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Mark Osiel
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MAKING SENSE OF MASS ATROCITY

“Who done it?” is not the first question that comes to mind when seeking to make sense of mass atrocity. So brazen are the leader–culprits in their apologetics for the harms, so wrenching the human destruction clearly wrought and meticulously documented by many credible sources. Yet in legal terms, mass atrocity remains disconcertingly elusive. The perversity of its perpetrators is polymorphic, impeding criminal courts from tracing true lines of responsibility in ways intelligible through law’s pre-existing categories, designed with simpler stuff in mind.

Genocide, crimes against humanity, and the worst war crimes are possible only when the state or other organizations mobilize and coordinate the efforts of many people. Responsibility for mass atrocity is always widely shared, often by thousands. Yet criminal law, with its liberal underpinnings, prefers to blame particular individuals for isolated acts. Is such law, therefore, constitutionally unable to make any sense of the most catastrophic conflagrations of our time? Drawing on the experience of several recent prosecutions (national and international), this book both trenchantly diagnoses law’s limits at such times and offers a spirited defense of its moral and intellectual resources for meeting the vexing challenge of holding anyone criminally accountable for mass atrocity. Just as today’s war criminals develop new methods of eluding law’s historic grasp, so criminal law flexibly devises novel responses to their stratagems. Mark Osiel examines several such recent legal innovations in international jurisprudence and proposes still others.

Mark Osiel’s writings seek to show how legal responses to mass atrocity can be improved by understanding its organizational dynamics, as revealed through comparative historical analysis. His writings have inspired several conferences and are assigned at many leading universities in North America and Western Europe in a number of fields. He lives in The Hague, where he is director of public international law programs at the T.M.C. Asser Institute, a think tank associated with the University of Amsterdam.

His books include *Mass Atrocity, Collective Memory, and the Law* (1997); *Obeying Orders: Atrocity, Military Discipline, and the Law of War* (1999); *Mass Atrocity, Ordinary Evil, and Hannah Arendt: Criminal Consciousness in Argentina’s Dirty War* (2002); and *The End of Reciprocity: Terror, Torture, and the Law of War* (2009).

Osiel regularly advises international organizations and governments in post-conflict societies on issues of transitional justice. He has been a visiting Fellow at Cambridge University, Harvard’s Kennedy School of Government, and the London School of Economics, as well as universities in Argentina, Brazil, France, the Netherlands, and India (as a Fulbright lecturer).

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The Nazi crimes, it seems to me, explode the limits of the law; and that is precisely what constitutes their monstrousness.

Hannah Arendt (1946)

The logic of law can never make sense of the illogic of extermination.

Lawrence L. Langer (1995)

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Preface

Pinpointing responsibility for mass atrocities on particular individuals – as the criminal law demands – is an elusive and perilous enterprise.¹ Genocide, war crimes, and crimes against humanity occur in the havoc of civil strife, in teeming prison camps, and in the muck and messiness of heated combat. The victims are either dead or, if willing to testify, “unlikely to have been taking contemporaneous notes.”² There are the anonymity of mass graves, the gaps and uncertainties in forensic evidence, the complexity of long testimony covering several places and periods, years ago. There is also the fluidity of influence by leaders over followers and of equals in rank over one another, as well as the uncertain measure of freedom from others – both superiors and peers – enjoyed by all. The central questions become:

How does mass atrocity happen?

How should criminal law respond?

