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and he mused that some people were critical of his decision to go to Baghdad but that it was too late to do anything. We had become close friends and I wished him every success. Our paths had first crossed when I was Director of the International Conference on the Former Yugoslavia and Director in the Office of the Special Representative in charge of all UN peace and humanitarian operations in the former Yugoslavia. Sergio, who was then Director of External Relations in UNHCR, was itching to go back into the field and I met him in the Palais des Nations in Geneva to discuss an assignment. Would he become the Executive Delegate of the Special Representative of the Secretary General (SRSG), based in Sarajevo? He liked the title, which I had lifted from the International Committee of the Red Cross (ICRC). We discussed his terms of reference and he made minor comments on the draft I had prepared. Our paths would cross again at meetings in Sarajevo and later in Zagreb as I accompanied the UN peacemakers and peacekeepers on their missions.

The next time we worked together was when he was designated High Commissioner for Human Rights. I had been Deputy High Commissioner and continued as Deputy until he went to Baghdad, when I acted as High Commissioner for the next fourteen months. We remained close friends while he was in Baghdad, and I have many e-mails we exchanged while he was there demonstrating our personal and professional friendship. When he was killed I went to Baghdad to escort his body through Geneva to Brazil and then back to Geneva for burial. I shall never forget the moment when I saw his casket at Baghdad airport and was asked to eulogize him there, nor the moment in

Rio de Janeiro when his mother, grieving and frail, got up from her chair and embraced me because she knew that I had accompanied her son's body from Baghdad. In my remarks at Baghdad airport I noted that a UN High Commissioner for Human Rights had died in Iraq, and that should have meaning for the future of human rights in the country.

If Sergio Vieira de Mello had continued as High Commissioner he would have served with distinction; for he was a United Nations professional who believed in the Charter and went about his assignments with heart and energy. The Office of High Commissioner grieved at his loss.

#### **Bertrand G. Ramcharan\***

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#### **Mark A. Drumbl, *Atrocity, Punishment, and International Law* (New York: Cambridge University Press, 2007), 320 pp.**

It is estimated that the number of people killed over the last hundred years as a result of actions considered international crimes is more than 170 million.<sup>1</sup> Coun-

1. M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps, and Ambiguities*, 8 *TRANSNAT'L. & CONTEMP. PROB.* 203 (1998).

tries where mass atrocity has occurred during the twentieth century include Armenia, Bosnia, Burundi, China, the Democratic Republic of Congo, Ethiopia, Guatemala, India, Indonesia, Iraq, Nigeria, Pakistan, Rwanda, the Soviet Union, Sri Lanka, Turkey, and Uganda.

While the various components of international law required to deal with such crimes have existed for some time, one of the major weaknesses of the international human rights and international humanitarian systems has been enforcement.<sup>2</sup> The international community took few steps, except perhaps in the last decade and half, to hold responsible parties accountable at the international level. In general, accountability for mass violations of international law did not often occur, even domestically, until quite recently.<sup>3</sup> While some domestic trials have taken place since the Nuremberg trials in the 1940s, until 1993 when the International Criminal Tribunal for the former Yugoslavia (ICTY) and 1994 when the International Criminal Tribunal for Rwanda (ICTR) were established, no international criminal tribunal existed to punish those accountable for international crimes.<sup>4</sup> Initially, the international criminal justice system was ad hoc in nature, but the establishment of the International Criminal Court (ICC) created a permanent court, albeit for only a few

international crimes.<sup>5</sup> The ratification of the international criminal court statute by more than 100 countries has influenced those countries to import the statute's standards as well as international legal principles into domestic law.

The use of hybrid courts (joint domestic and international courts) in Cambodia, Kosovo, East Timor, and Sierra Leone<sup>6</sup> have been useful to some extent in dealing with country-specific mass atrocities which an international tribunal on its own, far from the scene of the conflict, would have had difficulty addressing.

Many of the new courts, including the Extraordinary Chambers in Cambodia, the Special Panels in East Timor, the Special Court for Sierra Leone, and the Kosovo courts, increasingly have international and national judges applying both national and international law.

As a result of the formation of the various international courts since 1993, international law in general and international criminal law specifically have dramatically grown in substance and stature. Developments in international law not only affect the international tribunals but also the domestic courts that apply international law. The literature on the various components of the new laws and institutions has also burgeoned. However, the study of punishments in the field of international criminal law is one area that remains underdeveloped.

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2. Maggie Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. UNIV. INT'L L. REV. 321 (2000).
  3. Craig Etcheson, *The Politics of Genocide Justice in Cambodia*, in INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA 181 (Cesare P.R. Romano, André Nollkaemper, & Jann K. Kleffner eds., 2004)
  4. NEW APPROACHES IN INTERNATIONAL CRIMINAL JUSTICE: KOSOVO, EAST TIMOR, SIERRA LEONE AND CAMBODIA (Kai Ambos & Mohamed Othman eds., 2003).
  5. INTERNATIONAL CRIMINAL COURTS: PRACTICE, PROCEDURE AND EVIDENCE (Rodney Dixon, Karim A. A. Khan, Richard May eds., 2003)
  6. These are the "Regulation 64" Panels in the Courts of Kosovo, the Special Panels for Serious Crimes in the District Court of Dili, the Special Court for Sierra Leone, the War Crimes Chamber of the State Court of Bosnia and Herzegovina, and the Extraordinary Chambers in the Courts of Cambodia.

