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## Criminology of International Crimes

FRANK NEUBACHER

## I CRIMINOLOGY MEETS INTERNATIONAL CRIMINAL LAW

The criminology of international crimes is a neglected field, and even this is an understatement. Just a few years ago, distinguished scholars such as Alex Alvarez, John Hagan and Wenona Rymond-Richmond, Susanne Karstedt and Nicole Rafter started to contribute to this slowly emerging research area.<sup>1</sup> In different ways, they have searched for criminological explanations of international crimes. John Hagan and Wenona Rymond-Richmond were right when they stated in 2009: 'It took criminology a long time to address some

<sup>1</sup> See A. Alvarez, *Genocidal Crimes* (Abingdon/Oxon: Routledge, 2010); J. Hagan and W. Rymond-Richmond, *Darfur and the Crime of Genocide* (Cambridge: Cambridge University Press, 2009); S. Karstedt, 'Genozid (Völkermord)' in H.J. Schneider (ed.), *Internationales Handbuch der Kriminologie*, 2 vols. (Berlin: De Gruyter, 2009), Vol. II; N. Hahn Rafter, *The Crime of all Crimes: Towards a Criminology of Genocide* (New York/London: New York University Press, 2016) and, for German Criminology: S. Harrendorf, 'How Can Criminology Contribute to an Explanation of International Crimes?' (2014) 12 *Journal of International Criminal Justice* 231; J. Holling, *Internationaler Strafgerichtshof und Verbrechensprävention: Eine Analyse der Auswirkungen globaler Strafrechtspflege auf die Bekämpfung von Makrokriminalität* (Berlin/Münster: LIT Verlag, 2016); H. Jäger, *Makrokriminalität: Studien zur Kriminologie kollektiver Gewalt* (Frankfurt: Suhrkamp, 1989); D. Khakzad, *Kriminologische Aspekte völkerrechtlicher Verbrechen: Eine vergleichende Untersuchung der Situationsländer des Internationalen Strafgerichtshofs* (Mönchengladbach: Forum Verlag Godesberg, 2015); F. Neubacher, *Kriminologische Grundlagen einer internationalen Strafgerichtsbarkeit: Politische Ideen- und Dogmengeschichte, kriminalwissenschaftliche Legitimation, strafrechtliche Perspektiven* (Tübingen: Mohr Siebeck, 2005); F. Neubacher, 'How Can It Happen That Horrendous State Crimes Are Perpetrated? An Overview of Criminological Theories' (2006) 4 *Journal of International Criminal Justice* 787; F. Neubacher, 'Kriminologie und Völkerstrafrecht: Diskussionsstand, Forschungsperspektiven, Erklärungsansätze' (2015) 10 *Zeitschrift für Internationale Strafrechtsdogmatik* 485; S. Nimaga, *Grundlagen einer Wirkungsforschung des Völkerstrafrechts* (Berlin: Wissenschaftlicher Verlag Berlin, 2016); C. Reese, *Großverbrechen und kriminologische Konzepte: Versuch einer theoretischen Integration* (Münster: LIT, 2004).

of its most important topics, for example, white-collar crime. It took criminology even longer to confront its more deadly neglected topics, namely genocide, war crimes, and crimes against humanity.<sup>2</sup> Since then, criminology has mainly focused on the crime of genocide while there is hardly anything specific on war crimes or crimes against humanity not to mention about other criminological aspects such as procedural, penological and victimological issues that still have been rarely addressed.

Before entering the field of international crimes, it seems appropriate to introduce criminology by raising the question of what criminology is about. According to Edwin Sutherland's (1883–1950) famous definition, criminology is the study of the making of laws, the breaking of laws and of society's reactions to the breaking of laws.<sup>3</sup> The development of criminology was vastly propelled by the preventive turn in criminal sciences at the end of the nineteenth century. In Germany, Franz von Liszt (1851–1919) challenged the retributive tradition of the classical school strongly influenced by Kant and Hegel by promoting prevention as the core concept in criminal law. According to him, prevention should be achieved through the deterrence of opportunistic offenders, the rehabilitation of those in need of it, and – if necessary – through the incapacitation of persistent offenders ('Marburger Programm').<sup>4</sup> In the following decades, the preventive approach changed the way of reasoning on criminal law, in particular on sentencing. Criminal law was in need of explanations for why people became offenders and how to rehabilitate them. Statistical data was supposed to help understand crime as a social phenomenon. Consequently, Franz von Liszt made the case for a strong criminology being an integral part of a 'whole' criminal science and ranking no longer below criminal law. Without the need to justify punishment in terms of prevention, without the interest in the consequences of different sanctions, there would not have been anything like criminology. Since then, criminology has embraced phenomenology, etiology, penology and victimology all under one umbrella.

This paper underlines the importance of criminology for the study of international crimes by addressing three key issues from a criminological point

<sup>2</sup> J. Hagan and W. Raymond-Richmond, 'Criminology Confronts Genocide: Whose Side Are You On?' (2009) 13 *Theoretical Criminology* 503.

<sup>3</sup> E.H. Sutherland and D.R. Cressey, *Principles of Criminology*, 7th ed. (Philadelphia: Lippincott, 1960), 3.

<sup>4</sup> F. von Liszt, 'Der Zweckgedanke im Strafrecht' (1883) 3 *Zeitschrift für die gesamte Strafrechtswissenschaft* 1, 3.

of view: First, what is the purpose of punishing perpetrators of mass atrocities; second, how do we explain international crimes; and third, the question of sentencing. The answers given aim at challenging some working routines of international criminal justice and at paving the way for more reflected reactions to international crimes.

## II WHY PUNISH? – PREVENTING CRIME THROUGH INTERNATIONAL CRIMINAL LAW

When it comes to the purpose of punishment, criminal justice follows a unifying approach. This holds true at the national and international level. Retribution and deterrence are said to be ‘equally important’. This has been underlined several times by the International Criminal Tribunal for the former Yugoslavia (ICTY) as well as the International Criminal Court (ICC).<sup>5</sup> Sometimes these short reflections are garnished with some expressivist thoughts on the importance to show that there is no impunity for international crimes or to strengthen faith in the rule of law. In general, however, we miss theories that are designed to specifically fit at the international level. What could they look like?

