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HAGUE INTERNATIONAL TRIBUNALS

Common Civility: The Culture of Alegality in International Criminal Law

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Abstract

Written from an outsider's perspective, this paper tries to capture the ethos, or, if you prefer, the *Sittlichkeit*, of international criminal law. It argues that international criminal law can profitably be seen as an ethos, rather than a body of law. In this telling, international criminal law, despite its name, emerges as an ethical–administrative enterprise rather than a legal one. If placed alongside global administrative law, for instance, international criminal law appears as alegal rather than illegal, so that to criticize international criminal law for violating, say, the 'principle of legality' would be like faulting apples for not producing orange juice, and oranges for not making apple pie.

Key words

critical analysis; European criminal law; global administrative law; international criminal law; legality

Least ambitiously, this paper tries to capture the ethos of international criminal law.[1] More ambitiously, it argues that international criminal law *is*, or can profitably be seen as, an ethos, rather than a body of law. In this telling, international criminal law, despite its name, emerges as an ethical–administrative enterprise rather than a legal one. If placed alongside global administrative law, international criminal law appears as alegal rather than illegal, as *ignoring* the principle of legality, say, rather

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1 This paper is written from the outside of international criminal law looking in. It does not reflect anything resembling an encyclopedic knowledge of this vast, exciting, and ever-growing field. At the risk of serious omission, I have instead focused on a few recent texts that appeared to me to give particularly rich and influential accounts of the nature of international criminal law as a project; these include, in addition to Robinson's 'The Identity Crisis', David Luban's 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (2010), 569 (and, to a lesser extent, his 'A Theory of Crimes against Humanity', (2004) 29 Yale JIL 124), Antony Duff's 'Authority and Responsibility in International Criminal Law', in Besson and Tasioulas, ibid., at 589, and Andrew Altman and Christopher Heath Wellman's 'A Defense of International Criminal Law', (2004) 115 *Ethics* 35.

than as *violating* it, so that to criticize international criminal law for its illegality would be like faulting apples for not producing orange juice, and oranges for not making apple pie.

I begin, in section 1, by suggesting what might be gained by engaging in a critical analysis of international criminal law as an ethical, rather than as a legal, enterprise in general and in light of the notion of common civility in particular. Section 2 then sketches the outlines of such an account. Section 3 applies this account to the question of whether international criminal law is a misnomer, being neither international, nor criminal, nor law.

1. The ethos of international criminal law

The culture of international criminal law has been said to combine civil and common-law elements. This observation is trivial if it merely refers to the fact that there are civil-law and common-law countries (or at least systems) in the world and that international criminal law, as all international law, will likely reflect both civil-law and common-law elements, or at least influences. In fact, it might be more accurate to say that this observation is *at best* trivial, since the very distinction between 'civil-law' and 'common-law' elements, influences, countries, and even systems is as unclear as it is unhelpful, and becoming ever less clear and more unhelpful, and should therefore be taken with ever more grains of salt. Few approaches to comparative criminal law, or international criminal law as applied comparative criminal law, are less productive than comparisons, and, almost inevitably, normatively loaded comparisons between 'the common-law' and 'the civil-law' position on, or approach to, a given issue. Cross-country comparison is difficult enough, particularly if one supposed point of comparison is itself a multi-jurisdictional construct, such as the United States or, for that matter, the United Kingdom.[2]

And, yet, the notion of 'common civility' can provide a useful, or at least a convenient, point of departure for an exploration of the culture of international criminal law. This is so because international criminal law's ethos reflects common and civil elements in two senses. First, the ethos of international criminal law combines 'the common' and 'the civil' commonality (or community) and civility: it represents and creates, or at least gestures at, a community of civility. The *Sittlichkeit* of international criminal law is defined, and distinguished, by its shared commitment to norms of civility. It is an ethical community of the civil, defined against the non-civil, barbaric, other, a Durkheimian penal society as brittle as it is broad, as thin as it is wide, that has little, if anything, in common beyond its shared commitment to civility in the face of the non-civil, instantiated – if not personified, strictly speaking, depending on one's concept of personhood – by disgraced and isolated individuals whose powerlessness (following the prerequisite fall from power) marks them both as suitable

2 See, generally, M. Dubber, 'Comparative Criminal Law', in M. Reimann and R. Zimmermann (eds.), *Oxford Handbook of Comparative Law* (2006), 1287.

and, at the same time, inappropriate as common, and community-defining, objects of ethical condemnation.

