Introduction

In 1950, four years after the Nuremberg judgment, Georg Schwarzenberger wrote his famous essay on 'The Problem of an International Criminal Law'.[1] Schwarzenberger asked whether a global criminal law exists. He wrote:

> When ... there is a new dernier cri, such as suggestions for the development of an international criminal law, it is advisable not to follow uncritically in the train of the enthusiastic protagonists of such an idea, but to pause and reflect on the meaning and value of it all.[2]

He came to the conclusion that '[i]n the present state of world society, international criminal law in any true sense does not exist'.[3] His main objection was that international criminal law cannot be applied universally due to the lack of central institutions. Today, this picture has changed fundamentally. International criminal cannot be criticized for underreach. On the contrary, it may suffer from overreach. There is a turn towards criminalization and accountability in many areas of international law. This is again a reason to 'pause and reflect'.

Few of the effects that international criminal law produces have been imagined in past decades. The International Criminal Court (ICC) is invoked in many situations of conflict. International criminal justice moves at such a rapid pace that it is difficult to follow its developments. Some speak of a 'new age of accountability'.[4] The UN Secretary-General Ban-Ki Moon used this term in 2010 at the Kampala Review Conference. He expressed an old cosmopolitan vision: '[t]hose who commit the worst of human crimes will be held responsible. Whether they are rank-and-file foot soldiers or military commanders ... whether they are lowly civil servants following orders, or top political leaders ... they will be held accountable'.[5] This vision deserves careful scrutiny. The idea of a modern age of accountability is grounded in the human rights movement. Accountability is related to certain key concepts: justice, truth and

[1] G. Schwarzenberger, 'The Problem of an International Criminal Law', (1950) 3 *Current Legal Problems* 263.
[2] Ibid., 263.
[3] Ibid., 295.
[4] See M. de Serpa Soares, 'An Age of Accountability' (2013) 15 *JICJ* 669.
[5] Secretary-General's 'Age of Accountability' address to the Review Conference on the International Criminal Court, Kampala, 31 May 2010, SG/SM/12930L/3158.

effective remedies. It has been promoted in the work of various UN agents and NGOs. It is frequently associated with the label of the 'fight against impunity'. The famous Joinet and Orentlicher principles relate the idea of accountability to four fundamental rights: The right to know the truth about gross human rights violations; the right to justice, which entails an obligation to investigate violations, and a right to fair and effective remedy; the right to reparation; and guarantees of non-repetition.[6]

International criminal courts and tribunals[7] play a key role in this process. They have to some extent reshaped contemporary understandings of justice.[8] In a traditional setting, criminal justice is primarily associated with ideas of fairness, retribution and justice for victims. The state is viewed as the guardian of legality. In the international arena, state agents often turn into criminals. In this context, justice is connected to a broader agenda, namely the 'fight against impunity'.[9] This determination features prominently in the preamble of the ICC Statute.[10] It implies that inaction, namely the failure to investigate and prosecute, may constitute a form of injustice.[11]

Repression of crime is only one element. International justice has been associated with a variety of goals, such as prevention and deterrence, the condemnation of specific patterns of atrocity violence, a catalytic effect on international on domestic society or a stabilizing effect on peace.

There are some reasons for optimism. In certain cases, international criminal justice may serve as a broader form of 'social deterrent'.[12] It creates greater awareness of atrocities, restricts the leverage and reach of political elites involved in crime, or may empower domestic constituencies (e.g. courts) and victim groups. Kathrin Sikkink went so far as to speak of a new 'justice cascade', arguing that prosecutions have a positive effect on human rights protection.[13]

In UN practice, international criminal justice has become part and parcel of the promotion of the rule of law. The turn towards accountability is reflected in a strengthening of the mandate of peace operations,[14] and a growing number of

