

Justice after Atrocity: A Cosmopolitan Pluralist Approach

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By way of introduction, it is a great joy to be with you here. I would like to thank the Foundation for Law, Justice, and Society; the Centre for Socio-Legal Studies at Oxford; the Oxford Transitional Justice Research Group; and St Hughs College for the generous invitation. It always is a great pleasure to return to Oxford.

We gather to examine international criminal justice, its meaning, its legitimacy, the aspirations it evokes and, looking ahead, how it might become more effective in attaining these – and other – aspirations.

But, before we go any further, I would like to raise an important threshold question. This is: what is the connection between international criminal law, on the one hand, and international criminal justice, on the other? The two concepts are related, to be sure, but also are distinguishable. To the extent that the imagination of transnational law- and policy-makers narrows international criminal *justice* to international criminal *law* – well, this reductionism opens some windows but it also closes some doors. Criminal law, after all, may hem in justice as much as it promotes it. And afflicted communities may not share the same understanding of justice as that represented by the criminal law. In these opening remarks I would like to examine the tension between criminal law and post-conflict justice; and question current orthodoxies regarding their interface. I draw from, but also transcend, arguments I make in my book [Atrocity](#).

[*Punishment, and International Law* \(Cambridge University Press, 2007\)](#). I hope to provide a foundation to inspire what I hope will be an inspired conversation at tomorrow's workshop.

I begin with two claims: one descriptive, one analytic. I follow these with a proposal for reform. I propose that the lexicon of justice should expand; that we should pluralize international criminal justice. Justice transcends the courtroom and the jailhouse. Although accountability for atrocity is a shared cosmopolitan value, pluralism suggests that the process of accountability could well take different forms in different places. There is no one-size-fits-all solution, in practice; nor, as a matter of theory, should we search for such totalizing solutions.

I.

Let me begin with the first claim. In brief, international criminal justice has become ideally implemented through the institutions, vocabulary, and modalities of liberal criminal law. Liberal criminal law is the template against which justice initiatives are measured; the base-line. Ideally, justice for genocide and mass atrocity involves the courtroom and the jailhouse; it involves adversarial criminal prosecutions and incarceration for the guilty; it centers on the perpetrator as an individual. This conception of justice has animated an extensive array of transnational institution-building.

Symbolically, at least, much of this began with the redressing of the crimes of Nazi Germany. Hannah Arendt explored the relationship between Nazi crimes and totalitarianism. She initially described these crimes as they occurred within the context of the Holocaust as "radical evil," borrowing a phrase that had been coined much earlier by Immanuel Kant. In subsequent work, Arendt recast the evil as "extreme" or "thought-defying," preferring such descriptions to "radical" owing to the evolution of her thinking regarding the thoughtlessness and banality of the violence.

International lawmakers did not believe that extreme evil lay beyond the reach of the law. They felt that law could recognize extreme evil and sanction it as a breach of universal norms. The area of law

believed to be best suited as the best practice to condemn extreme evil was the criminal law. In terms of substantive categorization, however, extreme evil was no ordinary crime. After all, Arendt herself noted that extreme evil “explode[d] the limits of the law.” This did not mean that extreme evil was incapable of condemnation through law, but that the law had to catch up to it. In this regard, international lawmakers categorized acts of extreme evil as qualitatively different than ordinary common crimes insofar as their nature was much more serious. These acts seeped into the realm of *extraordinary international criminality*. And the perpetrator of extraordinary international crimes has become cast, rhetorically as well as legally, as an *enemy of all humankind*.

Those acts of atrocity characterized as extraordinary international crimes include crimes against humanity (a phrase that neatly embodies this notion of our shared victimization), genocide, and war crimes. The definitions of these crimes have evolved over time to become quite complex. At the very core of the extraordinariness of atrocity crimes is conduct – planned, systematized, and organized – that targets large numbers of individuals based on their actual or perceived membership in a particular group that has become selected as a target, in particular on discriminatory grounds. In these situations, group members become indistinguishable from, and substitutable for, each other. The individual becomes brutalized because of group characteristics. The attack is not just against individuals, but against the group, and thereby becomes something more heinous than the aggregation of each individual murder. Moreover, the discriminatory targeting of a group is often effected in the name of the persecutor’s own group. Accordingly, the interplay between individual action and group membership is, as we shall explore in greater depth later, central to extraordinary international criminality. This interplay engenders thorny questions of responsibility and punishment. Crimes motivated by this discriminatory animus are deeply influenced by notions of group superiority and inferiority which, in turn, propel collective action. There also is tension in terms of the victimology of the violence – the interests between the actual physical victims and the metaphysical victims in the international community at large may not necessarily be shared. They may, in fact, be at cross-purposes on occasion.

