Propaganda, War Crimes Trials and International Law

From Speakers’ Corner to War Crimes

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Crimes of atrocity, the problem of punishment and the situ of law

Lawrence Douglas

Coming to terms with atrocity

The 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—has given birth to a branch of law essentially unknown before Nuremberg. In the decades since Nuremberg, international criminal law has developed remarkable jurisdictional principles for puncturing the shield of sovereignty; it has redefined what jurists understand as “international;” it has exploded temporal limitations on prosecution; and it has given rise to a prosecution-facilitating, victim-centric jurisprudence supported by novel theories of liability. At the same time that it has sponsored these dramatic innovations, however, international criminal law has failed to rethink the basic purposes of the criminal sanction. This failure, more than even the practical obstacles that face international prosecutions, leaves international criminal law in a troubled state, lacking a coherent justificatory logic.

It is my immodest goal in this chapter to try to map out the conceptual problems facing international criminal law, and to suggest a possible solution to them. This solution, as we will see, asks us to see the international criminal trial as a didactic (perhaps “propagandistic” would be too strong) exercise and the punishment of crimes of atrocity as performing a symbolic purpose. Seeing the trial and punishment of perpetrators of atrocity in these terms, I believe, will help us better to grapple with the critical question of situ—what or where are the proper staging grounds for doing justice to crimes of atrocity?

Shattering the International Military Tribunal paradigm

In the familiar domestic national paradigm, law views criminal behavior as a deviant act, characteristically committed by a discrete individual, that harms community norms and interests. The state, in this account, intervenes as the accuser and as the agent for enforcing and defending violated norms of community order. As such, the state serves as the locus of legality—in certain positivist accounts, such as the Hobbesian, this is true by definition; and this strong connection
between state power and legal efficacy informs the theory of sovereignty and the prerogatives of immunity that generally have insulated the state from legal interference.¹

The contact with Nazi atrocity revolutionized law by creating the exigent need, if not the theoretical apparatus, for puncturing this 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 of a hybrid character. 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 Peace of Westphalia—this foundational principle was widely seen before Nuremberg as an absolute bar to international prosecutions.² As a practical matter, the shield of sovereignty has hardly lost its luster: 60 years after Nuremberg, it remains mighty strong—from the perspective of the human rights lawyer, frustratingly so. Moreover, the very trope of puncturing sovereignty has its limits, as it overlooks how the contact with atrocity has also, in authorizing the exercise of such unorthodox practices as universal jurisdiction, empowered the sovereign act—made it more fluid and extended its reach.³ Nonetheless, the conceptual shift has been dramatic. In the wake of Nuremberg, Karl Jaspers framed the term Verbrecherstaat, the criminal state, a notion meant to name and denote a phenomenon that lay beyond the ken of the standard model of the criminal law and was nonsensical to it. Jaspers’ formulation demanded that the state be seen not as the defender of order but as the principal perpetrator of crimes, as the very agent of criminality.⁴

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 in international law. Although crimes against peace are nominally under the jurisdiction of the ICC, this jurisdiction is contingent on the framing of a workable definition of the crime—something that has long bedeviled international jurists and despite recent progress toward this end, it is far from clear that aggressive war will ever play a meaningful part in the work of the ICC.⁵ 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. The history of how this came to be is vexed, and made for sharp disagreements among the Allied powers and between members of the American team, which pioneered the idea.⁶ But if it lacked an adequate definition and arguably violated nulla crime, nulla poena sine lege,⁷ the incrimination made sense from the perspective of the classic theory of sovereignty. By seeking to punish the unprovoked attack of one nation on another, the prosecution of crimes against peace can be seen as a conservative gesture, an attempt to safeguard and not usurp the system of sovereign nation states. The jurisprudential theory of Nuremberg can be expressed in this way: on
certain rare occasions, such as in the case of transparently 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 two other substantive crimes adjudicated at Nuremberg: war crimes and crimes against humanity. Like crimes against the peace, the prosecution of war crimes allowed the international community to shatter sovereignty for the ultimate purpose of preserving it; its prosecution at Nuremberg meant to forestall the possibility that warring sovereigns will annihilate one another by relying on impermissible means, particularly in an age in which the technologies of war-making make possible slaughter on a scale unimaginable at an earlier period of history.