[6] Commission on Human Rights, 'Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity', UN Doc E/CN.4/2005/102/Add.1, 8 February 2005.
[7] The term is used in the abstract here. It includes the ICC, the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the Former Yugoslavia (ICTY), the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Court for Sierra Leone (SCSL) and the Special Tribunal for Lebanon (STL).
[8] See M. A. Drumbl, 'Policy Through Complementarity: The Atrocity Trial as Justice', in C. Stahn and M. El Zeidy (eds.), *The International Criminal Court and Complementarity. From Theory To Practice* (Cambridge: Cambridge University Press, 2011) 197, 212.
[9] See K. Engle, 'Anti Impunity and the Turn to Criminal Law in Human Rights' (2015) 100 *Cornell Law Review* 1070.
[10] Preamble, Rome Statute of the International Criminal Court (ICC Statute), opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002).
[11] See L. Douglas, 'Truth and Justice in Atrocity Trials', in W. A. Schabas (ed.), *The Cambridge Companion to International Criminal Law* (Cambridge: Cambridge University Press, 2015) 34, 44.
[12] For an account, see B. Simmons, 'Can the International Criminal Court Deter Atrocity?' (2016) 70 *International Organization* 443, 449.
[13] K. Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: W. W. Norton, 2011). For a critique, see P. McAuliffe, 'The Roots of Transitional Accountability: Interrogating the "Justice Cascade"' (2013) 9 *International Journal of Law in Context* 106.
[14] See e.g. para. 9 (d) of Resolution 2211 on the Intervention Brigade, UN Doc. S/Res/2211 (2015), 26 March 2015.

references in thematic and country specific resolutions.[15] There has been an unprecedented move to address accountability and international crimes in international fact-finding.[16] Hardly any situation of armed conflict or atrocity violence can be settled without engagement with the question of accountability. Violations are increasingly documented by eyesight witnesses or bystanders. The point when people start to ask questions about accountability moves ever closer to the actual events.

At the same time, international criminal justice continues to face criticism and rejection.[17] Several African states have threatened to withdraw from the ICC[18] or even advocated for a collective withdrawal from the ICC Statute.[19] In 2017, Burundi became the first state to withdraw from the ICC.[20] Enforcement of international criminal justice remains selective. It remains a challenge to bring hard cases that threaten powerful states.[21] From the perspective of the Global South, the 'fight against impunity' is sometimes perceived as a movement with certain disempowering features. It may dominate the discourse on peace, re-entrench inequalities or prioritize specific Western-liberal approaches to accountability and hide who benefits from such policies.[22] Where justice intervention occurs in ongoing conflict, or is carried out in conjunction with military action, such as in the Libyan context,[23] it may have certain destabilizing effects. The nexus between peace and justice remains a bone of contention. Although there is broad agreement that the two prerogatives are interconnected, timing, sequencing and the precise modalities of justice remain open to discussion. The slogan 'no peace without justice' is too general. Sometimes, there might be no justice without peace.

Experiences over past decades leave some doubts whether international trials can be expected to create security or an accurate account of the past.[24] There is typically a focus on spectacular trials. There are numerous historical examples: the Nuremberg and Tokyo trials which tried German and Japanese leaders after World War II,[25] the

[15] Findings include characterizations of certain acts as crimes under the Rome Statute, references to ongoing investigations, prosecutions or warrants of arrest, or recognition of the importance of cooperation with the Court. For a survey, see D. Ruiz Verduzco, 'The Relationship between the ICC and the United Nations Security Council', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford: Oxford University Press, 2015), 30.

[16] Since the mid-1990s, more than twenty missions have been vested with an accountability mandate. See L. van den Herik, 'An Inquiry into the Role of Commissions of Inquiry in International Law: Navigating the Tensions between Fact-Finding and Application of International Law' (2014) 13 *Chinese Journal of International Law* 507.

[17] On the appeal of international tribunals to less powerful states, see A. A. Jacovides, 'International Tribunals: Do They Really Work for Small States?' (2001–2002) 34 *New York University Journal of International Law and Politics* 253.

[18] In 2017, Burundi became the first state to withdraw from the Rome Statute.

[19] P. Labuda, 'The African Union's Collective Withdrawal from the ICC: Does Bad Law Make for Good Politics?', EJIL Talk, 15 February 2017, at www.ejiltalk.org/the-african-unions-collective-withdrawal-from-the-icc-does-bad-law-make-for-good-politics/.

[20] The Philippines notified their withdrawal in 2018.

[21] See e.g. W. Schabas, 'The Banality of International Justice' (2013) 11 *JICJ* 545.

[22] See V. Nesiah, 'Doing History with Impunity', in K. Engle, Z. Miller and D. M. Davis (eds.), *Anti-Impunity and the Human Rights Agenda* (Cambridge: Cambridge University Press, 2016), 95, 111–112.

