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van der Wilt, H.

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UNIVERSITY OF AMSTERDAM

CRIMES AGAINST HUMANITY: A CATEGORY HORS CONCOURS IN INTERNATIONAL CRIMINAL LAW?

Harmen van der Wilt

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Amsterdam Center for International Law
Oudemanhuispoort 4-6
NL-1012 CN Amsterdam
website: www.jur.uva.nl/acil

‘Crimes against Humanity: A category *hors concours* in (international) criminal law?’

1) Introduction

Crimes against humanity belong to the subject matter jurisdiction of international criminal tribunals and the International Criminal Court.¹ It is a dubious privilege that they share with war crimes, genocide and – as far as the Rome Statute is concerned – the crime of aggression. Crimes against humanity are particularly heinous crimes, committed as part of a widespread or systematic attack against a civilian population. The perpetrator must have had knowledge of the attack. Although the Nuremberg Charter and the Statute of the ICTY still required a connection with an armed conflict, this restriction has been dropped in the Rome Statute.² The abolition of this ‘nexus’ makes sense, as the category of crimes against humanity has especially been created in order to counter a state’s systematic oppression of its own population, a situation that was not envisaged or covered by the legal concept of ‘war crimes’.³ Upholding the connection between crimes against humanity and armed conflict would imply that the oppressed population puts up a level of resistance, reaching the threshold of an internal armed conflict, which is obviously not always the case.

The exact degree of involvement of a state in crimes against humanity is a matter of some controversy. Article 7 (2) (a) of the Rome Statute defines ‘attack’ as a ‘course of conduct (...) pursuant to or in furtherance of a State *or* organizational policy to commit such attack’. The use of the conjunction ‘or’ immediately clarifies that the violence need not emanate from the state. However, the sheer scale of crimes against humanity arguably requires planning and organization of (human) resources, which is captured by the words ‘organizational policy’. According to the (majority of the) Pre-trial Chamber in the recent Kenya-decision, a group does not have to possess State-like features, in order to meet the requirement of Article 7 (2) (a). Decisive would be its capability to perform acts which infringe basic human values.⁴ On the basis of this criterion, the Chamber concluded that ‘various groups including local leaders, businessmen and politicians associated with the two leading parties, as well as with members of the police force acting at the material time constituted organizations within the meaning of Article 7(2)(a) of the Statute.’⁵

¹ Compare Article 4 of the Statute, of the International Criminal Tribunal for Rwanda, Article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 2 of the Statute of the Special Court for Sierra Leone and Article 5 of the Rome Statute of the International Criminal Court.

² Article 6 c) of the Nuremberg Charter postulated that crimes against humanity had to be committed in execution of or in connection with any crime within the jurisdiction of the Tribunal (id est, either war crimes or crimes against peace). Article 5 of the ICTY-Statute explicitly held that crimes against humanity had to be committed in armed conflict, whether international or internal in character. The general opinion amongst ICL experts is that these restrictions set jurisdictional limitations to the Nuremberg Tribunal and the ICTY respectively.

³ Geoffrey Best, *War and law since 1945*, Oxford 1994, 180.

⁴ *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC 01/09, 31 March 2010, § 90.

⁵ Ibid, § 117.

Judge Kaul disagreed with the majority's view. In his opinion, the organization within the meaning of Article 7(2) (a) at least had to possess a number of features of a State.⁶