The two queries are generally asked in isolation: the first by social scientists and historians, the second by courts and lawyers. Properly understood, the questions are inseparable, this book shows, for the law stands to learn much from careful attention to atrocity’s actual dynamics. The law itself permits the trial of hundreds or even thousands, each for any number of serious

¹ The author thanks the editors of the *Columbia Law Review* and the *Cornell International Law Journal* for allowing republication here of portions from Mark Osiel, “The Banality of Good: Aligning Incentives Against Mass Atrocity,” 105 *Colum. L. Rev.* 1751 (2005), and Osiel, “Modes of Participation in Mass Atrocity,” 38 *Cornell Int’l L. J.* 793 (2005). In developing those articles into a book, the comments of several Harvard Law School students in the 2005 International Law Workshop, taught by William Alford and Ryan Goodman, were especially helpful. The sustained support of the T.M.C. Asser Institute in The Hague and the College of Law, University of Iowa, have also been indispensable. Valuable research assistance was provided by Louis Ebinger, Jeffrey Elkins, Bojan Lazic, David Osipovich, and Duvel Pierre, Christopher Shaw, Benjamin To, and Helen Yu.

² David Luban, “Modes of Participation,” unpublished manuscript, 2005.

offenses (as is often the case). Prosecutors hence confess that they enjoy great discretion over how to proceed.³ This freedom should surely be exercised in light of the best understandings of how and why mass atrocity occurred.⁴

Historians and social scientists offer considerable counsel to this end, perhaps especially in identifying the particular persons bearing greatest responsibility for the most grievous wrongs. In a comparative survey of recent rebel movements, for instance, one leading scholar finds that when people are lured to insurgencies by immediate prospects for material gain – whether natural resources available at home or external funding from a foreign patron – they often commit mass atrocities because their survival and success do not greatly depend on the local communities they occupy.⁵

By contrast, when insurgent movements recruit and inspire their members on the basis of long-term grievances shared with such enviroing communities, atrocities against civilians are quite rare. Mass atrocity by rebel movements results, in other words, when leaders do not require much support from the noncombatant population to initiate and continue their struggle against the state. If infractions of the organization's formal "code of honor" do occur,⁶ the discipline of members – especially for mistreatment

³ Hassan B. Jallow, "Prosecutorial Discretion and International Criminal Justice," 3 J. Int'l Crim. Justice 145 (2005). The author, at the time, was Chief Prosecutor at the ICTR.

⁴ It is tempting to say as well that the more accurately law can reflect the real distribution of responsibility for such large-scale horrors, the more likely its conclusions will be accepted, rather than rejected as scapegoating or mythmaking. If law can find a way to get the facts right – in all their admitted complexity – its conclusions cannot be so readily dismissed, one hopes, by the often skeptical communities whose leaders are thereby impugned. This claim proves more difficult to sustain and may well reflect no more than wishful thinking. Perhaps mythmaking has a legitimate role to play, to be sure, in the societal reconstruction following mass atrocity. Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* 200–92 (1997). But this goal, when it guides the telling of a new "official story," often threatens to run afoul of inconvenient historical facts. The tension between the aims of historical accuracy and national reconciliation cannot readily be resolved by legal doctrine standing alone. Identifying the possible trade-offs that are likely involved and how they might best be managed has been the focus of considerable recent thinking. Id. *passim*; Leora Bilsky, *Transformative Justice: Israeli Identity on Trial* (2004); Ruti Teitel, *Transitional Justice* (2000); Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (2001); Marouf Hasian Jr, *Rhetorical Vectors of Memory in National and International Holocaust Trials* (2006); Nehal Bhuta, "Between Liberal Legal Didactics and Political Manichaenism: The Politics and Law of the Iraqi Special Tribunal," 6 Melbourne J. Int'l L. 245 (2005).

⁵ Jeremy Weinstein, *Inside Rebellion: The Politics of Insurgent Violence* 327–41 (2007). This study concentrates on several rebel organizations in Peru, Mozambique, and Uganda, but looks further afield to many other such movements.