Second, this essential, or at least defining, ethicality and alegality of international criminal law reflects common and civil elements in the more technical and familiar sense of 'common law' and 'civil law'. Contrary to the pointless, but apparently irresistible, claims of normative superiority made on behalf of the 'common law' over the 'civil law', and, of course, vice versa, countries that are generally considered as representative of either system themselves display alegal characteristics. International criminal law's alegality, in this sense, is not unique, though it may well be uniquely constitutive.[3] It is an oversimplification to regard domestic criminal-law systems as grounded in legality, occasional slip-ups on the margins notwithstanding, and as closely approximating an ideal of legality that so far has remained beyond international criminal law's grasp. This approach misunderstands both domestic and international criminal law because domestic criminal law is less committed to the ideal of legality than might appear from the remote perspective of international criminal law and because international criminal law, as alegal, is not in the business of pursuing this ideal in the first place.

To what extent 'common-law' and 'civil-law' countries are not merely illegal (in the sense of inconsistent with the principle of legality) but alegal (in the sense of unconcerned with the principle of legality) is a nice question. It is tempting, though overly simplistic, to distinguish between common-law and civil-law countries by reference to the distinction between ('mere') illegality and alegality, even if this analysis would concede the legality deficit of civil-law systems – a recognition that would complicate efforts to present the challenge of international criminal law as the transfer of domestic legality that is, if not perfectly realized, at least close enough for government work.

Nonetheless, even if one entertains the possibility of the alegality, and not 'merely' the illegality, of the penal regime in civil-law countries, common-law and civil-law alegalities differ historically and systematically, even interestingly. Taking the United States as an example, the argument can be made – and in fact has been made[4] – that the US penal regime as a whole is systemically alegal insofar as it derives historically and even doctrinally from the so-called *power to police*, where 'police' is to be understood in the traditional broad sense of the welfare of the state household, reflecting precisely that patriarchal conception of governance on which the law-based critique of the Enlightenment, with its notions of the rule of law and of the *Rechtsstaat*, cut its critical teeth.[5]

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3 See Robinson, *supra* note *, at 927, 929.

4 M. Dubber, 'The Story of *Keller*: The Irrelevance of the Legality Principle in American Criminal Law', in R. Weisberg and D. Coker (eds.), *Criminal Law Stories* (forthcoming 2011).

5 See, generally, M. Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (2005). On the project of a *Polizeistaat*, or 'well-ordered police state', see, e.g., M. Raeff, *The Well-Ordered Police State: Social and Institutional Change through Law in the Germanies and Russia, 1600–1800* (1983); R. Dorwart, *The Prussian Welfare State before 1740* (1971). For Foucault's insightful discussion of police, see M. Foucault, 'Governmentality', in G. Burchell, C. Gordon, and P. Miller (eds.), *The Foucault Effect: Studies in Governmentality* (1991), 87.

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By contrast, in Germany – taken here, as elsewhere, as a representative civil-law country – criminal law for some time has been located within the context of the *Rechtsstaat* project, at least at the level of theory, and more recently at the level of constitutional principle, as the foundational work not only of Kant and Hegel, but also of P. J. A. Feuerbach, and the post-Second World War jurisprudence of the German Constitutional Court make clear.[6] This is not to say, however, that the German penal regime cannot be usefully regarded from the perspective of alegality, rather than illegality. Commentators continue to note policial aspects of the current German penal regime, by diagnosing a general policification of the penal regime (*Verpolizeilichung*);[7] by recognizing a so-called enemy criminal law (*Feindstrafrecht*) that coexists with, and within, German criminal law;[8] and by documenting the historically uncertain status of the legality principle in German criminal law, and not merely during the Nazi regime, but also before and after.[9] It is therefore at least debatable whether any legality deficit in the German penal regime reflects a failure to consistently implement an acknowledged principle of lawness or a failure to acknowledge, and to appreciate, the fundamental significance of that principle in the first place.

In the end, of course, the distinction between the alegality and (mere) illegality of a domestic penal regime is secondary for our present purposes. Primary is the point that domestic penal regimes are not panaceas of lawness that bring the perceived legality deficit of international criminal law into sharper relief.

2. Common civility

The 'commonness', or commonality, of the common civility of international criminal law is, most abstractly, a sharedness, an identity in the sense of some shared characteristic that connects all members of the community of international criminal law. What that commonality consists of remains not only vague, but also difficult to discern, partly on account of its very thinness. The community of international criminal law, after all, is not a political community, one defined by a polis, or, more concretely, a state or set of political or government institutions. It is also entirely novel, continuously creating and bootstrapping itself, without the benefit of a shared history.[10] It is a frontier community, always seeking and remaking its limits.

Here, the international criminal-law community recalls the commonness of the common law, which traditionally has been contrasted with the formality, and

6 See M. Dubber, 'The Legality Principle in American and German Criminal Law: An Essay in Comparative Legal History', in G. Martyn and H. Pihlajamäki (eds.), *From the Judge's Arbitrium to the Legality Principle: Legislation as a Source of Law in Criminal Trials* (forthcoming 2012).