Whereas the proper 'qualifications' for an organization in the sense of Article 7 (2) (a) are still slightly left in abeyance, I will argue in this essay that the position of the State is pivotal for a clear understanding of crimes against humanity. By either actively oppressing or persecuting its own citizens, or by blatantly failing to protect them against such systematic violence of other (contending) groups, the state forsakes its primary duty and forfeits (part of) its sovereign claims. This offers the prime justification for the international community to pierce the sovereign veil and take over powers of criminal law enforcement, either by the International Criminal Court or by way of universal jurisdiction. In this respect I fully agree with Larry May who has sustained the international community's authority to trump the state's privileges with solid legal philosophical theory.⁷ What puzzles me, however, is May's presentation of the international harm principle as an *additional* and *separate* condition to warrant international prosecutions. According to May, 'to counter the claim made in behalf of the defendant that his or her liberty is jeopardized by an international trial' it requires proof that the crimes affect a particularly strong interest of the entire international community, which he baptizes as 'the international harm principle'.⁸ In my opinion, May's 'security principle' suffices and captures it all: the death and deprivation, suffered by the population as a result of the state's defaulting on its primary obligations, is the gist of 'crimes against humanity', violates *eo ipso facto* the interests of the international community and authorizes both other states and international tribunals to intervene. Here I tend to agree with Altman and Wellman who have partially criticized Larry May's two pronged approach, arguing that the international harm principle is actually redundant: 'His two principles arguably give May the best theory of international criminal law to date, but (...) the international harm principle is problematic. The security principle on its own and suitably elaborated would be theoretically preferable.' And to demonstrate their point, they add that 'when a government perpetrates or permits the violation of the basic rights of its people, third parties – in this case, other states in the international community – have a moral right, if not a duty, to interfere.'⁹ However, I do not share their opinion that gross violations of human rights only in a metaphorical sense harm humanity.¹⁰ The

⁶ Dissenting Opinion of Judge Hans-Peter Kaul, ICC-01/09, 31 March 2010, § 51. Judge Kaul identified the following characteristics: 'a) a collectivity of persons; b) which was established and acts for a common purpose; c) over a prolonged period of time; d) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; e) with the capacity to impose the policy on its members and to sanction them; and f) which has the capacity and means available to attack any civilian population on a large scale.' Claus Kress has correctly observed that these criteria reflect those of a party to a non-international armed conflict, as enumerated in the Second Additional Protocol to the Geneva Conventions, minus the requirement of territorial control; Claus Kress, 'On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision', *Leiden Journal of International Law* 23 (2010), 855, 866.

⁷ Larry May, *Crimes against Humanity: A Normative Account*, 2005

⁸ May, n. 7, 80.

⁹ Andrew Altman and Christopher Wellman, 'A Defense of International Criminal Law', 115 *Ethics* (2004), 40 and 45.

¹⁰ Altman and Wellman, n. 9, 42/43.

only point I wish to make is that the security principle encapsulates the international harm principle.

In order to canvass the soundness of my assumptions, I will first discuss May's principles in more detail. Next, I will dwell upon the question whether 'humanity' has any common interests which can be harmed by heinous crimes. To that purpose I will address the Preamble of the Rome Statute, contrast crimes against humanity with other 'core crimes' and take stock of David Luban's inspiring discourse, arguing that crimes against humanity profoundly affect our interests as 'political animals'. And finally – in paragraph 4 – I will shortly reflect on international criminal tribunals' capacities to give expression to the common interests of humanity.

2) Larry May's two principles

The two – cumulative – principles which Larry May has developed to gauge the legitimacy of international interference with criminal law enforcement derive from his self-professed libertarian leanings, combining a 'minimalist' approach towards criminal law with a notion of international relations as a 'society of states', where sovereignty still reigns supreme.¹¹ Against this political background, he argues that the international community must have overriding reasons to encroach on the state's sovereignty *and* deprive individual perpetrators from their fundamental rights. May points out that the mythical creation of the State (*Leviathan*), famously expounded by Thomas Hobbes, implied a trade-off between free individuals *inter se*, sacrificing their absolute freedom on the proviso that the state would secure and protect them against the dismal hazards of the 'state of nature'. By implication, if the state were to default on this primary task it would forfeit its privileges as a sovereign entity, allowing the international community to intervene on behalf of the forsaken and betrayed population.¹² The failure of the state to secure life, bodily integrity and property of its citizens can take two shapes. Either the state is 'too weak' to offer the people sufficient protection or the state is 'too strong', constantly and systematically oppressing its subjects. In both cases the fate of the population is in mortal peril and in both cases the international community is allowed to intervene. This is the content of the *security* principle.¹³

The great virtue of May's analysis is that he forges a direct link between the right of the international community to trespass on the state's sovereignty and the state's very *raison d'être*. However, in May's opinion the failure of the state to observe its primary task in the realm of providing security does not suffice to legitimize international criminal justice. The application of the *security* principle offers sound reasons for the international community's right to intervene in the internal affairs of the state, but the incursion upon

¹¹ Larry May, n. 7, 65.

