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International Criminal Law as a Means to Fight the "Hostes Humani Generis"? – On the Dangers of the Concept of Enemy Criminal Law

Andreas Werkmeister*

I. Introduction

The International Criminal Court "is fighting impunity". The International Criminal Tribunal for former Yugoslavia described how "the torturer has become, like the pirate and the slave trader before him, *hostis humani generis*, an enemy of all mankind".[1] And also *Hannah Arendt* when writing about Eichmann averred that Israel was capturing an outlaw, a *hostis humani generis*.[2]

These quotations indicate that in the political, philosophical and juridical discourse about International Criminal Law, the refrain of a fight against the enemies of all mankind is fairly common. *Vis-à-vis* the universal enemy the question whether and why international institutions have the right to punish individuals seems to be obsolete. Taking into account the cruelty of the core crimes – genocide, war crimes, crimes against humanity and aggression – this seems understandable, but is it also acceptable? The exercise of supranational power in the form of criminal punishment, on the other hand, directly impacts personal liberty of living individuals. Will it therefore not remain necessary to reflect the individual as someone who is worthy of being given adequate reasons for actions that affect him in a substantive way?[3] It is against this backdrop that I will discuss the dangers of enemy criminal law in an international context.

My reflections about that topic will be structured in three parts. First I will analyze (II) and then criticize the normative implications of the concept of enemy criminal law (III). I

* The author works as a research assistant to Professor Petra Wittig at the Ludwig-Maximilians-University in Munich. This article is based on a speech given at the conference "Law and Behavior" hosted by Kyushu University in February 2013. Thanks are given to Professor Petra Wittig for her continuing support and to Professor Toshiyuki Kono and Professor Mark Fenwick of Kyushu University for the fruitful conference.

[1] ICTY Judgment of 10 December 1998, Prosecutor vs. Furundzija, IT-95-17/1-T, no. 147 (citing a USA court in *Filartiga v. Pena-Irala*, 630 F. 2d 876, 2d Cir.1980).

[2] *Arendt*, Hannah Arendt/Karl Jaspers Briefwechsel, 1926-1969, 1985, p. 451; *Arendt*, Eichmann in Jerusalem, 2011, p. 400; see also *Arendt*, Hannah Arendt/Karl Jaspers Briefwechsel, 1926-1969, 1985, p. 459.

[3] *Forst*, Ethics 2010, 711 (734).

will conclude with some remarks about the framework for an alternative conception of punishment in International Criminal Law (IV).

II. Normative Analysis of Enemy Criminal Law

1. Background Information

In German criminal law, law professor *Günther Jakobs* made the most significant developments to the concept of an enemy criminal law.[4] The concept, as *Jakobs* propounded it, drew a distinction between a normal "criminal law for citizens or persons" and a "criminal law for enemies".[5] Whereas citizens or persons are fundamentally geared to the notion of right and wrong, *Jakobs* defined enemies as those who (presumably) have permanently abandoned the legal order.[6] As concrete examples for the category of enemy criminal law, *Jakobs* mentioned, *inter alia*, anti-terrorist legislation, the laws to fight organized crime and International Criminal Law.[7] However I do not want to refer especially to *Jakobs'* concept, it is just seen as one example of theorizing the enemy.
In enemy criminal law punishment has different, extreme purposes – the deontologically structured constraints such as the principle of guilt or core procedural rights of the defendant that define a liberal criminal law can be passed over. In the opinion of the theorists of the enemy criminal law the exclusion of the enemy is inevitable to guarantee the rule of law for the rest of the society.[8] In the context of an incompletely developed international society theorists think that International Criminal Law is a sort of enemy criminal law as long as no constituted world community exists.[9] As signs of enemy criminal law theorists mention *inter alia* the position of International Criminal Law towards the principle of *nullum crimen, nulla poena sine lege*, the conception of defenses and a greater political influence on juridical decisions.[10]

Even though it is sometimes disputed the concept goes beyond that descriptive dimension: It does not only describe elements of enemy criminal law and argues that enemy criminal law is inevitable but it also implies that enemy criminal law is

