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# *The Sensibility and Sense of International Criminal Law*

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## **Abstract**

*Intolerable large-scale crimes seem to render the justification of international criminal justice self-evident. It just feels right. But why? This article exposes international criminal justice to the 'why' question by applying the most frequently evoked models of the working mechanisms of rational, utilitarian, enlightened criminal justice. It demonstrates that the basic pre-conditions for their effective working according to the prevailing theories do not exist or get fulfilled. Regardless of the common outspoken statements referring to utilitarianism, the real answers to the 'why' question seem to echo the retributivist tone of justification. Everybody knows that prevention does not work, even if we hope it might one day. Everybody knows, but the knowledge has no consequences. Prevention is cited simply because of the void of alternatives, the rational ones. What would be left if the international criminal justice system were to be stripped of its utility and rationality? International criminal justice comes close to a religious exercise of hope and perhaps of deception. The ideology of a disciplined, mathematical structure of responsibility serves as a relieving strategy to measure the immeasurable. The seemingly unambiguous notion of guilt creates consoling patterns of causality in the chaos of intertwined problems of social, political and economic deprivation surrounding the violence. The article concludes with a question: Could the rational and utilitarian purpose lie elsewhere than in the prevention or suppression of criminality?*

## **1 Sensibility**

J'ai tout vu à Hiroshima. Tout. — Non, tu n'as rien vu à Hiroshima. Tu n'as rien vu. Rien.<sup>1</sup>

Verdun, Ieper, Tuol Sleng, Srebrenica, Rwanda, Grozny. War crimes, genocide, crimes against humanity, aggression.<sup>2</sup> Everybody is affected, directly or indirectly. The difficulty of addressing the major forms of violence and destruction, the mere

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<sup>1</sup> Marguerite Duras, script to the film by Alain Resnais, *Hiroshima mon amour*, 1959.

<sup>2</sup> For efforts to express post-Second World War victimization in figures, see e.g. Balint, 'An Empirical Study of Conflict, Conflict Victimization and Legal Redress 1945–1996', in Christopher C. Joyner (ed.), *Reining*

consciousness of their existence, has remained unaffected by any intellectual, technological or bureaucratic innovations. The current efforts to articulate a response to them concentrate on the domain of law. These efforts rely on two disciplines of law and two traditions, in many respects different from one another: international law and criminal law. International law offers its horizontal framework, classically based on the willingness between equals to conform to a rule or practice that is accepted as appropriate.<sup>3</sup> The setting of international law is that of diplomatic conferences, convention-making by consensus and autopoietic interpretation of law. Criminal law, then, with its origins in the nation-state, has contradictory expectations attached to it. Although it is supposed to be normative, formal, predictable and equal, it is also supposed to be a local interpreter of common values, offering a solution, a remedy to social problems, and thereby setting on them the miraculous seal of finality. Most importantly, criminal law carries utilitarian aspirations *vis-à-vis* the future: prevention of further crime, integration of society and rehabilitation of offenders.

To compare and confront international law and criminal law in this simplistic manner is certainly distorted: whereas criminal law is but a slice of our idea of a domestic legal system, international law is the whole cake. What is addressed by confronting them is the manner in which international law, international lawyers and international decision-makers have recently taken tools out of the criminal law toolbox and started to apply them to the international framework. The field of law referred to as 'international criminal law' and the legal bureaucracy devoted to it has, since the beginning of the 1990s, been in a strongly expansionary phase.<sup>4</sup> A lot has

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*in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference 17–21 September 1998* (Nouvelles Études Pénales, Association internationale de droit pénal, Toulouse, 1998) 101–124, at 101. For literary and personal accounts, see e.g. Primo Levi, *Si c'est un homme* (1996); and Ruth Klüger, *Weiter leben* (1992).

<sup>3</sup> See Georg Jellinek, *Die rechtliche Natur der Staatenverträge* 2 (1880) 42–49 and 56–58. See also the *Lotus* judgment of the Permanent Court of International Justice: 'International law governs relations between independent States. The rules of law binding upon states therefore emanate from their own free will.' *SS 'Lotus' (France v. Turkey)*, 1927 PCIJ Series A, No. 10, at 18.

<sup>4</sup> See e.g. Raimo Lahti's description of the 'boom': 'First, the system of international criminal law is right now emerging forcefully ... Secondly, the globalisation of crime and criminal justice is a noteworthy trend ... Thirdly, we can see the strong development of international criminal law and the increase of the importance of the UN's activities in global criminal policy taking place at the same time as the regional strengthening of similar tendencies, e.g. on the European level.' Lahti, 'Towards an International and European Criminal Policy?', in Matti Tupamäki (ed.), *Liber Amicorum Bengt Broms: Celebrating His 70th Birthday 16 October 1999* (1999) 222, at 222–223. See also McCormack and Simpson, 'The International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind', 5 *Criminal Law Forum* (1994) 2, at 3–4: 'Not since the Nuremberg and Tokyo trials ... has there been so much interest in war crimes and individual responsibility.' The interest is noticeable also in the study programmes of universities; see e.g. 'Report of the ABA Task Force on Teaching International Criminal Law', 5 *Criminal Law Forum* (1994) 91. For comparison, we can get an idea of the (here German) academic atmosphere before the 'boom' in Otto Triffterer's statement from 1985 with reference to direct criminal responsibility according to international law: 'In der übrigen wissenschaftlichen Literatur ... wird diese Frage in den letzten Jahren immer weniger behandelt.' Triffterer, 'Völkerstrafrecht im Wandel?', in Theo Vogler (ed.), *Festschrift für Hans Heinrich Jescheck zum 70 Geburtstag, 2 Halbband* (1985) 1477, at 1495.

changed since 1989, when during the Special Session of the General Assembly on drugs Trinidad and Tobago proposed the initiation of a discussion of the creation of an international criminal court, with reference to the limited possibilities of the states in its region to deal with expanding international drug criminality.<sup>5</sup> The general reaction ranged from caution to fatherly amusement full of pessimism. The great international leap forward experienced in the 1990s took place in the field of international humanitarian law and was caused by violence: 'right up to the eve of the atrocities committed in Yugoslavia', according to Theodor Meron's account of the evolution, 'the criminal aspects of international humanitarian law remained limited and the prospects for its international enforcement poor'.<sup>6</sup>

Contemporaneously with the emergence of international criminal jurisdiction by way of the establishment of the Yugoslavia Tribunal and soon thereafter the Rwanda Tribunal, an expansionary phase can also be observed in the international cooperation in criminal matters between states. A lot of that has to do with the post-1989 changes to the previous political blocs. Existing networks of conventions in the field, such as that of the Council of Europe, are getting new members, gaining new territories. A recourse to criminal law occupies, both nationally and internationally, a central position in the contemporary way to relate to the problems of everyday life. In May 2001, the ad hoc tribunals for the former Yugoslavia and for Rwanda were involved in full-scale adjudication. The Statute of the International Criminal Court, adopted in Rome in 1998, has so far been signed by 139 states and ratified by 37 states.<sup>7</sup> A half-national, half-international tribunal for the Khmer Rouge is about to be established in Cambodia. A few cases turning on the existence or not of universal jurisdiction have made headlines worldwide, most notably the *Pinochet* case. The community of human rights activists has, it seems, 'adjusted its historic predisposition for the rights of the defence and the protection of prisoners to a more prosecution-based orientation'.<sup>8</sup>

What is the task of this forcefully emerging international criminal law? In simple terms, it is to be effective enough to finally live up to the public desire 'after almost 50 years of lip service and neglect . . . to enforce this responsibility in real trials that send

<sup>5</sup> See General Assembly Resolution 44/39, 4 December 1989; Stephen C. McCaffrey, 'The Forty-Second Session of the International Law Commission', 84 *American Journal of International Law* (1990) 930; Bassiouni, 'Introduction, Draft Statute International Criminal Tribunal', 9*bis Nouvelles Études Pénales* (1993) 3, at 11.

<sup>6</sup> Meron, 'War Crimes Law Comes of Age', 92 *American Journal of International Law* (1998) 462, at 464.

<sup>7</sup> As at 6 August 2001. In accordance with Article 126 of the Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (hereinafter the 'ICC Statute'), the ratification of 60 states is required for it to enter into force.

<sup>8</sup> See Schabas, 'Sentencing by International Tribunals: A Human Rights Approach', 7 *Duke Journal of Comparative and International Law* (1997) 461, at 515.

real criminals to real prisons'.<sup>9</sup> In other words, nothing less than 'to discourage future offenses, deter vigilante justice, promote reconciliation, and reinforce respect for the law and new democratic regimes'.<sup>10</sup> All this promise of the benefits of real law, however, confronts the unpredictable 'reality' of international politics — the ambiguity or non-existence of jurisdiction, of competent legislators, of police, judges and prisons. Criminal law as a tool of international lawyers faces an enormous challenge. As opposed to mere 'human rights sensibilities',<sup>11</sup> it is supposed to be the, by definition, positivistic discipline of law, based on the fundamental importance of legality, the principle of *nullum crimen sine lege, nulla poena sine lege*.<sup>12</sup>

But how positivistic, rational, utilitarian and 'real' can international criminal justice be? This is not a question easy to pose. The unambiguously devastating quantity and quality of the suffering of the victims of serious international crimes calls for intuitive-moralistic answers, in the manner of '[c]ertain things are simply wrong and ought to be punished. And this we do believe.'<sup>13</sup> To feel compelled nevertheless to subject also international criminal law to the question 'why?' bears the risk of being misunderstood, the risk of being defined in terms of for or against the violence and injustice the crimes represent. This is why it is necessary here — before trying to claim anything — to make clear what is not claimed.

First, I am not of the opinion that we should ignore our intuition and just 'accept those crimes', on the ground that 'nothing works'<sup>14</sup> anyway. Nor is there any reason to think that inquiring as to the meaning and justification of criminal law in general and international criminal law in particular should have, as a consequence, 'letting those guilty of genocide walk free'. Secondly, with all due respect to criminal law theory, the political sciences and the moral philosophy of tomorrow, there will hardly ever be a perfect explanation. The inherent problems attending criminal law, and even more so international criminal justice, are not likely to disappear just by developing a perfect theory. The hard questions will remain: the infliction of suffering for a good purpose, the ambivalence of individual responsibility in the light of the close

<sup>9</sup> John L. Washburn, in an Internet column for the Carnegie Council on Ethics and International Affairs, cited in Barbara Crossette, *New York Times*, 12 June 2000.

<sup>10</sup> Scharf, 'Reining in Impunity for International Crimes, Report of the Rapporteur', in Joyner, *supra* note 2, at 127.

<sup>11</sup> See Simma and Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View', 93 *American Journal of International Law* (1999) 302, at 303.

<sup>12</sup> On interpretation in the context of international criminal law, see e.g. Tallgren, 'Jugoslavia-tuomioistuin', in *Entisen Jugoslavian alueen humanitaarisen oikeuden loukkaukset tuomiolla* (Publications of the Advisory Board for International Human Rights Affairs, No. 8, Helsinki, 1996) 1.

<sup>13</sup> Andrew von Hirsch, *Doing Justice: The Choice of Punishments. Report of the Committee for the Study of Incarceration* (1976) xxxix.

<sup>14</sup> This slogan has become famous as the conclusion of a review of 231 different surveys in 1945–1967 on the efficacy of the treatment of offenders on reducing recidivism; see Douglas Lipton, Robert Martinson and Judith Wilks, *The Effectiveness of Correctional Treatment. A Survey of Treatment Evaluation Studies* (1975).

connection of the concept of guilt to the values of the particular society in question,<sup>15</sup> not to mention the ever-present possibility of error.

As this article aims to demonstrate, this is not to say that these questions should not be asked. While everybody is busy with it, does one really know what to do with international criminal justice? And why? This article examines the current narratives of how criminal law is supposed to work in the international context and how its exercise is justified. My analysis starts with an effort to 'apply' the most often reiterated option for justifying criminal law in the national context, i.e. general and special prevention. I aim to find out how the particular pre-conditions of these rational, utilitarian mechanisms, the way they are conceived of in the national context, fit into international criminal justice. Thereafter, I examine possible alternatives. I am interested in coming to terms with the prevailing rhetorical pattern of inventing and reiterating the background of the consequentialist justifications for international criminal law, even with the smallest prospect of any success, were the logic of those justifications themselves to be followed. The thesis that I develop in this article is that the 'rational and utilitarian' purpose of international criminal law could partly lie elsewhere than in the prevention and suppression of criminality.

