

Mark Drumbl, *Atrocity, Punishment and International Law* (Cambridge: Cambridge University Press, 2007), 320 pp. \$80.00 (Hardback), ISBN: 9780521870894. \$29.99 (paperback) ISBN 9780521691383

1. Mass Atrocity in International Law

The last decades of the previous century will definitely be remembered for their astounding numbers of gross and massive human rights violations, as a direct result of severe and violent conflict: the killing fields in Cambodia, the genocides in Guatemala and Rwanda, ethnic cleansing in the former Yugoslavia, the ethno-religious conflicts in East Timor, the attacks and counter-attacks between Israelis and Palestinians, and the long-lasting apartheid regime in South Africa, to name but a few. All occurring well after the end of the Second World War, these violent conflicts have produced tens of millions of victims, men, women and children.

At the same time, the last 15 years have witnessed an unprecedented development in international relations and international law. For the first time since the trials of the German and Japanese war criminals, various mechanisms have seen the light of day to deal with the consequences of violent conflicts in legal terms, in order to call the offenders to account and to provide compensation to the victims. These mechanisms range from national and international tribunals or courts, to non-judicial forums like truth commissions and indigenous mechanisms for conflict settlement.¹

The main breakthrough came after the end of the Cold War, with the establishment of the two international ad hoc tribunals, one

for the former Yugoslavia in 1993 and one for Rwanda in 1994. This was followed by several mixed tribunals or courts, for Sierra Leone, East Timor, Kosovo and Cambodia, and coupled with the creation of the International Criminal Court, the first permanent court to enforce the individual criminal responsibility of persons having committed atrocities in peace or war time. Giving substance to these institutional developments is the rapid expansion of international criminal law, mostly by codifying existing crimes but also by creating a more sophisticated understanding of international crimes. Tribunals and courts, and the body of international criminal law, continue to contribute to a gradual shift from situations of impunity towards situations of accountability.

2. Assessing the Legacy of International Criminal Justice

Given this rapid rise of the institutional and normative framework of international crimes, it is somewhat surprising that very few studies have undertaken a systematic assessment of the current day machinery of international criminal justice. This is of course partly due to the relative novelty of these developments — but also due to the absence of coherent frameworks of evaluation. The latest book by Mark Drumbl, entitled *Atrocity, Punishment and International Law*, fills this gap in an admirably courageous and an indisputably successful manner.

The main focus of this book is two basic but crucial questions: the first being descriptive — namely how we punish persons who have committed the most heinous crimes (genocide, crimes against humanity and war crimes) — and the second normative — in which way we should punish them. Drumbl rightly argues that these two questions have received far less attention than they deserve, although they are at the heart of international criminal justice. The book is in fact intended to provide answers to these questions, and by doing so, to stir further debate among scholars and practitioners of various disciplines, not only

1 See C. Bassiouni (ed.), *Post-Conflict Justice* (Ardsey: Transnational Publishers, 2002); N. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, 3 Vols. (Washington: US Institute of Peace, 1995).

(international) law but also other social sciences.

The book approaches this task in three main parts. In the first part, which takes more than half the volume, the author gives an overview of the practice of existing criminal justice institutions in dealing with mass atrocity crimes. While his overview is not limited to international institutions, including references to local and national case-law, the focus is indeed on the international level and in fact on the four major institutions after the Second World War — the tribunals of Nuremberg and Tokyo and for the former Yugoslavia and Rwanda. Drumbl offers a very thoughtful overview of each tribunal's jurisprudence in relation to the crimes of mass atrocity, without losing track of the main principles and headlines. This overview will serve as a great source of information for scholars and practitioners worldwide. In particular Chapter 4, which discusses the jurisprudential approach the tribunals adopted towards the Rwandan genocide and the war crimes in ex-Yugoslavia, is very well researched and written.

A number of aspects of the author's approach are remarkable. Interestingly, the author does not hesitate to draw on his extensive personal experience in both Rwanda and the former Yugoslavia. Quite original is Drumbl's use of extensive citations from the case law as well as from scholarly writings — a combination which is decidedly uncommon in overviews of the type he offers here, demonstrating his willingness to open doors between various disciplines in the social sciences.

