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WHY PUNISH PERPETRATORS OF MASS ATROCITIES?

PUNISHMENT AND THE DOMESTIC ANALOGY – WHY IT CAN AND CANNOT WORK

Elies van Sliedregt[*]

1. INTRODUCTION

Punishment practice and theory in International Criminal Law (ICL) is largely modelled on domestic criminal law. This is understandable: dealing with mass atrocities is done through the process of a criminal trial and in doing so judges rely heavily on domestic criminal law theory and practice. International judges recruited from the criminal bench in their respective countries will bring with them domestic experience. More than any other branch of international law, ICL opened up to domestic law. Criminal law experience qualifies you for the ICL profession, be it as a judge, prosecutor or defence attorney. This is generally a good thing. After all, the core business of these international courts is running a criminal trial.

There are, however, a number of drawbacks with this import of national practice. First of all, it poses an obstacle to developing ICL into a coherent body of law with a common methodology and culture. It is difficult for domestic criminal law practitioners to lay off their national cloak and to 'forget' the system they have been educated and trained in. The amalgamation of different legal cultures in ICL makes it an inherently pluralist legal endeavour, which sometimes results in misunderstandings and even conflict.[1] The import of domestic legal practice has another disadvantage. It lumbers ICL with the domestic analogy of adopting criminal law paradigms drawn from domestic practice and theory that insufficiently take account of the distinct legal, moral, and constitutional context of ICL.

The question I aim to answer in this chapter is to what extent the domestic analogy 'works' when it comes to punishment theories in ICL. Does the use and reliance on domestic criminal law in ICL do justice to the specificities of ICL? This requires answering the question to what extent is ICL special? To this end, I explore the special or *sui generis* nature of international crimes and international perpetrators (section 3). I start, however, by looking into the domestic analogy (section 2). I discuss the domestic analogy at two levels. First, at a meta-level, when discussing the international legal order and the authority to punish. Secondly, at a micro-level, when discussing sentencing purposes in international trials. The domestic analogy puts the legitimacy-

[*] Professor of International and Comparative Criminal Law, Co-Director Centre for Criminal Justice Studies, University of Leeds.

[1] See E. van Sliedregt, Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide. *Journal of International Criminal Justice,* 2007, 184-207; E. van Sliedregt & S. Vasiliev, 'Pluralism: A New Framework for International Criminal Justice', in: E. van Sliedregt & S. Vasiliev (eds.), *Pluralism in International Criminal Law*, Oxford: Oxford University Press 2014, 3-39.

question on the table. In whose name do international courts punish? On behalf of the international community? On behalf of the affected region or local community? Questions of community and authority are particularly pertinent when we look into the restorative and reconciliation aspect of sentencing. In discussing punishment and sentencing purposes in ICL (section 4) we see that retribution and deterrence lie at the heart of international criminal justice. Contemporary international courts and tribunals have been given a role to play in restoring peace, of bringing divided communities together, of 'peace through justice'.[2] In recent years, the debate around sentencing purposes has moved from community level to the individual level; from restoring peace between ethnic groups to reintegration of the individual into the community. After almost 25 years of international criminal practice, sentenced persons are being released having served their sentence. As a result, questions arise over their reintegration into society. Drawing on theories developed in national criminal justice systems, criminologists Hola and Van Wijk call for international courts to consider rehabilitation and reintegration when sentencing perpetrators of international crimes.[3] The *sui generis* argument can only go so far; it should not be an obstacle to taking on board rehabilitative considerations developed in domestic law. Moreover, it can be argued that rehabilitation contributes towards restoration of peace. While there is no evidence (yet) to back up the claim that individual rehabilitation contributes positively to restoration/peace at group level, it is not hard to imagine that there is a mutual beneficial relationship between the two.

The most important outcome of the analysis below, is that there are fundamental flaws in the international criminal justice system that hamper restorative justice ambitions. International criminal justice is a criminal justice system that operates in a vacuum. It takes over from national justice systems in doing the retributive bit: prosecution and adjudication. In that sense it is an imperfect, one-sided process. For the post-trial and restorative justice-part it reverts back to the sovereign State. The domestic analogy can and cannot work in ICL. It works to the extent that international courts can incorporate and apply theories of punishment in imposing sentences. It is, however, more difficult when it comes to restoration and enforcement of post-trial justice purposes such as reintegration and reconciliation.

2. DOMESTIC ANALOGY

When discussing the domestic analogy in ICL, we can take two perspectives, the international law perspective and the criminal law perspective. Discussing the domestic analogy in the international law context requires us to discuss the theory as developed in international relations theory where it was relied upon to justify building a world order analogous to a domestic order. In the following, I will call this the 'domestic analogy proper' since it in this context that the domestic analogy-terminology was first coined. Taking a criminal law perspective, the domestic analogy concerns the (uncritical) international application of domestic

[2] UN Security Resolutions establishing ad hocs and ICC preamble. See also SCSL and ECCC. Check ASP statements.

[3] B. Hola and J. van Wijk, 'Life after Conviction at International Criminal Tribunals. An Empirical Overview', 12 *Journal of International Criminal Justice* 2014, 109-132.

criminal law concepts and theories.[4] This process of legal transplanting accounts for my terminology of the 'domestic analogy of transplant'. Domestic analogy proper discusses issues at a meta-level: the international legal order and the authority to punish. The domestic analogy of transplant discusses issues at micro or criminal trial-level, e.g. punishment and sentencing in ICL.

