In *Atrocity, Punishment, and International Law*, Mark Drumbl rethinks how perpetrators of atrocity crimes should be punished. After first reviewing the sentencing practices of courts and tribunals that censure genocide, crimes against humanity, and war crimes, he concludes that these practices fall short of the goals that international criminal law ascribes to punishment, in particular retribution and deterrence. This raises the question whether international prosecutorial and correctional preferences are as effective as we hope. Drumbl argues that the pursuit of accountability for extraordinary atrocity crimes should not uncritically adopt the methods and assumptions of ordinary liberal criminal law. He calls for fresh thinking to confront the collective nature of mass atrocity and the disturbing reality that individual membership in group-based killings is often not maladaptive or deviant behavior but, rather, adaptive or conformist behavior. This book deploys a bold, and adventurously pluralist, interpretation of classical notions of cosmopolitanism to advance the frame of international criminal law to a broader construction of atrocity law and a more meaningful understanding of justice. Drumbl concludes by offering concrete reforms. He urges contextual responses to atrocity that welcome bottom-up perspectives, including restorative, reparative, and reintegrative traditions that may differ from the adversarial Western criminal trial.

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Dr. Drumbl has lectured and published extensively on international law, human rights, and criminal justice. He has worked in the Rwandan prisons and as defense counsel in Rwanda’s genocide trials. He has been an expert on international law in litigation in the U.S. federal courts, has taught in a variety of places – including Pakistan and Brazil – and, from 1994 to 1995, served as judicial clerk to a justice of the Supreme Court of Canada. Drumbl’s legal practice experience also includes representation of the Canadian Chief-of-Defense Staff with regard to the Royal Commission investigating military wrongdoing in the United Nations Somalia Mission. He is a frequent media commentator.
Atrocity, Punishment, and International Law

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Dedicated to Victims, and Survivors, of Humanity’s Inhumanity
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Preface and Acknowledgments

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.

These questions have received much less attention than they deserve. Although international criminal law has gone a long way to convict individuals for perpetrating atrocity, it has traversed far less creative ground in terms of conceptualizing how to sanction them. Scholars, too, have been remiss. Surprisingly little work has been undertaken that explores how and why criminal justice institutions punish atrocity crimes and whether the sentences levied by these institutions actually attain the proffered rationales. Furthermore, there is little empirical work that assesses whether what international tribunals doctrinally say they are doing actually has a consistent and predictable effect on the quantum of sentence.

In this book, I hope to respond to these lacunae and, through this endeavor, make three contributions.

First, to present data regarding how and why local, national, and international institutions punish genocide, crimes against humanity, and war crimes. Although I include information from many atrocities, the focus centers on three in particular: Rwanda, the former Yugoslavia, and World War II/the Holocaust. My methodology involves a review of positive law instruments, sentences, and sentencing jurisprudence. This part of the book (Chapters 3 and 4) is supplemented with extensive citations. This research serves important compilation and reference purposes for practitioners and scholars and, thereby, responds to the gap in the literature regarding data on sentencing and evaluative review thereof.

Second, to explore whether extant methods of sentencing actually attain the affirmed objectives of punishment. In Chapter 6, the heart of the book, I conclude that there is an overall shortfall, although certain rationales are better served than others.

Third, to move the dialogue from diagnosis to remedy. I argue that the punishment of extraordinary international crimes should not uncritically adopt the methods and assumptions of ordinary liberal criminal law that currently
underpin international courts and tribunals and seep into national institutions (even those outside of liberal traditions). Extraordinary international crimes simply are not the same as ordinary common crimes. Consequently, criminal law designed for common criminals is inherently limited as a response to mass atrocity and as a device to promote justice in its aftermath. We need to think hard about transcending existing procedural and institutional frameworks. A sustained process of critique and renewal may provide international criminal punishment with its own conceptual and philosophical foundations, instead of its current grounding on borrowed stilts.

The architects of international criminal law have done much to establish and mainstream institutions such as the International Criminal Court. This is a great accomplishment. But we cannot become complacent now that these institutions have been edified. A proliferation of adversarial and individualized criminal law does not inevitably lead to enhanced effectiveness in sanctioning or deterring atrocity. Criminal trials should never become a substitute for more preventative action on the part of the international community to combat atrocity. Nor is it productive for the turn to trials to inhibit grassroots solutions that reach beyond the criminal law or, even, formal law generally.