## 2 Sense

### A *Handy Analogies of the National?*

Penal law is one of the remedies suitable to ensure effective compliance with the law, and should be at the disposal of the international community for purposes of deterrence and retribution.<sup>16</sup>

The 'international criminal justice system' uses the same means as national systems: proscription, determination of responsibility, intentional infliction of pain. The 'international criminal justice system' has no proper justifications of its own, so far. It could be claimed that it is merely an extension, by delegation, of the state power to determine criminal law norms and to punish. As a confirmation of this argument it could be suggested that the forms of conduct in question threaten human existence so fundamentally that they are criminalized in most national criminal codes. Where this is not the case, the argument would be that they are prohibited in international customary law, with a reference to the Nuremberg and Tokyo trials. This seems, tentatively, to be a valid argument for explaining why it generally seems to be taken for granted that whatever objectives and justifications work — or are supposed to work — on the national level should also, without any extra effort, cover the decisions

<sup>15</sup> See e.g. Norrie, 'Albert Speer, Guilt, and "The Space Between"', in Matt Matravers (ed.), *Punishment and Political Theory* (1999) 133.

<sup>16</sup> Tomuschat, 'Crimes Against the Peace and Security of Mankind and the Recalcitrant Third State', 24 *Israel Yearbook on Human Rights* (1995) 41.

and actions taken by the states in concert. As the Trial Chamber of the ICTY stated in the *Erdemovic* case:

The International Tribunal's objectives as seen by the Security Council — i.e. general prevention (or deterrence), reprobation, retribution (or 'just deserts') as well as collective reconciliation — fit into the Security Council's broader aim of maintaining peace and security in the former Yugoslavia.<sup>17</sup>

This pattern of thought is part of the more general domestic analogy: the assumption that the principles regarded as valid in inter-individual relations apply in inter-state relations as well. The domestic analogy is among the most debated issues in international law scholarship.<sup>18</sup> My focus here is on the analogy of the justification of criminal law, which has several flaws. First, from the positivistic point of view the analogy relies on the presumed consent of all states to the use of the delegated exercise of their power by international institutions of criminal justice. In so doing, the analogy ignores that, for example, the ICC may, according to its Statute, impose jurisdiction explicitly and perhaps in an exemplary manner contrary to the will of states.<sup>19</sup> Secondly, from the civil libertarian point of view, the analogy concentrates solely on the relationship between the state and the international community. It ignores the relationship between individuals — whose responsibility is at issue in international criminal justice — and the 'international community' acting as the punishing authority. Thirdly, from the internationalist libertarian point of view, such an analogy misunderstands the whole issue of international criminal justice.<sup>20</sup> The 'international criminal justice system' is simply not the same as any national system. Added value is supposed to be created by the fact that international criminal law is applied by an international institution. From that perspective, the domestic analogy is a degradation of international criminal justice.

And what kind of a national criminal justice is the source of this analogy? Most

<sup>17</sup> See *Prosecutor v. Erdemovic*, Sentencing Judgment of Trial Chamber 1 for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia Since 1991, by Security Council Resolution 827 (1993) (hereinafter ICTY), Case No. IT-96-22-T (29 November 1996), para. 58.

<sup>18</sup> See e.g. Hidemi Suganami, *The Domestic Analogy and World Order Proposals* (1989); and Edward Hallet Carr, *The Twenty Years' Crisis 1919–1939* (2nd ed., 1984). On liberalism and domestic analogy, see Martti Koskeniemi, *From Apology to Utopia* (1989) 68–73; on the link between the domestic analogy and liberal-capitalist ideas about statehood, see Anthony Carty, *The Decay of International Law* (1986) 8–11, 43–60 and 88.

<sup>19</sup> In the international criminal trials so far, international jurisdiction has been imposed against the will of the state. In innumerable situations of impunity on the national level, the general suggestions have gone in the direction that international jurisdiction should have been imposed. The ICC Statute explicitly provides for the imposition of international jurisdiction against the will of the state or states in question (here generally the territorial state is meant, but in some cases it could also be the state of nationality of the offender or the custodial state). This is possible not only when the Security Council refers 'a situation' to the jurisdiction of the Court, but also when the ICC decides on complementarity or *ne bis in idem* contrary to the position of a state; see Articles 12, 13, 15 and 17–20.

<sup>20</sup> This can be illustrated by the criticism William A. Schabas has levelled against the 'positivistic' efforts to apply the legality principle in international criminal justice: 'If the crimes are not the same, why should the penalties be the same?' See Schabas, *supra* note 8, at 478.

often, not the one known from the national discussions and everyday life, that all-too-fragile combination of the repressive routines adapting to political pressures ('we have to do something against this criminality, don't we?') and the barely hidden helplessness, being at a loss as to the basic rationale of the routines exercised ('whether anything will work and, if so, why this measure?').<sup>21</sup> Like a wishful but lazy parent, the national system is telling the international system: 'Don't do as I do, do as I say!' The 'international criminal justice system' is assumed to function following the mechanisms of an idealized national system that cannot be localized anywhere.<sup>22</sup> The extension of international criminal jurisdiction to particular conduct would appear to be a powerful reproof of the international community as a whole. The potential criminals would read the resolutions of the Security Council and stop their grave violations of international humanitarian law amounting to a threat to the maintenance of international peace and security. A mercenary or a soldier of a nationalistic movement would be indoctrinated to refrain from further breaches of law and to support the shared values of the international community if one of his co-fighters were to receive a 15-year prison sentence in The Hague.

Paradoxically, coexisting with the exclusive reliance on analogy in its justification, there is the will to stress the truly independent international nature of the 'international criminal justice system'. Rather than being a mere substitute or complementary part of a national system, it is a fortress of its own, with its own laws and policy. I will discuss this by taking as an example the Statute of the ICC, Article 77 on Applicable Penalties that 'builds on the principle of equality of justice through a uniform penalties regime for all persons convicted by the Court'.<sup>23</sup> Before that, I will elaborate on the basic lines of thinking with respect to the justification of criminal law in general.

## **B Fitting the Justifications to International Criminal Law**

I believe that a properly constituted and structured [international criminal court] can make a profound contribution in deterring egregious human rights abuses worldwide.<sup>24</sup>

The way the national discussion has it, the questions of the justification of criminal

<sup>21</sup> I have elsewhere described the tone of the discussions in the Diplomatic Conference on the establishment of the ICC where 'our rising criminality rates, crowded prisons and corroding social cohesion' were forgotten. Seldom, if ever, were doubts expressed as to whether the international criminal justice system, faced with serious large-scale criminality, 'could master the punishing game so much better than the national systems in general'. See Tallgren, 'We Did It? The Vertigo of Law and Everyday Life at the Diplomatic Conference on the Establishment of an International Criminal Court', 12 *Leiden Journal of International Law* (1999) 683, at 686.

<sup>22</sup> A different aspect is that the national systems are, for their part, at least in theory, bound by international yardsticks in the forms of human rights conventions and other standards or models. These were, however, when drafted, addressing the national system, i.e. a state exercising its power to punish.

<sup>23</sup> See Fife, 'Article 77 Applicable Penalties', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999) 985, at 986.

<sup>24</sup> Bill Clinton, when deciding to sign the Statute of the ICC: see 'Clinton's Words: The Right Action', *New York Times*, 1 January 2001.

justice are closely linked to the trust of the public. The general opinion on whether criminal law is ‘applied’ or ‘implemented’ in a credible and acceptable manner, in the sense that it is felt to be sufficiently effective, predictable and acceptable, and whether the punishing instance is seen as an authority, is often addressed in terms of the empirical ‘legitimacy’ of criminal justice.<sup>25</sup> In the national systems, this empirical legitimacy is generally not regarded to be sufficient as a justification for the criminal justice system and the infliction of punishment. Instead, legitimacy and justification need to be ‘critical-normative . . . formulated according to the discourse theory in a relevant auditorium’.<sup>26</sup> This is fair enough. And what would this mean, now, for international criminal justice?<sup>27</sup>

The first step in finding out seems to be to try to see to what extent the known options for justifying criminal law fit international criminal justice. To start with, the main lines of the different theories of punishment move between the consequentialist and the retributivist theories. It needs to be added at the outset that in current scholarship this labelling of the theories is of only limited use. The thinking on punishment is a colourful mixture of different theories, both more sophisticated versions of the two main ones mentioned above, and theories that mix basic assumptions of the two.<sup>28</sup> In the following, the basic alternatives, the ‘classical’ punishment theories, are examined in cursory form.<sup>29</sup> The focus in the following is not a comprehensive application of current criminal law theory. The perspective in the search for justification is an external one: what is behind the creed in criminal law that is currently being reiterated at international forums? I will therefore concentrate on such questions as whether the ‘international criminal justice system’ is useful at all, and if so then in what way and based on what values. The simplistic approach of the presentation should not be confused with subscribing to the monistic attempt, in the sense of trying to refer the international criminal system to one single, coherent

<sup>25</sup> See Lahti, ‘Kriminalvetenskaplig forskning och kriminalpolitik’, 73 *Nordisk tidskrift för kriminalvetenskap* (1986) 353; Lahti, ‘Towards a Rational and Humane Criminal Policy — Trends in Scandinavian Penal Thinking’, *Journal of Scandinavian Studies in Criminology and Crime Prevention* (2000) 141, at 149; Lappi-Seppälä, *Rangaistuksen määräämisestä I* (1987). The problematic term ‘legitimacy’ in this context would merit a whole discussion of its own. This must, however, be left aside here. See Thomas M. Franck, *The Power of Legitimacy Among Nations* (1990); Koskenniemi, ‘Book Review on “The Power of Legitimacy Among Nations”’, 86 *American Journal of International Law* (1992) 175.

<sup>26</sup> See Lappi-Seppälä, ‘Miksi rikosoikeus?’, in Ari Hirvonen (ed.), *Kohti 2000-luvun rikosoikeutta* (1994) 19, at 33; Lahti, ‘Towards a Rational and Humane Criminal Policy’, *supra* note 25, at 146, referring to Aulis Aarnio, *The Rational as Reasonable* (1987), and Nils Jareborg, *Begrepp och brottsbeskrivning* (1974) 229.

<sup>27</sup> See Tallgren, *supra* note 21, at 705–706.

<sup>28</sup> See Matravers, ‘“What to Say?”: The Communicative Element in Punishment and Moral Theory’, in Matravers, *supra* note 15, at 108–123; Nicola Lacey, *State Punishment: Political Principles and Community Values* (1988) 46–57. Andrew von Hirsch presents a comprehensive mixed theory in *Censure and Sanctions* (1993).

<sup>29</sup> I leave aside a detailed analysis of the different questions involved in the justification (e.g. the system as such, the application of the system in a particular case, the justification, the purposes, the criminalizations, the procedure chosen) that has been attempted by the so-called analytical school; see e.g. H.L.A. Hart, *Punishment and Responsibility* (1968) 3.

framework of values or purposes according to which the more detailed rules of the systems are constructed.<sup>30</sup>

### 1 Prevention

Something ought to follow certain actions — but we do not know what, how much, or in what way.<sup>31</sup>

The consequentialist or relativist theory of punishment bases its justification for punishing on the possibility of prevention by means of general or special prevention. Punishment looks to the future and contributes to greater utility by preventing further criminality. The background of this manner of justifying punishment rests on the general framework of utilitarian moral philosophy, according to which the moral value of an act is based on its socially useful consequences. The greatest possible happiness of the greatest number of persons may require the infliction of the greatest misery on a few. Punishment is justified by the gain of less crime in the future, either by the offender himself or by others.<sup>32</sup>

In the 'international criminal justice system', the scenarios for the functioning of prevention are based on the assumption that the mere existence of international criminal courts, or as it is currently, the possibility that the Security Council would create ad hoc tribunals, would deter the likely offender from committing the crime.<sup>33</sup> Furthermore, the possibility of a state exercising jurisdiction based on the universality principle could be added here. It is not easy to estimate how likely the preventive effect of the international system is. There are no grounds to exclude the possibility of such an effect. Neither is there evidence in its favour. Instead, there are some statements like: 'There is some evidence, albeit anecdotal and uncertain, that the ad hoc tribunals and the prospects for the establishment of the ICC have had some deterrent effect on violations.'<sup>34</sup> As with many other complex social phenomena or institutions, any criminal justice system operates in a world of likelihoods, possibilities and beliefs that does not easily submit itself to 'empirical truths' or 'clear analysis'. As in any comparable attempts to make sense of social life, the 'tension between broad generalization and the specification of empirical particulars'<sup>35</sup> is unavoidable. Familiarly, the assessment of prevention is one of the most difficult and controversial issues in criminal law theory. Empirical studies of the national systems have met with considerable criticism and are of very limited value for this study.<sup>36</sup> Since it is not

<sup>30</sup> The fallacy of such an attempt has been broadly acknowledged; see e.g. Hart, *supra* note 29, at 1: 'any morally tolerable account of punishment must exhibit it as a compromise between distinct and partly conflicting principles.'

