Punishment Goes Global
International Criminal Law, Conflict

BY MARK DRUMBL

La création du Tribunal pénal international permet à la communauté internationale de rendre responsables ceux qui infligent la violence sous forme de haine sexuelle et ethnique. S'inspirant des histoires de cas du Rwanda et de la Bosnie, l'auteur constate à quel point une justice criminelle rétributive peut décourager les contrevenants et promouvoir le changement structurel d'une société.

An International Criminal Court (ICC) was created in July, 1998.[1] Arising out of lengthy negotiations, the ICC was heralded by many as a victory for human rights; it portended the demise of the impunity which has often graced those who infringe these rights.[2] Non-governmental organizations and women's groups played a pivotal role in the negotiations. These efforts successfully resulted in the inclusion within the mandate of the ICC of gendered crimes against humanity such as rape, enforced prostitution, and enforced sterilization.[3]

The creation of the ICC has given rise to considerable celebration. Clearly there is cause to celebrate, as the international community now has available an enforcement mechanism which can hold accountable those who commit grievous abuses of human dignity, equality, and integrity. But this celebration should not detract from the need for reflection about what exactly the ICC can achieve.

The *supra*-national criminalization of mass violence can be viewed as the logical extension of the national criminalization of gender crimes and hate crimes. In recent decades, social reformers have been successful in encouraging governments to include such crimes within domestic criminal legislation. Mandatory arrest policies in cases of domestic violence, the criminalization of rape during marriage, augmented sentences in cases of crimes motivated by racism or heterosexism, and limiting the use of a complainant's prior sexual history in sexual assault prosecutions constitute the end result of many years of activism.

Retributive criminal justice models have not done well in serving the interests of women as they do little to address the structural sources of misogyny.

In a recent commentary in the *Osgoode Hall Law Journal*, Dianne Martin suggests that these legislative outcomes, many of which flow from feminist law reform efforts, may in fact run counter to the initial goals motivating this reform. In many ways, the increased criminalization of gendered crimes and hate crimes represents a reinforcement of the retributive criminal justice model. It may also represent a problematic coupling of this model with feminist approaches to law and society, as well as a poaching (and appropriation) of feminist discourse. In the past, Martin suggests, retributive criminal justice models have not done well in serving the interests of women or disempowered groups as the social engineering contemplated by such models does little to address the structural sources of misogyny, sexism, and racism.[4] Martin assesses a "dark irony" at the "core of feminist criminal law reform efforts":

> Feminist activism was engaged originally with criminal law reform because so much about the criminal justice system was at worst abusive and at best inattentive to human needs, particularly the needs of women and victims of violence. Little about the criminal justice system merited feminist support and much required amendment, particularly the essentially nineteenth-century patriarchal values that (still) dominate criminal law doctrine. However, the reform agenda moved beyond challenging the criminal justice system as a whole, and acquired some new allies, with their own agendas. One of the most troubling, and most ubiquitous of the new initiatives is the attempt to use the criminal trial, and the punishment that it justifies, as an occasion of healing and closure for crime victims. (155-56)

This article suggests that the International Criminal Court represents a similar pattern of dominance for the retributive and punitive criminal justice paradigm, this time at the global level. As such, many of Martin's concerns as to the longer-term (in)effects of this model on women ought to apply to these international developments. These reflections may offer a *contrepoids* to the jubilation expressed by many at the creation of the ICC. It may well be that women who have suffered and continue to suffer from the terror of genocidal situations may be better served through a blended response to mass political violence, and not one which focuses exclusively on retribution, punishment, adjudication, and incarceration. Experiences I have had in Rwanda[5] working with Hutu women accused of genocide[6] currently imprisoned in Rwandan jails confirms in my mind how the hegemony of a retributive justice model risks embedding ethnic ten-

