DECONSTRUCTING INTERNATIONAL CRIMINAL LAW

Kevin Jon Heller[*]

ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW. By *Mark A. Drumbl.* New York: Cambridge University Press. 2007. Pp. xv, 298. Cloth, $80; paper, $29.99.

INTRODUCTION

After nearly fifty years of post-Nuremberg hibernation,[1] international criminal tribunals have returned to the world stage with a vengeance. The Security Council created the International Criminal Tribunal for the former Yugoslavia ("ICTY") in 1993 and the International Criminal Tribunal for Rwanda ("ICTR") in 1994. Hybrid domestic-international tribunals have been established in Sierra Leone (2000), East Timor (2000), Kosovo (2000), Cambodia (2003), Bosnia (2005), and Lebanon (2007). And, of course, the international community's dream of a permanent tribunal was finally realized in 2002, when the Rome Statute of the International Criminal Court ("ICC") entered into force.[2]

This unprecedented proliferation of international criminal tribunals reflects the world community's deep-seated faith in the ability of trials to heal the wounds caused by mass atrocity. The Security Council resolution establishing the ICTY claimed that an international tribunal "would contribute to the restoration and maintenance of peace."[3] The ICTR Statute states that the prosecution of those responsible for genocide in Rwanda would "contribute to the process of national reconciliation" and help ensure "that such violations are halted and effectively redressed."[4] Not to be outdone, the Rome Statute confidently links criminal prosecutions to the "peace, security and well-being of the world."[5]

If anything, the human rights community is even *more* optimistic about the transformative potential of criminal trials, often insisting that international

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* Senior Lecturer, University of Auckland Faculty of Law.

1. *See, e.g.*, Ruti Teitel, *The Law and Politics of Contemporary Transitional Justice*, 38 CORNELL INT'L L.J. 837, 852 (2005) ("For about a half century, the postwar trials . . . would remain solitary precedents in international criminal adjudication.").

2. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15–July 17, 1998, *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 (July 17, 1998) [hereinafter *Rome Statute*].

3. S.C. Res. 808, pmbl., U.N. Doc. S/RES/808 (Feb. 22, 1993).

4. ICTR Statute, S.C. Res. 955, pmbl., U.N. Doc. S/RES/955 (Nov. 8, 1994).

5. *Rome Statute*, *supra* note 2, pmbl.

trials are "the single most appropriate response to communal violence"[6] and "the centerpiece of social repair."[7] Indeed, it is not an exaggeration to say that "the quest for 'justice' [has] displaced the traditional pursuit for 'truth' as the rallying cry for the human rights movement."[8]

In *Atrocity, Punishment, and International Law*, Mark Drumbl[9] categorically rejects this kind of unbridled faith in international criminal law. First, he believes that "[a] proliferation of adversarial and individualized criminal law does not inevitably lead to enhanced effectiveness in sanctioning or deterring atrocity" (p. xii). And second, he argues that a preference for international trials has "prompted a shortfall with regard to the consideration and deployment of other legal, regulatory, and transformative mechanisms in the quest for justice" (p. 5). Drumbl thus insists that international criminal law needs to be pluralized both vertically and horizontally: vertically, by requiring tribunals to defer more readily to national and local transitional-justice institutions; and horizontally, by encouraging national and local authorities to rely more heavily on nonpunitive accountability mechanisms,[10] whether legal (such as civil sanctions) or nonlegal (such as truth commissions) (p. 18).

One paragraph is obviously insufficient to capture the complexity of Drumbl's argument. Part I thus explores his deconstruction of the transformative potential of international trials and his proposed reconstitution of international criminal law at greater length. Part II then argues that although Drumbl's critique is both compelling and persuasive, his reconstitution is likely to be less effective—and less just—than he believes.

I. Drumbl's Argument

A. *The Limits of Individual Criminal Responsibility*

Drumbl's argument unfolds from the undeniable premise that the collective nature of "extraordinary international crimes"—genocide and crimes against humanity in particular—distinguishes them from "ordinary domestic crimes" (p. 11). Three differences stand out.

First, whereas ordinary domestic crimes normally affect a small number of victims targeted indiscriminately,[11] extraordinary international crimes involve large numbers of victims who are specifically targeted because they are members of a disfavored group (p. 4). The gravamen of genocide is the

6. Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 Hum. Rts. Q. 573, 578 (2002).

7. *Id.*

8. *Id.* at 575 n.4.

9. Class of 1975 Alumni Professor of Law, Washington & Lee University School of Law.

10. In this Review, I use "nonpunitive" to mean mechanisms that do not involve criminal punishment.

11. There are, of course, exceptions. Some ordinary domestic crimes, such as fraud, can involve hundreds if not thousands of victims, and others, such as hate crimes, involve victims chosen because of their sociological characteristics.

"intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."[12] And ordinary crimes like murder and rape only become crimes against humanity when committed as part of a "widespread or systematic attack" on a civilian population.[13]

Second, ordinary domestic crimes are usually committed either by individuals or by small groups of perpetrators whose culpability is relatively equal. Extraordinary international crimes, by contrast, are normally committed by large groups of perpetrators whose culpability differs substantially (p. 25). At the top of the pyramid are the *conflict entrepreneurs*, the individuals who "exacerbate discriminatory divisions, which they then commandeer" (p. 25). Next are the *mid-level officials* who, "while exercising authority over others and often ordering killings, themselves remain subject to authority and, accordingly, are ordered into ordering others" (p. 25). Below the mid-level leaders are the *actual killers*, "most of whom are ordinary folks" (p. 25). And finally, there are the *bystanders*, "those multitudes who comply with the violence, who acquiesce in it, or who idle while it unfolds around them" (p. 25). These groups, in Drumbl's opinion, "represent descending levels of blameworthiness for atrocity"—although all are necessary for atrocity to occur (p. 25).

Third, and finally, "whereas ordinary crime tends to be deviant in the times and places it is committed, the extraordinary acts of individual criminality that collectively lead to mass atrocity are not so deviant in the times and places where they are committed" (p. 8). Murder, torture, and rape are prohibited regardless of whether a country is at peace or suffering mass atrocity. Yet the state's willingness to punish such acts and the populace's willingness to condemn them as immoral differs significantly depending on the context. In times of peace, both punishment and condemnation are the norm, isolating the perpetrator and branding his act as deviant. In times of atrocity, the state not only encourages the perpetrator's act; similar acts are committed by large swaths of the population (p. 33). The peacetime relationship between norm and transgression is thus inverted: "[t]hose who commit extraordinary international crimes [are] the ones conforming to social norms," while "those who refuse to commit the crimes choose to act transgressively" (p. 30).

Given these differences, we would expect international criminal law to be specifically attuned to the collective nature of mass atrocity. The opposite is actually true: "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" (p. 6). Drumbl is referring here to what he calls the "liberal legalist" criminal trial—a trial in which "[a]ccountability determinations proceed through adversarial third-party adjudication, conducted in judicialized settings, and premised on a construction of the individual as the

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12. *E.g.*, *Rome Statute*, *supra* note 2, art. 6.

13. *Id.* art. 7(1).

central unit of action" (p. 5). Long a mainstay of domestic Western criminal law, such trials are now the idiom of international criminal law, as well.

In Drumbl's view, international criminal law's embrace of the forms of ordinary criminal law is deeply problematic. First, he believes that liberal-legalist trials of extraordinary international criminals are incapable of addressing the complicity of bystanders, states, and international organizations in mass atrocity. And second, he believes that such trials are unlikely to realize the basic penological goals of ordinary criminal law—retribution and deterrence.

