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## Killing Globally, Punishing Locally?: The Still-Unmapped Ecology of Atrocity

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## BOOK REVIEW

### **Killing Globally, Punishing Locally?: The Still-Unmapped Ecology of Atrocity**

ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW. By Mark A. Drumbl. *Cambridge University Press*, 2007. Pp. vii, 316. \$29.99 (paperback).

TIMOTHY WILLIAM WATERS†

All we can do is gaze in wonderment at the diversity of discursive species, just as we do at the diversity of plant or animal species.

Jean-François Lyotard<sup>1</sup>

#### INTRODUCTION: LOCATING THE PROJECT

It can be difficult to write something interesting about something one agrees with. So it is with Mark Drumbl's *Atrocity, Punishment, and International Law (APIL)*.<sup>2</sup> I generally find Drumbl's intuitions and recommendations commonsensical, in accord with things I have thought myself or noted with approval in others' work. But that makes for dull reading; one way to generate some critical

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1. JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* 26 (Geoff Bennington & Brian Massumi trans., 1984).

2. MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* (2007).

traction, if not friction, is to consider where his idea might, even must, go further—to ask, in a sense, what else the author might have said.

Drumbl's core intuition—that the international criminal law (ICL) paradigm fails, and by its nature will fail, to address much of the complexity of great evil, while also driving out local variation responsive to the interests and needs of affected communities—is surely right, and his conclusion—that it is time to move beyond the protectively encomiastic Pollyannism of the early ICL project and begin to ask searching questions about costs, benefits, failings, and improvement<sup>3</sup>—is surely right as well. So the intuitions and the conclusions are right; the framework in between—and the implications beyond—are places of complexity, contestation, and, inevitably, speculation. While agreeing, then, one feels that there are challenges, obstacles, and opportunities that inevitably present themselves.

Drumbl is not plowing virgin soil, and he's not plowing alone. His contemporaries—people like Immi Tallgren,<sup>4</sup> Robert Sloane,<sup>5</sup> and Laurel Fletcher<sup>6</sup>—are writing on substantively similar lines; while established scholars instrumental in developing or expounding the project of ICL—such as Diane Orentlicher<sup>7</sup> and Mark Osiel<sup>8</sup>—have long expressed critical concerns about ICL's narrowness and rigidity, and, like Drumbl, have contemplated a broader range of responses. The entire field of transitional

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3. See *infra* Part I.

4. Immi Tallgren, *The Sensibility and Sense of International Criminal Law*, 13 EUR. J. INT'L L. 561 (2002).

5. Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39 (2007).

6. Laurel E. Fletcher, *From Indifference to Engagement: Bystanders and International Criminal Justice*, 26 MICH. J. INT'L L. 1013 (2005); Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573 (2002).

7. Diane F. Orentlicher, 'Settling Accounts' Revisited: Reconciling Global Norms with Local Agency, 1 INT'L J. TRANSITIONAL JUST. 10 (2007) (reviewing a discussion of transitional justice from the late 1980s).

8. Mark J. Osiel, *Why Prosecute? Critics of Punishment for Mass Atrocity*, 22 HUMAN RTS. Q. 118 (2000) (rehearsing a number of dissatisfactions with ICL); Mark J. Osiel, *Modes of Participation in Mass Atrocity*, 38 CORNELL INT'L L. J. 793 (2005).

justice—populating the academy and practice<sup>9</sup>—is in effect an outgrowth of these kinds of concerns. Indeed, in this sophisticated environment, it is increasingly rare to find a dogmatic defense of the pure ICL project that makes no accommodation of the broader transitional justice paradigm. And was there ever really a time when these concerns—pragmatic concerns, philosophical concerns—did not shadow the project of international justice? After all, the intellectual contours of a speciated taxonomy of guilt, including the collective element so critical to Drumbl’s view, were being laid out just after the war—even as the Nuremberg trials were underway—by Karl Jaspers.<sup>10</sup>

But sharing the land with others doesn’t mean there is nothing to do—this is, after all, one of the few book-length treatments, rather than a journal article,<sup>11</sup> on this particular question.<sup>12</sup> The commonsensical propositions that Drumbl advances may be shared, but they are not universally accepted and only imperfectly acted upon. Jaspers’s work, for all its importance, didn’t provide the model for ICL, which has mostly honored his ideas by quoting and ignoring them on the way to its apotheosis of the individual as the sole subject of the international criminal process. And

9. See, e.g., *THE HANDBOOK OF REPARATIONS* (Pablo de Grieff ed., 2006); see also *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* (Neil J. Kritz ed., 1995); *INT’L CTR. FOR TRANSITIONAL JUSTICE, WHAT IS TRANSITIONAL JUSTICE?*, <http://www.ictj.org/en/tj/> (2006) (noting that transitional justice activities include: “[d]omestic, hybrid, and international prosecutions . . . truth-telling initiatives, including national and international commissions . . . reparations . . . including compensatory, restitutionary, rehabilitative, and symbolic reparations . . . Institutional reform . . . [including] vetting of abusive, corrupt, or incompetent officials . . . Promoting reconciliation within divided communities . . . Constructing memorials and museums . . . Taking into account gendered patterns of abuse”).

10. KARL JASPERS, *THE QUESTION OF GERMAN GUILT* (1947). Drumbl cites Jaspers twice and a letter to him from Hannah Arendt. DRUMBL, *supra* note 2, at 36, 156, 225 nn.79-80, 269 n.29.

11. Two of Drumbl’s earlier articles form part of *APIL*. DRUMBL, *supra* note 2, at xi. One passage is drawn from a third work—Mark A. Drumbl, *Pluralizing International Criminal Justice*, 103 *MICH. L. REV.* 1295, 1317 (2005) (reviewing *FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE* (Philippe Sands ed., 2003)). DRUMBL, *supra* note 2, at 36, 225 n.75.

12. Certainly some of Mark Osiel’s books—such as *MASS ATROCITY, ORDINARY EVIL, AND HANNAH ARENDT: CRIMINAL CONSCIOUSNESS IN ARGENTINA’S DIRTY WAR* (2001)—have asked similar questions, but Drumbl’s focus on punishment is unusual.

certainly, despite the broader recognition of the fairly obvious proposition that complex problems require complex answers, a defense of the narrow ICL model is still made from some corners, in full voice: outrage at procedurally deviant trials; insistence that no amnesty for international crimes is possible; the ritual invocation that through the criminal trial process we avoid the stigma of collective punishment and advance the campaign to end impunity—all with a stultifying effect on the intellectual and practical development of post-conflict responses beyond the canonical, reflexive resort to the criminal process.

So there is certainly still an argument to be made, and if necessary made again. And this Drumbl undertakes; his intended contribution—which, taken as a whole, is essentially to press an existing debate further—can be divided into three objectives.

The first is definitional: to demonstrate that the defining difference between international and domestic crime is the collective nature of mass atrocity; the second is quasi-legislative: to advocate adoption of multiple processes for responding to atrocity, and with them, the legitimation of defined forms of collective punishment; and the third is evidentiary or methodological: to ground these objectives in an empirical penological proof.<sup>13</sup>

The thing which has interested many people, I think, is in the second of these: Drumbl's call for acknowledging acceptable forms of collective punishment. This interest is as much dismay as enthusiasm, I suspect, since the abjuring of collective punishment is still a reflexive rhetorical posture for many, and his particular interest in monetary penalties draws comparison to sanctions whose profligate and imprecise cruelty has been much criticized. But the first and third contributions are worth careful and critical examination as well.

And there is a minor note in *APIL*, though one which might productively be brought to the fore, because it complements the argument: the idea of an *ecology* of

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13. This is not how Drumbl characterizes his own contribution; instead he sees these three things: "to present data regarding how and why local, national and international institutions punish [atrocities]"; "to explore whether extant methods of sentencing actually attain the affirmed objectives of punishment"; and "to move the dialogue from diagnosis to remedy." DRUMBL, *supra* note 2, at xi.

atrocities and punishment.<sup>14</sup> The rationales for diverse responses to atrocities lie in claims about local, particular instantiations of highly general universal norms in ways that are sensitive to context, culture, history, politics, and values. The language of environmentalism and biodiversity<sup>15</sup> or of human and cultural geography<sup>16</sup> might ground and describe the rationales of complexity, diversity, and underlying commonality that Drumbly locates in cosmopolitan pluralism: genetically related, but speciated, specialized, inter-related but suited to the niches in which they dwell, “both the diversity and the similarities have the same underlying causes.”<sup>17</sup> And so although the tropes and frameworks of these disciplines are not the structure Drumbly has chosen, he has—as with his principal themes—indicated a direction in which things might evolve: an ecological perspective with the still-unfinished project of mapping that implies.

## I. THE ARGUMENT OF THE BOOK IN BRIEF

It is worth having an outline of *APIL*'s argument, both to see its basic sensibility and to bring into focus those areas where its framework implies some further challenge,

14. *Id.* at 37 (“[T]he orthodoxy of the predicate of avoiding collective responsibility could be rethought and broader ‘ecological’ approaches to the violence acknowledged.” (citing Fletcher & Weinstein, *supra* note 6, at 573, 580, 601)). Later, Drumbly describes a “legal geology” of transplanted norms and refers to “the social geographies of the afflicted societies.” DRUMBL, *supra* note 2, at 125-27, 148. The reverse—considering environmental damage as atrocities—has been attempted. See Kathryn Norlock, *The Atrocity Paradigm Applied to Environmental Evils*, 9 *ETHICS & ENV'T* 85 (2004); see also ELLI LOUKA, *BIODIVERSITY & HUMAN RIGHTS: THE INTERNATIONAL RULES FOR THE PROTECTION OF BIODIVERSITY* (2002).

15. Cf. *BIODIVERSITY* (Edward O. Wilson ed., 1988); DAVID TAKACS, *THE IDEA OF BIODIVERSITY: PHILOSOPHIES OF PARADISE* (1996).

