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PLURALIZING INTERNATIONAL CRIMINAL JUSTICE

Mark A. Drumbl*

FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE. Edited by *Philippe Sands*. Cambridge: Cambridge University Press. 2003. Pp. xiii, 192. Cloth, \$60; paper, \$21.99.

INTRODUCTION

From Nuremberg to The Hague scours the institutions of international criminal justice in order to examine their legitimacy and effectiveness. This collection of essays is edited by Philippe Sands, an eminent authority on public international law and professor at University College London.¹ The five essays derive from an equal number of public lectures held in London between April and June 2002. The essays — concise and in places informal — carefully avoid legalese and arcania. Taken together, they cover an impressive spectrum of issues. Read individually, however, each essay is ordered around one or two well-tailored themes, thereby ensuring analytic rigor. Consequently, the overall collection is accessible without being breezy. It provides an insightful contribution to a burgeoning field and busy debate.

Sands has assembled an illustrious group of contributors. Two of the invited essays are authored by scholarly giants of international law. James Crawford (Whewell Professor of International Law, University of Cambridge, and Member of the United Nations (UN) International Law Commission from 1992 to 2001) sets out the negotiation process

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1. Sands directs the Project on International Courts and Tribunals (PICT) Centre for International Courts and Tribunals at University College London. PICT engages in a comparative and thematic analysis of the work of courts that adjudicate international crimes in places as diverse as Kosovo, Bosnia, Rwanda, Sierra Leone, East Timor, Iraq, and Cambodia. Additional information on PICT's projects is available online at <http://www.pict-pecti.org>. Sands also is a practicing barrister specializing in public international law litigation with the Matrix Chambers in London. In this capacity, he has been involved in leading cases, including litigation involving the former President of Chile, General Pinochet, and also important international environmental law disputes.

of the International Criminal Court, the permanent institution that entered into force in 2002 to adjudicate alleged perpetrators of genocide, war crimes, and crimes against humanity. Andrew Clapham (from the Graduate Institute of International Studies in Geneva) thoughtfully examines how international criminal law has responded to the complexity of the conduct it proscribes and the reality of widespread public complicity in that conduct. In addition to editing the volume, Sands also contributes an essay. He carefully explores the interplay among national and international courts in punishing perpetrators of international crimes. The opening essay in the volume is by a historian, Richard Overy, who traces extant international criminal law back to its genesis at the Nuremberg trials. Cherie Booth, a well-known human rights litigator, authors the final essay in the volume. She discusses how international criminal justice could improve its response to gender violence. The involvement in the project of Booth — and certainly also Crawford and Sands — diversifies the volume's content insofar as these authors have considerable litigation experience and, therefore, represent the voices of those who argue and operationalize international law in a variety of courts.

In terms of readership, this edited volume obviously will interest theoreticians and practitioners in international, comparative, and criminal law. It will also intrigue scholars of jurisprudence. *From Nuremberg to The Hague*, however, also resonates outside of the legal academy. This is in part due to the contributors' ability to present the law in a lively and engaging manner. The volume generates even more dynamism owing to its focus, rather uncommon within the literature, on an interdisciplinary and victim-centered analysis. One of the premises of this book is that, whereas “[l]awyers are particularly interested in the *minutiae* of technical questions[,] . . . what matters to most people is a bigger question: is the emerging system of international criminal justice fulfilling its objectives?” (p. 106). This premise augments the currency of *From Nuremberg to The Hague* among those who apply sociological, anthropological, psychological, and social science methodologies to come to grips with mass atrocity and the role of justice in transcending systemic violence.

I intend in this Review to examine the contributions and limitations of *From Nuremberg to The Hague* and, in so doing, engage in a sustained process of critique and reflection regarding the internationalization of criminal process and its application to individual perpetrators of collective violence. To varying degrees, each contributor to this volume supports this process and its

operationalization through international courts and tribunals, many of which have been created over the past decade.²

In this regard, the contributors write within the dominant metanarrative of international criminal law.³ This paradigm, which has gained currency since the Nuremberg trials (pp. 22, 28), casts mass violence as something blatantly transgressive of universal norms. Transgressions of this magnitude constitute extraordinary acts of criminality that necessitate thorough investigation, effective prosecution, and retributive punishment. What is more, this heuristic posits the need to stigmatize this behavior through special categories of criminality that recognize the particularly opprobrious nature of the crimes at hand. This, in turn, gives rise to proscriptions concerning genocide, crimes against humanity, war crimes, and — inchoately — to large-scale acts of terrorism. This heuristic takes seriously Hannah Arendt's notion that the criminality of mass atrocity is of concern not just to individual victims or roiled societies but also to humanity as a whole and, consequently, that international institutions largely staffed by individuals personally disconnected from the conflict constitute appropriate conduits to prosecute and punish offenders and, thereby, effect justice.⁴ As Sands notes, there has been a proliferation of such institutions in recent years, reflecting the reality that “the international community has determined that the gravest crimes are properly the subject of criminal justice systems” (p. 71). These institutions appropriate the legitimacy of punishment as practiced by states and reapply it in a supra-statal context to punish the “enem[ies] of all humankind.”⁵

Assuredly, it is comfortable — and comforting — for the contributors to *From Nuremberg to The Hague* to write within this metanarrative. This comfort, though, also cabins the full creative output of the volume. What I wish to accomplish in this Review Essay is to build upon the insights and wisdom of the contributors to suggest ways — some of which at first blush may seem eccentric or unorthodox — through which international criminal justice might become more effective in making the world a safer place.

2. Cherie Booth may be the most enthusiastic of the contributors regarding international criminal law institutions and the power of individualized legal process to transform conflict situations. Pp. 178-80.

3. JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* xxiv (Geoff Bennington & Brian Massumi trans., 1984).

4. HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 269 (1963) (arguing that insofar as the Holocaust was a crime against humanity, it needed an international tribunal to do justice to it); HANNAH ARENDT, *THE HUMAN CONDITION* 241 (1958) (calling these incidents of criminality “radical evil”).

5. David Luban, *A Theory of Crimes Against Humanity*, 29 *YALE J. INT'L L.* 85, 90 (2004).

I. NUREMBERG AND HAGIOGRAPHY

As its title foreshadows, *From Nuremberg to The Hague* specifically examines the evolution of international criminal justice from the Second World War to the contemporary wave of legal institution-building that animates international relations. The preface equates the output of this current wave to an “emergence of a new system of ‘international criminal law’” (p. x). Sands astutely ascribes the termination of the Second World War as coincident with the beginnings of the mainstreaming of international criminal law, although it is unclear whether this has reached the level of creating a new legal “system.” Instead, perhaps, international criminal law may be thought of as a patchwork of loosely connected national, regional, international, and hybrid judicial proceedings. That said, the Preface’s reference to a new system of international criminal law certainly is given momentum by the creation in 2002 of the International Criminal Court (ICC) which, assuredly, may provide precisely the sort of permanent enforcement system Sands envisions.⁶

Prior to the Second World War, international criminal law evidenced only rare — and fleeting — life signs. These included suggestions of international or transnational criminal process in the wake of the Turkish campaigns against the Armenians in 1915 and the tactics of the German Kaiser in his effort to secure a German victory over the Allies in the First World War.⁷ These suggestions never gathered much momentum. Consequently, it is fair to say that prior to World War II “individuals had no standing at all in international law and, apart from insignificant exceptions, humanitarian law had never been enforced.”⁸

To be sure, Nuremberg was somewhat of a watershed. Although formally conducted within an institution called the International Military Tribunal, the Nuremberg proceedings essentially were criminal proceedings, not courts-martial.⁹ These proceedings were catalytic in “building the foundation for contemporary international law on war crimes” (p. 28). Nuremberg also played a pivotal role in discrediting the *ex post facto* defense: namely, that it is improper to prosecute someone for an act that was legal at the time and place where the crime was committed (p. 21).

6. Crawford also inquires whether these new institutions, in particular the ICC, create an international justice “system.” Pp. 145, 150.

7. Stephan Landsman, *Those Who Remember the Past May Not Be Condemned to Repeat It*, 100 MICH. L. REV. 1564, 1566-67 (2002).

8. Richard J. Goldstone, *International Human Rights and Criminal Justice in the First Decade of the 21st Century*, 11 HUM. RTS. BRIEF 3, 3 (2004).

9. Landsman, *supra* note 7, at 1568.

That said, it is important not to engage in a hagiographic treatment of the Nuremberg proceedings. Richard Overy's essay, in which he draws from his academic training as a historian, is to be credited for its cautiousness. Overy does not venerate the trials, but instead examines them with great curiosity and great care. He goes out of his way to identify the mindset of the architects of the Nuremberg trials at the time of the establishment of the Tribunal and at the time of the prosecution of various cases. This is refreshing as it counters the seductive tendency to sprinkle the past with some revisionism to make the past conform to contemporary understandings of how it ought to look.

Although the Nuremberg proceedings were animated by rhetoric that evinced legalist zeal, in the end only twenty-two defendants were indicted (p. 12). Many suspects avoided prosecution. The involvement of non-German nationals in the atrocities was deliberately overlooked. Moreover, the initial focus of the proceedings was not on the atrocities perpetrated against European Jewry, but on the crime of waging an aggressive war. In fact, Nuremberg began not as an affirmation of the law of atrocity but rather as a condemnation of Nazi warmongering and militarism.¹⁰ Subsequent apprehensions by the Soviet Union, however, regarding the criminalization of waging an aggressive war — let us not forget the Soviet invasions of Poland and Finland — prompted a political settlement that gave birth to a new offense, crimes against humanity, into which the deliberate persecution and murder of Jews and gypsies could be folded (p. 21). In the end, the indictment formally issued by the Tribunal on October 19, 1945 included four charges: a common conspiracy to wage aggressive war, crimes against peace, war crimes, and crimes against humanity. Overy notes that “[a]t least one of the four prosecuting states, the Soviet Union, was guilty on three of the four counts” (p. 23). United States prosecutors increasingly turned to atrocity evidence to sustain the momentum of the trials while reassuring the Soviet Union. History has recorded Nuremberg to be much more about the law of atrocity than it actually was.

Overy also reminds us that justice at Nuremberg was highly selective and abundantly politicized. He notes that

[e]ven while the horrors of the Nazi camp system were being revealed in court, the Soviet authorities were setting up concentration camps in the Soviet zone of occupation, like the isolation camp at Mühlberg on the Elbe, where, out of 122,000 prisoners who were sent without trial to the camp, over 43,000 were killed or died (pp. 25-26).

10. LAWRENCE DOUGLAS, *THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST* 93 (2001) (noting also that the main evidentiary focus was Nazi aggression and not the plight of victims of atrocities).

The political need to prevent exposing the Soviet Union as an international pariah sparked a legal process that limited guilt to the German nation and, within this nation, placed responsibility upon the shoulders of a handful of notorious individuals.