To recap: international lawmakers believe that extreme evil is cognizable by substantive criminal law. Because extreme evil is so egregious, however, only special substantive categories of criminality (in some cases newly defined, named, or created), could capture it. These categories include genocide, crimes against humanity, and war crimes.

Defining the crimes, though, is only one step in the enforcement process. It would also be necessary to establish procedures, institutions, and sanctions through which perpetrators of atrocity could be brought to account. Procedures, institutions, and sanctions have emerged. Although these may be somewhat diverse in practice, a normative hierarchy has emerged among them. At the apex lie international criminal trials. Courtrooms have gained ascendancy as the first-best forum to censure extreme evil. Here, accountability determinations proceed through adversarial third-party adjudication, conducted in judicialized settings, and premised on a construction of the individual as the central unit of action. A number of select guilty individuals squarely are to be blamed for systemic levels of group violence. At Nuremberg, some of the guilty were executed. Today, punishment predominantly takes the form of incarceration in accordance with the classic penitentiary model, where convicts are isolated and sequestered. The enemy of humankind is punished no differently than a car thief, armed robber, or felony murderer in those places that adhere to this model domestically.

The ascendancy of the criminal trial, courtroom, and jailhouse as the ideal and preferred international modalities to promote justice for atrocity is not random. Rather, it is moored in a particular worldview that derives from the intersection of two influential philosophical currents. The first of these currents is legalism; the second is liberalism. As with all choices, there are externalities and opportunity costs. In this case, the preference for criminalization has prompted skepticism toward other mechanisms in the quest for justice. However, evidence on the ground reveals that many afflicted populations actually prefer these other modalities. In practice, recourse to these alternate accountability modalities – including the amnesty – remains steady, if not increasing, in the resolution of conflicts. This means that the practice of transitional justice operates in the absence of rigorous study, appreciation, recognition, and analysis by

international criminal lawyers. This, in turn, deepens the divide between lives lived locally and lives lived transnationally; between victims and technocrats; between the law and the harms the law is trying to curb. International criminal trials attract, and demand, a disproportionate amount of resources, intellectual effort, imagination, and time.

International institutions include the International Criminal Court (ICC, 2002, now with 108 states party), ad hoc tribunals for Rwanda (International Criminal Tribunal for Rwanda, ICTR, 1994) and the former Yugoslavia (International Criminal Tribunal for the Former Yugoslavia, ICTY, 1993), the Special Court for Sierra Leone (SCSL, 2000), and other hybrid panels or chambers that operate, or have recently operated, in Cambodia, Timor-Leste, and Kosovo. Hybrid institutions divide judicial responsibilities between the United Nations, or its entities, and the concerned state. The International Criminal Court represents the most influential incarnation of this liberal legalist vision of justice. It began its first trial on Monday. Thomas Lubanga, a Congolese national and former rebel leader, stands accused as a co-perpetrator of recruiting, enlisting, or using children under the age of 15 in armed conflict -- a war crime. He pleaded not guilty. ICC Prosecutor Moreno-Ocampo plans on calling 30 witnesses, including 9 former child soldiers. The *Lubanga* trial is the first one in history where victims (93 in total, assisted by 8 lawyers) will directly participate in the proceedings. This is a major step in international law and practice. Millions of people have been victimized by conflict in the Democratic Republic of Congo (DRC) (some estimates up to 5 million people dead from starvation, disease and other effects of being driven from their homes); sexual torture abounds, and violence now is re-escalating. It remains unclear how seriously ordinary Congolese view the use of child soldiers in light of the other crimes committed, including by those same child soldiers who international criminal law now treats as innocent. Moreover, Lubanga is by no means the most senior commander responsible for widespread killing. He is, however, associated with endemic levels of violence and instability in the Ituri region. Two of his rivals are in ICC custody and are awaiting trial. What is more just recently Rwanda assisted in taking rebel leader Laurent Nkunda, who operated in the Kivu region but had more grandiose ambitions as well, into

custody. Nkunda's incapacitation might provide some new security in what is generally a deteriorating situation.

