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REVIEW ESSAYS

Punishing the Enemies of All Mankind

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Mark A. Drumbl, *Atrocity, Punishment, and International Law*, New York: Cambridge University Press, 2007, ISBN-13 9780521691383, 316 pp., $29.99 (pb).

1. Introduction

How do we and how should we punish perpetrators of international crimes such as war crimes, crimes against humanity, and genocide? Is it fair to hold individuals responsible for their role in manifestations of this type of collective violence? Do the punishments issued by international criminal institutions support the usual penological rationales? Do they actually attain their goals? Is the Westernized international criminal justice system the most appropriate means of dealing with mass violence, especially in non-Western countries which might have a different perception of justice? What are the alternatives? These are just some of the questions which Mark Drumbl addresses in this book.

The trials at Nuremberg and Tokyo after the Second World War marked the birth of an international criminal law regime. International criminal law deals with international crimes such as war crimes, crimes against humanity, and genocide. These crimes are manifestations of collective violence and are described by lawyers as structural or system criminality. These types of crime are furthermore usually supported by the state bureaucracy, and many state functionaries get involved. Nevertheless, individuals rather than states are held accountable. The reason is that our Western concept of criminal justice rejects collective responsibility and strongly emphasizes individual criminal responsibility. Illustrative of the rationale behind our urge to do so is the telling statement by Telford Taylor, the public prosecutor at Nuremberg, that crimes are committed by individuals and not by abstract entities.[1] The establishment of the two international criminal tribunals, for the former Yugoslavia and for Rwanda, by the Security Council in the early 1990s and the work of these two tribunals, as well as the hybrid courts and mixed tribunals[2] which have been established since, resulted in the maturation of international criminal law into a fully accepted and important body of law. The establishment of

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1 'Judgment of the Tribunal', (1947) 41 AJIL 172.

2 Hybrid and mixed courts have been established in Sierra Leone (2000), East Timor (2000), Kosovo (2000), Cambodia (2003), and Lebanon (2007).

the International Criminal Court (ICC) is a further manifestation thereof and is by many considered a landmark achievement in the fight against impunity. But while the first cases are under the investigation of the ICC it is a timely moment to take a step back and assess to what extent punitive justice as well as international criminal courts and tribunals are the most appropriate means of addressing atrocities and to analyse critically the underlying concepts of international criminal law, and this is precisely what Drumbl does in his thought-provoking book.

2. The structure and main contentions of the book

As the title of his book suggests, Drumbl studies atrocities (such as war crimes, crimes against humanity, and genocide), punishment, and international law. His main aim is both to describe and to reflect critically upon the practice of sentencing, on both a national and an international level. The main question of the book is 'whether the sentences levied by criminal justice institutions support the penological rationales' (p. 2). In the first chapter Drumbl gives an overview of the issues he deals with in the book. Chapter 2 deals with the distinction between the perpetrator of mass atrocity and the perpetrator of ordinary crime. Chapter 3 reviews the positive law of international criminal tribunals and chapter 4 describes and analyses the activities of national and local institutions in relation to sentencing. In chapter 5, 'Legal Mimicry', Drumbl critically assesses the negative consequences of the transplantation of international norms into the domestic legal order. In chapter 6 he discusses to what extent the three theoretical justifications for punishment – namely retribution, deterrence, and expressivism – are actually met when dealing with international crimes. Drumbl's main contentions are that the perpetrator of international crimes is a different type of perpetrator compared with the perpetrator of ordinary crime, but that international criminal law nevertheless is modelled on national criminal law systems which have been developed to deal with ordinary, common crime. International criminal law has been developed without first developing a thorough criminology of mass violence, and that is probably the main reason why the practice of international criminal justice falls short of achieving the goals that international criminal law ascribed to punishment. Unfortunately national systems mimic the international system and consequently show similar flaws while simultaneously overriding contextual approaches which might better fit the nature of the crimes and the demands from the victimized society. In chapter 7 Drumbl suggests two reforms, a vertical one and a horizontal one. His main contention is that bottom-up approaches – which might include restorative, reparative, and reintegrative traditions and thus advance from law to justice – are to be welcomed. The last (short) chapter is dedicated to examining some immediate implications relating to legal institutions and jurisprudence and to political institutions and behaviour. Drumbl, in short, takes a very critical stance towards international criminal law but does not fully reject it. International criminal prosecution should, however, only be used as a last resort and should operate concurrently within a 'multilayered and diverse array of initiatives . . . which promote accountability' (p. 205). To be more effective international criminal law should,

furthermore, be better tailored to deal with international crimes and their perpetrators by taking their true and distinctive nature into account.

The overriding part of this review will deal with the core elements of Drumbl's critique of international criminal law, as this is the most innovative part of the book.

3. Fundamental issues and paradoxes of international criminal law

International criminal law has to deal with several paradoxes and fundamental issues. The first paradox is that international crimes are considered the worst crimes possible: genocide, for example, is referred to as 'the crime of all crimes' and its perpetrators are consequently considered *hostes humanis generis* – enemies of all mankind. The crimes are often so atrocious and gruesome that they go beyond human imagination. Yet the almost universal outcome of scholarly research is that most perpetrators of these crimes are just ordinary people, people who are not mentally deranged or retarded and who have no explicit sadistic tendencies. Those who do have a violent past, sadistic tendencies, or a criminal record are in the minority.[3] With the exception of such political leaders and criminal masterminds as Hitler, Stalin, and Saddam Hussein,[4] most perpetrators of international crimes are ordinary people in extraordinary circumstances, who have been gradually transformed into perpetrators through submission to an authoritarian leader, a genocidal ideology, or an oppressive regime, to name just a few examples. International criminal law has thus to deal with the paradox that many of the perpetrators who are considered to be the enemies of all mankind are, to quote Hannah Arendt, 'terribly and terrifyingly normal'.[5]

A second paradox with which international criminal law has to deal is that it aims to hold *individuals* responsible on the basis of the concept of individual criminal responsibility for crimes which are clear and explicit manifestations of *collective* violence. International crimes are group crimes par excellence, and in order to understand how and why people commit such atrocious crimes as, for example, genocide we need to take the full context and the explicit collective nature of these crimes into account. Many criminal law systems, however, reject the notion of collective responsibility. What we demand of our criminal law systems is to prosecute and punish the individual perpetrators and to convict them on the basis of individual criminal responsibility; how can we disentangle individual from collective responsibility in crimes which are so particularly collective in nature?

A third fundamental paradox is that the concepts used in international criminal law are derived from national criminal law systems; these systems were designed

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3 In some cases it is known that criminal organizations and known criminals have become involved in the war, such as 'Arkan' (Željko Ražnatović) in the Yugoslavian war. In some cases private security organizations have become involved in crimes, such as the US company Blackwater in Iraq. J. Scahill, *Blackwater, the Rise of the World's Most Powerful Mercenary Army* (2007). Sometimes the state even uses former criminals deliberately, to conduct their dirty work. See, e.g., G. Prunier, *Darfur: The Ambiguous Genocide* (2005), 79.

4 See on Hitler and Stalin E. Fromm, *The Anatomy of Human Destructiveness* (1973); and for leaders in general, J. M. Post, *Leaders and Their Followers in a Dangerous World: The Psychology of Political Behavior* (2004).

5 H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1964), 276.

to deal with deviant individuals, whereas international criminal law has to deal with obedient masses, and thus with a completely different type of criminality and a completely different type of perpetrator. Criminal law aims to punish those who disobey the law, who break the rules, who act in deviance from overriding social norms and values. Perpetrators of international crimes violate international rules but often act in conformity with the social norms and values which are prevalent in that particular state at that particular time. One may therefore wonder whether the same concepts which are used to deal with ordinary crimes and ordinary criminals can be used to deal with international crimes and the perpetrators thereof. Should not international criminal law develop its own concepts designed to deal with this type of criminality and these types of criminals?

