

## BOOK REVIEWS

*ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* BY MARK A DRUMBL  
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Mark Drumbl's *Atrocity, Punishment and International Law* is an important and challenging book that addresses one of the most complex issues facing international criminal justice in the late postmodern world: namely, how to make the justifications, structures and practices of international penalty more responsive to the harms caused by those behaviours which are labelled as 'international crimes' and to the demands for justice of societies and communities damaged by war and social conflict. In this sense, Drumbl's book is less about the norms and authority of substantive international law, and more about the institutions and functions of punishment administered internationally in the name of international humanitarian law and its various hybridised and national manifestations. The complexity of the intellectual task is considerable in that it crosses disciplinary boundaries and, in so doing, confronts a number of controversial and unresolved academic debates which have fundamental implications for the development of international criminal justice as a conceptual and social reality.

The book's central purpose is stated concisely in the preface: 'How do we, and how should we, punish someone who commits genocide, crimes against humanity, or discrimination-based war crimes? These questions — the former descriptive, the latter normative — are the focus of this book'.<sup>1</sup> Drumbl sets out to achieve his objective through a largely positivist analysis of law and sentencing, concentrating particularly on Rwanda (where he has personal experience as a former intern), the former Yugoslavia, and World War II, especially the Holocaust.

Chapter 1, 'Extraordinary Crime and Ordinary Punishment: An Overview', as its title suggests, sets the scene for what follows and summarises the major themes running through the text. Drumbl rightly points out that, whereas substantive international criminal law has spawned a considerable scholarly literature, analysis of the rationales, structures and empirical effects of international punishment is still in its infancy.<sup>2</sup> He also correctly signals the need for such analyses to address the normative aspects of punishment.<sup>3</sup> In essence,

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<sup>1</sup> Mark A Drumbl, *Atrocity, Punishment, and International Law* (2007) xi.

<sup>2</sup> Ibid 2. For a sample of the literature on point, see Stuart Beresford, 'Unshackling the Paper Tiger — The Sentencing Practices of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda' (2001) 1 *International Criminal Law Review* 33; Shahram Dana, 'Revisiting the Blaškić Sentence: Some Reflections on the Sentencing Jurisprudence of the ICTY' (2004) 4 *International Criminal Law Review* 321; Olaoluwa Olusanya, *Sentencing War Crimes and Crimes against Humanity under the International Criminal Tribunal for the Former Yugoslavia* (2005); Ralph Henham, *Punishment and Process in International Criminal Trials* (2005); Mirko Bagaric and John Morss, 'International Sentencing Law: In Search of a Justification and Coherent Framework' (2006) 6 *International Criminal Law Review* 191.

<sup>3</sup> Drumbl, above n 1, 2.

the chapter focuses on the historical development of extraordinary crimes, and traces the reasons for the ascendancy of international trial justice as a response to mass atrocity since Nuremberg, attributing this to the intersection of the two philosophical strands of legalism and liberalism.<sup>4</sup> Following Shklar<sup>5</sup> and Fletcher,<sup>6</sup> Drumbl cites liberal legalism as responsible for the ascendancy of individual responsibility in criminal and civil law systems of justice, this being reflected in the dominant method for allocating responsibility and punishment following mass atrocity.<sup>7</sup>

The second chapter, entitled 'Conformity and Deviance', begins to develop some of the book's main themes. Drumbl's main concern here is to confront the paradox that extraordinary crimes, unlike ordinary crimes, may not be deemed deviant at the time and place they are committed.<sup>8</sup> Although he regards mass atrocity as difficult to reconcile with 'deviance theory',<sup>9</sup> his analytical overview of the area is sometimes less than convincing. He describes deviance as a 'fuzzy concept' that is not clearly applicable to certain kinds of criminalised behaviour, especially extraordinary crimes.<sup>10</sup> For example, Drumbl points to the inequity of deviance theory to explain situations where the autonomy of the individual is overridden by group pressures to conform with behavioural norms that may be perceived as completely unacceptable to outsiders, drawing parallels with certain forms of discrimination-based atrocity.<sup>11</sup> In so doing, he refers to subcultural explanations of gang conformity as transient<sup>12</sup> and, by definition, oppositional to dominant norms.<sup>13</sup> However, this analysis ignores later work by Becker<sup>14</sup> and Lemert<sup>15</sup> which stresses the contingent and relative nature of deviant labelling, particularly in pluralistic notions that deviance must be relevant, so that an understanding of context is imperative. Also ignored is the whole thrust of critical criminology's emphasis on the deconstruction of 'deviant' contexts, not to mention victimisation. Similarly, Drumbl's invocation of Hirschi's control theory<sup>16</sup> to illustrate the paradox of the often strong bonds uniting perpetrators of mass atrocity with both state and society<sup>17</sup> ignores Hirschi's later work with Gottfredson which emphasises the importance of the relationship between contingent and psychological variables.<sup>18</sup> These points are not mere quibbles because they indicate a greater need to engage with theory that is capable of

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<sup>4</sup> Ibid 5.