16. Cf. RICHARD PEET, *MODERN GEOGRAPHICAL THOUGHT* (1998); W. Wesley Pue, *What is Law? Preliminary Thoughts on Geojurisprudential Perspectives*, in *GEOGRAPHY, ENVIRONMENT, AND AMERICAN LAW* 30 (Gary L. Thompson et al. eds., 1997).

17. Mark A. Dimmitt, *Biomes and Communities of the Sonoran Desert Region*, in *A NATURAL HISTORY OF THE SONORAN DESERT* 3 (Steven J. Phillips & Patricia Wentworth Comus eds., 2000); see also W. R. Tobler, *A Computer Movie Simulating Urban Growth in the Detroit Region*, 46 *ECON. GEOGRAPHY* 234, 236 (1970) (“[E]verything is related to everything else, but near things are more related than distant things.”).

as well as to consider the direction one could, and perhaps should, go.<sup>18</sup>

1. Mass atrocities (which Drumbl calls extraordinary international crimes) have qualities that distinguish them from ordinary crime: a unique egregiousness;<sup>19</sup> a strongly collective component where ordinary crime is individual; and a basis, not in deviance, but in conformity. This difference in the nature of the underlying crime recommends different models of response—of process and punishment—and even different purposes for the entire enterprise.

2. However, the dominant response to atrocities has been a project constructed on a close analogy to the domestic criminal process and drawing on the “liberal legalist”<sup>20</sup> assumptions which underpin that process: focus on the individual, abjuring of collective punishment, reliance on procedure, and a theory of punishment grounded on the deviant nature of the criminal. Appearing in variants from The Hague to East Timor, Rwanda to Sierra Leone, and in national courts, this standard ICL model is highly homogeneous.

3. The standard model also makes certain claims about its purposes; however, an analysis of punishment—one of the least examined elements of the ICL process—makes clear the failure of the current model to reach those goals. International and domestic courts’ sentencing practice is inconsistent and incoherent, and their rationales for punishment are problematic: sentencing is too selective, spotty, and inconsistent to serve retributive goals; the prospect of trials is too remote and infrequent to deter effectively; and expressivist goals, though more defensible, are not adequately served either.

4. Worse, even as it fails to achieve its own aims, ICL—with its formal decisional mechanisms—delegitimizes and

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18. Drumbl provides one too: The first chapter of *APIL* condenses the argument of the entire book, and it is reprised in stages throughout and again at the end. This Review’s summary does not hew precisely to the order of Drumbl’s chapters, though it represents his argument.

19. “[I]nternational lawmakers believe that extreme evil is cognizable by substantive criminal law. Because extreme evil is so egregious, however, only special substantive categories of criminality (in some cases newly defined, named, or created) could capture it. These categories include genocide, crimes against humanity, and war crimes.” DRUMBL, *supra* note 2, at 4.

20. *Id.* at 5 (also describing this as “Western legalist”).

displaces other means of responding to atrocity, such as restoration, lustration, and amnesty, as well as traditional or context-specific mechanisms such as reintegrative rituals. These other projects are only allowed space so long as they are subordinate to the formal ICL project; and because many of these culturally particular methods are procedurally heterogeneous, they are viewed as antithetical—contradictory rather than complementary—to the ICL project. The effect is “legal mimicry”<sup>21</sup> that imports international legal process—and with it that process’s Western commitments—into the domestic systems of countries affected by atrocity; in turn, these “transplants”<sup>22</sup> migrate downward, with municipal courts colonizing or driving out local, non-conforming traditions.

5. This homogenization of legal space—and its evident failure, on purely pragmatic grounds, to achieve effective and just outcomes—moves Drumbl to consider ways to construct a broader, more inclusive mechanism. His approach is grounded in philosophical perspectives about the fundamental unity of human response to extreme evil and the wide variation in that response’s possible expression: “[t]he notion of diverse procedure for universal wrongdoing . . . fits within a cosmopolitan theory of law, although it certainly tends toward the pluralist end of the continuum. [His] model, therefore, is one of ‘cosmopolitan pluralism.’”<sup>23</sup>

6. Concretely, Drumbl proposes reform along two fronts: vertical and horizontal. First, he proposes creating space for “bottom-up approaches to procedure and sanction”<sup>24</sup> to counteract the downward-cascading pressures of the dominant liberal-legalist paradigm. Of course, concerned about quality control, he proposes a model of “qualified deference”<sup>25</sup> to determine when heterodox models meet what he defines as a cosmopolitan pluralist minimum. What he imagines is a model that is simultaneously more robust and more flexible than the International Criminal Court’s (ICC) complementarity—itself a process that is, he

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21. *See id.* ch. 5.

22. *Id.* at 125.

23. *Id.* at 20 (emphasis omitted).

24. *Id.* at 18.

25. *Id.* at 188.



suggests, actually far more intrusive and controlling of state practice than is commonly supposed.

Second, in the horizontal space he proposes progressively integrating non-criminal models—such as civil penalties and service requirements—and then a range of transitional justice mechanisms—truth commissions, reparations, commemorative projects, and institutional reform. The purpose of this widening is “to advance *from law to justice*: initially, by moving international criminal law to a capacious law of atrocity and, ultimately, to an enterprise that constructively incorporates extra-judicial initiatives.”<sup>26</sup> It is here that Drumbl directly addresses something he has been indicating all along—that these wider responses are a form of collective punishment.

7. It should be noted that the center, if not the heart, of *APIL* is quantitative. In explicating all of this, Drumbl draws on a range of international and national courts—fitting to his eventual theme of diversity—and grounds his case on a study of their punishment practice. The quantitative and argumentative weight fall mostly on Rwanda—where Drumbl has worked—which clearly captures his imagination and provides in its *gacaca* system, a pool of data and the central exhibit in the case for a broader alternative approach.

The rest of this Review considers elements of this framework in more detail, first in light of the three contributions the book attempts, and then with regard to the implications of taking it seriously and taking it further.

## II. DEVIANT INDIVIDUAL AND CONFORMING COLLECTIVE: BEHAVIORAL VARIATION IN STRUCTURED HABITATS

### A. *The Nature of Atrocity*

For Drumbl, it is not the domestic origin of the criminal process model, but its liberal assumptions, that make it unfit for service at the international level. Domestic crime is typically an individual, deviant activity, and domestic courts are designed to try and punish deviant individuals—their processes are a response to the nature of human

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26. *Id.* at 19.

activity in the domestic context. But international crimes are more often characterized by conformity and collective action. These crimes are not simply massively aggregated individual acts; they are essentially public, both in their performance and their participation. Unlike domestic crime, atrocity often has a performative aspect, conducted in open view with state sanction; the idea of ritual—and ritual slaughter—attaches to atrocity. Participation is often a matter of social adherence and identity: in extreme cases, such as Rwanda, a literal majority of the population may be actively involved, but even in less popular atrocities, where the actual killing is done by a small group, the Jasperian layers of involvement permeate most of the population who also participate by approving, supporting, benefiting from, or even ignoring the killing all around them. Why are all these lovely houses suddenly empty? No matter—let's move in!

As Drumbl notes:

This broad participation [in atrocity], despite its catalytic role, is overlooked by criminal law, thereby perpetuating a myth and a deception. The myth is that a handful of people are responsible for endemic levels of violence. The deception, which inures to the benefit of powerful states and organizations, involves hiding the myriad political, economic, historical, and colonial factors that create conditions precedent for violence.<sup>27</sup>

In situations of mass violence, the assumptions of the domestic model are reversed: *most* people are implicated in the atrocity, and non-participation—at least, open opposition—is the deviant act.<sup>28</sup>

The book is at its best here, early on, discussing the unique qualities of the collective and consequently, the different nature of human behavior in that habitat—not saying something entirely new,<sup>29</sup> but saying it clearly and

27. *Id.* at 172.

28. Drumbl recognizes the complexity—crime in the domestic context can exhibit collective features (he points to conspiracy, felony murder, corporate crimes, and racketeering, among others), while buried within mass atrocities are diverse individual agendas, from the settling of scores to material opportunism. *Id.* at 37-38. His point—a fair one, I think—is that the general features of the two, though existing on a spectrum, fall in identifiably different zones and consequently exhibit different features.

29. *Cf.* Tallgren, *supra* note 4, at 575 (“Contrary to most national

gesturing towards the implications. Psychological studies of leading Nazis after the war showed no proclivity towards instability or deviance—these were stable, socially conforming individuals. Placed in new contexts (in Argentina, say, or Spain) international criminals show no signs of recidivism, and are often model citizens—a fascinating (if evidentiarily problematic<sup>30</sup>) insight into how international crime really is different.

This difference has implications for the way one would want to respond to—and punish—such acts. Specifically, it raises questions about the appropriateness of the criminal law model. What Drumbl describes as the Western, liberal-legalist model—the commitment to individual trial, procedure, and punishment—is, however imperfectly realized, an organically sited response to the image of crime as an individual act of deviance. This means that particular elements of the criminal process are inapposite to the different motivations and dynamics of mass atrocity: atrocity contains undeniable conformist and collective elements, but ICL is organized according to strongly individualistic principles.

Frankly, this is more asserted than demonstrated—Drumbl does not catalogue the elements of the domestic trial that fail in translation—but this seems to be a plausible claim, and certainly a common one. In any event, there is one element that he does focus on: among these inapposite elements is punishment by incarceration as practiced in domestic courts.

Incarceration serves specific penological goals such as retribution, deterrence, and rehabilitation. These goals are ill-served at the international level where the mass nature

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criminality which is understood to constitute social deviation, acts addressed as international crimes can, in some circumstances, be constituted in terms of conforming to a norm.”).

30. Problematic, that is, because recidivism requires opportunity as well as intention, and opportunity is generally lacking following the decisive defeat of the regimes that committed the atrocity. People like Eichmann, hiding out in Argentina, have little practical opportunity to foment genocide or operate its logistics, while they have special incentives to be well-behaved so as not to get noticed. But the point is trenchant nonetheless, and a powerful empirical antidote to the popular assumption, reinforced in movies from *They Saved Hitler's Brain* (Paragon Films 1963) to *Marathon Man* (Paramount Pictures 1976) to *The Boys from Brazil* (Twentieth Century Fox 1978), that these characters would re-offend given the chance.

of both victimhood and participation—and the layered nature of responsibility—make it difficult to imagine a criminal process ever apportioning blame to all parties. Even in the largest applications of the criminal process—Rwanda, or the trials of perhaps 100,000 collaborators in France—only a fraction of those involved ever come before a court.