All international criminal tribunals largely incorporate ordinary methods of prosecution and punishment dominant in liberal states. Within this process of incorporation, international criminal courts and tribunals have – to varying degrees *inter se* – technically harmonized aspects of Anglo-American common law procedure with tenets of the Continental civil law tradition. However, this harmonization is far from a genuine amalgam that accommodates the sociolegal traditions of disempowered victims of mass violence – largely from nonWestern audiences – who already lack a voice in international relations. Although these traditions are not incommensurable with Western systems, and share points of commonality, they differ in important ways, including when it comes to rationales for and modalities of punishment. In short, international criminal law largely borrows the penological rationales of Western domestic criminal law. The ICC takes a step in a reparative direction with the Victim's Trust Fund, and victim involvement in the prosecutions (93 victims are involved in the *Lubanga* case) but it remains unclear how this Fund will operate in practice and how the victim participation will harmonize with the Prosecutor's need to control the case.

These international institutions also borrow from the operation of human rights frameworks in dominant states, in particular due process rights accorded to criminal defendants. International criminal procedure accords great importance to the need to “pay particular respect to due process” in order to avoid, in Justice Jackson's famous admonition, “pass[ing] [...] defendants a poisoned chalice.” Among legal scholars, there is little, if any, questioning of the suitability of this transplant. Instead, it is often a cause for celebration. I believe that the reality on the ground is more complex and that it is problematic for international institutions to assume that formulaic reliance upon due process standards alone leads to legitimacy and credibility, particularly among populations transitioning from conflict. I do not deny the relevance of due process in preserving the humanity of those who prosecute and in serving as an example for the rule of law. I merely suggest that justice is not a recipe; and due process is not a magic ingredient.

To conclude: the criminal law has ascended as an influential regulatory mechanism for extreme evil. This process began with Nuremberg and has, in the years since, gained currency and become consolidated.

II.

My second claim is analytic. International criminal law and procedure goes some way to achieving justice, but do not go very far. Certainly, not far enough. More immediately, criminal prosecutions and sentences fall short of each of the many goals they espouse, namely retribution, deterrence, expressivism, and restoration. International criminal tribunals lack a coherent penology. In the cases of certain aspirations – in particular retribution and deterrence – it remains unclear whether a *génocidaire* can receive just deserts or, given the collective, propagandized and administrative nature of the crime, ever be deterred by the prospect of being hauled before a fancy tribunal in The Hague. I do think it is important to transcend the near messianic qualities ascribed to the ICC to deter and punish, qualities that dot its preamble and, certainly, animated the jubilation at the now 10 year old Rome Conference. This enthusiasm may have been necessary to secure the political participation of states in the creation of the ICC, but now poses a problem of excessive expectations on the justice front. International criminal lawyers may well have oversold or overmarketed the value of the product we bring to the table.

The criminal law builds upon a major fiction, namely that, as Nuremberg intoned, wide-scale atrocity is the crime of men. Such it may be, but it also is much more. The sum is larger than the parts. Atrocity is also the product of groups, of acquiescent bystanders, of collective action, of colonial histories and blood diamonds, and of the passivity of foreign states. Yet the criminal law pins blame only on those most immediately responsible. This offers a simple solution to the complex sources of extreme evil. The simple explanation may soothe our sensibilities. It may assuage our fears. But it is a fiction. The collective and systemic nature of atrocity should push us beyond the criminal law to consider what collective and systemic forms of justice would look like.

Most particularly in cases of genocide and those crimes against humanity that are motivated by discriminatory animus, individual killers may not be deviant, nor transgressive, nor pathological. They may in fact be conforming to social norms that dominate in the place and time where they undertake their work – they may well believe themselves engaged in purifying their spaces of the 'other', of 'taking out the garbage', of 'expunging the vermin', of 'trimming the tall trees' and of 'pulling out the bad weeds' – theirs is often a terrible social project, a bureaucratic enterprise, a day of service to the collective.