The first part concludes with a chapter (5) drawing major conclusions from the foregoing overview of case law. Drumbl's main argument is that the practice of punishment by international tribunals, despite the differences among them, is foremost an example of 'legal mimicry' (at 123), whereby every new institution tries to build on the experience of the previous one, despite the many different crime situations they are facing and despite the often 'confusing, disparate, inconsistent and erratic' sanctions they have applied thus far (at 11). In essence, Drumbl raises very serious questions about the fact that international criminal justice has been strongly imbued with a western conception of justice, which is liberal and legalistic, and may not be the only model to deal with these 'extraordinary' crimes that

involve many victims, many perpetrators, a large group of bystanders — and all of these within a political context.

3. The Objectives of International Criminal Justice

This analysis leads Drumbl to his main research question, namely what the objectives of international criminal justice really are. It is in this second part — actually only one chapter (6) — that Drumbl clearly shows his intellectual courage, undertaking a critical analysis of current day international sentencing, making use of a variety of sources, such as legal reasoning, but also statistical data and scholarly writings from various disciplines.

Drumbl explicitly refers to the field of penology (which studies sanctions, their objectives and their impact) and hence also points at the wider field of criminology (which studies why crimes are committed, how to deal with them, and why certain human behaviour is regarded as criminal). In this part, the author distinguishes three major objectives of punishment as present in international criminal justice: (a) *retribution*, meaning that criminals should be punished because they deserve to be punished; (b) *deterrence*, in the sense that punishment builds a safer world; and (c) '*expressivism*' (at 173, emphasis added), because conducting trials and punishment confirms the rule of law and the general public's faith in it.

The first two objectives are quite well known in penology and criminology, and are not new in themselves, except in their application to the international sphere. And Drumbl's application of these concepts is quite critical, since he argues that the practices of international tribunals in fact undermine both the retribution and the deterrence theory, because of the selectivity of trials, the severity of the sanctions imposed, the possibility of plea bargaining, and the weak and scattered evidence about the deterrent effects. The real innovation, however, lies in the exposition of the third objective, that of expressivism. Here too, the author points at many problematic aspects of contemporary international criminal justice in its pursuit of this objective, such as the selective use of truths, interrupted trials (as in the *Milošević* trial), and the different strategies to manage cases. His conclusion is more nuanced but largely the same as that reached

in relation to the two other objectives, namely that punishment in international tribunals is not convincingly guided by expressivism. Despite Drumbl's strong argumentation, it seems that this part of the three objectives of punishment is mostly based on writings of penology and legal theory, and might have benefited from closer references to theories of crime and punishment in mainstream criminology.

Having criticized the current objectives of international criminal justice in a fairly harsh manner, every reader will expect the author to offer an alternative approach. Drumbl is not shy in this regard, spending his last two chapters (7 and 8) in just this endeavour. In this phase of 'reconstruction', he does away entirely with the commonly held idea that justice after violent conflict can best — if not exclusively — be served by trying perpetrators before an international criminal tribunal or court. Instead, he replaces the idea of law by that of justice in a wider sense, one that is 'vertical' and more inclusive of other mechanisms, and one that is more 'horizontal' and goes beyond the criminal process to look at the general regulatory power of law. Such a concept of justice provides ample room for alternative and non-western ideas about atrocity and punishment, and explicitly encompasses local and indigenous conceptions. Moreover, it does not limit legal interventions to the reactions of criminal law, but also looks at the contribution of law to issues of political, economic and social justice.

4. Beyond International Criminal Justice

Drumbl most interestingly argues that including such conceptions of justice will not reduce the universality of mechanisms to deal with the past, but by including diversity justice in post conflict situations will be more cosmopolitan, rather than less. This is the seemingly simple, but enormously challenging thesis of this book, and the main reason why it is innovative and deserves all the attention it can receive. So what is the impact of this thesis on the operation of the existing mechanisms for international criminal justice?

Drumbl is not an 'abolitionist' in the sense that he wants to downplay the importance of the existing international tribunals, or to do away with the international court. He does,

however, wish to enlarge the framework of justice and to look for other models to provide justice after violent conflicts, e.g. hybrid criminal courts, civil courts, non-courts or non-judicial mechanisms, and even by looking at other dimensions of justice. He is very clear in strongly advocating a multi-dimensional, multi-level and multi-institutional approach to post-conflict justice. In this sense, he goes further than recent publications that try to combine retributive and restorative justice elements inside the procedures of international criminal justice² or as complementary mechanisms to international criminal justice.³ Less clear in Drumbl's final chapters is the exact relationship between judicial and non-judicial approaches, or between national and international approaches, or even between legal justice and other forms of justice. This definitely requires further study, since issues of timing, recourse and complementarity are all burning issues in this field.