One problem concerns the bystander exemption—the fact that the people who materially support a regime of mass atrocity through indirect means are morally responsible, but are not criminally culpable. This clearly troubles Drumbl, who views it as one of the more powerful arguments why a broader set of mechanisms is necessary. Still, it is interesting to consider why the bystander exemption is not an instance of the more sophisticated and layered model Drumbl wants: formal criminal culpability for some, other kinds of responsibility for others? Drumbl's response is that the criminal trial process does not merely fail to reach bystanders, but actually gives them a kind of amnesty: the criminal culpability of the few creates a kind of proof of non-complicity for the many—not guilty, and therefore innocent.<sup>31</sup>

There may be no entirely satisfactory way to have a criminal process without the very thing it does—convicting the guilty—creating a kind of halo around the merely responsible. Only an alternative outside the criminal law could avoid this risk, but even if such responses existed, they might prove very difficult to institutionalize, at least in any *pre hoc* way that the international community as a whole can recognize precisely because they would need to be case-specific and society-specific. It is Drumbl's attempt to empower just such a set of responses that motivates his project.

In any event, there is a certain irony in this entirely persuasive account of the mismatch between domestic commitments to individualism and the collective nature of international crime—not only because ICL constantly

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31. Cf. Fletcher, *supra* note 6, at 1076, 1079 (“[C]riminal trials are ill-suited to acknowledging the range and complexity of bystander relationships to the violence . . . liberal law adjudication implies a false moral innocence among bystanders . . . Trials provide no direct acknowledgment that bystanders—silent and complicit—also are beneficiaries of the violence carried out in their name.”).

intones the importance of avoiding collective punishment, but because one of ICL's effects has been to introduce the individual into international law as an undeniable subject—a process that, among other things, has given impetus to claims about the need for individuals to participate more fully in the formation of law, a matter to which we will return.

### B. *Atrocity and War*

In explicating the differences between international and domestic crimes, Drumbl cautions against “falling into the trap that equates campaigns of genocide and crimes against humanity with war.”<sup>32</sup> And to a point, this is sensible advice: war, as he points out, can be legal, while genocide and crimes against humanity never are; the ICC only identifies mass atrocity crimes as manifestly illegal. But in perceiving a trap, one may give it an overly wide berth, and I think this is what Drumbl has done in drawing such a stark distinction. These crimes are different, yet war is most often the environment that generates the collective, conformist behavior Drumbl identifies as an accelerant for mass atrocity. Drumbl's view is understandably shaped by his focus on Rwanda, but even in that case there was a context of military conflict which in part motivated Hutu radicalization towards genocide (which in turn may have served, for Tutsi rebels, as an instrument of war policy<sup>33</sup>). Or, how are we to understand Srebrenica, which was an act of genocide, but also an incident of military operations and an integral element of Serb war goals?

Here the focus on the nature of the crime, but not the context in which it is normally committed, seems out of step with the general thrust of the project. It is more useful to view the relationship between different kinds of international crimes as existing on a continuum—whose relationships are statistical and probabilistic rather than statically defined.

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32. DRUMBL, *supra* note 2, at 34.

33. See, e.g., Alan J. Kuperman, *Provoking Genocide: A Revised History of the Rwandan Patriotic Front*, 6 J. GENOCIDE RESEARCH 61 (2004) (discussing efforts by the Rwandan Patriotic Front to provoke genocide as part of a military strategy). There has been renewed controversy about which side shot down the aircraft carrying Rwanda's and Burundi's presidents—the event which precipitated the genocide.

Moreover, this is a view fully compatible with Drumbl's own analysis of the collective and individual qualities of international and ordinary crime, and the consequences he draws: the diversity he argues for is mostly one of fora and authorities—allowing different models and actors into the process in different places, not necessarily the creation of formal, lawyerly distinctions within any one institution.

### *C. Structural Features of the International Environment*

Drumbl's argument is grounded on the uniquely collective nature of the crime, but might the inappropriateness of domestic-analogy criminal processes also be tied to questions of structure—to the unique features of the international environment? Drumbl is of course aware of this possibility, but doesn't think much of it: the difficulties that arise from the peculiarly collective nature of violence he says, "transcend the standard, and at times tired, arguments according to which it is difficult to analogize from the domestic order to the international because the latter lacks a constabulary, legislature, and enforcement agencies."<sup>34</sup> And though the world still lacks a police force and a parliament, presumably the dramatic expansion of international judicial institutions has, for Drumbl, made this concern moot.

Still, attention to structure—that is, to the social and institutional arrangements surrounding and shaping the criminal process—rather than simply to the object of that process might clarify what exactly the contours of the mismatch are. The failure of ICL to realize the classic goals of punishment may track better with structural explanations included than with the collective-individual dichotomy Drumbl develops alone.

The salient feature of international structure is not the lack of a constabulary, but the absence of the vertical relationships that shape municipal life. These include enforcement mechanisms, of course, but also (and this is often missed) political mechanisms that sit atop and control, define, or legitimate those mechanisms—an electoral system, for example, or the executive pardon power—and interacts with juridical structures. This

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34. DRUMBL, *supra* note 2, at 24.

flatness leaves us with an international process that is, on the one hand, a pure function of *realpolitik*, and on the other, obsessed with the trappings of legalism. Domestic systems are neither.

And perhaps it is precisely the structural features of the international system—its flatness, horizontality, conditions of decisional anarchy, and even, in the formation of norms, its organic, conversational nature—that motivate the move to diversity. After all, how many domestic jurisdictions demonstrate the kind of heterogeneity Drumbl desires, or would wish to? The presence of “a constabulary, legislature, and enforcement agencies”<sup>35</sup>—and the social agreement that, far more than the formal monopoly of violence, underpins their functioning—displaces and homogenizes alternative reconciliation and dispute resolution mechanisms.<sup>36</sup>

An easy dismissal of structure underestimates the role it can play in complementing Drumbl’s own argument: certainly, an appreciation of the structural differences between international and municipal systems of social control is in no way incompatible with an appreciation of the different crime bases those systems confront. Drumbl may be tired of the debate, but that may be because it is perennial—an evergreen, really, that does not fade because it has not been answered. Finally, even if it does not motivate Drumbl’s project, attention to structure may help indicate some of the necessary paths of development that the project of *APIL* implies, such as the need for a justificatory and jurisgenerative system of support to the individuals and communities who logically must craft the local solutions Drumbl has in mind; I shall return to this in the final section.

### III. MULTIPLICITY

*APIL*’s second contribution is to propose a radical expansion of the legitimated means by which we respond to

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35. *Id.* at 24.

36. At the same time, the domestic model has considerably greater diversity in one important respect: the resort to civil processes and a varied economy of reparation, which is of great interest to Drumbl. It may be that Drumbl is not merely tired of the argument, but determined to avoid it, because the domestic analogy proves useful in this respect, even if it is not in parsing the nature of criminal violence.

mass atrocity. Today, the field is largely preempted by international criminal law, although truth commissions, for one, play a significant role. Moreover, as Drumbl shows, the pressure for states to adopt models that are compatible with and derived from ICL is pervasive. The challenge, therefore, is to find a means of identifying and supporting alternative means that, while normatively acceptable, are locally adapted and responsive to the unique qualities of mass atrocities, namely their collective aspect and their cultural specificity.

### A. *Vertical Expansion*

Rather than develop his own catalogue of acceptable responses, Drumbl proposes a decisional mechanism—qualified deference: “a rebuttable presumption in favor of local or national institutions that, unlike complementarity, does not search for procedural compatibility between their process and liberal criminal law and, unlike primacy, does not explicitly impose liberal criminal procedure.”<sup>37</sup>

This is primarily a mechanism for dialogue and conversation, not an *a priori* indication of acceptable outcomes: “[i]t falls to those individuals, including members of afflicted communities, who enforce the universal goal of condemning the great evils at the national and local levels to fine-tune the interplay and overlap that emerges from dialogue between the local and the universal.”<sup>38</sup> At the same time—and perhaps in response to the almost immediate objection that might arise about any such conversation between local and universal claims—Drumbl identifies six “interpretative guidelines [that] contour the implementation of qualified deference”:

- (1) good faith;
- (2) the democratic legitimacy of the procedural rules . . . ;
- (3) the specific characteristics of the [preceding] violence and of the current political context;
- (4) the avoidance of gratuitous or iterated punishment;
- (5) the effect of the procedure on the universal substan[tive norms]; and

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37. DRUMBL, *supra* note 2, at 188.

38. *Id.* at 189.



(6) the preclusion of infliction of great evils on others.<sup>39</sup>

We need to examine this mechanism critically, especially its likely application in real cases. There are actually relatively few concrete examples of alternative criminal systems in *APIL*—the Pashtunwali customary law system, the Iraq High Tribunal, and the Sudanese court system—and none receives more than a cursory examination. The Pashtunwali, Afghan customary law, is discussed and dismissed in two paragraphs—likewise, the Iraqi High Tribunal. The Sudanese government's domestic trials are scrutinized for three paragraphs before being rejected. We have very little information, or even speculation, on the alternatives a process of qualified deference might discover.

The little we do know suggests a problem of application. The two reasons Drumbl gives for rejecting the Pashtunwali, cursory as they are, are instructive. One is mistreatment of women, since customary law allows the transfer of women between families in repayment of harm.<sup>40</sup> The second objection is more interesting still: the Pashtunwali, Drumbl says, fails qualified deference because “[i]t lacks democratic legitimacy. The Pashtunwali emerges from the *diktat* of patriarchal elites who serve as nonrepresentative religious or military leaders. It is not a consensual project.”<sup>41</sup> Another way of characterizing the provenance of the Pashtunwali is that it emerges from a locally legitimated, highly traditional society of precisely the kind that Drumbl is hoping to empower. Still Drumbl's disapproval is matched only by his distaste, and this may be a problem; it is a very small step from objecting to a practice because it is not democratically derived to objecting because one does not approve on substantive grounds.