<sup>31</sup> Christie, 'Utility and Social Values in Court Decisions on Punishment', in Roger Hood (ed.), *Crime, Criminology and Public Policy. Essays in Honour of Sir Leon Radzinowicz* (1974) 281, at 290.

<sup>32</sup> For a general description of the consequentialist or utilitarian theory, see e.g. C.L. Ten, *Crime, Guilt, and Punishment. A Philosophical Introduction* (1987) 3–4 and 7–38. For a discussion of Bentham's theory of sanctions, see H. L. A. Hart, *Essays on Bentham* (1982) 132–147.

<sup>33</sup> See Tallgren, *supra* note 12, at 59–63.

<sup>34</sup> Meron, *supra* note 6, at 463.

<sup>35</sup> See David Garland, *The Culture of Control* (2001) vii.

<sup>36</sup> See e.g. Ten, *supra* note 32, at 7–13; Thomas Mathiesen, *Prison on Trial. A Critical Assessment* (1990) 51–58.

meaningful to start further speculations here, the approach chosen is to refer to a few issues that influence, in international criminal law, the effectiveness of the mechanisms of prevention as they are currently conceived of in the national context.

## 2 *General Prevention*

Believing that the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed.<sup>37</sup>

In general prevention, the main mechanisms by which an individual is supposed to refrain from committing the prohibited conduct are often presented as divided into the following three categories. First, prevention is believed to take place out of fear of the negative consequences, i.e. the deterrent effect of the punishment. The threat of punishment is supposed to have a direct effect on the motivation of the offender. Secondly, an individual is supposed to yield to criminal law by internalizing the moral values behind the punishment, i.e. starting to believe that what is prohibited is wrong. That way of thinking sees criminal law as shaping the values of the society. Furthermore, criminal law is supposed to strengthen the value system that it represents. The third mechanism of general prevention is subordinate to the two previous ones. It is understood as creating coherence in the values of a certain group or society. That is referred to as integration prevention, or, with a slightly different emphasis, as the habit-creating factor. The clue is to believe that people start to behave in a certain manner simply out of habit, or because others behave in the same manner as well.<sup>38</sup>

The mechanisms of general prevention rely, in simple terms, on three kinds of conditions: cognitive, systemic and behavioural conditions.<sup>39</sup> By cognitive conditions it is normally understood that the object of the prevention needs to be aware of the norms, of the likelihood of negative consequences of breaking them and of the severity of the punishment that may be imposed.

The systemic conditions concerning the repressive system and its functioning are believed to be most important for the mechanism whereby prevention is supposed to take place through internalizing the moral values the repressive system is aiming to promote. The same holds true for the mechanism whereby prevention is supposed to

<sup>37</sup> Security Council Resolution 827, 25 May 1993, Preamble, para. 7.

<sup>38</sup> For discussion, see Bernd Schünemann, Andrew von Hirsch and Nils Jareborg (eds), *Positive Generalprävention: kritische Analysen im deutsch-englischen Dialog* (Uppsala Symposium, 1996). See also Jareborg, 'What Kind of Criminal Law Do We Want?', in Annika Snare (ed.), *Beware of Punishment: On the Utility and Futility of Criminal Law* (1995) 17. Nils Jareborg and Josef Zila differentiate between empirical and expressive general prevention; see Nils Jareborg and Josef Zila, *Strafrettens paföljdslära* (2000) chapter II.9. Concerning the latter, they stress that 'Det viktiga är att försöka kommunicera, övertyga, ge uttryck för värderingar, "göra markeringar", visa at man menar allvar, o. dyl. Vi kallar detta synsätt "expressiv allmänprevention" man önskar paverka allmänheten genom att understryka ifragavarande förhållningsregels betydelse. Det behov som skall tillfredställas är ett upplevt (närmast känslomässigt) behov av "normbekräftelse"' (at 81–82).

<sup>39</sup> Here I follow in simplified terms the presentation by Lappi-Seppälä, *supra* note 25, at 196–225 with references.

work through integrating the members of a group or a society. One way to see it is to claim that the systemic conditions are fulfilled when the system enjoys legitimacy and the punishing organ enjoys authority; when the punishment is understood as censure and when the criminalized acts are, over time, felt to deserve condemnation. The greater the authority of the organ pronouncing the moral statement, the stronger the moral-creating effect is supposed to be. Furthermore, a coherently effective system is felt to be more credible and equal than a random one, thereby creating more legitimacy. According to this logic, a system that lacks legitimacy, authority, coherence and is not based on established common understanding of the punishable conduct cannot achieve integration prevention. Foreshadowing my forthcoming conclusions here, it cannot be ignored that this is how the 'international criminal justice system' may be deemed to be experienced from the perspective of the individuals, groups or nations targeted.

The behavioural conditions concern the possibilities of affecting the behaviour of possible offenders. They depend on the personal characteristics of the offenders, such as their values, background, personal circumstances, mental capacity, position and previous encounters with criminal law. In the context we are discussing here, this raises startling questions: What kind of a person is likely to get involved in a serious, large-scale crime, such as those listed in the ICC Statute? How is it possible to explain 'die relative Leichtigkeit, mit der das Regime — und auch die Regime vor und nach der NS-Zeit — ihre Henker fanden und finden'?<sup>40</sup> The field of criminological, psychological and sociological research on the related issues is very broad, and these questions open up a wide variety of others that cannot all be taken up here satisfactorily. Some 30 years have passed since the publication of Hannah Arendt's famous study on the banality of evil.<sup>41</sup> A variety of other ground-breaking works have been published, such as Zygmunt Bauman's analysis of modernity and the holocaust.<sup>42</sup> We are aware of the Milgram experiment,<sup>43</sup> Arthur Koestler's explanation,<sup>44</sup> the ideas of Lorenz on instinctual aggression, etc.<sup>45</sup>

Still it seems that in everyday bureaucratic life, in diplomatic rhetoric and in the mass media, a criminal is a criminal, no matter whether one is talking about a street robbery or genocide, as if it were one disease, with one cure. It seems that in the current project of international criminal justice, the special circumstances of the criminality in question and thereby also the additional difficulties in affecting the behaviour of the potential criminals addressed are largely ignored or, rather, intentionally passed over in silence. Consequently, the project seems to have adopted

<sup>40</sup> See Schumacher, 'Psychologische Mechanismen bei der Manipulation des Rechtsbewusstseins in totalitären Systemen', in Klaus Lüderssen and Fritz Sack (eds), *Von Nutzen und Nachteil der Sozialwissenschaften für das Strafrecht, Erster Teilband* (1980) 169, at 182.

<sup>41</sup> See Hannah Arendt, *Eichmann in Jerusalem — A Report on the Banality of Evil* (1994).

<sup>42</sup> See Zygmunt Bauman, *Modernity and the Holocaust* (1989).

<sup>43</sup> See Stanley Milgram, *The Individual in a Social World* (1971); Stanley Milgram, *Obedience to Authority* (1974). For Zygmunt Bauman's reading of Milgram, see Bauman, *supra* note 42, at 151–168.

<sup>44</sup> See Arthur Koestler, *Janus: A Summing Up* (1978).

<sup>45</sup> See Konrad Lorenz, *On Aggression* (1966).

a discourse following the rhetorical patterns established by a lame analogy of the national systems that does not fully serve the utilitarian purpose it expressively declares, namely, the prevention of such criminality.

It is not useful here to become absorbed in the criminological-psychological-sociological analysis of, for example, genocide or crimes against humanity. For the sake of this argument it suffices to refer to the most general differences in the circumstances surrounding the offender of the crime in a stereotypical international crime and in a stereotypical national crime. The discussion has to make a distinction on how to envisage the possible offenders the system is likely to address. For the purpose of illustration, a division into two groups can be made: first the possible offenders the system is targeting at the programmatic level, the leaders responsible for planning, ordering, and instigating the crimes, such as Hitler, Pol Pot and Milosevic, to name some prominent examples; secondly, such possible offenders as Tadic or Erdemovic, who mainly carry out the plans and have little or no influence on those features of the crimes that actually make them international ('with the intent to destroy, in whole or in part, a . . . group', 'as part of a widespread or systematic attack', 'as part of a plan or policy or as part of a large-scale commission of such crimes'<sup>46</sup>).

The early activity of the ICTY, where some of these examples are taken from, showed a clear discrepancy between its rhetorical focus (leaders) and its factual focus (medium or lower ranking).<sup>47</sup> Without going into any further descriptive analysis here, it is undeniable that after the ICTY's starting period an emphatic effort was made to concentrate on individuals with higher standing in the hierarchy of command responsibility, both concerning the indictments and the accused actually tried or awaiting trial. In 2000, the ICTY's own conception of its focus referred to 'charges against high-level accused or against lower accused for particularly heinous offences',<sup>48</sup> in other words to an individual 'who merits prosecution in the international forum'.<sup>49</sup> This development culminated in the transfer of former president Milosevic to The Hague in June 2001. This does not pre-empt the discussion of future practices, however. The idea behind the notion of complementarity of jurisdiction as included in the ICC Statute is that in cases where the national system has collapsed or is non-existent, offenders with ranks comparable to those of Erdemovic or Tadic should also be tried under the ICC Statute.<sup>50</sup>

When profiling the typical offender, a variety of issues could be addressed, such as the nature of the act as premeditated or random, the age of the offender, any possible defences based on insanity, intoxication, error in law or error in fact. What is most relevant here, however, is the extent to which the motives that the possible offender has to commit a crime affect the likelihood of any threat of punishment having a

<sup>46</sup> See the ICC Statute, the definitions of crimes in Articles 6–8.

<sup>47</sup> See e.g. Tallgren, *supra* note 12, at 71–73.

<sup>48</sup> Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, reprinted in 39 *ILM* (2000) 1257, chapter 90.

<sup>49</sup> *Ibid.*, at chapter 5.

<sup>50</sup> See preamble and Articles 17–20 of the ICC Statute. See also Tallgren, 'Completing the International Criminal Order', 67 *Nordic Journal of International Law* (1998) 107.

preventive effect. It could be typical of crimes falling under the jurisdiction of the ICC that the offender is not acting individually in a similar sense as the offender committing a 'normal' murder or robbery. Instead, the offender is likely to belong to a collective, sharing group values, possibly the same nationalistic ideology.<sup>51</sup> In such a situation, the offender may be less likely to break the group values than the criminal norms. The commitment of crimes may be encouraged not just by material benefits but also by various techniques affecting the offender's judgment as to what constitutes prohibited conduct. That way the actor may be manipulated, lured or indoctrinated to commit the crimes. Or he is among the leaders, those that manipulate, lure or indoctrinate.

The whole idea of criminality as social conduct, as general submission or resignation, as a result of 'not being able to act otherwise' because of superior orders or the repressive totalitarian system in general, has, of course, long been debated, most notably in the context of the Nazi crimes.<sup>52</sup> It has as often also been forcefully contested as a disguise or denial of guilt, as a cheap defence. But the basic argument is difficult to contest: criminal law that could be obeyed only by exceptional individuals is hard to justify. As for the justification of an individual case, the requirement of the principle of conformity sets the limit: punishment cannot be justified if the person punished could not have acted or could not have been required to act otherwise.

More than the existence of dictators, such as Hitler, who have been demonized and mystified to such an extent that they start to appear as inexplicable and inevitable as natural catastrophes, the fact that 'Mr Anybody' would commit extremely serious crimes is puzzling. This situation is not easy to confront, particularly as thorough psychiatric-psychological reports may be either not prepared or disclosed.<sup>53</sup> Based on all the research, examples of which were referred to above, however, it seems evident that acts of exceptional cruelty can indeed be committed by 'ordinary people' under

<sup>51</sup> See Bauman, *supra* note 42, at 176–177. 'In the aftermath of the Holocaust, legal practice, and thus also moral theory, faced the possibility that morality may manifest itself in insubordination towards socially upheld principles, and in an action openly defying social solidarity and consensus.'

<sup>52</sup> See e.g. Herbert Jäger, *Makrokriminalität — Studien zur Kriminologie kollektiver Gewalt* (1989); and *Individuelle Zurechnung kollektiven Verhaltens — Zur strafrechtlich-kriminologischen Bedeutung der Gruppendynamik* (1985); Daniel Goldhagen's controversial study, *Hitler's Willing Executioners* (1996) caused an intense public reaction, in particular in Germany.