¹² May, n. 7, 72-75.

¹³ In May's own words (n. 7, 68): 'If a State deprives its subjects of physical security or subsistence, or is unable or unwilling to protect its subjects from harms to security or subsistence, a) then that State has no right to prevent international bodies from 'crossing its borders' in order to protect those subjects or remedy their harms; b) and then international bodies may be justified in 'crossing the borders' of a sovereign State when genuinely acting to protect those subjects'. It is telling that the terms 'unable' and 'unwilling' are the benchmarks which allow the International Criminal Court to trump domestic jurisdictions and arrogate jurisdiction over core crimes under the complementarity principle, compare Articles 1 and 17 of the Rome Statute.

the liberty of the individual defendant requires the compliance with an additional test, emanating from the *international harm principle*. Borrowing from the theories of his fellow liberal-thinker Joel Feinberg who starts from the premise that harm to others is usually a necessary and sufficient condition for the application of criminal law, Larry May expands the scope of the harm principle beyond the limits of the nation-state and assumes that the international community or humanity as such can be aggrieved by very dreadful crimes and therefore has an interest in their suppression.¹⁴ Only the violation of the international harm principle tips the balance in favour of international prosecutions, to the detriment of the rights of the defendant.

May's assertions beg the question *when* and *why* the international harm principle is exactly at stake. As to the 'when', May makes an effort to elucidate his point. The gist of crimes against humanity, so he argues, is that they are 'group-based', either because they target larger groups of victims (id est: on the basis of their belonging to the group), or because they are committed by collective entities. And precisely these collective dimensions jeopardize the international community:

'Only when there is serious harm to the international community, should international prosecutions against individual perpetrators be conducted, where normally this will require a showing of harm to the victims that is based on non-individualized characteristics of the individual, such as the individual's group membership, *or* is perpetrated by, or involves a State or other collective entity.'¹⁵

May points out that group-victimization corresponds with the 'widespread'-component of crimes against humanity, while the 'systematic' variant connotes the collective features of the perpetrator.

May's elaboration of the international harm principle raises several problems. First of all, one wonders whether the 'collective dimension' is not already implicit in the security principle. When the state is strongly involved in the oppression of its own citizens, it acts by definition as a collective. In a similar vein, states are usually no proof against rebellious groups engaging in human rights violations, because they are equaled or even surpassed in power by such strong collectives. In both cases, the security principle would be triggered as well.

Presumably the strongest case favouring May's two-pronged approach would be a complete break down of law and order, a relapse into anarchy, reminiscent of Hobbes' state of nature, such as, for instance, the situation in Somalia. In this case, May's security principle unquestionably applies. However, as long as no dominant political or tribal group, bullying and oppressing others, can be identified, it will not qualify as a crime against humanity, at least not under the definition of the Rome Statute. For the same reason, the situation will not meet May's 'group'-test, as all are (potential) victims and perpetrators.

Another interesting case in point which is the mirror image of the previous 'break down of law and order' situation is the dramatic massacre by the rightwing extremist Anders Breivik. Shortly after the horrendous events, the judicial authorities announced that they would investigate whether Breivik could be prosecuted for crimes against humanity, as

¹⁴ May, n. 7, 82. On Joel Feinberg's theories, see especially J. Feinberg, *Harm to Others*, Oxford 1984.