Another fundamental issue – rather than a paradox – relates to the question whether (international) *criminal* law is the most appropriate means of dealing with international crimes. Given the different nature of international crimes as described above, one may wonder whether the ordinary rationales for criminal law, such as, first and foremost, retribution and deterrence, are effective and appropriate means of dealing with international crimes.

4. Ordinary people and extraordinary evil

International crimes such as war crimes, crimes against humanity, and genocide are so atrocious and their consequences so extreme that they can in the true sense of the word be considered crimes against *humanity*, crimes against *mankind*. The UN Security Council has, on behalf of the international community, recognized the extreme consequences of these types of crime, and has on several occasions qualified widespread and systematic gross human rights violations, including international crimes, as a threat to international peace and security.[6] Qualifying a particular situation as such entitles the Security Council to take measures on the basis of Chapter VII of the UN Charter to maintain or restore the peace.[7] The Security Council used these powers to create the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) and gave them primary jurisdiction, thus overriding state sovereignty. The rationale behind these measures is that given the nature of international crimes the entire international community has the right and even moral duty to prosecute these crimes.[8] No state may provide a safe haven for the perpetrators of such crimes, because the crimes are of concern to each and every individual state, even if the crimes

6 See for the first instance UN Doc. S/RES/1078 (1996) of 9 November 1996. See for an extensive discussion of this development F. Grünfeld, 'Human Rights Violations: A Threat to International Peace and Security', in M. Castermans, F. van Hoof, and J. Smith (eds.), *The Role of the Nation-State in the 21st Century* (1998).

7 See Art. 39 of the UN Charter, which reads as follows: 'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.'

8 In practice few states actually prosecute perpetrators who committed international crimes in other states, but this does not change the common and universal acceptance of the possibility and moral duty of doing so.

are not directed towards this state in particular. This had already been recognized in, for example, the Geneva Conventions (1948), which all have an 'extradite or prosecute' provision, and is furthermore recognized in the general obligation of states to co-operate with the international criminal tribunals at their request.

Many of the atrocities committed are beyond our scope of imagination. Can we ever really grasp what it is like when 800,000 people are killed in 90 days, as was the case in Rwanda? The same goes for the industrialized extermination of an entire people. We know all about the bureaucratized mass murder of the Jews during the Holocaust: the clear plans, the huge organization, and all the protocols to run the operation smoothly. We all know what happened in Auschwitz, Birkenau, Treblinka, and all the other camps, and yet it is completely insane. The scope of suffering is simply too enormous, too disturbing, too threatening to really grasp. Confronted with mass atrocity we tend to react by putting ourselves in a state of denial and thus try to preserve a feeling a safety in an utterly unsafe and unfair world.[9] People generally do not want to acknowledge that they too can become the victims or the perpetrators of such atrocities. After the Second World War, for example, many scholars tried to prove the so-called 'mad Nazi' thesis.[10] They desperately tried to prove that the perpetrators of the Holocaust were not normal and average people. Psychiatrists who studied the Rorschach tests[11] of the defendants in Nuremberg after the Second World War even refused to acknowledge their own results, which showed that the defendants were perfectly normal.[12] We desperately want to believe that the perpetrators of such extreme crimes are different from us, but many of those who have tried to prove this failed, to their own frustration. 'More normal, at any rate, than I am after examining him', reads the illustrative and telling quote from one of several psychiatrists who tested Eichmann as normal.[13] Arendt witnessed Eichmann's trial in Jerusalem and described how Eichmann, whom everyone expected to be a monster, turned out to be nothing more than a pathetic little man. Arendt's treatise on the 'banality of evil' was, however, heavily criticized at the time. Although many scholars now accept her thesis, even today some scholars devote their scholarly life to showing that Arendt was wrong. The message that ordinary people can become involved in extraordinary evil is, although almost universally recognized, still extremely unpopular. It is a lot easier and more comforting to point an accusing finger at the perpetrators and exclaim, 'they are the ones who did it; they are the culprits', rather than acknowledging that – in particular circumstances – it could be us. It is not surprising that Goldhagen's book, *Hitler's Willing Executioners*, in which he stressed that specific features in the German character made Germans more prone to follow someone like Hitler and to commit genocide on the Jews, is more popular than Browning's *Ordinary Men*, in which the author focused on the social dynamics that

9 S. Cohen, *States of Denial: Knowing about Atrocities and Suffering* (2001), 1.
10 For an overview see J. Waller, *Becoming Evil: How Ordinary People Commit Genocide and Mass Killings* (2007), 55–87.
11 The Rorschach test is a method of psychological evaluation using inkblots to examine personality characteristics and emotional functioning.
12 See Waller, *supra* note 10, at 63–4.
13 See Arendt, *supra* note 5, at 25.

can turn almost anyone into a perpetrator.[14] The late Holocaust scholar Raul Hilberg, one of the first to show how ordinary people can come to commit extraordinary evil, said that people would probably be happier if he had been able to prove that all perpetrators were crazy.[15] But this is not the case. Most perpetrators are just like Eichmann, 'terribly and terrifyingly normal'. And international criminal law has to deal with this, the acknowledgment that most enemies of all mankind are 'terribly and terrifyingly normal'.

5. A DIFFERENT TYPE OF PERPETRATOR?

In his book Drumbl stresses that 'the perpetrator of mass atrocity fundamentally differs from the perpetrator of ordinary crime' (p. 8). His assertion that we deal with a different type of perpetrator is crucial to his line of argument and leads him to conclude that the practice of international law falls short of achieving its aim (p. 187). In the following paragraphs I shall assess whether his contention is substantiated by findings from social science literature. In doing so I shall distinguish two features of international crimes and their perpetrators which stand out when they are compared with ordinary crime and ordinary criminals: the collective nature of the crimes and the involvement of the state in the crimes. I shall discuss these two characteristics separately.

5.1. Collective violence

International crimes are a form of collective violence. Drumbl states that 'collective violence cannot be rigorously analyzed without considering the effects of the collective on the individual' (p. 35). In this assertion he is absolutely right. International crimes are manifestations of collective violence and we can only truly understand the causes of international crimes if we take the effect of groups on individuals into account. Man is a social animal: he naturally bonds with others and looks for the comfort of a group.[16] To quote Gupta, 'Forming groups is rooted deep in the human psyche.'[17] Human beings feel a natural urge to bond and to belong to a group, and to a certain extent derive their identity from this group.[18] Gupta submits that unless we recognize that human motivations are the products of dual identities – individual and collective – we will fail to understand human beings as social animals.'[19] Groups strongly influence our behaviour and even our judgement. Social processes within a group not only result in the pressure to conform but group members often desperately *want* to belong and thus want to comply. They are afraid and scared

14 D. J. Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* (1996); and C. R. Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (1992).
15 Z. Baumann, *Modernity and the Holocaust* (1989), 83.
16 See also the telling title of Aronson's handbook on social-psychology: E. Aronson, *The Social Animal* (2004).
17 D. K. Gupta, *Path to Collective Madness: A Study in Social Order and Political Pathology* (2001), 73.
18 See the social identity theory of Tajfel and Turner with the unfortunate result that people tend to identify themselves as distinctive from the other. H. Tajfel and J. Turner, 'The Social Identity Theory of Intergroup Behaviour', (1986) *Annual Review of Psychology* 1.
19 Gupta, *supra* note 17, at 72.

