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International Criminal Law: Year in Review 2014–2015

Mark A. Drumbl*

First, let me tell you a little bit about myself. This background might help explain why my “Year in Review” talk follows the lines that it pursues.

I first became interested in international criminal law through work at the national level: prosecutions and defense work for serious human rights abuses and international crimes. One point of view that I would like to bring to the table today in thinking about not only a year in review, but also the years ahead, is to underscore one very important reality: the vast number of attempts to deal with justice following terrible atrocities do not happen at the international level. In fact, statistically speaking, only a tiny number of trials occur at the international level. This number is completely dwarfed by national and local prosecutions.

Therefore, I would like to review not only what has happened over the past year at international tribunals—I will talk a bit about that—but also to underscore the importance and to tell a story or two about national prosecutions as well. The action on the justice front operationally happens in a lot of places that people just do not talk about much. And these places lie well beyond The Hague.

What I do not want to do is review and repeat what has already been said about the international arena. I thought what I would do is boil it down to a couple observations that I have about the activities at the international institutions over the past year, and discuss four elements that have emerged.

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One is transition. What I mean by this is that the work of a number of the international institutions is winding down, moving on, relocating.

The second criterion is what I would call unevenness. With the International Criminal Court (ICC) in particular, I think we see some high highs and some low lows. It is a staccato process. And I cannot fully figure out if it is two steps forward and one back or one step forward and two back; or maybe even higher numbers, probably more in the backwards direction. But I am an optimist, so I would say that there are two forward and one back.

The third theme: migration. This grafts onto the theme that I opened with: proceedings moving from the international level to the national level and being dealt with there.

And then, the final criterion that I see emerging is what I would simply call omissions. I woke up this morning agape at another omission that we have been talking about quite a bit: a photo I saw from the latest torture practices that ISIS is deploying. There was a photo of four men on a bar—it actually looks like a swing set—and there is a bar that goes across the middle. These men are tied to the bar, arms and legs up above, so they are face down. In front of these four men is a row of kerosene: a row with straw on it. There are four of them. Their bodies are also doused with kerosene. Each of these four rows is lit on fire. Kerosene advances, and the men burn to death, face down.

So here, we see omission. Conceptually, these are crimes that definitely fit within the realm of international institutions. Operationally, though, we see nothing because of jurisdictional concerns. So if I have to summarize the past year, it would be transition, unevenness, migration, and gaps.

What I would like to do today is take three different steps. First, I would like to discuss some facts about activities at the international

level. This is an audience where I see some familiar faces and I see some new faces, and that suggests to me that there are going to be a number of people in the room who may not necessarily be insiders to the process of international criminal law. So I am also going to set out a bit of simple background about some of the institutions.

Then I want to talk to you about people, because at the end of the day, justice is about individuals. Human beings are the ones—not monsters, not demons—that commit atrocities against other human beings, and the human beings accused of atrocities have stories. I am not saying they have much, perhaps, in the way of humanity, but they are at least members of the human collective.

I want to tell you stories about three defendants that appeared this past year in the news whose stories I think are somewhat compelling, not necessarily from an empathy point of view, but certainly from a point of view of getting us thinking about what is happening.

Then from the third of these three, I want to move to the final part of my remarks. This is the “Year in Review,” looking at years behind and years ahead, and trying to excavate some of the work that has happened at the national level, with regards to our gathering on international criminal justice.

Of the three individuals that I am going to talk about, the first will be Dominic Ongwen. He will appear in The Hague. The confirmation of charges will be in January at the ICC. The second person, Pauline Nyiramasuhuko, is being prosecuted as part of the Butare Six trial. The appeals judgment is pending, and as we heard from Chief Prosecutor Hassan Jallow yesterday, it is the last case of the Rwanda Tribunal. The third person is someone that I am quite fascinated with, a man called Oskar Gröning. He was prosecuted in Germany, in Hamburg, for his role as the bookkeeper at Auschwitz, seventy years after his bookkeeping. This is a national prosecution that took place this summer.