Moreover, it is telling that the title of this volume refers only to Nuremberg and not to its companion institution, the International Military Tribunal for the Far East (colloquially referred to as the Tokyo Tribunal).¹¹ Whereas some legalism did trickle into Nuremberg, the Tokyo Tribunal was “fraught with procedural irregularities and marred by abuses of judicial discretion.”¹² The proceedings were abundantly politicized in a much more blatant manner than at Nuremberg. By 1953 most of the Tokyo Tribunal’s convicts had been quietly released. What is more, by 1954 “two of the major war criminals [it] convicted . . . became the prime minister and the minister of foreign affairs of Japan.”¹³

In the ensuing decades, international criminal law mostly endured as the preserve of a small group of academics and international lawyers as the Cold War stymied efforts to move international criminal law into the agora of international politics. Principally, the Cold War triggered a sclerosis at the Security Council that hampered efforts at international criminal law-making.¹⁴ The thawing of the Cold War, however, led to a renaissance characterized by the “startling growth of efforts to establish a worldwide criminal process capable of punishing heinous crimes ranging from genocide to grave breaches of the Geneva Conventions.”¹⁵ More important, even, is the channeling of this growth into a proliferation of brick-and-mortar institutions that exercise jurisdiction over individuals. These include purely international courts — such as the ICC¹⁶ — and ad hoc tribunals for

11. The essays only make scattered reference to the Tokyo Tribunals. Clapham raises the fact that the Tokyo Tribunal, in some contrast to the Nuremberg Tribunal, did not deal with issues of criminal organizations or the responsibility of Japanese industrialists. P. 41.

12. JACKSON NYAMUYA MAOGOTO, *WAR CRIMES AND REALPOLITIK: INTERNATIONAL JUSTICE FROM WORLD WAR I TO THE 21ST CENTURY* 103 (2004).

13. *Id.* at 106.

14. Crawford notes that, at the end of the Cold War, “[t]here had been no experience of the international administration of criminal justice since the 1940s.” P. 124.

15. Landsman, *supra* note 7, at 1565.

16. For Overy, “[t]he International Criminal Court . . . is a direct descendant of the Nuremberg Military Tribunal.” Pp. 28-29. Booth remarks that “[t]he ICC is part of a continuum, a process that was catalysed in Nuremberg.” P. 191. The ICC, which entered into force on July 1, 2002, was created by the Rome Statute of the International Criminal Court. See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9* (1998), available at <http://www.un.org/law/icc/statute/romefra.htm> [hereinafter Rome Statute]. It is a permanent institution mandated to investigate and prosecute the most serious crimes of international concern, namely genocide, crimes against humanity, and war crimes. *Id.* arts. 1, 4-8. At the time of writing, ninety-seven nations have become parties to (and 139 nations have signed) the Rome Statute. See *Ratification Status*, available at <http://untreaty.un.org/>

Rwanda (International Criminal Tribunal for Rwanda, ICTR)¹⁷ and the former Yugoslavia (International Criminal Tribunal for the former Yugoslavia, ICTY).¹⁸ Brick-and-mortar institutions also include what Sands calls “internationalised national courts,” (p. 73) such as the Special Court for Sierra Leone¹⁹ and hybrid (UN/domestic) panels or chambers in Kosovo,²⁰ East Timor,²¹ and Cambodia.²²

ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp (last visited June 11, 2004).

17. The ICTR was established as an ad hoc institution by the Security Council. See Statute of the ICTR, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., at 15, U.N. Doc. S/Res/955 (1994). The ICTR investigates and prosecutes persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda, and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring states, between January 1, 1994 and December 31, 1994. *Id.* para. 1.

18. The ICTY, another ad hoc institution of the Security Council, investigates and prosecutes persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. See Statute of the ICTY, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 29, U.N. Doc. S/Res/827 (1993), para. 2.

19. The Sierra Leone Special Court (opened on March 10, 2004) was established jointly by the government of Sierra Leone and the United Nations to prosecute those with greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since November 30, 1996. See Statute of the Special Court for Sierra Leone, art. 1, available at <http://www.sc-sl.org/scsl-statute.html> (last visited June 8, 2004); S.C. Res. 1315 (2000), adopted at the 4186th mtg. (Aug. 14, 2000).

20. Special panels within the Kosovo legal system mix international and national judges and prosecutors. See United Nations Interim Administration Mission in Kosovo, Regulation 2000/64 of 15 December 2000. These special panels adjudicate a variety of crimes committed from May 1998 to June 1999 in the course of the armed conflict between Kosovo separatists and the forces of the Federal Republic of Yugoslavia, but they do not have exclusive jurisdiction over such crimes. ORGANIZATION FOR SECURITY AND COOPERATION IN EUROPE MISSION IN KOSOVO, KOSOVO'S WAR CRIMES TRIALS: A REVIEW 9 (Sept. 2002).

21. Courts have been organized in East Timor with the assistance of the United Nations Transitional Administration in East Timor (UNTAET). UNTAET Regulation 2000/11 (2000), as amended by UNTAET Regulation 2001/25 (2001). One District Court, located in Dili, has two Special Panels for Serious Crimes with exclusive jurisdiction over “serious criminal offenses,” namely genocide, war crimes, crimes against humanity, murder, sexual offenses, and torture committed between January 1 and October 25, 1999, when pro-Indonesian militias rampaged throughout East Timor after the region voted for independence from Indonesia. *Id.* art. 9; UNTAET Regulation 2000/15, *On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences* (2000), s. 1.3; Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT'L & COMP. L. REV. 157, 195 (2004).

22. G.A. Res. 57/223, A/RES/57/228 B (2003), *Khmer Rouge Trials, Annex Draft Agreement between the United Nations and the Royal Government of Cambodia*. From 1975 to 1979, the Khmer Rouge massacred approximately 1.7 million Cambodians. The Cambodia-UN agreement contemplates the formation of extraordinary legal chambers in the Cambodian judicial system to prosecute Khmer Rouge leaders and others most responsible for serious violations of Cambodian penal law, international humanitarian law and custom (including genocide), and international conventions recognized by Cambodia committed during the period April 17, 1975 to January 6, 1979. It remains unclear if and when these extraordinary chambers actually will begin to hear cases.

Although each of these institutions formally is independent from the others, James Crawford (pp. 109-156) demonstrates how they draw strength from each other and weave together to form the tapestry of international criminal law. Whether this tapestry rises to the level of a formalized system, however, is a thorny question. The question is all the more complex because of the need to separate systematization on an institutional level from systematization on a doctrinal level. Institutionally speaking, international criminal tribunals operate with some degree of independence, although they remain firmly dependent on national political systems to capture suspects, provide witnesses, and incarcerate convicts. This limited institutional independence is tempered by a deeply embedded theoretical dependence. As I shall explore further in Part III, international criminal justice has not yet developed a free-standing theoretical framework. Although international criminal law has made great strides in conceptualizing the behavior it criminalizes (genocide, crimes against humanity, and war crimes), it has struggled to develop independent approaches to determine the guilt of defendants, punish convicts, and narrate historical tragedies. In all three of these important areas, international criminal law depends on the often contested modalities of national criminal law. These embedded dependencies, along with some circumspection regarding the role of law in expiating hatred generally, suggest that the need for vigilance in venerating the Nuremberg Tribunal also applies to each of the institutions it has spawned. For the international lawyer, modesty about what the law can accomplish is an important virtue. In this vein, Sands is wise to remind us that “[c]riminal law in general — and international law in particular — will never be a panacea for the ills of the world” (p. 71).

II. INDIVIDUAL GUILT, ORGANIC CRIME, AND PURIFICATION THROUGH LAW

The international criminal tribunals strongly have emphasized that the extraordinary nature of atrocity crimes justifies the need for these crimes to be adjudicated by international institutions. For example, in an interlocutory ruling in the *Tadić* case, the ICTY warned of the “perennial danger” that international crimes might be characterized as ordinary crimes and cited this danger as justifying the primacy of the ICTY over national courts.²³ Despite the extraordinary nature of the criminality of mass atrocity, however, the approach of the international criminal tribunals to punishment and the process of determining guilt or innocence remains rather ordinary, and perhaps

23. Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, para. 58 (ICTY Appeals Chamber, Oct. 2, 1995).

even staid. Under the extant heuristic of international criminal law, accountability arises from third-party adjudication in a trial setting²⁴ followed by incarceration. This means that the methodology of international criminal law largely replicates methods of prosecution and punishment dominant within those states that dominate the international political order.²⁵ To be sure, international criminal law has developed its own institutions and rules.²⁶ These, as Crawford details, are the product of considerable hard work and diplomatic maneuvering (pp. 135-37). I posit, however, that although these institutions and their rules may be formally distinct from national systems, they are not substantively distinct.²⁷ Nor are they distinct

24. The ICTY and ICTR adhere to an adversarial Anglo-American model of adjudication. GEERT-JAN ALEXANDER KNOOPS, *AN INTRODUCTION TO THE LAW OF INTERNATIONAL CRIMINAL TRIBUNALS* 6 (2003). The ICC, reflecting the fact it developed through an internationally negotiated treaty, is more of a balance between the adversarial approach and the inquisitorial approach preferred by the civil law. *See id.* at 10-11, 160. That said, both approaches prioritize retributive, punitive, and individualized justice applied through the incapacitation of the offender. Although international criminal justice institutions may have harmonized adversarial and inquisitorial methodologies, this harmonization is a political settlement among powerful international actors. It is not a genuinely inclusive process that accommodates the disempowered victims of mass violence — largely from non-Western audiences and often estranged from any state or government — who consistently lack any clout in international relations.

25. *See, e.g.*, ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 18 (2003) (arguing that international criminal law results from the “transposition on to the international level of rules and legal constructs proper to national criminal law or to national trial proceedings”); M. CHERIF BASSIOUNI, *INTRODUCTION TO INTERNATIONAL CRIMINAL LAW* 11 (2003) (asserting that the goals of international criminal law are an extension of the goals of national criminal law).

26. *See, e.g.*, Prosecutor v. Ndindabahizi, Case No. ICTR-2001-71-I, para. 22 (ICTR Trial Chamber, July 15, 2004) (“[T]he Chamber is not bound by national rules of evidence, but by its own Rules. Where the Rules are silent, the Chamber is to apply rules of evidence which best favour a fair determination of the matter before it and which are consonant with the spirit of the Statute and the general principles of law.”). For a discussion of the law of evidence in the international criminal tribunals, see 2 JUDGE RICHARD MAY & MARIEKE WIERDA, *INTERNATIONAL CRIMINAL EVIDENCE* (2002).

27. Crawford discusses the choice the architects of the ICC had to make regarding how to frame the system of international criminal justice. According to Crawford:

[I]t was possible to envisage two broad solutions. One was essentially a procedural solution. The ICC would in effect borrow its legitimacy from a national system or systems of international criminal justice, acting as surrogate for these, exercising their jurisdiction and applying their substantive law to the extent that the limited rules of international criminal law did not cover some question. The second solution was to establish, from the beginning, an essentially autonomous international criminal justice system, with its own institutions and rules, essentially distinct from national systems and dependent on them only for co-operation and enforcement.