1. *The Web of Complicity*

As noted earlier, mass atrocity can only occur with the participation of four discrete groups of perpetrators: conflict entrepreneurs, mid-level officials, actual killers, and bystanders. The first three groups are subject to prosecution—the actual killers for committing the atrocities, the mid-level officials and conflict entrepreneurs for commanding or abetting them. Bystanders, by contrast, are essentially *immune* from prosecution: It is simply not criminal for someone to "draw their blinds and look away" as innocents are slaughtered (p. 25). It is not even criminal for someone to benefit indirectly from atrocity—the Hutu who sees the slaughter of Tutsis as a source or ethnic pride, the German who moves into a luxurious apartment previously occupied by a Jew deported to Auschwitz. There is thus a dangerous lacuna at the heart of international criminal law.

Nor is that the only lacuna. International criminal law's focus on individual guilt also "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 decisionmakers in international organizations" (p. 173). The severity of the Rwandan genocide could have been significantly reduced had the UN heeded the desperate warnings of its head peacekeeper that the atrocities were about to occur (p. 137). Similarly, a strong case can be made that the ICTY was created to atone for the world community's failure to intervene in the former Yugoslavia.[14] International criminal law is powerless, however, to punish such unconscionable failures of political will—thereby increasing the likelihood that they will not be the last ones.

2. *Penological Rationales*

Drumbl also questions the utility of international criminal law *within* its narrow band of responsibility. In his view, liberal-legalist trials of extraordinary international criminals are unlikely to promote either retribution or deterrence, the traditional rationales for punishment.

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14. *See, e.g.*, GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 207 (2000).

a. *Retribution*

Drumbl identifies three limitations on the retributive value of international criminal law. First, given the seriousness of atrocity crimes—often involving hundreds or thousands of murders—an adequate retributive punishment might require "torture or reciprocal group eliminationism" of those who perpetrate it (p. 157). Such punishments are not only prohibited by international human rights standards, they are also morally unthinkable—"[i]n such a scenario, survivors would become as depraved as their tormentors" (p. 157).

Second, even if "ordinary" criminal sentences could be retributively adequate, international tribunals do not actually impose them. No international tribunal since Nuremberg has permitted the death penalty, and judges have shown little inclination to impose life sentences on individuals responsible for mass atrocity. Indeed, as Drumbl's extensive research indicates, sentences for extraordinary international crimes are generally no longer than sentences imposed by domestic courts for serious ordinary crimes—and sometimes are even shorter (p. 154). Consider the median sentences imposed by the international tribunals: the ICTY, twelve years; the ICTR, fifteen years; the East Timor Special Panels for Serious Crimes ("SPSC"), eight years (pp. 57–58). Seven ICTR defendants have received final sentences of life imprisonment, but no ICTY defendant has ever received such a sentence—and life imprisonment was not even an option for the SPSC.

b. *Deterrence*

Drumbl is also skeptical of international criminal law's ability to deter mass atrocity. In his view, the deterrent value of punishment is a function of two factors: the likelihood that a perpetrator will be prosecuted, and how quickly the perpetrator will be punished once captured.[15] If perpetrators are captured, the "promptness" factor is relatively unproblematic, because international prosecutions rarely result in acquittals: to date, for example, the ICTY has acquitted five of forty-one defendants,[16] while the ICTR has acquitted five of thirty-three defendants.[17]

The likelihood that a particular perpetrator will be prosecuted, by contrast, is almost nonexistent. Because of financial and manpower limitations, international tribunals prosecute very few perpetrators, particularly relative to the number of perpetrators involved in mass atrocity (p. 151). Moreover, because they do not have their own police forces, the tribunals are dependent on national governments to capture perpetrators—governments that may well reject their legitimacy, like Serbia and the ICTY. As a result, there is a

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15. P. 170. Drumbl actually discusses the likelihood of capture, but the two concepts are interchangeable—a perpetrator obviously cannot be prosecuted if he cannot be captured.

16. Fact Sheet on ICTY Proceedings, http://www.un.org/icty/glance/procfact-e.htm (last visited Nov. 23, 2007).

17. Status of ICTR Detainees, http://69.94.11.53/ENGLISH/factsheets/detainee.htm (last visited Nov. 23, 2007).

"very low chance that offenders ever are accused or, if accused, that they ever are taken into the custody of criminal justice institutions," crippling the deterrent value of international prosecutions (p. 169).

Drumbl acknowledges the obvious rejoinder to his critique: if the problem is that international tribunals cannot conduct enough prosecutions, why not simply create more tribunals and fund them better? He responds with a far more radical claim: namely, that it is not clear whether the perpetrators of mass atrocity are even *capable* of being deterred by the threat of punishment. The deterrence value of prosecution assumes that perpetrators are rational—that they have the ability to weigh the likelihood of punishment against the expected rewards of criminal activity. It is questionable, however, whether the perpetrators of mass atrocity possess such rationality. "Do genocidal fanatics, industrialized into well-oiled machineries of death, make cost-benefit analyses prior to beginning work?" (p. 171). In Drumbl's opinion, the answer is no.

B. *Reconstituting International Criminal Law*

For Drumbl, in short, international criminal trials have two fundamental limitations: they cannot reach bystanders, states, and international organizations, all of whom play a necessary role in the perpetration of mass atrocity; and they have minimal retributive and deterrent value. Those limitations do not make such trials superfluous; Drumbl readily admits that "[t]here is some room for adversarial criminal trials within the justice matrix" (p. 21). But they do indicate that international criminal law needs to be pluralized both vertically and horizontally.

1. *Vertical Pluralization*

It's bad enough, in Drumbl's view, that international criminal law cannot adequately address the collective nature of mass atrocity. Even worse is the fact that international tribunals put downward pressure on domestic criminal institutions to *mimic* their failed norms, procedures, and sanctions (p. 123). ICTR and ICTY referrals are a perfect example: although the tribunals are given primary responsibility for prosecuting extraordinary international criminals within their territorial jurisdictions, they retain the right to refer specific cases to domestic courts—something national governments fervently desire.[18] That right, however, comes with two critical limitations: the tribunals can only refer a case if they are satisfied that a defendant will be given a fair trial and if a convicted defendant will not receive the death penalty. "The effect of this process is to induce national courts that seek jurisdiction to conform to a variety of modalities that mimic those found in international criminal law regarding sanction (i.e., no death penalty) and

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18. *See, e.g.*, Hirondelle News Agency, *Rwanda: The Judges of the ICTR Invite Kigali to Prove Its Capacity to Try One of Their Accused*, ALLAFRICA.COM, Sept. 28, 2007, http://allafrica.com/stories/200709290171.html (last visited Nov. 23, 2007).

procedure (i.e., a fair trial)" (p. 139). Rwanda, for example, recently eliminated the death penalty so it could receive ICTR referrals.[19]

The ICC's complementarity principle has a similarly homogenizing effect. Although complementarity gives domestic courts the initial opportunity to investigate and prosecute cases, that right is conditioned on the domestic court not being "unwilling" or "unable" to do so effectively—a determination made by the ICC itself. As a result, "the more a national legal process approximates that of the ICC, including its specific trial and sanctioning modalities, the greater the likelihood that this process will be palatable and pass muster" (p. 143). Indeed, complementarity may even prohibit states from using nonpunitive accountability mechanisms like truth commissions and civil reparations (p. 142).

The problem, of course, is that the balance of power between international tribunals and domestic courts is too heavily weighted toward the tribunals. Drumbl thus suggests that primacy and complementarity be replaced by what he calls the principle of *qualified deference*: "a rebuttable presumption in favor of local or national institutions that, unlike complementarity, does not search for procedural compatibility between their process and liberal criminal law and, unlike primacy, does not explicitly impose liberal criminal procedure" (p. 188). According to qualified deference, a national or local transitional-justice institution would be allowed to operate as long as it did not grossly deviate from a number of interpretive guidelines, including good faith, democratic legitimacy, and the preclusion of the infliction of great evils on others (p. 189).