For a criminologist inclined to preventive theories of criminal law, justice cannot be a metaphysical endeavour. On the contrary, it must be rather concrete and serve human beings on earth. Criminology should then contribute to the knowledge and understanding whether the purposes of criminal law can be achieved in reality. As we all know, there are strong objections against the retributive philosophy of punishment. This is valid for international crimes in particular.<sup>6</sup> What could be an adequate punishment for multiple murder? What would be a proportional sanction for mass atrocities? In the end there is no ‘just’ punishment for genocide and, for many good reasons, international criminal law has abolished capital punishment. The Preamble of the Rome Statute is concerned about the ‘peace, security and well-being of the world’ and modestly declares the determination ‘to put an end to impunity for the

<sup>5</sup> See M.A. Drumbl, *Atrocity, Punishment and International Law* (Cambridge: Cambridge University Press, 2007), 60; G. Werle and F. Jeßberger, *Völkerstrafrecht*, 4th ed. (Tübingen: Mohr Siebeck, 2016), 49 (referring to, inter alia, the ICTY Judgement in *Kupreškic et al.*, Trial Chamber, 14 January 2000, para 848). For statements on the aims of punishment by the main international and hybrid criminal courts, see the contribution by Sergey Vasiliev in Chapter 4. On the ICC in particular, see the contribution by Gerhard Werle and Aziz Epik in Chapter 18.

<sup>6</sup> But see the contributions by Mordechai Kremnitzer and Jens David Ohlin in Chapters 10 and 15.

perpetrators of these crimes and thus to contribute to the prevention of such crimes'.<sup>7</sup> This should be read as a commitment to prevention and is a rather mundane starting point in search for peace and security.

Generally, punishment is justified by prevention, and prevention in turn can be achieved through a combination of, first, deterrence (a classical purpose of punishment); second, strengthening faith in the rule of law (a purpose sometimes labelled as 'expressivist theory'); third, incapacitation of the culprits (whereas the length of the prison term is limited by the individual's degree of guilt); and fourth, offender rehabilitation.<sup>8</sup> It is reflecting a global consensus that according to Article 10(3) of the International Covenant on Civil and Political Rights of 16 December 1966 'the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation'. Roughly speaking, these aims can be transferred to the international level if a few caveats are considered. On the international level, the situation might slightly differ from the national one (e.g. with regard to the community) and therefore require adaptations. Moreover, the state of empirical knowledge may even be weaker on the international level. Both are true for deterrence, for example; we will return to that point shortly.

The purpose of punishment in international criminal law still has to be something more, something that responds to the international nature of the crimes. Therefore, from a victimological perspective, the traditional aims of punishment should be complemented – for the victims' sake and for a more restorative justice – with two new aims, namely establishing the truth and acknowledging the victims' status (solidarity).<sup>9</sup> Favouring this broadening is due to the lack of trials on the national level where solidarity is painfully missed by the crime victims. There is substantial empirical evidence that crime victims are not expecting any kind of revenge from international courts but clarity and solidarity.<sup>10</sup> This holds true even if crime victims are very different in their individual needs and even if victim participation is a

<sup>7</sup> ICC Statute, Preamble, paras. 3 and 5. See also Nimaga, *Grundlagen einer Wirkungsforschung des Völkerstrafrechts*, 133.

<sup>8</sup> See A. Werkmeister, *Straftheorien im Völkerstrafrecht* (Baden-Baden: Nomos, 2015), 147 et seq.; Werle and Jeßberger, *Völkerstrafrecht*, 49 et seq.

<sup>9</sup> See Werkmeister, *Straftheorien im Völkerstrafrecht*, 316–328. For a similar argument, see the contribution by Daniela Demko in Chapter 11 (Section IV).

<sup>10</sup> Cf. E. Kiza, C. Rathgeber and H.-C. Rohne, *Victims of War: An Empirical Study on War-Victimization and Victims' Attitudes towards Addressing Atrocities* (Hamburg: Hamburg Edition online, 2006); see also E. Hoven, M. Feiler and S. Scheibel, *Victims in Trials of Mass Crimes: A Multi-perspective Study of Civil Party Participation at the Extraordinary Chambers in the Courts of Cambodia* (Köln: Institute for International Peace and Security Law, Universität

difficult field.<sup>11</sup> Criminal procedures can neither be satisfying for the victims in all cases nor should their satisfaction be the primary goal of international criminal justice. Victim participation may also be challenging for the legal professionals in international criminal trials.<sup>12</sup>

Obviously, there are some limitations to this concept of prevention, limitations that are more serious on the international level than on a national level. From a theoretical viewpoint, three major challenges arise:

- (i) *Responsivity of the potential perpetrators*: Not every potential perpetrator is responsive to the messages sent out by the application of law. There are offenders who do not make a rational choice – in particular when it comes to politically motivated crimes or hate crimes. They just act out of the moment without prior planning or reasoning. Even if they did so, they might think that their risk of getting apprehended and sentenced is very low, at least for a considerable period of time.<sup>13</sup> And finally it is known that (instead of deterrence) moral standards are crucial for obeying the law and that perpetrators often care more about the reactions of their social environment (e.g. peers, fellows, soul-mates) than about the formal reaction of the law. In that regard, international criminal law is facing a serious problem because it is not the exemption but the rule that perpetrators feel encouraged by their social environment and act in full harmony with its expectations.
- (ii) *Selectivity in the application of law*: Furthermore, deterrence completely depends on a regular and certain application of law. Compared to the national level, the limitations are even stronger on the international level because in general resources are limited, international police forces are inexistent and national prosecution has priority according to the principle of complementarity. As a natural and inevitable consequence, selectivity endangers both general deterrence and expressivist theories because, much too often, moral values and legal norms cannot be affirmed by court proceedings.

zu Köln, 2013), 25–30; Neubacher, *Kriminologische Grundlagen einer internationalen Strafgerichtsbarkeit*, 206–214.

<sup>11</sup> On victims' participation as a central aspect of modern international criminal justice and its challenges, see the contribution by Philipp Ambach in Chapter 20.

<sup>12</sup> Cf. E. Hoven, 'Civil Party Participation in Trials of Mass Crimes: A Qualitative Study at the Extraordinary Chambers in the Courts of Cambodia' (2014) 12 *Journal of International Criminal Justice* 81.