Pp. 135-36.

For Crawford, the ICC represents “the move from the first to the second model.” P. 137; *see also* p. 154. I agree with Crawford about the importance of making this move. I part company with him, however, regarding the scope of movement that has thus far taken place. Although some movement may be afoot, in my mind international criminal justice still has a very long way to go before it can claim autonomous and distinct status. At present, the ICC,

from the theory that underpins dominant national criminal law systems, thereby lending credence to Cherif Bassiouni's construction of international criminal law as essentially reactive to tragedy, instead of proactive and doctrinally self-supporting.²⁸

There is, of course, lively debate regarding the suitability of dominant methods of punishment in the ordinary domestic context. The proponents of these new international institutions avoid this debate, however, and simply apply these same methods to the context of mass atrocity. In this sense, scholars of international criminal law expend little effort in connecting with scholars critical of criminal law. Assuredly, there are very few international legal scholars sufficiently zealous to believe that criminal trials should be the only response to mass atrocity. That said, there are many scholars who ascribe considerable transformative potential to these trials.²⁹ This potential echoes in other intellectual constituencies.³⁰ Moreover, the community of international human rights activists supports the expansion of the international criminal justice paradigm. So, too, do many political actors, including states, international organizations (for example, the UN), and nongovernmental entities.

From Nuremberg to The Hague largely shares this enthusiasm for law. Its criticisms of the extant project of international criminal justice, although insightful, are not structural. While the volume is enriched by its invocation of historical and feminist perspectives, it — with one exception — does not incorporate much in the way of critical criminology. This exception is Andrew Clapham, whose contribution to *From Nuremberg to The Hague* is the most piercing.

Clapham's thesis is that massive crimes involve levels of complexity (pp. 31-50) and complicity (pp. 50-62) that are alien to domestic criminal law. For Clapham, "simple rules attributing conduct to single actors fail to capture the complexity of the phenomena . . ." (pp. 50-51; emphasis omitted). Clapham's response is modest insofar as it operates within the paradigm of individual criminal responsibility. Essentially, he aspires for individual criminal responsibility to be more

together with all of the institutions punishing extraordinary criminality, does not yet bring an autonomous doctrinal framework to punishing perpetrators of mass violence.

28. BASSIOUNI, *supra* note 25, at xxxii, xxxvi, 583, 588.

29. See, e.g., Payam Akhavan, *Review Essay*, 97 AM. J. INT'L L. 712, 712 (2003) (noting "the euphoria surrounding the ICC's establishment"); Nehal Bhuta, *Review Essay*, 27 MELB. U. L.R. 255, 256 (2003) (book review) ("[I]nternational lawyers' enthusiasm for the concept of international criminal law has only increased . . . '[I]nternational justice' at times appears in danger of becoming a panacea for the problems of contemporary international order, allegedly fulfilling a cornucopia of objectives . . .").

30. John M. Czarnetzky & Ronald J. Rychlak, *An Empire of Law?: Legalism and the International Criminal Court*, 79 NOTRE DAME L. REV. 55, 62 (2003) (noting that "faith in the ICC . . . is held quite strongly in Western intellectual circles").

aggressively asserted against a greater number of individuals.³¹ This is, so to speak, a “widening of the net” (p. 62). One way to widen the net is to call on theories of individual culpability that take into account the role of collective action. Recent jurisprudence from the ICTR and ICTY has invoked collective liability theories along these lines to ground convictions for atrocities in Rwanda and the former Yugoslavia.³² These theories specifically include joint criminal enterprise, conspiracy, complicity, command responsibility, and incitement.

The *Niyitegeka* judgment is illustrative.³³ Eliézer Niyitegeka, a journalist and newscaster on Radio Rwanda, was appointed Minister of Information in the genocidal government that assumed power in April 1994.³⁴ The ICTR convicted him on a variety of counts, including conspiracy to commit genocide. The ICTR ruled that the existence of a conspiracy and the specific intent to commit genocide among the conspirators could be established circumstantially. In this case, the ICTR considered a variety of testimonial and documentary evidence as germane to proof of the specific intent to commit genocide.³⁵ In terms of proving the existence of a conspiracy, the ICTR held that the “organized manner in which the attacks were carried out . . . presupposes the existence of a plan.”³⁶

31. Pp. 58, 67. “We can hope that this wide net of accountability, covering not only people in positions of authority but also those who simply aid and abet others, should serve to prevent crimes as people alter their conduct to avoid liability.” P. 67.

32. Prosecutor v. Krstić, Case No. IT-98-33-A (ICTY Appeals Chamber, Apr. 19, 2004) (convicting defendant of aiding and abetting genocide and substituting that for a conviction at trial as a participant in a joint criminal enterprise to commit genocide); Prosecutor v. Nahimana, Case No. ICTR-99-52-T (ICTR Trial Chamber, Dec. 3, 2003) (convicting three defendants for Conspiracy to Commit Genocide and Direct and Public Incitement of Genocide through the media); Prosecutor v. Semanza, Case No. ICTR-97-20-T (ICTR Trial Chamber, May 15, 2003) (convicting defendant of Complicity in Genocide and Crimes Against Humanity and sentencing him to twenty-five years’ imprisonment); Prosecutor v. Musema, Case No. ICTR-96-13-A (ICTR Appeals Chamber, Nov. 16, 2001) (convicting director of a tea factory of genocide based on command responsibility and sentencing him to life imprisonment); Prosecutor v. Tadić, Case No. IT-94-1-A, para. 220 (ICTY Appeals Chamber, July 15, 1999) (holding that intent in joint criminal enterprise liability can be shown directly or “as a matter of inference from the nature of the accused’s authority within the . . . organizational hierarchy”).

33. Prosecutor v. Niyitegeka, Case No. ICTR-96-14-T (ICTR Trial Chamber, May 15, 2003) (convicting defendant on a number of charges, including conspiracy to commit genocide, and sentencing him to life imprisonment), *aff’d*, Case No. ICTR-96-14-A (ICTR Appeals Chamber, July 19, 2004).

34. *Id.* para. 2.

35. This includes evidence regarding Niyitegeka’s participation in and attendance at meetings, planning of attacks, distribution of weapons to attackers, expression of support of the Rwandan Prime Minister, actions or inactions in failing to protect the victimized Tutsi population, and his general leadership role. *Id.* para. 427.

36. *Id.* para. 428. It also was held that Niyitegeka had “sketched a plan for an attack.” *Id.*

In another case, *Prosecutor v. Nahimana*, a different ICTR Trial Chamber explicitly relied on the *Niyitegeka* decision in support of the propriety of inferring an agreement to commit conspiracy to commit genocide from circumstantial evidence.³⁷ In that decision, it was additionally held that such an agreement “can be inferred from coordinated actions by individuals who have a common purpose and are acting within a unified framework.”³⁸ Assuredly, this alone is not an expansive reading of conspiracy as a basis for liability.³⁹ The ICTR, however, went on to note that

[a] coalition, even an informal coalition, can constitute such a framework so long as those acting within the coalition are aware of its existence, their participation in it, and its role in furtherance of their common purpose [C]onspiracy to commit genocide can be comprised of individuals acting in an institutional capacity . . . independently of their personal links with each other.⁴⁰

In sum, conspiracy as a basis for culpability has become less controversial than it initially was when boldly introduced at Nuremberg.⁴¹

Interestingly, though, the ICTY has begun to express some concern with the expansive use of collective liability theories to ground individual criminal responsibility as a direct participant. On July 24, 2004, the ICTY Appeals Chamber reversed sixteen of the nineteen convictions previously entered by an ICTY Trial Chamber against Bosnian Croat military officer Tihomir Blaškić for ordering crimes against Muslim civilians and for failing as a commander to prevent the commission of those crimes.⁴² The Appeals Chamber expressed concern with elements of vicarious liability that apparently had informed the Trial Chamber’s interpretation of ordering and command responsibility.⁴³ Instead, the Appeals Chamber emphasized

37. *Nahimana*, Case No. ICTR-99-52-T, para. 1046.

38. *Id.* para.1047.

39. *Cf.* *United States v. Cangiano*, 491 F.2d 906 (2nd Cir. 1974), *cert. denied*, 419 U.S. 904 (1974).

40. *Nahimana*, Case No. ICTR-99-52-T, paras. 1047-48.

41. Overy does a masterful job at setting out this controversy. Pp. 14-18, 28. Whereas conspiracy enjoys considerable legitimacy within the Anglo-American common law, many civil law jurisdictions remain somewhat inhospitable to criminal conviction based on conspiracy.

42. *Prosecutor v. Blaškić*, Case No. IT-95-14-A (ICTY Appeals Chamber, July 29, 2004).

43. *See also* Mirjan Damaska, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455, 456 (2001) (“Generally speaking, international criminal law on [command responsibility] seems to be somewhat more hospitable to notions of vicarious liability and other legal constructs which, in their practical application — if not already in their formulation — display a measure of insensitivity to the degree of the actor’s own personal culpability.”).

the need for the prosecutor to prove subjective awareness (or, at a minimum, recklessness) to secure a conviction.⁴⁴ Moreover, in the September 1, 2004, decision in *Prosecutor v. Brđjanin*, an ICTY Trial Chamber rejected joint criminal enterprise in a case with an extraordinarily broad nature and in which the accused was physically and structurally remote from the crimes.⁴⁵

What is more, the ICTY Appeals Chamber also recently overturned the conviction of General Krstić, a General-Major in the Bosnian Serb army at the time it massacred 7000 to 8000 Bosnian Muslim men in the UN safe-haven of Srebrenica.⁴⁶ Initially, an ICTY Trial Chamber had convicted Krstić as a primary perpetrator based on joint criminal enterprise. In the earlier *Tadić* decision, the ICTY Appeals Chamber had held that joint criminal enterprise is an extended form of individual criminal responsibility that “embraces actions perpetrated by a collectivity of persons in furtherance of a common criminal design.”⁴⁷ In the trial decision in *Krstić*, the ICTY noted that genocidal intent could be inferred circumstantially from

44. Regarding ordering, the Appeals Chamber held that “a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order [] has the requisite *mens rea* for establishing liability . . .” *Blaškić*, Case No. IT-95-14-A, paras. 42, 166. For the Appeals Chamber, “[t]he knowledge of any kind of risk [that violations would occur], however low, does not suffice for the imposition of criminal responsibility . . . [U]nder the Trial Chamber’s standard, any military commander who issues an order would be criminally responsible, because there is always a possibility that violations could occur.” *Id.* para. 41. Furthermore, the Appeals Chamber criticized the understanding of command responsibility adopted by the Trial Chamber, affirming instead a different understanding, according to which “a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates.” *Id.* para. 62 (emphasis omitted) (citations omitted); *see also* para. 406.

45. *Prosecutor v. Brđjanin*, Case No. IT-99-36-T (ICTY Trial Chamber, Sept. 1, 2004). The Trial Chamber also held that, although genocidal intent may be inferred circumstantially, in cases where direct evidence is absent, the inference of intent must be the only reasonable inference available. *Id.*

46. *Prosecutor v. Krstić*, Case No. IT-98-33-A, para. 2 (ICTY Appeals Chamber, Apr. 19, 2004).