7 W. Naucke, 'Vom Vordringen des Polizeigedankens im Recht, d.i.: vom Ende der Metaphysik im Recht', in G. Dilcher and B. Diestelkamp (eds.), *Recht, Gericht, Genossenschaft und Policey: Studien zu Gundbegriffen der germanistischen Rechtshistorie* (1986), 177; B. Zabel, 'Die ordnungspolitische Funktion des Strafrechts', (2008) 120 ZStW 68.

8 G. Jakobs, 'Bürgerstrafrecht und Feindstrafrecht', (2004) 5 *HRR-Strafrecht* 88, at 92; G. Morguet, *Feindstrafrecht: Eine kritische Analyse* (2010).

9 H.-L. Schreiber, *Gesetz und Richter: Zur geschichtlichen Entwicklung des Satzes nullum crimen, nulla poena sine lege* (1976).

10 A. Duff, *supra* note 1, at 600.

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centrality, of royal or statutory law. In this light, international common criminal law is informal, rogue, even 'wild', organic, grass-roots law, all bottom, no top, and therefore also, paradoxically, local, non-centralized law, to pursue the analogy with common law in its communal–parochial telling before the advent of central governmental institutions, and eventually something resembling a state.[11]

This view of the common law, of course, contrasts sharply with that of the common law as an instrument for the unification, or at least standardization, of a patchwork of disparate local norms – that is, of common law as common royal law. In this conception of common law, its commonality derives from its royal nature; common law is common insofar as it is the king's law, imposed by the king's courts on local communities whose norms were diverse, informal, perhaps oral and at any rate difficult to determine or to comprehend (or both), and therefore resisted royal attempts to integrate and to govern (and to tax) the king's realm.

International criminal law as common law obviously denies even the existence, never mind the influence, of a centralizing state. There are no royal courts; there is no royal law. It is therefore the common law in its purely communal form, without even the hint of a central standardizing project for the sake of more convenient governance.

Note that the commonness of international criminal law is not confined to common-law countries, nor does it reflect a historical, or even a conceptual, connection between international criminal law and 'The Common Law'. Garré's rich study of 'common law', which explores the multifaceted significance of common law in legal discourse, concerns itself with the Continental *jus commune*, not with English common law. Studies of the *jus commune* and the common law rarely take notice of each other, to the point at which this mutual lack of interest itself has become the subject of scholarly inquiry.[12] 'Civil-law' countries today are seen in contradistinction to 'common-law' countries, so that the *jus commune* is confined at best to historical curiosity of no domestic or contemporary significance, the recent explosion of interest in the *jus commune* as a set of European communal norms notwithstanding. In fact, the excitement of (re)discovering a European *jus commune* nicely illustrates the continued communitarian significance and power of the idea of common law, even in countries that regard themselves as having long left behind the chaotic, pre-scientific, wild days of the common law, and having seen the light of codification instead.

Just as 'civil-law' (i.e., not-common-law) countries deny the commonness of their law, so 'common-law' countries historically have denied the civilness of theirs: here, civilness is associated with a troubling oppressive centralizing tendency – originally identified, by the English, with French governance, first royal and then, with little adjustment in the prejudice, republican – seen as an attempt to bulldoze over the locality, singularity, and diversity of common law and indeed of those who govern themselves by it – that is, Englishmen who possess that quintessential English

11 On the 'wildness' of common law, see R. Garré, *Consuetudo, Das Gewohnheitsrecht in der Rechtsquellen- und Methodenlehre des späten ius commune in Italien (16.–18. Jahrhundert)* (2005).

12 R. H. Helmholz, *The Ius Commune in England: Four Studies* (2001).

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characteristic, common sense (also much admired by Continental Anglophiles, particularly in nineteenth-century Germany). This conception of common law extends the historical myth of the locality of common law into modern governance and combines it with the denial of its centrality, and therefore of the modern state itself. In England, public law to this day struggles to define itself in the absence of a coherent affirmative account of the state.[13] In English criminal law, the very idea of codification remains controversial, partly as a result of its association with the inflexibility of top-down, if not to say anti-democratic, civil dogmaticism (an ironic anxiety given the central role of Austinian positivism in English legal theory, even as Bentham's influence is generally ignored). In the United States, not even widespread codification of the criminal law, early on and in particular in the second half of the twentieth century in the wake of the completion of the American Law Institute's Model Penal Code, has managed to transform criminal law into a public-law code-based subject, even as the massive and massively oppressive penal regime of the so-called war on crime pursued a comprehensive campaign of state control.[14]

2.1. International criminal law

As a denial of stateness, the commonness of common law is reflected in international criminal law, which likewise fashions itself as a penal regime without a state, and more generally without a sovereign.[15] Apart from the question of whether penality without sovereignty is possible, or at least how penality without sovereignty is to be conceived given the long-standing, if not foundational, intimate connection between the two in political discourse and practice, it is worth noting that the denial of statelessness in the common-law world has also been a denial of the need to legitimate the exercise of penal power by the state. In a system that denies the existence of the state,[16] the central critique of the Enlightenment directed at all state power – and the demand for legitimation in light of the fundamental principle of autonomy derived from the modern conception of the person as possessed of the essential, and sufficient, capacity for self-government – simply has no point; it misses its target because it has none.

