity. The concept of the reasonable person is evident again very strongly here. Under the Statute, individuals are not deemed to be criminally responsible if, at the time of their conduct, they suffered from a mental disease or defect that destroyed their capacity to appreciate the unlawfulness or nature of their conduct, or capacity to control their conduct to conform to the requirements of law. Equally, they are not criminally responsible if they were in a state of intoxication sufficient to destroy their capacity as above, unless they became "voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court." A "normal" person's capacities to appreciate the kind and quality of his conduct, and to control that conduct, are taken for granted here, and the lack of these capacities is seen as being caused by either disease, defect or drugs. Thus, the default setting for the notional international agent is one of contemplation and control. This element of rational capacity appears again in the following clause, which details the range of actions allowable in self-defence. Under Article 31(1)c of the Rome Statute, a person is not criminally responsible if they act *reasonably* to defend themselves or another person or, in the case of war crimes, essential property, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person, or the other person or property protected. Essential property is limited to that which is essential for the survival of the person in question or another person, or which is essential for accomplishing a military mission. The agent must therefore make judgments on the proximity and legitimacy of the force facing them, the degree of danger posed by that force, the responses which would count as proportionate to the force, given the means available to them, and, in the case of defence of property, the importance of the property to be defended in terms of human survival or military tactics. There is no room in this clause for instinctive, intuitional or emotionally propelled action, even though the likelihood of finding time for all of the necessary rational calculations is small given the imminent nature of the danger required by the Statute.

Article 33 covers the defence of "Superior Orders," allowed in a very limited and specific set of circumstances, and then only for war crimes (and, arguably, aggression). The Article states first that the presumption of the Court is in favour of holding the defendant criminally responsible

("The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless . . . .") then sets out the three conditions which must be fulfilled for the defence to be considered. The accused must be "under a legal obligation to obey orders of the Government or the superior in question," must "not know that the order was unlawful," and the order itself must not be "manifestly unlawful." The standard of action here is extremely high, and the wording suggests that Superior Orders will rarely be a successful defence before the Court. Many actors will fulfil the first condition, but few will be able to satisfy the second and third, except perhaps for the less heinous of the war crimes listed. Responsibility is forced down through the ranks onto the individual actor.

The position an individual holds in relation to his state also offers no possibility of a defence. Article 27 makes clear that official capacity is irrelevant both to criminal responsibility and to mitigation of sentence under the ICC, and that any special rules or immunities which traditionally attach to the official capacity of a person, under domestic or international law, will not prevent the Court from exercising its jurisdiction.

The defences allowed within the Rome Statute reinforce the view of the individual gleaned from the requirements of *mens rea.* The "ideal type" perpetrator of international crime is reasonable, rational, intentional and knowledgeable, and his actions are entirely under his volitional control. His social origin and position within formal hierarchies and his particular capabilities and personal circumstances are all irrelevant. Only in the discussion of punishment are these issues considered, and it is to this I now turn.

The correct punishment for international criminality according to the Rome Statute is imprisonment. Article 78 gives the following guidance on sentencing: "In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence (Rules), take into account such factors as the gravity of the crime and the individual circumstances of the convicted person." The Rules outline a range of possible mitigating or aggravating factors, additional to the gravity of the crime and the individual circumstances, many of which are relevant to the consideration of what constitutes an individual agent according to the Statute. Rule 145 states that the Court should give consideration to: "the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the

degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person." Rule 145 goes on to list substantially diminished mental capacity or duress and the convicted person's conduct after the act as mitigating circumstances, and relevant prior convictions, abuse of power or official capacity, commission of the crime where the victim is particularly defenceless or there are multiple victims, commission of the crime using particular cruelty, and commission of the crime for any motive involving discrimination on the basis of generalized or social characteristics, as aggravating circumstances.

It would seem, therefore, that social or group factors *are* relevant in the field of punishment for international crime. The Court is instructed to take into account the degree of *participation* and the age, education, social and economic condition of the convicted person. Again, an "ideal type" agent can be discerned—a sort of noble savage who treats his victims as equals, doesn't discriminate, doesn't abuse power, picks fair fights with victims who can defend themselves and who does not have the age, education, class or money to know better.

