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Introduction

IN ITS MARCH 10, 1965, edition, the German newsweekly *Der Spiegel* devoted a remarkable sixteen pages to an interview that *Spiegel*'s publisher, Rudolf Augstein, had conducted with the philosopher Karl Jaspers. The topic—whether the German statute of limitations for the crime of murder should be lengthened—hardly seemed to warrant such a dedication of space or to promise a profound discussion between Germany's most prominent publisher and arguably its most renowned living philosopher.

And yet the German statute of limitations had emerged as a topic of passionate and acrimonious debate both domestically and abroad. By the terms of the German criminal code, the prosecution of every crime was controlled by such temporal restrictions. (We are speaking of the Federal Republic of Germany, then West Germany; matters were different in East Germany.) Cases of assault and battery, for example, had to be prosecuted within five years of their commission, while manslaughter had a fifteen-year prescriptive period. Murder had the longest statute of limitations—twenty years.

This meant that in 1965, the twenty-year statute of limitations on murder prosecutions was about to toll on Nazi-era crimes. Without a statutory extension by the Bundestag, the German parliament, May 8, 1965—the twentieth anniversary of the end of the war in Europe—would have signaled the end of all Nazi-era prosecutions in the German Federal Republic. Thereafter no former Nazi or member of the SS living in Germany would need to worry about

a day of legal reckoning. German prosecutors would henceforth be powerless to bring criminal charges against anyone responsible for the Third Reich's mass atrocities.

This prospect aroused considerable international outrage. *The New York Times* editorialized that effectively exonerating "men and women who helped to perpetrate the greatest crime . . . in all history" represented a "monstrous distortion of justice."[1] But the German minister of justice, Ewald Bucher, remained unmoved, announcing that he would not seek an extension. Polls showed that Germans had grown weary of postwar trials—not that Germany had conducted many such proceedings. In 1958, the Federal Republic finally created a centralized agency responsible for investigating Nazi-era crimes, but it took several years for this dedicated unit to develop the institutional and investigatory resources necessary to mount successful cases, and it was not until 1963—when a court in Frankfurt began hearing evidence against twenty-two former Auschwitz functionaries—that Germany managed to mount an ambitious postwar trial of international significance. That trial, which ran nearly two years and hosted many prominent observers, including Professor Jaspers, had yet to reach its conclusion when Justice Minister Bucher dismissed as "nonsense" the claim that "tens of thousands of Nazi murderers remain free and unpunished."[2] Bucher was resolved to make sure that Germany's first great Nazi trial would remain its last.

Support for Bucher came from Thomas Dehler, who had served as West Germany's first minister of justice under Konrad Adenauer, and who likewise questioned the justice of trying persons for "actions that happened twenty-five years ago under exceptional circumstances."[3] Pushback came mainly from the Social Democrats (SPD), the lead opposition party to the ruling centrist-conservative coalition. Adolf Arndt, a leading SPD jurist, described his draft extension of the statute of limitations as a "tiny drop of justice owed to honor all those who lie in unknown mass graves."[4] The debate in the Bundestag was passionate, though unresolved. So matters stood when publisher Augstein traveled to the Swiss city of Basel to interview the famous philosopher, then in his eighty-third year.

Jaspers had long taught at Heidelberg, Germany's most venerable university, where, among other notable accomplishments, he

FIG. 0.1A "Expiration?" (referring to the looming statute of limitations on Nazi-era atrocities)

