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Global Justice and Global Criminal Law*s*: The Importance of *Nyaya* in the Quest for Justice after International Crimes

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Abstract

This brief contribution to the debate concerning global law draws on the authors' analysis of international criminal justice. It argues that the extent to which international criminal law is in fact contributing to global justice in the aftermath of international crimes remains to be seen. In particular, the smooth relationship between international criminal law and the perception of justice can be called into question, as it relies too heavily on the idea that going through the motions of westernized forms of international criminal law will automatically inculcate a sense of justice in victimized populations, while *en passant* contributing to the resurrection of the rule of law. The connection to broader issues in global justice and global law will draw heavily on Amartya Sen's recent critique of John Rawls' Theory of Justice, in which the former employs the ancient Sanskrit notions of *niti* and *nyaya*.

Keywords

victimology; international criminal law; global justice; international crimes

1. Introduction

One of the primary difficulties in discussing the development or emergence of global law is that the construct is used loosely and can mean different things in the eyes of different scholars.[1] In this short contribution we will sidestep this problem by positing that a clearer understanding of global law

[1] T Nardin, 'Justice in the Global Order' (2011) 37 Review of International Studies 259.

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can be found in the application of this broad idea to relevant areas of law, in which progression – at least rhetorically – towards a global legal order is underway and where the notion of contributing to global justice is explicit.

This applies in particular to our own area of expertise; that of criminal law. The developments in the past decades in the field of international criminal law have been, in many ways, spectacular. There is the definition of a special class of international crimes; genocide, war crimes and crimes against humanity; the installment of *ad hoc* tribunals - first for Rwanda and the former Yugoslavia (the ICTR and ICTY), followed by judicial bodies for Sierra Leone, East Timor, Lebanon and Cambodia, ultimately culminating in the establishment of the permanent International Criminal Court.[2] The connection of international criminal law to global justice is evident in the stated key aim of holding the *'hostis sui generis,'* the enemies of all mankind, to account for their atrocities. It is also made explicit in the view of the current prosecutor of the ICC, Luis Moreno Ocampo, that the ICC seeks global justice.[3] The latter sentiment is echoed in the work of scholars of globalization who view the materialization of international criminal law as key elements of the development towards global justice.[4]

However, the extent to which international criminal law is, in fact, contributing to global justice in the aftermath of international crimes remains to be seen. In our recent work we questioned the smooth connection between international criminal law and the perception of justice, which relies too heavily on the idea that going through the motions of westernized forms of international criminal law will automatically inculcate a sense of justice in victimized populations, while *en passant* contributing to the resurrection of the rule of law.[5]

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[2] B Broomhall, *International Justice and the International Criminal Court. Between Sovereignity and the Rule of Law* (Oxford University Press 2003).

[3] L Moreno-Ocampo, 'The International Criminal Court: Seeking Global Justice' (2007) 40 Western Reserve Journal of International Law 215.

Of course it is possible to take issue with the notion that the ICC indeed has global reach, as neither the United States, nor the majority of Islamic and Asian countries have ratified the Rome Statute.

[4] D Held, 'Cosmopolitanism: globalisation tamed?' (2003) 29 Review of International Studies 465.

[5] RM Letschert, RH Haveman, A de Brouwer and A Pemberton (eds), *Victimological Approaches to International Crimes: Africa* (Intersentia 2011); A Pemberton, RM Letschert, A-M De Brouwer and RH Haveman, Het internationale strafrecht: een victimologisch perspectief' [2011] Tijdschrift voor Criminologie 385; A Pemberton, RM Letschert, A-M De Brouwer and RH Haveman, *Coherence in International Criminal Justice: A Victimological Perspective* (forthcoming). See also: MA Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press 2007); LE Fletcher and HM Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation', (2002) 24 Human Rights Quarterly 573.

