

The Myth of ‘International Crimes’: Dialectics and International Criminal Law

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Abstract

The label of 'international crime' for genocide, crimes against humanity and war crimes appears to be universally or at least widely accepted and casting doubt regarding this determination is considered a near transgression for an international (criminal) lawyer. The way international (criminal) lawyers label a crime influences the way they present it, their readers perceive it and the academic community reproduces it. Ultimately, repeated references to the presupposed 'international nature' influence the evolution of international (customary) law, blur the line between the 'international' and the 'national' and create an amalgam of wishful thinking, political aspirations, prosecutorial necessities and the evolution of substantive (criminal) law. This article scrutinizes why the current doctrine singles out a certain category of criminalized human rights abuses as 'international' and questions if genocide, crimes against humanity and war crimes should really be viewed as 'international crimes', while murder, theft or sexual abuse are largely being considered as 'national crimes' or 'ordinary crimes'. It concludes that there is no substantive reason for classifying these crimes as 'international': they are per se no threat to peace; they don't share a contextual element; war crimes and genocide are not per se determined by the scale of the abuses; implication of the state or state-like entities is typical for human rights abuses in general and not only the so-called 'international crimes'. However, common to all three crimes is the (perceived) need and wish for an international response to the commission of the crimes in question. If the State is implicated in the commission and the cover-up of some of atrocities, the 'international community' has reason to fear that accountability for and punishment of these crimes cannot be achieved on the national level. 'International prosecutions' of 'national crimes' can therefore be considered legal and legitimate under limited circumstances.

A. Introduction: A ‘Crime Under International Law’ or an ‘International Crime’

The ‘Convention on the Prevention and Punishment of the Crime of Genocide’¹ (Genocide Convention) states in Art. 1: “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a *crime under international law*² which they undertake to prevent and punish.” The Genocide Convention is certainly the most famous international convention declaring a behavior as a criminal offence by virtue of international law. Besides being considered as ‘crimes under international law’ genocide, crimes against humanity and war crimes – as enumerated in Art. 5 (1) (a)-(c) of the Rome Statute³ – are most commonly labeled as ‘international crimes’ or as prominently laid down in the preamble of the same Statute as “the most serious crimes of concern to the international community⁴ as a whole”⁵. These labels imply a powerful stigmatization and

¹ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277, 280 [Genocide Convention].

² Emphasis added.

³ *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 3. [Rome Statute]. The crime of aggression will not be addressed as it is in many aspects different from the other crimes enumerated in Art. 5. Furthermore, it is acknowledged that other crimes e.g. torture, acts of terrorism or piracy are sometimes labeled as ‘international crimes’. While there is no consensus (see e.g. list provided for by A. Cassese, *International Criminal Law*, 2nd ed. (2008), 12. See also the extensive list provided for by C. Bassiouni, *Introduction to International Criminal Law* (2003), 136–226 [Bassiouni, 2003]) on the contours of the debated label – not to speak of an agreed definition (Bassiouni, 2003, 111) – it seems obvious that only a tiny part of abuses of internationally recognized human rights are commonly labeled in such a manner.

⁴ For more information on the concept of ‘international community’ see A. Paulus, *Die Internationale Gemeinschaft im Völkerrecht* (2001).

⁵ Sometimes those crimes are also referred to as ‘crimes against the international community’ or as ‘crimes against Peace and Security of Mankind’ as laid down in the ‘Draft Code of Crimes against the Peace and Security of Mankind’, text adopted by the International Law Commission in 1996, available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1996.pdf (last visited 25 August 2011). The term ‘international crime’ appears likewise in Art. 19 of the ‘Preliminary Draft Articles on State Responsibility’ of the International Law Commission published in January 1997, available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_1996.pdf (last visited 25 August 2011). Since the final ‘Draft Articles on State Responsibility of Internationally wrongful acts’, published in

rightfully recall the atrocious nature of genocide, crimes against humanity and war crimes. It can be assumed – not forgetting the failure of the international community to react to the genocide in Rwanda⁶ – that they shock the “conscience of humanity”⁷ or, if such a notion exists, a “universal conscience”⁸. The label of ‘international crime’ appears to be universally or at least widely accepted and casting doubts regarding this determination is a near transgression for an international criminal lawyer.⁹ However, why a certain category of criminalized human rights abuses is being singled out as ‘international’ while others are not should be scrutinized. One has to keep in mind that criminal law, for good reason, is most naturally conceived as being a State prerogative. Most Nation States possess a highly developed body of law, and a distinguished and highly differentiated doctrine and jurisprudence. Moreover, the lower costs involved in national prosecutions, the gathering of evidence, the hearing of witnesses, and the enforcement of the sentence clearly benefit from keeping criminal law at the national (or even regional) level.¹⁰ Furthermore, the national administration of justice guarantees a more democratic legitimization¹¹ and might thereby increase

2001, available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf (last visited 25 August 2011) do not contain the term anymore this aspect will not be treated in the following.

⁶ See R. Dallaire, *Shake Hands with the Devil* (2004).

⁷ *Rome Statute*, Preamble.

⁸ D. Orentlicher, ‘Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles’, 92 *Georgetown Journal of International Law* (2004) 6, 1057, 1117.

⁹ Tallgren puts it as follows: “The unambiguously devastating quantity and quality of the suffering of the victims of serious international crimes calls for intuitive-moralistic answers, in the manner of certain things are simply wrong and ought to be punished. And this we do believe. To feel compelled nevertheless to subject also international criminal law to the question ‘why’ bears the risk of being misunderstood, the risk of being defined in terms of for or against the violence and injustice the crimes represent.” see I. Tallgren, ‘The Sensibility and Sense of International Criminal Law’, 13 *European Journal of International Law* (2002) 3, 561, 564. C. Prittitz even stresses a quasi-religious belief in International Criminal Law: C. Prittitz, ‘Internationales Strafrecht: Die Zukunft einer Illusion?’, in 11 *Jahrbuch für Recht und Ethik* (2003), 469, 471. Similarly, Koskenniemi states: “[...] I often wonder to what extent international law is becoming a political theology in Europe [...]”, M. Koskenniemi, ‘International Law in Europe: Between Tradition and Renewal’ 16 *European Journal of International Law* (2005) 1, 113, 120 [Koskenniemi, 2005].

¹⁰ M. Bergsmo, O. Bekou & A. Jones, ‘Complementarity After Kampala: Capacity Building and the ICC’s Legal Tools’, 2 *Goettingen Journal of International Law* (2010) 2, 791, 800.

¹¹ Orentlicher, *supra* note 8.

acceptance of the judgments rendered.¹² Nevertheless and most surprisingly, the ‘international’ nature of the crimes enumerated above appears to be taken for granted. But why – apart from its emanation from international law – should genocide, crimes against humanity and war crimes be considered as ‘international crimes’, while murder, theft or sexual abuse are considered to be ‘national crimes’ or ‘ordinary crimes’?¹³ In other words, should a behavior be labeled as an ‘international crime’ for the sole reason that States agreed to include it in an international convention? What if the community of States one day decides to universally condemn a simple theft or an armed robbery (not occurring on the high seas)? Should one then consider theft and armed robbery as ‘international crimes’? Jescheck,¹⁴ the well-respected scholar of international criminal law, once advanced the following three criteria which are to be satisfied to attribute the label of ‘international crime’:

1. The criminal norm has to emanate directly from international (conventional or customary)¹⁵ law;
2. There have to be provisions allowing prosecution by international courts or third States (on the basis of universal jurisdiction); and
3. The international status requires bindingness on a wide majority of States.

¹² See P. Schneider, ‘Menschenrechtsschutz durch Internationale Strafgerichte: Nützlich oder schädlich? Wirksam oder ineffektiv?’, in S. B. Gareis & G. Geiger (eds), *Internationaler Schutz der Menschenrechte* (2009), 81; J. N. Clark, ‘Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation’, 20 *European Journal of International Law* (2009) 2, 415, 423.

¹³ The label of ‘ordinary crime’ is an unfortunate one as it might appear a belittlement of the crimes committed. As a contrasting label to ‘international crime’ and in line with the broader consensus it should be kept for the following discussion.

¹⁴ H.-H. Jescheck, ‘International Crimes’, in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, Volume II (1992), 1119, 1120.

¹⁵ Cassese recalls that the recognition of international crimes as ‘international crimes’ will in general be achieved through the creation of customary international law since ratification of international conventions rarely achieves the necessary universality; see Cassese, *supra* note 3, 12. See also C. Kreß, ‘Universal Jurisdiction over International Crimes and the *Institut de Droit International*’, 4 *Journal of International Criminal Justice* (2006) 3, 561, 566 [Kreß, 2006].