[23] See SC Resolution 1970 (2011), UN Doc. S/Res/1970 (2011). 26 February 2011. For an analysis, see L. Vinjamuri, 'The ICC and the Politics of Peace and Justice', in Stahn, *Law and Practice*, 13.

[24] See C. Stahn, 'Between Faith and Facts: By What Standards Should We Assess International Criminal Justice' (2012) 25 *LJIL* 251.

[25] On Nuremberg, see G. Mettraux (ed.), *Perspectives on the Nuremberg Trial* (Oxford: Oxford University Press, 2008). On Tokyo, see N. Boister and R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford: Oxford University Press, 2008).

trial of Nazi leader Adolf Eichmann in Jerusalem,[26] the trial of Saddam Hussein after the fall of the Iraqi regime,[27] the trials against Slobodan Milošević, Radovan Karadžić or Ratko Mladić before the International Criminal Tribunal for the former Yugoslavia in The Hague,[28] or the trial of Charles Taylor which completed the work of the Special Court for Sierra Leone.[29]

Such criminal trials are in many ways imperfect.[30] International criminal justice is based on a rupture between past and present. It analyses historical events mainly through the lens of crimes. As Hannah Arendt put it in her observations on the Eichmann trial (*Eichmann in Jerusalem*): 'No punishment has ever possessed enough power of deterrence to prevent the commission of crimes'.[31] Trials are highly selective. They reflect only a fraction of incidents and charges. This compromises their ability to contribute to prevention and justice. In proceedings, facts and events are filtered through the rationality of the law. The legal process seeks to bring order into chaos. It is geared at clarifying and simplifying social reality. It relates facts, conduct and events to legal concepts and tangible normative constructs. It analyses human conduct through certain ordering structures, hierarchies and chains of causation, and it uses constructed knowledge and fictions to fill gaps. As a result, the judgment often reflects at best one among multiple truths. Drawing on the experiences of post-authoritarian transitions, scholars have made the argument that certain crimes are so outrageous and complex that no punishment can suffice to render adequate justice.[32]

Proceedings are frequently criticized for being too long and too costly.[33] Some trials are perceived as 'show trials',[34] or might even heighten tensions in local communities, as shown by evidence in the Balkans.[35] Sometimes, a judgment produces injustice. For instance, in the *Šešelj* case Judge Lattanzi argued that Šešelj's acquittal at trial by the majority 'showed total disregard, if not contempt, for many aspects of the application and the interpretation of that law as set forth in the case-law of the ICTY and the

[26] See W. Schabas, 'The Contribution of the Eichmann Trial to International Law' (2013) 26 *LJIL* 667.
[27] M. Newton and M. Scharf, *Enemy of the State: The Trial and Execution of Saddam Hussein* (New York: St. Martin's Press, 2008); J. E. Alvarez, 'Trying Hussein: Between Hubris and Hegemony' (2004) 2 *JICJ* 319.
[28] See generally T. Waters (ed.), *The Milošević Trial: An Autopsy* (Oxford: Oxford University Press, 2014); G. Boas, *The Milošević Trial* (Cambridge: Cambridge University Press, 2007).
[29] See C. Jalloh, 'Charles Taylor', in W. Schabas (ed.), *Cambridge Companion to International Criminal Law* (Cambridge: Cambridge University Press, 2016), 313–332.
[30] See G. Nice, 'Trials of Imperfection' (2001) 14 *LJIL* 383.
[31] H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin, 2006), 273.
[32] C. Santiago Nino, *Radical Evil on Trial* (New Haven: Yale University Press, 1996).
[33] R. Zacklin, 'The Failings of the Ad Hoc International Tribunals' (2004) 2 *JICJ* 541, 543, 545.
[34] On the fine line between show trials and political trials, see J. N. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge, MA: Harvard University Press, 1986); M. S. Ball, 'The Play's the Thing: An Unscientific Reflection on Courts under the Rubric of Theater' (1975) 28 *Stanford Law Review* 81; M. Koskenniemi, 'Between Impunity and Show Trials' (2002) 6 *Max Planck Yearbook of United Nations Law* 1.
[35] M. Milanović, 'The Impact of the ICTY on the Former Yugoslavia: An Anticipatory Post-Mortem' (2016) 110 *AJIL* 233; K. L. King and J. D. Meernik, 'Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia: Balancing International and Local Interests while Doing Justice', in B. Swart, A. Zahar, and G. Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: Oxford University Press, 2010), 7.

