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Law versus Justice in International Atrocity Prosecutions

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The Conundrum of International Atrocity Law

Atrocities are collective in nature. Yet criminal courts only adjudge individuals. A vexing transpositional challenge therefore arises. How to blame the few—namely, a handful of select individuals—for the violence of the many, to wit, groups, societies, and the masses? This conundrum bedevils the operation of atrocity law (Drumbl 2007; Osiel 2009).

Attribution of individual criminal responsibility in the context of extraordinary international crimes that, *pace* Hannah Arendt (1963), explode the limits of law and bust the global trust, indeed, remains fraught and taut. Hence, attention to legally cognizable linkages between the free will of the accused person and the connived malignant context matters greatly. These linkages adopt various monikers, including nexus and modes of liability. Insofar as international criminal trials self-identify as imposing international criminal law—as opposed to show trials that heave theatrics upon a stage—some respect toward due process is required in order to maintain credibility. While international criminal law generally aims to convict and not to acquit (with acquittals often seen as failures), the fact remains that to declare something as law means adhering to the minima of fairness and some principled punctiliousness to ensure that the attribution of responsibility does not unduly compromise the rights of the accused.

Collective Responsibility and Individual Blame

Liana Georgieva Minkova's *Responsibility on Trial* explores the modalities of placing collective blame upon the shoulders of the few. This book does so mostly (albeit not exclusively) through a case study of one institution, the International Criminal Court

(ICC). The ICC was created in 1998 by the Rome Statute.[1] It entered into force in 2002. It investigates and prosecutes core international crimes: genocide, war crimes, and crimes against humanity. It currently has 124 states parties. The ICC has delivered a paltry and anemic output. Minkova notes that "[a]s of February 2022 only five persons, all nationals of African countries, have been convicted for core international crimes at the ICC" (1). The ICC's jurisprudence nonetheless remains a meaningful case study and serves as a laboratory of thought and experimentation. Minkova remarks that "while this number of cases at the ICC . . . may be relatively small . . . it provides sufficient evidence to gain insights into the role of judicial reasoning in relation to the assessment of criminal responsibility" (62).

That said, the five convictions of the ICC over twenty-two years of operation contrast sparsely with the combined outputs of other international criminal tribunals, such as the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda as well as the Special Court for Sierra Leone (SCSL), not to mention (far more saliently) the hundreds of thousands of atrocity convictions at the national level in countries across the globe. On this note, associative and attributive liability theories in the German national courts following the *Demjanjuk* decision are intrepid and also rather confronting to liberal legalism, as are Rwanda's national and local prosecutions of the 1994 genocide (Drumbl 2007; Douglas 2016; Fournet and Drumbl 2023).[2] But the ICC attracts attention that is vastly disproportionate to its actual usefulness, which might perhaps explain why it preens more than it prosecutes. On this note, before unpacking *Responsibility on Trial*, I might caution against inferring the content and possibilities of international criminal law (ICL) exclusively from the content and actualities of ICC law. In many ways, ICC law is but a tiny slice of ICL.

Commendably, *Responsibility on Trial* begins by noting the challenges that inhere in "demarcating the boundaries of 'guilt' and 'innocence' against the messy reality of mass atrocity" (2). Minkova's perspective is one of optimism in extant structures—including the flailing ICC—being able to competently effect this balance. Hers is a glimmering angle amid a generalized sense of gloom. Minkova's book is therefore traditional, and conservative, in that she retains faith in the system as it currently stands. She adopts this faith as a lens. I find this admirable. It is much like authors in natural or religious law traditions who believe and persist and are committed and loyal against the odds. Minkova even reads critics of the transformative potential of ICL through these critics' least critical words. She reflexes toward law's purported intrinsic normativity rather than seeking justification for law's interventions through empirical, theoretical, or interdisciplinary methods (31).

Minkova develops an "intersubjective analysis" that is "sensitive to both the distinctiveness of legal reasoning and the role of power in shaping the law" (29). Minkova adopts this as a way to internalize the international relations of ICL—specifically, it is mainly the individual criminal responsibility of a handful of African men that count as the successful attributive outputs of the ICC as a whole. Despite its references to "intersubjective analysis," *Responsibility on Trial* fundamentally remains

[1] Rome Statute of the International Criminal Court, 1998, 2187 UNTS 90.