It is to this broad field that Mark Drumbl's *Atrocity, Punishment and International Law* contributes. Drumbl is well qualified to evaluate these questions. He is the Class of 1975 Alumni Professor of Law at Washington and Lee University's Law School and Director of the School's Transnational Law Institute. He has taught advanced courses on international criminal law. He is a well-known speaker on issues relating to international law and justice, including in the media. This book has already received the International Association of Criminal Law (US National Section) Book of the Year Prize for 2007.

Drumbl's book deals specifically with the question of sentencing by the tribunals, which in general is an understudied area of international law.<sup>7</sup> Two questions drive the book, the first descriptive and the second normative: 1) How do we punish those who commit genocide, crimes against humanity, or discrimination-based war crimes? and 2) How should we punish such individuals?

*Atrocity, Punishment, and International Law* critically examines the sentences handed down by international criminal justice institutions including hybrid courts, their reasons for doing so, and the effectiveness of such sanctions vis-à-vis their purported goals of promoting

retribution and deterrence. The book also provides suggestions for improvements to the system. Drumbl's empirical research leads him to conclude that the current international criminal sentencing paradigm fails to meet its intended goals. Thus, his aim is to "locate a principled middle ground"<sup>8</sup> between those who advocate purely local responses to mass atrocity and those who espouse international solutions.

The book's objective situates it within the debate on the role and relevance of the international criminal tribunals in enforcing the norms of international law and promoting human rights. While these developments have been termed the "justice cascade,"<sup>9</sup> Jack Snyder and Leslie Vinjamuri note, "despite what might seem like an increasingly institutionalized 'norms cascade' in the area of international criminal justice, we are skeptical of these claims."<sup>10</sup> Others such as Helena Cobban have argued that "it is time to abandon the false hope of international justice" [as they] "have squandered billions of dollars, failed to advance human rights, and ignored the wishes of victims they claim to represent."<sup>11</sup>

Drumbl's book argues that a range of options beyond international criminal law also ought to be used to bolster

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7. Some recent scholarship includes Mark B. Harmon & Fergal Gaynor, *Ordinary Sentences for Extraordinary Crimes*, 5 J. INT'L CRIM. JUST. 683 (2007); Robert D. Sloane, *Sentencing for the "Crime of Crimes": The Evolving "Common Law" of Sentencing of the International Criminal Tribunal for Rwanda*, 5 INT'L CRIM. JUST. 713 (2007); Silvia D'Ascoli, *Sentencing Contempt of Court in International Criminal Justice: An Unforeseen Problem Concerning Sentencing and Penalties*, 5 INT'L CRIM. JUST. 735 (2007); Ralph Henham, *Developing Contextualized Rationales for Sentencing in International Criminal Trials: A Plea for Empirical Research*, 5 INT'L CRIM. JUST. 757 (2007). The only specific book in this area is RALPH HENHAM, PUNISHMENT AND PROCESS IN INTERNATIONAL CRIMINAL TRIALS (2005).
  8. MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW, at xii (2007).
  9. Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 AM. UNIV. INT'L L. REV. 301, 312 (2003).
  10. Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT'L SEC. 5, 39–40 (2003–2004).
  11. Helena Cobban, *Thinking Again: International Courts*, FOREIGN POLICY (Mar.–Apr. 2006).

mechanisms that can assist in preventing human rights abuse. He recognizes that this would include mechanisms useful directly for victims, such as those that enable them to obtain compensation.<sup>12</sup> The recent establishment of the Hariri tribunal in Lebanon by the United Nations indicates that the international community is willing to continue to establish such institutions should the need arise.

However, because there is great reluctance to do so these institutions will be created only in exceptional cases. This reluctance stems not only from the existence of the ICC, but also from the highly criticized weaknesses of these institutions. Certainly, the high cost of establishing and running tribunals when they indict and prosecute so few individuals is a large reason for the criticism.<sup>13</sup> Other complaints involve their protracted proceedings, the language used in the tribunals, and the inability of the defendants to understand the proceedings. Criticism has also been leveled at some lawyers who have drawn out proceedings to make more money.<sup>14</sup> On the other hand, the tribunals have successfully assisted in creating and recording a historical narrative of events in those areas of the world. In most cases, this history had been highly contested. These institutions have brought a number of high-ranking officials, as well as others, to justice. They have created a greater expectation that those who commit such

offenses will be held to account.<sup>15</sup> They help to solve one of the greatest issues in international human rights law and international humanitarian law: enforceability. While there is debate about the extent to which these processes work as a deterrent, it is difficult to maintain that these processes have not had an effect in parts of the world where such abuses have occurred. At the very least, it is likely that they have forced some leaders to reflect on the possible consequences of their actions. It is still too early—and there is a lack of empirical evidence—to make a determination regarding the impact of developments in the international criminal justice process on individual conduct. At a minimum, these processes have symbolic value as proof that the international community will do something to reduce impunity. We do however know that the number of conflicts around the world dramatically declined 40 percent between 1992 and 2005.<sup>16</sup> This seems to suggest some correlation although there may have been a range of other factors that contributed to this significant reduction.

