Atrocity, Punishment, and International Law

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Preface and Acknowledgments

How do we, and how should we, punish someone who commits genocide, crimes against humanity, or discrimination-based war crimes? These questions – the former descriptive, the latter normative – are the focus of this book.

These questions have received much less attention than they deserve. Although international criminal law has gone a long way to convict individuals for perpetrating atrocity, it has traversed far less creative ground in terms of conceptualizing how to sanction them. Scholars, too, have been remiss. Surprisingly little work has been undertaken that explores how and why criminal justice institutions punish atrocity crimes and whether the sentences levied by these institutions actually attain the proffered rationales. Furthermore, there is little empirical work that assesses whether what international tribunals doctrinally say they are doing actually has a consistent and predictable effect on the quantum of sentence.

In this book, I hope to respond to these lacunae and, through this endeavor, make three contributions.

First, to present data regarding how and why local, national, and international institutions punish genocide, crimes against humanity, and war crimes. Although I include information from many atrocities, the focus centers on three in particular: Rwanda, the former Yugoslavia, and World War II/the Holocaust. My methodology involves a review of positive law instruments, sentences, and sentencing jurisprudence. This part of the book (Chapters 3 and 4) is supplemented with extensive citations. This research serves important compilation and reference purposes for practitioners and scholars and, thereby, responds to the gap in the literature regarding data on sentencing and evaluative review thereof.

Second, to explore whether extant methods of sentencing actually attain the affirmed objectives of punishment. In Chapter 6, the heart of the book, I conclude that there is an overall shortfall, although certain rationales are better served than others.

Third, to move the dialogue from diagnosis to remedy. I argue that the punishment of extraordinary international crimes should not uncritically adopt the methods and assumptions of ordinary liberal criminal law that currently

underpin international courts and tribunals and seep into national institutions (even those outside of liberal traditions). Extraordinary international crimes simply are not the same as ordinary common crimes. Consequently, criminal law designed for common criminals is inherently limited as a response to mass atrocity and as a device to promote justice in its aftermath. We need to think hard about transcending existing procedural and institutional frameworks. A sustained process of critique and renewal may provide international criminal punishment with its own conceptual and philosophical foundations, instead of its current grounding on borrowed stilts.

The architects of international criminal law have done much to establish and mainstream institutions such as the International Criminal Court. This is a great accomplishment. But we cannot become complacent now that these institutions have been edified. A proliferation of adversarial and individualized criminal law does not inevitably lead to enhanced effectiveness in sanctioning or deterring atrocity. Criminal trials should never become a substitute for more preventative action on the part of the international community to combat atrocity. Nor is it productive for the turn to trials to inhibit grassroots solutions that reach beyond the criminal law or, even, formal law generally.

Insofar as I am deeply concerned with improving the project of international criminal law, this book displays a reconstructive ambition. My goal is to locate a principled middle ground between, on the one hand, the most relentless skeptics of universal law as a response to mass atrocity and, on the other hand, the most relentless proponents who often remain distrustful of bottom-up initiatives in postconflict societies. If successful, my arguments could inspire short-term reforms to existing institutions and a longer-term reconstitution of the field. I chart some proposals.

Within this process of reconstitution, it is important to emphasize contributions from nonlawyers, in particular anthropologists, mental health professionals, criminologists, social workers, political scientists, and public policymakers. I think the arguments of this book will be of interest to them, and I hope they feel welcome in debates among international lawyers that pertain to complex questions of justice.

The roots of this academic project trace back to my work in 1998 in the Rwandan genocide prisons. Along the way, many colleagues provided invaluable comments, feedback, and ideas on this manuscript at various stages of drafting – from the inchoate to the nearly finished. I thank each of you. It would be impossible to list everyone who played a part. But here is an attempt, in no particular order: Rick Kirgis, Ken Gallant, Roger Clark, Diane Marie Amann, Chris Blakesley, Chandra Lekha Sriram, Erin Daly, Penny Andrews, Allison Marston Danner, Scott Sundby, Ellen Podgor, Laura Dickinson, Holger Rohne, Laurel Fletcher, Darryl Brown, Tai-Heng Chen, Louise Halper, Paul Roberts, Donal Coffey, Cyrus Tata, Michael Fowler, Rosemary Byrne, Ralph Henham, David Zaring, Brad Wendel, Dorothy Brown, and Linda Malone.