⁶ Id. at 127.

of civilians – has been consistently more effective within the second type of insurgent organization than the first. Authority is also less centralized in this second variety of rebel group.⁷

Empirical regularities of this sort will prove pertinent to how the law of “superior responsibility” – by which leaders are held responsible for their followers’ crimes – should apply in a given case. At the very least, such regularities will bear on the credibility of evidence, about where control actually resided and what purposes it sought, offered by prosecution and defense in particular trials. The factual patterns uncovered by this social science, however, are complex and their legal implications are by no means transparent. For instance, “although many opportunistic groups” – the first, atrocity-generative variety of an insurgent organization – “exhibit a high degree of centralization in military command, much of the violence for which they are responsible is committed in a decentralized fashion as a result of a culture of indiscipline – one that goes unpunished by local, rather than national, commanders.”⁸ Also, each incident of mass atrocity displays certain features unique to it, often relevant to the assessment of those implicated at various levels of the organization responsible.

The most fundamental question such morally relevant complexities present is whether law can comprehend and conceptualize mass atrocity with enough clarity and precision. This issue arises even before political constraints impose themselves, constraints often preventing the legal system from acting on any such comprehension. Revering precedent, we lawyers are tempted to follow well-trod pathways, developed in redress of more garden-variety criminality. This way of thinking has led many nonlawyers to wonder whether the peculiar contours of mass atrocity may throw up novel challenges that criminal law is incapable of meeting. In response to that skepticism, this book shows how legal responses to mass atrocity are benefiting from closer attention to the organizational patterns and causal processes by which it occurs.

There is surely no more noble aspiration than ridding the world of genocide, of violent persecution, of the slaughter of innocents in war – horrors that repeatedly plagued the twentieth century and conspicuously continue into the twenty-first. To this end, many people across the globe today place great hope in international criminal law. Courts now elaborate and refine its rules, while idealistic young people flock to its study. It provides the common vocabulary of any serious search for moral consensus across national

⁷ Id. at 38–44, 145–59, 349–50.

⁸ Id. at 350.

borders today. Unity in opposition to the conduct it proscribes virtually defines the meaning of “the international community,” insofar as one really exists.

Yet beneath the surface enthusiasm for this burgeoning enterprise, there pervades a deep undercurrent of doubt. Dictators may no longer necessarily die happily in office or in luxurious exile on the French Riviera. But their complicated trials prove interminable, allowing them to elude conviction. Victims of mass atrocity regularly resign themselves in apparent ease to reconciliation with their tormenters,⁹ moreover, if only because criminal punishment is rarely a high priority for anyone during the social and economic collapse that often accompanies regime breakdown and civil war.¹⁰

Current skepticism about law’s promise focuses on the failure of so many countries seriously to implement the ideal of transitional justice: that past crimes of former despots be addressed systematically and fairly. In the 1990s, transitional justice quickly became a norm to which postconflict states had formally to subscribe to be seen as committed to the rule of law, and therefore safe for foreign aid or investment. But follow-through by domestic legal institutions often proved incomplete, even disingenuous. Transitional justice even became a rhetorical banner under which new rulers often sought to repress legitimate political opponents.¹¹ International criminal law thereby came to be hijacked for purposes alien to its ideals.

Yet this tension between the ideal and reality of transitional justice should not lead us to minimize the very real tensions within the ideal itself. Mass atrocity proves to present more fundamental challenges that are threatening to elude law’s understanding and evaluation. Law’s critics insistently point to a series of seeming contradictions: Criminal law sees a world of separate persons, whereas mass atrocity entails collective behavior. Both victims and perpetrators act less as individuals than as members of social groups. The state normally punishes torture and homicide; here, it instead rewards these crimes, performed for official ends. A murderer usually deviates from social norms, yet conforms to them in these cases. Extreme violence, generally

⁹ Helena Cobban, *Amnesty after Atrocity: Healing Nations after Genocide and War Crimes* 128–35 (2007); Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* 118, 125 (2002).

¹⁰ *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* 325 (Eric Stover & Harvey Weinstein, eds., 2004) (reporting from survey results that their “informants told us that jobs, food, adequate and secure housing, good schooling for their children, and peace and security were their major priorities”).