to be left out, to be rejected.[20] Peer pressure and the strong urge to belong even lead to an internalization of the norms and values of the group and sometimes to changes in privately held beliefs.[21] In their eagerness to belong, group members are not always aware of these gradual but sometimes crucial changes. In their book on group processes Baron and Kerr state that 'this process can produce a "one step at the time" pattern of escalating commitment in which initial compliance triggers private beliefs change, which then leaves the indoctrinee susceptible to even more extreme requests from the group'.[22] The attitude changes are furthermore reinforced by a phenomenon called 'cognitive dissonance' which explains how, why, and under what circumstances individuals adapt their views and attitudes. Cognitive dissonance refers to a nagging feeling of distress when people act in a way which is opposed to their beliefs or attitudes.[23] It is a natural tendency to have a positive self-image and to reduce cognitive dissonance whenever it occurs. The consequence is that people start to rationalize and justify what they have done whenever they become involved in things of which they would usually not approve. In relation to groups people can come to change their beliefs unconsciously in order to become a full member of the group. Internal group mechanisms might even lead to a polarization of the group and initiate a 'subtle competition among group participants to be at least above average' in terms of their adherence to the group norm.[24] The consequence thereof is that within groups individuals tend to show far more extreme behaviour than when on their own.[25] This can have very positive but also very negative consequences. Individuals who submit their individual identity to a collective identity can ultimately be 'swept away by the forces of collective madness' and get involved in genocide.[26] The effect of groups on individuals may explain why most crimes, even common crimes, are committed in groups rather than by individuals. Criminal conduct is primarily group behaviour, which led Warr to conclude that 'criminal conduct is predominantly social behaviour'[27] and that it is learned social behaviour, a proposition which is in line with Sutherland's social learning theory.[28] When studying international crimes and when judging their perpetrators we have to take the effect of the group on the individual into account, because international crimes are forms of group behaviour par excellence.

International crimes are not merely forms and manifestations of group crime; they are also manifestations of political violence.[29] Harff, for example, has found empirical evidence to show that genocide is often preceded by a period of political turmoil,[30] and Melson found a significant correlation between revolutions and

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20 E. Fromm, *The Fear of Freedom* (1942).
21 R. S. Baron and N. L. Kerr, *Group Process, Group Decision, Group Action* (2003), 110.
22 Ibid.
23 See L. Festinger, *A Theory on Cognitive Dissonance* (1957).
24 Baron and Kerr, *supra* note 21, at 99.
25 Ibid., at 93.
26 Gupta, *supra* note 17, at 73. See also N. J. Kressel, *Mass Hate: The Global Rise of Genocide and Terror* (1996).
27 M. Warr, *Companions in Crime: The Social Aspects of Criminal Conduct* (2002), 3.
28 E. H. Sutherland, *Criminology* (1947).
29 Political violence can be defined as violence aimed at gaining or maintaining political power.
30 B. Harff, 'No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder since 1955', (2003) 97 *American Political Science Review* 57.

genocide.[31] Within a period of great uncertainty individuals tend to hold on to a certain group identity and feel a strong urge to stick together and take action. Political entrepreneurs can take advantage of this and try to gain support by providing a doctrine and an ideology, a vision and a programme on how to create a better world. One of the most effective bonding mechanisms within groups is, unfortunately, to have a common enemy. Political entrepreneurs can take advantage of this by creating such a common enemy. It is furthermore psychologically comforting if this enemy (rather than oneself) can be blamed for the misfortune of the masses.[32] This happened to the Jews in Nazi Germany, the intellectuals in Cambodia, and the Tutsi in Rwanda. The targeted group is usually a privileged minority; state-supported ideologies play an important role in rationalizing and justifying the violence used. People who follow the flow come to believe in these ideologies. Group dynamics and their underlying social mechanisms can ultimately cause groups to engage in atrocities, can cause a mass to turn into a dangerous and murderous collective.

This collective nature in itself is not, however, what fundamentally differentiates perpetrators of ordinary crimes from perpetrators of international crimes. Criminal conduct is a social phenomenon, many ordinary crimes are committed by a group of people, and many of the above mentioned phenomena are very familiar to organizational criminologists and others who study other forms of crime, such as football hooliganism or organized crime, to name just two examples. In relation to the collective nature of crime the difference is a difference in degree rather than in kind, between group delinquency, organized crime, and collective violence. The crucial distinction between ordinary crimes and international crimes is, however, that it is more than merely a manifestation of collective violence; it is usually also a manifestation of *state-sanctioned* collective violence.[33] It is this differentiation that distinguished ordinary perpetrators from perpetrators of international crimes, because perpetrators of state-sanctioned crimes commit so-called crimes of obedience.

5.2. Crimes of obedience

Ordinary criminals, such as shoplifters, thieves, child abusers, and rapists, are deviant and break the law. Whether alone or within a group or organization, they act in contravention to the ruling social norms and values. Perpetrators of international crimes, on the other hand, operate within a very particular political, ideological, and institutional context which sanctions and legitimizes violence. This might be a context of systematic and structural mass violence, an oppressive regime, or a government or militaristic organization which bends the rules beyond the limits in order to defend national security. Many perpetrators of international crimes commit so-called crimes of obedience: they abide by the law, follow the law and the chain of command, and precisely because they do so get involved in international crimes. Crimes of obedience can be defined as acts 'performed in response to orders from

31 R. F. Melson, *Revolution and Genocide: On the Origins of the Armenian Genocide and the Holocaust* (1992).
32 E. Staub, *The Roots of Evil: The Origins of Genocide and Other Group Violence* (1989).
33 International crimes are usually committed and supported by states or state organs, but according to the law this is not an absolute requirement: non-state actors can also be responsible for international crimes and sometimes they indeed are.

authority that are considered illegal or immoral by the international community'.[34] For a crime to be qualified as a crime of obedience it is not necessary that the actual crime is committed following a direct order. What is crucial is that the crime, in the perception of the perpetrators, is authorized or condoned by the authorities. In other words a crime should be qualified as a crime of obedience when it is supported by the authority structure. It is a crime of obedience when 'perpetrators believe and have reason to believe that the action is authorized, expected, at least tolerated, and probably approved by the authorities – that it conforms with official policy and reflects what their superiors would want them to do'.[35] Many decent and law-abiding citizens can get caught up in a malignant system just by following orders, just by going along.[36] Drumbl notes that 'the state urges the violence and can even go so far as to sanction nonparticipation' (p. 33). Because the crimes are justified by political rhetoric and specific ideologies and are authorized by the state, many perpetrators genuinely believe that what they are doing is good. In his book Drumbl (p. 1) refers to a young man who during the genocide in Rwanda 'mechanically levelled a church with two thousand Tutsi trapped inside', killing many of them, and then 'calmly asked the priests for the promised compensation for the public service he had provided'. This is not a unique but rather an illustrative and typical example of how many perpetrators of international crimes come to view their own acts. Perpetrators of international crimes can thus be considered norm-abiding criminals and some, as for example in Nazi Germany and in South Africa under the apartheid regime, even as law-abiding criminals.[37] Norm-abiding criminals obey authority, obey hierarchical structures and the social norms supported by society and the state, whereas law-abiding criminals in addition obey the law which supports the crimes.

Criminologists who study perpetrators of ordinary crimes focus on the questions of why the perpetrators break the law and why they behave in a manner that deviates from the prevailing social norms and values. These types of question are central to criminological theorizing. Hirshi's control theory, for example, states that people commit crimes when their bonds to society are weakened.[38] Drumbl, however, correctly asserts that 'the killer in contexts of mass atrocity . . . often exhibits a very strong bond with both state and society' (p. 33). The very reason why certain people committed international crimes is because they adapted to the – at the time – overriding ideology which justified violence and violations. Drumbl rightly notes that 'this ability to fit in suggests something curious, and deeply disquieting about atrocity perpetrators: namely, . . . their easy integration into a new set of social norms' (p. 8). One of the most explicit characteristics of perpetrators of international crimes

34 H. C. Kelman and V. L. Hamilton, *Crimes of Obedience* (1989), 46.
35 H. C. Kelman, 'The Policy Context of Torture: A Social-Psychological Analysis', (2005) 87 *International Review of the Red Cross* 123, at 126.
36 See Arendt, *supra* note 5; and M. Osiel, *Mass Atrocity, Ordinary Evil, and Hannah Arendt: Criminal Consciousness in Argentina's Dirty War* (2001).
37 Cf. A. Smeulers, 'Perpetrators of International Crimes: Towards a Typology', in A. Smeulers and R. H. Haveman (eds.), *Supranational Criminology: Towards a Criminology of International Crimes* (2008).
38 T. Hirschi, *Causes of Delinquency* (1969).

is that they easily adapt to social norms and in that sense they differ fundamentally from the ordinary criminal, who is deviant and non-conforming.