This combination of the denial of sovereignty and the assumption and uncontested exercise of an assumed penal power essentially connected to the very idea of sovereignty is one way of framing the central paradox, or at least irony, of American penality in particular. American penality historically manifested itself as an obvious, even natural, exercise of the power to police, which was both defined by its undefinability and considered so essential to the concept of sovereignty that the

13 M. Loughlin, *Foundations of Public Law* (2010); *The Idea of Public Law* (2003). The classical example is A. V. Dicey, *An Introduction to the Study of the Law of the Constitution* (1885).

14 M. Dubber, *Victims in the War on Crime: The Use and Abuse of Victims' Rights* (2002).

15 In fact, sovereignty in international criminal-law discourse appears as an obstacle to, not as the source of, penal power. See, e.g., Altman and Wellman, *supra* note 1, at 39. International criminal law, rather than manifesting sovereignty, 'deflat[es]' it. Luban, *supra* note 1, at 578 (international criminal-law project recalls 'early securalists' deflationary view of state authority as manifestation of human rather than divine will').

16 A denial that manifests itself also in the tendency to frame questions of state power in terms of the 'powers' of 'government', duly or at least prudently separated, where appropriate.

federalist compromise rested on its retention by the states.[17] We will return to the policial – and therefore alegal – nature of American penality a little later on; for now, the point is simply that this most sovereign of powers coexists uneasily with a self-conception of American governance as sovereignless, as though the rejection of the King of England as sovereign meant the end of sovereignty, rather than its transferral, be it onto the conveniently amorphous 'people' or the supposedly absent state in the (mythical) laissez-faire community of the New World.[18]

The paradox of American penality, of sovereign sovereignlessness, then, illustrates the difficulties of subjecting a stateless governance regime in general, and a stateless penal governance regime in particular, to the fundamental and comprehensive legitimacy scrutiny associated with the Enlightenment, and therefore the modern liberal political project. To the extent that international criminal law regards itself as stateless, it faces the same difficulty. One of the central aims of the Enlightenment in the political sphere was to subject the exercise of power, and of penal power, as the sharpest form of power, in particular, to critique, forcing those who assumed the power to punish for the first time to justify actions that until then had been taken – if they were thought about at all – as obvious instances of the very nature of governance. Through its at best naive posture of natural, or 'wild', statelessness, international criminal law removes itself from this critique and, in that sense, locates itself in a premodern realm of unquestioned, and unquestionable, penal power.

If one were to understand commonness not negatively as not-civilness (disregarding for the moment the paradoxical nature of that conception), but positively as commonality, international criminal law could be seen as harkening back not to premodern sovereignty asserting itself naturally through penal discipline, but instead to the communitarian notion of common law as common. While this notion is most commonly associated with English domestic political history, it also plays an important, though often underappreciated, role in the Continental or at least inter-sovereign political history of Europe, represented by the recently rediscovered *jus commune*.[19] In this connection to, if not (possibly anachronistic) yearning for, a commonality of norms, international criminal law thus would recall not merely English common law, but more directly the evolving project of European criminal law, at least to the extent that European criminal law can be seen as part of a comprehensive attempt to discover the 'common core' of European law generally speaking, which so far has largely been limited to private law but recently has expanded into criminal law as well.[20] European criminal law, it is worth noting, displays the same tension between commonality and civility, between locality and centrality, that characterizes international criminal law, as efforts to codify European criminal law coexist uneasily with attempts to catalogue areas of overlap in principle or in doctrine.[21]

17 Dubber, *supra* note 5, Chapter 6.
18 W. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (1996).
19 See, e.g., the *Maastricht Journal of European and Comparative Law*, an entire journal devoted to 'considering the issues from the perspective of *ius commune Europaeum*'.
20 See, most recently, A. Klip (ed.), *Substantive Criminal Law of the European Union* (2011).
21 M. Dubber, 'The American Law Institute's Model Penal Code and European Criminal Law', in ibid., at 209.