¹¹ A compelling account of this development is offered by Jelena Subotić, “Decoupling International Norms: Domestic Politics of Transitional Justice Norm Diffusion,” *International Studies Association Convention paper*, March 2006.

rare, becomes commonplace. Criminal law usually highlights the defendant's deeds, treating sociopolitical context as irrelevant. The accused's contribution to mass atrocity, however, is unintelligible in isolation from many others' actions, often distant in place and time. The law generally asks what harm the accused has caused. Yet here lines of causation are multiple and muddled, agency is dispersed, labor divided. Responsibility for mass atrocity is widely shared. But its far-reaching scope often lies beyond anyone's complete control or contemplation.

The moral world that the law assumes is thus rendered topsy-turvy, its familiar furniture rearranged. The criminal law developed its conceptual repertoire to redress conventional deviance, to which individualistic notions readily apply – notions of responsibility, causal agency, intention.¹² These ideas sit uneasily, however, with the defining features of modern mass atrocity: officially endorsed, bureaucratically enforced, perpetrated by and against groups, often motivated as much by vocational obligation as personal inclination. Such atrocities must also often be addressed by international law, applied in international courts. These courts are often unresponsive to national nuances of the societies whose members they presume to judge, particularly to the widespread desire within such societies for reconciliation among former antagonists in civil war or other internal strife.

Most lawyers do not even perceive these problems, it is claimed, because doing so would admit the limits of our learning, disabling us from dominating a society's response to such pivotal events. Many observers, however, find criminal law inherently incapable of coping with these persistent perplexities.

This book argues the contrary. It shows the law's considerable resourcefulness and resilience in conceptualizing mass atrocity's myriad forms. Critics blame law's failings on its commitment to liberalism, often denigrated as "liberal legalism,"¹³ although the term is something of a caricature in that

¹² Articulating this view without endorsing it, Christopher Kutz writes, "Because individuals are the ultimate loci of normative motivation and deliberation, only forms of accountability aimed at and sensitive to what individuals do can succeed in controlling the emergence of collective harms." *Complicity: Ethics and Law for a Collective Age* 7 (2000).

¹³ This is a common term of derision in "law and society" circles, denoting the view that Western law enshrines an individualism – methodological and normative – disabling it from adequately understanding or evaluating the social conduct it presumes to judge. Stuart Scheingold, "'The Dog That Didn't Bark': A Sociolegal Tale of Law, Democracy, and Elections," in *The Blackwell Companion to Law and Society* 523, 525–32 (Austin Sarat, ed. 2004). But the liberal tradition has actually long been much more attentive than this view suggests to the social causation of personal misconduct and the desirability of its redress by means of social policy other than individual punishment. This strand of

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actual liberal thinkers are rarely cited nor their claims refuted.¹⁴ A generation ago, such a critique could only have sounded from the political left. Today, it emerges instead simply from the honest, face-to-face encounter (of one author, for instance, Mark Drumbl) with the many thousands of plebeian *genocidaires* rotting for years, awaiting trial, in Rwanda's jails.¹⁵ For another, George Fletcher, the new critique of law's liberalism emerges in a more rarefied way, from a former arch-Kantian, passionately converted – seemingly overnight and mid-life – to a steamy brew of nineteenth-century European, collectivist-Romantic social thought (the political valence of which often historically inclined to the political right).¹⁶

In rejoinder to both brands of criticism, the criminal law must offer a defense of liberalism's flexibility and continuing appeal in the face of the

social liberalism, as it is sometimes called, runs from such Victorians as Hobhouse to contemporary self-declared liberals like Paul Starr. Leonard Hobhouse, *Liberalism* (1911); Paul Starr, *Freedom's Power: The True Force of Liberalism* (2007). See also Stefan Collini, *Liberalism and Sociology: L. T. Hobhouse and Political Argument in England, 1880–1914* (1979). The prevalent methodological individualism of Anglo-American moral philosophy manifests itself not in any reluctance to judge and blame individual persons for their role in criminality that others might consider essentially collective, but rather in doubts about the defensibility of blaming collectivities as such for the wrongs of their individual members. See, e.g., Philip Pettit, "Groups with Minds of Their Own," in *Socializing Metaphysics*, F. Schmitt, ed. 167 (2003); David Copp, "On the Agency of Certain Collective Entities," 30 *Midwest Studies in Phil.* 194 (2006).