B. The Victim of International Crime

In the rhetoric of the ICJS, the victim of international crime is often conceived of as humanity as a whole, with humanity then being entitled (or even required) to prosecute the perpetrators. For my purposes in this chapter, it is more instructive to examine the victims as conceived within the descriptions of the Statute crimes, and in the sections on punishment. I intend to show that the victim of international crime is necessarily socially located, entirely in contrast to the perpetrator who is modelled as having no relevant social ties.

Prosecutions at the ICC will rely on evidence of harm to individual persons, yet genocide and crimes against humanity, as defined in the Rome Statute, *could not take place* if individuals do not have identities as members of groups. Individuals may be victims of murder or serious bodily or mental harm, but they cannot by themselves be victims of genocide or crimes against humanity. A genocide must by definition take place against a group: "For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group . . . ."[5] Equally, crimes against humanity are defined by the Statute as meaning any of the qualifying acts "when committed as part of a widespread or systematic attack *directed against any civilian population*, with knowledge of the attack."[6]

This is not to say that all groups count as relevant victims under international law: the Statute has difficulty conceiving and defining relevant groups. A person has not committed genocide, for instance, unless the Court makes the political decision that the group the person intended to destroy was a "proper" group. Political and social groups were explicitly rejected by the framers of the Rome Statute as possible targets of genocide, leaving a series of accepted groups that are assumed to be well bounded and stable over time, a lot like the individuals postulated as their attackers.

Characteristics of the victim can also be discerned in a reading of Rule 145 of Rules, in which the Court is instructed to consider the degree of harm caused to victims *and their families*, and in assumptions about the relevance of motive to punishment. The Rome Statute does not cover motive in detail, but is likely to follow the ruling made by the ICTY in *Delalic*,[7] in which the group membership of the victim can be seen again to be of relevance. Aggravated punishment is required when the accused is seen to be taking revenge on an individual *or* the group to which they belong, and lesser punishment is merited when the perpetrator showed compassion toward the victim *or* the group to which they belong. The relationship of perpetrator to victim is complicated by group membership: the actions of the perpetrator towards the group that the victim belonged to are seen as somehow separate from the actions of the perpetrator towards the individual victim.[8]

Groups have complex roles in the Statute: national, ethnical, racial or religious groups (assumed to be well bounded and stable over time) can be the specific victims of crimes, and are in fact required to be the victim for the successful prosecution of genocide and crimes against humanity. These groups are of course comprised of individuals, yet something aside from the sum total of people, something shared between the current members of the group and their historical forebears, is seen as relevant to their victim status.[9] The group membership of the individual victim is paramount in the prosecution of the two most important international crimes, and of relevance in the determination of punishment, yet the group membership of the individual perpetrator is formally irrelevant to the Court and judged to be irrelevant to the perpetrator when he plans his actions. This confused conception of the individual as both a pre-social criminal and simultaneously a socially embedded victim is a serious issue within the ICJS, the implications of which will be examined in Section 4.

3. Morality, Law and Politics

During the First World War there was significant demand in Britain for "Germany" to be punished for making war (in breach of

international treaties) as well as for individual Germans to be tried for war crimes. The US was hostile to this idea, arguing that responsibility for breaches of treaties and crimes against the laws of humanity were an issue for morality and not law. This view of the limits of law is still popular with some in US politics, and with many in the field of International Relations, but has long since been superseded in the dominant international criminal law discourse by a view that law is a way to realise morality across borders. International criminal law on this view represents a universal declaration of right and wrong in the international moral sphere. This section will argue that such law actually represents the results of negotiations between states rather than a universal moral code, and that as such it is inherently political. The discourse may seek to deny a role to the political, but it is weakened by its inability to acknowledge both the inseparability of politics and law, and the necessity of politics in the field of international justice.

The ICC is located in political time and geographical space. The idea for such a Court gained popularity in the 1950s, but the configuration of the Cold War international system meant no real progress towards the Court was made for more than thirty years. Then, when the political context changed, new possibilities for international justice began to be pursued in earnest. Schabas argues that the situation in the former Yugoslavia in the early 1990s "provided the laboratory for international justice that propelled the agenda [for the creation of an international criminal court] forward."[10] I will discuss briefly here the format of the Rome Conference from which the Rome Statute emerged and in so doing will highlight the political nature of the negotiations.