2.1 Domestic Analogy Proper

The domestic analogy proper is the argument that the principles that apply to inter-individual relations apply to inter-state relations as well. Hedley Bull describes the domestic analogy as "the argument from the experience of individual men in domestic society to the experience of states, according to which states, like individuals, are capable of orderly social life only if…they stand in awe of a common power".[5] The domestic analogy proper has been instrumental in justifying the establishment of a world order. Such an order would lead to peace, or at least to an end of a Hobbesian state of nature, which is a state of war.[6]

The theory has had quite some traction in international law. It has been relied upon to advocate world government, going back to Grotius and Vitoria who argued in favour of a world community as a follow-up to the *Republica Christiana*.[7] Kant's work builds on the domestic analogy in proposing the concept of a global legal order[8] where international law is created through commonly accepted principles of international rights: *ius cosmopoliticum*.[9] This assumes an interstate system of international governance.[10]

> nations . . . [and] peoples can be regarded as single individuals who injure one another through their close proximity while living in the state of nature (i.e., independently of external laws). For the sake of its own security, each nation can and should demand that the others enter into a contract resembling the civil one and guaranteeing the rights of each.[11]

There are different interpretations of Kant's concept of cosmopolitan law. Archibugi argues it comprises rights that are forerunners of human rights as comprised in the

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[4] This is 'distinct' from the domestic analogy proper. See H. Suganami, 'Reflections on the Domestic Analogy: The Case of Bull, Beitz and Linklater', 12 *Review of International Studies* (1986) 145-158, at 149.

[5] H. Bull, *The Anarchical Society: A Study of Order in World Politics*, London: Macmillan, 1977, at 46.

[6] H. Suganami, 'Reflections on the Domestic Analogy: The Case of Bull, Beitz and Linklater', 12 *Review of International Studies* (1986) 145-158, at 145-146. See also Ch. Bottici, 'The Domestic Analogy and the Kantian Project of Perpetual Peace', 11 *The Journal of Political Philosophy* (2003), 392-410, at 392.

[7] See R. Lesaffer, 'The Grotian Tradition Revisited: Change and Continuity in the History of International Law', *British Yearbook of International Law*, 103-139.

[8] Bottici, supra n. 6, at 395. Patrick Capps and Julian Rivers in their paper 'Kant's Concept of International Law', 16 *Legal Theory* (2010), 229-257, argue that Kant's cosmopolitan world order is proposing a confederal rather than a federalist superstate type of governance.

[9] "Dieses Recht, so fern es auf die mögliche Vereinigung aller Völker in Absicht auf gewisse allgemeine Gesetze ihres möglichen Verkehrs geht, kann weltbürgerliche (*ius cosmopoliticum*) genannt werden." 6 *Gesammelte Schriften*, https://korpora.zim.uni-duisburg-essen.de/kant/aa06/352.html, at 351. See also Capps and Rivers, supra n. 8, at 251.

[10] See Patrick Capps and Julian Rivers, supra n. 2, relying on Immanuel Kant, 6 *Gesammelte Schriften*, 24 (Royal Prussian Academy of Science ed.), at 351; and Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor trans., 1996) (1797), at 120.

[11] Kant, 8 *Gesammelte Schriften*, supra note 3, at 348n, cited by Capps and Rivers, supra n. 9.

Universal Declaration of Human Rights. [12] Capps and Riversadopt a more minimalist approach, where "[c]osmopolitan law is tied up with the conditions by which commerce between nations is possible". An international legal order should only be built to the extent that mutual interests so require. This indeed aligns best with Kant's world order, which is a federation of states based on mutual interests.[13] Such an order can be implemented and enforced by the state institutions themselves; it does not require institution building at the international level. [14] Kant's cosmopolitan world order is an inter-state, confederation of people, not a supranational world community.[15] International law can be an autonomous system of law properly institutionalized without implying the institutional forms that we associate with a unitary global state.[16] We are reminded here of Georges Scelle's theory of 'dédoublement fonctionnel', which assumes that state agents or courts have a dual role: they act on behalf of the national or on behalf of the international legal order.[17] This, to use Cassese's words, 'role-splitting' makes a separate international institutional framework superfluous. [18] This global, non-supranational nature of the international justice system is important when we discuss punishment theories in ICL.

Kant's work inspired international lawyers in the 19th and 20th century and lead them to advocate the idea of world community and world government. Even after the horrors of the 20th century with wars, genocide and decolonization there was still support for the cosmopolitan world view.[19] After the WWII, Lauterpacht stated faith in world government in his famous piece on the 'Grotian tradition'. [20] This optimism reached new heights with the establishment of international criminal tribunals and courts after the end of the Cold War. Antonio Cassese, one of ICL's main architects, can be seen to champion cosmopolitanism in his book *Realizing Utopia*.[21] Cosmopolitanism still is the belief system that supports and pervades ICL and its supporters.

The domestic analogy has not been immune to critique.[22] With the argument that the international society is unique and different from any national legal order, Hedley Bull rejected the domestic analogy as a way to justify and explain the international legal order.[23] Koskeniemmi is equally critical of the idea of world government since, judging from the history of Western political thought, it presupposes imposition and hegemony.[24]

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[12] D. Archibugi, 'Immanuel kant, Cosmopolitan Law and Peace', 1 *European Journal of International Relations*, 429-456, at 429-430.
[13] Capps and River, supra n. 2, at 253.
[14] Ibidem.
[15] Bottici, supra n. 6, at 397.
[16] Patrick Capps and Julian Rivers, supra n. 8, at 357.
[17] Georges Scelle, *Précis de droit des gens. Principes et systimatique* (Vol. I) (1932) 43, 54-56, 217; (VoL II) (1934) 10, 319, 450.
[18] A. Cassese, 'Remarks on Scelle's Theory of "Role-Splitting" ('dédoublement fonctionnel) in International Law, 1 *European Journal of International Law* 210–231 (1990), at 212–213.
[19] M. Koskeniemmi, 'The Subjective Dangers of Projects of World Community, in A. Cassese, *Realizing Utopia: The Future of International Law*, Oxford: Oxford University Press 2012, at 8.
[20] Ibidem, referring (n. 4) to H. Lauterpacht, 'The Grotian Tradition in International Law' 23 *British Yearbook of International Law* (1946), 1-53.
[21] A. Cassese, *Realizing Utopia: The Future of International Law*, Oxford: Oxford University Press 2012.
[22] For an overview of some of this critique see Suganami, supra n. 4, 145-158.
[23] Bull, supra n. 5, at
[24] Koskenniemi, 'supra n. 19, at 4.

2.2 Transplanting domestic theories

In ICL, the domestic analogy plays a specific role. As Tallgren points out, it is not about the relationship between the state and the international community.[25] ICL's main concern is the relationship between individuals, between perpetrators and victims. The domestic analogy in ICL is about mimicking the national criminal justice framework. The latter is the blueprint for international criminal trials, from the investigation and evidence-gathering phase through to the actual trial, its proceedings, attribution of criminal liability and punishment. This mimicry has been criticized for a number of reasons and from different perspectives.