<sup>5</sup> Judith Shklar, *Legalism: Law, Morals and Political Trials* (1964) 152.

<sup>6</sup> Laurel E Fletcher, 'From Indifference to Engagement: Bystanders and International Criminal Justice' (2005) 26 *Michigan Journal of International Law* 1013, 1031.

<sup>7</sup> Drumbl, above n 1, 5.

<sup>8</sup> Ibid 29–33.

<sup>9</sup> Ibid 32–3.

<sup>10</sup> Ibid 33.

<sup>11</sup> Ibid.

<sup>12</sup> David Matza, *Delinquency and Drift* (1964) 26.

<sup>13</sup> Drumbl, above n 1, 33.

<sup>14</sup> Howard S Becker, *Outsiders: Studies in the Sociology of Deviance* (1963).

<sup>15</sup> Edwin M Lemert, *Human Deviance, Social Problems, and Social Control* (2<sup>nd</sup> ed, 1972).

<sup>16</sup> Travis Hirschi, *Causes of Delinquency* (3<sup>rd</sup> ed, 1974) 16–33.

<sup>17</sup> Drumbl, above n 1, 35.

<sup>18</sup> Michael R Gottfredson and Travis Hirschi, *A General Theory of Crime* (1990) 65.

explaining the normative contexts of ‘deviance’ and the development of methodologies for their understanding.<sup>19</sup>

A similar vagueness surrounds Drumbl’s explication of the concept of ‘conflict entrepreneurs’<sup>20</sup> — somewhat reminiscent of Becker’s ‘moral entrepreneurs’<sup>21</sup> — which he introduces to describe ‘those individuals who exacerbate discriminatory divisions, which they then commandeer’.<sup>22</sup> For example, it would perhaps have been useful to develop this, together with the other levels of hierarchical authority relationships which Drumbl adumbrates,<sup>23</sup> within a more nuanced consideration of theories of power and hegemony (such as that of Foucault<sup>24</sup>), in so far as this may have helped to explain the broader contexts of authority, blame and responsibility.

The chapter closes with a section on ‘Victims’ that contains a useful evaluation of Kiza, Rathgeber and Rohne’s<sup>25</sup> recent work on war victimisation and its contribution to the victimology of mass atrocity.<sup>26</sup> As Drumbl correctly points out, a significant limitation of this research is its failure to address victims’ perceptions of the purposes of punishing offenders,<sup>27</sup> although this has since been the subject of further work by Parmentier.<sup>28</sup> Additionally, any social theory which seeks to explain the nature and significance of victimisation must necessarily address its legal, socio-historical, economic and political dimensions. For a comparative analysis, this involves appreciating the multi-layered nature of the relationships between the values and actions which produce victimisation within particular cultures and being able to make epistemologically acceptable generalisations about such relationships.

Chapters 3 and 4 contain the empirical core of the book. Chapter 3, ‘Punishment of International Crimes in International Criminal Tribunals’, is an analytical tour de force of the sentencing law and practice of international criminal institutions. In particular, there are very useful sections which address the internal and comparative aspects of sentencing practice in the international tribunals based on a statistical analysis of sentencing patterns.<sup>29</sup> The latter confirms the sometimes erratic and eclectic nature of international sentencing, and the considerable disparity that exists between the sentencing outcomes of the International Criminal Tribunal for the former Yugoslavia (‘ICTY’) and the International Criminal Tribunal for Rwanda (‘ICTR’). In particular, Drumbl draws attention to the largely unfettered sentencing discretion enjoyed by judges

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<sup>19</sup> See also Mark Findlay and Ralph Henham, *Transforming International Criminal Justice: Retributive and Restorative Justice in the Trial Process* (2005) chs 1–2.

<sup>20</sup> Drumbl, above n 1, 25.

<sup>21</sup> Becker, above n 14, 147.

<sup>22</sup> Drumbl, above n 1, 25.

<sup>23</sup> Ibid.

<sup>24</sup> Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan trans, first published 1975, 1979 ed) 46 [trans of: *Surveiller et punir: Naissance de la prison*].

<sup>25</sup> Ernesto Kiza, Corene Rathgeber and Holger C Rohne, *Victims Of War: War-Victimization and Victims’ Attitudes towards Addressing Atrocities* (2006).

<sup>26</sup> Drumbl, above n 1, 42.

<sup>27</sup> Ibid 44.

<sup>28</sup> Stephan Parmentier, ‘Ask the Victims: Towards a Bottom-Up Approach in Transitional Justice’ (Paper delivered at the Oxford Centre for Criminology Seminar, Oxford, UK, 9 May 2007).