47. *Prosecutor v. Tadić*, Case No. IT-94-1-A, para. 193 (ICTY Appeals Chamber, July 15, 1999). All participants in a joint criminal enterprise are equally guilty of the crime regardless of their individual roles in its commission. The ICTY has defined a joint criminal enterprise as

an understanding or arrangement amounting to an agreement between two or more persons that they will commit a crime. The understanding or arrangement need not be express, and its existence may be inferred from all the circumstances. It need not have been reached at any time before the crime is committed. The circumstances in which two or more persons are participating together in the commission of a particular crime may themselves establish an unspoken understanding or arrangement amounting to an agreement formed between them then and there to commit that crime.

Prosecutor v. Krnojelac, Case No. IT-97-25-T, Judgment, para. 80 (ICTY Trial Chamber, Mar. 15, 2002), this conclusion *aff’d*, Case No. IT-97-25-A (ICTY Appeals Chamber, Sept. 17, 2003).

proof that Krstić was aware of the genocidal intent of other members of the Bosnian Serb Army but did nothing to prevent the use of army resources and personnel under his command to facilitate the killings.⁴⁸ The ICTY Appeals Chamber held that a conviction for genocide only can be entered where the specific intent of genocide unequivocally has been established.⁴⁹ In the case of a joint criminal enterprise, that intent must be shared by the co-perpetrators. By holding that Krstić did not possess the requisite genocidal intent, the ICTY set some boundaries around the potentially broad scope of joint criminal enterprise announced in *Tadić*. This finding, however, only relieved Krstić from conviction as a principal perpetrator of genocide based on his direct involvement in a joint criminal enterprise. The ICTY Appeals Chamber instead substituted a conviction for aiding and abetting genocide — which it deemed to reflect a less serious level of criminal responsibility — and sentenced Krstić to thirty-five years' imprisonment, rather than his previous sentence of forty-six years.⁵⁰ Consequently, and notwithstanding its circumspection, the ICTY continues to convict based on collective-liability theories that, to some extent, tinker with traditional understandings of individual criminal culpability in order to suit this culpability to the special context of mass atrocity.⁵¹ After all, the Appeals Chamber did recognize that “there was no evidence that Krstić ordered any of these murders, or that he directly participated in them. All the evidence can establish is that he knew that those murders were occurring and that he permitted the Main Staff to use personnel and resources under his command to facilitate them.”⁵²

48. *Krstić*, Case No. IT-98-33-A, paras. 42, 83.

49. *Id.* para. 134.

50. *Id.* paras. 237, 275. The ICTR also has convicted for genocide based on secondary involvement as an aider and abettor. *Prosecutor v. Ndindabahizi*, Case No. ICTR-2001-71-I (ICTR Trial Chamber, July 14, 2004).

51. For example, in the *Vasiljević* case, the ICTY Appeals Chamber convicted a defendant of persecution on a theory of aiding and abetting even though no principal perpetrator was on trial and even though two alleged co-perpetrators remained unidentified. *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Judgment, para. 102 (ICTY Appeals Chamber, Feb. 25, 2004). *Blaškić* was not convicted of aiding and abetting war crimes or crimes against humanity, but this was not because of substantive interpretation of the scope of aiding and abetting. Instead, the *Blaškić* Appeals Chamber did not consider the issue because the claim was insufficiently litigated on appeal and not fairly encompassed in the indictment. *Prosecutor v. Blaškić*, Case No. IT-95-14-A, para. 52 (ICTY Appeals Chamber, July 29, 2004); see also *Damaska*, *supra* note 43, at 461 (discussing the ICTY position on complicity as one in which “no causal link needs to be proven between a superior’s act of assistance and the crime committed by subordinates” (citation omitted)).

52. *Krstić*, Case No. IT-98-33-A, para. 144. Although the Appeals Chamber came to these conclusions specifically in regard to Krstić’s commission of crimes against humanity and war crimes, they are indicative of the genocide charges as well.

Assuredly, this more generous use of conspiracy and aiding and abetting is understandable given the need to adapt the essentially stringent modalities of proof under the ordinary criminal law to the different context of mass atrocity, where gangs maul groups of victims and where survivors hide in ceilings, latrines, and under dead bodies, often for weeks at a time. In this inferno, exactly documenting which militant murdered which specific victim at what time of the day through corroborated eye-witness testimony — the ideal-type of the modern law of evidence — simply is unrealistic.⁵³ The use of forensic evidence to personalize death amid the anonymity of mass graves presents immense challenges. What is more, most postconflict societies lack the resources and technology to safeguard whatever evidence is preserved and analyzed. Viewed through the prism of these realities, recourse to generous — and at times somewhat vicarious — liability theories becomes eminently understandable insofar as these theories permit the tribunals to ascribe individual guilt in cases where violence has several, and often murky, organic sources.

I certainly share Clapham's hope that this broader ascription of individual responsibility will serve a deterrent effect (p. 67). As I see it, however, the adaptation of the paradigm of individual guilt to the cauldron of collective violence that has gained currency with the international criminal tribunals is much more form than substance. Although this adaptation may, for Clapham, amount to a "new way[]" of thinking about the prosecution of violations of international crimes" (p. 66), it is really just a "new way" in a very modest sense. Truly recognizing the riddle of collective action requires more than just an extension of the dominant discourse of ordinary criminal law, which embraces liberalism's understanding of the individual as the central unit of action and thereby deserving of blame when things go terribly wrong.⁵⁴ This understanding echoes one of the most famous legacies of Nuremberg, namely the Tribunal's pronouncement that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."⁵⁵ This predicate carries through to modern institutions of international

53. *Ndindabahizi*, Case No. ICTR-2001-71-I para. 27; BASSIOUNI, *supra* note 25, at 633-34.

54. BASSIOUNI, *supra* note 25, at 685.

55. Pp. 32-33. Despite this bold pronouncement, the Nuremberg Tribunal did engage in some ascription of collective liability. For example, Clapham points out that it did declare certain organizations, including the Nazi Party and the Gestapo, to be criminal organizations. P. 34. Moreover, the trials were held collectively.

criminal justice, including the ICC, which only can try individuals.⁵⁶ The complication, however, is that criminal law systems focused on individual responsibility may be ill-suited to promote accountability for collective wrongdoing. There is a schizophrenia, one which emerges tellingly in the *Blaškić* proceedings: these systems incorporate vicarious legal elements in order to secure convictions, but then express concern that criminalization ought not be based on vicarious liability.

One response might be for the law of atrocity to consider redressing collective violence through collective modalities of accountability. That said, international criminal law's reification of individual responsibility reflects a fear of collective responsibility, collective blame, and, especially, collective guilt. This fear ought to be reappraised dispassionately, by recognizing the specific nature of mass atrocity and differentiating it from ordinary criminal liability. Given the unique nature of the extraordinary criminality of mass atrocity, shouldn't this criminality be addressed through a unique and independent doctrinal and theoretical framework? I have elsewhere called for the law of atrocity to build its own penology, criminology, and victimology.⁵⁷ The absence of an independent theoretical framework obliges international criminal law to invoke the rationales of domestic criminal law. This invocation may be convenient, but it comes with a price: namely, such a system glosses over the fact that the perpetrator of mass atrocity is qualitatively different than the perpetrator of ordinary crime. Whereas ordinary criminals tend to deviate from mainstream society when they commit crimes,⁵⁸ those individuals who perpetrate the extraordinary crimes that collectively lead to mass atrocity are not so deviant in the times and places in

56. P. 48. Under the ICC, "[i]t will not be possible to bring cases against states, nor will there be cases against political organizations or companies." P. 48.

57. Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539 (forthcoming 2005).

58. There are certain ordinary crimes that may not be so starkly deviant and, consequently, not so clearly distinguishable from extraordinary international crimes. For example, organized crime, hate crime, and gang activity may occur in social conditions that loosely parallel those found in conflict societies. Perpetrators of these offenses may not perceive themselves as deviant and may in fact not deviate measurably from codes of conduct prevalent within their self-identified social community. They may well be conforming to these codes. That said, there are stark differences between these social communities and those societies entirely afflicted by the breakdown and remobilization that are conditions precedent to systemic violence. In these societies, national leaders, courts, laws, and bureaucracies may legalize the violence and, instead of punishing individual perpetrators, may actually encourage their behavior. This means that murder, torture, and sexual assault deviate less from mainstream norms in these societies than they would from norms in societies with violent or criminal sub-cultures. However, in terms of those areas of domestic activity where individual deviance may be obfuscated by group order, I certainly welcome criminological, preventative, and penological doctrine that recognizes the influence of the group as a social agent and the structural nature of criminogenic conditions.

question. There is a deep contradiction in their behavior: although they transgress a *jus cogens* norm, this transgression often results from adherence to a social norm that is much closer to home.⁵⁹ This deep complicity cascade does not diminish the brutality or exculpate the aggressor, but it implicates, and in many ways problematizes, a variety of important issues. These include bystander innocence, reparations for victims, reconciliation, groupthink, reintegration of offenders, and the dual role of the international community as enabler of violence and as arbiter of right or wrong.

Violence would not reach epidemic proportions without support from the masses. Whereas Clapham might respond to this through more expansive individual criminal liability, Cherie Booth espouses an even more traditionalist approach tightly connected to Nuremberg. Booth would narrow criminal liability only to those deemed most responsible so as to deliberately avoid the perception of “collective responsibility” (p. 184). The assumption, however, that a handful of people are to be blamed for the mass murder of hundreds of thousands may not be a realistic appraisal of life within societies engulfed by violent cataclysm. Although that handful certainly may be the most blameworthy, this does not mean that everyone else is innocent.

Rwanda presents a particularly telling example. From April to July 1994, a government comprised of extremist members of the Hutu ethnic group initiated a populist genocide in which 800,000 Rwandans (approximately ten percent of the national population) were murdered.⁶⁰ The victims were overwhelmingly from the Tutsi ethnic group. In July 1994, the Rwandese Patriotic Army (RPA), the military wing of a then extraterritorially based Tutsi political party called the Rwandese Patriotic Front (RPF), invaded Rwanda. The RPA ousted the genocidal government, placed the RPF in power, and largely quelled the genocide.

The speed, intensity, and rapidity of the Rwandan genocide was nearly triple that of the Nazi Holocaust.⁶¹ It is estimated that upwards of one million persons (a staggeringly high number among a national population of seven to eight million) were involved as perpetrators in the genocide: some physically doing the killing, others as accomplices,

59. *Jus cogens* are the array of peremptory norms applicable to all states from which no derogation is possible.

60. GÉRARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* 261, 264-65 (rev. ed. 1997).

61. PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* 4 (1998).

facilitators, and aiders and abettors.⁶² In Rwanda, killing became a civic duty enthusiastically put into place by broad swaths of the population. The violence was not anarchic; it arose from the conscious implementation of a shared social norm, according to which “[t]he government, and an astounding number of its subjects, imagined that by exterminating the Tutsi people they could make the world a better place.”⁶³ To these killers and their accomplices must be added the millions of other Rwandans who silently acquiesced to the killings. After all, there was nothing secret about these killings; they were committed publicly, with butchered bodies piled up in every neighborhood throughout the country. No one could have been oblivious to them. That said, many people averted their gaze: some out of fear of recrimination, others because they did not object, and many more because they supported the extirpation.

In the wake of the Rwandan genocide, there has been considerable reliance on national and international trials to pursue a myriad of goals, including accountability, peace, reconciliation, and truth-telling. The international proceedings held at the ICTR operationalize the premise of selective, individualized, retributive criminal justice that underpins international criminal law. The ICTR was established by the UN Security Council on November 8, 1994 to investigate and prosecute political, military, and civic leaders for their involvement in the genocide.⁶⁴ All told, as of mid-2004 the ICTR has arrested sixty-six individuals on charges of individual criminal responsibility (for genocide, crimes against humanity, and war crimes) for the Rwandan atrocity⁶⁵ and has issued twenty convictions.⁶⁶ There have been three acquittals (two of which remain subject to appeal). Given the ICTR’s annual budget of \$180 million,⁶⁷ this breaks down to an average cost of nearly \$80 million for each individual defendant for whom a trial verdict has been issued. Rwandan authorities and national prosecutors

62. Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1250 (2000).

63. GOUREVITCH, *supra* note 61, at 6.

64. See Statute of the ICTR, *supra* note 17, arts. 2-4. Ironically, Rwanda was the only member of the Security Council not to support the creation of the ICTR. Rwanda objected to the limited temporal jurisdiction of the ICTR and the fact that it cannot issue a death sentence. On February 22, 1995, the Security Council resolved that the ICTR would be based in Arusha, a city in northern Tanzania. This, too, was of concern to the Rwandan government, which understandably would have preferred that the tribunal be sited in Rwanda.

65. *ICTR Detainees — Status on 20 September 2004*, at <http://www.ictor.org/ENGLISH/factsheets/detainee.htm> (Sept. 20, 2004).

66. *Id.*

67. Gérald Gahima, Prosecutor General of Rwanda, Comments to the Fifth Biennial Conference of the International Association of Genocide Scholars (June 7-10, 2003) (transcript on file with the author).

have interceded in an attempt to broaden the circle of accountability, arresting another 130,000 individuals. This is a significant number of detainees. Poor infrastructure, lack of funding from donor states, turf battles with the ICTR, and fairly routine criticism from the international community regarding the integration of international due process norms all have hampered the effectiveness (not to mention the occurrences) of domestic trials for these detainees. Thus far, estimates suggest that from 6500 to 8000 such trials have been held.⁶⁸ The Rwandan government now is turning to traditional dispute resolution (called *gacaca*) to determine wrongdoing with a view to reintegrating offenders. The decision to subject persons accused of genocide to *gacaca* has prompted withering criticism from international human rights activists and considerable reserve on the part of the international community.⁶⁹

The deliberate choice by international criminal justice institutions to selectively blame a handful of individuals for mass violence also may serve selfish purposes. Pinning responsibility on a few erases not only the involvement of ordinary Rwandans, but also the involvement of the international community in the violence. The ICTR's judicial reductionism absolves the role of international agencies, transnational economic processes, the foreign policies of influential states, and colonial policies, each of which exacerbated ethnic conflict by creating an environment conducive to violence in Rwanda. It also glosses over decisions by foreign states to ignore the violence after it had begun,⁷⁰ and the international community's failure adequately to support peacekeeping or peace enforcement.⁷¹

It may be convenient to place blame for mass violence on selected savage individuals, instead of offering a fuller — and much more

68. BBC News, *Mass Genocide Verdict Delivered*, Aug. 1, 2003 (on file with the author); Peter Uvin and Charles Mironko, *Western and Local Approaches to Justice in Rwanda*, 9 GLOBAL GOVERNANCE 219, 223 (2003); *18 Sentenced to Death in Rwanda in 2003* — Amnesty, Hironelle News Agency (Lausanne), May 31, 2004 (on file with the author). The ICTR has announced that in 2005 it will begin transferring cases to national courts, including Rwandan courts; up to forty-one cases may be considered for potential transfer. Completion Strategy of the International Criminal Tribunal for Rwanda (Apr. 26, 2004), paras. 4-7, available at <http://www.ictor.org/ENGLISH/completionstrat/s-2004-341.pdf>. Talk of transfer is motivated by the ICTR's financial difficulties and impending deadlines for the completion of trials and appeals, and not by a framework of reference that suggests that holding these trials at the national level would be more effective in attaining the goals posited for these trials. *ICTR to Refer 45 Cases to Rwanda*, MONITOR (KAMPALA), Aug. 19, 2004, available at <http://allafrica.com/stories/200408180472.html>.

69. AMNESTY INTERNATIONAL, RWANDA: THE TROUBLED COURSE OF JUSTICE, Rep. AFR 47/10/00 (2000).

70. SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE (2002).

71. ROMÉO DALLAIRE, SHAKE HANDS WITH THE DEVIL 79 (2003).

embarrassing — display of the multiple political, economic, historical, and colonial factors that facilitate violence. The trade-off for this convenience, though, is a narrower breadth of justice and a compromised preventative strategy. By virtue of its leaving the acts and omissions of international agents untouched, international criminal law fails to allocate blame according to degrees of responsibility. This, in turn, leads to a retributive shortfall, insofar as only a few people receive their just deserts while many powerful states and organizations avoid accountability.

Even more frustrating is the seeming inability of ex post legal sanction to prod the UN — or influential states — toward taking assertive ex ante preventative measures. A telling example is that, on the ten-year anniversary of the Rwandan genocide, massive human rights violations rage in Darfur, Sudan, precipitating the deaths of at least 30,000 civilians and foretelling an imminent humanitarian disaster.⁷² Although the UN has warned of this catastrophe, it has procrastinated in taking more direct action.⁷³ The UN largely is an agent of the political will of influential states, so this piddling can directly be traced back to some of those states. There is a painful similarity between the initial response of the international community to the Darfur crisis and the 1994 crisis in Rwanda. For example, there has been considerable legalistic debate over whether black Africans in

72. *UN and US Warn that Huge Toll in Darfur Crisis is Now Inevitable*, Agence France-Presse, June 3, 2004 (on file with the author); Emily Wax, 'A Big Sheik' Denies Crisis in Darfur, WASH. POST, July 18, 2004, at A1 (reporting that 1.2 million people have been displaced from Darfur by militia violence that has killed another 30,000).

73. Eric Reeves, *Genocide in Sudan*, THESE TIMES, May 6, 2004, at 16, 22 (reporting that “[U.N. Secretary-General] Annan has yet to make concrete proposals for either the resources or the mandate that would guide an intervention. The U.N.’s failure to act ensures that hundreds of thousands of Darfurians will die in the coming months.”); Wax, *supra* note 72 (reporting that the United States has urged the Sudanese government to disarm the militia but that militia leaders continue to roam free). On June 11, 2004, the Security Council adopted a resolution that “urged an immediate halt to violence in Darfur” but that did not propose any concrete action. *UN Approves Peacekeeping Operation in Sudan*, GLOBE & MAIL, June 11, 2004. On July 30, 2004, the Security Council passed Resolution 1556, which requested the Sudanese government to disarm and prosecute rampaging militia but only went so far as to state that it would “consider further actions” in the event the Sudanese government failed to do so. A draft of Resolution 1556 provided for sanctions in the event of Sudanese noncompliance, but seven of the fifteen members of the Security Council (including Algeria, China, and Pakistan) expressed reluctance with this wording and it was subsequently dropped. Mikael Nabati, *ASIL Insights: The U.N. Responds to the Crisis in Darfur: Security Council Resolution 1556*, at <http://www.asil.org/insights/insigh142.htm> (Aug. 2004). In the wake of Resolution 1556, the Sudanese government agreed to take steps to disarm the militias; however, serious attacks continue and the Sudanese government has restricted relief flights to the region. Nima Elbagir, *Sudan Launches New Round of Attacks in Darfur*, Reuters, Aug. 10, 2004; Somini Sengupta, *Death and Sorrow Stalk Sudanese Across Border*, N.Y. TIMES, Aug. 20, 2004, at A1.

Darfur are being subject to genocide, but much less in the way of intervention to prevent and protect them from attack.⁷⁴

III. GROUP SANCTION

Group sanction can take various forms. Among these, *collective guilt (or blame)* is the starkest. Here, criminal liability is attributed to the perpetrator group, whether a state⁷⁵ or a specific ethnic, racial, religious, or political group. Methods of punishment traditional to international criminal law, in particular incarceration, would flow from this attribution. Since groups and states are not natural persons, incarceration would have to be visited upon individuals comprising the group or state. For the most part, collective guilt is viewed dubiously,⁷⁶ although one scholar, George Fletcher, has made an interesting — albeit limited — case for it.⁷⁷

There are other, less invasive, forms of group sanction. These flow not from collective guilt, but rather from a notion of *collective liability*. This category of group sanction would invoke the kinds of remedies that ordinary law might mandate in cases of tort or civil delict (especially where punitive damages are called for in addition to compensatory damages). These include the imposition of economic sanctions and trade restrictions on the perpetrator state or group,⁷⁸ embargoes, fines, taxes, coerced international territorial administration, and restriction on travel of group members. In this regard, the discussion of collective liability I raise here would tend more toward the law of state responsibility or countermeasures than international criminal law per se. In any event, although

74. Steven R. Weisman, *Powell Says Rapes and Killings in Sudan Are Genocide*, N.Y. TIMES, Sept. 10, 2004, at A3 (noting the U.S. statement that the Darfur violence is genocide but also objections raised by other Security Council members). A United Nations Commission of Inquiry concluded that the violence in Darfur amounted to crimes against humanity but not to genocide. Frederic L. Kirgis, *United Nations Commission's Report on Violations of International Humanitarian Law in Darfur*, ASIL INSIGHTS, Feb. 2005.

75. As Crawford notes, state criminal liability has “gained very little acceptance, and it was deliberately rejected by the ILC [International Law Commission] in its Articles on Responsibility of States for Internationally Wrongful Acts (2001).” P. 116.

76. Beth Stephens, *Conceptualizing Violence Under International Law: Do Tort Remedies Fit the Crime?*, 60 ALB. L. REV. 579, 585 (1997).

77. George P. Fletcher, *Collective Guilt and Collective Punishment*, 5 THEORETICAL INQUIRIES L. 163, 168, 169, 173-74 (2004) (positing that collective guilt is a “plausible . . . and sometimes healthy response to collective wrongdoing”).