sions, gender inequality, false accusations, and may dissuade social reconciliation. Under the aegis of this punitive model, it is unclear when these women will be released or tried (most do not even know of what they are accused and have been imprisoned for over four years). The lengthy pre-trial delays make it problematic for these women to be reintegrated into Rwandan society and reunified with their families. Additionally, many of these women shared stores of sexual assault inflicted by their captors and guards while in jail, especially in the fall of 1994, when most were first incarcerated. Conversations I have had with Tutsi women who have survived sexual torture, gendered violence, and ethnic hatred in the Rwandan genocide also evidence victim frustration at the lack of resolution arising out of a criminal trial, the silencing effects of adjudication, and the absence of victim control over the process. This should not come as a surprise. After all, as noted by Hannah Arendt in *Eichmann in Jerusalem*, "a trial resembles a play in that both begin and end with the doer, not with the victim" (8). In the end, thought should be given to Martin's exhortation to avoid the "retributive trap" in the international promotion of women's rights.

If a goal of public policy in the wake of genocide is to transform the inequities in the pre-genocidal society, then the retributive criminal justice model, with its focus on the determination of individualized guilt, may have little transformative effect. In Rwanda, domestic prosecutions for crimes committed during the genocide are encapsulated within the Organic Law, adopted on September 1, 1996. One of the most serious offenses under the Organic Law is sexual torture: a conviction thereof could result in capital punishment. Sexual torture during the Rwandan genocide—which occurred from April, 1994 to July, 1994—was commonplace, particularly vicious, and deliberately advocated as part of a plan to exterminate all of the Tutsi. It is estimated that 250,000 women were raped during the genocide, many of whom suffered genital mutilation (Human Rights Watch/Africa; McIlroy; Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935). Tutsi women were targeted for sexual objectification and dehumanization by the genocidal propaganda disseminated by the Hutu regime; Hutu men were exhorted to rape and torture Tutsi women. Children born out of the 1994 rapes are referred to as the "children of bad memories" and many are abandoned (McIlroy A15). In some cases, forced sterilization was practiced to prevent Tutsi from ever reproducing.

Although sexual torture figures on the Organic Law's list of the most serious crimes, very few individuals have been tried for these crimes.[7] A comparable situation operates at the International Criminal Tribunal for Rwanda (ICTR): apart from the successful conviction of Jean-Paul Akayesu on charges of rape and sexual violence, similar charges against other detainees have been dropped as part of the plea-bargaining process.[8] For example, Omar Serushago—a Hutu militia leader in the Gisenyi *préfecture*—pled guilty to accusations of genocide and crimes against humanity, denied an accusation of rape, and this latter charge was then dropped in order to process the guilty plea which, ultimately, led to a sentence of 15 years imprisonment. In other situations, individuals have not been charged with sexual violence although the evidentiary record may support the laying of such charges. As a result, the victims and survivors alleging rape never had a chance to tell their stories. Prosecutorial discretion and judicial administration silenced these survivors.

The International Criminal Tribunal for the Former Yugoslavia (ICTY) has taken a somewhat more proactive approach to sexual violence. Nonetheless, the ICTY's experiences with sexual violence reveal the difficulties any retributive justice model may have in addressing the complexity and brutality of such violence. At the ICTY, attempts have been made to attenuate evidentiary rules so as to encourage the admission of a broader array of testimony in sexual violence prosecutions. This has given rise to controversy. In one case, the Prosecution was ordered upon motion by defense counsel to admit evidence that the lead witness (who was also a victim of battery and rape) had, after her ordeal, been treated for post-traumatic stress disorder (*Prosecutor* v. *Anto Furundzija*). After months of delay, the defense was given the right to further cross-examine the lead witness. Here, evidentiary rules geared to promote women telling their stories of sexual torture were subject to an adversarial system which essentially undermined their purpose. But perhaps this undermining is inevitable when trials are used as devices to determine the "truth" and to mete out accountability. Within the punitive criminal justice paradigm, conflict between victims and due process may simply be unavoidable.

Women who have suffered from the terror of genocidal situations may be better served through a blended response to mass political violence.