<sup>29</sup> Drumbl, above n 1, 55–9.

sitting on these tribunals, asserting that they are ‘comfortable with their discretionary powers to fix sentence within the traditional mode of incarceration notwithstanding the concomitant lack of consistency in sentencing’.<sup>30</sup> Drumbl also alludes to the problematic nature of sentence ‘individualization’ in the absence of a coherent sentencing framework.<sup>31</sup> This is an important point in the context of developing more constructive rationales for international sentencing which could have borne further commentary. As things stand, the predominantly retributive and deterrent ideological framework of international penalty suggests a particularly narrow interpretation of individualisation — certainly not one that engages constructively with the wider social contexts of punishment, especially those of mass atrocity. Although Drumbl hints at the linkage between theory and structure in its relationship to the use of judicial discretionary power,<sup>32</sup> he does not expand on this. In particular, he does not explore how judicial discretionary power could be utilised to achieve more ‘morally just’ solutions for international criminal justice, in the sense that outcomes should engage more with the justice demands of victims and communities of interest in post-conflict societies.<sup>33</sup>

Chapter 4, ‘Punishment of International Crimes in National and Local Criminal Justice Institutions’, again provides a unique and penetrating analysis of the roles that national and local forms of criminal justice play in punishing mass atrocity, focusing on case studies of Rwanda, the former Yugoslavia and World War II. For example, with respect to Rwanda, Drumbl examines the role of national courts, including their specialised chambers, foreign national or military courts, and *gacaca*.<sup>34</sup> In relation to the latter, he constructs convincing arguments<sup>35</sup> to explain his contention that ‘attempts to diversify the accountability paradigm in Rwanda through popular measures such as *gacaca*, although partly successful, underachieve their restorative, cathartic, and reconciliatory potential’.<sup>36</sup> Following his review, Drumbl affirms the predominance of the retributive dynamic in these modalities of criminal justice, and is sanguine about the collective failure of national and local responses to theorise, or operationalise, anything resembling a penology of mass atrocity.<sup>37</sup> The significant ‘[p]ressures emanating from dominant international norms narrow the diversity of national and local’ structures and operational mechanisms of accountability.<sup>38</sup>

Chapter 5, entitled ‘Legal Mimicry’, takes the preceding analysis one step further by questioning whether the operations of the international criminal tribunals, including the referral process of the ad hoc tribunals and the International Criminal Court’s (‘ICC’) complementarity provisions, actually distort the prospects for achieving justice at the local level. Drumbl is surely correct in his conclusion that the widespread implementation of international

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<sup>30</sup> Ibid 59.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid 60.

<sup>33</sup> Cf Findlay and Henham, *Transforming International Criminal Justice*, above n 19, ch 6.

<sup>34</sup> Drumbl, above n 1, 77–99.

<sup>35</sup> Ibid 93–7.

<sup>36</sup> Ibid 93.

<sup>37</sup> Ibid 121.

<sup>38</sup> Ibid.

criminal law, through what he calls the 'vertical application of authority',<sup>39</sup> has produced a 'democratic deficit' in terms of its tendency to marginalise local demands for justice and their moral foundations.<sup>40</sup> Drumbl also makes the important point that the 'legitimacy and effectiveness of Western legalist modalities of prosecuting and punishing perpetrators of atrocity cannot be assumed' when referring to their diffusion and transplantation.<sup>41</sup> Although Drumbl makes passing reference to the considerable literature on legal transplants,<sup>42</sup> he appears to gloss over a theoretical debate which has some relevance to his conclusions. This debate concerns the extent to which it might be thought necessary to adopt a broader sociological approach to the analysis of international criminal justice in order to fully appreciate areas of similarity and difference; a significant issue for comparative theory and method. It goes to the heart of how we interpret law, and whether consistent (that is, valid) conclusions can be drawn, something of growing importance, since law's boundaries are becoming increasingly fluid through globalisation.<sup>43</sup> Notwithstanding, the apparently parochial nature of that debate is deceptive because it touches directly on the issue of how we judge 'legitimacy' and, more directly, how we are able to measure the effectiveness of law and legal process, and against 'what' parameters. In other words, there is a need, particularly in studies of this kind, to establish the theoretical foundations and principles against which we are to judge 'legitimacy'. Arguably, this leads to the conclusion that the only way to get beyond the symbolism of retributive justice, and for sociological descriptions of the different contexts of international punishment to be meaningful, is for us to be able to relate these symbolic effects more directly to the 'subjective' experiences of the relevant audience, whether global or local. Such a normative perspective would, as Tyler implies,<sup>44</sup> lead us to examine the values which underpin internalised norms of justice and obligation, especially how personal experience has a direct effect upon perceptions of legitimacy. Since the normative foundations of international punishment remain largely retributive, there is a fundamental need to develop methodologies which will explain why the hegemony of retributive justice predominates in different social contexts, and its different manifestations.

