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Crim. L. & Criminology 699 (2008) (reviewing
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Recommended Citation

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PUTTING PANDORA ON TRIAL

KAREN E. WOODY*

MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW*
(Cambridge University Press 2007). 298 pp.

It is impossible for offenses against the most fundamental collective sentiments to be tolerated without the disintegration of society, and it is necessary to combat them with the aid of the particularly energetic reaction which attaches to moral rules.¹

In the wake of increasing globalization over the past fifty years, international criminal law has transformed from a toothless shadow into a concrete reality; the International Criminal Court is the most recent and impressive institutional accomplishment. Unfortunately, international criminal law has enjoyed this progress on the heels of increasingly horrific international crimes. International adjudicatory institutions have taken many forms and the sentences they deliver have varied widely.² In *Atrocity, Punishment, and International Law*, Mark Drumbl reviews the strides made in international criminal law from the Nuremberg trials through present-day trials, particularly those related to the crimes committed in Rwanda and Yugoslavia.³ In doing so, Drumbl offers one of the most comprehensive assessments of the role of punishment in international criminal law. In this Review, I detail Drumbl's primary themes and acknowledge the book's numerous and notable contributions to the field of international criminal law. I then argue that a natural extension of Drumbl's theory of cosmopolitan pluralism is the use of religious institutions as vehicles of rehabilitation and restoration for communities fractured by mass atrocity.

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¹ EMILE DURKHEIM, *THE DIVISION OF LABOR* 397 (George Simpson trans., The Free Press 1933).

² See, e.g., William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1 (2002).

³ MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* (2007).

I. OVERVIEW

Drumbl begins his book by giving an overview of the atrocities that occurred in Rwanda, Yugoslavia, and Nazi Germany, and then describes the national and international legal institutions erected to adjudicate and punish the perpetrators of these atrocities and others.⁴ Drumbl draws from a variety of sources and disciplines to examine the rationales behind the tribunals and their punishment schemes.⁵ At the heart of his analysis, however, lies a sense of skepticism towards the liberal,⁶ predominantly Western notions of common crime and punishment that are imposed upon international tribunals charged with adjudicating uncommon crimes.⁷ While not entirely eschewing the merits of international tribunals replete with liberal legal theories of punishment, Drumbl begins to outline the limits of the tribunals in achieving the goals of the judicial process.⁸

In his early chapters, Drumbl writes about the fundamental differences between perpetrators of the aforementioned atrocities and “common” criminals such as car thieves or armed robbers.⁹ He notes that the essence of criminal law serves to punish social deviants—individuals such as the car thief or the armed robber who commit hazardous acts, likely to warrant punishment, that depart from societal regulatory norms.¹⁰ Yet Drumbl points out that those who engaged in the mass killings participated in “deviant” acts that were not necessarily banned by their particular society at the time.¹¹ Instead, because social norms were upended in the midst of

⁴ Drumbl’s first chapter serves as a summary of the book’s contents and of his main arguments. While helpful to orient the reader, this chapter goes into such detail that the text in later chapters seems, at times, redundant.

⁵ Drumbl has seventy-two pages of footnotes accompanying the text, citing sources as varied as legal theorists, sociologists, and criminologists, as well as victims and perpetrators of atrocity.

⁶ For an exposé on liberal ideals, see JOHN RAWLS, *POLITICAL LIBERALISM* 4-15 (1993).

⁷ See DRUMBL, *supra* note 3, at 8.

⁸ *Id.* at 10.

⁹ *Id.* at 6.

¹⁰ *Id.* at 33.