Another example of the conflict between due process and the legitimization of victims emerges from the trial (also at the ICTY) of Dusko Tadic. One of the accusations was that Tadic had ordered a Bosnian Muslim, "G," to bite off the testicles of Fikret Harambasic, another Bosnian Muslim, on June 18, 1992 (Scharf 159-163). These accusations were brought into evidence by witness "H," who testified anonymously and in closed session (in order to protect him and his family from retribution) that he saw "G" ordered to bite off Harambasic's testicles. There was no dispute as to whether Harambasic, who was subsequently murdered, had suffered this incident of sexual torture. The dispute arose only as to whether Tadic was physically present in the same room where these tragedies occurred. In the end, the ICTY held that there was insufficient evidence placing Tadic in the same room where the castration occurred. As a result, Tadic was acquitted of the sexual violence charge. In the end, special procedures had to be undertaken to introduce the testimony and then the testimony was deemed insufficient to produce a conviction. However, Harambasic was the victim of sexual torture motivated entirely by ethnic hatred and a desire to wipe out the Bosnian Muslim population. Someone ordered "G" to bite off his testicles. Dealing with these tragedies through the criminal trial process results in the delegitimization of Harambasic's tragedy and the discrediting of his suffering—just as it has for the many victims, overwhelmingly women, of sexual torture in times of political and military conflict. These realities strike at the heart of the myth that the criminal trial can promote closure for victims which, to return to Martin's words, has led to the justification of:

> a range of procedural amendments that essentially make convictions easier to obtain by reducing the trauma of testifying and participating in the trial process. In effect, much of the present reform agenda seeks to do more (good) with the criminal sanction (not less harm). (156)[9]

The burden of proof, the right to silence, the adversarial oppositionalism, and lack of survivors' control over the criminal trial reinforces the survivors' victimization.

In many cases, the burden of proof, the right to silence, the adversarial oppositionalism, challenges as to the impartiality of the adjudicator, and lack of survivors' control over the criminal trial reinforces the survivors' victimization instead of mitigating it. Without a defendant in a criminal process, no stories can be told. If a defendant is subsequently released or acquitted, this further disempowers the storyteller as her experiences are dismissed, regardless whether they may have happened. The experiences are dismissed because they did not happen in a certain way, or because certain people were not present, or because certain intentions or facts were absent, or because a third party felt there to be reasonable doubt about the accuracy of the story. The limited transformative potential of the criminal trial suggests that such trials, even when undertaken in extensive numbers, can do little to address the disadvantaged situation of women in post-genocidal societies, especially for those women who suffer the intersectionality of gender and ethnic oppression. Although the ICTR's judgment in the Akayesu matter should be lauded for setting out a comprehensive historical narrative of sexual violence in the Taba *commune* (and for providing a definition of rape in international law),[10] the question arises as to what sort of reconstructive value it can have in weaving together a new society purged of violence against women and, in particular, without the sexualized objectification of Tutsi women.

From a deterrence point of view, will the adoption of international criminal procedures against those who perpetrate mass political violence inhibit individuals from committing these crimes in the first place? Martin suggests that a punitive criminal justice model, anchored in the notion that if people fear punishment they will rationally choose not to act criminally, does little to deter personal violence. She notes that "a theory of rational choice is largely irrelevant to acts motivated by non-rational impulses"(Martin 162). Fear of punishment is mitigated by the unfortunate reality that the policing machinery of the retributive state only produces low apprehension rates. This article suggests that the rational choice model is especially inapplicable as a deterrent to criminal behavior in a war-torn, chaotic, and socially unstable society in which a government is exhorting mass political violence. An individual's decision to participate in such violence will be even less deterred by the prospect of eventual prosecution before the ICC, for a decision to participate in this violence may not even be perceived as a legal or, sadly, even a moral wrong. It may even be too much to expect anyone—from civilian to political agent—to make a rational choice calculus based on a logical algorithm or matrix when surrounded by a situation of mass hysteria, fear, and prejudice.

