University of Glasgow

Shattering Nuremberg: The Holocaust and Law's Response to Atrocity

Professor Laurence Douglas,
Professor of Law, Jurisprudence & Social Thought.,
Amherst College.

The Eighth University of Glasgow Holocaust Memorial Lecture
22 January 2008

Shattering Nuremberg:

The Holocaust and the Law's Response to Atrocity

Lawrence Douglas
James J. Grosfeld Professor
Department of Law, Jurisprudence & Social Thought
Amherst College

University of Glasgow
22 January 2008

Please do not quote without the author's permission

***

The fabric of international law has been radically and irrevocably changed as a result of its contact with atrocity – first in the form of Nazi crimes, and more recently in the shape of atrocities in the Balkans and genocide in Rwanda. Unfortunately the creative effort to gain legal dominion over acts of atrocity has not been matched by similar creativity devoted to examining and theorizing the purposes served by prosecuting the perpetrators of such acts. In today's talk, I want to argue that the bold promise of international criminal justice can best be fulfilled by tying perpetrator trials to the law's didactic function: its utility as a means of serving the interests of history and memory in communities riven by extreme crimes.

The Nuremberg Paradigm

At its most basic, the contact with atrocity has led to a paradigm shift in the basic model of criminality. At the most basic level, this has led to a paradigm shift in the basic model of criminality. In the familiar domestic national paradigm, law views criminal behavior

as a deviant act harmful to community norms and interests. In this model, the culprit characteristically is an individual, and it is the state that intervenes as the accuser and as the agent for enforcing and defending violated norms of community order. The state, then, has classically been seen as the locus of legality – in certain positivist accounts, this is true by definition – and so has been insulated from domestic and international interference by prerogatives of immunity.

Perhaps, then, the clearest way in which the contact with atrocity has changed law is by puncturing the shield of sovereignty. Today we accept without argument the idea that state actors responsible for atrocities should have to answer for their conduct in courts of criminal law – be they domestic, international or hybrid tribunals. But we run the risk of forgetting how deeply radical this idea was before Nuremberg. Sovereignty: the plenary power of the nation state, articulated in the political theory of Hobbes, enshrined in the Treaty of Westphalia – this foundational principle was widely seen before Nuremberg as an absolute bar to international prosecutions. I don't want to overstate the *practical* significance of the puncturing of the shield of sovereignty. Sixty years after Nuremberg, the shield remains mighty strong – from the perspective of human rights lawyers, frustratingly so. Yet the *conceptual* shift has been dramatic.

We get a clearer sense of the importance of this conceptual shift when we look more closely at the four foundational international crimes that can puncture the shield of sovereignty: crimes against the peace, war crimes, crimes against humanity, and genocide. Of these, crimes against the peace may seem the most anomalous inasmuch as it has never acquired a coherent definition and will only be justiciable before the fledgling International Criminal Court if and when a satisfactory definition can be agreed

upon – most probably never. But if we turn the clock back to Nuremberg, crimes against the peace was the gravamen of the prosecution's case – it was understood as *the* principal international crime. This, in fact, made perfect sense from the perspective of the classic theory of sovereignty. Definitional problems aside, the against the peace, by criminalizing the unprovoked attack of one nation on another, can be seen as deeply conservative, an attempt to safeguard and not usurp the system of sovereign nation states. The jurisprudential theory of Nuremberg can be stated thusly: on certain rare occasions, such as in the case of unprovoked warfare, it may be necessary to puncture the shield of sovereignty in order to protect the larger system of sovereign nation-states.

We find this same jurisprudential understanding expressed in the other crimes adjudicated at Nuremberg: war crimes and crimes against humanity. Like crimes against the peace, war crimes permit the international community to shatter sovereignty for the ultimate purpose of preserving it; it is a regulation meant to forestall the possibility that warring sovereigns will annihilate one another by relying on impermissible means. The International Military Tribunal's (IMT) conceptualization of Crimes Against Humanity, a crime first recognized at Nuremberg, also fits this pattern. By now it is familiar that at Nuremberg Crimes Against Humanity had to demonstrate a nexus to aggressive war in order to be justiciable before the IMT. But this nexus requirement was not simply a cynical effort on the part of the United States to insulate Jim Crow laws from judicial scrutiny. It also reflected the larger jurisprudential vision of Nuremberg that conceived of international crimes in the quite literal sense as crimes between legal entities called nation-states. If Nuremberg pioneered the radical idea of shattering the prerogatives of

the sovereign, it was toward the conservative end of preserving, not supplanting, the larger system of sovereign nation-states.

Shattering Nuremberg

The incrimination that remained most volatile or unstable vis-à-vis this conservative ambition was the crime against humanity. Even before the end of the trial before the IMT, Control Council Law no. 10, the Allied document which set forth the legal basis for each occupying power to conduct war crimes trials in its respective zone of occupation, had supplied a definition of crimes against humanity that severed the nexus requirement. As an international crime that now no longer needed to demonstrate a connection to international conflict, the crime against humanity was soon joined by genocide, the neologism first coined by Raphael Lemkin, a Polish-Jewish jurist who long before the Nazi extermination of the Jews had agitated for international legal recognition of Turkish atrocities perpetrated against the Armenians. But it wasn't until 1943 and the advent of Nazis' techniques of administrative massacre that Lemkin coined the term genocide; the term genocide already makes its first appearance in a legal document in the Nuremberg indictment – albeit as a description of a war crime, not as a crime against humanity – and by 1948, genocide finds itself elevated by the international legal community to the status of an independent international crime. Indeed, genocide is now considered *the* international crime, supplanting crimes against humanity as the gravest violation of any legal code, be it domestic or international.