Within specific circumstances ordinary law-abiding human beings can gradually be transformed into perpetrators.[39] In the literature many case studies have been presented, as have the many factors which play a role in this transformation process: several defence mechanisms and coping strategies which can turn into psychological traps have been identified.[40] In his book Drumbl refers to many important scholarly works on this issue and shows himself to be familiar with their most important findings. His arguments and main conclusions can be considered to be fully substantiated by scholarly work on genocide and other international crimes. They are, however, a departure from some of the more traditional theories within social science that human nature results from motives arising at the individual level. And it is a departure from the very foundation of criminal law, in which man is primarily considered to be an individual agent. Drumbl is one of the very few legal authors who acknowledge that individual agency might be subsumed into a kind of collective agency, and thus he challenges the very foundations of criminal law.[41] In contrast to most legal scholars, Drumbl furthermore accepts that perpetrators of international crimes can genuinely come to believe that they are doing right.

Not all perpetrators fit the profile of the so-called law-abiding criminal. Perpetrators of international crimes can be driven by many different motives, such as ideology, greed, or fear. It is even possible to distinguish various types of perpetrator such as the criminal mastermind, the careerist, the devoted warrior, the profiteer, and the criminal, to name just a few.[42] Not all perpetrators are the same and some certainly are driven by personal profit, sadism, or criminal intentions, and only adapt because it is profitable to do so. These perpetrators are not fundamentally different from those who commit ordinary crimes. The point is that the environment in which perpetrators of international crimes operate seems to approve the crimes, and that is a decisive factor which turns many more people, even otherwise law-abiding people, into perpetrators. The following quote from Eichmann is telling and illustrative: 'Despite conscientious self-examination, I have to conclude in my own defence that I was neither a murderer nor a mass murderer . . . I carried out with a clear conscience and faithful heart the duty imposed upon me. I was always a good German, I am today a good German and shall always be a good German!'[43] It is, however, equally telling that he several times stressed that he 'could see no one, no one at all who disagreed with the Final Solution'.[44] We can thus conclude that the

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39 A. Smeulers, 'What Transforms Ordinary People into Gross Human Rights Violators?', in S. Carey and S. Poe (eds.), *Understanding Human Rights Violations: New Systematic Studies* (2004), 239; and Waller, *supra* note 10.

40 E.g. Kelman and Hamilton, *supra* note 34; Staub, *supra* note 32; R. J. Lifton, *Nazi Doctors: Medical Killing and the Psychology of Genocide* (1988); but see also the experiments by Milgram and by Zimbardo et al.: S. Milgram, *Obedience to Authority* (1974); and P. G. Zimbardo, C. Haney, W. Curtis Banks, and D. Jaffe, 'The Psychology of Imprisonment: Privation, Power, and Pathology', in R. Zick (ed.), *Doing unto Others* (1974), 61–73, and the literature on social-psychology and defence mechanisms such as Festinger, *supra* note 23.

41 See also, however, M. Osiel, 'The Banality of Good: Aligning Incentives against Mass Atrocity', (2005) 105 *Columbia Law Review* 1751.

42 See more extensively on a typology of perpetrators Smeulers, *supra* note 37.

43 P. Z. Malkin and H. Stein, *Eichmann in My Hands* (1990), 82.

44 Arendt, *supra* note 5, at 116.

crime's collective nature in combination with the involvement of the state, leads many perpetrators to believe that what they are doing is the right thing.

6. Collective violence, individual criminal responsibility, and the myth of collective innocence

The question is, how can we judge the blameworthiness of individuals if they are so much part of a group and genuinely believe that they are doing the right thing? Can we really punish individuals if their behaviour can only be understood by focusing on their collective (and conformist) identity rather than on their individual (and deviant) identity?[45] Can we really blame them if they act and behave in such a way as ordinary and average people in similar circumstances would do? If we have to conclude that probably all of us would have acted and reacted in the same way within these circumstances, is it fair to punish those who were exposed to these circumstances? Drumbl states that he does not wish to enter a 'debate on whether collective pressures eviscerate moral choice and free will, and instead substitute determinism'. Rather, he states that he wants to make 'more modest use of Milgram's findings to argue that collectivization, diffusion, and conformity whittle down the scope of individual choice and, accordingly, create group phenomena that intersect brusquely with legal systems based on the primacy of individual agency' (p. 31). It is not the mere fact that it might be very difficult to attribute individual blame for these types of crime, especially if we take into account that people came to behave that way precisely *because* they acted within a collective. An even bigger problem is that sticking to the notion of individual criminal responsibility and rejecting the notion of collective responsibility creates the myth of collective innocence. This myth downplays the role of many people who played minor roles or stood idly by. By prosecuting and convicting only a few, others seem to be absolved from blame. We should, however, never underestimate the influence of those who stand by or play seemingly small, but often indispensable, roles. Bystanders, for example, seem uninvolved but can have a significant effect on the perpetrators. If bystanders do not react to atrocity they then encourage the perpetrators to continue, since the perpetrators will qualify bystanders' inaction as tacit approval. If bystanders stand idly by, perpetrators are reinforced in their belief that what they are doing is good and justified. Bystanders are therefore important and can be considered the crucial third party in the so-called atrocity triangle, consisting of perpetrators, victims, and bystanders.

Drumbl quotes the ICTY trial chamber in the *Nikolić* case, which stated, 'by holding individuals responsible for the crimes committed, it was hoped . . . that the guilt of the few would not be shifted to the innocent'. But one may wonder who the innocent were. By declaring only a few to be guilty the chamber made a crucial mistake, according to Drumbl: 'it played to a wishful construction of atrocity rather than the bitter reality of atrocity'. Mass violence involves many more people

45 See also Drumbl's award-winning article on this issue in 2005: M. A. Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity', (2005) 99 *Northwestern University Law Review* 539.

than just the few who have committed the most atrocious crimes and can be held criminally responsible. In relation to this point Drumbl is harsh in his criticism and has reason to be so critical: 'the implementation of international criminal law is characterized by the fact that it fails to hold accountable the full array of people who individually are responsible for the collectivization of atrocity' (p. 37). In Drumbl's eyes it is troubling that the international community sticks to these 'fictionalized notions of individual agency' (p. 41) rather than capturing responsible groups. Drumbl acknowledges that the ICTY has developed the concept of joint criminal enterprise (JCE), which is a departure from the classical understanding of individual agency. The wide controversy over this concept, which is sometimes ridiculed as being a synonym for 'just convict everyone', is according to Drumbl more telling than the actual departure from individual agency.[46] Besides, it will still only hold a handful of people responsible rather than the broad supporting layers of the society concerned. Despite these developing concepts, international criminal tribunals still primarily address individuals rather than culpable groups. The consequence is that – to quote Balint – 'the particular dimensions of international crime are inadequately addressed'.[47]

There are several reasons why the international community sticks to individual criminal responsibility when attributing blame for collective violence. Drumbl enlists the following reasons: 'search for simplicity; a good faith belief that individualized guilt simply is the most effective and practical response to mass crimes . . . absolving the many might be more conducive to the grand project of social healing' (p. 41). The myth of collective innocence can serve important political purposes: 'In the process of attributing guilt it pulls our gaze away from the many other actors involved in the tapestry of atrocity – including malfeasant, complicit, or distracted states and their officials along with decision makers in international organizations' (p. 173). In doing so the international community will, however, 'do little to root out atrocity's multicausal origins' (p. 173). The need to select challenges the very concept of fair justice and retribution.[48] In order to achieve some kind of reconciliation it is crucial to acknowledge that many people were involved in the crimes. Drumbl calls for a liability scheme in which 'tort, contract and restitution can promote different goals – such as restoration, reconciliation and reparation' (p. 195). Drumbl further proposes a broad 'integration of extrajudicial and extralegal modalities such as truth commissions, legislated reparations, public inquiries, lustration, the politics of commemoration, redistributing wealth, and fostering constitutional guarantees that structurally curb the concentration of power' (p. 196).