78. Since the advent of the Charter of the United Nations, states and international organizations have on numerous occasions turned to economic sanctions as an enforcement mechanism where a state fails to comply with international law or, more broadly, as a method to apply political pressure. Economic sanctions are, therefore, familiar terrain for international lawyers.

history teaches us that economic sanctions can have devastating indiscriminate effects on individuals in targeted countries (effects that may be harsher even than penal sanctions), these forms of civil liability certainly lack the denunciatory stigma of the criminal law.

There are also more original ways of thinking about group sanction. I offer, as a starting point, a perspective that treats victims as individuals and aggressors in the collective (instead of international criminal law's current focus on victims in the collective and aggressors as individuals). This approach might facilitate the development of remedies that stigmatize active and passive involvement in mass atrocity but also focus on the need to restore victims (which is often overlooked in criminal law systems aimed at retribution). This model would structure group sanction around the notion of *collective responsibility*, which differs from collective guilt, blame, or liability. Remedies for collective responsibility recognize that for many victims, justice means more than simply the imprisonment of offenders. As such, restorative, commemorative, and reparative approaches could help operationalize collective responsibility.

The use of *gacaca* in Rwanda invokes certain elements of the collective responsibility paradigm. Tens of thousands of individuals accused of a broad array of crimes during the genocide (ranging from intentional homicide to looting) will face *gacaca* proceedings in which they will return to the communities where they allegedly committed their crimes to face judgment by the whole community. Although *gacaca* has gotten off to a shaky start, it has the promise to fulfill many goals, including advancing managerial concerns, promoting atonement, meting out accountability, and overseeing restoration.⁷⁹ Among the remedies contemplated by the *gacaca* proceedings are community service, which "may involve rebuilding destroyed schools, houses or clinics, maintenance work on buildings, roads or gardens, crop cultivation to feed the prison population, educational and motivational activities, first aid or personal care."⁸⁰ These remedies displace the traditional focus on punishment and, in the words of one observer, amount to "collective reparations."⁸¹

From Nuremberg to The Hague does not actively discuss these novel remedies. In fact, it avoids the thicket of group sanction altogether, thereby belying its conceptualization of international criminal justice as synonymous with individual criminal trials. Frankly, this is not surprising. Conversations about group sanction are awkward because of international criminal law's discomfort with

79. For a detailed discussion of the structure and implementation of *gacaca*, see Roht-Arriaza, *supra* note 21, at 192-95.

80. *Id.* at 194.

81. *Id.*

collective blame, which, in turn, motivates the focus of accountability on a relatively small number of high-profile trials. Booth, writing within the context of the ICC and citing eminent South African jurist Richard Goldstone, echoes this conventional wisdom:

[P]roceedings before the ICC have the potential of countering the attribution of collective responsibility for acts committed by individuals. Richard Goldstone put it well when commenting on the emotive photographs of the accused in the dock at Nuremberg. He said that ‘one sees a group of criminals. One does not see a group of representatives of the German people — the people who produced Goethe or Heine or Beethoven.’ (p. 184)

The point of the matter is that the people who produced Goethe, Heine and Beethoven also produced Goebbels, Himmler, and Mengele. If Goldstone is to credit the entire German people for producing artistic geniuses, why should they be spared responsibility for producing mass criminals? The logic of collective exoneration is somewhat frail.

Assuredly, there is a need to accommodate managerial concerns. It is proper to suggest that a narrow, individualized criminal law paradigm is suitable if truly purposive and broad mechanisms of accountability would be too unwieldy and costly. This managerial ethic, however, is not the rationale animating criminal trials of a handful of perpetrators. That rationale, instead, draws from a belief that prosecuting a small number of individuals (generally officials or leaders, but not necessarily so) serves a broad range of normative goals such as retribution, reconciliation, peace, and narrating history. On this latter point, if as Milan Kundera suggested, “the struggle of man against power is the struggle of memory against forgetting,”⁸² it remains unclear how well individual trials relate historical truths about collective violence. Nuremberg Chief Prosecutor Robert Jackson famously advised that criminal proceedings could be a mechanism to “establish incredible events by credible evidence”⁸³ and thereby authenticate a historical record. In the case of Nuremberg, trials played an important didactic role and helped create a broadly shared narrative of Nazi aggression and atrocity. In other cases, like the Tokyo Tribunal, there is little evidence that trials accomplished much in the way of historical authentication, individual punishment, or storytelling. For the ad hoc and hybrid tribunals that currently motor the operation of international criminal law, only time will tell. What seems odd, though, is that despite the strenuous efforts expended by

82. MILAN KUNDERA, *THE BOOK OF LAUGHTER AND FORGETTING* 3 (Michael Henry Heim trans., 1986).

83. TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 54 (1992).

the ICTY to individualize guilt, there is scant evidence that individual Bosnians, Croats, or Serbs blame other individuals for the crimes; rather, it seems that they still accord much of the blame on the other groups.⁸⁴ Consequently, it does not appear that individualized guilt dissipates the specter of collective blame. These de facto realities, in turn, suggest that international lawyers might consider de jure methods of accountability that accept the responsibility of collectivities.

Thus far, I have discussed group sanction as a retrospective way to effect some justice after atrocity has occurred. But it also is important to think about group sanction as a deterrent or preventative mechanism. International criminal lawyers tell us that criminal punishment can have a deterrent effect, as potential perpetrators might restrain themselves from committing extraordinary acts of international criminality out of a fear of getting caught and served up for prosecution before an international tribunal. Let me argue here that group sanctions might serve a more effective deterrent role.

As we have learned from Rwanda, mass atrocity is not the product of random or spontaneous behavior. Rather, it largely is planned, deliberate, and orchestrated. Perpetrators often participate because they want to or because it is rational for them to do so at the time. This rationality can stem from the reality that subordinates stand to gain when they follow the orders of their superiors. It also derives from the sickening reality that “a large number of people . . . find war and a barracks existence a step up rather than a step down.”⁸⁵ There also is an emotive or affective component to mass violence. This component can be particularly compelling: participants want to be part of a collective movement, want that movement to succeed, seek the status and privileges of that success, and often believe that they are doing good by committing evil. As journalist Robert Kaplan notes, “people find liberation in violence.”⁸⁶

Many leaders of violent movements are what political scientists would call conflict entrepreneurs. These are individuals who stand to gain economically, socially, and politically from violent conflict. Conflict entrepreneurs may deliberately create, exacerbate, inflame, or manipulate ethnic, racial, religious, national, or political cleavages in order to consolidate their power. One thing we have learned from the jurisprudence of the ad hoc tribunals is the pervasiveness of ethnic hate propaganda in fuelling the violence in the Balkans and Rwanda. Through this demagoguery, conflict entrepreneurs badgered and

84. David Mendeloff, *Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?*, 6 INT'L STUD. REV. 355, 368 (2004).

85. ROBERT D. KAPLAN, *THE COMING ANARCHY* 44 (2000).

86. *Id.* at 45.

brainwashed ordinary citizens to see good in committing violence. This faith, together with the dehumanization of the scapegoated enemy, makes it much easier for ordinary people to participate in communal butchery. Moreover, the death of the enemy often results in individual privileges and rewards for the killer (more land, money, and goods; promotion in rank; enhanced social status; pride as a patriot). In other cases, for example Sierra Leone, the horrible internecine violence had little to do with demographic categories.⁸⁷ This violence engulfed civilians in repeat nonideological conflict conducted among warlords, rebels, and government henchmen fighting to control lucre, natural resources, or power. At a certain point it becomes rational for ordinary citizens to join some side for protection and to play the game — after all, if you are on no one's side, no one is on yours, and you'll never win. This is how individual rationality metastasizes into the tragedy of collective irrationality.

It is not just genocide that is ordered and derivative of community sources. So, too, are international crimes such as terrorism and systemic human rights violations such as prisoner abuse. These crimes and abuses do not just happen, but instead occur for reasons that transcend the individual perpetrator's malevolence. Large-scale terrorism, for example, is the product of much more than just the behavior of a handful of suicide-bombers. These individuals are financed, supported, coddled, and placated by a broader array of people and, on occasion, states. An even broader set of actors turns a blind eye to them. There is a continuum of responsibility at play. The difficult questions are whether law can thwart the continuum and, if so, how? Clearly, it is problematic to assume that law can deter those who would kill themselves in order to kill others. But without broader support, whether it be direct, indirect, passive, or acquiescent, these individuals would not pose the danger that they do. It is to this phenomenon that law should focus its attention. International criminal law as presently constituted, however, seems unable, or unwilling, to do so.

Moreover, as philosopher Michael Ignatieff observes, systemic human rights abuses can be perpetrated by anyone in the name of any side to a conflict.⁸⁸ The abuse of Iraqi prisoners at Abu Ghraib, deliberately contoured to include sexual humiliation, reveals that no one is immune.⁸⁹ In the aftermath of Abu Ghraib, familiar tensions

87. AMY CHUA, *WORLD ON FIRE* 150 (2004).

88. MICHAEL IGNATIEFF, *THE LESSER EVIL* 115, 118 (2004).

89. Scott Higham and Joe Stephens, *New Details of Prison Abuse Emerge*, WASH. POST, May 21, 2004, at A1 (reporting investigations of allegations at Abu Ghraib of savage beatings, prisoners being forced to retrieve food from toilets, sexual molestation, force-

emerge: the easy answer (let's punish a handful of perverted, abusive individual perpetrators for their independent actions), on the one hand, and more discomfiting questions (did these individual guards act because they were ordered, encouraged, or permitted to do so by more senior commanders?⁹⁰ or because the chain of command was muddled among military and civilian-corporate superiors?⁹¹ or because they grotesquely exaggerated perceived cues from high-level policy decisions to minimize the role of law in the name of national security?) on the other.⁹² The role of law in accounting for Abu

feeding of pork and liquor to Muslim prisoners, forcing prisoners to bark like dogs, riding prisoners like animals, forced masturbation, rape, and sodomy).

90. See Bradley Graham & Josh White, *Top Pentagon Leaders Faulted in Prison Abuse*, WASH. POST, Aug. 25, 2004, at A1 (reporting that an independent panel concluded that top Pentagon civilian and military leaders, including Secretary of Defense Rumsfeld, failed to exercise adequate oversight and allowed conditions that led to the abuse of detainees in Iraq); Thom Shanker & Kate Zernike, *Abuse Inquiry Faults Officers on Leadership*, N.Y. TIMES, Aug. 19, 2004, at A1 (reporting that a high-level Army inquiry found that, although there was no evidence of direct culpability above the colonel who commanded the military intelligence unit of the Abu Ghraib prison, senior U.S. commanders created conditions that allowed abuses to occur); *Frederick Gets 8 Years in Iraq Abuse Case*, N.Y. TIMES, Oct. 21, 2004 (reporting on the sentencing of a staff sergeant for abuse at Abu Ghraib and on the sergeant's insisting that the chain of command forced prisoners to submit to degrading treatment for military intelligence purposes). The defense of "following orders" has largely been rejected in the Abu Ghraib prosecutions. That said, there is evidence that some interrogators believed they were following orders. Editorial, *War Crimes*, WASH. POST, Dec. 23, 2004, at A22 (discussing in particular Guantánamo).