These conclusions are corroborated by recent events in the former Yugoslavia and Rwanda. After several years of hearings, the ICTY has done little to protect the citizens of Bosnia or Kosovo from ethnic violence and attack; the existence of the ICTR has not deterred the spread of anti-Tutsi ethnic violence to the Democratic Republic of Congo, where national authorities announced in 1998 that the Tutsi are "microbes that ha[ve] to be exterminated."[11] It remains that effective protection of women and ethnic minorities will not flow from the threat of future punishment but, rather, may grow out of transformative, inclusive, and restorative justice initiatives which purge the structural factors—autocracy, poverty, racism, sexism, mistrust, ethnic superiority, the

pathologies of violence—which contribute to mass political crimes in the first place. During a genocide, the murder, torture, rape, and mutilation of members of one ethnic group by those of another is not really deviant behavior: it is encouraged by the state and becomes a norm of social conduct, a barometer of the extent to which one is part and parcel of the dominant social group. So, too, with violence against women. Reliance on a criminal justice model which is designed to punish deviant and anomalous behavior does little to ferret out the embedded nature of gender violence (in conflict situations as well as outside of conflict situations). In fact, by treating such violence as an individualized transgression of social propriety, the criminal justice system blankets and perpetrates the structural nature of this violence, thereby doing a disservice to survivors and future generations.

The Statute of the International Criminal Court leaves little opportunity for tools other than the criminal trial to deal with mass political violence. This may well be its greatest limitation, as the criminal trial constitutes a blunt instrument which may do little to foster equality and dignity in post-genocidal societies. Recent work by Martha Minow suggests that truth commissions, public inquiries, reparations, and restitution may be more effective devices at promoting the healing of victims after mass violence. In particular, truth commissions may offer therapy on a collective level, solidarity with other survivors, and group catharsis. Truth commissions may avoid the often intractable conflict between victims and due process which may be endemic to criminal trials.

Of course, any discussion of truth commissions is incomplete without reference to the South African experience. The South Africa Truth and Reconciliation Commission has moved beyond prior truth commissions in its use of amnesties to stimulate truth-telling, sanctions to compel participation, and linkage of victim testimony with eventual reparations. Through the pursuit of dialogic truths between victim and aggressor, the South African Truth and Reconciliation Commission has permitted many victim stories to be corroborated by aggressor atonement. This has given these stories an undeniability which, in turn, has facilitated the creation of a nationally shared historical narrative as to where accountability for mass violence should lie. The South African experience with truth-telling contrasts with that of Rwanda.[12] In Rwanda, where accountability for involvement in the genocide is principally pursued through criminal trials, there is no shared historical tapestry of what happened during the genocide (from April to July, 1994) and why it happened. Nor is there much atonement among aggressors for the harms they perpetrated. In fact, the overwhelming majority of the prisoners I interviewed expressed no remorse, no culpability, no regret, and no sorrow over what had happened. Even though many of these individuals have been in jail for over five years, there is little, if any, contrition. Many of these individuals call the events of April to July, 1994 "the war" and not "the genocide," even though by all accounts (and as confirmed by the ICTR in the Akayesu decision) any war was fought in response to a governmentally orchestrated plan to wipe out the Tutsi population. In Rwanda, trials appear to have reinforced individual denial which, in turn, has created a convenient collective amnesia in which the suffering of the victims and survivors—especially of women and children—is silenced.

Notwithstanding the usefulness of truth commissions, there is no permanent international truth commission, nor is there much of a movement afoot to create such an institution (Wedgwood). This raises the interesting question why we have a permanent international criminal court yet no permanent international truth commission. Part of the answer may lie in the fact international lawyers are trained to equate justice with the courtroom. In fact, it is counter-intuitive to legal education that truth can readily emerge from mechanisms other than the adversarial trial. In this regard, international lawyers would do well to more modestly evaluate their own role in post-genocidal healing, and to do so from more of an interdisciplinary perspective.