The IMT's conceptualization of crimes against humanity, a crime first recognized at Nuremberg, also fits this pattern. By now it is familiar that the IMT concluded that only those crimes against humanity that demonstrated a nexus to aggressive war were justiciable. As a result of this holding, the tribunal refused to consider German on German crimes perpetrated before the Wehrmacht crossed the Polish frontier on September 1, 1939. The practical consequences of this ruling might have been negligible as the overwhelming majority of the Nazis' most egregious crimes against humanity occurred after the start of the war. But the conceptual importance of the nexus requirement remains. Certainly Chief Allied Prosecutor Robert Jackson, who acknowledged, "[w]e have some regrettable circumstances at times in our own country in which minorities are unfairly treated," was concerned that the absence of a nexus requirement could potentially open Jim Crow laws to the scrutiny of some future international jurist. Yet more to the point, the nexus requirement reflected the larger jurisprudential vision of Nuremberg that conceived of international crimes in the quite literal and altogether convincing sense as crimes between legal entities called nation-states. If the IMT empowered international law and international courts to shatter the prerogatives of the sovereign, it was toward the conservative end of preserving, not supplanting, the larger system of sovereign nation-states.

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 IMT, Control Council Law No. 10 (CCL 10), the Allied document that 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 differed from the definition framed by the IMT in two notable respects. First, CCL 10 expanded the range of crimes against humanity to include "atrocities and offenses" such as "imprisonment," "torture," and "rape"—acts not mentioned in Article 6(e) of the IMT Charter. Second, and more significantly, CCL 10 severed the nexus requirement that conditioned the justiciability of crimes against humanity to their link to crimes against peace. The practical significance of the severance of the nexus requirement should not be overstated. It appears that many of the judges in the subsequent trials before the Nuremberg Military Tribunal (NMT) failed to appreciate the significance of this change and continued to hew
narrowly to the IMT precedent. Telford Taylor, chief prosecutor for the NMT, acknowledged this point in his Final Report, diplomatically noting, “For the most part, the tribunals established under Law No. 10 were reluctant under any circumstances to adopt a broader construction of these definitions than the IMT had applied in its judgment.”

On the other hand, the change was not entirely lost on the subsequent tribunals. In his opening statement in the Einsatzgruppen case, Benjamin Ferencz specifically called attention to the difference:

The London Charter restricted the jurisdiction of the International Military Tribunal to crimes against humanity connected with crimes against peace or war crimes. This restriction does not appear in the Control Council enactment, which recognizes that crimes against humanity are, in international law, completely independent of either crimes against peace or war crimes. To deny this independence would make the change devoid of meaning.

The NMT trials represent, then, an unmistakable, if not always fully articulated, shift away from the IMT aggressive war paradigm and towards what I will call the “atrocity paradigm.” By this I mean that the NMT trials focused far more explicitly on crimes of atrocity: acts of extermination, genocide, systematic murder of civilian populations and other crimes against humanity. Of the 12 NMT trials, crimes against peace appear as a formal charge in only four cases. By contrast, crimes against humanity appear as a charge in all 12. In the IMT proceeding, crimes against humanity were treated as interstitial offenses, covering a relatively narrow range of crimes that technically could not be enfolded within the ambit of war crimes. Before the NMT, by contrast, crimes against humanity emerge as the principal crime in the Medical trial (No. 1), the RuSHA case (No. 8) and the Einsatzgruppen case (No. 9). Even in those trials nominally organized around the IMT paradigm of aggressive war, such as the High Command case (No. 12), crimes against humanity came to play a central role in the proceeding, as acts of atrocity came to the fore of the prosecutors’ case.

The development of the atrocity paradigm was strengthened by the United Nations Convention on the Prevention and Punishment of Genocide 1948, which recognized genocide as a crime independent from crimes against humanity. As we recall, the term genocide was the creation of 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, and who, in 1943, coined the neologism to name the Nazis’ techniques of administrative massacre directed against the Jewish population of Europe. The term made its first appearance in a legal document in the IMT indictment—albeit as a description of war crimes, not as a crime against humanity—and found scant mention during the trial (although it did surface in the statements of both British and French prosecutors). The neologism gained far greater circulation in the NMT trials. In the RuSHA case, Prosecutor James McHaney used the term as the
The sharpest way to characterize and designate the Nazis' most extreme crimes against humanity, although McHaney's formulations still hark back, in part, to the IMT paradigm—"... genocide was part of the Nazi doctrine of total warfare."15 More revealing was its use in the Einsatzgruppen case, where Judge Michael Musmanno, in his judgment, spoke sardonically of the "development of the fine art of genocide."16 And Benjamin Ferencz, in his opening statement for the prosecution, described the "crime of genocide"17—though the term as had yet to gain independent legal status—and specifically decoupled it from the logic of warfare: "... the killing of defenseless civilians during a war may be a war crime, but the same killings are part of another crime, a graver one if you will, genocide—or a crime against humanity."18