2. *Horizontal Pluralization*

Qualified deference would obviously give national and local authorities a significant amount of freedom to experiment with nonpunitive sanctions for mass atrocity. And that, for Drumbl, is precisely the point: given the failure of criminal prosecutions to remedy or deter mass atrocity, new and different sanctions—sanctions that "acknowledge the group-based nature of atrocity"—are needed (p. 194). Some possible sanctions have already been tried, including lustration (limiting the political participation of perpetrators), legislative reparations, and state responsibility. Drumbl suggests that these sanctions could be more broadly integrated into the transitional-justice project (p. 196). Other sanctions that hold promise, however, have never been used to address mass atrocity, such as civil remedies based in tort, contract law, and the law of restitution (p. 195).

Drumbl acknowledges that these group-based sanctions raise the unsettling specter of collective guilt—the idea that individuals can be punished for acts committed by groups in which they are members, regardless of their personal responsibility for those acts (p. 197). Nevertheless, he believes that

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19. *See* Petter Clottey, *Rwanda's Senate Votes to Abolish Death Penalty*, NEWSVOA.COM, July 12, 2007, http://www.voanews.com/english/archive/2007-07/2007-07-12-voa2.cfm (last visited Nov. 23, 2007), *available at* 2007 WLNR 15645964.

his proposals for horizontal pluralization are actually based on the quite different idea of *collective responsibility*: "Whereas many individuals are responsible for atrocity, a much smaller number are criminally guilty. . . . Civil liability implicates those individuals and institutions found to bear some responsibility for discrimination-based mass atrocity. This can be a large group, hence the recourse to the phrase collective responsibility" (p. 197).

He also insists that nonpunitive collective sanctions would be both more retributively just than criminal punishment and far more likely to deter future atrocities. They would be more retributively just because they would permit "more carefully calibrated measurements of degrees of responsibility" and offer "a more textured understanding of the key roles played by many otherwise neglected actors" (p. 195). And they would be more likely to deter because the threat of sanction would not only encourage bystanders to control conflict entrepreneurs early on, before they are able to "inflame and exacerbate communal tensions" to the point of violence, but would also put foreign states and international institutions on notice that their failure to prevent mass atrocity will have consequences (p. 202).

II. The Critique

Atrocity, Punishment, and International Law is a challenging and provocative book. No transitional-justice scholar to date has so convincingly critiqued the transformative potential of international criminal law. Indeed, it is difficult to disagree with Drumbl's relentless insistence that the individualist liberal-legalism of international trials makes them singularly ill-equipped to address the collective nature of mass atrocity.

Drumbl's deconstruction of international criminal law, however, is more persuasive than his reconstitution of it. In my view, his proposals for the vertical and horizontal pluralization of international criminal law are both problematic.

A. *Vertical Pluralization*

There are, I would suggest, three basic problems with Drumbl's proposals for vertical pluralization. First, very few national or local transitional-justice institutions will satisfy the requirements for qualified deference, particularly good faith, democratic legitimacy, and the prohibition on inflicting great evil. Second, in the wrong hands, the "great evil" guideline is likely to devolve into little more than a modern-day repugnancy clause, imposing Western values on those who knowingly and consensually reject them. Third, it is unclear why it should never be acceptable to tolerate a "great evil" in the name of peace.

1. *How Deferential Is Qualified Deference?*

As noted earlier, Drumbl believes that a "rebuttable presumption in favor of local or national institutions" would encourage national legal systems to experiment with nonpunitive sanctions that may remedy and deter mass atrocity better than international criminal trials (p. 188). There is no question that such "qualified deference" would be more deferential than either primacy or complementarity (p. 187). But *how much* more is debatable, given that Drumbl says a "gross failure on the part of the measure to meet one of the guidelines could suffice to reverse the presumption" (pp. 189–90). If recent and current transitional-justice institutions are any indication, nearly all such institutions would run afoul of at least one interpretive guideline, rebutting the presumption of deference.

a. *Good Faith*

A number of transitional-justice institutions would violate the "good faith" guideline, which asks whether a particular institution "express[es] or display[s] sufficiently good motives on the part of the legislators" (p. 190). Consider Rwanda's *gacaca* courts, Drumbl's primary example of an institution that he believes exhibits sufficient "good faith" to deserve deference. Although the Rwandan government claims that the *gacaca* courts are designed to promote social reconciliation,[20] the courts actually "have more to do with consolidating [the government's] own political power."[21] First, the Rwandan government amended the Organic Law in 2004 to remove war crimes from the *gacaca* courts' jurisdiction, thereby preventing them from hearing cases involving genocide-era crimes committed by soldiers and officials of the now-ruling Rwandan Patriotic Front ("RPF").[22] Second, although the Rwandan government has still not found the motivation to create the compensation fund called for in the 1996 and 2001 Organic Laws, it wasted little time in legislating its own immunity from civil liability.[23] Third, as popular participation in *gacaca* proceedings has declined, the Rwandan government has increasingly resorted to using its armed security forces to coerce individuals to attend.[24] Needless to say, these are not the actions of a government acting in good faith.

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20. *See* Olivia Lin, *Demythologizing Restorative Justice: South Africa's Truth and Reconciliation Commission and Rwanda's Gacaca Courts in Context*, 12 ILSA J. INT'L & COMP. L. 41, 78–79 (2005).

21. Radha Webley, Gacaca and Reconciliation in Post-Genocide Rwanda 10 (Jan. 29, 2004) (unpublished manuscript, on file with the author).

22. Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice*, 79 TEMP. L. REV. 1, 61 (2006).

23. *Id.* at 56–57.

24. *E.g.*, Lin, *supra* note 20, at 84 ("[A]t weekly gacaca meetings, armed security forces are often present, and coerced participation is a relatively frequent trend." (internal quotation marks omitted)); Waldorf, *supra* note 22, at 67 ("Low participation rates have forced the state to employ coercion, thus publicly exposing *gacaca*'s unpopularity and the contradictions in the state's ideology of national unity and reconciliation." (internal quotation marks omitted)).

We should not be surprised that the Rwandan government has used *gacaca* as a "tool of social control"—Drumbl's own description (p. 95)—instead of as a way to promote reconciliation. No matter how lofty their rhetoric, official state institutions imposed top-down on populations torn apart by atrocity will only be as progressive as the governments that create them. And the Rwandan government is anything but progressive: as summarized by Villia Jefremovas, the RPF has simply "reproduced the pattern of clientalism, political exclusion, double language, and corruption of the previous regimes, acting with the same brutal disregard for the needs of the majority of the population as the previous regimes."[25]

Gacaca, of course, is not the only national transitional-justice institution that would likely run afoul of the "good faith" guideline. South Africa's much-heralded Truth and Reconciliation Commission ("TRC") is another plausible candidate. Although the TRC's primary goal was to maintain political stability by awarding amnesty,[26] the government's public rhetoric was carefully designed to conceal that fact:

> Politically, the individuals who were involved in the TRCs [sic] development amplified its construction as an ideological formula rather than its original position as a "primarily formal measure in [the] overall political settlement." . . . The public hearings, in particular, re-framed the TRC as less an agent for political transition and rather, an agent for spiritual rehabilitation.[27]

This gap between rhetoric and practice was no accident. The government was fully aware that the overwhelming majority of South Africans opposed giving amnesty to those who defended apartheid through violence.[28] The good faith solution would thus have been for the government to make its case for amnesty through open democratic dialogue. But it did not, preferring instead to downplay the *realpolitik* behind the TRC through misleading slogans like "Reconciliation through truth."[29] Even worse, the government conveniently used the TRC's amnesty provisions to prevent victims of apartheid from obtaining civil damage awards against the state.[30]

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25. Villia Jefremovas, Brickyards to Graveyards: From Production to Genocide in Rwanda 124 (2002).