The perpetrator of mass atrocity fundamentally differs from the perpetrator of ordinary crime. We need more criminological research on the etiology of atrocity. Happily a small group of criminologists is in fact undertaking such research and coming up with fascinating results.

International institutions have not acquired a monopoly on the accountability business. Far from it. In fact, most of this business actually is carried out by national and local institutions. However, international institutions serve as tremendously important trendsetters for their national and local counterparts. Therefore, the distinctions between international and national institutions are far from watertight.

In the case of the ICTR and ICTY, this influence is exerted because of the primacy these institutions enjoy over their national counterparts. The result is that international visions of liberal legalism seep into national jurisdictions. These international pressures are most evident now with the completion strategies of the ad hoc tribunals. Part of these completion strategies depend upon the referral of cases from the ad hoc tribunal to national institutions. Referrals occur under Rule 11bis. Rule 11bis determinations require the judges of the international institutions to be satisfied that national proceedings satisfy their interpretation of international human rights standards. The review undertaken by international institutions is quite searing and searching. Referral applications from the ICTR Prosecutor are instructive. ICTR judges have been very demanding.

On October 8, 2008, the ICTR Appeals Chamber upheld the Trial Chamber's decision (taken May 28, 2008) to refuse the Prosecutor's request to transfer the case of Yussuf Munyakazi to Rwanda.¹ The ICTR Trial Chambers have been reticent about approving ICTR Prosecutor requests to refer cases to the Rwandan courts. In *Munyakazi*, the Appeals Chamber disagreed with the Trial Chamber with regard to its conclusion that the Rwandan judicial system, in particular the High Court which would adjudicate the transfer cases, was not independent or impartial. However, the Appeals Chamber agreed with two other bases upon which the Trial Chamber had denied the referral request. These bases were: 1. the weakness of witness protection in Rwanda and concern that Munyakazi would not be able to obtain the attendance of defense witnesses; and 2. the incompatibility of the sentence schematic (in particular the sentence of life imprisonment with "special provisions", which was understood to mean in isolation) with international human rights norms. The sentence of life imprisonment in isolation replaced the death penalty under Rwandan law. After a very exacting review, the ICTR Appeals Chamber decided this form of punishment fell short of international standards to the point that referral to the Rwandan courts would not be possible. The Appeals judges ruled this way despite the fact that Rwanda submitted that it gave "the assurance that no person transferred from [the ICTR] would be sentenced to solitary confinement in Rwanda." (at para. 14 of the Appeals Chamber judgment). The mere possibility that life imprisonment in isolation might apply to Munyakazi was deemed sufficient to determine the penalty structure inadequate for the purposes of transfer under Rule 11bis. (at para. 20 of the Appeals Chamber judgment). Now, it might be that the two concerns cited by the Appeals Chamber could be accommodated through subsequent amendment of domestic Rwandan practice. The ICTR Prosecutor has indicated that once the necessary remedial measures were taken his office would be ready to apply to ICTR Chambers to consider further referral requests. The ICTR Prosecutor, after all, has an institutional interest in referring cases to national jurisdictions as part of satisfying the ICTR Completion Strategy.

¹ Prosecutor v. Yussuf Munyakazi, Case No. ICTR-97-36-R11bis (ICTR Appeals Chamber, October 8, 2008).

As an aside, it is of some interest regarding the allegedly enhanced retributive value of international prosecutions that Munyakazi, along with other defendants in their cases, have opposed the prosecutor's bid to refer the matter to the Rwandan courts. Munyakazi, who was a businessman and farmer in Cyangugu Province, was jointly indicted in 1997, with two others. In 2000, the Trial Chamber granted the severance of his case, and the indictment was subsequently amended in 2002, charging him with genocide and alternatively complicity in genocide, and extermination as a crime against humanity. On 6 June 2008, Trial Chamber I denied the Prosecution's request to transfer the case of Gaspard Kanyarukiga to Rwanda on similar grounds. The referral of Michel Bagaragaza to the Netherlands was revoked (in 2007) by the ICTR Prosecutor after he was informed by the Dutch Prosecutor that their courts did not have the jurisdiction to try the case. Previously, the ICTR Prosecutor had sought to transfer Bagaragaza to Norway, which was denied by the ICTR judges on the basis that Norwegian criminal law did not provide for the crime of genocide.