Mark Drumbl was an early critic of transplanting domestic justice to international criminal justice. In his work *Atrocity, Punishment and International Law* he points to the paradox of international lawmakers emphasizing the extraordinary nature of international crimes, demarcating the difference with ordinary common crimes, yet relying on the ordinary/domestic modality of punishment, theory of sentencing and process of determining guilt or innocence.[26] Moreover, he argues, international criminal justice insufficiently takes on board local, non-Western perspectives on justice, which by embracing concepts such as collective guilt and punitive rituals that do not entail incarceration, deviate from key-principles of Western-style justice. [27] Mimicking Western justice is especially problematic when victim communities themselves provide for such justice mechanisms. Think of the gacaca system in Rwanda.[28] Western-style international criminal justice may feel distant for victims and undermine the efficiency of individualized criminal trials premised on incarceration.[29] Drumbl proposes what he calls a 'cosmopolitan pluralism' theory of punishment, based on universal values but diversified it its enforcement leaving room for grassroots and local justice mechanism that differ from and exist alongside Western-style criminal trials.[30]

Others have criticized the domestic analogy of transplant because it ignores the fact that international crimes differ fundamentally from 'garden variety', domestic crimes.[31] International crimes have a unique, collective nature which does not square with individualized justice based on liberal values of autonomy and moral agency. Moreover, perpetrators of international crimes are different from perpetrators of 'ordinary' crimes. At this point we need to discuss the *sui generis*-argument.

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[25] I. Tallgren, 'The Sensibility and Sense of International Criminal Law', 13 *European Journal of International Law* (2002) 561-595, at 566.
[26] M.A. Drumbl, *Atrocity, Punishment and International Law*, Cambridge University Press 2007, at 6.
[27] Ibidem, 123-148.
[28] Ibidem, at 124.
[29] Ibidem, at 184.
[30] Ibidem, at 185-187.
[31] G.J. Bass, Stay the Hand of Vengeance: *The Politics of War Crimes Tribunals, Princeton University Press* 2000, at 13-14; Steven R. Ratner, The Schizophrenias of International Criminal Law, 33 *Tex Int'l L J* 237, 251 (1998); Mark J. Osiel, Why Prosecute? Critics of Punishment for Mass Atrocity, 22 *Hum Rts Q* 118 (2000).

3. SUI GENERIS

In Sloane's view, ICL differs from domestic criminal law in at least three ways.[32] First, it serves multiple communities, ethnic and national, and the elusive international community which itself hosts multiple and competing constituencies and interests. Secondly, the collective nature of international crimes is *sui generis*. Thirdly, international perpetrators act in an inverse universe where evil is the norm; they are not classic deviants. As a result, justifications for punishment common to national systems cannot be transplanted unreflectively to the distinct context of ICL. Both points, the *sui generis* nature of international crimes and of its perpetrators impact on the sentencing rationale. According to Sloane, the expressionist dimensions of punishment best capture both the nature of international sentencing and its unique institutional capacity.[33]

3.1 Nature of International Crimes

Each of Sloane's three points warrants reflection. The first point, on the community ICL serves, will be discussed separately below (section 5). The second point, concerns the serious nature of international crimes. Genocide sits on a different level of moral condemnation than (multiple) murder. The moral gravity stems from the fact that these are crimes that violate core values the international community aims to protect, and as a comity of nations was established to protect (right to life, humaneness, self-determination). The difference between domestic and international crimes becomes real when we look at the referral practice of international courts. In 2006, the ICTR prosecutor attempted to refer the *Bagaragaza* indictment, which included charges of genocide and other crimes, to Norway. Because Norway's domestic law did not specifically include the crime of genocide, it proposed to prosecute the case as homicide under its national law. ICTR chambers rejected the referral to Norway because the crime of homicide, it noted, lacks the specific intent element required for genocide and, more importantly, homicide was not a crime of comparable gravity to genocide. [34] A conviction and punishment for murder would not have the same expressionist value.

The expressionist dimension of sentencing equally affects the broader question of criminal responsibility. The domestic criminal law framework may not have the capacity to sufficiently express moral repudiation. I use two examples from Dutch criminal law to illustrate my point. First the *Basebya* case, which concerns a Rwandan politician who was convicted for incitement to commit genocide by a Dutch court and sentenced for incitement to genocide to 6 years and 8 months.[35]

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[32] Robert D. Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and The Potential of International Criminal *Law'43 Stan. J. Int'l L.* 39 (2007), at 41.

[33] Ibidem, at 42. For a good overview on the argument of expressive justice in ICL and its limits see B. Sander, *The Expressive Limits of International Criminal Justice: Victim Trauma and Local Culture in the Iron Cage of the Law*, iCourts No. 38 2016.

[34] *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-AR11*bis*, Decision on Rule 11bis Appeal, 30 August 2006, para.17 available via http://cld.irmct.org/assets/filings/338-ICTR-05-86-0037-1-BAGARAGAZA-DECISION-ON-RULE-11BIS-APPEAL.pdf

[35] The Hague District Court, 1 March 2013, LJN: BZ4292. For a summary in English, http://www.asser.nl/upload/documents/20130328T104222-Unofficial%20english%20translation%20Decision%20Rechtbank%20den%20Haag%2001-03-2013.pdf

The Court was apologetic in imposing the sentence; it felt the sentence insufficiently expressed moral condemnation especially bearing in mind the defendant had not expressed any remorse.[36] Incitement in Dutch criminal law is criminalized in section 131 of the Dutch Penal Code. It does not specifically refer to genocide, it concerns inciting any criminal offence that disturbs the public order. As such it comes with a lenient sentence (5 years).[37] In 2003, the International Crimes Act came into effect, which criminalizes incitement to commit genocide separately and provides for a harsher sentence. Yet, because incitement is an inchoate form of liability – like attempt - a Penal Code provision still applies that reduces the sentence with a third.[38] This does not accord with international practice to impose serious sentences on those who mastermind mass criminality and instigate ethnic hatred by way of incitement. Because of the legality principle, prohibiting retroactive application of the law, the Court was bound by the law as it stood at the time of the offences. It imposed the sanction of section 131 of the Penal Code and increased it with a third because of multiple commission of incitement.[39]