When the retribution and punishment of the trial model become universalized as the exclusive way to "deal with" mass political violence, the creativity of conjunctive local solutions becomes marginalized. Within the Rwandan context, there would be little room before an international tribunal to permit the use of the traditional *gacaca* model of dispute resolution—in which local communities settle disputes through the appointment of conciliators who bring together all parties in the search for restorative justice. Given that the ICC will exert jurisdictional primacy when it assesses that a local tribunal is "unwilling or unable to genuinely" carry out the investigation or prosecution,(Rome Statute for the International Criminal Court, art. 17) a decision by a local government not to prosecute but to proceed through a different model—or collateral set of models—could result in the ICC ousting local jurisdiction in favor of the punitive, retributive approach. The end result is the criminalization of politics, where the trial may divert attention from the usefulness of political and institutional reform in the process of social transformation. This may well be happening in Rwanda today. For example, although the Rwandan government has been committing five per cent of the national budget to a fund designed to support the health, education, and shelter needs of genocide survivors, the international community expends a disproportionately larger portion of money on the ICTR

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than on social policy for Rwandan citizens, including genocide survivors (*IRIN News Update*).

This article suggests it is important to guard against the perception that the ICC is a satisfactory, and exclusive, method to address gender and ethnic violence. The ICC creates a machinery to enforce a basic set of human rights by punishing—after the fact—those who disparage these rights. It may do little to promote the development of these rights, foster their embeddedness, or promote a social consensus against their violation. It does not give center-stage to the victim and does not allow her to freely tell her story. As a result, the ICC may be most effective when part of a broad-based and comprehensive approach to international human rights. Such a broad-based approach would blend restorative, reparative, and transformative justice—as well as programs for reunification of displaced family members and return of stolen property—together with punitive justice for paradigmatic rights-violations. If left standing alone, the ICC may do little to purge the complex sources and manifestations of gendered and ethnically-motivated violence. All a trial can do is determine the objective truth about the guilt or innocence of the person who is accused. Promoting equality, dignity, and security requires a good deal more.

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[1]Rome Statute of the International Criminal Court, A/Conf. 183/9, July 17, 1998.

[2]For example, Scharf, writes: "There could be no greater contribution to a new world order than to provide the necessary legal machinery to deter and, if necessary, to respond to the most serious violations of international law wherever they occur" (228).

[3]Rome Statute for the International Criminal Court, art. 7(1)(g). Rape formed part of the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR); enforced prostitution and sterilization, together with forced pregnancy, sexual slavery and "any other form of sexual violence of comparable gravity" were added in the Rome Statute. Jurisdiction over these crimes arises should the crimes be part of a "widespread or systemic attack" against a "civilian population" and be committed "with knowledge of the attack" and "pursuant to or in furtherance of a State or organizational policy to commit such attack". *See chapeau* to art. 7 and art. 7(2)(a).

[4]"[A]t the level of popular discourse, where hegemonic values are shaped, the retribution claim has either dominated or at least has been closely associated with feminist claims in the popular mind. That association—between taking crimes against women "seriously" and treating offenders punitively—is a troubling consequence of feminist activism around the victimization of women" (Martin 158-59)

[5]I had the opportunity to work as a public defender in the Rwandan genocide courts as a volunteer with Legal Aid Rwanda, a not-for-profit group based in New York City. Legal Aid Rwanda was active in the Rwandan courts and jails from January to July 1998. In total, Legal Aid Rwanda volunteers interviewed 450 prisoners in the central prison of Kigali. For a broader discussion of the public defender program, the questions asked the detainees, and the results of the work, *see* Drumbl.