¹⁵ May, n. 7, 83.

this would considerably raise the maximum sentence.¹⁶ Unless Norway explicitly deviates from the standards as propounded by the Rome Statute, the chances of success are slight, as Breivik did not act within the context of an official policy.¹⁷ It is interesting and revealing to subject the case of Breivik to May's two pronged test. Obviously, the situation does not meet the security principle, as the Norwegian authorities were perfectly willing and able to prosecute the terrorist. Does the Breivik-case trigger the application of the international harm principle, as understood by May? Probably, yes, as he targeted his victims because of their xenophile and leftist political preferences. Larry May contends in this context that 'group-based harms are of interest to the international community because they are more likely to assault the common humanity of the victims and to risk crossing borders and damaging the broader international community.'¹⁸ While this observation is factually probably correct, it is not very helpful for analytical purposes. The deeper problem is that May does not precisely indicate why group based crimes affect the international community. Lumping together selfish interests (the risk of spill-over) and disinterested feelings of empathy for fellow-human beings obscures the pertinent question which motive will at the end of the day prevail. The Breivik-case reveals the flaws of May's international harm principle as an analytical tool. While the massacre probably cannot be qualified as a crime against humanity and certainly does not meet the threshold of May's security principle, it arguably does comply with the international harm principle as understood and promulgated by May. But in that case the international harm principle is not of great value in the identification of crimes against humanity.

3) Humanity as a victim

Whereas the previous paragraph found Larry May's understanding of the international harm principle wanting, this paragraph seeks to improve the argument that crimes against humanity may indeed affect the interests of the international community as a whole. The issue raises the question, first, whether there is indeed an international community, harbouring common sentiments and interests and, secondly, whether the 'core crimes' in general and 'crimes against humanity' in particular affect and harm those shared interests. It is appropriate to start this inquiry with the Preamble of the Rome Statute, as it renders affirmative answers to both questions. First, the Preamble postulates the communality of mankind:

'Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time'

¹⁶ www.bbc.co.uk/news/world-europe-14288941 (last visited on 20 September 2011).

¹⁷ In the Kunarac-case the Appeals Chamber of the ICTY held that the existence of a plan or policy was not required under the Statute of the ICTY, nor under customary international law, *Prosecutor v. Kunarac et al.*, Judgment in the Appeals Chamber, case No. IT-96-23/1-A, 12 June 2002, § 98. However, Schabas observes in his blog that this decision is poorly grounded and probably overhauled by the recent judgments of the International Criminal Court.

¹⁸ May, n. 7. 83.

Next, the Preamble asserts that the common interests of the international community are particularly jeopardized and harmed by the ‘core crimes’:

‘*Mindful* that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity;
Recognizing that such grave crimes threaten the peace, security and well-being of the world.’

The language is beautiful and forceful, but the statement is too sweeping, as it ignores the dialectics between different legal cultures, power politics and the specific nature of the core crimes.

In her famous work on Legalism, Judith Shklar exhibits a fine understanding of these complex issues.¹⁹ She questions the existence of a world order, tied together by a shared revulsion of heinous – international - crimes and contends that one should at least differentiate between those crimes. Shklar substantiates her point of view by means of searching analyses of the moral and political impact of the Nuremberg and Tokyo Trials. At Tokyo, the legal approach and presentation of the charges by the Prosecutor’s Team alienated both the suspects in the docks and wider Japanese society. The high-flown references to natural law and legalism by the American prosecutor Keenan were completely lost on the Japanese, whose “‘situational ethics’ are inherently unlegalistic”.²⁰ Moreover, the primordial charges being conspiracy to commit crimes against peace, the suspects were not allowed to discuss the causes of the war in the Far East, which added fuel to the Japanese suspicion that the Allies’ main concern had been to conserve the international status quo. It does not completely transpire from Shklar’s account whether to her mind the disparate legal philosophies or the political controversies prevailed. Probably both aspects contributed to the disconcerting failure of the Tokyo Tribunal to reach out to the Japanese people.

In Nuremberg, on the other hand, the Tribunal succeeded in appealing to at least part of the population, viz. the ruling elite and representatives of the legal profession, reminding them of their earlier strong commitment to legalism which had been completely forsaken by the Nazis. As Shklar comments:

‘The Trial, by forcing the defense lawyers to concentrate on the legality of both the entire Trial and its specific charges, induced the German legal profession to rediscover and publicly proclaim anew the value of the principle of legality in criminal law, which for so many years had been forgotten and openly disdained.’²¹

And she adds later on:

‘The Trial, addressing itself to the political and legal elite, gave the elite a demonstration of the meaning and value of legalistic politics, not only by offering a decent model of a

¹⁹ Judith N. Shklar, *Legalism; Law, Morals and Political Trials*, Harvard University Press 1964, Part III.