In discussing the externalisation of justice, Drumbl rightly draws attention to the influence of common law traditions and adversarialism on the provision of separate sentencing hearings in the ad hoc tribunals.<sup>45</sup> Whether there should be a

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<sup>39</sup> Ibid 123.

<sup>40</sup> Ibid 124.

<sup>41</sup> Ibid 126.

<sup>42</sup> Ibid 12, 125, 127. The comparative interpretation of trial narrative is itself controversial. Twining, for example, highlights the fact that there is an absence of a definite and uniform legal vocabulary: William Twining, 'Narrative and Generalizations in Argumentation about Questions of Fact' (1999) 40 *South Texas Law Review* 351. There is also a 'fringe of vagueness' or 'open texture' within legal methodology that is compounded where the analysis of difference and synthesis is applied across different procedural traditions. As such, different meaning may be given to the same text: Brian Bix, 'H L A Hart and the "Open Texture" of Language' (1991) 10 *Law and Philosophy* 51, 52.

<sup>43</sup> See the debate between David Nelken and Roger Cotterrell in Andrew Harding and Esin Örtücü (eds), *Comparative Law in the 21<sup>st</sup> Century* (2002).

<sup>44</sup> Tom R Tyler, *Why People Obey the Law* (2<sup>nd</sup> ed, 2006) 277–8.

<sup>45</sup> Drumbl, above n 1, 127.

distinction made between verdict and sentence, or provision for a separate sentencing phase, is one of the most important issues to impact on sentence decision-making in international criminal trials. It is a decision that has fundamental evidential repercussions for the sentencing outcome. The current position is that both the ICC and the ad hoc tribunals for the Former Yugoslavia and Rwanda have a predominantly unified structure. Article 76(1) of the *Rome Statute*<sup>46</sup> provides that, following a conviction, the Trial Chamber should move on to the sentencing issue, taking into account evidence presented and submissions made during the trial that are relevant to sentence. Significantly, art 76(2) goes on to provide that (in contested cases only and before completion of the trial) the Trial Chamber may direct (or must, if requested by the Prosecutor or the accused) a further hearing to consider any additional evidence or submissions relevant to sentence.<sup>47</sup> Although Drumbl concludes to the contrary,<sup>48</sup> there is a strong case to be made for merging the verdict and sentence phases of international criminal trials, primarily to ensure that no artificial distinctions are drawn between the substantive and sentence-related purposes for which factual information is admitted which result in its selective appropriation. The purposes for the trial should be broader than those concerned solely with establishing individual criminal responsibility and should extend to a wider consideration of the social context in which international crimes are committed and their normative significance for the delivery of justice.

Drumbl goes on to raise the important question of the extent of victim engagement within the ICC framework in the light of experience in the ICTY and ICTR.<sup>49</sup> At first sight, it certainly seems that ICC judges will be able to give real meaning to victims' interests and rights. The powers available to ICC judges to consider and permit victim participation appear to be a considerable advance on the ICTY and ICTR position.<sup>50</sup> Article 68 of the *Rome Statute* is especially significant.<sup>51</sup> It provides a far more detailed account of the nature of victim and witness protection<sup>52</sup> and their participation in the proceedings than does the

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<sup>46</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) ('*Rome Statute*').

<sup>47</sup> See *Rules of Procedure and Evidence*, ICC-ASP/1/3, r 143 (adopted at the First Session of the Assembly of States Parties, New York City, US, 3–10 September 2002) ('*ICC Rules of Procedure and Evidence*'). Schabas suggests that this procedure creates a strong presumption in favour of a distinct sentencing hearing following conviction, but this has not been the experience of the ad hoc tribunals: William Schabas, *An Introduction to the International Criminal Court* (2001) 131–2. However, Zappala argues that the position regarding the ICC remains unclear as to whether there should be one decision containing both verdict and sentence, or two distinct decisions: Salvatore Zappala, *Human Rights in International Criminal Proceedings* (2003) 198.

<sup>48</sup> Drumbl, above n 1, 207.

<sup>49</sup> *Ibid* 135–6.

<sup>50</sup> *Ibid* 136.

<sup>51</sup> *ICC Rules of Procedure and Evidence*, above n 47, r 86, contains a general injunction to the Trial Chamber and other Court organs that 'in performing their functions under the Statute or the Rules, [they] shall take into account the needs of all victims and witnesses in accordance with article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence'.

<sup>52</sup> *Ibid* r 87, for details of their procedural implementation.

statutes of the ICTY<sup>53</sup> or the ICTR.<sup>54</sup> For example, art 68(1) provides that the ICC ‘shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses’ and imposes obligations in this respect upon the Prosecutor. Significantly, the provision goes on to state that the measures taken are not to be ‘prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’. This injunction is repeated in art 68(3), which provides that the Court has the discretion to permit the views of victims and their concerns to be presented and considered at whatever stages in the proceedings it thinks fit, where the personal interests of victims are affected. The detailed implementation of these provisions is to be found in the *ICC Rules of Procedure and Evidence* but, notwithstanding the detailed procedural injunctions contained therein, there is nothing that *obliges* the Court to admit relevant victim evidence.<sup>55</sup> Read in conjunction with rule 145, which deals with the determination of sentence, the ICC provisions concerned with victims do not provide for their unconditional participation in any stage of the proceedings.