The ascendancy of the atrocity paradigm—exemplified in the severing of the IMT's nexus requirement, the eclipse in the importance of the crime of aggression, and in the development of the jurisprudence of crimes against humanity and genocide—finds further elaboration in the recent jurisprudence of war crimes. The ongoing work of the ICTY and the ICTR, as well as the early operations of the permanent ICC clearly demonstrate the predominance of the atrocity paradigm. The IMT's focus on aggressive war remains, despite recent attempts at revival, largely moribund; what now dominates international criminal law is the focus on genocide, systematic extermination and ethnic cleansing. The principle first articulated in CCL 10, that international law no longer required a nexus between crimes against humanity and aggressive war—a principle imperfectly understood by many NMT judges—is now well settled in international criminal law.19

In the IMT paradigm, war crimes stood second to the crime of aggression as the paradigmatic international crime, as such offenses arose in the context of armed conflict between sovereign nations. In one of its most important rulings, the ICTY concluded in its Tadić decision that a conflict need not be strictly international in character to give rise to violations of the laws of war justiciable in an international court.20 Perhaps the most dramatic example of the rejection of the IMT paradigm is supplied by the NATO air war waged against the Federal Republic of Yugoslavia in the spring of 1999. The war, as we recall, was launched without authorization of the UN Security Council, and thus, under the terms of the UN Charter, arguably constituted an act of aggression. NATO, of course, argued that military intervention was necessary in order to stop Serbian acts of ethnic cleansing that were tantamount to crimes against humanity and genocide. However we might feel about the particulars of the case, it represents the clearest triumph of the NMT paradigm over the IMT approach, or to put it somewhat differently, of the atrocity paradigm over the aggressive war paradigm. Indeed, the NATO air war does not simply represent the priority of atrocity over aggressive war in contemporary international law. Stated somewhat tendentiously, it stands for the more remarkable proposition that acts of atrocity arguably warrant the waging of aggressive war.21

Thus although crimes against humanity, genocide and war crimes today stand as the paradigmatic international crimes, the very term "international" is something of
a misnomer. For the conduct that they name and reach need not have the character of depredations committed between nations; on the contrary, the acts they denote and make criminal can, and often will, direct themselves 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—has been largely overlooked by scholars of international law. And yet its importance cannot be ignored. Although Nuremberg continues to be viewed as 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 focus of the Nuremberg trial and the incrimination with the clearest connection to international conduct—has become largely a curiosity, 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.”

The supranational crime

We can better understand these crimes as transcending the nation-state, or as “supranational,” “cosmopolitan” or “universal”—although none of these terms is entirely adequate. “Supranational” and “universal” tempt us to overlook that the crimes so designated may often assume an entirely intrastate quality, while “cosmopolitan crimes” suggest an offense against the decorous consumption of latte. Still, these terms succeed in reminding us that the traditional fixation on the nation-state as the relevant unit of analysis has receded in importance. That many international jurists would resist this analysis does not undercut its force. Luis Ocampo, Chief Prosecutor of the ICC, has sought to locate the international character of atrocities in the Democratic Republic of Congo by appeal to the spillover effect: inasmuch as such 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 that 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 international crimes. The terms supranational, cosmopolitan and universal thus capture an essential aspect of these crimes missed by lumping them with other international crimes, such as hijacking, trafficking, laundering and piracy. As opposed to the latter, the former 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?

To answer this question, the repair to Kant has been all but inevitable, although appeals to Kantian universalism have the consequence of collapsing the conceptual difference between morality, the logic of which pushes to the universal, and the legal, which tolerates, and often insists upon, the character of the local and
positive. This, however, is less a criticism than an observation, as the contemporary invocation of Kant in general, and the appeal to his concept of hospitality in particular, has fueled the effort to supplant a Westphalian theory of sovereignty with what Seyla Benhabib calls “liberal international sovereignty”—apparently without appreciation for its oxymoronic ring.23 Both Arendt and Jaspers, indebted as they were to Kant, sought to ground universalism by explicating the core idea of “humanity” contained in the term “crimes against humanity.” That the very drafters of the term seem not to have known exactly what it meant is perhaps worth mentioning: at the IMT, for example, there was a split between those who parsed the term “crimes against humanity” to refer to some notion of humaneness and those who thought it referred to a collective ideal of humanity. One finds this ambiguity reflected in official translations prepared by the IMT; German documents at times refer to “Menschlichkeit” (humaneness) and at others to “Menschheit” (humanity).24 Arendt, who famously parsed the term in this latter sense, understood the crime as an assault on the human status as such.25 More recently, David Luban has attempted to identify the crime as, at its core, an attack on the human status as a political animal.26 I will return to this later, 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. In this regard, the theoretical writing on crimes against humanity has been peculiarly influenced by the very name of the incrimination. Had the crime named and defined in Article 6(c) of the IMT Charter been called “crimes against civilian populations” or “crimes against communities,” the very theory of this incrimination would be, I believe, dramatically different.