ICTR', and reduced law to Cicero's old maxim 'In times of war, the law falls silent' (*Silent enim leges inter arma*).[36]

The turn to accountability and sanctions for violations has transformed human rights discourse and approaches towards human rights investigation and prosecution. It offers new prospects for enforcement. But it might easily take on certain missionary features. It is too simple to assume that international law can deal with evil by investigating and prosecuting 'bad actors'.[37] The concept of 'fight against impunity' can be used as a pretext by a government to silence political opposition. It induces pressures of compliance and emergence of justice mechanisms that are oriented towards global priorities. Coupled with socio-economic incentives, this approach may create strong discrepancies between 'ordinary' justice and elitist international justice regimes – which ultimately run counter to the objective of effective and long-term justice enforcement. As cautioned by scholars, there is a risk that the expansion of global accountability may effectively narrow or reduce, rather than broaden, the options of justice.[38] In certain contexts, international criminal law may impede peace efforts or humanitarian relief action. For instance, in Sudan the government expelled humanitarian NGOs following the issuance of ICC arrest warrants.[39]

I.1 Content

This book examines these dilemmas. It seeks to set the foundations and law and practice of international criminal law into context. It explores how international criminal law defines and legitimizes itself as a juridical field, how it works, what outcomes it produces and how it can be improved.[40]

International criminal law draws on a number of justifications: consent-based arguments, based on delegation of authority or social contract theory, process-based justifications (e.g. fairness and impartiality of proceedings), consequentialist arguments based on projected outcomes (e.g. deterrence, justice for victims) and expressivist claims, related to the affirmation of laws and social values. Many of these justifications are under challenge.

This work starts from the premise that justifications and critiques can be understood best through study of international practices and relations between agents and constituencies. It seeks to unpack some of the existing tensions in global discourse, such as the

[36] *Prosecutor* v. *Šešelj*, IT-03–67-T, Judgment, 31 March 2016 (*Šešelj* Trial Judgment), Partially Dissenting Opinion of Judge Flavia Lattanzi, paras. 143 and 150.
[37] M. J. Aukerman, 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice' (2002) 15 *Harvard Human Rights Journal* 39.
[38] See e.g. S. M. H. Nouwen and W. G. Werner, 'Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity' (2015) 13 *JICJ* 157.
[39] 'Sudan Expels 10 Aid NGOs and Dissolves 2 Local Groups', *Sudan Tribune*, 4 March 2009.
[40] On international criminal law as an object of study, see E. van Sliedregt, 'International Criminal Law: Over-studied and Underachieving?' (2016) 29 *LJIL* 1; M. Burgis-Kasthala, 'Introduction: How Should We Study International Criminal Law? Some Reflections on the Potentialities and Pitfalls of Interdisciplinary Scholarship' (2017) 17 *International Criminal Law Review* 227.

shifting contours of criminality and international crime, the relationship between 'the collective' and 'the individual', frictions between 'global' and 'local' visions of justice, foundations of the legal process, and divides between perpetrators and victims.[41]

The content is organized along five main themes that go to the heart of contemporary dilemmas of international criminal justice: the search for a definition of international crimes, the tension between individual and collective responsibility, the role and challenges of justice institutions, the organization of justice procedures, and approaches towards punishment and the repair of harm.

The first chapter introduces key concepts and foundations of international criminal law, including the evolving nature of the notion of international crimes. It shows that international criminal law struggles to identify a normative theory of international crimes. It illustrates how the fluid nature of international crime facilitated the framing of new labels of criminality. It revisits not only core crimes, but also contemporary understandings of historical crimes, as well as certain neglected crimes. It demonstrates how international crimes have been developed beyond their original context and practice. It argues that the distinction between international and transnational crimes is less fluid than traditionally assumed.

The second chapter examines the tension between individual and collective responsibility. It argues that international criminal law has developed a rigid distinction between individual criminal guilt and collective responsibility in order to counter critiques of victor's justice. According to this vision, individual guilt is expressed predominantly through criminal prosecution while collective responsibility is addressed through reparations. The book illustrates how existing concepts and theories struggle to translate the collective nature of criminality into an individualized framework of responsibility. It examines some of the contextual factors underlying international crimes, including typologies of group action. It then explores theories used to connect offenders to collective atrocities and grounds for excluding criminal responsibility.