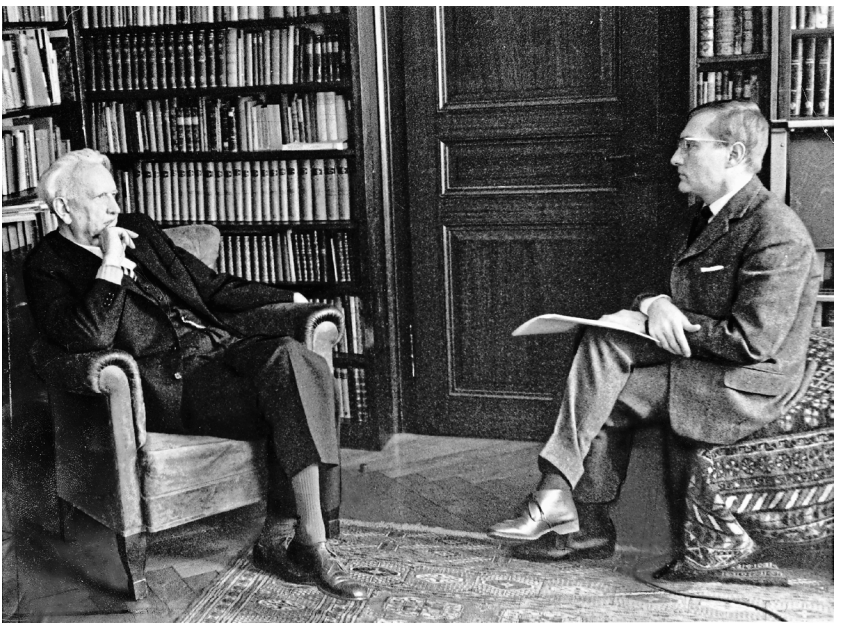

FIG. 0.1B Karl Jaspers interviewed by Rudolf Augstein

had served as Hannah Arendt's *Doktorvater*. Jaspers's wife was Jewish, and during the Third Reich Jaspers had been subject to an increasing number of restrictions before being forced out of his professorship and seeing his work banned altogether. During the war, his wife went into hiding, and the couple agreed to commit suicide if arrested. In 1948, he left Germany for a professorship in Basel, where he remained a voice of conscience, demanding that Germany forthrightly reckon with its Nazi past.

At the outset of the *Spiegel* interview, Augstein made clear that he wasn't interested in exploring the technical legal question of whether extending the prescriptive period for murder could be squared with the German Basic Law. Instead, he called upon the philosopher to weigh the matter of prosecuting former Nazis from a "moral standpoint," asking Jaspers to "bear the following in mind":

> During the conquest of Jaffa, Napoleon took 3000 prisoners . . . [and] to save on powder and bullets, he had them all bayonetted to death. Many of these captives were in company of their families, and these families—the women and children—were also slaughtered with

> bayonet. Nevertheless, no one suggested that anyone beside Napoleon should be held responsible for this massacre. By contrast, today . . . [in the case of] Nazi crimes, we act as if it's typical and proper to put on trial anyone who may have shot women and children under orders.[5]

Jaspers politely rejected Augstein's analogy. "Don't we need to recognize an essential distinction?" the philosopher answered. "History knows many such stories as the one about Napoleon. In this case, the representative of the state, Napoleon, committed a crime. But the state in its essence and entirety was not criminal. The decisive point is to recognize that the Nazi state was a *Verbrecherstaat*, a criminal state, not a state that happened to commit crimes."[6] Hitler was hardly the first tyrant to rule a European state. But the Nazi state, Jaspers insisted, was not a simple tyranny. The criminality of Nazi Germany was not limited to the excesses of a particular statesman or branch of government. The problem was not a criminal *regime* run by a corrupt leadership. Rather, Hitler's Germany had become a *Verbrecherstaat*; the state in its entirety—its vast bureaucratic network, administration of justice, and military—had become a criminal organization.