The concept of crimes against humanity and genocide, however, are radical not only in the sense of naming radical transgressions or in authorizing the shattering of sovereign prerogatives. They are radical in that the very term "international" is something of a misnomer. They need not in the first instance reach conduct between nations; on the contrary, they can, and most typically will, reach actions perpetrated against groups or populations controlled within the territorial bounds of a coherent nation-state. This remarkable trend – toward severing "international crimes" from any connection to conduct between states – finds further elaboration in the recent jurisprudence of war crimes. In one of its most important rulings, the International Criminal Tribunal for the former Yugoslavia (the ICTY) concluded in its Tadic decision that a conflict need not be strictly international to give rise to depradations of the laws of war justiciable in an international court. Thus although Nuremberg remains the most important precedent in international criminal law, the developments in the field post-Nuremberg have largely dismantled its basic paradigm. The crime of aggressive war – the incrimination with the clearest connection to international conduct – has become largely a dead letter, and in its stead we find the development of a rich jurisprudence of three international crimes – crimes against humanity, genocide, and war crimes – which have largely severed Nuremberg's connection to the core meaning of the concept of "international." Indeed, these crimes can better be described as transcending the nation-state, or as "supranational." Even this appellation may sound misleading inasmuch as these crimes may often assume an entirely intrastate quality. But I call them supranational because the term reminds us that the traditional fixation on the nation state as the relevant unit of analysis has receded in importance.

Granted, many international jurists resist this analysis. Characteristic of this resistance, ICC prosecutor Louis Moreno-Ocampo, in a response to Owen Fiss's recent piece in the *Boston Review* on Africa and the International Criminal Court, located the international character of the depradations in the DRC in the spill-over effect: inasmuch as these crimes threaten to spill over national boundaries, they threaten to destabilize the entire region. While I do not doubt that Ocampo may be correct in certain cases, I find more notable his effort to preserve the Nuremberg idiom to describe a rapidly evolving jurisprudence which has largely rendered it obsolete. Indeed, it sounds impoverishing as well as conceptually flawed to insist that it is only the promise of spillover that renders intrastate genocide or crimes against humanity into an international crime. The term supranational thus captures an essential aspect of these crimes missed by lumping them with other international crimes such as hijacking, trafficking, laundering and piracy. Supranational crimes permit shields of sovereignty to be punctured, but not toward the larger end of protecting the system of nation states. Toward what end then?

Some theorists have tried to answer this question by explicating the core idea of "humanity" contained in the term "crimes against humanity." That the original framers of the term seem not to have known exactly what it meant is perhaps worth mentioning – at Nuremberg, for example, there was a split between those who parsed the term to refer to some notion of humaneness and those who thought it referred to a collective ideal of humanity. One finds this ambiguity, for example, reflected in official translations prepared by the IMT; German documents at times refer to "Menschlichkeit" (humaneness) and at others to "Menschheit" (humanity). Hannah Arendt famously parsed the term in this latter sense, understanding the crime as an assault on the human

status as such. More recently, David Luban has modified Arendt, identifying the crime as, at its core, an attack on the human status as a political animal. I want to return to this theme at the end of my talk, but for now I want to note that both Arendt's and Luban's efforts share the unusual feature of trying to tease out the meaning of a name chosen through a process that was largely fortuitous. The theoretical writing on crimes against humanity has, then, been peculiarly influenced by the very name of the incrimination. Had the crime named and defined in section 6c of the IMT charter been called "crimes against civilian populations" or "crimes against communities," the very theory of this incrimination would, I believe, be dramatically different.

Our three supranational crimes – crimes against humanity, genocide, and war crimes – are extraordinary in another sense. It is no exaggeration to say that they explode law's spatio-temporal coordinates. Most crimes, particularly in the continental system, tend to be controlled by a statute of limitations, but with the Convention on the Non-Applicability of Statutory Limitations of 1968, the international legal community agreed that these supranational crimes should be controlled by no prescriptive period. Thus, as was the case with Maurice Papon, the former Vichy official and French Minister of Finance, who was convicted of complicity in crimes against humanity in 1998 (and who died earlier this year), prosecutors are authorized to try perpetrators a half century after the commission of their crimes.

Equally remarkable is the spatial dimension. Compared to Nuremberg, the Eichmann trial tends to be seen as an important social and cultural event, but not as a particularly important precedent in the development of international law. I think understanding presupposes a strict, and in my mind, untenable, separation between the

legal and the cultural meaning of a trial. More to the point, it overlooks a crucial legal legacy of the Eichmann trial – its jurisdictional profile. The Eichmann court established jurisdiction over the accused through an extremely unorthodox reading of the principle of passive personality: the idea that a state can claim jurisdiction over criminal acts in which its nationals count among the victims. Here the Israeli court claimed that the victims of the Holocaust were would-be citizens of Israel, an argument that overlooked the fact that the state might never have been established but for the horrific crime. More radically, the court relied on a theory of universal jurisdiction, that is, jurisdiction conferred exclusively by the nature of the crime. Here again, the idea is that supranational crimes – crimes against humanity and genocide and war crimes – are so extreme as to authorize any court, anywhere to sit in judgment on the perpetrators. In the decades following the Eichmann trial, universal jurisdiction seemed to be little more than a moribund juridical curiosity, only to experience a remarkable revival with the Pinochet affair, the prosecution of Serbs in Germany for atrocities in the Balkans, and Rwandans in Belgium for genocide.

