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CHAPTER 1

Extraordinary Crime and Ordinary Punishment: An Overview

Beginning on April 8, 1994, Tutsi escapees – hunted and terrified – fled to the Catholic church in Nyange, a rural parish in western Rwanda. They sought shelter from attacks incited by Hutu extremists. The attackers were determined to eliminate the Tutsi as an ethnic group and killed individual Tutsi as a means to this end.

The Nyange church soon filled with over two thousand huddled Tutsi, many of whom were wounded. These Tutsi initially thought the church, as a house of God, would be a refuge. In fact, they had been encouraged to hide there by parish priests. The priests, however, decided to demolish the church. Accordingly, workers were engaged to operate a mechanical digger.

On April 16, 1994, a worker named Anastase Nkinamubanzi bulldozed the church with the Tutsi crammed inside. The roof crashed down. A few Tutsi survived the razing of the church. Nearly one-third of the local Hutu population assembled to finish them off. They did so with machetes, spears, and sticks.

Four years later, a Rwandan court prosecuted six individuals on charges of genocide and crimes against humanity for the Nyange church massacre.[1] Nkinamubanzi was among the accused. From the case report, we learn that he was born in 1962, was a bachelor, and worked as a heavy equipment driver.[2] Nkinamubanzi had no assets. He had no prior criminal record. The case report also sets out, through the sterility of legal prose, the evidence underpinning the accusations that he mechanically leveled a church with two thousand Tutsi trapped inside. After demolishing the church, Nkinamubanzi calmly asked the priests for the promised compensation for the public service he had provided.[3]

The court found Nkinamubanzi guilty of most of the charges brought against him, including genocide. Upon conviction, he was sentenced to life imprisonment. Although Nkinamubanzi admitted he bulldozed the church bursting with escapees, the court did not formally accept his guilty plea, the details of which it found inexact. Still, the court was influenced by his request for forgiveness. It considered that request as a mitigating factor. Two other defendants, who were church leaders, received the death penalty at trial; these sentences have not been carried out.

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As for the Nyange church, over a decade later "all that is left of the massacre site are heaps of earth and concrete."[4] And, as for Nkinamubanzi, media accounts indicate that – stricken with tuberculosis – he is serving his sentence in a Rwandan prison.[5]

Many ordinary people in Rwanda were like – or, at least, a little like – Nkinamubanzi; many others are like him in many other places, countries, and continents; moreover, many more have the potential to become like him in the future. Ordinary people often are responsible for killing large numbers of their fellow citizens, whether by their own hands, by helping the hands of others, or by encouraging the handiwork. Some revel in the killings.[6] Others simply play along nervously, grimacing while they administer the deathblows or fidgeting while they distribute a list of targeted victims. Many simply think they are doing their patriotic duty and fulfilling their civic obligation, which they satisfy with pride, *Pflicht*, composure, and the quiet support of the general population. They are the exemplars of Hannah Arendt's "banality of evil."[7] That said, those leaders who give the orders to kill or in whose name the killings are undertaken also promote banality. After all, it is they who normalize violence and make it a way of life. Acting as what Amartya Sen describes as "proficient artisans of terror,"[8] these leaders ensconce atrocity as civic duty and, thereby, become conflict entrepreneurs.

So, what exactly do we do with individuals, leading a group or acting on its behalf, who murder tens, hundreds, thousands – or more – fellow members of humanity *because of* their membership in a different group? Should we subject these killers to the process of law? If so, what kind of law? What punishment is appropriate? What about the collective forces that provide the killers with a support network and social validation? Should we sanction those, too? If so, how?

This book addresses the reasons that extant criminal justice institutions – sited domestically as well as internationally – give for punishing perpetrators of mass violence and also investigates whether the sentences levied by these institutions support these penological rationales. Little scholarship has been undertaken in this area. In fact, whereas sophisticated work explores the substantive crimes,[9] the formation of institutions and their independence,[10] and the impact of prosecuting these crimes on collective reconciliation and political transition,[11] only isolated – and often conclusory – analysis exists concerning what institutions say they are accomplishing by punishing and, most importantly, whether the punishments issued actually attain the goals they are ascribed. Leading treatises on international criminal law devote limited space to punishment and sentencing.[12] The project that follows begins to address this lacuna in the scholarly literature. With this analysis as a base, the project then pushes in a normative direction by inquiring how offenders should be punished and how extant punishment schemes might be enhanced. In this first chapter, I provide an overview of the arguments advanced in this book.