Jaspers was not alone in characterizing Nazi Germany as a criminal state. In the same year as Augstein's interview with Jaspers, the Italian legal theorist Giorgio del Vecchio published a short essay in a German legal journal titled "Der Staat als Verbrecher"—The State as Criminal.[7] Del Vecchio, who was Jewish, had been stripped of his professorship in Rome in 1938 but had found his postwar reinstatement briefly and ironically derailed thanks to his early, fleeting flirtation with fascist ideas. In 1965, del Vecchio was eighty-seven years old, five years older than Jaspers, and perhaps the most prominent living Italian legal thinker. In characterizing Nazi Germany as a criminal state, del Vecchio noted that "no criminal or group of criminals ever went so far in the violation of the most basic norms of morality as did . . . the Nazi state."[8] Two years earlier, in her famous account of the Eichmann trial, Hannah Arendt had likewise used the term "criminal state" to describe Hitler's Germany.[9] And two decades before that, in a short book called *Hitlerite Responsibility Under Criminal Law* that appeared in English translation in 1944, the Soviet Jurist Aron Naumovich Traĭnin had also characterized the Third Reich as a criminal state.

But it was Jaspers who most thoughtfully, if only schematically, explored the implications of calling a state criminal. For Jaspers, the *Verbrecherstaat* embodied the perversion of justice. "What it [the state] establishes through a flood of laws [*in einer Flut von Gesetzen*]," he asserted, was "the subjugation of the mass of humanity." Jaspers insisted that the Nazi criminal state operated not outside the law but rather through it—indeed, through a veritable *flood* of laws. Moreover, the criminal state "attests to, or reveals, its core principle" through its exterminatory acts; the state claims the prerogative to decide "which peoples lack justification to exist on the face of the earth."[10]

Two years after his interview with Augstein, Jaspers revisited the concept of the criminal state in a slim volume called *Wohin Treibt die Bundesrepublilk?*—which appeared in English as *The Future of Germany*. By then, the Bundestag had dealt with the statute of limitations problem in an awkwardly stopgap manner. Rather than simply lifting the statute for Nazi-era murder altogether, the German legislature relied on a bit of legal sleight of hand, reasoning that the prescriptive period for launching prosecutions had essentially been suspended from May 1945, the moment of Germany's unconditional sovereignty, until January 1, 1950, when German sovereignty was restored. In this way, the Bundestag granted prosecutors another five years, until New Year's Day 1970, to bring charges against those who had committed or aided and abetted Nazi murder. (The approach of this latter date in late 1969 predictably occasioned a fresh parliamentary debate and the hasty decision to simply extend the prescriptive period for murder from twenty to thirty years. This second stopgap measure gave German prosecutors and legislators a ten-year reprieve but failed to solve the deeper problem, which predictably resurfaced in 1979. The government's third go at the problem sparked little in the way of the profound debate that had gripped the Federal Republic fifteen years earlier; with little discussion and no fanfare, the Bundestag finally eliminated the statute of limitations for murder altogether.)

Except for a collection of autobiographical writings, *Wohin Treibt die Bundesrepublik?* was Jaspers's last book, and it is suffused with pessimism. At the time of its publication, Germany

was giddily enjoying the fruits of the *Wirtschaftswunder*, the "economic miracle"—the remarkable postwar manufacturing boom that transformed the devastated nation into Europe's most formidable economic power. The book briefly topped the bestseller list, but reviews were largely negative, as few Germans were prepared to have the pleasures of renewed prosperity dampened by the gloomy prognostications of an elderly and embittered philosopher out of touch with the bright new German realities.

And so, few paid attention to the book's brief but remarkable insights into Germany's recent past. In no more than a handful of pages, Jaspers returned to the concept of the *Verbrecherstaat* that he had introduced in his interview with Rudolf Augstein, proposing three ideas that will be of interest to us. First, he described the *Verbrecherstaat* as a "historical rupture" (*ein Ausbruch der Geschichte*). The advent of an exterminatory state in the heart of Europe upended Enlightenment assumptions about Western progress and the confident association of Western statehood with the highest form of civilization. As a second matter, Jaspers observed that "the actions of people of this state cannot be properly grasped" by the "ordinary criminal code." These are perpetrators, he insisted, "who never would have committed such crimes without the instigation of the Verbrecherstaat," and who "without *Mordlust* [murderous impulses] and without the slightest compulsion planned and organizationally engaged in mass murder."[11] Finally, Jaspers argued that the problem of the *Verbrecherstaat* cannot be solved by simply prosecuting a handful of leaders. Such a state must be destroyed in its entirety.