The second example concerns an older case and is about the reliance on the defence of necessity. In the post-WWII case of *Fullriede*, the defendant raised the defence of necessity to deny liability for war crimes.[40] Fullriede was a member of the German occupation forces in the Netherlands. As a reprisal measure for an assault on German officers, he was under the duty to inflict collective punishment on the population of the village of Putten. Ninety houses were burnt down and a few hundred men were arrested and deported to Germany. Fullriede claimed that he had executed the order in a mild way and that if it had been left to another, it would have been executed in full severity and two thousand houses would have been burnt down. His resort to the defence of necessity/choice of evils ('noodtoestand') was declined. The Court held that necessity can never *justify* such a huge loss of life. In 'ordinary' Dutch criminal law necessity can be a choice of evils-defence that fully exempts the defendant even when there is a loss of life.

The issue is even more pertinent when the defendant relies on the defence of duress to *excuse* him/her for succumbing to a pressure in taking human life to save his/her own. Duress in most civil law systems is a complete defence for murder. Most common law systems, however, do not accord duress the status of complete defence. In cases of murder, it can only mitigate the sentence. Interestingly, with regard to international crimes cases, there is no distinction between civil law and common law systems on this point. There is a reluctance across the board to accord duress the status of complete defence when it concerns international crimes. This was the position taken by the ICTY Appeals Chamber in *Erdemovic* when the defendant relied on the defence of duress for being forced – at gunpoint - to kill

[36] The Hague District Court, 1 March 2013, LJN: BZ4292, paras 22.11 and 22.12

[37] A maximum of 5 years imprisonment applies: "Hij die in het openbaar, mondeling of bij geschrift of afbeelding, tot enig strafbaar feit of tot gewelddadig optreden tegen het openbaar gezag opruit, wordt gestraft met gevangenisstraf van ten hoogste vijf jaren of geldboete van de vierde categorie". When it concerns a terrorist offence the penality is increased with a third (section 131(2) of the Dutch Penal Code)

[38] In section 3(2), the ICA it provides that a person is punished for a third of the max penalty for genocide, which is 30 years imprisonment. Ergo for incitement to genocide it would be 10 years imprisonment. See https://documents.law.yale.edu/sites/default/files/netherlands_-_international_crimes_act_english_.pdf (accessed 2 January 2019).

[39] Required by section 57 of the Dutch Penal Code.

[40] Dutch Special Court of Cassation, 10 January 1949, *Nederlandse Jurisprudentie,*1949, 541

seventy Muslims.[41] In my view this is the appropriate position.[42] As in the case of Fullriede, Erdemovic had killed a large number of people; such a crime cannot go unpunished. Even though he was forced to pull the trigger and anyone in his situation would have done the same, his conduct warrants punishment. That way, it serves the objective of justice for victims. Maybe more controversially, I would argue it can serve the perpetrator himself. This is what Erdemovic had come to accept.[43] The punishment, which was lenient - five years imprisonment - was an atonement that enabled him to start anew and return to his community whose families had been affected by his acts. Both examples illustrate how ordinary domestic criminal law needs tweaking when international crimes are tried before domestic courts, mainly because of expressionist concerns of punishment.

3.2 Perpetrators of International Crimes

Sloane's third point concerns the nature of international perpetrators. Here we can draw on the work of criminologists. Kelman & Hamilton have pointed out that international perpetrators may be perfectly law-abiding in ordinary circumstances.[44] A collapse of common values in a period of transition and disintegration, however, may turn them into criminals. In fact, since these crimes are often committed as part of a system, they may engender conduct that is criminal outside the system but actually comports with the system (Nazi Germany).[45] This resonates in Hannah Arendt's work on the *Eichmann*-case where she describes evil as 'banal' for the sheer lack of moral reflection on the part of the defendant when performing his murderous task within the Nazi bureaucracy.[46] As Smeulers argues in drawing up a typology of international perpetrators, rather than constituting *deviant* conduct, international crimes are crimes of obedience.[47] In her typology, Smeulers distinguishes between perpetrators who would be perfectly law-abiding in normal circumstances and those who are 'genuinely' bad. The likes of Hitler, Saddam Hussein and Milosevic, who mastermind crimes, are at the apex of Smeulers' typology and are considered inherently evil. This type of perpetrator will often be driven by hatred, sadism and have a narcissistic personality. They are referred to as 'enemies of mankind' or *hostis humanis*. Others who, one way or

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[41] *Prosecutor v Erdemovic*, Judgment, IT-96-22-A, 7 October 1997.

[42] For another – persuasive - view see: L.E. Chiesa, 'Duress, Demanding Heroism and Proportionality: The Erdemovic Case and Beyond', *Vanderbilt Journal of Transnational Law* 41 (2008), 741-773; I sympathise with that view: E. van Sliedregt, *Individual Criminal Responsibility in International Law,* Oxford monographs in international law, OUP 2012, section 9.7.3, at 259.

[43] See statements by Erdemovic at his trial:
https://www.youtube.com/watch?v=rAQp27mSTAM

[44] H.C. Kelman, V.L. Hamilton, *Crimes of Obedience: Toward a Social Psychology of Authority and Responsibility*, Boston: Harvard University Press 1989.

[45] See H.C. Kelman, 'The Policy context of International Crimes', in: A.P. Nollkaemper and H.G. van der Wilt (eds.), *System Criminality in International Law*, Cambridge University Press 2009, 26-41.

[46] Arendt's work has been criticized for giving rise to interpretations that portray Eichmann as a mere cog in the wheel, disguising his strong anti-Semitic views and support for the *Endlosung*. *See B. Strangeth, Eichmann* Before Jerusalem: The Unexamined Life of a Mass Murderer, New York: Vintage Books 2014; D. Cesarini *Becoming Eichmann: Rethinking the Life, Crimes, and Trial of a "Desk Murderer"*, Anthos 2004.