As you all know, there are ad hoc institutions at the international level, and there is the permanent International Criminal Court. The two ad hoc institutions that have done quite a bit of work demographically in terms of numbers are the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR). These institutions, as you have learned over the course of your time here, are transitioning into basically their own nonexistence in terms of graduating from the excellent work that they have done to the residual Mechanism for International Criminal Tribunals that is then going to take the brunt of the work going forward. This is the theme of transition. As I mentioned, the ICTR retains one case on appeal. There are about five or six, maybe seven, ongoing cases for appellate and trial at the ICTY.

Let us look at the numbers. Since its inception and creation, the ICTR has indicted ninety-three individuals: sixty-one have been sentenced, fourteen acquitted, and ten referred to national jurisdictions. Three of the defendants passed away prior to or during trial. Three remain fugitives.

Jurisprudentially, as we learned yesterday as well, the ICTR has done great work in terms of, for example, redress for grievous sexual violence, associating rape with genocide. In another landmark case, the *Media* case, the ICTR became the first international tribunal to hold members of the media responsible for incitement to genocide.

Remember that number: ninety-three. Roughly 10,000 individuals have been prosecuted at the national level in specialized chambers at the Rwanda national courts. I think it is a safe estimate, a conservative estimate, to say that roughly 800,000 people—perhaps even more—have been prosecuted nationally in Rwanda through the neo-traditional Gacaca prosecution. Gacaca is, in theory, a traditional form of dispute resolution in Rwanda, but it has been officialized and standardized. It was completed a couple years ago. Those numbers

are strikingly disproportionate. Yet, there is so much more talk about the ICTR than about Gacaca.

The ICTY, as we learned yesterday as well, has a slightly larger number of people that it has indicted: 161. Proceedings have been completed in the cases of 147 individuals, 18 of whom have been acquitted, 80 sentenced. A number have been transferred to serve their sentence, and fifty-two have already served their term, which in many instances may vary widely, including early release.

As I mentioned before, the work of these institutions is transitioning to the Mechanism, as is the work of the Special Court for Sierra Leone to its own residual institution. The Mechanism's work is not only to deal with ongoing prosecutions, but also to track remaining fugitives; to deal with appeals proceedings, retrials, and contempt trials; to keep protecting victims and witnesses; and, very importantly, to supervise and enforce sentences. As you may or may not know, individuals convicted at the ad hoc tribunals serve their sentences in national courts that have conducted agreements either with the tribunals or with the mechanism that convicts them. This has actually led to quite a diaspora of individuals in terms of where they serve a sentence. The Mechanism is also geared towards assisting national jurisdictions when it comes to dealing with their own proceedings.

The permanent International Criminal Court is similarly invested in nine situations and, at present, twenty-two cases. There has been a great level of unevenness—again, the staccato process, forward, backwards. The situations in which the ICC is involved divide into those where the Office of the Prosecutor gets referrals from state parties, referrals from the Security Council, and when the prosecutor proceeds independently *proprio motu*. There are also preliminary investigations where the ICC has been involved. The big one in the past year has been about Palestine, which ratified the Rome Statute on April 1, thereby becoming the 123rd state to do so.

I think it will be interesting now to segue from these numbers to talk about people. Let me talk to you a bit about Dominic Ongwen. Dominic Ongwen has been indicted by the International Criminal Court. As I said earlier, the confirmation of charges hearing is scheduled for January 2016. So who is he? He is a brigadier commander in the Lord's Resistance Army (LRA), a group most virally notorious through the Kony 2012 video. He is also a character that has had quite the life trajectory. He is the youngest individual to be accused and indicted at the International Criminal Court. His life story begins one day when he was walking home from school and is kidnapped, abducted, and forcibly recruited into the Lord's Resistance Army as a child soldier.