The three supranational, cosmopolitan 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 are controlled by statutes 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.27 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, prosecutors are authorized to pursue perpetrators many decades after the commission of their crimes. Equally remarkable is the spatial dimension. The IMT, as I have mentioned, continues to be lauded as the watershed moment in international criminal law, its reputation stronger today than at the time of its staging; the Eichmann trial, by contrast, remains unfairly neglected as an important precedent in the development of international law. This overlooks a crucial legal legacy of the Eichmann trial—its jurisdictional profile. The Eichmann court established jurisdiction over the accused by invoking a theory of universal jurisdiction, that is, jurisdiction conferred exclusively by the nature of the crime. Eichmann’s crimes, it was argued, were so extreme as to authorize any court, anywhere, to sit in judgment on the former Nazi official. In the decades following the Eichmann trial, universal jurisdiction seemed to be little more than a moribund
juridical curiosity, only to experience a remarkable—if, as I will argue, ultimately problematic—revival with the Pinochet affair, the prosecution of Serbs in Germany for atrocities in the Balkans, and the passion of Belgium prosecutors to seek indictments against a slew of the world’s most prominent statespersons.  

Law’s contact with atrocity has led, then, 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 criminal procedure has largely sought to protect 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 dignity 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 withering mobilization of force.

Shift the perspective from domestic national courts to trials involving supranational or cosmopolitan 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. This is not to denigrate the quality of justice dispensed by international tribunals: certainly the rules of evidence and proof adumbrated by the ICTY and the ICTR 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 ICC is controlled by extensive norms meant to protect the rights of the accused. That said, it is still fair to say that the larger shift has been toward facilitating the power of prosecutors while recognizing and promoting victims’ rights.

This again marks a move away from the IMT paradigm. Following the strategy outlined by Justice Jackson, IMT prosecutors structured their case around captured documentary evidence, material considered harder and more reliable than eyewitness testimony. By the conclusion of the trial, Jackson was able to report to President Truman, “the case . . . against the defendants rests in large measure on documents of their own making, the authenticity of which has not been challenged.” The IMT’s aggressive war paradigm supported the “trial by document,” as few witnesses, let alone members of victims groups, could offer any insight into the motives, planning and preparations of the war of aggression, while highly incriminating documents abounded. As a consequence, the prosecution unfolded largely absent the testimony of witnesses, depriving the trial of an “affirmative human aspect” and turning it into, to borrow Rebecca West’s memorable formulation, a “citadel of boredom.” The failure of the prosecution to call more than a token number of victims, and the virtual absence of testimony from Jewish survivors, disappointed victims’ groups and eroded support for the trial within victim communities.
The atrocity paradigm, by contrast, has come to place the narrative and testimony of the survivor-victim at the center of the legal proceeding. Here again the NMT proceedings can be seen as constituting a critical moment of transition. In the Medical trial, for example, prosecutors used advertisements to search for victims willing to testify, and, after a process of vetting to select the sturdiest and most articulate survivors, organized their cases, at least in part, around their testimony. Prosecutors also discussed the creation of a fund meant to compensate witnesses; although this came to naught, it anticipated devices incorporated into more recent international tribunals. The most outstanding example of the use of testimony in an atrocity trial remains the Eichmann trial, another overlooked legacy of that proceeding. However much Arendt might have lamented Gideon Hausner’s courtroom histrionics, the Israeli Attorney General and lead prosecutor succeeded in his aim of capturing the hearts and minds of the public by organizing the prosecution’s case around survivor testimony.

If we look at the work of the ICTY and the ICTR, we see that it now becomes possible to speak of victims’ rights in international cases. These latter rights include matters of voice and of control, and embrace 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 interveners to represent victims’ groups in the trial process. And the ICC, as Amnesty International recognizes, specifically “enshrines” three key principles relating to victims’ rights: “(1) victim participation in the proceedings, (2) protection of victims and witnesses and (3) the right to reparations.”

Of relevance to facilitating prosecution are important innovations in the principles of criminal accountability. These principles must not be confused with substantive supranational incriminations; instead, they serve as theories of liability specifically designed to facilitate proving the substantive guilt of persons or groups accused of committing supranational crimes. A confounding if not ineluctable feature of such crimes is that their principal architects are often organizationally far removed from the atrocities on the ground, a fact that complicates the legal process of establishing liability. Nuremberg attempted to address this problem through two techniques. First, the prosecution sought to rely heavily on the notion of conspiracy, though, consonant with the Nuremberg paradigm that I described earlier, the IMT 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 issued individual determinations of guilt and also declared specific organizations, such as the Gestapo, criminal. This declaration had no bearing on the judgments rendered against the trial’s defendants, but it was meant to facilitate guilty verdicts against hundreds of thousands of other possible defendants brought before Allied courts under CCL 10. Since the IMT, neither theory has played a robust role in jurisprudence of supranational crimes. 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 have been replaced by other powerful theories of liability, most notably the JCE. Articulated almost exclusively through the case-law of the ICTY, the JCE 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 a theory of JCE—a point suggested in the ICTY’s judgment in the Krajišnik case and one that underscores the problems with using theories of extended liability to prove crimes of specific intent. Along with the JCE, ICTY and ICTR prosecutors have structured indictments around the theory of command responsibility, and the related notion of superior responsibility; again, these must be seen as additional devices designed to make possible the imputation of liability to persons often far removed from the atrocities on the ground.