Law's contact with atrocity has thus led to the articulation of supranational crimes that explode law's spatio-temporal dimensions. It has also led I believe to a shift in the jurisprudence of criminal procedure. It is fair to say – particularly in Anglo-American circles – that the jurisprudence of domestic national criminal procedure has been largely centered around the protection of the rights of the accused. To borrow Herbert Packer's classic formulation, this jurisprudence has been closely allied with a due process model geared toward protecting the dignitary rights of the accused by placing brakes upon the prosecutorial zeal of the state. This orientation makes sense in terms of the model of deviance that I mentioned at the outset. Inasmuch as the process of accusation pits the

individual against the centralized coercive powers of the state, criminal procedure should plausibly be geared toward shielding the accused from this potentially withering mobilization of force.

Shift the perspective from domestic national courts to trials involving supranational crimes, and the outlook is quite different. Here I would observe that the concern has shifted toward facilitating prosecution and protecting the rights of victims. In making this claim, I do not meant to denigrate the quality of justice dispensed by international tribunals. Certainly the rules of evidence and proof adumbrated by the International Criminal Tribunals for the former Yugoslavia and for Rwanda include detailed protections of the rights of the accused – rights designed both instrumentally to support accurate verdicts and deontologically to protect the dignity and autonomy of the accused. Likewise, the International Criminal Court is controlled by extensive norms meant to protect the rights of the accused. That said, I think it is still fair to say, the larger shift has been toward facilitating the power of prosecutors and recognizing victims' rights. These latter rights can be divided into matters of voice and matters of control. They include everything from a protection of the interest that victims have in telling their stories told in court; to a relaxation of the norms that conventionally protect the defendant's rights of confrontation; to a recognition of the right of civil intervernors to represent victims groups in the trial process; to the creation of novel devices, such as the victims trust fund, formally incorporated in the statute of the ICC.

I believe this expansion of victims' rights reflects, in part, the belief that harms occasioned by supranational crimes such as genocide are qualitatively worse than those caused by more conventional crimes; in part, it also reflects the idea that the international

trial plays a different function, one we might describe as memorializing or commemorative, than that played by the conventional criminal trial. Finally, it may be the case that the banishing of the victim's interests from the conventional domestic criminal trial represents the perfection of the nation-state and its tendency to monopolize not simply force but the very logic of the accusatorial and trial process; in the case of supranational legal institutions, this centralization and concentration of force is less pronounced in a manner that creates space for the resurfacing of the victim.

Of relevance here are also certain innovations in the principles of criminal accountability. These principles differ from the substantive supranational incriminations such as genocide or crimes against humanity; instead, they can be seen as theories of liability specifically designed to facilitate proving the substantive guilt of persons or groups accused of committing supranational crimes. As we know, the principal and auxilliary perpetrators of such crimes are often organizationally far removed from the atrocities on the ground, thus raising thorny problems of establishing liability. Nuremberg attempted to address this problem through two techniques, first by relying heavily on the notion of conspiracy – though, consonant with the Nuremberg parardigm, the court interpreted the conspiracy charge as applying only to the crime of waging aggressive war.

Second, Nuremberg pioneered the theory of criminal organizations in international law. In its judgment, the IMT both issued individual determinations of guilt and also declared certain specific organizations, such as the entire Gestapo, as criminal. This declaration had no bearing on the judgments rendered against the trial's twenty-two defendants, but it was meant to facilitate guilty verdicts against hundreds of thousands of

other possible defendants brought before Allied courts under Control Council Law 10. Neither the theory of conspiracy nor the concept of criminal organizations has played a robust role in jurisprudence of supranational crimes since Nuremberg. The statute of the ICC, for example, makes no mention of the idea of criminal organizations, which largely has been repudiated as a discredited example of collective punishment – this notwithstanding the fact that it touches one of the crucial features of the supranational crime, namely its corporate nature.

But if conspiracy and the theory of the criminal organization have fallen into disfavor, they've been replaced by other powerful theories of liability, most notably the joint criminal enterprise. Articulated almost exclusively through the case law of the ICTY, the joint criminal enterprise has proved itself to be an elastic and versatile theory of liability through which prosecutors can seek to convict a wide range of perpetrators for crimes they did not physically commit. If it has shown one limitation, it is that ICTY judges appear reluctant to return verdicts of guilt in genocide cases based on theory of joint criminal enterprise – a point suggested in the ICTY's recent judgment in the Krajisnik case.