As for *gacaca*: if one did not already have a guess about Drumbl's view, what would one conclude about its compatibility under the qualified deference test? It passes, of course, but even on the facts that Drumbl provides,<sup>42</sup> one

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39. *Id.* (emphasis omitted).

40. There are curious, if limited, parallels to the collective punishment models Drumbl advances later—as well as to his preference for economic reparations.

41. DRUMBL, *supra* note 2, at 192.

42. His reference is, principally, to the neo-traditional form of *gacaca*

could well imagine the opposite outcome. This suggests a problematic indeterminacy in the concept of qualified deference: what is it proposing exactly—a legal test, an atmospheric change, a game of language?

This indeterminacy has practical consequences. There is deep tension between diversity of outcomes in a pluralist system and respect for universal principles (here, universal condemnation of great evil). The unavoidable reality is that local communities, acting according to their own lights, will often reach conclusions well outside the comfort zone of cosmopolitan pluralists like Drumbl.

Discussing the problematic role of plea bargains in East Timor, Drumbl notes that “[t]he East Timorese situation . . . demonstrates the value of an accountability paradigm that is implemented through different kinds of procedures keyed to the sociolegal particularities of the afflicted society, instead of a simple transplant.”<sup>43</sup> So how exactly are we to determine the “sociolegal particularities of the afflicted society”? Drumbl’s answer is a careful process of determining legitimate local interests or interpretations of universals. But what is to be the means of determining the right mix of institutions and instrumentalities for a given place? The immediate aftermath of a devastating civil conflict—or an ongoing conflict—is hardly the time to send in the anthropologists to get a dispassionate view of local reconciliation patterns. After conflict is precisely the wrong time to construct a careful review—at least, we have enough experience of post-crisis to expect that unreflective, reactive management may be an endemic and unavoidable feature of transition.

And what this suggests is a deeper political question buried within qualified deference: which individuals and which collectives matter—not only as victim and perpetrator, but as decision-makers in negotiating the outlines of a cosmopolitan pluralist model of punishment? Who, exactly,

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modified to include incarceration provisions for genocide and implemented in an organic law in 2004. This form, he notes, was itself influenced by cascading pressures from the international courts and, more broadly, by liberal-legalist sensibilities, often under direct pressure from outside donor and diplomatic groups. *Id.* at 72. As such, this instance of a model that meets the qualified deference standard also serves as an example of how this standard is readily susceptible to cooptation.

43. *Id.* at 167.

is it that defers? The answer would seem to be: us. We—the international community, the West, the North, the intervention force—defer to them, the South, the torn countries, those in need of intervention, or those unable to forestall it. And while deference of that sort sounds good, it also sounds like an opportunity to control the definition and the process: we are the ones who get to qualify our own deference.<sup>44</sup>

Drumbl must know this is a risk. He has just finished showing, in what I think is one of the more powerfully compact treatments in the book, how the ICC's complementarity principle—much touted as a great defense against judicial overreach—can and will have the effect of homogenizing national legal systems on an international liberal-legal model that represents law substantively and procedurally very much as the ICC does.<sup>45</sup> If complementarity can do that, what might qualified deference do? We cannot be sure, or even speculate with much confidence, because Drumbl's analytical energies have been deployed elsewhere, earlier, on the project of a penological proof. When he arrives at the moment of application, the record is incomplete, and we are left, mostly, with an exhortation to further research and to begin the conversation.

The limited number of examples Drumbl discusses do

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44. Cf. Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1164 (2007) ("The excruciatingly difficult case-by-case questions concerning how much to defer and how much to impose are probably impossible to answer definitively . . . . The crucial antecedent point, however, is that although people may never reach agreement on *norms*, they may at least acquiesce in *procedural mechanisms, institutions, or practices* that take hybridity seriously, rather than . . . dissolving it through universalist imperatives.").

45. DRUMBL, *supra* note 2, at 143. The displacing and homogenizing power of the international level is considerable but not absolute; local actors can successfully contest that relationship. For example, Drumbl points out the pressures on Rwanda to bring its substantive and procedural law into conformity with international standards and preferences, but the record in the contest is mixed. See, e.g., Luc Reydam's, Book Review, AM. J. INT'L L. (forthcoming Oct. 2007) (manuscript at 6, on file with author) ("The [Rwandan] government's blaming and shaming of the tribunal and through it, the international community, coupled with its repeated threats of non-cooperation—which in effect would halt the trials in Arusha—and the lack of response thereto by the UN Security Council have made it prevail in most confrontations . . . . At the same time the Rwandan government has not hesitated to use the tribunal to legitimate its hold on power. International judicial recognition of genocide provides a powerful political weapon that can be deployed any time against critics.").

provide some valuable points of navigation for the boundaries of the project—things like these will lie beyond the acceptable zone—but on the other hand, this might suggest that qualified deference, practically applied, may not prove more open to diverse approaches than the present model. If this is the conclusion in a paper exercise, then in the rough-and-tumble of actual decisionmaking, advocates of ICL may find objections to almost every heterodox practice. Drumbl's qualified deference, in application, may simply lead to the replication of a homogenized, non-pluralist set of commitments. In any event, no one would want to plan a route on such a sketchy map, which suggests more surveying is needed.

Drumbl knows this, I imagine—his implicit purpose is to make the case that the way is worth exploring. Still, for those of us who were already convinced of the problem, the issue of next steps—and identifying their location—is already compelling enough.

### B. *Horizontal Expansion*

Alongside this recalibration of the criminal law on the vertical axis, Drumbl proposes expanding outward, especially at the state and local level, to embrace judicial processes that international criminal law has largely ignored—non-incarcerative penalties such as civil fines and public service. Indeed, one evident source of Drumbl's dissatisfaction with punishment rationales is that courts cling to a “formula of discretion exercised within a strict reliance on traditional modes of punishment reserved for ordinary common criminals . . . . The exercise of discretion affects the severity but not the form of punishment, which . . . effectively has become limited to incarceration.”<sup>46</sup>

A second phase would expand to extra-judicial institutions that are the province of transitional justice—and indeed, Drumbl sees the purpose of these moves as “push[ing] the enterprise of atrocity law toward the holistic promotion of *justice for atrocity*.”<sup>47</sup> This seems a commonsensical aspiration—an impression reinforced, especially with regard to the second move, by the fact that many of these

46. DRUMBL, *supra* note 2, at 50.

47. *Id.* at 194.

non-judicial processes are already employed in various countries.

As before, however, Drumbl provides very few concrete examples of alternative systems. Certainly, *gacaca* receives considerable attention—its neo-traditional form occupies an interim position between criminal law and procedurally heterodox dispute resolution mechanisms—and individual truth commissions are occasionally mentioned but beyond that, the Ugandan traditions of *mato oput*<sup>48</sup> and *nyouo tong gweno*<sup>49</sup> are among the few examples briefly mentioned.

This relative paucity of examples does not necessarily vitiate the attraction of Drumbl's proposals, but it does introduce a level of abstraction about their practical application. Several questions arise. For example, is this sequencing necessary? In actual post-conflict societies, there is no clear pattern of preferring to expand judicial remedies before turning to extra-judicial remedies; many communities have chosen a non-judicial means like a truth commission before, or in lieu of, turning to any formal judicial process.<sup>50</sup> Moreover, extra-judicial remedies can conflict with the criminal law project: both Bosnia and Sierra Leone<sup>51</sup> have seen brush-ups between a court and a truth commission (or rather, in Bosnia, a proposal for one), for example. This would counsel for some means of mediating the predictable disputes and turf wars along the horizontal.

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48. A traditional Ugandan practice of "drinking bitter root herb." *Id.* at 144.

49. A traditional Ugandan welcoming ceremony "incorporating eggs and twigs." *Id.*

50. Drumbl acknowledges that just because a process is not judicial does not necessarily make it better:

Restorative modalities are no panacea; local justice must not be sentimentalized. Restorative modalities that draw parallels from mechanisms used to reintegrate ordinary deviant transgressors in settled times will likely run afoul of the complexities or reintegration in situations of mass atrocity. Restorative shaming theory predicated on a majority of the community's disapproval of the impugned conduct may not be directly transposable to contexts where a majority of that community may not have actually disapproved of atrocity.

*Id.* at 148.

51. *But see* William A. Schabas, *A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 15 CRIM. L.F. 3 (2004) (arguing that the two institutions succeeded in cooperating, although acknowledging that there was tension).

One mechanism seems ready at hand: why is qualified deference not applied to the broader range of *horizontal* processes—to the traditional Ugandan practices, for example? I see no principled or practical reason why Drumbl has limited this device—for all the issues I see with it—to mediating between vertical instances of the criminal law process.

### C. *Collective Punishment*

But these are relatively minor issues; given Drumbl's expressly speculative, exhortative project, we can hardly expect everything to have been tested in advance.<sup>52</sup> Besides, what is most interesting here is the turn to collective punishment.

"Turn" is not quite adequate to describe Drumbl's project, which is in effect a headlong assault on one of ICL's points of pride and principal justifications: the claim that by advocating individualized criminal process, it is ridding the world of dangerous notions of collective guilt. The personalization of guilt is supposed to move societies subjected to atrocity beyond collective, ethnic formulations of conflict and make reconciliation possible.<sup>53</sup> As with any point of pride, the belief that this is both true and right is largely unquestioned by mainstream ICL practitioners and scholars;<sup>54</sup> the International Criminal Tribunal for the Former Yugoslavia (ICTY) trumpets this accomplishment

52. Cf. DRUMBL, *supra* note 2, at 204 ("[T]his is a discussion of what might be, not what obviously is. Experiments have not been concluded. Data have not been generated.").