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insight, and careful reads of the manuscript helped sustain my energy. Chris Gosnell gave me tremendous perspective. Larry May, who has introduced me to much of the rich philosophical literature on international criminal justice, offered wonderful advice and suggestions. I also would like to acknowledge the commentary from three anonymous reviewers at Cambridge University Press, whose input at a much earlier stage in the drafting process helped frame the debates.

My wife Michelle read every chapter. Her unwavering support, love, and patience, which guided every step taken through this project, continue to brighten each of my days. My parents deserve credit for many things, not the least of which is teaching me to finish a thought before beginning a new one.

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I wrote much of this book from a lovely office with a thoughtful view at University College, Oxford University, where I was appointed Visiting Fellow for Michaelmas Term 2005. I extend my warmest gratitude to Univ for hosting me. I also thank the Institute for International Integration Studies at Trinity College Dublin, where I served a very productive stint as a Visiting Scholar in May 2006. My greatest appreciation, however, goes to my home institution, Washington and Lee University, School of Law, for unflaggingly and unfailingly supporting this research agenda from its inception, including through the grant of sabbatical leave and resource support through the Frances Lewis Law Center. I owe a great professional and personal debt to Dean David Partlett for his friendship and encouragement.

Select parts of this book contain material that draws from, adapts, or is significantly reworked from my article, "Collective Violence and Individual Punishment: The Criminality of Mass Atrocity," which appeared in *Northwestern University Law Review*, Vol. 99, No. 2, 539 (Winter 2005). This article has been used by special permission of Northwestern University School of Law, *Northwestern University Law Review*. Adaptation reflects the evolution of my thinking, events on the ground, and the results of new research. I was deeply honored when this article was selected as one of two co-winners of the 2005 Scholarly Papers Competition of the Association of American Law Schools.

Select portions of Chapter 4, Part (i) draw from, update, and adapt material that originally appeared as a published lecture in the *Ohio Northern University Law Review*, Vol. 31, 41 (2005), for which the *Ohio Northern University Law Review* grants permission to reuse. Cover photo © James Nachtwey/VII.

This book incorporates material and data on sentencing gathered up to May 2006, inclusive, unless otherwise indicated. Any errors or omissions in the text are entirely my own.

List of Abbreviations

DRC	Democratic Republic of the Congo
FRY	Federal Republic of Yugoslavia
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHT	Iraqi High Tribunal
IMT	International Military Tribunal (at Nuremberg)
JCE	Joint criminal enterprise
OSCE	Organization for Security and Cooperation in Europe
RPF	Rwandan Patriotic Front
SCSL	Special Court for Sierra Leone
SFRY	Socialist Federative Republic of Yugoslavia
Special Panels	East Timor Special Panels
UNAMIR	United Nations Assistance Mission in Rwanda

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CHAPTER 1

Extraordinary Crime and Ordinary Punishment: An Overview

Beginning on April 8, 1994, Tutsi escapees – hunted and terrified – fled to the Catholic church in Nyange, a rural parish in western Rwanda. They sought shelter from attacks incited by Hutu extremists. The attackers were determined to eliminate the Tutsi as an ethnic group and killed individual Tutsi as a means to this end.

The Nyange church soon filled with over two thousand huddled Tutsi, many of whom were wounded. These Tutsi initially thought the church, as a house of God, would be a refuge. In fact, they had been encouraged to hide there by parish priests. The priests, however, decided to demolish the church. Accordingly, workers were engaged to operate a mechanical digger.

On April 16, 1994, a worker named Anastase Nkinamubanzi bulldozed the church with the Tutsi crammed inside. The roof crashed down. A few Tutsi survived the razing of the church. Nearly one-third of the local Hutu population assembled to finish them off. They did so with machetes, spears, and sticks.

Four years later, a Rwandan court prosecuted six individuals on charges of genocide and crimes against humanity for the Nyange church massacre.[1] Nkinamubanzi was among the accused. From the case report, we learn that he was born in 1962, was a bachelor, and worked as a heavy equipment driver.[2] Nkinamubanzi had no assets. He had no prior criminal record. The case report also sets out, through the sterility of legal prose, the evidence underpinning the accusations that he mechanically leveled a church with two thousand Tutsi trapped inside. After demolishing the church, Nkinamubanzi calmly asked the priests for the promised compensation for the public service he had provided.[3]

The court found Nkinamubanzi guilty of most of the charges brought against him, including genocide. Upon conviction, he was sentenced to life imprisonment. Although Nkinamubanzi admitted he bulldozed the church bursting with escapees, the court did not formally accept his guilty plea, the details of which it found inexact. Still, the court was influenced by his request for forgiveness. It considered that request as a mitigating factor. Two other defendants, who were church leaders, received the death penalty at trial; these sentences have not been carried out.