Let us for a moment stand back and take stock of the remarkable innovations in law designed to establish a workable jurisprudence of atrocity. We have seen that the contact with atrocity has led to remarkable innovations in the fabric and processes of law. We first saw how the idea of international crimes pioneered at Nuremberg punctured the shield of sovereignty. Next we saw how the subsequent development of incriminations such as crimes against humanity and genocide in the years following exploded the very paradigm of international crimes created at Nuremberg. Indeed, I've argued that name

notwithstanding, these offenses can be better understand as supranational crimes, crimes whose character is now divorced from any substantial connection to relations between nations. We have also seen how these supranational crimes explode spatio-temporal limitations on prosecution, as they are governed by no prescriptive periods and can be tried under universal jurisdiction. We've noted how the effort to prosecute perpetrators of these crimes has led to a prosecution-facilitating, victim-centric jurisprudence supported by theories of liability such as the joint criminal enterprise. Finally, we should mention the remarkable commitment of institutional resources. The ICTY currently has a staff of 1100 and an annual budget of over a quarter billion dollars. The ICTR has secured a score of convictions at the cost of well over a billion dollars. The fledgling ICC, which was established five years ago, has yet to stage a single trial and has only one suspect in custody, already has a staff of 600 and an annual budget of 90 million euros, 125 million dollars.

The Problem of Punishment

This then returns me to my original question: what purposes are served by the extraordinary efforts of the legal imagination and of institutional will to submit atrocity to legal judgment.

The answer appears self-evident: it is to put an end to impunity for perpetrators of atrocity. No matter when the atrocity was committed, no matter where it occurred, no matter how complex the administrative structure of which the perpetrator may have been a part, the law now has the tools to bring perpetrators of atrocity to justice. This I would

agree is a terrific triumph, but still it does not entirely answer the question. For what does it mean to bring a perpetrator of atrocity to justice? Again the answer appears obvious: it means staging a criminal trial, and in cases in which guilt has been established beyond a reasonable doubt, putting the perpetrator in prison. This is not to say that the criminal trial is the sole means of addressing the legacy of atrocity. Truth and reconciliation commissions, civil reparation policies, national educational and commemoration initiatives: all of these can complement perpetrator trials as means of coming to terms with the legacy of atrocity. But when it comes to the core idea of justice, the criminal trial plays a necessary if not sufficient role. That said, a number of scholars, such as Mark Drumbl, have noted a troubling disconnect between the radical and creative efforts to gain legal dominion over acts of atrocity and the deeply conventional outcome of the process: incarceration. This disconnect becomes more troubling when we recall that the theory of penology does not defend incarceration as an end unto itself; its justifications are instrumental, intended to serve broad societal purposes. How well do these purposes serve the ends of doing justice to crimes of atrocity?

American prisons are today referred to as correctional institutions, and at least nominally, most institutions are designed to reform, rehabilitate, correct. But however fanciful this goal may be in the case of common criminals, it seems particularly quixotic in the case of architects of crimes of atrocity. The Nuremberg experience is suggestive. Of the twenty-one defendants in the dock at Nuremberg, eleven were sentenced to death, three were acquitted, and seven were sent to Spandau, the castle-like prison fortress in the environs of Berlin. As the historian Norman Gorda has recently shown, Allied jurists

gave shockingly little thought to the how and why of incarcerating Nazi war criminals. Small matters, such as the work, recreational and visitation privileges available to the inmates became matters of major international squabbling between and among the American, British, French and Soviet administrators of the prison. And while Spandau might have created a fascinating crucible in which Cold War tensions were enacted over, say, the proper daily caloric intake of the prison's inmates, it did very little to "correct" the seven Nazi war criminals housed there. To the contrary, inmates such as Dönitz, Funk, and Hess only became more convinced of their martyrdom with the passing of very year. Even Albert Speer's periodic statements of regret and contrition were less genuine than calculated toward securing an early release. Even in the case of the three defendants found not guilty at Nuremberg, acquittal did not supply a sufficient condition for their reintegration into post-war German society. They, along with millions of their compatriots were processed through a program of de-Nazification, an ambitious process of correctional lustration designed to create a responsible democratic citizenry. Yet despite the good intentions, particularly of the Americans with their famously elaborate questionnaires of former party members, the fact that by 1951, 94 percent of Bavarian judges and prosecutors were former Nazis suggests something about the success of this effort, which, needless to say, was not even meant to reach the chief perpetrators of Nazi atrocities. Thus whatever we hope to gain by incarcerating perpetrators, it is not their correction.

What of simply taking them out of circulation? This a more plausible account, though if this were the only purpose, it's far from clear that a political solution like the one that sent Napoleon to his island retreat, or Idi Amin to Saudi Arabia, or Baby Doc

Duvalier to the Cote d'Azur, would not be equally efficacious. Spandau, run by its four squabbling partners, may have been unique in the astonishing inefficiencies of its administration, but the fact that, as I've mentioned, the ICTR has spent well over a billion dollars to secure a score of convictions, reminds us that international justice does not come on the cheap.