²⁰ Shklar, n. 19, 180.

²¹ Shklar, n. 19, 166.

trial, a great legalistic drama, but by presenting evidence in a way that the political elite could not shrug off.’²²

Undoubtedly, the distinct legal cultures – and the insensitivities of the victorious countries towards the oriental mind! – accounted for the different impacts. But Shklar attributes the conspicuous reactions to the specific charges as well. In Tokyo, the emphasis was on waging aggressive war, which easily provoked the *tu quoque* response. The Tribunal did not allow such defenses, which understandably aggravated the frustration and anger of the defendants.

In Nuremberg and its aftermath the moral abyss of the Holocaust became gradually visible. Even amongst international crimes, crimes against humanity were something special, a category *hors concours*.²³ Here, the *tu quoque* defense did not wash, as both Buruma and Shklar submit.²⁴ But the lack of reciprocity in case of crimes against humanity cuts deeper than the simple observation that the division of guilt between the parties is asymmetrical and that the *tu quoque* defense is therefore unavailable to the party standing trial. In case of charges of war crimes and crimes against peace (aggression), the bonds of allegiance between rulers and ruled may easily be reinforced in the face of the antagonism with the prosecuting – and often victorious – counterpart. And it is precisely this dynamic of rapprochement and opposition which hampers the common and universal denunciation of those crimes. In case of crimes against humanity, on the other hand, the alliance between the governors and its population is irreparably damaged and severed, while the ties between the oppressed community and wider international society are simultaneously solidified.

In my view, the key to the understanding why crimes against humanity indeed affect the entire international community is that they strike at the core of the human condition, by shattering the political realm. As far as I know, no one has better understood this phenomenon, nor clarified it more eloquently than David Luban.²⁵ He starts his discourse by pointing out the eternal tension between man’s individuality and his social inclinations. Borrowing the inspired term ‘Unsociable sociability’ from Immanuel Kant to portray this inherent schizophrenia, Luban qualifies politics as the indispensable mediator: ‘For politics is the art of organizing society so that the mutual opposition which threatens to break up the society does not turn our propensity to enter into society into a suicide pact.’²⁶ Time and again Luban emphasizes that we have no alternative to living in groups and under some form of political control. This already shaky existence is trampled whenever people are targeted because of their membership in a group, especially when this is done by the entity which is supposed to guard them and which

²² Shklar, n. 19, 169.

²³ Compare Ian Buruma, *The Wages of Guilt; Memories of War in Germany and Japan*. London 1994, 149: ‘Whether you are a conservative who wants Germany to be a “normal” nation or a liberal/ leftist engaging the “labor of mourning, the key event of World War II is Auschwitz, not the Blitzkrieg, not Dresden, not even the war on the eastern front.”

²⁴ In the words of Buruma (n. 23, , 148): ‘Tu quoque could be invoked, in private if not in the Nuremberg court, when memories of Dresden and Soviet atrocities were still fresh. But Auschwitz had no equivalent. That was of another war, or, better, it was not really a war at all; it was mass murder pure and simple, not for reasons of strategy or tactics, but of ideology alone.’ For similar reflections, see Shklar, n. 19, 164.

²⁵ David Luban, ‘A Theory of Crimes Against Humanity’, 29 *Yale J. of International Law* (2004), 85-167.