As for the Nyange church, over a decade later "all that is left of the massacre site are heaps of earth and concrete."[4] And, as for Nkinamubanzi, media accounts indicate that – stricken with tuberculosis – he is serving his sentence in a Rwandan prison.[5]

Many ordinary people in Rwanda were like – or, at least, a little like – Nkinamubanzi; many others are like him in many other places, countries, and continents; moreover, many more have the potential to become like him in the future. Ordinary people often are responsible for killing large numbers of their fellow citizens, whether by their own hands, by helping the hands of others, or by encouraging the handiwork. Some revel in the killings.[6] Others simply play along nervously, grimacing while they administer the deathblows or fidgeting while they distribute a list of targeted victims. Many simply think they are doing their patriotic duty and fulfilling their civic obligation, which they satisfy with pride, *Pflicht*, composure, and the quiet support of the general population. They are the exemplars of Hannah Arendt's "banality of evil."[7] That said, those leaders who give the orders to kill or in whose name the killings are undertaken also promote banality. After all, it is they who normalize violence and make it a way of life. Acting as what Amartya Sen describes as "proficient artisans of terror,"[8] these leaders ensconce atrocity as civic duty and, thereby, become conflict entrepreneurs.

So, what exactly do we do with individuals, leading a group or acting on its behalf, who murder tens, hundreds, thousands – or more – fellow members of humanity *because of* their membership in a different group? Should we subject these killers to the process of law? If so, what kind of law? What punishment is appropriate? What about the collective forces that provide the killers with a support network and social validation? Should we sanction those, too? If so, how?

This book addresses the reasons that extant criminal justice institutions – sited domestically as well as internationally – give for punishing perpetrators of mass violence and also investigates whether the sentences levied by these institutions support these penological rationales. Little scholarship has been undertaken in this area. In fact, whereas sophisticated work explores the substantive crimes,[9] the formation of institutions and their independence,[10] and the impact of prosecuting these crimes on collective reconciliation and political transition,[11] only isolated – and often conclusory – analysis exists concerning what institutions say they are accomplishing by punishing and, most importantly, whether the punishments issued actually attain the goals they are ascribed. Leading treatises on international criminal law devote limited space to punishment and sentencing.[12] The project that follows begins to address this lacuna in the scholarly literature. With this analysis as a base, the project then pushes in a normative direction by inquiring how offenders should be punished and how extant punishment schemes might be enhanced. In this first chapter, I provide an overview of the arguments advanced in this book.

(1) EXTRAORDINARY CRIME

The liberation of the concentration camps at the end of the Second World War uncorked a torrent of emotions. For the survivors, these emotions scaled a wide spectrum. Primo Levi and Viktor Frankl poignantly recorded how survivors experienced relief, fear, and loneliness while engaged in a painful search for meaning and the relevance of their survival.[13] For the liberating soldiers, there was repulsion and shock; for the returning Axis combatants, shame, denial, and disappointment.

The Allied rulers divided about what to do with the Nazi leaders. U.K. Prime Minister Churchill sought their quick dispatch, including by extrajudicial execution, owing to the fact that their guilt was so evident that there was no need for judicial process to establish it.[14] The Soviet Union's Stalin sought similar ends, but following short show trials. U.S. President Truman, encouraged by Secretary of War Stimson, envisioned careful trials to narrate to all the value of law and the depth of the defendants' culpability.

This latter view prevailed, leading not only to the Nuremberg trials, but also to the genesis of an influential paradigm. This paradigm cast Nazi crimes as extraordinary in their nature and, thereby, understood them not only as crimes against the victims in the camps or the helpless citizens in the invaded countries, but also as crimes in which everyone everywhere was a victim.[15] This understanding gave two distinct groups a forum to express outrage: the international community and the actual individual survivors. The fact that these groups are not necessarily allied foreshadows the complicated, yet largely undeveloped, victimology of mass atrocity.