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(1) EXTRAORDINARY CRIME

The liberation of the concentration camps at the end of the Second World War uncorked a torrent of emotions. For the survivors, these emotions scaled a wide spectrum. Primo Levi and Viktor Frankl poignantly recorded how survivors experienced relief, fear, and loneliness while engaged in a painful search for meaning and the relevance of their survival.[13] For the liberating soldiers, there was repulsion and shock; for the returning Axis combatants, shame, denial, and disappointment.

The Allied rulers divided about what to do with the Nazi leaders. U.K. Prime Minister Churchill sought their quick dispatch, including by extrajudicial execution, owing to the fact that their guilt was so evident that there was no need for judicial process to establish it.[14] The Soviet Union's Stalin sought similar ends, but following short show trials. U.S. President Truman, encouraged by Secretary of War Stimson, envisioned careful trials to narrate to all the value of law and the depth of the defendants' culpability.

This latter view prevailed, leading not only to the Nuremberg trials, but also to the genesis of an influential paradigm. This paradigm cast Nazi crimes as extraordinary in their nature and, thereby, understood them not only as crimes against the victims in the camps or the helpless citizens in the invaded countries, but also as crimes in which everyone everywhere was a victim.[15] This understanding gave two distinct groups a forum to express outrage: the international community and the actual individual survivors. The fact that these groups are not necessarily allied foreshadows the complicated, yet largely undeveloped, victimology of mass atrocity.

Arendt explored Nazi crimes and their relationship with 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.[16] 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.[17]

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 for the condemnation of extreme evil was the criminal law. And, in fact, the criminal law has gained ascendancy as the dominant regulatory mechanism for extreme evil. This ascendancy began with Nuremberg and has, in the years since, gained currency and become consolidated.

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."[18] This did not mean that this 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.[19] These

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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*.[20] I use both of these phrases in this book given that they reflect dominant understandings of the wrongdoing and wrongdoers. Those acts of atrocity characterized as extraordinary international crimes include crimes against humanity (an appellation that neatly embodies our shared victimization), genocide, and war crimes.[21]

The definitions of these crimes have evolved over time to become quite complex. Stripped to the essentials, though, crimes against humanity include a number of violent acts "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[22] Genocide is defined to include a number of acts (including killing and causing serious bodily or mental harm) committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such.[23] The special intent of genocide distinguishes it from crimes against humanity. War crimes represent the behavior that falls outside of the ordinary scope of activities undertaken by soldiers during armed conflict.[24] Whereas killing the enemy is part of a soldier's ordinary activity, torture, inhumane treatment, or willful murder of civilians is not. Launching attacks that are disproportionate, that fail to discriminate between military and civilian targets, or that are not necessary to secure a military advantage also can constitute war crimes.

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 on discriminatory grounds.[25] 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 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.

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.[26] International criminal justice

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largely is operationalized through criminal tribunals. Courtrooms have gained ascendancy as the forum to censure extreme evil. 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.[27] A number of select guilty individuals squarely are to be blamed for systemic levels of group violence. At Nuremberg, some of the guilty were hung. 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 preferred 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.

To follow Judith Shklar, legalism is the view that "moral relationships [. . .] consist of duties and rights determined by rules."[28] When it comes to atrocity, however, the application of legalism becomes narrower. It does so in two ways. One is disciplinary. The turn is not to law generally to promote justice in the aftermath of terribly complex political violence but, rather, most enthusiastically to the criminal law. I argue that the preference for criminalization has prompted a shortfall with regard to the consideration and deployment of other legal, regulatory, and transformative mechanisms in the quest for justice.[29] The second narrowing is sociocultural. The kind of legalism, voiced through the criminal law, which has become operative is one that embodies core elements of liberalism, including, as Laurel Fletcher notes, the tendency to "locate the individual as the central unit of analysis for purposes of sanctioning violations."[30] Liberalism originates in and underpins the legal structures of Western societies. Accordingly, when it comes to atrocity, the justice narrative is deeply associated with liberal legalism rooted in the ordinary procedure and sanction of the criminal law of Western states. Although I share Fletcher's definition of liberal legalism as "refer[ing] to the legal principles and values that privilege individual autonomy, individuate responsibility, and are reflected in the criminal law of common law legal systems,"[31] I would add that these values also are shared by civil law legal systems suggesting, at a deeper level, the difficulty in deracinating them from Western social and legal thought.[32] The ascendancy of these modalities of justice thereby represents the ascendancy of specific forms of procedure and sanction, which often become applied to societies where such forms are neither innate nor indigenous.