In the end, the same international community that sat idly by while genocide devastated Rwanda now claims the legitimacy to withhold Rwanda's ability to adjudicate persons accused of genocide because Rwandan courts are deemed to fall short in terms of their conformity to a liberal legalist template. Similar ironies emerge in cases where former colonial powers turn to universal jurisdiction to prosecute offenders, such as in Belgium, where convictions have been issued regarding Hutu *génocidaires*. These convictions obtain some justice, but also inure to the benefit of the former colonial power by bleaching its own role in the violence – both historically, e.g. the 1933 ethnic identity cards, as well as in a contemporary context, e.g. inadequate peacekeeping. France, whose courts have indicted a number of members of the current Rwandan government allegedly implicated in the plane crash – the trigger event of the genocide – also sits somewhat queasily in the capacity of an impartial judge. One trial, involving Rose Kabuye and implicating anti-terrorism laws, is set to start.

Furthermore, although the ICC is to be complementary to national initiatives, it also exerts conformist pressures on national and, in particular, local accountability mechanisms. This has been the

case in both Uganda and the DRC. The ICC accords national institutions the first opportunity to prosecute and punish. In this regard, complementarity may promote heterogeneity in terms of the numbers of institutions that promote accountability. But as I argue, complementarity also will promote homogeneity in terms of the process that these institutions will follow and, in this regard, further ensconce the influence of the criminal trial, and of liberal criminal law, as the ideal and reflexive justice response to atrocity. This is so because states are incentivized to mimic international approaches in order to reduce the risk that the ICC admits a case. And also to receive funding. Self-referrals also crimp the justice narrative in another direction. It was the Ugandan government that referred atrocity in Uganda to the ICC. This means that only conduct by LRA rebels, under the leadership of Joseph Kony, opposed to the government has become judicialized. Government conduct has not been judicialized. Similar phenomena animate the injection of international criminal law into the DRC and Rwanda. So, this presents a tension. Securing justice for rebels or losers comes at the price of immunizing the government or winners from justice. Although the government of Uganda does not engage in the brutality of the LRA, its hands are far from clean. Its policies of internal displacement of the Acholi population in the north into IDP camps have triggered a humanitarian crisis. The International Court of Justice found that Uganda had committed massive violations of international human rights and humanitarian law in its interventions into the DRC. The Ugandan governments fingerprints are all over Lubanga's UPC army in its initial stages.

Although national institutions still punish with a broader qualitative variety of sanction and, in cases of incarceration, a broader quantitative range of length of imprisonment, I predict, as the modalities of international tribunals continue to enter national legal frameworks through referrals, complementarity, and other conduits, that both the variety of sanction and range of sentences available within national frameworks increasingly will shrink. In terms of imprisonment, for example, I foresee that national institutions will raise minimum sentences – and embed duties to prosecute that might disfavor alternate modalities of accountability – while lowering maximum sentences and, in addition, eliminating the death penalty. In particular, conformist pressures are placed on local approaches, such as restorative

methodologies. The situation of traditional dispute resolution – *gacaca* – in Rwanda is a telling example. Although the ICC offers potential for greater inclusiveness as a whole international criminal law remains distant from restorative and reintegrative methodologies, both in theory as well as in practice, which I argue weakens its effectiveness and meaning in many places directly afflicted by atrocity.

This transplant from the international to the national may in fact be welcomed by many state actors. Particularly in transitional contexts, not all of which match the idealized path to greater democratization, state actors often crave and seek out the consolidation of power occasioned by punitive criminal law frameworks instead of the more free-ranging and authority-diffusing modalities of justice that percolate bottom-up from local constituencies. In this vein, international modalities can inform center-periphery relationships in transitional societies in a way that consolidates centralized state authority. This certainly has been the case in Timor-Leste.