These clear criteria most certainly allow for an appraisal of what is to be seen as an 'international crime' at a given moment in history. If one applies the three criteria to genocide, crimes against humanity and war crimes, those crimes would in fact rightly be seen and designated as 'international crimes'. Murder, theft or sexual abuse, on the other hand, would not merit such an 'international' label. Unfortunately, the criteria advanced by Jescheck allow only for a snapshot of what is currently high on the international agenda.¹⁶ He, deliberately or not, does not advance any substantive criteria to determine which crimes merit the adjective 'international'. He leaves out which characteristic features of the *crime itself* ought to be taken into consideration. As will be shown, he merits being applauded for offering such restrictive, precise and clearly articulated contours of the label of 'international crimes'. However, there would not be any basis and need for this article if the label had always been used as cautiously as done by Jescheck. One has to notice that, while there is certainly no agreed-upon definition, the 'international' label is often (implicitly or explicitly) ascribed to genocide, crimes against humanity and war crimes for supposedly existing characteristic features "elevating" them to 'international crimes' and delimiting them from 'ordinary crimes'. It is the author's opinion that such features are non-existent and that therefore the label of 'international crime' should either be used in the strict formalistic sense advanced by Jescheck or be dismissed as misleading and unfit at least for the legal debate. Since the article cannot provide an in-depth analysis of the phenomenon of labeling in international criminal law, it will confine itself to some brief remarks. In the first part (B.), some short reflections about the importance of labeling in international law will be provided. The second part (C.) will be devoted to questions about the label of 'international crime' and the current discrepancy mentioned above. In the third part (D.), it will be advanced that turning away from the label should not be perceived as a setback since international prosecutions of crimes

¹⁶ As Ratner puts it: "to entail such accountability, the international community must share a consensus on the gravity of these offences [...]", S. R. Ratner, 'The Schizophrenias of International Criminal Law', 33 *Texas International Law Journal* (1998) 2, 237, 241; Kittichaisarre proclaims: „It is the international community of nations that determines which crimes fall within this definition [referring to the broad definition of the US Military Tribunal at Nuremberg] in light of the latest developments in law, morality, and the sense of criminal justice at the relevant time", K. Kittichaisarre, *International Criminal Law* (2001), 3.

labeled as ‘national crimes’ or ‘ordinary crimes’ can be legal and legitimated. The fourth part (E.) will briefly reflect on some thorny issues in contemporary international criminal law to suggest that a change of perspective might be helpful. Still one has to acknowledge the statement made by Blutman:

“One can hardly fight against linguistic conventions as these do not necessarily obey the rules of semantics and logic, but are evolving in everyday discourse in an ‘organic’ way.”¹⁷

B. Why Labeling Matters!

Lawyers, especially those coming from a civil law background, are – in general – not so much prone to reflect on the influence labeling and discourse can have on the evolution of the normative order. International law and especially customary international law, however, cannot be understood without appreciating how discourse affects the creation and interpretation of norms.

I. Discourse and the International Legal Order

While legal discourse influences also the interpretation of conventional law, it is especially the creation of customary norms that is affected by scholarly and political debate. Koskenniemi rightly remarked:

“What is being put forward as significant and what gets pushed into darkness is determined by the choice of the language through which the matter is looked at, and which provides the basis for the application of a particular kind of law and legal expertise.”¹⁸

Concerning customary international law, defined by Art. 38 of the ICJ-Statute as “general practice accepted as law”, two remarks should indicate the way discursive elements play an intrinsic part in norm creation.

¹⁷ L. Blutman, ‘In the Trap of a Legal Metaphor: International Soft Law’, 59 *International and Comparative Law Quarterly* (2010) 3, 605, 605.

¹⁸ M. Koskenniemi, ‘The Politics of International Law – 20 Years Later’, 20 *European Journal of International Law* (2009) 1, 7, 11.

The first remark being of *de jure* relevance, the second relating to a *de facto* influence.

While every student of international law is taught that customary international law is one of the three (main) sources of international law there has always been an intensive scholarly debate on how to identify customary norms and who should be bound by them¹⁹ under which conditions.²⁰ Despite the disagreement on the exact contours of what is to be perceived as customary international law some norms appear to be widely recognized as amounting to *general practice accepted as law*: the prohibition of genocide,²¹ the prohibition of use of force,²² the prohibition of torture,²³ or the immunity of sitting heads of State²⁴ are some prominent examples. Taking the definition advanced by the ICJ-Statute seriously, one might wonder why. How is it possible to establish a general practice as proof of a norm that demands for *abstention*?²⁵ In fact, it is the reaction to acts of genocide or torture and the expressed discontent and disapproval that serves as a (partial) proof of the customary law nature. Furthermore, one should

¹⁹ Main question being the binding effect on states not consenting to a new norm but without persistently objecting to it, see J. P. Kelly, 'The Twilight of Customary International Law', 40 *Virginia Journal of International Law* (2000) 2, 449, 473 and 508. See also P. Weil, 'Towards Relative Normativity in International Law?', 77 *American Journal of International Law* (1983) 3, 413.

²⁰ See as examples: A. Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making', 12 *Australian Year Book of International Law* (1988-1989) 22; Kelly, *supra* note 19, 449.

²¹ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports 2007, 43, 110, para. 161. It is even by some considered in principle as an accepted norm of *ius cogens*, see L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*, (1988), 466.

²² *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, ICJ Reports 1986, 14, 27, para. 34.

²³ *Prosecutor v. Delalić, Mucić, Delić, Landžo*, Judgment, IT-96-21-T, International Criminal Tribunal for the Former Yugoslavia, 16 November 1998, 166, para. 454.

²⁴ Concerning the parallel rule of immunity of foreign ministers see *Case concerning the Arrest Warrant of 11 April 2000, (Democratic Republic of Congo v. Belgium)*, Judgment of 14 February 2002, ICJ Reports 2002, 3, 21 para. 53 [Arrest Warrant Case].

²⁵ See also B. Simma & P. Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', 12 *Australian Year Book of International Law* (1988-1989) 82, 103.

take into consideration that a mere empirical observation of practice without the discursive entourage does not allow one to distinguish between a State behavior in line with a customary norm in formation and such behavior being at first glance contrary to it, but which could also be seen as an exception to the general norm in formation.²⁶ A good example is the proclaimed right to pre-emptive defense evoked in order to legitimize the 2003 Iraq intervention.²⁷ Without the discursive reference to UN SC Res. 678 (1990), pre-emptive needs and humanitarian grounds, how would it be possible to classify the American behavior? Should one consider it as an American refusal to accept the customary rule of the prohibition of the use of force or as a general acceptance of exactly this rule subject to certain exceptions (in this case permission by the Security Council, pre-emption or the so-called humanitarian intervention)? One might therefore conclude that discourse is an inherent part of the assessment of customary international law.²⁸

But even if one refuses to widen the scope of what is to be considered as a basis for assessing customary international norms one cannot turn a blind eye to the *de facto* influence that discourse has on the evolution of customary norms. A reason for this can be seen in one of the characteristics of the evolution as described by Orentlicher:

“Strict regard for existing law would inevitably limit the ability of domestic legislatures and courts to contribute to the development of universal jurisdiction in the same way they contribute to other areas of customary international law. For it is precisely through the emergence of state practice that at first represents a departure from established norms that new rules of customary law are established.”²⁹

²⁶ Kelly, *supra* note 19, 500. See also Simma & Alston, *supra* note 25, 97; K. F. Gärditz, ‘Ungeschriebenes Völkerrecht durch Systembildung’, 45 *Archiv des Völkerrechts* (2007) 1, 1, 27.

²⁷ See S. D. Murphy, ‘Assessing the Legality of Invading Iraq’, in 92 *Georgetown Law Journal* (2004) 2, 173, 174.

²⁸ See also International Law Association, ‘Final Report of the Committee on Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law’ (2000), available at <http://www.ila-hq.org/download.cfm/docid/A709CDEB-92D6-4CFA-A61C4CA30217F376> (last visited 25 August 2011), 14; Kreß, 2006, *supra* note 15, 573.

²⁹ Orentlicher, *supra* note 8, 1110.

A departure from established norms is a risky endeavor as the State puts itself in danger of being accused of unlawful behavior.³⁰ Such steps are consequently accompanied by a strong discourse with good arguments put forward, to avoid the impression of deliberate violation of international law. Furthermore, not only States use discourse to boost progressive law-making. Human rights activists and lawyers,³¹ as well as international judges³² are well known to push the applicable law further and further. To conclude, one might argue that discourse matters!

II. 'International Crimes' in the International Legal Discourse

It should be noted from the outset that the label 'international crime' or its synonyms, while omnipresent in doctrine and jurisprudence, is totally absent from the specific operative parts of international conventions. Nevertheless, it seems that there have rarely been labels as influential and widely used in international legal discourse as the label of 'international crime' and its synonyms. It makes its appearance, for instance in the debate about universal jurisdiction in *absentia*,³³ immunity of heads of States and government,³⁴ and the legality of amnesties in case of genocide, crimes

³⁰ Gärditz, *supra* note 26, 23.

³¹ Kelly, *supra* note 19, 469 speaking of a "messianic quest". See also remarks by K. Anderson, 'The Rise of International Criminal Law: Intended and Unintended Consequences', 20 *European Journal of International Law* (2009) 2, 331, 349-353.

³² M. Koskeniemi & P. Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *Leiden Journal of International Law* (2002) 3, 553, 567: "[...] ICTY judges manifest a striking *Missionsbewusstsein* [...]".

³³ See references to "international crimes" in *Arrest Warrant Case*, *supra* note 24, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 50 and "crimes regarded as the most heinous by the international community", para. 60. See also M. Vajda, 'The 2009 AIDP's Resolution on Universal Jurisdiction – An Epitaph or a Revival Call?!', 10 *International Criminal Law Review* (2010) 3, 325, 331. As emblematic example see B. Kuschnik, 'Humaneness, Humankind and Crimes against Humanity', 2 *Goettingen Journal of International Law* (2010) 2, 501, 510: "[...] crimes against humanity are generally regarded as crimes, which due to their heinous nature shock the collective conscience of the peoples and therefore are of concern for the international community as a whole, *resulting* in the right for each state to prosecute crimes against humanity under the universality principle" (emphasis added).

³⁴ See reference to "international crimes" in *Arrest Warrant Case*, *supra* note 24, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 74 and Dissenting Opinion of Judge *ad hoc* van den Wyngaert, para. 27.

against humanity and war crimes.³⁵ Recently, the question of what differentiates crimes against humanity – as one example of ‘international crimes’ – from ‘ordinary crimes’ made a renewed appearance at the International Criminal Court (ICC) when Judge Kaul in a Dissenting Opinion questioned the majority opinion of the Pre-Trial Chamber I allowing further investigations into the post-election violence in Kenya.³⁶

C. Questioning the Label

Labels can be questioned for a multitude of reasons and from a wide variety of angles. One could look at the use of discourse as means of (western) struggle for dominance.³⁷ One could also reflect on the rising influence of non-governmental actors, like NGOs,³⁸ on international law-making and agenda-setting. Furthermore, it seems equally important to question the way a certain State’s behavior is stigmatized as genocide, the debate surrounding Darfur³⁹ or the Armenian-Turkish debate being two well-known examples.⁴⁰ However, for the purpose of this article, the lens through which the label is to be questioned is the so-called “*Rechtsgutstheorie*” which is central to German criminal law thinking.