In describing the remarkable innovations in law designed to establish a workable jurisprudence of atrocity, final mention should be made of the commitment of institutional resources. The ICTY currently has a staff of 1,000 and an annual budget of over US$300 billion. The ICTR has secured a score of convictions at the cost of well over US$1 billion. The fledgling ICC, which was established has yet to complete a single trial, already has a staff of 600 and an annual budget in excess of 100 million euros. These figures may seem minuscule compared to the costs of a full-scale military campaign, but they still represent a commitment of resources that would have been unthinkable a generation ago.

The problem of the sanction

Let us for a moment stand back and take stock. 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 the IMT. I have argued that name notwithstanding, these offenses can be better understood 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. Finally, we have 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 JCE and command responsibility.
We are now, then, in the position to pose the question that this inventory assumes already answered: What is the purpose behind these extraordinary acts of the legal imagination and of institutional will? The obvious answer—to bring perpetrators of atrocity to justice—does less to settle the matter than to beg the question. For what does it mean to bring a perpetrator of atrocity to justice? Again, the answer may appear obvious: it means placing a perpetrator on trial, and in cases in which guilt has been established beyond a reasonable doubt, putting the perpetrator in prison. This is not to insist 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.43 That said, it is hard to deny 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 theories of penology do not defend incarceration as an end unto itself; its efficacy must be weighed in terms of its power to advance broad social purposes such as correction, removal from circulation, deterrence and retribution. How well do these purposes align with the task of doing justice to crimes of atrocity?

American prisons are today referred to as correctional institutions, but however fanciful, if not Orwellian, the designation, it plays no role in the logic of incarcerating architects of atrocity. The IMT experience is suggestive. Of the 21 defendants in the dock at Nuremberg, 11 were sentenced to death, three were acquitted, and seven were sent to Spandau, the castle-like prison fortress in the environs of Berlin. 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 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 was never conceived of as a place to “correct” the seven Nazi war criminals housed there.44 Thus whatever we hope to gain by incarcerating perpetrators, it is not their reform.

What of simply taking them out of circulation? This is a more plausible purpose, though it is far from clear that a political solution such as the one that sent Napoleon to his island retreat, or Idi Amin to Saudi Arabia, 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 have mentioned, the ICTR has spent well over US$1 billion to secure a score of convictions, reminds us that international justice does not come on the cheap. The continuing controversies surrounding the indictment of Sudanese president Omar Hassan al Bashir by the ICC remind us that many diplomats believe the threat of prosecution frustrates the goal of a negotiated settlement, as strongmen with their
backs to the wall have less incentive to bargain than those offered a cushy retirement in a beachfront retreat. Finally, it is worth noting that persons convicted by the ICTY and the ICTR are handed over to a designated host country to serve their terms, an arrangement that places the convict under the parole policy of the host country; in the case of Sweden and Germany, two host countries, these policies are very liberal, indeed. Bracketing the question of the fairness of such an arrangement, we must ask whether liberal parole policies—created in the crucible of ordinary criminal law—can be reconciled with the goal of removing perpetrators of atrocity from circulation.

Then, of course, there is the classic utilitarian goal of punishment: deterrence. Deterrence is specifically mentioned as a goal in the ICC Statute as well as in the Charter of the Yugoslav and Rwandan tribunals. Whether the trial and incarceration of perpetrators of crimes of atrocity 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 as institutions of supranational justice gain greater traction, their 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 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 crimes of atrocity remains, then, almost entirely speculative and aspirational.

Then, of course, there is the classic Kantian purpose of punishment as retribution. Here at least we find an open recognition of the vexatious nature of the problem, as opposed to a bewildering obliviousness that a problem even exists. At the time of the IMT proceeding, Hannah Arendt famously wrote to Karl Jaspers, "The Nazi crimes, it seems to me, explode the limits of the law; and that is what constitutes their monstrousness. For these crimes, no punishment is severe enough."45 Arendt, prescient as ever in her thinking, saw the IMT in a manner different from the trial's own self-understanding—that is, as an atrocity proceeding whose greatest contribution to international law was the admonishment of the crime against humanity, a point she explicitly made years later in Eichmann in Jerusalem. Indeed, in Eichmann in Jerusalem, Arendt faulted the Israeli court for failing to build on the one distinctive achievement of the IMT—the juridical recognition of crimes against humanity.46 Yet here too, she returned to the retributive dilemma of the jurisprudence of atrocity: that no punishment appears proportional to crimes of atrocity. In his summation before the court, Israeli Attorney General and lead prosecutor Gideon Hausner himself conceded, "It is not always possible to apply a punishment which fits the enormity of the crime."47