The third chapter analyses some of the key challenges related to global justice institutions. It starts with an examination of the turn to institutions, and some of their justifications and critiques. It shows that international criminal courts and tribunals are not simply legal agents, but social actors whose actions are marked by investment by various agents and continuing strategies of goal adjustment. It analyses strengths and weaknesses of different justice models (domestic, international, hybrid and regional justice),[42] their links to politics, and approaches that institutions have developed to counter challenges to the enforcement of their mandates. It illustrates that there is a certain paradigm shift. Throughout much of the nineteenth and twentieth centuries, international criminal law has been driven by the ideal of international criminal jurisdiction. In contemporary practice, many limitations and

[41] On child soldiers, see M. Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford: Oxford University Press, 2012).
[42] See generally F. Mégret, 'What Sort of Global Justice is "International Criminal Justice"' (2015) 13 *JICJ* 77.

critiques of this universal model have become apparent. The accountability architecture is becoming more diverse and pluralist. Domestic jurisdiction, quasi-judicial or alternative forums are gaining broader importance. One of the key challenges is to develop a broader accountability texture that draws on the individual strengths of these diverse forums, and allows greater dialogue between their constituencies.

The fourth chapter examines justice procedures. It illustrates how international proceedings have been adjusted to capture the exceptional nature of international crimes. It analyses the different stages of the justice process, including the question of to what extent criminal processes and procedures promote justice and truth. It covers the role of different actors in the process, including prosecutorial strategies and dilemmas, Defence perspectives, the role of judges and the space of victims in international criminal proceedings. It shows that international justice cannot be measured simply in terms of 'bad guys' being convicted and innocent victims receiving reparation. Justice is largely about the justice process. Many important choices are made before the actual trial. The significance of proceedings extends far beyond the judgment, defendant or the Courtroom.

The final chapter addresses how harm is repaired. Traditionally, punishment is seen as the main instrument to remedy wrong. The book explains the complex functions of punishment and its different justifications. It traces the role and paradoxes of sentencing, including the difficulty of applying 'ordinary sentences' to extraordinary crimes.[43] It pleads for greater imagination in relation to punishment. It analyses contemporary trends to provide reparation through criminal proceedings, including differences between human rights-based and criminal justice approaches. It claims that reparative practices have an important symbolic space in international criminal proceedings, but should not be confused with national reparation programmes or other forms of humanitarian assistance.

The book concludes with some reflections on how to rethink the status quo of international criminal law. It argues that international criminal law as a field is likely to remain fundamental, despite the flaws and setbacks of specific global justice institutions. It pleads for greater modesty, and a fresh look on some fundamental conceptions, narratives and ambitions.

I.2 Foundations

The idea of justice can be traced back to ancient civilizations,[44] and is reflected in domestic criminal justice systems. However, as a field of international law,

[43] See M. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2007), 1–22; M. B. Harmon and F. Gaynor, 'Ordinary Sentences for Extraordinary Crimes' (2005) 7 *JICJ* 683.

[44] On justice in pre-modern societies, see S. M. Shahidullah, *Comparative Criminal Justice Systems* (Burlington: Jones and Barlett, 2014), 130. On international criminal law specifically, see C. M. Bassiouni, *Introduction to International Criminal Law: Second Revised Edition* (Leiden, Boston: Martinus Nijhoff, 2013), 1047–1087.

international criminal justice is relatively young. It is in many ways a body of law in the making. It has a complex identity. Logically speaking, it has never been fully international, or purely criminal.[45] The connection between law and politics is porous.

Formally, international criminal law emerged at the boundaries of public international law and domestic law. Early works associated the idea of international criminal law with the exercise of jurisdiction by states over foreign crimes or domestic crimes committed by foreigners.[46] Throughout the twentieth century, it gained a special place in public international law. Public international law is traditionally focused on interstate relations and subjects of international law, such as international organizations. International criminal law deals with the rights and responsibility of individuals, and the mechanisms designed to promote individual criminal responsibility for violations of international law. Its sources are international, but the sanction is penal.