¹¹ *Id.* at 27. Another difference between common criminal law and law related to atrocity is that typically less “law” is applied when the victim and criminal are close in society. See DONALD BLACK, *SOCIOLOGICAL JUSTICE* (1989). The author notes that “intimacy . . . tends to immunize people against law” in the sense that fewer judicial or police resources are utilized the closer the relation between victim and criminal. *Id.* at 102. Black posits that police tend to make fewer arrests if the crime is, for instance, domestic violence than if the crime was one committed between strangers. *Id.* at 11-12. The “stranger” crime would necessitate that greatest amount of “law.” *Id.* at 11. In the case of the genocide in Rwanda, neighbors killed neighbors, priests turned over Tutsi congregants, and doctors betrayed Tutsi clients. See generally PHILLIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES* (1998). Thus, in

atrocities, the civilians who did not participate in the killings arguably were more deviant than those who did.¹² This mass involvement in social deviance results in a pyramid of culpability: at the top are the conflict entrepreneurs, who devised and strategized the mass killing, followed by the leaders who remained accountable to the entrepreneurs yet commanded others to kill; the next tier of criminals was that of the actual killers.¹³ Below this level are the complicit masses.¹⁴

With this background of mass culpability, Drumbl deftly describes how a combination of national and international judicial systems have handled and sorted the first three categories of criminals. Drumbl highlights the merits and accomplishments, as well as the shortcomings, of international tribunals and national judicial systems designed to adjudicate genocidal killers and war criminals.¹⁵ Specifically, he analyzes the punishments meted out at the International Criminal Tribunal for Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda ("ICTR"), and the East Timor Special Panels, noting their similarities and differences to the sentences given decades ago in Nuremberg.¹⁶ Drumbl then describes the domestic judicial systems in the countries where the atrocities took place and national efforts to restore the rule of law after atrocity.¹⁷ He points out that despite a larger variety of sentencing options present in the national courts,¹⁸ the trends in the international tribunals, such as the lowering of maximum sentences, have put pressure on domestic judicial systems to follow suit.¹⁹ He buttresses his argument with sentencing statistics from both the international tribunals and national systems of justice.²⁰ Drumbl asserts that this indirect international pressure

considering Black's theory related to common crimes about relational distance determining the amount of law applied, the case of Rwanda certainly turns the theory on its head.

¹² Deviance is defined in criminological terms as a departure from social norms. The theory behind criminal law is to punish social deviants in order to maintain social norms and the efficacy of the rule of law. See, e.g., WAYNE R. LAFAVE, CRIMINAL LAW § 1.5 (4th ed. 2003); see also DRUMBL, *supra* note 3, at 33.

¹³ DRUMBL, *supra* note 3, at 25.

¹⁴ Moreover, to increasingly complicate the culpability spectrum, Drumbl acknowledges that victims often became victimizers who themselves need to account for their crimes. See *id.* at 44.

¹⁵ *Id.* at 46-66.

¹⁶ *Id.*

¹⁷ *Id.* at 68-121.

¹⁸ *Id.* at 70.

¹⁹ *Id.* at 121.

²⁰ For example, Drumbl details that the ICTR has imposed twenty-four sentences, 45.8% of which are life imprisonment. The ICTR's mean sentence term is 23.5 years, and the median term is 25 years. In contrast, the ICTY has issued fifty-four sentences, and not one

is a further imposition of liberal Western notions into domestic courts, and that this pressure affects even neo-traditional, and originally restorative, models such as *gacaca* in Rwanda.²¹

After detailing the sentencing statistics for the tribunals and the domestic court systems, Drumbl shifts from a penological analysis to a criminological one,²² lucidly outlining the justifications for punishment in the context of international and national law and pointing out the varying theories of punishment at play in the sentencing schemes. In his thorough analysis, he first examines the theories of retribution and deterrence.²³ He posits that the goals of retribution are not attained in the international tribunals because the punishments often do not fit the gravity of the crimes.²⁴ Additionally, the retributive theory is handicapped in international arenas by the vast discretion of sentencing judges, the selectivity of defendants, and the option of plea-bargaining.²⁵ Drumbl also notes that the deterrence theory goals are not met by international tribunals because it does not take into account the highly charged and collective nature of mass atrocity;²⁶ moreover, he argues the deterrence theory falls flat when criminals remain passionate about their cause and do not recognize their culpability.²⁷

of them has been a life sentence. The average sentence term issued by the ICTY is 14.75 years, and the median term is 13 years. *Id.* at 57.