When aggregated, these various pressure points squeeze out local approaches to justice, most notably those that eschew the methods and modalities dominant internationally. These pressure points are proving to be of great relevance to the structure of punishment modalities for extraordinary international criminals although they have little to do with theoretical or applied determinations regarding the actual nature of extraordinary international crime. In particular, victimological research indicates that individualized criminal trials often do not correspond to victim preferences when pursued as the dominant response, and certainly not when pursued exclusively.

Of course, there is little advantage in venerating the local or that which otherwise differs from internationalized ideal-types simply to promote pluralistic difference as an end in itself. Local punishment schemes, in particular of a communitarian nature, may be prone to manipulation, abuse, or arbitrary application. Moreover, many national legal orders are corrupt, unreliable, and illegitimate; in many postconflict societies, the industrialization of mass violence often arose as a matter of conforming to the law. International input can ameliorate the output of national and local institutions. In the end, just as it is irresponsible to sentimentally venerate the local *qua* local, it is equally irresponsible to venerate a process

simply because it has become globalized and thereby assume its legitimacy, effectiveness, and credibility. Moreover, just because customary forms of justice are complicated doesn't mean international criminal lawyers should disregard them.

III.

What to do? In my book, *Atrocity, Punishment, and International Law* I raise the possibility of a cosmopolitan pluralist approach to international justice. This is a modest attempt to move from diagnosis to remedy.

It is crucial to separate the substantive goals at hand, namely the condemnation of extreme evil, from the process regarding *how* this condemnation is to be operationalized and the institutions *where* this process occurs. Certain substantive universals, such as accountability for extreme evil, can be attainable through diverse procedural mechanisms. In this regard, I draw from *cosmopolitan theory*.

Cosmopolitans, from the ancient Stoics and Cynics to their contemporary counterparts, share the belief that all human beings belong to a single moral community. Cosmopolitans differ, however, regarding the values intrinsic to this shared community. Some cosmopolitans argue that there is a very thick set of shared values and that this set should expand; whereas other cosmopolitans claim a thin set and are more agnostic regarding the question whether the content of this thin set should expand. One important issue for cosmopolitans is the place of local, patriotic, and national affiliations in human identity. All cosmopolitans acknowledge the existence of these affiliations, although contemporary cosmopolitans engage with them with particular vivacity. I consider the approaches of a broad array of cosmopolitans – ranging from the Stoics and Cynics to contemporary writers such as Martha Nussbaum, David Hollinger, David Held, Kok-Chor Tan, Kwame Anthony Appiah, and Paul Schiff Berman – to the place of local affiliations. Contemporary cosmopolitans recognize multiple affiliations and overlapping associations. There are certain transnational commonalities intrinsic to human existence, but other aspects

of the human condition remain best expressed and understood at the local level by the individual among his or her fellow citizens and neighbors.

Insofar as the model I propose recognizes the universality of our shared membership in a moral community that condemns great evil and entitles victims thereof – in particular those most directly affected – to accountability, it aligns with cosmopolitanism’s basic precept. On the other hand, the model adopts cosmopolitanism’s acceptance of the richness of local identifications, particularly when this richness helps promote justice. The notion of diverse procedure for universal wrongdoing thereby fits within a cosmopolitan theory of law, although it also derives from the tenets of legal pluralism. My model, therefore, is one of “*cosmopolitan pluralism*.” One advantage to cosmopolitan pluralism is that it would welcome, recognize, and reflect actual post-conflict practice where there is considerably more variation in terms of what justice means than the conformist expectations of the international criminal law paradigm.

Admittedly, there is an intrinsic tension within cosmopolitan pluralism in terms of mediating the universal and particular. However, it is *because* of this tension that cosmopolitan pluralism seems particularly well suited as a framework for emergent fields, such as international criminal law, that must fulfill difficult balancing acts between global governance and local legitimacy. Cosmopolitan pluralism justifies a position that holds that, although genocide and discrimination-based crimes against humanity are universal evils, they can be coherently sanctioned in diverse manners that might instantiate themselves differently in light of the distinctive social geographies of various atrocities. One advantage of cosmopolitan pluralist reforms is that they recognize that each occurrence of discrimination-based atrocity is somewhat different and, instead of flattening difference through application of one-size-fits-all process, endeavor to fine-tune process without undermining the expressive value of sanctioning universal wrongdoing.