Article 68 is conditional in several aspects. For example, the decision as to what constitutes ‘the personal interests of the victims’ is left to the Court’s discretion, as is the decision whether to admit the victims’ views and concerns at all. Article 68(3) simply mandates the Court to ‘*permit* their views and concerns to be presented and considered at stages of the proceedings *determined to be appropriate by the Court*’<sup>56</sup> and then goes on to qualify that possibility further by adding that any such presentation and admission must be ‘in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’.<sup>57</sup> Rule 145(1)(c) merely obliges the Court to ‘*give consideration*’ to, inter alia, the harm caused to victims and their families. There is no right for them to lodge a victim impact statement which *must* be taken into account in fixing the sentence. In short, the ICC Trial Chamber’s obligations do not extend beyond immediate victims within the jurisdiction of the Court and their families to take on board the feelings and concerns of ‘significant others’ within victim

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<sup>53</sup> *Statute of the International Criminal Tribunal for the Former Yugoslavia*, annexed to *Resolution 827*, SC Res 827, UN SCOR, 48<sup>th</sup> sess, 3217<sup>th</sup> mtg, UN Doc S/RES/927 (25 May 1993) art 22.

<sup>54</sup> *Statute of the International Criminal Tribunal for Rwanda*, annexed to *Resolution 955*, SC Res 955, UN SCOR, 49<sup>th</sup> sess, 3453<sup>rd</sup> mtg, UN Doc S/RES/955 (8 November 1994) art 21.

<sup>55</sup> *ICC Rules of Procedure and Evidence*, above n 47, rules 89–93.

<sup>56</sup> *Rome Statute*, above n 46, art 68(3) (emphases added).

<sup>57</sup> This is a necessary discretion to maintain balance between the competing rights of the parties.

communities.<sup>58</sup> No attempt has been made to provide mechanisms to address what these wider concerns might be and how the Court might engage with them, or whether what is proposed has any sort of moral legitimacy in terms of the wider victim community. Furthermore, there is no apparent indication, either in any rationale discernable from the foundation instruments, or any procedural mechanisms, whether what victims are allowed to put forward and its admission subject to the Court's discretion might (or should) contain information along these lines. Again, the concerns of victims and victim communities appear to receive symbolic rather than actual attention.

Nevertheless, the formal legal and procedural provisions promoting victims' interests in the ICC have certainly been hailed as profound.<sup>59</sup> Whilst Zappala is no doubt correct in asserting that, 'in the ICC statute an attempt has been made to increase the procedural rights of victims and expand them to the procedural dimension',<sup>60</sup> this is arguably more symbolic than concrete in its effects and has had little (if any) impact in addressing the fundamental philosophical and structural weaknesses affecting international criminal trials and sentencing. For these aspirations to become reality requires something more than an increased potential for change. In order to deliver a trial process that contributes to reconciliation and the removal of injustice there should be a rationalisation of purpose favouring trial transformation and a normative model which ensures the proactive engagement of victims and other representatives of communities of interest.<sup>61</sup>

Chapter 6, entitled 'Quest for Purpose', sees Drumbl moving on to address the fundamental question of whether or not the punishment of 'extraordinary international criminals' attains those values that are inherent in retribution, deterrence and expressivism. His treatment is both comprehensive and perceptive, and he rightly focuses on retributive justice. However, he

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<sup>58</sup> Article 2 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* makes it clear that a person may be considered a victim 'regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim': UN GAOR, 96<sup>th</sup> plen mtg, Annex, UN Doc A/RES/40/34 (29 November 1985). This article further clarifies that '[t]he term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization'. Unfortunately, such clarification was not included by the drafters of the ICC provisions: Amnesty International, *The International Criminal Court: Ensuring an Effective Role for Victims*, AI Index IOR 40/010/1999 (July 1999) 5–6, available from <<http://web.amnesty.org/library/engindex>> at 18 October 2007. The fact that there were multiple victims may be taken into account as an aggravating factor in the determination of sentence: *ICC Rules of Procedure and Evidence*, above n 47, r 145(2)(b)(iv).

<sup>59</sup> See, eg, Zappala, above n 47, 232:

it is extremely important for international criminal justice that victims be entitled to be involved in the proceedings. This increases the chances of achieving the objectives of reconciliation and the removal of injustice. Participation enables victims to feel that they are part of a mechanism designed to deliver justice. This may contribute to reducing a desire for vengeance and increasing the chances of a successful confidence-building process that may lead to national reconciliation and lasting peace.