<sup>13</sup> Cf. J. Schense 'Conclusions: Findings and Recommendations', in J. Schense and L. Carter (eds.), *Two Steps Forward, One Step Back: The Deterrence Effect of International Criminal Tribunals* (Nürnberg: International Nuremberg Principles Academy, 2016), 333, 338.

- (iii) *Legitimacy of international criminal justice*: In the end, the legitimacy of international criminal justice is in peril if the whole project can be dismissed as unjust or arbitrary. From criminology we know that perpetrators tend to minimize their responsibility and deny the injury and the victim. In this context, Gresham Sykes and David Matza have to be mentioned, who analysed the application of what they called ‘techniques of neutralization’.<sup>14</sup> They encompass ‘the denial of responsibility’, ‘the denial of injury’, the ‘denial of victim’ and ‘the appeal to higher loyalties’. One of the five techniques is the ‘condemnation of the condemners’. Here, the perpetrator does not deny the wrongdoing – he or she claims that the adversary is even worse and not entitled to appeal to the law. We all know this kind of strategy from the Nuremberg Trial when the accused denounced the trial as ‘victor’s justice’. Obviously, these kinds of accusations are damaging for the mission of international criminal justice. They can undermine its legitimacy – rather in the eyes of the public than in the eyes of the culprits.<sup>15</sup>

When turning to the empirical evidence on punishment, first of all the issue of deterrence has to be addressed. It is surprising how much the discussion in international criminal law is detached from criminology. While international criminal law pretends that deterrent effects of punishment are a reality, criminological evidence referring to the effects of international criminal justice can in the best case be described as anecdotic or methodologically weak.<sup>16</sup> In fact, deterrence remains one of the most debated issues in general criminology.

Numerous scientific studies were conducted leading to inconsistent findings and pointing to the necessity of meta-studies and methodological rigour.<sup>17</sup> The lesson is clear: A potential deterrent effect may be moderate but depends on various variables and the applied methodology. One type of study considered the responsiveness of crime to various interventions of the criminal justice system (e.g. law-making, intensity of policing) using aggregate data

<sup>14</sup> G.M. Sykes and D. Matza, ‘Techniques of Neutralization: A Theory of Delinquency’ (1957) 22 *American Sociological Review* 664; A. Alvarez, ‘Adjusting to Genocide: The Techniques of Neutralization and the Holocaust’ (1997) 21 *Social Science History* 139; Neubacher, ‘How Can It Happen That Horrendous State Crimes Are Perpetrated?’, 787–799.

<sup>15</sup> Cf. Holling, *Internationaler Strafgerichtshof und Verbrechensprävention*, 182.

<sup>16</sup> See Schense and Carter, ‘Introduction’, in Schense and Carter (eds.), *The Deterrence Effect of International Criminal Tribunals*, 1, 4 et seq.

<sup>17</sup> Cf. D. Dölling, H. Entorf, D. Hermann and T. Rupp ‘Is Deterrence Effective? Results of a Meta-Analysis of Punishment’ (2009) 15 *European Journal on Criminal Policy and Research* 201.

from the macro-level, mostly crime statistics (or the number of casualties or dead<sup>18</sup>). These studies provide evidence in favour of a negative relationship between crime and the interventions applied. The finding, however, that a certain change in the criminal justice system results in reducing the number of crime remains debatable as crime statistics (reflecting the reporting behaviour and policing strategies) certainly are not a suitable measuring instrument, and this body of research fails to separate incapacitation effects from deterrent effects.<sup>19</sup> Another type of study (using experimental or interview data) chose individual-level risk perceptions as the key variable and found a ‘weak, negative association that is usually interpreted as evidence of a slight deterrent effect on increased risk perceptions’.<sup>20</sup> It is commonly agreed, however, that the certainty of punishment has a much greater effect than the severity of punishment and that the deterrability of specific types of offenders may vary substantially.<sup>21</sup>

Altogether, the research area is too complex for simple answers as there are many other relevant variables. It makes no sense, for example, stating that lawful behaviour is an effect of deterrence if in fact the behaviour is resulting from a moral decision of the potential perpetrator<sup>22</sup> or from the anticipated reaction of the immediate environment. Still, the probability of informal sanctions via friends or family appears to have a greater deterrent potential than the probability of formal sanctions by the criminal justice system.<sup>23</sup> Dieter Dölling et al. conducted a statistical meta-analysis of 700 deterrence studies and found a relatively low general preventive effect. They summarise their findings as follows:

The greatest effects are found in experimental studies which concern norms not intended to protect essential interests. The smallest effects are to be found in studies on the death penalty. In this area the relevant norms protect fundamental interests. Moreover, the deterrence hypothesis is more

<sup>18</sup> See Schense and Carter, ‘Introduction’, 4 et seq.

<sup>19</sup> See D.S. Nagin, ‘Deterrence: A Review of the Evidence by a Criminologist for Economists’ (2013) 5 *Annual Review of Economics* 83.

<sup>20</sup> T.A. Loughran, R. Paternoster, A. Chalfin and T. Wilson, ‘Can Rational Choice Be Considered a General Theory of Crime? Evidence from Individual-Level Panel Data (2016) 54 *Criminology* 86, 89.

<sup>21</sup> Loughran, Paternoster, Chalfin and Wilson, ‘Can Rational Choice Be Considered a General Theory of Crime?’, 89; Nagin, ‘Deterrence: A Review of the Evidence by a Criminologist for Economists’, 87. On the selectivity in international criminal law as a problem for theories of punishment, see the contribution by Harmen van der Wilt in Chapter 18.

<sup>22</sup> P.-O.H. Wikström, A. Tseloni and D. Karlis, ‘Do People Comply with the Law Because They Fear Getting Caught?’ (2011) 8 *European Journal of Criminology* 401, 405.