[47] A. Smeulers, 'Perpetrators of International Crimes', in: A. Smeulers & R. Haveman (eds.) *Supranational Criminology: towards a criminology of international crimes*, Antwerp: Intersentia 2008, chapter X.

another, have found themselves forced to commit international crimes like Erdemovic do not qualify as such, yet they are worthy of punishment. They are compromised by the situation or passive bystanders who fail to intervene.

Not all perpetrators are brainwashed bureaucrats or compromised bystanders. One can think of Hassan Ngeze, the extremist editor-in-chief of the anti-Tutsi newspaper Kangura who was convicted for genocide and incitement to commit genocide by the ICTR and who serves a 35-year sentence in Mali.[48] With regard to the situation in the former Yugoslavia, some perpetrators did what they always did and would have done: operate outside the law. They were thugs before, during and after the war. The war was just an opportunity to increase their criminal trade. Željko Ražnatović, also known as Arkan, headed a paramilitary group called the tigers, which in essence was a mafia type mob, a criminal organization that made lots of money on the black market that flourished during the war. Theft, plunder and organized crime is intimately linked to armed conflict and mass atrocities. In his 2005 book *Hitler's Beneficiaries*, historian Aly describes the Holocaust as "the most single-mindedly pursued campaign of murderous larceny in modern history".[49] Greed similarly drove the Hutu's to kill and loot Tutsi households.[50]

The *sui generis* nature of international crimes and perpetrators should, not be exaggerated. There is an overlap between organized crime and bureaucratic/systemic international crimes; between 'ordinary perpetrators' and perpetrators of international crimes. When it comes to perpetrators, those who benefit from armed conflict by making money out of it; they can be remarkably similar to the average gang leader or mafioso. Here, the *sui generis*-argument against the domestic analogy does not work. When there are similarities between 'ordinary' and international crimes there is no bar to the international application of domestically developed sentencing purposes.

4. PUNISHMENT AND SENTENCING IN ICL

Punishment requires justification. Most criminal justice systems employ three main sentencing purposes: retribution, prevention, condemnation/denunciation and to a more or lesser degree rehabilitation. In ICL, the first three play a prominent role. The ICTY, in one of its first judgments reiterated the sentencing purposes, which it said were the Tribunal's objectives:

"[g]eneral 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. These purposes and functions of the International Tribunal as set out by the Security Council may provide guidance in determining the punishment for a crime against humanity.[51]

[48] *Prosecutor v Nahimana et al.*, Judgement, Appeals Chamber, Case No. 99-52-A, 28 November 2007.
[49] A. Gotz, *Hitler's Beneficiaries: Plunder, Racial War and the Nazi Welfare State*, New York: Holt Paperbacks 2005, at 285. Other works: M. Dean, *Robbing the Jews: The Confiscation of Jewish Property in the Holocaust, 1933-1945*, Cambridge: Cambridge University Press, 2008.
[50] J.Hatzfeld, *Machete Season: The Killers in Rwanda Speak*, New York: Farrar, Straus & Giroux 2005, at 87, discussed in David Jones, *Genocide. A Comprehensive Introduction*, Routledge, 3rd ed. 2017, at 531-532.
[51] *Prosecutor v. Erdemovic*, Sentencing Judgment, IT-96-22-T29 November 1996, para. 58.

Over the years, and certainly since Nuremberg, international legal practice has been more explicit in how it views sentencing purposes in relation to the wider objectives of international criminal justice. Nuremberg was still embracing a predominant expressionist theory of punishment where the priority was moral condemnation. It was mainly backward looking. In modern ICL, we witness a move to a communicative theory of punishment, which comes with the ambition of reconciliation and reparation, of peace through justice. A communicative theory of justice is backward-looking *and* forward-looking. In terms of sentencing purposes, this comes with an increased interest in the transitional justice functions of international trials, in recording history and post-conflict resolution. This tracks the success of restorative justice that has become popular in national jurisdictions from the early 1990s onwards. Restorative justice is the justice process whereby parties with a stake in a specific offence resolve collectively how to deal with the aftermath of the offence and implications for the future.[52] It is increasingly popular in transitional settings since it holds a promise for its conflict-solving ability. There are, however, serious obstacles to implementing it in situations of transition. I will discuss this further below.

One of the sentencing purposes that plays an important role in domestic sentencing but hardly any in ICL, is rehabilitation. Only, in the *Erdemovic* case was rehabilitation taken into account when sentencing the defendant. His young age and the fact that he had expressed genuine remorse played an important role in imposing a lenient sentence.[53] That way, the court considered, he had the best chance to start again and return to his community. Rehabilitation does not play a role with the bigger fry, those who mastermind crimes. Neither is it taken into account with defendants who have orchestrated the commission of crimes or committed such crimes *con amore*, with conviction. Here the *hostis humanis*-argument seems to hamper any post-conviction considerations.

Just in general, even after an acquittal and when defendants have served their sentence, do international courts and tribunals fail in paying attention to reintegration. For the post-trial justice part international courts revert back to the sovereign State and the (former) defendant's domestic jurisdiction. For years now, a number of former accused of the International Criminal Tribunal for Rwanda (ICTR) reside in a safe house in Arusha, Tanzania.[54] Some have been acquitted, and some have completed their sentences. They cannot leave Arusha and join their families, most of whom live in Western-Europe and Canada. These States refuse to grant them asylum. States can lawfully do so on the basis of Article 1F(a) of the

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[52] Marshall, *Restorative Justice: An Overview*. Minneapolis: Center for Restorative Justice and Peacemaking, reprinted in Gerry Johnstone (ed.) *A Reader in Restorative Justice*. Cullompton: Willan Publishing, 28-45, at 28. Eglash, a psychologist, who worked in programmes for youthful offenders and adult prisoners, is credited with first using the term restorative justice. He defined it as the technique of [creative] restitution, contrasting it to retributive and distributive justice, which he associated with techniques of punishment and therapeutic treatment, respectively, A. Eglash, 'Beyond restitution: creative restitution', in J.Hudson and B. Galaway (eds), *Restitution in Criminal Justice*. Lexington, Mass.: D.C. Heath and Company, 91-100, referred to by K. Daly, 'The Punishment Debate in Restorative Justice, in: J. Simon and R. Sparks (eds), *The Handbook of Punishment and Society*. London: Sage Publications.