In this book, at times I turn to phrases such as *liberal legalist* or *Western legalist* to describe the dominant method of determining responsibility and allocating punishment in the wake of atrocity. At times, I also turn to the phrase *ordinary criminal law and process* as shorthand for the domestic law and process regulating common crime in liberal states. I recognize the complex philosophical debates on liberalism generally. This book is not a treatise on liberalism. Nor

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is it a broadside thereof. Nor is it a critique of Western philosophical traditions generally. Many of the philosophical approaches I find compelling, for example, cosmopolitanism, pluralism, and democratic theory, associate with liberal Western traditions. My goal is not to assess the merits of liberalism as a broad, and often abstractly defined, philosophical worldview. Rather, my goal is much more modest. I intend to investigate the effectiveness of criminal trials and punishment, as presently conducted internationally and nationally, as responses to atrocity. I also investigate the effects that the embrace of criminal prosecution and punishment has on other potential approaches to regulate, sanction, and prevent atrocity. Neither legalism nor liberalism can be fully disentangled from these investigations insofar as they both animate the preference for prosecution and punishment as presently constituted.

(II) ORDINARY PROCESS AND PUNISHMENT

A paradox emerges. International lawmakers have demarcated normative differences between extraordinary crimes against the world community and ordinary common crimes. However, despite the proclaimed extraordinary nature of atrocity crime, its modality of punishment, theory of sentencing, and process of determining guilt or innocence, each remain disappointingly, although perhaps reassuringly, ordinary – so long as ordinariness is measured by the content of modern Western legal systems.

At the international level, there has been a proliferation of new legal institutions to adjudge mass violence. These institutions have become legitimated as appropriate conduits to dispense justice and inflict punishment.[33] A number of justifications are evoked in this regard. One is deontological, namely that the crimes are so egregious that they victimize all of us and, hence, must be condemned internationally; it would be unjust for a particular state's courts to "confiscate" these crimes.[34] Other justifications are pragmatic. Extraordinary international crimes often trigger security concerns, threaten regional stability, affect the viability of groups, and induce cross-border refugee movements. In a very real sense, these crimes therefore implicate what Larry May calls an "international interest."[35] International institutions also derive legitimacy because, in the wake of atrocity, national institutions may be annihilated, corrupt, politicized, biased, or too insecure. Accordingly, but for the creation of an international institution, in many instances no justice would be effected.

That said, 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, which are or increasingly look like Western criminal courts, and which rely on jurisdictional bases such as territoriality, nationality, or universality.[36] International institutions serve as tremendously important trendsetters for their national and local counterparts.[37] Therefore, the distinctions between international and national institutions are far from watertight.[38]

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Newly created international institutions include the International Criminal Court (ICC, 2002),[39] ad hoc tribunals for Rwanda (International Criminal Tribunal for Rwanda, ICTR, 1994)[40] and the former Yugoslavia (International Criminal Tribunal for the Former Yugoslavia, ICTY, 1993),[41] the Special Court for Sierra Leone (SCSL, 2000),[42] and a variety of hybrid panels or chambers. Hybrid institutions divide judicial responsibilities between the United Nations, or its entities, and the concerned state.[43] Strictly speaking, they are, therefore, internationalized legal institutions instead of purely international legal institutions; that said, in the interest of simplicity, I consider them under the rubric of international institutions. A hybrid model currently operates in Kosovo;[44] one has ceased operations in East Timor;[45] another is emerging in Cambodia.[46]

There is considerable homogeneity among these international institutions. All of them largely incorporate ordinary methods of prosecution and punishment dominant in liberal states. This incorporation is noted but does not raise many eyebrows within the community of international criminal law scholars, including among its most distinguished members.[47] 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.[48] However, this harmonization is far from a genuine amalgam that accommodates the sociolegal traditions of disempowered victims of mass violence – largely from non-Western audiences – who already lack a voice in international relations.[49] 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.