I. The “*Rechtsgutstheorie*” as a Tool for Questioning the Label

The German “*Rechtsgutstheorie*” defines the function of criminal law as the protection of legal goods (*Rechtsgüter*). This, in German doctrine and jurisprudence widely accepted theory allows for critical reflections on what

³⁵ See e.g. G. Hafner *et al.*, ‘A Response to the American view as Presented by Ruth Wedgwood’, 10 *European Journal of International Law* (1999) 1, 108, 112.

³⁶ Dissenting Opinion Judge Kaul, as an annex to the *Decision Pursuant Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, ICC-01/09-19 (Pre-Trial Chamber II), 31 March 2010, para. 10.

³⁷ See for example Koskenniemi, 2005, *supra* note 9, 123.

³⁸ See examples mentioned by Kuschnik, *supra* note 33, 503.

³⁹ See M. L. Wade, ‘Genocide: The Criminal Law between Truth and Justice’, 19 *International Criminal Justice Review* (2009) 2, 150, 154.

⁴⁰ See e.g. P. Boghossian, ‘The concept of genocide’, 12 *Journal of Genocide Research* (2010) 1, 69.

sorts of behavior can legitimately be criminalized.⁴¹ There is undoubtedly agreement that the commission of genocide, crimes against humanity and war crimes can and should be considered as criminal offences. In this respect, the “*Rechtsgutstheorie*” does not reveal anything new. Before turning to the second aspect of the theory and for the sake of completeness one might add two brief remarks. First, the determination of a legal good is a necessary condition for criminalization but surely not sufficient. It has further to be established that the criminalization serves the protection of the respective legal good, in other words, that the purposes of punishment can be achieved.⁴² Second, criminal law is not only focused on criminalizing direct attacks on the legal good like for instant a murder, an assault or a theft. It can also legitimately encompass behavior posing a risk to these legal goods. A classical example on the national level is the offence of “driving while under the influence of alcohol” which is considered as a (abstract) threat to life and limb of others.

For the present purposes, the second aspect of the *Rechtsgutstheorie* has to be looked at more closely. The *Rechtsgutstheorie* allows for a clearer distinction between and delimitation of different offences as each offence must be traced back to the legal good, which it serves to protect.⁴³ It can thereby be used as a lens through which the label of ‘international crime’ and the discrepancy occurring in comparison to other criminalized human rights abuses could be evaluated. The discrepancy of labels would be validated if the criminalization of genocide, crimes against humanity and war crimes serves the protection of distinct legal goods (II.) or if the legal goods are threatened in a different way (III.) than by ‘ordinary’ human rights abuses or ‘national crimes’. One general remark should be brought in at this juncture. To serve as a meaningful label for a group of crimes, the crimes labeled as ‘international’ must not only be distinguishable from the so-called ‘national crimes’. The crimes also have to share the characteristic feature(s) delimiting them from others.

⁴¹ For a comprehensive overview see C. C. Lauterwein, *The Limits of Criminal Law*, (2010), 5-40.

⁴² Concerning the difficult question which purposes of punishment are to be pursued in international criminal law and if those can be achieved see e.g. M. Damaška, ‘What is the Point of International Criminal Justice?’, 83 *Chicago-Kent Law Review* (2008) 1, 329, 331-339.

⁴³ Lauterwein, *supra* note 41, 30.

II. The (Desperate) Search for a Distinct Legal Good

The label ‘international crime’ for genocide, crimes against humanity and war crimes is – applying the lens of the *Rechtsgutstheorie* – the correct one if it can be shown that the criminalization serves the protection of a distinct legal good.⁴⁴ As a starting point for the following reflections, one should glance at the preamble of the Rome Statute. Two indications in the preamble are noteworthy. Referring to “unimaginable atrocities that deeply shock the conscience of humanity” indicates that the mere extensive or atrocious nature and gravity of the crime elevates genocide, crimes against humanity and war crimes to ‘international crimes’. Second, it recognizes “that such grave crimes threaten the peace, security and well-being of the world”. To this can be added the characterization made in the Genocide Convention, examined immediately below.

1. ‘Great Losses on Humanity’ or ‘the Unimaginable Atrocities’

Already as early as 1948, the preamble of the Genocide Convention stated that: “*genocide has inflicted great losses on humanity*”⁴⁵. Similar ideas can be found in the early work of Arendt who stated in 1963: “And, finally, and most important, there were objections to the charge itself, that Eichmann had committed crimes ‘against the Jewish People,’ instead of ‘against humanity,’ [...]”⁴⁶. It has to be clearly stated from the outset that the term “humanity” is ambiguous and allows for different interpretations. This is reflected in two different German translations of the term

⁴⁴ See also E.-J. Lampe, *Verbrechen gegen die Menschlichkeit*, in H. J. Hirsch *et al.* (eds), *Festschrift für Günter Kohlmann zum 70. Geburtstag* (2003), 147, 155; G. Manske, *Verbrechen gegen die Menschlichkeit als Verbrechen an der Menschheit*, (2003), 272-273.

⁴⁵ Genocide Convention, *supra* note 1, Preamble, 278.

⁴⁶ H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, (1st ed. 1963), 233. Pointing in the same direction but with a clearly dangerous connotation is the description of the perpetrators as ‘enemies of mankind’ or ‘hostis humanis’, see e.g. D. N. Nsereko, ‘The Role of the International Criminal Tribunals in the Promotion of Peace and Justice: The Case of the International Criminal Court’, 19 *Criminal Law Forum* (2008) 3-4, 373, 381.

'humanity':⁴⁷ The first translation being the term *Menschheit* implying reference to the collectivity of human beings. In a second sense, the term *Menschlichkeit* refers to the intrinsic human value of each individual and is thereby closely related to the concept of human dignity.⁴⁸

For the sake of structuring the argument, one should start with the latter. Admittedly, the crime of genocide is in clear disrespect of human dignity and the right to individual and collective existence.⁴⁹ The same holds true for crimes against humanity since the acts committed, such as murder, rape or torture, are truly vicious and appalling. But can one State the same for all sorts of war crimes? Is it really degrading and inhumane to make "improper use of a flag of truce"? Besides, one has to remember that life and limb as well as human dignity are also protected by a multitude of international conventions. But does that lead us to consider despicable and clearly degrading acts such as the commission of hate crimes or acts of cannibalism as 'international crimes'. Certainly, it would not. Bassiouni⁵⁰ therefore rightly stated in 1986 that the penal proscriptions of war crimes, crimes against humanity, and genocide protect basic human rights.⁵¹ Apparently in the same logic, Kaleck *et al.*⁵² choose the expression "human rights crimes"⁵³. In fact, the inhumane nature is (unfortunately) not limited to genocide, crimes against humanity and war crimes. It is a characteristic feature of a multitude of crimes. In other words, genocide, crimes against

⁴⁷ See H. Vest, 'Humanitätsverbrechen – Herausforderung für das Individualstrafrecht?', 113 *Zeitschrift für die gesamte Strafrechtswissenschaft* (2001) 3, 457, 460. See also Lampe, *supra* note 44, 150; Kuschnik, *supra* note 33, 511-515.

⁴⁸ See also Kuschik, *supra* note 33, 509.

⁴⁹ See Ratner, *supra* note 16, 238; K. Ambos, *Internationales Strafrecht*, 2nd ed. (2008), 84 [Ambos, 2008]. For a discussion on the protection of collective rights in case of crimes against humanity see A. Gil Gil, 'Die Tatbestände der Verbrechen gegen die Menschlichkeit und des Völkermordes im Römischen Statut des Internationalen Strafgerichtshofs', in 112 *Zeitschrift für die gesamte Strafrechtswissenschaft* (2000) 2, 381, 382 (with further references).

⁵⁰ C. Bassiouni (ed.), *International Criminal Law, Volume I* (1st ed. 1986), 19-21. He recognized however, that an international element is necessary, without elevating this element to a distinct protected value.

⁵¹ Similar Ratner, *supra* note 16, 238; C. Möller, *Völkerstrafrecht und Internationaler Strafgerichtshof – kriminologische, straftheoretische und rechtspolitische Aspekte* (2000), 419.

⁵² W. Kaleck *et al.* (eds), *International Prosecution of Human Rights Crimes* (2007).

⁵³ See also T. Smith, 'Moral Hazard and Humanitarian Law: The International Criminal Court and the Limits of Legalism', 39 *International Politics* (2002) 2, 175, 176.

humanity and war crimes share the inhumane nature with other crimes that one would not label ‘international crimes’.⁵⁴ That is why the definition for ‘international crimes’ advanced by Cassese, who defines them as: “[...] rules [...] intended to protect values considered important by the whole international community [...]”⁵⁵, cannot suffice as it neither specifies from what or whom the values are to be protected nor does it explain which values ought to be in the focus.

Let us now turn to the collectivistic understanding of humanity (*Menschheit*). Such an interpretation of the term hints to a quantitative explanation of why some crimes are elevated to ‘international crimes’.⁵⁶ From a phenomenological viewpoint one could easily detect such a pattern of mass violence in the prominent cases at the ICTY, ICTR and nowadays at the ICC and one is thus inclined to read it into the norm itself. This pattern will certainly be more accentuated in the future due to the gravity criterion laid down in 17 (1) (d) of the Rome Statute.⁵⁷ It is, however, far from clear if the scale of the acts committed really forms the cornerstone of the crimes as defined in Arts 6 to 8 of the Rome Statute. While there is agreement that the incriminated act of the perpetrator does not presuppose an important quantitative dimension,⁵⁸ it remains ambiguous whether a massive circumstantial occurrence of similar acts is a *conditio sine qua non* or whether the pattern determines only the jurisdiction of the international court or tribunal in question. Emblematic of this distinction is Art. 8 (1) of the Rome Statute. It proclaims:

“The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”

⁵⁴ See also Kaul, *supra* note 36, para. 52; Kuschnik, *supra* note 33, 511.