[2] *Demjanjuk*, Munich Regional Court II, Germany, May 12, 2011.

a book by and for lawyers. At the end of the book—indeed, in its final paragraph—Minkova reveals that the "aim" of her work is to "facilitate dialogue within the [ICL] field by elucidating the major debates on criminal responsibility rather than taking a side in those debates" (298). She achieves this admittedly somewhat modest aim. That said, this book has much to offer to a broader social science audience, and I hope to unpack some of these contributions in this review. Intriguingly, Minkova's choice of adjectival terms to describe the "sides"—notably, between proceduralism and substance—is impliedly revealing in its aesthetics and semantics. I will return to this idea later.

Minkova is talented when it comes to her ability to work with law. Her book is a stellar contribution to that literature. The book is nicely organized and ordered. It is sequential. It explains itself well. Minkova is clear at the outset about her methodology. She blends multiple sources: doctrine, legal documents, prosecutorial submissions, jurisprudence, secondary sources as vetted through discourse analysis, positions of states and non-governmental organizations, and interviews (57–61). Her research is thorough and impeccable. The book's exposition of law is comprehensive and accurate. Minkova brings a capacious understanding of law to the reader. Her expertise in common law and civil law, remedial law and punitive law, morality and retribution, rationality and sensibility, and process and penitence are all on ample display for the reader.

While the book examines how international courts assess the guilt or innocence of individuals, the most granular analysis is reserved for the ICC—notably, an extensive discussion in chapter 6 that interprets the otherwise overinterpreted Rome Statute and, more illustratively, the discussion in chapters 8 and 9 of two ICC acquittals (*Bemba* and *Gbagbo and Blé Goudé*) and two ICC convictions respectively (*Ongwen* and *Ntaganda*).[3] In these two chapters, Minkova demonstrates the balance effected by ICC judges in the space of ensuring justice (measured in convictions) while still retaining some commitment to law—in particular, the rule of law, which is intrinsic to the credibility of any legal system generally. Minkova links these balances to a number of variables, including, importantly, struggles that take place within the legal field (295). Assuredly, these struggles also impact persons outside of the legal field, mainly victims, and this review further vivifies Minkova's analysis by presenting some of these extralegal, so to speak, effects.

Law in the Life of Non-Lawyers: From the Hague to Sierra Leone

Minkova's book about lawyerly law for lawyers and about lawyers in the space of law triggers a prompt to think about law in the life of non-lawyers and about lawyers in the lives of others. Such is the process of law and social inquiry, no? So, on this note, one aspect of the process of individuation that Minkova does not consider is how to explain this phenomenon of attribution to multitudes of afflicted populations who notably sit in the post-conflict far away from The Hague and its culture of

[3] ICC, *Bemba*, ICC-01/05-01/08-3348 (Appeals Chamber), April 4, 2016; ICC, *Gbagbo and Blé Goudé*, ICC-02/11-01/15-T-232-ENG (Trial Chamber I), January 15, 2019; ICC, *Ongwen*, ICC-02/04-01/15-1762-Red (Trial Chamber IX), February 4, 2021 (subsequently affirmed on appeal); ICC, *Ntaganda*, ICC-01/04-02/06-2666-Red (Appeals Chamber), March 30, 2021.

international criminal procedure. Indeed, international criminal procedure has its own culture, with specific educational requirements, ways of speaking, language, rules of evidence, methods of deciding, rites to putatively ensure rights, courtroom sites to channel all those lights, along with legal garb and legal grammar. How to explain to victims this cultural practice of the attribution of responsibility for mass atrocity to a small handful of evildoers?

I was recently in Sierra Leone. A conflict raged there from 1991 to 2002. Seventy thousand people were brutally killed; many others amputated and raped; child soldiers were enlisted; forced marriages were endemic; millions were displaced. The SCSL was established in 2002 to deliver justice. It was created by a treaty between the United Nations (UN) and the government of Sierra Leone. The SCSL conducted and concluded four trials. Its official mandate was to punish those most responsible for the violence. Striking to me is how SCSL outreach explained this mandate to the people of Sierra Leone. After all, the crushing preponderance of the violence was committed by the "little people"—children, coerced recruits, small-town hooligans—who were suddenly empowered with machine guns, amulets, and situational power. So how to explain this?