<sup>53</sup> A classic in the portraits of perpetrators of international crimes is that of Eichmann by Hannah Arendt, see *supra* note 41. See also Rudolph Höss, *Kommandant in Auschwitz. Autobiographische Aufzeichnungen von R. Höss* (1958). Bauman, *supra* note 42, at 19, quotes the conclusion drawn by Kren and Rappoport on the claimed abnormality of the SS men: 'Our judgment is that the overwhelming majority of SS men, leaders as well as rank and file, would have easily passed all the psychiatric tests ordinarily given to US army recruits or Kansas City policemen.' George M. Kren and Leon Rappoport, *The Holocaust and the Crisis of Human Behaviour* (1980) 70.

special circumstances. And that therefore the more interesting questions lie in determining how this is ‘achieved or denied both psychologically and rhetorically’.<sup>54</sup>

An example of the earlier studies of the so-called crimes of obedience is Willi Schumacher’s analysis of the case of H.G., a *Typ Jedermann*, based on a report prepared during his trial at a Frankfurt court. Having joined the SS for ‘music and company’, H.G. was accused of being involved in the death of at least 150,000 persons at the extermination camp of Sobibor between April 1942 and October/November 1943. According to the conclusions Schumacher makes from the report, H.G. lacked any signs of sadistic character, greed for power or previous criminal conduct.<sup>55</sup> H.G.’s own way to explain his participation in the crimes that took place in the camp was the same defence that is referred to in much of the case law in international criminal law, namely, that of superior orders.<sup>56</sup>

Instead of relying on the defence of superior orders, however, Schumacher tries to explain the crimes as the result of more complex psychological mechanisms of manipulation of the *Rechtsbewusstsein*, of the sense of justice of the perpetrators. As a result, the *Unrechtsbewusstsein*, the sense of injustice, is eliminated or minimized. Values are manipulated in such a way that the prohibited conduct starts to appear as a holy obligation, a positive achievement.<sup>57</sup> A further technique is the externalization of psychological control and command in a manner that ‘die Etablierung eines autonom arbeitenden eigenen Gewissens verhindert wird’.<sup>58</sup> The same end of setting the sense of injustice aside is served by projecting the aggressiveness to the victims: transferring the guilt to the victims, establishing a cult of worshipping the wrongdoers as heroes, excluding any identification by means of alienation, and relying on the effects of group dynamics.<sup>59</sup> These kind of policies have frequently been referred to in connection with both the former Yugoslavia and Rwanda.<sup>60</sup>

No effort is made here to engage in further facile psychologizing about Ms or Mr

<sup>54</sup> See Jamieson, ‘Towards a Criminology of War in Europe’, in Vincenzo Ruggiero, Nigel South and Ian Taylor (eds), *The New European Criminology, Crime and Social Order in Europe* (1998) 481, referring to Cohen, ‘Human Rights and Crimes of the State: The Culture of Denial’, 26 *Australian and New Zealand Journal of Criminology* (1993) 97; Cohen, ‘State Crimes of Previous Regimes: Knowledge, Accountability and the Policing of the Past’, 20 *Law and Social Inquiry* (1995) 7.

<sup>55</sup> He lived, in an extreme manner perhaps, up to the roles and conformed to the norms of any social environment: his family, school, workplace, the totalitarian Nazi regime, the determination camp, the prison for some 20 years, and thereafter the transformed, democratic Germany; see Schumacher, *supra* note 40, at 178 and 182–183.

<sup>56</sup> The classical case reference to the issue of superior orders is that of Yamashita, see e.g. Richard L. Lael, *The Yamashita Precedent: War Crimes and Command Responsibility* (1982). For a commentary on the ICC Statute, see Triffterer, ‘Article 33 Superior Orders and Prescription of Law’, in Triffterer, *supra* note 23, at 573–588. According to Schumacher, rather than being a consequence of superior orders, the crimes of H.G. could be traced to ‘[d]as allgemein vorhanden gewesene Gefühl des totalen Eingefügtseins in die Maschinerie eines absoluten Polizeistaates, die herrschenden Maxime von Gehorsam und Befehlstreue besonders in Organisationen wie die der SS mögen als reales Hintergrunderleben bei der Ausgestaltung des Gefühls, im Befehlsnotstand gehandelt zu haben, mitspielen’. Schumacher, *supra* note 40, at 176.

<sup>57</sup> See *ibid.*, at 175–177.

<sup>58</sup> See *ibid.*, at 187.

<sup>59</sup> *Ibid.*, at 176. See also Bauman, *supra* note 42, at 21–23 on organizational discipline.

<sup>60</sup> See e.g. Marc Feher, *Powerless by Design — The Age of the International Community* (2000) 60–63.

Anybody. The complexity of the relationship between war and crime, and the criminology of war, cannot be addressed in broader terms in this article.<sup>61</sup> For my purposes, it suffices to conclude that the criminality that international criminal law is addressing is, typically, not a result of social or economic marginalization, which is how we tend to view the major bulk of crimes dealt with in national systems, such as youth delinquency, urban violent crime or drug criminality. That seems to hold true even though parts of the vast field falling under international criminal law, such as the use of child soldiers or trafficking in human beings for the sex industry, do resemble or originate from comparable circumstances.

Contrary to most national criminality which is understood to constitute social deviation,<sup>62</sup> acts addressed as international crimes can, in some circumstances, be constituted in terms of conforming to a norm. As a result, the refusal to commit such acts could be considered as socially deviating behaviour.<sup>63</sup> Examples are not too difficult to find: the same chain of events can be described and evaluated from different points of view, as justified civil disobedience/internal disturbance, followed by more human rights activism/rebellion, followed by promotion of national liberation/terrorism, followed by retaliation/counter-terrorist action, followed by strengthened oppression by the majority/self-defence, and so on. The easiest way to give a current framework of images to this is to refer to Israel and Palestine. It seems that instead of being exceptional acts of cruelty by exceptionally bad people, international crimes are typically perpetrated by unexceptional people often acting under the authority of a state, or, more loosely, in accordance with the political objectives of a state or other entity.

Based on these considerations, a preliminary conclusion regarding the possibility of general prevention can be made. It seems clear that, in the circumstances of a typical example of a crime that would fall under the jurisdiction of the ICC, additional, major obstacles confront the intent of the law to create morality or to internalize norms, in the sense that an individual would refrain from violating the law because the act is felt to be morally wrong. The remaining option for a possible mechanism of prevention would have to be the one mentioned first, namely, that of deterrence, refraining out of fear of negative consequences.

In that mechanism, the belief is that 'the heavier the punishment, the stronger the disapproval'.<sup>64</sup> As a result, deterrence is also supposed to be more effective, the more severe the punishment is. The other factor believed to be decisive is the likelihood of being brought to trial. Considering the practical and structural difficulties of international criminal law, the latter is likely to remain on a very low level. Following the assumption of the mechanism, this raises the expectation of compensation by

<sup>61</sup> See Jamieson's effort to come up with explanatory models of the relationship, *supra* note 54, at 482–488.

<sup>62</sup> This is certainly not an attempt to claim that the national criminal codes always draw a clear and generally accepted conception of social behaviour. Different kinds of subcultures exist in national societies, where the understanding of socially acceptable and deviating behaviour is by no means consonant with the penal code.

<sup>63</sup> See also Arendt, *supra* note 41, at 293–295.

<sup>64</sup> See Johannes Andenaes, *Punishment and Deterrence* (1974) 118.

more severe punishment. A consequence of this line of argument would be that in order to produce the desired general prevention, the ‘international criminal justice system’ should concentrate on exemplary decisions, in contrast to routine decisions.

The system would thus have to make use of very severe forms of ‘hard treatment’. The international community would — making use of the utilitarian roots of the preventive theory discussed above — act as the keeper of the international ‘Panopticon’.<sup>65</sup> In the interests of the far greater number of human beings, those who will always remain outside the appalling conditions of Panopticon, the international community would have to get involved in subjecting all prisoners, actual and potential, to inhuman treatment. A truly deterrent system would approach — thereby combining the mechanisms of general and special prevention — the incapacitation of the offender (to be discussed below). In addition, these forms would, in order to be effective, perhaps have to be so severe that the system would face difficulties in making the treatment compatible with its generally enlightened ideas, such as the often defended argument that the ‘international criminal justice system’ must fully and in an exemplary manner follow all international human rights standards.<sup>66</sup>

### 3 *Special Prevention*

Envisaging the mechanisms of the punishment mainly with regard to the particular offender himself, the notion of special prevention originates from the so-called sociological (modern) school of penal law, associated with Franz von Liszt. According to that school of thought, the offender’s characteristics, dangerousness and need for treatment are relevant for the selection of the sanction. The special prevention is supposed to fulfil the purpose of crime prevention by the mechanisms of either giving a warning to the offender, rehabilitating him by means of treatment, care and education, or incapacitating him and thereby eliminating the risk of further crime.<sup>67</sup>

In the context of the ‘international criminal justice system’, the two last-mentioned mechanisms have been playing a prominent role. The goal of rehabilitating the sentenced offender is included in human rights conventions and in several international instruments on imprisonment.<sup>68</sup> Article 10, paragraph 3, of the

<sup>65</sup> See Jeremy Bentham, ‘Panopticon’, in John Bowring (ed.), *The Works of Jeremy Bentham*, vol. IV (1843). For an analysis by Michel Foucault, see *Surveiller et punir. Naissance de la Prison* (1975) 228–264. Burke famously compared the keeper of the Benthamite Panopticon prison to ‘the spider in the web’: see Gertrude Himmelfarb, *Victorian Minds* (1968) chapter 2.

<sup>66</sup> See Report of the Secretary-General on the Establishment of the ICTY, S/25704 (3 May 1993), para. 106, according to which it was ‘axiomatic that the international tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings’. Similarly, see Schabas, *supra* note 8, at 467–468.

<sup>67</sup> See Lappi-Seppälä, *supra* note 25, at 236–244.

<sup>68</sup> See e.g. Article 10(3) of the International Covenant on Civil and Political Rights: ‘The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and rehabilitation’ (ICCPR, adopted 16 December 1966, entered into force 23 March 1976, UN Doc. A/6316 (1967)). See also Article 5 of the American Convention on Human Rights, San Jose, Costa Rica 1969, reprinted in ILM (1970) 673; the Basic Principles for the Treatment of Prisoners, adopted and proclaimed by General Assembly Resolution 45/111, 14 December 1990; and Recommendation No. R (87) 3 of the Committee of Ministers to Member States on European Prison Rules, 12 February 1987.

International Covenant on Civil and Political Rights declares that '[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation'.<sup>69</sup> In accordance with the UN Standard Minimum Rules for the Treatment of Prisoners, 'the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life'.<sup>70</sup> In several states rehabilitation into society plays a predominant role in the national legal system as a justification for imprisonment, and the goal of rehabilitation is included in some national constitutions.<sup>71</sup> As a consequence, for them the penalty of life imprisonment, nullifying any chance of return to life in society, contradicts the basic parameters of criminal justice. Some other states have renounced the goal of rehabilitation as more or less completely 'unrealistic'.<sup>72</sup> In the current international discussion in the forums of criminal policy, the goal of rehabilitation thus divides the opinions of states strongly.<sup>73</sup>

That was the case also in the ICC negotiations. Because of the way its jurisdiction is framed, a logical conclusion would be to picture the ICC as inflicting only very serious penalties on those who are guilty of very serious crimes.<sup>74</sup> Were those accused of such crimes tried in the national courts, the penalties for such acts would in most cases be likely to reach the uppermost latitudes on the scale of penalties. The context of the most serious crimes against international law made it nonsensical for some states to discuss rehabilitation: how do you reform someone guilty of genocide? These states thought it more natural in that context to discuss special prevention in terms of incapacitation. Since some 86 states in the world still retain and use the death penalty,

<sup>69</sup> ICCPR, *supra* note 68.

<sup>70</sup> See Chapter 58 of the Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 1955, UN Doc. E/3048 (1957) and 2076 (LXII) (1957).

<sup>71</sup> See van Zyl Smit, 'Life Imprisonment as the Ultimate Penalty in International Law: A Human Rights Perspective', 9 *Criminal Law Forum* (1999) 5.

<sup>72</sup> The criminal policy shift has been, in the 'West' or 'North', from the treatment ideology towards 'neo-classical' thinking. In 1975, Michel Foucault gave an ironic image of the full-fledged treatment ideology: see Foucault, *supra* note 65. In 2001, David Garland observed, at least in the UK and the US, which were the focus of his work, a renaissance of open and explicit retribution: see Garland, *supra* note 35. For a recent analysis of these developments in the Nordic countries, see Lahti, 'Towards a Rational and Humane Criminal Policy', *supra* note 25, at 141–155.