Then, of course, there is the goal of deterrence. Deterrence is specifically mentioned as a goal in the statute of the ICC as well as in the charter of the Yugoslav and Rwandan tribunals. Whether the trial and incarceration of perpetrators of supranational crimes serves the ends of deterrence remains, however, an open question. It seems dreadfully obvious that the Nuremberg and Eichmann trials did little to deter Pol Pot, and that the work of the ICTY and ICTR has done little to put a brake on genocide in Darfur. This might simply be a consequence of the fact that perpetrator prosecutions have until now been extremely rare and anomalous events, and as the institutions of supranational justice gain greater traction, the deterrent effects will become more visible. But even this seems highly questionable. Even in the case of conventional domestic crimes, deterrence – which, after all, is a negative effect – is often notoriously difficult to measure; in the case of supranational crimes, involving complex organizations if not direct state sponsorship, it may be altogether impossible. Deterrence as a justification for punishment remains, then, almost entirely speculative and aspirational.

Then there is the retributive function of punishment. But here again we run into problems that have vexed all perpetrator trials. At the time of the Nuremberg trial, Hannah Arendt wrote to Karl Jaspers about the problem of punishment. If retribution is anchored in some notion of proportionality, no punishment would seem proportional to

crimes of atrocity. This identical concern surfaced at the time of the Eichmann trial. In his summation before the court, Israeli Attorney General and lead prosecutor Gideon Hausner openly acknowledged the inadequacy of even the most extreme punishment for Eichmann's atrocities, conceeding, "It is not always possible to apply a punishment which fits the enormity of the crime." If these issues plagued debates about the imposition of the death penalty, they apply with only greater vigor in the case of the ICC whose maximum sanction is generally set at thirty years imprisonment, and only in rare circumstances has the ICTY and ICTR imposed such lengthy sentences. Indeed, as Mark Drumbl has painstakingly documented, the sentencing practices of international and quasi-international tribunals reveal the absence of any clear guidelines or standards; and in conversations with numerous actors associated with ICTY, I heard time and again concerns raised about the unseemliness of sentencing a convicted perpetrator of crimes against humanity to, say, eleven years in prison. Needless to say, these disparities appear all the more grotesque when compared to sentences meted out by domestic national courts in trials involving conventional crimes: how can one reconcile, for example, the sentencing of a juvenile killer in the United States to a mandatory life term with the twenty-five year term given a perpetrator of genocide in the ICTY? One could, I suppose, insist on the absolute difference between the respective systems – that is, between the domestic-national and the international – but that fails to account for the disparities of punishment within the international system itself. In making this observation, I am not, I should make clear, trying to argue in favor of the restoration of the death penalty in international law, for as, I've noted, even this sanction would not solve the problems of a retribution in the face of atrocity.

This then leaves the expressive purposes of punishment. Since this is the only central purpose left standing, perhaps it comes as no surprise that I find it the most compelling and the most under-theorized as it applies to supranational crimes. The expressive function implicitly recognizes that punishment of perpetrators is in the first instance a symbolic, declarative act. What is the content of this expression? In the final pages of Eichmann in Jerusalem, Arendt assumes the voice of the judge in order to pronounce judgment on the defendant. She does so not in the name of the Israeli judiciary; rather the "we" for which she speaks is the outraged moral conscience of all humanity. Her judgment is a declaration from humanity to Eichmann, explaining the reasons why we – humanity – cannot share the same earth with you, the perpetrator. Arendt accepts the appropriateness of putting Eichmann to death, dissenting from the arguments of thinkers such as Martin Buber who insisted Eichmann's execution would be a "mistake of historical dimensions. And yet Arendt's defense of the death penalty does not accept the prosecution's untenable logic of retribution. Rather, for Arendt, the death penalty serves as a faute de mieux for her desired punishment – global outlawry, planetary exile, ostracism from the fold of humanity. More recently, Louis Arbour, the former chief prosecutor of the ICTY has echoed, perhaps unwittlingly, Arendt's argument, justifying international criminal trials as tools of global ostracism. In Arendt's case, the expressive purpose behind Eichmann's punishment is consonant both with the theory of "humanity" she found nestled in crimes against humanity, and with her larger belief that failure to try Eichmann before an international tribunal constituted the greatest shortcoming of the Jerusalem trial. Because, in her mind, Eichmann's crimes were an attack on humanity writ large, and because the death sentence was meant to declare

Eichmann's exclusion from membership in humanity, Arendt understandably insisted that only an international court could have done justice to the global semiotics of the historic trial.

Yet in certain respects, history has surely proven Arendt wrong. If anything, the Eichmann trial has come to be seen as a great success precisely because it was staged in Israel. The intimate connections between perpetrator, place and public that made the Eichmann proceeding such rivetting drama – not simply in Israel, but in Germany, the United States and across the globe – would surely have been lost had the case been removed to an international trial. Can we then re-imagine the expressive purposes of punishment in such a way as to hear in it something other than a defense of universalist or cosmopolitan ideals?