In the pages that follow, we will be centrally concerned with examining how international law has struggled to formulate principles and processes adequate to the task of addressing the specter of the *Verbrecherstaat*. Our goal is not to offer a theory of the Nazi state—a rich literature has already devoted itself to that task.[12] Nor will our goal be to contribute to the body of work that seeks to assign criminal liability to the state itself or that examines state criminality by importing concepts from corporate criminality.[13] Whatever merits such exercises may have, our task will remain fixed on addressing

the unusual challenges posed by prosecuting leaders and enablers of *Verbrecherstaat*. We shall see that acts committed by these officials stubbornly resist being framed by categories developed in the domestic criminal context. Mastering the moral and legal problems posed by those who commit and support the crimes of the *Verbrecherstaat* requires that we reimagine traditional understandings of criminal wrongdoing; indeed, we will ultimately need to entertain a different metric of justice altogether.

The problems we shall encounter register in the dissonance of the term *Verbrecherstaat*. From the perspective of traditional political and legal thought, the term "criminal state" smacks of oxymoron. Western political thought and international law was long committed to what British jurist and Nuremberg prosecutor Hartley Shawcross memorably called "the mystic virtues of the sanctity of state sovereignty."[14] Finding early formulation in the works of Hobbes, this was the idea that the state represented the greatest bulwark against the disordering effects of violence, and that obedience to the law represented the paradigmatic virtue of the pacified citizenry.

Endowed with these "mystic virtues," the state was considered the great defender of threats to security and order that issued from both within and without. By the lights of traditional Western international law, all states were formally equal and vested with the twin prerogatives of sovereignty. In its internal affairs, the state enjoyed a monopoly on legitimate force—with the "legitimacy" of state coercion born of the simple fact that it issued from the state. Sovereign prerogative allowed the state and its leaders to name, prosecute, and punish crimes and other acts that threatened internal social order, free from any external legal interference. And in the matter of foreign affairs, sovereign prerogative authorized the state to name its enemies and to wage war against them—not only to defend its interests, but also to advance them. In vouchsafing the dual prerogatives of sovereignty, the system of Western international law that prevailed through the end of the nineteenth century authorized no third party to scan the legality of how a sovereign exercised its internal police powers or its resort to military force.

This legal system was an expression of a still deeper ideology that associated statehood with civilization and civilization with the West. Indeed, the term "Western international law" was something of a pleonasm, as international law was considered the reserve of

Western states. In his influential text from 1836, *Elements of International Law*, the American jurist and diplomat Henry Wheaton described the system as "limited to the civilized and Christian people of Europe or those of European origin."[15] More than half a century later, John Westlake, the British parliamentarian and Cambridge professor, began his famous treatise on the subject with the simple statement, "International law is the law which is observed in the society of states, that is to say, of civilized states."[16] Life in Western nation-states promised to reach ever higher levels of civilization as industrialization, technological advances, the growth of market economies, and the development of bureaucratic administration made possible ever greater prosperity, better health, and an expanded freedom of individual choice.

As Jaspers understood, Nazism exploded this model. In Nazi Germany, the state became the principal perpetrator of mass crimes, the very agent of criminality.[17] The advent of the Nazi *Verbrecherstaat* represented a shock—a rupture, in Jaspers's words—to the Western political and legal imagination. That Germany, the land of *Denker und Dichter*, could turn into a *Verbrecherstaat* raised profound and inescapable questions for Western thinkers and jurists. How could a predatory, exterminatory state emerge in the heart of Europe? Was civilization simply a "thin veneer" that, under the right conditions, would inevitably peel away in an explosion of "primitive barbarism"? Did every modern bureaucratic nation-state contain the germ of a *Verbrecherstaat*, or was it a problem unique to Germany? In his novel *It Can't Happen Here*, Sinclair Lewis vividly imagined that it *could* happen here. The idea that every advanced state could deform into a *Verbrecherstaat* was, as we shall see, a matter that deeply preoccupied Western thinkers in the postwar period.