<sup>23</sup> Dölling, Entorf, Hermann and Rupp, ‘Is Deterrence Effective?’, 217; Nagin, ‘Deterrence: A Review of the Evidence by a Criminologist for Economists’, 85.

frequently confirmed when administrative offences are investigated as opposed to crimes. The relevance and acceptance of a norm appears therefore to be an important condition for the effectiveness of deterrence.<sup>24</sup>

Thus, there is substantial reason for doubting the deterrent effect of punishment. However, to make things worse for international criminal justice, what about the perception of sanction risk in the specific group of powerful leaders? Not only is their probability of being apprehended and sentenced lower than for ordinary criminals because international criminal justice is slow and highly selective both for legal and political reasons. What can they really know about the sanction regime and the sanction probably handed out in their case, if cases are rare and incomparable and if a general sentencing practice is lacking? Having started with the hope for deterrence, we have ended up with a tremendous relativization of the effects of punishment, in particular on the international level. That is why scholars and practitioners of international criminal justice badly need to know much more about perceptions of individuals and groups in order to link relevant deterrence to the work of international courts.<sup>25</sup> This is a major prerequisite for future attempts of achieving prevention through sending out messages to specified individuals or group of individuals ('targeted deterrence'<sup>26</sup>).

### III ON THE EXPLANATION OF INTERNATIONAL CRIMES

While in criminal law the point of reference is the law, in criminology we have a behavioural point of reference. That makes a huge difference and explains why a certain behaviour may violate the law but at the same time remain in perfect consistence with the behavioural norms of the social environment. The behaviour may be illegal, but it is not deviant because in the given setting and for a certain period of time the behaviour is regarded as normal. Normativity and factuality can fall apart; and that is causing problems for international criminal justice, for the common practice on the national level may deviate from international law thus making it more difficult for national players to recognize the discrepancy.<sup>27</sup> Any criminological explanation of international crimes needs to bear in mind the societal and environmental norms – an individualistic approach would be misleading.

<sup>24</sup> Dölling, Entorf, Hermann and Rupp, 'Is Deterrence Effective?', 223.

<sup>25</sup> See Schense, 'Conclusion', 334.

<sup>26</sup> Schense, 'Conclusion', 334.

<sup>27</sup> On the possibility of norm-collisions between domestic and international criminal law, see the contribution by Klaus Günther in Chapter 13.



For heuristic reasons, three levels of explanations should be considered: A macro-, meso- and a micro-level.<sup>28</sup> They can be associated with the system (macro), groups or organizations (meso) and the individual (micro) respectively. Criminologists have already pointed out that some macro-level factors contribute to international crimes, particularly conflicts, social inequality, discrimination and a weak rule of law.<sup>29</sup> In a ground breaking book published by Nicole Rafter in 2016, genocidal organizations, the legal status of exemption and the expectation of impunity are listed as crucial causes for crimes of genocide.<sup>30</sup> In their case study on Darfur that is rich of empirical data collected from refugees who had fled Sudan, Hagan and Rymond-Richmond developed a theory of genocide based on a collective action theory. Not only did they differentiate between the macro-, meso- and micro-level; they furthermore attributed the relevant factors to the respective levels each. On the macro-level, the competition for land and a state-led, pro-Arab ideology shape collective action frames. As a reaction to the macro-level conflict, organized interest groups are formed on the meso level. On the micro-level, individual group members become active having internalized the state-led ideology. Altogether, ‘such individual actions coalesce into collective action’.<sup>31</sup>

In his 2016 Sutherland Address to the American Society of Criminology Ross L. Matsueda continued tackling this ‘micro-macro-problem’ (also branded as ‘the levels of explanation problem’) advocating for an integrated approach that is mainly resting on the work of the sociologist James S. Coleman.<sup>32</sup> This approach aims at ‘specifying causal mechanisms by which interactions among individuals produce social organizations outcomes’.<sup>33</sup>

<sup>28</sup> Neubacher, ‘Kriminologie und Völkerstrafrecht’, 489; see also Rafter, *The Crime of all Crimes*, 20. For further criminological insights, Karstedt, ‘Genozid (Völkermord)’; S. Karstedt, ‘Contextualizing Mass Atrocity Crimes: The Dynamics of “Extremely Violent Societies”’ (2012) 9 *European Journal of Criminology* 499. Andreas Werkmeister has used these different levels to develop a meso-preventive theory of international punishment; see his contribution in Chapter 14 with references to his publication *Straftheorien im Völkerstrafrecht*.

<sup>29</sup> Holling, *Internationaler Strafgerichtshof und Verbrechensprävention*, 151.

<sup>30</sup> Rafter, *The Crime of all Crimes*, 204; see also S. Kühl, *Ganz normale Organisationen: Zur Soziologie des Holocaust* (Berlin: Suhrkamp, 2014).

<sup>31</sup> R.L. Matsueda, ‘Toward a New Criminology of Genocide: Theory, Method, and Politics’ (2009) 13 *Theoretical Criminology* 495, 496–497; J. Hagan and W. Rymond-Richmond, ‘The Collective Dynamics of Racial Dehumanization and Genocidal Victimization in Darfur’ (2008) 73 *American Sociological Review* 875, 878–882.

<sup>32</sup> J.S. Coleman, *Foundations of Social Theory* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1990), 6 seq.; see also Neubacher, ‘Kriminologie und Völkerstrafrecht’, 489.

<sup>33</sup> See R.L. Matsueda, ‘Toward an Analytical Criminology: The Micro-Macro Problem, Causal Mechanisms, and Public Policy’ (2017) 55 *Criminology* 493, 493.

It rejects the assumption that causality exclusively lies at the macro-level and that individuals can be ignored. On the other hand, methodological individualism argues that causality solely operates on the individual level and that groups and societies are simple aggregations of individual-level causal mechanisms. This view seems to be one-sided, too. Instead, the transitions between macro- and micro-level need to be studied carefully. What are the macro-level factors that affect the individual choice process? And what are, taking a look in the opposite direction, the ‘rules by which individuals combine to produce a group outcome’?<sup>34</sup>

(i) *Macro-level*: The macro-level, that is the policy context, seems to be of utmost importance because in most cases there would hardly be an international crime without the involvement of state organizations or social organizations. The supra-individual level may be represented by the government, military, secret police or other state agencies, political parties, militias or armed groups. Mass media and the propaganda apparatus should be taken into account as well. In the context of international criminal justice, organizational or individual crime is usually resulting from a system triggering, legitimizing and/or tolerating violence. It is the political system that is appealing to a state of emergency (or at least to the perception of a security threat), it is the political system or a political party that is defining humans as enemies, that is setting up black lists, orchestrating the violence and justifying the attacks. How do they manage that? How do they involve organizations and individuals? The criminological answer is that above all they provide frames. In sociology, framing refers to processes through which relevant information is first separated from irrelevant information and is then placed in a certain field of meaning. In essence, it is about how information is presented and which meaning is attached to it. Not too long ago, for example, US soldiers were made to believe that waterboarding was not illegal torture but a legitimate and necessary instrument of gathering intelligence (‘torture memos’).<sup>35</sup> Of course, there are many more examples in history and in the world of today of how people are misled by political leaders. History has taught us that people feel authorized when adopting the justifications offered to them by the political

<sup>34</sup> Matsueda, ‘Toward an Analytical Criminology’, 497.