Insofar as I am deeply concerned with improving the project of international criminal law, this book displays a reconstructive ambition. My goal is to locate a principled middle ground between, on the one hand, the most relentless skeptics of universal law as a response to mass atrocity and, on the other hand, the most relentless proponents who often remain distrustful of bottom-up initiatives in postconflict societies. If successful, my arguments could inspire short-term reforms to existing institutions and a longer-term reconstitution of the field. I chart some proposals.

Within this process of reconstitution, it is important to emphasize contributions from nonlawyers, in particular anthropologists, mental health professionals, criminologists, social workers, political scientists, and public policymakers. I think the arguments of this book will be of interest to them, and I hope they feel welcome in debates among international lawyers that pertain to complex questions of justice.

The roots of this academic project trace back to my work in 1998 in the Rwandan genocide prisons. Along the way, many colleagues provided invaluable comments, feedback, and ideas on this manuscript at various stages of drafting – from the inchoate to the nearly finished. I thank each of you. It would be impossible to list everyone who played a part. But here is an attempt, in no particular order: Rick Kirgis, Ken Gallant, Roger Clark, Diane Marie Amann, Chris Blakesley, Chandra Lekha Sriman, Erin Daly, Penny Andrews, Allison Marston Danner, Scott Sundby, Ellen Podgor, Laura Dickinson, Holger Rohne, Laurel Fletcher, Darryl Brown, Tai-Heng Chen, Louise Halper, Paul Roberts, Donal Coffey, Cyrus Tata, Michael Fowler, Rosemary Byrne, Ralph Henham, David Zaring, Brad Wendel, Dorothy Brown, and Linda Malone.

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Preface and Acknowledgments

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I wrote much of this book from a lovely office with a thoughtful view at University College, Oxford University, where I was appointed Visiting Fellow for Michaelmas Term 2005. I extend my warmest gratitude to Univ for hosting me. I also thank the Institute for International Integration Studies at Trinity College Dublin, where I served a very productive stint as a Visiting Scholar in May 2006. My greatest appreciation, however, goes to my home institution, Washington and Lee University, School of Law, for unflaggingly and unfailingly supporting this research agenda from its inception, including through the grant of sabbatical leave and resource support through the Frances Lewis Law Center. I owe a great professional and personal debt to Dean David Partlett for his friendship and encouragement.

Select parts of this book contain material that draws from, adapts, or is significantly reworked from my article, “Collective Violence and Individual Punishment: The Criminality of Mass Atrocity,” which appeared in Northwestern University Law Review, Vol. 99, No. 2, 539 (Winter 2005). This article has been used by special permission of Northwestern University School of Law, Northwestern University Law Review. Adaptation reflects the evolution of my thinking, events on the ground, and the results of new research. I was deeply honored when this article was selected as one of two co-winners of the 2005 Scholarly Papers Competition of the Association of American Law Schools.
Preface and Acknowledgments

Select portions of Chapter 4, Part (i) draw from, update, and adapt material that originally appeared as a published lecture in the Ohio Northern University Law Review, Vol. 31, 41 (2005), for which the Ohio Northern University Law Review grants permission to reuse. Cover photo © James Nachtwey/VII.

This book incorporates material and data on sentencing gathered up to May 2006, inclusive, unless otherwise indicated. Any errors or omissions in the text are entirely my own.
List of Abbreviations

DRC  Democratic Republic of the Congo
FRY  Federal Republic of Yugoslavia
ICC  International Criminal Court
ICJ  International Court of Justice
ICTR International Criminal Tribunal for Rwanda
ICTY International Criminal Tribunal for the Former Yugoslavia
IHT  Iraqi High Tribunal
IMT  International Military Tribunal (at Nuremberg)
JCE  Joint criminal enterprise
OSCE Organization for Security and Cooperation in Europe
RPF Rwandan Patriotic Front
SCSL Special Court for Sierra Leone
SFRY Socialist Federative Republic of Yugoslavia
Special Panels East Timor Special Panels
UNAMIR United Nations Assistance Mission in Rwanda