This issue continues to vex the work of the ICTY and ICTR, and will most certainly plague the ICC, as well. As Mark Drumbl has painstakingly documented, the sentencing practices of international and quasi-international tribunals reveal
the absence of any clear guidelines, standards, or logic;⁴⁸ in conversations with numerous participants associated with the ICTY, I heard time and again concerns raised about the unseemliness of sentencing a convicted perpetrator of crimes against humanity to, say, 11 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 we reconcile, for example, the sentencing of a juvenile killer to a mandatory life term in an American court with the 25-year-term given a perpetrator of genocide in an international tribunal?

The didactic value of the atrocity trial

Perhaps the best way to solve the problems that arise from applying conventional theories of punishment to the atrocity trial, is to see the atrocity proceeding as, in the first instance, a didactic exercise. Punishment, in this calculus, serves more a symbolic end, helping to communicate the pedagogic or tutelary lessons of the trial.⁴⁹ The atrocity trial, so understood, can serve several distinct ends: it can deliver a tool of political-legal legitimation by making visible the sober operation of the rule of law; it can promote a reckoning with the past by clarifying a history of horror often obscured in rumor, denial and silence; it can establish a baseline account of traumatic history that may serve the interests of democratic transition; and it can confer public recognition upon the memories of survivors and honor upon the memory of victims.

While some scholars have expressed serious doubts about the value of atrocity trials as tools of historical instruction and memory construction,⁵⁰ I would insist that legal didactics are a necessary feature of the justificatory logic of any jurisprudence of atrocity. Indeed, it is no coincidence that many of the principal participants in atrocity trials have openly embraced their didactic function. Robert M.W. Kempner memorably defended the Nuremberg trials as the “world’s greatest research institute,”⁵¹ and Michael Musmanno, in his judgment in the Einsatzgruppen case, likewise saw the trial as a pedagogic exercise:

Judicial opinions are often primarily prepared for the information and guidance of the legal profession, but the Nuremberg judgments are of interest to a much larger segment of the earth’s population. It would not be too much to say that the entire world itself is concerned with the adjudications being handed down in Nuremberg.⁵²

Taylor himself offered the strongest defense of the NMT program as a didactic exercise:

Nowhere can these records be put to more immediate or better use than in Germany; the reorientation of German thought along democratic lines must ultimately be accomplished by the Germans themselves. But the least we can
do is to insure that the documents which expose the true nature of the Third Reich are circulated throughout Germany. The Nuernberg documents must be utilized to the full in writing German history, if the Germans of today are to grasp the truth about the past.53

Didactic legality, of course, has its risks, but even the failures remain emblematic. The NMT experience makes clear that an atrocity trial cannot succeed as a didactic exercise in the absence of a commitment of resources and supporting acts of political will. Taylor’s concluding remarks in his summary report betray his frustration with the absence of coordinated support for the NMT program:

A failure to disseminate the Nuernberg records and judgments in Germany, accordingly, is not only a failure to make use of their contents to promote the positive aims of the occupation. It is a failure to put the necessary “ammunition” in the hands of those Germans who can make use of the documents presented and testimony given during the trials in reconstituting a democratic German society.54

Had the USA invested the requisite money and energy toward disseminating the NMT records and judgments, there is no way of knowing whether Taylor’s didactic ambitions would have met with success. History by counterfactual is always a tricky enterprise, and there is no clear recipe for orchestrating the successful reception of an atrocity program. But if we cannot confidently chart the path to success, we certainly know the way to failure. The unwillingness or inability to use political tools to support the juridical lessons of an atrocity trial will certainly doom its reception, especially given the opposition that such proceedings inevitably arouse. In this case, the failure to “get the word out” played into the hands of a well-organized campaign of opposition within Germany that was able to cast the entire Nuernberg trial program as a tool of victors’ justice.55 This is a lesson the ICTY, with its underfinanced outreach program, failed to master, and that must be mastered by the ICC.

**The symbolic purpose of punishment**

Granted, many scholars question the didactic value of the atrocity trial. Yet if we agree that the punishment of perpetrators of atrocity bears an uncertain relationship to correction, retribution and deterrence, then we might be all the more prepared to accept the trial as a 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 if we fail to appreciate its didactic function.