<sup>73</sup> My comparative analysis stays on the surface here, relying mainly on the discussions in the working group on penalties in the negotiations on the ICC Statute and the published commentaries on them; see e.g. Bassiouni, *supra* note 5; Fife, *supra* note 23; and Schabas, *supra* note 8. An in-depth comparison of the theories of punishment of the national systems in general is beyond the scope of this study.

<sup>74</sup> Earlier international criminal tribunals provided little guidance, since their provisions on penalties were so broad as to leave the choice open. For example, Article 27 of the Nuremberg Charter of the International Military Tribunal states, 82 UNTS 279: 'The Tribunal shall have the right to impose upon a defendant a conviction, death or such other punishment as shall be determined by it to be just.' See also van Zyl Smit, *supra* note 71, at 8–9. In the negotiations on the ICC, the levying of a fine as a sole punishment was excluded, since it was seen to be disproportionately lenient. Similarly, the imprisonment cannot be probationary; see Article 77 of the ICC Statute and its commentary by Fife, *supra* note 23.

compared to 75 states that have abolished it totally,<sup>75</sup> it was not surprising that there was persistent support for the death penalty in the ICC negotiations, as well as for life imprisonment.<sup>76</sup>

By intuition, it seems, even very severe punishments become acceptable when balanced with the horrors of the crimes. In terms of the communicative theory discussed in the next section, it is as if we would just naturally speak louder to communicate our disapproval of heinous acts.<sup>77</sup> Following that logic, consideration of aspects normally regarded as necessary, such as minimizing the harm caused by the punishment and that of facilitating the possible rehabilitation after enforcement, would be excluded by reference to the exceptionally heinous nature of the crimes, signifying a high degree of harmfulness. This would correspond to some recent tendencies in national criminal policies, where there are signs of the concept of incapacitation gaining momentum, even in the form of special, ‘enemy-oriented’ criminal law.<sup>78</sup>

And if one really could draft plans for a ‘system’ in which the different actors would work together according to preset rules like a team, it could be easy for a rational criminal policy to justify incapacitation. It would suffice merely to portray the international judgments as exemplary, standard-setting judgments, in contrast with routine judgments on the national level. That would entail a division of tasks to the effect that the consideration of the personal circumstances of the offender and milder punishment (for milder crimes?) would take place on the national level. The international criminal court would set the example, as a higher court. This would almost make sense, would it not? The ICC would have the role of an international forum for the incapacitation of the ‘enemies of mankind’, a sort of sanitary necessity for a more peaceful world.<sup>79</sup> The national courts would exercise a more humane, perhaps even rehabilitation-oriented, criminal policy.

The problem is that this would make sense only if the national courts exercised jurisdiction in the routine cases and if the ICC were in the position to try those cases truly suitable for this kind of exemplary criminal justice. The offenders would have to be those charged with crimes requiring long-term planning and preparation, who were in a leading position to guarantee the ability to determine the course of the criminal acts, and having the possibility to know the contents of the criminal law. In these kinds of specific conditions, there might, according to the prevailing understanding of the preventive mechanisms, be some room for the preventive action to take

<sup>75</sup> The figures cited according to Amnesty International, Website against the Death Penalty, [www.web.amnesty.org](http://www.web.amnesty.org). See also William A. Schabas, *The Abolition of the Death Penalty in International Law* (1997).

<sup>76</sup> See Fife, *supra* note 23, at 986–991; see also Schabas, ‘Life, Death and the Crime of Crimes’, 2 *Punishment and Society* (2000) 263.

<sup>77</sup> As an example, see my comment on the recommendation, made by the Special Representative of the Secretary-General for Children and Armed Conflict, of ‘particularly heavy sentences . . . for adults guilty of crimes involving the use and abuse of children’: Tallgren, *supra* note 21, at 686.

<sup>78</sup> See Jung, ‘New Perspectives or More of the Same? Criminal Law and Criminal Science in the 21st Century’, *Keio Law Review* (1993) 41, at 46.

<sup>79</sup> See Tallgren, *supra* note 50, at 112, with references.

place. The way the 'international criminal justice system' works currently, however, there are very limited possibilities to formulate such a policy of granting the ICC jurisdiction in the most serious cases. This would seem to be possible only in cases of a change in the government or of occupation, perhaps in the form of a notorious 'victor's justice'. It should not be forgotten that the other basic assumption was that the national systems do not work well enough to take care even of the 'normal' trials and that, if the national systems really worked well, then the principles of complementarity and *ne bis in idem* would prevent international jurisdiction.

In the ICC negotiations, not all states were ready to follow the 'enemies of mankind' argument to its logical conclusion. The penalties that the ICC is allowed to impose in accordance with Article 77 of the Statute are very serious ones: imprisonment for a specified number of years not exceeding a maximum of 30 years or life imprisonment. Yet they fall short of determinate incapacitation. The active contribution of the 'international community' towards the establishment of an institution initiated in the name of communitarian ideals of justice and peace but turning into the exemplary infliction of pain, seemed to be too much for a clear majority of states participating in the Diplomatic Conference.<sup>80</sup> Interestingly enough, this was also true for some states whose national law would have sentenced a majority of the likely ICC defendants — if guilty — to life imprisonment or death. For some other states, however, the exclusion of these forms of punishment was a truly difficult decision that almost undermined their support for the ICC as a whole.<sup>81</sup>

#### 4 Retribution

In contrast to the future-oriented preventive theories, retributivism, absolute theories of punishment, find their justification by looking to the past, to the crime that took place. The wrong, the injustice perpetrated by the offender by criminal conduct needs to be balanced, and reconciled by the punishment. The criminal is believed to deserve the punishment as appropriate censure for his conduct.<sup>82</sup> This justification for punishment reflects the Kantian ethics of obligations, deontological moral theories.<sup>83</sup> In the pure form of this way of thinking, the consequences of the act have no relevance to the determination of the moral value of the act.

To some extent, the roots of the retributionist thinking point towards religion. Pope Pius XII, addressing the Sixth International Congress of Penal Law in 1953, described the 'ultimate meaning of punishment',<sup>84</sup> summarizing the core ideas of retributivism:

The essence of the culpable act is the free opposition to a law recognized as binding. It is the

<sup>80</sup> For a description of the negotiations on the ICC Statute, see Fife, *supra* note 23, at 985–998; and Fife, 'Article 80 Non-Prejudice to National Application of Penalties and National Laws', in Triffterer, *supra* note 23, at 1009–1014. For an analysis of the penalty of life imprisonment from the human rights law perspective, see van Zyl Smit, *supra* note 71, at 33–35.

<sup>81</sup> See Fife, 'Article 80', *supra* note 80.

<sup>82</sup> Andrew von Hirsch launched the 'just deserts' debate in von Hirsch, *supra* note 13. See also Lacey, *supra* note 28; and Garland, *supra* note 35.

<sup>83</sup> For a recent analysis, see Sorell, 'Punishment in a Kantian Framework', in Matravers, *supra* note 15, at 10.

<sup>84</sup> Pope Pius XII, 'International Criminal Justice', in Joyner, *supra* note 2, at 26.

rupture and deliberate violation of just order. Once done, it is impossible to recall. Nevertheless, in so far as it is possible to make satisfaction for the order violated, that should be done. For this is the fundamental exigency of ‘justice’, whose role in morality is to maintain the existing equilibrium, if it is just, and to restore the balance, when upset. It demands that by punishment the person responsible be forcibly brought to order. And the fulfilment of this demand proclaims the absolute supremacy of good over evil: right triumphs sovereignly over wrong.

The prevailing feature in the current thinking on retributivism is the understanding of punishment as the expression of disapproval, as the communication of condemnation.<sup>85</sup> The punishment is meant to invite the offender to reflect on right and wrong and to reform, in addition to reconciling himself with those he has wronged. A critical reader might reasonably ask here what could still remain to be communicated about genocide, crimes against humanity or war crimes. Is it not the case that it is precisely in connection with such acts that their common disapproval and even the knowledge of their criminal nature are supposed to be absolutely unambiguous, known to everybody? In fact, the international jurisdiction for these crimes is generally based on the commonly shared understanding of their being universally and unexceptionally prohibited. In that sense, the task of the ‘international criminal justice system’ is to communicate what everybody knows already. To such remarks, the retributivist communication theory replies by explaining how the censure appeals to the sense of justice of people and thereby gives normative reasons to refrain from prohibited conduct.<sup>86</sup>

The current thinking about punishment as communication seems to be divided along communitarian and liberalist lines.<sup>87</sup> In the liberal perspective, individuals pursue their goals under contractual terms that allow others to do the same. Criminal law focuses on the acts that breach the social contract, and thus harm or threaten interests that need to be protected to enable social life to continue according to the preset contractual terms.<sup>88</sup> In the communitarian perspective, people are bound together by ‘shared concerns, affections, projects and values’.<sup>89</sup> By committing a criminal act, a person ‘damages or destroys her relationships with other members of the community, and separates herself from them’.<sup>90</sup> The role of criminal law is then, in addition to defining and proscribing the crime, also to contribute to rectifying the damage suffered by the community and the person herself.

In the empirical reality of the difficulties of enforcing international criminal justice, reference is sometimes made to symbolism. Payam Akhavan believes that ‘the symbolic effect of prosecuting even a limited number of the perpetrators, especially the leaders who planned and instigated the genocide, would have considerable impact on

<sup>85</sup> See Tallgren, *supra* note 12, at 60–61, discussing this in the terms of Nils Jareborg. See Robin Antony Duff, *Trials and Punishments* (1986) chapters 3, 4, 9 and 10; and Matravers, *supra* note 28.

<sup>86</sup> See von Hirsch, *supra* note 28, at 11–13.

<sup>87</sup> See Duff, ‘Punishment, Communication, and Community’, in Matravers, *supra* note 15, at 48–68; von Hirsch, ‘Penance, and the State: A Reply to Duff’, in Matravers, *supra* note 15, at 69–82.

<sup>88</sup> See Duff, ‘Choice, Character and Criminal Liability’, *12 Law and Philosophy* (1993) 345, at 383.

<sup>89</sup> See *ibid.*, at 381.

<sup>90</sup> Duff, ‘A Reply to Bickenback’, *18 Canadian Journal of Philosophy* (1988) 787.

national reconciliation, as well as on deterrence of such crimes in the future'.<sup>91</sup> Some commentators speak of the 'merely' symbolic effects of international criminal justice.<sup>92</sup> For any discussion of criminal justice as symbolism it seems that the most relevant question would have to be that of content: whose symbols, standing for what? The same goes for communicative theory in general: in a plurality of political conceptions, what values should be communicated?<sup>93</sup>

### 5 Example: Article 77 of the ICC Statute

After the Statute has been adopted no offender who commits a crime against the peace and security of mankind will be able to argue that ...<sup>94</sup>

I am now coming back to the topic of the quest for a truly independent international application of international criminal law. Rather than remaining a mere substitution for or complementary helping hand of a national system, international criminal law is building a fortress of its own, with its own laws and policy. A relevant example here is Article 77 of the ICC Statute on applicable penalties, which 'builds on the principle of equality of justice through a uniform penalties regime for all persons convicted by the Court'.<sup>95</sup> The punishment will be chosen and meted out irrespective of the national law that would have otherwise been applied to the convicted person or of the place where the crime was committed. Compared to the Statutes of the ICTY and the ICTR — according to which '[i]n determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of [the former Yugoslavia or Rwanda, as the case may be]' — this has generally been seen as an improvement.<sup>96</sup>

This is excellent, from the point of view of abstract international equality before international law. This approach is indeed fair and well organized, when seen through

<sup>91</sup> Akhavan, 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment', 90 *American Journal of International Law* (1996) 501, at 509.

<sup>92</sup> See e.g. Träskman, 'Inrättandet av en internationell domstol för brottmal', *Nordisk Tidskrift for Kriminallvidenskap* (1994) 143, at 155.

<sup>93</sup> See Ivison, 'Justifying Punishment in Intercultural Contexts: Whose Norms? Which Values?', in Matravers, *supra* note 15, at 88.

<sup>94</sup> Van Zyl Smit, *supra* note 71, at 47.

<sup>95</sup> See Fife, *supra* note 23, at 986.