[4] *Jakobs*, in: *Eser/Hassemer/Burkhardt* (Ed.), Die deutsche Strafrechtswissenschaft vor der Jahrtausendwende, 2000, 47; *Jakobs*, HRRS 2004, 88; *Jakobs*, Staatliche Strafe: Bedeutung und Zweck, 2004, p. 47–48; *Jakobs*, HRRS 2006, 289.
[5] *Jakobs*, HRRS 2006, 289 (293).
[6] *Jakobs*, in: *Eser/Hassemer/Burkhardt* (Ed.), Die deutsche Strafrechtswissenschaft vor der Jahrtausendwende, 2000, 47 (52).
[7] *Jakobs*, in: *Eser/Hassemer/Burkhardt* (Ed.), Die deutsche Strafrechtswissenschaft vor der Jahrtausendwende, 2000, 47 (52, 54).
[8] *Jakobs*, in: *Eser/Hassemer/Burkhardt* (Ed.), Die deutsche Strafrechtswissenschaft vor der Jahrtausendwende, 2000, 47 (53). *Jakobs*, HRRS 2004, 88 (92); similar *Pawlik*, Der Terrorist und sein Recht, 2008, p. 40.
[9] *Jakobs*, Staatliche Strafe: Bedeutung und Zweck, 2004, p. 47; *Pawlik*, ZIS 2006, 274 (291).
[10] *Pawlik*, ZIS 2006, 274 (291).

legitimate.[11] The concept of the enemy criminal law normatively implies that the (universal) enemy is deprived of his condition of being a person. Therefore the demands for any account of justifying punishment are lowered. The individual declared as enemy loses his right to claim the constraints of a liberal criminal law and the punitive actions towards him are only limited if the punishing body decides (out of prudential reasons) to restrict itself to certain measures.[12] Other that is more extreme purposes of punishment seem to be acceptable. This could especially apply to International Criminal Law and the enemies of all mankind.

Regarding the analysis of the enemy criminal law one has to distinguish between the description of elements of enemy criminal law in the positive International Criminal Law, the question of empirical inevitability and the question of normative legitimacy. In my evaluation I will only focus on the latter. Of course one can already cast doubt on whether the category of enemy criminal law is as inevitable as its advocates think. On a theoretical level however it seems more important that even if enemy criminal law was inevitable (which is an empirical question) there might be a non-contingent that is normative reason, why we cannot legitimately accept such a conception as justified.[13] I will try to defend the thesis that human dignity offers this normative reason.

2. Persons and Enemies

a) Basics

Before I will go a bit deeper into the discussion about the different conceptions of punishment in an international enemy criminal law I will analyze the distinction that theorists draw between enemies and persons. This distinction is fundamental as it describes the line between two different legitimating narratives.[14]

b) Enemies and the State of Nature

The idea is that the enemy has to be regarded as being excluded from any form of social contract or any concept of society. In other words: the enemy is not part of the society judging him.[15] For international criminal law, that means that the enemies (of all mankind) are excluded from the world society. Rather, they are often associated with the state of nature as described by many theorists of the social contract.

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[11] For example *Pawlik*, ZIS 2006, 274 (291); It is important to note that the concept of an enemy criminal law could also be used to only describe and criticize elements of enemy criminal law in the existing positive law or the jurisprudence based on it. Some of the quoted authors might use the term in that sense. The topic of this article is however whether the enemy criminal law which we might find in reality could normatively be justified.

[12] *Jakobs*, Staatliche Strafe: Bedeutung und Zweck, 2004, p. 44.

[13] *Greco*, Feindstrafrecht, 2010, p. 40.

[14] *Pawlik*, Der Terrorist und sein Recht, 2008, p. 40.

[15] *Jakobs*, HRRS 2004, 88 (95).

The (universal) enemy of human rights, so deeply and visible demonstrates his dangerous or amoral capacities that he deprives himself of the condition of being a person. The enemy thus reduces himself to the state of nature, where legal personality supposedly does not exist as a notion of law.[16] In that sense the exclusion of the enemy is self-exclusion.[17] This gains traction if we think of crimes in ethnic conflicts, where, for example, perpetrators of core crimes continue to deny any sense of community with those whom they have wronged.[18]

c) Hostis Humani Generis

To make the point that the human rights abuser is not only excluded from national societies there is also reference to the Roman notion of *hostis humani generis*[19] (enemy of all mankind) which can be traced back to Cicero's philosophy.[20] This makes clear the global dimension of the exclusion of the perpetrators of core crimes. The *hostes humani generis* are seen as global outlaws: they stand outside every legal order.[21] In that sense, "the withdrawal of social protection from the wrongdoer is universal".[22] The concept was previously only used to describe the legal status of pirates, but theorists have also applied it to human rights abusers.[23]