¹⁴ See, e.g., Mark Drumbl, *Atrocity, Punishment and International Law* 5, 35–41, 127–8 (2007) (attributing criminal law's limitations in confronting mass atrocity to the presuppositions of something called "liberal legality," but referencing only other critics of this enigmatic and apparently elusive intellectual adversary). Admittedly, criminal law presupposes "that each individual should be treated as responsible for his or her own behaviour" and that "individuals in general have the capacity and sufficient free will to make meaningful choices." Andrew Ashworth, *Principles of Criminal Law* 28 (4th ed. 2003). Liberals have no monopoly over such claims, however. What distinguishes the liberal view of criminal law is its normative commitment to "the principle of autonomy," which "assigns great importance to liberty and individual rights in any discussion of what the state ought to do in a given situation." *Id.* at 29. Thus, a liberal "theory of criminal responsibility ought at least to be consistent with the principle that we should respect, promote and protect autonomy." Victor Tadros, *Criminal Responsibility* 45 (2005).

¹⁵ Mark Drumbl, "Rule of Law Amid Lawlessness: Counselling the Accused in Rwanda's Domestic Genocide Trials," 29 *Colum. Human Rights L. Rev.* 545 (1998); Drumbl, "Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda," 75 *N.Y.U. L. Rev.* 1221 (2000); Drumbl, "Law and Atrocity: Settling Accounts in Rwanda," 31 *Ohio N.U. L. Rev.* 41 (2005).

¹⁶ "I am very much drawn to the idea that the guilt of the German nation as a whole should mitigate the guilt of particular criminals like Eichmann, who is guilty to be sure, but guilty like so many others of a collective crime." George Fletcher, "The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt," 111 *Yale L. J.* 1499, 1539 (2002).

collective conflagrations here at issue.¹⁷ Liberalism must rise to the challenge of mass atrocity, for although these events are so clearly at odds with liberal morality, they are also emblematic of our era. If liberal thought could not make much sense of them, it would indeed stand denuded of its claim of offering meaningful redress. Yet although social scientists and historians condemn the “inherent limits” of something they call “legal logic,”¹⁸ the law itself finds ways to adapt – albeit never effortlessly, not without fresh thinking. In its fundamental theoretical ideas no less than in its practical implementation, international criminal law is very much a work in progress. I do not at all wish to suggest that anyone has yet neatly or satisfactorily resolved the key question here assayed. Although I will defend particular answers to it, my chief aim is rather to convey to nonlawyers (and lawyers specialized in other matters) a vivid sense of the refined professional debate and of the field’s advancement through close engagement with some unconventional ideas about how law affects conduct through incentives and about how to understand the philosophical puzzle of shared responsibility. My aim is to deepen analysis and understanding of the problems, on their own terms, as much as to advance the details of any particular solutions to them.¹⁹

In postconflict societies, there often will be good reason, to be sure, not to rely primarily on criminal law in redressing large-scale wrong. These are mostly reasons of political prudence, however, not limitations on law’s inherent capacity to comprehend and evaluate the relevant events. We should thus never reject criminal prosecution on the basis of internal inadequacies – however they are characterized.

The law’s limits lie not within but beyond it, in other words – most prominently in the enduring power of potential defendants, whose threats of future violence generate demands for social peace. Such power eventually wanes, however, often well before its holders’ deaths, prompting renewed public demands for prosecution even decades after the events, as prominently occurred in Chile and Argentina, for instance. As in those two

¹⁷ Others, especially in western Europe, are similarly committed to this objective. See, e.g., Katrina Gustafson “The Requirement of an ‘Express Agreement’ for Joint Criminal Enterprise Liability: A Critique of *Brdanin*,” 5 J. Int’l Crim. J. 134, 157 (2007) (“It is not necessary to deviate from basic criminal law principles of individual responsibility in order to attribute the appropriate degree of responsibility to these individuals”).