⁵⁵ Cassese, *supra* note 3, 11.

⁵⁶ As a parenthesis one ought to recall that if this were the case, piracy and torture, would certainly no longer merit the international label.

⁵⁷ See S. SaCouto & K. Cleary, ‘The Gravity Threshold of the International Criminal Court’, 23 *American University International Law Review* (2007) 5, 807, 818.

⁵⁸ G. Evans, *The Responsibility to Protect* (2008), 12; G. Werle, *Völkerstrafrecht*, 2nd ed. (2007), 279; Ambos, 2008, *supra* note 49, 205; G. Fletcher, ‘The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt’, 111 *The Yale Law Journal* (2002) 7, 1499, 1525; Lampe, *supra* note 44, 156; Manske, *supra* note 44, 295; Boghossian, *supra* note 40, 71; W. Schabas, *Genocide in International Law*, 2nd ed. (2009), 179.

At first sight, one might be inclined to read Art. 8 as if it were laying down a quantitative requirement. However, Art. 8 (1) only determines and limits the jurisdiction of the court.⁵⁹ A single wrongful act enumerated in Art. 8 (2) in an otherwise 'clean war' can amount to a war crime.⁶⁰ A highly debated issue is also whether genocide is conceivable as a singular event.⁶¹ Art. 2 of the Genocide Convention defines it as follows: "*In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such.*" The definition in Art. 6 of the Rome Statute is a verbatim copy of the original definition, as well as the definition in Art. 4 (2) of the ICTY-Statute⁶² and Art. 2 (2) of the ICTR-Statute⁶³ and does not remove any ambiguity. The Elements of Crime supplementing the Rome Statute hint, however, in the direction of a quantitative element.⁶⁴ Admittedly, an expressive requirement of scale can be found in Art. 7 (1) of the Rome Statute stating that "*a widespread and systematic attack directed against*

⁵⁹ M. Cottier, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed. (1999), Art. 8, para. 9.

⁶⁰ Cassese, *supra* note 3, 101.

⁶¹ Pro: *Prosecutor v. Jelisić*, Judgment, IT.95-10-T (Trial Chamber I), International Criminal Tribunal for the Former Yugoslavia, 14 December 1999, para. 100; A. Cassese in A. Cassese *et al.* (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol. I, (2002), 349; Ambos, 2008, *supra* note 49, 209; Werle, *supra* note 58, 286. Contra: Schabas, *supra* note 58, 246. For an overview see L. McKay, 'Characterising the System of the International Criminal Court; An Exploration of the Role of the Court Through the Elements of Crimes and the Crime of Genocide', 6 *International Criminal Law Review* (2006) 2, 257.

⁶² *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, Annex to SC Res. 827, 25 May 1993 [ICTY-Statute].

⁶³ *Statute of the International Tribunal for Rwanda*, Annex to SC Res. 955, 8 November 1994 [ICTR-Statute].

⁶⁴ The Elements of crime specify Art. 6 of the Rome Statute by insisting on "a manifest pattern of similar conduct", Elements of Crimes (Art. 6) ICC-ASP/1/3(part II-B) (09.09.2002), available at <http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf> (last visited 25 August 2011). See also *Situation in Darfur, Sudan in the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir*, Second Decision on the Prosecution's Application for a Warrant of Arrest, ICC-02/05-01/09-94 (Pre-Trial Chamber I), 12 July 2010, para. 13. However, it is also stated that knowledge of the manifest pattern could be dispensable.

any civilian population” has to occur so that murders and rapes are elevated to crimes against humanity.⁶⁵ Art. 7 (2) (a) specifies that “‘Attack directed against any civilization population’ means a course of conduct involving multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack”. The quantitative dimension, while nowadays widely agreed upon, has not always been the characteristic feature of crimes against humanity.⁶⁶ In the aftermath of the Second World War, it was most prominently the close relationship with war and the crime of aggression that was emphasized as a characteristic feature of crimes against humanity. Later on, the jurisdictional threshold of the discriminatory intention gained attention. Art. 5 of the ICTY-Statute did not even evoke the scale of the acts committed and it was only the ICTY Appeals Chamber which helped to turn back the focus on the “widespread or systematic attack”-element.⁶⁷ What is important for the present discussion is that purely counting the number of casualties and the amount of rapes committed will take the debate nowhere.⁶⁸ It would be a cynical endeavor to try drawing the line between ‘international’ and ‘national’ crimes purely on the basis of the death toll (which is difficult to establish) or the number of women raped. How should one classify school massacres such as Columbine with twelve fatalities? Or how should one quantify a rape in comparison to murder?

What is therefore widely emphasized is not the numerical dimension but the circumstances of the crime or what is most commonly termed as the ‘contextual element’.⁶⁹ Even ignoring the fact that there is no real agreement on the contextual element of genocide, it is puzzling why one should focus on the “widespread or systematic attack” or the existence of a (non-) international armed conflict. The emphasis put on the contextual element is confusing and reflects the arbitrary manner of labeling. As has been shown on the one hand, the element of “widespread and systematic attack” comprises the repeated commission of acts regarded as illegal. On the other

⁶⁵ Cassese, *supra* note 3, 101.

⁶⁶ See R. Dixon, in Triffterer, *supra* note 59, Art. 7, para. 4. It could be argued that this element is only determining a jurisdictional threshold, see Kuschnik, *supra* note 33, 521.

⁶⁷ R. Dixon, in Triffterer, *supra* note 59, Art. 7, para. 5, *Prosecutor v. Tadić*, IT-94-1-A, Judgment of the Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, 15 July 1999, para. 249.

⁶⁸ See also Lampe, *supra* note 44, 156.

⁶⁹ See e.g. Schabas, *supra* note 58, 243; Werle, *supra* note 58, 39.

hand, the occurrence of an armed conflict is, while regrettable, a fact with no legal valuation. War crimes can be committed by every party to the conflict irrespective of the rules of the *ius ad bellum*.⁷⁰ The contextual elements for the two crimes are of a totally different nature.⁷¹ In fact, if one wants to explain the international nature by pointing to the contextual element, it is absurd to pick different ones. The contextual element is not a common characteristic of all so-called 'international crimes'.

2. 'The Threat to Peace'

Until now, the focus has been on values or, using the terminology of the '*Rechtsgutstheorie*', legal goods attributed to individuals and while there is agreement that those values are treated with contempt, it does not distinguish so-called 'international crimes' from other criminalized human rights abuses. A much more promising approach seems therefore to focus on a distinction made by Köhler.⁷² He rightly points out that there are on the one side legal goods accepted *by* the whole international community and on the other side legal goods accepted to be those *of* the whole international community.⁷³ The paradigmatic example for such an international legal good is 'international peace'.⁷⁴ Triffterer states that: "The peace and security of mankind were for a long time the only expressions summarizing the basic, inherent values of the community of nations which had to be protected in the interest of all, individuals and States alike"⁷⁵. Therefore, the

⁷⁰ See for an interesting analysis on the implications of the *ius ad bellum* on the *ius in bello*, R. Sloane, 'The Cost of Conflation: Preserving the Dualism of *Jus ad Bellum* and *Jus in Bello* in the Contemporary Law of War', 34 *Yale Journal of International Law* (2009) 1, 47 [Sloane, 2009].

⁷¹ See *Prosecutor v. Tadić*, *supra* note 67, para. 251.

⁷² M. Köhler, 'Zum Begriff des Völkerstrafrechts', 11 *Jahrbuch für Recht und Ethik*, (2003), 440. Contrary to this approach Villalpando speaks of "ethical values common to all humankind.", S. Villalpando, 'The Legal Dimension of the International Community: How Community Interests Are Protected in International Law', 21 *European Journal of International Law* (2010) 2, 387, 407.

⁷³ See Paulus, *supra* note 4, 253.

⁷⁴ Also Kreß, 2006, *supra* note 15, 567 alludes to "fundamental values of the community"; Villalpando, *supra* note 72, 407.

⁷⁵ Triffterer, in Triffterer, *supra* note 59, preamble, para. 11. See also: Werle, *supra* note 58, 40; Ambos, 2008, *supra* note 49, 83; K. Ambos, 'Möglichkeiten und Grenzen völkerstrafrechtlichen Rechtsgüterschutzes', in F. Neubacher & A. Klein, *Vom Recht der Macht zur Macht des Rechts?* (2006), 111; Tallgren, *supra* note 9, 586.

historically articulated close connection between these crimes and their (supposedly) negative effect on international peace and security should be addressed in the following section. Anderson argues that: “international criminal law and the ICC are efforts to address the ‘unstable’ world”⁷⁶. This declaration is in line with previous UN Security Council Resolutions declaring the commission of horrible crimes as ‘a threat to peace’⁷⁷ in accordance with Art. 39 of the UN Charter.⁷⁸

In order to gain significant results, the term ‘peace’ must be employed cautiously. To assess the exact scope of the notion of ‘peace’, the UN Charter, due to its universality and quasi-constitutional character, will provide the most relevant insights. Since the ICTY and ICTR were created by virtue of the powers conferred to the UN Security Council in Chapter VII and Arts 13(b) and 16 of the Rome Statute refer to this central chapter, Art. 39 of the UN Charter – as the key for operative measures to protect ‘peace’ – has to be examined closely. As Frowein and Krisch convincingly point out, the notion of ‘peace’ in Art. 39 is strictly focused on military conflicts in an inter-state relationship thus following a narrow concept of ‘peace’.⁷⁹ The narrow interpretation of the notion of ‘peace’ is balanced, however, by an extensive interpretation of the notion of ‘threat to peace’.⁸⁰ Applying this notion one can examine whether the presumption that these crimes are to be considered as a ‘threat to peace’, is compelling. To approach this question, one clarification is to be made from the outset. There is a difference between the commission of the crime as a ‘threat to peace’ and the non-prosecution⁸¹ of such crimes as a distinct ‘threat to peace’.⁸² Unfortunately,

⁷⁶ Anderson, *supra* note 31, 333. See also K. Kaikobad, ‘Crimes against International Peace and Security, Acts of Terrorism and Other Serious Crimes: A Theory on Distinction and Overlap’, 7 *International Criminal Law Review* (2007) 2-3, 187, 190; Vest, *supra* note 47, 464; Bassiouni, 2003, *supra* note 3, 114.