53. See, e.g., GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 297 (2000) ("The basic argument here—a common one—is that, in Albright's words, 'responsibility for these crimes does not rest with the Serbs or Croats or Muslims as *peoples*; it rests with the *people* who ordered and committed the crimes. *The wounds opened by this war will heal much faster if collective guilt for atrocities is expunged and individual responsibility is assigned.*" (citing Madeleine K. Albright, *Bosnia in Light of the Holocaust: War Crimes Trials* (Apr. 12, 1994))).

54. See, e.g., ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 136-39 (2003) (discussing elements of individual liability and limits on corporate or collective liability). Cassese also identifies a trend towards enforcement of individual liability by "attempting to prosecute and punish individuals rather than by invoking the responsibility of the State . . . [and an] increasing tendency to target *individuals* (sometimes in addition to States), and in certain cases even to use tools of international *criminal* justice." *Id.* at 447.

prominently on its website, despite an almost total lack of evidence of this effect in the former Yugoslavia.<sup>55</sup> Some have noted the problematic—even unfounded—nature of this claim,<sup>56</sup> but Drumbl's argument goes well beyond critique to an affirmative embrace of the very thing ICL abhors.

I do not think many other writers—though they may express the logic—have stated quite so directly that, yes, the collective nature of atrocity requires a collective response which the ICL process is institutionally unfit and indisposed to provide, and indeed, that the principal reason we should be looking to broader, non-judicial remedies is precisely because they address the collective aspects of atrocities by invoking collective responses.<sup>57</sup>

Drumbl is particularly intrigued with—I am tempted to say fond of—monetary damages and reparations as a form of collective punishment. He has heard of Versailles, of course, but he is not dissuaded by this “bête noire”<sup>58</sup>: “international criminal lawyers’ fears of collective responsibility have inhibited dispassionate conversations about its potential in thwarting atrocity and retrospectively promoting justice.”<sup>59</sup> Addressing problems of over- and

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55. International Criminal Tribunal for the Former Yugoslavia, ICTY at a Glance, <http://www.un.org/icty/glance-e/index.htm> (last visited Nov. 30, 2007) (“By trying individuals on the basis of their *personal* responsibility, be it direct or indirect, the ICTY *personalizes* guilt. It accordingly shields entire communities from being labeled as collectively responsible for others’ suffering.”).

56. See, e.g., BASS, *supra* note 53, at 297-301 (discussing critically the claim that ICL individualizes guilt, and noting, at 301, that “the idea that war crimes tribunals will individualize guilt turns out to be fraught with ambiguity”).

57. Drumbl has indicated this preference for collective responsibility elsewhere in a critique of the “traditionalist” and individualist focus of ICL. Drumbl, *supra* note 11, at 1310 (“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.”).

58. DRUMBL, *supra* note 2, at 201.

59. *Id.* at 202. Other scholars have considered financial penalties, though generally in the context of individual civil suits. See, e.g., STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 240-48 (2001) (discussing civil suits as a judicial alternative). The International Criminal Court can award monetary reparations. Rome Statute of the International Criminal Court

under-inclusion, he comes down in favor of what he calls the “*crude way*”<sup>60</sup> on utilitarian grounds: if the potential costs of being a bystander—or of occupying that empty flat—are high, then the knowledge of potential collective responses “could inject a risk allocation and management analysis into the minds of the general population in the very inchoate stages of atrocity.”<sup>61</sup> Proof that one was not involved in any way could trigger an exemption.

I am not sure I find the utilitarian rationale persuasive—it makes a big assumption about the rationality of actors, despite Drumbl’s having already persuasively demonstrated just how different the standard assumptions about rationality, deviance, and conformity are under differing conditions, and presumably therefore, how different the calculations individuals make in those differing environments are too. (He himself backtracks somewhat, noting how speculative it all is.<sup>62</sup>) But as Drumbl notes, collective, non-criminal punishment comports with other rationales, including a logic of retribution: if, following Jaspers, we acknowledge the layered and collective nature of guilt, then material extractions may make sense and be fair. Simply denying that atrocity has a collective element—and that this logically should have consequences for our models of response—hardly seems satisfactory.

Drumbl is not insensitive to the complexities of collective punishment. Indeed, it is precisely because he *is* sensitive to them—because he is not wearing the doctrinal blinders of the ICL project, whose theology and self-justification are premised precisely on not being collective—that he is able to recognize and say that ICL should abandon its doctrinaire and defective resistance: collective punishment

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art. 75, July 17, 1998, 37 I.L.M. 1002; *see also* International Criminal Court, Victims and Witnesses: Reparation, <http://www.icc-cpi.int/victimissues/victimsreparation.html> (last visited Nov. 30, 2007).

60. DRUMBL, *supra* note 2, at 197, 201. As opposed to “the careful way,” which strictly limits its reach to those who have offended according to a theory of individual agency and therefore “abides by Western legalist assumptions of causation and individual agency . . . . In cases of civil responsibility . . . the careful way still conditions group membership on some sort of demonstrable linkage between action (or nonfeasance) and the great evil.” *Id.* at 198.

61. *Id.* at 203.

62. *Id.* at 204; *see also id.* at 171-72 (discussing “two painful realities that jeopardize the assumption of perpetrator rationality amid cataclysmic events. These are: first, gratification; and, second, survival”).



can be appropriate, can actually be more just. As he notes, "[t]he inevitability of assessing the place of collective responsibility within the project of international justice . . . should be a cause for contemplation and optimism, not embarrassment or annoyance."<sup>63</sup> To me, this is the signal contribution of the book.

#### IV. THE PENOLOGICAL EVIDENCE

*APIL* speaks about punishment a great deal. Drumbl makes a strategic decision to organize *APIL*—as its title suggests—around a critique of ICL's penological practice. His aim is methodological: to turn our focus to questions of punishment and sentencing—which, he considers, have been under-examined<sup>64</sup>—as a productive, even indispensable site for critical analysis of the role of ICL.

It is unquestionably true that courts and scholars alike have paid relatively little attention to sentencing and punishment, preferring instead to discuss issues of culpability and process. Still, there has been considerable work on the problems with ICL and the attractions of alternatives; so, the value of an expressly penological approach must somehow be that it brings a new perspective to work on transitional justice. And this is where I think *APIL* confronts an evidentiary and organizational challenge: can looking at punishment tell us what is wrong or how to fix it?

Drumbl makes strong claims based on data about international and national courts' sentencing practice that he analyzes in two chapters which form the center of

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63. *Id.* at 201.

64. Two aims are implied in his description of the lack of penological studies:

Surprisingly little work has been undertaken that explores how and why criminal justice institutions punish atrocity crimes and whether the sentences levied by these institutions actually attain the proffered rationales. Furthermore, there is little empirical work that assesses whether what international tribunals doctrinally say they are doing actually has a consistent and predictable effect on the quantum of sentence.

*Id.* at xi. These aims track two of the contributions Drumbl identifies for the book, as noted above.

*APIL*.<sup>65</sup> This should be a promising avenue to pursue since, as he notes, “the positive law documents essentially are silent as to the penological purpose of the sentences imposed, [and therefore] much of this structure has emerged from the jurisprudence of the sentencing institutions.”<sup>66</sup> He concludes that “[t]he preference for incarceration following what liberal international lawyers deem to be an acceptable criminal trial on the whole falls short of its penological objectives, in particular retribution and deterrence.”<sup>67</sup>

Looking for patterns in the sentencing practices of the international courts, Drumbl finds very few: the quantum of punishment bears little relation to the crime’s seriousness, with courts trying international crimes often awarding lower sentences than ordinary crimes might receive; deployment of aggravating and mitigating factors is “unpredictable and obscured by significant discretion.”<sup>68</sup> Sentencing, Drumbl finds, is “poorly conceptualized,”<sup>69</sup> an “afterthought, instead of a vivid *situs* of analysis.”<sup>70</sup> A lack of coherence and consistency across institutions weakens claims about the retributive, deterrent, and expressivist effects of ICL; his concern is that “erratic sentencing practice could also affect the coherence and legitimacy of the punishing institutions, which, in turn, may undermine confidence in their rationality . . . .”<sup>71</sup> This is important for his argument, as these shortcomings open argumentative and pragmatic space for different policies and approaches.

What concerns me is not the conclusion, but the base of evidence and the uses to which it is put. What Drumbl conclusively demonstrates is that courts trying atrocities exhibit no clear pattern in sentencing, nor any clear theory of why they sentence as they do. But what does this mean? What does this tell us about the *effects* on atrocity? The answers are more speculative than Drumbl supposes—even

65. *Id.* at 46-122.

66. *Id.* at 60.

67. *Id.* at 180.

68. *Id.* at 121.

69. *Id.*

70. *Id.* at 46.

71. *Id.* at 66 (making reference to H.L.A. Hart).

though, as I say, he may have it right.

Part of the problem is a matter of data: there may simply not be enough data, or sufficiently comparable data of the right quality to draw the robust conclusions Drumbl reaches. Where international tribunals are concerned, there are an extremely limited number of cases; the  $N$  of all international trials is very small, and variation will inevitably be more pronounced.<sup>72</sup> Moreover, these are hardly white lab mice; many of these cases may not be the least bit comparable—at least, we have no reason to assume they are given the structural heterogeneity of the jurisprudence: different courts in different places adjudicating different crimes from different conflicts at different times, and sometimes applying different law.<sup>73</sup> Internal, institutional dynamics could explain much of the variation, but these seem discounted in Drumbl's analysis in favor of a general claim of untheorized chaos.<sup>74</sup>

In addition, there is a poverty of information in the presentation of data: many of the notes for Chapters 3 and 4, in which Drumbl analyzes data on sentencing, do not tell us enough to make meaningful judgments as readers. In

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72. For example, the ICTY has publicly indicted 161 people; of the 111 cases concluded, 25 indicted individuals had all indictments withdrawn and eleven died prior to completion of trial (four during proceedings, seven prior to transfer). Two of the 53 individuals sentenced have died while serving their sentences—a nearly four percent death rate (so far), fairly high when one recalls that the ICTY only issued its first sentence about eleven years ago. (The two who died—Milan Babić and Miroslav Deronjić—had served just under two and just over three years, respectively. Until Babić died in March 2006, the death rate for those sentenced was zero.) International Criminal Tribunal for the Former Yugoslavia, ICTY at a Glance, <http://www.un.org/icty/glance-e/index.htm> (last visited Nov. 30, 2007). Trials in international courts constitute only a fraction of all atrocity trials; after the Second World War, for example, “the vast majority of proceedings occurred at the national level . . . or by instrumentalities of the occupying powers . . . and other states.” DRUMBL, *supra* note 2, at 48-49.