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46 See for a series of articles on this concept *Journal of International Criminal Justice* (2007) 5 (1). See also Osiel, *supra* note 41.

47 J. Balint, 'Dealing with International Crimes: Towards a Conceptual Model of Accountability and Justice', in Smeulers and Haveman, *supra* note 37. See also the criticism by M. Mamdani, 'Reconciliation without Justice', (1996) 46 *South African Review of Books* 3, who according to Wilson 'bitterly criticized the TRC for avoiding the issue of the beneficiaries of apartheid, and the commission's inability to see apartheid as a system'. See R. A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-apartheid State* (2001), 35.

48 J. E. Alvarez, 'Crimes of States/Crimes of Hate: Lessons from Rwanda', (1999) 24 *Yale Journal of International Law* 365, at 482.

Drumbl aims to move away from criminal responsibility and to achieve collective responsibility rather than collective guilt (p. 197). He suggests that collective responsibility might also have a deterrent effect, because it would give bystanders an incentive to interfere: '[t]he threat of collective sanction' might result in group members policing each other and 'may activate group members to marginalize the conduct of conflict entrepreneurs' (pp. 202–3). I doubt whether this would really play a role. To me the fact that collective responsibility matches better the collective nature of the crime is crucial. Alvarez, who studied the question of whether the Rwandan genocide was a crime of state or a crime of hate, concluded: 'An approach to criminal accountability that acknowledges that these are crimes of hate as well as of states may also help redefine the kind of national reconciliation that we are seeking to achieve within societies devastated by mass atrocities.'[49] I fully agree: if the establishment of individual criminal responsibility inherently entails a rejection of collective responsibility and thus creates a myth of collective innocence, then international criminal law misses its point.

7. Sentencing

Needless to say, when it is extremely difficult to attribute blame to individuals who operate within a collective it is equally difficult to decide on an appropriate sentence. The statutes of the international criminal tribunals and of the International Criminal Court give only limited guidelines to the magnitude of the sentence. Article 24 of the ICTY Statute reads as follows: 'In imposing sentences the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.' Article 78 of the ICC Statute has a similar wording. Article 145 of the Rules of Procedure and Evidence of the ICC states that the sentence 'must reflect the culpability of the convicted person'. The rule also enumerates the following factors which ought to be taken into account: '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'; other influential factors are related to the degree of participation and intent, the circumstances of the case, and personal circumstances. These circumstances can be either of an aggravating or of a mitigating nature.

In his book Drumbl enumerates all the mitigating and aggravating circumstances which can be derived from the case law (p. 64). However, judges are still faced with many difficult dilemmas in which mitigating and aggravating circumstances exist simultaneously and are diametrically opposed. The type and gravity of the crime might warrant an extreme sentence, whereas the type of perpetrator and the conditions in which he carries out the crime warrant a low sentence. In other words: heinous crimes of great magnitude justify a severe penalty, but the perpetrators are – in many cases – merely ordinary people who commit crimes of obedience in an environment which tends to support these crimes. The fact that they got involved

49 Ibid.

can be explained by the fact that they found themselves in an atrocity-producing situation rather than by their individual wickedness. Another difficult question is: who deserves the highest sentence: the leader with the ideas, the bureaucrat who plans and organizes the execution of the policies, the superiors who pass on the orders, or the rank-and-file soldiers and policemen who pull the trigger? In his book Drumbl distinguishes the conflict entrepreneurs, the mid-level officials, the actual killers, and the bystanders (p. 25): 'these groups represent descending levels of moral blameworthiness for atrocity. In other words, conflict entrepreneurs are the most culpable according to standards adopted by traditional criminal law, namely intentionality of action. They are followed by the leaders and killers, then by those who assist atrocity, those who benefit from it, and lastly those who draw their blinds and look away' (p. 25). The problem, however, is that the higher the rank of an individual the further he is distanced from the actual crimes and the more difficult it will be to prove his involvement. Another dilemma is that, unlike the international community, victims sometimes do not care about the leaders. They want to have the physical perpetrators behind bars. They were the ones who raped and tortured them or who killed their loved ones. Actual levels of responsibility and blameworthiness might not coincide with the general perception of victims as to the question of who is to be blamed most, and in order to achieve reconciliation the victims and the victimized community do matter more than the sensitivities of the international community.

7.1. The purpose of sentencing

In chapters 3 and 4 of his book Drumbl compares the sentencing practices of the international criminal tribunals with the sentencing practices of national and local institutions when dealing with mass atrocity. In his book Drumbl has particularly focused on Rwanda, the former Yugoslavia, and the courts which dealt with crimes committed during the Second World War. Drumbl concludes that

> [P]enological rationales and modalities of sanction are more diverse at the national and local levels than they are internationally. However by and large sentencing is an afterthought and poorly conceptualized. Retribution remains a consistent goal, although national and local punishing institutions experience considerable difficulty in operationalizing enhanced retribution to accord atrocity perpetrators their comeuppance. Aggravating and mitigating factors derive from those applicable to ordinary common criminals. There are trends to consider certain factors in a typology of aggravation and mitigation, but recourse to these factors in actual cases is unpredictable and obscured by significant discretion. (p. 121)

Courts and tribunals have stressed that the three main functions of sentencing perpetrators of international crimes are retribution, deterrence, and expressivism (p. 206). The main idea behind the retributive theory is that the perpetrator receives a sentence which is just in relation to the gravity of the crime and the blameworthiness of the individual. One may wonder, however, whether a sentence for genocide can ever be just. From his empirical research Drumbl concludes that the sentences given for these type of crimes are not usually in any way heavier than the sentences given for serious ordinary common crimes (p. 154). In some countries the heaviest

sentence for murder is life imprisonment or even the death penalty. How long should a sentence for ten, a hundred or complicity in even a thousand murders be? I fully agree with Drumbl that 'The gravity of atrocity crimes can quickly become overwhelming – so much so that, from a retributive perspective, gravity becomes unintelligible and immeasurable' (p. 156). Drumbl is not the only one to raise this issue. In his book *Stay the Hand of Vengeance*, Bass concludes: 'There is no such thing as appropriate punishment for the massacre at Srebrenica or Djakovica; only the depth of our legalist ideology makes it seem so.'[50] Bass furthermore quotes a letter from Hannah Arendt to Karl Jasper, in which she wrote, 'For these crimes, no punishment is severe enough. It may well be essential to hang Göring, but it is totally inadequate. That is, this guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems. That is the reason why the Nazis in Nuremberg are so smug'.[51] From a retributive perspective sentencing will always be inadequate.