Here, however, one might insist that I have blundered into a contradiction by running together the didactic purposes of the trial with the symbolic function of
punishment. Recall that in the final pages of Eichmann in Jerusalem, Arendt turns from journalist to judge in order to pronounce judgment on the defendant.56 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 whom she addresses directly in the second
person, explaining the reasons why we—humanity—cannot share the same earth
with you, the perpetrator. Arendt defends the appropriateness of putting Eichmann
to death, dissenting from arguments of thinkers such as Jaspers and Martin Buber
who urged a commutation of sentence.57 For Arendt, the death penalty serves as
a form of radical lustration, and, as such, as a faute de mieux for her desired
punishment—global outlawry, planetary exile and ostracism from the fold of
humanity. From this understanding, we can better understand why the failure to
try Eichmann before an international tribunal constituted, in Arendt’s mind, 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’s fold,
Arendt understandably insisted that only an international court could have done
justice to the global semiotics of the historic trial.58 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 supra-
national crime—as an offense against humanity—and the theory of the trial—as
staged for particular groups. Yet by way of answering the Arendtian challenge, I
would insist the punishment of supranational crimes need not be understood as a
symbolic declaration of Kantian universalism. To the contrary, these crimes can
be better understood as crimes against plurality, directed against identifiable
groups and communities. While it is true that Arendt herself, at times, speaks of
the crime against humanity as a crime against plurality, her concept of plurality is
characteristically Kantian: abstract, void of thickness and particularity.59 An
examination of the definition of these crimes shows that they concern themselves
with a far thicker and less attenuated concept of plurality and community than
Arendt was prepared to accept. 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.60 Far from a
crime against a thin version of community that admits all humans, genocide is a
crime against a more thickly constituted notion of identity. By “focusing on a non-
individualized feature of the victim,“61 genocide represents the ultimate negation
of our human status, not as members of a global collective, but quite to the con-
trary, as specific thickly constituted individuals.

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 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 symbolic purpose behind the punishment of the supranational crime—as a defense of collective existence as expressed in the attachments of group and community—and the didactic function of the trial as a tool of collective history and memory. For how else do bonds of a kin, community, and group find expression than in the shared terms of history and memory?

This link—between the symbolic purpose of the punishment of crimes of atrocity and the didactic function of the trial—helps us to bridge the disconnect I noted earlier: 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, my aim is to do more than simply solve a conceptual conundrum. For the conclusion also helps better appreciate a critical problem raised by the jurisprudence of atrocity: the situ of justice.

The situ of justice

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 as witnessed by the resignation of the first presiding judge and the veto lodged against his replacement. The judge who finally took the reins, Raouf Rasheed Abdel-Rahman, frequently got into shouting matches with the defendants and curtailed the calling of defense witnesses, turning the trial into a partisan, and not a judicial exercise—this, even before the grotesque spectacle of Saddam's execution. The Hussein trial 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 have 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 raised by Eichmann’s attorney, Robert Servatius, went to the question of the tribunal’s impartiality. 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 claim the authority to judge 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 thrilling aspects of the Pinochet affair, but the fact that Magistrate Baltasar Garzón was permitted to investigate the crimes of the former colony, but not the crimes of Franco Spain suggests something perverse about the uses of universal jurisdiction.\(^{64}\) Likewise, the trials of Serbs in Germany for Balkan crimes, also bridge a troubled past over which pass not the ghosts of colonial domination but the more recent footfalls of Nazi atrocities in Yugoslavia. When judgment becomes more a gesture of domestic expiation for a nation’s own displaced crimes, or when it reaches far and wide to grandly defend the interests of all humanity, then the act of judgment threatens to turn into something arrogant, arid and imperial.

The *Milošević* trial invites similar observations. Consider an incident at the trial involving a prosecution witness named Morten Torkildsen, an expert in tracing financial transactions. Torkildsen had been called to the stand by the prosecution to testify about transfers of funds that took place between the Serb Republic and the Republika Srpska, the breakaway Bosnian Serb territory, between the years 1991 and 1995. The International Court of Justice’s judgment in the genocide suit brought by Bosnia against Serbia, though disappointing in many respects, did specifically highlight the critical importance of these financial transfers. Without this financial support and flow of funds, the International Court of Justice 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 *Milošević* trial, Torkildsen was asked a bizarre question. One of the judges, who later would become the presiding judge at the trial, 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 1985–91.\(^{65}\) 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. To those who have followed the work of the ICTY, Klarin is a legendary figure. For more than a 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 one of the first figures to call 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. For it was not isolated. From others, I learned of the story of the prosecutor who after being briefed on the Banja Luka crimes approached a staffer in the OTP and growled, “Banja Luka, Banja Luka—why haven’t we indicted Banja Luka!”—only to be told that Banja Luka was a town, not a person. The fact that not a single Milošević prosecutor had even a reading knowledge of BCS only underscores these problems. Commenting on the work of Milošević’s chief prosecutor, a Serbian researcher observed, “It is like listening to a very accomplished and brilliant pianist who is technically very good, but unfortunately the whole song is wrong.”