⁷⁷ See M. Bothe, in W. Vitzthum (ed.), *Völkerrecht*, 5th ed. (2010), 679-81.

⁷⁸ Ambos, 2008, *supra* note 49, 83.

⁷⁹ J. Frowein & N. Krisch, in B. Simma *et al.* (eds), *The Charter of the United Nations. A Commentary*, 2nd ed., (1995), 720. See also Bothe, *supra* note 77, 681; G. Gaja, ‘Réflexions sur le rôle du Conseil de Sécurité dans le nouvel ordre mondial’, *Revue Générale de Droit International Public* (1993), 297, 301.

⁸⁰ It therefore seems to be questionable that Werle proclaims international criminal law to provide protection of peace using a broad interpretation, see Werle, *supra* note 58, 55.

⁸¹ The author does not want to use the term ‘impunity’ as its contours are not totally clear and still open to debate.

⁸² See below Part D.

the UN Security Council Resolutions 827 and 955 creating the ICTY and ICTR are not entirely precise in this regard. In Resolution 955, the Security Council states:

“*Expressing once again its grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda,*

Determining that this situation continues to constitute a threat to international peace and security [...]”⁸³

This part shows that the UN Security Council sees the acts committed in Rwanda as a ‘threat to peace’. These atrocities could be legitimately called ‘international crimes’ as they threaten an international legal good, namely ‘international peace’. However, the assessments by the UN Security Council have to be looked at very cautiously. What the UN Security Council states is that the acts committed *in Rwanda* constitute a ‘threat to peace’. That is not to say that every occurrence of such crimes constitutes *ipso facto* a ‘threat to peace’.⁸⁴ A short look at the definition of the crimes recognized in Arts 6 to 8 of the Rome Statute may support this viewpoint. To begin with, none of the definitions explicitly make reference to ‘peace’ and ‘security’. Some of these provisions might even be counter-productive for a rapid transition to ‘peace’ – recalling the narrow definition of ‘peace’ as an international legal good recognized in international law. One should consider the following virtual example. A (not even necessarily) democratically inspired rebel group finds itself in an armed struggle with a tyrannical government. In order to avoid further combat and to defeat the governmental army once and for all, it decides to (mis-) use uniforms of the United Nations. Such methods are in clear violation of international

⁸³ ICTR-Statute, *supra* note 63.

⁸⁴ On three occasions the UN Security Council decided to ascribe to certain behavior such an abstract peace threatening capability: SC Res. 1373, 28 September 2001 determined acts of international terrorism in general as threats to peace (reaffirmed in SC Res. 1390, 28 January 2002; SC Res. 1540, 28 April 2004 ascribed to the Proliferation of weapons of mass destruction a general peace threatening capability. Finally, SC Res. 1422, 12 July 2002 implicitly declared the risk of prosecutions of international peacekeepers by the ICC as having a peace threatening potential, see J. Macke, *UN-Sicherheitsrat und Strafrecht* (2010), 180.

humanitarian law and criminalized as war crimes (Art. 8 (2) (b) (vii) of the Rome Statute). However, they may be employed to guarantee victory and to enable a peaceful and democratic transition.⁸⁵ As Blum rightly remarks with regard to war crimes: “The entire project of IHL is premised on the idea that some cruelty must be curbed, even at the expense of prolonging lawful violence and suffering”⁸⁶. Or as Walzer puts it: “There is no right to commit crimes in order to shorten a war [...]”⁸⁷. Another – this time unfortunately realistic – example might also help to elucidate the problem. The deadly American attacks on Hiroshima and Nagasaki would certainly nowadays be characterized as war crimes⁸⁸ as defined in Art. 8 II (b) (iv) of the Rome Statute as it can be assumed that such attacks “cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated”⁸⁹. Although the motivations justifying the American attacks are questionable,⁹⁰ one could argue that the dropping of the bombs accelerated the end of the Second World War in the Far East.⁹¹ These examples can show that a direct and unambiguous link between the incriminated act and ‘peace’ appears not always to be existent. An indicator for such an

⁸⁵ This is not to say that such a conduct should be legalized. The interdiction of improper use of insignias and uniforms is of utmost importance for assuring the status of neutrality of the UN and the International Committee of the Red Cross (ICRC), enabling them to alleviate the pain for combatants and civilians suffering from the war ravaging their country, G. Blum, ‘The Laws of War and the “Lesser Evil”’, 35 *Yale Journal of International Law* (2010) 1, 1, 41.

⁸⁶ *Id.*, 5.

⁸⁷ M. Walzer, *Just and Unjust Wars*, 4th ed. (2006), 210.

⁸⁸ The ICJ in the Nuclear weapons Case declared them in 1996 as generally in violation of international humanitarian law, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 266 para. 105, see also M. Mandel, *How America gets away with murder* (2004), 223; J. Meernik & R. Aloisi, ‘I Do Declare: Politics, Declarations and the International Criminal Court’, 9 *International Criminal Law Review* (2009) 2, 253, 261. Blum, *supra* note 85, 2. See also the critique by John Bolton, arguing that under the Rome Statute the bombs on Hiroshima and Nagasaki would be considered as war crimes, J. Bolton, ‘The Risks and Weaknesses of the International Criminal Court from America’s Perspective’, 64 *Law and Contemporary Problems* (2001) 1, 167, 170.

⁸⁹ See Cassese, *supra* note 61, 396-408.

⁹⁰ Mandel, *supra* note 88, 222; Blum, *supra* note 85, 24-26.

⁹¹ For the purpose of this article it suffices to mention that the use of the atomic bomb did not prolong the Second World War.

interpretation can also be seen in Art. 13(b) of the Rome Statute. A Security Council referral has to be based on Chapter VII of the UN Charter and a determination of a ‘threat to peace’ pursuant to Art. 39 of the Charter.⁹² Why would such a restriction⁹³ be necessary – especially recalling the gravity criterion in Art. 17 (d) of the Rome Statute – if the crimes committed are *ipso facto* to be considered as peace threatening? To conclude, one might question the peace threatening nature of the so-called ‘international crimes’.⁹⁴ A short and final reflection might underline this conclusion. If the primary objective is to avoid ‘threats to peace’, why then is only aggression⁹⁵ criminalized under international law while intra-state upheavals – as certainly more direct threats to international peace than for example war crimes – remain outside the scope of application of international criminal law? What one could only argue is that every crime is to be seen as an abstract ‘threat to peace’ (*abstraktes Gefährdungsdelikt*)⁹⁶ even if the threatening nature does not become evident in each and every case.

3. A Distinct Legal Good - Concluding Remarks

Having put the focus on the search for a distinct legal good one must conclude that the discrepancy between crimes labeled as ‘international crimes’ and those labeled as ‘national crimes’ or ‘ordinary crimes’ cannot convincingly be explained. The sole anchorage for such a distinct treatment could be the purely hypothetical and thereby abstract peace threatening nature of genocide *et al.*. What one might argue, however, is that it is not the legal good which determines the ‘international’ or ‘national’ nature, but rather the way the legal good is threatened.

⁹² C. Contag, *Der Internationale Strafgerichtshof im System Kollektiver Sicherheit* (2008), 112.

⁹³ D. Heilmann, *Die Effektivität des Internationalen Strafgerichtshofs* (2006), 153.

⁹⁴ Manske, *supra* note 44, 283.

⁹⁵ Quoting the Judgment of the Nuremberg Tribunal, Nsereko points out that aggression “contains within itself the accumulated evil of the whole”, see Nsereko, *supra* note 46, 390.

⁹⁶ See Möller who speaks of a “threatened legal good” (*gefährdetes Rechtsgut*), *supra* note 51, 8. Vest emphasizes a threat potential of genocide, *supra* note 47, 476.

III. The Source of the Threat as a Distinctive Feature?

A characteristic aspect of genocide, crimes against humanity and war crimes is the fact that those crimes are phenomena that are (widely perceived to be) related to state or state-like behavior.⁹⁷ However, looking at international jurisprudence and doctrine it is not clear whether state implication really is a legal necessity. While the prohibition of war crimes is focused on misbehavior of soldiers and therefore presupposes the implication of the State or a state-like entity there is controversy whether such an implication is legally necessary for the commission of crimes against humanity and genocide. Looking at the definition of genocide in Art. 6 of the Rome Statute⁹⁸ one must conclude that an implication of the State is far from being an evident and necessary condition, as can also be observed in the ICTR judgment against members of Radio Milles Collines.⁹⁹ Concerning crimes against humanity, the ICC Pre-Trial Chamber decision on the Kenya situation is highly symbolic for the debate. While Judge Kaul fervently advocates a necessary link to the State or a state-like entity,¹⁰⁰ the majority allows even criminal gang activities to be subsumed under the Rome Statute.¹⁰¹ What is certainly true is that mafia-like organizations (e.g. in southern Italy) are able to terrorize the population, extort important sums of money, bribe local officials, commit crimes in an organized manner similar to what one would consider a “widespread and systematic attack”. While the author tends to agree with Judge Kaul the determination bears no real relevance for the question debated here. Even assuming state (or state-like) implication as *conditio sine qua non* for genocide, crimes against

⁹⁷ See Kaul, *supra* note 36, para. 61; Manske, *supra* note 44, 319.