The Memorial Garden in Freetown, adjacent to the Sierra Leonean Peace Museum and the now dilapidated, collapsing UN-built SCSL courthouse offers a telling illustration. At the gateway to the garden, visitors encounter a large sculpture that puts in the visual the SCSL's core legal tenet of prosecuting "those who bear the greatest responsibility." The carving constellates five men designated as being most responsible—their identities readily discernible for Sierra Leoneans from their faces—in an arc above a line of little figures—the little peoples, anonymized—who point in accusation at this choir of the big five. But, in their pointed exclamations of attribution, I also see the pursuit of soothing exculpations of involvement. Assignation of responsibility can become the comforting salve of an assuaging, yet deceiving, non-responsibility. After all, the little people did have some responsibility—a lot, in fact. They actually did it. Lilliputian neighbors betrayed, stalked, killed, and tortured neighbors. Little people rampaged and raged. They did so very far away from any leadership; moreover, what exactly is leadership in a scattered-shattered society often bereft of communication lines? Indeed, the core attribution principle of international criminal law captures this carving, and the carving puts words into images, much in the way the stained glass of medieval churches instructs on guilt, sin, indulgence, devilishness, and mercy through the visuality of parables. But, in the end, the visualities of this attribution principle, at least as carved on a memorial wall in Freetown, bring its limitations into sharp relief (see Figure 1).

Unsurprisingly, perhaps, this artwork clashes with another sculpture, inside the garden, which features two non-responsible little people bigly dressed in faux military gear tearing a child from his mother's arms and seemingly tearing the child apart. There is no exculpation theme here—none at all. In the end, the limitations of penal law to those most responsible, and the reductive language of attribution—however cognizable—may also be unsatisfactory. Mapping the techniques of legal interventions upon the sensibilities of the public adds a further wrinkle to the question of who, exactly, to blame.

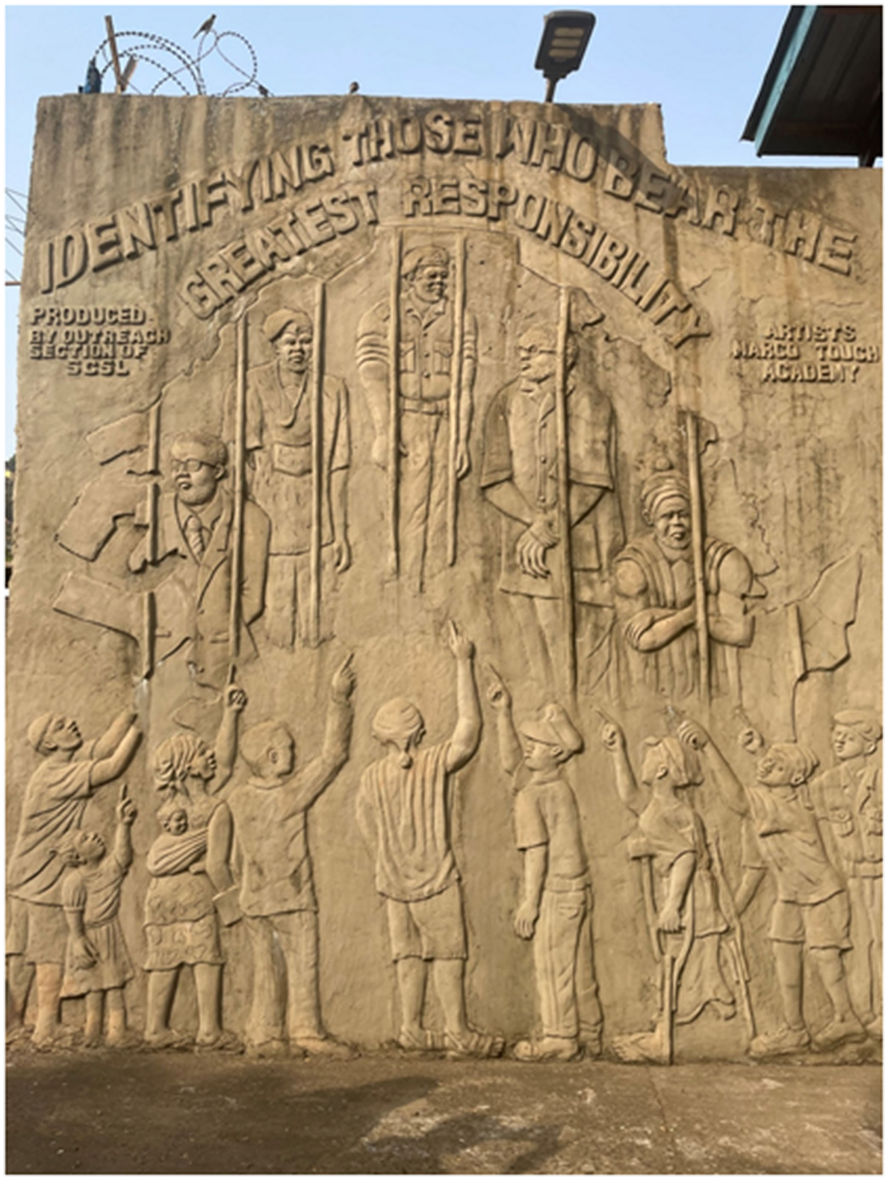

Figure 1. Photograph of memorial, Freetown, Sierra Leone, February 28, 2024. Credit: courtesy of the author.