¹⁸ The author has heard such terms casually bandied about, for instance, at a conference on transitional justice in May 2008, at L’École de Hautes Études en Science Sociales, Paris.

¹⁹ In support of this stance, see Austin Sarat & Susan Silbey, “The Pull of the Policy Audience,” 10 L. & Policy 97 (1988) (contending that legal sociology should retain considerable intellectual independence, in its explanatory concerns, from efforts to influence immediately the content of law and public policy).

countries, earlier amnesties may then be overturned on legally acceptable grounds.²⁰

Postconflict societies may frequently favor alternatives to criminal trials, of course. Truth commissions, victim reparations, and vetting of perpetrators from public office can prove valuable, but serve other purposes and reveal themselves, on close inspection, as no panaceas.²¹ The heavy focus on such institutional innovations in current thinking about transitional justice should not diminish our appreciation of criminal law's practical availability, moral defensibility, and analytical coherence in analyzing and grappling with these events. To this end, we should become more fully aware of its enduring potential and practical dexterity as an intellectual resource at such times.

The argument herein for collective sanctioning of military officers, for instance, arises from widespread frustrations with the two reigning legal alternatives of civil liability for entire states and criminal liability for individual persons.²² International law's efforts to prevent and punish mass

²⁰ In Chile, judges have been investigating twenty-five hundred cases, issued five hundred indictments, and convicted more than two hundred and fifty persons for crimes arising from human rights abuse during military rule. Fundación de Ayuda Social de las Iglesias Cristianas, Estadísticas, July 2008. In Argentina, where far more people were "disappeared" at the juntas' hands, more than thirty people have been sentenced for such offenses and dozens more prosecutions are pending. Centro de Estudios Legales y Sociales, "Juicios: más de mil imputados por crímenes de lesa humanidad," July 25, 2008. "União assume a defesa de acusados de tortura na ditadura," oglobo.globo.com/pais/mat/2008/10/21/uniao_assume_defesa_de_acusados_de_tortura_na_ditadura-586060736.asp; "Chile: Pinochet Official Sentenced," www.nytimes.com/2008/07/01/world/americas/01briefs-PINOCHETOFFICIAL.html?_r=1&scp=1&sq=Chile%20Pinochet&st=cse; "Chile: Pinochet Security Forces Arrested," query.nytimes.com/gst/fullpage.html?res=9901EED91E38F93BA15756C0A96E9C8B63&scp=3&sq=Chile%20Pinochet%202008&st=cse; "Governo aprova indenização para ex-ministro Nilmário Miranda," <http://www1.folha.uol.com.br/folha/brasil/ult96u487098.shtml>; "Comissão de Anistia quer pesquisar ligações entre empresas e ditadura," <http://www1.folha.uol.com.br/folha/brasil/ult96u470074.shtml>; "Parlamentares pedem para Procuradoria investigar ex-tenente do Exército por tortura," <http://www1.folha.uol.com.br/folha/brasil/ult96u474710.shtml>; "Diputados oficiales piden reabrir juicio por crimen de Víctor Jara," <http://www.emol.com/noticias/nacional/detalle/detallenoticias.asp?idnoticia=304856>.

²¹ On some of the dangers of truth commissions, see Mark Freeman, *Truth Commissions and Procedural Fairness* (2006); of personnel vetting, see Adam Michnik, "Waiting for Freedom, Messing It Up," N.Y. Times, March 25, 2007, at A13 (criticizing the perceived excesses of Polish lustration). On the moral complexities and political complications involved in victim reparations programs throughout the world, see *The Handbook of Reparations* (Pablo de Greiff, ed., 2006).