<sup>35</sup> H.C. Kelman, ‘The Policy Context of Torture: A Social-Psychological Analysis’ (2005) 87 *International Review of the Red Cross* 123; J. Hagan, J. Kaiser and A. Hanson, *Iraq and the Crimes of Aggressive War: The Legal Cynicism of Criminal Militarism* (Cambridge: Cambridge University Press, 2015), 64 et seq.; J. Hagan, *Who Are the Criminals? The Politics of Crime Policy from the Age of Roosevelt to the Age of Reagan* (Princeton/Oxford: Princeton University Press, 2012), 49.

system. In light of a mission, not only do ‘they feel justified in overcoming their moral scruples; indeed they feel obliged to do so’.<sup>36</sup>

Here again, techniques of neutralization play a role. It should not go unnoticed that Sykes and Matza’s theory contributed to the fundamental understanding that perpetrators are not so different from law-abiding people in that they usually do not reject the dominant social order and share the same values and norms. They have, however, learned to override norms in certain situations by applying ‘techniques of neutralizations’. By this, they maintain a positive self-image despite committing the crime (or, as Sykes and Matza put it, ‘they eat the cake and have it, too’).<sup>37</sup> The conscience can be kept clean by denying the responsibility (‘I did not mean it’), by denying the injury (‘I did not really hurt anybody’), by denying the victim (who is dehumanized as aggressor or enemy), by condemning the condemners (‘you are worse’, ‘you are a hypocrite’) and by appealing to higher loyalties. In the last case perpetrators claim, for example, that they protected their family, defended national security or punished enemies. In any case, they have their reasons and in their eyes the end justifies the means. It is, then, normal people, not certain ‘types of offenders’ who gradually change sides by ‘drifting’ into delinquency. The techniques of neutralizations are perfectly applicable in the context of international criminal justice.<sup>38</sup> As Heinrich Himmler’s infamous speech held in front of high-ranking SS-officers in Posen on 4 October 1943 demonstrated, even genocide can be presented as heroic if it is framed as a fight for purity and survival.<sup>39</sup>

On the macro-level, relevant political players are perceived as authorities by the people. Provided that the authority appears to be legitimate, most people are willing to follow. The Milgram experiment<sup>40</sup> has strikingly proven that it does not take much to make people obey given instructions. If authority just offers a ‘good reason’ (e.g. in Milgram’s case, the sake of science), the majority of people are ready to inflict considerable harm to others – nota bene without being threatened by any kind of sanction in the case of disobedience. The lessons to be learnt from Milgram, whose findings were repeatedly replicated,

<sup>36</sup> H.C. Kelman, ‘Violence without Moral Restraint: Reflections on the Dehumanization of Victims and Victimizers’ (1973) 29 *Journal of Social Sciences* 25, 44–45.

<sup>37</sup> Sykes and Matza, ‘Techniques of Neutralization’, 664 et seq.

<sup>38</sup> Neubacher, ‘How Can It Happen That Horrendous State Crimes Are Perpetrated?’, 762 et seq.; see also Alvarez, *Genocidal Crimes*, 115 et seq.

<sup>39</sup> Neubacher, ‘How Can It Happen That Horrendous State Crimes Are Perpetrated?’, 796 et seq.

<sup>40</sup> Cf. S. Milgram, ‘Some Conditions of Obedience and Disobedience to Authority’ (1965) 18 *Human Relations* 57.

are twofold: first, in certain circumstances it is not the kind of person but the kind of situation in which one is placed, that determines actions. In this sense, a situation can be shaped by authorization. And second, to a lesser extent, there are disobedient people too. What made them resist remains a bit obscure in the Milgram experiment, but the fact that some were obedient while others were not is confirming the assumption that macro- and micro-level factors collaborate.

(ii) *Meso-level*: Processes of authorization also have a large share in the functioning of groups and organizations as they are regularly structured in a hierarchical way. We only need to think of military units in which this is evident. Apart from authorization (what may be called the vertical dimension), soldiers let themselves equally be guided by the common practice of their comrades (the horizontal dimension). This exactly corresponds to the findings of military historians who analysed the wire-taped conversations of German military officers being held in prisoner camps at the end of World War II. It became clear that before they were captured they used to worry about what their comrades might have thought of them if they had stepped out of line.<sup>41</sup> Naturally they did not, as the group bonds were too strong. The same can be studied in the Milgram experiment where this phenomenon was labelled as ‘group effects’.

In a collective, the burden of personal responsibility is lifted. Division of labour is effectively facilitating the process of distancing oneself from the outcome. Where many people get involved, nobody will really feel responsible for the whole. This effect, also known as bystander effect, is exacerbated by the fact that repeated joint action leads to routinization which is accompanied by ‘numbing’ as Herbert Kelman put it.<sup>42</sup> According to him,

routinization fulfills two functions. First, it reduces the necessity of making decisions, thus minimizing occasions in which moral questions may arise. Second, it makes it easier to avoid the implications of the action since the actor focuses on the details of his job rather than on its meaning.<sup>43</sup>

By this, routinization helps stabilize the given frames as they are not questioned anymore. The way a situation is perceived hereby becomes a habit for those involved. Once again, Kelman: ‘Routinization operates both at the level

<sup>41</sup> S. Neitzel and H. Welzer, *Soldaten: Protokolle vom Kämpfen, Töten und Sterben* (Frankfurt: S. Fischer, 2011), 16 et seq., 394.

<sup>42</sup> Kelman, ‘Violence without Moral Restraint’, 52.