Arendt explored Nazi crimes and their relationship with totalitarianism. She initially described these crimes as they occurred within the context of the Holocaust as "radical evil," borrowing a phrase that had been coined much earlier by Immanuel Kant.[16] In subsequent work, Arendt recast the evil as "extreme" or "thought-defying," preferring such descriptions to "radical" owing to the evolution of her thinking regarding the thoughtlessness and banality of the violence.[17]

International lawmakers did not believe that extreme evil lay beyond the reach of the law. They felt that law could recognize extreme evil and sanction it as a breach of universal norms. The area of law believed to be best suited for the condemnation of extreme evil was the criminal law. And, in fact, the criminal law has gained ascendancy as the dominant regulatory mechanism for extreme evil. This ascendancy began with Nuremberg and has, in the years since, gained currency and become consolidated.

In terms of substantive categorization, however, extreme evil was no ordinary crime. After all, Arendt herself noted that extreme evil "explode[d] the limits of the law."[18] This did not mean that this evil was incapable of condemnation through law, but that the law had to catch up to it. In this regard, international lawmakers categorized acts of extreme evil as qualitatively different than ordinary common crimes insofar as their nature was much more serious.[19] These

acts seeped into the realm of *extraordinary international criminality*. And the perpetrator of extraordinary international crimes has become cast, rhetorically as well as legally, as an *enemy of all humankind*.[20] I use both of these phrases in this book given that they reflect dominant understandings of the wrongdoing and wrongdoers. Those acts of atrocity characterized as extraordinary international crimes include crimes against humanity (an appellation that neatly embodies our shared victimization), genocide, and war crimes.[21]

The definitions of these crimes have evolved over time to become quite complex. Stripped to the essentials, though, crimes against humanity include a number of violent acts "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[22] Genocide is defined to include a number of acts (including killing and causing serious bodily or mental harm) committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such.[23] The special intent of genocide distinguishes it from crimes against humanity. War crimes represent the behavior that falls outside of the ordinary scope of activities undertaken by soldiers during armed conflict.[24] Whereas killing the enemy is part of a soldier's ordinary activity, torture, inhumane treatment, or willful murder of civilians is not. Launching attacks that are disproportionate, that fail to discriminate between military and civilian targets, or that are not necessary to secure a military advantage also can constitute war crimes.

At the very core of the extraordinariness of atrocity crimes is conduct – planned, systematized, and organized – that targets large numbers of individuals based on their actual or perceived membership in a particular group that has become selected as a target on discriminatory grounds.[25] In these situations, group members become indistinguishable from, and substitutable for, each other. The individual becomes brutalized because of group characteristics. The attack is not just against individuals, but against the group, and thereby becomes something more heinous than the aggregation of each individual murder. Moreover, the discriminatory targeting of a group is often effected in the name of the persecutor's own group. Accordingly, the interplay between individual action and group membership is central to extraordinary international criminality. This interplay engenders thorny questions of responsibility and punishment. Crimes motivated by this discriminatory animus are deeply influenced by notions of group superiority and inferiority, which, in turn, propel collective action.

To recap: international lawmakers believe that extreme evil is cognizable by substantive criminal law. Because extreme evil is so egregious, however, only special substantive categories of criminality (in some cases newly defined, named, or created) could capture it. These categories include genocide, crimes against humanity, and war crimes.

Defining the crimes, though, is only one step in the enforcement process. It would also be necessary to establish procedures, institutions, and sanctions through which perpetrators of atrocity could be brought to account. Procedures, institutions, and sanctions have emerged.[26] International criminal justice

largely is operationalized through criminal tribunals. Courtrooms have gained ascendancy as the forum to censure extreme evil. Accountability determinations proceed through adversarial third-party adjudication, conducted in judicialized settings, and premised on a construction of the individual as the central unit of action.[27] A number of select guilty individuals squarely are to be blamed for systemic levels of group violence. At Nuremberg, some of the guilty were hung. Today, punishment predominantly takes the form of incarceration in accordance with the classic penitentiary model, where convicts are isolated and sequestered. The enemy of humankind is punished no differently than a car thief, armed robber, or felony murderer in those places that adhere to this model domestically.

The ascendancy of the criminal trial, courtroom, and jailhouse as the preferred modalities to promote justice for atrocity is not random. Rather, it is moored in a particular worldview that derives from the intersection of two influential philosophical currents. The first of these currents is legalism; the second is liberalism.