⁹⁸ And same holds true for Art. 2 of the Genocide Convention, *supra* note 1.

⁹⁹ *Prosecutor v. George Ruggiu*, Judgment, ICTR-97-32-I, (Trial Chamber I), International Criminal Tribunal for Rwanda, 1 June 2000 (after guilty plea for incitement to genocide as a journalistic broadcaster). See also the case of Julius Streicher, convicted in Nuremberg for publishing the Nazi ‘newspaper’ *Der Stürmer*. For more on the issue of the relationship between media and international law, see D. Joyce, ‘Human Rights and the Mediatization of International Law’, 23 *Leiden Journal of International Law* (2010) 3, 507-527.

¹⁰⁰ Kaul, *supra* note 36, para. 52, see also Gil Gil, *supra* note 49, 386.

¹⁰¹ *Decision Pursuant Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, ICC-01/09-19 (Pre-Trial Chamber II), 31 March 2010, para. 91. See also Manske, *supra* note 44, 318; emphasizing a territorial control element Vest, *supra* note 47, 470.

humanity and war crimes, it does not amount to a distinctive feature compared to other human rights abuses. Targeted killings, arbitrary detention, electoral fraud or unlawful expropriation are in most cases acts of state or state-like agents. Campaigns of intimidation of opposition figures are often planned and executed by members of the police or police-like militias. State implication *in the commission* of the crimes therefore does not explain the discrepancy in the labeling.¹⁰² A totally distinct question is, which conclusions should be drawn from a possible implication of the State in a cover up of the crimes or in shielding the suspected perpetrators. However, the nature of the crime committed cannot be dependent on the manner that the State reacts to them retrospectively. If this were to be the case it would lead to the bizarre result that the ‘international’ or ‘national’ nature of the crime cannot be defined at the moment the crime is being committed but only after the national institutions failed to address it. The (non-) reaction of the State therefore has and can only have procedural implications.

IV. Questioning the Label – Concluding Remarks

Through the lens of the *Rechtsgutstheorie* the label of ‘international crime’ appears to be at least questionable.¹⁰³ A persuasive value-based explanation is inexistent. Apart from the somewhat abstract ‘threat to international peace’ one might discern in the commission of crimes such as genocide, crimes against humanity and war crimes, no distinctive feature can be established that would “[...] elevate the acts [...] to international crimes [...]”¹⁰⁴. Neither the state implication nor the cruelty and scale can explain how to draw a line between “[...] human rights violations on the one side and international crimes on the other side, the latter forming the nucleus of the most heinous violations of human rights representing the most serious crimes of concern to the international community”¹⁰⁵. One other aspect has to be touched upon in order to illustrate that such a label is not only inexplicable but also in flagrant disregard of the evolution of human rights. Is it not a step backwards when one declares atrocious human rights abuses as ‘crimes against the international community’? Is it not one of the most

¹⁰² Cassese, *supra* note 3, 12.

¹⁰³ See also Vajda, *supra* note 33, 334.

¹⁰⁴ Kaul, *supra* note 36, para. 18.

¹⁰⁵ *Id.*, para. 53.

important successes to have left behind the conception that rights are granted to individuals only as constituent part of another entity: his or her State?¹⁰⁶ How can one then declare incommensurable harm inflicted on an individual or a group of individuals as a crime against the international community or as ‘international crime’? Such labeling amounts to what Christie called “structural theft”¹⁰⁷ by arbitrarily “elevating” a certain category of crimes to the international level¹⁰⁸ and stealing it from the local community directly concerned by the atrocities.

D. International Prosecutions of ‘National Crimes’

It may feel uncomfortable to give up the label of ‘international crime’ as the label appears to be a perfect way to consolidate support for the fight against impunity for crimes of a truly atrocious nature. For many, the creation of international tribunals such as the ICTY or the ICTR, the Extraordinary Chambers in the Courts of Cambodia (ECCC) or the Special Tribunal for Sierra Leone and finally the ICC are accomplishments which are linked to the basic idea that genocide, crimes against humanity and war crimes are crimes which are somewhat ‘international’ or ‘universal’ in nature. The important question is: Does one need such a label in order to advance the protection of fundamental human rights? Is the nature of the crime really of such relevance in order to engage international actors? This depends on how one conceives the relationship between the nature of the crimes committed and international involvement. Judge Kaul declares in his Dissenting Opinion:

“There are, on the one side, international crimes of concern to the international community as a whole, in particular genocide, crimes against humanity and war crimes pursuant to articles 6, 7, and 8 of the Statute. There are, on the other side, common crimes, albeit of a

¹⁰⁶ See Ratner, *supra* note 16, 241.

¹⁰⁷ N. Christie, ‘Conflicts as Property’, 17 *British Journal of Criminology* (1977) 1, 1-15.

¹⁰⁸ Pocar notes, that the current (partial) criminalization of human rights violations may even be contrary to the human rights idea as such in creating a de facto hierarchy of human rights, Pocar, in M. Politi & G. Nesi, *The Rome Statute of the International Criminal Court* (2001), 72. The haphazard results of the partial criminalization are also outlined by Ratner, *supra* note 16.

serious nature, prosecuted by national criminal justice systems [...].”¹⁰⁹

This quote, the author believes, reflects the somewhat binary thinking which underlies the usage of the term ‘international crime’ and international criminal law in general. It ascribes to each category of crime the prosecutorial model it deserves. Describing genocide, crimes against humanity, and war crimes as ‘international crimes’ implies that national and international judicial organs are acting as agencies of the ‘international community’ by reprimanding violations of international law.¹¹⁰ But is it inconceivable to allow for international prosecutions of crimes one would consider as ‘national crimes’?

The fact that there is wide enthusiasm for labeling crimes as ‘international’ as a way of calling for international prosecutions can certainly be explained by the deep mistrust towards classical human rights enforcement mechanisms – under the ICCPR, ECHR or by the ICRC in case of international humanitarian law – and a certainly well-founded fear that human rights protection in the hands of the Nation State is far from being guaranteed. History shows a multitude of examples where national law enforcement failed in time of crisis. The classical human rights mechanisms which are focused on influencing state behavior are futile if the central State organs refuse to adapt to outside pressure. International prosecutions and the threat thereof might be seen as a necessary and promising tool to address such noncompliance. That is not to say that international prosecutions, be they by international tribunals or third States, should be seen as a panacea and therefore critical voices try frequently to be heard.¹¹¹ However, for the present reflections some positive effects of international prosecutions should be assumed. Two questions have to be answered. First, are international prosecutions of ‘national crimes’ permitted under international law? Second and if so, when should they be considered legitimate?

¹⁰⁹ Kaul, *supra* note 36, para. 8.

¹¹⁰ See Möller, *supra* note 51, 8; El Zeidy, ‘The Principle of Complementarity: A New Machinery to Implement International Criminal Law’, 23 *Michigan Journal of International Law* (2002) 4, 869, 911.

¹¹¹ See e.g. F. Dencker, ‘Verbrechen gegen die Menschlichkeit und internationales Strafrecht’, 3 *Zeitschrift für internationale Strafrechtsdogmatik*, (2008) 7, 298; Prittowitz, *supra* note 9, 469-487, A. Branch, ‘Uganda’s Civil War and the Politics of ICC Intervention’, 21 *Ethics and International Affairs* (2007) 2, 179, P. Stolle & T. Singelstein, in Kaleck *et al.*, *supra* note 52, 37-52, Anderson, *supra* note 31.

I. The Legality of International Prosecutions of ‘National Crimes’

The following remarks should be considered as being obvious. International tribunals as well as third States are only competent to prosecute individuals if their jurisdictional basis is accepted in international law and can thereby be traced back to the consensus of their Home State. While the territoriality and the personality principle are unanimously recognized in international law as a potential basis for international prosecutions, the principle of universal jurisdiction (*in absentia*) is far more controversial. It would not be wise at this juncture to reopen the debate on universal jurisdiction and especially universal jurisdiction *in absentia*. What can be stated, however, is that third State prosecutions based on universal jurisdiction can only be deemed legal if it can be established that there is international consensus that every State should have the right to prosecute the crime in question. Taking the example of piracy one can see that such consensus has been achieved even for crimes that one could¹¹² (or should) not define as the “*most heinous crimes of concern to the international community as a whole*” and which are certainly not of a peace threatening nature. In other words, once consensus is established even minor crimes could theoretically be prosecuted universally. The qualification of the crime does not limit a consensual expansion of prosecutorial rights. It appears also clear that such consensus should not be replaced by vague and ambiguous reference to the grave nature of the crime. There is - and should be - no rule granting universal jurisdiction based on an assessment of the mere nature of the crime.¹¹³ In addition to third State prosecutions there are multiple examples of prosecutions by international courts and tribunals. While the ICCs jurisdiction is mainly based on territoriality and personality as enshrined in Arts 12 (2) and 13 (a), (c) of the Rome Statute, Art. 13 (b) as well as the creation of the ICTY and ICTR show that by way of implication of the UN Security Council international prosecutions are possible even

¹¹² Kreß, 2006, *supra* note 15, 569: “These statements provoke a measure of astonishment. It should go without saying that piracy does not even come close to match the ‘heinousness’ of genocide or crimes against humanity [...]”.

¹¹³ That is certainly why Jescheck emphasizes the need for an international consensus on the jurisdictional basis: Jescheck, ‘International Crimes’, *supra* note 14, 1120.

without specific consent of the Home State of the accused.¹¹⁴ However, as the powers granted to the UN Security Council result from the consent of the Member States to the UN Charter international prosecutions are in line with international law as long as the reigning impunity amounts to a ‘threat to peace’. The UN Security Council stated therefore in Resolution 955¹¹⁵:

“*Convinced* that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and the restoration and maintenance of peace, [...]”