²⁶ Luban, n. 25, 113.

owes its existence primarily to this function. Crimes against humanity are therefore the example *par excellence* of politics gone cancerous: ‘The legal category of “crimes against humanity” recognizes the special danger that governments, *which are supposed to protect the people who live in their territory*, will instead murder them, enslave them, and persecute them, transforming their homeland from a haven into a killing field.’²⁷ And somewhat later on he observes: ‘For a state to attack individuals and their groups solely because the groups exist and the individuals belong to them transforms politics from the art of managing our unsociable sociability into a lethal threat.’²⁸

All this sounds very familiar, as Larry May in essence takes a similar view. Luban also shares Larry May’s opinion that the commission of crimes against humanity authorizes the international community to intervene. However, sharper and more perceptive than May, Luban demonstrates how the international community’s right of criminal law enforcement is directly linked to the way the perversion of politics which is inherent to crimes against humanity backfires on the entire international community and affects us all: ‘To criminalize acts of a government toward groups in its own jurisdiction, and thus to pierce the veil of sovereignty through international criminal law, is tantamount to recognizing that the cancerous, autopolemic character of crimes against humanity represents a perversion of politics, and thus a perversion of the political animal.’²⁹

In sum: Larry May is entirely correct in contending that crimes against humanity involve a violation of the international harm principle. Where he is wrong, in my view, is that he positions this violation outside the realm of the security principle, suggesting that the fundamental betrayal by a state does not *eo ipso facto* entail that the international community is affected as well. The oppression by the state of its own population – or its impotence to shield the population against oppression by other powerful groups – bereaves that people from a vital capacity and simultaneously arouses the concern of all humanity, because the essential destruction of the political realm reflects upon all of us.

4) Why international tribunals are especially qualified to try crimes against humanity

The violation of the security principle both allows the international community to intervene – because its interests are at stake – and makes such intervention indispensable – because the state itself is not willing or not able to legally protect its population. It does not follow, however, that international criminal tribunals or courts, rather than other states on the basis of the principle of universal jurisdiction, should engage in criminal law enforcement. Hannah Arendt has argued that crimes against humanity should be prosecuted and tried by international tribunals.³⁰ According to Arendt, these crimes assault ‘human diversity, the characteristic of the human status without which the very words ‘mankind’ or ‘humanity’ would be devoid of meaning’.³¹ In her essentialist approach of crimes against humanity, Arendt comes close to Luban, although her

²⁷ Luban, n. 27, 117.

²⁸ Ibidem.

²⁹ Luban, n. 27, 117.

³⁰ Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, 1965 (rev. ed.) 269.

³¹ Arendt, n. 30, 268-269.

qualification of ‘an assault on diversity’ better suits ‘genocide’ than ‘crimes against humanity’.³²

Meanwhile, the Rome Statute and the International Criminal Court have not followed Arendt’s plea for exclusive competence of international tribunals. The Preamble emphasizes the obligation of *every* state to prosecute and try international crimes (including crimes against humanity and genocide).³³ Moreover, the ICC’s Prosecutor has, in the context of the practice of ‘self-referrals’, confirmed the right of states to exercise universal jurisdiction:

‘if a territorial state agreed to non-exercise of jurisdiction over certain crimes in favour of ICC prosecution, other states would remain entitled to investigate and prosecute on other jurisdictional bases (active nationality, passive nationality, *universal jurisdiction*).’³⁴

In other words: other states are equally qualified and entitled to intervene if the territorial state defaults on its primary obligations. In view of the principle of complementarity, one could even argue that they might take precedence over the International Criminal Court. Nonetheless, there are good reasons to allot the prosecution and trial of crimes against humanity to international criminal tribunals, because they have, compared with domestic courts, superior qualities in the realm of norm expression. Criminal law’s function of norm expression has especially been raised and developed by the eminent French sociologist Emile Durkheim. As is well known, Durkheim attributes positive qualities to criminal law and punishment in their capacity to reinforce the collective conscience (*la conscience collective*). Each (serious) crime threatens and challenges the values we hold dearest and trial and punishment serve the ritual function of reaffirming those moral values, thus solidifying social solidarity.³⁵ Durkheim has developed his theories especially for primitive communities, but he has always claimed that the cleansing and norm expressive qualities of criminal trials and punishment had survived in modern society as well.