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2.2. European criminal law

Unlike the project of European criminal law, and European law in general, however, international criminal law does not, and cannot, look back upon a common history, however mythical; unlike European criminal law, international criminal law cannot wish, however hopelessly, to (re)join together what has been put asunder. International criminal law instead perceives itself as a pioneer project to boldly go where no one has gone before. Comparison among domestic criminal-law systems is not designed to unearth common roots as much as it is to find a compromise position that reflects disparate influences (in particular those of the 'common law' and the 'civil law', occasional references to other legal systems notwithstanding). In this sense, international criminal law is a profoundly ahistorical project, as opposed to the profoundly historical (or at least anachronistic) project of European criminal law.

Without a sovereign and without a communal history, the nature and scope of international criminal law's commonness remain unclear and flexible; the community of international criminal law continuously defines, or rather recreates, itself. Its commonality is negative, exclusionary in the literal sense. It is defined by those who remain outside it, who help define it in contradistinction to itself. The community of international criminal law, unlike a sovereign community, is not defined in relation to other communities, but in relation to its non-members, who themselves remain without community. The community of international criminal law, in other words, is defined by the quintessential outsider, the relevant other, the outlaw, the uncommon.

The boundaries of international criminal law are ill-defined, ad hoc, felt rather than made explicit. Without the scope of sovereignty, it is a natural community that manifests around particular instances of exclusion, or rather of the shared recognition of non-membership. On the face of it, it appears as global, though it is less global, or international, than it is not domestic and not bounded. It has been said to reflect the existing global power structure, informally manifesting the dominance of North over South, and rich over poor. The International Criminal Court, in particular, is widely perceived as, and criticized for, having focused on Africa, with all current cases before it originating in Sub-Saharan Africa.[22]

Without predetermined limits, sovereign or merely historical, international criminal law as lived community is driven by common disgust and hatred – a shared and uncomplicated, natural and healthy appreciation of pure evil that is beyond legitimation. The boundaries of this community of feeling are less defined than they are performed; trials are not means for the application of predetermined general norms to specific cases, but performances and shared experiences of commonality. International criminal tribunals are theatres of communal exclusion. They do not constitute the procedural element of international criminal law; they *are* international criminal law.

22 Congressional Research Service, International Criminal Court Cases in Africa: Status and Policy Issues, 7 March 2011.

International criminal law thus is, at best, a communal practice in search of a rationale. The logic of international criminal law is *ex post*, not *ex ante*. In this sense, international criminal law resembles corporate criminal liability.[23] One is driven by a shared sense of disgust that neither requires nor permits legitimation, the other by a shared sense of pragmatic necessity; both have developed, and continue to develop, with little patience for the *ex ante* constraint of legal norms or, for that matter, of principles of legitimacy. Who, after all, could possibly quarrel with 'incapacitating toxic political leaders'?[24] Legitimacy is beyond doubt, and legal norms are accommodated and adjusted as needed, as if to comply with a set of extraneous requirements that are reinterpreted as informal guidelines.

Given the enormity of the evil, the strength of the shared feelings of disgust triggered by 'perpetrators of infamies',[25] the international criminal trial, very much like the substantive and procedural norms of international criminal law, itself appears as a technicality, a communal experience of exclusion complicated and disturbed by rules that may stand in the way of reaching the inevitable conclusion of guilt, which – ironically – becomes less significant, as the trial itself constitutes the shared experience, even apart from its technical conclusion. Substantive, or 'moral', guilt will be established even if formal (technical), or 'legal', guilt is not.[26] In fact, substantive guilt will have been felt long before the trial, as even the pretence of a presumption of innocence is dropped along with the distinction between suspect, accused, and perpetrator.[27]

Historically, the process in international criminal law appears as an extended, but similarly undermotivated, version of the short process (*kurzer Prozess*) used in cases of offenders caught red-handed (*handhabende*, *in flagranti delicto*, etc.), namely where the offence was 'open and manifest'. Whereas the *handhabende* thief could be summarily punished, the international criminal-law offender is subjected to an extended process. That process, however, is not necessary to establish the offender's legal guilt or the legitimacy of his punishment, but rather to reflect, to perform, and to communicate the offender's condemnation by the community of the civilized. International criminal law needs a 'champagne-quality'[28] process because only champagne quality will do to illustrate civilized behaviour, even in the face of utter, yet powerless, evil. The civilized pursue evil, but they do not descend into uncivilized behaviour no matter how great the temptation. (Consider, in this context, also the rejection of capital punishment, which otherwise stands in curious contrast to the enormity of the evil personified by international criminal offenders.)