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"[50] in order to avoid, in Justice Jackson's famous admonition, "pass[ing] [. . .] defendants a poisoned chalice."[51] For ICTY President Meron, "[t]here can be no cutting corners" when it comes to due process else the tribunal ceases to be credible to the public.[52] Due process rights, which apply to persons accused of common crimes in liberal states, now inure to the benefit of persons accused of extraordinary international crimes often committed far away from these states. Among legal scholars, there is little, if any, questioning of the suitability of this transplant. *A contrario*, 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 have elsewhere underscored the importance of both of these phenomena.[53] I merely suggest that justice is not a recipe; and due process is not a magic ingredient.

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This replication of the process, sanction, and rationales of ordinary criminal law is reassuring to some, insofar as the familiar often is comfortable. But this replication also is vexing, in that the perpetrator of mass atrocity fundamentally differs from the perpetrator of ordinary crime. The fulcrum of this difference is that, whereas ordinary crime tends to be deviant in the times and places it is committed, the extraordinary acts of individual criminality that collectively lead to mass atrocity are not so deviant in the times and places where they are committed. Assuredly, as I explore in Chapter 2, this is not the case for *all* incidents of atrocity. However, as atrocity becomes more widescale in nature, and more popular, it becomes more difficult to construct participation therein as deviant. Insofar as international criminal law claims a regulatory interest in the most serious crimes of international concern, it concerns itself with the kind of violence that is most difficult to reconcile with deviance theory. Although widespread acts of extraordinary international criminality transgress *jus cogens* norms, they often support a social norm that is much closer to home.[54] In such cases, participation in atrocity becomes a product of conformity and collective action, not delinquency and individual pathology. This latter reality, which I initially came to appreciate experientially through my work with detainees in Rwanda,[55] brings to light complex and discomfiting issues of human agency. Although this deep complicity cascade does not diminish the brutality or exculpate the aggressor, it does problematize certain tropes central to international criminal law such as bystander exoneration, individual autonomy, and the avoidance of collective sanction. The complicity cascade also involves the misfeasance or nonfeasance of foreign governments and international organizations during times of atrocity, thereby imperiling the moral legitimacy of pronouncements of wrongdoing by foreign and international judges elected by and representing these putatively neutral governments and organizations. What is more, many extraordinary international criminals, who engaged in acts of unfathomable barbarity, are able to conform easily and live unobtrusively for the remainder of their lives as normal citizens. The examples of Nazis who fled Germany following World War II to take up residence elsewhere in Europe or the Americas stand out. This ability to fit in suggests something curious, and deeply disquieting, about atrocity perpetrators: namely, their lack of subsequent delinquency or recidivism and their easy integration into a new set of social norms.

Chapter 2 examines distinctions between the perpetrator of mass atrocity and the perpetrator of ordinary common crime. In this regard, Chapter 2 considers perspectives that contend that distinctions between the extraordinary and ordinary criminal are not so apparent and, in fact, may be quite blurred. In particular, I give careful consideration to: (1) certain ordinary common crimes that share collective characteristics; and (2) sophisticated new research on individual participation in civil war that suggests that not all participants are motivated by political goals, but that some are motivated by private goals in a manner that resembles the behavior of the common criminal. Ultimately, I conclude that there remains a materially significant difference between the perpetrator of discrimination-based atrocity and the ordinary common criminal such that the

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application of punishment designed for the latter to the former is ill fitting and, what is more, that this ill fit accounts for a number of the penological shortfalls of the project of international criminal law. This finding does not eviscerate the usefulness of accumulated knowledge regarding the common criminal in terms of how we consider punishing the extraordinary international criminal. Rather, it suggests that we need to transcend this knowledge instead of relying heavily upon it. Moreover, thinking hard about the perpetrator of atrocity could help us better understand the ordinary common criminal and the extent to which extant punishment schemes for common criminals (already subject to considerable criticism) can better attain their own penological objectives.

Chapter 2 also explores tensions within ordinary criminal law between individualism as a first principle[56] and the reality that ordinary criminal law exceptionally turns to notions of vicarious liability and collective responsibility that, *prima facie*, run contrary to the ethos of individual agency.[57] Paradoxically, however, even though international criminal law responds to conduct that is much *more* collective in nature than that faced by ordinary criminal law, it evokes a *similar* rhetorical archetype of individual agency.[58] This leads to deep tension and doctrinal tautness.