73. Even the closely related ICTY and ICTR exhibit differences in their statutes, and interpretative divergence has grown out of those initial differences. Such variation is even more likely when one expands the comparison to include the postwar international tribunals—which themselves had radically different structures, processes, and membership—and national trials, and those for conflicts as diverse as Sierra Leone and East Timor.

74. An alternative—perhaps less pleasant, but certainly available from Drumbl's evidence—would be that atrocity trials as a whole are so infrequent relative to the crime base that no sentencing practice—whether consistent, flexible, or otherwise—would satisfy the penological objectives of ICL.

general, we have only the sentence quantum and a squib line about the reasoning of the court (a reduction for following orders, for example) to compare to another case in which the sentence was derived in a different way. For example, discussing several post-WWII cases, Drumbl notes that “[t]here does not seem to be any predictable, or at times even explicable, basis upon which mercy reviews or confirmations of sentence were conducted”<sup>75</sup> and cites several cases from British courts with widely varying outcomes; however, all we learn is the sentences—“[b]oth accused were found guilty and sentenced to death by being shot”; “confirming officer commuting death sentence to life imprisonment”; “confirming officer not confirming guilt”; “all sentences confirmed”<sup>76</sup>—but nothing about *why* the confirming officers might have decided as they did. This is typical—and curable, because a richer case report could be produced—but without some indication of the underlying facts, how are we to know that this variation in punishment (discussion of which, Drumbl tells us repeatedly, is usually absent or cursory<sup>77</sup>) is not indicative of some substantive difference in the cases?

The problem, it seems, is that although Drumbl is right about one thing—that judges do not discuss the rationales for particular punishments systematically—he may not be right in what he concludes from this—that there is no rationale to be discovered. Given judges’ textual neglect of punishment, we must look to the full, rich record of the trials themselves. Discussions of mitigation and aggravation (which Drumbl rightly shows are generally ill-developed or entirely lacking) are, even when well done, ancillary to the question of guilt for the act. It is only by looking at this question—and assuring ourselves that two defendants committed substantively similar crimes (in both quantity and quality)—that apparent inconsistencies in application of mitigating and aggravating factors can be meaningfully examined. Drumbl is focused on judges’ discussion of punishment, and perhaps because of this, he rarely

75. DRUMBL, *supra* note 2, at 113.

76. *Id.* at 255 n.241 (noting several WWII cases in British military courts in which sentences were variously reduced or confirmed).

77. *Id.* at 48 (“The case reports are silent with regard to factors to differentiate the punishment inflicted on the various individuals convicted in the [*I.G. Fargen* and *Krupp*] industrialists’ trials.”).

considers their discussion of guilt—but without this, how can we evaluate his thesis? I consider this a problem of evidence or presentation. It may be that Drumbl is right about the failures of punishment, and of ICL more broadly, and as I have suggested, I largely agree; but I do not think that the evidence about punishment, at least as we have it here, effectively proves this.

Yet even if problems of the size of the data set and the like could be resolved, and even if we could say with confidence that the penological practices of courts are as inconsistent as his data suggest, this does not necessarily mean international trials are failing in the way he describes. Drumbl sees inconsistency across tribunals (and, within them) as a proof of ineffectiveness and incoherence. But this selfsame variation could, alternatively, be analyzed as an example of the very thing Drumbl is looking for: a diversity of voices responsive to local, particular circumstances—and more diverse and responsive than they would be if they demonstrated a predictable, lock-step sentencing pattern for each crime.<sup>78</sup> In the Drumblian model of qualified deference, international criminal law and courts still play a prominent role; what exactly *should* their jurisprudence look like? How homogeneous ought their outcomes be?

Finally, there is the question of Drumbl's strategic choice to focus on penology. Much of the argument about the purposes of ICL and its shortcomings could be made with reference to the processes of trial and conviction; indeed, Drumbl himself builds much of his case on observations, not about punishment, but about the trial process.

For example, his discussion of why domestic court models are inapposite to cases of mass atrocity points to liberal-legal commitments about individual culpability and procedure; punishment principles are, at best, a minor key in his discussion. Similarly, his critique of how ICL has imported domestic evidentiary standards has nothing to do with punishment principles (or with data about punishment); instead, the problems with using domestic

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78. Judges in international tribunals defend their sentencing discretion as responsive to the different means by which crime can be committed, varying levels of culpability, and the unique qualities of each case. DRUMBL, *supra* note 2, at 59-60, 235-36 nn.78-80.

evidentiary *and* punishment standards spring from the same underlying mismatch between the nature of ordinary crime and atrocity (as well as, I would add, the structure of the two levels). Likewise, his account of the cascading process of legal mimicry—in which state courts adopt the model of international criminal process—is explained in terms of decisions about investigation and procedure, not punishment.<sup>79</sup> Punishment is one element of ICL—and Drumbl is right that it is an understudied one—but it is not clear that it is the essential lens through which to perceive how ICL fails in cases of mass atrocity.

It may be that the data we have is not amenable to analysis that would answer these questions. The kind of crime that “shatters any and all legal systems”<sup>80</sup> by its radical evil may not be responsive to a particular quantum of punishment; the effort to quantify may prove unproductive, and the effort to draw conclusions about the effectiveness of punishment metrics for a crime that is immeasurable seems quixotic.

This raises the question about what, exactly, the contribution of these chapters—which together constitute something like two-fifths of the text—is to the book as an integral project. There is a contribution—even if not one in proportion to the erudition and effort they evidently required, nor to their central place in *APIL*. It is not clear to me that answering the question “does what international tribunals doctrinally say they are doing actually have a consistent and predictable effect on the quantum of sentence?” tells us anything particularly useful about the fitness of ICL for responding to mass atrocity or what alternatives might be more fit. Suppose tribunals’ doctrinal claims indeed proved irrelevant as guides to predicting sentencing, surely the relevant question would still be “what effect do actual sentences have on response to atrocity?” The question Drumbl poses is an interesting, even important one, but it, and the work undertaken to answer it, have the feeling of being grafted onto another

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79. Drumbl’s enthusiastic endorsement of expressivism as a defensible and attainable goal of punishment is constructed almost entirely on examples drawn from the trial process, not sentencing. *Id.* at 173-79.

80. *Id.* at 156 (quoting a letter from Hannah Arendt to Karl Jaspers (Aug. 17, 1946), in HANNAH ARENDT, KARL JASPERS CORRESPONDENCE 1926-1969, at 54 (Lotte Kohler & Hans Saner eds., Robert & Rita Kimber trans., 1992) (1985)).

project.

## V. BEYOND INTUITIONS: IMPLICATIONS

At the end of the first, summary chapter of *APIL*, Drumbl deploys a strategically left-handed defense of ICL's role: "[t]here is some room for adversarial criminal trials within the justice matrix. The value of trials, though, best flourishes when trials constitute *a* means to justice, not *the* means to justice."<sup>81</sup> In an understated way, this promises a bold departure: a curiously undercutting admission that, after the revolution, what is now the archetype might still be afforded "some room." But when one admits a plurality, one also admits competition, instability, and contestation. And although these can be good things, they can create a marketplace of models that must be managed. The intuition, then—the idea that ICL must become an "a" instead of "the"—must be completed by a robust framework for decision, prioritization, and reconciliation. Without such a framework, Drumbl's revolution will create a merely rhetorical space that will change how we talk, but not what we do—something like the faddish insistence by an all-powerful international community that torn societies must take "ownership"<sup>82</sup> of their own crises.

Drumbl's whole project exhibits what he calls at the outset "a reconstructive ambition . . . [to] inspire short-term reforms to existing institutions and a longer-term reconstitution of the field."<sup>83</sup> And consistent with that, the concluding chapter really is a kind of recommendation list, almost in the style of human rights reports; it eschews analysis for exhortation. They sound like the right exhortations and the right directions to take, but for one already convinced of their rightness, the case for moving

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81. DRUMBL, *supra* note 2, at 21.

82. *See, e.g.*, Press Release, Security Council, Bosnia and Herzegovina at Threshold of Promising Future, Must Now Take Responsibility for Reform, Development, Security Council Told, at ¶ 8, U.N. Doc. SC/8693 (Apr. 18, 2006), <http://www.un.org/News/Press/docs/2006/sc8693.doc.htm> ("While allowing Bosnians to take ownership, the High Representative should continue advancing reform and complete civilian implementation of the Dayton Accords."); International Campaign to Ban Landmines, *Countries Affected By Cluster Munitions Take Ownership of Discussions on New Treaty - Belgrade, 3-4 October [2007]*, Sept. 27, 2007, [http://www.icbl.org/news/belgrade\\_conference](http://www.icbl.org/news/belgrade_conference).

83. DRUMBL, *supra* note 2, at xii.

more boldly and systematically beyond intuition and inspiration to implications—for giving more weight here at the end—is compelling.

Again, I think the core intuition is right: the fetishization of ICL has displaced much else that might be more useful in stabilizing post-conflict situations and achieving what affected populations might define as justice. The problem, as so often, is not with the intuition but with the progress: Drumbl does not outline the mechanisms or principles by which we would inter-relate the various niches of this multiple, varied topography. What, concretely, would we do to settle on other mechanisms in a given case? It is not satisfactory to leave this in the realm of the untheorized: the pull of existing institutions is too strong, so how is this going to be done?

This is just a book review, not a book, and so I will do little better. But here are some sketches of the kinds of problems that taking *APIL's* argument seriously raises, and that its project, at least, will need to answer.