Commonality of civility, then, is one way of capturing the ethos of international criminal law. International criminal law is the community of the civilized, and

23 See, e.g., T. Weigend, 'Societas delinquere non potest? A German Perspective', (2008) 6 JICJ 927.
24 Luban, *supra* note 1, at 575.
25 Ibid., at 571.
26 Altman and Wellman, *supra* note 1, Part V.
27 Robinson, *supra* note *, at 934 ('*in dubio contra reo*').
28 Luban, *supra* note 1, at 579; see also H. Arendt, *Eichmann in Jerusalem* (1994), 10; M. J. Osiel, 'Ever Again: Legal Remembrance of Administrative Massacre', (1995) 144 *University of Pennsylvania Law Review* 463; J. Peterson, 'Unpacking Show Trials: Situating the Trial of Saddam Hussein', (2007) 48 *Harvard Journal of International Law* 260.

the project of international criminal law is a project of civilization and, indirectly, of pacification. International criminal law marks off not only the civil from the uncivil, but also the civilized from the uncivilized. In its most idealistic Camelotian moments, international criminal law devotes itself to spreading civilization throughout the world, bringing peace and security to the remotest corners of the globe.[29] In the end, international criminal law contributes to an ambitious project of establishing a well-ordered world community, a *pax universalis* (much as European criminal law pursues a *pax europaeana*).[30] This global peacemaking and -keeping project is usefully compared to other globalization regimes, notably that of global administrative law, an evolving phenomenon of governance that we will consider in greater detail a little later on.

As with all pacification projects, and all penal pacification projects in particular, international criminal law faces the question: whose peace? Without an answer to this question, if not with an attempt to deflect it by proclaiming its own powerlessness, international criminal law leaves itself open to critique that civilizing and pacifying enthusiasm may come to mask imperialist and colonizing tendencies. We have already noted the International Criminal Court's focus on African cases; similar concerns have been raised about the evolution of global administrative law, which is said to favour the interests of powerful over Third World states under the guise of the apparently neutral pursuit of globalization.[31]

3. International criminal law as misnomer

Regarded as common civility, international criminal law is an ethos. It is not law. Nor is it international or criminal law. In other words, it is a misnomer through and through.

It is easily seen that there is nothing, strictly speaking, *international* about international criminal law. International criminal law, unlike international law, does not concern itself with nations individually or their interrelation; it is neither national nor international. It marks individuals as worthy of universal condemnation, for crimes against humanity, pitting the offender, or rather the accused, against all of humanity, as an 'enem[y] of all mankind'.[32] The victims of international criminal law, too, are victims as individuals, not as members of this or that political community, subject to this or that sovereignty.[33] (Even genocide is, at least arguably, not an offence against the genus, but against individuals who were victimized on account of

29 UNSC Res. 827 (1993), Preamble, paras. 5 and 6 ('restoration and maintenance of peace'); see also G. Fletcher and J. Ohlin, 'The ICC: Two Courts in One?', (2006) 4 JICJ 428 (contrasting 'restoring collective peace and security' with 'the classic goals of criminal law to adjudicate individual guilt').

30 See, generally, M. Koskenniemi, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education', (2007) 1 *European Journal of Legal Studies* 1.

31 B. S. Chimni, 'International Institutions Today: An Imperial Global State in the Making', (2004) 15 EJIL 1; 'Cooption and Resistance: Two Sides of Global Administrative Law', International Law and Justice Working Papers No. 2005/16, Institute for International Law and Justice, New York University School of Law.

32 Luban, *supra* note 1, at 571.

33 See, e.g., A. Cassese, 'A Big Step Forward for International Justice', *Crimes of War Project: The Magazine*, December 2003.

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their membership in the genus.) Judges and other 'officials' of international criminal justice likewise are engaged as humans, not as officials of some nation or other.

Here, it is interesting to recall Gustav Radbruch's account of the distinct histories of criminal and international law, which marks the very concept of international criminal law as an oxymoron.[34] According to Radbruch, criminal law evolved from the master's (literally) domestic – or economic – disciplinary power over the inferior members of his household, and slaves in particular. Criminal law thus was essentially hierarchical, an assertion of superior power. International law, by contrast, was essential egalitarian, as it concerned the relation among householders, and eventually among states. One householder might negotiate with another, in the hope of reaching a mutually acceptable resolution to a conflict. As a last resort, he might abandon negotiation and turn to war to protect his interests, or the interests of his household (which were seen as merged, given that the householder was the only cognizable representative of the household). But, even in war, households/states would face one another as equals, subject to a more or less elaborate set of norms.

The very idea of international criminal law, which, on its face, combines the essential hierarchy of criminal law with the essential egalitarianism of international law, is therefore puzzling. The internal tension of the project of international criminal law may be seen as another way of capturing its attempt to have its cake and eat it, too – that is, to invoke the condemnatory force of penal power without facing the challenge of its legitimacy. International criminal law thus would appear as a utopia of egalitarian punishment, as a settlement of disputes among humans (as equals), while at the same time marking the objects of punishment as offenders against humanity and as evil incarnate.