He was nine years old when abducted. After being abducted and forcibly recruited, he is trained and later becomes a child soldier. He fights. He is an active participant in the Lord's Resistance Army. Through his use of violence, coercion, empathy, pardon, and at times mercy, he rises through the ranks of the Lord's Resistance Army to become a brigadier commander. That is when he surrendered in January 2015 while in the Central African Republic.

In the Ugandan situation, the ICC prosecution has indicted five people. Ongwen is one of them. Two are dead. Two are at large. Ongwen, therefore, presents as an indicted person who has suffered some of the crimes of which he is charged, mainly enslavement as a crime against humanity and unlawful recruitment and use of child soldiers, suggesting to me a very interesting fact: how the lines between victims and victimizers in the context of mass atrocity are often porous and permeable—not transparent, but there is certainly a translucence. This is something that is important for us to accept and appreciate because it is often very easy to divide perpetrators and victims into boxes that are clear-cut and categorically good/evil, innocent/guilty. Those categories are necessary for law, but the reality of violence is often much more complicated.

There has been a tremendous global push to restrict the use of children in armed conflict. But the protective push to shield children from violence becomes complex when an individual is an adult who was socialized as a child soldier. What do you do when someone has a “rotten social background” and then commits crimes as an adult? I cannot imagine a more rotten social background than growing up in the Lord’s Resistance Army. So what do you do with that? Does the global push to protect children from violence lead to a conversation about the culpability and responsibility of a former child soldier who has, in turn, as an adult, committed serial acts of violence?

Conversations in Uganda about Ongwen are complex. There are a number of Ugandans that believe that Ongwen should be prosecuted. Other Ugandans believe Ongwen, like many other LRA fighters, should be amnestied and in that particular context should be allowed to reintegrate into society without penal consequence.

Ongwen himself, according to reports from the LRA, is a bit of an enigma. Ongwen was apparently among the less abusive of the LRA leaders. He drank heavily. He occasionally was capable of showing mercy and would take risks to protect others.

Will Ongwen’s trial help unpack the reality of the complexities of child soldiering and how victims can become victimizers? I don’t know. Trials are geared to simple narratives, as I said before: guilty/innocent. As a prosecutor, I would not want to bring much into play about the accused’s social background. But the bottom line here is you cannot disentangle the conduct as an adult from the socialization as a youth.

If all we see in a trial is a conversation about the guilt or innocence of the person in the box, then these questions may be less relevant. But if we see in a trial something that teaches, that messages, that instructs, that reports on the anatomy of collective violence, then we do need to have these particular conversations because a great deal of

collective violence is committed by people who are not categorically evil, but who themselves have complexities. Many perpetrators are tragic; many victims are imperfect. And to me, that complexity belies the reality that atrocity itself is just not so simple.

So I am hopeful that in this trial, germinating this year and coming to fruition in the future, it will serve that purpose. There is one question I want to throw out to you; How do you approach it, a child socialized in this function who then becomes a leader?

A second person that I want to talk about is Pauline Nyiramasuhuko—the former minister of Women’s and Family Development in Rwanda—the lead defendant in the Butare Six trial, accused together with others, including her son, Arsène.

She was one of three ministers in the Rwandan government at the time of the genocide who is a woman. Another is the justice minister who is serving a long-term prison sentence in Rwanda right now, prosecuted at the national level; the third, the former prime minister of Rwanda, a moderate within the government, was murdered by her own guard after having been sexually assaulted by them. Her assassination was one of the opening factors that led the genocide in Rwanda to be as graphic as it was.

Nyiramasuhuko flees after the genocide ends. She is found later in a Congolese camp. She is indicted in 2011. Trial Chambers sentences her to life. Her appeal is ongoing.