The advent of the *Verbrecherstaat* lent urgency to the task of radically rethinking the protections that international law had long conferred on state sovereignty. Nuremberg's International Military Tribunal (IMT) represented a paradigm shift—an ambitious, complicated, and yet not uncontroversial project of juridification designed to subject those responsible for the mass violence of the *Verbrecherstaat* to the sober ministrations of the law. A legal

reckoning with the Nazi *Verbrecherstaat*, it was hoped, would serve as a necessary step toward the construction of a workable and potent system of international criminal law.

One register of the problem was jurisdictional. Courts through history have served as instruments of state practice. Far from providing a tool capable of puncturing the mystical shield of sovereignty, international law had forged and tempered the durable prerogatives of the state. Toward the end of the nineteenth century, some progressive jurists began agitating for the creation of an international criminal court, but these efforts found little resonance or success before Nuremberg, the first criminal tribunal of a true international character in human history. In the decades after Nuremberg, jurists would experiment with a range of special tribunals—some international, some domestic, some of a hybrid character—designed to address the legacy of state-sponsored mass crimes.

Whatever form they assumed, such courts would need to master the evidentiary, linguistic, historical, and forensic problems posed by state-sponsored atrocities. Courts would learn the hard way that practices designed to prosecute conventional domestic criminals were ill suited to dealing with the crimes of the *Verbrecherstaat*. It is hard to overestimate the sheer complexity of such cases: Relevant documents are often sequestered in the archives of the very state under investigation and in a language beyond the competence of ordinary investigators; crucial forensic evidence might be buried in mass graves separated by hundreds if not thousands of miles; and complex regional histories might blur the distinction between perpetrator, victim, and bystander. Mastering these problems would require the creation of specialized investigatory units and the forging of novel courtroom procedures, not to mention an exceptional dedication of money and prosecutorial will.

More generally still, the very *model*—the conceptual understanding—of criminality anchored in domestic municipal law would struggle to accommodate state-sponsored crimes. As R. A. Duff has put it, criminal law is conventionally understood as "part of the institutional structure of the state."[18] Domestic law tends to treat criminal violence as the product of unmastered compulsions, evil motives, and deviant preoccupations, such as greed and bloodlust. I will call these acts of everyday wrongdoing "microcriminal"—not because

they are necessarily small or of little consequence, but to draw a needed contrast to what Herbert Jäger called acts of state-sponsored "macrocriminality."[19] Perpetrators of serious domestic crimes are assumed to have moral knowledge of the wrongness of their acts, although they may—out of perversion, deep-seated hatred, opportunism, or recklessness—choose to suppress or ignore that knowledge. The assumption of moral knowledge allows the law to ascribe criminal liability for wrongful acts. We do not hold those lacking such awareness—children, persons with an organic brain defect or suffering from severe mental illness—criminally responsible.

As Jaspers recognized, the advent of the *Verbrecherstaat* upset this model. To master the juridical challenge posed by state-sponsored macrocriminality, the law would need to address the capacity of the *Verbrecherstaat* to make mass violence into an everyday norm. This would require the forging of novel categories of wrongdoing—that is, incriminations that could stand over and against the state, and could condemn *legally authorized* actions of state functionaries. This represented a radical undertaking, and a deeply controversial one.