[6]The Rwandan genocide was implemented by a murderous Hutu government in April, 1994. It drew to a close in July, 1994, when an extraterritorial Tutsi army seized power and installed a Tutsi government. From April to July, 1994 approximately 800,000 Tutsi were killed by the Rwandan army, militia forces, and civilians; it is estimated that from 10,000 to 30,000 Hutu—moderates, who opposed the genocidal Hutu regime—were also killed. Hutu and Tutsi had lived together in Rwanda for centuries. Mutual perceptions of each other as oppositional ethnic groups began in the colonial era (beginning in the late 1800's) and emerged as a hot-button political issue after independence from the Belgians in 1960. However, the depth and scale of the 1994 violence is absolutely unprecedented in Rwandan history. The involvement of women as perpetrators of genocide is discussed in *Rwanda Not So Innocent (When Women Become Killers)*: "Women participated in the slaughter in countless ways, though to a much lesser extent than men. [W]hen it came to mass murder, there were a lot of women who needed no encouragement. Some of these women organised and led the attacks ... A number of them shot refugees; but more often women hacked other women, and children and sometimes even men, to death" (1, 27).

[7]In truth, few individuals have been brought to trial for any offenses in Rwanda. As of January, 2000, there are approximately 125,000 individuals incarcerated in Rwandan prisons; so far 3,700 detainees have been adjudged (in addition, there have been several thousand confessions which have not yet been processed by the Prosecutor's office). Most individuals with whom we met have been imprisoned since the fall of 1994.

[8]Akayesu was only charged with rape and sexual violence after the proceedings against him had already begun. The addition of these charges was largely due to the testimony of systemic rape elicited from witnesses to the other charges and the efforts of a broad coalition of NGOs who submitted a compelling *amicus* brief.

[9]The 16-26 February, 1999, Preparatory Commission negotiations on the International Criminal Court focused on potential rules of procedure and evidence for the ICC. On the agenda were concerns over the use of corrobora-

tion of victim's testimony in sexual violence cases, the admissibility of the prior sexual conduct of the victim, the ability of consent to act as a defense, and counselor-patient privilege. The purpose of this enclave of evidentiary rules for gendered violence is to mitigate gender discrimination in the criminal justice process by, to return to Martin's words, "reducing the trauma of testifying and participating in the trial process" and "making convictions easier to obtain." Although it is necessary to make the criminal justice system more responsive to women, the question arises whether these procedural amendments to an essentially adversarial and cavalier process can promote the (re)structural reform necessary to truly promote gender equality.

[10]The ICTR held that rape is a "physical invasion of a sexual nature, committed on a person under circumstances which are coercive" which, if undertaken with the specific intent to destroy, in whole or in part, a particular group, can constitute genocide. However, the ICTR went beyond the "physical invasion" definition in concluding that "sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact." As a result, the ICTR found that Akayesu's ordering militia forces to undress a student and force her to do gymnastics naked in front of a crowd constitutes sexual violence. In regard to proof of "coercion," the ICTR held that "coercive circumstances need not be evidenced by a show of physical force ... threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of *Interhamwe* [*n.b.* militia] among refugee Tutsi women at the *bureau communal.*"

[11]Press Statement, Kigali (January 13, 1998) (on file with the author). Nor has the ICTR done much to deter Hutu rebel activity in Rwanda, which has made large portions of the Rwandan state (especially in the north-west) difficult to govern.

[12]This experience challenges the thinking of many of the advocates of international criminal proceedings, such as Scharf, who concludes: "The record of the trial provides an authoritative and impartial account to which future historians may turn for truth, and future leaders for warning. While there are various means to achieve an historic record of abuses after a war, the most authoritative rendering is possible only through the crucible of a trial that accords full due process" (215).

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JACOB KADAR PENNER

The fresh grass sways through the air
The flowers that smell so beautiful
crush in a battle of hatred
Hatred of a race, hatred of a human like me
and you.
This group who does this is troubled,
A people who are mad.
War will happen, it can't be stopped—
People tortured in camps
Bombs happen,
Big bombs happen.
It's over now
And again fresh grass sways through the air.

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