Although obtaining a conviction in such trials is crucial to the deterrent effects of these processes, sentencing is also a critical component of deterrence. Many acknowledge that the role of sentencing, until recently, was not a major area of study in international criminal law. This book attempts to redress this fact and

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12. See also Claude Jorda & Jérôme de Hemptinne, *The Status and Role of the Victim, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 1387 (Antonio Cassese, Paolo Gaeta, & John R. W. D. Jones eds., 2002).
  13. Daryl A. Mundis, *Improving the Operation and Functioning of the International Criminal Tribunals*, 94 AM. J. INT'L L. 759, 773 (2000).
  14. Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court*, 5 WASH. UNIV. J. L. & POL'Y 87, 103 (2001).
  15. Albin Eser, *Individual Criminal Responsibility, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT*, supra note 12, at 767.
  16. HUMAN SECURITY REPORT 2005: WAR AND PEACE IN THE 21ST CENTURY (2005), available at <http://www.hsrgroup.org/index.php?option=content&task=view&id=266>.

should play a role in spurring further research in this crucial area, especially in the international arena. Critically, comparative international research between the various new international and hybrid institutions is necessary in order to garner lessons from sentencing outcomes but also to assist these courts in the roles they play regarding sentencing.

Drumbl's first chapter provides an in-depth overview of his findings and arguments concerning the shortcomings of international criminal sentencing. He summarizes the data and theories upon which he relies to advance his argument that international and domestic responses to mass atrocity require reform. He indicates that his empirical research of international criminal sentencing reveals two problematic trends: first, that sentencing for multiple international criminal violations is not any harsher, and perhaps more lenient, than sentencing imposed by domestic courts for single crimes and second, that punishment is meted out inconsistently within and among international criminal institutions.<sup>17</sup> He blames these shortcomings on the international criminal system's reliance upon liberal prosecutorial and punishment models.<sup>18</sup> He argues that the trial-then-prison model adopted by ad hoc and hybrid tribunals does not meet its stated deterrent, retributive, or expressive aims.<sup>19</sup>

Drumbl purports to reduce the current international criminal order's fixation on liberal criminal modalities by pursuing two modes of reform: vertical and horizontal. In the former, qualified defer-

ence—not to be confused with complementary existence—will be granted to local justice models of procedure and punishment. In the latter, the quest for accountability will be diversified from purely legal responses to those of a quasi- and extra-legal nature.<sup>20</sup>

In Drumbl's second chapter, he highlights issues stemming from the international criminal regime's treatment of extraordinary international crimes as akin to those of domestic ordinary crimes by reviewing the roles that perpetrators, bystanders, beneficiaries, and victims assume during times of atrocity. While Drumbl concedes that domestic legal process may have lent the international criminal legal order a certain amount of "legitimacy" at its outset, such reliance has become a "liability" because domestic systems cannot adequately address the "complex sources of atrocity, the multitudes of victims and perpetrators, and the organic nature of responsibility."<sup>21</sup>

Drumbl begins his review of the perpetrators of atrocities by arguing that international tribunals' focus on the criminal liability of high-level perpetrators ignores the very critical mass that characterizes such violence.<sup>22</sup> He thus petitions for a more collective legal response.<sup>23</sup> Arguing that the perpetrator of mass atrocity is "qualitatively different" from that of an ordinary crime, Drumbl claims that "[i]gnoring or denying the uniqueness of the criminality of mass atrocity stunts the development of effective methods to promote accountability for mass criminals."<sup>24</sup> He faults the

17. DRUMBL, *supra* note 8, at 15.

18. *Id.* at 18.

19. *Id.*

20. *Id.*

21. *Id.* at 24.

22. *Id.* at 26.

23. *Id.* at 31.

24. *Id.* at 32.

international criminal regime's fixation on individual criminal liability yet acknowledges that its efforts to accommodate mass atrocity—via theories of joint criminal enterprise (known, according to him, as “just convict everyone”) and command responsibility—have faced problems. “Simply put, it is taxing to shoehorn collective agency into the framework of individual guilt.”<sup>25</sup> Drumbl contends that these failings set the stage for “an expanded accountability paradigm that implicate[s] broader levels of group responsibility through mechanisms outside the criminal law,”<sup>26</sup> a model he explores in Chapter Seven.

Drumbl calls for more attention to victims' needs following atrocity, citing surveys that reveal that reparations and restitution are as important to victims as prosecution and sanctions.<sup>27</sup> Such findings expose the need for a more holistic approach to atrocity. Certainly, questions relating to reparation ought to be given more attention, as is happening now with the ICC and in various European states where victims in criminal proceedings can claim damages from the perpetrator after a guilty verdict.

In Chapter Three, Drumbl provides empirical data on the sentencing processes and practices of international criminal tribunals from Nuremburg to the International Criminal Court (ICC). Beginning with the International Military Tribunals for Nuremburg and Tokyo, Drumbl finds little attention paid to sentencing rationales in the decisions of either tribunal.<sup>28</sup> Moving on to contemporary permanent,

ad hoc, and hybrid tribunals, Drumbl discovers that sentencing includes not only imprisonment but restitution as well. He also recounts practices of pardons and commutations as well as early releases, the last of which is governed by the law of the imprisoning jurisdiction.