Despite the fact that the suitability of ordinary criminal process for collective acts of atrocity cannot be assumed, and is in fact problematic, newly created punishing institutions benefit from significant levels of enthusiasm. The turn to criminal trials to promote justice for atrocity has acquired striking support among scholars and policymakers. Payam Akhavan and Jan Klabbers are right to observe that many legal scholars ascribe lofty transformative potential to atrocity trials.[59] There is a sense that conducting more criminal trials in more places afflicted by atrocity will lead to more justice, so long as those trials conform to due process standards. Optimism regarding the potential of international criminal tribunals also echoes, albeit with greater circumspection, in other scholarly communities ranging from historians to moral philosophers.[60]

Legal practitioners, too, share this enthusiasm.[61] International human rights activists also are enthusiastic partisans and, according to William Schabas, thereby have "adjusted [their] historic predisposition for the rights of the defense and the protection of prisoners to a more prosecution-based orientation."[62] Political actors, such as states and international organizations (for example, the United Nations) – along with nongovernmental organizations and development financiers – stand behind international criminal tribunals. Even while opposing the ICC and shrinking the role of criminal law in the "war on terror," the U.S. government elsewhere propounds legalist prosecution, punishment, and incarceration for individual perpetrators of mass atrocity. The United States has supported temporary international criminal tribunals from Nuremberg in 1945 to the ICTR and ICTY today, and atrocity prosecutions in general, as exemplified by the Saddam Hussein trial.[63] Many of the substantive international crimes (and principles of individual penal responsibility) punishable by the Iraqi High Tribunal (whose Statute was drafted with considerable U.S. assistance) track those of the Rome Statute of the ICC. U.S. opposition to the ICC does not

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focus on the appropriateness of its methods, but, rather, on the independence of the institution and the prospect that U.S. soldiers, officials, or top leaders might become its targets.[64]

In short, faith on the part of so many activists, scholars, states, and policymakers in the potential of prosecution and incarceration has spawned one of the more extensive waves of institution-building in modern international relations. I believe the time has come to pause and reexamine this faith, even if just for a moment. I argue that prosecution and incarceration is not always the best way to promote accountability in all afflicted places and spaces. In fact, my interviews of perpetrators and survivors in Rwanda and experiences with victims of internecine violence in Afghanistan suggest that the structural simplicity pursued by the prevailing paradigm of prosecution and incarceration squeezes out the complexity and dissensus central to meaningful processes of justice and reconciliation.[65]

To be sure, some constituencies (for example, international relations theorists of the realist school) express considerable reserve regarding the merits of international criminal law and its institutional operationalization. According to the realist conception, law should do no more than promote cooperation when states find this to be in their best interests. Law certainly should not redistribute power. Nor should it attempt to impose moral limits on politics. For realists such as Carl Schmitt, such an imposition only makes politics crueler.[66] Other realists, for example, George Kennan, criticize the "legalistic approach to international affairs" because this approach "ignores in general the international significance of political problems and the deeper sources of international instability."[67] Eric Posner, John Yoo, and Jack Goldsmith currently import this view into the legal academy under the auspices of rational choice theory.[68] Other scholars, in turn, have compellingly demonstrated weaknesses that inhere in this importation.[69]

There is middle ground, which I hope to cultivate, between the proponents and the naysayers. This middle ground recognizes – but does not romanticize – the potential of atrocity trials; it also recognizes the limits to the criminal law's ability to rationalize complex social phenomena. One of my goals is to offer a critical perspective rooted in criminology, victimology, and especially penology that supports the universal goal of accountability for extraordinary international criminals and the denunciation of their universal crimes of group discrimination, but which expresses concern that dominant procedural and institutional methodologies fall short in terms of legitimacy and effectiveness.[70] I believe this critique is central to developing a sophisticated understanding of social control at the global level for those who breach the global trust. Furthermore, I hope to look beyond the criminal law to consider the role that law generally, as well as other regulatory initiatives, can play in promoting justice following atrocity. In this regard, I hope to pursue an encouraging but tempered search for law's potential. The search for this potential begins with a review of the existing accomplishments of international criminal law in sentencing extraordinary international criminals.

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