Legal Didactics: Linking Communities to History and Memory

I believe we can, if we are prepared to see the expressive function of punishment as closely associated with the didactic purpose of the perpetrator trial. I have written about this latter purpose at some length, and I don't think it would be appropriate to review it in detail now. Suffice it say that I believe the perpetrator trial can serve two central didactic ends: First, it can serve as a tool of political-legal legitimation by making visible the sober operation of the rule of law. Second, and more relevant for our concerns, it can serve the ends of history and memory in communities overcoming the legacy of atrocity. Here it can play a powerful role in clarifying a history of horror often obscured in rumor, denial and silence; it can establish a baseline account that may serve the interests of

transition; and it can confer public recognition upon the memories of survivors and honor upon the memory of victims. Certainly my defense of the didactic trial is not uncontroversial. If anything, the weight of scholarly opinion was against my defense of trials as valuable tools of historical instruction and memory construction. But if we agree that the punishment of perpetrators bears an uncertain relationship to correction, retribution, and deterrence, then we might be all the more prepared to accept the trial as an expressive, didactic exercise. Indeed, we might go further still and insist that legal didactics are a necessary feature of the justificatory logic of any jurisprudence of atrocity. Put a bit differently, the perpetrator trial emerges as a wasteful, vexed, and possibly incoherent project once we ignore its didactic function and the expressive purposes of punishment.

Here, however, one might lodge two challenges. First, one might insist that I am running together two distinct ideas: the expressive function of punishment with the expressive function of the trial. By way of response I would insist that the two cannot be separated. The trial's power to serve the ends of history and memory is strongly linked to the declarative finality of punishment. The trial and execution of Saddam Hussein provides a strong example of this, albeit in the negative. The ugly show of Saddam's hanging, which achieved the unimaginable goal of making a mass murderer appear more dignified than his executioners, cast a pall back over the trial that ended in the sentence of death. Here the shameful execution supplied, in form of a two-minute grainy cell-phone video, proof that the trial was, from the get-go, about nothing more than revenge. By contrast, the Nuremberg defendants, and later still Eichmann, were executed in a manner designed to avoid spectacle and to defeat the impulse, on the part of neo-Nazis, to turn

the execution into an occasion of commemoration. Here execution served as a means of purging. By all measures, this effort was successful as the major war criminals quickly vanished from the public eye. Buber's concern that Eichmann's execution would transform Eichmann into a martyr proved entirely unfounded. The Spandau experience tells another story, however. As figures such as Funk, Hess, and von Schirach grew old and infirm in prison, they became highly public and contested symbols of an unmastered past, their causes championed by a curious mix of human rights advocates, religious progressives and political revanchists. This forced the Allies, allied in name only, riven by the Cold War, to prepare grotesque contingency plans for the disposal of the inmates' bodies in cases in which death preceded the running of the sentence. The Spandau experience suggests, then, an interesting defense of capital punishment of major perpetrators– not as a tool of retribution, which, as we've already noted makes little sense, but as an expressive gesture meant to support national reconciliation and transitional justice. This approach is implicit in the death penalty jurisprudence of nations which have abolished the death penalty as a general matter, but still authorize its use only for perpetrators of genocide or the most egregious crimes against humanity. Israel, for example, abolished the death penalty for murder in 1953, yet retained it for perpetrators of Nazi crimes such as Eichmann, who remains the only person put to death in the nation's history. Such a punishment would be at once symbolic, expressive, and purposive, erasing the perpetrator before he can age into a victim.

Still, as a second matter, one might insist that I've blundered into a contradiction. For Arendt, the punishment of perpetrators of atrocities expresses a universal message, a declaration from all of humanity. Arendt's position appears to have the strength of

offering a unified theory of venue, incrimination, and punishment, demanding, as it does, that international courts vindicate the interests of humanity writ large by purging the human community of the pollution of the perpetrator. By, contrast, my defense of the didactic function of the trial appears to push in the opposite direction, creating a dissonance between the theory of the supranational crime and the theory of the trial. By attending to the trial's role as a tool of history and memory, the theory of the didactic trial ties the crimes of atrocity to the experiences of specific communities – as constituted both by victims and perpetrators. Indeed, this theory insists that the purpose of the trial of supranational crimes is to contribute less to the repair of abstract humanity writ large than to the repair of the violated bodies and spirits of members of specific groups and collectives. Ostensibly this understanding invites a stern challenge from the Arendtian, who insists that it creates a disharmony between the crime – an offense against humanity – and the trial – as a defense of specific groups.

By way of response, I would first insist that supranational crimes, far from offenses against the human status (*pace* Arendt) or against the political animal (*pace* Luban), *are*, in their essence, crimes against plurality, directed against identifiable groups and communities. Arendt, or a more current cosmopolitan, might answer by insisting that distinction between humanity and the collective is spurious – that the supranational crime imagines a moral community constituted by all humanity. But a closer examination of the definition of these crimes shows that they concern themselves with a far thicker and less abstract concept of community. This is clearest in the crime of genocide, which by definition, criminalizes behavior directed toward the destruction of a group qua group, be it terms of its ethnicity, religion, race or national character. Thus far from a crime against

community defined as all humans, genocide is a crime against a more thickly constituted notion of identity. Why should such a crime be considered international or supranational? Larry May has hazarded an answer by arguing that by "focusing on a non-individualized feature of the victim," genocide represents the ultimate negation of our human status, not as members of a global collective, but quite to the contrary, as thickly constituted individuals. Such a massive crime also invites massive self-help by surviving communities, something not to confused with Ocampo's feared spillover effect.