<sup>96</sup> See Article 24(1) of the ICTY Statute, *supra* note 17; and Article 23(1) of the ICTR Statute, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January 1994 and 31 December 1994 by Security Council Resolution 955 (1994). The aim of this provision in the Statutes is the search for legal certainty, an effort of progressive application of the *nulla poena sine lege* principle also to the crimes against international law. For the limits of this approach and a critical analysis of the practice of the ICTY with regard to the life imprisonment that was not allowed under the law applied by the courts of the former Yugoslavia, see van Zyl Smit, *supra* note 71, at 16–19. On the 1994 ILC Draft Statute for an International Criminal Court Van Zyl Smit, *supra* note 71, at 48, notes that 'from the point of view of principle as well as of the desirability of developing an international sentencing jurisprudence, the reference to the practice in specific States is undesirable'. See also Fife, *supra* note 23; and Schabas, *supra* note 8.

the eyes of a diplomat reading the Statute, a professor teaching a class in public international law or a judge on the bench of the ICC. For such an audience, the following may also make sense, despite the fact that everybody knows that tens of thousands have been incarcerated in Rwanda since 1994–1995:

The place and conditions of detention should certainly be considered as mitigating factors in the sentencing determination ... [T]here is no prison in Rwanda that even approaches internationally recognized minimum prison conditions. Short of a major prison construction program in Rwanda, financed by international donors, it is unlikely that condemned prisoners will be detained in that country.<sup>97</sup>

But in the light of my current exercise of ‘applying’ the criminal law theories on which criminal justice is supposed to rest, it does not make sense. For the fictive ‘individual concerned’<sup>98</sup> or his compatriots, abstract international equality before the law is absurd.<sup>99</sup> The punishment bears no reference to the norms of behaviour in accordance with the moral and criminal code with which the person in question is most likely to be familiar. As a result, the cognitive elements that, according to the mechanism, are necessary to achieve a preventative effect, are lacking. It could therefore be claimed that, for the individual concerned, the severity or mildness of the international judgment imposed has no reference to anything he has understood of criminal law so far. In that sense, he would be in a situation similar to that which confronts foreigners who are unfamiliar with the legal system of the state in which they happen to be. For those situations, the traditional set of rules of state jurisdiction and inter-state cooperation in criminal matters contains special rules going back to the notion of double criminality.<sup>100</sup> In the context of crimes such as war crimes, crimes against humanity or genocide, however, this argument could be contested by claiming that nobody could be unaware that these acts are serious crimes and that they warrant severe punishment.<sup>101</sup>

In any case, despite Article 77 of the ICC Statute, which aims at universal equality, individuals of different nationalities condemned for similar crimes will receive different penalties, depending on where the trial took place. That is the result of the complementarity principle of the jurisdiction of the ICC.<sup>102</sup> As such, this does not change the *status quo* of various laws and practices of criminal justice in different states at all. The efforts in the ICC negotiations to create a balancing mechanism to

<sup>97</sup> Schabas, discussing the enforcement of sentences of the ad hoc tribunals; see Schabas, *supra* note 8, at 494.

<sup>98</sup> See Koskeniemi, ‘The Effect of Rights on Political Culture’, in Alston *et al.* (eds), *The EU and Human Rights* (1999) 99.

<sup>99</sup> The absurdity of the presumption of equality before the law is inherent in criminal law theory even in the national context; see the discussion on ‘justice in injustice’ or ‘just deserts in an unjust society’; e.g. Murphy, ‘Marxism and Retribution’, in Robin Antony Duff and David Garland (eds), *A Reader on Punishment* (1994) 47, at 57–65.

<sup>100</sup> See e.g. Träskman, *supra* note 92.

<sup>101</sup> See Schabas, *supra* note 8, on *de lege* crimes or *de facto* crimes. I discuss the same issue in the context of the legality principle in Tallgren, *supra* note 12, at 30–31.

<sup>102</sup> See Preamble to the ICC Statute and Article 17; Williams, ‘Article 17, Issues of Admissibility’, in Triffterer, *supra* note 23, at 383; Tallgren, *supra* note 50.

deal with the most flagrant disparities in Article 20 of the Statute on *ne bis in idem* did not succeed.<sup>103</sup> Furthermore, the 'international criminal justice system', here the ICC, has explicitly acknowledged, for example by introducing the notion of complementarity, that it can only play a very restricted role in any practical retribution. Because of the marginal role the ICC could ever assume in practice, its punitive functions will always remain marginal. The principle of proportionality, according to which punishment shall be proportionate to the seriousness of the crime, may find so little practical application by the ICC that it remains fragmentary and unpredictable. For this reason, for those who ambitiously would like to apply, for example, the communicative theory of punishment, the role of punishment in conveying blame becomes distorted if the punishment is not commensurate with the blameworthiness of the conduct. The message the 'international community' is communicating regarding its disapproval of the act in question risks being unclear or having adverse connotations, depending on the background of the offender.<sup>104</sup>

As discussed above, the prevailing understanding of prevention puts an emphasis on the possibility of affecting the motivation of the offender and thereby the conception the offender had of the punishments before being condemned. If the offender had expected the sanction to be milder than it actually was, there is, according to the theory, less likelihood of committing crime in the future. Had the offender anticipated the sanction to be heavier than it actually was, the likelihood is supposed to operate in the opposite direction.<sup>105</sup> As is generally known, in some national jurisdictions the average penalties are so severe that a 15-year imprisonment for crimes against humanity must seem an insult to the victims. In other national jurisdictions, a sentence of life imprisonment with the first opportunity for review coming only after having served 25 years of the sentence, as well as the possibility of nominal prison sentences reaching up to 30 years, seems cruel and inhuman treatment as such. This could turn public sympathy towards the sentenced person rather than towards acceptance of the criminal justice system, as was intended. As these simplified examples demonstrate, the requirements of legitimacy, coherence and cognitive elements run the risk of not being fulfilled as would be required by the mechanisms of general prevention.

The same is understandably true for the victims and for the society in which the crime was committed. As an example one could mention the abolition of the death penalty under the Statute of the Rwanda Tribunal that was 'essentially a question of determining whether, because of moral considerations, conceptions of justice prevailing in certain societies should prevail over that of the Rwandese people'.<sup>106</sup>

<sup>103</sup> See Tallgren, 'Article 20, Ne Bis in Idem', in Triffterer, *supra* note 23, at 434: 'The comparison of the severity of sentences as a clear-cut rule was deemed too ambitious and controversial because of the differences of criminal policies internationally.'

<sup>104</sup> On the role of the context in which an individual interprets communication on criminal law and criminal justice and the distortion of the believed mechanism of general prevention, see Mathiesen's interesting analysis based on communications sociology, Mathiesen, *supra* note 36, at 58–69.

<sup>105</sup> See e.g. Lappi-Seppälä, *supra* note 25, at 237; and Andenaes, *supra* note 64, at 177.

<sup>106</sup> See Akhavan, *supra* note 91, at 508.

Valid considerations support the decision made when drafting the Statute of the ICTR. According to the theories of prevention, however, such a decision reduces the effectiveness of the supposed mechanisms: the victims and their society are more likely to compare the punishments inflicted, as results of the crimes against them, to the punishments they would see inflicted upon themselves if they had broken the law, than to the consistent patterns of jurisprudence based on the principles of international equality and proportionality that are available on the Internet pages of the international institutions or as announced by CNN.

Now, the critical reader might ask what difference it ultimately makes to the one who commits genocide whether he will get 15 years or a concrete life imprisonment. Common sense suggests that he will not reflect on the difference between the punishments when committing such horrible crimes. The theory of prevention in general is vulnerable to the criticism that the potential criminal is unlikely to try consciously and rationally to estimate the benefits and risks of the crime beforehand. In the context of the most serious crimes it is even more relevant to ask how often criminals act in circumstances that are conducive to such considerations. This is a further example of the difficulties of applying the features of national criminal justice systems by analogy to the ‘international criminal justice system’. As was discussed above, the conduct addressed by international criminal law differs drastically from the conduct that forms the major bulk of crimes that the national criminal justice systems are faced with on a daily basis.

This distinction is relevant because the theories of punishment generally rely on a particular concept of crime and a concept of criminality: who or what is threatened, offended or harmed by the crimes, what is behind the criminality problem, who the likely criminals are. In international criminal law, all these questions have somewhat startling answers. Because of the scope and seriousness of the prototypical international crime, the analogous national theorizing to the effect that imposing imprisonment without the possibility of parole as a penalty for drunken driving might diminish the incidence of that crime, as people would calculate that it is wiser to pay for a taxi than spend six months in prison, seems inadequate when discussing international criminal justice. And even there, empirical studies have often pointed to the lack of long-term correlation between the levels of punishment and criminality.<sup>107</sup>

It is not difficult to come up with many other arguments that can be offered against the suggestions discussed above. One of them could be based on the general progress narrative of international law and international community: is unfamiliarity with international criminal law and the international adjudication not just a ‘natural’ problem during the starting phase, to fade away with the further ‘development’ of the system in the time to come? When the international bureaucracy is able to generate and disseminate more information about the ‘international criminal justice system’, will it not in the long run bring criminal law to the everyday level of the possible offenders and their victims, thereby curing, among other things, the problems

<sup>107</sup> For a summary of the results of a few empirical studies on the amount of criminality and for a realistic estimation of the value of such studies, see Lappi-Seppälä, *supra* note 25, at 210–220.

concerning the 'cognitive element' in the prevention theories? This may well be the case, but not necessarily. The example cited from Article 77 of the ICC Statute to demonstrate the strong quest for the independent existence, even the supremacy, of the 'international criminal justice system' also reveals the risk of failure when the two different concepts meet: the majestic programme of universalistic ideology and the concrete day-to-day life of a vulnerable individual, be it a suspect, an offender, a victim or a member of a victimized society.

## 6 Ultima Ratio?

One more effort could be made to apply the tools of criminal law theory to the context of the 'forcefully emerging' international criminal law. An essential feature in nineteenth-century classical criminal law theory is to measure the justification — either of the whole criminal justice system or of a particular criminalization — against the *ultima ratio* principle. The core idea of this approach is that criminal law should be the last resort only, i.e. it should be applied only in cases where better alternatives are no longer available. Thus the primary condition for the use of the means of criminal law is that it must aim at offering protection only to such interests as are capable of being protected by it. Furthermore, criminal law must aim only at the protection of such interests that are seen as a task — in the national application of the principle — of the state. The fulfilment of these conditions does not alone suffice, however, to justify the use of criminal law if another means, less harmful and less detrimental to the rights of the individual, are available.

A first effort to fit this principle to international criminal law could be made by relying on the human rights discussion. According to Bassiouni, 'international criminal proscriptions are the *ultima ratio* modality of enforcing internationally protected human rights'.<sup>108</sup> The preceding alternatives are the familiar means of human rights dissemination, monitoring and individual complaints.<sup>109</sup> Resort to criminalization is 'compelled when a given right encounters an "enforcement crisis" in which other modalities of protection appear inadequate'.<sup>110</sup> The major problem of this effort seems to be that a great variety of rights are in constant enforcement crisis. The application of this criterion to determine criminalization would lead to a wide variety and large number of criminalizations. The role of the *ultima ratio* principle to restrict the use of criminal law would thereby find no room.

Another effort to fit the *ultima ratio* principle to the 'international criminal justice system' could focus on the interests protected. What interests could actually be protected by international criminal law? What interests can clearly not be protected by it and should therefore be left out of its scope? It is difficult to analyze the broad scope of the issues at stake in situations where, for example, the ICC Statute would likely be resorted to. As a random example of current international topicality one

<sup>108</sup> Bassiouni, 'The Proscribing Function of International Criminal Law in the Process of Human Rights', 9 *Yale Journal of World Public Order* (1982) 1456.

<sup>109</sup> *Ibid.*, at 1472–1475.

<sup>110</sup> *Ibid.*, at 1453.

could mention the request made by the Democratic Republic of Congo to the ICJ for provisional measures in order to obligate the government of Uganda to:

dorénavant respecter pleinement le droit à la souveraineté, à l'indépendance politique et à l'intégrité territoriale que possède la République démocratique du Congo, ainsi que les droits et libertés fondamentales que possèdent toutes les personnes sur le territoire de la République démocratique du Congo.<sup>111</sup>

In addition to the same interests as in the national systems, such as life, physical integrity, property, etc., there are also the interests of the state, such as state sovereignty, territorial integrity, independence and self-determination, as well as international communitarian interests, such as international peace, security or development. As a critical reader is likely to claim, in a situation of an acute armed conflict like this random example, the first question is whether criminal law has any role in protecting anything at all. I will try, however, to continue the somewhat abstract exercise of fitting the *ultima ratio* principle here. It seems evident that the more one focuses on the direction of the interests of the state to be protected, the more relevant the *ultima ratio* question becomes: are there more efficient and less harmful ways to protect the territorial integrity of a state than by applying criminal law?