As we shall see, Allied jurists at Nuremberg charged the agents of the *Verbrecherstaat* with three substantive crimes: "crimes against peace," "war crimes," and "crimes against humanity." Of these, "war crimes" enjoyed the clearest legal pedigree before Nuremberg, having been codified in international instruments on the laws and customs of war. By contrast, "crimes against peace" and "crimes against humanity" were first recognized as international crimes at Nuremberg. To this list of novel incriminations we can add "genocide," the term coined by the Polish-Jewish jurist Raphael Lemkin in 1944 to describe the Nazis' treatment of Jews (and Slavic populations) in occupied Europe. With the framing of the UN Genocide Convention in late 1948, a new but flawed instrument was added to the arsenal of prosecutors seeking to hold perpetrators of mass atrocities to account.

The shape and content of international criminal law continues to bear the traces of its contact with what remains the paradigmatic

case of the *Verbrecherstaat*—Hitler's Germany. It is no exaggeration to say that the field we now call international criminal law was largely forged in response to Nazi Germany and the breathtaking crimes of the Third Reich. The effort to master the specter of the Nazi *Verbrecherstaat* led to extraordinary legal innovations—the creation of untested institutional forms, the introduction of new jurisdictional principles, the use of unorthodox evidentiary conventions, and most of all the shaping of novel incriminations that transformed interstate aggression and intrastate atrocities into international crimes.

The Nazi *Verbrecherstaat* created the conditions for juridical breakthroughs that had remained frustratingly beyond the reach of international jurists who, in the wake of the Great War, sought to criminalize those responsible for a state's resort to unprovoked war. But the unprecedented destruction wrought by Hitler's Germany prodded Allies at Nuremberg to treat aggressive war-making as the core crime of the Nazi *Vebrecherstaat*. In its final judgment, the IMT famously declared that to "initiate a war of aggression . . . is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."[20]

Nuremberg's effort to construct a postwar edifice of international criminal law around a state's unwarranted waging of war forms what I will call the "aggression paradigm." By treating aggression as the supreme international crime, Nuremberg insisted that the *Verbrecherstaat*'s acts of atrocity followed from its unjustified recourse to military force.

The aggression paradigm conceived at Nuremberg proved unstable, however. These instabilities would surface soon enough—both at Nuremberg's companion tribunal in the Far East, and at the twelve subsequent trials conducted by the American military in the same Nuremberg courtroom that had hosted the international tribunal. The Cold War spelled the further erosion of Nuremberg's aggression paradigm, as the United Nations failed to build upon Nuremberg's understanding of the crime of aggression.

But while the Cold War generally frustrated the cause of international justice, the period was not without its achievements. The UN Genocide Convention of 1948, itself a document weakened by

painful Cold War compromises, nevertheless represented a significant attempt to add to the legal tools available to be deployed against agents of the *Verbrecherstaat*. And notable trials addressed the legacy of the Nazi *Verbrecherstaat*, the most important of which remains the Jerusalem trial of Adolf Eichmann in 1961. The Eichmann trial transformed global perceptions of Nazi extermination from an extreme example of the violence of the Second World War to a crime sui generis, whose motives, organization, and goals could not be reduced to the logic of aggression.

The framing of the Genocide Convention and the staging of the Eichmann trial marked the rise of what I call the "atrocity paradigm," the notion that crimes of atrocity—namely, war crimes, crimes against humanity, and genocide—represent the paradigmatic and core offenses in the system of international criminal law. The unraveling of Nuremberg's attempt to make aggression the centerpiece of the emerging system of international criminal law, and its replacement by crimes of atrocity, marks, I argue, the most dramatic shift in legal understandings and priorities in the postwar period.

The last part of the book will be devoted to thinking through the consequences of the eclipse of Nuremberg's focus on aggression and the rise of the atrocity paradigm. While aggression remains a core international crime, we shall see that deep confusions continue to attach to the nature, range, and purpose of the incrimination. At the very least, we can agree that aggression is a leadership crime, with responsibility limited to those who plan and command the resort to arms. Crimes of mass atrocity are, by contrast, *mass* crimes—both in terms of the number of victims they exact and the number of those implicated in their commission. Criminality runs from the leaders of the *Verbrecherstaat* down to the hands-on killers, potentially implicating untold perpetrators and accessories. As a consequence, the prosecution of atrocities poses problems distinct from the prosecution of aggression.

