

## H-NET BOOK REVIEW

Published by [H-Human-Rights@h-net.msu.edu](mailto:H-Human-Rights@h-net.msu.edu) (January 2008)

Mark A. Drumbl. *Atrocity, Punishment, and International Law*. New York: Cambridge University Press, 2007. x + 298 pp. Notes, index. \$80.00 (cloth), ISBN 978-0-521-87089-4; \$29.99 (paper), ISBN 978-0-521-69138-3.

Reviewed for H-Human-Rights by Nevin T. Aiken, Department of Political Science, University of British Columbia

### Justice in Transition

With this book, Mark A. Drumbl undertakes a much-needed critical reassessment of current punishment and sentencing practices in international criminal law. Incorporating theoretical inquiry, empirical analysis, and persuasive insights for institutional reform, Drumbl reveals the tensions that attend the use of criminal prosecution as the primary form of international accountability for mass atrocity and, in so doing, offers a vital 'second generation' contribution to the field of transitional justice. Accordingly, those interested in issues of transitional justice will have much to learn from this book, as will scholars and practitioners working in related fields of international law, human rights, political science, and peace studies.

Following a comprehensive overview of the scope of the volume in chapter 1, Drumbl begins by examining the legal roots of international accountability for 'extraordinary crimes' such as genocide, war crimes, and other crimes against humanity, tracking them from their Nuremburg genesis through their most visible current institutionalization in the form of the standing International Criminal Court (ICC). In chapters 3 and 4, Drumbl elaborates the ascendancy of criminal prosecutions since the Second World War as "the dominant regulatory mechanisms for extreme evil" (p. 3)- an ideology that informs the structures and punishment practices of the national trials and international tribunals that are now the primary modes of accountability for contemporary atrocities in Rwanda, Bosnia, Sierra Leone, East Timor, Afghanistan, and Iraq.

However, while lauding the overall movement towards universal norms of justice and accountability in response to atrocity, the bulk of Drumbl's work-and, indeed, its most compelling contribution-focuses on the tensions that inhere in the contemporary "homogenization of process" (p.13): the institutionalization of criminal prosecution as the only normatively legitimate mechanism of accountability

under international law. In chapters 4 and 5, Drumbl evidences the growth of a system of legal authority for criminal accountability that flows from the international to the local level, suggesting that indigenous accountability mechanisms have been pressured to conform to Western 'liberal legalist' standards of individualized prosecution and punishment. In particular, local methodologies that are more restorative or extralegal in nature and don't fit typical criminal justice models are, it seems, often marginalized. The result, as Drumbl argues, has been an 'externalization' of justice—a physical and cultural distancing of justice from affected populations—as well as the development of a 'democratic deficit' in which those afflicted by violence are increasingly excluded from the development and operation of accountability mechanisms (p. 124).

Chapter 2 explores further contradictions that arise from borrowing the "penological rationales of Western domestic criminal law" (p. 7) and transplanting these structures internationally to adjudge extraordinary crimes of mass violence. One of Drumbl's most powerful critiques of the internationalization of Western approaches to legal accountability stems from his illustration of the disjuncture between the liberal legalist construction of the individual as the locus of criminal sanction and the inherently collectivized nature of mass atrocity. As evidenced in the Rwandan genocide and 'ethnic cleansing' in the former Yugoslavia, individuals become targets of atrocity not because of their personal characteristics, but because of their perceived membership in a group targeted for discrimination by perpetrators whose actions themselves depend on a sense of group identity. This insight, while widely recognized by scholars of mass violence working in the fields of social psychology, peace studies, and political science, is one which to date has had little impact on the institutional design of contemporary structures of transitional justice. Indeed, the dominant tradition of Western criminal prosecution in the aftermath of atrocity operates under the assumption that full justice can be achieved by holding a select number of 'deviant' individuals to blame for systematic group violence. This raises serious questions about the appropriateness of an exclusively individualized conception of accountability and punishment for group violence, pointing toward the need for a broader engagement with issues of 'collective responsibility' in justice after atrocity—a debate Drumbl himself later takes up in chapter 7.

In Chapter 6, Drumbl examines a secondary disconnect resulting from the application of Western domestic criminal law in prosecuting extraordinary crimes of mass violence, namely the gap between practices of criminal prosecution and punishment and their assumed penological goals of retribution, deterrence, and expressivism.

For example, by illustrating that international law frequently allows opportunities for plea bargaining by the perpetrators of atrocity, and that even the 'most responsible' top leadership might expect more lenient sentences under international tribunals than everyday violent criminals receive from national courts, Drumbl directly challenges the notion of 'just desserts' that underlies legal retributivism when applied in cases of atrocity. Additionally, little evidence is found in support of the rationale for general deterrence of future crimes as a result of punishment, with violence having noticeably recurred in several cases following criminal prosecutions.

Interestingly, however, Drumbl does point towards the potential for trials and punishment to succeed by means of 'expressivism' after atrocity; that is to say, trials can function as communicative institutions in the post-conflict societies by conveying new information about the moral unacceptability of atrocity, narrating an official history of past violence, and reinforcing social norms of respect for the rule of law. Strangely, while a rich literature exists in the field of international relations regarding the ability of institutions to function as sites of norm generation and reinforcement, the potential for justice institutions to play a similar role in the construction of new social values in the post-conflict environment is often underappreciated in transitional justice scholarship. Here again, however, while allowing that the perceived legitimacy often accorded international trials could bolster their communicative value, Drumbl notes that the adversarial nature of criminal trials, their reliance on strict rules of due process, and their frequent externalization from local communities inherently limits their narrative and truth-telling capacities—elements identified as key to achieving the pedagogical aims of expressivism.

However, Drumbl's primary contribution is reserved until Chapter 7, in which he moves beyond critique to introduce innovative proposals for long-term reform that push the debate "from law to justice" (p. 181) in addressing the shortcomings of prosecution and punishment in international criminal law. These proposals take two main forms, both based on Drumbl's underlying philosophy of "cosmopolitan pluralism" (p. 186): the idea that while atrocity must be held as a universal evil, its sanction requires a range of responses that depend on culture and context and that incorporate goals beyond retribution. The first of these, 'vertical' reform, argues against the 'top-down' imposition of international prosecution as the sole option for accountability, stressing the need for a system of 'qualified deference' which would give first priority to alternate mechanisms at the national and local levels that meet basic standards of human rights and democratic

legitimacy. The second, 'horizontal' reform, calls for a widening of the range of permissible accountability options beyond criminal law, opening up the possibility of other legal processes (such as civil sanctions), as well as quasi or fully extra-legal mechanisms such as truth commissions, reparations, and indigenous practices which may pursue more restorative or reintegrative aims. In this way, Drumbl's work marks a significant contribution to the body of recent 'second generation' scholarship in transitional justice, which has come to recognize that no single solution will ever be appropriate across all contexts of atrocity, and that while prosecution and punishment remain important tools for accountability, "international criminal law is only-and can only be-part of the justice picture" (p. 205).

While perhaps beyond the scope of this volume, the only potential disappointment for the reader is the limited space devoted to considerations of short-term institutional reform in Drumbl's final chapter. Some specific suggestions are made, particularly as to how the ICC might be adapted to become more inclusive of the alternative justice concerns Drumbl raises throughout the book; however, it would be interesting to see how he envisions his reforms being operationalized institutionally at the national and local levels. Admittedly, this remains a small point given the detailed attention apparent throughout the rest of the volume, but it does indicate the need for consideration as to how the complex intersections of the international and the local, and the restorative and the retributive, might inflect the design of future institutions of transitional justice.