In 1998, delegates from 160 states plus 33 Inter-Governmental Organisations and a coalition of 236 Non-Governmental Organisations met in Rome at the UN Diplomatic Conference of the Plenipotentiaries on the Establishment of an International Criminal Court. The majority of the work of the Conference was done in working groups charged with looking at aspects of the formation of a Court such as General Principles, Procedures and Penalties. Provisions of the Statute were adopted "by general agreement" in the working groups. In an example of the disdain for politics found within international law, voting was not allowed within the groups—provisions had to be accepted by consensus. This process, however, must still be seen to be political. Provisions were negotiated; consensus was reached through bargaining and trade off. Two examples of this process of compromise are the positions taken by the conference on command responsibility and the death penalty. There was a good deal of support at

the Conference for the proposal to extend the principle of command responsibility to civilian commanders, but China opposed this very strongly. The US negotiated a compromise position between the two sides, with civilian command responsibility possible, but requiring a higher standard of disregard. The issue of whether or not the ICC should be able to sentence perpetrators to death was the cause of much greater conflict. A group of Arab, Islamic and Caribbean states, along with Singapore, Rwanda, Ethiopia and Nigeria, argued strongly in favour of its inclusion. After much negotiation, the final Statute does not allow for the death penalty to be imposed by the Court itself, but the principle of complementarity (whereby national courts take precedence in prosecuting crimes covered by the Rome Statute if they are willing and able to do so) means that the national courts of State Parties can impose death sentences if their domestic legal systems allow for it.

These examples show that the Conference was a place of politics where law was made, rather than discovered through illumination of a common moral code. This is even plainer in the case of the final Statute, intended by the organisers to be adopted by consensus as a triumphant end to the conference. In fact, the US (among others) was unhappy with the provisions set out in the draft Statute and forced a vote. The Rome Statute was adopted by majority vote at the final session: 120 states voted in favour, 21 abstained (including India and a range of Islamic, Arab and Caribbean states) and 7 voted against. A majority prevailed and the Statute was adopted, but through a political rather than a legal process, and without the support of key representatives from several cultural and moral traditions.

One of the most difficult questions the Conference had to face was the role of the United Nations Security Council (UNSC) and the relevant provisions in the Statute remain highly controversial. The UNSC has a significant role, under Article 39 of the UN Charter, to determine aggression, and a critical concern at the Conference was the ability of the Council to interfere with the work of the Court. States who were not Permanent Members of the Council did not want the international legal process to be politicised. Permanent Members argued that decisions over possible criminal prosecutions should not be taken at a time when negotiations to promote international peace and security were under way. The compromise reached allows the Council to prevent the Court from exercising jurisdiction by passing a positive resolution, renewable annually. This measure is called “deferral,” but it appears that it could be used to permanently prevent the ICC trying a particular case, through

continued renewals. The success of the US in forcing the Council to pass in 2002 (and renew in 2003) Resolution 1422 (which guaranteed that non-State Parties contributing to UN forces were exempt from the Court), by threatening to veto all future peacekeeping operations, demonstrates a genuine stalemate between Council and Court.

The format of the Rome Conference attempted to factor politics out of the creation of international criminal law, but the resultant Court may be weakened by its inability to acknowledge the necessity of politics in the field of international justice. There is no substantive shared moral code upon which to ground international criminal law, even though there may be some common ground, so politics is even more a feature of the system than in the domestic context, where some societal values or culture can be assumed. It may also be a useful feature, as is only through politics that difference can be successfully negotiated (demonstrated at the Rome Conference, where an innovative Court was created through compromise and bargaining). There is a danger in treating the legal rules that resulted from a political process of bargaining *between* ethical traditions as if they are expressions of a universal moral understanding; somehow above the world of politics, for doing this tempts one to overlook the very real difficulties of reconciling law with power in the international sphere. A public political process, the basis of domestic law creation, could strengthen and develop the nascent global norms which international criminal law claims as its foundation, and suggest ways forward when law and power clash, through the open dialogue it would encourage.

4. Implications of the Conceptualisation of Agency within the Rome Statute

Customary international criminal law since 1945 has not prevented genocide, stopped wars, or ended injustice and impunity. At the time of writing (October 2004), the ICTR had convicted 18 people and acquitted one, since the first trials started in January 1997. The ICTY had tried 46 accused, of whom two were acquitted by the Trial Chamber and three have had their convictions overturned by the Appeals Chamber. Considering the scale of the atrocities these tribunals were set up to confront, this number suggests that justice is far from being done. The innovation of the ICC, with its confused conception of the agent of international violence and its fear of politics and power, is unlikely to fare any better. In the final section of the chapter I will begin to explore the implications of the particular conceptions of agency within the Rome Statute as they impact on the goals of the Court.