#### A. *Pluralism or Deviation?*

Drumbl outlines a model of cosmopolitan pluralism—a commitment to universal values expressed in a multiplicity of forms.<sup>84</sup> The two elements of this model are in a necessary tension: the decision to afford deference to local solutions will, in many instances, strike outsiders as *deviation* from universal (and of course entirely reasonable) norms. This deviation may have entirely plausible, persuasive explanations, such as its rootedness in local context, but it remains, in appearance, a deviation. And for many—for those who are more cosmopolitan than pluralist—this will prove too great a strain, too much to accept.

As I noted, one of the few concrete alternatives Drumbl mentions (and, presumably, approves) is *mato oput* which involves, according to its name, the consumption of bitter herbs. Now this actually sounds perfectly plausible to me: reintegrative shaming can be a highly effective means of bringing closure to conflict. But I can well imagine the concern, skepticism, and ultimately, in Drumbl's terms, the

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84. *Id.* at 181-87.



qualification—all in the name of protecting some entirely reasonable minimum of international human rights protection, of course—that might greet such a practice, especially if it were seriously presented as an alternative to the ICL process.<sup>85</sup>

That there is an element of paternalism, post-colonial disdain, or bare cultural preference in such a judgment may be regrettable, but it is also predictable (and indeed Drumbl identifies the Western commitments—biases—of the ICL project). The human rights and ICL community—and to a much lesser extent, the transitional justice community—has a near-obsession with impunity, particularly with ending it. The risk, I think, is that Drumbl's instinctively liberal pluralism will prove more theoretical than practical, and may falter in the face of concern (his own and others) that taking it too seriously would jeopardize rights and give impunity a reprieve. Immediately a heterogeneous claim is made and the political moment of decision comes, what crosses the threshold of the universal and meets with *our* approval will prove quite narrow indeed. We can expect, in other words, that the qualifications will be considerable, and the deference less so, unless we develop a robust framework in which to cabin discretionary assessment of exactly which practices pass muster, and why—a grounding in something other than our abstracted, objectified preferences.

### B. *A Minimum List or a Pragmatic Conversation?*

One way of proceeding might be to inquire what a truly

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85. See Drumbl on this point:

Many bottom-up transitional justice movements invoke sanctions such as apologies, shaming, sharing the truth, lustration, and reparations; and often are willing to procure these by offering amnesties to perpetrators. This is the case even though such modalities are often at odds with, and largely squeezed out by, the operation of the [ICL] paradigm. [ICL] responds poorly to the preferences of local populations when such preferences conflict with its normative worldview. This leaves local populations with little recourse but to articulate these preferences outside of and at times in resistance to top-down internationalist pressures . . . . [T]hese initiatives are at most given a role of adjunct or additional complement to the fixture of liberal procedural legalism.

*Id.* at 63.

minimum universal normative commitment would require. Candidates might include: commitments to truth;<sup>86</sup> procedural protections; an end to impunity;<sup>87</sup> or perhaps a kind of conditional commitment to uphold liberal-legalist standards *if* a trial is held.<sup>88</sup>

But a minimum list is problematic in at least two ways. First, it is extremely difficult to produce an effective list: a true minimum is unlikely to satisfy committed liberal-legalists, while a more expansive list will so constrain local choice as to defeat the exercise. For some, amnesties are anathema and may contradict obligations in human rights treaties; but for others, amnesty may be a way out of endemic violence. A pragmatic view would ask whether we care more about a project of reconciliation or adherence to a treaty, but then that is the nature of a minimal list: it signals that we have reached the limits of pragmatism and compromise.<sup>89</sup>

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86. See Orentlicher, *supra* note 7, at 12 (“[E]ven in the ‘early days’ human rights and other professional experts saw disclosure of the truth about past abuses as a non-negotiable moral obligation of governments.”).

87. Cf. The Secretary-General, *Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶¶ 1, 10, 32, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 3, 2004), available at <http://daccess-ods.un.org/access.nsf/get?open&DS=S/2004/616&Lang=E&Area=UNOC> (stating that amnesties cannot be granted in respect to international crimes).

88. I am reminded of Justice Jackson’s much-quoted comment from Nuremberg about the high importance of procedure, and the less quoted part immediately preceding it to the effect that it would be all right to summarily execute the Nazi leadership, but if one does have a trial, then it must be done correctly. Robert H. Jackson, *The Rule of Law Among Nations*, 31 A.B.A. J. 290, 293 (1945); see also BASS, *supra* note 53, at 6 (citing a letter from Robert Jackson to Henry Morgenthau Jr.: “It’s a political decision as to whether you should execute these people without trial, release them without trial, or try them and decide at the end of the trial what to do . . . . That decision was made by the President, and I was asked to run the legal end of the prosecution. So I’m not really in a position to say whether it’s the wisest thing to do or not.”).

89. Cf. The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, ¶ 22, delivered to the Security Council, U.N. Doc. S/2000/915 (Oct. 4, 2000), available at <http://daccess-ods.un.org/access.nsf/get?open&DS=S/2000/915&Lang=E&Area=UNOC> (“While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.”).

Second, any attempt to arrive *a priori* at a list will inevitably reflect the interests of those who compile it—and this risks, in practice, replication of the Western liberal-legal paradigm.<sup>90</sup> The purpose of Drumbl's approach, I take it, is precisely *not* to pre-determine an acceptable list (though his "interpretive guidelines"<sup>91</sup> effectively establish a kind of minimum), but rather to empower a conversation that would generate different approaches. His distrust of a list is the right intuition.<sup>92</sup>

Thus the core educative and reformative project that Drumbl's cosmopolitan pluralism suggests may well be directed at ourselves—we cosmopolitans—who will have to learn not only to put up with, but embrace, a considerable dose of pragmatism. And not the kind of grudging pragmatism that human rights advocates have shown in the past—for example, in a much earlier iteration of the kind of project Drumbl contemplates, when Latin American activists had to weigh the pursuit of legal justice and truth against the real residual power of the military to destabilize

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It would be interesting to consider what the response of today's robust ICL and transitional justice community would have been to the post-Franco transition in Spain, which was premised precisely on public amnesia and effective amnesty concerning events of the Civil War and the dictatorship. Even with the recent passage of a Law on Historical Memory, there is no question of prosecution—yet despite not having followed the prescribed ICL course, Spain is today a wonderful place.

90. Even Jose Zalaquett's maxim "the whole truth and as much justice as is possible"—conventionally seen as an exercise in pragmatism—reveals an ideal, ideological commitment to a particular project of transitional justice: truth-telling. Orentlicher, *supra* note 7, at 12. One suspects that a candid review of indigenous reconciliation (and punishment) projects would reveal, at best, an uneven record about the necessity of "truth," if by truth we mean an accurate historical accounting of the events and causes of atrocity. Shared history is not identical with true history—Renan speaks of a nation as a group of people united by a mistaken view about the past. The risk, then, is that the international—global—community will reassert itself: if *we* know there is another history that is more true—and we are committed to the truth—then the coalescence among the locally affected population of a collective recollection that demonstrably deviates from the international view will not satisfy; and because it does not satisfy, it will not serve its purpose—we will not allow it to.

91. DRUMBL, *supra* note 2, at 189; *see also supra* note 36 and accompanying text.

92. Cf. Berman, *supra* note 44, at 1236 ("The messiness of hybridity also means that it is impossible to provide answers *ex ante* regarding occasions when pluralism should be honored and occasions when it should be trumped.").

that continent's new democracies.<sup>93</sup> In the debate about ICL, it is the advocates of human rights who have power and will have to be restrained: setting non-negotiable standards will have to be a far rarer and more humble activity; universal standards and non-negotiable minimums will have to be very general, and very minimal.

Even if successful in re-educating elites who are committed to a narrow liberal-legalist model, the entire project of accommodation could collapse under the lightness of its own relativism. But that may be a risk worth taking, since the alternative—that a Galadrielite elite will, out of the most humane impulses, refuse to negotiate anything, defer to anything, understand anything—is by far the greater and more real risk, arising as it does out of the natural logic of power, which destroys perspective and sympathy even as it intensifies the conviction of one's own righteousness.

### C. *Taking Victim Communities Seriously*

One of the virtues of *APIL* is that it is not exclusively centered on the victim; Drumbl's discussion of the uniquely collective nature of mass atrocity focuses equally on perpetrators, since both are collective communities implicated in discrimination-based mass atrocity. Still, Drumbl's book—like transitional justice initiatives more generally—takes the perspectives of victims very seriously, and this is, in its way, expressive of a humane and liberal individualism.<sup>94</sup>

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93. See, e.g., Orentlicher, *supra* note 7, at 127 (“In many countries in Latin America, the price exacted for the end of military rule was society's acceptance of the outgoing junta's self-amnesty; in others, impunity for past crimes was the military's implicit but unambiguous price for remaining in the barracks as fragile democracies took root. Yet for the newly elected successor governments to honor nakedly self-serving claims of untouchability would betray the very principles they had pledged to restore and safeguard.”). Even in the moment of pragmatic compromise, the human rights community articulated principles and commitments that were in effect non-negotiable. This is a courageous undertaking when one is in a position of weakness—like Havel's “speaking truth to power”—but it is more complicated when one has become, like the advocates of ICL today, the powerful one. Cf. DAVID KENNEDY, *THE DARK SIDES OF VIRTUE* (2004).

94. Cf. Drumbl, *supra* note 11, at 1316 (“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

Yet a serious desire to empower local *communities* of victims may sit uncomfortably with a democratic qualification on ICL's deference, which is one of Drumbl's guidelines—seen, for example, in his rejection of Pashtunwali as patriarchal and unrepresentative. I have no doubt that almost all victims would prefer that their own concepts of justice should govern—that the punishment should fit the crime as *they* define each—and when one moves from the level of the individual to that of the community, it is quite common that communities (through their locally legitimate leaders) reach conclusions about participation and definition that may not accord with individual members' views. Atrocity visits traditional and illiberal communities as often as it does modern, inclusive ones, and insisting too strongly on a narrowly defined democratic pedigree for alternative models—or using tests of democratic participation as pretexts for rejecting substantive solutions we disfavor<sup>95</sup>—may undercut the effort to grant those communities some jurisgenerative role in devising a justice-based response to atrocity.<sup>96</sup>

#### D. Customary Law Implications

Reflecting on the problem of including victim communities reminds us that once we open the vertical and horizontal planes to multiple models, we also open them to contestation and competition. Perhaps there is no satisfactory, stable equilibrium between the demands of a uniform universalism and the cacophony of diverse decisional

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and aggressors as individuals).”).