In an important sense, international criminal law is also not *criminal*. It is in the end concerned with radically immoral and unethical conduct, where moral and ethical norms can be seen to coincide, given that the ethical community at stake is the community of all humans, and international 'crimes' are 'crimes' against humanity. It is no surprise, then, that international criminal law struggles to distinguish itself from humanitarian law, so that it often goes without saying that a violation of a humanitarian norm is also regarded, or at least treated, as a violation of a criminal norm.[35] What is at stake is not criminal guilt, but moral guilt, or ethical deviance, through violation of norms of the human moral/ethical community.[36]

Most significant, for our purposes at least, international criminal law is also not *law*.[37] It is not a body of law, but a regime of police.[38] Ostensibly framed in the

34 G. Radbruch, 'Der Ursprung des Strafrechts aus dem Stande der Unfreien', in G. Radbruch (ed.), *Elegantiae juris criminalis: Vierzehn Studien zur Geschichte des Strafrechts* (1950), 1.

35 See Robinson, *supra* note *, at 947; see also 954 (causation).

36 Duff, *supra* note 1, at 600 ('humanity as a moral community').

37 The debate about whether international law is 'really' law, of course, is as old as international law itself. For some recent contributions, see A. D'Amato, 'Is International Law Really Law?', (1985) 79 *Northwestern University Law Review* 1293 (is law); J. Goldsmith and E. Posner, *The Limits of International Law* (2005) (is not law); M. Scharf and P. Williams, *Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser* (2010) (is too law).

38 See Judge Robertson's comments on the legality principle in *Prosecutor v. Norman*, Child Recruitment Decision, Appeals Chamber, Dissenting opinion of Justice Robertson, Case No. SCSL-2004–14-AR72(E), 31 May 2004, para. 14 ('It is the reason why we are ruled by law and not by police').

language of human rights, it in fact pursues the establishment of a global peace in much the same way as the medieval householder protected and enforced his peace (*mund*), as English criminal law has for centuries protected and enforced the king's (or queen's) peace, and as American criminal law has for (now also, if fewer) centuries protected and enforced the public peace, having transferred sovereign power from the king to 'the people'.[39] From this perspective, the violation of human rights is relevant insofar as it marks the offender as violator of a global human peace, the humanity of the victim being significant insofar as it identifies her as a member of the relevant global human household. The oddity of the international criminal police regime, of course, is its denial of sovereignty. There is no householder, royal or otherwise. Consider American penal and constitutional history, which also denied the existence of an essentially superior, and specifically royal, sovereign through the obfuscating fiction of an amorphous people sovereign. The non-sovereign sovereign of international criminal law is not 'the people', but humanity as a whole – a community that not only manages to be vastly wider and abstracter than 'the people' of American constitutional history, but also lacks even the vague political connotation of that construct. The absence of a sovereign not only allows international criminal law to deflect the need to justify the exercise of superior power, but also creates a vacuum that may be filled in a way that replicates existing global power structures, giving rise to the sort of critiques of discriminatory enforcement that have been levelled against global asovereign regimes such as international criminal law and global administrative law.

4. Conclusion: international criminal law as global moral police

The analogy to global administrative law suggests a reinterpretation, or at least an alternative conception, of international criminal law. Having remarked that international criminal law is neither international nor criminal nor law, one might reconceive it as *global moral police* instead. The project of international criminal law is *global*, rather than international, insofar as it concerns itself not with the interaction of nations or with nations taken individually, but with individuals' relationship to humanity globally speaking; the offender of international criminal law offends humanity anywhere and everywhere, regardless of national affiliation. International criminal law, as we have seen, is concerned with violations of fundamental *moral* and ethical norms – considering the abstract community of persons as a mega-ethical community – rather than with specifically, narrowly, or formally criminal conduct (as illustrated, for instance, by the flexible application of the retroactivity prohibition on the ground that moral guilt, rather than legal guilt, is

39 To say that the regime of international criminal law – or, for that matter, the regime of global administrative law – is not law in the sense of alegal (as opposed 'merely' illegal) is not to characterize, and perhaps to critique, it as an exception to, or deviation from, Law with a capital L or some particular system of law. It is to say that it is usefully conceptualized as not a system of law, but as an instance of an alternative mode of governance that seeks not justice, but peace, not right, but order: police. See F. Johns, 'Guantanamo Bay and the Annihilation of the Exception', (2005) 16 EJIL 613.