International criminal law is essentially a 'criminal law without a state'.[47] Unlike domestic criminal law, it is not grounded in the powers of a central sovereign institution. On the contrary, its essence and normative order transcends the authority of individual states.[48] Modern theorizations of international law have accepted the idea that international criminal law can exist as a body of law, despite the absence of one central sovereign institution at the international level that enforces it.[49] Cherif Bassiouni refers to the foundations of international criminal law as 'the convergence of two different legal disciplines', the 'international aspects of national criminal law' and the 'criminal aspects of international law'.[50] However, the ambiguous nature of international criminal law continues to pose tensions.[51] There is a conflict between realist and cosmopolitan visions of international criminal law.[52]

Realists argue that international criminal law is grounded in a state-centred international order. According to this view, international criminal law is essentially derived from state consent. Cosmopolitan approaches claim that international criminal justice derives from a human-centred order that places groups or individuals at the core of international society. A popular theory is that the commission of international crimes triggers a *jus puniendi*, i.e. a right to punish that is grounded in a responsibility of individuals towards the society of world citizens (*ubi societas ibi ius puniendi*).[53]

[45] C. Stephen, 'International Criminal Law: Wielding the Sword of International Criminal Justice' (2012) 61 *International and Comparative Law Quarterly* 55.
[46] E. Wise, 'Prolegomenon to the Principles of International Criminal Law' (1970) 16 *New York Law Forum* 562.
[47] K. Ambos, 'Punishment without a Sovereign? The Ius Puniendi Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law' (2013) 33 *Oxford Journal of Legal Studies* 293.
[48] On the normative problems, see Schwarzenberger, 'Problem of an International Criminal Law', 263.
[49] See Q. Wright, 'The Scope of International Criminal Law: A Conceptual Framework' (1975) 15 *Virginia Journal of International Law* 561.
[50] C. M. Bassiouni, 'The Penal Characteristics of Conventional International Criminal Law' (1983) 15 *Case Western Reserve Journal of International Law* 27.
[51] E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague: TMC Asser Press, 2003), 4.
[52] S. C. Roach (ed.), *Governance, Order, and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court* (Oxford: Oxford University Press, 2009).
[53] See Ambos, 'Punishment without a Sovereign', 313.

According to cosmopolitan approaches, humanity is the sovereign and the *urbi* and *orbis* of international criminal law. Critical approaches, including Third World Approaches to International Law (TWAIL),[54] question some of the articulations of humanity represented by cosmopolitan approaches[55] and certain liberal premises of international criminal law, such as the virtues of juridification, criminalization and individualization.[56] They draw attention to limitations and tensions, such as the unequal effects of international criminal justice in international relations,[57] the narrow historical trajectory of atrocity trials, their selectivity, their limited attention to everyday forms of violence, or the gendered nature of doctrines and discourse.[58]

International criminal law seeks to protect different interests. As Herbert Packer has argued, the essence of criminal justice may be explained by two models: the 'crime control' model and the due process model.[59] The crime control model is grounded in the idea that the 'criminal process is a positive guarantor of social freedom'.[60] It stresses the value of criminal law enforcement to prevent the breakdown of public order. The due process model emphasizes the protection of the liberty of persons.[61] It introduces controls and safeguards against the abuse of power. International criminal justice encompasses both dimensions. However, it places special emphasis on the defence of international public order and peace and security. History has shown that these two conceptions may clash with each other.[62]

International criminal law is shaped by pragmatism. Initially, perpetrators were presented as outlaws of the international community, e.g. in the context of piracy. The international criminal law movement turned 'enemies' into criminals. It reduced at the same time the need for a turn to natural law. Early crimes, such as slavery or terrorism, were guided by the idea of sanctioning certain acts or practices that affected the common interest of states. In the course of the twentieth century, however, the

[54] According to Makau Mutua, TWAIL is driven by 'three basic, interrelated and purposeful objectives. The first is to understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions that subordinate non-Europeans to Europeans. Second, it seeks to construct and present an alternative normative legal edifice for international governance. Finally, TWAIL seeks through scholarship, policy, and politics to eradicate the conditions of underdevelopment in the Third World'. See M. Mutua, 'What is TWAIL?' (2000) 94 *American Society of International Law Proceedings* 31.

[55] For a critique of a 'monolithic' vision of international community' see I. Tallgren, 'The Voice of the International: Who is Speaking?' (2015) 13 *JICJ* 135.