The official website of the Rome Statute of the ICC lists the following as reasons for the establishment of an international criminal court[11]: to achieve justice for all; to end impunity; to help end conflicts; to remedy the deficiencies of ad hoc tribunals; to take over when national criminal justice institutions are unwilling or unable to act; to deter future war criminals. These are noble goals, but the problems highlighted in this chapter suggest that the International Criminal Court and its attendant international criminal law will not achieve the most critical of them. The Court may remedy some financial and practical deficiencies of ad hoc tribunals, and it may take over in a small number of cases where national criminal justice institutions are unwilling or unable to act. However, I argue below that it will not achieve justice for all: the vast majority of war crimes will remain unpunished, and it will not deter future crime.

The possibility of the Court achieving justice for all is encouraged by the illusion that the Court has the causes and perpetrators of the most serious incidents of international violence within its jurisdiction. In fact, the move from state civil to individual criminal agency has narrowed the focus of concern to exclude most suffering. Tallgren argues that the move renders almost invisible macro issues, such as state aggression, nuclear weapons and the massive environmental damage caused by war, through its concentration on the actions of individuals.[12] Justice is also unlikely to be served when it focuses on the wrong parties: a consequence of the development of the ICJS has been to frame violence which is seen as intolerable or "atrocious" as the action of individuals, so rendering all violence which doesn't fall within the remit of the system, principally state violence or aggression (which is included in the Rome Statute as a crime, but is unlikely to ever be satisfactorily defined and therefore prosecuted), as acceptable or legitimate. Yet it is states that bring about the situations of conflict in which much of this violence takes place, so states which should be in the dock in order to achieve justice. Clearly, the solution is not so simple—after all, the turn to individual responsibility took place after the perceived failure of state responsibility. The relationship between state violence and law is complicated: law is intended to control this violence, but also relies on it (or at least the threat of it) for enforcement. However, justice would surely be better served by acknowledging, rather than denying, this complexity.[13]

The Court is also severely limited by its founding Statute as to the number of cases it can try. Most of the accused who appear before the Court will not be the direct perpetrators of crimes, but those who plan, organise and incite them. The Court will have to make judgments both

between crimes, on the basis of gravity, and between persons, on the basis of the role they played in the crime, in order to manage its case load. The scale of the solution is far smaller than the scale of the problem.

This, however, is a backwards looking view. What of the final goal on the list—the deterrence of future crime? If the ICC is successful in deterring crime through assigning responsibility and punishing criminals then the size of the Court machinery may in time be irrelevant. Unfortunately, the small scale of the Court (which rules out fear of being caught and prosecuted as a deterrent) and the unproblematised move from domestic to international criminal law suggest that international criminal law will not prevent future atrocities, as the necessary societal conditions are not present, and the nature of international crime differs so considerably from that of domestic crime.

In contrast to domestic crimes, international crimes tend to be committed by "ordinary" people in "extraordinary" times. In their study of the Holocaust, Kren and Rappoport state: "Our judgment is that the overwhelming majority of SS men, leaders as well as rank and file, would have easily passed all the psychiatric tests ordinarily given to US recruits or Kansas City policemen."[14] International criminals cannot be identified by their deviance, dysfunction or difference to their fellow citizens. Their behaviour cannot be explained with reference to their economic or societal marginalisation. It is the circumstances they act in which are unusual. War is as far from the "ordinary course of events" as can be imagined. Rather than the Court acting as a deterrent by encouraging the convergence of the value systems of deviants to the norms of society, extraordinary circumstances may mean there are no guidelines or norms for individuals to apply, or that the norms applied change, and norms which promote stability or the safety of the group become more relevant. For instance, following the trial of William Calley for the My Lai massacre during the Vietnam War, a survey of the American public found that 51% would follow orders if commanded to shoot all inhabitants of a Vietnamese village. The authors of the survey concluded that a substantial proportion of Americans saw Calley's actions as "normal, even desirable, because [they think] he performed them in obedience to legitimate authority."[15]

Finally, the ICC is unlikely to ensure that justice is done because it conceives of the individual as an international actor in a contradictory and unjust way. Victims and perpetrators of international crime are seen as different types of agent—one as socially embedded and the other as pre-social. This false dichotomy constructs our understanding of atrocities in a way that precludes us from seeing perpetrators as victims and vice versa.