Drumbl also looks to emerging case law to examine modern-day rationales for sentencing. He documents a shift from strict retribution during the Nuremburg era to an equal emphasis on deterrence in the jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR).<sup>29</sup> The book also notes an increased concern within the international criminal legal order for expressivism, consequentialism, rehabilitation, reconciliation, and peace-building.

Usefully, Drumbl provides a list of aggravating and mitigating circumstances that international criminal jurisprudence reveals in sentencing individuals convicted of extraordinary crimes, all of which he notes resemble those found in domestic legal systems.<sup>30</sup> He concludes, however, that judicial discretion continues to rule sentencing practice, providing little or no consistency.<sup>31</sup> While this is not as problematic as it seems, the catalogue of aggravating and mitigating factors will be useful to practitioners who wish to examine further which issues are most likely to influence the tribunals, even if discretion is the paramount issue, as it should be.

Drumbl argues today's tribunals have inherited little “penological guidance

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25. *Id.* at 39.

26. *Id.* at 40.

27. *Id.* at 43.

28. *Id.* at 48–49.

29. *Id.* at 60.

30. *Id.* at 64–65.

31. *Id.* at 66.

from their watershed predecessors."<sup>32</sup> However, this should not be surprising given the origin and scope of the earlier institutions. Thus, the book examines sentences handed down by the new tribunals and compares them to sentences handed down by other institutions such as the Special Panels of the East Timorese courts. What is clear is that sentences handed down by the recent tribunals are far more lenient than those handed down at Nuremburg or Tokyo.

Harmon and Gaynor have found that while 92 percent of those convicted at the Tokyo trials and 79 percent convicted at Nuremburg received either a death sentence or a sentence of life imprisonment, only 37 percent of those convicted at the ICTR, and just 1.8 percent (one person) of those convicted at the ICTY received life imprisonment.<sup>33</sup> However, these comparisons are unfair given the criticisms of victor's justice leveled at these institutions. As well, the outcomes are dramatically different because of who the appointed judges were and how they were appointed. This has changed drastically, as has the extent of the discretion of today's judges who also must have recourse in their decision making to the types of sentences handed down by the courts in those areas of the world.

Certainly when it comes to examining consistency in sentencing between the ICTR and the ICTY, there is considerable variation in sentencing decisions. Drumbl determines that the mean term handed down by the ICTR has been 23.5 years while for the ICTY it is 14.75 years.<sup>34</sup> These trends are supported by Harmon and Gaynor who indicate that of the

fifty-seven convicted persons at the ICTY by February 2007, twenty people or 35 percent received sentences of less than ten years, while twenty-eight individuals or 49 percent received sentences of between ten and twenty years. Nine people or 16 percent received sentences over twenty years, of whom only one received life imprisonment. On the other hand, of the twenty-seven people convicted by March 2007 by the ICTR, three persons or 11 percent received sentences under ten years, five persons or 19 percent received sentences of between ten and twenty years, and nineteen persons or 70 percent received sentences over twenty years, of whom ten received life imprisonment.<sup>35</sup> Harmon and Gaynor claim that part of the reason for this is that the ICTY gives far more weight to issues of mitigation and has used plea agreements more often.<sup>36</sup>

Usefully, Drumbl compares the sentencing outcomes of the ICTR and ICTY with the East Timor Special Panels and finds that their sentences are most comparable to those of the ICTY. Hopefully, further research will be conducted examining and comparing all the international and hybrid tribunals with regard to sentencing patterns.

In Chapter Four, Drumbl undertakes a qualitative and quantitative review of national criminal responses to international atrocities. Surveying case law arising from the conflicts in Rwanda, the former Yugoslavia, and Nazi Germany, Drumbl concludes that national judiciaries are driven to punish those guilty of international crimes in much the same manner (a calculus of aggravating and

32. *Id.* at 46.

33. Harmon & Gaynor, *supra* note 7, at 683, 684.

34. DRUMBL, *supra* note 8 at 57.

35. Harmon & Gaynor, *supra* note 7, at 684–85.

36. *Id.* at 688–89.

mitigating factors) and for many of the same reasons (retribution and deterrence) as they punish those convicted of ordinary crimes. He discovers however, that national criminal mechanisms also consider reconciliation and restoration during the sentencing process. He also argues that domestic punishment and accountability mechanisms are profoundly influenced by their international counterparts. Drumbl criticizes this discovery as the “squeezing out of local approaches that are extralegal in nature.”<sup>37</sup>

Drumbl’s self-professed “cursory overview”<sup>38</sup> of the three target conflicts begins with Rwanda. Having served as defense counsel in Rwanda and having written a number of articles about Rwanda, he is well qualified to conduct this overview. For example, he has previously examined the possibility of restorative justice in Rwanda.<sup>39</sup> In this book, he reviews Rwanda’s Organic Law, which categorizes offenses related to the 1994 genocide and encourages guilty pleas. Reviewing judgments compiled by *Advocats sans Frontiers*, Drumbl calculated the median prison term at eleven years and the mean at 15.5 years. The Organic Law rationalizes sentencing based on the following benefits: punishment, deterrence, protection, rehabilitation, and reconciliation (via pleas). Drumbl also refers to prosecutions outside of Rwanda (e.g. Belgium) but arrives at the conclusion that the “upshot” of such prosecutions is “difficult to discern” and their relationship to justice “remains quite complex.”<sup>40</sup>