Consequently, cosmopolitan pluralism does not demand the development of a singular vision of punishment for extraordinary international criminals that becomes universally applicable to all extraordinary international criminals everywhere.

Although atrocity violates universal norms, and in theory we all are the victims of a crime against humanity, in the end atrocity also is a profoundly local matter. It often involves priests killing congregants, as in Rwanda; neighbors attacking neighbors, as in East Timor; and boys destroying their own villages, as in Sierra Leone and Uganda. Liberal criminal trials conducted in far away places through externalized methodologies may not resonate with the accountability expectations of survivors. As a result, a major challenge for the justice narrative is how to welcome local accountability mechanisms, in particular when these differ from liberal criminal trials, and local sanctioning mechanisms, in particular when these differ from imprisonment. To date, this is not something international criminal tribunals have done well.

What would a cosmopolitan pluralist vision look like in practice? I envision two major areas of reform. One is vertical, the other is horizontal.

I propose to substitute *qualified deference* for complementarity or primacy as the framework contouring vertical applications of institutional authority that radiate from international institutions to the national and, in turn, to the local. Qualified deference gives more leeway to local variation from the trial and punishment modalities of contemporary international criminal tribunals. Insofar as local and national accountability mechanisms are potentially abusive, corrupt, illegitimate, and susceptible to machination, there is a need for gatekeeping. Accordingly, I propose that *in situ* justice modalities be accorded a presumption of *deference*, but that this presumption be *qualified*. I proposed that the following interpretive guidelines contour the implementation of qualified deference:

- (1) *good faith*;
- (2) the *democratic legitimacy* of the procedural rules in question;

- (3) the *specific characteristics of the violence* and of the *current political context*;
- (4) the *avoidance of gratuitous or iterated punishment*;
- (5) the *effect of the procedure on the universal substance*; and
- (6) the *preclusion of the infliction of great evils on others*.

These interpretive guidelines would operate disjunctively. In other words, not all of them must be met in order for the presumption of qualified deference to a local or national accountability measure to remain satisfied. However, a gross failure on the part of the measure to meet one of the guidelines could suffice to reverse the presumption in favor of qualified deference.

Complementarity runs the risk of viewing a transitional justice institution only through the lens of its ability to satisfactorily determine individual penal responsibility under a universalized, yet not necessarily universal, normative template. Other possible institutional goals, such as popular participation, reconciliation, and restoration are thereby excluded from the evaluative framework under which legitimacy is assessed. Phil Clark's work on *gacaca* in Rwanda underscores how this lens is the one through which the international community assesses the effectiveness of this institution is assessed; and it an unduly narrow lens. I posit that qualified deference would open up a broader heuristic through which to evaluate transitional accountability measures generally. Assuredly, we do not yet have the lexicon to assess or predict effectiveness in this broader regard. The language of complementarity, however, inhibits our development of such a lexicon. It forces us to assess institutions in complex post-conflict contexts through the lens of conformity to international trial process and pursuit of penological goals such as deterrence and retribution that I posit international criminal law cannot realistically deliver regardless.

The second reform is *horizontal*. Here, I propose a diversification in which the hold of the criminal law paradigm on the accountability process yields through a two-step process: initially, to integrate approaches to accountability offered by law generally (such as judicialized civil sanctions or

group-based public service) and, subsequently, to involve quasilegal or fully extralegal accountability mechanisms such as truth commissions, legislative reparations, public inquiries, transparency, and the politics of commemoration. The goal of this outreach is to acknowledge the group-based nature of atrocity, a task for which criminal trials are not well suited. Were the project of international justice to horizontally integrate a broader swath of regulatory mechanisms, it would become more responsive to group dynamics. To the extent that cosmopolitan pluralism favors this capaciousness, it has much to offer as an ordering framework.