They are simply not constructed as the same types of human being, and this leads to conflict being viewed in dangerously simple terms: as the battle between innocence and irredeemable evil[16]—a battle in which politics and the negotiation of difference become appeasement. Yet the perpetrators of international crime are invariably playing particular roles, be it state representative, organisation member, follower of a particular ideology, or member of the formal or informal armed forces. The Rome Statute virtually requires that the individuals it prosecutes be located in relation to others as organisers, leaders, or instigators of the crimes within its jurisdiction, yet denies the relevance of social roles.

The idea of international criminality within the Rome Statute denies the importance of group membership and thus misses much of the significance of the societal nature of the person—the effect of social roles; the non-rational behaviour impelled by human social instincts; the enabling function of groups. Doubtless, a system which acknowledges this nature would be far less amenable to simple judgments of guilt and innocence, and the idea of the causal responsibility of the intentional individual embedded in international criminal law might have to give way to some (less prosecutable) concept of contributory responsibility, but this may be a price worth paying if it works more effectively to prevent violence. Prosecutions of individuals at Nuremburg for the massacres of the Holocaust did not prevent the 1994 genocide in Rwanda, nor does the threat of prosecutions seem to be guaranteeing the safety of black Africans in Sudan as this chapter is being written. A more nuanced approach to responsibility, which takes into account the enabling effect of formal and informal institutions (for instance state executives and bureaucracies, the media, cultural practices and the powers which adhere to certain social roles) as well as the tendency for individuals to act in extraordinary ways in extraordinary times, might at least have identified the likelihood of these slaughters prior to their taking place and forced all those connected to the events to consider who or what could act to prevent the circumstances of atrocity, rather than to write off the eventual killings as the unforeseeable actions of evil individuals.

5. Conclusion

The atrocities of the Second World War presented such a challenge to Western ideas of progress and civilisation that a response had to be found. Part of this response has been the elaborate construction of an individual international agent to hold responsible for international crimes. Necessary to support this construction is the fiction of a global moral community peopled by rational individuals who act freely according to a

substantially shared ethical code. This chapter has argued that this shared ethical code is a fiction; questioned the move to individual agency; examined the concepts of perpetrator and victim within the Rome Statue; and exposed the contradictory nature of the idea of international agency contained therein.

To live successfully, it seems that we do need to tell stories that explain what we see in the world and find patterns or predictability within it, and we often do this by asserting agency. If this is the case, one can certainly understand the need to develop convincing stories to explain the Nazi period in Europe and subsequent moral horrors as these events seem too terrible to be conceived of as accidental or as consequences of the normal workings of the international system. They had to be described as the work of voluntary agents, for then they could be punished and future atrocities could be avoided. Agency, responsibility and blame are thus ascribed not because it is in any way *correct* or *true* to do so, but rather because we feel it *necessary*. The contemporary ICJS gives a vocabulary with which to structure and understand international political violence, and this provides the illusion of control. This vocabulary—of the individual perpetrator doing violence to the innocent group—is seductive but ultimately flawed and, as such, will not result in the realisation of the stated goals.

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Notes

1. Tallgren, 562.
2. Denham, 119.
3. Schabas, 21.
4. Barnes, 12.
5. Article 6 Rome Statute 1998.
6. Article 7 Rome Statute 1998 (italics added).
7. Prosecutor v Delalic et al., Judgement of the ICTY in case number IT 96-21-T (1998), para. 1235.
8. This ruling also allows group pressure as a mitigating factor, which is not seen as mitigating within the Rome Statute.
9. Roberto Buonamano outlines the relationship of individual to humanity or sociability with regards to human rights in his chapter in this volume.
10. Schabas, vii.
11. "Overview" page on website of the Rome Statute of the ICC at

<http://www.un.org/law/icc/general/overview> (14 October 2004).

12. Tallgren, 594.

13. John Parry discusses the relationship between the violence and law in more depth in his chapter in this volume.

14. Kren and Rappoport, 70.

15. Gross, 325.

16. Kofi Annan, in a press conference following the ratification of the Rome Statute, stated: "The best defence against evil will be a Court in which every country plays its part."
<http://www.un.org/apps/sg/offthecuff.asp?nid=80> (14 October 2004).