In this brief contribution to the debate concerning global law we will sketch these problems in greater detail, before connecting this to more abstract notions of justice. The latter will draw heavily on Amartya Sen's recent critique of John Rawls' Theory of Justice, in which he employs the ancient Sanskrit notions of *niti* and *nyaya*.[6] Finally, in conclusion, the analysis of international criminal law will be used as a base to provide more general notions about global justice and global law.

2. The (Mis)match between International Criminal Law and Global Justice?

As a means of ensuring justice, criminal law is by no means perfect. Its faults are legion, from a poor coverage rate, through bias in its administration to a large discrepancy between its stated aims of retribution and prevention and its actual outcomes.[7] It is no small wonder that politicians who tout the adjudication and enforcement of criminal law as a resolution to social problems are viewed by the academic community with suspicion: well captured in the concept of penal populism.[8]

In the move to the international level the shortcomings of criminal law have been given short shrift, replaced instead by a triumphant and aspirational rhetoric of 'ending impunity' and 'delivering safety and justice on a global scale'.[9] This is remarkable, considering the fact that the characteristics of international crimes render the delivery of justice through criminal law, *more* rather than *less* difficult. Just to mention a number of additional difficulties: establishing individual guilt for crimes committed as a collective and/ or in the name of a collective,[10] in other words the abundance of evidence of collective evil, coupled with a lack of proof of individual

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[6] A Sen, *The Idea of Justice* (Allen Lane 2009); J Rawls, *A Theory of Justice* (Harvard University Press 1972).

[7] JJM van Dijk, *World of Crime*, (Sage 2007); L Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Duke University Press 2009); M Tonry, *Retributivism has a Past: Has it a Future?* (Oxford University Press 2012).

[8] JV Roberts, L Stalans, D Indermaur and M Hough, *Penal Populism and Public Opinion: Lessons from Five Countries* (Oxford University Press 2003).

[9] MA Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' (2005) 99 Northwestern University Law Review 539 & MA Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press 2007).

[10] See Drumbl, 'Collective Violence' ibid; DJ Levinson, 'Collective Sanctions' (2003) 56 Stanford Law Review 345 & M Osiel, 'The Banality of Good: Aligning Incentives Against Mass Atrocity' (2005) 105 Columbia Law Review 1751.

wrongdoing; the uncertain line between culpable and inculpable parties,[11] including the role of so-called innocent bystanders,[12] the difficulty of finding a remedy suitable to the enormity of the crimes committed[13] and, coupled with the previous points, the diminished likelihood of reaching goals of criminal justice such as retribution and general or special prevention.[14]

In practice moreover, these shortcomings have been exacerbated by problems of selectivity, insufficient proportionality and lengthy procedures. The punishment meted out for international crimes is *lower* rather than *highe*r compared to ordinary crimes, while the treatment of the often top-level suspects and convicts in international criminal justice is vastly superior to the facilities available in most domestic criminal justice systems.[15] The latter also applies to the emphatic and time consuming emphasis on meeting all criminal-procedural nicities. In stark contrast to the trials of Nuremberg, which were over and done with within the space of 11 months and trials in the domestic sphere – the Rwandans managed to try over 5000 cases with one tenth of the funding of the ICTR, before the latter handed down one verdict – international criminal law proceeds at an almost glacial pace.[16]

The reason given for this, as noted by ICTY-appeals court judge Patricia Wald, is that 'we have to assure that justice is seen to be done'.[17] This is also

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[11] Osiel, ibid.

[12] Drumbl, *Atrocity, Punishment and International Law* (n 5); LE Fletcher, 'From indifference to engagement. Bystanders and International Criminal Justice' (2005) 26 Michigan Journal of International Law 1013 & E Staub, *The Roots of Evil: The Origins of Genocide and Other Group Violence* (Cambridge University Press 1989).

[13] Osiel (n 10) & RM Letschert, T Van Boven, 'Providing Reparation in Situations of Mass Victimization: Key Challenges Involved' in Letschert (n 5).