²² The strengths and weakness of these alternatives are assessed by Thomas Franck, "State Responsibility in the Era of Individual Culpability," unpublished paper; Eric Posner & Alan Sykes, "An Economic Analysis of State and Individual Responsibility under International Law," 9 Amer. L. & Econ. Rev. 72 (2007).

atrocity have shifted decisively in recent years from the first of these remedies to the second. Among the several good reasons for this reorientation is that responsibility for mass atrocity is never equally shared among all citizens of the offending state. Yet sanctioning the state as a collective entity lets the moral and pecuniary burden fall equally on them all. The threat of such collective liability also fails to induce state leaders to prevent and punish mass atrocity when its perpetrators themselves control the state. The burden of future liability then falls only on their successors.

Yet the switch to individual criminal liability gives rise to difficulties of its own. Responsibility for mass atrocity, although not *equally* shared among all citizens, is nonetheless very *widely* shared, in ways that make it difficult to identify, with satisfactory precision, the nature and extent of any individual defendant's culpability and contribution, distinguishable from other participants, including many who will avoid prosecution. That problem is the central focus of this study, which contends that collective sanctions directed against responsible groups – intermediate between the state and the individual – offer a workable middle way.²³

A NOTE ON AUTHORIAL VOICE

Writing about mass atrocity, even the legal response to it, inevitably requires an author to establish a suitable measure of distance – moral and emotional – from the “raw material,” which often proves very raw indeed. One's first impulse may be to dive into the wreck, striving to feel and reproduce the victims' agony and righteous indignation, and perhaps too the perpetrators' zealous fury. How else to convey the human experience of mounting distress amidst approaching disaster, the vertiginous awfulness, the sheer terror of such times?

This strategy poses twin risks, however. It may merely titillate the reader with the vicarious effervescence of a theme-park ride.²⁴ One sells more books this way, but only by descending to the prurience of a Hollywood disaster flick. We live in an age, after all, where glimpses of a revolution's greatest savagery become ready grist for coffee-table best sellers. In the U.S. Holocaust Memorial Museum, by welcome contrast, the graphic depiction of mass death by gas chamber skirts sensationalism, being rendered only in dioramic miniature; the victims – arms raised in gasping delirium – stand

²³ Such sanctions would be combined with criminal trials of persons most blameworthy. See Chapters 9 and 10.

²⁴ This and ensuing paragraphs are inspired by Martin Jay, “Diving into the Wreck: Aesthetic Spectatorship at the Turn of the Millennium,” in his *Refractions of Violence* (2003).

scarcely two inches tall. How deeply are most readers, in any event, really prepared to accompany an author into the belly of such a beast?²⁵

Diving into the wreck also risks evoking a simple sympathy for the victims of mass atrocity and a corresponding wrath for perpetrators that paints too reassuring a portrait of “good guys” and “bad guys.” The resulting picture sits uneasily with any serious effort at understanding the relevant complexities – moral and explanatory – that come to the fore in all but the most superficial discussions. Stray too close to the fire, then, and one is quickly immersed in the wrenching passions of the calamity itself. Effacing the line between spectacle and spectator, this approach easily ends as low entertainment, high melodrama, or both.

Stray very far from the horror, however, and one soon finds oneself gazing down on its frail human participants from too high above the battle, at a contemplative remove. No hint remains of the messy, sanguinary sources of it all: the torn flesh and tears, the loathing and pity. There is comfort in the safety of spectatorial distance, to be sure, and the prospect for ethical judgment it may afford. But we surely recoil from any tranquil taxonomizing of mass atrocity, an academic exercise more suitable to a collection of sea shells.

Most legal scholarship on the subject is written just so, in a sanitizing spirit, with seeming indifference to the world’s true nuttiness. This standpoint lets us tell a heartening story about the ever-widening scope of humanitarian sensibility, a Whig history of moral progress through the international rule of law. In fact, we jurists secretly almost welcome every new conflagration as a chance to advance our legal schemes for humankind’s improvement. We forgive ourselves with the reminder that a crisis is a terrible thing to waste.