The issue could be approached from yet a different angle: does the 'international criminal justice system' need to protect the same interests as the national system in general? Are there any specific interests the protection of which belongs among the exclusive tasks of the 'international community'? Could the *ultima ratio* principle have an independent, modified content in the 'international criminal justice system'? Tentatively, at least the following two applications could be examined. The first one concerns the legislative level: the extension of international criminal law to include a particular act should be the *ultima ratio* in a stricter, more emphatic manner, so that what is a crime in national systems in general is not automatically a crime in the international system. Special reasons would be needed, such as exceptional gravity, large-scale effects, or concern to the international community as a whole. Here one should note that the ICC Statute does indeed reflect this kind of idea of an aggravated quality or quantity of the criminality as a threshold. References to that effect can be found in the preamble, in the Articles on the definitions of crimes and in the Articles on jurisdiction and admissibility.<sup>112</sup> What is lacking in this fitting of the *ultima ratio* principle, however, is the second important part of the principle, namely, the consideration of the alternatives. This will be addressed below.

The second effort to find a modified application of the *ultima ratio* in the international context would concentrate on the level of application. The decision to resort to international criminal justice in a particular case, i.e. the creation of an ad hoc tribunal or the activation of the jurisdiction of the ICC, would be subordinate to a

<sup>111</sup> Demande en indication de mesures conservatoires République démocratique du Congo contre la République de l'Ouganda, 19 June 2000, p. 4, para. 6. Among the fundamental rights of persons explicitly mentioned are the rights to health and to education (see para. 4); and concerning the state 'toute exploitation illégale des ressources naturelles ... ainsi que tout transfert illégal de biens, d'équipements ou de personnes à destination de [l'Ouganda]' (para. 5).

<sup>112</sup> See ICC Statute, Preamble, para. 9, and Articles 6–8 and 17.

prior consideration of whether other means exist that are less detrimental, less restrictive with respect to the rights of individuals, less detrimental to international peace and stability and more useful in the furtherance of justice or of international peace and stability. The discussion of the creation of the ICTY and the ICTR reflected, to some extent, this kind of balancing of means. The point most often made with respect to the ICTY was concern for the detrimental effects for peace making.<sup>113</sup> However, this second application of *ultima ratio* suffers from the same defect as the one discussed above: what about the alternatives to criminal law that were supposed to be exhausted first?

What then are the possible alternatives to international criminal law? Three alternatives are clear. The first alternative could be impunity. That reflects the *status quo*, except for some sporadic efforts in the exercise of jurisdiction. But that is, according to our hypothesis here, a substantially unacceptable outcome and therefore not a real alternative. The second alternative would be leaving these crimes to the national criminal systems. That is, according to our hypothesis here, an acceptable alternative on the condition that the national system is efficient, impartial and in harmony with international conceptions of criminal justice. On the practical level, however, this second alternative would often be the same as the first one: impunity. It was exactly the non-existence or deficiency of the national alternative that was the *primus motor* behind the creation of both the ad hoc tribunals and the ICC. In the presumed current circumstances, where the establishment of an international criminal court was necessary because of impunity on the national level, this alternative is thus not an acceptable one. Intermediate solutions can be imagined, however, as demonstrated by the recent example of the internationally instigated but nationally dominated criminal tribunal for Cambodia.<sup>114</sup> The third alternative could be the other 'modalities of accountability'.<sup>115</sup> These include truth and reconciliation commissions, investigatory commissions, compensation mechanisms, fact-finding and public discussion. The most prominent current example is the truth and reconciliation process in South Africa, and other efforts have taken place in, for example, El Salvador and Colombia.<sup>116</sup>

What about alternatives that are completely distinct from criminal or comparable individual accountability? In a situation similar to the one in the former Yugoslavia, the means at the disposal of the 'international community' seem to take the form of

<sup>113</sup> See Tallgren, *supra* note 12, at 62.

<sup>114</sup> See Rajagopal, 'The Pragmatics of Prosecuting the Khmer Rouge', *Yearbook of International Humanitarian Law* (1998) 189; Stephen R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law* (1997) 227–288.

<sup>115</sup> See Joyner, *supra* note 2.

<sup>116</sup> See Tallgren, *supra* note 12, at 20–24 and 57. On the South African example, see Tapio Puurunen, *The Committee on Amnesty of the Truth and Reconciliation Commission of South Africa* (2000). Ratner and Abrams, *supra* note 114, at 193–215, discuss in addition to the investigatory commissions also the option of civil suits as 'an alternative day in court for victims' (at 204) and the use of immigration policies by denying access to refuge to the perpetrators of international crimes.

different steps in accord with their gravity.<sup>117</sup> First come recommendations, then serious concern, the dissemination of information, expressions of disapproval by prominent members of the international community, exhortations for action, offers of mediation, expertise, investigative panels, and humanitarian aid. Then, if these benign measures do not help, relative steps are taken: aid is interrupted, experts called home, and the floor is cleared for harsher means, such as condemnations in resolutions, sanctions, exclusion from the community of states, breaking diplomatic relations, and, as a last resort, violence.

Which of these means could, in a tentative application of the *ultima ratio* principle, serve as alternatives to criminal law? The question, in light of, for example, the experience of the Yugoslavia Tribunal, seems absurd, hypothetical, and irrelevant. That is because the question seems to ignore the prevailing principle of the distinction between individual criminal responsibility and action taken by the state. Consequently, it is the state that is the target of the steps listed above. Individuals, then, are prosecuted for their individual criminal acts. The only connection between the state and the individual acts would thus be constituted as the responsibility of the state to prevent the crimes of the individuals, not to tolerate the crimes and, finally, to prosecute the alleged criminals.<sup>118</sup> As the Democratic Republic of Congo puts it in its request, cited above, to the Republic of Uganda:

prendre toutes les mesures en son pouvoir pour que les unités, forces ou agents qui relèvent ou pourraient relever de son autorité, qui bénéficient ou pourraient bénéficier de son appui, ainsi que les organisations ou personnes qui pourraient se trouver sous son contrôle, son autorité ou son influence, cessent immédiatement de commettre ou d'inciter à commettre des crimes de guerre ou toute autre exaction ou acte illicite à l'encontre de toutes les personnes.<sup>119</sup>

However, in the light of the history of international criminal jurisdiction and the recent ICC negotiations, this conception gives an inadequate picture. The relationship of the state *vis-à-vis* the individual and of state responsibility *vis-à-vis* individual responsibility is anything but simple in international criminal law. Despite the explicit focus on individual criminal responsibility in the discourse, recourse to international criminal jurisdiction is, in the prevailing structures of the 'international community'

<sup>117</sup> See e.g. O'Brien, 'The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia', 87 *American Journal of International Law* (1993) 639, at 640–643, on the action of the United Nations Security Council in response to the situation of the former Yugoslavia. On the problemacy of humanitarian intervention, see Orford, 'Muscular Humanitarianism: Reading the Narratives of the New Interventionism', 10 *European Journal of International Law* (1999) 679; and Peter Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force* (1993) 30 and 69 n. 298. See also Martti Koskenniemi, *Kansainväliset pakotteet ja Suomi. Ulko- ja turvallisuuspolitiikan alaan kuuluvat ei-sotilaalliset sanktiot ja niiden täytäntöönpano Suomessa* (1994).

<sup>118</sup> See Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, Article 49, according to which the contracting parties 'undertake to enact legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention', and 'shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches'. See also Article 28 of the ICC Statute, *supra* note 7, on the responsibility of commanders and other superiors. On the 'obligation *erga omnes*' to punish, see Tallgren, *supra* note 50.

<sup>119</sup> Demande en indication, *supra* note 111, at 3, para. 3.

often, if not always, constituted as an action against a particular state or states. Appropriate examples are not difficult to find, starting with the *Lockerbie* case leading to the sanctions against Libya,<sup>120</sup> or the reluctance of Croatia or Serbia to cooperate with the ICTY leading to condemnations in resolutions approved by the Security Council.<sup>121</sup> Among the most recent examples, reference can be made to the strong negative reactions of the Russian Federation with respect to allegations of international crimes committed in Chechnya.

The distinction between the state and the individual criminal responsibility of its nationals is not, then, so clear-cut as to hinder these exercises in the *ultima ratio* thinking on the application of criminal law. Other problems present themselves, however. Namely, what is the condemnatory value of the use of criminal law compared to the other means? Which is the most serious or efficient means: the recourse to criminal law, economic intervention or military intervention? Here, at least at first sight, the analogy of the national and international seems, once more, inadequate. In the national system, criminal law is the most concrete and severe means to intervene in the legal status and life of an individual. In the international system, this continues to hold true for the particular individual directly targeted. But for states targeted, even if indirectly, this does not seem to be the case. Instead, the other means at the disposal of the international community, listed above as alternatives to criminal law, target the state directly and individuals indirectly. As the example of the sanctions against Iraq demonstrates, however, indirect targeting does not mean that the effects on individual lives might not be very serious. The unselective infliction of suffering by economic sanctions can, in practical terms, resemble a collective punishment.

The criminality which has been regarded as the most serious in the history of international criminal law, and which the ICTY, the ICTR and the ICC are primarily meant to target, is normally committed in connection with the exercise of state power. The connection may be more or less close, just as the state power may be monolithic or fragmented, but some sort of connection can be presumed. It could, therefore, be appropriate to suggest that it is more in accordance with the *ultima ratio* principle in the international setting to concentrate on the means that target the source directly, the cause of the criminal activity, not on a random selection of individuals representing the regime.<sup>122</sup> On the basis of this logic, the way in which recourse is

<sup>120</sup> See Security Council Resolutions 748/1992 and 731/1992 on the sanctions imposed on Libya. See also *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, ICJ Reports (1998) 9.

<sup>121</sup> See e.g. Security Council Resolutions 1019/1995, 1034/1995 and 1145/1995.

<sup>122</sup> The issue of the 'state responsibility' or 'state crimes' has famously been on the agenda of the International Law Commission for a long time; see Draft Articles on State Responsibility, International Law Commission, UN Doc. A/51/10 and Corr.1, at 125–151. The hypocrisy, even a dangerous apology of that project, was highlighted in 1988 by Allott, 'State Responsibility and the Unmaking of International Law', 29 *Harvard International Law Journal* (1988) 1. Allott claims, on the one hand, that the new conceptual category called state responsibility 'obscures the fact that breaches of international law are attributable formally to the legal persons known as states but morally to the human beings who determine the behavior of states'; see *ibid.*, at 13–14. On the other hand, however, its 'ironic

currently made to international criminal law gives grounds for criticism. Criminal law is not the *ultima ratio* for the international community. It is, instead, a subsequent means in addition to the mere exercise of military and economic power.

### 3 Conclusions: Utility Revisited

So far I have demonstrated that, whatever logical inconsistencies, behavioural uncertainties or practical difficulties one may encounter when trying to ‘apply’ the utilitarian theories of prevention to ‘ordinary’ criminality in the national system, an experiment to fit the theories to the ‘international criminal justice system’ multiplies them exponentially. The basic pre-conditions for the effectiveness of the mechanisms according to the prevailing theories either do not exist or remain unfulfilled. The efforts to make them fit any current empirical examples seem out of place, artificial, even ridiculous, falling into the fictive, rhetorical universe of international speech situations.

Two possible conclusions present themselves here. Either one has to conclude that the theories, the model mechanisms for utilitarian criminal law, are false. That could mean that the effects do take place, but they follow other models, other theories. Or one has to conclude that there seems, at present, to be little room to justify the ‘international criminal justice system’ with these utilitarian arguments. ‘At present’ stands here also for the future, when the ICC Statute has entered into force. Because of the inherent problems of the ICC Statute, there is no reason to believe that the pre-conditions addressed in this article would be considerably better fulfilled when the Statute is in force.

This tentative assessment of the possibilities of the utilitarian redemption of international criminal law is definitively not certain. As stated earlier, these questions are impossible to answer with undeniable truths. Any analysis operates instead in an area of more or less justified belief. Neither is this tentative assessment in any way new. In fact, it is evident that, regardless of the usual explicit statements referring to utilitarianism, international criminal law has now and always had in our minds, in the general conscience, a firm retributivist tone of justification.<sup>123</sup> Everybody knows that prevention does not work, even if one hopes it might one day. Everybody knows, but the knowledge has no consequences. Thus, the manner in which the ‘international criminal justice system’ works now or could ever work in the future,

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consequence’ is that ‘it necessitates the possibility of attaching liability in exceptional cases to individual human beings by the addition of another category, the so-called international crime. The irony of such a proposal lies in the fact that such criminal behaviour is precisely the behaviour for which collective, and not individual, liability is more appropriate’; *ibid.*, at 15.