[53] *Prosecutor v. Erdemovic*, Sentencing Judgment, IT-96-22-T29 November 1996, para. 58.

[54] See the report on http://whenjusticeisdone.org/index.php/32-acquitted (accessed 2 January 2019). See the latest annula report of the Residual Mechanism for International Criminal Tribunals (MICT) of 1 August 2018, which suggests there are still former defendants waiting to be resettled and residing in Arusha (para. 71): http://www.irmct.org/sites/default/files/documents/180801-sixth-annual-report-en.pdf,

Refugee Convention, which stipulates that persons seeking refuge can be excluded from protection when there are "serious reasons for considering" they committed war crimes, crimes against humanity or crimes against peace. The "serious reason for considering"-threshold falls short of the criminal law standard of "beyond reasonable doubt". This means that even when acquitted, a person may remain undeserving for protection under the Refugee Convention. Sending acquitted and sentenced persons back to Rwanda is not an option since they will face prosecution for related charges and not necessarily receive a fair trial. Former ICTR President Judge Khan has deplored this problem of resettlement.[55] It is a fundamental expression of the rule of law to guarantee acquitted and sentenced persons the right to live, including full enjoyment of education, employment, and family. The registrar of the Rwanda tribunal has tried to persuade countries to resettle those residing in the ICTR safe-house. He has not been very successful; very few states have come forward to volunteer and reintegrate former defendants. In this context, we can mention the rather uplifting ruling in the *Ruhumuliza* case where the UK immigration Tribunal considered suitable for settlement, a Rwandese claimant who had been excluded from refugee protection while residing in the UK for over 10 years.[56] After a character and conduct assessment, where his remorse and apologies regarding the genocide played an important role, the Tribunal held that these tests "involve a consideration that goes beyond looking at the past".[57] ICL is currently too one-dimensional, focused on prosecution and adjudication. Rehabilitation should be an integral part of international criminal justice, as it is in any sophisticated and human rights-compliant criminal justice system. Here the domestic analogy should guide international criminal justice in rebalancing the system and bolster the protective side of criminal justice.

When sentencing an individual who committed very serious but 'unusual' or extra-ordinary offences, in the sense that they are not part of the normal pattern of civil society, there are two conflicting forces. One is to say, offences are so serious that we must impose the most serious sentence available, which in ICL is life. The other is to say, normality needs to be brought back to a divided community and by having a sentence, which is measured and not overly harsh to one particular side you are more likely to appease and bring about a process of reconciliation. Which way one goes, depends on the victim community. In Rwanda, imposing a lenient sentence would have been difficult to digest for victim communities. As it would have been for the Tutsi government and President Paul Kagame who lead the civil war against the Hutu, which preceded and arguably triggered the genocide. In the former Yugoslavia, the situation was different; ethnic divisions are more complex. ICTY defendants, especially those in senior positions still enjoy, and throughout their trials enjoyed, support in parts of Serbia, Croatia and Bosnia. General Ante Gotovina, who was acquitted by the ICTY[58], was greeted by 100,000 supporters upon his arrival in Croatia.[59] Croatians regarded his trial as an attack on the (young) State of Croatia. When he was acquitted this felt like a collective

[55] Letter dated 16 November 2011 from the President of the International Criminal Tribunal for Rwanda addressed to the President of the Security Council, S/2011/731.
[56] [2016] UKUT 284 (IAC), section 5.
[57] [2016] UKUT 284 (IAC), section 11.
[58] *Prosecutor v Gotovina and MarkaČ*, Judgment, IT-06-90-A, 16 November 2012.
[59] See J. van Wijk and B. Hola, Acquittals in International Criminal Justice: Pyrrhic Victories, 30 *Leiden Journal of International Law* 2016, 241-262, at 243-244. See also https://www.telegraph.co.uk/news/worldnews/europe/croatia/9682855/Croatian-hero-Ante-Gotovina-acquitted-of-war-crimes.html.

vindication of the earlier felt stigma when he was charged and prosecuted.[60] Research by Van Wijk and Hola, however, has shown that lower level defendants had a hard time returning to their communities in the former Yugoslavia.[61] The Serbian Delalic lost his business during his 2-year pre-trial detention; he was never compensated and lives in poverty as a result of it.[62] Kupreskic, a former member of the Croatian defence Council of the self-proclaimed State of Croatia in Bosnia, befell a similar fate.[63] He is still viewed by his neighbours as a war criminal.

Post-trial rehabilitation and reintegration have been afterthoughts when setting up international courts. These sentencing purposes deserve more thought especially when one of the goals of international criminal justice is reconciliation. Reintegration can accommodate and smoothen reconciliation. More thought has to go into which punishment theories fit which type of conflict situation or defendant. Addressing perpetrators of international crimes as *sui generis* and focusing only on retribution and prevention is not good enough. Why should we not think about other sentences than incarceration? Again, domestic law may inspire us. What about community sentences? Alongside a prison sentence, defendants could be required to contribute to a victim's trust fund or to participate in a community project. In that context, the Supreme Court Chamber of the Cambodia Tribunal[64]'s decision in the case of Kaing Guek Eav ('Duch') is interesting. It affirmed the Trial Chamber's sentencing decision to compile and post on the ECCC's official website all statements of apology and acknowledgements of responsibility made by Duch during the course of the trial, including the appeal stage.[65]

5. PUNISHMENT & COMMUNITY

The biggest obstacle to having an international criminal justice system that provides for rehabilitation and reconciliation alongside reprobation and retribution, is the fact that it largely operates in a vacuum. International criminal justice is not embedded in a political community and relies heavily on State cooperation to perform basic functions such as arresting accused persons, evidence-gathering, and imprisonment. Having said that, the ICC and the ad hoc Tribunals, are said to represent the interests of the international *community* when prosecuting and punishing those who commit international crimes. What does that mean? The international community is a rather elusive and abstract notion. The best that can be said of this 'communitarianism' is that by setting up international justice, the UN and other multinational bodies such as the ICC, side with victims who have no government or judicial authority to turn to when it comes to punishing their perpetrators. International courts temporarily replace and take over from a malfunctioning domestic justice system. This does not necessarily mean that the interests of an international court or tribunal align with those of the State or region whose justice systems(s)