determinative and by the conflation of humanitarian and criminal norms). Finally, international criminal law is *policial*, namely alegal, rather than merely illegal, in that it seeks global police (*Policey*) – in the traditional sense of peace, commonweal(th), welfare – a well-ordered society of human neighbours, an end that is thought to require no justification, nor adherence to strict rules (say, the principle of legality).[40]

Unconcerned with legitimation, international criminal law as global moral police is more descriptive and pragmatic than normative, more police science (in civil-law terms) or police power (in common-law terms) than legal science or legal doctrine,[41] more implementation than definition, more procedure than substance. It is, to be sure, an odd police regime, in that it denies its power in asserting it, operating in the name of the sovereignless sovereignty of blinding moral truth. The need to legitimate the enterprise of international criminal law does not arise because it is benign: it asserts, represents, and exercises no power. Its institutions are 'weak, decentralized',[42] even 'fragile', as David Luban puts it, and, at any rate, 'less important than the attention they receive warrants'.[43] To the extent that international criminal law does warrant some attention, its legitimacy is no less beyond question than the exercise of the power of penal discipline essential to the very notion of sovereignty. In this light, the sovereignty of 'the people' familiar from American constitutional history is further abstracted into a sovereignty of humanity; there is no 'there' there in international criminal law – no there that could be critiqued, challenged, rejected, whether systematically or individually in particular cases.

As in a penal police regime – described some time ago less sharply and more benignly before the massive police regime of the so-called war on crime by Herbert Packer as the 'crime control' model of the American criminal process[44]

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40 Again, like international criminal law in particular and international law in general, global administrative law has seen its essential, or at least necessary, lawness drawn into question. See B. Kingsbury, 'The Concept of "Law" in Global Administrative Law', (2009) 20 EJIL 23; D. Dyzenhaus, 'The Concept of (Global) Administrative Law', (2009) 2009 *Acta Juridica* 3. The alegality (or, more commonly, illegality) of international criminal law and global administrative law tends to be attributed to their 'international' or 'global' aspects. It is useful, however, to consider the alegality of their 'criminal' or 'administrative' aspects, as well, if only to guard against a certain international (or global) exceptionalism that obscures the connections between governmental regimes, domestic or not. The interesting question, again, is not (only) whether international criminal law is more or less 'legal' than domestic criminal law, but whether 'criminal law' in general can be usefully conceptualized as alegal. On the alegality of (domestic) administrative law, including its origin in the power and science of police, see Dubber, *supra* note 5; D. Lindenfeld, *The Practical Imagination: The German Sciences of State in the Nineteenth Century* (1997); M. Stolleis, *Geschichte des öffentlichen Rechts, Vol. 2: Staatsrechtslehre und Verwaltungswissenschaft 1800 bis 1914* (1992). Note also that both international law and administrative law struggled to find a place in American legal education because they were initially dismissed as perhaps interesting, but not legal, subjects better left to other departments, notably political science. See Comment, 'Ernst Freund: Pioneer of Administrative Law', (1962) 29 *University of Chicago Law Review* 755.

41 A similar point might be made about global administrative law, which has traced its origins to Lorenz von Stein, who was more concerned with capturing (domestic, and only incidentally international) administration in its actual operation than in the legality, or legitimacy, of the modern administrative state. In other words, von Stein was more interested in the science or study of administration (*Verwaltungswissenschaft* or *-lehre*) within the context of a comprehensive science of the state (complicating the expansion of his project to the international realm), than in the law of administration (*Verwaltungsrecht*). His enormously ambitious project was primarily descriptive, rather than normative – even if this distinction is not easily applied to Stein, given his Hegelian approach. See Kingsbury, *supra* note 40; see generally Lindenfeld, *supra* note 40.

42 Luban, *supra* note 1, at 583.

43 Ibid., at 587.

44 H. Packer, *The Limits of the Criminal Sanction* (1968).

– international criminal law as global moral police proceeds from a presumption of guilt, not of innocence. Viewed as a system for the 'administrative elimination of wrongdoers',[45] global moral police regards the processing of the prejudged as an opportunity not to determine guilt, but to perform any number of other functions, including creating a historical record of atrocities attributable more or less directly to the accused, providing the victims of these atrocities a forum to express their grief and outrage, and ultimately to manifest the accused's outlaw status, his radical difference from, and inferiority to, the human community of the civil that is sitting in judgement of him. The paradigmatic process of the domestic police regime is the plea negotiation in prosecutors' offices, with the accused reduced to the object of a bargain in the name of efficient crime control – the paradigmatic process of international criminal law as global moral police regime instead is the show trial, with the accused serving as the occasion for the global communal experience of identifying and condemning the ultimate outlaw, who not only stands outside the bounds of ordinary legality, but also violates the norms of the moral community of all humanity.

45 *Prosecutor v. Norman*, *supra* note 38.

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