<sup>60</sup> Ibid 221. Zappala does however acknowledge certain practical drawbacks pertaining to the greater procedural participation possible for victims under the ICC regime: at 232.

<sup>61</sup> For further elaboration of how this can be achieved, see Mark Findlay and Ralph Henham, *Beyond Punishment: International Criminal Justice Achieved* (forthcoming).



disappointingly dismisses further consideration of rehabilitation, incapacitation and integration in the present context, arguing that they are more appropriate to the project of transitional justice.<sup>62</sup> Drumbl correctly points to the rhetorical nature and limited impact of the references made to purposes — such as reconciliation — in the context of international criminal trials.<sup>63</sup> But this is to take a negative view of their potential for contributing to the goals such purposes espouse. Exactly the same argument can be deployed in the case of retribution and deterrence, as symbolism and rhetoric characterise their exposition in international criminal trials. This kind of approach postulates a somewhat limited role for international trial justice specifically<sup>64</sup> and, more particularly, in its capacity to engage with collective responsibility in any meaningful way. This occurs primarily because it operates within a largely adversarial framework which focuses on establishing individual responsibility for legal guilt, rather than working towards developing understandings of the relationship between individual and collective responsibility, and what this might mean for reconciliation and peaceful coexistence. Arguably, a more realistic and constructive approach would be to think about how we might engage with the phenomenology of international trial justice more normatively, by providing more convincing accounts of the justice demands of different groups of victims and communities in post-conflict situations, and by speculating more effectively about how to reflect these demands in more inclusive and relevant sentencing outcomes. It is through the process of engagement, participation and integration that the transformative potential of international criminal trials can be realised, thus moving beyond rhetoric and symbolism for all the purposes of punishment that may be invoked in the name of international criminal justice.

Drumbl also provides a detailed and useful evaluation of the plea bargaining phenomenon as it operates within the context of retributive justice.<sup>65</sup> There is little doubt that the use of plea bargains in international criminal trials provides a perfect example of how the dynamics of retributive justice and adversarial trial can work together to obfuscate international criminal justice. In the ICTY, for example, plea agreements have been justified on the basis that they can make a significant contribution to truth-telling and thereby aid the process of peace and

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<sup>62</sup> Drumbl, above n 1, 149.

<sup>63</sup> *Ibid* 150.

<sup>64</sup> See Emiliios A Christodoulidis, 'Truth and Reconciliation as Risks' (2000) 9 *Social and Legal Studies* 179; Immi Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 13 *European Journal of International Law* 561; Laurel E Fletcher and Harvey M Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation' (2002) 24 *Human Rights Quarterly* 573; Stephan Parmentier, 'Global Justice in the Aftermath of Mass Violence: The Role of the International Criminal Court in Dealing with Political Crimes' (2003) 41 *International Annals of Criminology* 203; Declan Roche, 'Truth Commission Amnesties and the International Criminal Court' (2005) 45 *British Journal of Criminology* 565.

<sup>65</sup> Drumbl, above n 1, 163.

reconciliation in post-conflict societies.<sup>66</sup> However, it is certainly arguable that a major underlying rationale for the encouragement of guilty pleas and the increasing use of plea agreements in the ICTY is the simple administrative expedient of speeding-up the trial process with a consequent saving of resources, especially when faced with an increasing workload and deadlines for case completion.<sup>67</sup> The dissenting judgement of Presiding Judge Wolfgang Schomburg in the *Deronjić* case, for example, represents a significant attack on the use of plea agreements by the ICTY on the basis that they diminish the quality of justice by undermining the principle of proportionality.<sup>68</sup> This argument hinges on the capacity for plea negotiations to distort ‘truth’ — in the sense that the factual situations included in them are not only tailored to suit particular negotiated circumstances, but they are also selective in terms of the ‘truths’ that offenders are willing to reveal. Plea agreements and guilty pleas produce sanitised and censored versions of the ‘truth’ which tend to obfuscate the real extent of individual responsibility for international crimes, alienate victims and communities of interest and exclude the possibilities for restorative forms of justice.<sup>69</sup> Whilst this is no doubt correct, as with all perceptions of procedural justice, these are closely linked to their substantive context; in this case, the retributive and adversarial framework for the delivery of international trial justice. Arguably, therefore, a transformed rationale and context for justice delivery in the case of the trial would produce a more constructive setting for plea negotiations, since they would be conceived in the broader terms of their possible contribution to a collective and integrated solution for meeting the justice demands of the relevant audience.