Pursuing Justice While Imperiling Law

A recurrent debate arises between peace versus justice. What is this? In a nutshell, while devout international lawyers generally maintain that there can be no peace without an anterior pursuit of justice, which has been reduced to mean criminal trials for a handful of the most "scapegoatable" or blameworthy individuals, political

scientists and humanitarians (and many others) often point out that the pursuit of justice may imperil peace. In a sense, this is a debate with no off-ramp. It is imbued both with an incommensurability as well as with a stasis. Minkova's project thankfully is not about peace versus justice. Rather, it sheds light on the dyadic dynamism between law and justice. There are times where justice (that is, imprisoning the ostensibly guilty) might be impeded by the punctilious application of law—notably, due process correctives. Defendants get off on technicalities; the obviously guilty senior official in a genocidal government who was by happenstance elusive on the day when the specific charges said he did A to B; the passage of time that exhausts witnesses and resources such that the trial efforts simply dry up. The end is disappointment. Impunity persists.

Minkova gestures toward this dyadic tension through her invocation of respecting "the principle of personal culpability" that pulls against the "ease of convicting perpetrators of mass atrocities" (186). The use of the term "convicting perpetrators" is deeply revealing. One cannot be a perpetrator, under law, without having been convicted, so the process of "convicting perpetrators" is preordained and predetermined. It suggests the epiphenomenal nature of legal process in contexts of mass atrocity. It also intimates that collective justice understandings of perpetration often see an actual conviction as confirmatory rather than determinative. Indeed, hardly anyone truly believes that a person accused of mass atrocity in The Hague actually is innocent, is the "wrong guy," or represents a tragic case of mistaken identity, racist police, zealous prosecutors, craven witnesses, or just plain bad luck.

Notwithstanding all the calls among activists to defund the enforcement of domestic criminal law, all the calls among activists exhort to fund the enforcement of ICL. Indeed, I would posit that hardly anyone operating within the sphere of international legalism genuinely believes that persons acquitted at the international criminal tribunals actually are innocent, and, in any event, barely any human rights workers, otherwise disconcerted by retributivism in ordinary national criminal law, make any effort seriously to rehabilitate or reintegrate persons convicted of torture as genocide, of mass gender-based violence, or of other international crimes.

Is the legitimacy of justice predicated on glossy convictions, even if these flout or circumvent law? Indeed, law may in fact get in the way of justice—notably, individuated justice for mass atrocity. After all, it can be far easier to convict, through the penal procedure's microscopic truths, one individual for a delinquent act inveighed against the strictures of the state than it might be to convict one individual for collective violence committed at the behest of the state.

There Is a World Elsewhere

In the end, then, the note on which Minkova elects to close her book is wise. She notes that power struggles animate the legal field. These are struggles, *inter alia*, between substance and procedure, between technicality and result, and between lawyers for law (often seen as disappointing cold originalist regressives) and lawyers for justice (often seen as exciting dashing romanticist interpretive progressives). Minkova deploys language of "substantive justice" and "procedural justice" (257), noting over time in its tiny sample of cases a shift in ICC practice "from substantive to procedural

justice, from a moral intuition of fairness to neutral and predictable application of legal rules, regardless of the outcome, from emotion to rationalism" (257). I would rephrasingly add that, in my personal view, "substantive justice" embodies the appealing *desideratum* of "justice," and "procedural justice" covers begrudging, nagging, eye-rolling, technical "law." Indeed, procedure tends to be the subjacent pest to the magnificence of substance. As the aphorism goes, one turns to procedure to stymie, parry, and delay when the substance is stacked, or is stacking, against oneself. Whereas convictions are emotionally resonant, however obtained, due process and respect for personal culpability is dispassionate and emotionless (287–88).

In the end, and notwithstanding fractures within the community of lawyers, a far larger rift likely exists between the community of lawyers and many other communities that lie outside lawyerliness, including communities gutted by violence. Upon his banishment from Rome, Coriolanus intones in William Shakespeare's ([1623] 2013) classic play that bears his name: "There is a world elsewhere!" (act III, scene 3). Coriolanus is right. There is a big world beyond Rome and its statute.

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