It thereby declared the non-prosecution of certain crimes as being a distinct ‘threat to peace’. Otherwise, the UN Security Council would not have been in the position to establish the ICTR. The UN Charter demands for more than an assertion of a ‘threat to peace’ in line with Art. 39. The action taken by the Security Council must be conceived so as to address the determined threat.¹¹⁶ But can the impunity for ‘national crimes’ be considered as a ‘threat to peace’? Taking into consideration the creation of the Lebanon-Tribunal one could respond in the affirmative.¹¹⁷ Art. 2 of the Statute of the Special Tribunal for Lebanon¹¹⁸ states:

“The following shall be applicable to the prosecution and punishment of the crimes referred to in article 1, subject to provisions of this Statute:

- a) The provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, [...] and
- b) Articles 6 and 7 of the Lebanese Law of 11 January 1958 on ‘Increasing the penalties for sedition, civil war and interfaith struggle’.”

¹¹⁴ See D. Akande, ‘The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir’s Immunities’, 7 *Journal of International Criminal Justice* (2009) 2, 333, 343.

¹¹⁵ SC Res. 955, 8 November 1994.

¹¹⁶ J. Aston, *Sekundärgesetzgebung internationaler Organisationen zwischen mitgliedstaatlicher Souveränität und Gemeinschaftsprinzip* (2005), 80.

¹¹⁷ Macke, *supra* note 84, 170.

¹¹⁸ *Statute of the Special Tribunal for Lebanon*, Attachment to SC Res. 1757, 30 May 2007.

International prosecutions of ‘national crimes’ are absolutely in line with international law as long as they are backed by a consensus *in concreto* or *in abstracto* by the primarily responsible Home State.¹¹⁹

II. The Legitimacy of International Prosecutions of ‘National Crimes’

While, from the viewpoint of international law, there is no theoretical limit to international prosecutions it would be unwise to stretch such interference in domestic affairs too far. Self-restraint in this area is recommendable for a multitude of reasons already suggested.¹²⁰ At present, it appears that the level of legitimate intervention through international prosecutions is closely linked to and determined by a catalogue of crimes. The focus is on the substantive law, which is by its very nature an all-or-nothing-option. It lacks the flexibility that procedural norms can provide.¹²¹ If one agrees with the assessment made above that it is impossible to distinguish genocide *et al.* from other sorts of criminalized human rights abuses, it is nothing but logical to establish the level of international involvement by looking at the need for international prosecutions.¹²² If, and only if, the international community and its core values ‘international peace’ and ‘security’ are put at risk by the way a State addresses the crimes committed one can legitimately call for international action.¹²³ Benchmarks might be conceived as follows:

¹¹⁹ Bassiouni even states that “[a] sovereign state or a legal entity that has some sovereign attributes can enforce the prescription of another state, or of international law, even though the enforcing power may not have prescribed what it enforces”, C. Bassiouni, ‘Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice’, 42 *Virginia Journal of International Law* (2001-2002) 1, 81, 89 [Bassiouni, 2001].

¹²⁰ *Id.*, 96, Bassiouni speaks of the “natural judge”.

¹²¹ See A. Bruer-Schäfer, *Der Internationale Strafgerichtshof* (2001), 154.

¹²² See Vajda, *supra* note 33, 343.

¹²³ Bassiouni, 2001, *supra* note 119, 97 rightfully recalls that the call for international prosecutions can be the result of a pragmatic policy-oriented position “that recognizes that occasionally certain commonly shared interests of the international community require an enforcement mechanism that transcends the interests of the singular sovereignty.” See also Lampe, *supra* note 44, 153.

- Necessary preconditions for legitimate international prosecutions is agreement on the need for criminalization of a set of human rights abuses.¹²⁴
- As all human right abuses are to be seen as ‘national crimes’ there is a presumption for national prosecutions.
- International prosecutions, if accepted *in abstracto* or *concreto* by the community of States, should be exceptions rather than the rule. They are legitimate if the behavior of the State in question has a peace threatening potential. That will mostly be the case if the Nation State is unable to guarantee a fair trial or if it is unwilling to address (not necessarily to punish)¹²⁵ the crimes committed.

The last aspect certainly merits some further explanation as the difference between “unwilling to address” and “unwilling to prosecute” is an essential one. To further evaluate this aspect one has to differentiate between a possible short-term risk and a middle and long-term risk. Where exactly to draw the line for a legitimate intervention should be open to debate – a debate often neglected due to the favored all-or-nothing approach.

1. Short-Term Risk

Crimes of this magnitude typically occur in the wake of civil or regional wars. An absence of appropriate reactions to such atrocities risks perpetuating a cycle of violence. If a State fails to address such cycle of violence and to stabilize the country, it can be of interest to the international community to make a contribution by prosecuting the worst offenders in order to avoid trans-border effects and regional destabilization. However, considering the short-term dimension, an appropriate reaction cannot be reduced to criminal prosecution. As one can see in the case of South

¹²⁴ See e.g. Lampe, *supra* note 44, 161.

¹²⁵ Sloane notices “that where state authorities can and will genuinely investigate or prosecute, international penal interests dissipate [...]”, R. Sloane, ‘The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law’, 43 *Stanford Journal of International Law* (2007), 39, 55 [Sloane, 2007]. The problematic point in Sloane’s argumentation is the fact that it presupposes an international penal interest which could then dissipate.

Africa,¹²⁶ the stabilization of a country can well be achieved by other means, be they a Truth and Reconciliation Commission or other forms of addressing the past. Presently, it is hotly debated whether the struggle for 'peace' in Northern Uganda can be achieved by similar means. A cursory glimpse at the situation should illustrate the dilemma unstable governments might face: The Lords' Resistance Army (LRA) has committed and is still committing atrocious crimes in northern Uganda, southern Sudan, the Central African Republic and the Democratic Republic of Congo. While the ICC issued an arrest warrant against the LRA leader, Joseph Kony, the peace processes is faltering. One of the main reasons for the deadlock appears to be the threat of criminal prosecution.¹²⁷ Outweighing the costs of a continuation of the hostilities and the risk of perpetuating impunity, the Ugandan Government issued the 2000 Amnesty Act for each LRA fighter voluntarily giving up the fight. This stick-and-carrot-approach convinced a number of LRA fighters to lay down their weapons, and is by some considered to be a feasible way to end the fighting in Northern Uganda and the neighboring countries.¹²⁸ If this turns out to be true such deal-making might decrease the risk of further conflict in the short-term.

2. Long-Term Risk

An appropriate method to pacify a conflict in the short-term might have negative implications in the long-term, both for the country in question as well as for 'international peace'. A total disrespect for international norms could undermine the (international) legal order, creating a 'ticking bomb'-situation for future conflicts.¹²⁹ Therefore, for instance, self-amnesties and other deals forced on the war-torn society by unscrupulous

¹²⁶ See M. Scharf, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court', 32 *Cornell International Law Journal* (1999) 3, 507, 510; P. van Zyl, 'Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation commission', 52 *Journal of International Affairs* (1999) 2, 647-669; E. Blumenson, 'The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court', 44 *Columbia Journal of Transnational Law* (2006) 3, 801, 834.

¹²⁷ Quinn, 'Getting to Peace? Negotiating with the LRA in Northern Uganda', 10 *Human Rights Review* (2009) 1, 55, 66.

¹²⁸ This would necessitate a withdrawal of the pending arrest warrant against Joseph Kony.

¹²⁹ See also Villalpando, *supra* note 72, 395.

Latin American leaders, appear to be dubious and surely are a risky endeavor. Nonetheless, one should not consider every kind of deal as contrary to the spirit of human rights and democracy. The example of the South African Truth and Reconciliation Commission (TRC) clearly reflects the general acceptance of and adherence to international human rights norms by the transitional leadership. Public hearings, lustration procedures, and the fact that confessions were required for perpetrators to qualify for amnesties on an individual basis, show that non-prosecution cannot be equated with lawlessness. It surely does not conform to an international rule of *criminal* law. As the South African transitional government acted to avoid further bloodshed and atrocities it conformed with their obligations to prevent its population from falling victim to more human rights violations.¹³⁰ Even if one feels the necessity to emphasize the urgent need for a prosecutorial response¹³¹ one has to admit that there is no manifest lack of law observance and it therefore remains unclear whether such behavior has long-term peace threatening potential.

E. Why a Change of Perspective Might Be Helpful!

Until now, this article focused on why the term 'international crime' is void of any meaningful content. Genocide *et al.* are by no means always more inhumane than other human rights abuses. State implication in the

¹³⁰ See the obligation to prevent as enshrined e.g. in Art. 1 of the Genocide Convention, *supra* note 1. See also remarks by M. Toufayan, 'The World Court's Distress When Facing Genocide: A Critical Commentary on the *Application of the Genocide Convention Case (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*', 40 *Texas International Law Journal* (2005) 2, 233.

¹³¹ This certainly implies a turning away of a strong emphasis on negative deterrence which can hardly be achieved by other means than criminal prosecution. The importance of the negative deterrent function of international criminal prosecutions has to be put into perspective in three aspects. First, it is doubtful that the threat of criminal prosecution is significantly dissuading perpetrators from committing crime (see e.g. Sloane, 2007, *supra* note 125, 76-77) Second, a renunciation to prosecution will remain the absolute exception. E.g. as the Ugandan Amnesty Act points out, in case the LRA fighter are captured they are not benefiting from the amnesty. Therefore, the deterrent function can be upheld while accepting limited exceptions. See M. Deiters, *Legalitätsprinzip und Normgeltung* (2006), 46-49. Third, watching new crimes being committed undermines the norm which is to be upheld. See M. Aukerman, 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice', 15 *Harvard Human Rights Journal* (2002) 39, 70.

commission is typical for human rights abuses in general. Even the supposed peace threatening nature is far from being a constant feature of these crimes and more importantly not limited to them. It has also sketched why discourse matters for the interpretation and evolution of international law. It is understood that the way one labels a crime has by no means a concrete legal implication. However, it shapes the legal debate and the subtle influence wording might have makes more reflection necessary. By way of conclusion, the article glimpses at some current issues in international criminal law to illustrate how a change in perspective could affect the debate.