As Jaspers noted, the motives and psychology of those who commit atrocities at the behest of a *Verbrecherstaat* resist being easily assimilated into standard criminological models anchored

in domestic law. While some perpetrators will fit the Hollywood stereotype of the SS sociopath, the vast majority of perpetrators and accessories will prove to be drearily unremarkable figures, persons who, but for the deformations of the *Verbrecherstaat*, would not have participated in acts of mass atrocity. Crimes of atrocity demand, then, a fresh account of criminal behavior and guilt.

The sheer number of participants in state-sponsored atrocity crimes also means that even the most ambitious prosecutorial program will be able to bring to trial only a tiny fraction of perpetrators and accessories. Numerous factors—for example, whether the principal architects remain in power—will determine who, if anybody, gets prosecuted. Given these stubborn realities, post-atrocity trials will inevitably seem insufficient to those who measure justice by the conventional metric of prosecutorial success.

We shall also see how crimes of atrocity explode the spatio-temporal limits that control domestic prosecutions. In 1968, in response to Germany's unseemly struggle with the issue, the UN adopted the Convention on the Non-Applicability of Statutory Limitations, declaring that war crimes, crimes against humanity, and genocide are imprescriptible—that is, subject to no statute of limitations. Having finally lifted its statute of limitations for murder in 1979, Germany has continued to file charges against surviving SS camp functionaries. In 2022, a German court convicted ninety-seven-year-old Imgard Furchner, former secretary to the commandant at the Stutthof concentration camp, as an accessory to murder, and yet because she had begun her duties at seventeen, the nonagenarian was tried in a German juvenile court. Trials such as Furchner's raise pressing questions about the meaning and purpose of exceptionally belated prosecutions.

No less fraught are the spatial dimensions of atrocity trials. Domestic prosecutions are subject to conventional jurisdictional limits; a court's authority typically extends over a particular community or locale—and no further. But crimes of atrocity confer universal jurisdiction—that is, jurisdiction conferred exclusively by the severity of the crime. In principle, this means that any criminal court, *anywhere*, has the authority to try persons accused of crimes of atrocity. The principle of universality is now accepted by many domestic national court systems, as witnessed by the successful

German trials of Congo rebel leaders, Rwandan genocidaires, and Syrian war criminals.[21]

While many applaud the advent of universal jurisdiction, its invocation also raises concerns. If universal jurisdiction can serve as a tool against impunity, it may also resonate uncomfortably with colonial practices—as when, for example, Spain exercised jurisdiction over Pinochet's atrocities in Chile while refusing to engage in a reckoning with the crimes of Franco. A related specter of imperial presumptuousness hovers about the work of international criminal courts, which perforce pursue cases against weaker states, leaving powerful states unruffled. And when international or far-flung courts attempt to defend the interests of all humanity from a position of Archimedean neutrality, the act of judgment threatens to turn arrogant and arid.

Finally, acts of mass atrocity expose a glaring disconnect between the extraordinary violence of the crimes and the limited scope of the law's sanction. No penalty "fits" crimes of mass atrocity. Even the death penalty, imposed, exemplarily, on eleven of the Nuremberg defendants and on Adolf Eichmann, only highlighted the imbalance between the millions anonymously murdered by the agents of the *Verbrecherstaat* and the legally authorized execution of an individual. Theories of penology developed on the level of domestic criminal law conceive punishment as a means, variously, of correction, social isolation, deterrence, and retribution; and while one can certainly question whether conventional domestic sanctions successfully advance any of these goals, it is clear that none of the standard purposes or practices of punishment fit crimes of mass atrocity. Such crimes expose the limits of the criminal law as a punitive or retributive system.