[14] MA Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' (2005) 99 Northwestern University Law Review 539; DJ Levinson, 'Collective sanctions' (2003) 56 Stanford Law Review 345; M Osiel, 'The Banality of Good: Aligning Incentives Against Mass Atrocity' (2005) 105 Columbia Law Review 1751; MA Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press 2007); LE Fletcher, 'From Indifference to Engagement. Bystanders and International Criminal Justice' (2005) 26 Michigan Journal of International Law 1013; E Staub, *The Roots of Evil: The Origins of Genocide and Other Group Violence* (Cambridge University Press 1989); MJ Aukerman, 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice' (2002) 15 Harvard Human Rights Journal 39.

[15] MA Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press 2007).

[16] GJ Bass, *Stay the Hand of Vengeance: The Politics of War Crime Tribunals* (Princeton University Press 2001); J Rabkin, 'Global Criminal Justice: An Idea Whose Time has Passed' (2005) 38 Cornell International Law Journal 753.

[17] Rabkin (2005) uses this quote to make a similar point.

the explanation for international criminal law's recurring emphasis on the *independence* of international criminal law, which attempts to protect it from so-called victor's justice, but, simultaneously, erects a Chinese wall separating it from domestic attempts to provide justice, from other, concurrent attempts to rebuild state structures and from the history, tradition and political realities of affected societies.[18]

International criminal law is *remote* justice, meted out by an 'international community' which may have positive connotations for many commentators, but whose actions in the experience of inhabitants of war-torn societies are most often characterized succinctly as 'too little, too late'.[19] The legitimacy of the process and actors involved in the process of international criminal law in the eyes of these populations is suspect, which further strains the smooth and easy connection of international criminal law to the provision of a sense of (global) justice.[20]

3. Niti and Nyaya: Applying Ancient Sanskrit Notions to International Criminal Law

In our view much of the difficulties in the development of international criminal law can be traced to the over-emphasis on procedure and more precisely the faith that striving for global justice encompasses the development of a perfect procedure, which is capable of ensuring just outcomes, irrespective of the context in which it is placed.[21] This procedural view of justice has a decidedly Rawlsian quality. The requirement of the so-called *veil of ignorance* in Rawls' original position as a starting point for deliberations about justice necessitates a view of justice which is independent

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[18] LE Fletcher and HM Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation' (2002) 24 Human Rights Quarterly 573; HM Weinstein, 'Editorial: The Myth of Closure: The Illusion of Reconciliation. Final Thoughts on Five Years as Co-Editor in Chief' (2011) 5 International Journal of Transitional Justice 1.

[19] Eg MJ Aukerman, 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice' (2002) 15 Harvard Human Rights Journal 39.

[20] See for instance T Longman, P Pham and HM Weinstein, 'Connecting Justice to Human Experience: Attitudes Toward Accountability and Reconciliation in Rwanda' in E Stover and HM Weinstein (eds), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge University Press 2004). See also the subsequent population surveys of the Berkeley Human Rights Center.

[21] In greater detail: A Pemberton, RM Letschert, A-M De Brouwer and RH Haveman, Het internationale strafrecht: een victimologisch perspectief' [2011] Tijdschrift voor Criminologie 385; A Pemberton, RM Letschert, A-M De Brouwer and RH Haveman, *Coherence in International Criminal Justice: A Victimological Perspective* (forthcoming).

of specific situations: the participants in the deliberation do not know what their position is in society or indeed to which society they belong. The justice of a procedure is then judged by its fairness as a procedure, rather than the outcomes it delivers in specific situations.

Recently, Amartya Sen developed a critique of Rawls' theory which is probably most succinctly summarized in his description of the Sanskrit justice concepts *niti* and *nyaya*.[22] The former concept proposes that justice should be conceptualized in terms of organizational arrangements, regulations and procedures; it is in other words an arrangement-focused view of justice, which fits well with Rawls' theory. The latter instead concerns the world that actually emerges; it is a realization-focused understanding. Niti measures justice by the extent to which it meets some standard of perfection, while nyaya does so on the basis of a comparison with other realistic alternatives, a comparison that includes the independent value of organizational arrangements, but does not allow this to override all other concerns.