Finally, Drumbl considers the significance of expressivism, suggesting its capacity to transcend retribution and deterrence ‘in claiming as a central goal the crafting of historical narratives’.<sup>70</sup> Interestingly, he refers to the ‘significant messaging value’ of ‘punishment’,<sup>71</sup> relating this to Garland’s reference to ‘penalty’ as communicating meaning ‘not just about crime and punishment but also about power, authority, legitimacy, normality, morality, personhood, social relations, and a host of other tangential matters’.<sup>72</sup> However, it is important to note that Garland is talking about ‘penalty’, not simply punishment. The

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<sup>66</sup> See, eg, *Prosecutor v Plavšić (Trial Chamber)* Case No IT-00-39&40/1 (27 February 2003) [66] (Sentencing Judgement). Here, the Trial Chamber concluded that the accused’s guilty plea and acknowledgement of responsibility should carry significant weight in mitigation as a ‘positive impact on the reconciliatory process’: at [81]. Despite this, the Trial Chamber was eventually swayed by the heinous nature of what had taken place and its effects. The prosecution was criticised for giving insufficient weight to, inter alia, the accused’s guilty plea and her post-conflict conduct, yet there was a distinct lack of clarity in the Trial Chamber’s determination of exactly what the effect of the mitigation (described as ‘very significant’) should be on the sentence: at [132]. Such an outcome tends to support Zappala’s point that it may not be appropriate to allow plea bargaining and plea agreements for crimes of extreme gravity: Zappala, above n 47, 89.

<sup>67</sup> *Prosecutor v Erdemović (Appeals Chamber)* Case No IT-96-22 (7 October 1997) [8] (Judgement) (Separate and Dissenting Opinion of Judge Cassese).

<sup>68</sup> *Prosecutor v Deronjić (Trial Chamber)* Case No IT-02-61-S (30 March 2004) [14] (Sentencing Judgement) (Dissenting Opinion of Judge Schomburg).

<sup>69</sup> Henham, above n 2, 117–18.

<sup>70</sup> Drumbl, above n 1, 173.

<sup>71</sup> *Ibid* 174.

<sup>72</sup> David Garland, *Punishment and Modern Society: A Study in Social Theory* (1990) 252.

distinction is not simply semantic, it is crucial because the theory and practice of punishment as presently conceived is a key element of 'international penalty'. Consequently, it is important to clarify exactly what we mean by invoking this concept before exploring its wider significance in terms of governance. Certainly, Garland suggests a more inclusive (socially reflexive) paradigm for penalty;<sup>73</sup> one that invites us to go beyond the semantics of crime and punishment to engage with its pluralities in terms of morality, philosophy and sociology. Garland's point about the signifying nature of penalty has special resonance in the notion that international forms of punishment should be reflective of generally understood cultural meanings of crime and punishment.

Another significant issue raised by Drumbl in this section concerns the extent to which international punishment might reflect a social consensus about the 'moral unacceptability' of mass violence, especially the notion of punishment as moral education.<sup>74</sup> This discussion again highlights the problem of envisaging how individuals, victims and communities relate to the idea of punishment for mass atrocity in a normative sense; more especially, in terms of those internalised values which might connect them, either individually or collectively, to the (or a) concept of international punishment.<sup>75</sup> A useful insight is suggested by Durkheim's notion of moral individualism and its implication that individual and collective concern for others is a moral imperative.<sup>76</sup> Cotterrell maintains that the value system of individualism envisaged by Durkheim can be conceptualised as sustaining a shared moral culture which transcends national boundaries.<sup>77</sup> The difficulty remains in envisaging the moral basis upon which law's authority is claimed to rest in terms of such shared beliefs or sentiments — especially, how to identify transnational values of individualism in forms of international regulatory power.

Regarding the issue of punishment as a moral educator, some exploration of Duff's thesis of punishment as a form of communication might also have proved illuminating in this context.<sup>78</sup> Essentially, Duff claims that the main aim of punishment should be to re-integrate individual offenders into the community through a process of reconciliation.<sup>79</sup> Duff believes that this reconciliation is brought about through the process of punishment, which induces repentance and aims to alter the moral sentiments of the offender.<sup>80</sup> Although communicative theory may be seen as 'deficient as a general justification' for sentence, since it fails to offer reasons for moral education and reconnection with communitarian

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<sup>73</sup> Ibid 282–3.

<sup>74</sup> Drumbl, above n 1, 174.

<sup>75</sup> Ibid.

<sup>76</sup> Roger Cotterrell, *Émile Durkheim: Law in a Moral Domain* (1999) 202.

<sup>77</sup> Ibid.

<sup>78</sup> See R A Duff, *Punishment, Communication and Community* (2<sup>nd</sup> ed, 2003). See also Robert Nozick, *Philosophical Explanations* (1981) 371.

<sup>79</sup> Duff, above n 78, 109–11, 114–15, 123–4.

<sup>80</sup> Ibid 106–11. In this it moves beyond von Hirsch's emphasis on the censoring aspects of punishment. Von Hirsch recognises that censure provides the offender with the opportunity to make a rational moral choice to desist from crime, but not on the basis of the kind of moral repentance envisaged by Duff: Andrew von Hirsch, 'Punishment, Penance and the State: A Reply to Duff' in Matt Matravers (ed), *Punishment and Political Theory* (1999) 69, 69–73.

values,<sup>81</sup> it seems, nevertheless, to resonate intuitively with the notion of international punishment as being somehow morally transformative, within the context of a predominantly retributive rationale.