Drumbl devotes considerable space (fourteen pages) to a discussion of Rwanda’s traditional courts known as the *gacaca* proceedings in which he reveals himself to be a politically cautious advocate of the practice. After a review of the practice and dialogue with critics of *gacaca*, Drumbl concludes that the practice is entitled to qualified deference as a unique accountability mechanism as well as a potential catalyst for restoration and reconciliation.<sup>41</sup>

However, as I have written elsewhere, these courts ought to be seen in their present guise as what they are: more political than legal. While I am not opposed to local means of justice promotion, such processes, as constituted and designed originally, ought to contain safeguards and prove to be credible and legitimate. They ought not be overtly political. They ought to be seen to be legitimate by all, especially in divided societies that remain fractured, and be independently established. Safeguards and checks and balances ought to be built into the system to ensure that their purpose remains true and that they are not caught up in notions of victor justice. While there has been a great deal of support for the *gacaca* process, often predicated on a wait and see basis, already these courts have attracted criticism. In January 2006, Human Rights Watch reported that while these courts were considered legitimate because of their popular participation, many Rwandans did not trust them and even boycotted them. Human Rights Watch also described how some judges ignored the

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37. DRUMBL, *supra* note 8, at 122.

38. *Id.* at 71.

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

40. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW, *supra* note 8, at 85.

41. *Id.* at 99.

rules of these courts and jailed hundreds in preventive detention or because they gave false or incomplete evidence. HRW reported that about 10,000 people fled to neighboring countries fearing false accusations and unfair trials, and that many of the courts had failed to win public confidence for reasons such as the fact that hundreds of the judges themselves were accused of crimes, some witnesses were unwilling to testify, and the courts were barred from dealing with cases that involved RPF soldiers. HRW stated that the perception existed that the courts delivered one-sided justice. One justifiable criticism, directed at the ICTR, is the failure to prosecute Rwandan soldiers and government officials. While these parties clearly did not commit levels of atrocities anywhere close to those committed by others during the genocide, even a few prosecutions of these individuals by the ICTR would have legitimized the process further in the eyes of Rwandans and others.<sup>42</sup> It is useful that Spain is, by evoking notions of universal jurisdiction, indicting forty Rwandan soldiers for atrocities they allegedly perpetrated against civilians.

Turning to the 1998–1999, atrocities in the former Yugoslavia, Drumbl briefly examines domestic proceedings in Bosnia and Herzegovina, Croatia, Serbia, and other European states. Based upon data from the Organization for Security and Cooperation in Europe, Drumbl finds that the mean sentencing for conflict-related crimes in Bosnia and Herzegovina is under nine years, early convictions

from Serbia evidence a sentencing range between two and twenty years, and over half of atrocity convictions in Croatia fall below the statutory minimum of five years.

Drumbl also looks back at prosecutions following World War II, from early military commissions immediately after the armistice to domestic cases as late as the 1990s. Judicial discretion resulted in a wide variety of sentences for architects of the Holocaust and atrocities in the Pacific theatre—from death by hanging to shorter prison terms. Again, Drumbl finds little discussion on penological rationale in these decisions, although a single case from the Netherlands suggests that expressive interests motivated Hans Rauter's sentence.<sup>43</sup>

While Drumbl makes the convincing case (at the outset of this chapter as well as throughout the entire volume) that sentencing methodology remains a lacuna in international criminal research, he provides a general overview of domestic criminal responses to atrocity—including discussions on the evolution of domestic penal law and criminal procedure—rather than in-depth examinations into sentences and their rationales. As he admits, this is because such data is obscured by scant reference to sentencing in national and international decisions. This area certainly requires more research.

In his chapter on legal mimicry, Drumbl examines the influence of international criminal legal mechanisms on domestic criminal regimes. In the end,

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42. Carla del Ponte blames the US and Rwanda for blocking her efforts to prosecute members of the present government of Rwanda and its security forces for human rights violations. See CARLA DEL PONTE, *THE HUNT: ME AND MY WAR CRIMINALS* (2008). See also FLORENCE HARTMANN, *PAIX ET CHATIMENT: LES GUERRES SECRÈTES DE LA POLITIQUE ET DE LA JUSTICE INTERNATIONALES* (2007). Del Ponte was later removed as prosecutor of the International Criminal Trial for Rwanda remaining only as the prosecutor of the International Criminal Tribunal for Yugoslavia.

43. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW*, *supra* note 8, at 112.

this chapter provides more of a review of the advocacy and critique of international criminal law vis-à-vis domestic law. Once again, Drumbl marshals the criticism that international processes trample on indigenous restorative justice mechanisms, in order to call for cautious deference to domestic responses. He links this argument to his central thesis by concluding that: "The value of punishment will increase to the extent that it resonates with local populations, is internalized in ravaged communities, and can form a coordinated part of post-conflict transition instead of competing with other transitional justice mechanisms."<sup>44</sup> Unfortunately, it is clear that at times domestic justice is impossible for a variety of reasons including resource constraints, lack of political will, or state fragility. Thus, often an external process is necessary. At other times, the context calls for a joint international and domestic response, including possibly criminal trials. These structures ought to function alongside other processes that deal with additional issues. It is clear that tensions between peace and justice, and between indigenous systems and the calls for accountability in the criminal sense, exist quite often.

Drumbl examines the externality of justice and the democratic deficits implicit in the international criminal regime's response to mass atrocity. His exploration of externalization begins with a review of common and civil law's influence over international criminal tribunals and he critiques this influence for depriving local voices of influence in post-conflict reconstruction.

When justice is externalized from the afflicted societies for which it ought

to be most proximately intended, it becomes even more difficult for any of the proclaimed goals of prosecuting and punishing atrocity perpetrators—whether denouncing extreme evil, expressing rule of law, voicing retribution, or preventing recidivism—to have effect.<sup>45</sup> However, at times, while there are weaknesses in such a process, it surfaces as the best among the worst of possibilities.

While Drumbl diligently re-examines the pros and cons of externalization, he concludes—after case studies of failed internalization in East Timor and Rwanda—that international criminal responses are largely paternalistic responses to weaker states which serve only to assuage the West's guilt at inaction and to develop international criminal law.<sup>46</sup> In support of this contention, Drumbl points to the US response to the terrorist attacks of 11 September 2001. Rather than deploy an international tribunal to adjudge and sanction those responsible for the atrocity on US soil, the US government determined that such measures were not feasible and instead embarked upon an armed campaign followed by dubious military commissions. "International criminal law should not be built upon the travails of the disempowered objects of international institutions while the masters of those same institutions pursue the sort of self-help and systematic parsing of legalism, forbidden to others."<sup>47</sup>

Drumbl begins his discussion of the democratic deficits of international criminal law by pointing out that its institutions are decidedly top-down responses to internal conflicts. Though he notes some improvements in these shortcomings—by way of the ICC's prin-

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44. *Id.* at 125.

45. *Id.* at 128.

46. *Id.* at 132.

47. *Id.* at 133.

ciple of complementarity, consent-based treaty, and victim engagement—he finds these efforts insufficient to qualify as international criminal law’s engagement with local politics. The book revisits the failure of the UN peacekeeping mission in Rwanda as a way to tenuously link this failure to Rwanda’s lack of faith in the ICTR.<sup>48</sup>

Drumbl looks closely at referrals from the ad hoc criminal tribunals and the complementarity of the ICC as means by which international criminal law can connect more effectively with atrocity-ridden states. Drawing from referrals from the ICTY to courts in the former Yugoslavia, he concludes that they have the effect of “flattening . . . the diversity of national legal frameworks” by requiring procedural compliance with the international tribunal.<sup>49</sup> He points to the failure to transfer cases from the ICTR to Rwandan courts for fear that Rwandan courts would employ the death penalty against those convicted. Drumbl also argues that complementarity will encourage legal homogeneity as states seek to avoid losing jurisdiction to the ICC. As evidence of this, he points to many Ugandans’ preference for local dispute resolution mechanisms to ICC indictments and argues that international criminal law has little respect for the wishes of those ravaged by mass violence.<sup>50</sup>

Drumbl argues that the rush to sentence at the international level ignores “the reform of criminogenic conditions”<sup>51</sup> in affected states. He calls upon scholars and international criminal lawyers to promote the use of local restorative justice

mechanisms in responding to mass atrocity. However, the extent to which local processes should be accessed ought to be vociferously debated. These processes can be undemocratic, illegitimate, unaccountable, and problematic when they are used for political purposes.

In his sixth chapter, Drumbl examines international and national criminal responses to atrocity through the lens of various punishment motivations, including: retribution, deterrence, and expressivism. He concludes that both national and international criminal mechanisms fall short of operationalizing these stated goals. Moreover, criminal processes and punishments at both the international and criminal levels fail to accord reconciliation appropriate weight.<sup>52</sup>

Drumbl examines the goal of retribution through punishment and finds three challenges to the retributive effectiveness of extant punishing frameworks. First, such mechanisms are selective in their practice. Political concerns, logistical and geographical constraints, as well as limited temporal jurisdictional mandates all conspire to leave some acts of evil unpunished. This erodes the retributive effects of criminal proceedings. Moreover, all criminal sentences are widely perceived to fall short of matching the evil perpetrated during times of mass atrocity. “The fact that punishment does not match this enhanced gravity weakens retribution’s credibility as a penological goal for international criminal law.”<sup>53</sup>

Drawing upon data from Chapters Three and Four as well as newly-presented case law, Drumbl finds that inter-

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48. *Id.* at 137–38.

49. *Id.* at 139.

50. *Id.* at 145.

51. *Id.* at 147.

52. *Id.* at 150.