It remains, however, Drumbl's impressive contribution to the field of international criminal justice to have probed a number of crucial issues that usually remain implicit, or are addressed 'in the shadows' at best, and that deal with the core of international punishment, both in its actual (empirical) form and in its preferred (normative) form. The book is extremely well researched and very well written, and provides a whole series of strong arguments to open up our horizons when dealing with these issues. The footnotes are informative and well chosen and provide a wealth of information for further reading and

2 See for example M. Findlay and R. Henham, *Transforming International Criminal Justice: Retributive and Restorative Justice in the Trial Process* (Devon, UK and Portland, OR: Willan Publishing, 2005).

3 See for example S. Parmentier, 'Global Justice in the Aftermath of Mass Violence. The Role of the International Criminal Court in Dealing with Political Crimes', 41(1–2) *International Annals of Criminology* (2003) 203–224; E. Weitekamp, S. Parmentier, K. Vanspauwen, M. Valinas and R. Gerits, 'How to Deal with Mass Victimization and Gross Human Rights Violations. A Restorative Justice Approach', in U. Ewald and K. Turkovic (eds), *Large-Scale Victimization as a Potential Source of Terrorist Activities. Importance of Regaining Security in Post-Conflict Societies* (Amsterdam: IOS Press, 2006), 217–241.

analysis. And finally, Drumbl has made the ultimate argument that justice after violent conflict is not only of interest and importance to law and to lawyers, but that many other disciplines can contribute to a more comprehensive understanding of justice, and in fact should also become more engaged in this endeavour.

Although Drumbl's focus is on the practice of international criminal justice institutions, and does not even mention the concept of 'transitional justice', it is clear that his work is squarely located in the latter field. This field has been defined as 'the study of the choices made and the quality of justice rendered when states are replacing authoritarian regimes by democratic state institutions'⁴ and more recently as 'the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation'.⁵ Several other notions are used to depict largely the same reality, such as 'post-conflict justice' and 'dealing with the past'. Drumbl's work is not only an important contribution to the critical study of international criminal justice, but by offering new lenses to look at justice it is also inevitably closely linked to transitional justice in its widest sense. It is clear that a fruitful dialogue between these various approaches is a main challenge for the coming years and well into the twenty-first century.⁶

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- 4 R. Siegel, 'Transitional Justice. A Decade of Debate and Experience', 20 *Human Rights Quarterly* (1998) 431–454.
- 5 *The rule of law and transitional justice in conflict and post-conflict societies*, Report of the Secretary-General to the Security Council, UN Doc. S/2004/616, 23 August 2004.
- 6 N. Roht-Arriaza and J. Mariezcurrena, *Transitional Justice in the Twenty-First Century* (Cambridge: Cambridge University Press, 2006).

Shane Darcy, *Collective Responsibility and Accountability Under International Law* (Procedural Aspects of International Law Monograph Series; Leiden:

Transnational Publishers, 2007), i–xxvi, 398 pp. €125.00 (Hardback), ISBN 9781571053763

Shane Darcy's *Collective Responsibility and Accountability Under International Law* is a good primer on a pressing judicial problem. The book is a balanced account of one of the more controversial principles in international criminal law today, collective responsibility.

Collective Responsibility and Accountability Under International Law is the book version of the author's doctoral dissertation under the supervision of Joshua Castellino, a human rights professor at the National University of Ireland. The book is divided into two parts. Part A discusses three controversial measures that are legally circumscribed based on the principles of individual and collective responsibility (collective punishments, taking of hostages and belligerent reprisals). Part B concerns when an actor may be held responsible under international criminal law for the acts of others who violate the laws of war (conspiracy, common plan and joint criminal enterprise liability; criminal organizations; and command responsibility).

The most analytic section of the monograph is the chapter on belligerent reprisals, which Darcy defines as the 'intentional disregarding of the laws of war in response to prior unlawful actions and for the purpose of enforcing compliance' (at 145; though see the slightly different definitions at 77, 153). The author observes that while in the early twentieth century, the laws governing armed conflict were based on the principle of reciprocity, by the end of the century, the international criminal tribunals clearly expressed that minimum standards of humanitarian law had been established that operated independent of reciprocity (at 158).

What about collective punishments (e.g. reprisals) in response to acts of terrorism? Can state A undertake forceful countermeasures against state B without attributing the relevant violative behaviour to the latter? Western states, by and large, have argued that there is no prohibition to such an approach; NGOs and other states, by and large, have