[56] On the idea of 'TWAILing' international criminal law, see M. Burgis-Kasthala, 'Scholarship as Dialogue? TWAIL and the Politics of Methodology' (2016) 14 *JICJ* 921. See also A. Anghie and B. S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2 *Chinese Journal of International Law* 77; J. Reynolds and S. Xavier, '"The Dark Corners of the World": TWAIL and International Criminal Justice' (2016) 14 *JICJ* 959; A. Kiyani, 'Group-Based Differentiation and Local Repression: The Custom and Curse of Selectivity' (2016) 14 *JICJ* 939.

[57] On alleged 'inherent imperialism', see F. Cowell, 'Inherent Imperialism' (2017) 15 *JICJ* 667.

[58] K. Engle, 'Feminism and its (Dis)contents: Criminalizing Wartime Rape' (2005) 99 *AJIL* 778; F. N. Aolain, 'Gendered Harms and their Interface with International Criminal Law' (2014) 16 *International Feminist Journal of Politics* 622; D. Buss, 'Performing Legal Order: Some Feminist Thoughts on International Criminal Law' (2011) 11 *International Criminal Law Review* 409.

[59] H. L. Packer, 'Two Models of the Criminal Process' (1964) 113 *University of Pennsylvania Law Review* 1.

[60] Ibid.

[61] See D. Robinson, 'A Cosmopolitan Liberal Account of International Criminal Law' (2013) 26 *LJIL* 127. On fairness, see M. Damaška, 'Reflections on Fairness in International Criminal Justice' (2010) 8 *JICJ* 611–620; Y. McDermott, *Fairness in International Criminal Trials* (Oxford: Oxford University Press, 2016).

[62] D. Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 *LJIL* 925.

focus shifted. International criminal law developed mainly as a response to mass violations of human rights by states against citizens and persons within their territory.[63] It stresses the obligation-related side of sovereignty. It makes state action answerable, not only internally, in the domestic realm, but also externally, on the international plane. It has a dual function: it serves as a shield against violations, and as a sword to hold perpetrators accountable.[64]

International criminal law encompasses at least three types of offences: transnational offences that affect certain global interests, offences relating to interstate relations (e.g. aggression) and offences protecting human beings.

The idea of protecting individuals has close synergies with two other bodies of law: international human rights law, which is designed to protect the basic rights and freedoms of all persons, and international humanitarian law, which protects citizens during armed conflict.[65] International criminal law seeks to reconcile three dimensions: the 'universalist' aspirations of public international law,[66] the 'humanist' dimensions of human rights law and the legality and fairness-oriented foundations of criminal law.[67]

International criminal law differs from human rights law and humanitarian law through its specific focus on individual criminal responsibility for violations. Unlike classical human rights law, it is not predominantly centred on obligations of states. The addressee of international criminal law is primarily the individual, as opposed to the state.

International criminal law at the same time overlaps with domestic criminal law. It includes offences, defences, modes of liability, as well as principles and procedures relating to evidence, sentencing, victim participation, witness protection or mutual legal assistance and cooperation.

A core foundation of international criminal law is the principle of legality, also called *nullum crime sine lege* ('no crime without law').[68] A person cannot or should not face criminal punishment except for an act that was criminalized by law before they performed the act. The principle was established as a reaction to the broad discretion of judges in the era of Enlightenment.[69] As the Permanent Court of International Justice held in 1935 in relation to changes of the German Penal Code

[63] For a critique, see S. Starr, 'Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations' (2007) 101 *Northwestern University Law Review* 1257.
[64] See F. Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 *JICJ* 577, with reference to the imagery used by Christine Van den Wyngaert.
[65] See R. Kolb, *Advanced Introduction to International Humanitarian Law* (Cheltenham: Edward Elgar, 2014).
[66] On 'universality', see B. Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 *EJIL* 265.
[67] See also K. Ambos, *Treatise on International Criminal Law: Vol. I Foundations and General Part* (Oxford: Oxford University Press, 2013), 55, making reference to the principles of 'legality, culpability and fairness'. For an analysis of the tensions between these aspirations, see A. Clapham, 'Three Tribes Engage on the Future of International Criminal Law' (2011) 9 *JICJ* 689.
[68] C. Kreβ, 'Nulla Poena, Nullum Crimen Sine Lege', in R. Wolfrum (ed.), VII *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2012), 889.
[69] R. Bellamy (ed.), *Beccaria, On Crimes and Punishments' and Other Writings* (New York: Cambridge University Press, 1995).