²¹ *Gacaca* means “justice on the grass” in Rwanda’s local tongue, Kinyarwanda. *Id.* at 85. *Gacaca* is a traditional means of justice in Rwanda, originally intended to describe the lawn where community members would meet to discuss minor grievances or property issues. Ariel Meyerstein, *Between Law and Culture: Rwanda’s Gacaca and Postcolonial Legality*, 32 *LAW & SOC. INQUIRY* 467, 467 (2007). In the wake of Rwanda’s genocide, the Rwandan government retooled the *gacaca* system to include thousands of local judicial panels that adjudicate genocide criminals. *Id.*; see also DRUMBL, *supra* note 3, at 85-86. The highest, and most culpable, category of *genocidaires* are prosecuted more formally, leaving the *gacaca* system to handle murderers, attempted murderers, and property violators. DRUMBL, *supra* note 3, at 87. In *gacaca* tribunals, members of the community speak and can ask questions of defendants. Defendants are also afforded an opportunity to confess and apologize. See *id.* at 85; see generally Meyerstein, *supra*. In addition, this author witnessed *gacaca* proceedings and bases her knowledge on her ethnographic studies. See David Caudill, *Ethnography and the Idealized Account of Science in Law*, 39 *SAN DIEGO L. REV.* 269, 281 (explaining that ethnography applies “loosely to any fieldwork-based method, including short-term observational studies”) (internal citations omitted).

²² Penological studies focus on sentencing and treatment of criminals whereas criminological studies focus on social deviance and examine the rationales for breaking social norms. See generally, DRUMBL, *supra* note 3, at 149.

²³ *Id.* at 150-73.

²⁴ *Id.* at 155.

²⁵ *Id.* at 151-68.

²⁶ *Id.* at 170-73.

²⁷ *Id.* at 171.

In addition to retribution and deterrence, Drumbl examines expressivism as a principal purpose underlying both international and national adjudications.²⁸ Expressivists believe that public punishment, handed down by a court, serves to strengthen the rule of law in a society. In other words, expressivism champions punishment as a means of reinforcing social norms and promoting adherence to the law.²⁹ Not surprisingly, when I worked at the Prosecutor General office in Rwanda, I was charged with analyzing the various transitional justice models to assist Rwanda's effort in lobbying the United Nations to terminate the ICTR as quickly as possible.³⁰ This task was a reflection of the national sentiment of disappointment and frustration with the ICTR, which I attributed to the lack of expressivism present within Rwanda.³¹ Because the ICTR was located in Tanzania, Rwanda itself did not have the opportunity for the many genocide trials to be on display and to serve expressivist purposes, leaving the country more embittered with the international community.³²

Unlike many academics, journalists, or social scientists who either discover, report, or analyze mass international atrocities,³³ Drumbl has the courage and intellectual muster to include suggestions and proposals for reform in the final two chapters of his book.³⁴ Drumbl proposes reforms

²⁸ See *id.* at 173-80.

²⁹ *Id.* at 174. Interestingly, Drumbl points out that the importance of expressivism is elucidated in the example of the United States after September 11, 2001. He states that had a foreign state caught Osama bin Laden, "erudite judges from outside the United States would determine his culpability, and that prosecutors from outside the United States would conduct the proceedings, would be simply unimaginable to most Americans." *Id.* at 132.

³⁰ The author worked for the Office of the Prosecutor General in Kigali, Rwanda, in 2003.

³¹ See *supra* note 21 and accompanying text on this author's ethnographic studies; see also DRUMBL, *supra* note 3, at 130.

³² Rwanda had a seat on the panel at the time the ICTR was put to a vote at the UN Security Council. The vote at the Security Council was 14-1, with Rwanda, ironically, being the only country opposed to the tribunal's genesis. Rwanda found the tribunal flawed by its location, as noted, as well as the lack of a sense of justice or punishment within the country's borders and the lack of the death penalty option. SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE 484-85 (2002). Perhaps nodding to this frustration and the international embarrassment that Rwanda voted against the genesis of its own tribunal, the ICTR has dealt harsher sentences than the ICTY. See DRUMBL, *supra* note 3, at 57. Also, Rwanda expressed frustration that the international community that sat idly by when the genocide was occurring later took the reins to control how justice and punishment would be effectuated after the conflict ended. Laura Bingham, *Strategy or Process? Closing the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 24 BERKELEY J. INT'L L. 687, 694 (2006).