But such high-minded aloofness from our distasteful, even grisly subject matter only ensures that we are read exclusively by fellow specialists in this already arcane subfield of international law, itself a most precious, insular enclave.²⁶ The dry land on which such writers purport to stand is ultimately an illusion, in any event, for as they write about the most recently completed

²⁵ One of my earlier efforts seeks to take the reader far into the perpetrators’ worldview. Mark Osiel, *Mass Atrocity, Ordinary Evil, and Hannah Arendt: Criminal Consciousness in Argentina’s Dirty War* 25–61, 104–30 (2001).

²⁶ Within the enormous scholarship on the law of armed conflict, for instance, one finds almost no serious effort to grapple with relevant details of the military technologies, operational issues, or tactical challenges essential to applying such law intelligently and realistically. For a rare exception, see Richard J. Butler, “Modern War, Modern Law, and Army Doctrine: Are We in Step for the 21st Century,” *Parameters: U.S. Army War College Quarterly* (Spring 2002); cf. Mark Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War* (1999).

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catastrophe, their minds race ahead to the next, incipiently under way – Darfur, the Congo, Chechnya, Georgia – and the implications their legal arguments may have for its redress. (This is gently reinforced by delusions of grandeur, of course.) The likely inaction of “the international community” to which they prominently belong distinguishes them from truly innocent bystanders. Any hope of impartial authority, of the magisterial repose or scientific detachment it might bestow, eludes them. Like the shipwrecked passengers themselves, they too are adrift on high seas.

At what measure of distance or proximity, then, should one stand when speaking and writing of such events? How to strike an authorial posture that is scholarly, yet humane; “disinterested,” yet not disengaged? How to represent the victims’ suffering, for instance, in a way that is neither luridly salacious nor unduly solicitous and sycophantic? For the victims sometimes turn out to be perpetrators as well. How to render the perpetrators’ self-understanding at once as supremely malevolent yet humanly intelligible? How to depict the zealotry of international prosecutors in both its sincere humanitarianism and its professional self-aggrandizement?

Whether I have succeeded in meeting this challenge any better than others is for the reader to say. But it is this aspiration, at least, that impels and informs my continuing efforts (over the course of five volumes) to educate the law’s response to mass atrocity with greater understanding of how such events occur and how alternative legal responses to them implicate the interests of relevant groups,²⁷ including military officers and the lawyers who both advise and prosecute them. Lawyers, in particular, turn out not to be the disinterested instrument through which the idea of human rights realizes itself in history, as some studies of “advocacy networks” imply.²⁸ Humanitarianism’s lofty aims gain a purchase on political reality, this book shows, only through the earthier claims and counterclaims of legal and military professionals.

The raging disagreements within humanitarian law today do not simply reflect diverging ideals of international order or competing normative visions of a better world, in other words. They also disclose a new and shifting vocational field – international criminal law – within which various professionals struggle to establish and defend their expertise and, in so doing, secure a commodious place for themselves at the big table. My main

²⁷ The present volume is the fifth in a series: *Mass Atrocity*, *Collective Memory*, op.cit., *Obedying Orders*, op. cit.; *Ordinary Evil*, op. cit; *The End of Reciprocity: Terror, Torture, and The Law of War* (2009).

²⁸ Nicolas Guilhot, *The Democracy Makers: Human Rights and International Order* 166–87 (2005).

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point here, however, is not to reduce the genuine concern of humanity's defenders to a fig leaf over raw material interests, but rather to begin to appreciate disinterestedness as itself a type of what Max Weber called "ideal interest" (that is, in valorizing ethical universals over local attachments),²⁹ and to investigate the social conditions of its advent and apparent ascendance within world politics today.³⁰

²⁹ Id. at 26.

³⁰ This approach draws inspiration from Pierre Bourdieu, *Méditations Pascaliennes* 148 (1997) and especially Max Weber, "The Social Psychology of World Religions," in *From Max Weber* 267, 280–1 (H. H. Gerth and C. Wright Mills, eds. & trans.) 1948.