26. Richard A. Wilson, The Politics of Truth and Reconciliation in South Africa 8 (2001) ("The central meaning of 'reconciliation' was an amnesty law, rather than the later formulations advanced by the Truth and Reconciliation Commission.").

27. Lin, *supra* note 20, at 63–64 (second alteration in original).

28. Wilson, *supra* note 26, at 25.

29. *See* François Du Bois, *"Nothing but the Truth": the South African Alternative to Corrective Justice in Transitions to Democracy*, *in* Lethe's Law: Justice, Law and Ethics in Reconciliation 91, 92–93 (Emilios Christodoulidis & Scott Veitch eds., 2001).

30. Wilson, *supra* note 26, at 24 ("[I]f a former agent of the government was granted amnesty by the Amnesty Committee, then the state [was] also automatically indemnified for damages.").

That indemnification was the height of bad faith, given that the government knew most South Africans preferred the right to sue to forgiveness.[31]

b. *Democratic Legitimacy*

Gacaca and South Africa's TRC would also likely violate the "democratic legitimacy" guideline, which asks whether a particular transitional-justice institution enjoys "a substantive form of social legitimacy" (p. 190). The troubled history of *gacaca* is a perfect example. Rwandan citizens initially supported the *gacaca* system,[32] despite the fact that the government created it following a "sensitization campaign" that was "too short and too top-down, with little or no room for a frank and open popular discussion."[33] That support, however, has all but disappeared[34] as a result of the system's endemic corruption, the thousands of *gacaca* judges suspected of involvement in the genocide, and the Rwandan government's heavy-handed and partisan decision to exempt RPF crimes from *gacaca*'s jurisdiction.[35] Indeed, the government's response to declining public participation reveals its recognition that the *gacaca* courts are now widely seen as illegitimate: as noted earlier, instead of trying to address the system's problems, the government has increasingly resorted to compelling participation in *gacaca* proceedings through armed force.[36]

Similar criticisms apply to South Africa's TRC. Although its amnesty provisions were critical to the country's political reconciliation,[37] there is little question that the TRC failed to achieve substantial social legitimacy. As noted above, few South Africans supported amnesty for those who used violence to protect apartheid, and even fewer believed that "national unity" justified extinguishing their right to sue for civil damages in exchange for token compensation.[38] It thus comes as little surprise that local people generally viewed the TRC as "weak, ineffectual and as a 'sell-out.' "[39] In fact, most South Africans rejected the idea that the TRC even *promoted* reconciliation; a national poll conducted in 1998 found that nearly two-thirds

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31. *See id.* at 24–25.

32. Christopher J. Le Mon, *Rwanda's Troubled Gacaca Courts*, 14 HUM. RTS. BRIEF 16, 17 (2007).

33. Filip Reyntjens & Stef Vandeginste, *Rwanda: An Atypical Transition*, *in* ROADS TO RECONCILIATION 101, 119 (Elin Skaar et al. eds., 2005).

34. *See, e.g.*, *id.* (noting there was "a fairly large participation of the population" initially in gacaca proceedings, but now "the participation of the population is much more reduced and in many cases, silence prevails").

35. *See* Le Mon, *supra* note 32, at 16–18.

36. *See supra* note 24.

37. *See* WILSON, *supra* note 26, at 27.

38. *See id.* at 22 ("The TRC made it clear that victims should expect little from the process and only a fraction of what they might have expected had they prosecuted for damages through the courts.").

39. *Id.* at 200.

believed that the TRC simply made South Africans angrier and caused relations between the races to deteriorate.[40]

As we will see later, one reason the TRC failed to achieve social legitimacy was its open hostility toward traditional South African legal institutions, such as the neighborhood courts known as *imbizo*. It is important to note here, however, that relying on traditional institutions in no way guarantees that a state-sponsored transitional-justice program will be seen as socially legitimate. The current situation in Uganda is a case in point. Faced with the suddenly unpleasant prospect of ICC prosecutions,[41] the Ugandan government negotiated an agreement with the Lord's Resistance Army ("LRA") in June 2007 that claims national reconciliation can be better achieved through traditional mechanisms like *mato oput*—a reintegration ceremony that is part of the Acholi legal system, *ker kwaro Acholi*—than through international trials.[42] That may be the case, but there is reason for skepticism: although equally distrustful of the ICC,[43] a majority of Acholi chiefs believe that it would not be possible to adapt *mato oput* for use on a national scale, given the scope and scale of the present conflict.[44] Nor are the Acholi chiefs alone: a recent study by the UN High Commissioner for Human Rights found that individuals throughout Uganda do not believe that the use of traditional practices will lead to peace and reconciliation over the long term and insist that they would be inappropriate for all but the lowest-level perpetrators.[45] Given such widespread skepticism, it seems reasonable to conclude that a government-sponsored transitional-justice program based on *mato oput* would not be seen by ordinary Ugandans as socially legitimate.

c. *Great Evil*

Finally, Drumbl's "great evil" interpretive guideline would also disqualify a wide variety of transitional-justice institutions—especially those that are based on traditional practices. This guideline establishes limits on the kinds of punishment that can be imposed on perpetrators or third parties:

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40. *See* Priscilla B. Hayner, Unspeakable Truths 156 (2001).

41. It was, after all, the Ugandan government that initially referred the situation in Northern Uganda to the Court. *See* Adrian Di Giovanni, *The Prospect of ICC Reparations in the Case Concerning Northern Uganda: On a Collision Course with Incoherence?*, J. Int'l L. & Int'l Rel., Fall 2006, at 25, 35–36.

42. *See* Julius Ocen, Inst. for War & Peace Reporting, Can Traditional Rituals Bring Justice to Northern Uganda? (July 25, 2007), http://iwpr.net/?p=acr&s=f&o=337405&apc_state=henh (last visited Nov. 23, 2007).

43. *See* Liu Inst. for Global Issues, Roco Wat I Acoli: Restoring Relationships in Acholi-Land: Traditional Approaches to Justice and Reintegration ii (2005), *available at* http://www.ligi.ubc.ca/sites/liu/files/Publications/JRP/15Sept2005_Roco_Wat_I_Acoli.pdf.

44. *Id.* at 66.

45. Office of the United Nations High Comm'r for Human Rights, *Making Peace Our Own: Victims' Perceptions of Accountability, Reconciliation, and Transitional Justice in Northern Uganda* 53–54 (Aug. 14, 2007), *available at* http://www.ohchr.org/english/docs/northern_Uganda_august2007.pdf.

"[p]unishment cannot take the form of what cosmopolitan values condemn as a great evil" (p. 191).

It would be easier to assess the "great evil" guideline if Drumbl told us what kinds of punishments he believes qualify as great evils. Unfortunately, he mentions only one: "sexual violence and terror" against women. That great evil appears in his discussion of why *Pashtunwali*, the tribal law of the Pashtun in Afghanistan, would not be entitled to qualified deference (p. 192). Like many traditional justice systems, *Pashtunwali* remedies violent acts by asking the family of the abuser to compensate the family of the abused, normally through the transfer of money or livestock. The problem, for Drumbl, is that compensation can include the transfer of young girls or women, as well:

> So long as one of the sanctions contemplated by the *Pashtunwali* (even if only *in extremis*)—namely, the transfer of young girls or women from the family of the human rights abuser to the family of the abused in order to restore the harm—remained operative, the *Pashtunwali* would not be entitled to qualified deference . . . because sanction would impose a new great evil, namely sexual violence and terror . . . . (p. 192)

It is easy to sympathize with Drumbl's position. But the "sexual violence and terror" of women is intrinsic to many traditional legal systems, including ones that have played a central role in successful transitional-justice institutions. East Timor's Truth and Reconciliation Commission ("CAVR"), for example, is widely credited as being more successful than the TRCs in South Africa or Sierra Leone at reintegrating perpetrators into their communities and promoting reconciliation.[46] CAVR's success was due, in large part, to its innovative Community Reconciliation Process ("CRP") hearings, which relied heavily on *nahe biti boot*, a dispute-resolution mechanism that is part of *lisan*, East Timor's traditional customary law.[47] A staggering ninety-six percent of CRP participants interviewed by CAVR "said that the CRP had achieved its primary goal of promoting reconciliation in their community."[48]

Despite its success as a restorative mechanism, however, *lisan*-based CRP hearings would not be entitled to qualified deference. *Lisan*, no less than *Pashtunwali*, subjects women to "great evils." There is almost no distinction in *lisan* between rape and adultery. Refusing to marry a woman after consensual intercourse is considered more serious than violent rape. Men who rape women are often required to marry the victim.[49] All in all, "the compensation negotiations associated with the resolution of rape (and

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46. *E.g.*, Waldorf, *supra* note 22, at 24.