To follow Judith Shklar, legalism is the view that "moral relationships [. . .] consist of duties and rights determined by rules."[28] When it comes to atrocity, however, the application of legalism becomes narrower. It does so in two ways. One is disciplinary. The turn is not to law generally to promote justice in the aftermath of terribly complex political violence but, rather, most enthusiastically to the criminal law. I argue that the preference for criminalization has prompted a shortfall with regard to the consideration and deployment of other legal, regulatory, and transformative mechanisms in the quest for justice.[29] The second narrowing is sociocultural. The kind of legalism, voiced through the criminal law, which has become operative is one that embodies core elements of liberalism, including, as Laurel Fletcher notes, the tendency to "locate the individual as the central unit of analysis for purposes of sanctioning violations."[30] Liberalism originates in and underpins the legal structures of Western societies. Accordingly, when it comes to atrocity, the justice narrative is deeply associated with liberal legalism rooted in the ordinary procedure and sanction of the criminal law of Western states. Although I share Fletcher's definition of liberal legalism as "refer[ing] to the legal principles and values that privilege individual autonomy, individuate responsibility, and are reflected in the criminal law of common law legal systems,"[31] I would add that these values also are shared by civil law legal systems suggesting, at a deeper level, the difficulty in deracinating them from Western social and legal thought.[32] The ascendancy of these modalities of justice thereby represents the ascendancy of specific forms of procedure and sanction, which often become applied to societies where such forms are neither innate nor indigenous.

In this book, at times I turn to phrases such as *liberal legalist* or *Western legalist* to describe the dominant method of determining responsibility and allocating punishment in the wake of atrocity. At times, I also turn to the phrase *ordinary criminal law and process* as shorthand for the domestic law and process regulating common crime in liberal states. I recognize the complex philosophical debates on liberalism generally. This book is not a treatise on liberalism. Nor

is it a broadside thereof. Nor is it a critique of Western philosophical traditions generally. Many of the philosophical approaches I find compelling, for example, cosmopolitanism, pluralism, and democratic theory, associate with liberal Western traditions. My goal is not to assess the merits of liberalism as a broad, and often abstractly defined, philosophical worldview. Rather, my goal is much more modest. I intend to investigate the effectiveness of criminal trials and punishment, as presently conducted internationally and nationally, as responses to atrocity. I also investigate the effects that the embrace of criminal prosecution and punishment has on other potential approaches to regulate, sanction, and prevent atrocity. Neither legalism nor liberalism can be fully disentangled from these investigations insofar as they both animate the preference for prosecution and punishment as presently constituted.

(II) ORDINARY PROCESS AND PUNISHMENT

A paradox emerges. International lawmakers have demarcated normative differences between extraordinary crimes against the world community and ordinary common crimes. However, despite the proclaimed extraordinary nature of atrocity crime, its modality of punishment, theory of sentencing, and process of determining guilt or innocence, each remain disappointingly, although perhaps reassuringly, ordinary – so long as ordinariness is measured by the content of modern Western legal systems.

At the international level, there has been a proliferation of new legal institutions to adjudge mass violence. These institutions have become legitimated as appropriate conduits to dispense justice and inflict punishment.[33] A number of justifications are evoked in this regard. One is deontological, namely that the crimes are so egregious that they victimize all of us and, hence, must be condemned internationally; it would be unjust for a particular state's courts to "confiscate" these crimes.[34] Other justifications are pragmatic. Extraordinary international crimes often trigger security concerns, threaten regional stability, affect the viability of groups, and induce cross-border refugee movements. In a very real sense, these crimes therefore implicate what Larry May calls an "international interest."[35] International institutions also derive legitimacy because, in the wake of atrocity, national institutions may be annihilated, corrupt, politicized, biased, or too insecure. Accordingly, but for the creation of an international institution, in many instances no justice would be effected.

That said, international institutions have not acquired a monopoly on the accountability business. Far from it. In fact, most of this business actually is carried out by national and local institutions, which are or increasingly look like Western criminal courts, and which rely on jurisdictional bases such as territoriality, nationality, or universality.[36] International institutions serve as tremendously important trendsetters for their national and local counterparts.[37] Therefore, the distinctions between international and national institutions are far from watertight.[38]