95. Drumbl notes concerns among the Acholi communities of northern Uganda that prosecution of the Lord's Resistance Army by the ICC may hinder local efforts at reconciliation. Leaders in the Acholi communities have proposed alternative, locally derived approaches that would, in effect, also create an amnesty. ICL proponents have questioned how much the Acholi leaders' view corresponds to those of individual members of the community—a democratic concern. This very act of questioning, however, simply reveals the deep, patterned preference for an atomized individualism, and, I think, a preference for the judicial model, since we assume—on minimal evidence—that any discrepancy between leader and people will be in favor of a model more like, well, our own. Would we spend as much time worrying about the democratic bona fides of the Acholi leaders if they were calling for ICC prosecution?

96. Perhaps the very fact that mass atrocity arises out of conformity—which is always conformity to some locally defined standard—is a justification for prioritizing local trials?

autonomies. But there is also an unequal, if often unacknowledged, distribution of power,<sup>97</sup> and in the face of elite skepticism and opposition, local alternatives will often collapse or conform. This much is clear from Drumbl's own analysis, and the question is: what confidence can we have that his alternative will prove any different?

As I have indicated, it was not the purpose of his book to develop fully the grounds for that confidence, but it seems immediately essential to consider how to develop a means of supporting and legitimating local claims—a means more robust than qualified deference (or any of the present models). This need not extend as far as “the narrow relativism of the belief that morality is entirely time and space specific, or purely a matter of local culture,”<sup>98</sup> but we need some theory of decisional autonomy that has sufficient skeletal strength to resist the viral, centripetal logic of the universal.

One such model may present itself: the focus on victims, local communities, and multiple voices suggests the potential of linking Drumbl's project with recent efforts to theorize the participation of individuals and communities in the formation of customary international law.<sup>99</sup> Giving local communities a claim to generate law would immensely strengthen their hand against homogenizing and preemptive

97. Cf. Reydams, *supra* note 45, at manuscript 1 (“As jurists we have been slow to recognize that international criminal justice is inseparable from (geopolitics).”).

98. DAVID M. SMITH, *GEOGRAPHY AND SOCIAL JUSTICE* 11 (1994).

99. See, e.g., Christiana Ochoa, *The Individual and Customary International Law Formation*, 48 VA. J. INT'L L. 119 (2007); Jordan J. Paust, *Customary International Law: Its Nature, Sources and Status as Law of the United States*, 12 MICH. J. INT'L L. 59 (1990); see also Detlev F. Vagts, *International Relations Looks at Customary International Law: A Traditionalist's Defence*, 15 EUR. J. INT'L L. 1031, 1032 (2004) (speaking of “break[ing] open the black boxes of nation-states and look[ing] at the interactions of flesh and blood individuals involved”). Even these approaches are, in general, far more focused on individuals interacting in ways consistent with classic liberal-cosmopolitan concepts—that is, through voluntaristic associations or through their states—than with traditionalist modes of social organization (including ethnic modes such as the Acholi or the community adhering to Pashtunwali); Ochoa, for example, identifies the following loci for individuals' participation in customary international law: General Assembly resolutions, non-governmental organizations, data from human rights litigation, and public polling. Ochoa, *supra*, 176-84. Presumably, a robust alternative to the current form of ICL would need to cast its net wider.

pressures from the international and state levels, and from committed advocates of a liberal-legalist perspective.

Unlike qualified deference, which inevitably leaves decisional authority with some repository of the international community as a whole and the committed cosmopolitan-universalist ICL community in particular, a claim based on authority to generate legal norms (or at least participate directly in their generation) involves communities as of right, without reference to an *a priori* standard which they must meet (in order, for example to be afforded deference). Such a view would also be entirely consonant with Drumbl's legal pluralist sensibilities,<sup>100</sup> without necessarily carrying the reflexive liberalism which normally attaches to pluralism but effectively precludes many traditional models from serious consideration.

An individual or community-based customary law perspective might provide a broader and more defensible platform for the articulation of local models which depart from universal commitments *precisely because* they are local—indigenous—to the place most affected by atrocity<sup>101</sup> and in turn, might provide a rationale for acquiescence by committed liberal-legalists who would naturally regret the illiberal choices other autonomous, law-generative communities make, but would also find it marginally more difficult, on principle, to object.<sup>102</sup>

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100. The linkages between legal pluralism (which Drumbl discusses in *APIL*) and individualist or community-based customary international law approaches—both of which posit multiple, overlapping, cooperating, and competing actors generating law—seem evident. Cf. Berman, *supra* note 44, at 1175-76 (“[P]rocesses of international norm development inevitably lead scholars to consider overlapping transnational jurisdictional assertions by nation-states, as well as norms articulated by international bodies, nongovernmental organizations . . . indigenous communities . . . networks of activists, and so on.”).

101. Cf. Michael Byers, *Power, Obligation and Customary International Law*, 11 DUKE J. COMP. INT'L L. 81, 84 (2001) (“[There] are always some who mark the soil more deeply with their footprints than others, either because of their weight, which is to say their power in this world, or because their interests bring them more frequently this way.” (citing CHARLES DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 149 (P.E. Corbett trans., 1957))).

102. Claims that empower individuals and communities to make customary international law certainly do not represent the mainstream. See, e.g., Ochoa, *supra* note 99, at 135 (noting that even critiques of the standard account of customary international law [CIL] “ha[ve] accepted the core premise that only states can form CIL. The idea that individuals ought to have a participatory

## CONCLUSION: NOT A MACHINE, BUT A MAP

I have no idea if these are the right implications to draw—if these risks, opportunities, and incentives plausibly arise from taking Drumb’s intuitions seriously and building a frame onto them. The intuitions seem right; the end goal, as far as it can be seen, seems worthy too. Between intuition and summation, between encouragement and arrival, whole books could be written. Drumb’s is one such book, and one of the first, so I would like to say one more thing about its direction, which concerns that other, minor theme of ecology.

I think Drumb wants a machine—complex, sensitive, fine-tuned with inter-operating and coordinated parts, but a machine nonetheless: “sanction might look different and assume different calibrations in each case of atrocity.”<sup>103</sup> A tool is useful because it is fit to a task, but precisely because it is designed to do one thing, it often does not do other things well. And so we need more tools, and more, and of course people must be trained to use them; inevitably, they become comfortable with some tools, and we all know the old saying about how a man with a hammer sees problems.

And the problem is that the problem he poses, and for which he builds, is more like a landscape: interdependent, dynamically interactive, changing across lines with few definable edges. It is a matter of biomes and niches, more than interoperability and specifications. Some things will grow almost anywhere—they are suited to a variety of conditions—but nothing on this earth grows in every climate. The world is a single biosphere, and what one does in one place affects every other, but that does not mean orchids bloom easily in Alaska. And anytime you introduce something new, no matter how useful, it comes at a cost.

I do not wish to push the metaphor beyond its

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role in CIL formation is nearly completely absent . . . . The literature on CIL includes writings in which individuals figure as shadows and whispers in relation to CIL”). But then Drumb’s project is, by its nature, a radically reformative one, and it might do better seeking conceptual allies in claims that resist the current doctrinal paradigm, rather than ones that assume it.

103. DRUMBL, *supra* note 2, at 19. Even when he picks up the ecological theme, the machine is there: “[C]onsideration should be given to consolidating diverse mechanisms more closely attuned to the social geographies of the afflicted societies.” *Id.* at 148.



usefulness: people are not plants, and norms may prove more transferable than trees. Nor do I wish to propose yet another “law and . . .” to fill the legal academy’s methodological void.<sup>104</sup> But there may be something to considering more seriously the organic nature of this project—which, after all, is really about culture—and consequently the need to ground institutional arrangements in the specific facts of local particularities and to give those particularities a special respect and priority. Our response to atrocity ought properly be ecological because atrocity itself is diverse: atrocity is unique not only because it is collective or international, but because each atrocity takes place in a specific context—a history, a culture, and a place—that marks it and makes it different from all others. Atrocity may be a crime against humanity, but it is first, foremost, most painfully, and most particularly a crime by, against, and within a community somewhere on the face of this earth.

Drumbl knows this; the whole project of *APIL* is an engagement with the fact of this diversity. It is one of *APIL*’s real contributions that he demonstrates the profound failure of the ICL project—convinced of its rightness and its efficacy—to allow or even imagine the flourishing of anything not in its own image. His response, however, has been to sketch a formidable engineering challenge. It may prove too difficult to build, though perhaps—if we put down the tools of the machinist and take up those of the naturalist—it can be encouraged to grow. But first, the evil that is its object needs to be understood; it needs to be mapped.

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104. Ecological explanations are already common in domestic criminological analysis, though principally in terms of explaining the origins of crime rather than designing institutional responses. See, e.g., *THE SOCIAL ECOLOGY OF CRIME* (J.M. Byrne & R.J. Sampson eds., 1986). The field of law that has proven most receptive to geographical approaches is, perhaps unsurprisingly, environmental law. See, e.g., Hari M. Osofsky, *Climate Change Litigation as Pluralist Legal Dialogue?*, 43 *STAN. J. INT’L L.* 181 (2007). Yet even within environmental law itself, the production of diversity can meet resistance from universalism. See, e.g., Nicolas de Sadeleer, *EC Law and Biodiversity*, in *REFLECTIONS ON 30 YEARS OF EU ENVIRONMENTAL LAW: A HIGH LEVEL OF PROTECTION?* 349, 369 (Richard Macrory ed., 2006) (warning that EU subsidiarity principles have “led to the production of fuzzy and soft law to the detriment of precise and unconditional rights” and that “[a]lthough subsidiarity has the merit of offering . . . indispensable room for manoeuvre to Member States, this principle could well sound the death-knell for a truly common policy”).