47. *Id.* at 25.

48. Comm'n for Reception, Truth & Reconciliation in East Timor, *Chega!*, pt. 9, ¶ 118 (Oct. 31, 2005), *available at* http://www.ictj.org/en/news/features/846.html [hereinafter *CAVR Report*].

49. Laura Grenfell, *Legal Pluralism and the Rule of Law in Timor Leste*, 19 LEIDEN J. INT'L L. 305, 321 (2006).

adultery) cases make the crime itself appear like a property offence and women appear as cattle."[50]

To be sure, the CRP hearings did not involve the most patriarchal aspects of *lisan*, because CRP did not have jurisdiction over sexual offenses.[51] Moreover, although women participate minimally in *lisan*,[52] women participated far more in the CRP panels.[53] It could be argued, therefore, that the CRP hearings would have been entitled to qualified deference despite the fact that they relied on a traditional practice that would itself qualify as a great evil. Unfortunately, that argument ignores the fact that the CRP's use of a nonpatriarchal *lisan* ultimately *strengthened* traditional *lisan* and thus *increased* the likelihood that it would subject women to great evils. Indonesia made a conscious decision to undermine *lisan* after it invaded East Timor, recognizing its importance to the Timorese. Any "success" Indonesia might have had, however, was quickly undone by the CRP. According to the Final Report of the CAVR, "the prominence given to *lisan* within the CRP, including the element of official recognition had helped to restore its place as a unifying force within communities."[54]

A similar critique applies to the recent efforts by the Ugandan government and the LRA to make practices like *mato oput* the cornerstone of reconciliation in Northern Uganda. If successful, those efforts will result in a transitional-justice institution that not only lacks democratic legitimacy, but also reinforces a traditional legal system, *ker kwaro Acholi*, that tolerates great evils against women:

> According to tradition, women who change sexual partners are ostracized, and often labelled a prostitute. This social norm can be so strong that it sometimes means a woman may unite with a man who raped her, particularly if a child is born of the rape. It may also be one of the reasons why a percentage of young women returning from the bush with children are willing to reunite with their so called 'husbands' once they return. . . . "Some may wish to remarry . . . but the child produced by rape is ostracized [by the husband, or the husband's family] and so these marriages often fail."[55]

2. *What Qualifies as a "Great Evil"?*

This analysis, of course, begs a fundamental question: what justifies regarding the kinds of patriarchal practices tolerated by traditional legal systems like *Pashtunwali*, *lisan*, and *ker kwaro Acholi* as "great evils"?

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50. Tanja Hohe & Rod Nixon, Reconciling Justice: 'Traditional' Law and State Judiciary in East Timor 61 (Mar. 19, 2003) (unpublished manuscript, on file with the author).

51. *CAVR Report*, *supra* note 48, pt. 9, ¶ 34.

52. *See* Grenfell, *supra* note 49, at 320.

53. Waldorf, *supra* note 22, at 25–26.

54. *CAVR Report*, *supra* note 48, pt. 9, ¶ 98.

55. Liu Inst. for Global Issues, *supra* note 43, at 49 (alteration in original) (quoting Interview with Margaret Tebere in Kanyagoga, Uganda (Feb. 23, 2005)).

Drumbl's answer, which is far more cursory than one would hope, is simply *cosmopolitan pluralism*, a theory that accepts "the richness of local identifications" while acknowledging "the universality of our shared membership in a moral community that condemns great evil" (p. 20). But that response is insufficient: although it is certainly true that all societies condemn certain practices as great evils, *they do not all condemn the same practices*. Practices like genocide and discrimination-based crimes against humanity may well be universally condemned, as Drumbl argues (p. 20). But those great evils are *departures* from accepted social practices, not *the accepted practices themselves*, like the transfer of young women as compensation for harm. Such practices cannot be considered universal evils, because they are not universally condemned—and are, in fact, often widely accepted. So what justifies labeling them "great evils"?

There are two possible answers. The first would be to insist that we cannot assume that a particular social practice is legitimate simply because it exists. Given that all societies experience conflict over social norms—even the most "traditional"—the existence of a particular practice in a society may simply reflect the nonmajoritarian preferences and power of its political, military, economic, or religious elites. If so, the "acceptance" of that practice should not disqualify it from being considered a great evil; indeed, the fact that the practice only survives because of powerful partisan interests may actually *support* the claim that it is one.

This is a powerful response, and one that Drumbl seems to embrace when he writes that *Pashtunwali* is "not a consensual project," but "emerges from the *diktat* of patriarchal elites who serve as nonrepresentative religious or military leaders" (p. 192). Unfortunately, it is far from clear whether practices like *Pashtunwali*'s transfer of young women are as nonconsensual as the response requires. I am not an expert in traditional legal systems, so I am reluctant to offer a definitive conclusion. Nevertheless, there is reason to be skeptical. Regarding *Pashtunwali*, for example, Drumbl offers no evidence in support of his claim that the transferred girls view their transfer as "sexual violence and terror," and at least one expert has noted that although it is difficult to understand why women participate in *Pashtunwali*, they not only do but actually resist reforming it.[56]

The same can be said of the other troubling practices. The most comprehensive study of East Timorese women's attitudes toward traditional justice found that, despite being critical of how men often administered *lisan*, they uniformly believed that it was "a good system, that it should be respected and that Timorese law should always be used in their search for justice."[57] Similarly, despite the fact that most Acholi are skeptical that *ker kwaro* practices like *mato oput* can end the conflict in Northern Uganda, the vast

56. *See* Palwasha Kakar, Tribal Law of Pashtunwali and Women's Legislative Authority 1–2 (2003) (unpublished research paper, Harvard University), *available at* http://www.law.harvard.edu/programs/ilsp/research/kakar.pdf.