3. Purposes of Punishment

With regards to the purposes of punishment in an International Enemy Criminal Law one has to distinguish three different conceptions. The first one is motivated by preventive reasons, the second is motivated by vengeance and the third one is motivated by symbolism. Equally one could distinguish three forms of enemies: a dangerous enemy, an amoral enemy and a defeated enemy.[24]

a) Prevention

Regarding the preventive line of thought, the enemy is seen as an origin of global danger which needs to be controlled.

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[16] *Jakobs* also discusses the possibility of a pre-legal personality *Jakobs,* Staatliche Strafe: Bedeutung und Zweck, 2004, p. 44.
[17] *Jakobs,* HRRS 2006, 289 (293); *Pawlik* describes this as a radicalization of a liberal paradigm *Pawlik,* Der Terrorist und sein Recht, 2008, p. 38.
[18] *Duff,* in: *Brudholm/Cushman* (Ed.), The religious in responses to mass atrocity, 2009, 79 (91).
[19] In political philosophy *Agamben* discusses the notion of *homo sacer: Agamben,* Die Souveränität Macht und das nackte Leben, 2002; See for the context of criminal law *Wittig,* in: *Heinrich/Jäger* (Ed.), Festschrift Roxin, 2011, 113-129.
[20] Nam pirata non est ex preduellium numero definiturs, sed communis hostis omnium (*Cicero,* De officiis, 2008, p. 292, III. 107).
[21] *Duff,* in: *Brudholm/Cushman* (Ed.), The religious in responses to mass atrocity, 2009, 79 (81).
[22] *Luban,* Yale J. Int'l L. 2004, 85 (140).
[23] *Luban,* Yale J. Int'l L. 2004, 85 (140).
[24] That of course exceeds the definition of enemy criminal law by Jakobs who only refers to the dangerous enemy.

There are those who argue that punishment in international criminal law does not reaffirm an existing legal order, but rather it is about the creation of a new one by use of coercive means.[25] Where international crimes are committed effective norms in reality either do not exist or they are corrupted.[26] The use of force against the enemy however could be justified as long as it helps to create a globally constituted order.[27]
Another line of thought rehearses to the categories of the law of war.[28] As the *hostis humani generis* has declared war against all mankind, all mankind must declare war against him.[29] In the name of all mankind an international court could punish the enemies as an act of warfare to eliminate the origin of a global danger. Theorists claim that these versions of enemy criminal law are still a somehow limited conception which only pleads for those acts which are *necessary* to defeat the dangerous enemy[30], which thereby are also necessary to *create* a globally constituted order[31].

b) Vengeance

In the vengeance orientated line of thought the enemy is seen as an amoral individual against whose amoral deeds mankind must retaliate. "This great crime offends nature, so that the very earth cries out for vengeance" (Yosal Rogat).[32] The punitive actions of the international community are driven by a moral lust to punish.[33] Having committed atrocities the perpetrators become anyone's and everyone's legitimate enemies,[34] they were outlawed.[35] In other words, the enemies of all mankind are seen as legitimate objects of vigilante justice. In this context it is interesting to note that it was suggested that it might have been legitimate for a Jew to assassinate Eichmann,[36] or that the young Armenian who executed Talat – the man directly responsible for the Armenian genocide – has remained unpunished[37]. Punishment would be constructed as a final act of exclusion and could be communicated with the following words borrowed by *Hannah Arendt*: "We find that no one, that is, no member of the human race, can be expected to