³³ See, e.g., GOUREVITCH, *supra* note 11; POWER, *supra* note 32.

³⁴ DRUMBL, *supra* note 3, at 181-209.

that he describes as horizontal and vertical.³⁵ Horizontal reforms include reaching beyond criminal law to areas of tort, contract, and restitution, as well as looking to extrajudicial institutions in acknowledging the culpability of the complicit masses.³⁶ In this vein, he underscores the importance of *in situ* sociolegal institutions.³⁷ Drumbl argues that horizontal reform would result in a sense of collective responsibility within a society, with the hope that collective responsibility would prevent any future atrocities.³⁸ Vertical reforms include greater deference to local judicial institutions rather than complete servitude to international institutions of justice.³⁹ Drumbl terms this “qualified deference,” meaning that there exists a rebuttable presumption in favor of local or national institutions but does not exclude liberal criminal law or criminal procedure.⁴⁰

Drumbl suggests that these reforms stem from a notion of cosmopolitan pluralism.⁴¹ He argues that cosmopolitanism, with its belief in global citizens and a universal moral community, would not do away with international criminal justice but would balance the international norms with domestic and local values.⁴² He bases his argument on the notion that mass atrocities such as these require more complicated legal frameworks than those of ordinary criminal law;⁴³ moreover, a philosophy of cosmopolitan pluralism would result in greater universal accountability while remaining true to both Western and non-Western ideas of justice.⁴⁴

II. ANALYSIS

Drumbl aptly explains both expressivism and cosmopolitan theory, positing that adopting the nuances inherent in these concepts would improve the efficacy of international adjudicatory institutions. I agree with Drumbl’s thesis that the prevailing legal thought in relation to mass atrocity has slowly started to move away from strictly international tribunals and has begun to incorporate the benefits of pluralistic opportunities such as

³⁵ *Id.* at 181.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *See id.* at 197.

³⁹ *Id.* at 181.

⁴⁰ *Id.* at 187-88.

⁴¹ *Id.* at 185.

⁴² *Id.* at 185-87.

⁴³ *See supra* note 14 and accompanying text (discussing the complexities of the legal landscape in a post-conflict society).

⁴⁴ DRUMBL, *supra* note 3, at 205.

hybrid court models, civil courts, and even non-adversarial systems such as *gacaca*.⁴⁵

Drumbl is correct that the scope of judicial options should be wider than Western conceptions of criminal law, for the many reasons he details in his book.⁴⁶ The unique international crisis of genocide, such as that in Rwanda, as well as the war crimes that occurred in Yugoslavia, involve not merely a few car thieves and armed robbers—they involve and affect entire societies.⁴⁷ Thus, in order for these societies to experience restoration, reconciliation, or even further the punitive goals of retribution, deterrence, and expressivism, they must utilize all of their societal institutions rather than relying solely upon their judicial systems.⁴⁸ It would seem that the most capacious way for a country to heal entirely is to use the means and resources it has within its borders to recreate itself. As such, transitional justice must incorporate local traditions, religions, and values in its attempt to reestablish societal norms.⁴⁹

Although Drumbl argues for the use of extrajudicial institutions in exacting cosmopolitan pluralism, he never explicitly refers to the potential of religious institutions in this role.⁵⁰ Notably, the rhetoric of cosmopolitanism is couched in spirituality.⁵¹ Cosmopolitans, however, likely would shy away from the promotion of religion as a means of societal restoration because of its potentially divisive effects.⁵² In defense of such cosmopolitans, I recognize that many of the most horrific international atrocities have been executed in the name of religion.⁵³ Nonetheless, the role of religion in post-conflict societies should not be overlooked, as it could be a vitally important piece in national rehabilitation. For example, during my time in Rwanda, the two predominant ethnic groups informally remained fairly separated in daily life, yet the local churches made

⁴⁵ *Id.* at 11-14. See, e.g., Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007).

⁴⁶ DRUMBL, *supra* note 3, at 10, 123.