The rationale behind deterrence is that those who have already committed crimes will be prevented from committing any further crimes by incarcerating them (special prevention) and that future criminals will be deterred from committing crimes because of the punishments they might get (general prevention). Empirical research has, however, shown that it is not the severity of the punishment but rather the likelihood of getting caught that is far more likely to influence and deter future perpetrators.[52] The percentage of perpetrators of international crimes who are actually caught and convicted and have to serve their sentences is extremely small. International criminal law thus has very little deterrence value. This line of argument seems to be supported by the fact that some of the worst violations, such as the massacre in Srebrenica in which over 7.000 Muslim men were killed, occurred in July 1995 – two years after the UN Security Council resolution establishing the ICTY was passed. Drumbl concludes,

> At first blush, it seems plausible that creating new institutions might go some way to augment deterrence. However, I remain unconvinced that, fundamentally, the existence of more liberal legalist punishing institutions would effectively deter committed extraordinary international criminals. This is because deterrence's assumption of a certain degree of perpetrator rationality, which is grounded in liberalism's treatment of the ordinary common criminal, seems particularly ill fitting for those who perpetrate atrocity. This assumption already is hotly debated within the context of isolated common crime. However, its viability already is even more problematic in the context of the chaos of massive violence, incendiary propaganda, and upended social order that contours atrocity. (p. 171)

We furthermore should keep in mind that most perpetrators of international crimes commit so-called crimes of obedience and are convinced that they are doing the right thing. Punishment for extreme crimes will not deter them because they will never realize that it could affect them.

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50 G. J. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (2000), 13.

51 Ibid., at 13.

52 R. Paternoster, 'The Deterrent Effect of the Perceived Certainty and Severity of Punishment: A Review of the Evidence and Issues' (1987) *Justice Quarterly* 173; C. R. Tittle, *Sanctions and Social Deviance, the Question of Deterrence* (1980).

Drumbl concludes that 'although these modalities go some way to meet retributive and deterrent goals, they fall well short of operationalizing these goals in any meaningful sense' (p. 149). From the perspective of the perpetrator his assessments seems fully adequate. Drumbl believes, however, that expressivism, the third rationale, has some value in relation to both prosecuting and punishing extraordinary crime. Expressivism 'affirms respect for the law, reinforces a moral consensus, narrates history, and educates the public' (p. 12). It is considered to be a function and goal in international sentencing, but less so in national sentencing. The challenges faced by the criminal process in relation to truth-telling is the challenge of selective truth. Criminal trials focus on what Drumbl calls logical and microscopic truth and what could also be called the 'legal truth'. It is a truth which will only be admitted if it meets high evidentiary standards. While this 'truth' can be considered very reliable, much 'truth' that does not meet these standards will not be recognized as such. In relation to expressivism Drumbl concludes, 'I believe that they [liberal criminal trials] are capable of such a function, although I certainly recognize that alternate forms of accountability may have equivalent or even enhanced truth-telling capacity' (p. 176). An example thereof is the South African Truth and Reconciliation Commission (TRC). In its report the TRC recognizes four forms of truth: (i) factual or forensic truth; (ii) personal and narrative truth; (iii) social or dialogue truth; (iv) healing and restorative truth.[53] These 'truths' might not all meet high evidentiary standards and are therefore to some extent debatable, but they might better serve the needs of a society which has to deal with the past in order to move on.

Expressivism thus seems to have an important function in international criminal law, but it all depends on the way in which trials are conducted. In some states the perpetrators are shielded from prosecution and crimes are left unresolved. Lieutenant Calley, responsible for the 1968 mass murder in My Lai of up to 500 unarmed Vietnamese civilians, was the only officer successfully prosecuted, but he ultimately served only three years' house arrest.[54] Another danger is that the urge to set the historical record straight becomes the foremost aim of the trial, overriding other aims. In his book *Crimes of the Holocaust*, Stephan Landsman concludes that criminal trials of major war criminals have two major aims, namely historical truth-telling and attributing individual criminal responsibility.[55] These aims are not easily reconciled, however, and can easily lead to an unwanted outcome. In the Eichmann trial, for example, it was clear, according to Landsman, 'that the State of Israel was determined to conduct a trial that would teach the world about the Holocaust'.[56] The consequence was that 'the trial required the presentation of great masses of evidence that had nothing to do with Eichmann'.[57] The judges in the *Demjanjuk* case were also so preoccupied with these aims that they disregarded evidence which related to the most important question of the whole case, namely whether the man in the dock really was the sadistic camp guard nicknamed 'Ivan the Terrible'. Landsman

53 *Truth and Reconciliation Commission of South Africa Report*, Vol. 1 (1998).
54 M. Bilton and K. Sim, *Four Hours in My Lai: A War Crime and Its Aftermath* (1992).
55 S. Landsman, *Crimes of the Holocaust: The Law Confronts Hard Cases* (2005).
56 Ibid., at 60.
57 Ibid., at 94.

commented, 'The desire to present a big case and prove a big crime distorted the proceedings so that the real question in the case . . . was buried under a mountain of irrelevancies.'[58]

Overall I would agree with Drumbl: the purposes of sentencing can only to a limited extent be achieved by international criminal tribunals. Criminal trials can have an important function and value, but only if they are conducted in a fair and impartial way. An important function of criminal trials can be to prevent the victims from seeking revenge. Empirical research has shown that, for example, genocides often occur in countries in which past genocides have occurred (e.g. Rwanda).[59] Effective criminal prosecution can thus terminate an otherwise never-ending cycle of revenge. According to Wilson there is evidence to suggest that lack of accountability for human rights violations in South Africa is the cause of the high crime statistics and wild justice in places such as Sharpeville.[60] Truth-telling and accountability are thus important pillars for the restoration of justice and peace. International criminal law can sometimes be the only means to achieve this, no matter how imperfect it might be. Bass concludes, 'If the international community will not step in, then vengeance will be left in the hands of the victims . . . It is simply not an alternative to pretend that war crimes did not happen. Justice, of a sort, will be done; the only question is whether it will be finely tuned or crude.'[61] The purpose of criminal trials and adequate sentencing of the perpetrators is thus to restore the rule of law and prevent the victims from seeking revenge. The international community can and even should take up this role when national states are unwilling or unable to do so (cf. Art. 17 ICC Statute), but it should only be used as a last resort.

8. Externalization of justice and legal mimicry

Despite all the shortcomings of international criminal law, Drumbl concludes that national and local institutions mimic international prosecutions and that this practice 'narrow[s] the diversity of national and local accountability modalities' (p. 121). In substantiating his point Drumbl extensively discusses the Rwandan case. Within a period of three months (April–June 1994) 800,000 people were killed in Rwanda. The ICTR was established by the UN Security Council, and within Rwanda itself criminal courts tried to prosecute those suspected of genocide. But there were simply too many suspects. More than ten years after the facts the prisons are still filled with suspects who have not yet been charged. After a pilot project Rwanda decided to use the traditional *gacaca* system, but because of a variety of pressures *gacaca* has moved 'away from its restorative and reconciliatory goals and structures to something that is much more punitive and retributive' (p. 94).

Drumbl qualifies this phenomenon as legal mimicry and critically analyses its consequences. He refers to Koskenniemi in stating that 'international law

58 Ibid., at 172. Ultimately it was acknowledged that the man in the dock was not Demjanjuk but another man who had committed atrocious crimes, in Treblinka rather than in Sobibor.
59 Harff, *supra* note 30.
60 Wilson, *supra* note 47.
61 Bass, *supra* note 50, at 310.

fundamentally is a European tradition derived from a desire to rationalize society through law' (p. 182). Ralph Henham, also appropriately quoted by Drumbl, concluded that 'the ideology and structures of punishment [in international sentencing] are closely aligned to maintaining the economic and political integrity of Western liberal democracies' (p. 128). International criminal law is marked by a predominance of Western influence and by a clear absence of non-Western discourses (p. 123). The consequence is not only that we miss out on certain particularities of local justice systems but also that 'the pursuit of accountability and the imposition of punishment arise through processes that are distant from or alien to local populations' (p. 128). What disturbs Drumbl most is that international norms address the interests of the international community rather than of the local population. Legal mimicry can lead to a situation in which national institutions use international rationales which might be neither 'indigenous nor innate' to the local culture (p. 122).