Now the interesting question is whether the Durkheimian thesis would equally apply at the international level. Could international criminal trials serve the function of vindicating our shared moral values, which have been jeopardized and questioned by horrendous crimes? Some preeminent legal scholars have indeed defended this point of view. The late Edward Wise, though not adopting all the broader implications of Durkheim’s general theory of law, avows that ‘this particular insight about the function of criminal law in affirming and strengthening feelings of social solidarity and community seems particularly apt – indeed stunningly apt – when we consider the likely effects of the Rome Statute.’³⁶ And Mirjan Damaska seems to share Wise’s view on the appropriateness of Durkheim’s analysis for international criminal law, where he

³² Luban, n. 27, 116. Luban accuses Arendt of confusing individual diversity with group diversity and Arendt indeed has an inclination to lump the two together.

³³ Preamble of the Rome Statute, par. 6: ‘*Recalling* that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.’

³⁴ Office of the Prosecutor, ICC, Informal Expert Paper, *The Principle of Complementarity in Practice*, 2003 (emphasis added).

³⁵ Steven Lukes and Andrew Scull, *Durkheim and the Law*, Oxford 1983, Chapter 3, 59-102.

³⁶ Edward M. Wise, ‘The International Criminal Court: A Budget of Paradoxes’, *Tulane Journal of International and Criminal Law*, Spring 2000, 267.

highlights the functions of 'normative expression' and didactics in international criminal justice.³⁷

However, if courts are to perform their norm expressive function satisfactorily, they should be able to captivate the public imagination. Moreover, if they are confronted with large scale crimes against humanity and administrative massacre, they are bound to paint the broader historical picture, indicating how specific crimes fit into the pattern of system criminality. The greatest challenge for courts in a period of transitional justice in particular is to establish a coherent narrative of the dark past which is acceptable to perpetrators, victims and bystanders. After all, Durkheims' theory on the social functions of criminal law and punishment implies that criminal law enforcement resonates in the moral fabric of the society in which it operates.

The nagging question is whether all these formidable challenges do not strain the limited powers and capacities of criminal courts. Mark Osiel has observed that liberal criminal law enforcement, for several reasons, seems not fully equipped to appeal to a broader audience of divergent political and moral persuasions.³⁸ For one thing, liberal legal and political theory's emphasis on 'Enlightenment universalism' easily estranges and exasperates those harbouring other opinions.³⁹ Furthermore, liberal criminal trials with their well-intentioned meticulous assessments of the evidence and over-scrupulous procedures lack the dramatic qualities to captivate the public audience. In Osiel's words: They are plainly boring.⁴⁰ As a consequence, in the clash of narratives, defense counsel easily obtains the edge over prosecutors who feel bound to play by the rules. In his fascinating account of the Barbie trial, Alain Finkelkraut points at this anomaly:

'The plaintiff's lawyers, duty bound by the past, (...) made people yawn, by rehashing, ad nauseam, the same tired formulas. (...) Mr. Vergès (Barbie's defense counsel), on the other hand, was free. No debt tied him to the past; he was in a position to plant suspense in the heart of the ceremony of remembering and to substitute the delicious thrill of the event for the meticulous reassessment of the facts.'⁴¹

We face therefore the paradoxical situation that the very qualities of liberal law theory – its Universalist ethical pretences and its focus on the rights of the defendant – may well hamper its capacity to convey moral messages to a broader public. Osiel observes theses difficulties, but argues that they can and should be overcome, witness the title of his essay. In the context of the legal assessment of mass criminality, he submits that courts have no other option than to exceed the narrow limits of the law and portray the wider historical background.⁴²

³⁷ M. Damaska, 'What is the Point of International Criminal Justice?' 83 *Chicago-Kent Law Review* (2008), 329.

³⁸ Mark J. Osiel, 'In Defense of Liberal Show Trials – Nuremberg and Beyond', in: G. Mettraux, *Perspectives on the Nuremberg Trial*, Oxford 2008, 704 – 725.

³⁹ Osiel, n. 38, 712.

⁴⁰ Osiel, n. 38, 714.

⁴¹ Alain Finkelkraut, *Remembering in Vain; The Klaus Barbie Trial & Crimes Against Humanity*, Columbia University Press 1992, 65.