<sup>43</sup> Kelman, ‘Violence without Moral Restraint’, 46.

of the individual actor and at the organizational level.’ At the end, there is ‘no expectation that the moral implications will be considered [...] nor is there any opportunity to do so’.<sup>44</sup> In this light, even mass killings have to be regarded as a ‘job’ which can be executed in a more or less efficient way and which requires refinements from time to time. One of the perpetrators of the Rwandan genocide, for example, stated: ‘I would teach the people in the group how to kill, and how to kill people without too much noise. I taught them how to be clever in the killings.’<sup>45</sup> It is also telling how a former member of the Iraq security forces under Saddam Hussein described his sentiments and rationalizations when he was trained as a torturer.<sup>46</sup>

(iii) *Micro-level*: On the micro-level, there is a wide scope for potential individual motives. They range from political fanaticism, ‘fun’ or greed to career interests (proving to be a reliable follower), thoughtlessness and even participation with disgust. In criminology, attempts have been undertaken to classify perpetrators by their motives. Alette Smeulers differentiated between ‘the criminal mastermind’, ‘the fanatic’, ‘the criminal/the sadist’, ‘the profiteer’, ‘the careerist’, ‘the devoted warrior’, ‘followers and conformists’, ‘the compromised perpetrator’ and ‘the professional’.<sup>47</sup> That may well be true but it is doubtful whether criminology is hereby coming closer to the understanding of international crimes. It is their characteristic that they do not stem from the individual level. A distinction has to be made between an individual’s motive and its social role. Motives can be different. It does not seem appropriate, however, to think of these motives as a primary cause of action. As already shown, social interaction is a paramount factor, and individuals are treated depending on their social roles (e.g. as soldiers). They get confronted with corresponding role expectations – no matter what their individual motives are. While individual motives may help in meeting the expectations of others, they do not override the social mechanisms. Even a reluctant individual will be drawn into the destructive dynamics of processes of authorization and routinization. Usually, this view does not result in exempting the individual from legal accountability. The individual is still responsible for accepting the

<sup>44</sup> Kelman, ‘Violence without Moral Restraint’, 47.

<sup>45</sup> A. Smeulers and L. Hoax, ‘Studying the Microdynamics of Rwandan Genocide’ (2010) 50 *British Journal of Criminology* 435, 450.

<sup>46</sup> See Hagan, Kaiser and Hanson, *Iraq and the Crimes of Aggressive War*, 29 et seq. (‘Learning to Torture’).

<sup>47</sup> A. Smeulers, ‘Perpetrators of International Crimes: Towards a Typology’ in A. Smeulers and R. Havemann (eds.), *Supranational Criminology: Towards a Criminology of International Crimes* (Antwerp: Intersentia Press, 2008), 244, 244 et seq.

frames and neutralizations offered, for his or her ‘moral disengagement’ and ‘victim blaming’ (Rafter) and, not least, for the consequential acts. Nevertheless, the criminological perspective sheds light upon those dynamics, minimizing the probability that individuals rebel or refuse cooperation.

In criminological literature, it has been worked out that genocide often is a top-down process. For the Rwandan genocide, Hollie Nyseth Brehm validated that ‘state actors orchestrated and executed the violence’ and that the government encouraged civilians to participate in the killings. Hutus were asked to form ‘self-defense’ groups and it was suggested that Tutsis would kill Hutus if they did not act first. Some participants in the genocide were forced to do so while many others were not.<sup>48</sup> Comparatively, more killings were executed in communities ‘in close proximity to the extremist center of the violence’ and in regions controlled by the reigning political party.<sup>49</sup> Even so, Nyseth Brehm advocated not viewing genocide exclusively as a top-down endeavour. By analysing the determinants of subnational levels of killings in 142 Rwandan communities, she found that fewer killings occurred in communities with higher marriage rates and higher formal employment rates, that she interpreted as an effect of social control and cohesion and described as ‘meso-level factors’.<sup>50</sup> These findings are in line with the view presented here that a collaboration of macro- and meso-level factors mainly determine the actions.

In a previous study, Nyseth Brehm showed that the Rwandan genocide did not follow the age and gender distribution common to other crimes. The peak age of those tried in the Rwandan gacaca court system was 34 years (at the time of the genocide), which is older than the age for most other types of crime. Women were more likely to participate in crimes against property while they were less likely to commit genocidal murder. However, these results should be interpreted as chiefly reflecting different opportunity structures because both the division of labour (e.g. representation in the government) and the expectation to participate in the violence were highly gendered.<sup>51</sup> Having said that, women’s participation in international crimes should not be underestimated

<sup>48</sup> H. Nyseth Brehm, ‘Subnational Determinants of Killing in Rwanda’ (2017) 55 *Criminology* 5, 9.

<sup>49</sup> Nyseth Brehm, ‘Subnational Determinants of Killing in Rwanda’, 25.

<sup>50</sup> Nyseth Brehm, ‘Subnational Determinants of Killing in Rwanda’, 10.

<sup>51</sup> H. Nyseth Brehm, C. Uggen and J.-D. Gasanabo, ‘Age, Gender, and the Crime of Crimes: Toward a Life-Course Theory of Genocide Participation’ (2016) 54 *Criminology* 713, 713, 720, 735.

in general. Those researchers are right who regard this topic a research field in its own right.<sup>52</sup>

However, it is not sufficient to have an idea about the interplay of the macro-, meso- and micro-level. We also need to understand that relevant situations are gradually emerging and can change over time. In this sense, collective violence certainly is a situational process. Situational means that this kind of violence is difficult to predict, that it can neither be explained by individual characteristics nor by motives only, and that it hardly makes sense to set up offender typologies. On the contrary, it is more realistic to assume that humans are capable of the most heinous acts while the same humans can heroically adhere to moral standards in another situation. Peer pressure may change, time for reflection may be lacking, role models may be present, personal mood or shape may vary as well. In the end, it might very well be that the situation, not the character, is the key.

In his study on violence, Randall Collins has argued that although confrontational situations are common, actual violence is quite rare because confrontational tension mixed with strong fears usually hinders people from resorting to violence. What is needed for the unleashing of violence is a state of imbalance, in which one side of the conflicting parties is gaining momentum, and emotional dominance, so that fears can break loose into a ‘tunnel of violence’. Collins identified several pathways into this tunnel, the most dangerous of which is ‘forward panic’ when tension spills forward into atrocities. At the centre of Collins’ study lies an interactional perspective explaining violence as a process between situationally placed individuals, not as something that can be studied as a personal trait. He is very clear on this point: ‘First, put the interaction in the center of the analysis, not the individual, not the social background, the culture, or even the motivation: that is to say, look for the characteristics of violent situations.’ In addition, on the same page: ‘Not violent individuals, but violent situations – this is what a micro-sociological theory is about. We seek the contours of situations, which shape the emotions and acts of the individuals who step inside them. It is a false lead to look for types of violent individuals, constant across situations.’<sup>53</sup>

Even if that view may not be valid for all kind of conflict situations, it offers valuable insights that can contribute to the understanding of situations

<sup>52</sup> S. Linton ‘Women Accused of International Crimes: A Trans-Disciplinary Inquiry and Methodology’ (2016) 27 *Criminal Law Forum* 159.