[60] Ibidem.
[61] See Van Wijk & Hola, supra n. 59; B. Hola and J. van Wijk, 'Life after Conviction at International Criminal Tribunals. An Empirical Overview', 12 *Journal of International Criminal Justice* 2014, 109-132.
[62] Van Wijk & Hola, supra n. 59, at 257.
[63] Ibidem.
[64] Also, the Extraordinary Chambers of the Courts of Cambodia (ECCC).
[65] *Prosecutor v. Kaing Guek Eav*, Case No . 001/18-07-2007-ECCC/SC, 3 February 2012, para 716.

is replaced. Tripkovic convincingly argues that the ICTY will never be able to achieve reconciliation in the former Yugoslavia because of a lack of shared perception and consciousness that it acts in the name and for the sake of the ex-Yugoslav community.[66] International prosecutions can only be a substitute for domestic processes if the aim of the international court to achieve justice is shared with the local community. Moreover, reconciliation via criminal justice is not possible when a common morality is affirmed for internally divided communities.[67] In fact, international prosecutions may go against the interests of senior officials in those displaced jurisdictions; government ministers and presidents may be subject to investigations and prosecutions themselves. In such situations, international prosecutors work at cross-purposes with the interests of those in the higher echelons of a particular political community. The cases of the presidents of Kenya and the Ivory Coast, Kenyatta and Gbagbo, at the ICC, and Radovan Karadzic at the ICTY, illustrate the point. The fact that international criminal justice operates in a vacuum hampers its ability to achieve reconciliation on the ground. At this point we have to turn to Anthony Duff's work.

Duff in his work on punishment reconciles what for a long time was considered irreconcilable: the punishment paradigm and the restorative paradigm.[68] He argues that restoration is not only compatible with retribution, it *requires* retribution in that the kind of restoration that crime makes necessary can … "be brought about only through retributive punishment".[69] Crime harms and wrongs a person, which requires a criminal response. Repair requires something that 'only an offender can provide', which 'involves the offender's punishment'.[70] In his view, reparation must be burdensome if it is to serve its restorative purpose.[71] It is not hard to see the parallel with the peace through justice maxim that underlies ICL.

Building on Duff's theory in reconciling punishment and restoration, we can engage with the other limb of his theory of punishment: communication. In *Punishment, Communication and Community* Duff introduces his theory of punishment as a process of communication.[72] This is different from an expressionist-communication theory of punishment which is a one-sided exercise. Punishment in Duff's view is two-sided, it is an exercise of purposive communication, namely to educate the defendant and the victim community. Punishment is a retributive notion of censure which at the same time addresses the consequentialist concern of crime-prevention.[73] Punishment can be justified as a mode of moral education. It is owed to the community but it also benefits the offender. Here an interesting parallel can be drawn with the

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[66] M. Tripkovic, 'Not in Our Name! Visions of Community in International Criminal Justice', in M. Aksenova, E. van Sliedregt and S. Parmentier, *Breaking the Cycle of Mass Atrocities Criminological and Socio-Legal Approaches in International Criminal Law*, Hart Publishing 2019 (forthcoming) X

[67] Ibidem, at X

[68] *Restoration and Retribution,* in: Andrew von Hirsch, et al. (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* Oxford and Portland, Oregon: Hart Publishing, 43-60.

[69] Duff in Andrew von Hirsch et al., supra n. 68, at 43.

[70] Ibidem, at 48.

[71] Ibidem, at 49.

[72] R.A. Duff, Punishment, *Communication and Community*, Oxford: Oxford University Press 2001.

[73]Ibidem, at 88-89.

Erdemovic case where I argued earlier that punishment enabled a return of the defendant to the community.[74] One crucial question Duff's theory throws up is: who owes what to whom?[75] This is not straightforward in transitional and civil war-like situations. Another important element of his two-sided communicative justice theory, concerns the perpetrator's attitude. Whether punishment as communication works depends on the type of offender and whether he/she accepts punishment.[76] Defiant offenders may not repent.[77] As we saw earlier, in transitional situations the restorative justice aim, despite its appeal, may be very difficult to meet since divided communities do not feel represented by an international court. The same can be said about defiant offenders; they do not recognize the court as having punishing authority. Karadzic was regarded a hero by part of the Serbian community back home for rejecting the ICTY's authority to try him, by denying criminal responsibility and by glorifying his role and conduct during the Yugoslav war. His supporters belonged to another community than the (Bosnian) victim community with whom the ICTY sided. Karadzic completely placed himself outside the community that the ICTY represented. Here Duff's theory is doomed to fail. Erdemovic was what Duff calls a shamed offender who 'owed up' to his crimes *vis-à-vis* the victim community.[78] Here restorative justice after punishment can work. This is a process left to the state. So far, there is no supranational restorative justice system. ICL only provides for the punitive part.

Whilst it is impossible to do justice to Duff's theory of punishment in the context of this chapter, we can take away a few points, which may inspire us to rethink the claim of reconciliation as a sentencing purpose for ICL. First of all, punishment in a communicative theory as proposed by Duff aligns nicely with the maxim of peace through justice and the backword- and forward-looking purposes of modern international criminal justice. At face value, it is a good starting point for further developing and refining punishment theories in ICL. However, and this is my second point, in reality it will be difficult to accomplish reconciliation. Reconciliation cannot happen when communities feel unrepresented by an international justice system. To quote Duff "the court must speak in the voice of law on behalf of the political community".[79] Such a political community must consist of fellow citizens, citizens that feel wronged by the defendant and whom they allow to re-enter after punishment. Not representing a community, is the biggest challenge to international criminal justice when it comes to reconciliation. Different reasons may account for this lack of representation: e.g. the fact that communities are divided or that there is no ownership over the justice process. The elusive international community does not necessarily speak for victim communities. In the words of a Srebrenica resident when asked about the impact of the ICTY on reconciliation: "no reconciliation can come from a court than has so little relevance to our daily lives".[80] Koskenniemi warns for those who claim to speak in the name of humanity.[81] Such claims are always "infected" by the particularity of the