⁴² Osiel, n. 38, 719: 'if courts are to influence collective memory of such historical episodes in persuasive ways, they must admit a wider range of evidence and argument than are often cognizable within strictly legal terms.'

More fundamental is the criticism of Hannah Arendt who admonished courts not to engage in any attempts to write definitive historical records of mass atrocities. Commenting on the Eichmann trial during which, according to Arendt, the chief prosecutor and Prime Minister Ben-Gurion were carried away by their zeal to fit Eichmann into the broader context of eternal anti-Semitism, she told the courts to stick to their jobs, viz. the assessment of the guilt or innocence of the accused:

‘The purpose of the trial is to render justice and nothing else; even the noblest of ulterior purposes – the making of a record of the Hitler regime which would withstand the test of history – can only detract from the law’s main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment.’⁴³

Apart from delivering “bad history and cheap rhetoric”, courts’ indulging in producing historical records is unfair towards the accused and violates principles of due process.⁴⁴ The pertinent question is whether Arendt’s critical observations refer to structural impediments or have been superseded. After all, her comments have been written some 50 years ago and concerned a domestic trial by a court which could not help being partisan and heavily involved in the aftermath of arguably the most dramatic event in the history of mankind.

Discussing the legacy of international criminal tribunals, Richard Ashby Wilson has challenged the Arendt-thesis at different conceptual levels.⁴⁵ First, he argues that, since international criminal tribunals are called to assess structural mass criminality, it is inevitable that they touch upon the broader historical context.⁴⁶ Next, he observes that international criminal tribunals have performed well and arguably have delivered better quality than domestic courts, precisely because they are more detached and have succeeded in maintaining their impartiality.⁴⁷ Elaborating on this final aspect, Ashby Wilson describes how the judges of the ICTY, not privy to the political and historical background of the former-Yugoslavia, invited scholars in history as expert-witnesses, in order to familiarize themselves with the context.⁴⁸ It is highly probable that this procedure has contributed to the quality of the historical record and has increased its moral authority as an example of historical impartiality.⁴⁹

⁴³ Arendt, n. 30, 253.

⁴⁴ Arendt, n. 30, 221.

⁴⁵ Richard Ashby Wilson, ‘Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia’, *Human Rights Quarterly* 27 (2005), 908-942.

⁴⁶ Referring to Dworkin’s ‘narrative theories of law’, Ashby Wilson comments that ‘there is significant evidence to support this theory, since even a cursory examination of judgments reveals that courts, *especially when dealing with human rights violations committed on a massive scale*, cannot escape interpreting history.’ (italics added); Ashby Wilson, n. 45, 918.

⁴⁷ Ashby Wilson, n. 45, 921: ‘As a result of its autonomy from nation-states, the ICTY has resisted being drawn into constructing facile collective representations (the suffering of all Bosnian Muslims, the guilt of all Serbs etc.) necessary for nationalist mythology.’

⁴⁸ Ashby Wilson, n. 45, 927/928.

⁴⁹ The first judgments of the ICTY and the ICTR start with a rather extensive survey of the historical background of the respective conflicts, compare *Prosecutor v. Tadić*, Opinion and Judgment, Case No. IT-94-I-T, 7 May 1997, §§ 55-126 and *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T, 2 September 1998, §§ 78 – 129.

To summarize the previous arguments: norm expression presupposes that courts can reach out to the broader public – either the stake holders, directly involved in the (former) conflict, or ‘humanity at large’, or both - and provide them with a consistent narrative. In case of mass violations of human rights, it is indispensable that courts engage in historical accounts, because without some historical context neither system criminality, nor international crimes can be properly understood. International criminal tribunals are better equipped to write historical accounts than domestic courts, because they are able to resist the temptation of getting involved in partisan disputes.

If we agree that norm expression is an important aim of international criminal justice, it follows that we should also accept the primacy of international criminal tribunals. At the end of the day, Hannah Arendt may thus be perfectly right in defending the priority of international tribunals in the prosecution and trial of crimes against humanity, but she would be unable to subscribe to the reasons I have adduced to sustain that argument.