<sup>53</sup> R. Collins, *Violence: A Micro-Sociological Theory* (Princeton: Princeton University Press, 2009), 1; see also S. Klusemann, ‘Massacres as Process: A Micro-Sociological Theory of Internal Patterns of Mass Atrocities’ (2012) 9 *European Journal of Criminology* 468, 468 et seq.

escalating into atrocities. Moreover, it perfectly fits with a theory that is widely accepted to reflect the current state of knowledge in criminology. The situational action theory combines a perception-choice process with a strong situational focus. According to it, crime is ultimately an outcome of a perception-choice process which is initiated and guided by relevant aspects of the person-environment interaction. A person's particular stability and change in exposure to criminogenic settings depends on processes of social and self-selection.<sup>54</sup> A person may find him- or herself placed in a moral environment (e.g. characterized by group members' attitudes) which is influencing the individual's perception and can even be stronger than the individual's morals. In this model, deterrence can only function as a control in the choice process if the person is deliberating at all (and not acting habitually) and if the impact of the moral environment is not too strong. This situational perspective is illustrating again, this time from a theoretical viewpoint, the limits of the concept of deterrence. Finally, another point deserves being mentioned: Per-Olof Wikström's concept of linking a situational model of crime to social contexts is perfectly compatible with the idea of macro-, meso- and micro-level factors because Wikström is drawing on Coleman's work.<sup>55</sup>

Another theory that should be mentioned in the context of international crimes is Charles Tittle's control balance theory.<sup>56</sup> It is based on the idea of control, which is, first, the degree to which others can limit an individual's behavioural options and, second, the extent to which an individual can exercise such control over others. According to this theory, deviance is the result of an imbalanced ratio of controls exercised to controls experienced. When mentioning 'repressive' types of deviance ('predation', 'defiance', 'submission') which result from control deficits, Tittle refers to behaviour similar to street crime, e.g. theft, rape, homicide, vandalism and political protest. In contrast, control surpluses are associated with 'autonomous' types of deviance ('exploitation', 'plunder', 'decadence') which – analogous to white-collar crime – are characterized by the abuse of power and the lack of control. As this also holds for political power and political organizations and as it is assumed that the greater the control surplus, the more serious the likely deviant conduct, this theory allows us to explain phenomena such as torture, genocide or extra-legal killings.

<sup>54</sup> P.-O.H. Wikström, 'Why Crime Happens: A Situational Action Theory' in G. Manzo (ed.), *Analytical Sociology: Actions and Networks* (Hoboken: John Wiley & Sons, 2014), 74, 74 et seq.

<sup>55</sup> Cf. Matsueda, 'Toward an Analytical Criminology', 496.

<sup>56</sup> C.R. Tittle, *Control Balance: Toward a General Theory of Deviance* (New York/London: Routledge, 1995); T. Newburn, *Criminology*, 3rd ed. (Abingdon/Oxon: Routledge, 2017), 256–261.



## IV ON THE REACTION TO INTERNATIONAL CRIMES

International criminal courts are struggling with several problems. One of them is the long duration of the proceedings and that the judgement is handed out a long time after the crime, sometimes after decades. Another problem is the length of the sentences. Some of them can only be understood against the background of retributive theories of punishment. From the standpoint of preventive theories it is hard to understand why, for example, in *Krstić* the ICTY's Trial Chamber deemed it appropriate to impose a prison term of 46 years for aiding and abetting genocide that later was reduced to 35 years by the Appeals Chamber.

Mark A. Drumbl speaks of an 'erratic sentencing practice'.<sup>57</sup> To his mind, there is no 'cogent framework' or 'heuristic' on how to standardize the determination of a sentence. Judges are even said to be divided over the purpose of punishment. From a global perspective, there probably are very different ideas of what appropriate sentences look like and which duration of a sentence is appropriate. Article 78 of the ICC Statute is very short on the determination of the sentence.<sup>58</sup> According to it, the 'gravity of the crime' and 'the individual circumstances of the convicted person' are taken into account. Rule 145 of the Rules of Procedure and Evidence hardly bears a helping hand. Primarily, it names 'the culpability of the convicted person', then 'any mitigating and aggravating factors', and

*inter alia* [...] the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.

It is common knowledge that the permanent ICC established in The Hague in 2002 has closed less than a dozen of cases so far. As of 1 December 2018, twenty-seven cases have been brought before the Court with verdicts in six cases: eight people have been convicted and two acquitted (with one case and five convictions for offences against the administration of justice). Most empirical studies have therefore dealt with the ICTY and the International Criminal Tribunal for Rwanda (ICTR). A recent analysis of all decisions issued by the ICTR found significant problems in its sentencing practice:

<sup>57</sup> Drumbl, *Atrocity, Punishment and International Law*, 66.

<sup>58</sup> Werle and Jeßberger, *Völkerstrafrecht*, 57.

most of them concerned omissions in the grounds for the judgement or were related to the violation of the ICTR Statute or fundamental procedural safeguards.<sup>59</sup> But things do not seem too bad, at least if we consider the results of a quantitative study conducted by a Dutch research team who applied a multiple regression analysis in order to study the extent to which selected factors predict sentence length in the sentencing practice of the ICTR and the ICTY.<sup>60</sup> As a result, the study suggested that similar patterns have emerged in the sentence practice. The conviction for genocide, the rank of the offender and the number of guilty counts appeared to be the strongest predictors.<sup>61</sup> Nonetheless, ‘inconsistencies and disparities across cases’ were identified (e.g. education or respected status were in some cases accepted as mitigating factors yet in others as aggravating factors) and, in general, the decisions seemed to be lacking ‘transparency and clarity’, for example by not indicating the weight assigned to individual sentencing factors and individual crimes in cases of multiple counts.<sup>62</sup>