A saddening example of this is the case of East Timor. Drumbl states that the traditional understanding of East Timor justice is that it emphasizes compensation, restoration, and ritual, whereas the East Timor Special Panels for Serious Crimes stress incarceration and sanction. Other scholars too have concluded that one can have doubts as to whether criminal prosecutions are the most appropriate means of addressing past wrongs, particularly in states which do not share Western concepts of justice. In East Timor many suspects have no idea what the consequences of a trial statement can be and thus – out of courtesy – tend to be polite when answering the questions of the prosecutor and the judges. According to local custom they provide the answers which they think are expected of them rather than telling the truth, not being aware that they might thus implicate themselves and risk imprisonment for things they have not done.[62]

Whether or not there are viable alternatives to international prosecutions and whether they provide a suitable means of dealing with the past is not always easy to tell. Drumbl seems rather positive about the local judicial traditions in Uganda, but others are more sceptical. In his book *Trial Justice* the anthropologist Tim Allen, who lived in Uganda for many years and has talked to many Ugandans, particularly the Acholi people who were the victims of the Lord's Resistance Army (LRA), about their views on the arrest warrants issued by the ICC, provides important insights on the issue. Allen explains that many activists were vehemently opposed to the ICC interference because according to them the warrants endangered the peace process and because 'the Acholi people had their own alternative approach to justice'.[63] According to Allen these 'eloquent activists' have propounded 'Acholi Justice' as an established truth and present it as a kind of 'received wisdom'. According to them the Acholi people have a special capacity to forgive, and as a consequence 'local understandings of justice are based upon reintegration of offending people into society'.[64] This local perception of justice is known as *mato oput*. 'The term has

62 A. H. Klip and A. L. Smeulers, 'Afrekenen met het Verleden: de Afdoening van Internationale Misdrijven', in A. H. Klip, A.L. Smeulers, and M. W. Wolleswinkel (eds.), *KriTies: Liber Amicorum et Amicarem voor prof. Mr. E. Prakken*, (2004), at 326.

63 T. Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (2006), at 129.

64 Ibid., at 129.

become a sort of euphemism for healing rites or blessings performed by *therwodi moo* (anointed chiefs) which promote reintegration of former LRA combatants into society by offering forgiveness.'[65] What we learn from Allen's book is that many people can be quoted about the local practices, the rituals, and the forgiveness, but there are many others who cannot forgive. Allen's personal experience and the outcome of a survey which was conducted jointly by the International Center for Transitional Justice and the Human Rights Center, University of California, Berkeley, show this other side. In this survey, in which 2,585 people were interviewed, '66 per cent wanted punishment for the LRA and only 22 per cent favoured forgiveness and reconciliation'.[66] Between 50 and 70 per cent (depending on the area from which they came) were, however in favour of traditional ritual ceremonies. Allen concludes by stating that 'rituals of healing are common . . . [but they do not confirm] that accountability for crimes has been set aside by the community as a whole'.[67] According to Allen most Acholis want those responsible to be held accountable and punished.[68]

One of the most important things to the victims of mass violence is that the injustice which has been done to them is officially acknowledged. Stanley Cohen distinguished knowledge from acknowledgement and it is especially the latter which victims seek,[69] but they do so in a procedure which is familiar to them. In his article on the Rwandan genocide Alvarez concluded,

> To many surviving family members of the victims of the Rwandan genocide, it matters a great deal whether an alleged perpetrator of mass atrocity is paraded before the local press, judged in a local courtroom in a language that they understand, subjected to local procedures, and given a sentence that accords with local sentiments, including perhaps the death penalty.[70]

Unlike Rwanda, the vast majority of the international community rejects the death penalty, but this difference of opinion on the death penalty resulted in the unacceptable situation that the major war criminals were sent to the ICTR, whose maximum sentence was life imprisonment, whereas the less important perpetrators were faced with the real danger of being executed. But that is not all: the due-process rights of the high-ranking perpetrators are guaranteed, whereas this is not the case for the rank-and-file perpetrators. Alvarez concludes that these anomalies 'are not likely to enhance the credibility of the rule of law inside Rwanda'.[71] Similar observations led Prunier to conclude,

> The immensity of the crime cannot be dealt with through moderate versions of European criminal law made for radically different societies . . . To reassure the 'small guys' who used the machetes and to assuage the immense pain of their victims' relatives, only the death of the real perpetrators will have sufficient symbolic weight to

65 Ibid., at 134.
66 Ibid., at 147.
67 Ibid., at 167.
68 Ibid., at 181.
69 S. Cohen, 'Human Rights and Crimes of the State: The Culture of Denial', (1993) 26 *Australian and New Zealand Journal of Criminology* 97.
70 Alvarez, *supra* note 48, 404.
71 Ibid., at 415.

> counterbalance the legacy of suffering and hatred which will lead to further killings if the abscess is not lanced.[72]

Despite the many enumerated disadvantages, states which have been completely destroyed by a period of collective violence are often very susceptible to international pressure and introduce international means, norms, and rationales of prosecution and sentencing. Drumbl is very critical about this externalization of justice, because such a vertical application of legitimacy shows a remarkable democratic deficit, namely 'the exclusion of afflicted populations from the design, development, and operation of accountability mechanisms' (p. 124). Drumbl's harsh conclusion is that prosecutions 'favour the interests of those only morally affected by the violence [the international community] over those actually physically afflicted by it [the local population]' (p. 124). The examples of Rwanda and East Timor are telling, but several other examples can be given. Kutnjak and Hagan, for example, conducted empirical research and measured to what extent the local population in the former Yugoslavia supported the trials in The Hague.[73] One of the conclusions was that the ICTY lost a lot of popular support through the introduction of the plea-bargaining system. This system, which had been unknown to the Yugoslavian criminal law system, was introduced for practical and cost-related reasons. The ICTY has been required by the UN Security Council to start its completion strategy; in order to continue to conduct the trials the ICTY decided to rely more heavily on this unpopular means of doing so, with dire consequences.

Drumbl points to another striking aspect, namely the fact that the international community plays an important role in the prosecution of the crimes committed in the former Yugoslavia and Rwanda, after having failed so miserably to prevent them. In both cases the United Nations was present but failed to take effective action to prevent the disaster. Seven thousand Muslim men were executed despite the fact that Srebrenica had been declared a safe haven by the UN. In Rwanda UN commander Romeo Dallaire had warned the UN by sending the so-called 'genocide fax' in January 1994 – three months before the genocide – indicating that the Hutus were preparing lists of Tutsis to be killed, had large amounts of weapons stored, provided training, and were turning more and more extremist. The fax was ignored by the UN bureaucracy and never forwarded to the Security Council.[74] International law is by its very nature anti-democratic, but especially in these cases one may wonder whether the international community has the moral right and authority to have a say in the prosecution. The fact that it nevertheless influenced the process and even took the lead in prosecuting the perpetrators caused an inevitable backlash both in the former Yugoslavia and in Rwanda.[75]

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72 G. Prunier, *The Rwandan Crisis: History of a Genocide* (2005), 355.

73 S. Kutnjak and J. Hagan, 'Bargain Justice? Perceptions of Procedural Justice at the International Criminal Tribunal for the Former Yugoslavia,' paper presented at the American Society of Criminology meeting in Atlanta, 14–17 November 2007.

74 F. Grünfeld and A. Huijboom, *The Failure to Prevent Genocide in Rwanda: The Role of the Bystanders* (2007); and cf. M. Barnett, *Eyewitness to Genocide: The United Nations and Rwanda* (2002).