Seeing the poor fit between the reality of international crimes and principles of criminal justice, we have argued previously that *nyaya*, rather than *niti* is a base to assess international criminal law.[23] Using *niti* as a benchmark entails striving for a standard of perfection within the justice procedure, blinded to the reality that in situations of mass victimisation it is a wholly unattainable ideal. A focus on *niti* restricts justice in the aftermath of mass victimization in three ways: it reduces it to what the criminal justice procedure can provide, isolates criminal justice from other relief efforts and – importantly - ringfences resources that may stand a better chance of providing a measure of justice if allocated elsewhere.

The extent to which justice is done should be measured by the actual, although probably at best modest, contribution to rebuilding society rather than its adherence to the blueprint of (Western) criminal justice procedure. Maybe more so than in the domestic sphere justice after international crimes is done, when it is *seen to be done*.[24] Historical and cultural aspects may give rise to different solutions, while the interplay between the crimes committed and the views of victimized populations may differentiate the

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[22] A Sen, *The Idea offjustice* (Allen Lane 2009).

[23] A Pemberton, RM Letschert, A-M De Brouwer and RH Haveman, Het internationale strafrecht: een victimologisch perspectief' [2011] Tijdschrift voor Criminologie 385.

[24] MA Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press 2007); J Feinberg, 'The Expressive Function of Punishment' in J Feinberg (ed), *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton University Press 1970).

reactions from one instance of victimization to another, even *within* the same societies: as Fletcher and Weinstein note, an *ecological* view of justice may be most appropriate.[25]

A key element of the use of nyaya rather than niti as lense for viewing international criminal law is therefore the insight that delivering global justice after international crimes is unlikely to proceed through a one-size-fits-all solution. We should never lose sight of the fact that lawmaking never entails a simple translation of morals: we have to reckon with the spin that the social and political reality will place upon this connection.[26] The question to what extent international criminal law delivers justice needs an empirical answer: this can not be resolved on the basis of theory and assumptions alone.

The yardstick involved in this measurement should include procedural concerns, but not allow them to overrule other, often more substantive measures of justice. Of course this is a highly complicated matter – the space of this article does not allow us even to attempt to broach the myriad complexities of developing such a measurement tool, in the face of the different and often competing notions of justice involved – but work of this kind is possible and in fact conducted even in the most difficult of circumstances (again we point to the work of Berkeley Human Rights Center as a promising practice example).[27]

4. Conclusion: Nyaya and Global Justice

Our analysis of the experience, particularly in the last 20 years, with international criminal law, has led us to the insight that *nyaya* rather than *niti* provides an appropriate base for assessing justice in the aftermath of international crimes. If generalization from this field of law to others is valid, the following general observations can be made.

First, legal scholars and policy makers should resist the temptation to view the *terra incognita* of global law as a licence to abstract its development and construction from the messy and uncomfortable realities connected to its application in practice. The vacuum of global law is not a blank slate: it is *pre*-shaped by the constraints of culture, politics and economics

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[25] LE Fletcher and HM Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation', (2002) 24 Human Rights Quarterly 573.

[26] D Runciman, *Political Hypocrisy: The Mask of Power from Hobbes to Orwell and Beyond* (Princeton University Press 2008).

[27] M Sandel, *Justice: What's the Right Thing to do* (Farrar, Straus & Giroux 2009).

and *post*-shaped by the interactions between law and legal actors, in the patterns visible in the growing body of work in the field of empirical legal studies. Indeed, as a rule the contribution of a system of global law to global justice is to a matter of empiricism, rather than of assumption.

And finally, global justice will likely entail global laws rather than global law: the political, social and cultural specificities of a given situation necessitate different solutions, also in the legal sphere. Rather than one-size-fits-all, the extent to which the global legal order will contribute to global justice, depends on the extent to which it meets these demands of ecological appriopriateness.