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[25] *Jakobs*, HRRS 2004, 88 (94).
[26] *Jakobs*, in: *Eser/Hassemer/Burkhardt* (Ed.), Die deutsche Strafrechtswissenschaft vor der Jahrtausendwende, 2000, 47 (54); *Jakobs*, HRRS 2004, 88 (94).
[27] *Jakobs*, HRRS 2004, 88 (95); Enemy criminal law theorists try to make reference to *Kant* to support this view (*Jakobs*, Staatliche Strafe: Bedeutung und Zweck, 2004, p. 43); In his writing on the perpetual peace *Kant* says that the human being in the "state of nature" could be forced to accept constituted-legal conditions (*Kant*, Zum ewigen Frieden, 1796, Zweiter Abschnitt, fn. 1).
[28] *Pawlik*, Der Terrorist und sein Recht, 2008, p. 40 in the context of terrorism.
[29] *Blackstone*, Commentaries on the Laws of England, Book the Fourth, Chapter the Fifth, p. 71 (avalon.law.yale.edu/18th_century/blackstone_bk4ch5.asp).
[30] *Pawlik*, Der Terrorist und sein Recht, 2008, p. 41.
[31] *Jakobs* for example discusses that it might not be legitimate to use the enemy as a means to deter others (*Jakobs*, Staatliche Strafe: Bedeutung und Zweck, 2004, p. 44).
[32] As cited in *Arendt*, Eichmann in Jerusalem, 2011, p. 401.
[33] *Du Bois-Pedain*, in: von *Hirsch/Neumann/Seelmann* (Ed.), Strafe - Warum?, 2011, 205 (211).
[34] *Luban*, Yale J. Int'l L. 2004, 85 (140).
[35] *Arendt*, Hannah Arendt/Karl Jaspers Briefwechsel, 1926-1969, 1985, p. 451.
[36] *Arendt*, Eichmann in Jerusalem, 2011, p. 387; *Luban*, Yale J. Int'l L. 2004, 85 (140).
[37] *Zaffaroni*, Journal of Scandinavian Studies in Criminology and Crime Prevention 2009, 2 (5) with fn. 12.

want to share the earth with you. This is the reason, and the only reason, you must hang".[38] According to some thinkers, institutionalized vengeance could be understood as being part of an evolutionary process possibly leading towards a constituted world order.[39]

c) Symbolism

The symbolic line of thought regards the perpetrator as defeated enemy who shall now once again be defeated in front of the judges.[40] It seems like the military defeated enemy is regarded as morally defeated "evil".[41] Therefore the perpetrator has to be punished at any price to give the military and moral defeat a counterpart in the communication system of law. The purpose of this symbolic process is not the determination of individual responsibility but rather is the creation and dissemination of a historical record of mass atrocities[42] or even is the international community recounting its own past "as a progress narrative from 'Nuremberg to The Hague', impunity to the Rule of Law"[43]. The international court would not communicate something to the offender but it would communicate to the public via his punishment. In that context punishment is not seen as a medium of law but a medium to execute the political decision to "fight impunity".[44] It has the character of an educational theater in which international criminal justice demonstrates its moral supremacy over the defeated enemy.[45] Symbolic punishment thus could lead to the construction of an elusive and "self-congratulatory" international community out of the tragedy of others.[46]

III. Normative Critique of Enemy Criminal Law

Enemy criminal law can be criticized in many ways. It shifts for example the perspective from a criminal law of the crime ("Tatstrafrecht") towards a criminal law of the perpetrator ("Täterstrafrecht"). It is demonizing the criminal as enemy and thereby it further inflames the rhetoric of war. However I want to focus my analysis on the question of whether the (international) enemy criminal law is at odds with the principle of human dignity. I will indeed argue that all conceptions of enemy criminal law violate the offender's dignity. Furthermore I will defend this result against the idea that the dignity of offenders of core crimes can legitimately be reduced.

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[38] *Arendt,* Eichmann in Jerusalem, 2011, p. 404.
[39] *Du Bois-Pedain,* in: von *Hirsch/Neumann/Seelmann* (Ed.), Strafe - Warum?, 2011, 205 (232).
[40] *Fronza,* JoJZG 2007, 121 (123).
[41] *Fiandaca,* in: *Vormbaum* (Ed.), Kritik des Feindstrafrechts, 2009, 21 (35). *Neumann* describes this problem in the national context: *Neumann,* in: *Uwer/Organisationsbüro der Strafverteidigervereinigungen* (Ed.), "Bitte bewahren Sie Ruhe", 2006, 299 (305).
[42] *Fronza,* JoJZG 2007, 121 (123).
[43] *Koskenniemi,* Max Planck UNYB 2002, 1 (34) with fn. 105.
[44] *Fronza,* JoJZG 2007, 121 (123).
[45] *Fronza,* JoJZG 2007, 121 (123).
[46] *Koskenniemi,* Max Planck UNYB 2002, 1 (34).