91. See Arianna Eunjung Cha & Renae Merle, *Line Increasingly Blurred Between Soldiers and Civilian Contractors*, WASH. POST, May 13, 2004, at A1.

92. Administration lawyers had advised that the President was not bound by an international treaty prohibiting torture or by federal antitorture legislation because of his authority as Commander in Chief to approve any technique needed to protect U.S. security and, furthermore, that any executive branch officials (including those in the military) could be immune from domestic and international prohibitions against torture. *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations* 21 (Mar. 6, 2003), available at http://online.wsj.com/public/resources/documents/military_0604.pdf. The Working Group Report also provided tightly constructed definitions of torture, concluding that an interrogator who knows that severe pain will result from his actions lacks the requisite specific intent to torture even if he acted in bad faith so long as causing this pain was not his objective. *Id.* at 8-12. The Working Group Report drew heavily from an August 1, 2002 memorandum signed by former Assistant Attorney-General Jay Bybee (currently a judge on the Ninth Circuit) that argued that the President's wartime powers superseded anti-torture laws and treaties. Dana Priest, *Justice Dept. Memo Says Torture "May be Justified"*, WASH. POST, June 13, 2004. This memorandum, in turn, derives from several earlier memoranda, including one authored by John Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, from the Office of Legal Counsel (Department of Justice) to the Department of Defense. *Memorandum, Application of Treaties and Laws to al-Qaeda and Taliban Detainees*, available at <http://www.msnbc.msn.com/id/5025040/site/newsweek>. The August 1, 2002 memorandum generated considerable criticism insofar as it appeared to justify the use of torture (stopping just short of death) in the war on terror and to immunize personnel committing torture from legal process. *Id.* As a consequence of this controversy, and nearly two years after the memorandum was initially authored, the Department of Justice disavowed it. David Johnston, *Uncertainty About Interrogation Rules Seen as Slowing the Hunt for Information on Terrorists*, N.Y. TIMES, June 28, 2004, at A1. On December 30, 2004, a new memorandum was issued that superseded the one that had been disavowed.

Ghraib, in which some of the abuses amount to the kinds of infringements of the Geneva Conventions that would be criminalized as war crimes, is a microcosm of a number of much broader questions. Does individual liability for the perpetrator suffice? Does this individual liability make life easier for the rest of us, since we can blame the abuse on a select small group of twisted individuals on the nightshift? Does their defense — that they were following orders — make us uncomfortable? What about an even bigger picture: namely, that the behavior at Abu Ghraib may be nothing more than a mutated form of our own suspicion of law in allaying our fears of terror? Guantánamo — isolated, shorn of process, access, and transparency — sits as another stark metaphor of the perceptions among certain influential actors of the cramped role law should play in the war on terror⁹³ and, in turn, a site of contestation for other important actors, including the U.S. Supreme Court and other federal courts.⁹⁴

There is an incredible distance between abuse in *hors-la-loi* prisons in Baghdad and the automaticity of mass violence. The point, though, is that for both ends of the continuum, as with many examples of troubling human behavior, structural factors can be controlled and incentivized to discourage individuals from acting in a manner that

Memorandum for James B. Comey, Deputy Attorney General, from Daniel Levin, acting Assistant Attorney General, U.S. Dept. of Justice, Office of Legal Counsel (Dec. 30, 2004). This memorandum flatly states that torture violates U.S. and international law and omits the position that the President, as Commander-in-Chief, could supersede U.S. anti-torture laws, that U.S. personnel could assert a number of defenses to torture, and the narrow definitions of torture (namely, that torture had to involve pain “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death”). *Id.* at 2. However, in December 2004, merely a couple of weeks before public release of the new memo but well after the disavowal of the August 2002 memo, a Justice Department lawyer instructed a Combatant Status Review Tribunal that “it would not be illegal to torture detainees to obtain statements about them.” Carol D. Leonnig & Julie Tate, *Detainee Hearings Bring New Details and Disputes*, WASH. POST, Dec. 11, 2004, at A1.

93. Goldstone, *supra* note 8, at 4-5.

94. *Rasul v. Bush*, 124 S.Ct. 2686, 2698 (2004) (holding that U.S. courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantánamo Bay). Following the *Rasul* decision, Combatant Status Review Tribunals were introduced at Guantánamo to determine the status of detainees. Detainees are entitled to a personal representative before these tribunals but the representative is not a lawyer nor is the relationship between detainee and representative one of privilege. Combatant Status Review Tribunals have been challenged in federal court; one district court judge has found them to be unconstitutional owing to their infringement of due process under the Fifth Amendment. *In re Guantánamo Detainee Cases*, 2005 U.S. Dist. LEXIS 1236 (D.D.C., Jan. 31, 2005). Moreover, a small number of Guantánamo detainees face prosecution in military commissions for war crimes. Scott Higham, *Bin Laden Aide Is Charged at First Tribunal*, WASH. POST, Aug. 25, 2004, at A1. The military commission proceedings have been mired in controversy and delay. Neil A. Lewis, *Guantánamo Tribunal Process in Turmoil*, N.Y. TIMES, Sept. 26, 2004, at A31. They, too, face challenge in federal court. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004).

may seem wholly repugnant after the fact but may well have been eminently rational at the time. Assuredly, this is a controversial suggestion. These thoughts are the beginnings of a more difficult process of discussion and deliberation that transcends the content of *From Nuremberg to The Hague*.

According to social norm theorists, group sanctions can succeed insofar as group members are in an advantageous position to identify and monitor the behavior of conflict entrepreneurs.⁹⁵ Since the criminal law currently does not reach acquiescent group members, it provides them scant incentive to cabin the behavior of conflict entrepreneurs or control their own reactions thereto. Group members therefore become unaccountable beneficiaries of the violence instead of potential gatekeepers. The threat of collective sanctions, on the other hand, may motivate group members to marginalize the conduct of conflict entrepreneurs or, even, snuff it out early on. Moreover, collective sanction does not have to be limited to perpetrator group members. Would international institutions and foreign states have responded with the same nonfeasance to genocide in Rwanda were they to be subject to the reach of collective sanctions?

My point here is that if all ordinary folks somehow would be held responsible for the carnage perpetrated in situations of mass violence, some of the major conditions precedent to such violence — namely the silence of the majority, the complicity of the bystander, and the inaction of the international community — might well dissipate. If average citizens believed they might be much worse off if they followed the exhortations of conflict entrepreneurs, then fewer would follow, and some might even discredit these entrepreneurs early enough in the game to preclude them from gaining momentum. Individuals tempted by violence might well change course. On the other hand, since passive acquiescence rarely — if ever — is implicated in a system based exclusively on individualized criminal justice, it is unclear how this system can deter this fundamental prerequisite to mass atrocity.

IV. JUSTICE, ACCESSIBILITY, AND EMPOWERMENT

Cherie Booth's contribution to *From Nuremberg to The Hague* calls for the active involvement of women in the ICC (p. 163).⁹⁶ For Booth, gender diversity among ICC jurists is essential to the ICC's legitimacy. While I share this sentiment, it is helpful to view issues of diversity and accessibility in a more subtle manner. Which women, exactly, should sit on the ICC bench? Does this include women from

95. Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 348 (2003).

96. See also Rome Statute, *supra* note 16, art. 36(8)(a)(iii) (requiring that there be fair representation of female and male judges).

postconflict societies? Or, on the other hand, shall the ICC continue the practice of ethnic neutrality adopted by the ICTR and ICTY, where members of victim and aggressor communities are deliberately excluded from the institution's personnel in the name of impartiality?

Booth's argument may propound gender diversity while perpetuating the dominance of elite legal technocrats at the expense of the hard work required to integrate local communities and local women in the adjudicative process. I certainly do not deny that the involvement of women jurists at the ICTR and ICTY has influenced the progressive development of international criminal law, for example when it comes to proscribing sexual violence. Booth grippingly documents how the presence of Judge Navanethem Pillay — “a South African Indian, and the only female judge on the Rwandan Tribunal at the time” (p. 168) — on the bench during the prosecution of Jean-Paul Akayesu (a local mayor accused of involvement in the Rwandan genocide) was instrumental in allowing testimony of sexual violence to be adduced and in turn utilized by the Prosecution in successfully pursuing charges of genocide and rape as a crime against humanity (pp. 167-71). Booth is correct to link the existence of gender diversity among international jurists and prosecutors to the expanding criminalization of sexual violence against women.⁹⁷ Even if the retributive and deterrent value of this criminalization might be called into question, the expressive value of making such conduct firmly and flatly illegal has tremendously positive implications in the struggle toward gender equality. That alone, however, is not enough; for the law truly to be purposive, it must welcome — to borrow from Derek Bell — “the faces at the bottom of the well”⁹⁸ so that they can assert ownership over their own trauma and articulate their own response. International criminal law will induce a democratic deficit for so long as it does not include, in the process of accountability, the voices of those actually afflicted by the violence.⁹⁹ It also may thereby replicate patterns of

97. Pp. 165-67. See also *Prosecutor v. Kunarac*, Case No. IT-96-23-T (ICTY Trial Chamber, Feb. 22, 2001), *aff'd*, Case No. IT-96-23-A (ICTY Appeals Chamber, June 12, 2002); *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T (ICTY Trial Chamber, Dec. 10, 1998).

98. DEREK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1993).

99. Concerns over democratic defects and operational pluralism are not limited to international criminal law. See, e.g., Obijiofor Aginam, *Saving the Tortoise, the Turtle, and the Terrapin: The Hegemony of Global Environmentalism and the Marginalization of Third World Approaches to Sustainable Development*, in HUMANIZING OUR GLOBAL ORDER 15 (Obiora Chinedu Okafor & Obijiofor Aginam eds., 2003) (arguing that international environmental law has failed to take into account those practices and belief systems of the countries of the South that are relevant to sustainable development).

political dominance that characterize the international socio-legal order generally.

In this vein, Sands discusses the role of national courts in the adjudication of international crimes. He does not explore the potential of local or indigenous justice mechanisms that, in many places, may carry greater legitimacy among the general population. Sands believes that there is an important role for national courts in the process of accountability (pp. 70-71, 81). I share this sentiment. That said, international lawyers must recognize that the national justice systems of conflict states may have little credibility due to their misuse as tools of repression during periods of authoritarian rule. What is more, Sands appears less amenable to a pluralistic definition of how those national or local institutions should proceed. His frame of reference essentially is one where proceeding nationally implies subsidiary implementation of the modalities of international criminal trials which, in turn, means the superimposition of the dominant criminal law methodologies of those states that dominate the world-order. Instead, those contemplating the future of international criminal justice may consider looking at alternative mechanisms, such as those that draw from restorative justice, local custom, or indigenous legal process.