57. *E.g.*, Aisling Swaine, Int'l Rescue Comm., Traditional Justice and Gender Based Violence 62 (2003), *available at* www.jsmp.minihub.org/Reports/otherresources/TJ_Report_IRC_11903.pdf.

majority—including women—continue to embrace the spiritual beliefs of which *ker kwaro Acholi* is an integral part.[58]

To be sure, it is always possible to argue that certain practices are evil *regardless* of whether particular societies consensually accept them. That position is not without its appeal: despite the fact that East Timorese women accept a traditional justice system that says they will have to marry their rapist if doing so will promote community harmony, many people are horrified by the practice and would happily see it eliminated.[59]

To say "many people" are horrified by *lisan*'s compelled marriages, however, is imprecise. What we really mean is that many *Western* people are horrified by it. The call to eliminate forced marriages is ultimately a call to impose Western values on the East Timorese—a fact that is not lost on the Timorese themselves, who have dismissed attempts to bring *lisan* in line with international human rights standards as a "new form of colonialism."[60] That resistance does not necessarily mean human rights activists should give up lobbying for a more Western view of women's autonomy. But it does counsel caution regarding claims that a particular traditional practice is a "great evil" that justifies international primacy over the national or local practice. In the absence of such caution (and in hands less skilled than Drumbl's), the "great evil" guideline could all too easily devolve into a modern-day "repugnancy clause"—a colonial provision that incorporated indigenous laws into colonial law only insofar as they did not offend "civilized" notions of "natural justice, equity, and good conscience."[61]

3. *Why Can't We Accept "Great Evil" in the Name of Peace?*

Even if we accept the idea that patriarchal practices like the transfer of young women, compelled marriages, and the ostracizing of children borne of rape qualify as "great evils," the qualified deference test fails to answer another critical question: Might the ends justify the means? In other words, is it wrong to accept such evils even if the traditional institutions of which they are a part promote peace and reconciliation? Many traditional institutions that contain "great evils" have proven far more successful at both than international tribunals. As noted earlier, for example, the use of *lisan* at the CRP hearings was very successful, particularly compared to the internationalized SPSC. The SPSC managed to convict only 87 out of 440 indicted suspects, largely because the international community was unwilling to put pressure on Indonesia, where most of the indictees were located;[62] imposed extremely lenient sentences, even on perpetrators convicted of extraordinary international crimes (p. 58); and were widely criticized by ordinary East

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58. *See* Liu Inst. for Global Issues, *supra* note 43, at 10.

59. *See* Grenfell, *supra* note 49, at 320.

60. *Id.*

61. Sally Engle Merry, *Legal Pluralism*, 22 Law & Soc'y Rev. 869, 870 (1988).

62. Caitlin Reiger & Marieke Wierda, Int'l Ctr. for Transitional Justice, Special Crimes Process 1 (2006), *available at* www.ictj.org/static/Prosecutions/Timor.study.pdf.

Timorese for prosecuting only low-level offenders.[63] Should transitional justice in East Timor have been limited to the SPSC because *lisan* permits great evils against women?

This "peace versus evil" question was posed even more starkly in post-apartheid South Africa. Although the TRC might have promoted political reconciliation, it did little to promote individual or community reconciliation. And the amnesty process was also not particularly successful: "almost no high-ranking officials of the apartheid government came forward to ask for amnesty, and the courts were largely unwilling to pursue cases, even well-founded ones, against those who disdained the offer of amnesty for truth."[64]

Traditional justice institutions in South Africa, by contrast, were much more effective at promoting peace and reconciliation—particularly neighborhood courts known as *imbizo*. After 1994, *imbizo* did much to prevent militant political activities from undermining the peace process, from calling for curfews to urging youth to stop fighting the police.[65] And perhaps even more important, they were a positive force for reconciliation between the races. Consider, for example, the very different experiences of townships that had an *imbizo* and those who did not:

> [T]he urban court in Boipatong has dealt quite successfully with outstanding questions of the political conflicts of the past. It is no coincidence that two former National Party members and councilors from 1988–90 have remained in their homes in the township, whereas other 'apartheid collaborators' have been killed or chased away in other Vaal townships.
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> . . . This contrasts strongly with the situation in neighboring townships without local courts such as Sharpeville, where no councilors have returned to their original homes, but are banished to shantytowns or special barbed-wire enclosed camps constructed by the police. The existence of an overarching justice institution in Boipatong, which can negotiate political compromises and enforce retribution, has paradoxically created an environment less conducive to revenge killings.[66]

Despite their many successes, however, there is no question that *imbizo* would not be entitled to qualified deference. *Imbizo* were vicious retributive mechanisms, prone to extracting confessions from suspects through torture and subjecting convicted defendants to public beatings with whips and golf clubs.[67] They even elevated such viciousness into an epistemological principle,

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63. *Id.* at 2.

64. Naomi Roht-Arriaza, *The new landscape of traditional justice*, *in* TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY 1, 5 (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006); *see also* Jeremy Sarkin & Erin Daly, *Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies*, 35 COLUM. HUM. RTS. L. REV. 661, 675 (2004) ("The TRC report . . . found that the parties most culpable for the nation's past bloodshed were usually the same ones who did not cooperate well with the commission's efforts.").

65. WILSON, *supra* note 26, at 211.

66. *Id.* at 211–12.

67. *Id.* at 205–07.

insisting that truth can only be established through physical violence.[68] Not surprisingly, in keeping with their retributive epistemology, *imbizo* did not provide defendants with even the rudiments of due process and mocked human rights organizations that insisted defendants be protected and given the right to silence.[69] Finally, *imbizo* were deeply patriarchal, physically punishing women and girls as young as fifteen found guilty of adultery.[70]

What are we to make of a traditional institution like *imbizo*? It clearly imposed great evils on both women and defendants—yet it also delivered transitional justice at the individual and community levels far more effectively than the national TRC. Would its great evils have justified international intervention, or would its successes have justified swallowing hard and accepting them?

Although Drumbl never specifically answers this question, he does suggest that "[i]n cases of failure to meet the guidelines, internationalized interventions should not replace *in situ* modalities, but, to the extent possible, work in tandem with local actors to develop harmonized structures that respond to the shortcomings" (p. 190). That response, however, evades the question. Of course we would hope that the international community would try to reform a traditional institution before preempting it. But what if that is not possible? It is difficult to see how *imbizo* could be harmonized with international human rights standards, and the Timorese angrily rejected international criticism of *lisan* as a "new form of colonialism." What happens then?

B. *Horizontal Pluralization*

Given the inability of individual criminal responsibility to address the collective nature of mass atrocity, it is not difficult to be sympathetic to Drumbl's desire to give collective sanctions—lustration, group tort liability, group restitution, and the like—a try. There are, however, two basic problems with such sanctions. First, in order to be retributively just, they would have to be imposed using the same liberal-legalist procedures that paralyze international criminal trials. Second—and perhaps most important—only retributively unjust collective sanctions can effectively deter mass atrocity.

1. *Retribution*

The critical issue with collective sanctions is, of course, how to define the responsible group. Drumbl distinguishes between two different methods: the *crude way* and the *careful way*. The crude way would define the group on the basis of obvious sociological characteristics like nationality, ethnicity, or religion, ignoring individual agency—holding all Germans responsible for the Holocaust, for example, regardless of the role they played in it

68. *Id.* at 207.

69. *See id.* at 206.

70. *Id.* at 215.

(p. 197). The careful way, by contrast, would limit the group "to those individuals who, by virtue of their action or inaction, are demonstrably responsible for atrocity," ensuring that "[i]ndividuals or entities for whom no connection can affirmatively be delineated would avoid membership in the sanctioned group" (p. 198).

If we follow Kant and define retributivism as the idea that "criminals should be punished because they deserve it,"[71] the crude way of defining the collectively sanctioned group would obviously be retributively unjust. As Drumbl notes, by ignoring individual agency in favor of sociological characteristics, the crude way would "include individuals who are not personally responsible," even those who were powerless to help prevent mass atrocity or actively opposed it, as long as "the atrocity was committed in their collective name" (p. 197). An excellent example of such injustice is Czechoslovakia's post–Velvet Revolution lustration law, which prohibited anyone who was an official of, or a collaborator with, the Communist Party from holding public employment. The law did not require the government to prove that an individual had been involved in human rights violations; it only had to produce records held by the secret police that indicated he or she had been a communist official or collaborator.[72] The law thus sanctioned three categories of individuals who were not responsible for the evils of the communist regime: those who had agreed to collaborate but never produced any usable information;[73] those who had only collaborated because they "were coerced into it through blackmail or threats of persecution of family members";[74] and—most unfortunate of all—those who were, because of unreliable and deliberately falsified police records, identified as collaborators despite having refused to collaborate.[75]

The crude way of defining a responsible group would not only be overinclusive. It would also usually be underinclusive, failing to sanction individuals who were personally responsible for atrocities but did not possess the defining characteristic of the sanctioned group. The first stage of denazification after World War II, for example, dismissed individuals from office on the basis of various crudely defined categories: their rank or position in the Nazi party or one of its organizations; their prominence during the war in the economic, cultural, or social fields; and so on. Such "overmechanical" standards meant that numerous individuals "who had played an important rô1e under the Nazis could escape the purge because, for one reason or another, they did not fall in one of the categories."[76]

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71. This is Drumbl's paraphrase. P. 150.