One might insist that these anecdotes highlight nothing more than idiosyncratic problems with the ICTY. After all, 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 in the early stages of the case. 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, is this not all the more reason to heed the insistence of various scholars that history be left out of the courtroom? But I do not believe this is an option. Cases involving crimes of atrocity 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 Milošević 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. Consider as well the organization of space and spectatorship at the Milošević trial. Many of the most famous photographs associated with the Eichmann trial, at least at the time of its staging, were not the images of the man in the glass booth. Rather, they were shots of the spectators at the trial reacting to the testimonial drama in the courtroom, their faces caught in expressions of grief, disbelief, anger and horror. If at the Eichmann trial the glass booth made the defendant into a specimen of display and scrutiny, the spectators themselves remained integrated into the proceeding. Their gasps, snickers and occasional violent outbursts were part of the trial and constituted a crucial point of primary reception for the journalists following the case. The contrast to the Milošević trial could not be greater. There it was the court itself that sat in the glass booth, sealed
from the gallery of spectators by sheets of glass thick enough to repel rocket propelled grenades. The glass was also soundproof; the only sounds that the spectator could hear were those broadcast over the headsets made available to each observer; the court was likewise sealed from any sounds from the spectators. As a consequence, there was no interaction between the court and the spectators—usually no more than a handful, though on occasion filling the gallery. For the observer, the feeling was akin to watching an elaborate psychology experiment through one-way glass, with the spectator entirely invisible to the Tribunal. The spectator gallery was supplied with TV monitors that tracked the proceeding; observers often found themselves watching the monitors instead of the courtroom—as powerful a trope as any for the formal removal of the court from the region in which the crimes took place. In an attempt to create a neutral venue, the ICTY succeeded in creating a thoroughly de-natured and un-situated courtroom—as if Beckett had staged a drama in the nonexistent space of Kantian universalism or behind Rawls’ veil of ignorance.

I do not mean naively to suggest that Milošević should have been tried in Serbia. Clearly this was not an option, though it is worth noting that the ICTY has, under the terms of its authorizing statute, removed some less high-profile defendants back to the region for trial.66 But these observations do challenge the alacrity with which many human rights lawyers champion international courts. Against this misplaced enthusiasm, I believe my larger jurisprudential argument delivers powerful support for the political pragmatics that undergirds the ICC: that international courts should be used only as courts of last resort.

As I have tried to argue, this jurisprudential argument 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 of the intimate connections between proceeding, people and place.

In the absence of these connections, the jurisprudence of atrocity that I have sketched insists that judgment becomes problematic in a second sense. For as I have tried to show, conventional theories of punishment fail 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 a symbolic gesture and the trial as a didactic exercise serving the interests of history and memory. From this perspective, 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.
Answering the challenge of atrocity

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.

Notes


10 For a full text of CCL 10, see T. Taylor, Final report to the Secretary of the Army on the Nuremberg war crimes trials under Control Council Law No. 10, Washington, DC: US Government Printing Office, 1949, Appendix D.


13 The use of forced labor, a crime against humanity, also played a key role in the three
industrialists trials; experiments and slave labor also stood at the heart of the Milch
case.
14 R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation – Analysis of
Government – Proposals for Redress*, Washington, DC: Carnegie Endowment, 1944,
p. 79.
15 Case 8, Opening Statement of the Prosecution, *TWC*, IV, 622.
16 Case 9, Opinion and Judgment, *TWC*, IV, 450.
17 Case 9, Opening Statement for the Prosecution, *TWC*, IV, 32.
18 Case 9, Opening Statement for the Prosecution, *TWC*, IV, 48.
the ICTY and Internal Violations of Humanitarian Law as International Crimes’,
21 For a critical comment on this novel doctrine of intervention, see T. Todorow, ‘Right
to Intervene or Duty to Assist?’, in N. Owen (ed.), *Human Rights, Human Wrongs*,
22 O. Fiss, ‘Within Reach of the State’, and L. Moreno-Ocampo, ‘Massive crimes are
24 See D. Segesser, ‘Der Tatbestand “Verbrechen gegen die Menschlichkeit”’, in
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26 D. Luban, ‘A Theory of Crimes Against Humanity’, *Yale Journal of International
28 See Reydams, *Universal Jurisdiction*.
30 See M. Cherif Bassiouni, ‘International Recognition of Victims’ Rights’, *Human
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34 Arendt, *Eichmann in Jerusalem*, p. 5f.
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<http://www.amnestyusa.org/international-justice/page.do?id=1011008> (accessed 1
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52 Case 9, Opinion and Judgment, TWC, IV, 413.


54 Ibid., p. 111.


57 Arendt, Eichmann in Jerusalem, pp. 251–252.


59 Arendt, Eichmann in Jerusalem, pp. 268–269.


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