Drumbl's mission in this book is, of course, broader than this, in that he envisages a combination of criminal and civil remedies to address the conundrum of collective responsibility for mass atrocity. He discusses this in considerable detail in Chapter 7, 'From Law to Justice', the final substantively argued chapter of the book. However, it is important to remember that Drumbl does so from a position which retains a parochial view of the potential of international trial justice to move beyond the retributive, and so is largely incapable of even beginning to engage meaningfully with notions of collective responsibility, integration and restorative justice. Drumbl elaborates the need for more flexible and alternative paradigms such as tort, contract and restitution, so that the universal norms of accountability are rendered relational.<sup>82</sup> He suggests, whilst rejecting notions of collective guilt, that notions of collective responsibility and collective sanction do not recognise the collective nature of the violence.<sup>83</sup> Drumbl goes on to argue that structures of accountability need to be more proactive, rather than simply reactive, by providing incentives for controlling the behaviour of those who promote conflict.<sup>84</sup> Sanctioning of the individual in such a way as is proportionate to their involvement in the collective wrongdoing will more easily facilitate the pursuit of more restorative approaches.<sup>85</sup> He refers to this as an 'obligation-based preventative model'.<sup>86</sup> Drumbl's proposals raise several difficult questions. For example, how does one monitor and control the activities of what he calls 'conflict entrepreneurs'?<sup>87</sup> How can a duty effectively be imposed on individual citizens to prevent the state from 'actualizing extraordinary international crimes'?<sup>88</sup> How can a framework of collective sanctions be effective?<sup>89</sup> Realising the potential of individuals or groups to identify and monitor potential sources of collective violence is problematic. Blurring or merging sanction outcomes in terms of civil/criminal possibilities would be very difficult to apply collectively. In the concluding chapter, Drumbl summarises the main point of the book and suggests, by way of reform, some short-term adjustments to legal institutions and jurisprudence, political institutions and behaviour.

Conceptually, Drumbl invokes cosmopolitan theory to develop a reading of punishment which reflects his vision of a shared moral response to mass atrocity.<sup>90</sup> Within this context, he then develops the notion of 'qualified deference' to temper the rigidity of concepts such as 'subsidiarity' and 'complimentarity', with the aim of promoting greater 'legitimacy' in the

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<sup>81</sup> Barbara Hudson, *Understanding Justice: An Introduction to Ideas, Perspectives and Controversies in Modern Penal Theory* (2003) 50.

<sup>82</sup> Drumbl, above n 1, 183.

<sup>83</sup> *Ibid* 186.

<sup>84</sup> *Ibid* 203.

<sup>85</sup> *Ibid* 206.

<sup>86</sup> *Ibid*.

<sup>87</sup> *Ibid* 209.

<sup>88</sup> *Ibid* 203.

<sup>89</sup> *Ibid* 208.

<sup>90</sup> *Ibid* 186.

punishment of mass atrocity.<sup>91</sup> Drumbl's foundations for a morality of justice are consistent with promoting the kind of relational justice advocated by Norrie,<sup>92</sup> with its focus on attentiveness to context, trust, responsiveness to needs, and the cultivation of caring relations. These ideas are tremendously important for building constructive outcomes because they emphasise that repairing relationships, building trust and working towards reconciliation and peace through international criminal justice is not a paradox. However, this can only begin once there exists more profound contextual knowledge about the relativity of justice which reflects the pluralistic values and methods for its achievement in different cultures and traditions, whether or not these happen to coincide with state boundaries.<sup>93</sup>

Certainly, for international criminal justice, its structures, and processes, the challenge is not simply one of appreciating the relativity and relational context of justice in the immediate locality of war and social conflict; it is much greater than this, since it seeks to reflect justice for the local and the global. Arguably, structures which more readily accommodate themes of restorative justice facilitate the reconciliation of opposing moralities, and provide a forum for mediating relationships and encouraging reconstructive strategies are urgently needed. Undoubtedly, Drumbl's book makes a major contribution towards unravelling and understanding the immense complexities of the task ahead, and suggests some innovative ideas for how they might be addressed.<sup>94</sup>

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<sup>91</sup> Ibid 188.

<sup>92</sup> Alan Norrie, *Punishment Responsibility and Justice: A Relational Critique* (2000) 202, 221.

<sup>93</sup> Such deep and multi-layered comparative contextual analysis is advocated by Findlay and Henham, *Transforming International Criminal Justice*, above n 19, ch 1.

<sup>94</sup> A minor point, but a source of some irritation when reading, was the provision of collective endnotes after the substantive text instead of footnotes, and the absence of a bibliography.

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