72. Roman Boed, *An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice*, 37 COLUM. J. TRANSNAT'L L. 357, 378 (1999).

73. *Id.* at 379.

74. *Id.* at 379–80.

75. *Id.* at 381.

76. John H. Herz, *The Fiasco of Denazification in Germany*, 63 POL. SCI. Q. 569, 571 (1948).

Two other drawbacks to the crude way are worth mentioning. First, by sanctioning all of the members of a responsible group regardless of their individual responsibility, the crude way would run the risk of mitigating the guilt of those who actually were most responsible for the atrocities—the idea being, to quote Hannah Arendt, that "where all are guilty, no one is."[77] George Fletcher, for example, has admitted to being "very much drawn to the idea that the guilt of the German nation as a whole should mitigate the guilt of particular criminals like Eichmann, who is guilty to be sure, but guilty like so many others of a collective crime."[78] Fletcher immediately qualifies that statement by acknowledging that an individual perpetrator's guilt might still be "sufficiently grave to justify severe punishment,"[79] but it is precisely that kind of individualized determination that the crude way would not provide.

Second, because they would be retributively unjust, crudely imposed collective sanctions would likely alienate the group against whom they are imposed, reducing—if not eliminating—their ability to promote reconciliation. "[P]unishment perceived to be unjust has the effect of increasing the solidarity and resentment of those who suffer and, ultimately, the effect of augmenting resistance rather than decreasing it."[80] Such was certainly the fate of the U.S. war crimes program after World War II: because most Germans viewed the program as little more than collective punishment for the sins of a select few, the program did almost nothing to re-educate or democratize them, generating instead intense anti-Allied sentiment.[81]

These drawbacks could be avoided, of course, by defining the responsible group carefully instead of crudely—"limit[ing] the group to those individuals who, by virtue of their action or inaction, are demonstrably responsible for atrocity" (p. 198). That was Vaclav Havel's position on Czechoslovakia's lustration law: he proposed minimizing the law's "collective guilt" by "providing an objective, impartial hearing in each case."[82] The careful way would obviously be far more retributively just, yet it has a fatal flaw as a procedural mechanism for addressing mass atrocity: the individu-

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77. Hannah Arendt, Responsibility and Judgment 21 (Jerome Kohn ed., 2003).

78. George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 Yale L.J. 1499, 1539 (2002).

79. *Id.*

80. George P. Fletcher, *Collective Guilt and Collective Punishment*, 5 Theoretical Inquiries L. 163, 166 (2004); *see also* Daryl J. Levinson, *Collective Sanctions*, 56 Stan. L. Rev. 345, 406 (2003) ("Sanctions that create nationalist backlash may turn out to be not just ineffective but actually counterproductive as a tool of foreign policy.").

81. Peter Judson Richards, Extraordinary Justice 131 (2007); *see also* Levinson, *supra* note 80, at 406 ("U.S. sanctions against Cuba, for instance, have been used by Castro to foster anti-American sentiment that has arguably strengthened his regime. Sanctions against Iraq have similarly been blamed for fostering resentment toward America throughout the Middle East." (footnote omitted)).

82. Boed, *supra* note 72, at 370.

alized hearings it requires would be procedurally indistinguishable from liberal-legalist criminal trials—a fact Drumbl basically recognizes.[83]

Because the careful way would require the same liberal-legalist procedures as the individualized criminal trial, it would be no better suited for remedying and deterring mass atrocity. Most obviously, the careful way would be completely impractical: given the large number of individuals who could conceivably be part of the group responsible for the atrocities—particularly if it includes all bystanders who did not actively work to prevent them, as Drumbl proposes—providing them all with "an objective, impartial hearing" would take decades. In Rwanda, for example, the International Committee of the Red Cross estimates that approximately 89,000 remain detained on genocide-related charges[84]—likely a conservative estimate, given that the Rwandan government wants to try between 760,000 and 1,000,000 people in *gacaca* courts for involvement in the 1994 genocide (p. 91). Holding that number of trials will be nearly impossible even in the *gacaca* courts, which accelerate the process by denying defendants even the rudiments of due process. In the context of a retributively just trial or hearing, it would be literally unthinkable—something the United States learned the hard way when it responded to German criticisms of denazification by introducing liberal-legalist hearings for the accused.[85] Although the hearings (which were conducted by the Germans themselves) somewhat quelled the criticism, they did so largely through their spectacular failure to find defendants responsible for the Nazis' atrocities.[86]

Drumbl himself, it is important to note, does not embrace either the crude way or the careful way. Instead, he defends a middle path in which "the group can be defined crudely, with the subsequent opportunity for group members to affirmatively demonstrate why they should be excluded from the liable group" (p. 204).

The crude-careful way, however, seems no more workable than the careful way. Although perhaps not requiring quite as much liberal-legalist procedure, an individualized hearing in which the burden of proof is on the defendant is still an individualized hearing. The defendant would still have to be allowed to obtain evidence (such as Czech secret-police records) from the authorities, to test its authenticity, and to call witnesses on his behalf—evidence that the prosecution would then have to challenge. Moreover, that defendant would have every incentive to put on the most elaborate and time-consuming defense possible: unlike an ordinary criminal defendant, he would not be able to argue that the prosecution's evidence was not strong enough to satisfy the burden of proof.

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83. *See* p. 198 ("The careful way thereby abides by Western legalist assumptions of causation and individual agency.").

84. William A. Schabas, *Genocide Trials and* Gacaca *Courts*, 3 J. INT'L CRIM. JUST. 879, 880 (2005).

85. *See* Herz, *supra* note 76, at 571.

86. *See id.* at 572.

The crude-careful way would also be much more likely to be retributively unjust than the careful way—and thus far more likely to alienate the "responsible" group. There is an important but deceptive asymmetry between normal and reversed burdens of proof in situations involving mass atrocity: when the prosecution bears the burden of proof, it would need to prove only that the defendant was involved in one act of group atrocity; but when the defendant bears the burden of proof, he would have to prove that he did not commit any of the group atrocities. Absent being able to prove that he was nowhere near the scene of each atrocity—and perhaps not even then, given aspatial theories of liability like joint criminal enterprise and command responsibility—how could a defendant satisfy that burden?

This critique, moreover, assumes that the defendant was actually a member of the responsible group. How would a defendant disprove that assumption? Consider the plight of the "dead souls" in postcommunist Czechoslovakia—individuals who were identified in secret-police records as collaborators even though they had never been approached for collaboration.[87] How would a dead soul prove that he had not collaborated with the secret police if he bore the burden of proving his nonmembership? After all, his name was right there in the records.

2. *Deterrence*

There is also reason to question Drumbl's belief that the threat of collective sanctions would encourage bystanders to control conflict entrepreneurs early on, before they are able to "inflame and exacerbate communal tensions" to the point of mass violence (p. 202). Unfortunately, only retributively unjust sanctions would provide bystanders sufficient encouragement.