A similar observation may be made about crimes against humanity. Certainly that subset of crimes against humanity which deals with persecution-type offenses presupposes that those crimes will be directed against persons by virtue of their inclusion in specific groups or communities, be they defined in terms of race, ethnicity, religion or political beliefs. Perhaps the only challenge to my reading of the nature of supranational crimes comes from the proposition that crimes against humanity also reach systematic attacks on "any civilian population." Here one might rightfully observe that a civilian population is not a community or group in any meaningful sense; it is simply an aggregate of persons who share nothing more than the thin bond of geographic proximity. Against this challenge, I would insist that the very experience of atrocity transforms a "civilian population" into a group – that is, one defined by the common experience of historical trauma. Moreover, the requirement of systematicity built into the definition of the crime against humanity suggests a civilian population targeted for reasons not unrelated to thicker aspects of its identity and composition. Thus I believe we can find a basic agreement between the nature of the supranational crime – as a foundational attack on collective existence as expressed in the attachments of group and community – and the

expressive function of the trial as a didactic tool in the service of collective history and memory. For the bonds of a kin, community, and group find expression in the shared terms of history and memory.

The Problem of Universal Justice

This link – between the nature of crimes of atrocity and the expressive purpose of the trial and punishment – helps us to solve the problem I identified at the outset of my talk: the apparent disconnect between the creative efforts to gain legal dominion over atrocity and the disappointingly unimaginative literature on the appropriate sanction for supranational crimes. But in insisting that legal didactics must play a role in the justificatory logic of the perpetrator trial, we have not simply solved a conceptual conundrum. For the conclusion also suggests certain normative responses to the problems raised by supranational trial. Take, for example, the issue of venue. Legal scholars rightly emphasize that impartiality and independence are critical features of the act of judging. These norms are not identical: Independence refers to the judge's structural insulation from political pressure; impartiality, by contrast, specifies the judge's emotional and evaluative distance from the issues of the case. The judges in the trial of Saddam Hussein, for example, lacked both. The tribunal experienced withering political pressure witnessed by the resignation of the first presiding judge, and the veto lodged against his replacement. Likewise, the fact that the judge who finally took the reins of control, Raouf Rasheed Abdel-Rahman, frequently got into shouting matches with the defendants and curtailed the calling of defense witnesses turned the proceeding into a partisan, and not a judicial exercise, even before the grotesque spectacle of

Saddam's execution. The Hussein trial dreadfully lacked what the norms of independence and impartiality share: a sense of enabling distance. To engage in justice, the judge must be structurally removed from political interference and cognitively and emotionally removed from the issues of the case.

But if justice is impaired by insufficient distance, can it also be impaired by *too much* distance? Can a case be so far removed as to erode the efficacy, if not the possibility, of justice? This is the issue raised by universal jurisdiction and, in part, by international courts such as the ICTY. Universal jurisdiction, as we've observed, found an early precedent in the Eichmann trial, but that case remains anomalous, inasmuch as the most serious challenge to the authority of the court, as raised by Eichmann's attorney Robert Servatius, and as echoed by Arendt, went to the question of the tribunal's impartiality, not to its absence of any meaningful connection to the atrocities before it. More recent invocations of universal jurisdiction – those that began with and followed the Pinochet affair – raise the opposite problem, however. Here we find the reductio of the theory that would comprehend supranational crimes as offenses against humanity writ large, as domestic national courts emerge as powerful instruments of judgment over acts to which they lack virtually all connection, or, as in the case of Belgium's trial of Rwandans or Spain's efforts to judge Pinochet, only the dim connection that comes in the form of the lingering ghost of colonial domination. This is not to deny the important aspects of the Pinochet affair, but there universal jurisdiction served less as a tool of full juridical potency than as an instrument of vexation, designed to disturb the distant sleep of former despots and perhaps secretaries of state. Nor do I mean to question the appropriateness of trying Serbs in Germany for Balkan crimes, though these prosecutions

also bridge a troubled past over which pass not the ghosts of colonial domination but the more recent footfalls of Nazi atrocities in Yugoslavia. But when judgment becomes more a gesture of domestic expiation for a nation's own crimes, or when it reaches far and wide to grandly defend the interests of all humanity, then the act of judgment runs the risk of turning arid and arrogant.

The Milosevic trial invites similar observations. In a piece I circulated in advance of today's talk, I described an incident that took place in the trial involving a prosecution witness name Morten Torkildsen, an expert in tracing financial transactions. Torkildsen testified about transfers of funds that took place between the Serb Republic and the Republika Srpska, the breakaway Bosnian Serb territory, between the years 1991-1995. The International Court of Justice's recent judgment in the suit brought by Bosnia against Serbia was disappointing in many respects, although it did specifically highlight the critical importance of these financial transfers. Without this financial support and flow of funds, it noted, the Republika Srpska would never have been able to perpetrate the atrocities that it did. But during his time on the stand at the Milosevic trial, Torkildsen was asked a bizarre question. One of the judges, who later would take over as presiding judge, asked Doctor Torkildsen if he had compared these financial transactions to transfers between the Serb Republic and the Republika Srpska from an earlier period, say 1985-1991. The witness, visibly stunned, politely informed the judge that that would be difficult inasmuch as an independent Serbia and the Republika Srpska did not exist at the time.