In an earlier book, I observed that atrocity trials have attempted to solve the crisis of sanction by reconceiving their basic purpose, enfolding a *didactic* function into the prosecutorial design.[22] The Eichmann trial famously sought both to prove the guilt of the accused *and* to use the proceeding as a way of transmitting memory and teaching history lessons. Prosecutors of agents of the *Verbrecherstaat* have, in effect, treated courtroom didactics as a legal solution to the problem that Hannah Arendt famously identified when, writing about Nuremberg, she observed, "For these crimes,

no punishment is severe enough. . . . This guilt, in contrast to all criminal guilt, oversteps and shatters all legal systems."[23] If crimes of mass atrocity reveal the limits of the criminal trial as a retributive exercise, the didactic trial delivers a reimagined prosecutorial purpose.[24]

This book argues that the atrocity trial inverts the normal domestic model of the relationship between proceeding and judgment. Conventionally, the trial is a *means* toward reaching a verdict. In an atrocity trial, the courtroom proceeding often takes on a life of its own, serving multiple and conflicting goals. It may seek to make visible the sober workings of the rule of law. It may aim to provide a baseline historical overview of the planning, organization, and commission of the mass crimes the accused is charged with facilitating. It may seek to promote transitional justice by revealing to the citizens of the *Verbrecherstaat* the true nature of the regime that acted in their name. It may aim to make visible the sacrifices of those who fought domestically and/or internationally to bring an end to the atrocities. It may seek to honor the victims and recognize the dignity of survivors. Less nobly, it may provide a tool of evasion and exculpation by, for example, pinning the atrocities of many on a select few.[25]

These various purposes that I've placed under the rubric of legal didactics—legitimation, clarification, education, transition, consolidation, evasion—suggest that our conventional conception of justice imported from domestic national law must be recalibrated when we weigh the purposes and evaluate the success of atrocity trials. What is needed is nothing short of a different conception and metric of justice.

Even the most successful prosecution remains a belated and limited response to crimes of atrocity. We will conclude our study by considering how the rise of the atrocity paradigm—and the recognition of the *belatedness* of any prosecutorial response—pushed jurists and officials to consider more muscular responses to state-sponsored mass crimes. We will attend to the tension between the Charter of the United Nations, which formalized the understanding that war waged for reasons other than self-defense (or

as a collectively authorized response to aggression) constitutes a violation of international law, and the UN's Genocide Convention of 1948, which seemingly authorizes or even obligates the use of force to stop a state from committing genocide against its own subjects. For many human rights advocates, the obligation to intervene underscores the somber responsibility of the world community to put a stop to the most horrific violations of human rights. For others, in the absence of UN authorization, armed foreign intervention to end domestic atrocity constitutes an illegal act of aggression.

"Wars of humanitarian intervention" and the doctrine known as the "responsibility to protect" expose grave tensions between the aggression paradigm and the atrocity paradigm. We shall see how wars of humanitarian intervention threaten to upset the standard model of war-making. A state perpetrating systematic atrocities against its own legal subjects is a *Verbrecherstaat*; state actors orchestrating, perpetrating, and assisting with such acts are committing international crimes. Seen in this light, armed humanitarian intervention looks less like war and more like a police action conducted by foreign militaries to put a stop to mass crimes and, perhaps, to disable the criminal state from ever committing further atrocities.

Teasing through the consequences of this understanding will raise profound legal questions. What right does a defender of a genocidal state have in opposing armed humanitarian intervention on *their territory*? What risks, if any, should armed intervenors be required to impose on their soldiers when they are fighting to put an end to far-flung domestic atrocities?[26] And how do we distinguish justified acts of intervention from pretextual ones, such as those trotted out by Russia to justify its invasion of Ukraine? Our answers to these questions will be quite paradoxical. Not only does the atrocity paradigm authorize acts of intervention that from Nuremberg's and the UN's perspective look like forbidden aggression; the atrocity paradigm arguably authorizes uses of force that otherwise would constitute international war crimes. This paradoxical result may be the most disquieting upshot of the law's efforts to master the challenges of the *Verbrecherstaat*.

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