1. Violation of the Offenders' Dignity

There are of course many different conceptions of human dignity, emerging from different historical, philosophical or religious roots. The violation of human dignity in the case of enemy criminal law, however, seems rather clear, whatever conception one is supporting.

From a *Kantian* perspective, which is often seen as groundbreaking for any modern conception of dignity, the "instrumentalization" of the individual seems to be most problematic. *Kant* famously says in his Metaphysics of morals: Persons may never be treated simply as means but always at the same time as ends in themselves.[47] With regards to this principle dignity is violated if one argues that international enemy criminal law in the end uses the offender not to reaffirm an existing legal situation but *only* to establish a "new legal order" or a "constituted world order" or to create an "elusive international community".

However what is at the core of indignity of enemy criminal law is the implication that the individual offenders are excluded from human society.[48] Law needs to address the individual not mere as object but as subject with a fundamental claim on his intrinsic worth. The excluded enemy of all mankind, however, is no longer part of the world community. Therefore his hard treatment cannot be part of any legitimating considerations within that community. The individual declared as enemy does not matter. Following the logic of the enemy criminal law the excluded enemy especially cannot have any claim on his own behalf that the community should restrict its punitive power.[49] The enemy is treated as a dangerous animal that should be eliminated, an object in a process of dissemination or a punching bag for subjective feelings of revenge.

2. Forfeiture of Human Dignity?

However the theorists of enemy criminal law could try to argue that the offender reduced himself to the state of nature and therefore has forfeited his dignity.

Even if there was in the context of International Criminal Law no such thing as an entirely constituted world community or a worldwide social contract it does not seem logically imperative and adequate to derive such serious practical consequences as the forfeiture of human dignity with reference to the thinking model of the state of nature.[50] Furthermore, it can be seen as common core of human dignity that it is an absolute value

[47] *Kant*, Die Metaphysik der Sitten, 1797, Rechtslehre § 49 E I.
[48] *Margalit*, The Decent Society, 1996, p. 108.
[49] *Greco*, Feindstrafrecht, 2010, p. 47.
[50] *Jakobs* discusses the possibility of a pre-legal personality (*Jakobs*, Staatliche Strafe: Bedeutung und Zweck, 2004, p. 44).

or an intrinsic good,[51] a deontologically reasoned constraint, which cannot be forfeited.[52] This holds true for the *Kantian* tradition which refers to human being's gift of reason and also for newer conceptions such as the one of *Margalit* rehearsing to men's capacity of reevaluating and changing one's life at any given moment.[53] *Gaita* gives these thoughts a humanistic shape by saying that "even the most terrible evil doers are owed this respect as human beings and that we owe it to them because we are human beings".[54]

It is also as an absolute value that human dignity is reflected as a founding principle or material concept in positive human rights law.[55] The preamble of the Covenant of Civil and Political Rights affirms that the provided rights "derive from the *inherent* dignity of the human person". Art. 1 of the Universal Declaration of Human Rights stipulates that "all human beings are *born* […] equal in dignity and rights". Although in a debate that goes beyond the existing positive law it is not enough to quote that law. However, these basic provisions form part of a discursive process and cannot be ignored when it comes to practical consequences.[56]

The international community would contradict itself in an (hypothetical) discourse about the justification of punishment if it is communicating to the offender that dignity does not exist in the normative universe of International Criminal Law: Under the ICC-Statute "outrages upon personal dignity, in particular humiliating and degrading treatment" are punishable as a war crime (article 8 (2) (b) (xxi) and 8 (2) (c) (ii) of the ICC-Statute). It cannot refer to an inherent human dignity to establish punitive power but not stick to this concept when it comes to the criminal offender. It is therefore, in the interest of coherence, paramount that the established punitive power respects the dignity of the criminals it wants to address.

IV. Concluding Thoughts

We can summarize that all versions of enemy criminal law violate the dignity of the offender and are therefore unacceptable as a legitimization of punishment in the international context. If we were limited in our rationalization of the practice of international punishment to rehearsing the semantics of enemies, we would have to abandon that practice. But before abandoning we should think of alternative conceptions.