<sup>123</sup> In a study on adjudication in the United States, Duncan Kennedy analyses the decision-making of judges between liberal and conservative outcomes. How are they able to operate in the belief, both personal and collective, that they are engaged ‘only’ in objective, non-ideological application of law? He claims that ‘the ideological element’ in adjudication is, in psychological terms, half-conscious, denial or ‘bad faith’, ‘a collective social psychological phenomenon with political consequences’. Duncan Kennedy, *A Critique of Adjudication: Fin de Siècle* (1997) 191–212. See also Peter Sloterdijk, *Critique of Cynical Reason* (1987); and Friedrich Nietzsche, *Zur Genealogie der Moral* (1991).

measured in utilitarian terms, does not have much relevance for the why question. In any case, we do want to talk about responsibility and punishment and we do want to criminalize and to punish. Faced with the horrors of the criminality, we feel we have no other option. We want to build up, entertain and enforce international criminal justice, no matter what is gained with it today, tomorrow, or in the next generation.

But why then invent and reiterate the background of the consequentialist justifications for international criminal law, even with the smallest prospect of any success? Because of the lack of alternatives, rational ones. Utilitarianism seems rational, even if it is (at least in this context — I do not try to embrace the national systems here, as well) utopian. To admit that there is no chance to further the utilitarian goals but still maintain that criminal justice is needed would be admitting that the objective is retribution, ‘to repress the revolt of a free being and re-establish the broken order’, here citing the words of His Holiness Pope Pius XII.<sup>124</sup> As Hannah Arendt noted in 1965:

We refuse, and consider as barbaric, the propositions ‘that a great crime offends nature, so that the very earth cries out for vengeance; that evil violates a natural harmony which only retribution can restore; that a wronged collectivity owes a duty to the moral order to punish the criminal’ (Yosal Rogat). And yet I think it is undeniable that it was precisely on the ground of these long-forgotten propositions that Eichmann was brought to justice to begin with, and that they were, in fact, the supreme justification for the death penalty.<sup>125</sup>

Retribution emanates from morals. Morals are ‘intuitive’, and follow ‘instincts’, as pointed out by the Nuremberg prosecutor, Robert H. Jackson: ‘The satisfaction of instincts of revenge and retribution for the sake of retribution are obviously the least sound basis of punishment.’<sup>126</sup> Law is ‘rational’. What else could a reasonable lawyer do than try very hard to keep apart ‘intuitive’ morals and ‘rational’ criminal policy?<sup>127</sup> More than anywhere else, the lawyer is here on very thin ice. An enlightened criminal justice system must, to remain true to its identity, even amidst circumstances alien to its own pre-conditions, carry on trumpeting forth the references to the principle of rationality as ‘a continuous warning that criminal policy should not indulge in the emotionalism of the moment’.<sup>128</sup>

Were the ‘international criminal justice system’ stripped of its utility and rationality, what would be left? One option would be to think that its main function

<sup>124</sup> Pope Pius XII, *supra* note 84, at 27.

<sup>125</sup> Arendt, *supra* note 41, at 277, citing Yosol Rogat, *The Eichmann Trial and the Rule of Law* (1961).

<sup>126</sup> See the Memorandum of Proposals for the Prosecution and Punishment of Certain War Criminals and Other Offenders of 1946, cited by M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (1992) 14.

<sup>127</sup> See e.g. Lappi-Seppälä, *supra* note 25, at 248 n. 34, criticizing Andrew von Hirsch’s intuitive moralistic views; see von Hirsch, ‘The Ethics of Selective Incapacitation: Observations of the Contemporary Debate’, *Crime and Delinquency* (1984) 185, at 185–187; Andrew von Hirsch, *Past or Future Crimes* (1985) 132–138.

<sup>128</sup> See Jung, *supra* note 78, at 61. Simon Chesterman discusses the attempts at an artificial separation of law and morality in the context of the Nuremberg Trials: see Chesterman, ‘Never Again . . . and Again: Law, Order, and the Gender of War Crimes in Bosnia and Beyond’, *22 Yale Journal of International Law* (1997) 299, at 306–307.

would be to serve as a symbol and as a model, showing the way for the national jurisdictions. Instead of it being the *ultima ratio* of the international community, there would be some considered use of international criminal law as a subsequent means. This could mean special roles for international criminal law: as the loudspeaker echoing the values of the international community, as a tool in negotiations, as the message preceding or following military intervention. International criminal law could set the standards of tolerable conduct by sending *ex ante* messages, even if the possible *ex post* sanctioning of the breach of this standard would take place with other means, outside the judicial context. Thereby the role of international criminal law would be, by disseminating information on common values, to contribute to down-playing the risks of conflict. This does, to some extent, echo the current tendencies at the level of national criminal policy, where criminal law itself is being 'used increasingly as the socio-technological system to prevent risks'.<sup>129</sup>

The problems with this scenario are both principled and pragmatic. As the discussion of symbolic criminal justice in domestic contexts has elaborated, such use of criminal sanctions contradicts several major principles of criminal law, beginning with equality before the law. According to the same criticism that utilitarianism faces from retributionism, the exemplary infliction of punishment is against the Kantian principle of not using a person as such as a means, but as an end himself. Pragmatic problems relate to the feasibility of even such an exemplary criminal justice. The negotiations on the ICC demonstrated clearly the lack of will to genuinely realize the jurisdictional basis for the functioning of the symbolism. Crippled as its jurisdiction is, even the future ICC risks remaining just another symbol of impunity. Such a message is not the message that we were looking for.

A supplementary argument often reiterated in support of international criminal justice is that of 'no peace without justice'. The claim presumes a healing mechanism whereby criminal justice renders finality to a conflict affecting a society. This idea was part of the argumentation evoked when the ICTY and the ICTR were established by the Security Council, based on its competencies under Chapter VII of the UN Charter to restore and maintain peace. As the Security Council resolution on the ICTR states, the prosecutions were intended to 'contribute to the process of national reconciliation and to the restoration and maintenance of peace'.<sup>130</sup> Such broad arguments are impossible to verify by any empirical means. A quick random survey of historical examples of the evolution of different societies seems to suggest, however, that the argument of 'no peace without justice' is as hollow as the promise of prevention.<sup>131</sup> It seems to be the case that this slogan is only as valid as any other slogan, such as 'peace without justice' and 'justice without peace'. Furthermore, as Marc Feher argues, the doctrine

<sup>129</sup> See Jung, *supra* note 78, at 52, on the possible new concept of criminal law in the national context.

<sup>130</sup> Security Council Resolution 955/1994, para. 1.

<sup>131</sup> It suffices to look at the background of the currently peaceful societies in Europe, with contrasting records of criminal justice elaboration of large-scale conflicts. See e.g. the interesting polemic by Müller-Rappard, 'A Culture of Impunity: Rethinking the Implications for International Crimes', in Joyner, *supra* note 2, at 91–100.

of 'no peace without justice' is not followed consistently. Instead, priority is at times claimed to be given to 'stability over justice',<sup>132</sup> where there is a risk of renewed violence if the local leaders are forced to face criminal trials. An even more fundamental question is whether criminal law could ever be able to provide closure to large-scale, deep-rooted injustice and suffering, and whether the expectation of finality after a criminal trial has established the truth by identifying the guilty could in fact violently silence other truths, other kinds of responsibilities. Perhaps there is pain which has no closure.

Yet another way to look at international criminal justice, even if it is close to that of symbolism, is to see it as a rite, an event, even a public gathering to serve a purpose. Nils Christie has evoked the idea of the trial as a collective funeral of sorrow, thereby approaching the finality argument I addressed with some reservations in the previous paragraph.<sup>133</sup> The Trial Chamber of the ICTY makes an allusion in the same direction in *Erdemovic*: 'thwarting impunity even to a limited extent would contribute to appeasement and give the chance to the people who were sorely afflicted to mourn those among them who had been unjustly killed.'<sup>134</sup> A somewhat different way still would be to focus on the word 'collective' and see criminal justice as a continuous 'service' of remembrance, like the divine services of religions: 'The lessons of history must be repeated for future generations in order to help prevent ...'<sup>135</sup> It is incontestable that, despite its marginality as a rational or utilitarian means of preventing large-scale conflicts and injustice, international criminal law is a truly illuminating package of ideas. It targets the questions of life and death, the choices between good and evil, the promises of justice, peace and love in a meaningful manner. While still waiting for honest and enduring answers to the *why* question of international criminal law, we seem to hold on to it with commitment, even enthusiasm, for the essential purpose of getting together — if not in a courtroom then in our minds — and expressing that, whatever happened, it should not happen any more. That collective service carries perhaps no concrete consequences. After all that has been said and done, it offers poor relief, it escapes any finality. Just an expression of belief: some limits do exist, even to violence.

International criminal law carries this kind of a religious exercise of hope that is stronger than the desire to face everyday life. Focusing on the idea of international criminal justice helps us to forget that an overwhelming majority of the crucial problems of the societies concerned are not adequately addressed by criminal law. The ideology of a disciplined, mathematical structure of international criminal responsibility serves as a soothing strategy to measure the immeasurable. The seemingly unambiguous notions of innocence and guilt create consoling patterns of causality in the chaos of intertwined problems of social, political, and economic deprivation

<sup>132</sup> See Feher, *supra* note 60, at 49.

<sup>133</sup> Nils Christie, *Pinans gränser* (1981) 83–89.

<sup>134</sup> *Prosecutor v. Erdemovic*, *supra* note 17, para. 65.

<sup>135</sup> See Schabas, *supra* note 8, at 516.

surrounding the violence. Thereby international criminal law seems to make comprehensible the incomprehensible.

By its deferral strategy of ‘action’ — at least something is done, for better or worse — international criminal law can ease the frustration, just as war can break the oppressive immobility of the social problems of peacetime, hardly ever really offering a solution to them, however. Most of all, the strongly emphasized principle of equality before the law, such an inherent part of the dogmas of criminal justice, serves to mask the overall inequality in any society, among the societies and in the ‘international community’ and in the actions carried out in its name.<sup>136</sup> By focusing on individual responsibility, criminal law reduces the perspective of the phenomenon to make it easier for the eye. Thereby it reduces the complexity and scale of multiple responsibilities to a mere background. We are not discussing state responsibility, we are discussing criminal law. We are not really discussing a crime of aggression, we are busy discussing a rape or murder.<sup>137</sup> We are not really discussing nuclear weapons, we are discussing machete knives used in Rwanda. We are not much discussing the immense environmental catastrophes caused by wars and the responsibility for them,<sup>138</sup> we are discussing the compensation to be paid by an individual criminal to individual victims. Thereby the exercise which international criminal law induces is that of monopolizing violence as a legitimate tool of politics, and privatizing the responsibility and duty to compensate for the damages caused.

Perhaps it is even true that the rational and utilitarian purpose of international criminal law lies elsewhere than in the prevention or suppression of criminality. Perhaps its purpose is to establish a system of symbols, analogous to domestic criminal law, that gives reason to believe that the ‘international community’, the world, can be submitted to a similar kind of rational governance as that of a national state. Its purpose may also be to give reason to believe that the competence of the institutions is as legitimate as that of the national institutions. Perhaps international criminal law serves a purpose simultaneously both to reason and to mystify the political control exercised by those to whom it is available in the current ‘international community’. Perhaps its task is to naturalize, to exclude from the political battle, certain

<sup>136</sup> Among those that have presented criticism regarding inequality in the sense of intentional ignorance and a green light for war crimes, see e.g. Noam Chomsky, *A New Generation Draws the Line — Kosovo, East Timor and the Standards of the West* (2000) in particular at 48–93. See also Feher, *supra* note 60, at 31–110.

<sup>137</sup> See the Final Report, *supra* note 48, chapter 34: ‘As a matter of practice, which we consider to be in accord with the most widely accepted and reputable legal opinion, we in the [Office of the Prosecutor] have deliberately refrained from assessing *jus ad bellum* issues in our work and focused exclusively on whether or not individuals have committed serious violations of international humanitarian law as assessed within the confines of the *jus in bello*.’ As the Final Report notes in chapter 4, ‘the legitimacy of the recourse to force by NATO is a subject before the International Court of Justice in a case brought by the FRY against various NATO countries’.

<sup>138</sup> See Drumbl, ‘Waging War Against the World: The Need to Move from War Crimes to Environmental Crimes’, 22 *Fordham International Law Journal* (1998) 122. See also the Final Report, *supra* note 48, chapters 14–25.

phenomena which are in fact the pre-conditions for the maintenance of the existing governance; by the North, by wealthy states, by wealthy individuals, by strong states, by strong individuals, by men, especially white men, and so forth. By the decisions that are made by states to include some acts within the jurisdiction of new institutions to try individuals, some other acts and responsibilities are excluded.