I. The Complementarity Principle

As a starting point, one should turn to the issue of complementarity. It has been argued that the complementarity principle as enshrined in Arts 1 and 17 and the preamble of the Rome Statute was a policy choice¹³² reflecting the States Parties' will to preserve a maximum of State sovereignty,¹³³ reducing the workload of the ICC, and encouraging the adoption of national laws to criminalize and prosecute the crimes enumerated in Art. 5 (1) (a)-(c) of the Rome Statute.¹³⁴ The view that the complementarity principle is a result of a political compromise and therefore implicitly, as a renunciation to primacy, reflects the drafting procedure. The assessment is right in a historical sense. However, taking into consideration the assessments made above one wonders whether complementarity is not the only logical option for a permanent international prosecutorial system. The concept of primacy presupposes that international courts act as agents avenging infringements on legal goods of the international community. The same does not apply to the ICTY and ICTR. Their primacy rules¹³⁵ are the result of an assessment *in concreto* that the former Yugoslavia and Rwanda could not cope with the major crimes

¹³² Williams & Schabas, in Triffterer, *supra* note 59, Art. 17 para. 20. Kreß, 2006, *supra* note 15, 579 (referring to the resolution 'Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes' of the Institute of International Law, available at http://www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf (last visited 25 August 2011)), 581.

¹³³ Williams & Schabas, in Triffterer, *supra* note 59, Art. 17 para. 1.

¹³⁴ See also Bergsmo *et al.*, *supra* note 10, 791-811.

¹³⁵ Art. 9 (2) ICTY-Statute, *supra* note 62, Art. 8 (2) ICTR-Statute, *supra* note 63.

committed as fair trials were far from being guaranteed.¹³⁶ A further example where the issue of complementarity arises is the discussions surrounding universal jurisdiction *in absentia*. The ICJ-Judges Higgins, Kooijmans and Buergenthal in their Dissenting Opinion in the Arrest Warrant Case proclaim that while the assertion of universal jurisdiction *in absentia* is in conformity with international law, “it [a State exercising the jurisdiction] must also ensure that certain safeguards are in place”¹³⁷. One safeguard is regarded to be an offer to the national State of the accused to act on the charges in question. One cannot but agree with them. It seems, however, not evident why such a safeguard should be a legal necessity¹³⁸ – and not only a pragmatic compromise – considering that the Judges adhere to the principle that those crimes ought to be considered as ‘international crimes’.¹³⁹ However, it fits the assessment made above. The same holds true for the concept of ‘Responsibility to Protect’ which is also encompassing a two-step approach. Focusing on the same crimes discussed here, an international responsibility emerges only in case of inability of unwillingness of the primary responsible Nation State.¹⁴⁰ To accept the complementarity principle as natural and inherent limitation to international prosecutions might also implicate on the interpretation of Art. 17 (1) of the Rome Statute. The OTP suggests that the “unwilling and unable test” does

¹³⁶ See B. Brown, ‘Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals’, 23 *Yale Journal of International Law* (1998) 2, 383, 395-398. One has to ponder on the question why primacy was granted over all courts and not only courts of the region, see also Brown, 402. The Appeals Chamber of the ICTY in the Tadić case seems to address two different approaches to legitimize the primacy rule: “Indeed, when an international tribunal such as the present one is created, it must be endowed with primacy over national court. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterized as ‘ordinary crimes’ [...] or proceedings being ‘designed to shield the accused’, or cases being not diligently prosecuted [...]” *Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, 2 October 1995, para. 58.

¹³⁷ *Arrest Warrant Case*, *supra* note 24, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 59.

¹³⁸ See also Hafner *et al.*, *supra* note 35, 118.

¹³⁹ A. Colangelo recalls that limitations to universal jurisdiction are theoretically inconsistent once it is assumed that the crimes committed are international crimes, see. A. Colangelo, ‘The new Universal Jurisdiction: In Absentia Signaling over clearly defined crimes’, 36 *Georgetown Journal of International Law* (2005) 2, 537, 541.

¹⁴⁰ GA Res. 60/1, 25 October 2005, paras 138-139.

not apply in case of inaction of the State. While the interpretation of the wording is totally convincing,¹⁴¹ one might wonder why the ICC Appeals Chamber¹⁴² stated in this respect: “*Such an interpretation [the need for an assessment of unwillingness or inability] is not only irreconcilable with the wording of the provision, but is also in conflict with a purposive interpretation of the Statute.*” What the Appeals Chamber seems to suggest is that there is a presumption for ICC jurisdiction. This presumption has even been upheld in situations where the ICC is not better equipped to handle the case, like e.g. the Kony case, and has therefore sparked widespread criticism.¹⁴³

II. Sentencing

If one accepts that the crime is by its nature a national (or even local) occurrence, one might question the way international courts deal with sentencing.¹⁴⁴ If one considers international prosecutions as a substitute to national proceedings and as a way to fill the void created by the failure of national institutions, why then should one define a distinct international sentencing policy? One should keep in mind the criticism of lenient sentences by the ICTY and ICTR and the resulting difficulties to explain that while the masterminds of the 1994 genocide came well off being judged

¹⁴¹ See C. Kreß, “‘Staateneigenüberweisungen’ an den Internationalen Strafgerichtshof und die Rolle des Chefanklägers”, in F. Neubacher & A. Klein, *Vom Recht der Macht zur Macht des Rechts?* (2006), 103-109.

¹⁴² *Situation in the Democratic Republic of Congo in the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment, ICC-01/04-01/07-1497 (Appeals Chamber), 25 September 2009, para. 79.

¹⁴³ For the debate see P. Akhavan, ‘Self-Referrals Before the International Criminal Court: Are States the Villains or the Victims of Atrocities?’, 21 *Criminal Law Forum* (2010) 1, 103-120, N. Jurdi, ‘The Prosecutorial Interpretation of the Complementarity Principle: Does It Really Contribute to Ending Impunity on the National Level?’, 10 *International Criminal Law Review* (2010) 1, 73-96, Kreß, in Neubacher & Klein, *supra* note 75, 103-109.

¹⁴⁴ For further information concerning the actual uncertainty about sentencing see e.g. R. Henham, ‘Some issues for Sentencing in the International Criminal Court’, 52 *International and Comparative Law Quarterly* (2003) 1, 81-114; A. Keller, ‘Punishment for Violations of International Criminal Law: An Analysis of Sentencing at the ICTY and ICTR’, 50 *International and Comparative Law Review* (2001) 1, 53-74; M. Bargaric & J. Morss, ‘International Sentencing Law: In Search of a Justification and Coherent Framework’, 6 *International Criminal Law Review* (2006) 2, 191-255; Damaška, *supra* note 42.

in an international setting, much harsher punishment applied to the low-level offenders. It is not to say that international courts should impose harsher sanctions. One should strongly consider, however, adhering to national standards as a basis for determining the sentence; an emphasis that has (in theory) been laid out famously in Art. 24 (1) of the ICTR-Statute. The fear of “justice à la carte”¹⁴⁵ could and must be addressed by harmonization. Capital punishment cannot be accepted as there is growing consensus in the international community against the imposition of the death penalty.¹⁴⁶

III. The so-called ‘Peace vs. Justice Debate’ and Art. 53 of the Rome Statute

The Chief Prosecutor of the ICC once famously stated in a policy paper on the interest of justice as enshrined in Art. 53 of the Rome Statute: “[...] there is a difference between the concepts of the interests of justice and the interests of peace and that the latter falls within the mandate of institutions other than the Office of the Prosecutor.”¹⁴⁷ With all due respect, it is difficult to fully agree with this statement in light of the classification of crimes advocated for above. The Prosecutor is right in the sense that the criminalization of genocide, crimes against humanity and war crimes is not related to the notion of ‘peace’. The *raison d’être* of international criminalization is the protection of human rights. However, it is the preservation of ‘international peace’ which legitimizes the international involvement in internal affairs. It is the *raison d’être* for international prosecutions. As a procedural norm, Art. 53 might well be interpreted differently.

¹⁴⁵ See H. van der Wilt, ‘National Law: A Small but Neat Utensil in the Toolbox of International Criminal Tribunals’, 10 *International Criminal Law Review* (2010) 2, 209, 236-240.

¹⁴⁶ Sloane, 2007, *supra* note 125, 67.

¹⁴⁷ Policy Paper on the Interests of Justice (2007), Office of the Prosecutor, available at <http://www.ohd.icc-cpi.int/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf> (last visited 25 August 2011).

F. Conclusion

International prosecutions have always been accused of being used as a political tool in international politics. While most accusations are (poor) defenses of suspected war criminals trying to avoid prosecutions or to seize the very last opportunity to cause a stir, it is no secret that international criminal law is deeply affected by world politics and *vice versa*. Fortunately, a great number of international legal practitioners and academics fervently oppose the instrumentalization of the criminal justice system and underline a kind of 'international separation of powers'. However, the interdependence between the field of criminal law and politics can, as this article has tried to demonstrate, also be detected in the domain of language and discourse. Political discourse surrounding post-conflict societies took up the panoply of legal and semi-legal expressions. Nowadays, one cannot find any peace agreements or strategy paper without reference to at least some shady and vague terms such as 'justice', 'accountability', 'rule of law', 'truth' or 'reconciliation'. Same holds true for legal doctrine and jurisprudence. The label of 'international crime' is but one of many examples of unclear terminology in current international legal discourse.