There are a very small number of women who are accused at an international level of committing crimes. To me, this is interesting because I think, once again, we have the reality that here is someone within a position of influence accused of committing terrible crimes—including ordering rape and sexual violence—as well as those she ordered her own son to commit. Yet, if one reads the trial judgment,

it is almost rehearsedly gender neutral. There is no mention made whatsoever of the gender of the perpetrators, other than just the initial background, as I mentioned.

If you look at the media reports of this case, something I have written about a little bit, there is actually quite a lurid gender sensationalism or glorification of a woman in a senior position convicted of rape, including having ordered and urged her son and others to commit the violence. To me, the sensationalism in the media goes two ways. One way is to find her more culpable because she is a woman, because it is even more unfathomable that a woman could commit these particular crimes. So here, gender is trotted out to make her more guilty, therefore deserving of greater punishment. But then there is the opposite stream where gender is spooled out to have a conversation about how there is no way that she could ever be guilty because no woman could ever do this. And this narrative is not only gender-specific—I can't think of a better word for it—but it is also parental. No mother, no grandmother, could ever commit these kinds of crimes. She is not the only parent-child tandem to have been prosecuted by ICTR, however. There is another involving a pastor and his son, and the conversation there between father and son genocidaires is very different than the media conversation of mother and son.

I think this case offers a porthole in which to open up broader dialogues about the role of gender, not only in the innovation, but also in perpetration of violence, and to assess how a broader analysis of masculinities and femininities in the development of an atrocity could and should be handled so that we can have a deeper understanding of why violence occurs—human violence occurs—and how gender plays into perpetration. It's a very under-discussed phenomenon. So that is a question I leave you with.

The third is Oskar Gröning. Gröning is a young SS man at the time he arrives in Auschwitz in 1942. He was an accountant and a

bookkeeper there. So what does that mean? That means that when the detainees come in, he removes from them their cash, jewelry, and valuables. He meticulously records the amounts and ensures that the stolen proceeds are sent back to Berlin to assist in the Reich war effort. He is a good, punctilious bookkeeper. The level of theft that occurred in the camps from other individuals who served as guards and bookkeepers into their own pocket, where they only sent half of the stolen proceeds back to fund the Reich war efforts, is very large. Gröning is a committed bookkeeper.

Gröning leaves Auschwitz in the fall of 1944 after having asked to leave twice before. His requests are denied. He wants to transfer out because he sees what is actually happening in the camp, so he says. His transfer request is denied. Finally, the war effort number of soldiers gets so thin he has to transfer out. He ends up getting wounded, captured. He ends up in England. He plays in some musical band for a couple of months in the United Kingdom after being in the war.

This July, a German court in Hamburg convicts him at the age of ninety-four of being an accessory to the murder of 300,000 of Auschwitz's inmates. He was most directly responsible in the summer of 1944 when a staggering number of Hungarian Jews were deported to Auschwitz. The investigations against Gröning began in 1977, but it took nearly forty years for him to be put on trial. He received a four-year sentence. He is appealing. He is well enough to face trial, but it is unlikely that he would actually ever serve a prison sentence.

Here are some aspects of Gröning that I think are particularly interesting. Consistently, he has acknowledged his "moral" guilt. He is very candid about his contribution to the functioning of the camp. He, in fact, went public himself with his moral guilt and the details of his involvement with journalistic interviews and in a sense did not challenge the idea of being prosecuted for a trial. What he did challenge, however, was his legal guilt. His take on it consistently is that he was

a cog in a small machine, and the question of whether or not he is criminally responsible is to be left to judges to decide, not to himself.

One of the major reasons he went public with his moral guilt and his involvement is because he claims to have been so disgusted by the residual Holocaust denialism that was ongoing in Germany. He is a member of a stamp club. One day, Gröning is at a stamp club meeting, sitting down, and instead of talking about stamps, the other stamp guy next to him starts saying, "Oh, the Holocaust never happened." Gröning says, "Well, I actually know something about that," and he starts to go public with his story.