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[51] *Petersen*, MPEPIL, Human dignity, no. 3.
[52] *Neumann*, ARSP 1998, 153 (154).
[53] *Margalit*, The Decent Society, 1996, S. 70. See also *Neumann*, ARSP 1998, 153 (165) who is supporting a relational conception arguing that dignity can be seen as a common promise to refrain from acts that degrade others.
[54] *Gaita*, Good and evil, 2004, p. 2.
[55] *Petersen*, MPEPIL, Human dignity, no. 9.
[56] *Neumann*, in: *Uwer/Organisationsbüro der Strafverteidigervereinigungen* (Ed.), "Bitte bewahren Sie Ruhe", 2006, 299 (313).

In the following I will only roughly sketch the limits which any such theory of punishment should accept.

If we can agree to take respect for human dignity as a central value for our account of punishment, then our normative theory should in the first place refer to the individual most concerned, that is the individual offender, who is – whatever he has done – worthy of being given adequate reasons for actions that affect him in a substantive way.[57] An individualistic line of thought is recently gaining ground in the field of public international law where a shift from a state-orientated to an individual-orientated international legal order was noticed.[58] The normative core of this approach seems to be expressed in the preamble of the Universal Declaration of Human Rights according to which the "[…] recognition of the inherent *dignity* and of the equal and inalienable *rights* of all members of the human family is the foundation of freedom, justice and peace in the world". An important consequence of an individualistic approach is that any legal order stipulating binding duties on individuals and not on states or other entities needs to give subjectivity and subjective rights to the individuals it wants to address.[59] From that perspective punishment could only be justified within an international community that respects basic individual legal positions of the offender as intrinsically justified.[60]

Only if this requirement is met the international community can for the purposes of International Criminal Law be understood as a partly constituted community, which has overcome the state of nature even though it cannot be regarded as a world state. It is at the end, an important function of every constitution to *limit* public authority by means of constituting principles, which are in particular, the basic rights of the citizens.[61]
In the positive law of the ICC-Statute there might be an indication for a constitutional provision which ultimately limits the punitive power of the international community. According to article 21 (3) of the ICC-Statute the application and interpretation of statutory law must be consistent with internationally recognized human rights. Many authors think that this article gives human rights a higher rank compared to other forms of applicable law.[62] And one can also find support to suggest that the motivation for this article was to protect the rights of the accused or sentenced criminal. In that sense one has to shape the argument as the polar opposite to that which underpins the enemy criminal law. Only by accepting that dignity and human rights of each individual, when

[57] *Forst,* Ethics 2010, 711 (734).
[58] *Peters,* JöR 2011, 411.
[59] *Peters,* JöR 2011, 411.
[60] See also *Werle,* Völkerstrafrecht, 2012, no. 143.
[61] *Walter,* GYIL 2001, 170 (196); *Zaffaroni,* Journal of Scandinavian Studies in Criminology and Crime Prevention 2009, 2 (8) with fn. 29 formulates comparable thoughts: "when constitutional law does not provide criminal law with its containment principles, criminal law loses its main function, and when it does not comply with its containment function, constitutional law loses its effect".
[62] *Werle,* Völkerstrafrecht, 2012, no. 206.

confronted with supranational power, are not a legal fiction but rather a central value will the International Community demonstrate and reaffirm its own status as partly-constituted normative community.

However this can only be a first step for any account of legitimizing punishment in the international context. In addition to such constitutional principles of constraint we need a theory of punishment explaining whether and why it is appropriate to punish within these limits. Another question is whether the international community puts into practice the implications of any such theoretical conception and resists falling within the enemy criminal law. I do not want to hide the fact that there was at least in the past some evidence to doubt that. A good example is the symbolic pathos with which a trail chamber of the ICTY delivered its judgment in the case of General Kristic: "In July 1995, General Kristic, you agreed to evil. This is why the Trial Chamber convicts you today and sentences you to 46 years in prison."[63] I will conclude with the most important question: does the international community respect the liberal restrictions of criminal law as intrinsically legitimized or are they seen as mere handicaps to the "fight against impunity"?

[63] ICTY press release no. 609 of 2 August 2001 (available under www.icty.org/sid/7964).

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