This incident was brought to my attention by Mirko Klarin. For those who have followed the work of the ICTY, Klarin is a legendary figure. For the last decade, he has

encamped himself in a small windowless office at the court in Schevingen, chain-smoking and tirelessly compiling and watching videotapes of the various proceedings. Originally a print journalist from Serbia, Klarin was the one, who in the early 1990s, in a courageous gesture, first called for a Nuremberg style response to the unfolding catastrophe in the Balkans. A defender of the Court over the years, Klarin told the Torkildsen story with resignation, as emblematic of the larger failings of the Court. Indeed, in describing the trial's low point, Klarin pointed not to Milosevic's grandstanding and histrionics, not to his humiliating cross-examination of witnesses, not even his untimely death, but the Court's exchange with Torkildsen. For it described a larger pattern. There was the story of the prosecutor who after being briefed on the Prijedor crimes approached a staffer in the OTP and growled, "Prijedor, Prijedor – why haven't we indicted Prijedor?" – only to be told that Prijedor was a province, not a person. The fact that not a single Milosevic prosecutor had even a reading knowledge of Serbo-Croatian, or BCS as its now designated, only underscored these problems. The OTP is riven by a fascinating tension between the prosecutors, typically American and British, and the researchers, typically Serbian. The researchers include many former dissidents and opponents of Serbian nationalsim who had to flee their country during the war, abandoning impressive careers. In their earlier incarnations, these researchers were well-known poets, senior professors, public intellectuals. Now they assist senior and middling prosecutors, who often treat their researchers dismissively and even with distrust – fearing that these Serbian assistants are unreliable because of their connections with either perpetrators or victims or even both. The researchers, who originally were staunch defenders of the Court, now follow the trials with something like bemusement,

not because the prosecutors get specific facts wrong, but because the larger framing narrative is off kilter. Commenting on the work of Milosevic's chief prosecutor, a researcher observed, "It is like listening to a very accomplished and brilliant pianist who is technically very good, but the unfortunately the whole song is off."

One might insist that these anecdotes highlight nothing more than idiosyncratic problems with the ICTY. Indeed, prosecutors are not historians, and even in the case of Eichmann, we now know that the prosecutors were largely ignorant about many details of the Final Solution before they began preparing for trial. Indeed, one upshot of this discussion might be to challenge my entire defense of the didactic function of the trial. If prosecutors are experts in law and not history, isn't this all the more reason to heed Arendt's insistence that history be left out of the courtroom? But I don't believe this is an option. Cases involving supranational crimes inevitably and necessarily usher complex histories into courtrooms. This is in part a result of the larger social expectations that come with staging a trial involving spectacular supranational crimes. But the problem also inheres in the nature of the crimes themselves, which almost inevitably deal with large communities and actions perpetrated over broad swaths of space and time. As a result, one cannot hope to hide from this problem by erecting an untenable divide between law and history. The question then is not whether to deal with history, but how to deal with it responsibly.

The experience of the ICTY, perhaps most visibly in the Milosevic prosecution, makes clear the difficulties of achieving didactic success when the tribunal lacks any organic connection to the history and memory of the communities caught up in the web of crimes. For in the absence of what Leora Bilsky has described as the intimate

connections between a proceeding, a people and place, the act of judgment turns into something arid. Perhaps worse, it runs the risk of bearing the marks of arrogance and incompetence that lie at the heart of the imperial gesture. Here I am not naively arguing that the Milosevic trial should have been staged in Serbia. Clearly this was not an option. But I do mean to challenge the alacrity with which many human rights lawyers champion international courts. Moreover, I believe my observations offer a jurisprudential theory that delivers power support for the political pragmatics that undergirds the ICC: that international courts should be used only as courts of last resort.

As I've tried to argue, this jurisprudential theory makes two principal claims. First, it insists that the separation of proceeding from people and place fails to do justice to the crimes of atrocity, because supranational crimes are less attacks on humanity writ large than they are attacks on the idea that human life is an enterprise organized in terms of group attachments, collective identities, and community allegiances. The trial process and the act of judgment must then be attentive to the history of concrete communities – as composed both of victims and perpetrators – a project likely to fail in the absence the intimate connections between proceeding, people and place.

In the absence of these connections, the jurisprudence of atrocity that I've sketched insists that judgment becomes problematic in a second sense. If staged as an abstract vindication of the interests of humanity, the trial of atrocity collides against the disconnect between proceeding and punishment. For as I've tried to show, conventional theories of punishment fail for the most part to offer a coherent justification for the extraordinary commitment of judicial resources necessary to bring perpetrators of atrocities to justice. I have suggested that the best way out of this conundrum is

comprehend punishment as an expressive gesture meant to highlight and dramatize the expressive purposes of the trial, purposes that comprehend the perpetrator trial as a didactic exercise that serves the interests of history and memory. In this regard, courtroom didactics are not an ancillary or supplemental purpose of the perpetrator trial. Rather, they lie at the heart of the enterprise and render it coherent. But to serve the end of didactics responsibly, the trial must attend to the intimate connections between proceeding and place.

The contact with atrocity has dramatically, radically and irrevocably changed the law – it has led to new substantive incriminations, novel jurisdictional theories, innovative theories of liability, new procedural hybrids and bold institutional commitments. But in the laudable effort to submit acts of atrocity to legal judgment, the law must not forget the intimate connections between proceeding, place and public that give the act of rendering judgment meaning. In the face of crimes against collective life, community attachment, and group belonging, the very ambition to do justice requires that courts do no further violence to these connections.