By “national” courts, international lawyers actually mean two distinct types of courts: (1) those of the place where the international crimes occurred (discussed in the previous paragraph); and (2) those in other places. Sands unpacks the role of national courts in other places. These courts — invoking principles of universal jurisdiction — in certain narrow cases may assert jurisdiction over foreign perpetrators of systematic human rights abuses against foreign nationals (pp. 89-102). Sands explores this phenomenon through a case study of the litigation initiated in Spain against General Pinochet of Chile, which led to a decision by the House of Lords permitting Pinochet’s extradition to Spain from the U.K. (where he had been detained after entering the U.K. for medical treatment). Sands also discusses the 2002 opinion of the International Court of Justice (ICJ) concerning a dispute between Belgium and the Congo regarding the legality of an arrest warrant of a Congolese government minister. In this case, the ICJ invoked the doctrine of official immunities under customary international law to limit the reach of foreign national courts over human rights abusers who were official heads of state or ministers at the time the abuses are alleged to have taken place.¹⁰⁰

100. Under customary international law, official immunities can serve as a defense to charges of international crimes. This defense, however, has been narrowed and, in certain cases, eliminated by the statutes of international courts such as the ICC, ICTY, and ICTR, and internationalized domestic courts such as the Special Court for Sierra Leone. See Rome Statute, *supra* note 16, art. 27; Statute of the ICTY, *supra* note 18, art. 7(2); Statute of the

Sands's comments are generally supportive of the exercise of universal jurisdiction as a mechanism to secure justice.¹⁰¹ For a variety of good reasons, he is critical of the ICJ decision (p. 108). Sands does not address concerns, however, with universal jurisdiction that transcend tired political realist arguments. One important concern is that judicial verdicts delivered by far-away courts may have little meaning among populations affected by the violence. Furthermore, Belgium's assertions of universal jurisdiction present a double-edged sword insofar as Belgium's colonial abuses in the Congo and Rwanda (Belgian courts have convicted Rwandans for genocide) intimately tie it to the violence. This, in turn, problematizes the *ex post* intervention of Belgian courts in the name of human rights. Involving national courts in the process of adjudicating extraordinary crimes should implicate, first and foremost, the legitimate courts of the place affected by the violence, not foreign national courts embarking on messianic enforcement of human rights while ignoring their own responsibility for the decay of those same rights. Of course, there are cases where the national (or local) courts of the place where the violations took place are closed to any claims because the authoritarian abusers are still in office. In such situations, I would argue that proceeding through an international institution such as the ICC — notwithstanding its shortcomings — is preferable to proceeding through a distant foreign national court.

Various contributors to *From Nuremberg to The Hague* examine the doctrine of complementarity, which is the principle guiding the interplay of the ICC with national courts (pp. 63-65, 74-81). According to this principle, the ICC only will assert jurisdiction over a case when it decides that national courts are unwilling or unable genuinely to investigate or prosecute.¹⁰² The complementarity mechanism of the ICC is much more nuanced than the brusque primacy given the ICTY and ICTR over all national proceedings. For Sands, the principle of complementarity means that “the ICC will play a residual role” (p. 75). As I see it, however, the ICC's role may be residual in form but not in substance. National institutions in post-conflict societies may feel inclined to adopt procedures that look much like those at the

ICTR, *supra* note 17, art. 6(2); Statute of the Special Court for Sierra Leone, *supra* note 19, art. 6(2).

101. Moreover, Sands has intervened as *amicus curiae* in litigation before the Special Court for Sierra Leone in favor of the argument that an international court may exercise jurisdiction over a serving head of state and that this head of state may not claim immunity under customary international law in respect of international crimes. *Prosecutor v. Charles Taylor* (SCSL, No. 2003-01-1), Submission of the *Amicus Curiae* on Head of State Immunity, available at <http://www.icc-cpi.int/library/organs/otp/Sands.pdf>.

102. Rome Statute, *supra* note 16, art. 17.

ICC to minimize the risk of ceding jurisdiction to the ICC. After all, it is a safe bet that, for an ICC judge, a “genuine” prosecution will be one that approximates the method employed by the ICC. Complementarity, therefore, may encourage heterogeneity in terms of the number of institutions adjudicating international crimes, but homogeneity in terms of the process they follow and the punishment they inflict. This does not give much of a chance to those legal processes that deviate from the dominant methodology of international criminal law, regardless of the legitimacy, scrupulousness, or connectivity of those local processes.

CONCLUSION

Most international lawyers are very proud of the new institutions of international criminal law. Certainly, there is much cause for that pride. These institutions are the product of hard work in the face of seemingly intransigent political gridlock. With this pride, however, understandably comes some defensiveness. This leads to a situation where the critic of international criminal law institutions often is viewed with considerable reserve. Part of the problem is that criticizing international criminal law institutions often puts the critic, no matter how well-intentioned, in the company of those who believe such institutions to be scurrilous or actually detrimental to national security interests.¹⁰³ This mode of political realism, which expresses considerable reserve regarding the legalization of international relations and the judicialization of politics, has proven influential to many governments, including that of the United States, when faced with the prospect of mass violence perpetrated by non-state-actor terrorists. There has been a resurgence of cynicism about the role of law in international affairs. In this regard I must agree with Booth, who distinguishes modesty about the potential of international criminal justice from cynicism (p. 177).

This cynicism sees law as something that stands in the way of combating security threats, thereby leading to a constriction of law. One example is the conscious decision by the U.S. to categorize terrorist attacks as armed attacks instead of criminal attacks, but then view international humanitarian law — which customarily governs the conduct of belligerents in armed conflict — as “quaint” and something to be circumscribed in conducting the war on terror.¹⁰⁴ This has given

103. GEORGE F. KENNAN, *DIPLOMACY IN THE MODERN WORLD* (1951); HENRY KISSINGER, *DOES AMERICA NEED A FOREIGN POLICY?: TOWARD A DIPLOMACY FOR THE 21ST CENTURY* (2001).

104. Alberto Gonzales, Memorandum to the President, *Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban* (January 25, 2002) (document on file with the author). See also Neil A. Lewis & Eric Schmitt, *Lawyers Decided Bans on Torture Didn't Bind Bush*, N.Y. TIMES, June 8, 2004, at

rise to Guantánamo, as discussed previously, along with a much broader array of policies, practices, and contestations.¹⁰⁵

Paradoxically, perhaps, Overy's contribution to *From Nuremberg to The Hague* teaches us about the dynamic role played by the United States, in particular Secretary of War Henry Stimson and President Truman, in establishing the Nuremberg tribunal at a time when British leaders would have preferred to "subject enemy leaders to a quick despatch before a firing squad" (pp. 3-4). Similarly, the United States has been an advocate of ad hoc tribunals judging international crimes in places as diverse as Rwanda, Cambodia, and the former Yugoslavia.¹⁰⁶ It supports a transparent legal process for Saddam Hussein and his cronies.¹⁰⁷ The idea that due process, law, and public trials are necessary for the perpetrators of unspeakable violence,

A1 (concluding that after the September 11 terrorist attacks the administration's lawyers "were set to work to find legal arguments to avoid restrictions imposed by international and American law"); Edward Alden, *Dismay at legal justifications for torture*, FINANCIAL TIMES (LONDON), June 10, 2004, at 7 (reporting that the memoranda regarding torture of terrorist suspects take "some extreme positions" wholly inconsistent with settled law).

105. For example, the White House has claimed that it has the unilateral ability to declare a U.S. citizen an enemy combatant and then deny that individual access to any form of legal process to contest the indefinite detention that might result. Anthony Lewis, *A President Beyond the Law*, N.Y. TIMES, May 7, 2004, at A31. This has been challenged by the judicial branch. Hamdi v. Rumsfeld, 124 S.Ct. 2633, 2648 (2004) (holding that due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker); see also Adam Liptak, *For Post-9/11 Material Witness, It Is a Terror of a Different Kind*, N.Y. TIMES, Aug. 19, 2004, at A1 (reporting on aggressive use of material witness warrants by U.S. prosecutors to detain those believed to have knowledge of terrorist activities); *supra* note 90 (discussing torture memoranda). Another example involves the accountability of the executive branch. White House Counsel Alberto Gonzales advised the White House that declaring Taliban and al-Qaeda detainees were not covered by the Geneva Conventions "substantially reduces" the threat of criminal prosecution for war crimes (defined to include any grave breach of the Geneva Conventions) under domestic U.S. law. Gonzales, *supra* note 104; John Barry, Michael Hirsh, & Michael Isikoff, *The Roots of Torture*, NEWSWEEK, May 24, 2004, available at <http://msnbc.msn.com/id/498948>; see also Michael Isikoff, *Memos Reveal War Crimes Warnings*, NEWSWEEK, May 17, 2004, available at <http://msnbc.msn.com/id/4999734/site/newsweek/> (reporting that "the internal memos show that administration lawyers were privately concerned that they could be tied for war crimes themselves based on actions the administration [was] taking"). Secretary of State Colin Powell submitted a sharp critique of this recommendation. Colin L. Powell, Memorandum for Counsel to the President, *Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan* (January 26, 2002) (document on file with the author). The President followed suit by stating that Taliban detainees were entitled to the coverage of the Geneva Conventions whereas al-Qaeda fighters were not; however, he then denied actual prisoner of war status to all detainees. Katherine Seelye, *A Nation Challenged: Captives*, N.Y. TIMES, Feb. 8, 2002, at A1; Paul Koring, *No PoWs Being Held in Cuba, Bush Says*, GLOBE & MAIL (Toronto), Feb. 8, 2002, at A12.

106. Landsman, *supra* note 7, at 1582.

107. Although it is important to remember that prior to the March 2003 conflict, the United States offered Saddam Hussein amnesty if he abandoned power.

however, has lost luster among U.S. governing elites when U.S. citizens are affected by that violence. This diminishing prioritization has acquired an additional outlet in the form of American exemptionalism from international conventions in the war on terror, and, in Crawford's words, "the unhappy and extravagant opposition" of the United States to the ICC (p. 109).¹⁰⁸

The purpose of my critique of international criminal law is not to constrict law. Abandoning law frightens me more than naively venerating legalism. My intent in this Review is, instead, to affirm the importance of law in the process of international cooperation and to underscore law's potential for stigmatizing enemies of humanity and remembering their victims. The only way for international criminal law effectively to grow in this direction is through a sustained process of critique and reflection. *From Nuremberg to The Hague* is a valuable step in this direction. It praises extant methods, but realizes that they still disappoint. It then draws strength by viewing disappointment as a prerequisite for improvement. *From Nuremberg to The Hague* also carries this debate to a broader nonspecialist audience, thereby serving a catalytic pedagogical function. I hope to continue this debate through this Review by suggesting that further restructuring of extant thinking is required in order for international criminal law truly to be transformative.

108. On the relationship between the United States and the ICC, see Sands and Booth, pp 76-77, 187-91. Booth's hope that the United States would remain within the ICC framework was dashed in April 2002 when President Bush announced the United States would in fact unsign the Rome Statute. See DOMINIC MCGOLDRICK, FROM '9-11' TO THE IRAQ WAR 2003 88 (2004) (adding that the legal effect of the decision to unsign "release[ed] the US from any obligation not to act inconsistently with the object and purpose of the ICC Statute").