To see why, I must first quibble with Drumbl's understanding of deterrence. As noted earlier, he believes deterrence is a function of the likelihood that an individual would be sanctioned and the speed with which sanctions would be imposed (p. 170). That formulation is idiosyncratic; most criminologists hold that deterrence is a function of the likelihood of prosecution and the severity of punishment if convicted.[88] If the traditional formulation is correct, the deterrent value of collective sanctions for bystanders would depend on two factors: the likelihood that they would be held responsible for not preventing mass atrocity, and the severity of the sanctions they would suffer if collective sanctions were actually imposed upon them.

In terms of the likelihood of sanction, the careful way would have almost no deterrent value. Drumbl acknowledges that bystanders who benefit from atrocity are less blameworthy than those who personally commit it: the conflict entrepreneurs, the mid-level officials, and the actual killers (p. 25). It is thus reasonable to assume that all of those perpetrators would be criminally prosecuted before bystanders would be civilly prosecuted. But if that

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87. Boed, *supra* note 72, at 381.

88. *E.g.*, Richard H. Speier et al., Nonproliferation Sanctions 55 (2001).

is true, then the threat of even the most draconian collective sanctions would provide bystanders with no incentive not to "draw their blinds and look away" (p. 25); no justice system could prosecute all of the perpetrators who actually *committed* atrocities, much less those perpetrators *and* all of the bystanders who allowed the atrocities to happen.

The crude way, by contrast, would have maximum deterrent value. Because it would sanction all of the members of a particular group regardless of their individual agency, the only question bystanders could have about being sanctioned would be whether they would be deemed members of the sanctioned group. That inquiry should be easy for bystanders to answer, however, given that that the crude way simply determines the responsible group "along its most evident characteristics," such as nationality, ethnicity, or party membership (p. 197).

The crude-careful way would have almost as much deterrent value as the crude way. Bystanders who were members of the responsible group could only escape being sanctioned by proving that they tried to prevent the atrocities. As we have seen, though, few if any bystanders will be able to do so. Most bystanders, therefore, would have every reason to expect being sanctioned for their group membership.

Because both the crude way and the crude-careful way make sanctions overwhelmingly likely for bystanders, the real question is how severe those sanctions would have to be to motivate bystanders ex ante to try to prevent those atrocities. There is no question that sufficiently motivating sanctions are possible,[89] such as bulldozing all of the houses in a village that produced a suicide bomber.[90] The issue is whether sanctions that we would consider retributively just—i.e., proportionate to the gravity of the offense[91]—would also work.

Regrettably, it seems unlikely. First, the sanctions would have to be sufficiently onerous to encourage bystanders not only to avoid participating in atrocities—even passive bystanders are subject to collective sanctions, in Drumbl's view—but also *to actively try to prevent them*. Such activities could expose bystanders to considerable personal danger, particularly in nondemocratic societies where opposition would have to go beyond the ballot box.

89. It is worth nothing, however, that although the crude way could encourage bystanders to *prevent* mass atrocity, it could not provide them with any incentive to *limit* atrocities once they began. Bystanders would have an incentive to prevent their group from committing atrocities because, once committed, they could do nothing to escape being sanctioned for them. For the same reason, however, they would have no reason to limit atrocities once they began, because the crude way would sanction even those who opposed the atrocities "committed in their collective name." The careful-crude way, by contrast, would not have the same limitation, because bystanders would at least have the opportunity to avoid collective sanctions by proving that they tried to prevent the atrocities.

90. This example is Alan Dershowitz's proposal for how Israel should respond to Palestinian suicide bombers. *See* ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 177 (2002).

91. *See* IMMANUEL KANT, THE METAPHYSICS OF MORALS 141 (Mary Gregor ed. & trans., 1991) ("[O]nly the *law of retribution* (*ius talionis*) . . . can specify definitely the quality and the quantity of punishment; all other principles are fluctuating and unsuited for a sentence of pure and strict justice because extraneous considerations are mixed into them.").

Second, the sanctions would also have to take into account that it is much more difficult to deter others from acting in ways they find "morally justifiable and perhaps even necessary" (p. 171). Drumbl is speaking about actual killers, the same holds true for the many bystanders who "benefit ideologically and politically from the atrocity" (p. 25).

It is difficult to argue that it would be retributively just to impose such sanctions on bystanders, even if we acknowledge that they are at least partially responsible for atrocity. As Drumbl notes, bystanders are less responsible than the conflict entrepreneurs, mid-level officials, and actual killers. They would thus obviously deserve lighter sanctions—especially given that we do not normally consider *failing to act* to be as culpable as *acting*. Moreover, bystanders who simply pull the blinds and look away are even *less* responsible than bystanders who do not participate in atrocities but benefit indirectly from them, such as the German who moves into the deported Jew's empty apartment. It would thus be even more difficult to justify imposing severe sanctions on bystanders who do not benefit from the atrocity.

Again, nothing in this analysis indicates that it would be impossible for the crude way or the crude-careful way to coerce bystanders into trying to prevent mass atrocity. But it would not be just—particularly given that neither the crude way nor the careful-crude way could justly determine who was a member of the collectively sanctioned group.

Conclusion

Atrocity, Punishment, and International Law provides a damning critique of the transformative potential of international criminal law. It is hard to imagine that anyone who reads the book will still be able to believe that liberal-legalist criminal trials, however well-intentioned, are capable of dealing with the collective nature of mass atrocity. Drumbl is absolutely right: a "richly multivalent approach" to transitional justice is needed (p. 181)—one in which international criminal law plays a far more modest role than it has hitherto. His call to experiment with new kinds of transitional-justice institutions is thus both long overdue and most welcome.

That said, we should not let our skepticism of the international make us unduly credulous of the national. If the problems with Drumbl's proposal for qualified deference indicate anything, it is that national transitional-justice institutions are no more likely to deliver justice than international ones. Unfortunately, although states often speak the language of reconciliation, their rhetoric all too often conceals far more partisan—and far less conciliatory—political goals. Rwanda's deliberate use of *gacaca* as a "tool of social control" is just one of many possible examples. Moreover, states are not neutral actors at the international level, but actively attempt to use international institutions whenever possible for their own partisan ends. The Ugandan government's (ultimately failed) attempt to use a self-referral to the ICC as a weapon against the LRA is an example (p. 144). And even more revealing is the fact that, as I have explained elsewhere, the states that

created the ICC made sure that the absence of due process in a domestic criminal prosecution would not make a case admissible before the ICC.[92]

Similarly, we must also remember that national transitional-justice mechanisms can be *both* pluralizing and homogenizing: pluralizing relative to international criminal law, and homogenizing relative to traditional forms of justice. "Official" state law has always been hostile to indigenous law,[93] and transitional justice is no different—even when that hostility is counterproductive. South Africa's TRC did everything it could to eliminate *imbizo*, despite their success at keeping the peace; Sierra Leone's TRC ignored traditional religious leaders and local forgiveness rituals, crippling its ability to promote reconciliation.[94] To be sure, traditional forms of justice often involve practices that seem—at least from a Western perspective—to inflict great evils on innocent parties. Nevertheless, to refuse to even *consider* trading autonomy and equality for peace is no more defensible than insisting that it is always wrong to trade justice for peace.

Finally, we must not permit our frustration with "ordinary" remedies for mass atrocity to blind us to the perils of collective responsibility. Collective sanctions may be effective, but they cannot be just if they sever the relationship between an individual's responsibility and the magnitude of his crime.

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92. *See* Kevin Jon Heller, *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process*, 17 CRIM. L.F. 255, 258–59 (2006).

93. *See, e.g.*, Sally Engle Merry, *Sorting Out Popular Justice*, *in* THE POSSIBILITY OF POPULAR JUSTICE 31, 31–32 (Sally Engle Merry & Neal Milner eds., 1993) ("Popular justice established in opposition to the state tends to die out or be colonized by state law . . . .").

94. Waldorf, *supra* note 22, at 23.