53. *Id.* at 157.

national criminal systems fail to impose longer sentences, prescribe harsher prison conditions, or attach greater stigma to the accused than national courts. He argues that this detracts from the retributive effect of international criminal process and punishment. Additionally, while Drumbl acknowledges that discretion provides sentencing judges with valuable flexibility, variations in sentencing can diminish the public's faith in the criminal process and render such proceedings—be they national or international—capricious in the public's eyes. By way of solution, Drumbl argues that international criminal mechanisms should incorporate national sentencing practices to inspire democratic legitimacy in their work.<sup>54</sup> This prescription is controversial and undermines the argument that international sentencing ought to be uniform. Such an approach would allow a great variety of sentencing practices.

Drumbl contends that plea bargaining detracts from the retributive effects of criminal processes because it “compete(s) with the notion that perpetrators deserve to be punished.”<sup>55</sup> Examining several pleas from cases out of the former Yugoslavia and East Timor, Drumbl finds that “[a]n institutional policy that differentially punished extraordinary international criminals based not upon the gravity of their offences, but, rather on judicial economy, strategic system interests, and bureaucratic contingencies splinters the deontological basis of retribution.”<sup>56</sup> However, deference to pleas in criminal cases is a well-accepted process. They are

used all over the world and often ensure a guilty verdict, which may be unclear when a defendant pleads not guilty. They often assist in attaining evidence against other perpetrators and determining a fuller version of the truth of the events.

Drumbl briefly addresses the deterrence motivation behind criminal punishment of mass atrocity but concludes that there is little evidence supporting such theories in practice. He argues that deterrence theory is grounded in perpetrator rationality, a trait that is not often present in those who commit mass atrocity. He contends instead that such individuals engage in violent acts out of gratification and survival.<sup>57</sup>

Others however have argued that these institutions have “utterly failed to deter subsequent abuses in the former Yugoslavia and Central Africa.”<sup>58</sup> They claim that amnesties have been far more effective at curbing massive human rights abuse. However, as Payam Akhavan has argued, “beyond . . . vindicating the suffering of victims,” the retributive justice paradigm has a deterrent effect on political and military leaders.<sup>59</sup> In spite of these sentiments, what is clear is that developments in international justice have occurred quickly and are so entrenched and supported that they are now an integral and important part of the international legal landscape.

Drumbl examines the expressivist goals of criminal sanction and finds that punishment can act as a “moral educator” by creating principled citizens.<sup>60</sup> He is most optimistic regarding international

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54. *Id.* at 163.

55. *Id.* at 164.

56. *Id.*

57. *Id.* at 171.

58. Snyder & Vinjamuri, *supra* note 10, at 5.

59. Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?* 95 AM. J. INT'L L. 7, 8 (2001).

60. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW, *supra* note 8, at 174.

criminal law's achievement of expressivist goals, although he identifies four challenges to the realization of this goal: selective truths (encouraged by common law strategies such as cross-examination); interrupted performances (as in the case of Milošević's death); management strategies (such as those displayed by the Iraqi High Tribunal); and pleading out (which discourages detailed confessions). Drumbl concludes that liberal international criminal tribunals fail to achieve their stated goals of retribution, deterrence, and expressivism.

Drumbl uses his seventh chapter to unveil his proposed solutions to the problems of democratic deficits and externalization of justice identified in Chapter Six as well as the failure of the prosecution-and-punishment model to meet its stated goals of retribution, deterrence, and expressivism. He proposes both a vertical solution, intended to generate bottom-up responses to atrocity, and a horizontal solution, meant to expand the post-conflict toolbox beyond legal mechanisms.

He sets the stage for his proposals by making the case for a legally pluralistic response to universally condemned evils. He argues that while international crimes can be widely accepted as such, responses to them can be varied. Drumbl then advances what he terms a "cosmopolitan pluralism," which he argues will "support substantive censure at the global level, but endeavor to allay democratic deficit concerns through optimistic incorporation of local control, process, and sanction."<sup>61</sup> This theory, he argues, will compel international actors to facilitate

a discursive space in which local actors can articulate their own responses to atrocity.

Drumbl's vertical approach to mass atrocity advocates "qualified deference"<sup>62</sup> to local mechanisms aimed at addressing mass violence. Qualified deference strikes a middle ground between subsidiarity and complementarity. "It creates a rebuttable presumption in favor of local or national institutions that, unlike complementarity, does not search for procedural compatibility between their procedural and criminal law and, unlike primacy, does not explicitly impose liberal criminal procedure."<sup>63</sup> He sets forth six interpretative guidelines to steer the exercise of qualified deference:

- (1) good faith, (2) the democratic legitimacy of the procedural rules in question, (3) the specific characteristics of the violence and of the current political context, (4) the avoidance of gratuitous or iterated punishment, (5) the effect of the procedure on the universal substance, and (6) the preclusion of the infliction of great evils upon others.<sup>64</sup>

He then applies his theory of qualified deference to the cases of Sudan (national criminal trials), Afghanistan (customary law), Iraq (Iraqi High Tribunal), and Rwanda (*gacaca*) to conclude that only the latter would be entitled to qualified deference under the six proposed guidelines.

Civil remedies provided by tort, contract, and restitution, as well as reconciliation mechanisms such as truth commissions, figure into Drumbl's horizontal approach to mass atrocity. He argues that criminal law is currently ill-equipped to

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61. *Id.* at 186.