If operationalized, these reforms raise the possibility that a larger number of individuals could become implicated in the justice process, thereby inviting a broader conversation regarding the viability of collective responsibility for collective criminality. *Collective responsibility* differs from collective guilt, which attaches to the question of culpability. There is a yawning gap between guilt and responsibility. Whereas many individuals are responsible for atrocity, a much smaller number are criminally guilty. A much larger number of individuals are responsible than can (and deserve to) be captured by criminal trials. Civil liability implicates those individuals and institutions found to bear some responsibility for discrimination-based mass atrocity. This can be a large group, hence the recourse to the phrase collective responsibility. We would do the project of international criminal justice a disservice if, in implementing international criminal law, out of unfounded fear of imposing collective guilt we marginalized or sneered down modalities of accountability that promoted the collective responsibility of groups.

Extraordinary international crimes are characterized, to varying degrees, by their connived collective elements. Downplaying this characteristic inhibits the emergence of effective penological and criminological goals. It seems that international lawyers have drained the collective nature of the crimes (even though they simultaneously pronounce their extraordinariness) so as to fit them within comforting procedural frameworks. A more challenging, albeit highly productive, task would be to discuss methodologies that recognize that the crimes are extraordinary precisely *because* of their collective

tendencies. One approach to this task is to pursue an accretion of various layers of accountability, instead of the reductionism inherent in boiling accountability down to simple liberal criminal law terminologies. Insofar as cosmopolitan pluralism welcomes this horizontal accretion, it permits the extraordinary international criminal to be treated independently, and not as an adjunct to the common criminal.

Collective responsibility frameworks can implicate benefiting bystanders. These frameworks can thereby affix a cost to an individual's drawing the blinds, receiving a promotion at work because the 'other' got fired, moving into a suddenly vacated apartment, and acquiescing in the hijacking of the state by extremists. It is well nigh impossible to deter a suicide bomber or crazed ideologue. Once an individual has passed a threshold of habituation in or affection for violence, has deeply imbibed hatred, or needs to kill to survive, the law can offer little in deterrence. However, the law may more plausibly reach the much larger group of people that passively allow the conflict entrepreneur to assume office, procure weapons, and build a power base of habituated killers. Any structure that incentivizes the masses to root out the conflict entrepreneur before that individual can indoctrinate and brainwash will diminish the depth of perpetrator moral disengagement that is a condition precedent to mass atrocity. Such a structure thereby inhibits early on, when inhibition still remains possible, the "escalating commitments" that psychologist James Waller believes demarcate the "road to extraordinary evil." The social death of the victims – a precondition to their actual deaths – may thereby be impeded. Capturing all individuals in a responsible collective might make it much more difficult for individuals to hide within the collective, seek exoneration in its anonymity, benefit from the diffusion of responsibility, and proffer excuses in Milgram's agentic state of transposed responsibility. Collective responsibility could inject a risk allocation and management analysis into the minds of the general population in the very inchoate stages of atrocity. I believe this would help move extant frameworks from being essentially *reactive* to tragedy to a somewhat more *proactive* position.

But we will never be able to evaluate the potential or limitations of a horizontally expanded law of atrocity that contemplates group-based sanction unless we shed our fears and dispassionately engage

with collective responsibility as a regulatory mechanism and as a possible tool in the justice toolbox. My point here is to spark renewed discussion and research.

In sum, the cosmopolitan pluralism I envision would permit criminal trials and punishment to stake a claim in the justice matrix and, hence, be a participant in the justice process, but would cast this claim as procedurally deferential (with qualifications) to the local *and* as conceptually porous to alternate private law and extrajudicial modalities. In both cases, the result is that the universal norm of accountability for great evil enters into dialogic, relational contact with local procedure *and* the richness of the legal landscape beyond the narrowness of ordinary criminal law.

IV.

There is some room for adversarial criminal trials within the justice matrix. The value of trials, though, best flourishes when trials constitute *a* means to justice, not *the* means to justice. Consequently, I posit that the value of prosecutions, for example those undertaken by the ICC, will increase if the ICC operates as one of many entities pursuing accountability in a diverse system where power is openly diffused polycentrically. If alternate, and overlapping, remedies were to become normalized and practically accessible, the political pressures for criminal convictions ironically would diminish. Over time, it is through a process of building upon past experiences through a series of imperfect reforms and halting advances that the project of international criminal justice will advance. In this regard, an important step is to resist the allure of parsimonious solutions to terribly complex phenomena of communal violence and human agency. The complexities of regulating atrocity and promoting justice in its aftermath underscore that no single reform is curative.