75 S. Kutnjak and J. Hagan, 'The Politics of Punishment and the Siege of Sarajevo: Toward a Conflict Theory of Perceived International Injustice', (2006) 40 *Law and Society Review* 369.

9. Towards qualitative deference?

In chapter 7 of his book Drumbl searches for means to move from law to justice. In dealing with their past, states should be given the possibility of including extrajudicial initiatives and local particularities. Drumbl uses the term 'cosmopolitan pluralism', which entails a vertical and a horizontal dimension. 'It is through this relational interplay between universal accountability and pluralistic enforcement that an independent criminology and penology for mass atrocity can emerge' (p. 187). In short, Drumbl does not question the condemnability of international crimes, but whether only Westernized international criminal law can condemn them. Drumbl accepts the universality of the condemnation of international crimes and in that sense he is a cosmopolitan, defining cosmopolitanism as 'a tradition in socio-political and legal philosophy according to which all human beings belong to a single community' (p. 185), but he strongly favours 'pluralistic and localized enforcement' (p. 187).

According to Drumbl *qualified deference* should be used to test when international tribunals should refer a case to national authorities. In his book Drumbl (p. 189) enumerates six interpretive guidelines to contour the implementation of qualified deference:

1. good faith;
2. the democratic legitimacy of the procedural rules in question;
3. the specific characteristics of the violence and of the current political context;
4. the avoidance of gratuitous or iterated punishment;
5. the effect of the procedure on the universal substance; and
6. the preclusion of the infliction of great evils.

According to Drumbl, not all states satisfy these criteria and qualify for qualitative deference. He gives Sudan, Afghanistan, and Iraq as examples of states that do not qualify. There are many ways to deal with the past but it is extremely difficult to tell in advance which means will work in a particular situation.[76] Many scholars have called for the use of restorative justice approaches to periods of mass violence, as they are designed to promote reconciliation rather than retribution.[77] The South African Truth and Reconciliation Commission is often referred to as a major success, and with reason, but several authors question whether it should be considered so successful.[78] Heller concludes that the 'government was fully aware at the time that the overwhelming majority of South Africans were opposed to giving amnesty to those who defended apartheid through violence'.[79] Heller refers to Hayner by stating

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76 See M. C. Bassiouni, *Post-conflict Justice* (2002); and N. Kritz, *Transitional Justice: How Democracies Reckon with Former Regimes* (1995).

77 E.g. M. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (1998); P. B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (2001); and C. Villa-Vicencio, 'Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet', (2000) 49 *Empory Law Journal* 205.

78 Cf. C. Villa-Vicencio, 'Restorative Justice in Social Context: The South African Truth and Reconciliation Commission', in N. Biggar (ed.), *Burying the Past: Making Peace and Doing Justice after Civil Conflict* (2001).

79 K. J. Heller, 'Deconstructing International Criminal Law', (2007) 106 *Michigan Law Review* 975.

that 'most South Africans rejected the idea that the TRC even promoted reconciliation; a national poll conducted in 1998 found that nearly two-thirds believed that the TRC simply made South Africans angrier and caused relations between the races to deteriorate'.[80] Parmentier, Vanspauwen, and Weitekamp concluded that 'A lot of victims felt disappointed and embittered after the proceedings of the TRC.'[81] Wilson too is very critical: according to him realpolitik prevailed over truth-telling and this caused major setbacks to the success of the TRC.[82] Heller furthermore notes that the East Timor Truth and Reconciliation Commission is generally seen as a great success, but that it subjected women to great evil by forcing the men who raped them to marry them. Other local traditional institutions ostracized the children born from rape. Heller concludes that these institutions thus inflict great evil according to Western standards and do not fulfil Drumbl's criteria, but that they can sometimes nevertheless promote peace and reconciliation.[83]

In conclusion we can say that it is easier to identify the flaws in a specific system than to find viable alternatives. It is even harder to develop criteria that can be universally used to decide when and how to defer specific situations to be dealt with by local communities rather than by international criminal justice institutions. It is good to search for workable criteria, but at the same time we need to accept that there are no perfect solutions and that sometimes it is very difficult to foretell how things turn out. Much more research on viable alternatives needs to be done. In his earlier work Drumbl himself gave an example of how to develop workable criteria. In his article 'Punishment, Postgenocide: From Guilt to Shame to "Civis" in Rwanda', Drumbl distinguished three types of post-genocidal society, namely the homogeneous, the dualist, and the pluralist.[84] Drumbl asserts that finding the most functional and most effective means of dealing with the past depends to a great extent on the type of society involved. What Drumbl showed in his article was that we should use empirical research to search for answers and to develop viable alternatives and usable criteria which will help states to determine what type of justice they need. But whichever means are best, it is always crucial to be open to local traditions and to respect local culture. In that sense I fully agree with Drumbl. The trouble is, however, that these local traditions might fail as well. The main reason why international criminal law has so many flaws is because it is based on national criminal law, and this system has not been designed to deal with 'obedient masses' committing mass atrocity; neither have local traditions and they will thus very likely have similar flaws.

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80 Ibid., at 985.

81 S. Parmentier, K. Vanspauwen, and E. Weitekamp, 'Dealing with the Legacy of Mass Violence: Changing Lenses to Restorative Justice', in Smeulers and Haveman, *supra* note 37. See also J. Gibson and A. Gouws, 'Truth and Reconciliation in South Africa: Attributions of Blame and the Struggle over Apartheid' (1999) 93 *American Social Science Review* 501; and M. Mamdani, 'Reconciliation without Justice', (1997) 10 *Southern Review* 6, at 22–5.

82 Wilson, *supra* note 47, at 73.

83 Heller, *supra* note 79, at 19.

84 M. A. Drumbl, 'Punishment, Postgenocide: From Guilt to Shame to "Civis" in Rwanda', (2000) 75 *New York University Law Review* 1221.

10. Conclusion

Drumbl's book is excellent and thought-provoking. By focusing on sentencing it fills an important lacuna in scholarly literature. More important, however, is Drumbl's critique of international criminal law, which touches on its very foundations. By taking into account the nature of international crimes as manifestations of state-sanctioned collective violence, Drumbl is one of the few authors who take a broad and interdisciplinary approach to international criminal law. Precisely because Drumbl's analysis is not limited to a purely legal discussion he touches on the core issues which have to be resolved in order to make international criminal justice a fair and an appropriate means of dealing with international crimes. His major critique is that international criminal law tries to judge, convict, and sentence the perpetrator of international crimes on the basis of national criminal law systems which were meant to deal with perpetrators of ordinary, common crimes, but that these two types of perpetrator are in their adherence to the law and overriding social norms diametrically opposed to each other. Drumbl substantiates his conclusions by using empirical research findings and this makes his book particularly worthwhile. His critique is well substantiated by scholarly findings from the social sciences. Despite calls from both criminologists and lawyers, among them Drumbl himself, to study international crimes from a criminological perspective using criminological theories and research methodology, this area of research is still in its developing stages.[85] In his work Drumbl goes further than merely calling out that we should use empirical findings; he shows how this may be achieved. One might argue as a point of criticism that Drumbl has not managed to present workable alternatives, but at least he has started something. Drumbl himself states that his major aim was to trigger further debate and research and in this he has fully succeeded. He received the 2007 Book of the Year Award from the International Association of Criminal Law (US national section) with this book, and to me he fully deserved it. I can only hope that Drumbl's approach to international crimes will be followed by others, because I sincerely believe that it is the only way to arrive ultimately at developing an international justice system which not only is fair and just but also adequately addresses the true nature and causes of atrocity.

85 See among others M. A. Drumbl, 'Toward a Criminology of International Crime' (2003–4) 19 *Ohio State Journal on Dispute Resolution* 263; and P. Roberts and N. McMillan, 'For Criminology in International Justice', (2003) 1 *Journal of International Criminal Justice* 315.