⁴⁷ See, e.g., POWER, *supra* note 32.

⁴⁸ See DRUMBL, *supra* note 3, at 10, 123, 205.

⁴⁹ See, e.g., DURKHEIM, *supra* note 1, at 398 (“[T]he characteristic of moral rules is that they enunciate the fundamental conditions of social solidarity. Law and morality are the totality of ties which bind each of us to society, which make a unitary, coherent aggregate of the mass of individuals.”).

⁵⁰ See DRUMBL, *supra* note 3, at 148 (listing examples of restorative justice initiatives while questioning their efficacy).

⁵¹ Drumbl acknowledges that the roots of cosmopolitanism are intertwined in Stoicism. *Id.* at 185.

⁵² See *supra* note 51 and accompanying text (noting the tenets of cosmopolitanism).

⁵³ Numerous international disputes, including that of Palestine and Israel, have been rooted in differences of religion. See, e.g., R. SCOTT APPLEBY, *THE AMBIVALENCE OF THE SACRED: RELIGION, VIOLENCE AND RECONCILIATION* (2000).

extraordinary efforts to bring Hutu and Tutsi together for services. Moreover, the church services I observed while in Rwanda emphasized forgiveness, charity, truth-telling, and the concept of a shared humanity among all attendees. Indeed, churches, synagogues, and mosques are able to bring diverse factions of society together, focusing them on a higher principle—one that would bind individuals together as congregants, worshipers, and members of a common belief. More importantly, the fundamentals of this common belief mirror the moral goals of cosmopolitanism and underscore social stability.⁵⁴

It is axiomatic that sociologists have long remarked on the function of religion in society. Regardless of what the religious belief centers upon, religion itself serves as social cohesion and establishes a moral code among its members.⁵⁵ Even a Marxist cynic disavowing religion as the “opiate of the masses” should recognize that the opiate itself serves a function—in this case, it provides positive reinforcement of social and moral norms.⁵⁶ Obviously, a strengthened role of religion in a post-conflict society is not a cure-all measure.⁵⁷ Societal reconciliation, however, is imperative. In the case of Rwanda, the Hutu and Tutsi must live together and coexist peacefully—there is not another option for society. Therefore, all societal institutions should be used in the arsenal aimed at achieving national rehabilitation and reconciliation. Religion is a particularly useful tool because it has the capacity to create bonds stronger than ethnic ties by literally idolizing a greater good and a higher ideal than the trappings of humanity. Consideration of these benefits and others that can be attained from an increasingly religious community, and the utility of religion in obtaining the goals set forth in cosmopolitan pluralism, should not be neglected.

III. CONCLUSION

The overwhelming strength and uniqueness of *Atrocity, Punishment, and International Law* lies in Drumbl’s ability to analyze the meta-goals

⁵⁴ See DRUMBL, *supra* note 3, at 185 (expounding upon the goals and ideals of cosmopolitan theory).

⁵⁵ See PETER HAMILTON, EMILE DURKHEIM: CRITICAL ASSESSMENTS 137 (2d ed. 1995).

⁵⁶ KARL MARX, A CONTRIBUTION TO THE CRITIQUE OF HEGEL’S PHILOSOPHY OF RIGHT (1844).

⁵⁷ Interestingly, truth and reconciliation commissions, an increasingly popular mechanism in post-conflict arenas, lean heavily on religious themes, such as forgiveness. The commissions also often incorporate religious ceremonies. See Jane E. Stromseth, *Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?*, 38 GEO. J. INT’L L. 251 (2007); see also Michael Nesbitt, *Lessons from the Sam Hinga Norman Decision of the Special Court of Sierra Leone: How Trials and Truth Commissions Can Co-Exist*, 8 GERMAN L.J. 977 (2007).

and lofty principles that justify international criminal law and its punishments while also being extremely detailed in specific examples. Drumbl is able to explain complex ideas and theories at both macro- and micro-levels with extraordinary lucidity. His research and personal experience affords the reader with a staggering amount of unique and invaluable information. This book should be a mandatory read for any student of international criminal law and theory, and deserves the praise and respect it has already earned among academics and legal practitioners.