He, after conviction, did acknowledge his legal guilt. He also, however, refused to apologize at trial for his deeds. He refused to apologize because the enormity, in his words, of his own guilt was so large that it was simply impossible for him to get any forgiveness or ask any forgiveness from mortals, survivors, or relatives. The only entity from whom he could beseech forgiveness was the divine.

So, for me, the *Gröning* case opens up three interesting questions: First, is it worth prosecuting someone seventy years after the fact? What do we make of delayed justice? Can it survive? Is it right? To me, though, more powerful is the legal counterfactual? Is it absurd to prosecute a ninety-four-year-old man, seventy years after the fact, or is it more absurd not to prosecute a ninety-four-year-old man seventy years after the fact when you actually have a pretty solid case against this particular individual in part because of his own willing participation in the process? It's a worthwhile inquiry.

Secondly, once again, the victim/victimizer divide emerges here. In a lot of ways, Gröning's life story actually shares some parallels with Ongwen's. Gröning's mother dies when he is five or six, very young. His father is austere. Like a lot of young people at the time, Gröning drifts into military service, success and so forth. At Auschwitz he

never committed any violence directly against anyone. He is your classic bookkeeper. He conducts audits in an overarching enterprise.

And, finally, what do we make of his statement that he has the power to admit his moral guilt, but that as a defendant, his legal guilt can only be assessed by outsiders? And he will accept what the outsider says, but determinations of legal guilt are not for the accused to make.

Those are three people that have been part of the tapestry of international criminal law, either internationally or nationally, over the past year. I think there is a lot more to be gained, in a sense, by thinking about their stories—by thinking about what they did and the questions that their experiences raise—than systematically going through a number of facts, figures, and statistics. The machine of justice involves individuals; there is a great deal of eccentricity, malevolence, but also mercy that narrates the actions of these individuals.

To me, the *Gröning* case is an important pivot to look ahead in the sense that the future of international criminal justice is not going to be written by international entities. I think the future of international criminal justice is going to happen at the national level in which the norm, the law, the energy that has emerged internationally, becomes instituted and implemented at the national level.

But, in a sense, that has been happening for a long period of time, and we do not talk about it very much. I have actually become very interested in looking at national proceedings—not in military courts, but in civil courts—after World War II in a number of jurisdictions that have involved the prosecution of atrocity related to World War II.

One project that I have become very interested in concerns an institution that hardly anyone has heard of, the Supreme National Tribunal of Poland. It operated from 1946 to 1948. It ran seven trials involving forty-nine individual defendants for Nazi atrocities within

Poland itself. This is the institution that convicted Rudolf Höss, the most infamous commander of Auschwitz. This is the institution that convicted Amon Göth, who was a leader of forced labor camps in Kraków, played by Ralph Fiennes in *Schindler's List*. This is the institution that convicted a man called Arthur Greiser, who was the regional governor of a large part of western Poland. He was the architect of forced Germanization in that area of the country. This is an institution that convicted Josef Bühler in a trial closely conceptually related to the justice trial at Nuremberg. This Tribunal prosecuted German lawmakers in the general government of Poland.

The jurisprudence of this particular institution is rather rich. It has dealt with issues of criminal membership, sexual violence, medical experiments, and genocide. This institution put in play a definition of genocide that was actually broader than the ultimate definition adopted in the Genocide Convention that included spiritual, artistic, and economic aspects of society.

One thing I think I would encourage everyone to do is look through the window not only about goings-on in The Hague and other centers of the transnational world, but also to look for windows that open to places where justice happens but where people don't really look that much. There are so many underexplored, under-discussed, and very valiant and very courageous forms of justice that took place, will take place, and are taking place. I think there is an incredible amount to learn from those particular institutions.

At Chautauqua we come to learn about the big-ticket international institutions, but there are a lot of smaller shows going on in many spaces. They, too, are important.

So I'll stop, and I hope that some of the questions that I've raised are ones that might trigger another conversation.