62. *Id.* at 187.

63. *Id.* at 188.

64. *Id.* at 189.

address collective responsibility in the wake of mass violence. Yet, the recent case in the International Court of Justice (ICJ) between Bosnia and Herzegovina and Serbia (not yet handed down prior to publication) indicates a need to effectively sanction those responsible, though not criminally liable, for atrocity. "Cosmopolitan pluralism would encourage an interface with collective responsibility mechanisms that, in turn, could go some way to plugging an important gap left by criminal trials."<sup>65</sup> Drumbl thus argues that a panoply of diverse mechanisms, including but not limited to criminal tribunals, is the best response to atrocity. In this, he is perfectly correct. These institutions and processes are not the panacea to preventing human rights abuse; they are one of a number of processes that hopefully can reduce their occurrence. They are not the only processes critical to impacting, and curbing, massive human rights violations. As Antonio Cassese has argued, no "single panacea" exists to prevent human rights abuse. He rightfully argues that it is important to rely "upon a host of possible options, using each of them to suit best the historical, social, and legal conditions of each individual situation."<sup>66</sup>

Drumbl concludes his book by assuaging fears that his proposed reforms will overwhelm international and national actors. He argues that existing frameworks can, at the outset, merely be modified to accommodate his cosmopolitan pluralistic vision.

Drumbl first calls for amendment to the referral mechanisms of international tribunals to accommodate qualified def-

erence to local institutions. He also calls for additional research and incorporation of non-Western legal traditions by international actors. He advises sentencing bodies to recognize their shortcomings in reaching their stated goals of retribution, deterrence, and expressivism. Drumbl encourages the ICC to better involve victims in its processes. Additionally, he would like to see curtailment of plea bargaining and early release.

In addition, Drumbl calls for more predictability in sentencing as well as due notice of bystanders in criminal judgments. Linkages between the ICJ and national courts also need to be clarified and synthesized. In keeping with Drumbl's interest in collective responsibility, he proposes collective sanctions. He also welcomes participation from citizens of conflict zones to promote accountability. Drumbl makes a number of recommendations to political institutions, such as: contractually binding the international community to intervene earlier in conflict; reducing the opportunity for the abuse of public and private offices in conflict; engaging donors/human rights activists with national legal institutions; recognizing the complexity of extraordinary crimes; and researching local responses to mass violence.

This is a superbly well written and researched book. It is challenging and provocative. It effectively brings together criminology and a range of other disciplines in an important and far reaching book. It contains critical lessons and observations for the international as well as domestic criminal justice regimes. The references are so full and thorough

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65. *Id.* at 203.

66. Antonio Cassese, *The Role of Internationalized Courts and Tribunals in the Fight against International Criminality*, in INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA, *supra* note 3, at 3.

that they are likely to be invaluable to those who would like to further examine aspects of sentencing issues that the book raises, or even others.<sup>67</sup> This book is a must read for those interested in the developments of international criminal justice and sentencing in particular.

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**The Story Behind the Case that Launched a Legal Revolution**  
**William J. Aceves, *The Anatomy of Torture: A Documentary History of Filártiga v. Peña-Irala* (Leiden and Boston: Martinus Nijhoff Publishers, 2007), 793 pp.**

## I. INTRODUCTION

Every once in a while, a case comes along that changes everything. *Filártiga v. Peña-*

*Irala*<sup>1</sup> was one of those cases. The *Filártiga* plaintiffs made an audacious assertion: that Paraguayan victims of human rights violations could bring suit in a US federal court against a Paraguayan perpetrator for acts of torture and extrajudicial killing committed in Paraguay in violation of international law. The case established many firsts: that the Alien Tort Statute (ATS)<sup>2</sup> supports assertions of extraterritorial jurisdiction, that long articulated but rarely enforced human rights norms are justiciable, that the individual is front and center in international law as victim and perpetrator, and that ensuring a robust system of accountability is consistent with the interests of the United States. *Filártiga* empowered hundreds of additional victims to mobilize the US legal system against human rights abusers who would otherwise find safe haven in the United States. Before Guantánamo and its repercussions, the United States boasted the most vibrant system of civil domestic human rights enforcement in the world. Professor William Aceves' engaging new volume *The Anatomy of Torture: A Documentary History of Filártiga v. Peña-Irala*<sup>3</sup> tells the story of this system of civil enforcement developed through a rich account of the *Filártiga* case and its progeny.

Aceves' project joins the "law stories" movement in legal pedagogy exemplified by Foundation Press' excellent series of course supplements.<sup>4</sup> Although sharing many of the law stories' features, this volume is more than a stereoscopic

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67. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW, *supra* note 8, at 211–83.

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1. *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).
  2. Alien Tort Statute (ATS) or Alien Tort Claims Act (ATCA), 28 U.S.C. §1350 (2006).
  3. WILLIAM ACEVES, *THE ANATOMY OF TORTURE: A DOCUMENTARY HISTORY OF FILÁRTIGA V. PEÑA-IRALA* (2007).
  4. The *Filártiga* case is also featured in Foundation's Law Stories text on international law with a chapter by Dean Harold Hongju Koh, a prominent founder and practitioner of