A lack of transparency and clarity is harming international criminal justice. While it is crucial that justice is done, there cannot be justice without taking into account the individual culpability which has to be understood both as a limitation to punishment and as an indication of the degree of individual guilt. In this regard, international criminal justice needs to perform better by handing out persuasive judgements. Strangely enough, the ICC’s Rules of Procedure and Evidence mainly mention ‘the degree of participation’ and ‘the degree of intent’ to distinguish different modes of participation and engagement. From a criminological point of view, it is not difficult to imagine many more factors, most of them mitigating: group pressure, the heat of the moment, alignment to frames, cognitive narrowing, group dynamics or group solidarity (particularly in combat). Some of them may represent situations of an inner conflict, situations to which the individual is drawn and from where there seems to be no way out, situations, however, that do not meet the legal requirements of a defence. It is striking how sometimes objective and subjective circumstances mismatch in international criminal law. The objective gravity of the crime may be very serious while the individual’s culpability is

<sup>59</sup> Cf. L. Babucke and K. Brettfeld, ‘Probleme der Rechtsfolgengestaltung im Völkerstrafrecht: Eine kritische Analyse der Strafzumessungspraxis des ICTR in Ruanda’ (2016) 99 *Monatsschrift für Kriminologie und Strafrechtsreform* 406.

<sup>60</sup> Cf. B. Holá, C. Bijleveld and A. Smeulers, ‘Consistency of International Sentencing: ICTY and ICTR Case Study’ (2012) 9 *European Journal of Criminology* 539.

<sup>61</sup> Cf. Holá, Bijleveld and Smeulers, ‘Consistency of International Sentencing’, 546–547.

<sup>62</sup> B. Holá, ‘Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law’ (2012) 4 *Amsterdam Law Forum* 3, 14, 23.

diminished. That is why international criminal law provides such a broad range of sentencing. Yet it would be an asset to have a model of liability incorporated in the statutes or in the rules that systematically takes into consideration the degree of culpability.<sup>63</sup> On a vertical axis the individual's hierarchical position would be registered, for example as mayor or political leader, as superior, as chief in the chain of command, as a follower or bystander.<sup>64</sup> The horizontal axis would refer to the individual's discretionary power: Has the individual acted voluntarily, on his or her own initiative, has he or she incited others or even exceeded given orders, and so on?

What the application of international criminal law needs is – roughly speaking – less selectivity and more well-founded judgements handing out shorter sentences where appropriate. The purpose of prevention would suffer no harm from that. In Chapter XXVII of his famous treatise 'On Crimes and Punishments', which is headed 'Of the Mildness of Punishments', Cesare Beccaria, the famous Italian philosopher and criminologist, stated in 1764:

Crimes are more effectually prevented by the *certainty*, than the *severity* of punishment. Hence, in a magistrate the necessity of vigilance, and in a judge of implacability, which, that it may become an useful virtue, should be joined to a mild legislation. The certainty of a small punishment will make a stronger impression, than the fear of one more severe, if attended with the hopes of escaping [...].<sup>65</sup>

## V CONCLUSION

Sure enough, from a criminological point of view, punishing the perpetrators of international crimes is an essential contribution to the prevention of future crimes. However, as formerly powerful political leaders normally do not display the deficits typical for the socialization of ordinary criminals, there are only a few starting points for offender rehabilitation programmes. They have to deal with the techniques of neutralization which helped the offender to suspend moral standards. The emphasis of punishment, however, will be put on incapacitation, by which the convicted is deprived of opportunities for

<sup>63</sup> On the culpability of the offender and its influence of the sentencing process, see the contribution by Gerhard Werle and Aziz Epik in Chapter 18.

<sup>64</sup> See Neubacher, *Kriminologische Grundlagen einer internationalen Strafrechtsbarkeit*, 433; similarly, see Drumbl, *Atrocity, Punishment and International Law*, 25 who is differentiating 'conflict entrepreneurs' and 'leaders' from 'followers' and 'bystanders'.

<sup>65</sup> C. Beccaria, *On Crimes and Punishments* (A New Edition Corrected, Albany: W. C. Little & Co., 1872), 49 (emphasis in original).

offending.<sup>66</sup> If, beyond all this (offender treatment, incapacitation), the application of international law is supposed to deter potential perpetrators and to strengthen the faith of the legal community in the rule of law it will be necessary to enhance the risk of criminal prosecution substantially. Criminologically speaking, the deterrent effect of punishment will not be radiated from the type and severity of the (threatened) sanction but from the offender's estimation of how probable it is that he or she will be apprehended and sanctioned at all. From that, it is clear that for the sake of prevention extra-long sentences or life imprisonment are not required. International criminal justice needs to pay more attention to the problem of deterrence and its implications. Time is up for just claiming deterrence without bothering with authentic effects and scientific evidence. More efforts have to be made to increase the offenders' risk of being prosecuted and sentenced.

International criminal justice does not bear an overall responsibility. In fact, its competences (as well as resources!) are limited in terms of time and place. Furthermore, it is bound by the principle of complementarity and depends on state cooperation. Against this background, much has been achieved compared to the situation at the beginning of the 1990s when the ad hoc Tribunals were established. Yet, it has also been demonstrated that the administration of international criminal justice can be imperfect and agonisingly slow. The healing and restorative effects of justice in post-conflict situations take time, in some cases maybe a new generation. That is why it is even more important that scientists, judges and politicians alike recognize that justice and prevention cannot be achieved by criminal trials only. Causes of international crimes have to be tackled at all relevant levels. This includes, but is not limited to, outreach programmes that deliver the messages of international criminal justice to the communities affected.<sup>67</sup> It must not be overlooked that the perpetrator's socio-political environment was conducive to the crime. Without a change of attitudes in his or her community, the convicted will remain a 'hero' and the preventive effect is in danger. And finally, having in mind that international crimes typically originate from macro- and meso-level factors, justice also needs to be sought through conflict prevention, separation of powers, development<sup>68</sup> and capacity building; in other words, through a proactive peace politics.

<sup>66</sup> For a similar argument, see the contribution by Alex Whiting in Chapter 16.

<sup>67</sup> On the importance of outreach, see the contribution by Philipp Ambach in Chapter 20.

<sup>68</sup> On this, see Holling, *Internationaler Strafgerichtshof und Verbrechensprävention*, 160.