[74] Ibidem, at 90.
[75] Ibidem, at 112-113.
[76] Ibidem, at 116.
[77] Ibidem, at 123.
[78] Ibidem, 117-118.
[79] Ibidem, at 185.
[80] Quoted by Tripkovic, X
[81] Koskeniemmi, supra n. 19, 8-13.

speaker, his/her world view, knowledge, ignorance and experience.[82] Drumbl is of a similar view and concludes that international courts have a limited potential when it comes to reconciliation.[83] A third point that should make us rethink the claim of reconciliation, is that there is no supranational infrastructure for restorative justice. This has to take place at the national level. ICL only provides for a punitive process, which may lead to restoration. This requires alignment and synchronisation of international and domestic interests, which as we saw under the second point, is not easy to obtain. Only in cases of shamed and remorseful defendants is there a chance of success. Only then can the international-punishment rationale be successfully linked to a national-restorative process. Fourthly, there is a careful balance to be struck in how ICL approaches defendants. A communicative theory is about moral education by way of placing the defendant (temporarily) outside the (wronged) community yet allowing him/her to return after punishment. This seems to require moderation in treating defendants. After all, they must be *able* to re-enter. Branding war criminals as enemies of humankind who can be excluded from refugee protection, wholly placing them outside any community, is an obstacle to restoration and reconciliation. The defendant's attitude is important too. Undermining the legitimacy of the international criminal justice system and, more importantly, taking the court room as a podium for political speeches should be limited within the confines of fair trial-requirements. Criminal master minds and mass murderers may be regarded as 'beyond rehabilitation' but the majority of defendants are not and will eventually be released. ICL needs to own up to this reality.

6. CONCLUDING OBSERVATIONS

In discussing punishment theories and sentencing purposes in ICL, we see differences and similarities between domestic and international criminal justice. The domestic analogy (of transplant) pulls in different directions. We might not do justice to the specific nature of international crimes and perpetrators when we uncritically adopt and apply domestic theories of punishment. On the other hand, we should not overdo the focus on differences. Distinguishing international crimes from domestic crime is sometimes based on a caricature of domestic, garden variety crime. This way, we fail to see the overlap and similarities between international crimes and certain forms of domestic (organized) crime. Also, we risk not grappling with the category of smaller fry; defendants who do not qualify as *hostis humanis*, enemy of mankind. In those cases, the domestic analogy *can* work. Adhering too much to the *sui generis* claim, might prevent us from benefiting from useful insights and research into alternative ways of punishment. There can be other or additional ways, other than imprisonment, to address international perpetrators. Such alternatives may be more effective in achieving restoration and reconciliation. In any event, there is need to explore such avenues and adopt a broader approach to punishment. Domestic criminal justice is an important and rich source to draw on.

The domestic analogy ('proper') offers an insight into what is a fundamental flaw of international criminal justice: the fact that it operates in a vacuum and is a surrogate criminal justice system that for post-trial justice reverts to domestic

[82] Ibidem, at 8.
[83] Drumbl, supra n. 26, at 124.

criminal justice. Cosmopolitanism, which inspired the thinking about world community and world government, and that has had an important influence on international criminal justice, does not come with a fully-fledged supranational criminal justice system. This in turn affects the domestic analogy of transplant. It cannot work. There is no international infrastructure to support restorative justice; it depends on State jurisdictions to provide for this part of the criminal process. International criminal justice reveals itself as an imperfect, one-sided exercise, solely interested in the punishment part of criminal justice.

What both the domestic analogy of transplant and the domestic analogy proper reveal when applied to ICL, is that the restorative potential of international criminal justice is problematic because 'community-concerns'. Peace through justice, reconciliation and restoration are drivers of ICL; they are a feature of modern-day international criminal justice. A prerequisite for restorative justice is that there is a community that not only has an interest in restoration but also a stake. This is not necessarily the case in transitional settings where different ethnic, religious and social-economic groups can be on conflicting sides. Indeed, in transitional situations, there can be a plethora of communities with different, sometimes opposing interests. This lack of a (homogeneous) community makes it difficult to reintegrate the offender and hampers the process of. Doing justice in the name of the international community reduces this complex picture of interests and values. Justifying international criminal justice by capturing it in vague ambitions like ending impunity and protecting the interest of humanity, does not do much to achieve reconciliation. The lofty ambitions do not automatically align with interests of the victim community. International courts risk alienating victim communities on whose behalf they claim to act when there is no further thought on why punishment is imposed and to what end. Duff's work on communicative punishment should make us think about the current process of punishing. We may need to rethink certain expressionist purposes of punishment. This could come with embracing Drumbl's theory of cosmopolitan pluralism and allow, as part of the international criminal justice process, local, grass-roots justice.

Different defendants require different approaches. This is the case in *any* criminal justice system. This is multiplied in ICL because of the heterogeneity of the communities defendants belong to or feel associated with. The reality of heterogeneity should always be in the forefronts of our minds when we think about punishment theories in ICL. This may prompt us to work on creating conditions of punishment and reintegration that decrease a divisive effect. One way forward would be to rethink the function of Residual Mechanisms (RMs) that have been set up after courts have closed down and that are tasked with prosecuting fugitives and with protecting the courts' legacy. RMs should prioritize post-trial, restorative justice support and focus solely on outreach activities with local authorities. This can take different forms, for instance telling the history of the conflict, preventing the rewriting history and glorifying battlefield myths. This should be the primary responsibility of any RM if peace through justice is to be taken seriously. I would go as far and suggest that RM should renounce prosecuting and trying remaining fugitives. When a tribunal or court closes, its judicial function closes. We move on. We have dealt with the conflict and its atrocities and focus on post-conflict justice.

A last observation concerns reintegration. As with the enforcement of sentences where States can agree to voluntarily imprison those convicted by the international courts, States should sign up to receive and resettle former defendants. The international community, presidents of international courts, NGOs and human rights organizations should get together and lobby for setting

up a system of resettlement and reintegration. If States support the fight against impunity and the system of international prosecution and adjudication, they must accept this part of international criminal justice too.